

THE USE AND EFFECT OF AN ANTITRUST GUILTY PLEA IN SUBSEQUENT CIVIL LITIGATION

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I. Introduction

Aggressive enforcement of federal antitrust laws by the United States Department of Justice (“DOJ”) has led to an increasing number of federal criminal investigations and prosecutions. For companies involved in these proceedings, however, the resolution of criminal charges rarely signals the end of litigation. Most criminal antitrust investigations generate wide-ranging civil litigation and, as a consequence, corporations often find themselves defending massive civil antitrust suits after they have already been convicted of criminal proceedings brought by the DOJ.

This article addresses one central legal issue arising from this predicament. Suppose the company you represent has entered a plea of guilty to violating federal antitrust law and now faces a barrage of civil suits brought by private parties seeking trebled damages under the Sherman Act. These plaintiffs want to use the conviction for a variety of strategic reasons. How do you determine whether—and the extent to which—the plea can be used against your client during subsequent civil proceedings?

The answer to this question depends on a careful analysis of the specific circumstances of your case. Whether your client will be precluded from contesting liability (or any other issue) will be decided within the statutory and common law framework of collateral estoppel. The court will perform a close study of the issues actually and necessarily decided by the guilty plea and then compare those issues to the issues raised in the civil antitrust matter. Estoppel should apply only to the precise facts admitted in the guilty plea, and your client should be free to litigate any issue not unambiguously resolved by the plea. Even if estoppel does not apply, however, there are still myriad other ways a guilty plea can be used that will pose challenges to the defense of civil antitrust claims. Plaintiffs can use the prior conviction in discovery and motion practice in ways that can constrain your client’s ability to articulate its defense and can permeate the action with the taint of criminal wrongdoing. As a result, determining the proper use and effect of the guilty plea will be a central issue at every stage of the civil antitrust litigation.

This article is intended as a general introduction to the legal and evidentiary principles that underlie the use of prior convictions in federal civil antitrust litigation. It is written from a

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defense perspective, and is divided into three parts. The first part addresses the legal framework for preclusion analysis and discusses the provisions of the Clayton Act and federal case law that define the scope and application of the doctrine of estoppel, as well as some criminal law principles that may be helpful to the estoppel analysis. The second part of the article summarizes some of the other uses, short of estoppel, that can be made of guilty pleas in antitrust litigation, along with some suggested defense responses. The third and final section of the article outlines some of the basic rules of evidence that may limit the admissibility or impact of a guilty plea in a subsequent civil antitrust action.

II. Preclusion Analysis

A. Section 5(a) of the Clayton Act

A starting point for the analysis of your defense should be the federal antitrust laws themselves. Section 5(a) of the Clayton Antitrust Act of 1914, 15 U.S.C. § 12 *et seq.*, addresses the use of final judgments from federal antitrust proceedings. The statute provides:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws 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. *Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel*, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under Section 5 of the Federal Trade Commission Act which could give rise to a claim for relief under the antitrust laws.

15 U.S.C. § 16(a) (second emphasis added). In 1980, Congress amended Section 5(a) to include the language italicized above, permitting full preclusive effect to be given to prior government antitrust actions in subsequent private enforcement suits. *See* H.R. Rep. No. 96-874, at *3-4, *reprinted in* 1980 U.S.C.C.A.N. 2752, 2753-54 (“When common law requirements for application of collateral estoppel are met, the amendment will permit application of the doctrine”). The House Report explained that Congress intended to “permit application of the [collateral estoppel] doctrine to eliminate wasteful retrying of issues and reduce the costs of complex antitrust litigation to the courts and parties.” *Id.* at *3.

Prior to the 1980 amendment, some courts had interpreted Section 5(a) to override the common law doctrine of collateral estoppel by permitting that *only* prima facie effect be given to evidence from a prior government proceeding. *See, e.g., Illinois v. Gen. Paving Co.*, 590 F.2d 680, 682-83 (7th Cir. 1979) (“Congress clearly indicated that [enforcement judgments] should not be given [collateral estoppel] effect.”). Congress passed the 1980 amendment to correct such misinterpretations. *See* H.R. Rep. No. 96-874, at *1, 5-6 (“H.R. 4046 clarifies and amends Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), to preclude interpretations of that provision

that may presently prevent application of the same collateral estoppel principles applicable to other government and private judgments.”).

In reality, the 1980 amendment simply restated the legislative intent underlying the provision at the time of its original passage in 1914. Congress enacted Section 5(a) at a time when the principle of mutuality of estoppel still held sway at common law (it no longer does). Mutuality had required that there be an identity of parties between the first and second actions in order for issue preclusion to apply. As a result, private litigants in the early 20th century enjoyed little benefit from a prior government judgment; Section 5(a) sought to solve that problem. As the Supreme Court explained, the “Congressional reports and debates on the proposal which ultimately became § 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions.” *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568 (1951).

There is no real dispute that a criminal conviction following a guilty plea qualifies as a final judgment within the meaning of Section 5 of the Clayton Act. *See, e.g., Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir. 1967) (applying Section 5(a) based on a conviction after a guilty plea). As a matter of criminal procedure, after the court accepts a guilty plea from a defendant it conducts a sentencing hearing and then enters a “judgment of conviction.” Fed. R. Crim. P. 32(k)(1). In a criminal case, a judgment is final when the sentence is imposed by the court. *Berman v. United States*, 302 U.S. 211, 212 (1937). In the context of Section 5(a), however, courts have held that a judgment is only “final” when the “time to appeal has run or the judgment has been affirmed by the court of last resort.” *Feldpausch v. Heckler*, 763 F.2d 229, 231 (6th Cir. 1985). Thus, there is no “final judgment” under this Clayton Act provision if an “appeal from the judgment of conviction is pending.” *New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp.*, 24 F.R.D. 186, 188 & n.5 (S.D.N.Y. 1959).

There is an important exception: Section 5(a) expressly carves-out “consent judgments or decrees entered before any testimony has been taken” from its estoppel provisions. Although this limitation caused some early courts to question whether convictions based on guilty pleas (because they occur by consent and without the taking of testimony) were to be considered final judgments within the meaning of the statute, subsequent case law clarified the issue, and it is now settled law that guilty pleas do not fall within this exclusion. *See, e.g., City of Burbank v. Gen. Elec. Co.*, 329 F.2d 825, 834-36 (9th Cir. 1964) (distinguishing guilty pleas from consent decrees for purposes of Section 5(a)). Convictions based on pleas of *nolo contendere*, however, are a different matter. A plea of *nolo contendere* is distinguished from a plea of guilty because it is “viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency.” *North Carolina v. Alford*, 400 U.S. 25, 35 n.8 (1970). Convictions based on pleas of *nolo contendere* are therefore generally treated as “consent decrees” under Section 5(a), although some courts have held they are admissible nonetheless if entered after testimony has been taken. *See, e.g., Dalweld Co. v. Westinghouse Elec. Corp.*, 252 F. Supp. 939, 941-42 (S.D.N.Y. 1966) (holding that a judgment of conviction based on a plea of *nolo contendere* was admissible when it was entered after a trial where the jury was unable to reach a verdict).

Thus, in view of the 1980 amendment to Section 5(a), whether a civil court will grant preclusive effect to your client's guilty plea will depend upon the application of the doctrine of collateral estoppel.

B. Principles of Collateral Estoppel/Issue Preclusion

The common law doctrine of collateral estoppel (also known as issue preclusion) provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Collateral estoppel therefore "precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

In *Parklane*, the Supreme Court endorsed the "offensive" use of collateral estoppel to bar a defendant from relitigating issues determined adversely to it in an earlier proceeding. *Id.* at 331. Although it approved the offensive use of this doctrine, the Court also recognized its potential for unfairness, and therefore concluded that courts have "broad discretion" to allow or deny its application.¹ *Id.* Collateral estoppel may make judicial proceedings more efficient, but courts are wary of mechanically applying the doctrine because it can produce harsh and unfair results. *See, e.g., Discover Fin. Servs. v. Visa U.S.A. Inc.*, 598 F. Supp. 2d 394, 398 (S.D.N.Y. 2008) (describing potential unfairness). Thus, courts carefully analyze the issues at hand before giving collateral estoppel effect to a prior judgment. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004) ("The caution that is required in application of offensive collateral estoppel counsels that the criteria for foreclosing a defendant from relitigating an issue or fact be applied strictly").

In general, "[t]he party asserting collateral estoppel must show that the estopped issue is identical to an issue actually litigated and decided in the previous action," and "[p]reclusive force attaches only to issues that were necessary to support the judgment in the prior action."² *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1031 (9th Cir. 2001). Specifically, the Ninth Circuit has identified the following prerequisites to the application of collateral estoppel:

- (1) there was a full and fair opportunity to litigate the identical issue in the prior action;
- (2) the issue was actually litigated in the prior action;
- (3) the issue was decided in a final judgment; and

¹ The *Parklane* Court stated that a prior judgment should not receive collateral estoppel effect as a "general rule" where "a plaintiff could easily have joined in the earlier action or where ... the application of offensive estoppel would be unfair to a defendant." *Parklane*, 439 U.S. at 330. Situations where application of offensive estoppel may be unfair to a defendant include where the "defendant in the first action is sued for small or nominal damages" such that the defendant had "little incentive to defend [the charges] vigorously." *Id.* Other examples of unfair application of the doctrine could arise where "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant," or where "the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Id.* at 330-31.

² *Syverson v. IBM*, 472 F.3d 1072, 1078 (9th Cir. 2007) (internal citations omitted).

- (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action.

It is by now well established that a defendant's prior criminal conviction can result in collateral estoppel in subsequent civil actions. *See, e.g., United States v. Real Property Located at Section 18*, 976 F.2d 515, 519 (9th Cir. 1992) (“[I]t is settled law in this circuit that a guilty plea may be used to establish issue preclusion in a subsequent civil suit. . . .”) An exception is made when the conviction was based on a plea of *nolo contendere*, because the plea is treated as “a confession only for the purpose of the criminal prosecution and does not bind the defendant in a civil action for the same wrong.” *Doherty v. American Motors Corp.*, 728 F.2d 334, 337 (6th Cir. 1984); *see United States v. Norris*, 281 U.S. 619, 622 (1930) (noting that a conviction by plea of *nolo contendere* “does not create an estoppel”). When the prior judgment for estoppel purposes is a criminal conviction, courts sometimes apply a modified analysis. For example, in the Ninth Circuit issue preclusion applies only if the prior conviction meets the following four requirements:

“(1) the prior conviction must have been for a serious offense so that the defendant was motivated to fully litigate the charges; (2) there must have been a full and fair [criminal proceeding] to prevent convictions of doubtful validity from being used; (3) the issue on which the prior conviction is offered must of necessity have been decided [by an adjudication of guilt]; and (4) the party against whom the collateral estoppel is asserted was a party or in privity with a party to the prior [criminal proceeding].”³

When plaintiffs seek preclusion based on your client's prior guilty plea, three of these four elements will likely be readily satisfied. Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1 *et seq.*, is the primary criminal statute enforced by the United States Department of Justice Antitrust Division. By definition, a conviction under this section is a “serious offense” punishable by up to ten years in prison for individuals and a statutory maximum fine of \$100 million for corporations on each count of the conviction. 15 U.S.C. § 1.⁴ Additionally, assuming the conviction is final⁵ and your client was indeed the party in the criminal proceeding, there are unlikely to be serious questions as to whether these conditions have been met.

The fight will probably center on whether the issue at stake in the civil lawsuit is identical to an issue relevant to the prior criminal case and whether that issue was actually decided by and necessary to the guilty plea. The general rule provides that preclusion is only allowed “where an element of the crime to which the defendant pled guilty or of which he was convicted [is] at issue in the second suit.” *Real Property Located at Section 18*, 976 F.2d at 519. Thus, a starting point is a comparison of the elements of the offense of conviction with those of the civil cause of

³ *Real Property Located at Section 18*, 976 F.2d at 518 (internal quotation marks omitted).

⁴ Under 18 U.S.C. § 3571(d), the fine may be increased to twice the gain from the illegal conduct or twice the loss to the victims.

⁵ Appeals of antitrust convictions based on guilty pleas are not common because the Antitrust Division generally insists that defendants waive their right to appeal as part of any plea agreement. *See Model Annotated Corporate Plea Agreement, US. Department of Justice, Antitrust Division* (last updated July 13, 2009), ¶ 2, available at http://www.justice.gov/atr/public/guidelines/corp_plea_agree.htm (last visited Jan. 13, 2013).

action. But even when both the criminal and civil actions are brought under the same statutes, this comparison alone will rarely be sufficient. Although criminal offenses and civil claims may share common legal elements, the specific conduct underlying the claim can vary significantly. As a result, “[w]hen faced with a collateral estoppel argument based upon a guilty plea conviction, the court must examine the record of the criminal proceedings and determine the issues which were necessarily decided by the guilty plea.” *Association of Am. Med. Colleges v. Mikaelian*, No. 83-2745, 1986 U.S. Dist. LEXIS 28062, at *37 (E.D. Pa. Mar. 18, 1986), *citing, inter alia, Chisolm v. Defense Logistics Agency*, 656 F.2d 42, 47-48 (3d Cir. 1981). Only then can the court compare the issues decided in the criminal case to those pending in the civil action.

Determining what was actually and necessarily decided by a guilty plea can be a difficult task. Criminal proceedings start with an indictment or information, but these charging documents are not determinative because not every accusation needs to be proven to obtain a conviction. *See, e.g., Emich Motors*, 340 U.S. at 569 (because the verdict did not indicate the means used to effectuate conspiracy, the court was required to examine the record of the entire proceeding); *In re: TFT-LCD (Flat Panel) Litig.*, No. C 10-1064 SI, 2012 U.S. Dist. LEXIS 148033, at *47 (N.D. Cal. Oct. 11, 2012) (no estoppel as to time period because the jury was not required to find that the conspiracy lasted for the entire period charged in the indictment). Instead, records relating to the defendant’s actual guilty plea will be the most probative. For a guilty plea to be valid there must be an adequate factual basis for each element of the substantive offense. *Libretti v. United States*, 516 U.S. 29, 38 (1995). The Federal Rules of Criminal Procedure require that a court “must determine that there is a factual basis for the plea” before entering a judgment of conviction. Fed. R. Crim. P. 11(b)(3). Accordingly, at the plea hearing (“colloquy”), the government generally proffers to the court the basic facts supporting the offense and the court questions the defendant under oath (“allocution”) to assure itself that the plea is voluntary and that a factual basis for guilt exists. In addition, most guilty pleas are the result of bargains made with the government. Plea agreements negotiated with the Antitrust Division contain (in addition to the terms of the bargain) a statement of facts supporting each proposed count of conviction. *See Model Annotated Corporate Plea Agreement, U.S. Department of Justice, Antitrust Division.*⁶ The DOJ requires that these plea agreements “be in writing and filed with the court.” *United States Attorney Manual* 9-27.450(A).⁷

Thus, the judicial inquiry on issue preclusion “begin[s] by examining the entire record and the Fed. R. Crim. P. 11 plea colloquy to determine exactly what was decided in the criminal proceeding.” *Seiffert v. Green*, No. 81-1956, 1987 U.S. Dist. LEXIS 6326, at *6 (E.D. Penn. July 14, 1987) (internal quotation marks omitted). “In determining what facts and issues are precluded in a civil action that is based on an underlying conviction, a court may look to the judgments of conviction, plea agreements, and facts presented by the government during a Rule 11 hearing.” *Buchanan County v. Blakenship*, 496 F. Supp. 2d 715, 720 (W.D. Va. 2007). The court will closely scrutinize this record to determine what issues are subject to estoppel in the civil litigation. *See, e.g., Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 643 (D. Alaska 1982) (concluding that “collateral estoppel in the present case extends to all

⁶ Available at http://www.justice.gov/atr/public/guidelines/corp_plea_agree.htm (last visited Jan. 13, 2013).

⁷ Available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.450 (last visited Jan. 13, 2013).

elements of the individual crimes to which [the defendant] pleaded guilty and all factual findings of the trial judge at the conclusion of the plea”).

Because guilty pleas are usually the product of negotiation and compromise, arguments are often made that their evidentiary value ought to be broader than the limited admissions contained in a plea colloquy or plea agreement. Private litigants will argue that the court should look to the set of facts developed in the entire criminal investigation to determine what issues have been adjudicated by a company’s admission of guilt. Although the analysis of the criminal record need not necessarily be limited to the plea hearing, the law is clear that preclusion can only extend “to questions distinctly put in issue and directly determined in the criminal prosecution.” *Emich Motors*, 340 U.S. at 569 (internal quotation marks omitted). A plaintiff will bear the burden of showing with “clarity and certainty” that an issue was actually litigated and decided, and must produce “a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated.” *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992) (internal quotation marks omitted). Even drawing a “reasonable inference” that an issue was decided is insufficient to warrant preclusion. *United States v. One Residential Property Located at 17348 Lyons Valley Road*, No. 04-CV-1698-L(JMA), 2007 U.S. Dist. LEXIS 20885, at *10 (S.D. Cal. Mar. 22, 2007) (a guilty plea for the offense of selling drugs did not determine whether a residence was used to facilitate a crime). Indeed, if there is any doubt as to whether an issue was decided in the criminal proceeding, then collateral estoppel is inappropriate. *See SEC v. Reyes*, No. C 06-04435 CRB, 2008 U.S. Dist. LEXIS 65895, at *13 (N.D. Cal. Aug. 25, 2008) (declining to apply collateral estoppel in the SEC’s civil suit based on securities fraud conviction because the court could not determine which misstatements were material to the jury’s verdict).

Application of these principles should result in a narrow construction of your client’s guilty plea. Even when both the criminal and the civil antitrust actions assert substantially similar claims, such as participation in an unlawful Sherman Act conspiracy, the specific conduct asserted in each case must be carefully analyzed. Variances in the stated objectives, means, or time frame of the conspiracies, and differences between the named participants or the victims of the conspiracies, all weigh heavily against the application of collateral estoppel. *See, e.g., SEC v. Hilsenrath*, No. C 03-03252, 2008 U.S. Dist. LEXIS 50021, at *11 (N.D. Cal. May 29, 2008) (declining to find preclusion where the civil complaint covered a longer time period than the conduct admitted in the plea agreement). Moreover, a plea agreement’s use of vague language to describe the unlawful conduct or its silence on a particular issue may be a basis for denying preclusion. *See, e.g., United States v. Wight*, 839 F.2d 193, 196 (4th Cir. 1997) (although the defendant was precluded from litigating liability for accepting gratuities through his government post, he was not estopped from contesting a civil damage award based on the amount of gratuities he received because the plea agreement did not indicate a specific sum but instead only stated that he “accepted gratuities”). Preclusion in the civil action should be limited to the precise facts admitted by the plea and extend only to those issues unambiguously resolved by conviction.

C. *Contra Proferentem*: A Helpful Principle

This strict application of collateral estoppel corresponds to the criminal law approach to interpreting plea agreements. The doctrine of *contra proferentem*—that ambiguities in a

criminal plea agreement are to be construed in favor of the criminal defendant—is consistent with the careful analysis courts should apply when determining, in collateral estoppel matters, what issues and facts were decided in, and were necessary to, the guilty plea. A plea agreement is a contract, and principles of contract law generally apply to its interpretation. “In [the] context of plea agreements, . . . [a]mbiguities are therefore construed in favor of the defendant.” *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (internal quotation marks and citation omitted). *Contra proferentem* in the criminal law context requires that the defendant’s interpretation of a plea agreement prevail when “each party’s proffered interpretation is neither clearly supported by the language of the agreement nor necessarily inconsistent with it either.” *United States v. De la Fuente*, 8 F.3d 1333, 1339 (9th Cir. 1993) (internal quotation marks omitted).

Two distinct rationales justify this contract principle in criminal law: one rooted in liberty, the other in fairness. As for the first rationale, plea agreements should be construed in favor of a defendant because his liberty may turn on the court’s interpretation of the contract. The principle arises in criminal cases when a defendant contests whether the government has lived up to its side of the bargain. The stakes are often high (i.e., jail time), and the principle is therefore quite necessary to ensure that a court does not curtail a defendant’s liberty based on vague language in a contract. *See United States v. Transfiguracion*, 442 F.3d at 1228 (“As a defendant’s liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made”) (citing *United States v. Packwood*, 848 F.2d 1009, 1012 (9th Cir. 1988)).

The second rationale is rooted in principles of fairness. In contract law, *contra proferentem* is necessary to correct for an asymmetry common when one party drafts all or the relevant part of an agreement. *See* Restatement (Second) of Contracts § 206 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”); *see also id.* at cmt. a (since the drafter “more likely than the other party [has] reason to know the uncertainties of [an agreement’s] meaning” and may have left the “meaning deliberately obscure,” the rule ought to apply). In the context of a plea agreement, “the government is usually the drafter [of the plea agreement],” and therefore it is only fair that it should “ordinarily bear the responsibility for any lack of clarity.” *Transfiguracion*, 442 F.3d at 1228. Courts presume that a “responsible public servant who recognizes the desirability of clarity in agreements would avoid . . . use” of vague language in plea agreements. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985).

These rationales ought to impel a court, when construing a plea agreement, to apply *contra proferentem* with even greater force than it would when applying the principle to a garden variety commercial contract. This is so because the government—the drafting party—has an overwhelmingly superior bargaining position over the defendant— in contrast to the power an average contract drafter wields over a draftee. The prosecutors’ advantage stems from the fact that they wield considerable power over the life and course of a criminal prosecution, whose stakes are inherently high for defendant. *See United States v. Gottesman*, 122 F.3d 150, 152 (2d Cir. 1997) (a plea agreement should be construed strictly against the government because the agreement is a contract in which the drafting party has an overwhelmingly superior bargaining position).

Courts usually invoke *contra proferentem* to interpret plea agreements when the government, the drafter of the contract, is a party to the subsequent litigation, as is the case in subsequent enforcement or habeas proceedings. In the civil antitrust context, when a federal agency sues a defendant who has previously pleaded guilty in a criminal antitrust action, the principle should naturally apply because an arm of the government drafted the agreement. Some may question, though, whether it should apply in a civil antitrust suit where a private plaintiff who neither drafted nor negotiated the plea agreement seeks to use it against the convicted party. Given the circumstances under which a plea agreement is drafted, the distinction should be immaterial. The government wields enormous leverage over the defendant in the plea bargain process and generally controls the drafting of the agreement. Thus, to the extent the plea agreement contains any ambiguity as to the scope of the unlawful conduct, that ambiguity should be resolved in favor of the defendant. This principle is particularly true where the effect of a more liberal construction would be to broaden admissions and potentially foreclose a company from defending against ruinous treble damages.

It is worth noting that even if a court estops a defendant from litigating certain issues, this fact alone is unlikely to warrant judgment for a plaintiff in a civil antitrust action. The elements necessary to establish a criminal antitrust offense are not co-extensive with those needed to secure a civil judgment. For example, in the case of a *per se* violation such as price fixing, the government is only required to prove knowing participation in an unlawful conspiracy that affected interstate or foreign commerce. The civil plaintiff, on the other hand, must prove additional elements, such as impact and damages, in order to obtain a civil judgment. *See, e.g., In re: TFT-LCD (Flat Panel) Litig.*, 2012 U.S. Dist. LEXIS 148033, at *47 (no estoppel based on the defendant's prior conviction because, *inter alia*, the jury did not specify that the defendant derived gains from sales to the plaintiff). As a result, a guilty plea should not ordinarily result in collateral estoppel as to issues other than liability. *See, e.g., Grumman Aero. Corp. v. Titanium Metals Corp.*, Nos. 80 CV 2809 (ERN), *et al.*, 1984 U.S. Dist. LEXIS 19670, at *7 (E.D.N.Y. Feb. 8, 1984) (observing that guilty pleas in criminal antitrust proceedings do not provide "assistance" as to any "pre- or post-indictment incidents, damages and rebuttal").

D. General and Specific Plea Admissions: Examples from Case Law

A review of these principles naturally raises questions about whether a company can structure its plea to an antitrust offense in a way that minimizes the risk of future preclusion. Exploring all the considerations involved in negotiating a plea agreement is beyond the scope of this article. It is nonetheless worth mentioning that preclusion can be altogether avoided if the company pleads *nolo contendere* to the criminal offense. Realistically, this will rarely be an option because a defendant has no right to plead *nolo contendere* and in federal court must formally petition the court for permission to do so. Fed. R. Crim. P. 11(a)(3). The court is required to solicit the government's view before accepting a *nolo contendere* plea, and the Antitrust Division invariably opposes such requests. *See United States Attorney Manual* 9-16.010 (DOJ policy is to refuse to consent to *nolo contendere* pleas in all but "the most unusual circumstances").⁸ Despite the rarity of the procedure, however, defendants are occasionally permitted to resolve even serious antitrust charges by pleading *nolo contendere* despite

⁸ Available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/16mcrm.htm#9-16.010 (last visited Jan. 13, 2013).

government opposition, thereby effectively eliminating the risk of collateral estoppel in future litigation. *See, e.g., United States v. Florida West Int'l Airways, Inc.*, 282 F.R.D. 695 (S.D. Fla. 2012) (permitting the defendant to plead *nolo contendere* to price-fixing charges over the government's objection).

Putting aside a plea of *nolo contendere*, the best opportunity to mitigate the risk of future preclusion usually arises in the context of establishing a factual basis for the guilty plea. One important consideration is whether it is preferable to simply admit to “bare bones” offense allegations, or whether instead it is more advantageous to negotiate specific factual representations tailored to the controversy. There is no one-size-fits-all strategy, but it is worth taking into account how courts interpret plea admissions before making any decision. As we have seen, courts generally construe pleas narrowly for estoppel purposes. On the one hand, this may argue in favor of avoiding specific admissions of fact (to the extent possible) in the hope that a lack of specificity will be an obstacle to a later finding of preclusion. On the other hand, there are risks involved in this approach. When faced with generic admissions, a court may feel compelled to more closely scrutinize the criminal record to determine what issues were necessarily decided by the guilty plea.

There have been relatively few court decisions that have addressed in any detail the application of collateral estoppel to guilty pleas in antitrust prosecutions. For our purposes it is worth looking at two decisions that help illustrate the different approaches that courts can take when confronted with claims of preclusion, particularly where there is some lack of clarity as to the full extent of the admitted conduct. *County of Orange v. Sullivan Highway Products*, Nos. 88 Civ. 8583 (JFK) *et al.*, 1989 U.S. Dist. LEXIS 12128 (S.D.N.Y. Oct. 12, 1989), is an example of how a guilty plea entered in a criminal antitrust prosecution effectively precluded a defendant from contesting liability in a subsequent civil antitrust suit. *In re Polyester Staple Antitrust Litig.*, No. 3:03CV1516, 2007 U.S. Dist. LEXIS 52525 (W.D.N.C. July 19, 2007), on the other hand, is a good example of how carefully some courts will parse admissions made in connection with a guilty plea in order to determine the exact issues decided in that prior criminal proceeding.

E. *County of Orange v. Sullivan Highway Products*: An Easy Preclusion Case

Let's say a federal agency sues your client for civil damages based on the exact same conduct to which it pleaded guilty in a prior federal criminal proceeding. The agency moves for summary judgment on collateral estoppel grounds. The result? The government will likely win the issue preclusion fight with relative ease and may need only to demonstrate proof of damage to obtain a civil judgment. Now substitute in a private plaintiff for that federal agency—one that was a named victim in the criminal offense—and have it bring suit based on the exact same conduct pleaded to in the guilty plea. That plaintiff will likely also succeed in precluding your client from contesting liability. *County of Orange v. Sullivan Highway Products*, 1989 U.S. Dist. LEXIS 12128, illustrates such a situation.

In *County of Orange*, the district court in the Southern District of New York granted the plaintiffs' motion for summary judgment and concluded that the defendants were liable under the Sherman Act. The defendants had pleaded guilty to an indictment charging that they had engaged in a Sherman Act conspiracy by “submitting collusive, noncompetitive bids for sale of asphalt” in certain geographic areas. *County of Orange*, 1989 U.S. Dist. LEXIS 12128, at *3.

As one defendant admitted, ““We had meetings with our competitors, and established prices.”” *Id.* at *4. In the subsequent civil action brought by private litigants, the defendants contended that their guilty pleas did not conclusively establish that the conspiracy caused the plaintiffs to pay higher prices for asphalt than they otherwise would have paid absent the conspiracy. *Id.* The district court rejected this argument, finding instead that because the plaintiffs were direct purchasers from the defendants, the plaintiffs suffered an injury as a result of the defendants’ admitted antitrust violation. *Id.* at *5-6. The court therefore concluded that “defendants’ violation of the Sherman Act [was] sufficient to prove liability under the Clayton and Donnelly Acts.” *Id.* at *10.

The court in *County of Orange* based its decision, in part, on the fact that two of the three plaintiffs were specifically named as victims in the criminal indictment and the judge’s allocution of the guilty plea. Defendants therefore were estopped from denying liability to those named victims. *County of Orange*, 1989 U.S. Dist. LEXIS 12128, at *3. Defendants argued that they had not pleaded guilty to harming a third plaintiff, the Town of Newburgh, because the indictment and allocution did not directly name Newburgh. Rather, the third victim was referenced generally as a “municipality.” *Id.* at *13. The court disagreed, finding that “defendants were made aware through the government’s Supplemental Bill of Particulars⁹ that references to ‘municipality’ or ‘municipalities’ for purposes of the indictment meant only Newburgh.” *Id.* Defendants, as a result, had necessarily pleaded guilty to harming Newburgh.

It is not clear from the opinion whether the defendants in *County of Orange* had intentionally resisted admitting conduct directed at Newburgh, or whether the omission was simply the result of the exigencies of plea bargaining. In any event, the court’s analysis implies that if the supporting documents had not identified Newburgh as the unnamed municipality, the court likely would have ruled that defendants were not estopped with respect to Newburgh and were free to litigate their liability to Newburgh in the civil proceeding. Had the defendants intended to preserve their opportunity to defend liability as to this plaintiff, their failure to raise the issue in connection with their guilty plea proved to be a costly misstep.

F. *In re Polyester Staple Antitrust Litigation*: A Harder Preclusion Case

Let’s say your client pleaded guilty to a criminal antitrust violation, and in a subsequent civil suit private plaintiffs claim to be victims but they were not identified in connection your client’s plea. Moreover, issues arise as to whether these victims bought the precise product that was identified in the plea. In such a situation, doubts regarding whether the specific civil claims were actually decided by the prior guilty plea make collateral estoppel inappropriate. *In re Polyester Staple Antitrust Litig.*, 2007 U.S. Dist. LEXIS 52525, is a helpful case in this regard.

In *In re Polyester Staple Antitrust Litigation*, the district court in the Western District of North Carolina declined to preclude the defendant from litigating the meaning and scope of the admissions made in its guilty plea. The plaintiffs alleged that defendant Arteva had conspired with other companies to fix the prices of polyester staple. *Id.* at *5-6. In evaluating the plaintiffs’ motion for class certification, the court considered whether Arteva’s guilty plea in a

⁹ A Bill of Particulars is a form of discovery in criminal practice where the prosecution sets forth the time, place, manner, and means of the commission of the substantive offense. *See* Fed. R. Crim. P. 7(f).

prior criminal antitrust proceeding constituted common evidence of Arteva's liability in the civil class action lawsuit. *Id.* at *59-60. Based on the specific language of its plea agreement, Arteva argued that its antitrust liability "extend[ed] only to the large textile manufacturers that purchased 'first-quality polyester staple.'" *Id.* at *60. Arteva had pleaded guilty to "participat[ing] in a conspiracy with other persons and entities engaged in the manufacture and sale of polyester staple, the primary purpose of which was to fix, increase and maintain prices, coordinate price increases, and allocate customers for first-quality polyester staple sold in North America." *Id.* at *34. The plea agreement and charging instrument defined "first-quality polyester staple" as "man-made, petroleum-based fiber that is manufactured in varying thicknesses and cut into short lengths." *Id.* at *33.

The district court concluded that "[a] determination as to the breadth of the price-fixing conspiracy was not necessary to Arteva's plea agreement," noting that "the phrase 'first-quality polyester staple' [is] reasonably susceptible to more than one interpretation." *Id.* According to the district court, "[f]irst-quality polyester staple" *could* mean that "the product met specification as manufactured the first time through the process," and it *could* encompass "a whole range of fibers." *Id.* at *61. The court thus found that Arteva's guilty plea did "not necessarily and conclusively establish that Arteva's antitrust violation encompassed all types of [polyester staple] meeting specifications" alleged by the plaintiffs. *Id.* at *61-62. For these reasons, the court held that Arteva was "not estopped from litigating in this civil action the significance of its guilty plea in the criminal case, and the weight to attribute to it, as this specific issue was neither adjudicated nor necessary in the criminal proceedings." *Id.* at *62.

As *In re Polyester Staple Antitrust Litigation* demonstrates, the scope of the issues that your client will be collaterally estopped from litigating in a subsequent civil antitrust case will depend upon a careful analysis of the language in its guilty plea as well as a comparison of the issues involved in the prior criminal proceeding and the civil lawsuit. In this case, the defendant's admissions were quite specific, although some ambiguity remained as to the specific product involved, and the victims of the conspiracy were not identified. Though the *Polyester* court did not cite the principle of *contra proferentem* to support its holding, it easily could have done so. The ambiguous term in the plea agreement counseled against barring the defendant from litigating the issue at hand in the civil litigation. In addition, unlike *County of Orange*, there was nothing in the criminal record that could identify the unnamed victims of the offense. As a result, the specificity of the defendant's factual admissions allowed it to argue for a narrow construction of its plea and preserved its opportunity to present a defense in the subsequent civil litigation.

III. Other Uses of Guilty Pleas in Antitrust Litigation

A. Preliminary Motions

Dodging preclusion hardly means your client is out of the woods. While you may be successful in preserving your client's ability to contest liability, a prior guilty plea can be used by plaintiffs in any number of ways that will pose hurdles to a defense. For example, at the very outset of litigation plaintiffs may be able to rely on your client's guilty plea to help establish personal jurisdiction or venue. *See, e.g., In re Isostatic Graphite Antitrust Litig.*, No. 00-cv-1857, 2002 U.S. Dist. LEXIS 21656, at*4-5, *10 (E.D. Pa. Sept. 19, 2002) (finding venue and

personal jurisdiction proper in part based on admissions during the plea colloquy). Plaintiffs can also bolster the sufficiency of their pleadings by including the guilty plea in the allegations of the complaint. *See, e.g., In re Static Random Access Memory (SRAM) Litig.*, 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) (various defendants' guilty pleas to conspiring in markets not directly involved in the claims before the court—though “not sufficient to support Plaintiffs' claims standing on their own”—supported a reasonable inference of conspiratorial behavior in the markets in the case before it); *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1011 (E.D. Mich. 2010) (denying motion to dismiss where various defendants had previously pled guilty to an antitrust conspiracy because, “taken as part of the larger picture,” “the guilty pleas in one market are suggestive of the plausibility of a conspiracy to commit the same illegal acts in another market”). Therefore, it will be important to differentiate your client's guilty plea in the prior criminal proceedings from the core claims at the outset of the civil litigation. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 09-5609 SI, *et al.*, 2010 U.S. Dist. LEXIS 64930, at *17 (N.D. Cal. June 29, 2010) (granting the defendants' motion to dismiss the complaint and rejecting the plaintiffs' contention that “in light of the admitted conspiracy to fix the price of TFT-LCD panels, it is plausible that defendants also conspired to fix the prices of STN-LCD panels”—where the plaintiffs failed to present any specific factual allegations of an STN-LCD conspiracy).

B. Use of a Guilty Plea in Discovery

A guilty plea can serve as a launching pad for civil plaintiffs' discovery requests and form the basis for interrogatories and requests for production of documents. *See, e.g., Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, No. 05-6042 (JBS), 2008 U.S. Dist. LEXIS 72705, at *10-16 (D.N.J. Aug. 27, 2008) (ordering defendants who previously pled guilty to antitrust violations to produce documents because evidence of a similar conspiracy in a related market may be probative of motive, opportunity, or intent); *In re Residential Doors Antitrust Litig.*, 900 F. Supp. 749, 757 (E.D. Pa. 1995) (granting the plaintiffs' motion to compel interrogatory responses related to the defendants' guilty pleas and rejecting the defendants' request to delay responses until completion of criminal investigations of their officers and employees). Plaintiffs will attempt to pin down facts they view as favorable to their case by, for example, crafting Requests for Admissions that track the language of the guilty plea. Your client will need to respond carefully to these discovery requests and avoid any appearance of contradicting earlier admissions, as its responses are sure to attract judicial scrutiny. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, *et al.*, 2011 U.S. Dist. LEXIS 90730, at *60-61 (N.D. Cal. Aug. 12, 2011) (deeming admitted RFAs served on a defendant who previously pled guilty because its responses “reflect[ed] a bad faith refusal to acknowledge its [earlier] sworn admissions” during a Rule 11 colloquy). Exercising due care in responding to discovery, however, does not mean acquiescing to all the plaintiffs' assertions simply because they appear related to the guilty plea. A defendant is well within its rights—and the parameters of good faith—to refuse to admit RFAs related to its guilty plea when plaintiffs, in their requests, have effectively modified the language or the factual representations contained in the plea, or when the plea agreement itself contains ambiguous terms. *See, e.g., United States ex rel. Strom v. Scios, Inc.*, No. 05-3004 CRB (JSC), 2011 U.S. Dist. LEXIS 129757, at *13, 15 (N.D. Cal. Nov. 9, 2011) (the language of a plea agreement did not require the defendants to admit in RFAs that they had a “continuous and uninterrupted intent” regarding a particular use of a pharmaceutical

drug during the plea period when they only pled guilty to having that intent “[b]etween August 2001, and April 1, 2003”).

In light of its guilty plea, your client will need to develop a factual record that is consistent with its prior admissions. One of the biggest challenges it may face in this regard is attempting to interview key witnesses or prepare them for testimony. Although entering a guilty plea resolves the company’s criminal exposure, the risk of prosecution often remains for the company’s individual employees. Even when the DOJ agrees not to prosecute employees as part of a corporation’s plea agreement, it usually identifies specific individual “carve outs” not covered by the protections of the agreement. *See Model Annotated Corporate Plea Agreement, U.S. Department of Justice, Antitrust Division*, n. 36 (“The Division seeks to prosecute culpable individuals from all corporate conspirators, domestic and foreign, except the amnesty applicant, and thus, will carve culpable individuals out of the corporate plea agreement.”)¹⁰ These individuals will require separate counsel and may not be readily accessible to the company’s lawyers. This will make the process of fact-gathering difficult, hamper the company’s ability to respond to discovery requests, and limit its overall ability to articulate a defense.

Plaintiffs will undoubtedly seek to depose these “carve-outs” during discovery. But unlike corporations,¹¹ individual witnesses have a Fifth Amendment privilege against self-incrimination. The decision of one or more of your client’s current or former employees to exercise this privilege at a deposition can have serious implications for the company. It can result, for example, in an adverse inference being drawn against the company in the civil litigation. *See, e.g., LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997) (adverse inference can be drawn against defendant when *inter alia* it has control over witness who asserts privilege and it shares the same interest in the litigation as the witness); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 153-154 (D. Conn. 2009) (postponing until trial a ruling on whether an adverse inference should be drawn against companies based on its executives’ assertion of privilege). To mitigate this risk, you can request a stay of civil discovery until the threat of criminal proceedings against the individuals has passed. Such a request is at best a long shot, however, as courts have substantial discretion in determining whether to issue a stay and will be reluctant to do so if it substantially delays the resolution of the civil litigation. *See Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). Alternatively, you should seek a discovery schedule (either through negotiation with the plaintiffs, at the initial case management conference, or by motion practice) that postpones the depositions of witnesses likely to take the Fifth until later in the discovery period, or request a discovery order that would allow employee witnesses to revoke their past invocation if they subsequently decide to testify at trial. *See, e.g., In re TFT-LCD Antitrust Litig.*, No. M07-1827-SI, *et al.*, 2009 U.S. Dist. LEXIS 109183, at *2 (N.D. Cal. Nov. 9, 2009) (“Upon notice, the revoking deponents will make themselves available for deposition at their expense in San Francisco, California not later than 45 days prior to the close of fact discovery.”).

¹⁰ Available at http://www.justice.gov/atr/public/guidelines/corp_plea_agree.htm (last visted Jan. 13, 2013).

¹¹ *See Curcio v. United States*, 354 U.S.118, 122 (1957) (“It is settled that a corporation is not protected by the constitutional privilege against self-incrimination.”).

C. Non-Preclusive Use of a Guilty Plea at Summary Judgment

Your client's guilty plea can also have an impact on summary judgment motions. Even if a plaintiff is unsuccessful in establishing liability based on the conviction, your client's plea admissions may nonetheless be sufficient to defeat any defense motion for summary judgment. Courts will sometimes infer the plausibility of a conspiracy when a defendant has pled guilty to related antitrust violations *and* additional evidence or allegations—independent of the guilty plea—support that inference. Guilty pleas have swayed courts to view evidence of mere contacts between competitors—which might otherwise be weak evidence—as a reasonable indicator of conspiracy, leading to the denial of the defendants' requests for dismissal at the summary judgment stage. For instance, one court denied a defendant's motion for summary judgment because its guilty plea to fixing the prices of one vitamin product established—when combined with other evidence—a genuine issue of material fact as to whether the defendant was part of a broader conspiracy to fix the prices of all vitamins. See *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 21-22 (D.D.C. 2004). The court reasoned that the defendant's plea of guilty in a related industry meant that “there [was] a higher probability” that competitor discussions—evidence of which the plaintiffs presented at summary judgment—were illegal. *Id.* at 21. Similarly, the Seventh Circuit reversed a grant of summary judgment in favor of the defendants on a claim that they fixed the price of high fructose corn syrup because (in part) one of the defendants had conceded in an earlier guilty plea that it “fixed prices on related products (lysine and citric acid) during a period overlapping the period of the alleged conspiracy to fix the prices of [high fructose corn syrup].” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002). The Seventh Circuit cited that guilty plea in its summary judgment analysis to make the point that the case involved no “implausibility” akin to the sort the Supreme Court had faced in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661.¹²

In short, even without the threat of estoppel, you will be litigating the significance of your client's guilty plea at all stages of the civil antitrust action. In responding to the plaintiffs you will need to muster arguments comparable to those advanced against issue preclusion: you must demonstrate to the court that the inferences the plaintiffs seek to draw (whether on the pleadings or at summary judgment) are not fairly based on the issues actually litigated and decided by the guilty plea. Moreover, at every opportunity before the court you must draw a distinction

¹² In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court concluded that the plaintiffs' antitrust claim—that defendants had colluded to set prices below cost so as to force competitors from the market and to subsequently charge monopoly prices—was implausible, and therefore reversed a lower court decision denying the defendants' motion for summary judgment. 475 U.S. at 588-93. The Court reasoned, *inter alia*, that the alleged predatory pricing conspiracy was “implausible” because it necessitated that conspirators endure significant losses in order to recoup uncertain gains. *Id.* at 594-95. The Court explained that “if the factual context [of a case] renders [the plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.” *Id.* at 587. The Seventh Circuit in *In re High Fructose Corn Syrup Antitrust Litigation* applied that principle and held that the conspiracy the plaintiffs had alleged—unlike the conspiracy in *Matsushita*—was eminently plausible, citing a defendant's guilty plea for support: “[T]he charge in this case involves no implausibility. The charge is of a garden-variety price-fixing conspiracy orchestrated by a firm, [defendant] ADM, conceded to have fixed prices on related products (lysine and citric acid) during a period overlapping the period of the alleged conspiracy to fix the prices of [high fructose corn syrup].” 295 F.3d at 661.

between any specific fact determined by a guilty plea (*e.g.*, the time, place, product, and participants involved in the conspiracy) and the fact of a criminal antitrust conviction. The former may have significance depending on the specific allegations in the civil action. But as to the latter, unless the criteria for estoppel applies, you should argue that the fact of conviction itself has no bearing on the viability of the civil claims. For example, it is noteworthy that in the *High Fructose* decision discussed above, the Seventh Circuit explicitly cautioned (even as it rejected summary judgment for the defendants) that a conviction cannot be used “to prove that the defendant probably is guilty of whatever [antitrust violations] he is now being charged with, merely because he has demonstrated a propensity to violate the law,” and that the “previous misconduct” cannot itself be used as evidence of an unlawful conspiracy in a civil action. *Id.* at 664.

IV. Admissibility of Guilty Pleas under the Federal Rules

Even if preclusion is unwarranted the court may still treat your client’s plea as substantive evidence. The court can, for example, give *prima facie* effect to the conviction under Section 5(a) and thereby create a rebuttable presumption in the plaintiffs’ favor. See *Purex Corp. v. Procter & Gamble Co.*, 453 F.2d 288, 291 (9th Cir. 1971) (explaining the *prima facie* effect of Section 5(a) but noting that it “cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury”). You will therefore need to carefully consider any arguments under the rules of evidence that could bar—or at least limit—the use of the guilty plea.

A. The Applicability of the Federal Rules of Evidence to Section 5(a)

As a threshold matter, it is at least arguable that Section 5(a) of the Clayton Act, by specifying that a final judgment “*shall be*” evidence, compels admission even if the court declines to exercise its “broad discretion” to apply collateral estoppel. No court appears to have adopted such an interpretation, however, and there are good grounds to resist it. Trial courts are entrusted with discretion to decide matters of admissibility, and there is nothing in Section 5(a) that overrides the Federal Rules of Evidence. If lawmakers had intended that courts admit prior antitrust judgments regardless of the requirements of the Federal Rules, then they could have easily indicated such an intention in the statute’s text. Contrast, for example, the language used in Section 5(a) with similar provisions governing false claims against the United States. As part of the False Claims Act, Congress provided that “[n]otwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements . . . shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding. . . .” 31 U.S.C. § 3731(d) (emphasis added).

B. Relevance and Character Issues

Relevance is of course the foundation for admissibility. Evidence is relevant if it has any tendency to make a fact at issue in the litigation “more or less probable.” Fed. R. Evid. 401. Depending on the facts of your case, you might argue that even if some portion of your client’s guilty plea is relevant to the plaintiffs’ civil claims, other aspects should be excluded because

they concern facts that are immaterial to the resolution of the dispute. In other words, relevance should not necessarily mean that the judgment of conviction and plea agreement must be admitted at trial *in toto*. The Supreme Court has emphasized that the trial court plays a central role both in determining what aspects of the prior judgment are admissible under Section 5(a) and in deciding what “portions of the record, including the pleadings and judgment, in the antecedent case . . . [are] necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial.” *Emich Motors*, 340 U.S. at 571-72.

You must also carefully distinguish between theories of relevance and inadmissible character evidence. Civil plaintiffs will naturally argue that any antitrust conviction tends to make their civil antitrust claims “more probable,” even if the specific events underlying the conviction occurred in a different time period or are not closely aligned with the conduct alleged in the civil suit. Such justifications should be squarely rejected. The Federal Rules state that “[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.” Fed. R. Evid. 404(a). Plaintiffs cannot admit evidence of a prior plea for the purpose of demonstrating that a company has a propensity to commit certain acts such price-fixing or restricting supply. “The clear purpose of [Rule 404] is to confront as a matter of law the proposition that a person’s bad character as demonstrated by behavior is relevant and therefore admissible to prove that he acted in conformity therewith.” *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). Simply put, the fact that your client was convicted of an antitrust offense in the past cannot be used to show it is more likely to have committed the antitrust offense alleged in the current civil suit. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 664 (a prior antitrust conviction is “inadmissible to prove that the defendant is probably guilty of whatever he is now being charged with, merely because he has demonstrated a propensity to violate the law”).

A more difficult analysis arises when the plaintiffs argue that the court should admit the guilty plea because it is relevant to show the background and development of conduct at issue in the civil litigation. *See, e.g., United States v. Andreas*, 216 F.3d 645, 664-66 (7th Cir. 2000) (evidence of prior antitrust conspiracies is relevant because they “were closely related parts of a master plan to control prices and product supply through collusion with competitors”). The Rules of Evidence provide that although “[e]vidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with that character,” it “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b). In the Ninth Circuit, admissibility under Rule 404(b) is determined by a four-part test. The district court may admit evidence of prior acts if it: “(1) tends to prove a material point; (2) is not too remote in time; (3) is based upon sufficient evidence; and, (4) in some cases, is similar to the offense charged.” *United States v. Robertson*, 15 F.3d 862, 870 (9th Cir. 1994), *rev’d on other grounds*, 514 U.S. 669 (1995).

Whether your client’s guilty plea is admissible under Rule 404(b) will turn on how close a connection there is between the facts underlying the criminal conviction and those at issue in the civil antitrust action. Even when there is a factual nexus, however, there may be ways to minimize the impact of this evidence. You should consider, for example, whether your client can concede the specific fact that connects the plea admissions to the plaintiffs’ case as a way to prevent introduction of the conviction itself. Although a party has a basic right to present its own

case, the rules of evidence still impose substantial limitations. In the context of criminal law, the Supreme Court has held that a trial court abuses its discretion in rejecting a defendant's offer to stipulate to his status as a felon and admitting the full record of a prior judgment when evidence of the prior judgment enhanced the risk of a verdict based on prejudicial considerations and the purpose of the prior judgment was solely to prove the element of prior conviction. *Old Chief v. United States*, 519 U.S. 172, 190-92 (1997). A similar analysis may be useful in the civil law context. See, e.g., *Blue v. IBEW Local Union 159*, 676 F.3d 579, 585-6 (7th Cir. 2012) (affirming admission of EOC file in a Title VII case but citing *Old Chief* for the proposition that although plaintiff is entitled to make her case with evidence of her own choosing it is nonetheless subject to the balancing test of Fed. R. Evid. 403)).

C. Hearsay Issues

If the court finds your client's guilty plea relevant, then it is unlikely that hearsay objections will be an obstacle to admissibility. Rule of Evidence 803(22) permits the introduction of a final judgment of conviction "entered after a trial or guilty plea . . . for a crime punishable by death or by imprisonment for more than a year . . . to prove any fact essential to the judgment" as an exception to the hearsay rule.¹³ Moreover, your client's "own statements at [its] plea allocution, including [its] explicit and unambiguous agreement with the description of evidence given by the government," will likely be deemed admissions under Rule 801(d)(2)(A). *SEC v. Berger*, 244 F. Supp. 2d 180, 189 (S.D.N.Y. 2001). Indeed, some courts have found that because the record of a guilty plea carries a heightened standard of reliability and trustworthiness, it may be admitted under the so-called "residual" exception to the hearsay rule. See, e.g., *In re Slatkin*, 525 F.3d 805, 812 (9th Cir. 2008) (admitting a plea agreement into evidence under Fed. R. Evid. 807).

The admission of a guilty plea can be particularly problematic if (as is often the case) the civil antitrust action involves multiple defendants. As a matter of criminal law, the guilty plea of one conspirator may not be admitted as substantive evidence in the trial of a co-conspirator. *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981) ("As a principle of general acceptance, the guilty plea or conviction of a codefendant may not be offered by the government and received over objection as substantive evidence of the guilt of those on trial.")¹⁴ In a civil action, however, the law can be different. Courts have held that in a multi-defendant civil trial a defendant's "guilty plea may be admitted under Rule 803(22) against all defendants as long as the plea [is] admitted 'to prove any fact essential to sustain the judgment.'" *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 892 (D.C. Cir. 2010) (quoting Fed. R. Evid. 803(22)); see *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995) (in an action brought by a plaintiff receiver to recover funds from a Ponzi scheme, it was proper on summary judgment to admit the guilty plea of the mastermind under Rule 803(22) to establish the civil liability of other defendants).

¹³ The 1972 Advisory Committee's notes to Rule 803(22) state: "When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all."

¹⁴ In a criminal case, the Confrontation Clause prevents the introduction of testimonial evidence, such as a co-defendant's admissions, without affording the opportunity for cross-examination. See *Kirby v. United States*, 174 U.S. 47, 55 (1899).

Admission in these circumstances will turn on the purpose for which the plea is being offered. A guilty plea should be admitted only if it establishes a “fact” that is at issue in the civil litigation, or (in the event collateral estoppel applies) to establish the liability of the pleading defendant. Other parties need to protect their ability to mount a defense, which is difficult when they have been implicated by a co-defendant’s plea. The *Miller* case, cited in the preceding paragraph, illustrates well the difficulties created by these situations. *Miller* involved the trial of a False Claims Act case brought against multiple defendants. The court admitted into evidence a plea of guilty by one defendant to a bid rigging conspiracy because it found that the bids and payments at issue in the plea were central to the civil case. Notably, the court admitted not only the plea but also the Rule 11 memorandum (submitted jointly by the defendant and the government) that described the scope of the conspiracy and the roles of co-conspirators. *Miller*, 608 F.3d at 892. But other defendants in the civil trial had neither been charged nor convicted of the conspiracy, and they strenuously objected, contending that they were being prejudiced and that the plea was being used to prove a legal “conclusion”—liability—and not any “fact” at issue. *Id.* Although the trial court overruled the objections and found admissibility under Rule 803(22), it nonetheless recognized the potential for prejudice. The court therefore redacted any specific references to the non-pleading defendants and instructed the jury not to draw any inference against any other defendant based on the plea. *Id.* at 892-93. The trial court explained that the civil plaintiffs “still bear the burden of establishing a link between the ‘others’ who [the guilty party] allegedly conspired with, and specific defendants in this case.” *Id.* at 891. *Cf. Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (defendant’s confession may be admissible in a joint criminal trial if it is accompanied by a proper limiting instruction and if it has been redacted to eliminate any reference to other defendants). Since the jury found all the defendants liable, it is hard to know whether these precautions had any effect.

D. The Danger of Unfair Prejudice

Your ultimate defense to the admission of any guilty plea lies with the court’s discretion. The Federal Rules of Evidence provide that a court “may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Thus, evidence of your client’s guilty plea, even if relevant, can still be excluded if the trial court is persuaded that there are sound reasons for keeping it out of the civil trial. For example, the danger of “unfair prejudice” generated by a criminal conviction arguably substantially outweighs its probative value if there is a high risk that it will be treated as impermissible character evidence and if a limiting instruction would likely be ineffective. A court may also exclude admissible evidence when admitting it could likely lead to a mini-trial on the circumstances of the prior conviction. *See, e.g., Duran v. City of Maywood*, 221 F.3d 1127, 1132-33 (9th Cir. 2000) (evidence was properly excluded under Rule 403 because its admission would have required “a full-blown trial within a trial,” and the marginal value of the evidence was substantially outweighed by confusion of the issues, misleading the jury, or undue delay). Moreover, plea agreements can sometimes be quite complex and filled with confusing or prejudicial language, and their admission into evidence may complicate the proceedings by necessitating explanatory testimony and court instructions. This could tip the scales in favor of exclusion. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1348 (5th Cir. 1978) (a trial “should not have been further complicated by the unnecessary, confusing, and potentially misleading element” of an earlier guilty plea). All these types of

evidentiary objections should be carefully considered in the context of the specific facts of your case.

V. CONCLUSION

Although resolving criminal antitrust charges with the federal government is unlikely to end litigation for your client, there are a number of legal tools that may limit the collateral consequences of your client's guilty plea. This article has attempted to identify some of the legal principles that may enable you to advise your client on how to navigate around its past criminal plea and preserve its opportunity to defend against civil antitrust claims. Whether your client will be successful will depend in large part on the facts underlying its conviction, and how closely the subsequent civil antitrust litigation mirrors the essential facts of its guilty plea.