

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

IN RE:

THE TAYLOR AGENCY, INC.,

CASE NO. 00-12425-WSS

Debtor.

Involuntary Chapter 7

**REPORT AND RECOMMENDATION AND CERTIFICATION  
TO THE U.S. DISTRICT COURT OF CIVIL AND CRIMINAL CONTEMPT**

W. A. Kimbrough, Jr., Counsel for Patricia Lynn Taylor  
Brenda D. Hetrick, Chapter 7 Trustee  
Mark Zimlich, Bankruptcy Administrator's Office  
The Taylor Agency, *pro se*

This matter is before the Court on the Trustee's motion to hold Patricia Lynn Taylor in contempt. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. However, the matter may not be a core proceeding because the Trustee asks that Patricia Lynn Taylor be held in criminal contempt as well as civil contempt of this Court's order of November 28, 2001. See *Brown v. Ramsey (In re Ramsey)*, 3 F.3d 1174 (8<sup>th</sup> Cir. 1993). Therefore, the Court finds Taylor to be in civil contempt and reports and recommends to the District Court that it hold Taylor in civil and criminal contempt of the Bankruptcy Court order of November 28, 2001, ordering her to prepare and file schedules for the Taylor Agency in the above-styled proceeding, or be incarcerated until she does prepare and file said schedules.

**FACTS**

The Court briefly outlines events involving the Taylor Agency and its principal, Patricia Lynn Taylor ("Taylor") because they are significant to the bankruptcy proceeding. In February 2000, the Alabama Department of Insurance ("the Insurance Department") filed a complaint against Taylor with the Alabama Commissioner of Insurance, alleging that Taylor engaged in a

series of fraudulent and dishonest acts, misrepresentations, misappropriations, conversions and other violations of Alabama insurance law. The Insurance Department sought to revoke Taylor's license as an insurance agent and broker, and to hold her accountable for reimbursing all monies obtained through her fraudulent activity as the principal of the Taylor Agency. It also sought an emergency cease and desist order pending the outcome of the complaint. The Cease and Desist order was granted on February 25, 2000. After an administrative hearing, the Insurance Commissioner entered a final order revoking Taylor's insurance license, banishing her from the industry and holding her personally liable for the misappropriated funds. As a result, the Taylor Agency ceased operations. Also in February 2000, a Choctaw County Grand Jury indicted Taylor on two charges of first degree theft of property. Taylor pleaded guilty on both charges and was sentenced to two consecutive ten year terms. Both sentences were suspended, and Taylor is on probation.

As a result of Taylor's and the Taylor Agency's activities, approximately seventy civil lawsuits were filed in Alabama state courts. The Taylor Agency is alleged to have misappropriated funds obtained from premium financiers to purchase insurance policies. Since the premiums were not used to purchase or maintain policies, the policies were either never issued or cancelled. The Taylor Agency is also alleged to have obtained financing for premiums from more than one premium finance company for the same policy, and then kept the funds from the duplicate financing. One group of plaintiffs consists of premium financiers and insurance companies or groups that may be liable for cancelling policies or failing to obtain insurance policies for clients. Another group of plaintiffs are the individuals and companies who paid premiums for insurance policies that were never issued or cancelled. The actions are based on state law claims of fraud, conversion and conspiracy.

On June 22, 2000, four creditors filed separate involuntary petitions against Taylor and the Taylor Agency. Taylor and the Taylor Agency filed answers to the involuntary petitions, and motions for the Court to abstain pursuant to 11 U.S.C. §305(a)(1) or dismiss the cases. This Court entered an order dismissing the petition against Taylor individually, but granting the involuntary petition against the Taylor Agency. The Court gave the Taylor Agency fifteen days to file its schedules and statement of affairs, and appointed Brenda D. Hetrick as the Chapter 7 Trustee (“Trustee”).

Counsel for the Taylor Agency filed two motions for extension of time to file schedules before withdrawing from the case in September 2001 because the Taylor Agency had no funds to pay its attorneys fees. The Court extended the deadline for filing schedules to July 20, 2001 and again to October 12, 2001. The §341 meeting of creditors was adjourned several times in anticipation of receiving the Taylor Agency’s schedules. On September 20, 2001, the Trustee filed a motion to compel the Taylor Agency to answer or to file the schedules. The Court granted the Trustee’s motion to compel on November 28, 2001, and ordered the Taylor Agency to file schedules and a statement of affairs by December 14, 2001. The Taylor Agency failed to file the schedules. Taylor did not attend a hearing on the Bankruptcy Administrator’s motion for status hearing on March 19, 2002, and the Court issued an order to show cause why Taylor should not be held in contempt for failure to file schedules. The Trustee also filed a motion to hold Taylor in contempt for failure to file the schedules.

At the April 23, 2002 hearing, Taylor through her counsel represented to the Court that she had no documents or records of the Taylor Agency from which to prepare schedules and the statement of affairs. According to Taylor, the Alabama Department of Insurance seized all

Taylor Agency documents and records in Taylor's possession.<sup>1</sup> The Court continued the show cause hearing and the motion for contempt to allow Taylor to obtain the documents. After several continuances, the Court conducted a hearing on the order to show cause and the motion for contempt on August 27, 2002. Mark Zimlich of the Bankruptcy Administrator's office asked Taylor the required questions for a §341 meeting. Taylor invoked her Fifth Amendment privilege, and refused to answer each question. The Court ordered Taylor to answer and she again invoked her Fifth Amendment privilege and refused to answer the questions.

## LAW

### **I. The Fifth Amendment Privilege**

An individual may assert the Fifth Amendment privilege against self-incrimination in any criminal or civil proceeding, including a bankruptcy proceeding. *In re McCormick*, 49 F.3d 1524, 1526 (11<sup>th</sup> Cir. 1995); *In re Potter*, 88 B.R. 843, 849 (Bankr. N.D. Ill. 1988) (citing *In re Martin-Trigona*, 732 F.2d 170 (2<sup>nd</sup> Cir. 1984), *cert. denied*, 469 U.S. 859 (1984)).<sup>2</sup> However, it is not enough to merely state that the requested information may tend to incriminate. "The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself— his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, . . ." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951) (citing *Rogers v. United States*, 340 U.S. 367 (1951)).

It may be clear from the surrounding circumstances why the claimant is asserting the

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<sup>1</sup>Later testimony indicated that the Taylor Agency's documents and records were seized by the district attorney's office rather than the Department of Insurance. The Trustee now has some of the Taylor Agency's documents and records.

<sup>2</sup>Section 344 of the Bankruptcy Code provides that a person required to testify in a bankruptcy proceeding may be granted immunity under part V of title 18. Immunity is not an issue in this case, as it was neither granted nor requested.

Fifth Amendment privilege. “To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” *Hoffman*, 341 U.S. at 486-87. If the incriminatory nature of the requested information is not clear, the individual has a duty to explain how the information is incriminatory. The individual does not have to reveal the threat of incrimination in detail, given that a detailed disclosure might negate the privilege that he seeks to invoke. *In re Blan*, 239 B.R. 385, 392 (Bankr. W.D. Ark. 1999) (citing *In re Connelly*, 59 B.R. 421, 434 (Bankr. N.D. Ill. 1986)). However, he must give the court enough information to show that providing the specific information requested will incriminate him. “In order to properly invoke the privilege, . . . , a debtor must produce, for the court, credible reasons why his answers would incriminate him.” *Scarfia v. Holiday Bank*, (*In re Scarfia*) 129 B.R. 671, 674 (Bankr. M.D. Fla. 1990) (citing *In re Connelly*, 59 B.R. at 432-33.); *In re Keller Financial Services of Florida, Inc.*, 259 B.R. 391, 400 (Bankr. M.D. Fla. 2000).

A case with extensive discussion of a debtor's assertion of the Fifth amendment privilege is *In re Connelly*, 59 B.R. 421 (Bankr. N.D. Ill. 1986). In filing a Chapter 7 petition, the debtor listed only his name, address, and social security number. For all other information in his petition, he invoked the Fifth Amendment privilege. *Id.* at 426. He also invoked the privilege at his first meeting of creditors. The Trustee filed a motion to dismiss the case based on his inability to administer it given the lack of information. *Id.* at 428. Noting that it is the court's duty to determine whether Fifth Amendment privilege is properly invoked, the *Connelly* court outlined the witness's burden for claiming the privilege: “He must, . . . tender some credible reason why a response would pose a real danger of incrimination, not a remote and speculative

possibility.” *Connelly*, 59 B.R. at 434 (quoting *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7<sup>th</sup> Cir. 1980), citations omitted). The court found that based on the evidence in the record, it could not determine whether the debtor had properly invoked the Fifth Amendment privilege, holding

“[h]e must come forward with credible reasons why answering each question on the schedules and all those questions posed by the trustee would pose real danger of incrimination. For instance, seemingly innocuous questions about his residence, . . . prior bankruptcy proceedings, and marital status have been asked of [the debtor]. He must come forward with a credible reasons [sic] why revealing such information presents more than a frivolous fear of incrimination.”

*Id.* at 434-435. “[He] must give at least some minimal explanation as to how his answers to those and other questions could potentially furnish a link in the chain of evidence needed to prosecute him for conduct under investigation.” *Id.* at 435.

The Fifth Amendment claimant in *In re J.M.V., Inc.*, 90 B.R. 737 (Bankr. E.D. Pa. 1988) was in a situation similar to Taylor. He was not the debtor, but the president of a debtor corporation. He refused to answer the questions asked of him at a Rule 2004 deposition based on his Fifth Amendment privilege. Before ruling on the Trustee’s motion to compel the witness’s testimony, the court reviewed the law on asserting the Fifth Amendment privilege. *Id.* at 738-39. The court stated that it had no knowledge of the debtor corporation’s bankruptcy which involved criminal activity. *Id.* at 739. The witness maintained that the questions asked in the deposition could implicate him or furnish a link in the chain of evidence to link him to violations of the mail, wire and bank fraud statutes and of violations of 18 U.S.C. §152, concealing assets from the Trustee. *Id.* at 741. The court examined the individual questions asked by the Trustee, and concluded that two of the questions were clearly within the scope of the privilege. *Id.* The court found a question about the location of the corporate records to be more problematic, but concluded that the witness’s testimony as to the knowledge of the

corporate books and records might “form a link in the chain of evidence needed to prosecute him.” *Id.* at 742. The court determined that the witness had not met his burden as to the remaining questions. “In the context of the case as it has been presented, no apparent connection exists between potential answers to questions such as ‘what is your occupation?’ and ‘did you ever take part in any corporate board meetings?’ and the crimes of mail, wire or bank fraud and/or concealment of assets from the trustee.” *Id.*

Like the debtors in *Connelly* and *J.M.V.*, Taylor asserted her Fifth Amendment privilege to almost every question asked of her by the Bankruptcy Administrator and the Chapter 7 Trustee. She gave only her name, address, and telephone number, and identified her daughter Margo Taylor, her niece Kim Lippard and her ex-husband, Wayne Taylor. She also identified Allison Pierce as her ex-husband’s niece, and Randy McKee as a former employee of the Taylor Agency. She refrained from even identifying her own capacity in the Taylor Agency. The Court refers to Taylor as a principal of the Taylor Agency for lack of a better term. Taylor refused to answer any questions about real or personal property owned by the Taylor Agency. She also refused to answer questions about the Taylor Agency’s debts and annual income in the year preceding the involuntary petition. Taylor refused to identify the Taylor Agency’s stockholders or whether it employed a bookkeeper or CPA.

Neither Taylor nor her counsel offered any explanation for refusing to give the requested information on Fifth Amendment grounds. Taylor’s counsel did state that Taylor’s testimony could lead to her prosecution, but he did not elaborate on the circumstances of the potential prosecution. He cited *Grand Jury Subpoena dated April 9, 1996*, 87 F.3d 1198 (11<sup>th</sup> Cir. 1996), in which the Eleventh Circuit Court of Appeals held that a custodian of corporate records may not be compelled to testify as to the location of documents not in her possession when the

testimony would be self-incriminating. The Court acknowledges the holding in the case. However, the case does not explain how Taylor's answers to the individual questions subjects her to possible prosecution. The Court has no evidence that any criminal investigation is pending against Taylor. She has been prosecuted in the past for her actions related to the Taylor Agency, but the Court has not been made aware of any current criminal charges. Taylor has offered only a blanket assertion of the Fifth Amendment privilege, and has not sustained her burden of providing reasonable, credible reasons for her fear of prosecution related to the specific questions. For this reason, the Court finds that she should be held in contempt for disobeying an order of the Court.

Taylor and her counsel may believe that this Court's intimate knowledge of the civil proceedings against her would give the Court sufficient information to find that Taylor can legitimately invoke her Fifth Amendment privilege. However, potential liability for fraud and breach of contract does not necessarily lead to criminal prosecution. The debtor in *In re Potter*, 88 B.R. 843 (Bankr. N.D. Ill. 1988) was a sole proprietor of a design and home construction firm. At her §341 meeting, she refused to answer any questions based on her Fifth Amendment right against self-incrimination. The debtor had previously been served with a grand jury subpoena. After discussing the witness's duty in sustaining a claim of Fifth Amendment privilege, the bankruptcy court found:

There is little doubt in this case that the debtor's Fifth Amendment claim is well founded. The debtor left behind her a trail of unhappy clients who had given her substantial sums of money to build homes she apparently never finished. . . . Apparently some of those same disgruntled clients have complained to the [district attorney's office]. An investigation is underway. The implications for the debtor are clear and her right to assert her Fifth Amendment claim in these proceedings seems equally clear.

*Potter*, 88 B.R. at 850.

This Court notes that the *Potter* court did not review the questions asked at the §341 hearing and did not require the debtor to give an explanation for asserting the Fifth Amendment privilege for the specific questions asked at the hearing. Further inquiry may have allowed the *Potter* court to apply the Fifth Amendment privilege more precisely. Another difference between the *Potter* debtor and Taylor is that Taylor is not presently under investigation, to the Court's knowledge. The events leading to the collapse of the Taylor Agency took place over three years ago. Certainly any pending criminal investigations would be known to Taylor at this point. Given the information available to this Court, it was not able to find that Taylor exercised her Fifth Amendment privilege appropriately by refusing to answer all questions asked by the Bankruptcy Administrator and the Chapter 7 Trustee.

## **II. Contempt**

A bankruptcy judge has civil contempt power and may hold a debtor in contempt of court. *Commercial Banking Co. v. Jones (In re Maxair Aircraft Corp.)*, 148 B.R. 353 (M.D. Ga. 1992); Fed. R. Bankr. P. 9020. This Court has found Taylor to be in contempt of court; however, the usual sanction for contempt violations is a monetary fine. *Eck v. Dodge Chemical Co. (In re Power Recovery Systems, Inc.)*, 950 F.2d 798, 802 (1<sup>st</sup> Cir. 1991). Imposing a fine against Taylor would not be an appropriate punishment. Having lost her insurance licenses, the Court doubts that Taylor has the means to pay a fine. The income that she does earn must certainly be spent for living expenses.

Incarceration is the other alternative for civil or criminal contempt. As a civil contempt penalty, this Court has authority to enter such a sanction. See *Commercial Banking Co. v. Jones (In re Maxair Aircraft Corp.)*, 148 B.R. 353 (M.D. Ga. 1992). The Eleventh Circuit has not conclusively held that bankruptcy judges have criminal contempt powers. *In re Honeywell*

*Corp.*, 967 F.2d 568 (11<sup>th</sup> Cir. 1992); *U.S. v. Yanks, (In re Yanks)*, 882 F.2d 497 (11<sup>th</sup> Cir. 1989) (court accepted the procedure for certifying the contempt order to the district court, but did not affirm it). For this reason, this Court is making a report and recommendation and certification to the District Court pursuant to Fed. R. Bankr. P. 9020 and 9033 recommending that the District Court hold Patricia Lynn Taylor in civil and criminal contempt and incarcerate her. This Court believes that this would be the only effective sanction. Taylor has no known assets that can be taken from her that would persuade her to give the information sought. Incarcerating Taylor may induce her to give the necessary information or at least fully explain the basis of her claim for Fifth Amendment privilege.

This Court has attached a proposed order which finds Patricia Lynn Taylor to be in civil and criminal contempt of this Court and sentences her to be incarcerated until she completes the schedules and statement of affairs for the Taylor Agency, and gives complete answers to the questions of the Bankruptcy Administrator and the Chapter 7 Trustee at the §341 meeting for the Taylor Agency.

Dated: February 18, 2003