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# ADMISSIBILITY AND EVIDENTIARY EFFECT OF CRIMINAL JUDGMENTS UNDER SECTION 5(a) OF THE CLAYTON ACT

## INTRODUCTION

The second half of the Twentieth Century has found private enterprise shocked into the realization that violations of the antitrust laws are not "minor" violations, "technical" infractions involving no wrongdoing, or merely "white collar" offenses<sup>1</sup> whose penalties are to be absorbed in the costs of doing business. The success of the Department of Justice in convicting twenty-nine corporations and forty-five executives, (seven of whom served prison sentences), in the Electrical Equipment Industry antitrust litigation in 1960<sup>2</sup> and the avalanche of multimillion dollar treble damage suits that followed,<sup>3</sup> emphasize the vulnerability of the business community to the double edged sword of the antitrust laws.<sup>4</sup>

The primary purpose of the penal provisions of the antitrust laws is to punish offenders and to deter others from future violations.<sup>5</sup> To effectuate this purpose, these laws provide the government with machinery for seeking injunctive relief<sup>6</sup> and

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<sup>1</sup> *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 170 (S.D. N.Y. 1955). In 1955, Congress increased the potential penalties for each violation of the Sherman Act from \$5,000 to \$50,000, Sherman Act, §1, 15 U.S.C. §1 (1964) amending 26 Stat. 209 (1890), because "in the popular mind the amount of the penalty is likely to bear a relationship to the gravity of the offense, and so a small fine may indicate that the offense for which it was levied is not very serious, with the result that some businessmen may consider the possibility of violation a good business risk." S. REP. No. 618, 84th Cong., 1st Sess. 2 (1955). Several proposals have been made since the Electrical Industry criminal cases in 1960 to further strengthen the penalties for violation of the antitrust laws. *See, e.g.*, S. 2252, 87th Cong., 1st Sess. (1962) which proposed to increase the Sherman Act penalties from \$50,000 to \$100,000; and on a second conviction within ten years of the first fine would be up to \$500,000 for corporate defendants and up to \$100,000 plus up to one year in prison for individuals.

<sup>2</sup> *See generally* for discussion of the criminal proceedings in the Electrical Industry cases, Watkins, *Electrical Equipment Anti-Trust Cases — Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97 (1961).

<sup>3</sup> For discussion of pre-trial procedural innovations implemented to handle these civil cases, consult Neal & Goldberg, *The Electrical Equipment Anti-Trust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964).

<sup>4</sup> *See, e.g.*, *La Hazeltine v. Zenith Radio Corp.*, Civil No. 59C, 1847 (N.D. Ill. 1966) (*appeal pending*) (an original damage award against La Hazeltine on an antitrust counterclaim amounted to over \$48,000,000).

<sup>5</sup> The following antitrust laws provide criminal sanctions for violations thereof: Sherman Act, 15 U.S.C. §1-3, §8 (1964); Clayton Act, 15 U.S.C. §24 (1964); Robinson-Patman Price Discrimination Act, 15 U.S.C. §13a (1964) (Borah-Van Nuys Discrimination in Rebates Act).

<sup>6</sup> Sherman Act §4, 15 U.S.C. §4 (1964); Clayton Act §15, 15 U.S.C. §25 (1964). It is significant to note that section 16 of the Clayton Act grants an injunctive remedy to "[a]ny person, firm, corporation, or association . . . against threatened loss or damage by a violation of the antitrust laws . . ." 15 U.S.C. §26 (1964).

even damages against infringing defendants.<sup>7</sup> Congress has also provided an important supplementary source of antitrust enforcement through Section 4 of the Clayton Act,<sup>8</sup> which permits injured private claimants to sue for treble damages,<sup>9</sup> thereby facilitating the use of "private self-interest as a means of enforcement of the antitrust laws."<sup>10</sup>

In order to recover under Section 4, the private suitor has to prove: (1) a specific violation of the anti-trust laws, (2) direct injury to his business or property by reason of such violation, and (3) actual damages.<sup>11</sup> Recognizing the burdens resting on private suitors to prove their claims,<sup>12</sup> Congress enacted Section 5 of the Clayton Act,<sup>13</sup> making available under certain circumstances, the evidentiary benefit of "matters" previously established by the government in antitrust actions successfully

<sup>7</sup> Clayton Act §4A, 15 U.S.C. §15(a) (1964), amending 38 Stat. 731, §4 (1914) (allows government to recover actual damages sustained by reason of an antitrust violation, but not treble damages).

<sup>8</sup> 15 U.S.C. §15 (1964). This treble damage provision was originally embodied in Section 7 of the Sherman Act, 26 Stat. 210 (1890), *repealed by* 69 Stat. 283, §3 (1955), but was restricted in operation to violations of that particular Act. Section 4 of the Clayton Act, 15 U.S.C. §15 (1964) as enacted, applied generally to "the antitrust laws," and thus superseded section 7. Section 4 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

<sup>9</sup> Congress has rarely authorized private treble damage actions. Section 4 is one of only three federal statutory provisions which provide for mandatory treble damage recovery. This rarity emphasizes the importance attached by Congress to effective antitrust enforcement.

<sup>10</sup> *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). This purpose was articulated by Congress in 1955:

The damages of 'persons' are treble so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws.

S. REP. No. 619, 84th Cong., 1st Sess. 3 (1955).

<sup>11</sup> *E.g.*, *Talon Inc. v. Union Slide Fastener Inc.*, 266 F. 2d 731, 736 (9th Cir. 1959). For discussion and collection of cases, consult Pollack, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U. L. REV. 691 (1963) and Timberlake, *Legal Injury Requirements and Proof of Damages in Treble Actions Under the Anti-Trust Laws*, 30 GEO. WASH. L. REV. 231 (1961).

<sup>12</sup> *See* 51 CONG. REC. 13851 (1914) (remarks of Senator Walsh): "We all know that the private individual is always at a disadvantage. He is never armed with the means at his command to cope with these great organizations; and that was the very reason why this act was passed - - - ." *See also id.* at 15825 (remarks of Senator Reed); *id.* at 16046 (remarks of Senator Norris). The government, on the other hand, had the means at its disposal (*e.g.*, grand juries, power of subpoena and discovery and nationwide investigatory agencies) to seek out and detect violations which the private litigant did not. For a discussion of the burdens of private suitors prior to 1914, see W. HAMILTON & I. TILL., *ANTITRUST IN ACTION*, 82-83 (TNEC Monograph No. 16, 1940).

<sup>13</sup> 38 Stat. 731 (1914), 15 U.S.C. §16(a) (1964).

prosecuted by it. The current Section 5(a), including its permanent exclusionary proviso, provides:

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 or by the United States under Section 15a of this title, as to all matters 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 or to judgments or decrees entered in actions under Section 15a of this title.<sup>14</sup>

As enacted in 1914, Section 5 contained a second "temporary" proviso:

Provided further, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.<sup>15</sup>

Furthermore, to enable and encourage the private suitor to utilize the findings and judgment of the prior litigation in the prosecution of his own suit,<sup>16</sup> Congress enacted a section tolling the statute of limitations during the course of the government litigation.<sup>17</sup>

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<sup>14</sup> *Id.* As amended in 1955, Section 5 underwent no significant policy changes. 69 Stat. 283, *amending* 38 Stat. 731 (1914). The amendment did permit the United States to introduce prior judgments in its own private damage actions, *see* note 7, *supra*. Organizationally, the prima facie rule portion of the section was segregated and renamed Section 5(a), while the tolling provision of Section 5, *see* note 16, *infra*, became Section 5(b). The temporary proviso was deleted, *see* text at note 15, *infra*. Also, some minor changes in wording were accomplished to accord with the terminology of the Federal Rules.

<sup>15</sup> 38 Stat. 731 (1914). This proviso was temporary in that its purpose was to restrict the retroactive effect of Section 5 upon suits pending at the time of enactment in 1914.

<sup>16</sup> *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 216 F. Supp. 507, 510 (D.N.J. 1963), *aff'd*, 332 F. 2d 346 (3rd Cir. 1964), *aff'd*, 381 U.S. 311 (1965).

<sup>17</sup> Section 4B of the Clayton Act bars a private treble damage suit unless brought within four years after the cause of action arises. 15 U.S.C. §15(b) (1964). Section 5(b) of the Clayton Act suspends the running of this limitation period during the pendency of the government suit. Section 5(b) provides:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violation of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however . . . any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

In order for Section 5(b) to apply there must be a substantial identity of subject matter and parties in the public and the private antitrust suits. *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965); *Union Carbide & Carbon*

Armed with the incentive of recovering three times the value of actual injuries suffered, and with the *prima facie* benefit of "matters" previously litigated, injured parties were equipped to go forth as an ancillary force to supplement the Justice Department's enforcement of the antitrust laws.<sup>18</sup> However, the effectiveness of this "ancillary force" necessarily depends on the extent to which the private treble damage suitor may rely on the prior criminal judgment<sup>19</sup> to establish the elements of his case. It will, therefore, be the purpose of this Comment to examine: (1) the applicability of the exclusionary proviso to criminal judgments, *i.e.*, whether pleas of guilty and *nolo contendere* are to be considered as consent decrees within the scope of the exclusionary proviso, (2) the variance between the elements which the government must prove in a criminal antitrust action and those which a private litigant must establish to prove his right to treble damages, and (3) the extent to

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Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962).

Although sub-sections (a) and (b) of Section 5 are complementary and should be construed together, Union Carbide & Carbon Corp. v. Nisley, *id.* at 569, they are not wholly interdependent or coextensive. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 316-318 (1965). (In this decision, the Court held the limitation period for private treble damage actions tolled by FTC proceedings against defendants to the same extent and in the same circumstance as it is by actions of the Justice Department. However, the Supreme Court withheld any opinion as to the applicability of Section 5(a) to FTC proceedings. *But see* Carpenter v. Central Arkansas Milk Producers, 5 TRADE REG. REP. (1966 Trade Cas.), ¶71817 (W.D. Ark. 1966), in which the court held an FTC order to be a civil antitrust "decree" within the scope of Section 5(a); *see* note 19, *infra*.)

In section 5(a) Congress was concerned with the narrow issue of the use of judgments or decrees as prima-facie evidence in private suits, whereas in Section 5(b), Congress meant to assist private litigants in obtaining all the benefits they might cull from governmental antitrust actions:

It may be . . . that when it was enacted the tolling provision was a logical backstop for the prima-facie evidence clause of §5a. But . . . it is certainly not restricted to that effect. . . . The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances . . . . Moreover, difficult questions of law may be tested and definitely resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree . . . .

Leh v. General Petroleum Corp., *supra* at 58-59.

<sup>18</sup> *Quemos Theatre Co. v. Warner Bros. Pictures Inc.*, 35 F. Supp. 949, 950 (D.N.J. 1940).

<sup>19</sup> Section 5(a) of the Clayton Act also provides prima facie effect to judgments entered in civil suits brought by the government to enjoin violations of the antitrust laws, *see* text at note 6, *supra*. Significantly, in *Carpenter v. Central Arkansas Milk Producers*, 5 TRADE REG. REP. (1966 Trade Cas.), ¶71817 at 82772 (W.D. Ark. 1966), the district judge held that an FTC order qualifies as an antitrust "judgment or decree" under Section 5(a), and that "the proceedings resulting in such final order or decree is a proceeding in equity and a civil proceeding within the meaning of Section 5(a) and an adjudication of a violation of the Clayton Act." *Accord*, *New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co.*, 332 F. 2d 346, 359 (1964) (*dictum*); *Contra*, *Proper v. John Bene & Sons, Inc.*, 295 F. 729, 732 (E.D. N.Y. 1923). *See* note 17, *supra*.

which a prior criminal judgment may be used to establish the elements which must be proven in the subsequent private treble damage action, particularly where the criminal judgment is entered on a plea of guilty.

#### ADMISSIBILITY OF CRIMINAL JUDGMENTS UNDER SECTION 5(a)

Implicit in any consideration of the evidentiary use which may be made of a criminal judgment entered on a plea of guilty or a plea of *nolo contendere* in subsequent litigation is the question of the status of these judgments pursuant to the permanent exclusionary proviso of Section 5(a).

Stated in terms of the defendant's case, a realistic appraisal of the possible impact of Section 5(a) in subsequent treble damage actions must be made in order for the defendant to properly evaluate the relative effects under that section of the possible alternative pleas of not guilty, with its accompanying trial, guilty, or *nolo contendere*. The direct threat of subsequent treble damage actions may bear heavily on his choice of plea in the criminal case.<sup>20</sup>

The exclusionary proviso, by its express language, exempts "consent judgments or decrees entered before any testimony has been taken" from the scope of the "prima facie evidence rule" of the section.<sup>21</sup> It is well settled that even under the most narrow construction the proviso covers, at the very least, consent decrees in public civil actions.<sup>22</sup> The question left undetermined is whether criminal judgments entered on pleas of guilty or *nolo contendere* are also within the scope of this exclusionary proviso and therefore inadmissible in a subsequent treble damage action.

The underlying policy of the exclusionary proviso of Section 5(a), as revealed by its legislative history and its subsequent judicial implementation, tends to support application of the proviso to criminal judgments entered on pleas of guilty and pleas of *nolo* as well as civil consent decrees. Nor is such application inconsistent with the express language of the proviso. However, three circuit courts of appeals have recently held that judgments entered on pleas of guilty are not consent decrees within the scope of the exclusionary proviso and therefore are admissible in subsequent treble damage actions.<sup>23</sup> Two of these courts dis-

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<sup>20</sup> See generally Seeley, *Pitfalls which Lurk in Government Litigation for Defendants Who May Be Subjected to Treble Damage Actions*, 4 ANTI-TRUST BULL. 17 (1959).

<sup>21</sup> See text at note 14, *supra*.

<sup>22</sup> See, e.g., *City of Burbank v. General Electric Co.*, 329 F. 2d 825, 831 (9th Cir. 1964).

<sup>23</sup> *General Electric Co. v. City of San Antonio*, 334 F. 2d 480 (5th Cir. 1964); *City of Burbank v. General Electric Co.*, 329 F. 2d 825 (9th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers*, 323 F. 2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

tinguished these judgments from judgments entered on *nolo* pleas, holding that the latter were consent judgments within the scope of the exclusionary proviso.<sup>24</sup> The United States Supreme Court has yet to rule on these issues directly.

### Legislative Intent . . .

Prior to the passage of Section 5(a), the general rule at common law was that judgments in criminal actions could not be received in subsequent civil actions as proof of the facts on which they were based.<sup>25</sup> Section 5(a) was the congressional response to a presidential plea that "it was unfair that the private litigant should be obliged . . . to establish again the facts which the government has proved."<sup>26</sup>

In the version originally passed by the House, Section 5 applied only to civil judgments and decrees, without distinguishing between those obtained by consent or litigation.<sup>27</sup> The effect of these judgments and decrees in subsequent litigation was made conclusive.<sup>28</sup> The Senate sought to modify the House version

<sup>24</sup> See cases cited note 23, *supra*. In *General Electric Co. v. City of San Antonio*, 334 F. 2d 480 (5th Cir. 1964), the inadmissibility of judgments entered on *nolo contendere* pleas was not challenged on appeal.

<sup>25</sup> *Buckeye Powder Co. v. Du Pont Powder Co.*, 248 U.S. 55, 63 (1918) (Government judgment issued prior to passage of Section 5(a) held inadmissible in subsequent suit).

The majority of jurisdictions still hold that a prior criminal judgment is not admissible to prove the facts on which it was based. *Contra*, *Smith v. Andrews*, 54 Ill. App. 2d 51, 203 N.E. 2d 160 (1964), *cert. denied*, 382 U.S. 1029 (1966). THE MODEL CODE OF EVIDENCE rule 521 (1942), supports admissibility of judgments entered on pleas of *nolo contendere* or guilty but the drafters' comment recognizes that this rule goes further than the reported decisions. The trend evolving is for the courts to abandon any general rule against admissibility and to evaluate each case on its own facts. See cases on both points of view collected in Annot., 18 A.L.R. 2d 1287 (1951).

<sup>26</sup> 51 CONG. REC. 1964 (1914). This statement was part of President Wilson's address to a joint session of Congress. In relevant part it reads: I hope that we shall agree in giving private individuals . . . the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government . . . and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of.

<sup>27</sup> H. R. REP. NO. 627, 63rd Cong., 2nd Sess. 2 (1914).

<sup>28</sup> *Id.* But see *id.*, *Minority Rep.*, at 9-10 (Remarks of Rep. Graham): No hindrance should be put in the way of the Department of Justice in respect to these [consent decree] negotiations. If this proposal were enacted, it would deter any company from ever consenting to the entry of a decree in a Government suit under the antitrust laws; for such a decree would simply invite a flood of litigation that might bankrupt any company.

Though this argument is directed at the evidentiary weight to be given the prior judgment, the same rationale applies in considering whether "consent decrees" should be excluded entirely from the scope of the *prima facie* section of 5(a).

only to the extent of making the prior judgment *prima facie* rather than conclusive evidence in subsequent litigation.<sup>29</sup> The Joint Committee of both Houses, meeting to reconcile the variance between the House and Senate versions, recommended two revisions not suggested by either pre-existing version. First, the scope of the section was broadened to provide that final judgments in criminal as well as civil proceedings should be admissible as evidence in subsequent private suits.<sup>30</sup> Second, and most importantly, the joint conferees added the permanent exclusionary and temporary provisos which excluded consent judgments and decrees from the scope of the main section.<sup>31</sup> This revised bill as recommended by the Joint Committee was subsequently enacted into law.

The congressional purpose in extending the scope of Section 5 to include criminal as well as civil judgments is self-evident.<sup>32</sup> Congress intended to give private suitors the same evidentiary benefits from both criminal convictions and public civil suits. However, the intended scope and application of the permanent exclusionary proviso is far less apparent. In essence, the question raised by the language of the proviso was whether Congress intended the term "consent judgments and decrees" to include criminal judgments entered on pleas of guilty and *nolo contendere*.

There is no written record of the Joint Committee's deliberations in adding the two provisos to the House and Senate versions of Section 5. The only legislative source available to reflect the congressional purpose in adopting the provisos is the record of the floor debates occurring after the joint com-

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<sup>29</sup> S. REP. No. 698, 63rd Cong., 2nd Sess. 58 (1914). See also, 51 CONG. REC. 13849 (1914). After Section 5 was reported from the Joint Conference committee, the following statement by Rep. Webb was made concerning the change made by the Senate:

Personally, I think the Senate did the best thing by making it *prima facie* . . . . A great many lawyers, . . . think that a provision making the judgment conclusive, would have rendered the bill unconstitutional, but with the *prima facie* provision it is constitutional and will be as effective [before a jury] as if we had left it conclusive.

51 CONG. REC. 16276 (1914).

<sup>30</sup> H. R. REP. No. 1168, 63rd Cong., 2nd Sess. 2 (1914); S. Doc. No. 585, *id.* at 4.

<sup>31</sup> For clarity, this "main" section will be hereinafter referred to as the *prima facie* section of 5(a), *i.e.*, Section 5(a) without its provisos.

<sup>32</sup> As originally enacted, Section 5 read: "That a final judgment or decree hereinafter rendered in any criminal prosecution or in any suit or proceeding in equity . . . ." Clayton Act, 38 Stat. 731 (1914), *as amended*, 15 U.S.C. §16(a) (1964).



mittee report was submitted to both Houses for adoption.<sup>33</sup> Some courts, in construing the impact of the provisos on the *prima facie* evidence rule, were forced to rely heavily upon this one limited source.<sup>34</sup>

Conceptually, Section 5(a) was designed by Congress to implement two distinct governmental policies, each of which seems to facilitate the enforcement of the antitrust laws. The *prima facie* section of 5(a) was designed to give parties injured by violation of the antitrust laws the benefit of prior judgments obtained by the government.<sup>35</sup> The purpose of the exclusionary proviso was to preclude the *prima facie* section from hampering efficient government enforcement of the antitrust laws. By excluding "consent judgments and decrees entered before any testimony was taken" from the effect of the *prima facie* section of 5(a), Congress sought to encourage capitulation of the "trusts,"<sup>36</sup> in order to reduce the government's burden and expense of prolonged litigation, while still achieving the ultimate goal of enforcement. It would seem that this purpose of the exclusionary proviso would require the exemption of criminal judgments en-

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<sup>33</sup> For the legislative history surrounding the adoption of the permanent exclusionary proviso see:

*Hearings before the House Committee on the Judiciary*, 63rd Cong., 2nd Sess., ser. 7 at 242-48, 974-75, 1279-82 (1914); H. R. REP. NO. 627, 63rd Cong. 2nd Sess. 2.14 (1914); *Minority Rep.*, H. R. REP. NO. 627, Pt. 2 63rd Cong., 2nd Sess. 9-10 (1914); H. R. REP. NO. 627, Pt. 3, 63rd Cong., 2nd Sess. 5 (1914); House Debates (Original Bill): 51 CONG. REC. 9079-89, 9910-11 (1914); S. REP. NO. 698, 63rd Cong., 2nd Sess. 10, 45 (1914); Senate Debates (Original Bill): 51 CONG. REC. 13858-59, 13898, 13907 (1914); Conference Committee Report, S. Doc. No. 585, 63rd Cong., 2nd Sess. 4 (1914); Senate Debates: 51 CONG. REC. 15821-27, 15938-40, 16003-04, 16046-47, 16058-59, 16149, 16170 (1914); House Debates: 51 CONG. REC. 16276, 16319, 16342-44 (1914).

<sup>34</sup> See *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 712 (N.D. Ill. 1962), *rev'd in part*, 323 F. 2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F. 2d 747 (8th Cir. 1941), *cert. denied*, 314 U.S. 644 (1941); *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 308 (E.D. Wis. 1940). *But cf.* *Ruth v. Eagle-Picher Co.*, 225 F. 2d 572, 578 (10th Cir. 1955) (dissenting opinion): "When we seek support for our views in the legislative history of an act it is not too difficult to find what we seek."

<sup>35</sup> *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); see 51 CONG. REC. 9270, 9488-90, 9494, 13851, 13853-56, 15939-40, 16319 (1914). As stated in *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939):

A defendant who stood trial and was found guilty, and against whom a final judgment was entered, became therefore subject to the use of said judgment as *prima facie* evidence in third party suits. Long and burdensome litigation was thereby saved to the injured third party, and the *prima facie* evidence of a final judgment would inure to his benefit. *Id.* at 369; see also address of President Wilson, 51 CONG. REC. 1964 (1914), at note 26, *supra*.

<sup>36</sup> *Twin Ports* at 371: "Congress apparently intended to encourage consent judgments and decrees. It sought to induce prompt surrender to the Government's demands by excluding consent judgments and decrees from the *prima facie* rule." See also 51 CONG. REC. 15824 (1914) (remarks of Sen. Lewis).

tered on pleas of guilty<sup>37</sup> or *nolo contendere* as well as consent judgments in civil injunctive proceedings. As long as the defendant did not "put the government to its proof," he should not be burdened in subsequent litigation by the *prima facie* rule of Section 5 (a).<sup>38</sup>

Although the intended legislative purpose of the exclusionary proviso is relatively clear, there remains the problem of reconciling the express language of that provision with such

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<sup>37</sup> Indeed, the argument verbalized in favor of the exclusionary proviso was "that it will induce the parties to come in and plead guilty." 51 CONG. REC. 15939 (1914). *But cf.* the views of Sen. Walsh, a member of the Conference Committee that drafted the proviso, in a colloquy, early in the debates, with Sen. Reed, who commented that a judgment entered on a guilty plea should not be deemed a "consent" judgment so as to come within the exclusionary proviso:

Mr. Walsh: He [Senator Reed] thinks the term 'consent judgment' would reach to a judgment entered on a plea of guilty? Mr. Reed: I think it would . . . It is really a judgment by consent . . . . The only way you can consent in a criminal case is by an absolute plea of guilty . . . Mr. Walsh: . . . [N]o criminal would ever consent that a judgment be entered against him when he pleads guilty. The judgment goes as a matter of course against him . . . I am not able to agree with the Senator that in the future the judgment entered upon a plea of guilty in a criminal action would not be available under the proposed statute.

51 CONG. REC. 15823-24 (1914). Yet, as the debates progressed, remarks of other Senators taking part indicate that although there was disagreement as to whether the proviso should be accepted, there was general agreement as to its meaning and its purpose. *See, e.g.*, 51 CONG. REC. 16046 (1914) (remarks of Sen. Norris): "The real effect of the proviso is to make the section inapplicable to cases in which consent judgments have been taken in cases where pleas of guilty have been entered by the defendant." Even those opposed to acceptance of the exclusionary proviso in any form seemed to understand that it would operate to place judgments entered on guilty pleas outside the ambit of the *prima facie* section, and thus were fortified in their opposition to its passage. *E.g.*, 51 CONG. REC. 15938-39 (1914) (remarks of Senator Nelson):

These provisos deal tenderly with the great trusts and monopolies, who, knowing that they are guilty, can come into court, *plead guilty*, and say, 'We have violated the law; *we admit our guilt; we will agree to a consent decree*; but these decrees must not be used in other suits against us where a private individual has been injured by the trust' . . . I have no doubt, if this becomes a law, they will feel like pleading guilty. (emphasis added)

*Id.* at 16059 (remarks of Senator Clapp):

. . . [Y]ou take away that *prima facie* effect when the criminal comes into court and solemnly *admits his guilt*. . . . The vice in that proposition is that . . . we erect a 'city of refuge' for the criminal who comes to the court and *confesses his guilt*. . . . (emphasis added)

*See also*, colloquy, *id.* at 16047, between Senators Borah and Norris:

Mr. Borah: . . . Not only that, but it [*prima facie* section] does not apply to all judgments hereafter rendered, but only to those rendered in contested cases. Mr. Norris: That is absolutely true.

<sup>38</sup> *E.g.*, 51 CONG. REC. 16276 (1914) (remarks of Rep. Webb):

If the Government brings a suit against a trust or monopoly and it surrenders, we eliminate the effect of the '*prima facie*' judgment. If it fights and loses, then the '*prima facie*' effect is given final judgment in the suit.

In *Twin Ports* at 376, Judge Nordbye summarized this view of the proviso: "That . . . Congress . . . intended by the provisos to 'encourage consent judgments' in criminal cases, as well as equity proceedings, can scarcely be gainsaid in view of the congressional record."

purpose. The legislative history of the act cannot override its express language, if clear and unambiguous.<sup>39</sup> The question is then whether the phrase "consent judgments and decrees," used in the proviso to define its scope, precludes any attempt by the courts to read into it, by judicial construction, a more comprehensive exclusion covering judgments entered on pleas of guilty and *nolo*, consistent with the manifest legislative intent of the proviso.

Words of a statute are generally construed to have their normal and customary meaning. The phrase "consent judgments and decrees" utilized in the exclusionary proviso was normally applied only to final adjudications in civil actions. In *United States v. Hartford Empire Co.*,<sup>40</sup> the court defined a consent decree as "an agreement between the contending parties in the case, such agreement meeting with the approval of the court."<sup>41</sup> The term "consent decrees," in this respect, connotatively emphasizes the consensus reached by the private parties as to the disposition of the controversy, requiring only formal approval by the court. Viewed in this light, the term cannot be applied to criminal matters where no such latitude is extended to the parties to stipulate the criminal sanction to be imposed.<sup>42</sup>

This narrow construction was effectively rebutted in *Twin Ports Oil Co. v. Pure Oil Co.*,<sup>43</sup> wherein the court pointed out that there was nothing extraordinary about Congress using "consent judgments" to signify capitulation in a criminal action:

. . . (C)onsent does not necessarily refer to or indicate a bilateral agreement; it may be unilateral. In Funk and Wagnall's New Standard Dictionary, 'consent' is defined as a voluntary yielding of the will, judgment or inclination to what is proposed or desired by another.<sup>44</sup>

To conclude, therefore, that Congress used the term "consent" to mean the consent to judgment given by the defendant through his plea of guilty or *nolo* is not inconsistent with the statutory language used to express such intent.

That Congress intended this more inclusive interpretation

<sup>39</sup> See, e.g., *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 306 F. 2d 48, 51 (7th Cir. 1962).

<sup>40</sup> 1 F.R.D. 424 (N.D. Ohio 1940).

<sup>41</sup> *Id.* at 427. See also *The Ansaldo San Giorgio I*, 73 F. 2d 40, 41 (2nd Cir. 1934), *aff'd sub nom.*, *The Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494 (1935): "A consent decree is an agreement of the parties under the sanction of the court as to what the decision shall be."

<sup>42</sup> See, e.g., *Lenvin & Meyers, Nolo Contendere: Its Nature and Implications*, 51 YALE L. J. 1255, 1267 (1942).

<sup>43</sup> 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F. 2d 747 (8th Cir. 1941), *cert. denied*, 314 U.S. 644 (1941).

<sup>44</sup> *Id.* at 371. See, however, text at note 54, *infra*, for another suggested construction of the term "consent judgments."

is reinforced by the unequivocal language of the temporary proviso of Section 5, in which Congress expressly applied the term "consent judgments or decrees" to both criminal and civil proceedings. As stated earlier,<sup>45</sup> this temporary proviso provides that Section 5 "shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity now pending . . . ."<sup>46</sup> The inference to be drawn is that since Congress expressly included criminal cases in the temporary proviso in order to protect the consenting defendant in an action already begun at the time of enactment of Section 5, it therefore intended that "consent judgments" in the exclusionary proviso would cover future criminal cases as well.<sup>47</sup>

### *The Common Law . . .*

Even if the force of the legislative history and the judicial construction of Section 5(a) suffices to extend the scope of the exclusionary proviso to include criminal judgments, it is nonetheless arguable that the extension should be limited to judgments entered on *nolo* pleas, and not judgments entered on guilty pleas.

The logic of this viewpoint finds some support in the fact that, at common law, the admissibility of pleas of guilty and pleas of *nolo* in subsequent actions was consistently distinguished. A plea of *nolo contendere*, at common law, was consistently treated as an "implied confession," an artificial presumption of guilt entertained solely for the sake of expedience in the pending action, and thus not admissible in subsequent litigation as an admission by a party opponent.<sup>48</sup> Conversely, a plea

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<sup>45</sup> See text at note 15, *supra*.

<sup>46</sup> *Id.* An exchange between Senators Nelson and Norris also seems to demonstrate that the Conference Committee in drafting the provisos understood that the term "consent decree or judgment" encompassed criminal judgments:

Mr. Norris: Does it [temporary proviso] mean that in the cases that are now pending the trusts may come in and plead guilty before they take all their testimony — that after this law is passed it will apply to them? Mr. Nelson: Yes certainly; and that you cannot use the judgment itself in a suit brought by anyone else.

Compare *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 712, 728 (N.D. Ill. 1962) with *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 308, 312 (E.D. Wis. 1941) (dictum as to plea of guilty).

<sup>47</sup> It may, contrarily, be argued that reading Section 5 as a whole, Congress used unmistakable language in both the *prima facie* section and the temporary proviso to refer to criminal judgments. Consequently, if Congress intended to include criminal judgments within the meaning of "consent judgments" in the exclusionary proviso, it would have done so explicitly.

<sup>48</sup> See, e.g., *Hudson v. United States*, 272 U.S. 451, 455 (1926) (dictum); *Mickler v. Fahs*, 243 F. 2d 515, 517 (5th Cir. 1957); *Simco Sales Service of Penn., Inc. v. Air Reduction Co.*, 213 F. Supp. 505, 506 (E.D. Pa. 1963).

of guilty was always deemed admissible at common law in subsequent litigation.<sup>49</sup>

Some courts have adopted the common law distinction between the two pleas as one basis for holding that only judgments entered on guilty pleas remain admissible under the *prima facie* section of 5(a).<sup>50</sup> However, being purely statutory, there is nothing to compel the assertion that Congress intended Section 5(a) to parallel the common law distinction between the two pleas. Moreover, the plea of guilty remains admissible under the common law rules of evidence whether or not a judgment on such plea is deemed inadmissible under the *prima facie* rule of Section 5(a).<sup>51</sup> Consequently, the policy appeal for including such pleas within the *prima facie* rule of 5(a), in order to aid the private litigant, is diminished since the private suitor may, in any event, invoke the common law rules of evidence to admit the prior plea.

However, the suggestion that Section 5(a) differentiates between judgments entered on pleas of guilty and pleas of *nolo* finds further support in the express language of the section when read together with Rule 11 of the Federal Rules of Criminal Procedure. Under Rule 11, a defendant may only plead *nolo contendere*, "with the consent of the court,"<sup>52</sup> whereas a plea of guilty may be entered by the defendant so long as it is made

<sup>49</sup> *E.g.*, *Book v. Datema*, 256 Ia. 1330, 131 N.W. 2d 470 (1966); *Smith v. Andrews*, 54 Ill. App. 2d 51, 203 N.E. 2d 160 (1964), *cert. denied*, 382 U.S. 1029 (1965); *see* WIGMORE, 4 EVIDENCE, §1066 (3rd ed. 1940); McCORMICK, EVIDENCE, §242 (3rd ed. 1954).

<sup>50</sup> *E.g.*, *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620, 626-27 (S.D. N.Y. 1962), *aff'd on other grounds*, 312 F. 2d 236 (2nd Cir. 1962), *cert. denied*, 373 U.S. 909 (1963). This distinction was employed by the court in *City of Burbank v. General Electric Co.*, 329 F. 2d 825 (9th Cir. 1964):

We think it curious that antitrust lawyers who will and have spent hours in urging district court judges that their clients should be permitted to plead *nolo contendere* rather than guilty to antitrust government charges, because of the differing effect of the two pleas, should now urge there really is not and should not be any different consequences of the two pleas.

*Id.* at 835; *see also* note 89, *infra*.

<sup>51</sup> Whether or not the guilty plea is admissible under §5 as *prima facie* evidence, it may, depending on the terms of the consent decree and the violations thereof alleged in the citation for contempt, be admissible under common law rules of evidence as an admission against interest.

*Sinco Sales Service of Penn. v. Air Reduction Co.*, 213 F. Supp. 505, 507-08 (E.D. Pa. 1963); *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620, 627 (S.D. N.Y. 1962). *But see* 51 CONG. REC. 15939 (1914), wherein, during the debates on Section 5 one Senator observed that the proviso would displace the common law rules as to admissibility of guilty pleas: "You have got no more right to destroy the evidentiary value of a plea of guilty in a trust case than in the case of an embezzler or murderer. The evidence in either case can be used without any statute . . ."

<sup>52</sup> FED. R. CRIM. P. 11 provides in part: "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere* . . ."

"voluntarily,"<sup>53</sup> with an understanding of the nature of the charge against him. Thus, a judgment entered on a *nolo* plea is a "consent judgment," in the sense that the consent of the court is a procedural prerequisite, while a judgment entered on a plea of guilty is not.<sup>54</sup>

### *Balancing the Underlying Policies*

While the Supreme Court has yet to determine the status of judgments entered on pleas of guilty and *nolo* under Section 5(a), these matters have been carefully considered in several lower court decisions, both at the trial and appellate levels. These decisions have been unanimous in holding judgments entered on pleas of *nolo* to be "consent judgments" plainly within the scope of the exclusionary proviso.<sup>55</sup> With respect to judgments entered on pleas of guilty, however, there has been some division among

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<sup>53</sup> See note 52, *supra*.

<sup>54</sup> *City of Burbank v. General Electric Co.*, 329 F. 2d 825, 835 (9th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F. 2d 412, 415-16 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

<sup>55</sup> The status of *nolo contendere* pleas was first considered in *Twin Ports* which firmly established that the judgment which follows acceptance of a *nolo* plea is in essence a criminal "consent judgment" unavailable under Section 5 as prima facie evidence in subsequent litigation. In that case, it was argued that a "'consent judgment' in a criminal case is an anomaly in legal parlance." *Id.* at 371. The court replied:

If Congress intended to designate judgments entered on pleas of guilty or *nolo contendere*, before any testimony had been taken, as consent judgments this court must give effect to such intention, however unusual or inappropriate the expression may be.

*Id.* It is significant that the issue before the court in *Twin Ports* concerned a judgment entered on a plea of *nolo*. Therefore, though well reasoned, the opinion in *Twin Ports* is merely dicta as to the status of guilty pleas under the exclusionary proviso. *General Electric Co. v. City of San Antonio*, 334 F. 2d 480 (5th Cir. 1964) (rejected *Twin Ports* as authority). See two other early cases holding *nolo* pleas "consent judgments": *Alden-Rochelle, Inc. v. American Society of Composers, Authors, and Publishers*, 3 F.R.D. 157, 159 (S.D. N.Y. 1942); *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 308, 310-12 (E.D. Wis. 1940).

The Electrical Equipment cases in 1960 have reinforced the status of *nolo* pleas as criminal "consent judgments", e.g., *City of Burbank v. General Electric Co.*, 329 F. 2d 825, 830-35 (9th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F. 2d 412, 414-15 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620, 628-29 (S.D. N.Y. 1962); *N.W. Electric Power Cooperative, Inc. v. General Electric Co.*, 30 F.R.D. 557 (W.D. Mo. 1961); *Philadelphia v. Westinghouse Electric Corp.*, 308 F. 2d 856 (3rd Cir. 1961); see also *Illinois v. Sperry Rand Corp.*, 237 F. Supp. 520 (N.D. Ill. 1965) (*nolo contendere* pleas coupled with express consent to entry of guilty findings). See generally Note, Section 5 of the Clayton Act and the *Nolo Contendere* Plea, 75 YALE L. J. 845 (1966); cases collected in Plea of *Nolo Contendere*, 89 A.L.R. 2d 540, 604-05 (1963).

One of the issues left to be decided by the courts in regard to *nolo* pleas is whether the judgment on the plea, or the plea itself, may be introduced in subsequent private actions for some collateral purpose. See, e.g., *Tseung Chu v. Cornell*, 247 F. 2d 929 (9th Cir. 1957), *cert. denied*, 355 U.S. 892 (1957) (in answer to inquiry on prior conviction, "fact of conviction" on plea of *nolo contendere* admissible, although not as an admission of guilt.); *Pfotzer v. Aqua System, Inc.*, 162 F. 2d 779, 784-85 (2nd Cir. 1947) (conviction admitted as evidence to impeach a witness).

the trial courts.<sup>56</sup> Nevertheless, as noted earlier, the three circuit courts of appeals which have directly dealt with this question have concurred in holding judgments entered on pleas of guilty admissible in subsequent private litigation within the scope of the *prima facie* section of 5(a).<sup>57</sup>

In the most recent of the three appellate decisions, the Fifth Circuit, in *General Electric Co. v. City of San Antonio*<sup>58</sup> concluded:

We agree with the conclusions reached by the 7th and 9th Circuits. The exclusionary proviso of Section 5(a) does not apply to judgments entered on pleas of guilty by defendants in criminal antitrust actions, and judgments entered on such pleas constitute *prima facie* evidence of the violation of the antitrust laws.<sup>59</sup>

The basic problem faced by the courts in these decisions lay in choosing between the manifest policy of the *prima facie* section of 5(a), that is, to aid persons injured by antitrust violations,<sup>60</sup> and the manifest purpose of the exclusionary proviso, which is to induce capitulation.<sup>61</sup> Thus, the Court of Appeals for the Ninth Circuit in *City of Burbank v. General Electric Co.*,<sup>62</sup> observed that "the real nub of the controversy is to be found in the delicate task of balancing the policies involved in

<sup>56</sup> In *Sacramento Municipal Utilities Dist. v. Westinghouse Electric Corp.*, 5 TRADE REG. REP. (1962 Trade Cas.), ¶70552, at 77225 (N.D. Calif. 1962), the trial judge concluded that section 5(a), "by its terms, does not apply to consent decrees, but a plea of guilty *cannot* be construed as being a consent decree, any more than a crime can be consented to . . . and no logical distinction appears herein between a plea of guilty and a conviction after trial." (emphasis added) Compare *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620, 624-27 (S.D. N.Y. 1962), with *Philadelphia v. Westinghouse Electric Corp.*, 5 TRADE REG. REP. (1961 Trade Cas.) ¶70,143 (E.D. Pa. 1961). *Contra*: *N. W. Electric Power Cooperative, Inc. v. General Electric Co.*, 30 F.R.D. 557 (W.D. Mo. 1961); see cases cited, *infra* note 57.

<sup>57</sup> *General Electric Co. v. City of San Antonio*, 334 F. 2d 480 (5th Cir. 1964); *City of Burbank v. General Electric Co.*, 329 F. 2d 825 (9th Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F. 2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). It is significant to note that all three appellate decisions reversed district court rulings which held the prior criminal judgments entered on pleas of guilty inadmissible under Section 5(a). See *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 712 (N.D. Ill. 1962); *Department of Water and Power of the City of Los Angeles v. Allis-Chalmers Mfg. Co.*, 32 F.R.D. 204 (S.D. Calif. 1963); the lower court decision involved in *General Electric Co. v. City of San Antonio*, *supra*, was unreported. See also the opinions of court of appeals Judge Knoch, dissenting in *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F. 2d 412, 417 (7th Cir. 1963), and the concurring opinion of Judge Connally in *General Electric Co. v. City of San Antonio*, 334 F. 2d 480, 487-88 (1964), in which he concurred in the result solely because of the weight of the decisions in the 7th and 9th circuits, *supra*. Judge Connally indicated that if he had been faced with the issue as a matter of first impression he would have been "strained to dissent." *Id.* at 487.

<sup>58</sup> 334 F. 2d 480 (5th Cir. 1964).

<sup>59</sup> *Id.* at 487.

<sup>60</sup> See text at notes 35-36, *supra*.

<sup>61</sup> *Id.*

<sup>62</sup> 329 F. 2d 825 (9th Cir. 1964).

antitrust enforcement."<sup>63</sup> In reaching their conclusion that judgments entered on pleas of guilty were not consent judgments and therefore admissible in subsequent private litigation, the circuit courts minimized the significance of the contra-indicating legislative history and narrowed the definition of the term "consent judgments or decrees" within the context of the exclusionary proviso.

This approach was premised on the fear that an extension of the scope of the exclusionary proviso to include judgments entered on both pleas of *nolo* and guilty would give almost exclusive recognition of the congressional policy of inducing capitulation in order to avoid the expense of trial and thus ignore the policy of aiding parties who have been injured by violations.<sup>64</sup> In the first reported case involving this question on the appellate level, Judge Kiley in *Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*,<sup>65</sup> expressed this viewpoint:

If guilty pleas were held to be within the exclusionary proviso, the private litigant, who is injured by the antitrust violation and who is the subject of Congress's concern in enacting Section 5 (a), would be, by the defendant's plea of guilty, thereby denied the total benefit of that section. Although that result may achieve one purpose of the section in aiding enforcement of the antitrust laws, we think it would help antitrust violators at the direct expense of the victims of those violations. Congress did not intend to confer a benefit in the body of Section 5 (a), indicating a primary purpose, and through the proviso, allow its frustration by the unilateral act of an antitrust violator.<sup>66</sup>

The distinction made by the circuits between pleas of *nolo* and pleas of guilty attempts to strike a balance between the two recognized policies of Section 5(a), in that the policy in favor of aiding private litigants is served by holding judgments entered on guilty pleas within the scope of the *prima facie* section and the policy of inducing capitulation is served by holding judgments entered on *nolo* pleas within the scope of the exclusionary proviso. As stated by the court in the *Commonwealth Edison* case, "both purposes of Section 5(a) and its proviso serve the broad objective of antitrust enforcement, and although the two

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<sup>63</sup> *Id.* at 834-35.

<sup>64</sup> The dissent of Judge Knoch in *Commonwealth Edison*, and the special concurring opinion of Judge Connally in *City of San Antonio*, considered the policy of promoting capitulation to be paramount to the policy of assisting private litigants, *supra*, note 57.

<sup>65</sup> 323 F. 2d 412 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

<sup>66</sup> *Id.* at 415. See generally Matteoni, *Antitrust Ambiguity Under Section 5(a) of the Clayton Act*, 11 U.C.L.A. L. R51. 792 (1964).



purposes are distinct . . . an accommodation must be made to preserve the essence of both."<sup>67</sup>

To maintain a balance along the lines of this distinction would seem to compel a restrictive position by the courts with respect to accepting *nolo contendere* pleas. Otherwise, what is saved by the policy of aiding private litigants through exclusion of judgments entered on guilty pleas from the proviso is lost by inclusion of judgments entered on *nolo* pleas, because a defendant has merely to plead *nolo contendere* and avoid the effects of the *prima facie* rule of Section 5(a).<sup>68</sup> Since under Rule 11 of the Federal Rules of Criminal Procedure, a *nolo* plea can be entered only with the consent of the court, the power to avoid the evidentiary effects of Section 5(a) rests with the court and not exclusively with the accused. Successive attorney generals have strenuously urged the courts to adopt this restrictive position in regard to acceptance of *nolo* pleas.<sup>69</sup> On the other hand, if *nolo* pleas will not be generally accepted in the future by the courts and pleas of guilty are not to be construed as consent judgments, then, practically speaking, all criminal judgments are without the proviso and the policy of inducing capitulation would be ignored. Therefore, to maintain this balance and not completely frustrate the legislative purpose and intent of Con-

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<sup>67</sup> 323 F. 2d 412, 415-16 (7th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). Also, in *General Electric v. City of San Antonio*, 334 F. 2d 480, 486 (5th Cir. 1964), the court observed that "it is obvious . . . the general overall objective of the Sherman and Clayton Acts will be served by construing Section 5(a) in such a manner as to make compatible the differing purposes of the Section and its proviso."

<sup>68</sup> See note 55, *supra*. After the enactment of Section 5(a) and prior to the Electrical Industry criminal cases in 1960, it was standard practice for antitrust defendants to plead *nolo contendere* and thereby escape the effect of the *prima facie* rule. The acceptance of such plea offers the further advantages of eliminating the time and expense of a full trial which would follow a plea of not guilty, and of minimizing the adverse publicity and stigma which would attach to a plea of guilty.

<sup>69</sup> *E.g.*, The attorney general set out the position of the United States in a memorandum to United States Attorneys quoted in *United States v. Jones*, 119 F. Supp. 288, 289 n.1 (S.D. Calif. 1954):

Uncontrolled use of the pleas has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplishes little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead *nolo contendere* admits guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned persists in his denial of wrongdoing . . . [T]he public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco. Also, in the Electrical Industry criminal cases, Attorney General Bicks pleaded:

[O]ur position is that public interest in effective law enforcement, in deterring the occurrence of like flagranies in the future by these defendants and others . . . suggests refusal on the part of this court to accept *nolo* pleas.  
*United States v. Westinghouse Electric Corp.*, 5 TRADE REG. REP. (1960 Trade Cas.) ¶69699 at 76754 (E.D. Pa. 1960).

gress, the Justice Department and the courts should be careful not to reduce the exclusionary proviso, apparently restricted to civil consent decrees and judgments entered on pleas of *nolo*, to a mere shadow by adoption of a rigid position against the entertainment of *nolo contendere* pleas.<sup>70</sup> There may be another means available to balance the underlying policies of Section 5(a), that is, by regulating the evidentiary use to which the judgment will be put in subsequent private litigation. This possibility will be discussed in the ensuing sections of this Comment.

In summary, though Congress probably intended to exempt criminal judgments entered on both pleas of guilty and *nolo contendere* from the effects of the *prima facie* rule of Section 5(a),<sup>71</sup> the courts by judicial construction have thus far restricted the antitrust defendant from this avenue of escape.<sup>72</sup> Thus, the courts have tipped the scales between the two conflicting policies underlying Section 5(a) in favor of aiding the private litigant. While, as noted above, the Supreme Court has yet to pass final judgment on these issues, it has endorsed the policy of the *prima facie* section of 5(a) and probably will agree, as the circuit courts have implied in their recent holdings, "that in the long run justice for an injured individual in an antitrust situation should not be sacrificed in the interest of short term national expediency."<sup>73</sup>

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<sup>70</sup> The courts have thus far not been fully receptive to the Justice Department's position. *E.g.*, in *United States v. Jones*, 119 F. Supp. 288 (S.D. Calif. 1954), the court, in responding unsympathetically to the attorney general's assertion regarding acceptance of *nolo* pleas, stated, ". . . It is not binding upon the Court . . . [A]nd in the absence of some reason why a defendant should not have the benefit of the plea, the Court will ordinarily allow it to be entered." *Id.* at 290.

However, there is some indication of an increasing acquiescence by the courts to the government's antagonism toward the acceptance of *nolo* pleas in antitrust prosecutions. For a discussion of current attitudes of the courts and government in this regard, see Comment, *Section 5 of the Clayton Act and the Nolo Contendere Plea*, 75 YALE L. J. 845 (1966).

<sup>71</sup> *Accord*, Seamons, Winson & McCartney, *Use of Criminal Pleas in Aid of Private Antitrust Actions*, 3 DUQ. 167 (1964-65); Note, *The Admissibility & Scope of Guilty Pleas in Antitrust Treble Damage Actions*, 71 YALE L. J. 684 (1961).

<sup>72</sup> It is interesting to note that Congressman Emanuel Celler, in 1963, introduced a bill to exempt guilty pleas from the operation of the exclusionary proviso, thus codifying the decisions of the courts that have so held, *supra*, note 57. H.R. 8253, 88th Cong., 1st Sess. (1963), reproduced at 109 CONG. REC. 16050 (1963). See discussion of this amendment to section 5(a) in Comment, 39 N. Y. U. L. REV. 518 (1964). This amendment would also exclude from the proviso judgments entered on pleas of *nolo contendere* which had been accepted over the objection of the Justice Department, and thus would divest the courts of their control. See generally Comment, *Section 5 of the Clayton Act and the Nolo Contendere Plea*, 75 YALE L. J. 845 (1966).

<sup>73</sup> Guilford, *Private Enforcement of United States Antitrust Policy*, 10 ANTITRUST BULL. 747, 777 (1965).

## ELEMENTS OF PROOF IN A PRIVATE TREBLE DAMAGE ACTION

To better understand the application of the evidentiary benefits of Section 5(a) in subsequent private litigation, it is necessary to recognize the extent to which the elements of the public and private antitrust actions are coextensive and consequently, the extent to which proof of these elements in the public action may be taken as *prima facie* established in the subsequent private action.

It is well settled that to sustain a conviction under Section 1 of the Sherman Act, proof of the conspiracy alone is sufficient. Conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiracy itself as a condition to liability.<sup>74</sup> It is the "contract, combination . . . or conspiracy in restraint of trade or commerce which the Sherman Act strikes down, whether the concerted activity was successful or not."<sup>75</sup> In a private treble damage action (under Section 4 of the Clayton Act), the private suitor must prove not only a general conspiracy in restraint of trade, but also an injury to his business or property caused by the violation and actual damages.<sup>76</sup>

As early as 1913, the United States Supreme Court in *Nalle v. Oyster*<sup>77</sup> enunciated the well established rule that "no civil action lies for a conspiracy unless there be some overt act that

<sup>74</sup> *Nash v. United States*, 229 U.S. 373, 378 (1918).

<sup>75</sup> *E.g.*, *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59 (1940). See generally on Sherman Act conspiracies, Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950). In prosecuting a Sherman Act, §1 violation, if there is no evidence that the conspiracy was formed within a certain district, the government may have to prove overt acts for the limited purpose of establishing jurisdiction of the particular district court to hear the case. *United States v. Socony Vacuum Oil Co.*, *supra*.

<sup>76</sup> See authorities cited note 11, *supra*. In a recent treble damage decision based on a conspiracy to fix the prices of electrical transformers, *Philadelphia Electric Co. v. Westinghouse Electric Corp.*, 5 TRADE REG. REP. (1964 Trade Cas.) ¶71123, at 79438 (E.D. Pa. 1964), the trial judge summarized the essential elements which must be proved to sustain recovery of damages:

(1) . . . [T]hat they did conspire, that they did agree and combine to fix, maintain or stabilize the prices of the electrical equipment here involved. . . .

(2) . . . [T]hat they took action which affected the prices paid by the Plaintiffs; that is, that the Plaintiffs sustained injury to their business or property by reason of a higher price paid for transformers brought about by a conspiracy and by the actions taken under the conspiracy. . . .

(3) . . . [D]amages which are capable of computation on a rational basis from evidence which is presented . . . .

This case is discussed at greater length with respect to other issues raised. *Infra*, text at notes 134-36.

<sup>77</sup> 230 U.S. 165 (1913).

results in damage to the plaintiff."<sup>78</sup> This general rule of liability has uniformly been applied in private antitrust actions.<sup>79</sup> As stated by the Ninth Circuit Court of Appeals:

Civil private antitrust actions are founded, not upon the mere existence of a conspiracy, but upon injuries which result from the commission of forbidden 'overt acts' by the conspirators.<sup>80</sup>

Thus, it is evident that it is not enough for a private suitor to allege and prove a general violation of the antitrust laws. He must, in addition, prove overt acts of one or more of the conspirators in furtherance of the conspiracy, and, that he sustained some consequential damage to his business or property of which the overt acts were the proximate cause.<sup>81</sup> The Seventh Circuit Court of Appeals has uniformly applied this rule of law. In *Baldwin v. Loews, Inc.*,<sup>82</sup> the court stated that a cause of action arises in a private treble damage action only when "the blow" which caused damage "was struck."<sup>83</sup> It is this impact of the violation directly on the plaintiff, the so-called "fact of damage," which constitutes the gist of the action, not the violation itself.<sup>84</sup>

It follows that if the private suitor can rely on the *prima facie* rule of Section 5 (a) to satisfy his burden of proof concerning the existence of the general conspiracy and the fact of damage, to the extent that the latter is of issue in the public action, he can greatly enhance his chances of recovery. This is particularly true because the burden of proof concerning the amount of damages, *i.e.*, the third element of the plaintiff's cause of action, is far less stringent than that required to prove the "fact of dam-

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<sup>78</sup> *Id.* at 182-83. Similarly, the court in *Rutkin v. Reinfeld*, 229 F. 2d 248 (2nd Cir. 1956) emphasized:

The damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts . . . . The charge of a conspiracy is merely the string whereby the Plaintiff seeks to tie together those, who acting in concert, may be held responsible in damages for any overt act or acts.

*Id.* at 252.

<sup>79</sup> See, *e.g.*, *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 153 F. Supp. 589, 592 (D.N.J. 1957), *aff'd*, 307 F. 2d 210 (3rd Cir. 1962), *cert. denied*, 372 U.S. 929 (1963): "The gravamen of the action lies not in the conspiracy but in the overt acts."

<sup>80</sup> *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.* 185 F. 2d 196, 208 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951).

<sup>81</sup> *Ford Motor Co. v. Webster's Auto Sales Inc.*, 361 F. 2d 874, 883 (1st Cir. 1966); *Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc.*, 153 F. Supp. 589, 592 (D.N.J. 1957), *aff'd*, 307 F. 2d 210 (3rd Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Beegle v. Thompson*, 138 F. 2d 875, 881 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944).

<sup>82</sup> 321 F. 2d 287 (7th Cir. 1963).

<sup>83</sup> *Id.* at 290-291. See also *Emich Motors Corp. v. General Motors Corp.*, 229 F. 2d 714 (7th Cir. 1956); *Beegle v. Thompson*, 138 F. 2d 875, 881 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944).

<sup>84</sup> *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 165 (1922); *Stearns v. Tinker & Razor*, 252 F. 2d 589, 605-06 (9th Cir. 1957); *Burnham Chemical Co. v. Borax Consol.*, 107 F. 2d 569, 571, 576 (9th Cir. 1948).

age.”<sup>85</sup> The plaintiff must present evidence that he sustained damages definitely attributable to the wrong. While such damages must be capable of reasonable computation and not based on mere speculation and conjecture,<sup>86</sup> “the wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise . . . .”<sup>87</sup>

An examination of the elements of a treble damage action brings to light the difficult problems of proof faced by the private claimant and reemphasizes the importance of ascertaining the extent to which he may utilize a judgment as *prima facie* evidence to establish the several elements of his case.

This problem becomes increasingly difficult with respect to judgments entered on pleas of guilty once it has been established that these judgments fall within the scope of the *prima facie* Section of 5 (a) and are not consent judgments or decrees within the meaning of the exclusionary proviso. In other words, of what value is this prior judgment to the private suitor in establishing the three elements of his treble damage action?

#### EVIDENTIARY EFFECT OF A PRIOR JUDGMENT UNDER SECTION 5 (a)

##### *The Emich Guidelines . . .*

The evidentiary value to the private suitor of a prior judgment under Section 5(a) was first considered by the Supreme Court in *Emich Motors Corp. v. General Motors Corp.*<sup>88</sup> This opinion was a milestone in the judicial implementation of the section. While this decision dealt with a prior judgment entered after trial on a plea of not guilty, the Supreme Court set down general guidelines to determine the evidentiary use and scope of prior judgments under Section 5 (a) in any given private antitrust suit.<sup>89</sup>

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<sup>85</sup> *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-66 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-64 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 378-79 (1927); *Flintkote Co. v. Lysfjoro*, 246 F. 2d 368, 392-94 (9th Cir. 1957), *cert. denied*, 350 U.S. 835 (1957). See generally, McConnell, *The Treble Damage Action*, U. ILL. L. F. 659, 665-68 (1950).

<sup>86</sup> See authorities cited note 85, *supra*.

<sup>87</sup> *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931).

<sup>88</sup> 340 U.S. 558 (1951). In addition to its *Emich* decision, the Supreme Court applied the “estoppel” standard of Section 5(a) in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

<sup>89</sup> The Supreme Court’s opinion in *Emich* made no explicit extension of the *prima facie* section to judgments entered on guilty pleas. It may therefore be questioned whether the “estoppel” under section 5(a) should be applied to judgments entered on guilty pleas or limited to judgments after trial on the issues. The basic rationale of “estoppel” is to prevent relitiga-

In *Emich*,<sup>90</sup> the plaintiff sought to introduce the prior criminal judgment which the government obtained prior to the commencement of the private suit, including the indictment, and the entire record of the criminal case, under Section 5(a), as *prima facie* evidence of the general conspiracy between the defendants and also, the "fact of damage," *i.e.*, that Emich's dealer franchises were cancelled pursuant to the unlawful conspiracy.<sup>91</sup> The Supreme Court held that "the criminal judgment was '*prima facie*' evidence of the general conspiracy, for the purpose of monopolizing the financing of GM cars and also of its effectuation by coercing GM dealers to use GMAC."<sup>92</sup> In reasoning from the private suitors' contentions to its final holding on the evidentiary use of such prior judgment, the Supreme Court emphasized and was guided by the general congressional purpose in enacting Section 5(a), *i.e.*, to aid private suitors in bringing their damage actions. In addition, the court looked to the express wording of the section which made a prior judgment or decree available to a private

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tion of issues already adjudicated. *See* authorities cited, note 97, *infra*. With a judgment based on a guilty plea, there is no actual "litigation" of any issues. The courts, however, have held that the guidelines set down in *Emich* are applicable to these judgments; that judgments entered on guilty pleas do have "estoppel value" in subsequent suits between the same parties. As stated in *United States v. Ben Grunstein & Sons Co.*, 127 F. Supp. 907, 909 (D.N.J. 1955): "Nor is it material whether the judgment of conviction results from a trial or from a plea of guilty." *Accord*, *United States v. Bower*, 95 F. Supp. 19, 21 (E.D. Tenn. 1951). This argument rests on the grounds that a party convicted after a denial of guilt should suffer no greater burden than one who pleads guilty and thus expressly admits his guilt.

Since a plea of *nolo contendere* is but an "implied confession," *i.e.*, it establishes the fact of guilt solely for the purpose of the particular case in which it is tendered and accepted, it is distinguished from a guilty plea in that the former works no estoppel. *See, e.g.*, *Hudson v. United States*, 272 U.S. 451, 455 (1926). Therefore, an alternative ground for holding judgments based on *nolo* pleas outside the scope of the *prima facie* rule of Section 5(a) is that "they do not create an estoppel between the parties" to the government action. *Barnsdall Refining Co. v. Birnamwood Oil Co.*, 32 F. Supp. 308, 312-13 (E.D. Wis. 1940). *But see*, *Dalweld Co. v. Westinghouse Electric Corp.*, 252 F. Supp. 939, 942 n. 1 (S.D. N.Y. 1966).

<sup>90</sup> The *Emich* case arose when plaintiff, a Chevrolet dealer, sued for treble damages pursuant to Section 4 of the Clayton Act alleging that he had been damaged by a conspiracy between defendants, General Motors (GM) and General Motors Acceptance Corporation (GMAC) (GM's subsidiary engaged in supplying credit facilities to dealers and retail purchasers of autos), in restraint of interstate commerce in automobiles manufactured by GM. More specifically, plaintiff alleged that cancellation of his dealer franchise had resulted from his refusal to finance his sales through GMAC. For detailed discussions of the *Emich* decision consult Notes, 62 YALE L. J. 417 (1952), 65 HARV. L. REV. 1400 (1952), 46 ILL. L. REV. 765 (1951).

<sup>91</sup> *See* text at note 84, *supra*. The specific issues before the Supreme Court on appeal were (a) whether the indictment in the antecedent criminal action was admissible in the civil case, and (b) whether the judgment therein could be used as evidence that the conspiracy of which defendant had been convicted occasioned Emich Motors' franchise cancellation. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 566 (1951).

<sup>92</sup> *Emich* case at 571.

suitor as *prima facie* evidence "as to all matters respecting which said judgment or decree would be an estoppel as between . . ." <sup>93</sup> the defendant and the government. Thus, the Court observed:

Congressional reports and debates on the proposal which ultimately became §5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the government in antitrust actions . . . . <sup>94</sup>

The Court proceeded to establish the "general doctrine of estoppel" <sup>95</sup> as the test by which to determine those issues of the prior litigation admissible under Section 5(a) in the subsequent litigation. The Court predicated its reasoning upon the express provision of the section which set forth "estoppel" as the guiding standard, stating:

We think that Congress intended to confer subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the government brought suit. <sup>96</sup>

It must, at this point, be emphasized that Section 5(a) creates no "estoppel" as the term is generally defined, since under the statute the judgment is given only *prima facie* effect rather than the conclusive effect which would be accorded to it under an application of traditional "collateral estoppel" theory. <sup>97</sup> The principles of collateral estoppel were merely made the hypothetical criteria for ascertaining the issues which are *prima facie* evidence in the subsequent suit. As the Court stated:

<sup>93</sup> *Id.* at 568.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* The term generally used to describe this doctrine is "collateral estoppel." RESTATEMENT, JUDGMENTS, §68, comment a (1942); see Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 3 n. 4 (1942).

<sup>96</sup> *Emich* case at 568.

<sup>97</sup> See, e.g., RESTATEMENT, JUDGMENTS, §68:

(1) Where a question of fact *essential* to the judgment is actually litigated and determined by a valid and final judgment, the determination is *conclusive* between the parties in a subsequent action on a different cause of action . . . (emphasis added).

(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first section.

This common law doctrine is called "collateral estoppel," *supra*, note 95, and, as §68 indicates, applies only to matters "*essential* to the judgment . . . actually litigated and determined." This doctrine is distinguished from the broader doctrine of *res judicata*. Under the latter doctrine, not only essential matters actually litigated are conclusively determined but also those matters which might have been but were not litigated between the parties in the prior action. These are conclusive in a subsequent proceeding based on the same cause of action. *E.g.*, *Commissioner v. Sunnen*, 333 U.S. 591 (1948); see also cases collected in *Hyman v. Regenstein*, 258 F. 2d 502, 510 (5th Cir. 1958); *cert. denied*, 359 U.S. 913 (1959); see generally, Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 813 (1952).

The classic statement of the doctrine of "collateral estoppel" appears in *United States v. Munsingwear*, 340 U.S. 36, 38 (1950):

The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a

Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution (. . . In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment . . .) Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish *prima facie* all matters of fact and law necessarily decided by the conviction and the verdict on which it was based.<sup>98</sup>

The Court, in *Emich*, then addressed itself to the question of whether application of the "collateral estoppel" test would *prima facie* establish only the general conspiracy or whether it would extend the judgment to establish the "fact of damage" element as well. As noted previously, the jury in the antecedent criminal action returned a general verdict of guilty pursuant to an indictment which had charged a general conspiracy for the purpose of monopolizing the financing of cars. Faced with a detailed and comprehensive indictment, alleging the various means used to effectuate the conspiracy, the Supreme Court had the task of adopting the "estoppel" test to ascertain "those matters actually litigated and essential to the verdict." Under these circumstances, the Court stated:

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court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

As stated above, traditionally, the doctrine applies only between the same parties or their privies in the subsequent litigation. This condition of "identity of parties" was based on the assumption that "mutuality of estoppel" had to exist before the doctrine could be applied. *See, e.g., Schafer v. Robillard*, 370 Ill. 92, 17 N.E. 2d 963 (1938). That is, the estoppel operates mutually if the one taking advantage of it would have been bound by it had it gone the other way. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 811, 122 P. 2d 892, 894 (1942). Since, however, the doctrine of estoppel "rests at bottom upon the ground that the party to be affected . . . has litigated or had an opportunity to litigate the same matter in a former action, in a court of competent jurisdiction," *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 467 (1918), the courts have held that "mutuality of estoppel" is no longer necessary to apply the doctrine. *See, e.g., B. R. Dewitt, Inc. v. Hall*, — N.Y. Ct. App. — (1967), 35 LAW WEEK 2522 (1967); *United States v. United Air Lines*, 216 F. Supp. 709, 725-29 (E.D. Wash.; D. Nev. 1962), *aff'd on this issue sub nom., United Air Lines Inc. v. Wiener*, 335 F. 2d 379, 404 (9th Cir.), *cert. dismissed*, *United Air Lines v. United States*, 379 U.S. 951 (1964); *Bernhard v. Bank of America*, *supra* at 812, 122 P. 2d at 894-95 (1942) (*dictum*).

It is interesting to consider how this change in the common law application of the collateral estoppel doctrine might affect the future implementation of section 5(a). Now that mutuality may no longer be a prerequisite under the common law, a defendant may find greater protection if the judgment entered on his plea of guilty were to be covered under the *prima facie* section of 5(a) rather than under the exclusionary proviso. Under the *prima facie* section of 5(a), no more than "prima facie" effect would be given to the adjudicated issues, while, if within the exclusionary proviso, plaintiff would be free to apply the collateral estoppel doctrine under the common law and thus give "conclusive" effect to the adjudicated issues. It is thus not hard to imagine a treble damage plaintiff, under this new "rule of mutuality," reversing his position and arguing that judgments entered on guilty pleas are "consent judgments" within the exclusionary proviso.

<sup>98</sup> *Emich* case at 569.



The difficult problem, . . . is to determine what matters were adjudicated in the antecedent suit. A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. . . . And since all of the acts charged need not be proved for conviction, . . . such a verdict does not establish that the defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts.<sup>99</sup>

Once this determination is made, the trial judge must properly present these adjudicated issues to the jury including, at his discretion, appropriate portions of the record reflecting these issues.<sup>100</sup>

The Supreme Court was thus unwilling to hold that the prior government judgment was evidence of the "fact of damage" element as contended by the plaintiff. Nor, on the other hand, did the Court adopt the more limited interpretation of the lower appellate court that "the judgment was *prima facie* evidence only

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<sup>99</sup> *Id.* The wording in this passage is somewhat ambiguous. The court previously referred to issues actually adjudicated and essential to the verdict, *supra* text at note 98, as *prima facie* determined by the prior judgment. Admittedly, this is in strict compliance with the general doctrine of collateral estoppel, *supra* note 97. However, the Supreme Court in this cited passage concerned itself with the determination of the specific acts in the detailed indictment "adjudicated and found to be used," making no reference to "essentiality." In a criminal antitrust action the conspiracy or agreement alone is sufficient to sustain a conviction under the Sherman Act and it is *not necessary* to prove any means or overt acts in furtherance of the conspiracy, *supra* text at note 74. Thus, as was argued by the court of appeals, 181 F. 2d 70, 76 (7th Cir. 1950), none of the means even though adjudicated were "essential to the verdict." However, as the Supreme Court concluded, if one or some of the means are proved, they are "essential" in the sense that these means were adopted by the jury as the basis for finding the general conspiracy in its essential nature. That is, the "fact of coercion" proven in the *Emich* criminal proceedings was a factor giving rise to the inference of conspiracy, and thus within the doctrine of "estoppel."

<sup>100</sup> *Emich* case at 571. As the Supreme Court observed:

He [the trial judge] is not precluded from resorting to such portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary and appropriate to use in presenting to the jury a clear picture of the issues decided . . . . A similar discretion must be exercised in approving the attachment of a copy of the indictment as an exhibit to the complaint.

*Id.* On the other hand, it may be argued that according to the express wording of Section 5(a), it is the "final judgment of the prior criminal proceeding" that is to be *prima facie* evidence against the defendant, and thus, the only document that should be presented to the jury is the formal judgment. Any other document, such as the indictment, admitted into evidence, would be overly prejudicial to the defendant, and beyond the evidentiary benefits intended to be available to the private suitor. The construction gives way to reasoning that if Section 5(a) is to truly be an "aid to private suitors," the trial judge should, if necessary, go beyond the prior formal judgment to define and present to the jury, those matters settled by the government litigation.

of a general conspiracy."<sup>101</sup> It adopted a middle position in holding that the jury verdict in the criminal action was admissible in the civil action to establish the fact of coercive conduct which was held to be essential in the criminal action to establish the ultimate fact of conspiracy.<sup>102</sup> The Supreme Court thus allowed plaintiff to use this finding of "overt acts of coercion" as a basis for establishing the second element of his *prima facie* case, the "fact of damage." The Court concluded:

To establish their *prima facie* case, it therefore was necessary for petitioners only to introduce in addition to the criminal judgment, evidence of the impact of the conspiracy on them [the fact of damage], such as the cancellation of their franchises and the purpose of GM in cancelling them and evidence of any resulting damages.<sup>103</sup>

This result reflects the application of a liberal "estoppel" standard to carry over into the subsequent action not merely the bare ultimate finding of a general conspiracy, which finding was by itself sufficient to sustain the conviction,<sup>104</sup> but also the factual determinations essential to support that finding.<sup>105</sup> Thus, the Court gave dimension to its assertion that Section 5(a) allows

<sup>101</sup> *General Motors Corp. v. Emich Motors Corp.*, 181 F. 2d 70 (7th Cir. 1950). The court of appeals had previously held, in part:

(1) The indictment was not admissible in evidence, (2) the prior judgment was not admissible as evidence, the dealer's franchise was cancelled pursuant to the conspiracy *but only as evidence that defendant had been guilty of a conspiracy* to restrain dealers' interstate trade and commerce in GM cars for the purpose of monopolizing the financing essential to the movement of their cars, and (3) approved the trial court's ruling as to the inadmissibility in evidence of the entire record of the criminal case (emphasis added).

*Id.* at 74-76.

<sup>102</sup> *Emich Motors v. General Motors Corp.*, 340 U.S. 558, 570 (1951). The trial judge in the criminal proceeding had instructed the jury that in order to find the ultimate fact of conspiracy in restraint of trade the jury had to first find that the defendants had coerced their dealers into using the facilities of GMAC. "That almost is the fact question of this case, whether the dealer could act as a free man . . ." *United States v. General Motors Corp.*, 121 F. 2d 376 (1941), *cert. denied*, 314 U.S. 618 (1941).

<sup>103</sup> *Emich* case at 571 (emphasis added).

<sup>104</sup> *See* text at notes 74-75, *supra*.

<sup>105</sup> *Cf.*, *State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 1966). In this consolidated treble damage action, the court dealt with a prior government civil decree and accompanying findings of fact, (which determined a price-fixing conspiracy had existed) and ruled "that the government decree was *prima facie* evidence of a conspiracy, its effectuation, and impact upon all plaintiffs located in the six-state area named in the government's complaint, rather than merely those identified in the government's evidence." *Id.* at 76. The court distinguished the *Emich* case:

The express determinations made here can be contrasted with the general verdict involved in *Emich* . . . Even though the *Emich* plaintiffs gave testimony in the government action, the general verdict did not necessarily determine that *they* had been coerced pursuant to the conspiracy. Thus, they had to show impact . . . The decree here is based on findings that the conspiracy resulted in submission of almost identical bids to the named sixteen [agencies] and that they were thereby deprived of the advantage of competitive bidding.

*Id.* at 72-73. The court went further, as noted above, and held that although the government's proof of the fact of damage was limited to sixteen agen-

the private suitor "as large a *prima facie* advantage as the estoppel doctrine would afford had the government brought the subsequent suit."<sup>106</sup>

### Application of *Emich* Guidelines . . .

It is questionable whether the collateral estoppel doctrine applied in *Emich* was fully consistent with the traditional application of this doctrine<sup>107</sup> or whether there was an implicit extension of the scope of this doctrine to accommodate the overriding policy of Section 5 (a), to favor the private litigant.

According to the *Restatement* rule,<sup>108</sup> "a question of fact essential to the judgment . . . actually litigated and determined . . . is conclusive between the parties."<sup>109</sup> *Emich* purports to apply a traditional test of "essentiality"<sup>110</sup> to justify searching beneath the ultimate fact of conspiracy to find the underlying mediate facts necessary to support this ultimate finding. This approach, apparently followed in *Emich*, would seem to be in conflict with the "ultimate facts" test<sup>111</sup> of "essentiality." Under the latter test, only the ultimate facts determined by the judgment

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cies, the proof was "indicative of bids to public authorities generally," *id.* at 74, and thus the *prima facie* benefits extended to local agencies throughout the states covered. But *cf.*, Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 543 (1954). In extending the scope of "estoppel" to the localities, the court rested its conclusion "on the realization that the government's proof was limited to sixteen agencies primarily to conserve trial time," *id.*, and on the suggestion in the *Emich* case that "Congress intended to give private plaintiffs as large an advantage as the estoppel doctrine can afford." *Id.* It would seem, however, that the court in the *Morton* case, stretched the concept of "essentiality" as construed in *Emich* beyond recognition in its effort to aid the private suitor.

<sup>106</sup> See text at note 96, *supra*.

<sup>107</sup> See note 97, *supra*.

<sup>108</sup> RESTATEMENT, JUDGMENTS, §68 (1). A full statement of this rule appears in note 97, *supra*.

<sup>109</sup> *Id.* (emphasis added) If all matters "actually litigated" were subject to collateral estoppel, lawsuits would be very hazardous, since every subsidiary matter actually decided would be held conclusive in subsequent suits. In addition, the rationale for requiring "essentiality" is partly historical. At early common law, the record consisted only of the pleadings, verdict, and judgment without a transcript or any other trial proceeding. Thus, the court in a subsequent action could, in any event, only apply estoppel to "ultimate facts." See *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 814, 840 (1952). The same reasoning applicable to early common law cases would seem to apply to judgments entered on guilty pleas.

<sup>110</sup> See 2 FREEMAN, JUDGMENTS, §693 (5th ed. 1925). "All matters which the record and pleadings indicate must have been decided in order to reach final judgment will be given collateral effect." The courts which have adopted this formulation refuse to distinguish between "ultimate" facts and "mediate" facts decided in the first suit, so long as they were necessary to the result. The *Evergreens v. Nunan*, 141 F. 2d 927 (2nd Cir. 1944), *cert. denied*, 323 U.S. 720 (1944).

<sup>111</sup> *King v. Chase*, 15 N.H. 9 (1844); see also, *Tomlinson v. Lefkowitz*, 334 F. 2d 262 (5th Cir. 1964); *Paulos v. Janetacos*, 46 N.M. 390, 129 P. 2d 636 (1942); cases collected in Note, 142 A.L.R. 1243 (1943).

are admissible in a subsequent action.<sup>112</sup> As analyzed by Judge Learned Hand in *The Evergreens v. Nunan*,<sup>113</sup> an ultimate fact is a hypothetical construct connoting "those facts upon whose combined occurrence the law raises the duty or the right in question."<sup>114</sup> According to Judge Hand, all other facts decided in the case are mediate or evidentiary facts.<sup>115</sup> As such, under an ultimate facts approach to "essentiality," the collateral estoppel doctrine would not extend to these facts.<sup>116</sup>

Subjecting the facts in the *Emich* case to Judge Hand's definition would leave the finding of "coercive acts," as a mediate and not an ultimate fact, since, as noted earlier, overt acts were not necessary elements of a Sherman Act, Section 1 violation,<sup>117</sup> but were only evidentiary facts, from which the ultimate fact of conspiracy was inferred. Therefore, applying the narrow traditional "essentiality" test, as defined in *Evergreens*, this fact of coercion should not have been accorded *prima facie* effect in the subsequent private suit.

It should be noted, however, that while Judge Hand clarified the ultimate facts approach to determine the scope of collateral estoppel, he did not himself espouse the adoption of this test or the more liberal test later applied by the Supreme Court in *Emich*, since the holding of *The Evergreens* case did not depend upon the application of either test.<sup>118</sup> In a later portion of his opinion, Judge Hand did recognize that "essentiality" should not be contingent upon the ultimate or mediate nature of the fact but upon a determination of whether the fact was necessary to the result in

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<sup>112</sup> For a discussion of the "ultimate facts rule" consult Note, *Collateral Estoppel by Judgment*, 52 COL. L. REV. 747, 660-63 (1952); *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 814, 840 (1952).

<sup>113</sup> 141 F. 2d 927 (2nd Cir. 1944), *cert. denied*, 328 U.S. 720 (1944).

<sup>114</sup> *Id.* at 928. RESTATEMENT, JUDGMENTS, §68, comment (p) originally referred to "facts in issue" being given conclusive effect as opposed to "evidentiary facts;" see, e.g., *Tomlinson v. Lefkowitz*, 334 F. 2d 262, 264 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965). In 1948, Judge Hand's formulation of ultimate facts was adopted to define "facts in issue." See RESTATEMENT OF THE LAW, 1948 Supp. at 336-37 (1949).

<sup>115</sup> "Mediate data are those underlying or evidentiary facts from whose existence may be rationally inferred the existence [of ultimate facts]." *The Evergreens* case at 928.

<sup>116</sup> See, e.g., *Norton v. Larney*, 266 U.S. 511, 517 (1925) (estoppel as to incidental, evidentiary facts rejected).

<sup>117</sup> See text at notes 74-75, *supra*.

<sup>118</sup> The issue decided in *The Evergreens* case was whether determinations in the first suit, be they ultimate or mediate, are conclusive as to facts mediate to the second action. The court held that in the second action, regardless of whether the issues in the first action were mediate or ultimate, such facts would not be conclusive except as to the ultimate issues in the second suit. Thus, it was not necessary for Judge Hand to choose between the narrow and liberal essentiality test, since neither would apply in *Evergreens* with respect to determining the mediate facts in the second suit. The Supreme Court accepted and applied this principle in *Yates v. United States*, 354 U.S. 298, 337-38 (1957).

the suit, which in turn would determine whether "it will be really disputed and the loser will have put out his best efforts."<sup>119</sup>

This disparity between the liberal "essentiality" test of estoppel applied in *Emich* and the traditional "ultimate facts" test does not appear to have been recognized by the lower courts. In *Gottesman v. General Motors Corp.*,<sup>120</sup> where the question of admissibility of a prior judgment based on a jury verdict of guilty in a subsequent private antitrust action was raised, the court applied the narrow "ultimate facts" test to determine the *prima facie* effect of the judgment under Section 5(a).<sup>121</sup> The court adopted the narrow *Evergreens* definition without even acknowledging any conflict with the test of "essentiality" implicitly applied in *Emich*.

Perhaps some further clarification should emanate from the Supreme Court to emphasize that for purposes of Section 5(a) the more liberal test of "essentiality" implicitly applied in *Emich* should control.

#### *Judgments Entered on Pleas of Guilty . . .*

Irrespective of the question as to which test should generally be applied to determine "essentiality" in the application of the "collateral estoppel" doctrine, it is clear that the *Emich* decision delineates the scope of the "estoppel" in a Section 5(a) case. However, the guidelines in *Emich* are not fully dispositive of the evidentiary use, under that section, of judgments entered on pleas of guilty. Since the prior criminal judgment available in the *Emich* case was entered after a jury trial on the issues, the en-

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<sup>119</sup> *Evergreens* case at 929-30:

It is, as we have said, a condition upon the conclusive establishing of any fact that its decision should have been necessary to the result in the first suit. That is a protection, for it means that the issue will be really disputed and the loser will have put out his best efforts. It can make no difference in this regard whether the original issue was as to an "ultimate" fact or as to a "mediate" datum; the parties can have no interest in what place in the logical hierarchy the issue occupies, if only the final outcome hinges upon it.

Judge Hand continued, by way of dictum; and added another limitation:

Were the law to be recast, it would therefore be a pertinent inquiry whether the conclusiveness of facts decided in the first, might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried.

*Id.* In *Hyman v. Regenstein*, 258 F. 2d 502, 510-11 (5th Cir. 1958), the court adopted its own version of the "ultimate facts" rule:

. . . [C]ollateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was foreseeable that the fact would be of importance in possible future litigation.

*Cf.* *Barzilay v. United States*, 256 F. Supp. 1010, 1015 (S.D. Fla. 1966).

<sup>120</sup> 221 F. Supp. 488 (S.D.N.Y. 1963), *interlocutory appeal denied*, (2nd Cir. 1964), *cert. denied*, 379 U.S. 882 (1964).

<sup>121</sup> *Id.* at 491. (" . . . I conclude that only ultimate facts determined in the first suit are *prima facie* evidence of the ultimate facts in the second suit.")

tire record of the criminal case was available to the trial judge in determining the issues adjudicated and provided the judge with a sound basis for giving the term "estoppel" a broad construction.<sup>122</sup>

However, when the prior judgment, in a Section 5(a) situation, is entered on a plea of guilty, the trial judge has only the indictment, the plea itself, and the formal judgment entered thereon to examine in order to determine what issues were decided by the former government litigation. How, then, is he to determine according to the principles of the *Emich* decision "all matters of fact and law necessarily decided by the conviction." Since, in almost all criminal antitrust actions, the indictment charges that the defendant used more than one means to effectuate the conspiracy,<sup>123</sup> it would seem to follow that the judgment on the plea would not establish any particular means as "essential." Conceptually, the trial judge would be limited to a determination that only the general fact of a conspiracy to violate the antitrust laws was decided, *i.e.*, only the first element of the private suitor's *prima facie* case.

With only a limited record available when the judgment has been entered on a plea of guilty, the indictment, as the only comprehensive writing specifying the matters in issue, is instrumental in determining which of these issues should be given *prima facie* effect in subsequent private litigation.<sup>124</sup> On this point, several recent decisions, in damage suits brought by the government, have considered this problem in applying the common law collateral estoppel doctrine where Section 5(a) was not involved.<sup>125</sup>

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<sup>122</sup> See text at note 99, *supra*.

<sup>123</sup> See text at notes 98-99, *supra*.

<sup>124</sup> Since the government draws the criminal indictment, this could place the power to determine the subsequent evidentiary effects of the prior judgment, practically, in the hands of the government. As such, this fact could have significance in terms of bringing together the conflicting policy considerations of Section 5(a) and its proviso; see text at note 67, *supra*. As exemplified by the exclusionary proviso of Section 5(a), Congress intended that the government obtain relief in the most efficient manner possible by encouraging capitulation. This policy could be effectuated by drawing the criminal indictment in very general terms, specific enough to meet the minimal test of sufficiency under the Sherman Act, see *Radiant Burners Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656, 660 (1961); Note, 71 *YALE L. J.* 684, 696-98 (1961), yet broad enough so that the trial judge in a subsequent private action can take only a narrow view as to the *prima facie* scope of the "estoppel." In return, the defendant may be willing to enter a plea of guilty. Since judgments entered on guilty pleas are not "consent judgments" within the proviso, see note 57, *supra*, subsequent treble damage plaintiffs are entitled to the evidentiary benefits of the section. Utilizing this approach the government, to some extent, still perpetuates the primary purpose of Section 5(a) to aid private suitors, yet accomplishes its goal of enforcement without trial.

<sup>125</sup> *United States v. Guzzone*, 273 F. 2d 121 (2nd Cir. 1959); *United States v. Ben Grunstein & Sons Co.*, 127 F. Supp. 907 (D.N.J. 1955); *United States v. American Packing Corp.*, 113 F. Supp. 223 (D.N.J. 1953). In each of these civil suits the government sought to recover damages following a

In each of these decisions, the court examined the "collateral estoppel" effect of a prior criminal judgment entered on a plea of guilty to an indictment charging conspiracy. The court, in each, narrowly limited the scope of the "estoppel" and held the defendants conclusively estopped from denying the "existence of the particular conspiracy in its essential nature and their participation therein,"<sup>126</sup> but not from denying the commission of particular overt acts alleged in the indictment.<sup>127</sup> As stated, for example, in *United States v. Ben Grunstein & Sons Co.*:<sup>128</sup>

But since in a criminal conspiracy case proof of the unlawful agreement between the parties, plus the commission of any overt act, not necessarily all those alleged, suffices to support a verdict of guilty, no conviction of a criminal conspiracy whether on verdict or plea, suffices of itself, without further evidence to prove that defendant either admitted, or was found guilty by the jury, of committing any particular overt act. Nor if the conspiracy is alleged to have been effectuated, as in *Emich Motors*, by a number of means, each of which would have sufficed therefore, can it be determined on a plea of guilty to such count, which of such means were admitted by the defendant to have been adopted for that purpose . . . . All that such plea admits is 'the existence of the conspiracy as charged as well as participation therein by the defendants so pleading.' . . . But . . . the conspiracy as charged means the admission of that particular conspiracy in its essential nature, else the pleading defendants could not later plead double jeopardy to another indictment of that same nature.<sup>129</sup>

However, the court observed, by way of dictum, that if the indictment were so framed that it emphasized particular overt acts as essential characteristics of the conspiracy, wherein a judgment on the plea would be necessarily determinative of these underlying facts as well, the "collateral estoppel" doctrine would then preclude their denial at a subsequent trial. The court, in the *Grunstein* case continued:

. . . [I]f then this bribery allegation is but the statement of one of the many means used for effectuating the conspiracy, the plea to the indictment does not constitute an admission of his bribery. . . . If the bribery is read as alleging one of the essential character-

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criminal conviction for a conspiracy to file false claims against it, attempting to introduce the prior conviction under the rules of collateral estoppel as conclusive evidence of the general conspiracy and particular overt acts committed pursuant thereto.

<sup>126</sup> *E.g.*, *United States v. Ben Grunstein & Sons Co.*, 127 F. Supp. 907, 910 (D.N.J. 1955).

<sup>127</sup> *E.g.*, *United States v. American Packing Corp.*, 113 F. Supp. 223, 225 (D.N.J. 1953): "The specification of illegitimate activities appended to the bald charge of conspiracy may be considered in the nature of a bill of particulars, advising the accused of the acts upon which the government bases its denunciation."

<sup>128</sup> 127 F. Supp. 907, 910 (D.N.J. 1955).

<sup>129</sup> *Id.*: In this case, proof of overt acts was required by statute; otherwise, proof of the unlawful agreement between the parties is sufficient to support a conviction, no overt acts being required. See text at note 74, *supra*.

istics of the indictment pleaded to, the plea would have admitted it.<sup>130</sup>

Nevertheless, any ambiguity as to whether the particular act was an essential part of the conspiracy "must be construed in favor of the defendants."<sup>131</sup> Thus, if the trial judge cannot, with certainty, determine which, if any, facts alleged in the indictment were "essential to the conspiracy," he will be limited to determining that only the general fact of conspiracy was decided by the prior judgment.

While *Grunstein* and its companion cases dealt with the conclusive effect of judgments entered on guilty pleas in subsequent litigation, the more specific problem of the *prima facie* "estoppel" effect of such judgments under Section 5(a) has been the subject of extensive analysis in a recent series of private treble damage actions arising out of the Electrical Equipment Industry criminal cases in 1960.<sup>132</sup> In each of these cases, the trial judge struggled with interpreting the evidentiary effect and use to be given the prior criminal judgment entered on a guilty plea.<sup>133</sup> In each, the trial judge concluded only that the defendants had at some specific time conspired to violate the antitrust laws, the minimum evidentiary effect which could be given under Section 5(a).

In *Philadelphia Electric Co. v. Westinghouse Electric Corp.*,<sup>134</sup> the plaintiffs, in commencing their case, were allowed to read to the jury the paragraph of the criminal indictment alleging a general conspiracy in violation of Section 1 of the Sherman Act. The judge then advised the jury of the defendant's plea of guilty to the indictment, of the judgment entered thereon, and of the effect of this judgment as *prima facie* evidence.<sup>135</sup> In his closing instructions to the jury, the judge reiterated:

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<sup>130</sup> 127 F. Supp. at 911; see note 124, *supra*.

<sup>131</sup> 127 F. Supp. at 912. In *United States v. American Packing Corp.*, 113 F. Supp. 223, 225 (D.N.J. 1953) the court set down a general rule:

In matters affecting criminality, not only statutes but also pleas of guilty must be construed strictly and must be limited to the narrowest confines consistent with an intelligent interpretation of the effect thereof.

<sup>132</sup> *E.g.*, *Philadelphia Electric Co. v. Westinghouse Electric Corp.*, 5 TRADE REG. REP. (1964 Trade Cas.) ¶71123 (E.D. Pa. 1964). See also *N. W. Electric Power Cooperative v. Maloney Electric Co.*, Civil No. 13290-3 (W.D. Mo. 1964); *City of Burlington, Vt. v. Westinghouse Electric Corp.*, Civil No. 348-62 (D.D.C. 1964), unpublished decisions, as reported in *Seamons, Winston and McCartney, Use of Criminal Pleas in Aid of Private Antitrust Actions*, 3 DUQ. 167 (1964-65).

<sup>133</sup> *Id.* for a detailed discussion of each trial judge's handling of the admissibility of the prior criminal indictment and judgment as evidence in these cases.

<sup>134</sup> 5 TRADE REG. REP. (1964 Trade Cas.) ¶71123 (E.D. Pa. 1964).

<sup>135</sup> The Supreme Court, in the *Emich* case, at 572, recognized that it is within the discretion of the trial judge to control the order of the proof at trial, *i.e.*, when the prior judgment will be admitted as evidence, and approved the explanation of the judgment to the jury in a preliminary in-



. . . [that the judgment on the] plea of guilty is *prima facie* evidence that the Defendants did at some time at least between 1956 and 1960 conspire to violate the antitrust act in respect to power transformers. . . . It is not evidence of the fact that the plaintiffs have been damaged. . . . It is not evidence of the amount of any damage. It is not evidence that the conspiracy had any effect on prices.<sup>136</sup>

In another of these cases, *N.W. Electric Power Cooperative v. Maloney Electric Co.*,<sup>137</sup> the defendants, in a pre-trial conference report, admitted a conspiracy in violation of the Sherman Act. Based on this admission, the trial judge refused, at the trial, to admit in evidence the prior judgment of conviction, the indictment, and the plea of guilty,<sup>138</sup> for the reason that the pre-trial admission obviated any evidentiary benefits which could be derived from the judgment or plea under Section 5(a). Significantly, the judge noted that "the plea of guilty does not admit anything more than the commission of an offense and the commission of acts . . . the minimum acts which would be necessary to constitute an offense. The offense is already admitted."<sup>139</sup> The

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struction, as was done by the trial judge in *Philadelphia Electric*, in "interests of clarity". *Emich* at 572.

In fact, it may always be desirable for the trial judge to explain the scope of the prior judgment when it is first introduced. The advantages in so doing are, first, that the plaintiff is informed of the extent to which he may rely on the prior judgment, or conversely, the extent to which he must adduce independent evidence to prove his *prima facie* case, *cf. Gottesman v. General Motors Corp.*, 221 F. Supp. 488, 490 (S.D. N.Y. 1963) (judgment construed earlier in case, prior to discovery-deposition), and secondly, that it helps the jury understand and evaluate this independent evidence as it is received.

<sup>136</sup> *Philadelphia Electric* case at 79438. The full text of the final charge to the jury appears therein.

<sup>137</sup> Civil No. 13290-3 (E.D. Mo. 1964), *supra* note 132.

<sup>138</sup> *Id.* His ruling on these issues was based on the following reasoning: I have come tentatively to the conclusion that, first, in view of the belated admission of conspiracy, that the judgment of conviction ought not to be admitted in evidence because it is of lesser force than the admission, both in breadth of time and in its effect . . . .

Now, the pleas of guilty in respect to the indictment create a different situation. And I am not certain that I am right about this because of the lack of authority in the form of judicial opinion at a higher level. But I am going to say, first, that unless I am shown some authority which indicates that the plea of guilty to the indictment does more than admit the minimum facts necessary to constitute the offense, I am not going to admit the pleas of guilty, and the portions of the indictment to which they relate. The reason is, that I have tentatively decided that the plea of guilty does not admit anything more than the commission of an offense and the commission of acts, the minimum acts which would be necessary to constitute an offense. The offense is already admitted.

Second, and independently, . . . I feel that the possible misuse of this by the jury, so greatly overweighs any probative effect that it might have that it ought not to be submitted to the jury.  
Record, pp. 2764-65.

<sup>139</sup> *Id.* On admissibility of guilty pleas in subsequent litigation, *see* authorities cited, note 49, *supra*. Under the common law rules of evidence, it is not the judgment which becomes admissible, as under Section 5(a), but the plea of guilty to the charge. *Race v. Chappell*, 304 Ky. 788, 202 S.W. 2d

implication from this statement is that, if the judge in *Maloney* had to directly rule on the evidentiary scope of the prior conviction, he would have agreed with the other trial judges in these cases, that the prior judgments entered on guilty pleas constituted *prima facie* evidence only of the existence of a general conspiracy, and of the participation therein by the defendants.<sup>140</sup>

The strict test employed in these cases to ascertain what issues were determined by the prior criminal judgment appears to diverge from the liberal test of "essentiality" applied in *Emich*. It is true that, in *Emich*, the prior criminal judgment was entered on a jury verdict of guilty, while in these electrical cases, the judgments followed pleas of guilty. Nevertheless, the same overriding policy consideration of 5(a), to aid the injured private party, should be operative in either situation.

However, these cases are reconcilable with the *Emich* decision in that judgments entered on guilty pleas necessarily involve the policy of encouraging capitulation. While the inclusion of judgments entered on pleas of guilty within the *prima facie* rule of 5(a) is premised upon the dominance of the policy favoring the private suitor, over the policy of encouraging capitulation, there is no necessity to completely abandon the capitulation policy with respect to such pleas. Perhaps, by applying a narrow "essentiality" test to judgments entered on guilty pleas, a defendant might still find some inducement to capitulate, if his exposure to liability under the *prima facie* rule would be less than if he pleaded not guilty.<sup>141</sup> His *prima facie* liability would thus be

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626 (1947). In spite of this distinction, there would seem to be a substantial parallel between the evidentiary effects of a plea of guilty in subsequent litigation under common law rules and the judgment on the plea under Section 5(a). The courts have held that under the common law rules of evidence, a plea of guilty admits only the essential elements, *e.g.*, *Adkins v. United States*, 298 F. 2d 842 (8th Cir. 1962), or, in the language of some courts, the material facts, *e.g.*, *Hawley v. Hunter*, 161 F. 2d 825 (10th Cir. 1947), charged in the indictment. Thus, the recent cases relating to the admissibility of guilty pleas under the common law rules of evidence do not shed light with respect to construing the "prima facie scope" problem under Section 5(a) since these courts, themselves, struggle with the same issue of defining "essentiality."

<sup>140</sup> *Accord*, *City of Burlington, Vt. v. Westinghouse Electric Corp.*, Civil No. 348-62 (D.D.C. 1964), *supra*, note 132.

<sup>141</sup> In excluding the prior judgment of conviction and the accompanying guilty plea, the judge in *N. W. Electric Power Cooperative v. Maloney Electric Co.*, Civil No. 13290-3 (W.D. Mo. 1964), *supra*, note 132, added:

. . . [T]o serve the policy of the antitrust laws I want to encourage the entry of pleas of guilty in criminal cases without a consideration by the defendant of the effects of that plea in civil cases other than (sic) the *prima facie* showing which is provided for by statute.

Record, p. 2765. Congress has recently considered what could be an additional legislative inducement to pleading guilty in S. 2512, 89th Cong., 1st Sess. (1965). In this bill, Senator Hart proposed giving conclusive effect to judgments entered after trial. However, if the defendant capitulates before trial, the judgment carries *prima facie* weight as under the current Section 5(a). In addition, he proposed giving *prima facie* effect to all criminal pleas, *nolo* and guilty.

limited to the minimum statutory elements of the violation. Moreover, *Emich* may be further reconciled in that the expanded record, including a full trial of the facts engendered by the plea of not guilty, enabled a feasible application of a liberal "essentiality" test to determine the underlying specific findings necessary to support the ultimate finding of conspiracy.<sup>142</sup> While in the cases where the judgment was entered on a plea of guilty without any presentation of evidence, the judgment was not as probative of the facts, and rendered application of a liberal "essentiality" test impractical.

A realistic approach to the problem of the evidentiary effect to be accorded a prior criminal judgment must also recognize the extrajudicial benefit accruing to the private suitor by the mere admission, alone, of the prior conviction. He benefits from the prejudicial influence on the jury gained from their awareness of the defendant's prior conviction. It is well accepted that the jurors are apt to give great weight to such evidence.<sup>143</sup> This lends further support to the *Electrical* cases view that the evidentiary impact of the prior conviction on pleas of guilty, under Section 5(a), should be minimized to mitigate the prejudicial effects of the admission. Even with a narrow construction of the evidentiary benefits available under Section 5(a), combining this admission with the extrajudicial benefit available to the private suitor once the prior judgment entered on the guilty plea is merely admitted, in fact, if not in legal theory, shifts the moral burden of guilt entirely to the defendant.

#### CONCLUSION

From the foregoing discussion, it would seem that the issues available to the private suitor in a subsequent treble damage action, as *prima facie* evidence, should be limited to the minimum statutory elements of the violation charged in the indictment. This conclusion gains further support by a reexamination of the dual policy considerations involved in the enforcement of the antitrust laws. The various circuits' determination that judgments entered on pleas of guilty were not "consent judgments or decrees" within the scope of the exclusionary proviso and therefore admissible in subsequent litigation, favored the policy of aiding private parties at the expense of the policy of inducing capitulation.<sup>144</sup> The effect of these holdings was to discourage capitulation through a plea of guilty, since it subjected these defendants

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<sup>142</sup> See text at note 122, *supra*.

<sup>143</sup> *Krulewitch v. United States*, 336 U.S. 440 (1949). "The naive assumption that prejudicial effects can be overcome by instruction to the jury . . . all practicing lawyers know to be an unmitigated fiction." *Id.* at 453.

<sup>144</sup> See text at notes 57-60, *supra*.

to the evidentiary burdens of Section 5 (a) as if they had litigated and lost. However, if the *prima facie* scope of the prior judgment is narrowly defined, it may still be enough of an inducement to the defendant to capitulate by pleading guilty in the criminal action, since the evidentiary benefits accruing to the private suitor would be minimized<sup>145</sup> and the burden and expense of defending a long criminal suit would be eliminated. Utilizing this approach, the government perpetuates the primary purpose of Section 5 (a), to aid injured private suitors, yet accomplishes its goal of effective, efficient enforcement, without trial.

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<sup>145</sup> The Supreme Court has suggested that the *prima facie* rule of Section 5 (a) may often be a benefit of limited practical value. *Cf. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965). *See* Notes, 65 HARV. L. REV. 1400, 1407 (1952), 61 YALE L. J. 417, 424, 425 (1952). Moreover, it has been suggested that the plaintiff may, practically, have to relitigate even the basic issue of conspiracy to get the true impact of the violation across to the jury, especially when the defendant introduces contradictory evidence to explain away his plea of guilty. *Id.* at 425.