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When Silence Is Not Golden: Real World Implications of Non-Parties "Taking the Fifth" in Civil Proceedings

BY MICHAEL TUBACH, ANNA PLETCHER, AND TRISHA PARIKH

THE FIFTH AMENDMENT RIGHT against self-incrimination is a bedrock of our legal system: "No person . . . shall be compelled in any criminal case to be a witness against himself." From television shows to daily conversation, it is well understood that when a person "takes the Fifth," they are invoking their right to not incriminate themselves. It is perhaps equally well understood that when an individual takes the Fifth in a criminal matter, their silence cannot be used against them.

However, civil lawsuits are different. When a party in a civil action invokes the Fifth, jurors may be allowed to infer that the witness is concealing negative information. As Justice Brandeis famously admonished, "Silence is often evidence of the most persuasive character."[1] This "adverse inference" becomes more complicated when a corporation is involved. A corporation has no Fifth Amendment privilege; only natural persons, such as its employees and former employees, do.[2] The result is that jurors are sometimes allowed to make adverse inferences against a corporate defendant when an individual, who is often not even a party to the action, takes the Fifth.

The question of whether an adverse inference is appropriate when a non-party invokes their right against self-incrimination commonly arises in antitrust cases.[3] This is because antitrust cases often involve parallel civil and criminal proceedings against corporate defendants. Also, antitrust cases by their nature involve some form of alleged concerted activity, making it more likely that one or more co-conspirators may be inclined to take the Fifth.

The issue has arisen in a number of antitrust cases over the years, most recently in the *In re Capacitors Antitrust Litigation*, a multidistrict litigation involving price-fixing allegations pending in the Northern District of California.[4] There, plaintiffs urged the court to find that an adverse inference instruction arising out of an executive's invocation of the Fifth Amendment privilege during a deposition was appropriate against *all* defendants, including those who had never employed the executive. Later in the litigation, the court again faced a Fifth Amendment question when five witnesses, executives employed by defendants, invoked the Fifth Amendment in response to substantive questions during depositions and later decided that they would in fact testify at trial without invoking the privilege.[5]

Given the frequency with which the adverse inference doctrine arises in antitrust cases and the potentially significant impact it could have at summary judgment or trial, antitrust practitioners should be familiar with this important evidentiary principle and understand its practical implications. How did the adverse inference doctrine come to be applied in the context of non-parties invoking the privilege against self-incrimination? When should a court allow it? How should jury instructions be drafted to promote fairness and the truth? And what practical steps should antitrust practitioners consider when non-parties invoke the Fifth and an adverse inference is sought? This article explores these questions.

The Adverse Inference Doctrine

The rationale for allowing an adverse inference in civil cases stems from notions of fairness and truth-seeking.[6] The Fifth Amendment allows a witness to refuse to testify in order to avoid self-incrimination. However, when a witness invokes the privilege in a civil case, their silence prevents the opposing party from learning potentially relevant and probative facts, putting that party at a substantial disadvantage. It also deprives the jury of information that it might need in order to reach a just decision. What's more, a witness could attempt to game the system by invoking the privilege in order to advantage one party over another.[7]

In *Baxter v. Palmigiano*,[8] the seminal case on this topic, a state prison inmate invoked his Fifth Amendment privilege during a civil disciplinary proceeding and the Supreme Court permitted an adverse inference to be drawn. There, the Court recognized the tension between the right against self-incrimination and the integrity of a trial: "[The Fifth Amendment] has little to do with a fair trial and derogates rather than improves the chances for accurate decisions."[9] In

Michael Tubach and Anna Pletcher are partners, and Trisha Parikh is an associate, in the San Francisco office of O'Melveny & Myers LLP. The views expressed herein are the authors' own, and do not necessarily reflect those of their firm or of any client.

striking a balance, the Court held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[10]

Baxter made clear that its holding extends only to *parties* in civil cases.[11] That limitation makes sense because when a party invokes the Fifth Amendment, the chances are high that the information withheld will be relevant and probative. Lower courts have also interpreted *Baxter* to require independent corroborating evidence of the fact about which the party refuses to answer before permitting an adverse inference.[12] This additional requirement further increases the likelihood that any adverse inference will be narrowly and accurately drawn.

Baxter addressed the question of whether an adverse inference could be drawn against a party who asserts their Fifth Amendment privilege. But in a case where there are multiple plaintiffs and defendants, and one party invokes the Fifth, is it appropriate to draw an adverse inference against other parties? The Second Circuit wrestled with this question in *Brink's Inc. v. City of New York*.[13] In that case, several employees of Brink's, an armored-car carrier company, were convicted of stealing money from city parking meters.[14] When the city canceled Brink's contract, Brink's sued the city for lack of payment and the city counterclaimed for losses from the theft.[15] Brink's then brought third-party complaints against the convicted former employees, several current employees, and their supervisor.

At trial, some of the current as well as the former employees asserted their Fifth Amendment privilege.[16] In deciding whether to give the jury an adverse inference instruction, the court focused initially on the relationship between Brink's and the invoking witnesses: "It is unfair to prevent a jury from drawing inferences against *defendants* when they or their employees exercise a privilege."[17] Because the questions that triggered the claims of privilege related to the employees' work for Brink's, the court found the jury could properly consider the invocations as vicarious admissions of the defendant employer.[18]

But, perhaps because of the unusual posture of the case, the court was not comfortable allowing an adverse inference based solely on the employer-employee relationship. It went on to weigh the probative value of the evidence against the danger of unfair prejudice under Federal Rule of Evidence 403 and found that the employees' invocations with respect to questions about the thefts were highly probative of knowledge or negligence on the part of Brink's.[19] And, the court reasoned, since the convictions of the third-party defendants were already admitted into evidence, any additional prejudice would be minimal.[20]

In many situations, however, the witness invoking the Fifth Amendment is not a party to the litigation. A non-party may have less knowledge of the relevant facts, less of a stake in the outcome of the litigation, and varied motives for invocation. If fairness and truth-seeking underlie the use or admission of adverse inferences, does this rationale still hold when a non-party witness invokes the Fifth? In *RAD Services, Inc. v. Aetna Casualty & Surety Co.*,[21] the Third Circuit allowed the admission of adverse inferences against non-party witnesses. There, the witnesses at issue had been employees of the defendant chemical company when they allegedly dumped toxic waste in violation of environmental laws. At trial, they claimed their Fifth Amendment privilege with respect to questions about their previous work with the defendant and their current employment status. The court began its analysis in the same way as *Baxter*—by acknowledging the tension between Fifth Amendment rights and the truth-seeking function of a trial. While *Baxter* found it a close call, the Third Circuit held that the interests strongly favored a fair trial.[22] It explained that "the desire for fact . . . impels the adversary process," and privileges—even constitutional privileges—"must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[23]

From this position, the court extended the principle from party to non-party witnesses, finding that "[a] non-party's silence in a civil proceeding implicates Fifth Amendment concerns to an even lesser degree."[24] Non-party employees of a defendant witness were no exception: "nothing forbids imputing to a corporation the silence of its personnel."[25] And former employees? Same result: "The mere fact that the witness no longer works for the corporate party should not preclude as evidence his invocation of the Fifth Amendment."[26] In explaining these conclusions, the court preferred to err on the side of providing the jury with more, rather than less, evidence.[27] It explained that the witnesses worked for RAD during the incidents at issue, so they likely were withholding relevant, probative evidence, and the jury could sort out any credibility issues raised by potentially questionable motivations for the invocations.[28] However, it emphasized that the trial judge has the discretion to decide, under Federal Rule of Evidence 403, whether to admit a non-party's claim of Fifth Amendment privilege.[29]

These three cases demonstrate how, over the course of a decade, the doctrine allowing adverse inferences against a corporate defendant expanded from invocations of the Fifth Amendment by individual parties, to employees and former employees who are parties to the action, and then to non-party former employees. One possible explanation for this progression is that in each of these cases, the invoking witnesses were clearly withholding important facts from the jury and those facts related to conduct within the scope of their employment. Thus, the leap from allowing adverse inferences against a party to a non-party former employee is not so large as it may appear; whether current or former, employees acting within the scope of their

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The *LiButti* Four-Factor Test

Enter *LiButti v. United States*,[30] the foundational Second Circuit case that addressed that key question and sought to bring a measure of transparency and standardization to the analysis. In that case, Robert LiButti was convicted of filing false tax returns. In an attempt to recover the taxes he owed, the IRS imposed a levy on Devil His Due, a race horse that it believed belonged to Robert's company, Lion Crest Stable. Robert's daughter, Edith LiButti, then brought a civil wrongful levy action, claiming that the horse actually belonged to her.[31] In a deposition taken for the civil action, Robert, who was not a party to the action, invoked his Fifth Amendment privilege and refused to answer questions pertaining to ownership of the horse.[32] In a bench trial, the district court declined to draw an adverse inference against Edith from Robert's silence.

The Second Circuit acknowledged that the law on drawing adverse inferences from a non-party's invocation was "undeveloped."[33] It affirmed that the inquiry should center on the specific factual circumstances of each case. It then identified four non-exclusive factors, drawn from patterns in the case law, to guide courts: (1) the nature of the relevant relationships, (2) the degree of control of the party over the non-party witness, (3) the compatibility of the interest of the party and non-party witness in the outcome of the litigation, and (4) the role of the non-party witness in the litigation.[34] Tethering the analysis back to its original stake, the court emphasized that "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for truth."[35]

Using this framework, the Second Circuit had no trouble finding that the lower court should have made an adverse inference with respect to Robert's silence: "In addition to the strength of their relationship and their indiscriminate manipulations of Lion Crest's monies and business affairs, Robert and Edith had precisely the same interest in the drawing of adverse inferences from Robert's testimony."[36] The court was determined to not let Robert profit from his gamesmanship at the expense of fairness: "[Robert's] apparent desire to guard against perjury or prosecution for criminally secreting his interests in Lion Crest and Devil His Due should not serve the further purpose of precluding the IRS from reaching his hidden assets."[37]

Today, *LiButti* is the standard to which courts turn when confronted with the question of whether to permit the fact-finder to draw an adverse inference against a party when a non-party invokes their Fifth Amendment privilege. The *LiButti* test has brought some uniformity to the technical analysis, but it is not a bright line rule. The Eleventh Circuit explained that "these factors should be applied flexibly" and "an invocation is not barred even if not all of the factors are satisfied."[38] While a principled application of *LiButti* may not always yield consistent outcomes, it does provide some structure to an otherwise free-form Rule 403 analysis, and on the whole, is likely to decrease abuses of the Fifth Amendment.

For example, courts have allowed adverse inferences when a familial relationship is involved, as in *LiButti*.[39] But courts have also allowed adverse inferences pursuant to the *LiButti* test where there are no family ties on the theory that loyalty, or a quid pro quo, is a sufficient proxy for trustworthiness.[40] And while some courts have allowed adverse inferences in situations where non-party witnesses were formerly employed by the defendant, others have disallowed it. For example, in *In re Urethane Antitrust Litigation*,[41] the court found that adverse inferences drawn from the silence of former employees were not admissible after considering all four *LiButti* factors and finding that allowing the jury to "draw the negative inference from these witnesses' invocation of the Fifth Amendment that in fact they did so in order to avoid admitting that the alleged conspiracy existed" is not "trustworthy in this case and would not advance the search for truth regarding whether a conspiracy existed."[42]

Perhaps this variety of results under *LiButti* reflects courts prioritizing the four factors differently in each case to reach a fair outcome. Or perhaps it is the inevitable result of courts exercising their wide discretion over evidentiary matters via Rule 403 even within the confines of the *LiButti* test. Nevertheless, in providing a standard test, *LiButti* offers at least some assurance that the admission of the adverse inference will promote fairness and truth-seeking. It does not, however, ensure that the jury will understand how to properly weigh the evidence at trial. For that, instructions are necessary.

Role of Jury Instructions

In addition to conducting a thoughtful *LiButti* analysis, courts can promote fairness and truthfulness through well-crafted jury instructions. Currently, instructions on this point vary widely, both within and beyond the antitrust context. Some are sparse, merely informing the jury that it is allowed to make an adverse inference, while others are extensive, providing the jury with detailed guidance on when and how to do so. Jury instructions should, at a minimum, (1) explain in simple terms the significance of an adverse inference, (2) explicitly identify the party against whom it will apply, and (3) provide guidance to analyze the strength

of the relationship between the non-party witness and the party against whom the inference will apply. This last element is important because, as the *LiButti* court explained, "the nature of the relationship will invariably be the most significant circumstance. . . . The closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship."[43] A jury properly instructed on this point is more likely to draw an accurate inference, if it chooses to draw one at all.

The ABA Model Jury Instruction offers a solid starting place:

> Under the Constitution, a person has the right to refuse to answer questions that may tend to incriminate him in criminal activity.
>
> During this case [*the witness*] refused to testify by exercising his privilege against self-incrimination. With respect to [*the witness*'] refusal to testify, you may, but are not required to, infer that this testimony would have been unfavorable to the [*party associated with the witness*] if and only if you find that the witness is sufficiently associated with [*that party*] so as to justify the adverse inference. Whether the witness is sufficiently associated with a party to justify an adverse inference depends upon the total circumstances of the case. For example, a witness who is a past or present employee, officer or agent of a party may be, but is not necessarily, sufficiently associated with that party to justify an adverse inference. Likewise, a coconspirator may be sufficiently associated with a party to permit the drawing of an inference adverse to the party if the coconspirator refuses to testify.
>
> If, however, you find that the witness is not sufficiently associated with the [*party*], you are instructed that you are not to attach any significance to [*the witness*'] refusal to testify. In other words, you should not make any assumption or speculate why [*the witness*] chose to exercise his constitutional privilege. In addition, if [the witness] is not sufficiently associated with either of the parties, you are not to infer anything adverse or unfavorable to either party in the case because [the witness] refused to testify.[44]

The Model explains clearly what an adverse inference is and which party it would affect. It also guides the jury through the analysis of the relationship between the non-party witness and the party against whom the adverse inference would be drawn.

In contrast, consider the bare-bones jury instruction in *RAD Services*:

> During the trial you also heard evidence by past or present employees of the plaintiff refusing to answer certain questions on the grounds that it may tend to incriminate them. A witness has a constitutional right to decline to answer on the grounds that it may tend to incriminate him. You may, but you need not, infer by such refusal that the answers would have been adverse to the plaintiff's interests.[45]

This instruction provides the jury with no guidance on when it may make an adverse inference. In failing to call attention to the relationship between the witness and the defendant, the instruction suggests that the invocation alone is sufficient to draw an adverse inference. This instruction could be problematic when a large corporate defendant's former employee, who had a minor role or little decision-making power, claims her privilege to remain silent. Without at least considering the nature of the relationship, the jury could be led to make an unjustified adverse inference.

At the other end of the spectrum, some courts have gone beyond the model instructions by offering the jury more detailed guidance. For example, in *In re Scrap Metal Antitrust Litigation*,[46] the instruction reads:

> As I said, under the Constitution, a person has the right to refuse to answer questions that may tend to incriminate him in criminal activity. During this case, you also heard *JACK WEINGOLD*, *LOREN MARGOLIS*, and *STUART AND MICHAEL SIMMS* refuse to testify by exercising their privilege against self-incrimination. These witnesses either are or were previously affiliated with corporate entities who were defendants in this action and who are accused of being co-conspirators in the anti-competitive conspiracy plaintiffs allege existed in this case.
>
> You may, but are not required to, draw a negative inference from the failure of these witnesses to testify. The nature of the negative inference you may draw from the testimony of these witnesses is limited, however, in the following ways:
>
> (1) you may, but are not required to, draw a negative inference against the corporations with which those witnesses are or were affiliated as it relates to the allegations about the conduct of those corporations in this action; and
>
> (2) you may, but are not required to, draw a negative inference against DeMilta Iron and Metal and the Columbia defendants from the failure of these witnesses to testify if, and only if, you first find:
>
> (a) there is independent (i.e., separate and apart from any negative inference) evidence to support the conclusion that such defendant participated in a conspiracy with the particular witness or with the particular corporation with which that witness was affiliated; *and*
>
> (b) you find that the witness was sufficiently associated with that defendant during the relevant time frame to justify such an inference. While this does not require a formal affiliation, you must be satisfied that the connection between the witness and the defendant was substantial, based on all the evidence you find relevant in this case.
>
> If the witnesses are not sufficiently associated with the defendants, or you fail to find independent evidence of a conspiracy between the defendants and the testifying witness (or his affiliated corporation), you are not to infer anything adverse or unfavorable to any defendant in the case because the witnesses refused to testify. This analysis applies individually with respect to each witness as he relates - or does not relate - to each defendant.[47]

Hearkening back to *Baxter*, the *Scrap Metal* court required the jury to find corroborating evidence in addition to a sufficient association between the witness and the defendant. It

also carefully explained the circumstances under which the jury should not make an adverse inference. An instruction with this level of detail could be particularly helpful to a jury in complex antitrust cases where the nature of the relationship between the non-party witness to the party against whom the inference would be drawn may not be easily determined.

Practical Considerations for Antitrust Practitioners

Attorneys representing corporate parties in civil antitrust proceedings should be mindful of the possibility that a non-party witness may invoke the Fifth Amendment. Whether on the plaintiff side or the defense side, attorneys in that situation should consider and be prepared to address certain common issues that frequently arise in such cases.

First, a non-party witness who may be at risk of criminal prosecution should be represented by their own legal counsel. Two key factors considered by the court in *LiButti* are (1) the nature of the relationship between the invoking party and the plaintiff or defendant, "the closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness" is to render damaging testimony; and (2) the degree of control the party has over the non-party witness, which will inform the court about whether the testimony can be viewed as a vicarious admission.[48] Whether a witness has independent counsel affects both of these elements. Having independent counsel creates distance between the non-party witness and the plaintiff or defendant and increases the likelihood that the individual invokes their right against self-incrimination freely and voluntarily, and not as part of an attempt by one of the parties at gamesmanship.[49]

Second, once the non-party witness invokes the privilege, consider whether the invocation was properly made. In order to assert a Fifth Amendment privilege, the witness must establish "an objectively reasonable belief that a responsive answer could expose that individual to criminal prosecution."[50] In complex antitrust cartel cases, it may not be clear whether an individual is exposed to a real threat of criminal prosecution. At the outset of a cartel investigation, it is often difficult to pinpoint the bounds of the concerted activity. As a result, there may be a large web of potential non-party witnesses who may be tangentially associated with the alleged illegal activity and might be incentivized to take the Fifth. Attorneys should consider "traditional tests," such as statute of limitations, immunity, and double jeopardy, as an initial gauge of the potential for prosecution.[51] If the witness has not received grants of immunity or informal assurances of non-prosecution, and if the "statute of limitations for criminal conspiracy [has] not run," the invocation is on more solid footing because it "does not depend upon the likelihood, but upon the possibility of prosecution."[52] For example, where a non-party witness had completed serving a sentence for the crime, a court found that the non-party witnesses "faced no threat of criminal prosecution for the alleged price fixing" scheme because the government had closed its investigation and the statute of limitations had run, and therefore the witness could not assert his right against self-incrimination.[53]

Third, counsel should consider whether evidence for the same point to be established by the adverse inference can be obtained through other means. Courts have found that "granting an inference would not be trustworthy" if "circumstances would seem to allow [plaintiff] to find [ ] answers elsewhere."[54] Indeed, the Ninth Circuit held that "no negative inference can be drawn against a civil litigant's assertion of his privilege . . . unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information."[55] A non-party's invocation of the Fifth cannot serve as a shortcut for a party to subvert discovery and motion practice.[56] As a result, parties may want to utilize the civil discovery process before relying on an adverse inference to establish a fact. For example, in *Emerson v. Wembley USA Inc.*, the district court found that the topics the witness was being questioned about, for which plaintiffs sought adverse inferences, could have been pursued by other means.[57] Conversely, in another case, the court found that an adverse inference was appropriate because it was established that "there are no company records or [ ] other employees whose information could effectively substitute for direct responses from [the witness]."[58]

Finally, the party seeking to have an adverse inference drawn should think carefully about the questions it asks of the witness who takes the Fifth. Having a witness refuse to answer a set of narrow, focused questions that target the unlawful conduct giving rise to civil liability, each supported by independent evidence, more easily justifies an adverse inference than a witness who refused to answer many hours' worth of questions about every conceivable topic related to the litigation.[59]

Conclusion

The adverse inference doctrine originated as a tool to protect the fairness and truth-seeking functions of a trial when a party invoked its Fifth Amendment privilege. Over time, the doctrine expanded to non-parties for the same reasons: a non-party's invocation could also withhold relevant and probative information and could involve gamesmanship. When the invoking witness is a non-party, however, the risk is greater that an adverse inference may mislead or confuse the jury.

Courts must carefully consider whether to permit the inference. The *LiButti* factors provide a rigorous framework for making this determination, keeping in mind that "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for truth."[60] But the court's responsibility does not end there. If it permits the adverse inference, it must also provide the jury with instructions that will allow that fact-finding body to accurately and fairly decide whether to make such an inference and what the scope of it should be.

Antitrust practitioners representing parties in civil cases, particularly those that involve parallel criminal proceedings, should be prepared for the possibility of a witness invoking their Fifth Amendment privilege, and should anticipate that the court will be considering issues related to fairness and truthfulness when determining whether to admit an adverse inference. For attorneys, that means considering whether the invoking non-party has separate counsel and properly invoked the privilege, whether there are alternative means of obtaining evidence for the same point to be established by the adverse inference, and the precision of the questions asked of the invoking witness. ■

[1] LiButti v. United States, 107 F.3d 110, 124 (2d Cir.1997) (quoting United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923).

[2] Bellis v. United States, 417 U.S. 85, 89–91 (1974) (holding that the privilege against self-incrimination is limited to protecting natural individuals from compulsory incrimination).

[3] *See, e.g.*, *In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 663 (7th Cir. 2002); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 153 (D. Conn. 2009); *In re* Polyurethane Foam Antitrust Litig. Direct Purchaser Class, 2015 WL 12747961, at *4 (N.D. Ohio Mar. 6, 2015); *In re* Urethane Antitrust Litig., 2014 WL 359565, at *2 (D. Kan. Feb. 3, 2014); *In re* Urethane Antitrust Litig., 2013 WL 100250, at *3 (D. Kan. Jan. 8, 2013); *In re* Scrap Metal Antitrust Litig., 2006 WL 816414 (N.D. Ohio Feb. 8, 2006).

[4] *In re* Capacitors Antitrust Litig., No. 3:14-cv-03264 (N.D. Cal.).

[5] The court has not ruled on the merits of whether an adverse inference instruction is warranted in this situation. However, as to the second issue, the court found that because the defendants notified the plaintiffs several months before trial that witnesses had a change of heart and wished to testify, the witnesses could withdraw their privilege assertion and testify at trial but only if they were made available for deposition at a time and place convenient for the plaintiffs. Order re Fifth Amendment Assertions at 1–2, *In re* Capacitors Litig., No. 3:14-cv-03264 (N.D. Cal. Jan. 15, 2020).

[6] *See* Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000).

[7] *See, e.g.*, *LiButti*, 107 F.3d at 124 (noting the non-party witness' "apparent desire to guard against perjury or prosecution for criminally secreting his interests" in certain assets "should not serve the further purpose of precluding the IRS from reaching his hidden assets").

[8] 425 U.S. 308 (1976).

[9] *Id.* at 319.

[10] *Id.* at 318.

[11] *Id.*

[12] *Glanzer*, 232 F.3d at 1264.

[13] 717 F.2d 700 (2d Cir. 1983).

[14] *Id.* at 703–04.

[15] *Id.* at 702.

[16] *Id.* at 707–08.

[17] *Id.* at 709–10.

[18] *Id.* at 710.

[19] *Id.*

[20] *Id.*

[21] 808 F.2d 271 (3d Cir. 1986).

[22] *Id.* at 275.

[23] *Id.* at 274–75 (internal quotations omitted).

[24] *Id*. at 275.

[25] *Id*.

[26] *Id*.

[27] *Id.* at 276.

[28] *Id.* at 275–76.

[29] *Id.* at 277.

[30] 107 F.3d 110 (2d Cir. 1997).

[31] *Id.* at 113.

[32] *Id.* at 117–18.

[33] *Id*. at 120.

[34] *Id.* at 123.

[35] *Id.*

[36] *Id.* at 124.

[37] *Id.*

[38] Coquina Invs. v. TD Bank, N.A., 760 F.3d 1300, 1311 (11th Cir. 2014).

[39] *LiButti*, 107 F.3d at 114.

[40] *See Coquina Investments*, 760 F.3d at 1311 (allowing an adverse inference after finding that former employee (non-party witness) was likely "loyal" to former employer (defendant) since former employer paid former employee's legal fees).

[41] 2013 WL 100250 (D. Kan. Jan. 8, 2013).

[42] *Id.* at *3.

[43] *LiButti*, 107 F.3d at 123.

[44] "Instruction 2: Invocation of the Fifth Amendment—by a Nonparty Witness," MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES 350 (AM. BAR ASS'N 2016).

[45] *RAD Services*, 808 F.2d at 277.

[46] 2006 WL 816414 (N.D. Ohio Feb. 8, 2006).

[47] *Id*.

[48] *LiButti*, 107 F.3d at 123.

[49] *See, e.g.*, United States *ex rel.* Lokosky v. Acclarent, Inc., 464 F. Supp. 3d 440, 443 (D. Mass. 2020) (noting that the non-party witnesses invoking the Fifth Amendment were represented by "counsel independent of [the] case" and finding that the adverse inferences were not trustworthy under all circumstances"); Zertuche v. United States, 2017 WL 6811994 at *13 (W.D. Tenn. Sept. 13, 2017) (finding that under a *LiButti* analysis, the second and third factors did not weigh in favor of an adverse inference because the individual invoking the privilege was represented by independent counsel).

[50] *In re* High Fructose Corn Syrup Antitrust Litig., 293 F. Supp. 2d 854, 859 (C.D. Ill. 2003); *see also* Mitchell v. United States, 526 U.S. 314, 326 (1999).

[51] *In re* Folding Carton Antitrust Litig., 609 F.2d 867, 872 (7th Cir. 1979).

[52] *In re* Master Key Litig., 507 F.2d 292, 293 (9th Cir. 1974).

[53] *High Fructose Corn Syrup Antitrust Litigation*, 293 F. Supp. 2d at 859.

[54] Emerson v. Wembley USA Inc., 433 F. Supp. 2d 1200, 1213 (D. Colo. 2006).

[55] *Glanzer*, 232 F.3d at 1264.

[56] *Emerson*, 433 F. Supp. 2d. at 1213–14 (refusing to allow a broad adverse inference based upon the plaintiff's wide-ranging questions to the witness, and noting it appeared the plaintiff was seeking an adverse inference rather than conducting other discovery to obtain the answers to its questions).

[57] *Id.*

[58] Serafino v. Hasbro, Inc., 82 F.3d 515, 519 (1st Cir. 1996) (internal quotations omitted).

[59] *Emerson*, 433 F. Supp. 2d at 1213–14 (refusing to allow a negative inference where plaintiff sought inference that was "massive in scope," and where plaintiff's counsel failed to lay foundation for certain questions for which the inference was sought).

[60] *LiButti*, 107 F.3d at 124.