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'Act of Production' Doctrine Doesn't Apply to Solely Owned Corporations

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Special to the Legal

There “simply is no situation” in which a corporation can avail itself of the Fifth Amendment privilege. In recently holding that a corporation consisting of only one person could not rely on the “act of production” doctrine to refuse to produce allegedly incriminating documents, the 2nd U.S. Circuit Court of Appeals in *In re Grand Jury Subpoena Issued June 18, 2009*, put to rest any doubt as to the conclusiveness of this statement.

The Fifth Amendment protects individuals from being “compelled in any criminal case to be a witness against himself.” Thus, individuals need not, and often do not, testify. In addition, courts have construed the Fifth Amendment as protecting individuals from producing certain documents pursuant to the “act of production doctrine.” With regard to individuals, then, the Fifth Amendment provides powerful protections. Since 1906, however, the U.S. Supreme Court has held that the Fifth Amendment does not apply to corporations.

Corporate officers, moreover,



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may not invoke the Fifth Amendment to avoid complying with a subpoena directed to the corporation. Under the “collective entity rule,” a corporate officer responding to a subpoena directed at the corporation acts in a representative capacity on the company’s behalf, not in a personal capacity on his own behalf. Thus, no privilege for corporations.

This individual-corporate distinction is problematic where the individual and the corporation are one and the same, however.

In *In re Grand Jury Subpoena*, a grand jury issued a subpoena duces tecum to Account Services Corp., a corporation for which Douglas Rennick served as the sole shareholder, officer and employee. Rennick argued that “act of productive” doctrine should excuse production because he was the only person capable of producing the requested documents, which production would be incriminating. The district court rejected Rennick’s argument and held him in contempt for failing to comply with the subpoena. Rennick appealed.

The U.S. Supreme Court has never spoken directly on whether a sole owner and operator of a corporation could assert the “act of production” privilege. More than 20 years ago, the Supreme Court flagged the issue in *Braswell v. United States*, stating in a footnote, “We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.” The

Supreme Court has never revisited the issue.

The 2nd Circuit has answered the question, however, in the negative, holding that there are no circumstances in which a corporation, or an officer acting on its behalf, can claim a Fifth Amendment privilege, including the act of production privilege. The 2nd Circuit premised its holding on three grounds. First, that application of the collective entity rule to a one-person corporation “prevents the erosion of the unchallenged rule that the corporation itself is not entitled to claim any Fifth Amendment privilege.”

While true, the threat of erosion seems minimal. Either a corporation consists of one person, in which case there is a persuasive argument that the “act of production” doctrine should apply, or it consists of more than one person and is therefore a true “collective entity,” for which there is no such protection. Second, the court found that its holding “recognizes that the decision to incorporate is freely made and generates benefits, such as limited liability, and burdens, such as the need to respond to subpoenas for corporate records.” Again, this statement is true. The reasoning, however, seems incomplete. Incorporation provides a powerful shield against liability, without which many companies likely could not do business. For corporations consisting

of one person, however, it is not clear why gaining such a shield should require the relinquishment of an important constitutional protection.

Finally, the court reasoned that application of the collective entity rule to all corporations, no matter the size, “avoids creating a category of organizations effectively immune from regulation by virtue of being beyond the reach of the Government’s subpoena power.” Presumably, the ability to incorporate and maintain certain Fifth Amendment privileges would

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lead to an increase in the number of one-person corporations. Yet, the practical difficulties of maintaining a one-person corporation would significantly limit the opportunity for abuse.

In conclusion, owners of solely operated corporations may not assert “act of production” protection. Thus, if a solely owned corporation is subpoenaed, it must produce relevant records, whether or

not the act of producing the documents is incriminating. Counsel to such entities and their owners can attempt to ameliorate the harm by shielding the sole owner/operator from the process of production (perhaps by using another individual as the corporate custodian), moving in limine to preclude the government from introducing any evidence concerning the act of production or seeking appropriate limiting or curative jury instructions. •