

## NEW YORK

the privilege being personal, the consequences are limited to the witness that invokes it (*id.* at 45, 427 N.Y.S.2d 961, 405 N.E.2d 205). Thus, where the privilege is asserted by a nonparty witness, no adverse inference may be drawn (*State v. Markowitz*, 273 A.D.2d 637, 646, 710 N.Y.S.2d 407, *lv. denied* 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393).

*Access Capital, Inc. v. DeCicco*, 302 A.D.2d 48, 52, 752 N.Y.S.2d 658, 661 (2002)

While no adverse inference typically arises from the invocation of the privilege by a nonparty witness (*see Access Capital v. DeCicco*, 302 A.D.2d 48, 52, 752 N.Y.S.2d 658 [2002]; *State of New York v. Markowitz*, 273 A.D.2d 637, 646, 710 N.Y.S.2d 407 [2000], *lv. denied* 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393 [2000] ), that rule is not inflexible. The inference may be appropriate where the witness is a former party who settled, the testimony in question is directly relevant to an issue before the jury and the party being \*838 burdened by the adverse inference may be held vicariously liable due to the witness's actions

*Searle v. Cayuga Med. Ctr. at Ithaca*, 28 A.D.3d 834, 837 38, 813 N.Y.S.2d 552, 555 amended on reconsideration, 817 N.Y.S.2d 922 (App. Div. 2006)

While it is true that an adverse inference may not generally be drawn against a party when a non-party asserts the privilege (*see Access Capital v. DeCicco*, 302 A.D.2d 48, 52, 752 N.Y.S.2d 658 [1st Dep't 2002]; *State v. Markowitz*, 273 A.D.2d 637, 646, 710 N.Y.S.2d 407 [3rd Dep't 2000], *lv. denied* 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393 [2000] ), the Courts in this State have recognized several exceptions to this rule, two of which apply in this case.

One of these exceptions deals with the situation where a corporate employee, who is the alter ego of his or her corporate employer, refuses to testify on Fifth Amendment grounds.

Andrew Carothers, M.D., P.C. v. Ins. Companies Represented by Bruno, Gerbino & Soriano, LLP, 26 Misc. 3d 448, 461, 888 N.Y.S.2d 372, 382 (Civ. Ct. 2009)

The second of these exceptions deals with the situation when the non-party who asserts his or her Fifth Amendment privilege \*462 and refuses to testify is a material witness in a particular party's control.

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Finally, in deciding whether or not it was appropriate to give the adverse inference charge, the Court was guided, in part, on seminal case of [LiButti v. U.S., 107 F.3d 110 \[2nd Cir., 1997\]](#), which is widely accepted in the Federal courts. While LiButti has not been officially adopted by any New York State Court, the decision is well reasoned, consistent with New York law and provides an excellent analytical framework for deciding whether an adverse inference charge should be given \*\*384 where an alleged non-party invokes his or her Fifth Amendment privilege.

In [LiButti](#), the Court held that in determining the admissibility of non-party's invocation of the Fifth Amendment privilege against self-incrimination and whether the fact-finder should be permitted to draw an adverse inference as a result thereof, the trial court should consider four non-exclusive factors: (1) the nature of the relevant relationships (2) the degree of control of the party over the non-party witness<sup>8</sup>; (3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation and (4) the role of the non-party witness in the \*464 litigation ([107 F.3d at 124](#)). “Whether these or other circumstances unique to a particular case are considered by the trial court, the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth” ([107 F.3d at 124](#)).

Andrew Carothers, M.D., P.C. v. Ins. Companies Represented by Bruno, Gerbino & Soriano, LLP, 26 Misc. 3d 448, 463 64, 888 N.Y.S.2d 372, 383 84 (Civ. Ct. 2009)

## MASSACHUSETTS

Lentz argues that no authority permits a party in a civil action to benefit from an adverse inference drawn from the exercise by a nonparty witness of the privilege against self-incrimination, where the witness is not within the control of the party against whom the inference is sought. He argues that such an inference may only be drawn against a party who himself invokes the privilege, or whose employee invokes the privilege.

123Poirier v. Plymouth, 374 Mass. 206, 210, 372 N.E.2d 212 (1978). We have long recognized that, in civil cases, an adverse inference may be drawn against a party who invokes the Fifth Amendment privilege against self-incrimination. See Kaye v. Newhall, 356 Mass. 300, 305-306, 249 N.E.2d 583 (1969); Phillips v. Chase, 201 Mass. 444, 450, 87 N.E. 755 (1909) (“[I]f evidence is material and competent except for a personal privilege of one of the parties to have it excluded under the law, his claim of the privilege may be referred to in argument and considered by the jury, as indicating his opinion that the evidence, if received, would be prejudicial to him”). See also Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

In Labor Relations Comm'n v. Fall River Educators' Ass'n, 382 Mass. 465, 471-472, 416 N.E.2d 1340 (1981), we expanded the rule to allow a reasonable adverse inference to be drawn against an organization whose officers invoked the privilege, where the officers had specific knowledge of actions taken on behalf of the organization in connection with the underlying claim. See Shafnacker v. \*27 Raymond \*\*542 James & Assocs., 425 Mass. 724, 735-736, 683 N.E.2d 662 (1997) (nonparty employee's assertion of privilege might permit adverse inference against party employer if relevant employment relationship established and witness asserted privilege regarding material issue).

Federal courts addressing a nonparty employee's invocation of the privilege, while avoiding a bright-line rule, have held that such evidence is admissible if the employee's role in the dispute is material and the invocation may fairly be used against the employer in the

circumstances. See, e.g., *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 278 (3d Cir.1986); *Brink's Inc. v. City of N.Y.*, 717 F.2d 700, 710 (2d Cir.1983); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F.Supp. 340, 352-353 (D.Mass.1993), aff'd. in part, 36 F.3d 1147 (1st Cir.1994). Contrast *Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1374 (1st Cir.1991) (invocation inadmissible where evidence insufficient to indicate invoking witness motivated by anything other than personal reasons). The rationale for admitting a nonparty employee's invocation of the privilege against self-incrimination as to a matter within the scope of employment is that it fairly may be characterized as a vicarious admission of the employer. The evidence may be admitted through former as well as current employees. See *Brink's Inc. v. City of N.Y.*, *supra*, citing Heidt, The *Conjurer's Circle-The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1119-1120 (1982).

The principle has been expanded further by some courts to allow adverse inferences to be drawn against a party in cases where the invoking witness was neither an employee, former employee, or officer of the party opposing the evidence. See *LiButti v. United States*, 107 F.3d 110, 123-124 (2d Cir.1997) (father's invocation admissible to prove daughter's business was alter ego for his assets); *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 45 F.3d 969, 978 (5th Cir.1995) (fraudulent loan recipient's invocation of privilege admissible in action against fidelity bond insurer of bank for fraudulent loans made by bank's lending officer). See also *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 520-521 (8th Cir.), cert. denied, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984) (in suit by tribe against contractor \*28 on irrigation project, tribe could introduce invocation of privilege by chairperson of tribal corporation responsible for administration of tribal land who conspired with others to defraud tribe). Although argued, we did not have to decide the issue in *Shafnacker v. Raymond James & Assocs.*, *supra*, where the nonparty invoking witness was an independent agent of the defendant, because “no reasonable inference could be drawn between [the witness's] invocation of [his] privilege and the issues disputed in [the] appeal.” *Id.* at 736, 683 N.E.2d 662. However, we did not foreclose the use of such evidence in an

appropriate case.

**4567** Metropolitan introduced sufficient evidence to establish a joint venture between Lentz, Cook, and Donovan. There was evidence that the Lincoln had not been damaged, or, if it had, the extent of that damage was far less than represented by Lentz and appraised by Cook. There also was evidence that the repairs Donovan had reported to Wrightson had not been made. There \*29 was evidence that Lentz and Donovan had attended high school together and were friends, but Lentz denied that they worked together at L & L Collisions. Metropolitan produced evidence that they did in fact work together at L & L, including evidence that Lentz listed L & L as his employer for the past twelve years in his application for a mortgage loan in November, 1996. Metropolitan likewise demonstrated a relationship between Lentz and Cook. Within seventeen months, Cook appraised three of Lentz's claims and paid \$21,931.86, all in connection with unwitnessed accidents involving unidentified third parties. There was evidence that Lentz had purchased the Lincoln for \$5,500 and that it was worth between \$3,500 and \$4,000 in September, 1996. Cook nonetheless appraised the damage to the Lincoln at more than twice the value of the car. When Cook and Donovan were asked to produce documentation reflecting their involvement in Lentz's claim for damages to the Lincoln, neither was able to do so. The jury could properly infer that Cook and Donovan collaborated with Lentz to perfect a false claim for property damage.

Lentz v. Metro. Prop. & Cas. Ins. Co., 437 Mass. 23, 26 29, 768 N.E.2d 538, 541 43 (2002)