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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

J. Lyle Smith, **Case No. 01-14168**

Debtor. **Chapter 11**

MEMORANDUM OPINION AND ORDER RE
McKENZIE BANKING COMPANY'S
MOTION TO CONVERT TO CHAPTER 7

The Court conducted a hearing on McKenzie Banking Company's Motion to Convert debtor's case to Chapter 7 on July 31, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT & CONCLUSIONS OF LAW

McKenzie Banking Company has filed the motion to convert the debtor's case to chapter 7 on the basis of the debtor's refusal to answer several questions at his § 341 meeting of creditors. After the hearing on McKenzie Banking Company's motion, the Court was provided with a transcript of the § 341 meeting. It appears from this transcript that the debtor did invoke his Fifth Amendment privilege when questioned about his assets, his income and his activities while employed by John Hancock Financial Services.

In the case of *Donovan v. Fitzsimmons, (In re Morganroth),* 718 F.2d 161 (6th Cir. 1983),

the Court of Appeals for this circuit set forth the requirements for a valid assertion of an individual's Fifth Amendment privilege. In so doing, the court first set forth a good summary of the privilege's scope and purpose:

> The Fifth Amendment to the United States Constitution states that "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. The privilege extends not only to answers which would in and of themselves support a criminal conviction, but also to answers which would furnish a link in the chain of evidence needed to prosecute. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). *See also, Maness v. Meyers,* 419 U.S. 449, 462, 95 S.Ct. 584, 593, 42 L.Ed.2d 574 (1975); *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73, 41 S.Ct. 26, 26-27, 65 L.Ed. 128 (1920). The fifth amendment privilege not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). *See also, Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 97 S.Ct. 2132, 2135, 53 L.Ed.2d 1 (1977).

Morganroth, 718 F.2d at 165.

Although the Fifth Amendment offers an individual a large cloak of protection against self-incrimination, the *Morganroth* court found that an individual must validly assert the privilege before he is entitled to remain silent:

> It is for the court to decide whether a witness' silence is justified and to require him to answer if it clearly appears to the court that the witness asserting the privilege is mistaken as to its validity. *Hoffman, supra.* A valid assertion of the fifth amendment privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. *Id.* A witness must, however, show a "real danger," and not a mere imaginary, remote or speculative possibility of prosecution. *United States v. Apfelbaum,* 445 U.S. 115, 128, 100 S.Ct. 948, 955-56, 63 L.Ed. 2d 250 (1990). *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472, 478, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234 (1972); *Rogers v. United States,* 340 U.S. 367, 374-75, 71 S.Ct. 438, 442-43, 95 L.Ed. 344 (1951); *cf., Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d

> 889 (1968). While the privilege is to be accorded liberal application, the court may order a witness to answer if it clearly appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge. *Hoffman, supra,* 341 U.S. 486, 71 S.Ct. 818; *In re Brogna,* 589 F.2d 24, 27 (1st Cir.1979); *Ryan v. Commissioner,* 568 F.2d 531, 539 (7th Cir.1977), *cert. denied,* 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978). A blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions. The privilege must be asserted by a witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify. *See Hoffman, supra,* 341 U.S. 486-88, 71 S.Ct. 818-819
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> A witness risks a real danger of prosecution if an answer to a question, on its face, calls for the admission of a crime or requires that the witness supply evidence of a necessary element of a crime or furnishes a link in the chain of evidence needed to prosecute. In *Hoffman,* the Supreme Court held that a real danger of prosecution also exists where questions, which appear on their face to call only for innocent answers, are dangerous in light of other facts already developed. In such a situation a witness bears no further burden of establishing a reasonable cause to fear prosecution beyond asserting the privilege and identifying the nature of the criminal charge or supplying sufficient facts so that a particular criminal charge can reasonably be identified by the court. The witness has met his burden and the court does not need to inquire further as to the validity of the assertion of the privilege, if it is evident from the implications of a question, in the setting in which it is asked, that a responsive answer might be dangerous to the witness because an injurious disclosure could result. *Id.* at 486-87, 71 S.Ct. 818-819. In appraising the claim, the court "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *Id.* 487, 71 S.Ct. 818; *Malloy v. Hogan,* 378 U.S. 1, 34, 84 S.Ct. 1489, 1507, 12 L.Ed.2d 653 (1964) (White, J., dissenting); *United States v. Moreno*, 536 F.2d 1042, 1047 (5th Cir.1976); *Klein v. Smith,* 559 F.2d 189, 200 (2d Cir.1977), *cert. denied,* 434 U.S. 987, 98 S.Ct. 617, 54 L.Ed.2d 482 (1977).

Morganroth, 718 F.2d at 167.

In the case at bar, the debtor invoked his fifth amendment privilege at the § 341 meeting of creditors. The Court was not present at that meeting and has only the transcript of the proceedings before it today. Based on this transcript, it is impossible for the Court to discern what danger of incrimination the debtor apprehended when he invoked his privilege. As a result,

the Court finds that before it can rule on McKenzie Banking Company's motion to convert, it must determine if the debtor validly asserted his fifth amendment right when asked the questions he refused to answer at his § 341 meeting. In order to do this, the Court finds that a rule 2004 examination of the debtor should take place in the United States Bankruptcy Courtroom whereby the Court can be called upon to rule on the validity of the assertion on a question-by-question basis.

II. ORDER

It is therefore **ORDERED** that McKenzie Banking Company's Motion to Convert to Chapter 7 is **CONDITIONALLY DENIED**.

It is **ADDITIONALLY ORDERED** that a further examination of the debtor, J. Lyle Smith, shall be conducted under FED. R. BANKR. P. 2004 in the United States Bankruptcy Court at 111 S. Highland, Courtroom 342, Jackson, Tennessee. The following parties shall have thirty days from entry of this order to agree on a date, subject to the Court's approval, for said examination: Tim Latimer, Cindy Bennett, Mark Donahoe, Harold Johnson, Steve Hughes, David Mangum, Jerry Spore, Neil McBrayer, and Jim Pentecost. If the parties are unable to agree on a date, the Court will schedule a date for the Rule 2004 examination. During the Rule 2004 examination, the Court will be available to determine the validity of the debtor's assertion of his 5th Amendment privilege on an issue-by-issue basis.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: August 21, 2002

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