The Antitrust Plaintiff Following in the Government's Footsteps

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I. Introduction

In the fiscal year ending June 1968, 659 private civil antitrust cases were commenced in the federal district courts, more than triple the number of cases filed in the same time period 10 years before. There are no statistics available to indicate what number or percentage of the 1,360 private antitrust cases pending as of June 30, 1968, were filed as a result of information disclosed in prior or pending United States Government civil or criminal antitrust actions. It is evident however that a large bulk of the pending private cases are related in subject matter to government actions. Most of the cases which have been brought before the Judicial Panel on Multi-district Litigation were based on complaints which closely followed government complaints or indictments. Presently pending are clusters of cases seeking treble damages across broad industry lines for violations

† Member of the Pennsylvania Bar. A.B., Temple University, 1953; LL.B., University of Pennsylvania, 1956.


3. See note 1 supra at 203.


5. The Panel was created by Congress in 1968 to consider transfer of actions having common questions of law or facts to one district for pretrial proceedings. For consideration of the statute; the Rules of Procedure adopted by this Panel; and some of the orders issued by the Panel, see Comment, A Survey of Federal Multi-district Litigation — 28 U.S.C. § 1407, 15 Vill. L. Rev. 916 (1970).

Private antitrust actions following government actions are, e.g., In re Concrete Pipe, 302 F. Supp. 244 (J.P.M.L. 1969) (30 cases consolidated and transferred); In re Gypsum Wallboard, 297 F. Supp. 1350 (J.P.M.L. 1969) (50 cases ordered consolidated); In re Library Edition of Children's Books, 297 F. Supp. 385 (J.P.M.L. 1968) (21 cases ordered consolidated and transferred); In re Plumbing Fixture Cases, 295 F. Supp. 33 (J.P.M.L. 1968) (39 cases ordered consolidated and transferred). Cases brought subsequent to the original transfer orders are sent to the transferee court shortly after they are filed. See In re Antibiotic Drugs, 303 F. Supp. 1056 (J.P.M.L. 1969); In re Plumbing Fixtures, 302 F. Supp. 795 (J.P.M.L. 1969); In re Gypsum Wallboard, 302 F. Supp. 794 (J.P.M.L. 1969); In re Protection Devices, 295 F. Supp. 39 (J.P.M.L. 1968) (80 cases ordered consolidated and transferred); In re Antibiotic Drugs, 1968 Trade Cas. ¶ 72,663 (J.P.M.L. 1969) (22 cases ordered consolidated and transferred).

(57)
of the antitrust laws affecting drugs, plumbing fixtures, library books, gasoline and bread.

These cases generally involve plaintiffs from the public sectors of the economy — states, cities, school districts, public libraries — as well as private purchasers at all levels of distribution. To add to the complexity is the relatively new concept asserted by states and some cities of their right to sue on behalf of all citizens and consumers within their confines under a “parens patriae” doctrine.6

In large part this influx of private litigation owes its very existence to the concern of the Department of Justice over industrial practices which have affected prices of goods purchased by governmental entities, often on public or sealed bids. It has now become axiomatic that a government complaint alleging bid rigging or territorial allocation will be followed immediately by private suits on behalf of municipalities and states within the area alleged to be affected. Recently, substantial settlements with local governments have been reported following federal government actions, even without the filing of a complaint by the local government.

This mass of litigation presents procedural and substantive problems and issues novel in the administration of the federal courts. In fact, it was the large number of cases filed throughout the country following the termination of 20 government criminal cases against the electrical manufacturers and the procedure which evolved for handling the discovery aspects of 1880 related private suits7 which eventually resulted in the amendment of the Judicial Code to provide for transfer of related cases pending in many district courts to one district for consolidated pretrial proceedings.8

The concentration of such cases before one judge has tended to focus perhaps more directly than before upon the relationship of this


When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote a just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. . . .

See generally Comment, note 5 supra.
litigation to the preceding or pending government actions. While the statute is still new and experience under the transferred cases has not reached a point where a trend is clear, it does appear that one result will be the liberalization of judicial opinion on the uses to which the prior United States Government proceedings can be put in the related civil litigation.

It is the purpose of this article to examine the extent to which the private litigant benefits from a prior or pending related government action, and to consider whether changes in the statutory scheme are appropriate.

II. TOLLING OF THE STATUTE OF LIMITATIONS

The courts in recent years have indicated that they view the tolling provision of the Clayton Act as one of the principal means intended by the Congress to assist litigants following in the footsteps of the government suit. The prior tendency to interpret this provision restrictively has now been reversed on all fronts.

Section 5(b) of the Clayton Act provides:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws . . . 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 . . .

One of the threshold issues arising under this section was whether it applied to a proceeding brought by the Federal Trade Commission since the statute by its terms refers only to “any civil or criminal proceeding . . . instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws.”

A conflict between the circuits was resolved by the Supreme Court in Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., where it held that a Federal Trade Commission proceeding brought under the antimerger provisions of Section 7 of the Clayton Act would toll the statute of limitations for a damage plaintiff who claimed that the challenged acquisition of a distributor by a

producer of electrical installation materials violated Sections 1 and 2 of the Sherman Act.\textsuperscript{18}

The Court recognized that there was little legislative history suggesting that Congress intended to include F.T.C. proceedings within the tolling provision. However it found support for its decision in Congress' intention to use private self interest as a means of enforcement of the antitrust laws.\textsuperscript{14} The Court said:

In resolving this question we must necessarily rely on the one element of congressional intention which is plain on the record — the clearly expressed desire that private parties be permitted the benefits of prior government actions.\textsuperscript{15}

Since the Federal Trade Commission had sued, in the Minnesota Mining case, to enforce Section 7 of the Clayton Act,\textsuperscript{18} a statute which is specifically defined as an “antitrust law” by statutory definition,\textsuperscript{17} the Supreme Court was not faced with the question of the applicability of the tolling provision to proceedings brought by the Federal Trade Commission under the Federal Trade Commission Act,\textsuperscript{18} which does not fall within the statutory definition of an “antitrust law.” Most of the courts which thereafter faced this question held that the statutory language was clear and that since the tolling provision is limited to prior proceedings with respect to “any of the antitrust laws” a Federal Trade Commission proceeding pursuant to Section 5 of the Federal Trade Commission Act cannot be given tolling effect.\textsuperscript{19} Recently, however, the District Court of Vermont in Lippa & Co., Inc. v. Lenox, Inc.,\textsuperscript{20} chose not to follow this reasoning. The court, although recognizing that Section 5 of the Federal Trade Commission Act could not be considered an “antitrust law” held that it did not follow that

\textsuperscript{13} 15 U.S.C. §§ 1, 2 (1964).
\textsuperscript{14} 381 U.S. at 319-20.
\textsuperscript{15} Id. at 320. Senate Report No. 619 states: “At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden of and expense of enforcement and thus save the Government time and money.” S. Rep. No. 619, 84th Cong., 1st Sess. (1955), published in 2 U.S. Code Cong. & Ad. News, 84th Cong., 1st Sess. 2329 (1955).
proceedings brought pursuant to that section are not brought to "prevent, restrain or punish violations of any antitrust laws."21

Because of the breadth of the prohibitions of Section 5(a)(1) of the Federal Trade Commission Act,22 many proceedings brought under that statute are brought to "restrain or punish violations of any of the antitrust laws" within the concept of the tolling provision. The court chose not to follow a path requested by plaintiff which would require the court to decide in each instance whether the Federal Trade Commission complaint alleges facts which constitute violations of one or more of the antitrust laws. Instead, this court relied on language in Supreme Court cases that the purpose of the Federal Trade Commission Act is designed to "stop in their incipiency acts and practices which, when full blown, would violate" either the Sherman or Clayton Acts.23 The court, in Lippa, held that all actions under the Federal Trade Commission Act other than those against deceptive practices are brought to "prevent . . . violations of the antitrust laws" within the meaning of Section 5(a), and hence such actions toll the statute of limitations for subsequent private litigants.24 While the decision has yet to be followed by other courts, it is, as the court itself characterized it, "consistent with the philosophy expressed in Minnesota Mining"25 and would certainly be one of the more practical benefits in view of the length of time before completion of many Federal Trade Commission proceedings.

The liberal policy approach taken by the Supreme Court affects not only the question of whether the tolling provision applies but how it is to be interpreted. Shortly after its decision in the Minnesota Mining case the Supreme Court was faced with the "restrictive interpretation" of Section 5(b) applied by the Court of Appeals for the Ninth Circuit which held that its applicability was limited to situations in which "[t]he same means must be used to achieve the same objectives of the same conspiracies by the same defendants."26 In Leh v. General Petroleum Corp.,27 the Supreme Court reaffirmed that the tolling provision must be "read in light of Congress' belief that private antitrust litigation is one of the surest weapons for effective

21. Id. at 184–85.
25. Id. at 189.
26. Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190, 196 (9th Cir. 1956). Contra, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), appeal dismissed under rule 60 sub nom., Wade v. Union Carbide and Carbon Corp., 371 U.S. 801 (1962), which held that the running of the period of limitations is tolled by section 5(b) if there is "substantial identity of subject matter." 300 F.2d at 570.
27. 382 U.S. 54, 59 (1965).
enforcement of the antitrust laws." Noting that the language of the tolling provision applies to cases based "in whole or in part on any matter complained of" in the government proceeding, the Court held that identity of parties and alleged time period of the conspiracy were not required.\(^\text{28}\)

Thus, in that case, an independent gasoline wholesaler who charged that the oil companies conspired to eliminate jobbers and retailers was permitted to benefit from a civil government suit although plaintiff's complaint alleged a conspiracy beginning in 1948 and continuing until 1956, while the conspiracy alleged in the government suit ran from 1936 to 1950. In addition, two of the eight defendants named by the government were not sued in the private action.\(^\text{29}\) The Court refused to conclude that a private claimant can invoke Section 5(b) "only if the conspiracy of which he complains has the breadth and scope in time and participants as the conspiracy described in the government action on which he relies."\(^\text{30}\)

After the Supreme Court's cautionary directions against a "niggardly construction of the statutory language,"\(^\text{31}\) the lower courts have now looked to policy reasons to justify their new broad interpretation of the tolling provisions. Following the language, albeit dicta, in the \textit{Leh} case the courts have held that the tolling provision applies as to individuals not even sued or named as co-conspirators in the prior government suit.\(^\text{32}\) Recent decisions have rejected the earlier holdings of the movie industry cases which calculated the end of the suspension

\(^{28}\) \textit{Id.} at 59, quoting from 381 U.S. 311, 318.

\(^{29}\) The plaintiff had sued one company, Olympia Oil Producers, who was not a defendant in the government proceeding but who was dismissed from the case prior to the ruling on defendants' statute of limitations defense. Thus, the question of the applicability of section 5(b) to defendants in the civil suit who were not named in the criminal suit has not been before the Court. However, an indication of its attitude on that issue is seen from the following dicta in the \textit{Leh} case: "In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained... some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net." 382 U.S. at 63-64.

\(^{30}\) \textit{Id.} at 63.

\(^{31}\) \textit{Id.} at 59.

period on a defendant-by-defendant analysis.33 Now, the government litigation is considered to pend as to each defendant until it is concluded as to all of them.34 The filing of a government civil antitrust action within a year of the termination of a related indictment has been held to continue the tolling effect until one year after the end of the civil suit.35 Finally, recognizing that "[c]ongressional policy is better served by a test which is easily applied" it has been held that a prior government suit does not cease to pend until the expiration of time to take an appeal from the final decree dealing with the relief, although all questions as to liability had been finally determined in earlier stages of the litigation.36

Although, paradoxically, the United States Government does not fare as well, when suing for its own damages,37 the statutory provision for tolling of the statute of limitations is of major assistance to the treble damage plaintiff. He can sit back and await the conclusion of the full panoply of government discovery, trial or settlement before deciding whether to undertake a private suit. Whether he so chooses may depend on political or tactical considerations, but the option is his. In theory, if the private plaintiff waits while the Government proceeds to a successful conclusion in a criminal or civil action, his labor in the subsequent damage proceeding should be considerably eased.

III. PRIIMA FACIPEFFECT OF PRIOR JUDGMENTS

The tolling provision enacted as Section 5(b) of the Clayton Act in 1914 was only one of the steps taken by Congress in that Statute as an inducement to the private litigant.38 Within the same

34. When the Government brought a criminal and a civil suit, the criminal action ended at different times because one defendant pleaded nolo contendere and the remaining went to trial and were acquitted. The civil suit likewise ended at different times because some defendants signed consent decrees and others proceeded to a trial resulting in a judgment against them which was affirmed on appeal. The government suit was held to pend until the latter of the two government actions, the civil suit, was ended as to final defendant. Michigan v. Morton Salt Co., 259 F. Supp. 35 (D. Minn. 1966), aff'd sub nom. Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir. 1967), cert. denied, 389 U.S. 912 (1967).
38. The major inducement to private litigants was the provision for treble damage recovery. 15 U.S.C. § 15 (1964). "[T]he purpose of giving private parties treble-damage and injunctive relief was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969).
section, Congress sought to confer upon the private litigant the fruits of the prior government litigation. Section 5(a) of the Clayton Act provides:

A final judgment or decree . . . 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 between the parties thereto: Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . .

In Minnesota Mining the Supreme Court, in ruling for a broad interpretation of Section 5(a), stressed that there are distinctions between Sections 5(a) and 5(b) that suggest that they are not wholly interdependent. The Court stated that since the two sections are not necessarily co-extensive and are governed by other considerations as well as congressional policy objectives, the applicability of Section 5(a) to Federal Trade Commission actions should not control on the Section 5(b) tolling issue.

Seemingly, this language, in the midst of an opinion stressing congressional intent to liberalize the rules and application of prior government suits for prior litigants, could be interpreted to support the line of lower court cases holding that Federal Trade Commission orders can not be given prima facie effect within this section. However, after analyzing congressional history and the precedents, the Court of Appeals for the First Circuit has now held that the same principles which caused the Supreme Court to hold that Federal Trade Commission proceedings toll the statute of limitations would also impel holding that a private litigant may have the evidentiary benefit from that final commission order as within Section 5(b).

41. Id. at 317–18.
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In Farmington Dowel Products Co. v. Forster Mfg. Co., Inc., the court noted that the passage of the Finality Act resolved the prior uncertainty as to whether a final commission order is considered a "judgment or decree." Since it now is so considered, and since the defendant has had his day in court with appropriate procedural safeguards, the court reasoned that there were no obstacles to holding that a prior Federal Trade Commission order to the effect that the defendant had violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act fell within the language of Section 5(b). This decision was followed in a case decided shortly thereafter by a California district court.

While these decisions seem to be leading to a broad, all inclusive interpretation of this section, there remains one area in which the courts have consistently foreclosed use of the prior suit. It is now well established that a judgment entered on a plea of nolo contendere is excluded by proviso from the scope of section 5(a), and most courts have stricken references to the plea appearing in treble damage complaints.

43. 421 F.2d 61 (1st Cir. 1969).
45. In Brunswick-Balke-Collender Co. v. American Bowling and Billiard Corp., 150 F.2d 69 (2d Cir.), cert. denied, 326 U.S. 757 (1945), the Court of Appeals reversed its initial decision that a final F.T.C. order finding a violation of section 3 of the Clayton Act was within section 5(a) and held, per curiam, that it was not included because an F.T.C. Clayton Act order was not operative without an enforcing decree by a Court of Appeals. 150 F.2d at 74.
47. 421 F.2d at 62. In Carpenter v. Central Arkansas Milk Producers Ass'n, Inc., 1966 Trade Cas. ¶ 71,817 (W.D. Ark. 1966), the court held that an F.T.C. order entered into by consent but after testimony had been given, while the Examiner's decision was on appeal, would fall within section 5(a).
48. Purex Corp., Ltd. v. Proctor & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970). Even if the F.T.C. orders are covered by section 5(a), as being within the scope of the "final judgment or decree," there remains, under this section, the question as to what type of F.T.C. proceeding is covered. The language of the section requires that it be brought "under the antitrust laws," as distinguished from the language in section 5(b) referring to proceedings "to prevent, restrain or punish violations of any of the antitrust laws." It was the inclusion of language such as "prevent" which led to the ruling that proceedings under section 5(a) of the Federal Trade Commission Act are within the ambit of the tolling provision, (see pages 60-61 supra), and the absence of such language in section 5(a) might lead to a different ruling. See Y & Y Popcorn Supply Co. v. A.B.C. Vending Corp., 263 F. Supp. 799 (E.D. Pa. 1967). (F.T.C. order held inadmissible because record was not clear whether it was to the effect that defendants violated section 7 of the Clayton Act, 15 U.S.C. § 18 (1950), which would have been given prima facie effect, or section 5 of the F.T.C. Act, 15 U.S.C. § 45 (1964), which, according to the court, does not rise to the level of an "antitrust law" and was not entitled to prima facie effect.)
Some defendants have attempted to broaden the scope of the proviso by arguing that a guilty plea proffered in the prior government criminal action (as distinguished from a judgment entered after a trial) should be considered a "consent judgment" and therefore have no prima facie effect. This position has been consistently rejected by the courts.

Once it is accepted that a guilty plea is to be given prima facie effect within the meaning of Section 5(a), the private plaintiff faces the practical problems of precisely what gets introduced into evidence, and of what help it actually is. The problem, first arising in the electric cases, was handled differently by the various trial judges. In the first case to be tried, Philadelphia Electric Co. v. Westinghouse, et al., the plaintiff, on the second day, offered into evidence the paragraph of the government's indictment which alleged the substantive offense. The court permitted it to be read to the jury and instructed them:

The Court: [Judge Joseph S. Lord, III] Members of the Jury, you have heard read to you a portion of the Indictment to which these defendants pleaded guilty. The effect of that plea of guilty is that the Indictment and plea are prima facie evidence of the

50. In argument for this position, see Seams, First Aid to the Plaintiff, 32 Antitrust L.J. 41, 56 (1966); Note, The Admissibility and Scope of Guilty Pleas in Antitrust Treble Damage Actions, 71 Yale L.J. 684 (1962).


53. Paragraph 10 of the indictment from the previous criminal action, United States v. Westinghouse Elec. Corp., No. 20361 (E.D. Pa., filed May 25, 1960), read: Beginning at least as early as 1956, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants together with other persons to the Grand Jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in power transformers, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended, . . . commonly known as the Sherman Act. See Record, June 1, at 7705, Philadelphia Elec. Corp. v. Westinghouse Elec. Corp., Civil No. 30015 (E.D. Pa., June 2, 1964).
facts contained therein; namely, prima facie evidence that the defendants did conspire to violate the Sherman Act, which is the antitrust act.

Prima facie evidence means that kind of evidence which establishes at first glance, or which establishes of itself a given set of facts, and which remains in the case throughout the trial and would be sufficient in itself to prove those facts without other evidence. It may however, be rebutted by the defendants by evidence which would rebut it if believed by you. It is not proof of any means by which the conspiracy, which has been admitted, was carried out, and it is proof only of the existence of the conspiracy during the period charged in the Indictment; namely from 1956 to 1960; nor is it any proof that the plaintiffs have been damaged by the conspiracy which has been admitted by the plea of guilty.54

In his charge to the jury at the conclusion of the trial, Judge Lord again read paragraph 10 of the Indictment to the jury, charged them that "that 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,"55 and instructed them as to the meaning of "prima facie" evidence in language similar to that which he used at the beginning of the trial.56

Plaintiff's counsel in another of the electrical cases was permitted to read to the jury more extensive portions of the indictment than in Philadelphia Electric but then the court instructed the jury that only two parts of the indictment containing the general allegation of conspiracy and its purposes were relevant.57 In the case tried in Kansas City, on the other hand, the court refused to permit the plaintiffs to refer to either the indictment or the guilty plea because the defendant, in the Pretrial Report, had admitted that a conspiracy had existed, and hence the court ruled that the prior guilty plea was irrelevant.58

The application of the "prima facie" provision becomes more complex when the prior government action has ended in a general verdict of guilty. In Emich Motors Corp. v. General Motors Corp.,59 the Supreme Court was faced with the question of how to use such

54. Id., March 17, at 175-76.
55. Id., June 1, at 7705.
a general guilty verdict for the benefit of the subsequent private damage plaintiff. Five possibilities were presented. The private plaintiff urged that the entire record in the criminal action should be admissible in the private case. The trial judge had held that only the indictment, verdict, and judgment should go to the jury. The Court of Appeals had ruled the judgment was prima facie evidence only of conspiracy. The defendant argued that since the indictment charged a single conspiracy to perform some 26 different acts, and proof of only one of them would have supported a guilty verdict, it is impossible to determine on which it was based and hence the judgment has no relevance in the private action.60 The position of the United States, as amicus curiae, was that the judgment was prima facie evidence both of the conspiracy and of the performance of such acts in accomplishing it as the criminal jury necessarily found to have occurred as determined by the trial judge in the subsequent damage action through examination of the entire criminal trial record. This was the position accepted by the Supreme Court which directed the trial judge (1) to examine the record of the prior criminal case to determine the issues actually decided by the judgment, (2) to reconstruct it to the jury to the extent he deems necessary to acquaint them fully with the issues and (3) to explain the scope and effect of the prior judgment on the case at trial.61

The decree in the prior government case does not necessarily limit the scope of the later use of the judgment if an examination of the record in the government action shows in actuality more was determined than set forth there. In Hanover Shoe, Inc. v. United Shoe Machinery Corp.,62 the defendant, who had previously been found to have monopolized the shoe machinery market in violation of Section 2 of the Sherman Act63 by reason of certain restrictive leasing practices, argued that the decree entered in the government action did not specifically find that the lease-only policy it had practiced was an instrument of the monopolization. The Supreme Court, noting that the decree in fact condemned only certain clauses in the standard lease, and did not expressly characterize other aspects of the leasing system as illegal monopolization, nevertheless held the private plaintiff

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60. Id. at 567.
61. Id. at 572. This was followed by the District Court in Michigan v. Morton Salt, 259 F. Supp. 35 (D. Minn. 1966), aff'd sub nom. Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir. 1967), where the court reviewed in detail the prior criminal record in order to ascertain what was adjudicated.
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was not so limited. "If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the Government, the private plaintiff can treat the outcome of the Government's case as prima facie evidence on that issue." In the prima facie cases as in the statute of limitations cases, the Supreme Court's lead in broad statutory construction to aid the treble damage plaintiff has been followed by more expansive interpretation of the statutory language by the lower courts.

Despite language in cases which indicates that the purpose of Section 5(a) is to give private litigants a formidable weapon, its actual accomplishments may be somewhat less potent. In no way does it measurably decrease the overwhelming task of discovery — the long, tortuous process in which often scores of lawyers are engaged for years in ferreting out facts in what is now termed "waves of discovery." Nor has the experience shown that it either decreases the length of time from inception to ultimate disposition of an antitrust case or the actual length of trial.

It is highly unlikely that a lawyer in an antitrust case would limit the presentation of his case to the jury to damages, relying for proof of liability on the relevant portions of the indictment and the guilty plea, or on instructions as to the findings in the prior government case. In the first place, the government in its enforcement of the antitrust laws need not press for an indictment which necessarily covers the full scope and depth of an antitrust conspiracy. Intensive discovery in several of the private consolidated cases has uncovered conspiratorial meetings before the time alleged in the indictment and aspects of conspiratorial conduct not covered by the indictment. A lawyer seeking treble damages for a client cannot afford to rely on the guilty plea which admits only some portion of the conspiracy during the four year statutory

64. 392 U.S. at 485.

65. In Gottesman v. General Motors Corp., 414 F.2d 956 (2d Cir. 1969), the court reversed a ruling that the plaintiff could not introduce the judgment in United States v. E.I. duPont DeNemours & Co., 353 U.S. 586 (1957), for anything other than historical purposes and background material because it covered a time period different than the one in this damage plaintiff's action. The Court of Appeals, although recognizing that no prior case had allowed into evidence a judgment in a government action which covered violations prior in time to those alleged in the damage action, held that the circumstances in the duPont situation, (identical defendants, same product lines, and same geographical market), made it "both appropriate and desirable to give substantial evidentiary weight to the judgment entered in duPont I." 414 F.2d at 963.


period, or on a prior government record which may prove less than he
needs to sustain his claim.

Secondly, the private plaintiff must still satisfy the jury (or
trial court) that he was injured as a result of the antitrust violation
and must establish the amount of the damages.

Thirdly, as long as the prima facie section gives the defendants
the opportunity to rebut, reliance upon the guilty plea or the prior
findings alone would merely shift the order of proof. Defendants
undoubtedly would offer testimony in an attempt to convince the
trier of fact that the antitrust violation was limited in scope and
geography, short lived, and ineffective. Thus plaintiff would be re-
quired in redirect to place before the trier of fact the full array of
evidence to prove the scope and effect of the antitrust violation.

Finally, plaintiffs' lawyers generally believe that the jury in
dealing with the assessment of damages, complex and difficult in any
antitrust case, would be hard put to understand the impact of the
conduct on the price of the product, without the background material
about the conspiracy to put the matter into context. Trial lawyers
undoubtedly believe that the repetition of evidence of conspiratorial
meeting after meeting, telephone contact after telephone contact, may
bear directly on the ultimate damage awarded, whatever its legal con-
nection thereto may be. Therefore it is in the psychological effect
on the jury of knowledge that these defendants had previously been
indicted and admitted guilt or found guilty, rather than on any legal
consequence of "prima facie effect," that the treble damage plaintiff
has his most potent use of the prior judgment.

IV. EVIDENTIARY ASSISTANCE

A. Grand Jury Documents

The 1955 Congressional Report68 which accompanied the amend-
ment to the Clayton Act stated: "Since the enactment of the Clayton
Act, the bulk of private antitrust litigation has followed successful
Government action, so that the judgment and decrees in the Federal
proceedings could be used to establish a case. Amassing evidence for
antitrust cases would otherwise be a prohibitively expensive task
for most plaintiffs."69 The Supreme Court has commented that
"government proceedings are recognized as a major source of evidence
for private parties."70


69. Id.

311, 319 (1965).
Presumably, if the Government has decided to indict or sue civilly on the grounds of antitrust violations, there must have come to the Government's attention persuasive information to support this claim. Thus, by subpoenaing of documents either before or in conjunction with grand jury testimony, the Government has wide range to unearth all documentary evidence relating to or supporting the charges of the indictment or the complaint. While many conspiracies are not documented with Boswellian minutiae, obviously this advance ground-breaking at least identifies the relevant categories of documents and can be of considerable assistance to plaintiffs, who now generally seek production of such documents en masse.

Following the court's refusal to permit prospective plaintiffs to inspect and copy grand jury subpoenas served in the electrical cases, the plaintiffs renewed their efforts to obtain such information after initiation of their civil suits. In the consolidated discovery, the courts entered pretrial orders requiring each defendant to place in a central depository copies and lists of the various corporate documents that had been submitted to the grand juries investigating the industry. In subsequent antitrust litigation it has not been uncommon for defendants to voluntarily produce for plaintiffs' examination copies of their grand jury documents.

However, in the "library book" antitrust cases, the defendants contested production of these documents. The several grand juries which had subpoenaed documents did not return indictments, but the government instituted eighteen civil actions for injunctive relief which were promptly settled by consent decrees. Treble damage plaintiffs sought to intervene in the government's civil action to obtain copies of the documents, and although intervention was denied, the


75. The order of the court denying intervention (unreported) was affirmed in City of New York v. United States, 390 U.S. 715 (1968).
judge directed that the documents remain in the government’s possession. Thereafter, following a series of procedural maneuvers, the court to whom the cases had been transferred and then consolidated entered an order requiring defendants to produce the grand jury documents.78 Defendants sought and were denied a writ of mandamus in the Seventh Circuit to vacate this paragraph of the pretrial order.77 Defendants then failed in their attempt to get the United States Supreme Court to take certiorari.78

Basically, defendants argued that good cause under rule 3479 for production of documents is not shown in and of itself by the fact that they have previously been subpoenaed by the government. Since defendants were unsuccessful, plaintiffs now argue that such documents are automatically deemed subject to production of documents under rule 34.

In most instances, examination of such documents will not in and of itself solve the problem of establishing liability. Generally, they include thousands of pieces of paper often covering transactions between defendant and the U.S. Government. Many of the other documents need explanation or identification. Nevertheless, the grand jury documents provide plaintiffs with a shortcut to what may be the heart of the documentary evidence. Moreover, their prior examination and indexing by the Government makes their destruction before viewing by the treble damage plaintiff, whether advertent or inadvertent, highly unlikely.

B. Grand Jury Testimony

Testimony given to the grand jury can be much more rewarding. If the government lawyers have prepared carefully (and they generally do) for the examination of the witness, the grand jury transcript will encapsulate a summary of all the incriminating evidence of which the witness is aware. A list of the names of the witnesses who appear before the grand jury is in and of itself a useful starting point for the treble damage plaintiff, and an interrogatory requesting identification of such witnesses, which many courts have permitted, has now been approved in the Manual for Complex and Multidistrict Litigation.80

80. Manual, supra note 67, (pt. 2) at Appendix 1.5, Sample Pretrial Order No. 3.
The testimony itself is obviously one of the principal goals. Attempts by various defendants under the banner of grand jury secrecy to make the grand jury an unassailable fortress where its treasures of information are forever unavailable in subsequent litigation has finally been rejected in the context of treble damage litigation. The Supreme Court has acknowledged that disclosure of grand jury testimony is a matter of judicial discretion, although the burden is on the party seeking disclosure to show a “particularized need” for the testimony.\textsuperscript{81}

The series of electrical cases initiated a procedure for the use of grand jury testimony by treble damage plaintiffs in subsequent civil suits. Shortly after the first witness testified in the National Deposition Program (which was conducted under the aegis of a deposition judge), plaintiff moved for the production of the witness’ testimony before the grand jury.\textsuperscript{82} The defendants’ argument that the court had no power to order disclosure of such testimony to nongovernment litigants was rejected by reference to the specific language of rule 6(e) of the Federal Rules of Criminal Procedure which permits disclosure “only when so directed by the court preliminary to or in connection with a judicial proceeding.”\textsuperscript{88} Although Chief Judge Thomas J. Clary affirmed the court’s power to order production, he held it was not warranted in the case of this particular witness. Nevertheless, since Judge Clary was intimately familiar with all aspects of the staggering civil litigation which had been instituted in these cases, he recognized that similar motions would be made in the course of these long and complex proceedings. Accordingly, he set forth the procedure to be followed with respect to grand jury testimony. He stated that disclosure should never be made for discovery purposes only, and should be made only when plaintiff had made a showing of particularly compelling need. Determination of such need required an \textit{in camera} examination of the transcript by the court, \textit{i.e.}, the judge presiding over the particular deposition. If disclosure was warranted, only so much of the transcript should be disclosed as is needed to achieve this result.


\textsuperscript{82} The deposition was held in Philadelphia which had also been the site of the criminal indictments. Thus, it happened that the judge presiding at the deposition, the Honorable Thomas J. Clary, then Chief Judge of the United States District Court for the Eastern District of Pennsylvania, was also the judicial custodian of the grand jury minutes from the preceding criminal action.

Finally Judge Clary agreed that he would send the transcript to the deposition judge upon request.\textsuperscript{84}

Thereafter, depending upon the circumstances, various of the deposition judges agreed to permit disclosure of portions of the grand jury testimony during the depositions of witnesses.\textsuperscript{85} Such disclosure was permitted by the judge on finding that the grand jury testimony contained material discrepancies or significant facts which the witness concealed or failed to remember at his deposition. When neither of these circumstances was present, the application for examination of the grand jury testimony was denied.\textsuperscript{86}

The actual use of a transcript in the subsequent civil litigation varies with the discretion of the judge. Some judges have permitted grand jury testimony to be read to the witness to see if it assists him in refreshing his recollection.\textsuperscript{87} Some judges have required that the testimony be shown first to the witness who was asked if it refreshed his recollection.\textsuperscript{88} Of course, grand jury testimony if disclosed may be used for impeachment of the witness and read to the witness and the jury as part of the question.

The witness' awareness that his prior grand jury testimony can be disclosed often has a salutary effect on his memory in and of itself. In fact, Judge Clary commented about one of the witnesses: "It is quite apparent after the Court had held the written record of his testimony not privileged, that his memory became sharper and keener than it had been up to that time."\textsuperscript{89}

\textbf{C. Other Evidentiary Material}

Related to the discovery of grand jury testimony is the question of whether a private plaintiff can see so-called "debriefing" memoranda, summaries of the grand jury testimony of a company's em-

\textsuperscript{84} 210 F. Supp. at 490–91. \textit{See Note, supra} note 7.


\textsuperscript{86} \textit{See}, e.g., Atlantic City Elec. Co. v. General Elec. Co., 244 F. Supp. 707 (S.D.N.Y. 1965). Many of the unreported cases and orders relevant to footnote 85 are referred to in the \textit{Manual, supra} note 67, (pt. 2) at 222–27.

\textsuperscript{87} \textit{See United States v. Socony-Vacuum Oil Co.}, 310 U.S. 150, 232 (1940).

\textsuperscript{88} \textit{See Note, supra} note 7, at 1162.

ployees which are generally prepared by the company's lawyers from information supplied by the company's employees soon after they testify before the grand jury. The collection of such statements appears to be a common procedure followed by most companies whose employees are subpoenaed to testify.

The fact that such statements are not protected by any grand jury secrecy does not automatically make them available for plaintiff's discovery. Defendants have argued that they are privileged, either because they are work-product, or because they come within the scope of the attorney-client privilege. In the electrical cases, statements made by most employees were held not protected by the attorney-client privilege. Since the corporation was the protected client, only those employees who were in a position to control or take a substantial part in a decision which the corporation may make upon the advice of the attorney were considered to be protected by the corporation's attorney-client privilege.

However, whether production of the statement would be ordered depended upon whether the plaintiff showed "good cause" or special circumstances sufficient to justify "invading the privacy of a lawyer in preparing his case for trial." Therefore the deposition judge read the statement and compared it with the witness' testimony to determine if discrepancies existed.

The availability of this source of evidence may now be foreclosed by the decision of the Seventh Circuit in Harper & Row Publishers, Inc. v. Decker which is presently pending in the Supreme Court. This court rejected the "control group" test and concluded that an employee of a corporation is sufficiently identified with the corporation if he communicates with the company's lawyer at the direction of its superior, and if the subject matter of the communication or attorney's advice is the performance of the employee's duties of employment.

A rich source of evidence unveiled in the prior government suit

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is the bill of particulars requested by and furnished to the defendants in the prior government criminal proceeding.

The utility of disclosure is obvious, for while the documents themselves are not evidence and would not be directly involved in the trial, they would clearly serve to pinpoint the trial issues, and, more importantly, would give form and illumination to the balance of the discovery process.95

Other rich sources of material present in the government's files can be made available to private plaintiffs by a sympathetic court. In United States v. American Honda Motor Co., Inc.,96 after the indictment was dismissed against Honda on the ground of double jeopardy because of a prior nolo contendere plea in a related case, Honda moved the court to "seal" the record. Judge Edwin D. Robson, one of the judges most familiar with the problems of private plaintiffs since he served on the Judicial Coordinating Committee in the electrical cases and now serves on the Judicial Panel on Multidistrict Litigation, denied the motion. The file in the criminal proceeding contained affidavits with evidentiary material filed by the defendant's officers or employees. Apparently some of the material in the file contained selected excerpts or summaries of grand jury proceedings. The court, noting that the substantive material would have to be divulged anyway upon depositions in the civil suit, said: "[T]here can therefore be no detriment to movant, but only a saving of discovery time for plaintiffs in the civil suit in not having to seek to elicit the same facts again."97

Similarly, the Court of Appeals for the Ninth Circuit has indicated that protective orders entered in government actions which shield documents and information from private plaintiffs are not to be favored:98

But neither in the express nor implied terms of the statutes or rules is there any indication that a consenting defendant could gain the additional benefit of holding under seal, or stricture of nondisclosure, for an indefinite time, information which would otherwise be available to the public or at least to other litigants who had need of it.99

More recently, private treble damage plaintiffs in an antitrust case pending in Chicago subpoenaed the chief of the Antitrust Division in Philadelphia to appear at a deposition with sentencing memoranda sub-

96. 1967 Trade Cas. ¶ 72,291 (N.D. Ill. 1967).
97. Id. at ¶ 72,291, p. 84725.
99. Id. at 265.
mitted by the Antitrust Division to the Probation Department and to the court in connection with the sentencing of the defendants in a prior criminal action to which they had pleaded nolo contendere. The court held that although that portion of the memoranda which contained information elicited through the grand jury proceedings was protected by the grand jury secrecy, the Government would be required to indicate what portions of the memoranda were not so grounded so that the court could determine whether disclosure should be ordered.100

The Justice Department recently indicated in the air pollution civil cases that it would not oppose either the impounding of grand jury transcripts, records and documents, or the discovery of third party documents which it obtained, provided their owners had notice and the opportunity to be heard as to the disclosure.101 Thus, the extent of the evidentiary assistance which the private plaintiff secures from the prior government suit varies from case to case, depending on the attitude of the court or the Department of Justice in that particular situation, rather than on a consistent and predictable policy or procedure as embodied in a statute or Department Rule.

V. Analysis

To an increasing extent, the courts are taking cognizance of congressional opinion that private antitrust litigation is "an important component of the public interest in 'vigilant enforcement of the antitrust law'"102 and that private litigants deserve assistance from government suits in the prosecution of their claims for violation of the antitrust laws.103 However, after more than a half century of treble damage plaintiffs serving as "private attorneys general"104 it is time to inquire 1) whether government suits have provided as much aid to these treble damage plaintiffs as originally expected; 2) whether the government, within the framework of existing statutes, could give more assistance, and; 3) whether a new statutory scheme would be in the interest of justice, not only in enforcing the antitrust laws, but in expediting judicial administration over private suits.

100. ABC Great States, Inc. v. Globe Ticket Co., 309 F. Supp. 181 (E.D. Pa. 1970). After an in camera review by the court, disclosure of the memorandum was denied because virtually all the facts were derived from testimony presented to the grand jury.
In the summer of 1968, when the attention of the country through the turmoil of the political conventions was focused on national problems and priorities, Judge John P. Fullam, of the United States District Court for the Eastern District of Pennsylvania, startled a meeting at an American Bar Association subcommittee on Private Antitrust Litigation, by commenting:

But I would like to say it is going to be absolutely necessary for private lawyers and lawyers in the Justice Department to work out a more efficient method of developing the facts in these cases. It seems to me that in this day and age we in this country simply cannot afford to waste the efforts of the legal talent which we have available. We have problems of society to solve, and lawyers are needed to solve them. No doubt, antitrust is an important problem area. But I wonder if anyone can rationally justify the concept of high priced, highly skilled legal talent conducting file searches, for example, in preparation for a treble-damage claim, going through precisely the same files which the Justice Department has gone through getting the same information all over again. I wonder if we can justify the amount of legal talent that is expended in attempting to litigate discovery issues in antitrust case. It seems to me that we are going to have to figure out some way of doing things once, and once and for all, letting that information become available to all who need it.106

The concentration of time and effort which private treble-damage actions require under the present system is well known and well documented. On January 20, 1970, 34 lawyers representing the treble-damage plaintiffs and the defendants in over 200 plumbing fixture antitrust cases, which were consolidated under section 1407 of the Judicial Code,107 appeared in a Washington, D.C. courtroom to attend the beginning of the deposition of one witness which continued for 23 days.107 This deposition was scheduled to be followed by the depositions of at least 28 more witnesses called by the plaintiffs. This magnitude of discovery was requested by plaintiffs and ordered by the court even though the criminal action upon which the damage cases were based had resulted in a jury verdict of guilty as to three of the corporate defendants (the other five having pleaded nolo contendere).108 The case before the jury took some 16 weeks.

In the gasoline cases, where discovery is now beginning upon termination of the government criminal suit after entry of nolo contendere pleas,109 more than 50 lawyers attended the first pre-trial hearings in Newark for discussion of the mechanics and schedules for proceeding.110

Nor are these isolated instances. In the electrical cases, despite pleas of guilty by all defendants in the criminal cases dealing with turbine generators and power transformers, there were at least two lengthy trials by damage plaintiffs in each of these product lines before the remainder of the damage actions were settled.111 Several cases were settled only after a jury had been impanelled and years of discovery and pretrial procedure had been completed. Had settlement negotiations failed, the courts would have been faced with many more trials, relictivating the question of defendants’ liability for an unlimited number of cases based on the same operative facts, thus further clogging already overcrowded dockets in overburdened district courts.

Hundreds of lawyers for hundreds of private plaintiffs must now spend an incalculable amount of time rediscovering information which is already in the possession of the Justice Department principally because there is no way under the present statutory scheme in which private plaintiffs can secure the full benefits of the prior government action. Attempts by plaintiffs, sometimes assisted and sometimes opposed by the Government, to be heard in or protected by the Government’s civil or criminal actions have failed. Moreover, there is considerable question as to whether such intervention would or could under the present statute ease the real burden on plaintiffs or the courts.

In the early 1960’s the Government agreed to consent decrees in suits alleging antitrust violations in the asphalt industries which specifically permitted subsequent civil plaintiffs to use the consent judgment decree as prima facie evidence in treble damage actions.112 Although

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That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the prima facie effect of this Final Judgment, in the suits specified below, and for no other purpose. Each defendant is enjoined and restrained from denying that this Final Judgment has such prima facie effect
from 70% to 75% of all civil antitrust cases brought by the Government end in consent judgments, 113 no other instance of such manifest concern for the private plaintiffs appears in any other published consent judgment. 114 Although one court held that the Government has no power to insist on the inclusion of an "asphalt clause", 115 the validity of that judgment is questionable in the light of a subsequent Supreme Court case vacating a consent decree which had been entered over the Government's objection. 116 In any event the Government has never pursued the issue to a consideration by the Supreme Court.

The extent to which the interests of private plaintiffs are considered by the Government in negotiating consent decrees is difficult to assess. Since 1961, the Justice Department has required that all proposed consent decrees be "filed in Court or otherwise made available upon request to interested persons" 117 at least 30 days before approval. In all consent decrees negotiated since that time, the Department has also reserved the right to withdraw or withhold its consent to the decree. While the Department has maintained that its action in this respect protects the interests of the private plaintiff, it has consistently and vigorously opposed the attempt by such plaintiffs to intervene in the government civil action in order to be heard on the question of relief.

113. Address by Donald F. Turner, then Assistant Attorney General, Antitrust Division, before the Association of the Bar of the City of New York, December 19, 1967. See 336 ANTI-TRUST & TRADE REG. REP. at x-1 (1967).

114. Donald F. Turner when he was Assistant Attorney General, Antitrust Division, stated that in negotiating consent decrees the Government will generally insist on the full range that litigation might conceivably secure, and will depart from that standard only when it has doubts as to the legal theory on which the case was brought, or when there would be unusual difficulties in establishing the appropriate facts at trial. He did not mention the effect on damage plaintiffs as one of the considerations. Id. at x-1, 2. On the other hand, shortly thereafter, one of the chiefs of a regional office of the antitrust division did indicate that the presence of damage plaintiffs was one element to be considered by the government in deciding whether to accept or reject a consent decree. Sarbaugh, The Government's View, 37 ANTI-TRUST L.J. 857, 860 (1968).

115. United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962). The provision originally proposed by the Government would have joined the defendants from denying any suit brought by a state or political subdivision on the ground that the defendant did not engage in a combination and conspiracy in violation of the Sherman Act. Thereafter, the government modified its proposal to require only an "asphalt clause" provision giving prima facie effect to the admission.


117. 28 C.F.R. § 50.1(b).
Generally, the courts have denied private parties the right to intervene in proceedings relating to a consent decree.118

Private damage plaintiffs, relying on the decision in Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,119 which held that the State of California and various private parties should have been permitted to intervene as of right in hearings on the form of divestiture which should be ordered as to a merger which violated antitrust laws, have renewed their efforts to intervene in hearings on the advisability of entering the consent decree negotiated between the defendants and the Government. However, they have continuously been denied the right to intervene.120 The Government and some commentators have interpreted the Cascade decision as limited to its particular facts,121 and have argued that intervention should not be allowed solely to protect private damage claims.

On the other hand, the Government, in its criminal antitrust actions, has expressly referred to the interests of private plaintiffs in its objections to the acceptance of nolo contendere pleas. Richard McLaren, Assistant Attorney General, Chief Antitrust Division, has stated, subject to certain qualifications, that: "The Division will ordinarily oppose pleas of nolo contendere in cases where a guilty plea or a conviction after trial will be of meaningful aid to private parties who may have suffered substantial damages as a result of the offense".122 Nevertheless, the Government's opposition to nolo contendere pleas is ineffective in 96% of the cases.123

Defendants freely admit that their prime motive and advantage in offering such pleas is that the plea is not available as prima facie evi-

119. 386 U.S. 129 (1967).
123. Fullam, supra note 105, at 867.
dence in private treble damage actions.\textsuperscript{124} Most courts, in accepting the nolo contendere plea, have rejected the consideration of assistance to the treble damage plaintiff.\textsuperscript{125} The minority opinion was expressed by Judge Weinfield, who rejected the proffered nolo pleas stating:

If a defendant in fact has violated the antitrust laws it would not be in the public interest that he have the aid of the Court to add to the admittedly heavy burden of the victim seeking redress, thereby decreasing the prospect of private treble damage recovery with its punitive value and possible deterrent effect. Instead of the heavy burden being lightened it would be rendered more difficult.\textsuperscript{126}

Several recent attempts in Congress to enact bills which would give nolo contendere pleas the same prima facie effect as guilty pleas under Section 5a\textsuperscript{127} have failed, despite the support of the Department of Justice.\textsuperscript{128} Although plaintiffs' antitrust lawyers have favored such a change\textsuperscript{129} and defendants' antitrust lawyers have, just as obviously, opposed it,\textsuperscript{130} experience has shown that while such a bill might assist plaintiffs in winning a verdict and recovering damages, it would not make any change in the manner in which antitrust cases are presently handled. Discovery would not be measurably shortened. Even with the prima facie rule, plaintiff's lawyers will not rely on the guilty plea alone.\textsuperscript{131} It has been suggested that the advantage of a nolo plea over

\textsuperscript{124} United States v. B.F. Goodrich Co., 1957 Trade Cas. ¶ 68,713 (D. Colo. 1957) at 72,873–75; See also United States v. Burlington Indus., Inc., 1964 Trade Cas. ¶ 71,319 (S.D.N.Y. 1964). Statement of Bruce Bromley at the Senate Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary, 89th Cong., 2d Sess. at 41, 43 (1966) [hereinafter cited as Hearings].

\textsuperscript{125} Judge Estes related the fundamental reason for the court's disposition: "This court does not believe that Congress intended that pleas of nolo contendere be refused in criminal antitrust cases for the purpose of aiding private litigants under Section 5 of the Clayton Act." United States v. Safeway Stores, Inc., 20 F.R.D. 451, 457 (N.D. Tex. 1957). Some courts have accepted nolo contendere pleas in criminal cases pointing to the existence of companion civil suits in which the Government could protect the private plaintiff in determining whether to accept a consent decree. United States v. Burlington Indus., Inc., 1964 Trade Cas. ¶ 71,319 (S.D.N.Y. 1964); United States v. Cigarette Merchandisers Ass'n, Inc., 136 F. Supp. 212, 213 (S.D.N.Y. 1955). Other judges have commented that the Government policy to oppose all attempts to enter a plea of nolo contendere lead the courts to question whether the opposition is seriously offered. United States v. Rubber Mfrs. Ass'n, Inc., 1959 Trade Cas. ¶ 69,435 (S.D.N.Y. 1959). See also Fullam, supra note 105, at 867.


\textsuperscript{127} The current bill is S. 2157. Previously, the Senate Subcommittee, supra note 124, did not pass out of committee S. 2512, which would have made other changes in addition to giving nolo contendere pleas prima facie effect. See Hearings, supra note 124, at 3.

\textsuperscript{128} Testimony of Donald F. Turner, Hearings, supra note 124, at 86.

\textsuperscript{129} See testimony of Harold E. Kohn, Hearings, supra note 124, at 22; testimony of Joseph L. Alioto, Hearings, supra note 124, at 45; testimony of Thomas C. McConnell, Hearings, supra note 124, at 7.

\textsuperscript{130} See testimony of Bruce Bromley, Hearings, supra note 124, at 31.

\textsuperscript{131} See testimony of Thomas C. McConnell, Hearings, supra note 124, at 9, 11, 17.
a guilty plea can be overrated in so far as the consequences in subsequent treble damage actions.132

One effective way to avoid the proliferation of cases in which the issue of liability must be redetermined on the basis of the same facts would be to provide that a judgment of guilty, in a prior criminal action whether by guilty plea or after trial, collaterally estops defendants from denying the issue of liability in subsequent damage actions, provided they are based on the same cause of action alleged in the criminal suit.

Application of collateral estoppel principles in instances of civil proceedings following criminal actions is not novel in the law. If the Government has successfully proved an antitrust conspiracy in a criminal action, the facts are conclusively determined against the defendants in a civil injunction action brought by the Government.133

The use and concept of collateral estoppel was, until recently, limited to suits brought between the same parties. However, reexamination of the basic concepts indicates that there is nothing inherently unfair or violative of due process in holding that a party may not relitigate against a different party those issues which he has already litigated and lost in the first suit.

In many cases the courts have recognized that the old and rigid principle of mutuality which would permit application of the collateral estoppel principle only to the same parties or their privies was more a matter of technical symmetry than one of essential fairness.134 More than a hundred years ago, Jeremy Bentham characterized the need for mutuality of estoppel as "a maxim which one would suppose to have


133. Teamsters Local 167 v. United States, 291 U.S. 293 (1934). Such holdings have been common in tax cases. See, e.g., Tomlinson v. Lefkowitz, 334 F.2d 262 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965); Moore v. United States, 360 F.2d 333 (4th Cir. 1965); Amos v. Commissioner, 360 F.2d 358 (4th Cir. 1965).

134. See, e.g., Provident Tradesmen's Bank & Trust Co. v. Lumbermen's Mut. Cas. Co., 411 F.2d 88 (3d Cir. 1969) (insurance company against which jury determined issue of coverage under omnibus clause held bound against retrying that issue as to other parties in the same accident); Graves v. Associated Transp., Inc., 344 F.2d 894 (4th Cir. 1965) (plaintiff was estopped to allege negligence of employee against employer, when employee had previously sued successfully in first suit); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964) (construction of a union contract adverse to position of employer held applicable to other group of employees not named in original suit); United States v. Webber, 396 F.2d 381 (3d Cir. 1968) (defendant subcontractor was collaterally estopped from defending government suit on basis of contingent fee agreement which had previously been held illegal); Bruszewski v. United States, 181 F.2d 419 (3d Cir.), cert. denied, 340 U.S. 865 (1950) (longshoreman who lost action for negligence and unseaworthiness against steamship company which served vessel was estopped from bringing similar claim against United States); United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. and D. Nev. 1962), aff'd on the issue of collateral estoppel, sub nom. United Air Lines, Inc. v. Weiner, 335 F.2d 379, 404 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964) (verdict on liability against United Air Lines in California actions held to estop defendant from defending suits in other districts brought by plaintiffs in same position as California plaintiffs).
found its way from the gaming-table to the bench”. 135 More recently, Judge Traynor, in the Bernhard case,136 rejected the doctrine of mutuality of estoppel and held that only three questions were pertinent to the validity of the application of collateral estoppel: 1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2) Was there a final judgment on the merits? and 3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?137

The dichotomy which was subsequently suggested — between use of the collateral estoppel principle against one who has the initiative in the first action as against one who did not138 — has not been accepted by most of the courts who have instead concentrated on the real issue of whether the party had an ample opportunity to litigate the issue fully in the first proceeding.139

There appears to be no reason why this principle should not be applied to antitrust cases. Certainly a defendant in a criminal action under the antitrust laws has sufficient incentive to litigate fully his guilt or innocence, and holding that the record of the criminal conviction is conclusive evidence of the offense charged in subsequent civil litigation merely follows similar rulings in other types of offenses.140

Although the principle of collateral estoppel has been extended in most areas of the law by judicial opinion, it is unlikely that it would be applied in antitrust laws without new legislation. The existence of section 5(a) of the Clayton Act makes it questionable whether Congress in fact intended that collateral estoppel apply. Thus, in United States v. Grinnell,141 the Government, having been successful in an injunction action against defendants for violation of the antitrust laws, attempted to use the prior decision to collaterally estop defendants from denying liability in a damage case. Although the parties were the same, and thus, under well accepted principles, collateral estoppel should have applied, the court refused to allow application of that doctrine. It held that Congress, by the enactment of section 5(a) making the prior

135. J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, in 7 WORKS OF JEREMY BENTHAM 171 (Bowring ed. 1843).
judgment merely prima facie evidence, must have intended this more limited use. If a judgment would have conclusive effect under the doctrine of collateral estoppel, any other reading would make the entire prima facie provision "mere surplus verbiage."

Presumably, the same reasoning would apply in damage actions by private third party plaintiffs. It is thus ironic that the very section originally intended to assist private plaintiffs in their use of government actions may operate instead to prevent application of new judicial concepts for their benefit.

If an amendment to the antitrust laws were enacted which would estop defendants from contesting liability if they had pleaded or been adjudged guilty, an obvious complementary action would be to eliminate the defendant's use of the nolo contendere plea in such cases, either by precluding its use or by providing that it would be equated with a plea of guilty for the purposes of statutory collateral estoppel. The validity of such a plea has already been questioned and its use serves only to dilute the deterrent effect of treble damage liability on prospective defendants.

One effect of such amendment would undoubtedly be an increase in the number of criminal trials by the Antitrust Division. However, some determination as to priorities should be made. Under present practice, government lawyers work for years in preparation for the trial of a criminal action, only to have the defendant submit the nolo contendere pleas on the eve of trial, after which private plaintiffs must begin anew the years of work and discovery.

The Justice Department, supporting the amendment which would give prima facie effect to nolo contendere pleas, recognized that one result would be that the Department would try more cases and need

142. Id.

143. In Purex Corp., Ltd. v. The Procter & Gamble Co., 308 F. Supp. 584, 589-90 (C.D. Cal. 1970), the court, while holding an FTC order had prima facie effect, refused to accord it collateral estoppel effect saying:

But application here of the principle of collateral estoppel, as urged by the plaintiff, would mean that the Commission order would be conclusive as to all matters to which it applied. The Commission order cannot be both prima facie and conclusive; and, it having been determined that the statute applies, the statute must govern. Accordingly, the principle of collateral estoppel is adjudged not to be applicable to this case, and the defendants are not estopped to deny anything expressed or implied in the Commission order.

144. Nolo contendere is not a constitutional plea but is referred to in rule 11 of the Fed. R. Crim. P. It is recognized in a number of states, and appears to have been given its major modern impetus in antitrust cases. See Plea of Nolo Contendere in American Law (prepared by the Library of Congress), and Report on the Plea of Nolo Contendere in English Law, Hearings, supra note 124, at 111.

145. Fullam, supra note 105, at 867.

additional staff, but believed the additional expenditures would be justi-
tified.147 The effect of the amendment suggested here would be that
those trials, if adverse to the defendants, would at least prevent the
duplicative effort now underway.

Another result might be that the Government would be encouraged
to limit the number of criminal actions. In so doing it could select
those cases where the defendants were repeated violators, or the harm
cau sed to the economy or to competition was substantial, or the damages
were so widespread, particularly to local governmental units, that it
would be appropriate to marshall the resources of the Justice Depart-
ment in proving liability, with the attendant collateral estoppel effect.

In those cases where the Department believed the proof was not as
strong, or the legal questions somewhat new or questionable, or other
mitigating circumstances existed, the Department could bring civil
actions, which would not be awarded the statutory collateral estoppel
effect. It could then negotiate consent decrees, insisting, if appropriate,
upon some version of an “asphalt clause.”

The extent to which defendants would actually insist on trials if
there were a collateral estoppel amendment is of course difficult to
assess. It has been suggested by counsel for defendants that there are
many reasons why corporate defendants seek to avoid a criminal trial.
Adverse harm to the corporate public image, the expenditure of time
and peace of mind of its executives and employees, and the divulging,
on the public record, of secret corporate facts, policies and plans148 all
militate against the defendant’s going to trial.

Nor would a collateral estoppel rule automatically give private
plaintiffs high verdicts, since in each instance, the plaintiff would still
be required to prove that it was damaged by the violation, and establish
the extent of the damage.149 Corporate defendants might prefer to
plead guilty and accept collateral estoppel as to liability, rather than
placing on the record in the criminal trials extensive facts which would
assist plaintiffs in the damage aspects of their cases.

VI. Conclusion

It can be anticipated that the suggestion of new legislation which
would give collateral estoppel effect to successful government criminal

147. Testimony of Donald F. Turner, Hearings, supra note 124, at 85.
148. Testimony of Bruce Bromley, Hearings, supra note 124, at 31, 42.
149. Injury and damage alone were the issues tried in E.V. Prentice Mach. Co. v.
    Associated Plywood Mills, Inc., 252 F.2d 473 (9th Cir.), cert. denied, 356 U.S. 951
    (1958). The case resulted in a verdict for defendants on the ground that plaintiffs
did not sustain damages.
actions under the antitrust laws and eliminate the advantage of nolo contendere pleas will be vigorously opposed by many who believe that the antitrust laws are already too heavily weighted in favor of the Government and private plaintiffs. However, the fact remains that despite years of enforcement of these laws, widespread violations continue to be uncovered.

Thus, in the last analysis the question is really whether the antitrust laws, and private enforcement thereof, serve a significant function in our society. One court has commented:

We pass to the fundamental issue which is at the heart of the controversy. The antitrust statutes, as has so often been emphasized, are aimed at assuring that our competitive enterprise system shall operate freely and competitively. They seek to rid our economy of monopolistic and unreasonable restraints. Upon their vigorous and constant enforcement depends the economic, political and social well-being of our nation. The concept that antitrust violations really are "minor" and "technical" infractions, involve no wrongdoing, and merely constitute "white collar" offenses, has no place in the administration of justice. Ever since the passage in 1890 of the Sherman Anti-Trust Act, referred to by Mr. Chief Justice Hughes as a "charter of freedom", Congress has shown constant and increasing concern over practices which destroy economic competition. 150

If this is the generally accepted view, then some effective means must be found which, while giving defendants due process and the opportunity for a full day in court in the Government's suit, will also eliminate the waste of time and effort of lawyers and courts in repeatedly sifting through the same facts and issues previously conceded by defendants or determined against them by other triers of fact. The legislation suggested above would contribute to accomplishing this result and help avoid the duplication of effort which our society can ill afford.