CONSTITUTIONAL LAW—FIFTH AMENDMENT—CIVIL DEPOSITION TESTIMONY NOT AUTOMATICALLY IMMUNIZED AND HENCE MAY NOT BE COMPELLED OVER DEPONENT'S VALID ASSERTION OF FIFTH AMENDMENT PRIVILEGE—*Pillsbury v. Conboy*, 103 S. Ct. 608 (1983).

One very interesting aspect of the law of antitrust is that it exists as an area of both private and public concern, and hence gives rise to both criminal and civil causes of action.[1] Inherent in this dual nature is the possibility that a deponent's civil action testimony may come back to haunt him in a subsequent criminal proceeding in which he is the defendant. This potential danger, quite naturally, has a significant chilling effect upon corporate employees called upon to give depositions in private antitrust suits brought against their employers. In this setting, it is commonplace for the deponent to assert his fifth amendment privilege against self-incrimination[2] in order to avoid

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[1] The federal antitrust laws contain provisions whereby an action may be brought in both a criminal and civil context. 15 U.S.C. § 15 (1982). The Supreme Court has recognized the importance of civil antitrust actions in ensuring that the federal antitrust laws are obeyed. Perma Life Mufflers, Inc. v. International Parts Corp., 329 U.S. 134, 139 (1968). The Court views the civil antitrust action as functioning on a dual level; first, with the focus on the award of treble damages, it functions as a deterrent against future antitrust violations; second, it acts concurrently as a means of redressing private wrongs. *Id.* The Court has adhered to the view that the "purposes of the antitrust law are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of antitrust laws." *Id.*

[2] U.S. CONST. amend V, reads in part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The purpose behind the fifth amendment privilege is to protect an individual from being compelled to give testimony which would subsequently be used to prosecute him. Counselman v. Hitchcock, 142 U.S. 547 (1892); Kastigar v. United States, 406 U.S. 441 (1972). The privilege extends not only to answers that would support a criminal conviction, but also to those answers which "would furnish a link in the chain of evidence" necessary for prosecution. Hoffman v. United States, 341 U.S. 479, 486 (1951).

An individual may claim a fifth amendment privilege only if the testimony sought to be elicited may be later used against him. *Id.* at 486-87. The burden on a witness who proffers a fifth amendment claim is slight and accordingly rarely disturbed by the court. United States *ex rel.* Yates v. Rundle, 326 F.2d 344, 347 (E.D. Pa. 1971). The witness who asserts his fifth amendment privilege need only show that he has reasonable cause to believe his answers might incriminate him. Reasonable cause is established by showing that, considering all the circumstances, the implications of the questions, and the setting in which they are asked, an answer to the question might disclose harmful information. *Hoffman*, 341 U.S. at 486. However, for a court to deny the fifth amendment privilege it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness who asserted the privilege is mistaken and the answers cannot possibly have such tendency to incriminate." *Id.* at 488 (citing Temple v. Commonwealth, 75 Va. 892, 898 (1881)).

In Counselman v. Hitchcock, 142 U.S. 547 (1892) the Court specifically rejected the contention that the fifth amendment privilege was meant to apply only in a criminal prosecution. *Id.* at 562. The privilege against self-incrimination has routinely been applied to both

being compelled to testify.[3] Hence, civil litigants damaged by price-fixing schemes are frequently deprived of testimony without which they are unable to prevail.[4]

It is interesting that in prosecuting antitrust defendants, the federal government is not similarly hampered by the withholding of testimony. This is because in many cases the Justice Department has already obtained this testimony in an earlier criminal antitrust action against a corporation suspected of engaging in anticompetitive behavior.[5] The government's method of procuring such information is to circumvent the fifth amendment by granting company employees use-derivative immunity.[6]

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administrative and legislative proceedings. *See* Smith v. United States, 337 U.S. 137 (1949); Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOKLYN L. REV. 121 (1972).

Although claims of fifth amendment privilege are routinely upheld by civil trial courts, in criminal proceedings such claims are thwarted by grants of immunity as provided for in 18 U.S.C. § 6002 (1982). See *infra* note 6 for text of statute.

[3] *See infra* notes 42-72 and accompanying text.

[4] Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3d Cir. 1977). The successful plaintiff must show that the defendants contracted, combined, or conspired to violate the antitrust laws by restraint of trade. *See* 15 U.S.C. § 1 (1982). Plaintiff must demonstrate public injury, that is "that the combination or conspiracy produced adverse anticompetitive effects within a relevant product and geographic market."

See generally Sherman Antitrust Act, 15 U.S.C. § 1-7 (1982) (§ 1 requires plaintiff to show that defendant has contracted, combined, or conspired to violate antitrust laws by restraint of trade). In order to recover, the civil litigant must put forth evidence from which the jury can infer that a violation of the antitrust laws occurred, resulting in public injury as well as specific injury to the plaintiff. *Glauser Dodge*, 570 F.2d at 81. A litigant is required to demonstrate direct and proximate injury to his business or property as a result of such conspiracy. *See* Ansul Co. v. Uniroyal, Inc., 306 F. Supp. 541, 567 (S.D.N.Y. 1969) (Ansul's treble damage suit dismissed due to failure to prove any damage suffered was related to Uniroyal's anticompetitive behavior), *aff'd*, 448 F.2d 872, *cert. denied*, 404 U.S. 1018 (1971).

Nevertheless, a civil antitrust plaintiff is not held to the same burden of proof as the government must establish in its criminal case. The civil litigant's burden of proof is "substantially less than 'beyond a reasonable doubt' standard borne by the government in its criminal action." *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 659, 666 (D. Minn. 1974).

[5] *See* Steinhouse, *A Practical Approach to Representation of a Client During a Federal Antitrust Grand Jury Investigation*, 29 CLEV. ST. L. REV. 97 (1980) (government will often grant immunity to obtain testimony needed to indict corporation allegedly engaged in anticompetitive behavior). The government need not be concerned with a corporate defendant refusing to supply needed information based upon a threat of incrimination inasmuch as corporations do not possess a fifth amendment right. Wilson v. United States, 221 U.S. 361, 384 (1911).

[6] Use-derivative immunity, which is narrower than transactional immunity, prohibits the government from directly or indirectly using any information elicited from an individual testifying under a grant of immunity; it does not foreclose the possibility of an immunized witness being prosecuted, but rather permits prosecution only if the government can show that the evidence it proposes to use is free of "taint" from the prior immunized testimony, and thus constitutes a wholly new, independent source. *See* Kastigar v. United States, 406 U.S. 441, 453 (1972).

The roadblock to civil antitrust litigants created by the corporate employee's refusal to testify at a deposition hearing was at issue in the recent case of *Pillsbury v. Conboy*.[7] In January of 1978, John Conboy, an executive of Weyerhaeuser Company,[8] was subpoenaed to testify before a federal grand jury investigating price-fixing activities in violation of the Sherman Antitrust Act.[9] Conboy, a participant in the alleged illegal activities, asserted his fifth amendment privilege.[10] Subsequently, he was granted use-derivative immunity[11] for his testimony and appeared before the grand jury.[12]

Conboy was again subpoenaed to appear in May of 1981 for depositions to support a civil suit brought by the Pillsbury Corporation against Weyerhaeuser for the same price-fixing activities.[13] At the

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18 U.S.C. § 6002 (1982) which defines use-derivative immunity provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
> (1) a court or grand jury of the United States,
> (2) an agency of the United States, or
> (3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (*or any information directly or indirectly derived from such testimony or other information*) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id. (emphasis added).

Transactional immunity is to be distinguished in that it extends not only to any crime about which a witness may testify but also to "any *transaction, matter or thing*." Brown v. Walker, 161 U.S. 591, 608 (1896) (emphasis in original). Thus, if in the course of his testimony a witness mentioned additional illegalities in which he participated, the government was precluded from prosecuting him even though the other illegal acts testified about had no connection to his immunized testimony.

Mere use immunity, on the other hand, is narrower than either transactional or use-derivative immunity since it only prevents direct use of the immunized testimony. Ullman v. United States, 350 U.S. 442, 437 (1956). Section 6002 has precluded the use of either transactional or use immunity.

[7] 103 S. Ct. 608 (1983).

[8] Brief for Petitioner at 3, Pillsbury Co. v. Conboy, 103 S. Ct. 608 (1983) [hereinafter cited as Brief for Petitioner].

[9] 15 U.S.C. §§ 1-7 (1982).

[10] *Pillsbury*, 103 S. Ct. at 610.

[11] See *supra* note 6 for text of 18 U.S.C. § 6002 providing for use-derivative immunity.

[12] *Pillsbury*, 103 S. Ct. at 610.

[13] Brief for Petitioner, *supra* note 8. Subsequent to several criminal indictments being handed down in the government's antitrust action, a myriad of civil antitrust actions were initiated. *Pillsbury*, 103 S. Ct. at 610. For purposes of discovery all the civil actions were consolidated in the District Court for the Southern District of Texas. *Id.* at 610-11. Pillsbury opted out of the class action and brought its own cause of action. *Id.* at 611.

deposition, Conboy, his counsel, and Pillsbury's counsel all had copies of the immunized grand jury testimony.[14] Pillsbury's counsel drew his deposition questions from the transcript, incorporated Conboy's prior answers into the questions, and asked him if that was the information to which he had testified.[15] Following each question, Conboy asserted his fifth amendment privilege against self-incrimination and refused to answer.[16] Pillsbury then moved to compel Conboy to answer and the district court granted the motion[17] but Conboy continued in his refusal to answer and was held in contempt. The order was stayed pending appeal.[18]

The Seventh Circuit Court of Appeals affirmed the district court order.[19] On rehearing the issue *en banc*, however, the Seventh Circuit reversed the district court, finding that Conboy was entitled to assert his fifth amendment privilege.[20] The appeals court found that section 6002 of the Organized Crime Control Act[21] (O.C.C.A.) does not protect a deponent's civil deposition testimony that either repeats exactly or closely follows his prior immunized testimony.[22] The United States Supreme Court, recognizing a split in the circuits,[23] granted certiorari and affirmed the Seventh Circuit, holding that Conboy could not be compelled to testify over his valid fifth amendment assertion.[24]

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[14] Pursuant to an order of the district court, the immunized testimony was made available to the attorneys for the class action and the opt-outs. *Id.*

[15] The Court provided an example of the questioning: "Q. Who did you have price communications with at Alton Box Board? Q. Is it not the fact that you had price communications with Fred Renshaw and Dick Herman . . .?
Q. Did you not so testify in your government interview of January 10, 1978?" *Id.* at 611 n.2.

[16] *Id.* at 611.

[17] *Id.* 28 U.S.C. § 1407 (b) (1976) conferred power upon Chief Judge John V. Singleton, Jr. of the District Court for the Southern District of Texas to grant the motion. *Id.* at 611 n.3.

[18] *Id.* at 611.

[19] *In re* Corrugated Container Antitrust Litig., Appeal of Conboy, 655 F.2d 748, 754, *rev'd on rehearing*, 661 F.2d 1145 (7th Cir. 1981), *aff'd sub nom.* Pillsbury Co. v. Conboy, 103 S. Ct. 608 (1983).

[20] 661 F.2d 1145, 1159 (7th Cir. 1981).

[21] 18 U.S.C. §§ 6001-6005 (1982).

[22] *In re* Corrugated Container Antitrust Litig., Appeal of Conboy, 661 F.2d 1145, 1159 (7th Cir. 1981), *aff'd sub nom.* Pillsbury Co. v. Conboy, 103 S. Ct. 608 (1983).

[23] The question of whether immunity extended to civil deposition questions based on immunized testimony had been resolved differently by the circuits. *Compare In re* Corrugated Container Antitrust Litig., Appeal of Fleischacker, 644 F.2d 70 (2d Cir. 1981) (deposition answers immunized) *and* Appeal of Starkey, 600 F.2d 1043 (8th Cir. 1979) (same) *with In re* Corrugated Container Antitrust Litig., Appeal of Franey, 620 F.2d 1086 (5th Cir. 1980) (deposition answers not immunized); *see also infra* notes 42-72 and accompanying text.

[24] *Pillsbury*, 103 S. Ct. at 617-18.

Historically, statutory immunity has been utilized to supplant a witness' fifth amendment right to remain silent in order to compel him to speak where the government has great need for information.[25] Consequently, the United States Supreme Court has repeatedly held that a grant of immunity must be consistent with the protection afforded an individual under the fifth amendment.[26] Nevertheless, despite the Court's holdings that an immunity grant is coexistent with the fifth amendment protection, Congress has contracted and expanded the scope of this protection since the passage of the first federal immunity statute in 1857.[27]

In 1970, Congress intended to put an end to the "immunity baths" it perceived to flow from transactional immunity which protected a witness from prosecution for *any* criminal act about which he testified, even if independent evidence existed, or if the criminal act(s) mentioned in his testimony were not being investigated at the time of the immunity grant.[28] The result was the enactment of Title II of O.C.C.A.,[29] which supplanted transactional immunity with use-derivative immunity, thus exposing a witness to prosecution if evidence wholly independent of the compelled testimony was discovered.

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[25] *See* Comment, *Current Controversies Concerning Witness Immunity in the Federal Courts*, 27 VILL. L. REV. 123 (1981-82); *see also* Kaminsky, *supra* note 2, at 124-28. Mykkeltvedt, *To Supplant the Fifth Amendment's Right against Self-Incrimination: the Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633 (1979).

[26] Kastigar v. United States, 406 U.S. 441, 462 (1971); Murphy v. Waterfront Comm'n, 378 U.S. 52, 54 (1964); Brown v. Walker, 161 U.S. 591, 594 (1896); Counselman v. Hitchcock, 142 U.S. 547, 585-86 (1892).

[27] The first federal immunity statute provided broad transactional immunity. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 155. The Act of 1857 was rescinded in 1868 and replaced with a statute providing mere use immunity. Act of Feb. 25, 1868, ch. 13, § 1, 15 Stat. 37. In 1893 a new immunity statute was enacted, The Compulsory Testimony Act of 1893, ch. 83, 27 Stat. 443 (repealed 1970). This Act afforded a witness transactional immunity for his compelled testimony. This grant of broad immunity was reduced by the Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001-6005 (1982) to use-derivative immunity. See *supra* note 6 for a comparison of the three types of statutory immunity.

Counselman v. Hitchcock, 142 U.S. 547 (1892) presented the only instance in which the Court struck down an immunity statute for constitutional inadequacy. The statute challenged in *Counselman* provided a witness with mere use immunity for his testimony; it did not prevent the government from using his compelled testimony to search out other sources of evidence for subsequent use against him. *Id.* at 564. The Court maintained that unless an immunity statute afforded a witness absolute immunity from prosecution for the crime about which he is compelled to testify, the protection afforded is not equal to the protection of the fifth amendment and therefore cannot be used to supplant the fifth amendment privilege. *Id.* at 585-86.

[28] *See supra* note 6.

[29] 18 U.S.C. §§ 6001-6005 (1982). See *supra* note 6 for text of § 6002 which provides for use-derivative immunity.

In *Kastigar v. United States*,[30] the United States Supreme Court upheld the constitutionality of use-derivative immunity.[31] The *Kastigar* Court, acknowledging that a grant of immunity must provide protection equal to that of the fifth amendment,[32] found transactional immunity to go beyond that in affording greater protection than was constitutionally mandated.[33] Justice Powell, writing for the majority,[34] found that the privilege against self-incrimination does not guarantee that one who invokes it is removed from the threat of *any* subsequent prosecution.[35] The Justice pointed out that transactional immunity supersedes these bounds by guaranteeing the witness absolute immunity against future prosecution.[36] Noting that the primary concern of the privilege against self-incrimination is to prevent one from being compelled to give testimony leading to punishment for criminal acts,[37] the Court reasoned that since use-derivative immunity prohibits any use of compelled testimony which further prosecutes the witness, the protection afforded is equivalent to the fifth amendment and thus is constitutionally permissible.[38]

The *Kastigar* Court also emphasized that once a witness testifies under a grant of use-derivative immunity, the government bears a heavy burden to prove that any evidence it proposes to use in a subsequent prosecution is derived from a source wholly independent of the compelled testimony.[39] The Court viewed this burden as a "very substantial protection, commensurate with that resulting from invoking the privilege itself."[40] Although the constitutional adequacy of use-derivative immunity as provided for in section 6002 has not been

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[30] 406 U.S. 441 (1972).

[31] *Id.* at 462. The petitioners in *Kastigar* were subpoenaed to appear before a United States grand jury. *Id.* at 442. Since it was probable that the petitioners would assert their right to silence, the government moved for an order granting immunity to the petitioners pursuant to 18 U.S.C. §§ 6002-6003. *Id.* Despite the petitioners' contention that the scope of use-derivative immunity was not coterminous with the fifth amendment, the district court granted the order. *Id.* The petitioners persisted in their refusal to testify and were held in contempt. *Id.* The Court of Appeals for the Ninth Circuit affirmed the district court order, *id.* at 442-43, and the Supreme Court granted certiorari. *Id.* at 453.

[32] *Id.*

[33] *Id.*

[34] Justice Powell was joined in the majority opinion by Justices Burger, Stewart, White, and Blackmun. Justices Douglas and Marshall each dissented separately.

[35] *Kastigar*, 406 U.S. at 453.

[36] *Id.*

[37] *Id.* at 452.

[38] *Id.* at 462.

[39] *Id.* at 460.

[40] *Id.* at 461.

challenged since *Kastigar*, the question remained whether a grant of immunity reached deposition questions based on immunized testimony, thus precluding a fifth amendment claim.[41]

In 1979 in *Appeal of Starkey*,[42] the Eighth Circuit answered this question positively. Starkey, a dairy employee, was granted immunity when subpoenaed to testify in 1977 at a federal grand jury criminal investigation of price-fixing in the Arkansas milk industry.[43] The criminal proceedings were terminated in December of 1977 after all the defendants pleaded *nolo contendere*;[44] however, prior to such termination, the state of Arkansas brought a civil class action against the dairies.[45] During the subsequent period of discovery, the trial court ordered Starkey's grand jury testimony released,[46] and he was thereafter subpoenaed to answer deposition questions formulated largely upon the basis of his protected statements.[47] His assertions of the fifth amendment privilege gave rise to a contempt order from which he appealed.[48]

The Eighth Circuit concluded that Starkey could not use the fifth amendment in refusing to answer questions as his replies would be "tainted" by the federal grand jury testimony and therefore could not subject him to future prosecution.[49] Judge McMillan, writing for a unanimous court, noted two factors which were indicative of "taint": (1) the grand jury testimony had been made available to all the parties and utilized by Arkansas' counsel in questioning Starkey at the civil deposition; and (2) the sequence of the deposition questions closely followed the order of the grand jury testimony, many of the questions being simply the immunized testimony repeated verbatim.[50] Further, the court found the fact that the Deputy Attorney General of Arkansas had argued that the deposition questions were derived from the immunized transcript particularly persuasive in showing that Starkey's

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[41] *See infra* notes 42-72 and accompanying text.

[42] 600 F.2d 1043 (8th Cir. 1979).

[43] *Id.* at 1045.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1046.

[48] *Id.* at 1045. Starkey was sentenced to an unspecified period of imprisonment to last until he testified at the civil deposition. The sentence was suspended pending appeal. *Id.* at 1045 n.2.

[49] *Id.* at 1046. The court found Starkey's deposition replies tainted despite the fact that the federal prosecutor refused to grant separate immunity for this deposition testimony. The request was refused because the government was not a party to the civil antitrust action. Such a request was never made to the state prosecutor. *Id.*

[50] *Id.*

statements were tainted.[51] The combination of these factors led the court to conclude that so long as the deposition testimony was confined to the limits of the grand jury transcript, it would be "tainted" and thus, the deponent could be compelled to speak.[52] In order to limit the deposition testimony to the parameters of the grand jury testimony, the court instructed that Starkey be required to answer those "questions which [were] within the same time, geographical and substantive framework as the grand jury testimony."[53]

The Second Circuit followed the *Starkey* rationale in the factually similar *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker*.[54] Fleischacker, granted immunity for his testimony before a federal grand jury investigating price-fixing activities in the corrugated container industry, was subsequently subpoenaed to testify at civil depositions stemming from the criminal action.[55] As in *Starkey*, the federal grand jury testimony had been released and the deposition questions were based upon them.[56] In response to each deposition question Fleischacker asserted his fifth amendment right and was subsequently held in contempt.[57]

Judge Meskill, writing the *Fleischacker* decision,[58] relied on the Eighth Circuit's reasoning in concluding that the corporate executive could be compelled to speak if the questions posed were derived from prior immunized testimony.[59] The Second Circuit reasoned that, as the answers to such questions would be derived from the immunized testimony, they would be "tainted" and therefore precluded from use in a subsequent criminal action.[60] The *Fleischacker* court, recognizing the potential danger resulting from the interference of the civil deposition answers with subsequent criminal prosecutions, concluded that a witness should not be required to "respond to questions that do not

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 1048. In 1980 the Eighth Circuit reaffirmed its holding in Little Rock School Dist. v. Borden, Inc., 632 F.2d 700 (8th Cir. 1980). Factually, *Little Rock School Dist.* was similar to *Starkey* except that in *Little Rock School Dist.* the grand jury testimony was not released. *Id.* at 705. As in *Starkey*, the court held that so long as the deposition questions were confined to the " 'same time, geographical and substantive framework as the witness' immunized grand jury testimony' " the witness could be compelled to answer. *Id.* (quoting *Appeal of Starkey*, 600 F.2d at 1048 (8th Cir. 1979)).

[54] 644 F.2d 70 (2d Cir. 1981).

[55] *Id.* at 72-73.

[56] *Id.* at 73.

[57] *Id.*

[58] *Id.* at 77.

[59] *Id.* at 75.

[60] *Id.*

concern subjects actually touched upon by questions appearing in the transcript of the prior immunized testimony."[61]

In *In re Corrugated Container Anti-Trust Litigation, Appeal of Franey*,[62] the Fifth Circuit created a split in the circuits[63] by holding that a witness could not be compelled to answer civil deposition questions based on prior immunized testimony absent a separate grant of immunity.[64] The *Franey* court maintained that it was not the role of the district court to determine if the answers to civil deposition questions would be tainted by the prior immunized testimony.[65] Judge Tjoflat explained that the only inquiry the court should make is whether the witness may properly invoke his fifth amendment privilege in response to the deposition questions.[66] The *Franey* court posited a two-part inquiry to make this determination: first, whether the witness' answers might reveal his involvement in criminal activities, and second, whether the witness would face the risk[67] of prosecution for criminal activities that might be revealed by his testimony.[68] Judge Tjoflat concluded that if the answers to both of these inquiries were affirmative, the witness could then assert his fifth amendment privilege and refuse to answer.[69]

Applying this analysis to the situation presented in *Appeal of Franey*, [70] Judge Tjoflat concluded that the deponent's answers might reveal his involvement in criminal antitrust violations on both a state and federal level.[71] Additionally, as the applicable statute of limitations had not yet run, and a new criminal investigation into the

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[61] *Id.*

[62] 620 F.2d 1086 (5th Cir. 1980). The appeals of Charles J. Franey, Philip Fleischacker, and Alex Hopkins were consolidated into one appeal. The Fifth Circuit litigated the appeals of Franey and Hopkins. Fleischacker's appeal was litigated in the Second Circuit. *See supra* notes 54-61 and accompanying text.

[63] *See supra* notes at 42-72 and accompanying text.

[64] *Appeal of Franey*, 620 F.2d at 1095.

[65] *Id.* at 1093. The Second and Eighth Circuits did not examine the power of the court to determine whether a witness may assert his fifth amendment privilege. These courts, in upholding the lower court decisions to compel testimony, maintained that the district courts were not creating immunity by ordering testimony, but were only identifying a derived use of already immunized testimony. *See Appeal of Fleischacker*, 644 F.2d at 78; *Appeal of Starkey*, 600 F.2d at 1047-48.

[66] *Appeal of Franey*, 620 F.2d at 1093.

[67] The risk may even be a remote risk. *Id.*; *see In re* Folding Carton Antitrust Litig., 609 F.2d 867 (7th Cir. 1979).

[68] *Appeal of Franey*, 620 F.2d at 1093.

[69] *Id.*

[70] *Id.* at 1093-95.

[71] *Id.* at 1092.

corrugated container industry had begun, the court perceived the possibility of future prosecution and therefore determined that Franey could properly remain silent.[72]

In *Pillsbury*, although the parties' central arguments concerned whether Conboy's answers to deposition questions based on immunized testimony would be derived from such testimony pursuant to section 6002,[73] the United State Supreme Court maintained that the real issue involved in the dispute was whether the grant of immunity given to Conboy for his grand jury testimony carried over to the subsequent civil deposition, thereby compelling him to speak.[74] Justice Powell, writing for the majority,[75] pointed out that if Pillsbury's claim that the grant of immunity extended to the civil depositions was rejected, Conboy could not be compelled to speak and an analysis into whether his answers, if freely given, would have been derived from the prior testimony would be meaningless.[76]

Focusing on Congress' purpose in enacting O.C.C.A., the majority concluded that section 6002 was intended to aid the government in its law enforcement efforts.[77] By limiting the scope of immunity to use-derivative and by vesting the authority to grant immunity solely within the Justice Department,[78] the Court reasoned that Congress sought to meet dual government needs: obtaining the information

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[72] *Id.*

[73] Pillsbury and Conboy differed as to whether there was a distinction between questions being derived and answers being derived. *Pillsbury*, 103 S. Ct. at 613-14. It was Pillsbury's contention that since the deposition questions were derived from the immunized testimony, the answers which would closely track the prior testimony of the witness would also be derived from the protected testimony and incapable of subsequent use against the deponent. *Id.* at 613. Conboy, on the other hand, claimed the answers to questions derived from immunized testimony were not in themselves necessarily derived. *Id.* Conboy contended that each answer arose from a deponent's current memory and, as such, constituted a new "source" capable of subsequent use against the witness. *Id.* at 613-14.

[74] *Id.* at 614.

[75] The *Pillsbury* appeal resulted in a 7-2 decision. Justices Marshall, Blackmun, and Brennan separately concurred in the decision of the Court although Justice Brennan chose not to write an opinion since his differences with the Court were not substantive. Justice Stevens was joined in a dissent by Justice O'Connor.

[76] *Pillsbury*, 103 S. Ct. at 614. Inasmuch as the Court did reject Pillsbury's claim, the majority did not address whether Conboy's answers would have been so derived. *Id.*

[77] *Id.* at 616. The Crime Control Act of 1970, of which § 6002 was an integral part, was drafted by the Nixon Administration as part of its campaign promise to "restore law and order." *See* Mykkeltvedt, *supra* note 25.

[78] 18 U.S.C. § 6003 (1982) provides that in cases where an individual refuses to testify at a proceeding before or ancillary to a court of the United States or a grand jury of the United States, a United States Attorney may request a grant of immunity for such individual if in his judgment the testimony is necessary to the public interest.

necessary for a criminal investigation while at the same time protecting its interest in further prosecution.[79]

Perceiving the deponent's interest as being adequate protection from prosecution, Justice Powell acknowledged that this concern would be maintained either through an extension of immunity or the right to silence.[80] Nevertheless, the Court reasoned that the government's interest would be adversely affected by the carryover of immunity from grand jury testimony to deposition answers.[81] The majority found that this expanded immunity might result in the deponent making additional statements that he did not make before the grand jury, thus possibly jeopardizing future government prosecutions.[82] Although the Court admitted the possibility that the deposition direct questions could so closely track the immunized testimony that no new information would be elicited, it acknowledged that cross-examination of the deponent would produce new immunized evidence.[83] Thus, the *Pillsbury* majority viewed Pillsbury's interpretation of section 6002 as extending to civil depositions to infringe upon the government's law enforcement interest by essentially turning use-derivative immunity into transactional immunity.[84]

Further, the *Pillsbury* Court maintained that Pillsbury's position places substantial risks on the deponent.[85] Preliminarily, the Court

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[79] *Pillsbury*, 103 S. Ct. at 616. Inasmuch as *Kastigar* imposed a heavy burden on the prosecutor when a witness had been granted immunity, it appears that Justice Powell was referring to prosecution for collateral matters rather than prosecution for the subject matter of the testimony when he spoke of the government's prosecutorial interest. *Kastigar*, 406 U.S. at 468.

[80] *Pillsbury*, 103 S. Ct. at 614. Although the Court contended that a deponent's interest would be maintained either through the extension of immunity or a fifth amendment assertion, Justice Powell noted that there may be practical reasons, such as the increased risk of perjury, for a witness preferring to remain silent. *Id.* at 614 & n.14.

[81] *Id.* at 614.

[82] *Id.* at 615. The majority pointed out that this expansion of immunity could severely hinder the government in an ongoing investigation. *Id.* at 616. Justice Powell reasoned that immunizing the witness' deposition answers would make it more difficult for the government to meet the burden imposed by *Kastigar* to show that the information proposed to be used was derived from a source wholly independent of the compelled testimony. *Id.*

[83] The majority maintained that direct examination might not be as limited as Pillsbury assumed it could be. *Id.* at 615 n.16. The Court noted that courts of appeals had allowed direct questioning in similar circumstances to go beyond a mere repetition of prior testimony. *Id.; see Appeal of Fleischacker*, 644 F.2d at 79 (witness compelled to respond to questions "concerning specific subjects that actually were touched upon by the questions appearing in the transcript of the immunized testimony"); *Appeal of Starkey*, 600 F.2d at 1048 (witness compelled "to answer only questions which are within the same time, geographical and substantive framework as the grand jury testimony").

[84] *Pillsbury*, 103 S. Ct. at 614.

[85] *Id.* at 616.

noted that a district court does not have the power under section 6003 to extend immunity;[86] thus, any broadening of immunity by a district court would amount to little more than a conjecture that in a subsequent trial the government would not be able to show a wholly independent source for the testimony.[87] Additionally, the majority pointed out that by compelling deposition testimony, a court would be subjecting the witness to other risks.[88] Justice Powell concluded that if forced to testify, a witness would not receive his fifth amendment protection.[89]

Although the Court recognized Pillsbury's need for information, it nonetheless noted that such need could only be maintained if it did not encroach on either the government's or the deponent's interest.[90] The majority maintained that civil antitrust actions, despite their importance as a means of strengthening the criminal laws, were to *supplement*, not to *supplant* the government's interest.[91] Accordingly, the Court held that absent a grant of immunity a witness could not be compelled to answer deposition questions based on prior immunized testimony.[92]

Justice Marshall concurred with the majority that Conboy could remain silent, yet also concluded that any answers the deponent may have given would have been derived from the immunized testimony.[93] Although the Justice found that these tainted answers could not be used in a subsequent trial, he posited that the deponent still ran certain risks by testifying.[94] The concurrence reasoned that a witness forced to give incriminating evidence at a deposition may be subsequently compelled to undergo more civil depositions based on his civil testimony and possibly have his statements elaborated on, thus creating the risk that such tainted evidence will not be able to be traced back to its original source.[95]

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[86] See *supra* note 78.

[87] *Pillsbury*, 103 S. Ct. at 616.

[88] *Id.* at 616-17; *see infra* notes 94-95 and accompanying text.

[89] *Id.* at 616.

[90] *Id.* at 614.

[91] *Id.* at 617.

[92] *Id.* at 617-18.

[93] *Id.* at 618. Justice Marshall was able to conclude that the answers would have been derived from the grand jury testimony because the questions were based on the testimony and there was no indication that the same questions would have been asked absent the grand jury transcript. *Id.*

[94] *Id.* at 620.

[95] *Id.*

Justice Blackmun also concurred with the majority's holding[96] that Conboy could remain silent, but he contended that Conboy's answers would not have been derived from the immunized testimony.[97] The Justice perceived the numerous references in the legislative history of section 6002 to the "fruits" doctrine enunciated in *Wong Sun v. United States*[98] as indicative of Congress' intent to construe the phrase "directly or indirectly derived from" in terms of the "fruits" doctrine.[99] Accordingly, Justice Blackmun maintained that if the deponent answered the questions of his own volition without being influenced by the compulsion of his prior testimony, the responses would be the result of " 'an intervening act of free will' "[100] and would not be derived from the privileged testimony.[101] The Justice reasoned that because Conboy's assertion of his fifth amendment privilege,[102] the considerable lapse of time between the giving of the immunized testimony and the civil depositions indicated a voluntary choice to respond not influenced by the prior compulsion, his answers would be the act of an "intervening independent act of free will" and could subsequently be used against him.[103]

In a strong dissent, Justice Stevens agreed with Justice Marshall that the deposition answers would have been "directly or indirectly derived from" the prior immunized testimony yet contended that the deponent could be compelled to testify without fear of subsequent prosecution.[104] Justice Stevens criticized the majority's analysis, which

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[96] *Id.* at 622.

[97] *Id.* at 626.

[98] 371 U.S. 471 (1963). The "fruits" doctrine as explained by the Court in *Wong Sun* is, conceding the existence of a primary illegality (i.e., an illegal arrest), any evidence obtained by an exploitation of that illegality must be excluded from future use as "fruit of the poisonous tree." *Id.* at 484. However, once there is an intervening act of free will and the connection between the primary illegality becomes so attenuated as to be purged of the taint, then the evidence need not be excluded as fruit of the poisonous tree. *Id.*

[99] *Pillsbury*, 103 S. Ct. at 624.

[100] *Id.* at 625 (quoting *Wong Sun*, 371 U.S. at 486).

[101] *Id.* at 626.

[102] Although Justice Blackmun noted that when any witness previously granted immunity asserts his fifth amendment privilege at a subsequent civil deposition he engages in an independent act of free will, he pointed out that it did not necessarily follow that one who does not assert his fifth amendment privilege in the same situation should have his testimony become automatically admissible against him. *Id.* at 627. Justice Blackmun maintained that if such testimony was subsequently introduced, it was the role of the Court to determine, in light of all the circumstances, whether the statements were "derived from" the protected testimony. *Id.*

[103] *Id.* at 626.

[104] *Id.* at 627 (Stevens, J., dissenting). The heavy burden imposed upon the prosecutor by *Kastigar* greatly reduces the possibility of future prosecution. *See supra* notes 39-40 and accompanying text.

found the government to retain an interest in prosecuting the witness after granting him immunity under section 6002. Justice Stevens maintained that the government's primary interest was, rather, the unearthing of the maximum amount of information to prosecute the witness' confederates.[105] Thus, the Justice concluded that only a broad construction of section 6002 would induce the witness to meet the government's foremost need.[106]

Focusing upon the damage to law enforcement that would result from the majority's holding, Justice Stevens perceived a substantial public interest in having injured private parties inquire into the details of antitrust arrangements through depositions.[107] Further, the dissent stressed that even if one could find a hypothetical risk that expanded immunity could hinder a possible prosecution,[108] the enforcement interest in allowing the deposition to occur clearly outweighed the chance of such a hindrance.[109] In particular, Justice Stevens posited that the factual situation in *Pillsbury* did not jeopardize the government's prosecutorial interest inasmuch as no information beyond the grand jury transcript was sought at the deposition.[110]

Although the *Pillsbury* decision has settled the question of whether the immunity given a witness for his grand jury testimony carries over to subsequent civil depositions, the Court's holding will create serious problems for civil antitrust litigants who are forced to rely upon previously immunized witnesses for information. By eliminating use-derivative immunity as a means of discovery for the plaintiff injured by a price-fixing scheme, the United States Supreme Court has closed off the litigants' major avenue to obtain evidence.[111]

Private antitrust actions have long been recognized by the courts as an important mechanism by which to enforce criminal antitrust laws:[112] The private action has been viewed as a deterrent to future

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[105] *Id.* at 630-31 (Stevens, J., dissenting).

[106] *Id.* at 631 (Stevens, J., dissenting).

[107] *Id.* at 632 (Stevens, J., dissenting).

[108] *Id.* at 633 (Stevens, J., dissenting).

[109] *Id.*

[110] *Id.*

[111] Generally, the information the civil antitrust litigant requires is confined to the memories of several corporate employees who in most cases have been granted immunity for their testimony in the criminal antitrust case. *See* Steinhouse, *supra* note 5. As a result of the Court's holding, these employees may assert their fifth amendment privilege and thus preclude the civil litigant from obtaining information which in most likelihood is not available from other sources. *See also* Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17, 21 n.25 (1983)(decline in number of private antitrust actions may be consequence of Court decisions having detrimental impact on civil antitrust plaintiffs).

[112] *See supra* note 1.

violations of these laws.[113] In light of the importance placed upon these civil actions, it becomes even more apparent that the civil antitrust plaintiff needs alternative ways to obtain admissible evidence when faced with a previously immunized witness who now asserts his fifth amendment privilege.

Three methods to facilitate discovery for the civil antitrust litigant in light of the *Pillsbury* decision have been posited by Janet L. McDavid.[114] The first approach is for the courts to permit antitrust plaintiffs to utilize at trial the grand jury testimony of the deponent who asserts his fifth amendment privilege.[115] Despite the fact that such evidence would be hearsay, McDavid foresaw the likelihood of admissibility under the residual hearsay exception in the Federal Rules of Evidence.[116]

Secondly, McDavid has proposed that juries be permitted to draw an adverse inference against the defendant corporation whose

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[113] *Id.*

[114] McDavid, *Decision Will Have Major Impact On Depositions in Civil Litigation*, Nat'l L. J., Mar. 14, 1983, at 26.

[115] *Id.*

[116] *Id.* (citing FED. R. EVID. 804). This rule, in pertinent part, provides:

> Hearsay Exceptions: Declarant Unavailable.
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> (a) Definition of unavailability.-"Unavailability as a witness" includes situations in which the declarant—
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (b) . . .
>
> (5) Other exceptions.— A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804.

This position was also taken by the Sixth Circuit in United States v. Barlow, 693 F.2d 954 (6th Cir. 1982). *Barlow* involved a witness who gave adverse testimony to the defendant at a grand jury proceeding. Subsequently, the witness married the defendant and asserted her spousal privilege so as not to be forced to testify against her husband at trial. *Id.* at 957. The Sixth Circuit concluded that by exercising her privilege she was unavailable within the meaning of the rule. *Id.* at 961. Second, the court examined the grand jury testimony and determined that it substantively possessed circumstantial guarantees of trustworthiness equivalent to the other exceptions in Rule 804. *Id.* at 962. In concluding that the guarantees were equivalent, the court focused on the fact that the witness had been immunized and thus lacked an exculpatory motive, she had personal knowledge of the events testified about and there was corroborating evidence. *Id.*

employee refuses to speak,[117] a technique that was utilized in *Corrugated Container, Antitrust Litigation*[118] The author also noted that in other circumstances the courts have held that an adverse inference may be drawn from a claim of fifth amendment privilege.[119]

Finally, McDavid has suggested that the antitrust plaintiff utilize federal law[120] which permits the use of a conviction procured by the government in a prior criminal or civil antitrust action as prima facie evidence in a later civil action of the same matter.[121] McDavid has pointed out, however, that the statute is not applicable in instances of *nolo contendere* pleas or consent judgments.[122]

These proposals, though well-intentioned, have several underlying flaws which render them inadequate in meeting the evidentiary needs of the civil antitrust litigant. First, a necessary prerequisite to having grand jury transcripts admitted into evidence is gaining access to such testimony.[123] A request undoubtedly would have to be made under the Federal Rules of Criminal Procedure which provide that grand jury testimony may be disclosed when a court directs it be released prior to or in connection with a judicial proceeding.[124] This rule was interpreted by the Court in *Douglas Oil Co. v. Petrol Stops Northwest*[125] to require the one seeking the testimony to show "a

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[117] McDavid, *supra* note 114, at 27.

[118] *Id.* at 27 & n.18. In citing to this case, McDavid explained that the court informed the jury that they could decide what import should be given to the fifth amendment claim but they were precluded from basing their verdict solely on the witness' silence.

[119] *Id.* at 27 & n.19 (citing Baxter v. Palmingiano, 425 U.S. 308 (1976) (adverse inference permitted at prison disciplinary proceeding)).

[120] 15 U.S.C. § 16(a) (1982) provides:

> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matter respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.

[121] *See supra* note 120; McDavid, *supra* note 114, at 27.

[122] McDavid, *supra* note 114, at 27.

[123] *See generally* Comment, *Grand Jury Disclosure in Antitrust Litigation*, 32 CATH. U.L. REV. 437 (1983).

[124] FED. R. CRIM. P. 6(e)(3)(c)(i).

[125] 441 U.S. 211 (1979). *Douglas Oil* was the first case in which the Supreme Court decided the accessibility of grand jury transcripts to civil antitrust plaintiffs. Previously the Court had

particularized need" by satisfying a three-prong test.[126] First, the one seeking such testimony must show that the testimony being sought is necessary to avoid possible injustice in a subsequent judicial proceeding; second, he must show that the need for disclosure outweighs the need for preserving secrecy; and finally, that the request is limited to cover only necessary material.[127] Although the Court maintained that the individual seeking the grand jury transcript bears a lighter burden justifying the release where the testimony has been disclosed,[128] the requirement that the plaintiff meet the three-prong *Douglas Oil* test may, in many circumstances, result in the inability to obtain the transcript. Further, even if the plaintiff is able to obtain the grand jury transcript, there remains the question of admissibility at trial.[129] Accordingly, this often would be an inadequate remedy.

McDavid's suggestion that the court permit the jury to draw an adverse inference against the defendant requires further explanation. It is generally accepted that a claim of fifth amendment privilege may not be the basis for such an inference.[130] An adverse inference may be

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only addressed the issue of requests for grand jury transcripts by antitrust defendants. *See* Dennis v. United States, 384 U.S. 855 (1966); United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

[126] *Douglas Oil*, 441 U.S. at 222.

[127] *Id.*

[128] *Id.* at 223.

[129] As noted by McDavid, *supra* notes 115-17 and accompanying text, the grand jury testimony would be hearsay by virtue of FED. R. EVID. 801 which in pertinent part provides:

> Definitions.
>
> The following definitions apply under this article:
>
> (a) Statement.— A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
>
> (b) Declarant.— A "declarant" is a person who makes a statement.
>
> (c) Hearsay.— "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Id.

The majority in *Pillsbury* assumed that the grand jury transcripts would be inadmissible at trial because the testimony was not subject to cross-examination. *Pillsbury*, 103 S. Ct. at 615 n.17.

[130] *See* Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971). The evidentiary value of fifth amendment claims has been mainly considered in the criminal context, but the analysis is equally applicable to antitrust cases. *See* Hartwell & Kenyon, *Reconciling fifth amendment claims and the factfinding process in civil antitrust litigation*, 26 ANTITRUST BULL. 633 (1981).

To allow a jury to base an inference on a fifth amendment claim would give rise to questions of relevancy. *See* FED. R. EVID. 401. A witness may have other reasons than guilt for asserting his privilege. *See supra* note 80. Further, even if it was determined that the fifth amendment claim was relevant, the prejudicial effect may substantially outweigh the probative value. *See* FED. R. EVID. 403.

drawn, however, from a witness' silence, even if his silence is a result of a fifth amendment claim.[131] Accordingly, it is the witness' silence which is being commented upon rather than the exercise of his constitutional privilege.[132]

Inasmuch as the adverse inference is a sanction against the defendant, it may not be very useful in the civil antitrust context where it is not the corporate defendant refusing to speak, but an employee.[133] In order to allow an adverse inference to be drawn against the corporate defendant, the individual asserting the privilege must be under the control of the corporation.[134] In each instance the court would be required to make this determination,[135] which the judiciary has been reluctant to do.[136] Thus, the cumbersome and unpredictable nature of this process suggests that the adverse inference may not be a very effective aid to antitrust plaintiffs.

The assistance that 15 U.S.C. § 16(a) will afford civil antitrust litigants is also minimal. Although the statute provides that a final judgment or decree adjudging a defendant to have violated the antitrust laws is available as prima facie evidence against such defendant in a subsequent civil antitrust action, consent judgments and *nolo contendere* pleas,[137] both common to criminal antitrust actions, are not permitted as evidence.[138] This fatal flaw renders the statute inadequate to most civil antitrust plaintiffs.

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[131] *See* Baxter v. Palmingiano, 425 U.S. 308 (1976) (inference may be drawn from party's silence even when silence results from fifth amendment claim).

[132] *See generally* Hartwell & Kenyon, *supra* note 130.

[133] Corporations do not possess a fifth amendment privilege. Hale v. Henkle, 201 U.S. 43 (1906); Wilson v. United States, 221 U.S. 361 (1911).

[134] *See* B.F. Goodrich Tire Co. v. E.H. Lyster, 328 F.2d 411 (1964) (sanctions could not be imposed upon defendant for refusal of employee not under his control to testify).

[135] *See id.*

[136] It has been posited that in antitrust cases a corporate defendant's ability to exercise control over its employees' fifth amendment claims ranges from very limited when dealing with current employees to nonexistent when the individuals are no longer employees. *See* Hartwell & Kenyon, *supra* note 130, at 664. Accordingly, it may be assumed that in most civil antitrust actions adverse inferences will not be allowed.

[137] See *supra* note 120 for text of statute.

[138] Consent pleas enable the government to settle antitrust litigation without having to go through a long, drawn out period of litigation. Consent judgments are integral to the enforcement of the antitrust laws. United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970). In order to encourage defendants to capitulate early in the stages of the antitrust action so as to avoid the costs of litigation, Congress exempted consent judgments and *nolo contendere* pleas from the effect of 15 U.S.C. § 16(a). *See* General Elec. Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964). Accordingly, it is to the advantage of an antitrust defendant who believes he will be convicted to have a consent judgment entered and thereby avoid the judgment becoming prima facie evidence in a subsequent civil action.

Notwithstanding the apparent roadblocks to the civil antitrust litigant, the Justice Department may possess the most effective method to obtain needed testimony. Pursuant to 18 U.S.C. § 6003,[139] a United States attorney may request a grant of immunity to obtain testimony if two conditions are met: first, that the information desired is "necessary to the public interest" and second, that the individual who possesses such information refuses to speak by asserting the fifth amendment.[140] The Justice Department may request an immunity grant when the privilege is asserted at a proceeding before or ancillary to a court of the United States.[141] As a civil deposition in an antitrust action is clearly ancillary to a federal court proceeding, a grant of immunity may be provided if the Justice Department concludes that the requested testimony is "necessary to the public interest."[142]

Testimony which is requisite to an antitrust plaintiff's cause of action should meet the requirement of being "necessary to the public interest,"[143] because the Supreme Court has placed great importance on civil antitrust actions.[144] The Justice Department should adopt such a view of the public interest in civil antitrust cases not only to aid the plaintiff but also to preserve the integrity of the civil antitrust action as the deterrent Congress intended it to be.[145]

This proposal will necessitate the Justice Department's active involvement in civil antitrust actions inasmuch as only the Department may make an immunity request.[146] Prior to making such a request, the Justice Department should require the plaintiff to make a showing of compelling need for such deposition testimony.[147] Failure to show such need would result in the Department's refusal to request

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[139] *See supra* note 78.

[140] *Id.* In *Appeal of Conboy* the plaintiff asked the Justice Department to request a grant of immunity for Conboy at the civil depositions but it was refused. *Pillsbury*, 103 S. Ct. at 611 n.5.

[141] 18 U.S.C. § 6003 (1982).

[142] *Id.*

[143] 18 U.S.C. § 6003 (1982).

[144] *See supra* note 1.

[145] *Id.*

[146] 18 U.S.C. § 6003 (1982). Although pursuant to § 6003 the Justice Department must request the district court to issue the grant of immunity, the function of the court is limited to determining if the statutory procedures have been complied with. *See* Thompson v. Garrison, 516 F.2d 986 (4th Cir. 1975).

[147] In showing "compelling need" the plaintiff should be required to show that without the testimony he will not be able to present his case and an injustice would be done. *See* United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) ("compelling need" standard applied in requesting release of grand jury testimony). In the vast majority of civil antitrust cases the plaintiffs do have a "compelling need" for the testimony. *See* Hartwell & Kenyon, *supra* note 130.

immunity, a necessary check on abuse of this process. Should the plaintiff meet this burden, the Justice Department could then determine if a continuing prosecutorial interest exists,[148] and, if so, whether this interest outweighs the plaintiff's need for testimony. As the balance should frequently be struck in the plaintiff's favor, conferring immunity on civil antitrust deponents will be the tool necessary to counter the stifling impact of *Pillsbury*.

Frances Panzini-Romeo

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[148] In most instances a prosecutorial interest does not remain. Justice Stevens pointed out in his dissent that a prosecutor who requests a grant of immunity is aware that in most cases he sacrifices the opportunity to prosecute the witness. *Pillsbury*, 103 S. Ct. at 630 (Stevens, J. dissenting). The vast majority of immunized witnesses are not prosecuted for crimes revealed in their immunized testimony. *See* Note, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002–6003*, 14 AM. CRIM. L. REV. 275, 282 (1976). Although the Immunity Unit of the United States Department of Justice does not maintain statistics as to what the incidence of subsequent prosecution based on immunized testimony is, "if any instances exist, they are rare." *Id.* at 282 n.46 (quoting Letter from E. Ross Buckley, Attorney-in-Charge, Freedom of Information Privacy Unit, Criminal Division, Department of Justice to David J. Sugar (October 1, 1976) (on file in the offices of the American Criminal Law Review, Washington, D.C.)).