Privilege Paves the Road to Dismissal in Defamation Cases

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Given the pivotal role of truth in a defamation action,[1] it is not uncommon for plaintiffs to resist the full disclosure of evidence bearing on the truth of the statements they challenge. When the information is crucial to the case, courts routinely order plaintiffs to produce it; and, in a typical case, they comply. But sometimes the plaintiff cannot produce the information because it is privileged, its disclosure would violate some law or rule of ethics, or it is not available to either the plaintiff or the defendant. If that is an accurate assessment of the circumstances, how can the case be fairly prosecuted or defended? The answer is that it cannot be. In those instances where the defendant is deprived of evidence that is of central importance to the defense of a defamation action, the action must be dismissed.

Although this proposition may seem Draconian, it is a matter of fairness and the justifiable consequence of a failure of proof. In the normal course of events, courts supervising discovery have the power to dismiss cases in which a plaintiff fails to produce critical evidence. In most jurisdictions, as a matter of rule[2] and precedent,[3] it is well settled that a plaintiff must disclose in discovery information that he himself has put in issue, or the court will dismiss his case. These cases permit dismissal as a sanction for a plaintiff's willful refusal to produce evidence or for a plaintiff's obstruction of the use of such evidence. Simply put, fundamental fairness requires that a defendant be allowed to discover and explore the facts underlying the claims that a plaintiff has put in issue.

Should there be a distinction, though, where the plaintiff can accurately say that his hands are tied, i.e., where a privilege (e.g., state secrets privilege or attorney-client privilege) bars him or another party from disclosing the information, or a law (right against self-incrimination) gives him a constitutional right to refuse to divulge the information? Those courts that have squarely wrestled with the issue say no. Whether a plaintiff willfully or involuntarily refuses to produce evidence, the defendant is deprived of information critical to its defense, and the plaintiff cannot carry the burden imposed by *Philadelphia Newspapers, Inc. v. Hepps*[4] to prove falsity. Dismissal is appropriate when the merits of the controversy at issue are "inextricably intertwined with privileged matters."[5]

State Secrets Privilege

The state secrets privilege, a privilege that protects from disclosure classified government information, has proven the most fertile ground for the test of the principle of dismissal for refusal to produce evidence in defamation actions.[6] Indeed, at our firm we have dubbed a motion to dismiss on this basis a *Trulock* motion, referring to *Trulock v. Lee*,[7] a case in which the Fourth Circuit affirmed the dismissal of a defamation action because factual questions about the truth or falsity of the statements at issue could not be resolved without unavailable classified government intelligence central to the plaintiff's allegations.

Trulock arose out of the government's investigation of Dr. Wen Ho Lee, a Taiwanese American scientist who was employed at Los Alamos National Laboratory, a government laboratory charged with ensuring the safety and reliability of the nation's nuclear stockpile. Dr. Lee was accused of mishandling sensitive documents concerning the United States' nuclear weapons.[8] Notra Trulock, then employed by the Department of Energy, was one of the government investigators responsible for initiating the investigation of Dr. Lee.

Lee and his lawyers charged in the press and in court documents that Trulock improperly focused on Dr. Lee because of his ethnicity. Trulock sued for defamation. During discovery, the government sought a protective order against the disclosure of classified documents, asserting that the reason for its initial investigation of Lee, including predicate information provided by Trulock, was protected from disclosure by the state secrets privilege.[9] After a magistrate granted the government's motion and entered a protective order, the government intervened as a defendant and moved for summary judgment on the ground that the case could not be litigated without the privileged information.[10] The district court agreed and dismissed the case. Trulock appealed.

As the court of appeals observed, the state secrets privilege is properly invoked to prevent the disclosure of evidence that raises national security concerns, that is, where "'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" Dismissal of a civil lawsuit pursuant to the state secrets privilege is required where (1) the privileged information is "critical to the resolution of core factual questions in the case"; (2) "the plaintiff's ability to prove his case necessarily depends on or threatens the disclosure of privileged information"; or (3) the absence of such information "deprives [the defendant] of a valid defense."[11]

The Fourth Circuit concluded that Trulock's motivation for his conduct in connection with the investigation of Dr. Lee "is itself a state secret."[12] It therefore dismissed the case, reasoning that "basic questions about truth, falsity, and malice cannot be answered without the privileged information."[13]

Almost twenty years earlier, in *Fitzgerald v. Penthouse International Ltd.*, the Fourth Circuit affirmed the dismissal of a defamation case because the invocation of the state secrets privilege had prevented critical evidence from

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being available at trial.[14] In that case, the plaintiff alleged that a magazine article had falsely implied that he sold "top secret marine mammal weapons system" technology to foreign countries.[15] The plaintiff planned to call expert witnesses to testify as to falsity, but the Navy objected that an adjudication of the defamation claim would likely lead to public disclosure of classified information that "could reasonably be expected to cause grave damage to the national security."[16] After reviewing a classified affidavit filed by the Secretary of the Navy and acknowledging the severity of the remedy of dismissal, the Fourth Circuit nevertheless concluded that the district court had properly dismissed the case. "Due to the nature of the question presented in this action and the proof required by the parties to establish or refute the claim," the court explained, "the very subject of this litigation is itself a state secret."[17] Dismissal was necessary because "truth or falsity of a defamatory statement is the very heart of a libel action."[18]

Under the *Fitzgerald* rule, dismissal is appropriate when the merits of the controversy at issue are "inextricably intertwined with privileged matters."[19] Where the classified information can effectively be obtained elsewhere or is not highly material, dismissal may not be the appropriate remedy.[20] But when access to material bearing on core factual materials is denied, dismissal is warranted.[21]

Although the authors are aware of one court that has expressed a reluctance to expand this doctrine to encompass privileged information that may not literally qualify as a state secret, a close reading of *Fitzgerald* makes clear that the court concluded the unavailable information "was not itself the subject of the litigation."[22]

These cases provide a framework, perhaps more relevant in today's world of increasing secrecy, for arguing that information sought but ultimately withheld deals a fatal blow to a defamation action because an exploration of the truth is of the utmost importance in such an action.

Attorney-Client and Doctor-Patient Privilege

The principle of dismissal for refusal to produce evidence applies with equal force when either the attorney-client privilege or the doctor-patient privilege is invoked. If a plaintiff files a complaint that raises claims implicating the attorney-client privilege, for example, "at some point in the litigation, the plaintiff will have to make a decision as to whether to waive the attorney-client privilege or to abandon the claims."[23] Likewise, when a patient puts in issue his medical or psychiatric condition, the patient cannot then assert that information relating to that condition is beyond the reach of discovery.[24]

When the plaintiff cannot waive the privilege because the privilege is not his to waive, he must suffer the consequence of dismissal. This concept was applied in *Eckhaus v. Alfa-Laval, Inc.*,[25] a defamation action brought by an attorney against his client. In that case, the attorney, who had served for a brief period as the defendant's general counsel, asserted that he was defamed by his employer during a performance evaluation at which several officers of the company were present.[26] The company filed a summary judgment motion, arguing that continued prosecution of the case would require the attorney to reveal client confidences in violation of the state ethical rule relating to disclosure of client secrets. The attorney, on the other hand, asserted that an exception to the rule applied, namely, that such confidences could be revealed in response to a claim that the attorney had engaged in wrongful conduct. The court, however, concluded that the exception was inapposite because it applied only in cases where the client initiated the lawsuit against the attorney and made a formal accusation of misconduct. "Informal charges made during a performance review of an in-house attorney specifically contemplated by his employment contract do not amount to 'an accusation of wrongful conduct' under these authorities."[27] Accordingly, the court held that the attorney could not maintain his action because its prosecution would require him to disclose confidential communications with the client/defendant in violation of the rules of professional responsibility.[28]

Self-Incrimination

The argument for dismissal similarly applies when a plaintiff, or a third party who would otherwise provide evidence material to the case, invokes the privilege against self-incrimination. As one court put it,

> The scales of justice would hardly remain equal in these respects, if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim. If any prejudice is to come from such a situation, it must, as a matter of basic fairness in the purposes and concepts on which the right of litigation rests, be to the party asserting the claim and not to the one who has been subjected to its assertion. It is the former who has made the election to create an imbalance in the pans of the scales.[29]

Rarely are the circumstances so stark. Practitioners should note that in the context of the privilege against self-incrimination, a privilege that arises from a constitutional right, courts are reluctant to impose the heavy penalty of dismissal, at least at first. Thus, the inquiry focuses on whether the case should be dismissed outright or stayed for some period of time to allow the criminal issues to resolve.

When access to material bearing on core factual materials is denied, dismissal is warranted.

To determine the appropriate outcome, some courts will apply a balancing test, focusing on the defendant's need for disclosure; the availability of possible alternatives, such as a stay; and the resulting prejudice to the parties.[30]

Other courts have suggested that a plaintiff's invocation of the privilege against self-incrimination should result in dismissal only as a last resort. In *Wehling v. Columbia Broadcasting System*,[31] for example, the Fifth Circuit directed the district court to enter a protective order staying further discovery in the case until the applicable statute of limitations for any criminal activity to which the plaintiff might be subject had run. The court's order resulted in a three-year stay.[32]

In that case, Carl Wehling, the owner of several parochial and trade schools, sued CBS, asserting that he had been libeled by a network news report stating that he had defrauded the government

and his students.[33] During discovery, Wehling refused to answer certain questions in his deposition and then asserted his Fifth Amendment privilege against self-incrimination after being ordered to comply. Wehling refused to comply with the order compelling his testimony and sought a three-year stay of the litigation, but the district court granted CBS's motion to dismiss with prejudice.

The more prudent approach may be to seek a stay, at least as the first step toward dismissal.

On appeal, the Fifth Circuit reversed. Although the court of appeals emphasized that a "civil plaintiff has no absolute right to both his silence and his lawsuit," it stated that "[n]either, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege."[34] The court of appeals recognized that what the plaintiff sought—a "three-year hiatus in the lawsuit"—was "undesirable," but it determined that "such inconvenience seems preferable at this point to requiring plaintiff to choose between his silence and his lawsuit."[35] However, the Fifth Circuit left open the window to dismissal, holding that upon the expiration of the stay, the case could be dismissed if the district court determined both that CBS had been deprived of crucial information as a result of the delay in discovery imposed by the stay and that, as a result, its ability to prove the truth of its report had been compromised.[36]

A related, but more difficult, argument to make is that a third party's assertion of the Fifth Amendment privilege, which precludes the disclosure of critical information, warrants dismissal or the entry of a stay. On the one hand, the principle that the defendant is deprived of evidence necessary for a fair defense operates in this scenario. On the other hand, some courts have expressed reluctance to impose this drastic sanction on a plaintiff who does not and cannot control the assertion of the privilege.[37] However, when the plaintiff is a corporate entity and the person who asserts the privilege is a director or officer, or former director or officer, the equities may resolve in the defendant's favor. Of course, if the court finds that the information precluded from disclosure by the assertion of the Fifth Amendment privilege is not crucial to the outcome of the case, no stay—and certainly no dismissal—will be granted.[38]

Although a request for dismissal is likely to be the first choice of every defendant, the more prudent approach under some circumstances may be to seek a stay, at least temporarily as the first step toward dismissal. In any event, at some point after a stay is entered, the issue of dismissal must finally be confronted. Although dismissal of an action is not a remedy to be taken lightly, it can certainly be argued that dismissal is the only viable alternative when the discovery sought by the defendants is critical to a central issue in the litigation and an indefinite delay of the lawsuit could prejudice the defendants.[39]

How Should a Defendant Ensure Fairness?

No matter what the case, the process toward dismissal must be a slow and methodical one. The groundwork for framing that issue must begin early with discovery requests, including deposition questions, aimed very precisely at eliciting the privileged information.

In *Glunk v. KYW-3 TV*,[40] for example, the plaintiff, a doctor who had been sued by the estate of a deceased patient for causing the patient's death, brought a defamation action against a television station that reported on the malpractice lawsuit. However, when his deposition was taken, the doctor refused to testify about his treatment of the deceased patient, an issue that went directly to the heart of his defamation claim, claiming that such testimony was barred by restrictions imposed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[41] and the doctor-patient privilege. He also refused to respond to questions related to his hospital privileges and the outcome of his peer review experiences, claiming that the peer review proceedings were privileged under the Pennsylvania Peer Review Protection Act.[42] The defendants moved to compel answers to these questions.

With respect to the doctor's claims that he could not disclose information subject to HIPAA or the doctor-patient privilege, the court ruled from the bench that the plaintiff would be compelled to reconvene his deposition and that it would rule on each of the doctor's privilege claims on a question-by-question basis. With regard to the doctor's refusal to respond to questions concerning his peer review experiences, the court agreed with the defendants that the plaintiff must produce this information, which was highly material to his defamation action.[43] Shortly thereafter, the doctor withdrew his claim.

Conclusion

Defendants certainly should not hesitate at an early stage to raise the suggestion that dismissal is warranted in the particular context of a defamation action, given the recognition by many courts that there exists a constitutional imperative to avoid "long and expensive litigation productive of nothing."[44] Although dismissal is a severe penalty, there is significant authority to support the proposition that it is warranted when—as is the case in defamation actions where truth is clearly at issue—the defendant's inability to obtain privileged information seriously impedes its ability to litigate core issues in the case.

Endnotes

1. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986), the U.S. Supreme Court held that a defamation plaintiff cannot recover damages against a media defendant for speech of public concern unless the plaintiff proves in the first instance that the speech is false.

2. For examples of rules authorizing a court to dismiss a case as a sanction for a party's failure to make discovery or to obey an order of the court respecting discovery, see FED. R. CIV. P. 37 (b)(2)(C) (allowing for dismissal of a case when a party commits discovery violations, such as failing to obey an order to provide or permit discovery); CAL. CIV. PROC. CODE § 2023.030(d)(3) (authorizing court to dismiss an action for misuse of the discovery process); N.Y. C.P.L.R. § 3126(3) (McKinney 1970 & supp. 1989) (permitting court to dismiss the action, or any part thereof, for refusing to obey an order for disclosure of information that court determined ought to have been disclosed); FLA. R. CIV. P. 1.380(b)(2(C) (providing that if a party fails to obey an order to provide or permit discovery, then the trial court may

issue an order dismissing the action or rendering a default judgment against the disobedient party); MD. RULE 2–433(a)(3) (authorizing court to dismiss an action, or any part thereof, or enter a judgment by default for failure to comply with discovery); TEX. R. CIV. P. 215(b)(5) (authorizing court, after notice and hearing, to dismiss an action, with or without prejudice, for failure to comply with discovery requests).

3. *See, e.g.,* Caesar v. Mountanos, 542 F.2d 1064, 1068 (9th Cir. 1976) ("Every person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based."); Upper Deck Co. v. Breakey Int'l, BV, 390 F. Supp. 2d 355, 362 (S.D.N.Y. 2005) (dismissing plaintiff's claim for lost royalties where plaintiff refused to divulge supporting information in discovery; court refused to consider same information when plaintiff proffered it in opposition to summary judgment); *In re* SCT Sec. Litig., No. 84–6004, 1988 WL 13263, *1 (E.D. Pa. Feb. 18, 1988) (unpublished disposition) (stating that third-party plaintiff "'has no absolute right to both his silence and his lawsuit'" and dismissing third-party complaint for plaintiff's refusal to disclose information relevant to his claims) (citation omitted); Wolford v. Cerrone, 584 N.Y.S.2d 498, 499 (N.Y. App. Div. 1992) (affirming dismissal of personal injury action where plaintiff failed to attend independent medical examination); Nardella v. Dattilo, 35 Pa. D. & C.4th 257, 261 (Pa. Ct. Com. Pl. 1996) ("[I]t would be fundamentally unfair to allow a litigant to make allegations about, and claim damages on the basis of, a mental or emotional condition and at the same time prevent a litigation adversary from testing those allegations or examining the asserted causal nexus."); Loftus v. Consol. Rail Corp., 12 Pa. D. & C.4th 357, 359, 361–62 (Pa. Ct. Com. Pl. 1991) (agreeing with defendant that it "'defies the principle[s] of justice and equity if plaintiff is permitted to submit a claim for alleged emotional and mental injury and yet forbid the party against whom the claims are made from discovery of the nature and extent of those allegations'" and ordering plaintiff either to make the requested disclosure or suffer dismissal of claims relating to emotional or physical injury).

4. 475 U.S. 767 (1986).

5. Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236, 1243 n.11 (4th Cir. 1985).

6. Although the state secrets privilege was officially recognized by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), the legal foundation for the privilege was established in the nineteenth century in *Totten v. United States*, 92 U.S. 105, 107 (1875). There, the Supreme Court stated thus:

> [P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. . . . Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed. *Id.* When the privilege is successfully invoked, the privileged information cannot be considered in the course of the legal proceedings, and the task of the court in such a case is to determine how the assertion of the privilege affects the continued prosecution of the case. *See* Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547–48 (2d Cir. 1991) (dismissal proper if state secrets privilege "so hampers the defendant" that trier of fact is likely to reach an erroneous result); Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (dismissal proper if "the very subject matter of [plaintiff's] action is a state secret"); *In re* United States, 872 F.2d 472, 476 (D.C. Cir. 1989) (dismissal proper "[i]f the [privileged] information is essential to establishing plaintiff's prima facie case").

7. 66 F. App'x 472 (4th Cir. June 3, 2003) (unpublished disposition).

8. *Id.* at 473. Lee was initially accused of stealing nuclear secrets and selling them to the People's Republic of China. The government later charged Lee with mishandling restricted data, a charge to which Lee ultimately pled guilty. *Id.* at 474.

9. *Id.* at 474–75.

10. The privilege belongs to the government. *Reynolds*, 345 U.S. at 7 (stating that the state secrets privilege "can neither be claimed or waived by a private party"). Thus, in cases where the government is not a party, a motion for dismissal usually is preceded by some form of government intervention. *E.g., Fitzgerald*, 776 F.2d at 1237 (government intervened and moved to dismiss action on state secrets grounds).

11. *Trulock*, 66 F. App'x at 475–76 (citation omitted).

12. *Id.* at 477.

13. *Id.* at 476.

14. 776 F.2d at 1243–44.

15. *Id.* at 1242.

16. *Id.*

17. *Id.* at 1243.

18. *Id.* at 1243 n.11; *see also* Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 79 (D.D.C. 2004) (dismissing civil action where "any effort . . . by the defendants to rebut [elements of plaintiff's claim] would risk disclosure of privileged information"), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005) (unpublished disposition); Patterson v. Fed. Bureau of Investigation, 893 F.2d 595 (3d Cir. 1990) (dismissing action where plaintiff could not receive any meaningful discovery in light of the FBI's assertion of the state secrets privilege).

19. 776 F.2d at 1243 n.11.

20. *See* DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327, 334 (4th Cir. 2001) (information subject to the state secrets privilege was "potentially relevant" but "not central to the question" of liability, and similar evidence was available elsewhere).

21. The privilege also has been applied outside the context of defamation actions. *See* Tilden v. Tenet, 140 F. Supp. 2d 623, 627 (E.D. Va. 2000) (summary judgment for defendant granted in an employment discrimination case where "there [was] no way in which th[e] lawsuit [could] proceed without disclosing state secrets"); Sterling v. Tenet, 416 F.3d 338, 346–47 (4th Cir. 2005) (affirming dismissal of CIA agent's employment discrimination suit both because plaintiff could not prove his case "without exposing at least some classified details of the covert employment that gives context to his claim" and because bar on state secrets evidence would also preclude government from presenting defense of legitimate nondiscriminatory reason for alleged adverse action); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004) (affirming summary judgment for defendants in religious discrimination case because "the state secrets doctrine . . . deprive[d] Defendants of a valid defense"); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (dismissing plaintiff's wrongful death claim against missile system manufacturer because questions of liability could not "be resolved or even put in dispute without access to [privileged] data regarding the design, manufacture, performance, functional characteristics, and testing" of the defendant's products); El-Masri v. Tenet, 437 F. Supp. 2d 530, 538–39 (E.D. Va. 2006) (dismissing plaintiff's suit against CIA for illegal detention under "extraordinary rendition" program because, inter alia,

defendant's defense "risk[ed] the disclosure of specific details about the rendition argument"); *Edmonds*, 323 F. Supp. 2d at 79, 81–82 (dismissing First Amendment, Fifth Amendment, and Privacy Act claims in part because "the defendants are unable to assert valid defenses to [plaintiff's] claims without . . . disclosures" of state secrets).

22. In *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501 (D. Minn. 1988), *aff'd*, 881 F.2d 1426 (8th Cir. 1989), an FBI agent brought a defamation action against the author of a book about the federal government's treatment of Native Americans. Relying on *Fitzgerald,* 776 F.2d at 1243 n.11, the defendants moved for dismissal of the case after the court, on the basis of the common law informer's privilege, prohibited the plaintiff from disclosing the identity of any FBI informant. *Price*, 676 F. Supp. at 1514. However, the court expressed uncertainty concerning whether dismissal was appropriate "beyond contexts involving military or state secrets privileges" and concluded in any event that the information the defendants sought "was not itself the subject of the litigation" as was the case in *Fitzgerald. Price*, 676 F. Supp. at 1514–15.

23. Ulizzi v. Trellis, 20 Pa. D. & C.4th 300, 309 (Pa. Ct. Com. Pl. 1993).

24. *See, e.g.,* Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000) ("Numerous courts . . . have concluded that, similar to attorney-client privilege that can be waived when the client places the attorney's representation at issue, a plaintiff waived the psychotherapist-patient privilege by placing his or her medical condition at issue.") (citations omitted); Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th Cir. 1994) ("[plaintiff] waived any privilege protecting his psychological records when he put his emotional condition at issue during the trial"); Heller v. Norcal Mut. Ins. Co., 8 Cal. 4th 30, 44 n.5 (Cal. 1994) (observing that rule of evidence provides that "the physician-patient relationship is waived 'as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by . . . [t]he patient'") (citation omitted); Scheff v. Mayo, 645 So. 2d 181, 182 (Fla. Dist. Ct. App. 1994) (plaintiff who makes his mental or emotional condition an element of his claim cannot invoke the doctor-patient privilege); Fetterhoff v. Zalezak, 34 Pa. D. & C.4th 67, 70 (Pa. Ct. Com. Pl. 1996) (citing Rost v. State Bd. of Psychology, 659 A.2d 626, 629 (Pa. Commw. Ct. 1995)) ("[I]t is controlling appellate law under *Rost* that where a plaintiff in a civil suit places his or her mental condition directly at issue, the [doctor-patient] privilege is waived as to that condition and the plaintiff must either consent to the disclosure of the information at issue or be precluded from pursuing claims related to his or her emotional and mental condition.").

25. 764 F. Supp. 34 (S.D.N.Y. 1991).

26. *Id.* at 35.

27. *Id.* at 38.

28. *Id.*

29. Lyons v. Johnson, 415 F.2d 540, 542 (9th Cir. 1969); *see also, e.g.*, *In re* Fin. Servs. of Fla., Inc., 259 B.R. 391, 407 (Bankr. M.D. Fla. 2000) ("[A] person may not seek affirmative relief in a civil action and then invoke the Fifth Amendment to avoid giving discovery, using the Fifth Amendment as both a 'sword and a shield.'"); Capanelli v. News Corp., 35 Med. L. Rep. (BNA) 1084, 1086 (N.Y. Sup. Ct. Jan. 26, 2006) ("A plaintiff who invokes the privilege [against self-incrimination] to deny a defendant substantive discovery to which it is entitled may not continue to maintain the action.") (citation omitted); Fremont Indemnity Co. v. Superior Court, 187 Cal. Rptr. 137, 140 (Ct. App. 1982) ("'[T]he gravamen of [plaintiff's] lawsuit is so inconsistent with the continued assertion of [the Fifth Amendment privilege against self-incrimination] as to compel the conclusion that the privilege has in fact been waived.'") (citation omitted).

30. *See, e.g.*, Black Panther Party v. Smith, 661 F.2d 1243, 1270–74 (D.C. Cir. 1981) (court should use balancing approach, weighing defendant's need for disclosure, possible alternatives such as a stay, and the resulting prejudice to the parties), *vacated sub nom.*, 458 U.S. 1118 (1982).

31. 608 F.2d 1084 (5th Cir. 1979).

32. *Id.* at 1089.

33. *Id.* at 1086.

34. *Id.* at 1088.

35. *Id.* at 1089.

36. *Id.*

37. *See, e.g.*, Kisser v. Coal. for Religious Freedom, No. 92 C 4508, 1997 WL 83296, at *1 (N.D. Ill. Feb. 19, 1997) (unpublished disposition) (refusing to dismiss plaintiff's complaint based on third party's refusal to testify and stating that "[t]here is no valid reason to hold a third party's assertion of his Constitutional right against self-incrimination against a party to an action.").

38. For example, in *Kisser*, the executive director of the Cult Awareness Network sued Church of Scientology defendants for, inter alia, libel based on statements "the gist of which state that Kisser advocates criminal activity and has personally engaged in criminal activity." 1997 WL 83296, at *1. After Kisser invoked the Fifth Amendment in response to questions "relating to the promotion, use or distribution of illegal drugs," the defendants sought dismissal. The court rejected the defendants' argument as irrelevant because "[t]he case, as it now stands, is clear on the point that the criminal activity that is the subject of the claimed libel relates to violent deprogramming activities that involve forcible restraint and assault." *Id.*

39. *See* Serafino v. Hasbro, Inc., 82 F.3d 515, 518 (1st Cir. 1996) ("[W]hile a trial court should strive to accommodate a party's Fifth Amendment interests[,] . . . it also must ensure that the opposing party is not unduly disadvantaged. After balancing the conflicting interests, dismissal may be the only viable alternative.") (citations omitted).

40. No. 02–08858 (Pa. Ct. Com. Pl., Chester County).

41. 42 U.S.C. § 1320d (2006).

42. 63 PA. CONS. STAT. § 425 (West 2006).

43. The court held that the act protected against the use of such information in an action against the doctor but did not entitle the doctor to rely on the act to withhold information he put in issue in the case. *Glunk*, No. 02–08858 (Sanchez, J.) (unpublished disposition). The court stated, "The Peer Review Protection Act was enacted to serve as a shield. The doctor, in this instance, is attempting to use it as a sword." *Id.*

44. Wash. Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966); *see also* McBride v. Merrell Dow Pharms., Inc., 717 F.2d 1460, 1466 (D.C. Cir. 1983) (defamation actions "should be controlled so as to minimize their adverse impact on press freedom"); Coles v. Wash. Free Weekly, Inc., 881 F. Supp. 26, 30 (D.D.C. 1995) ("given the threat to the first amendment posed by nonmeritorious defamation actions, it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted.").