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THE ACT-OF-PRODUCTION PRIVILEGE IN SEC PROCEEDINGS

An Individual Respondent to a Broad SEC Subpoena for Documents May Assert a Privilege against Self-Incrimination if Production Would Communicate that the Documents Existed, Were in His Possession or Control, and Were Authentic. The Privilege May Not Apply if the Papers Were Corporate or Their Existence Was a 'Foregone Conclusion.'

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In SEC investigations, individuals may invoke their privilege against self-incrimination under the Fifth Amendment to the United States Constitution in response to subpoenas for production of documents, pursuant to the so-called act-of-production privilege, where production of documents would be tantamount to an admission that the documents exist, are in the individuals' possession or control, and are authentic. Individuals who have been named as defendants in SEC civil actions also may invoke the privilege in response to discovery demands during litigation.

The act-of-production privilege, however, is narrow, and should be invoked sparingly. Most of the reported decisions arising from SEC proceedings involve *improper* invocations of the privilege, *e.g.*, by collective entities who have no privilege to assert, or by individuals with respect to corporate documents in their possession over which no privilege may be asserted. As discussed herein, the act-of-production privilege may be invoked properly only by individuals, where production of their personal documents may be incriminating, and where it is reasonably believed that the SEC is not aware that responsive documents exist, and/or where the SEC has not described the documents with sufficient particularity in its subpoenas or discovery requests.

SUPREME COURT PRECEDENTS

The act-of-production privilege is firmly established. The Supreme Court most recently addressed the privilege five years ago in *U.S. v. Hubbell*.[1] In that case, Webster L. Hubbell, the former Associate Attorney General of the

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1. 120 S.Ct. 2037 (2000).

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United States, pled guilty to charges of mail fraud and tax evasion (arising out of his billing practices as a member of an Arkansas law firm), and as part of a plea agreement promised to provide the Independent Counsel investigating the Whitewater Development Corporation with information relevant to that investigation. Independent Counsel obtained a subpoena compelling Hubbell to produce eleven categories of documents before a grand jury. Hubbell appeared before the grand jury, asserted his Fifth Amendment privilege against self-incrimination, and refused to state whether he had the documents called for by the subpoena. Hubbell was then served with an order, pursuant to 18 U.S.C. Section 6003(a), granting him immunity and directing him to respond to the subpoena. Hubbell complied with the order and produced 13,120 pages of documents; he testified that those were the only documents he had that were responsive to the subpoena.

Despite the immunity, Independent Counsel used the contents of the documents produced to issue a separate indictment of Hubbell on tax and fraud charges. Ultimately, the Supreme Court dismissed the indictment because the Fifth Amendment privilege protects a witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity.

In reaching this conclusion the Supreme Court considered whether the production of documents had a "*compelled testimonial aspect*," which might lead to the collection of evidence that would incriminate the individual seeking protection.[2] The act of producing documents in response to a subpoena may constitute "compelled testimony" because the act of production "may implicitly communicate 'statements of fact,'" and "[b]y 'producing the documents in compliance with a subpoena, the witness would *admit* that the *papers existed*, were in *his possession or control*, and were *authentic*.'"[3]

Hubbell's production of documents in response to the subpoena issued by Independent Counsel constituted compelled testimony because the categories of documents requested were very broad— *e.g.*, one request called for the production of "any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to" respondent or his family members for a three-year period.[4] Responding to the eleven categories of documents requested by the subpoena was "tantamount to answering a series of interrogatories."[5] The Government did not show that "it had any prior knowledge of either

2. *Id.* at 2043-44 (emphasis supplied).
3. *Id.* (emphasis supplied).
4. *Id.* at 2046.
5. *Id.*

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the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent."[6] The Supreme Court concluded that "[i]t is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution."[7] Hubbell did more than just turn over documents — "[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox."[8]

Much of the Supreme Court's rationale in *U.S. v. Hubbell* is derived from its 1994 holding in *U.S. v. Doe*.[9] In *Doe* the owner of sole proprietorships, which had been served with subpoenas for business records arising from a federal grand jury investigation of corruption in the awarding of county and municipal contracts, invoked his Fifth Amendment rights. The Supreme Court held that the owner could invoke the Fifth Amendment's protection and refuse to produce business records in response to the subpoenas because he demonstrated that the production would be incriminating to him personally. The subpoenas, like the subpoena in *Hubbell*, were "drawn in the broadest possible terms," and constituted a fishing expedition requiring the production of "virtually all the business records of one of respondent's companies" for a set period of time.[10] The Government conceded that the documents requested were potentially incriminating to the owner of the sole proprietorships, and the district court concluded that there was nothing in the record which indicated that the Government knew of the existence of documents responsive to the subpoenas in the owner's possession.

In both *Hubbell* and *Doe*, the Supreme Court distinguished the facts from those in its seminal 1976 Act of Production decision in *Fischer v. U.S.*[11] In *Fischer*, taxpayers, who were under investigation for possible civil or criminal liability under the federal income tax laws, had obtained documents from their accountants relating to preparation of their taxes and then transferred those documents to their attorneys. When the IRS learned the whereabouts of the documents, it served summonses upon the attorneys, who refused to produce them on the grounds that the documents were protected by the taxpayers' Fifth Amendment privilege. The Supreme Court held that the act of production in *Fischer* did not warrant Fifth Amendment protection because the "existence and location of the papers are a *foregone conclusion* and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."[12] In reaching this conclusion, the Supreme Court reasoned that:

> The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the 'truth-telling' of the taxpayer to prove the existence of or his access to the documents.[13]

An assertion that the documents being compelled contain incriminating information, in and of itself, is not sufficient grounds warranting refusal to produce.[14] In *Fischer* the Supreme Court held that the taxpayer "could not avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether, his own or that of someone else."[15] In order for the act of production to constitute compelled testimony, the individual producing the documents must communicate information, not already known by the party compelling production, about the existence of the papers, their authenticity and their whereabouts.

The lesson to be learned from a comparison of *Hubbell* and *Doe* on the one hand and *Fischer* on the other is that an act of production will be protected by the Fifth Amendment if it appears that the party compelling production is not aware of the existence of the documents, and the act of turning over the documents would tend to incriminate the witness.

6. *Id.* at 2048.
7. *Id.* at 2046.
8. *Id.* at 2047.
9. 104 S.Ct. 1237 (1984).
10. *Id.* at 1239, n.3.
11. 96 S.Ct. 1569 (1976).
12. *Id.* at 1581 (emphasis supplied).
13. *Id.*
14. *See Fischer*, 96 S.Ct. at 1580; *see also Hubbell*, 120 S.Ct. at 2043 (respondent "could not avoid compliance with the subpoena served on him merely because the demanded documents contained incriminating evidence, whether written by others or voluntarily prepared by himself")
15. *Fischer*, 96 S.Ct. at 1580.

The Fifth Amendment right attached to the act-of-production privilege generally protects only individuals from producing certain personal documents,16 including sole proprietors of businesses.[17] The privilege may not be asserted by a corporation,[18] or to protect corporate or partnership books or documents.[19] Generally, a corporate officer or custodian of records cannot invoke the privilege to refuse to produce corporate records held in his possession on the ground that the act of production would incriminate him.[20]

THE PRIVILEGE IN SEC INVESTIGATIONS

In formal investigations, the SEC has the power to issue subpoenas for testimony and documents.[21] SEC subpoenas tend to be blunderbuss, with broad demands for all documents that might conceivably assist the Commission with its investigation. The courts give the SEC wide discretion to subpoena whatever documents it wants in furtherance of its investigations.[22]

However, SEC investigative subpoenas are not self-enforcing; the SEC must go to federal court to seek an order compelling compliance with the subpoena.[23] The SEC rarely takes this route,[24] and only typically does so where the failure to comply with the subpoena was egregious.

The SEC's need to seek court assistance to enforce its subpoenas, and the delicate issues surrounding constitutional privileges, raise important strategic considerations for the Commission staff in dealing with questionable invocations of the act-of-production privilege in investiga-

16. *Braswell v. U.S.*, 108 S.Ct. 2284, 2288 (1988) (*citing Boyd v. U.S.*, 6 S.Ct. 524 (1886)).
17. *Doe*, 104 S.Ct. 1237 (holding that respondent, owner of sole proprietorships, could invoke the Fifth Amendment protection and refuse to produce business records in response to subpoenas, because he demonstrated that the production would be incriminating to him personally).
18. *Braswell*, 108 S.Ct. at 2288 (*citing Hale v. Henkel*, 26 S.Ct. 370 (1906)).
19. *Id.* at 2289 (citing Drier v. U.S., 31 S.Ct. 550 (1911)).
20. *See id.* at 2284 (holding that the custodian of corporate records may not "resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment"). In the Second Circuit, former corporate officials may assert the act-of-production privilege with respect to corporate documents they took with them upon their termination. *See, e.g., In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 183 (2d Cir. 1999) (employee who resigned from the corporation after a subpoena was issued to the corporation, took corporate documents with him, and signed a severance agreement with the corporation promising to cooperate in investigations, could validly assert his Fifth Amendment privilege and decline to produce documents to a grand jury because the former employee no longer held the documents in his representative capacity); *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d 981, 987 (2d Cir. 1983) (employee who took corporate documents with him upon leaving the company could properly invoke his Fifth Amendment privilege and refuse to produce the documents because they were now in his "personal possession"); *but see In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807 (11th Cir. 1992) (holding that "a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated"). The Second Circuit's broad view of the scope of the act-of-production privilege is not without limits. *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated January 30, 1992*, 804 F. Supp. 582, 584 (S.D.N.Y. 1992) (chairman of corporation not permitted to redact personal entries from corporate documents pursuant to the Fifth Amendment).
21. *See* Section 20(a) of the Securities Act of 1933, 15 U.S.C. §77t(a); Sections 21(a) and (b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a) and (b).
22. *See RNR Enterprises, Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997) (holding that the SEC's subpoena was not unreasonable because the information sought by the subpoena was relevant to an investigation into a possible violation of securities laws); *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (3d Cir. 1980) ("[i]n the context of a subpoena issued by the SEC, a determination that a subpoena is within the scope of the authority granted ... is enough to authorize subpoenas for the production of records which might reveal the existence and extent of any violation of the securities laws") (internal quotations omitted); *SEC v. Kanter*, 1998 WL 397835, *2 (N.D.Ill. July 10, 1998) ("Congress vested the SEC with broad discretion in its investigation of possible securities violations"); *Ruggles v. SEC*, 567 F. Supp. 766 (S.D. Texas 1983) ("The Securities and Exchange Act empowers the Commission to subpoena any records which it deems relevant, and the courts are to permit inquiries to whatever extent is necessary to make effective this power of investigation").
23. Section 21(c) of the Exchange Act, 15 U.S.C. §78u(c), and Section 209(a) of the Advisers Act, 15 U.S.C. §78u(c) authorize enforcement of the Commission's subpoenas upon application of the Commission. Pursuant to the Exchange Act provisions, in the case of a refusal to obey a Commission subpoena by any person, the Commission "may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on. . . ." Section 21(c) of the Exchange Act, 15 U.S.C. § 78u(c); *see also* 15 U.S.C. §§ 806-9(c) (authorizing federal courts to enforce Commission subpoenas pursuant to the Advisers Act). In 1994, the SEC formally delegated to the Director of the Division of Enforcement the decision whether to institute subpoena enforcement proceedings.
24. For the following fiscal years, the SEC brought the following number of subpoena enforcement actions: 2000 - 8; 2001 - 15; 2002 - 19; 2003 - 12. *See* Record of Enforcement FY 2000 - 2002, available at http://www.sec.gov/news/extra/enfrecfy2002.htm; SEC 2003 Annual Report Enforcement, available at http://www.sec.gov/pdf/annrep03/ar03enforce.pdf.

tions. Particularly, the staff must decide whether it wants to institute a special proceeding in the middle of its investigation — which may have the effect of delaying, publicizing, and otherwise complicating the investigation — to ask a federal district court judge to nullify an individual's invocation of his Fifth Amendment privilege against self-incrimination.

The SEC has not shied away from this issue in the past. We have found two cases where the SEC staff has challenged a respondent's invocation of the act-of-production privilege during an investigation. In the first action, *SEC v. Horowitz & Ullman, P.C.*,[25] respondents Firestone and Dorison were principals of partnerships involved in the sale to the public of securities in coal mining enterprises. They voluntarily produced documents pursuant to SEC requests during an informal investigation.

When the SEC later commenced a formal investigation and issued subpoenas to respondents, they asserted their Fifth Amendment privilege and declined to produce documents. The SEC filed subpoena enforcement proceedings in federal district court and respondents moved to dismiss the SEC's application for enforcement. Respondents claimed that the staff informed them the SEC "wants production in order to show not only the contents of the documents but also knowledge or intent on the part of respondents by the fact of possession of the documents."[26] The court found that the documents sought to be produced were corporate documents, and respondents, as partners and officers of these entities, could not assert a personal privilege and refuse to produce them. The court ruled: "Artificial entities such as partnerships and corporations have no Fifth Amendment privilege against self-incrimination and may be compelled to produce incriminating information."[27]

The second matter, *SEC v. Lay*, which arose during the recent Enron investigations, was resolved pursuant to stipulation, but is nonetheless interesting. The SEC staff served Lay with a subpoena for documents during its investigation. Initially, Lay produced thousands of pages of documents, including records referring to personal matters and documents with his handwriting. Subsequently, Lay withheld certain documents, asserting that this act of production would violate his Fifth Amendment rights. Lay told the SEC staff he would only produce the withheld documents if the SEC agreed that the production did not constitute a waiver of his Fifth Amendment rights. The SEC staff found this condition unacceptable.[28]

The SEC moved for an order requiring Lay to produce the documents he had withheld on grounds of privilege. After the matter was fully briefed, the district court "So Ordered" a stipulation between the SEC and Lay, wherein it was agreed that:

> Lay has no individual Fifth Amendment Act of Production Privilege with respect to both the corporate and personal documents he is designating and producing to the SEC. Lay also has no Fifth Amendment rights as to the content of the documents because the content was not compelled by the government, *see United States v. Hubbell*, 530 U.S. 27 (2000).[29]

The final sentence quoted above is a misstatement of the import of the *Hubbell* case, but may have been conceded to the SEC in return for the following stipulation also contained in the order: "Production of all documents to the SEC in response to the subpoena does not waive any Fifth Amendment rights Lay otherwise may have and the SEC will not assert that it does."[30]

THE PRIVILEGE IN SEC ENFORCEMENT CASES AND OTHER PROCEEDINGS

Because of the dearth of case law involving the act-of-production privilege in SEC subpoena enforcement proceedings, it is helpful to see how courts have reacted to the invocation of that privilege in SEC civil actions commenced after its investigations had been completed, and in

25. 1982 WL 1576 at *10 (N.D. Ga. March 4, 1982).
26. *Id.* at *10.
27. *Id.*
28. *See SEC v. Lay*, Civil Action No. 1:03 MS 01962 (RCL) (D.D.C.), Memorandum of the SEC in Support of its Application for Orders to Show Cause, for an In Camera Review, and Requiring Obedience to Subpoena, dated September 29, 2003, available at http://www.sec.gov/litigation/litreleases/enron-memo929.pdf.
29. Stipulation and Order Requiring Production of Records, available at http://www.sec.gov/litigation/litreleases/enron-layrecs110703.htm (emphasis supplied).
30. *Id.*

other relevant proceedings affecting securities industry professionals.[31]

Documents of Collective Entities

In *SEC v. First Jersey Securities, Inc.*,[32] the Second Circuit held that Havard Lee, a branch manager of a brokerage firm, could not invoke the Act of Production Privilege to avoid producing corporate documents pursuant to a court order enforcing a subpoena in a civil proceeding filed by the SEC. After Lee failed to produce documents in response to three requests from the SEC, the Commission obtained a subpoena commanding production of the documents. Lee refused to comply, asserting his Fifth Amendment privilege against self-incrimination. After a hearing, the court ordered Lee to produce the documents. When Lee failed to comply, the SEC successfully moved for an order finding Lee in contempt and fining him $1,000 per day until he complied. Lee appealed this order.

The Second Circuit concluded that the documents being subpoenaed were corporate records and there was no question that they must be produced. The only question was whether Lee could be held in contempt for refusing to produce them. Relying on the rationale in *Fischer*, the Second Circuit found that the "existence of the documents and their authenticity, as well as Lee's possession of them, may be taken to be a '*foregone conclusion*;'" therefore the act of producing them added little to the SEC's existing case.[33] The Second Circuit reasoned that "any testimonial effect from Lee's act of production would be minimal" because other branch managers had "produced the parallel documents relating to their offices;" and the brokerage firm had confirmed that the documents requested by the SEC were in the possession of branch managers, confirming the existence of the documents being subpoenaed.[34] Moreover, production by Lee was not necessary to authenticate the documents because some of them were required by law to be kept and those produced by Lee could be compared to others already produced by other branch managers to verify their authenticity. Furthermore, the "mere possession of the documents by Lee would not support any inference against him with regard to their contents" because it was clear they were documents held by the branch managers in the ordinary course of business.[35] While the Second Circuit recognized that the possession of the records could incriminate Lee in a "conspiracy to obstruct justice by keeping the documents out of the hands of the SEC," the court concluded that because it was a "foregone conclusion" that branch mangers had custody of these documents, production would not serve to further implicate Lee in a conspiracy against the SEC.[36]

In *SEC v. Kingsley*,[37] the District Court for the District of Columbia held that neither a limited partnership, nor a representative of the limited partnership, could assert a Fifth Amendment privilege against self-incrimination to refuse to produce limited partnership documents subpoenaed by the SEC. The court ruled that the act-of-production privilege is "personal and while it would protect an individual, or a sole proprietorship, it does not protect a collective entity or papers held by an individual in his representative capacity for a collective entity."[38]

Armstrong v. Guccione[39] involved one of the most vehement, albeit mainly misguided, invocations of the act-of-production privilege. Armstrong, a corporate officer, transferred $16 million in corporate assets to dealers to purchase "gold bullions, valuable antique coins, and antiquities" (including a bust of Julius Caesar).[40] The court-appointed receiver concluded that Armstrong held these items as a corporate custodian, ordered Armstrong to produce them, and served Armstrong with a subpoena compelling production of these items along with records and computers. Several hearings ensued and Armstrong was repeatedly informed by the court that under *Braswell*

31. While the courts did not uphold the act-of-production privilege in most of the cases described in this and the preceding section, this does not negate the potential value of invoking the act-of-production privilege in SEC proceedings. Many of the cases described in these sections dealt with invocation of the privilege to protect corporate documents that generally do not fall within the purview of the privilege, which may explain why there are not more decisions upholding the privilege in SEC proceedings. *See Braswell*, 108 S.Ct. at 2288-89.
32. 843 F.2d 74 (1988).
33. *Id.* at 76, *quoting*, *Fischer*, 96 S.Ct. at 1581 (emphasis supplied).
34. *Id.* at 76.
35. *Id.* at 77.
36. *Id.*
37. 510 F. Supp. 561, 563 (D.D.C. 1981).
38. *Id.*; *see SEC v. Oxford Capital Securities, Inc.*, 794 F. Supp. 104, 107-08 (S.D.N.Y. 1992) (SEC's motion for an order holding defendant corporation in contempt for failing to produce documents required for an accounting was granted because corporation could not invoke Fifth Amendment protection).
39. 351 F. Supp.2d 167 (S.D.N.Y. 2004).
40. *Id.* at 168.

v. U.S.,[41] he had no Fifth Amendment rights to refuse to produce corporate assets that he was holding as a custodian. Armstrong produced some of the items and indicated that he had transferred others. After the receiver produced evidence that Armstrong still was in possession of the assets, he was incarcerated. He then petitioned the Southern District of New York for a writ of *habeas corpus*, asserting his Fifth Amendment rights. The court denied the petition because "a *Braswell* turnover does not require testimony, and no use can be made of the fact of a simple turnover of corporate assets by a corporate officer . . ."[42]

Scope of the Privilege

SEC v. Dunlap[43] provides a textbook example of who may invoke the act-of-production privilege and the types of documents that are covered by it. Dunlap, a broker, appealed his contempt citation and incarceration for failure to comply with a preliminary injunctive order obtained by the SEC requiring him to produce records and accountings and to repatriate investor funds deposited overseas. Dunlap alleged that he did not have to produce documents because the act of production would violate his Fifth Amendment rights. The Fourth Circuit held, among other things, that the broker could invoke the privilege to refuse production of his own personal records and creation of an accounting of his personal assets, but he could not use the privilege to refuse production of the brokerage firm's business records. Further, the court ruled that the broker's Fifth Amendment privilege could not excuse the firm from being forced to prepare a new accounting of its assets. The court denied the broker's request for relief from the incarceration order because he had not produced the firm's business records and a new accounting of the firm's assets.

In the Martha Stewart case, *U.S. v. Stewart*,[44] the Government applied for a subpoena *duces tecum* directed to defendant Peter Bacanovic.[45] The District Court for the Southern District of New York found that the Government did not meet its threshold requirement of demonstrating relevance or admissibility and most of the requests were denied. With regard to the "items characterized as professional licenses and compliance materials," the Government argued that they were "relevant to Bacanovic's awareness of the confidentiality requirements of Merrill Lynch and the securities industry."[46] But the court held that Bacanovic's act of production would constitute compelled testimony because the "Government's claim of relevance thus depends on the fact that the documents were produced by Bacanovic from his files."[47] Citing *Hubbell*, the court concluded that "such an act of production is testimonial, and may not be compelled."[48] This was a clear-cut case where the act-of-production privilege should apply because by producing the documents Bacanovic was essentially testifying regarding the extent of his knowledge of the confidentiality requirements of the securities industry.

Waiver of the Privilege

It is important to note that failure to assert the privilege can have consequences beyond the SEC investigation. An SEC civil investigation concerning fraud is almost always accompanied by a parallel criminal investigation. Counsel must seriously consider advising a client not to testify or produce documents if such acts could be incriminating in the investigation at issue or any other investigation. Recent criminal cases involving securities suggest that if a party produces a document in response to a subpoena, the party cannot later invoke the privilege to avoid production of the same documents in response to a new subpoena.

In re Grand Jury Subpoena Duces Tecum[49] involved the government's appeal from denial of its motion to command John Doe to produce the original version of a calendar — a copy of which was already produced in response to an SEC subpoena. Initially, Doe had appeared before the SEC and invoked his Fifth Amendment privilege against self-incrimination. Doe eventually agreed to withdraw this invocation and produced documents, including a copy of the calendar, to the SEC. Doe's counsel wrote a letter to the SEC in which he claimed that these documents must remain confidential. While the SEC's investi-

41. 108 S.Ct. at 2284.
42. *Armstrong*, 351 F. Supp.2d at 173.
43. 253 F.3d 768 (4th Cir. 2001).
44. 2003 WL 2304461, at *1 (S.D.N.Y. Dec. 29, 2003).
45. While *U.S. v. Stewart* was a criminal prosecution, parallels can be drawn between the holdings in that case and SEC subpoena enforcement proceedings in the civil context.
46. *Stewart*, 2003 WL 2304461 at *2-3.
47. *Id.*
48. *Id.*
49. 1 F.3d 87 (2d Cir. 1993).

gation was pending, the U.S. Attorney's Office for the Southern District of New York requested that the SEC provide access to the documents produced by Doe, and after examining these documents became suspicious that the calendar had been altered with white-out. The government issued a subpoena compelling Doe to produce the original calendar. Doe's attorney allowed the government to view the calendar, and the government's suspicions were confirmed. But Doe asserted the act-of-production privilege and refused to produce the original calendar.

The Second Circuit concluded that Doe could not invoke the act-of-production privilege because the existence and location of the original calendar were a "foregone conclusion," and the act of producing the original calendar would add little to the government's case.[50] Moreover, Doe's production of the original calendar was not needed for authentication because the "government could authenticate the calendar, either in the grand jury or at trial, simply by establishing Doe's prior production of the copy to the SEC and asking the trier of fact to compare the copy and the original."[51]

Doe further argued that the subpoena should not be enforced because the SEC, by providing the calendar to the U.S. Attorney's Office, had breached an agreement not to disclose his documents to third parties. The Second Circuit "seriously question[ed] whether Doe actually procured an agreement from the SEC not to disclose the calendar to the U.S. Attorney's Office."[52] However, the court declined to resolve this issue because even if the SEC had not turned over the calendar to the U.S. Attorney's Office, it was clear that the U.S. Attorney's Office could have subpoenaed either the SEC or Doe's co-defendant in the SEC's civil suit to obtain a copy of the calendar.

In *U.S. v. E.O. Buck*,[53] the IRS brought an enforcement proceeding when a receiver failed to comply with a summons requiring appearance and the production of documents. The taxpayer whose records were sought was granted permission to intervene as the real party in interest. The District Court for the Southern District of Texas held that by turning over records to the receiver without asserting a Fifth Amendment privilege against self-incrimination, the taxpayer lost his right to assert that privilege. The SEC had subpoenaed documents from the taxpayer and was given access to most of the taxpayer's corporate records. The taxpayer's counsel indicated that this production did not waive any right the taxpayer might have, but he did not reserve any particular right. Negotiations with the SEC eventually broke down when the taxpayer invoked his Fifth Amendment privilege against self-incrimination and refused to answer questions about particular securities. The SEC filed a civil suit and an order was entered enjoining further violations of securities laws and appointing a receiver, who took charge of the taxpayer's records that the SEC had viewed. The taxpayer asserted his Fifth Amendment privilege against self-incrimination to decline to produce two safety deposit boxes, but he produced to the receiver all of the other documents called for by the order.

Shortly thereafter, as a result of an investigation of the taxpayer's tax returns, the IRS issued a summons to the taxpayer calling for production of documents, some of which had already been copied and put on microfilm by the SEC. The taxpayer asserted his Fifth Amendment privilege against self-incrimination. The court concluded that the taxpayer had waived this privilege because he had turned over the documents to the SEC without asserting a Fifth Amendment privilege.[54] However, the court cautioned that although "waiver of the privilege against self-incrimination during one official investigation does not normally bar its assertion during a later investigation, here the waiver extended to the allowance of extensive document copying during the investigation."[55] The court concluded that since the IRS could access the documents in question from the SEC microfilm records, "to refuse access to the originals would be illogical and irrational."[56]

50. *Id.* at 93 (quotation omitted).
51. *Id.* at 93.
52. *Id.* at 94.
53. 356 F. Supp. 370 (S.D.Texas 1973), *aff'd*, 479 F.2d 1327 (5th Cir. 1973).
54. The court further concluded that because the taxpayer had turned over the documents to the receiver without asserting the Fifth Amendment privilege against self-incrimination, the taxpayer waived the right to assert that privilege in the IRS proceeding. While the taxpayer in this case turned over documents to the receiver pursuant to an order, it was still a voluntary transfer because he did not oppose the order. *Id.* at 376; *see also In re Rashba and Pokart*, 271 F. Supp. 946 (S.D.N.Y. 1967) (client of accounting firm could not invoke Fifth Amendment privilege against self incrimination to refuse to produce documents in response to an SEC subpoena served on the accounting firm which sought production of workpapers that were based upon documents turned over by the client to the accountant).
55. *E.O. Buck*, 356 F. Supp. at 379.
56. *Id.*

Compliance with Consent Orders

The act-of-production privilege cannot be invoked by a defendant in contempt proceedings to justify his refusal or failure to comply with the terms of a settlement agreement with the SEC. In *SEC v. Oxford Capital Securities, Inc.*,[57] the District Court for the Southern District of New York held that individual defendants waived the privilege when they agreed to a consent judgment which required them to produce accountings, and granted the SEC's motion to hold the defendants in civil contempt for failing to produce documents needed for an accounting. The individual defendants were aware of their Fifth Amendment right against self incrimination; they had invoked this right to avoid answering some of the SEC's questions. However, they freely negotiated with the SEC and freely consented to a judgment compelling them to produce documents needed for an accounting. The court concluded that allowing the individual defendants to assert the privilege at this advanced stage in the proceedings would "be giving them the option to ignore the Judgments entered against them until such time as they could no longer escape the imposition of sanctions."[58]

In *SEC v. Margolin*,[59] the SEC moved for a civil contempt order against Ronald Margolin for failure to satisfy a final judgment. Margolin had failed to pay a final judgment for several years and the SEC tried to verify his claim that he was unable to pay by requesting that he complete a financial disclosure form. Margolin submitted the form without the requested, supporting documentation. The SEC was not satisfied with this response and subpoenaed Margolin to appear for testimony and produce documents. Margolin invoked his Fifth Amendment privilege and refused either to provide documentation or to answer questions. The District Court for the Southern District of New York concluded that Margolin could not invoke the Fifth Amendment because it "affords a defendant the right to avoid answering questions that may be incriminating, but its invocation cannot serve to satisfy a burden of production in a civil case."[60] The court further found that "in a civil proceeding, such as this one, the Court may draw the inference that on all of the matters on which the defendant has invoked his privilege, his testimony would not have satisfied his burden of production."[61] Margolin was incarcerated for his failure to comply with the final judgment.

Similarly, in *SEC v. Towers Financial Corp.*,[62] Steven Hoffenberg failed to comply with the Consent Final Judgment or to provide a detailed accounting showing why it was impossible for him to pay the judgment. After Hoffenberg failed to pay the judgment, the SEC requested that he appear at a deposition and produce documents, but Hoffenberg refused both requests and asserted his Fifth Amendment privilege against self-incrimination. The SEC moved to hold him in contempt. In a Report and Recommendation, a United States Magistrate Judge recommended that Hoffenberg be held in civil contempt, not as a punishment for invoking his Fifth Amendment right, but because "by invoking the Fifth Amendment, defendant Hoffenberg has not met his burden of proving his impossibility defense."[63]

THE DOWNSIDE OF INVOKING THE PRIVILEGE

The primary downside to invoking the act-of-production privilege during an SEC investigation is the adverse inference that will be drawn by the Commission in deciding whether enforcement proceedings should be brought. But because the SEC staff frequently works closely with the criminal authorities, the adverse inference may be a small price to pay for avoiding supplying incriminating evidence to prosecutors.

If, after the investigation is completed, the SEC files an injunctive action in federal court, or institutes administrative proceedings, the defendant is free to waive the privilege during those proceedings.[64] If the defendant continues to assert the privilege, the fact finder may draw an

57. 794 F. Supp. 104, 108 (S.D.N.Y. 1992).
58. *Id.*
59. 1996 WL 447996 at *4 (S.D.N.Y. Aug. 8, 1996).
60. *Id.*
61. *Id.*
62. 1996 WL 406685 at *3 (S.D.N.Y. March 26, 1996) (Report and Recommendation).
63. *Id.*
64. *See SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 855 (S.D.N.Y. 1997) (when a party invokes his Fifth Amendment privilege during an SEC proceeding he may be able to withdraw the privilege at a later stage as long invocation was proper and not used as a tactic to delay discovery), *aff'd*, 159 F.3d 1348 (2d Cir. 1998); *see also U.S. v. Certain Real Property and Premises Known as 4003-4005 5th Avenue*, 55 F.3d 78, 84 (2d Cir. 1995) (courts should "take a liberal view" with regard to withdrawal of the Fifth Amendment privilege "especially if there are no grounds for believing that opposing parties suffered undue prejudice from a litigant's later-regretted decision to invoke the Fifth Amendment").

inference that the defendant's withheld testimony and documents would be adverse. However, invocation of the privilege alone cannot justify the SEC in bringing an action and cannot result in entry of a judgment; the SEC is still required to prove its case.[65] Once again, any risk of ceding liability in a civil case by invoking the privilege may substantially outweigh the risk that incriminating information conveyed through the production of documents might assist the criminal authorities in prosecuting the defendant. ■

65. *See SEC v. Comserv Corp.*, 698 F. Supp. 784, 789 (D. Minn. 1988) (finding that "without additional evidence" a party's invocation of the Fifth Amendment privilege during an SEC investigation was "not a sufficient basis" for the SEC to bring an action); *see also SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191 (3d Cir. 1994) (drawing an adverse inference is proper when the Fifth Amendment privilege is invoked in a civil case; however, entry of an adverse judgment should not be an automatic sanction for invocation of the privilege); *Softpoint, Inc.*, 958 F. Supp. at 859 (invocation of the Act of Production Privilege did not relieve the SEC of its burden of proof); *see also Baxter v. Palmigiano*, 96 S.Ct. 1551, 1558 (1976) (silence alone is not sufficient to result in an adverse judgment, but when combined with other evidence against the defendant an adverse judgment may be proper).