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NEWSLETTER

Coverage Litigation Focus: Untimely Objection Waives Fifth Amendment Objection in Coverage Dispute

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The United States Bankruptcy Court for the Western District of Pennsylvania has ruled that a defendant in a declaratory judgment coverage action waived all of his discovery objections, including objections based upon the Fifth Amendment, for failing timely to assert them. *Federal Ins. Co. v. Le-Nature's, Inc.*, 380 B.R. 747 (Bankr. W.D. Pa. 2008). Wiley Rein LLP represented the insurer.

The insurer brought an adversary proceeding in bankruptcy court seeking a declaratory judgment regarding various coverage issues involving a D&O policy issued to Le-Nature's, Inc. (Le-Nature's). Prior to its bankruptcy in November 2006, Le-Nature's produced bottled water and flavored beverages. The insurer's declaratory judgment action also named as a defendant Gregory Podlucky, the former CEO of Le-Nature's.

In October 2006, a Delaware court ousted most of Le-Nature's management, including Podlucky, and appointed a trustee to run the company after allegations emerged of financial and accounting improprieties involving Le-Nature's management. In November 2006, the United States Bankruptcy Court for the Western District of Pennsylvania placed Le-Nature's in chapter 11 bankruptcy.

In September 2007, in the midst of discovery in the declaratory judgment action, the insurer served on Podlucky interrogatories, document requests, and requests for production of documents. The deadline for responses passed without a response. The insurer followed up with Podlucky by letter, but it went answered. A month later, the insurer filed a motion to compel Podlucky's responses.

At a hearing on an unrelated matter, Podlucky asserted for the first time that he could not provide responses to the insurer's discovery requests because doing so would run afoul of his Fifth Amendment privilege against self-incrimination. Podlucky claimed that he faced probable indictment based upon the allegations of financial and accounting misconduct at issue in the declaratory judgment coverage action. In a subsequent briefing, the insurer opposed Podlucky's attempt to avoid all discovery through an untimely assertion of his Fifth Amendment rights.

First, the insurer asserted that Podlucky waived all objections by failing timely to assert them. As the Supreme Court stressed in *Yakus v. United States*, 321 U.S. 414 (1944), "[n]o procedural principle is more familiar . . . than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of that right." *Id.* at 444. Thus, Fifth Amendment rights, like any other rights, are waived if not timely asserted. *Maness v. Meyers*, 419 U.S. 449, 466 (1975).

This proposition is well-established. For example, in U*nited States v. $1,322,242.58*, 938 F.2d 433 (3d Cir. 1991), the Third Circuit dismissed the idea that a party could avoid responding to discovery by filing untimely objections based on the Fifth Amendment. The court held that if a party responding to discovery "wished to assert his Fifth Amendment privilege in response to any of the interrogatories or requests for production of documents served by the government, he was required to assert timely objections in response to individual discovery requests." *Id.* at 439-40. Similarly, in *Jaffe v. Grant*, 793 F.2d 1182 (11th Cir. 1986), the court affirmed the district court's ruling that the plaintiff waived his Fifth Amendment privilege by failing to timely assert the privilege in response to discovery. *Id.* at 1190 n.6. In *Adams v. Cananagh Communities Corp.*, No. 82 C 7332, 1988 WL 64097 (N.D. Ill. June 13, 1988), the court held that parties asserting the Fifth Amendment as an objection to discovery waived their Fifth Amendment privilege because they first objected to discovery on Fifth Amendment grounds approximately three months after discovery responses were due, and only after the plaintiffs filed a motion for sanctions. *Id.* at *1. Indeed, as the court noted in *Davis v. Fendler*, 650 F.2d 1154 (9th Cir. 1981), "[g]enerally, in the absence of an extension of time or good cause, the failure to object to interrogatories within the time fixed by Rule 33 . . . constitutes a waiver of any objection. This is true even if an objection that the information sought is privileged. Clearly, the Fifth Amendment is not a self-executing mechanism. It can be affirmatively waived or lost by not asserting it in a timely fashion." *Id.* at 1160 (citation omitted).

Second, the insurer asserted that Podlucky should not be permitted to withdraw his deemed admissions. By failing timely to respond to the insurer's requests for admission, the requests were automatically deemed admitted by virtue of Federal Rule of Bankruptcy Procedure 7036, which incorporates Federal Rule of Civil Procedure 36(b). The insurer argued that Podlucky would suffer no prejudice from deemed admissions because admissions are not binding in a criminal case. *See* Fed. R. Civ. P. 36(b). And, even assuming Podlucky were allowed to assert a Fifth Amendment objection, the insurer argued that the result would be the same because parties are deemed to admit facts when they invoke the Fifth Amendment in response to requests for admissions in a civil case. *United States v. $493,850.00*, No. 03-2345 PHX VAM, 2006 WL 163570, at *7-8 (D. Ariz. Jan. 23, 2006).

The insurer also noted that Podlucky never offered a justification for his failure to respond or object to the insurer's requests for admissions. Courts typically consider whether the dilatory party demonstrated excusable neglect in failing timely to respond to requests for admissions. *Kleckner v. Glover Trucking Corp.*, 103 F.R.D. 553, 557 (M.D. Pa. 1984).

Third, the insurer asserted that Podlucky could not object to the insurer's document requests on the basis of

the Fifth Amendment because the Fifth Amendment typically does not protect the production of documents. *See Baltimore Dept. of Social Services v. Bouknight*, 493 U.S. 549, 555 (1990).

Finally, the insurer asserted that Podlucky improperly sought to make a blanket invocation of the Fifth Amendment. The insurer noted that a defendant's blanket assertion of the privilege to all discovery is unacceptable because it forces the opposing party and the reviewing court to speculate as to which questions would tend to incriminate. *Anglada v. Sprague*, 822 F.2d 1035, 1037 (11th Cir. 1987). Consequently, a person seeking to assert the privilege must do so with respect to each question so that the court may determine whether in each instance the claim is well-founded. 7 James Wm. Moore *et al.*, Moore's Federal Practice § 26.51[1] (3d ed. 1997).

After considering the parties' briefs, the court granted the insurer's motion to compel, holding that Podlucky waived all of his discovery objections, including Fifth Amendment objections, by failing timely to assert them. The court ordered Podlucky to respond to the insurer's discovery within 30 days and held that the insurer's requests to admit were deemed admitted unless Podlucky denied the requests within 30 days. The court held that "Podlucky, when responding to the Admissions Requests as he remains obligated to do, may no longer do anything more than simply admit or deny each matter," because all of his potential objections were waived for failing timely to assert them.