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Civil Procedure - A Prior Guilty Plea Is Sufficient to Raise and Establish the Affirmative Defense of Collateral Estoppel Even Though That Defense Is Neither Pleaded Nor Articulated and No Record of the Prior Proceeding Is Offered into Evidence

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CIVIL PROCEDURE—A PRIOR GUILTY PLEA IS SUFFICIENT TO RAISE AND ESTABLISH THE AFFIRMATIVE DEFENSE OF COLLATERAL ESTOPPEL EVEN THOUGH THAT DEFENSE IS NEITHER PLEADED NOR ARTICULATED AND NO RECORD OF THE PRIOR PROCEEDING IS OFFERED INTO EVIDENCE

Prinz v. Greate Bay Casino Corp. (1983)

In May 1981, employees of Greate Bay Hotel and Casino, Inc. (Greate Bay) approached patron David Prinz while he was playing blackjack and threatened to have him arrested if he did not leave.[1] Two months earlier, a casino staff official had advised Prinz that he had been identified as a card counter and that he would no longer be permitted to play blackjack on the premises.[2] As several members of the security force escorted Prinz to the door on this second occasion, a scuffle broke out.[3] Prinz was knocked to the floor, handcuffed and removed to a small detention room where he remained until the Atlantic City police arrived, some thirty to forty minutes later.[4] The police took Prinz to the station where a Greate Bay security officer filed a complaint against him for defiant trespass.[5] After he spent approximately twenty hours in custody, Prinz appeared before the Atlantic City Municipal

1. Prinz v. Greate Bay Casino Corp., 705 F.2d 692, 693 (3d Cir. 1983).

2. *Id.* The casino employees had told Prinz that if he attempted to play blackjack in the future, he would be ejected as a trespasser. *Id.* This warning occurred in March 1981, when the casino was known as the Brighton. Appellant's Appendix at 23a-25a, Prinz v. Greate Bay Casino Corp., 705 F.2d 692 (3d Cir. 1983) [hereinafter cited as AA] (citing Prinz v. Greate Bay Corp., No. 81-4707 (E.D. Pa. 1982) (unpublished trial record)). When Greate Bay Casino Corporation (Greate Bay) took over and began operating the casino under the name of the Sands, it retained most of the Brighton casino personnel, including those members of the security force who had previously warned Prinz not to play blackjack at their tables. AA at 23a-25a, 96a-98a, 103a.

Greate Bay did not allege at any time that Prinz had been disruptive or disorderly on either occasion. 705 F.2d at 695 (Higginbotham, J., dissenting). For a discussion of a casino's right to eject an individual for being a card counter, see notes 53-58 and accompanying text *infra.*

3. 705 F.2d at 693. There was conflicting testimony on whether the security guards offered Prinz the opportunity to cash in his chips, worth approximately $250, before he left. *See* AA at 34a-37a, 170a-171a. The scuffle occurred when Prinz stopped at the casino exit and attempted to return to the main room. *Id.* at 35a-40a. Prinz alleged that the guards then began to punch and kick him, causing cuts over his eyes and on his wrists, bruises to his hip and knees, and a groin injury. *Id.* at 41a-42a, 48a-49a.

4. *Id.* at 46a. Prinz was placed on a small stool in the detention room and one of his hands was cuffed to a metal bar that was attached to the wall. *Id.* at 43a-44a, 136a.

5. 705 F.2d at 693. Defiant trespass is a statutory offense in New Jersey. The relevant statute provides in pertinent part as follows:

b. Defiant trespasser. A person commits a petty disorderly offense if,

Court.[6] On the advice of a public defender assigned to that court, Prinz pleaded guilty to the defiant trespass charge and paid a fine of twenty-five dollars.[7]

In November 1981, Prinz filed a diversity action in the United States District Court for the Eastern District of Pennsylvania, charging Greate Bay with assault and battery and false imprisonment.[8] In its answer to Prinz's complaint, Greate Bay denied that the casino had falsely imprisoned Prinz, stating that its staff had merely held him on defiant trespass charges.[9] In the course of the trial, Greate Bay elicited testimony from Prinz in which he admitted pleading guilty to the trespass charge.[10] Greate Bay did not produce any record of the trespass complaint or conviction, nor did it use the phrase "collateral estoppel" in any of its pleadings, arguments, or post-trial motions.[11] The jury found Greate Bay liable on all charges and returned a

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knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

(1) Actual communication to the actor; or

(2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or

(3) Fencing or other enclosure manifestly designed to exclude intruders.

N.J. STAT. ANN. 2C:18-3(b) (West 1982).

6. 705 F.2d at 693.

7. *Id.* at 696 (Higginbotham, J., dissenting). Prinz testified on cross-examination that the public defender had told him that his "best bet" was to plead guilty and pay the $25 fine that would be imposed. *Id.* (quoting AA at 62a). Prinz further testified, "I didn't feel that I was guilty of anything, but . . . I was detained for 19, 20 hours and in a situation I had never been in and my main objective was to get my freedom again." *Id.* (quoting AA at 62a). For the text of Prinz's testimony, see note 71 *infra.*

8. Prinz v. Greate Bay Casino Corp., No. 81-4707 (E.D. Pa. April 2, 1982) (unreported). Prinz, a citizen of Pennsylvania, sought damages in excess of $10,000; hence federal jurisdiction was asserted on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332 (1976). AA at 5a. The case was heard before a jury. AA at 14a. *See* FED. R. CIV. P. 38(b).

9. 705 F.2d at 693, 697. Greate Bay's answer designated six defenses to Prinz's complaint, none of which referred to the trespass conviction. AA at 9a-10a. Among its general denials Greate Bay stated, "The allegations of false imprisonment are denied. To the contrary, defendant [sic] was detained pending the arrival of the Atlantic City Police Department and plaintiff was charged and convicted of defiant trespass." 705 F.2d at 693 (quoting from AA at 8a) [the denial mislabels plaintiff as "defendant" in the second sentence]. The answer did not allude to "estoppel" at all. 705 F.2d at 697 n.4 (Higginbotham, J., dissenting).

10. 705 F.2d at 693. Greate Bay cross-examined Prinz on his plea to "the charges" filed against him at the Atlantic City Police Department. *Id.* (quoting AA at 58a). No objection was raised by Prinz's counsel. *Id.* at 693. On redirect examination, Prinz's counsel asked him to explain the circumstances under which he pleaded guilty. *Id.* at 695-96 (Higginbotham, J., dissenting). Prinz's explanatory testimony is discussed in note 7 *supra.*

11. 705 F.2d at 695 (Higginbotham, J., dissenting). In motions for a directed verdict at the close of Prinz's case and at the close of all evidence, counsel for Greate Bay argued, "Then the false imprisonment claim, that he was detained while the Atlantic City Police were called. He was arrested by the Atlantic City Police and eventually pleaded guilty. I submit, your honor, that that would precluded [sic] his

judgment for Prinz in the amount of $105,000.[12]

Greate Bay argued on appeal that Prinz's trespass conviction collaterally estopped him from asserting that he was lawfully on casino premises, and that consequently the casino had had probable cause to detain Prinz for arrest.[13] The United States Court of Appeals for the Third Circuit vacated and remanded,[14] *holding* that an opposing party's testimony acknowledging a prior guilty plea is sufficient to raise and establish the affirmative defense of collateral estoppel even though that defense has been neither pleaded nor articulated and no record of the prior proceeding has been offered into evidence. *Prinz v. Greate Bay Casino Corp.*, 705 F.2d 692 (3d Cir. 1983).

The Federal Rules of Civil Procedure were designed to liberalize traditional hypertechnical pleading requirements so as to facilitate proper decision making on the merits.[15] To assure that pleadings fairly apprise the

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false imprisonment claim." 705 F.2d at 694 (quoting AA at 75a). This motion was denied. *Id.* at 694. Greate Bay requested the following jury charge on the false imprisonment claim: "You must consider the fact that the Atlantic City Police Department was notified immediately and took plaintiff into custody and charged him with defiant trespassing. Plaintiff admitted that he pleaded guilty to this offense." *Id.* (quoting AA at 266a). The district court refused this request and instead instructed the jury that the arrest was without legal authority and therefore did not provide the casino with a defense to false imprisonment charges. *Id.* at 694 (quoting AA at 238-39a). Further, the trial judge charged,

> [D]efendant's employees did not have legal authority to arrest the plaintiff for defiant trespass, because . . . the defendant did not have the right to exclude the plaintiff from the casino as a suspected card counter. Therefore, if you find from the evidence that . . . defendant's employees intentionally detained [plaintiff] against his will, by actual force, for some appreciable period of time, then you should find the defendant liable for false imprisonment.

Id. Although the trial judge did not cite his authority for this statement of the law, he may have relied upon a then-recent decision in which the New Jersey Superior Court used similar language. *See* Uston v. Resorts Int'l Hotel, Inc., 179 N.J. Super. 223, 431 A.2d 173 (1981), *aff'd*, 89 N.J. 163, 445 A.2d 370 (1982), noted in 28 VILL. L. REV. 451 (1983). For a discussion of *Uston* and the right of privately-owned businesses to exclude individuals from their premises, see note 53-58 and accompanying text *infra.*

12. 705 F.2d at 693. Finding Greate Bay liable for assault and battery, and false imprisonment, the jury awarded Prinz $5,000 in compensatory and $100,000 in punitive damages. *Id.*

13. *Id.* at 694. The district court's instructions to the jury are excerpted at note 11 *supra.* Greate Bay contended that these instructions were erroneous and that probable cause to detain a defiant trespasser was a defense to a charge of false imprisonment. 705 F.2d at 694.

14. The case was heard by Judges Aldisert, Gibbons, and Higginbotham, with Judge Gibbons writing the opinion of the court. Judge Higginbotham filed a dissenting opinion. 705 F.2d at 692. Because the jury had not made separate damage awards, the court vacated and remanded the entire case despite its holding that the assault and battery verdict was not affected by the erroneous charge on false imprisonment. *Id.* at 695.

15. *See* Foman v. Davis, 371 U.S. 178, 181-82 (1962). The *Foman* Court stated that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . ." *Id. See also* Cook v. Harris, 85 F.R.D. 279, 285 (N.D. Ga. 1979) (failure to use precise words in pleading "is of little importance under a system of procedural rules where the guiding princi-

court and opposing parties of disputed issues, rule 8(c) requires a party to plead specifically any affirmative defense upon which it intends to rely at trial.[16] However, so that defective pleadings do not result in forfeiture of claims or defenses, the rules incorporate a liberal amendment policy.[17] In

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ple is that the rules 'shall be construed to secure the just, speedy and inexpensive determination of every action.' " (quoting FED. R. CIV. P. 1)).

16. FED. R. CIV. P. 8(c). The rule reads in full:

> (c) Affirmative Defense. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, *estoppel*, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Id. (emphasis added).

An affirmative defense has been defined as "matter that is not within the claimant's prima facie case." 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 8.27[1], 8-243 (2d ed. 1983) [hereinafter cited as 2A MOORE'S FEDERAL PRACTICE]. In discussing the difference between an affirmative defense and a denial, the Oregon Supreme Court explained that whereas a general denial "puts in issue every fact . . . which the plaintiff is bound to prove," an affirmative defense tends to "contradict" and not "destroy" the plaintiff's cause of action. Denham v. Cuddeback, 210 Or. 485, 490, 311 P.2d 1014, 1016 (1957) (citations omitted).

The general rule is that an affirmative defense not pleaded is waived. *See* FED. R. CIV. P. 12(b). *See also* Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 433 (8th Cir. 1976). In *Sartin*, Simpson Sartin, Jr. sued a police officer under 42 U.S.C. § 1983 for false arrest. *Id.* at 432-33. Sartin had been arrested on charges of operating a motor vehicle while under the influence of alcohol. *Id.* at 432. After his arrest Sartin refused to submit to tests intended to determine whether he had been drinking. *Id.* State law required any person arrested for driving under the influence to submit to a test or face revocation of his driver's license. *Id.* Sartin was tried and acquitted by a jury of the charges of operating a vehicle under the influence of alcohol. *Id.* However, he failed to appear at a trial on the license revocation issue and soon after the default judgment was entered his license was revoked. *Id.* In Sartin's subsequent § 1983 action, the officer pleaded neither collateral estoppel nor res judicata as an affirmative defense, yet the trial court dismissed Sartin's false arrest claim on these grounds. *Id.* at 433. On appeal, the Eighth Circuit reversed, holding that failure to plead collateral estoppel or res judicata amounts to a waiver of these defenses, both at trial and on appeal. *Id.* Other courts have also held affirmative defenses were waived because they were not specifically pleaded. *See* United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974) (statute of limitations); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (estoppel); Systems Inc. v. Bridge Elecs. Co., 335 F.2d 465 (3d Cir. 1964) (fraud); Wackerle v. Pacific Employers Ins. Co., 219 F.2d 1 (8th Cir. 1955) (estoppel). Rule 8(c)'s pleading requirement is intended to facilitate judicial efficiency by notifying both court and counsel early on in the adjudication that certain matters are sought to be avoided. Blonder-Tongue Labs., Inc. v. University Found., 402 U.S. 313, 350 (1971). *See also* Mason v. Hunter, 534 F.2d 822, 825 (8th Cir. 1976) (because unpleaded issue of assumption of risk was raised prior to trial and again in defendant's opening statement, plaintiffs had ample notice and opportunity to argue the defense; therefore the defense was not waived); Schultz v. Cally, 528 F.2d 470, 475 (3d Cir. 1975) (case remanded because defendant was not put "on notice" of the unpleaded issue).

17. *See* FED. R. CIV. P. 15(b). The Supreme Court has stated that in the absence of any bad faith or dilatory tactics, leave to amend—as the rules require—

addition to permitting formal amendments to pleadings, rule 15(b) provides that any issue not pleaded but tried by the express or implied consent of the parties will be treated as if it had been properly pleaded.[18]

Generally, a litigant who asserts that unpleaded issues were tried by implied consent must show a strong basis for this conclusion in the record.[19]

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should be "freely given." Foman v. Davis, 371 U.S. 178, 182 (1962). For a further discussion of rule 15(b), see note 18 and accompanying text *infra*.

18. FED. R. CIV. P. 15(b). Rule 15(b) provides in full:

> (b) *Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.* Such amendment to the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Id. (emphasis added).

In effect, rule 15(b) provides "two very different routes" for amendment. Niedland v. United States, 338 F.2d 254, 259 (3d Cir. 1964). The first is used when evidence is introduced and objected to because it is not within the pleadings. *Id.* In such case, the rule provides that the court may freely allow amendments to the pleadings. *Id.* In the second, no formal amendment is made; rather, the court finds that an issue neither pleaded nor objected to has nevertheless been tried by express or implied consent. *Id.* For further discussion of the exception for issues tried by express or implied consent, see notes 19-23 and accompanying text *infra*.

19. *See, e.g.*, Schultz v. Cally, 528 F.2d 470, 475 (3d Cir. 1975). The *Schultz* court stated that rule 15(b) of the Federal Rules of Civil Procedure is applicable "only where it clearly appears from the record" that an unpleaded matter was in fact tried and litigated by both parties." *Id.* In *Schultz*, there had been no pretrial conference, and the court regarded the record of trial as incomplete. *Id.* Hence, it would be impossible to infer the necessary implied consent. *Id.* For the facts of *Schultz*, see note 21 *infra*. *See also* Radio Corp. of Am. v. Radio Station KYFM, Inc., 424 F.2d 14, 17 n.3 (10th Cir. 1970) (rule of implied consent is applicable "only where it clearly appears from the record" that the issue was in fact tried); Niedland v. United States, 338 F.2d 254, 258 (3d Cir. 1964) (court thoroughly examines prior record before determining whether there was implied consent to litigate an unpleaded issue); Systems, Inc. v. Bridge Elecs. Co., 335 F.2d 465, 467 (3d Cir. 1964) ("we find nothing in the record" to indicate that there was implied consent). For a discussion of the requirement of a complete trial record as it relates to the doctrine of collateral estoppel, see notes 31-35 and accompanying text *infra*.

Since judicial determinations of what was impliedly litigated are difficult, many courts will at least question the failure of a party to request amendment of the pleadings. *See, e.g.*, Albee Homes, Inc. v. Lutman, 406 F.2d 11, 13 (3d Cir. 1969) ("we are not holding that if a party fails to raise an affirmative defense in his original responsive pleading he is forever barred from raising it; we merely hold that normally the proper remedy is to move for leave to amend" as opposed to a later contention of implied consent. *See also* Mason v. Hunter, 534 F.2d 822, 825 (8th Cir. 1976) (it "would have been better housekeeping for defendant to have requested an amendment" than to rely on implied consent). In one case, the Sixth Circuit went so far as to refuse to find that an affirmative defense had been tried by implied consent of the

The Third Circuit has found that consent to litigate an unpleaded issue can be properly inferred where (1) evidence linked to the unpleaded matter was introduced;[20] (2) the opposing party had notice that the evidence went to the unpleaded issue;[21] and (3) the opposing party failed to object to the in-

parties because the defendants "should have moved the trial court for leave to amend." United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877 (6th Cir. 1974). According to the *Masonry* court, the defendants' failure to make "any attempt" to amend amounted to a waiver of that defense, even though the facts underlying that defense had been referred to in the course of the trial. *Id.*

20. *See* Frietag v. The Strand, 205 F.2d 778 (3d Cir. 1953). *Frietag* involved a suit by the government to recover a damage award Frietag had received in an unrelated lawsuit. *Id.* at 779. The government alleged that Frietag had breached an agreement to assign the award to the Internal Revenue Service by assigning to a third party. *Id.* Although the government did not plead fraudulent assignment, the trial court found for the government on that ground. *Id.* at 780. On appeal, the Third Circuit was asked to determine whether there had been implied consent to litigate this unpleaded issue. *Id.* at 781. Judge Hastie, writing the opinion, observed that implied consent is usually found on the basis of one or more of the following: both parties introduce evidence on an issue; evidence is introduced by one party and no objection is raised by the other; or an "issue" not raised by the pleadings is "in reality only an unanticipated line of proof" which serves to establish a duly pleaded issue. *Id.* However, the court stated, in this case the plaintiffs had failed to offer any evidence of the unpleaded matter. *Id.* There could not have been any implied consent to litigate since there was no indication on the record that either party regarded fraud as a subject at issue. *Id.* at 782. The court concluded, "It is not clear to us that the parties ever addressed themselves to that issue, ... Certainly, there was no such clear framing of the issue and plain proof as is desirable on so grave a matter . . . ." *Id. See* Niedland v. United States, 338 F.2d 254 (3d Cir. 1964) (since plaintiff introduced substantial evidence on special damages, his failure to plead the affirmative matter is not controlling); Systems, Inc. v. Bridge Elecs. Co., 335 F.2d 465, 467 (3d Cir. 1964) (since the only "evidence" of the affirmative defense of fraud was a vague remark by plaintiff, defendant has not established that there was implied consent to litigate that issue); *see also* Wirtz v. F.M. Sloan, Inc., 285 F. Supp. 669, 675 (W.D. Pa. 1968) (the failure of defendant to introduce evidence on the issue of exemption amounts to a waiver of the affirmative defense).

21. *See, e.g.*, Neidland v. United States, 338 F.2d 254, 258 (3d Cir. 1964). The Third Circuit examined the relationship between sufficiency of notice and implied consent to litigate at length in Schultz v. Cally, 528 F.2d 470 (3d Cir. 1975). In the initial action Schultz had erroneously alleged diversity of citizenship on the basis of the residencies (rather than the citizenship) of the parties. *Id.* at 472-73. Neither the district judge nor the parties made note of this error. *Id.* at 472. The case was tried and judgment was rendered for the plaintiff. *Id.* On appeal to the Third Circuit, the defendants argued that the judgment was invalid because of lack of subject matter jurisdiction. *Id.* Schultz argued that the defendants, by failing to object to evidence regarding interstate commerce, had impliedly consented that the adjudiction involved a federal question, thereby establishing proper federal jurisdiction. *Id.* at 473. Schultz had not pleaded a federal question. *Id.* On review, the Third Circuit emphasized that consent should only be found when it is clear that the party who has failed to object to the introduction of evidence on an unpleaded issue knew or should have known what was occurring. *Id.* at 474. Quoting the Tenth Circuit Court of Appeals, the court explained that under rule 15(b) of the FEDERAL RULES OF CIVIL PROCEDURE,

> [T]here is implied consent to litigate an issue if there is no objection to the introduction of evidence on the unpleaded issue, as long as the non-objecting party was fairly apprised that the evidence went to the unpleaded issue . . . . Amendment is not accomplished "merely because evidence

troduction of evidence on the unpleaded issue.[22] Of course, in determining whether the issues were expanded by implied consent, a reviewing court will have to examine the entire trial record.[23]

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which is competent and material upon the issues created by the pleadings incidentally tends to prove another fact not within the issues in the case." *Id.* (quoting Simms v. Andrews, 118 F.2d 803, 807 (10th Cir. 1941)). After reviewing the lower court testimony regarding interstate travel and mail, the Third Circuit concluded that "seemingly innocuous" evidence on interstate transactions could not, with certainty, have put defendants on notice that a federal securities act was asserted as a ground for federal jurisdiction. *Id.* at 475. Therefore, the court held, there could not have been implied consent to litigate that issue. *Id.*

The necessity of adequate notice as a prerequisite for finding implied consent to litigate an unpleaded issue is well established. *See, e.g.*, Albee Homes, Inc. v. Lutman, 406 F.2d 11, 13 (3d Cir. 1969) (plaintiff "did not put defendant on notice" that he intended to litigate the issue of "release"); United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877 (6th Cir. 1974) (defendants were not given notice of statute of limitations issue and therefore the issue was waived); Simms v. Andrews, 118 F.2d 803, 807 (10th Cir. 1941) (since there was no notice of the statute of limitations defense, there was no implied consent to litigate and the defense is waived); Wirtz v. F.M. Sloan, Inc., 285 F. Supp. 669, 675 (W.D. Pa. 1968) (no implied consent since plaintiff "had no idea at any time prior to, during, or after the trial that the defense of exemption . . . was even contemplated").

22. *See* Niedland v. United States, 338 F.2d 254, 258-59 (3d Cir. 1964). The *Neidland* court stated that "a litigant cannot, for tactical purposes, stand by silently while evidence is being admitted and then claim later that no relief can be given because the matter was not plead [sic]." *Id.* at 259. *See also*, Albee Homes, Inc. v. Lutman, 406 F.2d 11, 13 (3d Cir. 1969) (if the adverse party makes no objection to introduction of evidence on an unpleaded matter, "the issues are enlarged") (quoting 2A MOORE'S FEDERAL PRACTICE ¶ 8.27[3] at 1853 (2d ed. 1968)). *See generally* Barnwell & Hays, Inc. v. Sloan, 564 F.2d 254, 255 (9th Cir. 1977) (plaintiff not only failed to object to evidence of waiver, but argued the issue as well, thereby establishing implied consent to litigate); Mason v. Hunter, 534 F.2d 822, 825 (8th Cir. 1976) (court found implied consent to litigate defense of assumption of risk since evidence on the matter was introduced without objection both before and during trial); Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182 (7th Cir. 1973) (a judgment adverse to plaintiff in prior civil action to reform a mortgage estops plaintiff from relitigating issue of fraud in formation of mortgage, even though collateral estoppel not formally pleaded since plaintiff had treated the defense as if it had been pleaded); Lasseigne v. Nigerian Gulf Oil Co., 397 F. Supp. 465 (D. Del. 1975) (plaintiff not only failed to object, he argued as if the defense had been properly pleaded).

Conversely, the mere objection to evidence relating to unpleaded matters may not, in itself, conclusively establish lack of consent. Consent is often inferred when a deficient pleading is deemed to give ample notice of the unpleaded issue to the opposing party. *See* Barnwell & Hays, Inc. v. Sloan, 564 F.2d 254, 255-56 (8th Cir. 1977) (allegations of a "verbal agreement" in defendant's pleading held sufficient to apprise plaintiff of defendant's intention to rely on "waiver" as an affirmative defense); Mutual Creamery Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 427 F.2d 504, 507-10 (8th Cir. 1970) (references to a "legal novation" in the pleading impliedly raised the affirmative defense of ratification). *But compare* Cook v. Harris, 85 F.R.D. 279, 285 (N.D. Ga. 1979) (reliance on court decision in the pleadings was sufficient for a defense of res judicata) *with* United States v. Friedland, 391 F.2d 378 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1971), and *cert. denied*, 404 U.S. 914 (1971) (a pleading of double jeopardy is not adequate for a pleading of collateral estoppel even though both relate to the effect of a prior proceeding). For a further discussion of the notice requirement, see note 21 and accompanying text *supra*.

23. *See, e.g.*, Schultz v. Cally, 528 F.2d 470, 475 (3d Cir. 1975). The *Schultz* court

Because it is an affirmative defense, rule 8(c) requires that collateral estoppel be specifically pleaded.[24] Collateral estoppel is a common law doc-

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stated that rule 15(b) of the Federal Rules of Civil Procedure is applicable "only where it clearly appears from the record" that an unpleaded matter was in fact tried and litigated by both parties. *Id. See also* Radio Corp. of Am. v. Radio Station KYFM, Inc., 424 F.2d 14, 17 n.3 (10th Cir. 1970) (rule of implied consent is applicable "only where it clearly appears from the record" that the issue was in fact tried); Niedland v. United States, 338 F.2d 254, 258 (3d Cir. 1964) (court thoroughly examines prior record before determining whether there was implied consent to litigate an unpleaded issue); Systems, Inc. v. Bridge Elecs. Co., 335 F.2d 465, 467 (3d Cir. 1964) ("we find nothing in the record" to indicate that there was implied consent). For a discussion of the requirement of a complete trial record as it relates to the doctrine of collateral estoppel, see notes 52-55 and accompanying text *infra.*

24. For a discussion and text of rule 8(c), see note 16 and accompanying text *supra.* Collateral estoppel, when raised by a defendant, is deemed an affirmative defense in the federal system. Blonder-Tongue Labs., Inc. v. University Found., 402 U.S. 313, 350 (1971). However, the doctrine may be raised by either a plaintiff or a defendant. *See* Cromwell v. County of Sac, 94 U.S. 351 (1877) (extensive discussion on use by both parties).

Unlike the related doctrine of res judicata, collateral estoppel does not bar the cause of action; rather, it only serves to remove from the court's consideration all issues within that cause of action that have already been litigated. 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.441[3], 722 (2d ed. 1983) [hereinafter cited as 1B MOORE'S FEDERAL PRACTICE]. A succinct approach for determining the applicability of either of the two doctrines is found in United States Mach. Corp v. United States, 248 U.S. 451 (1922):

> [T]o determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit determinative of the matter in controversy in the second suit?

Id. at 459. In the former instance, res judicata would be applicable, while in the latter event collateral estoppel would apply. *Id.* Collateral estoppel has been variously labeled "issue preclusion," "preclusion by judgment," "estoppel by judgment," "estoppel by record," "estoppel by verdict," and, in older cases, simply "res judicata." 1B MOORE'S FEDERAL PRACTICE, *supra,* ¶ 0.441[2], at 722-24. The Restatement adopts the term "issue preclusion." RESTATEMENT (SECOND) OF JUDGMENTS § 27 comments a & b (1982). The federal courts favor the term "collateral estoppel." 1B MOORE'S FEDERAL PRACTICE, *supra,* ¶ 0.441[2], at 724. For further discussion, see Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1, 3 n.4 (1942).

The Restatement states the general rule of collateral estoppel: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same claim or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The United States Supreme Court has offered this variation on the definition: "Under collateral estoppel, 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) (citations omitted). For a good overview of the doctrine of collateral estoppel, see generally F. JAMES, CIVIL PROCEDURE §§ 11.18-11.22, 11.35 (1965); 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶¶ 0.441-.448; RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-29 (1982); Hazard, *Res Nova in Res Judicata,* 44 S. CAL. L. REV. 1036 (1971); Polasky, *Collateral Estoppel—Effects of Prior Litigation,* 39 IOWA L. REV. 217 (1954); Scott, *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818 (1952) [hereinafter cited as *Developments in the Law*]; Scott, *Collateral Estoppel By Judgment,* 56 HARV. L. REV. 1 (1942); Vestal, *Preclusion/Res Judicata Variables: Na-*

trine that operates to preclude the relitigation of issues[25] which were actually raised and litigated[26] and were essential to the judgment[27] in a prior judicial

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ture of the Controversy, 1965 WASH. U.L.Q. 158; Comment, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647 (1952); Note, *Collateral Estoppel and the Dollar Litigation*, 20 GEO. WASH. L. REV. 749 (1952). For a further discussion of collateral estoppel, see notes 25-29 and accompanying text *infra*.

25. Montana v. United States, 440 U.S. 147 (1979). The Restatement has noted that arriving at an exact definition of an "issue" may be "what is perhaps the most difficult problem" in the area of collateral estoppel. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c & Reporter's Note, at 264 (1982). Professor Moore comments that while the concept of a "cause of action" has received considerable elaboration, the concept of an "issue" has not; as a result, courts "have been inclined to decide cases upon implicit assumptions as to the identity of issue[s] . . . ." 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.443[2], at 760. The Supreme Court has referred to an issue as simply a "relevant fact" to the case at bar. *See* Commissioner v. Sunnen, 333 U.S. 591, 601 (1948). The Sixth Circuit has offered a more precise definition of "issue" as being "a single, certain and material point arising out of the allegations and contentions of the parties." Paine & Williams Co. v. Baldwin Rubber Co., 113 F.2d 840, 843 (6th Cir. 1940). This is to be contrasted with a "cause of action" which has been defined as a "right, question, or fact in controversy." Oklahoma v. Texas, 256 U.S. 70, 87 (1921). *See also* Donegal Steel Foundry Co. v. Accurate Prods. Co., 516 F.2d 583, 588 n.10 (3d Cir. 1975) (surveying numerous definitions given for "cause of action").

26. Lawlor v. National Screen Serv., 349 U.S. 322, 326 (1955) (collateral estoppel precludes issues actually litigated regardless of whether the second proceeding is on a different cause of action). In its literal sense, "litigate" means "to dispute or contend" or "to contest in law." BLACK'S LAW DICTIONARY 841 (5th ed. 1979). The Restatement strictly adheres to this definition, affording no preclusive effect to such matters as admissions in the pleadings (either explicit or by virtue of failure to deny), admissions in the course of the trial where no evidence on that issue has been adduced, stipulations between the parties, and judgments entered by confession, consent or default. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment 3 (1982). For a discussion of whether a criminal conviction based on a guilty plea satisfies the "actually litigated" requirement, see note 45 and accompanying text *infra*.

Aside from the question of whether actual litigation requires adversariness in its literal sense, an issue is said to have been *actually* litigated only when it was "expressly and definitely" presented in the prior suit. Montana v. United States, 440 U.S. 147, 157 (1979). It may have been presented in either the pleadings or in the course of such trial or proceeding. Paine & Williams Co. v. Baldwin Rubber Co., 113 F.2d 840, 843 (6th Cir. 1940). Thus, issues that could have been raised but were not, have no conclusory effect upon a subsequent litigation. *See* Cromwell v. County of Sac, 94 U.S. 351, 356 (1877) ("a point not in litigation in one action cannot be received as conclusively settled . . . upon a different cause, because it might have been determined"); Stebbins v. Keystone Ins. Co., 481 F.2d 501, 506 (D.C. Cir. 1973) ("[t]he judgment is not conclusive, however, as to issues that might have been litigated and determined in the earlier action, but were not"). Therefore, any defense which could have been asserted but was not, may be asserted in a later proceeding on a new claim, even though the two causes of action are closely related. *Cromwell*, 94 U.S. at 357. The *Cromwell* Court stated that "nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity . . . in the first action." *Id.* at 356. It should be noted that this tenet of collateral estoppel represents one of the doctrine's primary differences from res judicata. Under res judicata, or claim preclusion, all issues that either *were* raised or *could* have been raised in a proceeding on the same cause of action are precluded from any further litigation. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.433[3], at

proceeding.[28] The potentially severe impact of collateral estoppel has tradi-

769-72. For a discussion on the distinction between collateral estoppel and res judicata, see note 24 *supra.*

27. Montana v. United States, 444 U.S. 147, 153 (1979). An issue is "essential" or necessary to the judgment of the earlier suit only if such judgment "could not have been rendered without deciding that matter." Russell v. Place, 94 U.S. 606, 608-09 (1876). Immaterial or irrelevant issues, though vigorously litigated, will not generally be given conclusive effect in a later proceeding in which the issue is material. 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.444(5.-1), at 781. *See also* Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168 (5th Cir. 1981) (it has always been the rule that the prior judgment will not act as collateral estoppel if the issue was "incidental, collateral, or immaterial" to prior judgment); Donegal Steel Foundry Co. v. Accurate Prods. Co., 516 F.2d 583, 588 (3d Cir. 1975) ("[l]itigation of any matter that was collaterally in question, incidentally cognizable, or to be inferred by argument from the judgment is not restricted in a subsequent suit"); *cf.* Lynne Carol Fashions, Inc. v. Cranston Print Work Co., 453 F.2d 1177, 1183 (3d Cir. 1972) (requirement that the issue be necessary to the prior decision "is well entrenched in the law. The sound basis for the principle is that parties should be estopped only on issues they actually deem important, and not on incidental matters").

In order to determine whether the matter sought to be precluded was essential to the earlier judgment, it is generally held that where the court of the earlier proceeding fails to make express findings or where the record of the earlier proceeding has not been offered into evidence in the subsequent action, invocation of collateral estoppel would be inappropriate. *See, e.g.*, Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 433 (8th Cir. 1976) (no estoppel when it is "impossible to determine from the record what issues of fact were actually litigated and determined"). For a further discussion of this requirement, see note 32 and accompanying text *infra.* However, Professor Moore states that in the absence of express findings, a court may occasionally employ a "necessary inference" to discover what issues were actually adjudged. 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.443[4], at 775-76. The requirement that the inference be "inevitable," is generally a stringent one since the usual rule is that the question of law or fact must be "distinctly put in issue and directly determined" by the court in order to invoke collateral estoppel. Frank v. Mangum, 237 U.S. 309, 333-34 (1915). Thus, in one case, the Seventh Circuit reversed a lower court's finding that because a jury had found a plaintiff guilty of resisting arrest, the issue of excessive force incidental to that arrest was "necessarily determined in the jury's finding." Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972). In reversing, the circuit court held that those two issues were distinct and independent of one another, and therefore determination of one could not be used to estop litigation of the other. *Id.*

28. 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, § 0.441[2], at 723-30. Both collateral estoppel and res judicata rest on the general judicial policy favoring repose and the conclusiveness of matters already settled by judicial determination. Oklahoma v. Texas, 256 U.S. 70, 85-86 (1921). As the Supreme Court has recently stated, these doctrines serve to

> relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, . . . encourage reliance on adjudication . . . . When a state court has adjudicated a claim or issue, these doctrines also serve to promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 n.6 (1982) (citations omitted). *See also* United States v. Standefer, 610 F.2d 1076, 1092 (3d Cir. 1979) (application of the principle "will (1) promote judicial economy by minimizing repetitive litigation; (2) prevent inconsistent judgments that might undermine the integrity of the judicial system; and (3) bar the harassment of a defendant through repetitious and vexatious litigation"), *aff'd*, 447 U.S. 10 (1980); Bruszewski v. United States, 181 F.2d 419, 421

tionaly been tempered by the courts' willingness to consider the fairness of invoking the doctrine under the particular circumstances of each case.[29]

The party asserting collateral estoppel[30] has the burden of showing that the issue presently before the court is identical to one which formed the basis of the prior decision.[31] This requires the litigant to produce an adequate record of the earlier proceeding.[32] This substantive burden stems from an

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(3d Cir. 1950) (collateral estoppel promotes "[b]oth orderliness and reasonable time saving in judicial administration"), *cert. denied*, 340 U.S. 865 (1950).

29. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.441[2], at 730. Although collateral estoppel seems on its face a less drastic doctrine than *res judicata*, it can be "dangerously broader," in Professor Moore's words:

> Because the effect of collateral estoppel, unlike that of *res judicata*, is not limited to the cause of action asserted in the initial suit, but extends to other claims arising between the parties, unforeseeable and sometimes unjust results are possible, especially if the doctrine is applied without some degree of flexibility. This danger exists when the issues concluded relate to facts on which numerous subsequent actions might be based, and, because of the smaller likelihood of foreseeability, it is even greater when the concluded issues related to questions of fact or law that might be determinative in a completely related controversy.

Id. (footnote omitted).

Because of these dangers, then, courts have injected into the doctrine broad concepts of fairness and flexibility. *See* Commissioner v. Sunnen, 333 U.S. 591, 599 (1948) ("collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice"). The expression generally used is that the litigant against whom collateral estoppel is being asserted must have had a "full and fair opportunity to litigate" that issue in an earlier case. Allen v. McCurry, 449 U.S. 90, 95 (1980). For a further discussion of the requirement of a full and fair opportunity to litigate, see note 38 and accompanying text *infra*.

30. For a discussion of the pleading requirements, see note 24 and accompanying text *supra*.

31. Chisholm v. Defense Logistics Agency, 656 F.2d 42, 50 (3d Cir. 1981). The *Chisholm* court stated that the burden of proof is on the party raising the issue of collateral estoppel to establish that the doctrine should apply to an issue in the present adjudication. *Id. See also* Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 844 (3d Cir. 1974) ("the issue decided in the prior litigation must be identical with the issue presented in the action in question").

32. Oklahoma v. Texas, 256 U.S. 70, 88 (1921). The *Oklahoma* Court stated that "[w]hat was involved and determined in the former suit is to be tested by an examination of the record proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court . . . ." *See also* Montana v. United States, 440 U.S. 147, 155-57 (1979) (in order to determine whether the issues presented in the second litigation are the same as those in the first, the court must review the entire record of the prior proceeding); Ashe v. Swenson, 397 U.S. 436, 444 (1970) (use of collateral estoppel in a criminal case "requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matters"); United States v. International Bld'g Co., 435 U.S. 502, 505 (1953) (collateral estoppel cannot be employed when "there is no showing in the record or by extrinsic evidence" of the issues raised in the prior adjudication); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951) (what was decided by a criminal judgment must be determined "upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, any opinions of the court"). If the record appears vague as to the particular issues involved, operation of collateral estoppel is considered inappropriate. *See, e.g.*, Russell v. Place, 94 U.S. 606,

early case in which the United States Supreme Court enunciated a prudential limitation on the doctrine of collateral estoppel.[33] In *Russell v. Place*,[34] the Court ruled that before collateral estoppel may be employed, the record of the earlier proceeding must clearly demonstrate that the precise matter at issue was in fact litigated, and that its determination was necessary to the prior judgment.[35]

Depending upon the court, the proponent may have additional burdens. Under the traditional mutuality rule, a party seeking to assert collat-

608 (1876) ("it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined"). This principle is supported by decisions in the Third Circuit as well. *See, e.g.*, Chisholm v. Defense Logistics Agency, 656 F.2d 42, 50 (3d Cir. 1981) (the party seeking to effectuate an estoppel must produce "a sufficient and adequate record" of the prior proceeding); De Cavalcante v. Commissioner, 620 F.2d 23, 28 n.10 (3d Cir. 1980) (in "situations involving the collateral estoppel effects of criminal judgments based on conspiracy counts, the trial court in the subsequent civil proceeding must examine the entire record to determine exactly what was decided"); United States v. Standefer, 610 F.2d 1076, 1095 (3d Cir. 1979) (particularly in non-mutual collateral estoppel, the court "would have to scrutinize the record of the prior proceeding with extreme care"), *aff'd*, 447 U.S. 10 (1980); Cities Serv. Co. v. Securities and Exchange Comm'n, 257 F.2d 926, 930 (3d Cir. 1958) ("we must not forget the reminder of the Supreme Court that what was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein").

33. Russell v. Place, 94 U.S. 606 (1876).

34. 94 U.S. 606 (1876). *Russell* involved the second of two actions by the plaintiff against the defendant for patent infringement. *Id.* Although the patent covered two processes for treating leather, the record of the first judgment, which was for the plaintiff, did not indicate whether the court had determined the infringement was as to both or just one of the processes. *Id.* at 609. Therefore, the court refused to uphold the patent holder's assertion of collateral estoppel against the defendant. *Id.*

35. *Id.* at 608-09. The Court stated, "to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter . . . ." *Id.* (citing Packet Co. v. Sickles, 72 U.S. (5 Wall.) 580 (1866)). *See also* Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir. 1981) (refusing to give estoppel effect to either of two alternative grounds after extensive examination of cases and authorities on the subject); Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970) (refusing to permit use of collateral estoppel in relation to previous bankruptcy judgment which had expressly rested on three independent grounds). *Cf.* Scrofani v. Rare Bird Farm, Inc., 208 F.2d 461 (5th Cir. 1953) (prior decision not conclusive when it is uncertain upon which of the multiple grounds the decision rested). *See generally* 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.443[5.-2], at 789-93; Scott, *supra* note 24, at 845.

The *Russell* Court elaborated that "an estoppel must be certain to every intent; and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered as evidence." 94 U.S. at 610 (citations omitted). *See also* Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1183 (3d Cir. 1972) (since it is impossible to determine from the record of the prior proceeding what facts were established, the plaintiff is not precluded from litigating the matter in the second action). *Russell* has been consistently reaffirmed. *See, e.g.*, Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 327 n.12 (1955); Commissioner v. Sunnen, 333 U.S. 591, 598 (1948); Oklahoma v. Texas, 256 U.S. 70, 88 (1921); Basista v. Weir, 340 F.2d 74, 82 (3d Cir. 1965).

eral estoppel must show that his adversary in the present case was a party, or was in privity with a party in the earlier action.[36] The proponent may also

36. *See* Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 844 (3d Cir. 1974). The traditional rule of collateral estoppel requiring mutuality of parties provided that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in a second action may use the prior judgment as determinative of an issue in a second action." Blonder-Tongue Labs., Inc. v. University Found., 402 U.S. 313, 320-21 (1971). *See also* Russell v. Place, 94 U.S. 606, 608 (1876) ("[i]t is undoubtedly settled law that a judgment of a court . . . upon a question directly involved in one suit, is conclusive as to that question in another suit *between the same parties*") (emphasis added); RESTATEMENT OF JUDGMENTS § 93 (1942) ("a person who is not a party or privy to a party to an action in which a valid judgment . . . is rendered . . . is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action"). The early exceptions to this rule centered on the concept of privity, by which, for example, an indemnitor would be estopped from relitigating issues in an action in which his indemnitee had been a party. *See* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 311-29 (1961). *See also* 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.441[3.-1, -2], at 731-33; RESTATEMENT (SECOND) OF JUDGMENTS §§ 39-41, 51-58 (1982) (parties sharing some interest).

One of the first cases to reject this doctrine of mutuality of parties was Bernhard v. Bank of Am. Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942). In *Bernhard*, a plaintiff who had previously and unsuccessfully sued the executor of an estate for wrongfully withdrawing funds in decedent's bank account was estopped from relitigating the issue of wrongful withdrawal in a subsequent suit against the bank. *Id.* The California Supreme Court, in permitting the defensive (defendant's) use of collateral estoppel despite lack of mutuality, stated that there was "no compelling reason . . . for requiring that a party asserting the plea . . . must have been a party, or in privity with a party to the prior litigation." 19 Cal. 2d at 812, 122 P.2d at 894. Thereafter, other courts, including the Third Circuit, followed California's lead, at least with regard to successive civil suits. *See* Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950) (mutuality notwithstanding, "the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata*"), *cert. denied*, 340 U.S. 865 (1950). *See also* Cramer v. General Tel. & Elecs. Corp., 582 F.2d 259, 267 (3d Cir. 1978) ("[m]utuality of estoppel is no longer required for the principle of collateral estoppel to apply," at least where the prior judgment "is being invoked defensively against a plaintiff bringing suit on an issue he litigated and lost as plaintiff in a prior suit"), *cert. denied*, 439 U.S. 1129 (1979); Humphreys v. Tann, 487 F.2d 666, 669 (6th Cir. 1973) ("no satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as *res judicata* against a party who was bound by it is difficult to comprehend"); United States v. United Airlines, 216 F. Supp. 709 (E.D. Wash. 1962) (nonmutuality of parties is no bar to use of collateral estoppel in tort case involving multiple claimants); De Polo v. Greig, 338 Mich. 703, 62 N.W.2d 441 (1954) (a bankruptcy court's finding in a prior proceeding that stock purchasers had waived their rights estops purchasers from relitigating that issue in a subsequent suit by them against the corporation's president); Gammell v. Ernst & Ernst, 245 Minn. 249, 71 N.W.2d 364 (1955) (where issue of fraud as to public accounting firm's conduct was previously litigated in a federal action between stockholder and corporation for whom the firm performed their services, that issue may not be relitigated even though accounting firm was not a party to the prior action); Israel Wood v. Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97, 99 (1956) (a defendant in a suit by plaintiff alleging wrongful inducement of breach of contract, may assert collateral estoppel to preclude relitigation of the issue of breach, since plaintiff's prior suit for breach of contract against another defendant resulted in dismissal on ground that there had been no breach); Posternack v.

be required to demonstrate that invocation of the doctrine would be fair and appropriate on the facts of the case at bar.[37] In this regard, many courts

American Cas. Co., 421 Pa. 21, 218 A.2d 350 (1966) (where a plaintiff institutes separate suits for fire loss against two different insurers, the defendant insurer in the second suit may plead collateral estoppel as to the issues necessarily decided in the judgment of the first action against another insurer).

Despite the exceptions, as a general rule, mutuality of parties continued to be a requirement for both res judicata and collateral estoppel in most jurisdictions well into the 1960s. Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 304 (1961) ("most state courts recognize and apply the doctrine of mutuality, subject to certain exceptions . . . . And the same is true of federal courts when free to apply their own doctrine").

However, in 1971, the Supreme Court, in *Blonder-Tongue Labs., Inc. v. University Foundation*, handed down the narrow but significant decision that mutuality of estoppel is not necessary where a patentee seeks to relitigate the validity of a patent and a federal court has already declared that patent to be invalid. 402 U.S. 313, 349-50 (1971). The *Blonder-Tongue* authorization to nonparties went only to the defensive assertion of collateral estoppel against a party to the prior action. *Id.* at 329-39. *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). In *Parklane*, the Court expanded its assault upon mutuality, holding that under specifically defined circumstances, collateral estoppel may be asserted by a plaintiff who was not a party to the prior litigation upon which the estoppel is based. *Id.* at 331-32. The Court stated that a party may make offensive use of non-mutual collateral estoppel when he was procedurally barred from joining in the prior action, and when use of collateral estoppel would not be unfair to the other party. *Id.* In discussing the impact of these two decisions, Professor Moore has noted:

> Looking at the decisions in *Blonder-Tongue* and *Parklane* together, and taking the Restatement formulation as representative of widespread current thinking on the subject, it seems fair to state that while the prolonged ferment over the mutuality rule has produced a broadening in the application of estoppel, it has brought about a distinct shift toward viewing the doctrine of collateral estoppel generally as less a set of fixed rules and more a presumption to be followed unless the court thinks it would be fair to permit relitigation.

1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.441[3.-4], at 744. *See also* RESTATEMENT (SECOND) OF JUDGMENTS, § 29 and comments (1982). For general and historical examinations of the mutuality doctrine, *see* Callen & Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore*, 31 HASTINGS L.J. 755 (1980); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964); Comment, Blonder-Tongue *Bites Back: Collateral Estoppel In Patent Litigation—A New Look*, 18 VILL. L. REV. 207 (1972); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974); Note, *A Probablistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978).

37. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480-81 (1982). The Court in *Kremer* stated,

> We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue . . . . Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation.

emphasize the need to ensure that the party against whom collateral estoppel is asserted had sufficient incentive to litigate the issue in the prior adjudication.[38]

Id. (citations omitted). *See also* Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 844 (3d Cir. 1974) ("[p]rovided that the party against whom the plea is asserted has had a full and fair opportunity to present his claim in the prior litigation, collateral estoppel is available as a defense in this Circuit"); Township of Hopewell v. Volpe, 446 F.2d 167, 170 (3d Cir. 1971) (purpose of collateral estoppel is to limit litigation only after a litigant has had "a full and fair day in court").

The Supreme Court has never squarely addressed precisely what constitutes a "full and fair opportunity to litigate." *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982) ("[o]ur previous decisions have not specified the source or defined the content of the requirement"). However, the Court has suggested that within limited circumstances, it may mean no more than a guarantee of due process. *Id.*

The Restatement has enumerated a number of circumstances which make collateral estoppel inappropriate, all of which, presumably, rest on the lack of a "full and fair opportunity" to litigate. RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982). Stated briefly, these are 1) the inability of a party to appeal the first adjudication; 2) the existence of changes in the law where an issue of law is involved; 3) differences in the "quality and extensiveness" in the two proceedings; 4) a difference in the burden of persuasion between the first and second action; and 5) the presence of a "clear and convincing need" for a new determination because of the case's potential impact on the general public, or because the second action was not sufficiently foreseeable at the time of the first action, or because of other "special circumstances" whereby a party "did not have adequate opportunity or incentive to obtain a full and fair adjudication" in the first proceeding. *Id.* For a critical discussion of the Restatement's exceptions, see 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.441[3.-3], at 739-41. The following cases have recognized and examined some of these exceptions under the proper circumstances: Montana v. United States, 440 U.S. 147, 162-63 (1979) (intervening changes in the law); Parklane Hosiery Co. v. Shore, 439 U.S. 332, 330 (1979) (foreseeability of second suit; incentive to litigate the first action); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234-35 (1972) (differences in the burden of proof); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 846 (3d Cir. 1974) (intervening changes in the law); Stebbins v. Keystone Ins. Co., 481 F.2d 501, 511-12 (D.C. Cir. 1973) (other special circumstances—plaintiff acting as own counsel in first suit) (Hannlon, J., concurring); The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944) (foreseeability of the second action).

Despite these factors, the Supreme Court has admonished that there is no "automatic formula" for proper rulings on estoppel, since "[i]n the end," such decisions will "rest on the trial courts' sense of justice and equity." *Blonder-Tongue*, 402 U.S. at 333-34.

38. Prosise v. Haring, 667 F.2d 1133, 1141 (4th Cir. 1982) ("among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had . . . adequate incentive to litigate 'to the hilt' the issues in question"), *aff'd*, 103 S. Ct. 2368 (1983). Judge Learned Hand has opined that when the first adjudication involved a "trivial controversy," there was no reason for "subjecting the loser to such extravagant hazards" as collateral estoppel can give rise to in the subsequent actions. The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944). *See also* Hann v. Carson, 462 F. Supp. 954 (M.D. Fla. 1978) (where the earlier case had "marginal consequences," incentive for "full-throttle litigation was probably missing").

With the growing dissolution of rules on mutuality of parties and the trend toward expanding the use of collateral estoppel, the factor of a party's incentive to litigate is receiving greater attention. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979) (where there is no mutuality, use of collateral estoppel may be

Special considerations arise when collateral estoppel is asserted to preclude relitigation of an issue that had been determined in a prior criminal proceeding.[39] For example, under the mutuality of parties rule, a civil liti-

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unfair since the party to be estopped may have had "little incentive to defend vigorously, particularly if future suits are not foreseeable"). Professors Vestal and Coughenour have stated that a party's opportunity and incentive to litigate an issue should be the "primary inquiry" by courts in subsequent actions where employment of collateral estoppel is being considered. Vestal & Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecution*, 19 VAND. L. REV. 683, 718 (1966) [hereinafter cited as Vestal & Coughenour, *Criminal Prosecutions*]. *See also* Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 465 (1981) (criticizing the Second Restatement for not including the "incentive and opportunity to litigate" as a principal ingredient of issue preclusion). The Third Circuit has noted that when a party has had "every incentive to prosecute the action" use of collateral estoppel would not be unfair. Cramer v. General Tel. & Elecs. Corp., 582 F.2d 259, 268 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). Numerous courts have addressed the matter of incentive. *See, e.g.*, Raiford v. Abney (*In re* Raiford), 695 F.2d 521, 524 (11th Cir. 1983) (although collateral estoppel is not per se unfair, "it may be unfair if the party against whom it is used did not have the incentive to litigate the issue fully in the first proceeding"); Southern Pac. Transp. Co. v. Smith Material Corp., 616 F.2d 111, 115 (5th Cir. 1980) (in previous action, defendant had "engaged in week-long trial in which several hundred thousand dollars were at stake," and therefore he had "every incentive to litigate"); Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 504 (3d Cir. 1979) (no unfairness since party had "every reason to expect that a defeat in the first action might lead to a second suit founded on the judgment"), *vacated on other grounds*, 448 U.S. 902 (1980); Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990, 992 (7th Cir. 1979) (concept of "full and fair opportunity to litigate" includes several factors "including incentive to litigate"); Stebbins v. Keystone Ins. Co., 481 F.2d 501, 513 (D.C. Cir. 1973) ("collateral estoppel is not an inexorable rule of law, and where a lay litigant may not be aware of the need to oppose an assertion of fact," subsequent invocation of collateral estoppel should be avoided); Safir v. Gibons, 432 F.2d 137, 143 (2d Cir. 1970) (collateral estoppel is appropriate since plaintiff's potential liability of $337,000 provided him ample incentive to fully litigate in prior proceeding), *cert. denied*, 400 U.S. 942 (1970); Berner v. British Commw. Pac. Airlines, 346 F.2d 532, 540-41 (2d Cir. 1965) (since the first proceeding involved a trivial amount, defendant had no incentive to litigate and thus should not be estopped from relitigating the issue in a subsequent suit); Hyman v. Regenstein, 258 F.2d 502, 511 (5th Cir. 1958) (collateral estoppel is applicable only if "it was foreseeable that the fact would be of importance in possible future litigation"); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 247 (E.D. Tex. 1980) (would not be unfair to employ collateral estoppel since the first proceeding was "not a case where the defendants were sued for small or nominal damages").

For a discussion of the incentive to litigate factor as it relates to a prior guilty plea's effect in a subsequent civil action, see notes 48-49 and accompanying text *infra*.

39. *See* United States v. Oppenheimer, 242 U.S. 84 (1916). *Oppenheimer* appears to be the earliest of the United States Supreme Court cases to squarely base its holding on the principle that a criminal judgment may be given collatereal estoppel effect in a subsequent criminal prosecution. *Id.* at 88. One year before *Oppenheimer*, the Court had stated in dictum that the principle of collateral estoppel "is as applicable to the decisions of criminal courts as to those of civil jurisdiction." Frank v. Mangum, 237 U.S. 309, 334 (1915). Since *Oppenheimer* and until recently, the Supreme Court had treated collateral estopped as a coextensive but separate doctrine from that of double jeopardy. In 1970, the Supreme Court held that the collateral estoppel effect of an *acquittal* was "embodied in the Fifth Amendment guarantee against double jeopardy." Ashe v. Swenson, 397 U.S. 436, 445 (1970) (where defendant had been successively acquitted and convicted for the same criminal transaction but in-

volved different victims). *See also* United States v. Keller, 624 F.2d 1154, 1155-57 (3d Cir. 1980) (double jeopardy incorporation of collateral estoppel prohibits introduction of evidence which was used in a prior criminal prosecution that resulted in an acquittal); United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) (double jeopardy facet of collateral estoppel may not be invoked in the criminal trial of an aider and abettor when the principal has been acquitted), *aff'd*, 447 U.S. 10 (1980); United States v. Mespoulede, 597 F.2d 239 (2d Cir. 1979) (in a subsequent trial, the state is precluded from making evidentiary use of prior conduct which was the subject of a prior acquittal). *But see* United States v. Moore, 522 F.2d 1069, 1079 (9th Cir. 1975) (evidence of prior acquittal allowed in subsequent prosecution without any discussion of the constitutional scope of collateral estoppel), *cert. denied*, 433 U.S. 1049 (1976). For a discussion of the application of collateral estoppel and the double jeopardy clause of the Fifth Amendment to successive criminal actions, see Gershenson, *Res Judicata In Successive Criminal Prosecutions*, 24 BROOKLYN L. REV. 12 (1957-58); Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 318 (1953-54); Mayers & Harbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960-61); McLaren, *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases*, 10 WASH. L. REV. 198 (1935); Schmidt, *Res Adjudicata in Criminal Cases*, 28 CAL. ST. B.J. 366 (1951); Comment, *Double Jeopardy and Collateral Estoppel in Crimes Arising from the Same Transaction*, 24 MO. L. REV. 513 (1959); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965); Note, *Double Jeopardy and the Concept of Identity of Offenses*, 7 BROOKLYN L. REV. 79 (1937-38); Note, *Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which the Defendant Has Been Acquitted*, 2 FLA. ST. U.L. REV. 511 (1974). For a careful examination of current case law as it relates to collateral estoppel, the fifth amendment's guarantee against double jeopardy, and the requirement of mutuality of parties in successive criminal proceedings in order to employ collateral estoppel, see United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) (an abettor may not invoke collateral estoppel based on the principal's acquittal since mutual collateral estoppel is constitutionally required in criminal cases before a jury), *aff'd*, 447 U.S. 10 (1980).

Not all instances of successive criminal proceedings, of course, entail double jeopardy considerations. Issue preclusion is frequently invoked in a second criminal proceeding which clearly involves a different transaction or occurrence from the first. *See, e.g.*, United States v. Colacurcio, 514 F.2d 1, 6 (9th Cir. 1975) (facts essential to defendant's conviction for conspiracy may not be relitigated at later trial for income tax evasion); Hernandez-Uribe v. United States, 515 F.2d 20 (8th Cir. 1975) (where defendant had previously been found guilty of illegal entry into the country, he was precluded from relitigating the fact of his alienage); Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968) (in trial for violation of immigration laws, defendant is collaterally estopped from relitigating fact of alienage necessarily determined in prior conviction).

Where the action succeeding the criminal proceeding is a civil one, collateral estoppel is subject to limitations inherent in the different burdens of proof in the two adjudications. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.418[1], at 551. In a criminal-civil sequence of proceedings, collateral estoppel is usually applied only when the criminal trial resulted in a conviction. *Id.* In an acquittal, the failure of the government to establish the defendant's guilt beyond a reasonable doubt is not accorded estoppel effect since civil proceedings require a lesser burden of proof than criminal actions. *See* United States v. Burns, 103 F. Supp. 690 (D. Md. 1952) (widow acquitted of murdering her husband is subsequently held to have murdered her husband in a civil interpleader action to determine parties entitled to insurance proceeds), *aff'd*, 200 F.2d 106 (4th Cir. 1952). Occasional exceptions to this rule appear in cases where the defendant in the prior criminal prosecution was acquitted on the basis of his affirmative defense of alibi or insanity, since in such cases the defendant's burden of proof is equal to or greater than the government's. Vestal & Coughenour, *Criminal Prosecutions*, *supra* note 38, at 702. For the same reasons, a civil judgment may not normally be used to collaterally estop matters in a criminal prosecution since,

gant is rarely able to invoke the effect of a prior criminal judgment.[40] Thus, where strict mutuality is required, evidence of a prior conviction may be admissible but is not conclusive in subsequent proceedings.[41] Some jurisdictions recognize an exception to the mutuality rule, which allows a third party to assert the collateral estoppel effect of a prior conviction where the criminal subsequently seeks to benefit from his wrong in a civil action.[42] In

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again, the latter action requires a higher standard of proof. Helvering v. Mitchell, 303 U.S. 391, 397 (1938). If, on the other hand, successive criminal proceedings are involved, rather than criminal-civil actions, an acquittal *may* trigger the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436 (1970).

40. Vestal & Coughenour, *Criminal Prosecutions*, *supra* note 38, at 705-08. As a result of the mutuality rule, the majority of these cases pit the government against the same party in serial criminal civil proceedings. *See, e.g.*, Local 167 v. United States, 291 U.S. 293 (1934) (in civil injunction case instituted by government, defendants are precluded from denying issues determined in prior conspiracy conviction); Moore v. United States, 16 Am. Fed. Tx. R.2d 6058 (4th Cir. 1965) (serial criminal-civil income tax actions); Tomlinson v. Lefkowitz, 334 F.2d 262 (5th Cir. 1964) (successive criminal-civil tax proceedings), *cert. denied*, 379 U.S. 962 (1965); United States v. Gramling, 180 F.2d 498 (5th Cir. 1950) (civil forfeiture action by government preceded by criminal conviction for illegal sale of marijuana). *But see* Helvering v. Mitchell, 303 U.S. 391 (1938) (defendant's criminal acquittal for fraudulent tax evasion will not preclude litigation of fraud issue in later civil suit by government to recover unpaid taxes and penalty).

The Restatement contains a single section dealing with criminal-civil successive actions:

> § 85 *Effect of Criminal Judgment in Subsequent Civil Action*
> With respect to issues determined in a criminal prosecution:
> (1) A judgment in favor of the prosecuting authority is preclusive in favor of the government:
> (a) In a subsequent civil action between the government and the defendant in the criminal prosecution . . .
> (b) In a subsequent civil action between the government and another person whose claim is derivative from the defendant . . . .
> (2) A judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action:
> (a) Against the defendant in the criminal prosecution . . . .
> (b) Against a person having a relationship with defendant . . . .
> (3) A judgment against the prosecuting authority is preclusive against the government only under the conditions stated in §§ 27-29 [listing exceptions and factors to be considered before applying issue preclusion].

RESTATEMENT (SECOND) OF JUDGMENTS § 85 (1982). For a discussion of the Second Restatement's position on the effect of a prior guilty plea in a subsequent civil action, see note 48 and accompanying text *infra*.

41. 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.418[1], at 559-60. While there is a considerable difference of opinion among jurisdictions as to whether the mutuality requirement must be met before a party in a civil action may invoke collateral estoppel based on a prior criminal judgment, most courts have retained the requirement. *Id. See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683 (8th Cir. 1968) (prior conviction based on guilty plea not conclusive of issues in subsequent suit and may be explained). The Federal Rules of Evidence provide that evidence of a prior criminal judgment is admissible (but not conclusive) in a subsequent civil action so long as the crime was punishable by a prison sentence in excess of one year or by death. FED. R. EVID. 803(22).

42. *See, e.g.*, Rosenburger v. Northwestern Mut. Life Ins. Co., 182 F. Supp. 633 (D. Kan. 1960) (plaintiff who had been convicted of murdering the insured is collat-

jurisdictions which seem to have abolished the mutuality requirement altogether, any individual is apparently allowed to assert an opposing party's criminal conviction in subsequent proceedings.[43]

The propriety of giving collateral estoppel effect to a criminal conviction entered on a plea of guilty is a particularly controversial matter.[44] On a

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erally estopped from relitigating the issue of his guilt in subsequent action to recover as beneficiary of insured's policy); Mineo v. The Eureka Sec. Fire & Marine Ins. Co., 182 Pa. Super. 75, 125 A.2d 612 (1956) (plaintiff's conviction for arson is conclusive in subsequent suit for fire insurance proceeds). For a discussion of the so-called "benefit exception," see Vestal & Coughenour, *supra* note 38, at 708-11.

43. *See* Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3d Cir. 1974). The question before the *Scooper Dooper* court was whether, in successive civil antitrust actions, mutuality of parties is a prerequisite to employment of collateral estoppel. *Id.* at 844. The Third Circuit, characterizing itself as being "in the forefront" of the attack on the doctrine of mutuality, stated:

> Provided that the party against whom the plea is asserted has had a full and fair opportunity to present his claim in the prior litigation, collateral estoppel is available as a defense in this Circuit regardless of whether or not the party asserting the plea was a party (or privy) to the prior litigation.

Id. (citations omitted). *See also* Raiford v. Abney (*In re* Raiford), 695 F.2d 521, 523 (11th Cir. 1983) ("mutuality of parties is no longer considered a prerequisite in federal court to the fair uses of collateral estoppel," even in successive criminal-civil proceedings) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Labs., Inc. v. University Found., 402 U.S. 313 (1971)). For a discussion of *Parklane* and *Blonder-Tongue*, see note 36 *supra*. *See also* Wolfson v. Baker, 623 F.2d 1074, 1078 n.2 (5th Cir. 1980) ("in this Circuit, the use of a prior conviction to collaterally estop a party in a subsequent action does not depend upon an attempt by that party to benefit from the crime"), *cert. denied*, 450 U.S. 966 (1981). *See generally* Vestal & Coughenour, *supra* note 38, at 704-13; Annot., 18 A.L.R. 2d 1287 (1951).

44. *See* 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.418[1], at 557-60. In practice, the circumstance of successive criminal-civil actions involving a guilty plea in the first action has not frequently arisen. *See* Metros v. United States Dist. Court, 441 F.2d 313, 316 (10th Cir. 1971). As a result, there is considerable disagreement as to the guilty plea's effect on the second action. *Compare* State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683, 687 (8th Cir. 1968) ("[t]he clear trend of authorities is that evidence of a guilty plea is merely admissible against a party in a subsequent civil proceeding but it may be explained and is not conclusive") *with* United States v. Schneider, 139 F. Supp. 826, 829 (S.D.N.Y. 1956) ("where the prior conviction resulted from a plea of guilty there would appear to be greater warrant" for application of collateral estoppel). *See also* Vestal & Coughenour, *supra* note 38, at 715 (a conviction upon a guilty plea "normally will be given preclusive effect").

A significant factor in the courts' determination of whether collateral estoppel should be employed where preclusive effect of a prior guilty plea is sought in a civil action is whether the guilty pleader had been afforded procedural protections. *See* De Cavalcante v. Commissioner, 620 F.2d 23 (3d Cir. 1980). In *De Cavalcante*, the Third Circuit examined the question of whether a taxpayer's plea of guilty to illegal gambling activities should have estoppel effect in a subsequent civil action by the government for unpaid taxes. *Id.* at 25. Concluding that the lower court had indeed established a "factual basis" for the plea, and that this plea was made knowingly and voluntarily according to the requisites of rule 11 of the Federal Rules of Criminal Procedure, the circuit court held that the plea was preclusive of issues common to both proceedings. *Id.* at 25 (citing FED. R. CRIM. P. 11(F) (requiring that before a guilty plea is accepted, the court must satisfy itself that there is a "factual basis" for the plea)). The United States Supreme Court has admonished that a valid guilty plea must "not only be voluntary" but must be a "knowing, intelligent act done with

theoretical level, there is disagreement as to whether *any* issues can be said to

sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970) (footnote omitted). Thus, a significant number of cases in which collateral estoppel has been invoked against a prior guilty pleader were so decided only after the court conducted a careful examination of the record to assure itself that a factual basis for the plea did exist. *See, e.g.*, Raiford v. Abney (*In re* Raiford), 695 F.2d 521, 523 (11th Cir. 1983) (the reason for giving effect to a judgment based on a guilty plea is that "a federal court cannot enter judgment upon the plea unless it determines that a factual basis exists for it"); Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (since rule 11 procedures protected the defendant "from an improvident plea of guilty," collateral estoppel is appropriate in subsequent civil action); Plunkett v. Commissioner, 465 F.2d 299, 306 (7th Cir. 1972) (the criminal court in which the guilty plea was given, fully complied with the spirit of rule 11's requirements, and therefore defendant's knowing and voluntary plea is preclusive). *Cf.* Greenberg v. Mobil Oil Corp., 318 F. Supp. 1025, 1035 (N.D. Tex. 1970) (collateral estoppel would be unfair since defendant's plea of guilty is outweighed by his manifest inability to comprehend the gravity of the criminal proceedings); Mayberry v. Somner, 480 F. Supp. 833, 840 (E.D. Pa. 1979) (the lower court's "extensive inquiry" into the factual basis for the guilty plea "removes all possible doubt" regarding employment of collateral estoppel). *But see* United States v. $31,697.59 Cash, 665 F.2d 903 (9th Cir. 1982) (although rule 11 requirements were not met, defendant's guilty plea given preclusive effect since defendant did not avail himself in a timely manner of the avenues for contesting the conviction such as appeal or collateral attack).

Another factor to which the courts often address themselves in considering the effect of a prior guilty plea is the identity of the elements of the prior crime with the issue sought to be precluded in the civil action. *See, e.g.*, Prosise v. Haring, 667 F.2d 1133 (4th Cir. 1981), *aff'd*, 103 S. Ct. 2368 (1983). In *Prosise*, the Fourth Circuit noted that the majority of decisions finding issue preclusion in guilty pleas "have concerned issues that represented elements of the crime charged." *Id.* at 1140. This "element-issue preclusion by guilty plea," the Fourth Circuit said, is in contrast to preclusion of "non-elemental" issues, such as the legality of the initial arrest or search which led to the ultimate guilty plea by the defendant. *Id.* The *Prosise* court held that the plaintiff's civil rights action against an arresting officer for illegal search and seizure was not precluded by his guilty plea to the manufacture of a controlled substance, since the legality of the search was not an element of the crime to which plaintiff pleaded guilty. *Id.* at 1140-41. Similarly, in United States v. Schneider, 139 F. Supp. 826 (S.D.N.Y. 1956), the district court carefully examined the record of the indictment to which the defendant had pleaded guilty in the prior criminal proceeding before concluding that the plea was preclusive as to those elements common to issues in the subsequent civil suit by the government. *Id.* at 830. *See also* Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978) (collateral estoppel will apply to "each and every essential element of the crime" to which the plea was entered; Plunkett v. Commissioner, 465 F.2d 299, 306 (7th Cir. 1972) (a guilty plea is a conclusive admission of all the elements of the formal crime charged); United States v. American Packing Corp., 113 F. Supp. 223, 225-26 (D.N.J. 1953) (no preclusion since defendant's guilty plea does not encompass the elements in the subsequent civil charges by the government).

Other courts faced with prior guilty pleas in a subsequent civil action have given collateral estoppel a broader swathe and have allowed the preclusion of nonelemental issues as well. *See, e.g.*, Metros v. United States Dist. Court, 441 F.2d 313 (10th Cir. 1971). In *Metros*, the circuit court held that the plaintiff, who was suing a police officer under the Civil Rights Act of 1871, was precluded from relitigating the validity of a search warrant because his guilty plea to unlawful possession of heroin had already determined that issue. *Id.* at 317. The court stated that "availability of the challenges to the search is always important" and would have been a "very important factor in any consideration of the defense" had the present plaintiff chosen to litigate rather than plead gulity to the possession charges. *Id.* For criticism of *Metros*,

have been "actually litigated" when a conviction is based on a guilty plea.[45] Some authority does exist, however, for granting guilty pleas collateral estoppel effect where there is mutuality; that is, where in both the criminal and subsequent civil actions, a private party is pitted against the government.[46]

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see Note, *Collateral Estoppel—Effect of Guilty Pleas in Subsequent Civil Actions*, 43 U. COLO. L. REV. 337 (1972). A few other courts have adopted the *Metros* rule—at least where, as in *Metros* itself, there was mutuality of parties. *See* Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) (sale of heroin to which plaintiff had previously pleaded guilty encompasses and precludes issue of entrapment in subsequent civil rights action against police officer); Hooper v. Guthrie, 390 F. Supp. 1327 (W.D. Pa. 1975) (the issue of unlawful search was "bypassed" and therefore precluded by plaintiff's prior plea of guilty).

45. *Compare* Prosise v. Haring, 667 F.2d 1133, 1140 (4th Cir. 1982) (although as a matter of the rules of evidence, a guilty plea may have preclusive effect, preclusion by collateral estoppel requires actual litigation), *aff'd*, 103 S. Ct. 2368 (1982) *with* United States v. $31,697.59 Cash, 663 F.2d 903, 906 (9th Cir. 1982) ("appellants are collaterally estopped from litigating matter disposed of in the criminal case by their guilty pleas"). The Restatement has taken the position that a plea of guilty should never have collateral estoppel effect in a later civil proceeding because the plea is inconsistent with its requirement that an issue be "actually litigated." RESTATEMENT (SECOND) OF JUDGMENTS § 85 comment b (1982). The Restatement concedes that while "a defendant who pleads guilty may be estopped in a subsequent civil litigation from contesting the facts representing the elements of the offense," such an estoppel is "a matter of the law of evidence" and not within the scope of collateral estoppel. *Id.* Professor Moore has expressed accord with this reasoning. 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.418[1], at 558. He adds, however, that this is not the stance taken by many of the courts in actual practice. *Id.* ¶ 0.418[1], at 587. *See, e.g.*, Raiford v. Abney (*In re* Raiford), 695 F.2d 521, 523 (11th Cir. 1983) (although "disagreement exists, most courts give a judgment based on a guilty plea the same collateral estoppel effect as any other criminal conviction"); Arctic Ice Cream Co. v. Commissioner, 43 T.C. 68, 75 (1964) (for purposes of collateral estoppel, there is no difference between a guilty plea and a conviction resulting from a trial). Thus Professor Moore states that "the generally accepted rule is that a judgment of conviction, based on a plea of guilty, is conclusive in a civil suit between the same parties of all issues that would have been determined by a conviction after a contested trial." 1B MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 0.418[1], at 557. If, on the other hand, the same parties are not involved, the "preponderant view" is that the guilty plea is admissible "only as evidence." *Id.* For a general discussion of the "actually litigated" requirement and the opposing views of two commentators, see Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 465 (1981) (criticizing the Restatement's "actually litigated" wording, and maintaining that there need only have been opportunity to litigate for a guilty plea to have collateral estoppel effect); Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564 (1981) (defending the Restatement's position). *See also* Note, *Preclusive Effect Extended to Guilty Pleas in Subsequent Civil Litigation*—Ideal Mutual Insurance Co. v. Winker, 68 IOWA L. REV. 1331 (1983) (examining the debate between Vestal and the Restatement).

46. *See, e.g.*, Fontneau v. United States, 654 F.2d 8 (1st Cir. 1981) (in civil suit for tax refund, taxpayer is precluded from relitigating issues encompassed by his prior guilty plea to tax evasion charges). There appear to be two broad categories in which most of these cases fall. The first category involves situations in which the government, as a plaintiff in a civil suit, offensively pleads collateral estoppel on issues involving the defendant's plea of guilty in a prior criminal action. *See, e.g.*, De Cavalcante v. Commissioner, 620 F.2d 23 (3d Cir. 1980) (in civil action by the I.R.S. for unpaid taxes, defendant's guilty plea to illegal gambling activities precludes relitigation of these illegalities); Plunkett v. Commissioner, 465 F.2d 299 (7th Cir. 1972)

But only a few courts have lifted the mutuality strictures to allow a third-party (non-mutual) civil litigant to invoke collateral estoppel on the basis of his opponent's prior guilty plea to criminal charges.[47]

(in civil fraud penalty proceeding, defendant's prior plea of guilty to tax evasion collaterally estops him from denying that his tax returns were fraudulent).

The second category of collateral estoppel cases which has the combined elements of mutuality of parties, a prior guilty plea, and a subsequent civil action, involves those situations in which an individual brings suit (often under 42 U.S.C. § 1983) against an officer or official who then pleads collateral estoppel on the basis of the plaintiff's prior plea of guilty. *See, e.g.*, Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) (state prisoner's guilty plea to selling heroin precludes relitigation of issues in his subsequent action against police for entrapment—the court noting that the parties met "the mutuality requirement"); Metros v. United States Dist. Court, 441 F.2d 313 (10th Cir. 1971) (in § 1983 suit against police officer, plaintiff's guilty plea to unlawful possession of heroin precludes him from relitigating the validity of the search warrant); Mayberry v. Somner, 480 F. Supp. 833 (E.D. Pa. 1979) (inmate's plea of guilty to charges of murder and assault against prison guard precludes relitigation of plaintiff's guilt in subsequent civil suit against guard for violation of plaintiff's civil rights); Hooper v. Guthrie, 390 F. Supp. 1327 (W.D. Pa. 1975) (plaintiff's plea of guilty for passing worthless checks works as collateral estoppel in subsequent § 1983 action against officer for unlawful arrest). *But see* Prosise v. Haring, 677 F.2d 1133, 1141 (4th Cir. 1981) (court denies estoppel effect to plaintiff's prior guilty plea, stating that as to § 1983 actions "we believe a general rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases"), *aff'd*, 103 S. Ct. 2368 (1983).

47. *See* Nathan v. Tenna Corp., 560 F.2d 761 (7th Cir. 1977). In *Nathan*, the Seventh Circuit permitted the defensive use of collateral estoppel where mutuality was lacking. *Id.* at 763. The plaintiff, a manufacturer's representative, sued his former employer to recover commissions allegedly due him. *Id.* at 762. The court gave preclusive effect to the plaintiff's prior guilty plea to federal mail fraud charges for commission-splitting, since there was a clear identity of issues between the criminal and civil actions. *Id.* at 763-64. The court did not explicitly place this case under the generally accepted "benefit" exception to the mutuality of parties requirement, wherein a party who attempts to profit from his guilt will be precluded from so doing in a later civil suit, even in the absence of mutuality of parties. For a discussion of the benefit exception, see note 42 and accompanying text *supra*. *See also* Raiford v. Abney (*In re* Raiford), 695 F.2d 521 (11th Cir. 1983). In *Raiford*, the Eleventh Circuit permitted the offensive (plaintiff's) use of collateral estoppel based on the defendant's prior guilty plea despite the absence of mutuality of parties. *Id.* The defendant had earlier pleaded guilty in a criminal action to the felony of knowingly and fraudulently making a false oath or account in a bankruptcy proceeding. *Id.* at 522. In a subsequent civil suit initiated by the trustee in bankruptcy, the defendant was collaterally estopped from denying the fraudulent acts to which he had previously pleaded guilty. *Id.* at 524. The circuit court unequivocally stated that "mutuality of parties is no longer considered a prerequisite in federal court to the fair use of collateral estoppel." *Id.* at 523 (citing Parklane Hosiery Co. v. Shore, 438 U.S. 322 (1979); Blonder-Tongue Labs., Inc. v. University Found., 402 U.S. 313 (1971)). For further discussion of *Parklane* and *Blonder-Tongue* and the concept of mutuality of parties, see note 36 *supra*.

Other courts faced with the use of a prior guilty plea in a civil action in which mutuality is absent have either denied or not discussed collateral estoppel; permitting the plea to serve only an evidentiary function. *See, e.g.*, Eschelbach v. Scull, 293 F.2d 599 (3d Cir. 1961). In *Eschelbach*, the Third Circuit permitted introduction of the plaintiff's prior guilty plea to the traffic offense of careless driving, as evidence of contributory negligence in his automobile negligence action. *Id.* at 602-03. *See also* Rain v. Pavkov, 357 F.2d 506 (3d Cir. 1966). In *Rain*, the Third Circuit stated, "It is

Another critical question in the guilty plea-collateral estoppel context is whether the guilty pleader had had adequate incentive to litigate the criminal charges.[48] In this regard, most courts will at least consider the seriousness of the crime and its penalty when making their determinations.[49]

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the general rule that a plea of guilty to a charge of reckless driving is an admission against interest, and evidence thereof is admissible in an action for personal injuries based upon the same facts and circumstance from which the charge arose." *Id.* at 509. *See also* State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683, 686 (8th Cir. 1968) (insured's guilty plea to manslaughter, although admissible, has no preclusive effect in later suit by victim's family against insurer to recover judgment secured against insured); Breeding v. Massey, 378 F.2d 171 (8th Cir. 1967) (defendant's guilty plea to drunken driving is admissible as a declaration against interest if the offense is directly related to plaintiff's negligence action); Levell v. Powers, 248 F.2d 774 (10th Cir. 1957) (guilty plea to traffic offense is competent evidence in negligence action based on the same occurrence). *See generally* Note, *Admissions By Parties and Privies*, 74 HARV. L. REV. 1452 (1961) (only a minority of jurisdictions deem prior criminal conviction admissible as evidence in a civil action).

48. *See, e.g.*, Greenburg v. Mobil Oil Corp., 318 F. Supp. 1025 (N.D. Tex. 1970). In *Greenburg*, the district court refused to give estoppel effect to the defendant's plea of guilty to assault with intent to murder. *Id.* at 1035. The court noted that the defendant's lawyer had threatened to withdraw from the case unless defendant either paid him his fee or entered a guilty plea. *Id.* The court concluded that these circumstances, coupled with the defendant's relative naivete, suggested an understandable diminution of his incentive to litigate the charges. *Id.* at 1036. *See also* State Farm Mut. Auto. Ins. Co. v. Worthington, 405 F.2d 683, 685 (8th Cir. 1968) (since defendant's plea of guilty to manslaughter was predicated in part upon the lynch-mob temper of the community and the defendant's fear for his safety, sufficient incentive to litigate was lacking and his plea had no preclusive effect).

It is interesting to note that while Professor Vestal deems "opportunity and incentive to litigate" of singular importance to the doctrine of collateral estoppel, he would normally give all guilty pleas preclusive effect with the proviso that the party be permitted to show relevant facts surrounding the plea. *See* Vestal & Coughenour, *supra* note 38, at 715. *But see* Hazard, *supra* note 45 (suggesting that Professor Vestal's treatment of guilty pleas would convert option to litigate into compulsion to litigate). For a discussion of these varying views, see Prosise v. Haring, 667 F.2d 1133 (4th Cir. 1981), *aff'd*, 103 S. Ct. 2368 (1983). For a discussion of the holding of *Prosise*, see note 44 *supra*. For a discussion of the "actually litigated" requirement as it relates to the doctrine of collateral estoppel in general, see note 26 and accompanying text *supra*.

49. *See* Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962). In *Teitelbaum*, Justice Traynor asserted his view that a guilty plea to charges should not have collateral estoppel effect since such a plea "may reflect only a compromise or a belief that paying a fine is more advantageous than litigation." *Id.* at 605-06, 375 P.2d at 441, 25 Cal. Rptr. at 561. *See also* Note, *supra* note 47, at 1452 (it is "common experience that people plead guilty to traffic charges for reasons of expediency"). *Cf.* Brady v. United States, 397 U.S. 742, 752 (1970) (discussing various motives for pleading guilty other than actual guilt).

In *Raiford*, the court concluded that sufficient incentive to litigate was established where the defendant had pleaded guilty to a felony-grade crime. Raiford v. Abney (*In re* Raiford), 695 F.2d 521, 524 (11th Cir. 1983). Dismissing the defendant's argument that he had pleaded so because of promises of a lighter sentence, the court observed that the defendant "still had a great deal to lose by pleading guilty, "since he would always carry a felony record with him." *Id.* This, the court reasoned, "is not a simple misdemeanor in which impact is often minimal." *Id.* For the same reasons, the drafters of the Federal Rules of Evidence limited the hearsay exception for records of criminal convictions to those with a penalty exceeding one year. *See*

The Supreme Court has not addressed the question of whether the collateral estoppel effect of a guilty plea conviction may be asserted by a third party in a subsequent civil action.[50] However, in *Emich Motors Corp. v. General Motors Corp.*, the Court did stress that the preclusive significance of contested criminal convictions may only be asserted by careful scrutiny of the trial record,[51] and proffered specific instructions as to how a trial judge must proceed before precluding an issue from being litigated.[52] The Third Circuit, too, has also emphasized that close examination of the entire record of the

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FED. R. EVID. 803(22) advisory committee note (unlike with felonies, the motivation to defend misdemeanor charges is often minimum or nonexistent).

50. *See* Prosise v. Haring, 667 F.2d 1133 (4th Cir. 1981) (reviewing Supreme Court decisions regarding collateral estoppel and finding none apposite to the question of collateral estoppel effect of guilty pleas), *aff'd*, 103 S. Ct. 2368 (1983).

51. 340 U.S. 558, 569 (1951). In *Emich*, a former dealer of Chevrolets sued General Motors under § 4 of the Clayton Act to recover treble damages for injuries sustained as a result of General Motors' alleged conspiracy to monopolize the financing of its automobiles. *Id.* at 559. Because General Motors had been criminally convicted for conspiracy regarding the same transaction, Emich sought to preclude relitigation of the conspiracy issue. *Id.* at 564. In addressing this matter and its proper application under this statute, the Court stated that "[t]he evidentiary use which may be made under § 4 [of the Clayton Act] of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel." *Id.* at 568 (citing 15 U.S.C. § 16 (1976)). Thus, the Court stated, since estoppel only extends "to questions distinctly put in issue and directly determined," scrutiny of the prior record is imperative. *Id.* at 569. The *Emich* Court remanded the case, with directions that the court below examine the entire record, including the pleadings, the evidence submitted, the jury instructions and any opinions of the court, to determine what precisely was decided by the criminal judgment. *Id.*

52. *Id.* at 572. The Court stated,

> [T]he trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial.

Id.

Cases which have cited *Emich* for the proper application of collateral estoppel to a prior conviction include the following: Chisholm v. Defense Logistics Agency, 656 F.2d 42, 48 (3d Cir. 1981); Wolfson v. Baker, 623 F.2d 1074 (5th Cir. 1980), *cert. denied*, 405 U.S. 966 (1981); De Cavalcante v. Commissioner, 620 F.2d 23, 28 (3d Cir. 1980); United States v. Podell, 572 F.2d 31 (3d Cir. 1978); Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir. 1970); Metros v. United States Dist. Court, 441 F.2d 313, 316 (10th Cir. 1970); United States v. Fabric Garment Co., 366 F.2d 530, 533 (2d Cir. 1966). *See also* Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 433 n.4 (8th Cir. 1976) (collateral estoppel could not have been invoked since "it [was] impossible to determine from the record what issues of fact were actually litigated and determined"); Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972) ("lacking a certified copy of the transcript we are uninformed as to which of plaintiff's acts furnished the foundation for his conviction"); United States v. Friedland, 391 F.2d 378, 382 (2d Cir. 1968) (since the party claiming estoppel did not present the transcript of the prior trial "there is no basis for ascertaining what issues were determined"), *cert. denied*, 404 U.S. 914 (1971); Hyman v. Regenstein, 258 F.2d 502, 511 (5th Cir. 1958) ("collateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment").

criminal trial is a prerequisite to granting collateral estoppel effect to a conviction.[53]

The question of whether a casino policy against card counting can be the basis of a conviction for criminal trespass has not been conclusively de-

53. *See, e.g.*, Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981). In *Chisholm*, the Third Circuit, in deciding that collateral estoppel would not be applied against the defendant's prior criminal conviction, refused to forego the requirement of examination of the criminal trial record even though the offense was statutory. *Id.* at 50. Judge Hunter, in his dissent, argued that the trial record should not be necessary where all of the elements of the crime are contained in the statute and there is a conviction under that statute. *Id.* at 52 (Hunter, J., dissenting). However, the majority held that collateral estoppel must not be employed without a thorough examination of the pleadings and transcript of the criminal trial—neither of which had been introduced at the civil proceeding. *Id.* at 49. The majority reasoned that the record was necessary to determine whether the statutory offense of "striking, beating, or wounding" encompassed the civil allegations of "shoving and striking." *Id.*

In *Kauffman v. Moss*, the Third Circuit reaffirmed that a proponent of collateral estoppel must present a full record of the criminal proceedings to the trial court. Kauffman v. Moss, 420 F.2d 1270, 1275 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970). The plaintiff, who had been previously convicted of conspiracy to commit burglary and larceny, sued certain law enforcement officers for conspiring to secure his conviction by knowingly using perjured testimony. *Id.* at 1281-82. The Third Circuit vacated the district court's dismissal of the suit because that court had improperly relied on collateral estoppel. *Id.* at 1272. The *Kauffman* court stated that the veracity of witnesses cannot be assumed to have been adequately put in issue at the criminal trial, even where a conviction resulted, unless it was clearly shown by the trial record. *Id.* at 1275. Thus, the court admonished the district court for failing to examine the record of the state trial before reaching its decision to apply collateral estoppel. *Id.* (citing Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951)). For a discussion of *Emich*, see notes 51-52 and accompanying text *supra*. In a footnote, the *Kauffman* court noted that the principles expressed in this opinion should apply whether the issue is one concerning the truthfulness of witnesses, "or . . . other matters, such as search and seizure, assault and battery and the like. In our view, a guilty verdict per se no more establishes the veracity of every witness than it determines which of several alternative factual combinations the jury believed." *Id.* at 1275 n.10.

See also Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). In *Basista*, the Third Circuit held that a full record of the criminal conviction must be introduced and considered before a court may conclude that the lawfulness of the underlying arrest had been litigated and determined. *Id.* at 81-82. Basista had been convicted of assault and battery upon two police officers who had arrested him at his home for disorderly conduct. *Id.* at 77-78. He then initiated a suit against the officers under the Civil Rights Act, 42 U.S.C. § 1983 (1982). *Id.* at 78-79. The defendants affirmatively pleaded that Basista's prior conviction collaterally estopped relitigation of the lawfulness of his arrest and detention. *Id.* at 81. The district court granted a judgment n.o.v. for the defendants. *Id.* On appeal, the Third Circuit held that since no transcript of the criminal trial record had been presented at the trial below, evidence of Basista's prior indictment and conviction was not sufficient to establish precisely which issues had been actually litigated and determined. *Id.* at 81-82. The Third Circuit tersely reasoned, "[T]he transcript of the proceedings of Basista's trial before the Court of Quarter Sessions was not admitted in evidence and therefore there could be no collateral estoppel." *Id.* The court explained that "[l]acking a certified copy of the transcript we are uninformed as to what acts of Basista furnished the foundation for his conviction . . . ." *Id.* at 81-82.

termined under New Jersey law.[54] In *Uston v. Resorts International Hotel, Inc.*,[55] the New Jersey Supreme Court held that regulatory legislation governing the casino industry precluded casinos from exercising the common law right of an amusement-place owner to exclude patrons.[56] The court further reasoned that because the Casino Control Commission has exclusive authority over the rules and permitted methods of gambling, a casino owner may not exclude persons simply because they employ an otherwise permitted gambling technique, such as card counting.[57] Thus, although casino patrons

54. *See* Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 168, 445 A.2d 370, 372 (1982) ("we feel constrained to refute . . . that absent supervening *statutes*, the owners of places open to the public enjoy an absolute right to exclude patrons without good cause") (emphasis added). The essence of criminal "defiant" trespass is the absence of a right to be on the premises. For an excerpt of the New Jersey defiant trespass statute, see note 5 *supra*. For a discussion of *Uston*, see notes 11 *supra* & 56-57 and accompanying text *infra*.

55. 89 N.J. 163, 445 A.2d 370 (1980).

56. *Id.* at 166, 445 A.2d at 371. Uston was a professional blackjack player who was well known as a card counter. *Id.* Soon after Uston began playing at its casino, Resorts International Hotel (Resorts) solicited advice from the Casino Control Commission (Commission) as to whether it had the right to exclude professional card counters. *Id.* at 167, 445 A.2d at 372. Upon receiving the Commission's reply that no statute prevented casinos from so acting, Resorts barred Uston from its casino and subsequently instituted procedures for identifying and excluding all card counters. *Id.* at 167, 455 A.2d at 372. Uston appealed Resorts' action to the Commission which upheld Resorts' common law right to exclude any person with or without cause. *Id.* at 167, 445 A.2d at 372. On appeal, the New Jersey Superior Court reversed, holding that since the Commission had the sole authority to designate persons to be excluded from casinos, and since the Commission had not yet exercised its authority with regard to card counters, the individual casinos were precluded from asserting their common law rights to exclude alleged card counters. Uston v. Resorts Int'l Hotel, Inc., 179 N.J. Super. 223, 431 A.2d 173 (1981).

On appeal, the New Jersey Supreme Court affirmed, holding that the Casino Control Act "gives the Commission exclusive authority to set the rules of licensed casino games which includes the methods for playing those games. The Casino Control Act therefore precludes Resorts from excluding Uston for card counting." 89 N.J. at 166, 445 A.2d at 371 (citing N.J. STAT. ANN. §§ 5:12-1 to -152 (West Supp. 1983)). The court added that because the Commission had not yet determined whether card counters should be excluded, "we do not decide whether such an exclusion would be lawful." *Id.* at 166, 445 A.2d at 371.

Prior to *Uston*, it was generally recognized that a patron of an amusement establishment merely had a revocable license to enter, and that the proprietor had a right to exclude any individual for any reason. *See* Garifine v. Monmouth Park Jockey Club, 29 N.J. 47, 148 A.2d 1 (1959) (surveying the majority rule in the United States on the common law right to exclude). For further discussion of the right to exclude, see Turner & Kennedy, *Exclusion, Ejection and Segregation of Theater Patrons*, 32 IOWA L. REV. 625 (1947); Wade, *What Is A License?*, 64 L.Q. REV. 57 (1948); Annot., 90 A.L.R. 3d 1361 (1979); Annot., 1 A.L.R. 2d 1165 (1948).

57. *Uston*, 89 N.J. at 166, 445 A.2d at 372-73. The New Jersey Supreme Court in *Uston* emphasized the breadth of the Commission's statutory authority over the playing of blackjack. *Id.* at 168-69, 445 A.2d at 372-73 (citing N.J. STAT. ANN. 5:12-100 and 5:12-70). Additionally, the court noted the Commission's promulgation of "exhuastive rules" which "cover every conceivable aspect of the game." *Id.* at 169, 445 A.2d at 373. As a result, the *Uston* court stated, "[T]he Commission's regulation of blackjack is more extensive than the entire administrative regulation of many industries." *Id.* at 169, 455 A.2d at 373. Thus, because the Commission had exclusive

have a mere revocable license to remain on the premises, *Uston* indicates significant limitations on an owner's right to eject, exclude, or arrest patrons for impermissible reasons.[58]

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authority to exclude card counters from the playing of blackjack and because no regulations on that matter had been issued, "Resorts had no right to exclude Uston on grounds that he successfully plays the game under existing rules." *Id.* at 169-70, 445 A.2d at 373.

It is interesting to note that the New Jersey Supreme Court decision in *Uston* had been decided one month after the *Prinz* district court trial (held April 1-2, 1982), but prior to Prinz's Third Circuit appeal (heard January 6, 1983, and decided April 28, 1983). In his instructions to the jury the *Prinz* district court judge may have been relying upon the Uston superior court decision, although he made no specific citations. The district trial judge adopted virtually identical reasoning to that of the *Uston* superior court decision stating that even though Greate Bay had ejected Prinz on statutory rather than common law grounds,

> [T]his authority having been vested solely in the Commission, an individual casino is not empowered to blacklist or exclude a person . . . . The Commission itself has not adopted any regulation excluding card counters. Therefore, card counters, under the law of New Jersey may not be excluded from a casino by virtue of being a card counter.

Prinz, AA at 234a-235a. For a further discussion of the district judge's ruling in *Prinz*, see note 11 *supra*.

58. 89 N.J. 163, 445 A.2d 370. In a case decided two months after *Uston*, Marzocca v. Ferrone, the state superior court stated that the *Uston* decision "is solely based upon a modification of the common law exclusionary rule, . . . [so as to] invoke a reasonable rule of exclusion to be determined in the facts of each case." Marzocca v. Ferrone, 186 N.J. Super. 483, 453 A.2d 228, 234 (1982) (citing *Uston*, 89 N.J. 163, 445 A.2d 370). In *Marzocca*, the plaintiff, a horseowner, sought a restraining order against a raceway association to prevent its barring him from racing his horses at a particular track. 186 N.J. Super. at 486, 453 A.2d at 229. Applying the *Uston* reasoning, the superior court remanded for a determination of whether the plaintiff's common law right to pursue his business without unlawful or unreasonable hindrance is superceded by the raceway association's common law right to exclude. *Id.* at 493, 496, 453 A.2d at 234-35. The court explicitly noted that since only countervailing common law rights were at issue, the *Uston* decision was applicable. *Id.* at 493, 453 A.2d at 234.

In a case which was decided after the *Uston* superior court decision, but before the New Jersey Supreme Court decision, the New Jersey superior court was faced with the question of whether a casino has the right to detain (rather than exclude) a suspected card counter in order to question him. Bartolo v. Boardwalk Regency Hotel Casino, Inc., 185 N.J. Super. 534, 449 A.2d 1339 (1982). In *Bartolo*, two security guards for the defendant casino had grabbed the four plaintiffs by the arms and collars and pulled them away from a blackjack table. *Id.* at 535, 449 A.2d at 1340. A casino games manager then ordered them to produce identification so that they could be registered and prevented from playing blackjack. *Id.* Upon threat of arrest, the plaintiffs complied and were then directed to leave. *Id.* Plaintiffs then filed suit against the casino, alleging, among other things, false imprisonment. *Id.* at 536, 449 A.2d at 1340. The casino argued that it had a right and immunity to detain suspected card counters by pointing to a provision in the Casino Control Act which permits a casino to briefly detain individuals who are suspected of cheating. *Id.* at 539, 449 A.2d at 1343 (citing N.J. STAT. ANN. § 5:12-121(b) (West Supp. 1983)). The *Bartolo* court rejected the defendant's argument, stating that "there is no basis upon which card counting can be viewed as cheating or swindling a casino . . . ." *Id.* at 540, 449 A.2d at 1343. Thus, the court concluded, "Absent any affirmative statutory authorization to detain suspected card counters, the plaintiff's version of the incident at the Boardwalk Regency would constitute false imprisonment." *Id.*

Against this background, the Third Circuit considered whether a defendant on appeal may assert the collateral estoppel effect of the plaintiff's prior guilty plea, when at the trial level that defendant did not plead collateral estoppel as an affirmative defense nor did it introduce any record of the criminal conviction.[59]

Judge Gibbons, writing for the majority, began by identifying the competing arguments advanced by the parties on appeal.[60] Greate Bay argued that Prinz's guilty plea to the charge of defiant trespass estopped him from contending that he had a right to remain in the casino on the night in question.[61] Therefore, Greate Bay continued, its casino staff had probable cause to detain Prinz—a defense to a charge of false imprisonment in New Jersey.[62] In response, Prinz argued, based on Federal Rule 8(c),[63] that Greate Bay had waived the affirmative defense of collateral estoppel by failing to plead it in the district court.[64]

Judge Gibbons acknowledged that rule 8(c) generally requires that an affirmative defense be pleaded at trial or else it is unavailable on appeal.[65] However, he continued, where the issues are tried by the express or implied consent of the parties, rule 15(b)[66] provides an exception to the pleading

59. *See* 705 F.2d 692 (3d Cir. 1983). Specifically, the Third Circuit was called upon to determine whether Prinz was collaterally estopped from asserting false imprisonment charges against Greate Bay on the basis of his prior guilty plea and conviction for trespass on Greate Bay's casino premises. *Id.* at 694. For a discussion of the events leading to the trespass conviction and the subsequent false imprisonment charges, see notes 1-9 and accompanying text *supra.*

60. 705 F.2d at 694.

61. *Id.* Greate Bay argued that the trial judge had improperly allowed the "jury to consider Prinz's right to be on the casino premises notwithstanding Prinz's plea of guilty to being a trespasser. *Id.* The trial judge's instructions to the jury are excerpted in note 11 *supra.*

62. 705 F.2d at 694. The right of casino owners to exclude individuals from their premises is discussed in notes 54-55 and accompanying text *supra.* The Third Circuit majority did not directly address the status of New Jersey law on this issue, but commented that "[t]he law was far from certain." 705 F.2d at 694 n.2 (citing Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 445 A.2d 370 (1982)). For a discussion of the *Uston* decision, see notes 55-57 and accompanying text *supra.* The *Prinz* majority agreed with Greate Bay's statement that Prinz's guilty plea established 1) that he had no right to remain at the casino, and 2) the casino therefore had probable cause to detain him. *See* 705 F.2d at 694 ("probable cause for [plaintiff's] detention is a crucial element of the defense" to a charge of false imprisonment under New Jersey law). Judge Higginbotham's dissent takes issue with the majority's reasoning. *See* notes 77-78 and accompanying text *infra.*

63. 705 F.2d at 694. For the full text and discussion of rule 8(c), see note 16 and accompanying text *supra.*

64. 705 F.2d at 694.

65. *Id.* (citing Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 433 (8th Cir. 1976)). For a discussion of Sartin in particular, and the consequences of failure to plead an affirmative defense in general, see note 16 and accompanying text *supra.*

66. 705 F.2d at 694. The text of the majority opinion actually refers to rule "15(c)." *Id.* at 694-95. However, this is apparently a typographical error, as Judge Higginbotham suggests in his dissent. *See id.* at 696 n.1 (Higginbotham, J., dissenting).

requirement of 8(c).[67] If the issues underlying an affirmative defense were in fact tried below without objection, Judge Gibbons stated, then the defense should be treated as if it had been raised in the pleadings.[68]

In analyzing whether the collateral estoppel issue had been tried by the consent of the parties, the majority pointed out that Greate Bay had alleged the facts underlying the defense of collateral estoppel in its answer.[69] Judge Gibbons noted that Greate Bay had also mentioned Prinz's conviction in two motions for a directed verdict and in a timely request for charge.[70] Moreover, Greate Bay had elicited testimony from Prinz admitting the guilty plea, with no objection from Prinz's counsel.[71] Given this "totality of

67. 705 F.2d at 694. For a discussion of rule 15(b) and the criteria for determining if a matter has been litigated by the implied consent of the parties, see notes 17-23 and accompanying text *supra.*

68. 705 F.2d at 694. Judge Gibbons borrowed Professor Moore's explanation of the interplay of rules 8(c) and 15(b): " 'If an affirmative defense is not pleaded it is waived to the extent that the party which should have pleaded the affirmative defense may not introduce evidence in support thereof, unless the adverse party makes no objection in which case the issues are enlarged . . . .' " *Id.* (quoting 2A MOORE'S FEDERAL PRACTICE, ¶¶ 8.27[3], 8-251, 8-253 (2d ed. 1981)). Judge Gibbons added, "The rule is particularly applicable where, as here, the facts underlying the affirmative defense have been pleaded." 705 F.2d at 694 (citing Federal Sav. & Loan Ins. Corp. v. Hogan, 476 F.2d 1182, 1186 (7th Cir. 1973)). For a statement of *Hogan's* holding, see note 22 *supra.*

69. 705 F.2d at 693, 695. Judge Gibbons referred to Greate Bay's allegations that Prinz had been detained for arrest and subsequently convicted of defiant trespass. *Id.* "Thus," Judge Gibbons continued, "Greate Bay alleged facts which would bar Prinz's false imprisonment claim by virtue of collateral estoppel." *Id.* at 693 (citing Kauffman v. Moss, 420 F.2d 1270, 1274 (3d Cir. 1970); United States v. Schneider, 139 F. Supp. 826, 829 (S.D.N.Y. 1956)). For a discussion of *Kauffman,* see note 52 *supra.* For a discussion of *Schneider,* see notes 44 & 46 *supra.* The pertinent portions of Greate Bay's answer are set forth at note 9 *supra.*

70. 705 F.2d at 695. The relevant portions of Greate Bay's motions for a directed verdict and request for charge are set forth in note 11 *supra.*

71. 705 F.2d at 693. Greate Bay raised the issue of his guilty plea in its cross examination of Prinz:

> Q. Now concerning the Atlantic City Policy Department, the charges there, you pleaded guilty to those charges, didn't you?
> A. That's correct, sir.

Id. (quoting AA at 58a). Prinz's counsel made no objection to this question and in fact, during the redirect examination of Prinz, asked him to explain why he had pleaded guilty. 705 F.2d at 695-96 (Higginbotham, J., dissenting) (citing AA at 62a). Prinz described the circumstances surrounding his guilty plea as follows:

> A. Well, like I said, I was taken to the police station around midnight and I was ushered off into the cell. I was there for the morning. The afternoon went by. I still didn't hear anything. Finally, they took us to this room, handcuffed us, took us up to this courtroom with the public defendant—
> Q. Public defender.
> A. Public defender approached me and told me that my best bet, you know, is to plead guilty and they would give me a $25 fine.
> Q. Do you feel you were guilty?
> A. No, I didn't feel that I was guilty of anything, but as I said before, I was detained for 19, 20 hours and in a situation I had never been in and my main objective was to get my freedom again.

Id.

circumstances," the majority concluded that the preclusive effect of Prinz's prior conviction had in fact been tried by the consent of the parties, and that this brought into play rule 15(b)'s exception to the general pleading requirements of rule 8(c).[72] Thus, because the jury erroneously had been allowed to determine the issue of Prinz's right to be in the casino, the majority remanded the case for a new trial.[73]

Judge Higginbotham filed a dissenting opinion in which he criticized the majority for reversing the district court on an issue that he contended had been neither pleaded nor properly presented at trial.[74]

First, Judge Higginbotham pointed out that Greate Bay had not met the procedural burden imposed by rule 8(c) of pleading the affirmative defense of collateral estoppel.[75] Further, he stated that the majority's conclusion that the issue had actually been tried by consent of the parties was a misinterpretation of rule 15(b).[76] In Judge Higginbotham's view, the fact

72. 705 F.2d at 695. Judge Gibbons summarized as follows:

> Here the facts on which the defense of collateral estoppel rests were pleaded in the answer. They were introduced in evidence without objection. They were called to the court's attention in a motion for directed verdict, which was renewed at the end of the entire case. They were the subject of a timely request for charge . . . . In this totality of circumstances Rule 15(c) [sic] rather than Rule 8(c) provides the appropriate frame of reference.

Id. at 694-95.

73. *Id.* at 695. An additional factor cited by Judge Gibbons in support of the result was that "Prinz does not suggest that he has any evidence which might have been offered to overcome the collateral estoppel effect of his guilty plea." *Id.* The majority opinion does not indicate what sort of evidence it would require, or whether this evidence would be properly received by an appellate court in the first instance. *See id.*

74. 705 F.2d at 695 (Higginbotham, J., dissenting). Judge Higginbotham summarized his reasons for dissenting as follows:

> In this case the trial judge will be reversed because of the operation of an affirmative defense which defendant's counsel failed to articulate in his pleadings, during the course of trial or in his post trial motions. Defendant's counsel . . . also failed to offer into evidence the complaint on which the prior action was based and the record of the prior proceeding in order to demonstrate the propriety of its application to bar plaintiff's false imprisonment claim.

Id.

75. *Id.* at 696 (Higginbotham, J., dissenting). The dissent noted that Greate Bay did not affirmatively plead collateral estoppel, nor did it use the term "estoppel" in its answer, in any amendment to its answer, or in its motions for a directed verdict. *Id.* On the other hand, Judge Higginbotham pointed out, Greate Bay had used the term at least 12 times on appeal. *Id.* at 698 (Higginbotham, J., dissenting). Judge Higginbotham examined what he termed the "glaringly defective" answer submitted by Greate Bay: "[D]efendant's counsel filed an answer which was clouded with error, imprecision and ambiguity." *Id.* at 697 (Higginbotham, J., dissenting). Greate Bay's answer is excerpted at note 9 *supra*. Judge Higginbotham remarked that the answer appeared to indicate a decision to defend by litigating the false imprisonment issue rather than by pleading collateral estoppel as an affirmative defense. 705 F.2d at 698 (Higginbotham, J., dissenting).

76. *Id.* Judge Higginbotham suggested that the majority misapplied rule 15(b) when it concluded that the mere introduction of otherwise relevant factual matter

that Prinz's counsel did not object to evidence which *arguably* could have been the basis of a collateral estoppel assertion, was not sufficient to establish implied consent to litigate that issue.[77] Because neither the trial court nor the plaintiff had any notice that this unpleaded defense was being asserted, Judge Higginbotham concluded that there had been no consent to litigate and that rule 15(b) was therefore inapplicable.[78]

In addition to Greate Bay's procedural default, the dissent pointed to the casino's failure to meet the *substantive* burden imposed on a proponent of collateral estoppel—that of demonstrating the propriety of employing the doctrine in the present case.[79] Judge Higginbotham cited Supreme Court decisions requiring a trial judge to carefully evaluate evidence of a prior proceeding before deciding that an earlier determination should preclude relitigation of an issue.[80] Because Greate Bay had not produced a record of the trespass conviction or even a copy of the complaint, the dissent argued

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without objection can establish implied consent to litigate an unpleaded affirmative defense. *Id.* *See* note 77 *infra.*

77. 705 F.2d at 698-99 (Higginbotham, J., dissenting). Judge Higginbotham recognized that Prinz's counsel would have been entitled to object to Greate Bay's introduction of evidence in support of an unpleaded affirmative defense under rule 15(b). *Id.* However, he felt that the majority had improperly concluded that evidence that Prinz had pleaded guilty to defiant trespass was clearly identifiable as the basis for a defense of collateral estoppel:

> The evidence indicates *only* that appellee agreed to litigate *only* the issue raised during the course of litigation; that is, whether defendant had falsely imprisoned him. The mere existence of facts which *arguably* could have served as the basis for alleging another claim is insufficient proof that appellee had impliedly consented to litigate this other claim.

Id. at 699 (Higginbotham, J., dissenting).

78. *Id.* at 698 (Higginbotham, J., dissenting). The dissent stated that it was particularly important that notice of the collateral defense be clear in this case, since it is not immediately obvious that a false imprisonment charge would involve the same issues as a conviction for defiant trespass. *Id.* Judge Higginbotham asserted, "No New Jersey case states or even suggests that a guilty plea to or conviction of the crime of defiant trespass estops a false imprisonment claim." *Id.* Thus, he concluded, it would impose an "unnecessary and unrealistic burden" on the trial judge to expect him to infer that this is the defense being raised. *Id.*

79. *Id.* at 699 (Higginbotham, J., dissenting) (citing Chisholm v. Defense Logistics Agency, 656 F.2d 42, 50 (3d Cir. 1981); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3d Cir. 1974)). For a discussion of *Chisholm*, see note 53 *supra.* For discussion of relevant aspects of *Scooper Dooper*, see notes 31 & 36-37 *supra.* Judge Higginbotham recognized 3 elements necessary to demonstrate that collateral estoppel is appropriate: 1) the issues in the prior and subsequent actions must be identical; 2) the issues must have been actually litigated in the prior actions; and 3) the issue must have been necessary to the prior judgment. 705 F.2d at 699 (Higginbotham, J., dissenting) (citing *Scooper Dooper*, 494 F.2d at 844; Brighthart v. McKay, 420 F.2d 242 (D.C. Cir. 1969); Roth v. McAllister Bros., Inc., 316 F.2d 143 (2d Cir. 1963)). For a further discussion of these elements, see notes 25-28 and accompanying text *supra.*

80. 705 F.2d at 699 (Higginbotham, J., dissenting) (citing Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1959) (quoting Frank v. Mangum, 237 U.S. 309 (1915)) (in order to have collateral estoppel effect, the matter must have been " 'distinctly put in issue and directly determined' " in the criminal prosecution)).

that the result reached by the majority contravened binding precedent.[81] To support his conclusion, Judge Higginbotham cited Third Circuit case law establishing as an "essential" requirement that a party seeking to assert the preclusive effect of an antecedent criminal judgment introduce an adequate record thereof.[82] He criticized the "conclusory reasoning" which enabled the majority to ignore this well-defined precedent.[83]

Reviewing New Jersey casino law, Judge Higginbotham surmised that Prinz probably did not commit the crime of defiant trespass, to which he had pleaded guilty.[84] In the dissent's view, this made the majority's invoca-

81. 705 F.2d at 699 (Higginbotham, J., dissenting). Judge Higginbotham stated that the entire record of the prior case must be examined by the court before collateral estoppel may be applied, unless the face of the complaint to which the plaintiff pleaded guilty establishes that the subsequent action is barred. *Id.* at 699-700 (Higginbotham, J., dissenting) (citing Ashe v. Swenson, 397 U.S. 436, 444 (1970)) (further citations omitted). Because Greate Bay had not introduced even the criminal complaint, Judge Higginbotham asserted that neither the district court nor the Third Circuit could have conducted the requisite inquiry. *Id.* at 700 (Higginbotham, J., dissenting).

82. *Id.* (citing Chisholm v. Defense Logistics Agency, 656 F.2d 42, 50 (3d Cir. 1981); Basista v. Weir, 340 F.2d 74, 81-82 (3d Cir. 1965)). In *Basista*, Judge Higginbotham noted, the Third Circuit refused to hold that a criminal conviction precluded consideration of the lawfulness of the arrest in a subsequent civil action, even though the indictment and judgment were introduced in evidence. *Id.* at 700 (Higginbotham, J., dissenting). Judge Higginbotham explained this refusal on the basis of the court's inability to determine, without a full transcript, whether the lawfulness of the arrest had been determined in the earlier case. *Id.* For a discussion of *Basista*, see note 53 *supra*. Noting that the majority did not discuss *Basista*, Judge Higginbotham declared, "The panel apparently failed to recognize, or chose to ignore it, as binding precedent even though it is squarely on point and its approach has been reaffirmed often." 705 F.2d at 700 (Higginbotham, J., dissenting). The dissent also cited the Third Circuit's affirmation of this "necessarily decided" requirement in *Chisholm* and *Kauffman*. *Id.* at 699 (Higginbotham, J., dissenting) (citing *Chisholm*, 656 F.2d at 42, 49; *Kauffman*, 420 F.2d at 1270, 1274). For a discussion of *Chisholm* and *Kauffman*, see note 53 *supra*.

83. 705 F.2d at 700 (Higginbotham, J., dissenting). Judge Higginbotham stated that the majority had not properly considered the criminal conviction and had

> merely assumed that because plaintiff had pleaded guilty to the charge of defiant trespass his arrest was lawful and therefore he was collaterally estopped from maintaining an action, false imprisonment, for unlawful detention where the lawfulness of the underlying arrest is a defense.

Id. (citations omitted). The burden of proof to invoke collateral estoppel, explained Judge Higginbotham, must center on the question of whether the casino had probable cause to detain Prinz—not whether Prinz was trespassing. *Id.* Without a record of the defiant trespass proceeding, Judge Higginbotham felt it was impossible to determine whether the issue of probable cause was "necessarily decided" by Prinz's guilty plea. *Id.*

84. 705 F.2d at 701-02 (Higginbotham, J., dissenting). Because the casino had no right to exclude a card counter, Judge Higginbotham reasoned that Prinz was allowed to be present in the casino, and that therefore he could not have been guilty under the defiant trespasser statute. *Id.* (citing Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 445 A.2d 370 (1982)). For a discussion of *Uston* and the common law right to exclude amusement place patrons, see notes 54-58 and accompanying text *supra*. For a discussion of and excerpt from the New Jersey defiant trespass statute, see note 5 and accompanying text *supra*.

tion of collateral estoppel without an examination of the prior record a particularly egregious error.[85]

It is submitted that while the *Prinz* decision may be consistent with the federal court's lenient approach to deficient pleadings, it misapplies rule 15(b) of the Federal Rules of Civil Procedure by replacing the concept of implied consent with the court's own conclusion that an issue *should* have been litigated.[86] Greate Bay's references to Prinz's prior guilty plea were made without a single mention of "collateral estoppel."[87] Greate Bay did not plead collateral estoppel.[88] Given that courts, including the Third Circuit, treat prior guilty pleas as admissible evidence without preclusive effect, there was no obvious reason for Prinz or the trial court to have been on notice that the affirmative defense of collateral estoppel was being asserted against the false imprisonment claim.[89]

The *Prinz* court cited the single case of *Federal Savings & Loan Insurance Corp. v. Hogan* in support of its decision to apply rule 15(b)'s implied consent to litigate exception.[90] It should be noted, however, that while the defense of collateral estoppel had not been pleaded in *Hogan*, it was subsequently articulated in the course of that trial as well as in post-trial motions.[91] Moreover, the *Hogan* court noted two mitigating circumstances, not present in *Prinz*, which justified employing the implied consent exception: 1) the party

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85. 705 F.2d at 702 (Higginbotham, J., dissenting). Judge Higginbotham concluded,

> Prinz suffered the indignity of being in police custody for 20 hours for an act which was *not* a crime. The majority compounds the injustice . . . by allowing the casino to rely on a collateral estoppel defense which was neither pleaded nor proven as required by the rules and precedents.

Id.

86. For a discussion of the liberal principles underlying the Federal Rules, see note 15 and accompanying text *supra*. For a discussion of rule 15(b) and implied consent to litigate, see notes 17-23 and accompanying text *supra*.

87. *See* note 11 and accompanying text *supra*.

88. *See* note 9 and accompanying text *supra*.

89. *See* notes 46-47 *supra*. It should be noted that where a guilty plea is treated as an admission against interest in the *evidentiary* sense, this admission is generally understood to bear two consequences: 1) for the purposes of all proceedings relating to the original criminal action, including appeals, the admission is deemed a "judicial" admission, and therefore conclusive; and 2) in subsequent unrelated proceedings—civil and criminal—the admission is deemed an "evidentiary admission" which is not conclusive and may be explained. *See* State Farm Mutual Auto. Ins. Co. v. Worthington, 405 F.2d 683, 686 (7th Cir. 1968) (citing IV WIGMORE, EVIDENCE § 1066.) *See also* United States v. American Packing Corp., 113 F. Supp. 223, 226 (D.N.J. 1953) (a plea of guilty is only an evidentiary admission in proceedings not related to the original action in which the plea was made).

90. *Prinz*, 705 F.2d at 694 (citing Federal Sav. & Loan Ins. Co. v. Hogan, 476 F.2d 1182, 1186 (7th Cir. 1973)). For discussion of the pertinent holding of *Hogan*, see note 22 *supra*. *Hogan* involved a suit by a savings and loan association (Association) to recover damages for an alleged conspiracy to defraud by means of bribery. 476 F.2d at 1184. Hogan, a defendant in this action, had previously been found not liable in a suit by the Association for reformation of a mortgage on the grounds of fraud. *Id.* Hogan had not pleaded collateral estoppel in this second action. *Id.* at 1185.

91. *Id.* at 1186 n.2.

who had failed to properly plead had appeared at trial *pro se*, and was "obviously at a disadvantage;"[92] and 2) the party *against* whom collateral estoppel would apply was the party that initially raised the underlying facts of the defense, thus manifesting its "express consent" to litigate the matter.[93]

The Prinz majority also cited *Sartin v. Commissioner of Public Safety* for the "general rule" that "an affirmative defense not pleaded in the district court is not available on appeal."[94] It is suggested that *Sartin*, where allusions to the prior guilty plea were accompanied by neither articulation of the affirmative defense nor by sufficient evidence to establish that defense,[95] provides the more apposite precedent for the facts of *Prinz*.[96] In *Sartin*, the Eighth Circuit held that the unpleaded defense of collateral estoppel had been waived.[97]

Complementing the notice and consent requirements of the procedural rules, common law safeguards buttress the doctrine of collateral estoppel to prevent its unfair or inappropriate application.[98] Preeminent among these is the requirement that collateral estoppel be raised at the trial level and supported by the introduction of a complete record of the prior proceedings.[99] The Third Circuit has been adamant in its demand for a complete record for the purposes of demonstrating identity of issues,[100] and furnishing the basis for determining the fairness of invoking collateral estoppel in the particular case.[101] It is suggested, therefore, that in ignoring its own precedent, the Third Circuit has introduced a new level of imprecision and potential unfairness to the doctrine of collateral estoppel. In essence, the *Prinz* decision allows a court to take the parties at their word as to precisely what was

92. *Id.*

93. *Id.* at 1187. The *Hogan* court based its holding solely on express consent to litigate, and not implied consent. *Id.* For a discussion of rule 15(b) and implied consent to litigate, see notes 18-22 and accompanying text *supra*.

94. *Prinz*, 705 F.2d at 694 (citing *Sartin*, 535 F.2d at 433). For a discussion of the facts and holding of *Sartin*, see note 16 *supra*. For a discussion of waiver of an affirmative defense, see note 16 and accompanying text *supra*.

95. *See* note 16 *supra*.

96. For the pertinent facts of *Prinz*, see notes 9-11 and accompanying text *supra*.

97. 535 F.2d at 433. The Eighth Circuit stated, "Officer Mickelson did not plead res judicata or collateral estoppel in the District Court. Accordingly, those affirmative defenses were not available to him in that court and are not available here." *Id.*

98. *See* note 99 *infra*. For a general discussion regarding judicial concerns with the fairness of employing collateral estoppel, see notes 29 & 37 and accompanying text *supra*.

99. *See* notes 31-35 and accompanying text *supra*.

100. *See, e.g.*, Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981); Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). For a discussion of the facts and holdings of *Chisholm*, *Kauffman*, and *Basista*, see note 53 *supra*.

101. *See* Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 845 (3d Cir. 1974) (collateral estoppel is an available defense only if it is shown that the party against whom the plea is asserted has had a full and fair opportunity to litigate in the prior proceeding).

determined in the prior adjudication.[102]

Moreover, it is submitted, the *Prinz* court seems to have been unaware of the relative dearth of precedent for applying collateral estoppel where 1) there is no mutuality of parties;[103] 2) the case involves a prior guilty plea to a minor offense;[104] and 3) the issue precluded is not an element of the crime to which the guilty plea was entered.[105]

Although a small minority of courts have dispensed with the mutuality rule in guilty plea collateral estoppel cases,[106] they have done so only upon a showing that the guilty pleader had had ample incentive to litigate the matter.[107] In contrast, it is submitted, the Third Circuit ignored this incentive factor when it gave preclusive effect to Prinz's guilty plea to a misdemeanor which was punishable by a twenty-five dollar fine.[108] Furthermore, it is submitted that the fairness of affording collateral estoppel effect to a trespass conviction where the issue precluded is false imprisonment is dubious.[109] Some courts have stated that even a guilty pleader has the right to litigate

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102. The majority in *Prinz* cited *Kauffman v. Moss* and *United States v. Schneider* for its statement that Greate Bay's allegations of fact regarding Prinz's guilty plea were sufficient to bar Prinz's false imprisonment claim "by virtue of collateral estoppel." 705 F.2d at 693. For a discussion of the appropriateness of treating *Schneider* as precedent, see note 105 *infra*. For a discussion of the facts and holding of *Kauffman*, see note 53 *supra*. It is submitted that the Third Circuit's citation to *Kauffman* is a non sequitur, since that decision stands for the proposition that without a thorough examination of the record of the prior criminal proceeding, collateral estoppel must not be invoked. *Kauffman*, 420 F.2d at 1270. The *Kauffman* court did not question the *fact* of Kauffman's prior conviction, it merely refused to infer from the conviction any issues (even one so "necessary to the judgment" as the veracity of the witnesses) without an examination of the record. *Id.*

103. *See* notes 40-43 & 47 and accompanying text *supra*. It is possible that there is an argument for Greate Bay's being in privity with the state regarding the trespass conviction, since Greate Bay did file the complaint against Prinz. However, this argument was neither made to, nor considered by, the court since the entire issue of mutuality of parties went undiscussed in the *Prinz* opinion.

104. *See* notes 48-49 and accompanying text *supra*.

105. *See* note 44 *supra*. One case cited by the Third Circuit for the preclusive effect of a prior guilty plea is *United States v. Schneider*, a district court case. 705 F.2d at 693 (citing 139 F. Supp. 826 (S.D.N.Y. 1956)). For the facts and holding of *Schneider*, see notes 44 & 46 *supra*. In *Schneider*, however, mutuality of parties was present, the prior plea was to a felony, collateral estoppel had been pleaded, and the issue precluded was found to have been an element of the crime pleaded guilty to. 139 F. Supp. at 928-30. In fact, the *Schneider* court carefully scrutinized the record of the prior proceeding to assure itself of this issue identity. *Id.* at 830.

106. *See* note 47 and accompanying text *supra*.

107. *See* notes 48-49 and accompanying text *supra*.

108. For a discussion of the facts and circumstances surrounding Prinz's guilty plea, see notes 5-7 and accompanying text *supra*.

109. *See* 705 F.2d 700 n.5 (Higginbotham, J., dissenting). Judge Higginbotham stated,

> The majority apparently relies on *Jorgensen v. Pennsylvania Railroad Co.*, in support of the proposition that in New Jersey a guilty plea to the charge of defiant trespass estops plaintiff from proving a false imprisonment claim. Neither *Jorgensen*, nor any other New Jersey case stands for this proposition. Indeed, *Jorgensen* states only that "[t]he truth or falsity of the charge [of false

the lawfulness of his arrest since it is not an element of the crime to which he pleaded guilty.[110] The *Prinz* court did not address this issue.[111]

Finally, it is suggested that the Third Circuit's decision is particularly surprising since it is not altogether clear that Prinz had committed a crime, notwithstanding his guilty plea.[112] The New Jersey Supreme Court in *Uston* has severely limited the right of casinos to expel individuals for being card counters.[113] The tautological reasoning by which a casino may claim the statutory right to expel card counters by simply labeling them trespassers per se is highly questionable in light of New Jersey precedent.[114]

Thus, it is asserted, what at first glance appears to have been a simple accommodation of rules 8(c) and 15(b) may have considerably wider implications: the Third Circuit's holding serves not only to relieve a party of the burden of proof in litigating the defense of collateral estoppel,[115] but also imposes an unfair burden on litigants and trial judges who, in the dissent's characterization, will have to be omniscient to discern when collateral estoppel is being asserted or tried.[116] More significantly, the Third Circuit has attached harsh consequences to an individual's decision to plead guilty to a minor offense.[117] It is conceivable that the court's ruling will encourage a greater volume of litigation in the criminal courts since defendants will be wary of the consequences of simply "paying the fine."[118] It is even more apparent that the *Prinz* majority's approach, if followed, will actually defeat

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imprisonment] is, of course, germane to the establishment of probable cause."

Id. (quoting 38 N.J. Super. at 349, 118 A.2d at 782).

110. *See, e.g.*, Prosise v. Haring, 667 F.2d 1133 (4th Cir. 1981), *aff'd*, 103 S. Ct. 2368 (1983). For a discussion of the *Prosise* facts and holding, see note 44 *supra*.

111. *See* note 109 *supra*.

112. *See* 705 F.2d at 702 (Higginbotham, J., dissenting) (stating unequivocally that Prinz "pleaded guilty for an act which as a matter of law was not a crime under New Jersey law").

113. *See* notes 55-58 and accompanying text *supra*.

114. *See* 705 F.2d at 702 (Higginbotham, J., dissenting). The dissent argued,

> [T]here are risks which are assumed in swearing out a complaint against a person who, as it turns out, did not commit a crime. That person . . . may decide to bring a civil action in an attempt to remedy the harm to him as a result of having been detained and arrested. Here the casino gambled by relying on an erroneous theory of criminal law as to what constitutes the offense of defiant trespass in order to detain and charge Prinz . . . . In my view, the casino should not win on appeal with the present record before us.

Id.

115. *See* notes 99-101 and accompanying text *supra*.

116. 705 F.2d at 699 (Higginbotham, J., dissenting). Judge Higginbotham added that "trial judges should not be expected to see the issue(s) which counsel do not plead, articulate or litigate." *Id.*

117. *See* notes 118-119 and accompanying text *infra*.

118. *See* Note, *Preclusive Effect Extended to Guilty Pleas*, *supra* note 45, at 1354-56 (noting such possible impacts as a decline in plea bargaining, fewer guilty pleas, greater volume of litigation and onerous demands on the courts' already limited resources).

the federal courts' explicit policy of assuring every party a full and fair opportunity to litigate his claim.[119]

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119. For a discussion of the policy that a party have a full and fair opportunity to litigate, see note 37 and accompanying text *supra*.