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RECENT DECISIONS

ANTITRUST—CLAYTON ACT—ADMISSIBILITY OF CRIMINAL CONVICTION ENTERED ON A PLEA OF GUILTY AS PRIMA FACIE EVIDENCE IN CIVIL SUIT FOR TREBLE DAMAGES—In a civil action for treble damages under section 4 of the Clayton Act,¹ the plaintiff sought to allege as prima facie evidence of a Sherman Act violation a criminal conviction entered on a plea of guilty by the defendant in an earlier prosecution by the government. The trial court sustained a motion by the defendant to strike from plaintiff's complaint any reference to the criminal prosecution.² On appeal, *held*, reversed, one judge dissenting. A judgment entered on a plea of guilty is not a consent judgment³ within the meaning of the proviso to section 5(a) of the Clayton Act,⁴ and is therefore admissible as prima facie evidence of defendant's violation of antitrust law in a subsequent civil action for treble damages. *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 32 U.S.L. WEEK 2133 (7th Cir. Sept. 12, 1963).

Implicit in section 5(a) of the Clayton Act are two theories of antitrust law enforcement. On the one hand, the section encourages treble damage actions by injured private parties as an additional deterrent to violation of the antitrust laws. By permitting the plaintiff in a treble damage action to use a prior government judgment as prima facie evidence of the violation sought to be proved, section 5(a) considerably lessens the plaintiff's burden

¹ Section 4 authorizes civil actions for treble damages against defendants whose violations of antitrust law have injured the plaintiffs in their business or property. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

² *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 712 (N.D. Ill. 1962). The criminal violation in the instant case was price fixing, prohibited as a combination in restraint of trade by the Sherman Act. See 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

³ A consent judgment or decree is an agreement between the parties, approved by the court, determining the rights of the parties upon the facts of the case. See Donovan & McAllister, *Consent Decrees in the Enforcement of Federal Anti-trust Laws*, 46 HARV. L. REV. 885, 912 (1933). It cannot be forced upon the defendant without his consent. *United States v. Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio 1940). However, a consent judgment may be approved by a court without the consent of the government, where the government seeks to include in the judgment a waiver of the rule that consent judgments are not prima facie evidence in private suits for treble damages. See *United States v. Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis. 1962); *United States v. Ward Baking Co.*, 5 TRADE REG. REP. (1963 Trade Cas.) ¶ 70609 (M.D. Fla. Dec. 10, 1962); *Dabney, Consent Decrees Without Consent*, 63 COLUM. L. REV. 1053 (1963).

⁴ 69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1958), amending 38 Stat. 731 (1914) reads in full: "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 4A [of the Clayton Act] 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 4A." Prior to the passage of the Clayton Act in 1914, a criminal conviction was inadmissible in a subsequent civil action. *Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co.*, 248 U.S. 55, 63 (1918).

of proof and therefore increases the likelihood of recovery. On the other hand, the proviso encourages settlements in negotiated consent decrees by exempting these decrees from use as prima facie evidence in subsequent treble damage actions. In criminal proceedings, a plea of *nolo contendere*⁵ has been held to result in a consent judgment within the meaning of the proviso.⁶ Presently, there is disagreement among the federal district courts as to whether a conviction entered on a plea of guilty should also be considered a consent judgment.⁷ Resolution of the issue necessarily involves a decision as to which theory is more appropriate in the context of criminal proceedings—the encouragement of consent judgments or the deterrent to initial violation posed by use of a criminal conviction as prima facie evidence in a subsequent treble damage action.

Conceptually viewing the civil consent judgment, the *nolo contendere* plea, and the guilty plea, the significant dissimilarity of the guilty plea would seem to justify its exclusion from the protection of the proviso.⁸ A guilty plea is not the result of negotiation between the defendant and the government, as are the civil consent judgment and often the plea of *nolo contendere*.⁹ Nor does the guilty plea require the approval of the court or the prosecutor, as do the *nolo* plea and the civil consent judgment. The guilty plea is entered as a matter of right,¹⁰ whereas the court accepts

⁵ A plea of *nolo contendere* is a statement by the defendant that he does not wish to contest the issue of his guilt or innocence. Therefore the resulting judgment cannot bind the defendant beyond the particular case. *Hudson v. United States*, 272 U.S. 451, 455 (1926); *accord*, *United States v. Norris*, 281 U.S. 619, 622 (1930); *United States v. Safeway Stores*, 20 F.R.D. 451, 454 (N.D. Tex. 1957); *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 378 (D. Minn. 1939); *Lenvin & Meyers, Nolo Contendere: Its Nature and Implications*, 51 YALE L.J. 1255, 1263 (1942).

⁶ *Twin Ports Oil Co. v. Pure Oil Co.*, *supra* note 5, at 372; *accord*, *Atlantic City Elec. Co. v. General Elec. Co.*, 207 F. Supp. 620, 628 (S.D.N.Y. 1962); *Alden-Rochelle Inc. v. American Soc'y of C.A. & Publishers*, 3 F.R.D. 157, 159 (S.D.N.Y. 1942); *Barnsdall Ref. Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 308, 312 (E.D. Wis. 1940), 28 CALIF. L. REV. 777 (1940).

⁷ The district court's decision in the principal case was the first to hold that a conviction on a plea of guilty is a consent judgment. Earlier cases recognizing that proposition are: *Department of Water & Power v. Allis-Chalmers Mfg. Co.*, 32 F.R.D. 204 (S.D. Cal. 1963); *Twin Ports Oil Co. v. Pure Oil Co.*, *supra* note 6, at 371-72 (dictum). Supporting the result in the principal case are *Simco Sales Serv., Inc. v. Air Reduction Co.*, 213 F. Supp. 505 (E.D. Pa. 1963); *Atlantic City Elec. Co. v. General Elec. Co.*, *supra* note 6, at 627. For different opinions whether a conviction on a plea of guilty should be considered a consent judgment, see *Dix, Decrees and Judgments Under Section 5 of the Clayton Antitrust Law*, 30 GEO. L.J. 331, 342-43 (1942); 65 HARV. L. REV. 1400, 1401 (1952); 46 ILL. L. REV. 765, 766 n.10 (1951); 71 YALE L.J. 684, 686 (1962).

⁸ *Atlantic City Elec. Co. v. General Elec. Co.*, 207 F. Supp. 620 (S.D.N.Y. 1962) (convictions entered on pleas of *nolo contendere*, but not on pleas of guilty, are consent judgments); *accord*, *Dix, supra* note 7, at 342, where the author states: "In a criminal prosecution, a plea of guilty is not a consent judgment." See *Peterson, Consent Decrees: A Weapon of Anti-trust Enforcement*, 18 U. KAN. CITY L. REV. 34, 35 (1950); *Comment*, 55 MICH. L. REV. 92 n.1 (1956).

⁹ A plea of *nolo contendere* is sometimes negotiated when both parties prefer to avoid a long trial. *United States v. Socony-Vacuum Oil Co.*, 23 F. Supp. 531, 532 (W.D. Wis. 1938); see *Lenvin & Meyers, supra* note 5, at 1268 (some judges object to the plea as the result of compromise).

¹⁰ *Annot.*, 152 A.L.R. 253, 267 (1944).

civil consent judgments and *nolo* pleas at its discretion,¹¹ after taking into consideration the opinions of the prosecutor.¹² Moreover, the conviction resulting from a guilty plea is considered an adjudication of the defendant's guilt which binds the defendant beyond the particular case. A plea of guilty estops the defendant to deny his guilt in a subsequent suit.¹³ The civil consent judgment and the *nolo* plea, on the other hand, do not adjudicate the issues of defendant's liability or guilt,¹⁴ and a *nolo* plea creates no estoppel against the defendant to deny his guilt in a subsequent suit.¹⁵ Unlike the plea of guilty, the plea of *nolo contendere* could not be used as prima facie evidence in a subsequent suit even if it were said not to result in a consent judgment,¹⁶ because, unlike the plea of guilty, the plea of *nolo contendere* does not qualify as prima facie evidence according to section 5(a) of the Clayton Act.¹⁷ Since the plea of guilty does not closely resemble the *nolo* plea and the civil consent judgment, either by nature or by normal effect beyond the case, it would be difficult to conclude upon conceptual grounds that a guilty plea should be construed, like the *nolo* plea, as resulting in a consent judgment within the meaning of the proviso to section 5(a).

The language of section 5(a) and its legislative history provide insufficient guidance in determining whether a conviction entered on a plea of guilty should be treated as a consent judgment. An argument has been made, based on the language of the Clayton Act itself, that a conviction entered on a plea of guilty must be considered a consent judgment. The thrust of the argument is that consent judgments in both civil and criminal actions are recognized by the language of the statute, the necessary premise being that if such a thing as a criminal consent judgment exists, the guilty plea is within that category. For example, the proviso to section 5(a) refers to

¹¹ "A defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendere*." FED. R. CRIM. P. 11; Annot., 152 A.L.R. 253, 267 (1944); Lenvin & Meyers, *supra* note 5, at 1256.

¹² The consent of the prosecutor is unnecessary to the acceptance of the plea of *nolo contendere*. Annot., 152 A.L.R. 253, 294 (1944). However, the court will take the prosecutor's opinion into account in deciding whether to accept the plea. *United States v. Safeway Stores, Inc.*, 20 F.R.D. 451, 452 (N.D. Tex. 1957); *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 172 (S.D.N.Y. 1955). *But cf.* *United States v. Jones*, 119 F. Supp. 288 (S.D. Cal. 1954) (court accepted the plea over the government's objection).

¹³ *Hudson v. United States*, 272 U.S. 451, 455 (1926); *State v. Burnett*, 174 N.C. 796, 797, 93 S.E. 473, 474 (1917).

¹⁴ In consent judgments, the parties have settled rather than litigated the matters originally put at issue. James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 179 (1959); see RESTATEMENT, JUDGMENTS § 68, comment *i* (1942); Dix, *supra* note 7, at 343 (judgment based on a plea of *nolo contendere* is not an adjudication that defendant has violated antitrust law as charged).

¹⁵ See note 5 *supra*.

¹⁶ *E.g.*, *State v. LaRose*, 71 N.H. 435, 440, 52 Atl. 943, 946 (1902); Annot., 18 A.L.R.2d 1287, 1290, 1314 (1951).

¹⁷ A conviction on a plea of *nolo contendere* can not be used as prima facie evidence because the judgment would not be an estoppel as between the parties. See notes 4 & 5 *supra*.

"consent judgments or decrees," and earlier in the section the phrase "judgments or decrees" includes those rendered in criminal proceedings.¹⁸ Also, a temporary proviso to section 5(a) specifically mentioned "consent judgments or decrees rendered in criminal proceedings . . ."¹⁹ Yet nowhere in the language of the act is a conviction on a plea of guilty explicitly defined as a consent judgment.

Beyond arguments centering on the language of the statute, it has been asserted that Congress intended to include convictions entered on pleas of guilty within the meaning of consent judgment under the proviso.²⁰ In support of this argument are statements of congressmen, in debate, expressing their opinions that the proviso applies to all uncontested actions,²¹ and more specifically to convictions entered on pleas of guilty.²² However, the consent judgment construction of a plea of guilty was also expressly rejected in debate,²³ and several congressmen vigorously objected to the proviso if this interpretation were to be placed upon it.²⁴ Recent cases agree that there is room for difference of opinion as to congressional intent,²⁵ even though there is disagreement as to the ultimate question of whether consent judgments should include convictions on pleas of guilty. In light of the inconclusiveness of the legislative history and the conceptual difficulties in attempting to classify the guilty plea as a consent judgment, a resolution of the issue must be based on considerations of policy.

The major policy objectives of section 5(a) of the Clayton Act were to ease the burdens of litigation for an injured private party,²⁶ and, by in-

¹⁸ *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 368 (D. Minn. 1939); *Barnsdall Ref. Corp. v. Birnamwood Oil Co.*, 32 F. Supp. 308, 312 (E.D. Wis. 1940).

¹⁹ 38 Stat. 731 (1914). The temporary proviso read in full:

"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."

See *Atlantic City Elec. Co. v. General Elec. Co.*, 207 F. Supp. 620, 624-25 (S.D.N.Y. 1962). This case suggests that since the temporary proviso's reference to consent judgments rendered in criminal proceedings was excluded from the remaining proviso, the term "consent judgment" in the remaining proviso does not necessarily include any criminal judgments at all. Even Judge Nordbye, in his leading opinion in *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 371 (D. Minn. 1939), admits that "strictly speaking, it may be that there is no such thing as a consent judgment in criminal proceedings," and that "it is not an accurate characterization of the effect of a plea of guilty . . ." See 65 HARV. L. REV. 1400, 1401 (1952).

²⁰ For discussions of congressional history, see *Twin Ports Oil Co. v. Pure Oil Co.*, *supra* note 19; *Dix, supra* note 7, at 332-35; 71 YALE L.J. 684, 686-87 (1962).

²¹ *E.g.*, 51 CONG. REC. 16047 (1914) (remarks of Senator Borah); *id.* at 16276 (remarks of Mr. Webb).

²² *E.g.*, *id.* at 15939 (remarks of Senator Nelson); *id.* at 16046 (remarks of Senator Norris).

²³ *Id.* at 15823-24 (remarks of Senator Walsh).

²⁴ *E.g.*, *id.* at 15822-26 (remarks of Senator Reed); *id.* at 16046-47 (remarks of Senator Norris).

²⁵ *Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 211 F. Supp. 712, 728 (N.D. Ill. 1962); *Atlantic City Elec. Co. v. General Elec. Co.*, 207 F. Supp. 620, 625 (S.D.N.Y. 1962).

²⁶ *E.g.*, 51 CONG. REC. 13851 (1914) (remarks of Senator Walsh); *id.* at 16046 (remarks

creasing the latter's chances of recovering treble damages, to deter future violations of the antitrust laws.²⁷ On the other hand, it was recognized that consent judgments are an effective tool of antitrust enforcement because of their great potential for flexibility and economy.²⁸ Congress added the proviso exempting consent judgments from the prima facie evidence rule so that defendants wishing to avoid treble damage recoveries would be encouraged to accept consent judgments rather than litigation, which could lead to a judgment admissible under the prima facie evidence rule. In the context of civil proceedings, the preference for consent judgments has been conducive to prompt and effective enforcement of the laws. The government's saving of time and expense by avoiding plenary litigation in the consent cases allows more extensive investigation and prosecution of other violations of the antitrust law.

In criminal prosecutions, however, there are several considerations which suggest that the section 5(a) deterrent should not be precluded by the defendant's option to submit a plea of guilty. Economic injury to private parties is much more likely to result where predatory activities are deemed so serious as to warrant criminal prosecution, and thus there is a greater need for the section 5(a) deterrent.²⁹ Yet injured private parties may find the burdens of proving criminal violations of antitrust law prohibitive unless they can use defendants' pleas of guilty as prima facie evidence of guilt.³⁰ Because of the heavy burden of proving criminal violation, the legislative intention to facilitate private recovery by passage of section 5(a) would be unreasonably obstructed by allowing the protection of consent judgments in those cases where private parties are most likely to have sustained injury.

Encouragement of pretrial settlement does not justify the dilution of the deterrent effect intended for section 5(a) by the interpretation of guilty pleas as consent judgments. The government is no longer interested in ob-

of Senator Norris). See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 171-72 (S.D.N.Y. 1955); *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366, 369 (D. Minn. 1939).

²⁷ *United States v. Standard Ultramarine & Color Co.*, *supra* note 26, at 171; ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 378 (1955); see Vold, *Are Threefold Damages Under the Anti-trust Act Penal or Compensatory?*, 28 KY. L.J. 117 (1940).

²⁸ The economy of consent judgments is an important consideration to the government, "Caught in the vise of increasing complaints and decreasing enforcement resources." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 360 (1955). The district court in the principal case finds the saving of expense to the government to be the controlling consideration in its decision. *Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 211 F. Supp. 712, 728 (N.D. Ill. 1962); see 65 HARV. L. REV. 1400, 1401 (1952).

²⁹ See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 350 (1955), listing the types of offenses prosecuted criminally.

³⁰ The government's expenses of proving a violation of antitrust law are not nearly so great as those of injured private parties, because information already obtained from a grand jury assures the government a reasonable chance of conviction. Private parties can obtain the same information the government already has only by resorting to expensive discovery procedures before trial.

taining a consent judgment when it chooses to bring criminal proceedings against a violator of antitrust law. In situations where an offense might be prosecuted as a civil or criminal action, the government's decision to bring criminal proceedings is, in effect, a decision that the severe punishments of imprisonment, fines, and more easily attainable private treble damages recoveries are the most appropriate methods of antitrust enforcement in the particular case. Illustratively, the government often chooses to contest a *nolo contendere* plea because the resulting conviction would be a consent judgment, and hence unavailable as prima facie evidence in subsequent private suits.³¹ A defendant should not be able to obtain the protection of a plea of *nolo* as of right by pleading guilty instead. Proper exercise of discretion by the courts and the government in allowing use of the *nolo* plea will prevent unduly harsh results in criminal antitrust actions.³² Such an approach would seem preferable to the permissive use of the guilty plea by defendants as a partial insulation from subsequent private suits.

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³¹ *United States v. Jones*, 119 F. Supp. 288, 289 n.1 (S.D. Cal. 1954).

³² A treble damage recovery may result in excessive punishment of a defendant whose violation of the antitrust laws has been relatively minor. Comment, 61 *YALE L.J.* 1010, 1061-62 (1952). Yet "without the treble damage sanction, the meagre nature of the criminal penalties arising from government actions would render the anti-trust laws nugatory." 18 *U. CHI. L. REV.* 130, 138 (1950).