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ANTITRUST JUDGMENTS IN BENCH TRIALS AS EVIDENCE: THE UNINTENDED CONSEQUENCES OF SECTION 5(A)

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I. INTRODUCTION

When the Antitrust Division of the Department of Justice files a civil lawsuit challenging the conduct of a defendant, the government has the authority under Section 4 of the Sherman Act[2] to obtain an injunction against the challenged conduct but not to seek damages unless the conduct has injured the government as a purchaser itself.[3] It is inevitable that, after the government files such a case, private parties will file follow-on treble damages litigation.

It is the rare government case that goes to trial, but when a defendant does take that risk, the result of the trial has an important effect on the follow-on treble damages litigation. Private plaintiffs can use a government judgment against the defendant as prima facie evidence of liability under Section 5(a) of the Clayton Act[4], as long (1) the judgment is one "under the antitrust laws"[5] and (2) the judgment is entered after testimony is taken, i.e., either after trial or after trial has started. Private plaintiffs naturally prefer to await the result of the government case before prosecuting their own so that they can take advantage of this provision. Also contributing to the primacy of the government case is the difficulty, if not impossibility, of consolidating the government and private suits for trial even if all parties agree that it is a good idea to do so. "Congress has articulated a strong public policy against combining antitrust complaints brought by the government with private antitrust damages suits." *United States v. Dentsply, Int'l Inc.*, 190 F.R.D. 140 (D. Del. 1999) (denying motion to consolidate private suits with government antitrust case on the basis of the explicit preclusion of such consolidation in the statute authorizing pretrial multidistrict consolidation, 28 U.S. C. § 1407(g)). And, under the current version of Section 5(a), plaintiffs also can use collateral estoppel to preclude a defendant from re-litigating any issue necessarily and finally decided in the government case.

Since the government's case is equitable in nature, it is tried to the bench, without a jury. But the follow-on treble damages case, if tried, would be presented to a jury. If a

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2 15 U.S.C. § 4.
3 The government may, however, seek damages on its own behalf if the defendants' conduct has injured the government in its business or property.
4 15 U.S.C. § 16(a).
5 The limitation on the use of judgments to those obtained "under the antitrust laws" means that plaintiffs cannot use judgments that the Federal Trade Commission obtains, whether in a district court or administratively, as prima facie evidence of the defendant's liability. *See, e.g.*, *Y & Y Popcorn Supply Co. v. ABC Vending Corp.*, 263 F. Supp. 709, 713 (E.D. Pa. 1967) (concluding that a plaintiff could not invoke § 5(a)'s rebuttable presumption following entry of a judgment under Section 5 of the FTC Act because Section 5 is not an antitrust law); *Minnesota Mining & Manufacturing v. New Jersey Wood Finishing*, 332 F.2d 346 (3d Cir. 1964) (same).

defendant loses its case to the government after a bench trial, the private plaintiffs can invoke Section 5(a) as conclusive proof of issues decided in the prior case, and as prima facie evidence of liability on any other liability issues in the subsequent jury trial. That means that, in the follow-on jury trial, the defendant cannot contest most issues, and, on those that it can contest, the burden shifts to the defendant to rebut the plaintiffs' prima facie case. This circumstance seems to limit a defendant's constitutional right to a trial by jury since the burden of proof is dictated by the findings of a judge in a bench trial.

This paper explores the interrelationship between a verdict in the government's case and the use of that verdict in follow-on treble damages litigation. We first look for guidance in the origins of Section 5(a), and in the evolution of the jury trial right in cases with mixed legal and equitable claims. We then establish that Section 5(a)'s unintended consequences outweigh the benefits that informed Congress' view of the advisability of the provision in the first place. Finally, we offer some concluding thoughts.

II. THE GOVERNING PRINCIPLES

A. The Origin of Section 5(a)

Congress enacted Section 5(a) in 1914 as part of the Clayton Act. At that time, under the principle of "mutuality," a plaintiff could not use the doctrine of collateral estoppel to prevent a defendant from re-litigating an issue that it had lost in a previous trial, unless the plaintiff was a party in the previous action against the defendant. Private plaintiffs that brought follow-on civil treble damages claims therefore could not benefit from a finding of liability in a preceding government action because they had not been parties to the government suit. In addition, the federal rules did not permit collective actions in the same way that they do today; Congress did not adopt a form of the present Rule 23 until 1938.[6] Without an established class action framework, private plaintiffs were left to take on large corporate defendants on their own. They faced the prospect of lengthy trials regardless of whether the defendants had previously been found liable for the same conduct in an action brought by the government. And, even if the defendant had been found liable in the government action, the plaintiff had to prove up every element of its antitrust claim.

To address these perceived problems, Congress enacted Section 5 of the Clayton Act to increase the effectiveness of the Clayton Act's treble damages provision in two ways. First, under Section 5(a), "a final judgment or decree" from "any suit or proceeding in equity" brought by or for the United States for a violation of the antitrust laws would be "prima facie evidence" against the defendant in a subsequent, private treble damage suit. Second, pursuant to Section 5(b), the statute of limitations would be tolled or suspended during the pendency of the government litigation. Together, Congress intended for these elements to provide incentives to private parties to pursue punitive treble damages claims in follow-on civil actions.

B. The Evolution of the Right To A Jury Trial In Cases With Mixed Legal and Equitable Claims

There is no indication in Section 5(a)'s legislative history that Congress considered the question of how the new statute might affect a defendant's right to a jury trial in a

6 See Advisory Committee Notes to Subdivision A of former Rule 23 (1937).

subsequent private damages suit. But, at that time, despite the perceived importance of the right to a jury trial, there were circumstances in which that right could be compromised without running afoul of the Seventh Amendment. For many years, for example, courts struggled with the role of a jury trial in the resolution of cases that included both legal and equitable claims. Three competing rules emerged regarding the sequence of trials in cases with both legal and equitable issues. One line held that the determination of the sequence of trial should be left to the absolute discretion of the trial judge. *See Orenstein v. United States,* 191 F.2d 184, 190 (1st Cir. 1951). A second held that the nature of the "basic issue" should control, so if the "basic issue" was equitable, the bench trial preceded the jury trial. *See Reliance Ins. Co. v. Everglades Discount Co.*, 204 F.2d 937 (5th Cir. 1953). A third held that in the absence of special circumstances, factual issues common to both legal and equitable claims must be tried to a jury. *See Leimer v. Woods*, 196 F.2d 828 (8th Cir. 1952).

In *Beacon Theaters v. Westover*,[7] the Supreme Court began to tackle the application of the Seventh Amendment jury right to cases that raised both legal and equitable claims. In *Beacon,* the defendant in a declaratory judgment action asserted a counterclaim and cross-claim under the Sherman Act, requested treble damages, and demanded a jury trial to resolve the factual issues. The district court, however, denied the defendant's jury trial demand because the issues raised by the complaint were "essentially equitable"[8] and should be tried to a judge first. The defendant petitioned the Ninth Circuit for a writ of mandamus to require the district court to set aside its ruling, but the Ninth Circuit affirmed.[9]

The Supreme Court reversed the Ninth Circuit and granted the defendant's petition for a writ of mandamus to order the district court to try the legal claim first. The Court reasoned that a plaintiff could not eliminate a defendant's jury trial right by "blending" a "claim, properly cognizable at law" with a "demand for equitable relief in aid of the legal action."[10] Such a practice, the Court explained, would allow a plaintiff to effectively use the Declaratory Judgment Act to displace the "substantive right" to a jury trial afforded by the Seventh Amendment, which was precisely the opposite of what Congress intended.[11] Thus, where legal and equitable claims are joined in the same action, the Court held that the trial court has only limited discretion in determining the sequence of trial, and "that discretion . . . must, wherever possible, be exercised to preserve jury trial."[12]

Three years later, in *Dairy Queen, Inc. v. Wood*, the Supreme Court expanded on the jury trial principles announced in *Beacon Theatres*.[13] Dairy Queen sought an injunction against a defendant which continued to operate his business in violation of the Dairy Queen trademark. Dairy Queen also sought an accounting to determine the exact amount of money that the defendant owed it. The defendant demanded trial by jury, which the district court denied and the Court of Appeals affirmed.

The Supreme Court reversed and held that *Beacon Theatres* applied whether or not the trial judge chose to characterize the legal issues presented as "incidental" to equitable issues. Further, the Court held, under *Beacon Theatres*, any legal issues for which a trial by jury was timely, and properly demanded, must be submitted to a jury.[14] Construing the sole

7 *Beacon Theaters v. Westover*, 359 U.S. 500 (1959).
8 *Id.* at 503.
9 *Beacon Theaters v. Westover*, 252 F.2d 864 (9th Cir. 1958).
10 359 U.S. at 510.
11 *Id.* at 508-509 ("Our decision is consistent with the plan of the Federal Rules and the Declaratory Judgment Act to effect substantial procedural reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged.").
12 *Id.* at 510.
13 369 U.S. 469, 479 (1962).
14 *Id*. at 473.

question presented to be whether the action contained any legal issues, the Court concluded that the request for a money judgment was a claim that is "unquestionably legal."[15] Thus, the Court held, the Seventh Amendment entitled the defendant to a trial by jury on the factual issues relating to whether the defendant breached the trademark licensing agreement.

Beacon Theaters and *Dairy Queen* hold that if the *same case* raises both legal and equitable claims, the defendant has the right to have the jury claims tried first. Those cases, however, did not address the circumstances presented when a government judgment precedes a civil damages trial. In this context, there are *two different cases* with *two different plaintiffs*. And, the government's case is typically tried first to the bench. Thus, *Beacon Theaters*' directive on sequencing the trial of legal and equitable claims did not apply to preserve the jury trial right in the subsequent private case.

Several lower federal court cases explored this issue in some detail after *Beacon Theatres*. In *Rachal v. Hill*,[16] the Securities Exchange Commission obtained injunctive relief against the defendant for violations of federal securities laws. The plaintiff then brought a follow-on civil class action against the defendant to recover damages based on the same legal theory. The defendant claimed it had a right to have the damages claims tried to a jury. The district court, however, concluded that the defendants had had a full and fair opportunity to litigate the liability issue. The court held that the defendants were collaterally estopped from denying liability and granted the plaintiff's summary judgment motion. The Fifth Circuit reversed. The court observed that *Beacon Theatres* stood for the principle that a litigant has a right to have legal claims tried first to a jury in an action where legal and equitable claims are joined. As such, the court reasoned, it would be "anomalous" after *Beacon Theatres* to hold that a litigant could lose his constitutional right to a jury trial because of a prior adverse determination in an equitable, nonjury proceeding.

In *McCook v. Standard Oil Co. of California*,[17] a court confronted similar facts, but in an antitrust context. Following a successful government litigation against Standard Oil,[18] the plaintiff argued that the liability finding should collaterally estop the defendant from denying that it had violated the antitrust laws. The court disagreed. It identified three obstacles to applying collateral estoppel in this context: (1) the elimination of Standard Oil's jury trial right; (2) the *Rachal* holding, which held that collateral estoppel could not deprive a defendant of its jury trial right; and (3) the presence of Section 5(a), which, in the court's view, defined the use of the government judgment in a private case as prima facie evidence. The court held that, as a matter of judicial policy, it would be inappropriate to permit a plaintiff to collaterally estop a defendant from contesting liability where (1) Congress had expressed a preference for the Section 5(a) prima facie standard instead and (2) doing so would prevent the defendant from exercising its jury right, through no procedural fault of its own. "Therefore, the court conclude [d] that the strong public policy favoring jury trials preclude[d] the court from applying the doctrine of collateral estoppel . . . because Standard Oil did not have a right to try its case before a jury in the prior government action."[19]

15 *Id*. at 476.
16 435 F.2d 59 (5th Cir. 1970).
17 393 F. Supp. 256 (C.D. Cal. 1975).
18 *United States v. Standard Oil Co. of California*, 362 F. Supp. 1331 (N.D. Cal. 1972).
19 393 F. Supp. at 258; *id.* at 259 (noting because of the "public policy in favor of jury trials growing out of the Seventh Amendment," *Rachal* could be read as creating a "judicial policy exception to the general doctrine of collateral estoppel," not mandated by the Seventh Amendment, but by notions of basic fairness).

C. *Parklane Hosiery*: The Jury Trial Right and the Principle of Collateral Estoppel On A Collision Course

These cases, essentially limiting the application of collateral estoppel, were inconsistent with developing law that was extending it. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), for example, the Supreme Court held that a plaintiff could take advantage of collateral estoppel even if it had not participated in a prior litigation against the defendant, eliminating the requirement of "mutuality." Without the requirement that a private plaintiff must have participated in a government suit in order to use collateral estoppel against a defendant, the issue of whether it was constitutionally permissible to eliminate a defendant's right to a jury trial on issues litigated in the government case was presented squarely.

Similarly, the Supreme Court granted certiorari in *Parklane Hosiery Co. v. Shore*,[20] to resolve whether the jury trial right precluded a plaintiff from using collateral estoppel to prevent a defendant from re-litigating issues that it had lost in a prior government suit. In *Parklane*, a stockholder's class action sued a corporation on allegations that the corporation issued a false and misleading proxy statement. Soon thereafter, the SEC sued the same corporation based on substantially similar factual allegations. Although the two cases were filed in the same district, they were assigned to different judges. A bench trial was held in the SEC suit, and the district court found the defendants liable. In the private litigation, the plaintiffs then filed for summary judgment on the ground that the corporation was precluded from re-litigating the same issue in that suit.

On appeal, the Second Circuit held, and the Supreme Court affirmed, that the Seventh Amendment did not bar the application of collateral estoppel in a follow-on case for damages, where the defendant's prior liability finding arose in a bench trial. As to *Beacon* Theaters and *Dairy Queen*, the court noted that those cases established "a general prudential rule" in favor of a jury trial but not an absolute one.[21]

D. Moving Forward: Section 5(a)'s Application post-*Parklane*

In the antitrust context, two issues existed after *Parklane*. First, since Congress had provided in Section 5(a) that a government judgment is prima facie evidence of liability in a subsequent damages case, could a plaintiff also collaterally estop a defendant from re-litigating issues that it had lost in the government case, using the decree as conclusive proof instead of just prima facie evidence? Prior to 1980, Section 5(a) was silent as to the collateral estoppel effect of a government judgment. Some courts held that Congress intended that Section 5(a) supplant the common law principles of collateral estoppel under which a court could give not only prima facie but conclusive effect to government judgment. *Illinois v. General Paving Co.*, 590 F.2d 680, 682-832 (7th Cir. 1979). Congress amended Section 5(a) in 1980 to make clear that a plaintiffs' ability to use a government judgment as prima facie evidence of liability was in addition to any collateral estoppel rights that it may have.

Second, *Parklane* arose under the securities laws, so it did not address the jury trial right in connection with Section 5(a)'s provision that a government judgment is prima facie evidence of liability. While *Parklane* permits a private plaintiff to collaterally estop a defendant from re-litigating issues "necessarily and finally" decided in the previous

20 439 U.S. 322 (1979).
21 *Id.* at 334 (quoting *Beacon Theatres*, 359 U.S. at 510).

government case, that does not mean that the private antitrust plaintiff only has to prove up its damages to win the subsequent case. To prevail in an antitrust case, a private plaintiff, in addition to proving up the antitrust violation, must also establish that the violation injured it in its business or property. *See Story Parchment v. Paterson Parchment Paper Co*., 282 U.S. 555, 563 (1931). "[T]he issue of liability in antitrust cases includes not only the question of violation, but also the question of fact of injury, or impact." *Alabama v. Blue Bird Body Co., Inc*. 573 F.2d 309, 320 (5th Cir. 1978). The government need not prove that issue in order to win its case. *See Howard Hess Dental Laboratories, et. al. v. Dentsply Int'l Inc*., 602 F. 3d 237, 248 (3d Cir. 2010) (affirming that the issue of injury to private plaintiffs was not necessary to the judgment in favor of the government in previous case).

Thus, a plaintiff's ability to introduce a government judgment as prima facie evidence of liability is broader than its collateral estoppel right, and thus directly impacts a defendant's right to a jury trial on its claims. The private plaintiff may also be pursuing theories or causes of action not determined in the government case, and the presence of a government decree in such a trial may affect the fairness of the second proceeding.

III. AN ARGUMENT FOR RETIRING THE "PRIMA FACIE EVIDENCE" STANDARD OF SECTION 5(A)

As the evolution of the law from *Beacon Theaters* through *Parklane Hosiery* suggests, Section 5(a) as it now stands exists in a completely different enforcement and common law framework from when Congress enacted it. Specifically, in 1914:

- The Antitrust Division of the Department of Justice was the only active enforcement agency. The Federal Trade Commission existed on paper only.

- The federal rules of procedure did not contain a provision that permitted plaintiffs to bring class actions. Private plaintiffs injured by antitrust violations had to pursue their damages claims against corporate defendants independently.

- Perhaps most importantly, mutuality was a central element of collateral estoppel. In other words, Congress arguably enacted Section 5(a) to fill a void that no longer exists.

Given these changes, it is not clear that the "prima facie" evidence standard in Section 5(a) continues to make sense. To the contrary, rather than providing a counter-balance to a decidedly pro-defendant legal system as Congress intended in 1914, the evolution of collateral estoppel law combined with Section 5(a) now means that the thumb sits doubly on the plaintiff's side of the scale when it comes to follow-on cases. The plaintiff can collaterally estop a defendant from re-litigating issues finally decided in the government case, and can introduce the judgment as prima facie evidence of injury (or any other issues not decided in the government case), shifting the burden to the defendant to rebut that issue. This result gives the plaintiff far more advantage than the application of collateral estoppel does, and eliminates the defendant's right to have the plaintiff prove its own injury to a jury.

There are three arguments for amending Section 5(a) to eliminate the "prima facie evidence" standard and leave use of the judgment to collateral estoppel principles. We address each below.

A. Section 5(a) Creates Confusion for Judges and Juries

Section 5(a) does not specify the evidentiary treatment of a prior government judgment in an antitrust case. In 1915, the Supreme Court summarized Section 5(a)'s operation as follows:

> [Section 5] establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in anywise work a denial of due process of law.[22]

That application sounds straightforward enough. The problem, however, is the application of a rebuttable presumption in a jury trial where the only issues are injury and damages because the defendant is collaterally estopped from contesting the substantive violation. There are no assurances that a jury will not accord a liability finding undue weight in the follow-on litigation therefore effectively diluting the defendant's right to present a defense on the impact issue, or any other issue not decided in the government case. Indeed, courts frequently rely on Rule 403 of the Federal Rules of Evidence[23] to exclude otherwise admissible evidence (including related judgments) in civil contexts on the basis that the evidence, though relevant (1) would tend to confuse the jury[24] or (2) would permit the jury to decide a case based on a prior finding instead of basing its verdict on the evidence presented in the subsequent case.[25] A handful of courts applying Section 5(a)'s prima facie standard have expressed similar concerns.[26]

The risk of juror confusion that predominates these Rule 403 decisions exists every time Section 5(a) is applied. To be sure, a judge may attempt to limit the weight a jury accords to a prior finding by including a limiting instruction.[27] But it is not at all clear that the burden this places on the jury in the first instance leads to any salient benefit.

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22 *Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915).

23 Rule 403 states:
> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FED. R. EVID. 403.

24 *See, e.g.*, *United States Football League v. National Football League*, 842 F.2d 1335, 1372-73 (2d Cir. 1988) (court was "wary of allowing a trier of fact to draw inferences of intent from the outcome of prior lawsuits in an area so fraught with uncertainty and doubt"); *Diaz v. Cianci*, 737 F.2d 138, 139 (1st Cir. 1984) (upholding trial court's exclusion of prior adjudications under Rule 403); *Brownko Int'l, Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432, 1436 (S.D.N.Y. 1983) (ambiguous arbitration award excluded by trial court because "confusion of issues could clearly arise, the jury being led into the inappropriate function of relitigating the arbitration").

25 *See, e.g., Roche Diagnostics Operations, Inc. v. Abbott Diabetes Care*, 756 F. Supp. 2d 598, 605 (D. Del. 2010) ("The admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus, will not effectively, decide a case on evidence not before it"); *St. Clair Intellectual Prop. Consultants v. Fuji Photo Film Com., Ltd.*, 674 F. Supp. 2d 555, 2009 U.S. Dist. LEXIS 108679, *7 (D. Del. Nov. 19, 2009) (same); *see also Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1117-18 (8th Cir. 1999) (same); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir. 1975) ("A jury is likely to give a prior verdict against the same defendant more weight than it warrants."); *City of New York v. Pullman, Inc.*, 662 F.2d 910, 915 (2d Cir. 1981) (administrative report properly excluded under Rule 403 because "the report would have been presented to the jury in 'an aura of special reliability and trustworthiness' which would not have been commensurate with its actual reliability").

26 *See, e.g.*, *Buckhead Theatre Co. v. Atlanta Enters.*, 327 F.2d 365, 368 (5th Cir. 1964) ("This is a circumstance that must be taken into consideration by any court if it is to have any discretion as to the admission of evidence, which, while having some probative value, may also have extremely prejudicial effect by reason of non-relevant matters that would inevitably be presented to the jury if the evidence were to be admitted.").

27 *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 571 (1951) (noting in a Section 5(a) case that "[i]t is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit, and to limit to those issues the effect of that judgment as evidence in the present action").

B. Taking Testimony and the *Microsoft* Consent

Second, while there has been little substantive law developed in conjunction with Section 5(a), one issue that has been the subject of some debate is the fact that Section 5(a) does not "apply to consent judgments or decrees entered before *any testimony has been taken*." Although the reasoning behind this rule makes sense insofar it seeks to prevent prima facie liability or collateral estoppel from attaching where evidence was not presented, there is not complete agreement as to what this phrase means. On the one hand, reading this phrase literally, some courts have read it to mean that once a trial begins and the defendant settles, the ensuing settlement agreement is admissible under Section 5(a).[28]

Conversely, however, in the *Microsoft* litigation, the district court concluded that a settlement entered into between the DOJ and Microsoft was a "consent decree" within the meaning of the Tunney Act and Section 5(a), notwithstanding the fact that it followed a trial.[29] As one article has since noted, "characterizing the proposed settlement of a case after litigation has taken place as a Tunney Act proceeding may deprive subsequent treble damage action plaintiffs of the use of the 'final judgment or decree' in subsequent litigation, in violation of the express language of 5(a) of the Clayton Act."[30]

Given the government's increasing desire to challenge anticompetitive conduct and the extent to which a settlement after testimony will cost the defendant a finding of collateral estoppel or, at least, prima facie liability, the ambiguity surrounding this phrase could benefit from statutory clarification. Otherwise, a defendant will have no choice but to settle sooner than it might otherwise need to or want to in order to limit its financial exposure.

C. Section 5(a) Reinforces the "Two-Antitrust Agency" Problem

The best illustration of why Section 5(a) reflects bad policy is its differing application to FTC and DOJ proceedings. The statute treats FTC and DOJ findings differently in two respects. First, the prima facie standard only applies to government actions brought "under the antitrust laws."[31] This was of no moment when Congress enacted Section 5(a) in 1914 because Congress had yet to create the FTC let alone enact Section 5 of the FTC Act, which is the agency's principle statute for challenging anticompetitive conduct. When Congress enacted Section 5 in 1914, it elected not to amend the definition of "antitrust law" provided in Section 1 of the Clayton Act.[32] As a result, courts have uniformly held that FTC orders based on Section 5 of the FTC Act are not brought "under the antitrust laws" and are therefore outside of Section 5(a)'s scope.[33] This carve out proves significant because the FTC's principle authority for challenging anticompetitive conduct is *Section 5 of the FTC Act*. Section 5(a)'s prima facie standard essentially has no effect when it comes to FTC's challenges to anticompetitive conduct.[34]

28 *See, e.g., Ambook Enters. v. Time Inc.*, 612 F.2d 604, 612-13 (2d Cir. 1979); *Sablosky v. Paramount Film Distrib. Corp.*, 137 F. Supp. 929, 935 (E.D. Pa. 1955). *See also Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 65 (D. Minn. 1966) (admitting a civil consent decree against one of several defendants after concluding that the consent decree had been "entered after testimony was taken" for purposes of Section 5(a) based on the plaintiff's submission of testimony previously taken from the defendant in a related criminal case in which the defendant and others had been acquitted).

29 *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002).

30 J. Flynn & D. Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies,"* 34 LOY. U. CHI. L.J. 749, 800 (2003).

31 15 U.S.C. § 16(a).

32 15 U.S.C. § 12 (defining "antitrust laws" and not including the Federal Trade Commission Act, which promulgated Section 5).

33 *See, e.g., Y & Y Popcorn Supply Co. v. ABC Vending Corp.*, 263 F. Supp. 709, 713 (E.D. Pa. 1967) (concluding that a plaintiff could not invoke § 5(a)'s rebuttable presumption following entry of a judgment under Section 5 of the FTC Act because Section 5 is not an antitrust law); *Minnesota Mining & Manufacturing v. New Jersey Wood Finishing*, 332 F.2d 346 (3d Cir. 1964) (same).

34 A few courts have held that the prima facie presumption applies to FTC orders in proceedings brought under the Clayton Act which is "an antitrust law." *See Purex Corp. v. Proctor & Gamble Co.*, 453 F.2d 288 (9th Cir. 1971) (private litigation related to FTC merger challenge).

Second, as a result of amendments made by the Antitrust Procedural Improvements Act of 1980, Section 5(a) states that collateral estoppel will not apply to any finding made by the FTC "under the antitrust laws or under section 5 of the Federal Trade Commission Act which could give rise to a claim for relief under the antitrust laws." In short, Congress determined that defendants in a private antitrust suit should not be subject to liability without the evidence first being tested through the discovery, evidentiary, and trial procedures applicable in the federal courts.

In isolation, both of these FTC carve outs make sense. Their cumulative practical effect, however, is that Section 5(a)'s prima facie and collateral protections apply only to judgments rendered in litigations brought by the DOJ. Given the active nature of *both* the FTC and the DOJ when it comes to conduct investigations, such a one-sided rule is hard to justify. If the DOJ obtains a finding that Company A is liable under Section 2 of the Sherman Act for monopolization, a private plaintiff can then use that finding to claim that Company A is collaterally estopped in follow-on private litigation and to argue that the defendant is prima facie liable. If, however, the FTC successfully obtains a finding that Company B is liable under Section 5 of the FTC Act *based on the very same conduct*, a private plaintiff cannot use that finding for collateral estoppel or prima facie effect against Company B. Company A and Company B effectively stand in very significantly different situations in private litigation.

Moreover, and just as significantly, the disparate application of collateral estoppel under Section 5(a) arguably changes the incentives for a defendant to settle the government litigation depending on which agency obtains clearance: whereas Company B (the FTC defendant) need only think about all of the standard risks in settling versus litigation, Company A (the DOJ defendant) must weigh heavily the risk that it will be collaterally estopped from contesting a liability finding in private treble damages litigation.

In short, Section 5(a) situates two defendants that end up at different agencies in substantively different positions. Indeed, as to the follow-on private litigation, their rights to put on a defense are not remotely the same. Whether or not that rises to a due process violation, we believe it is, at a minimum, bad antitrust policy.

IV. CONCLUSION

It is unfortunate that the Supreme Court's decisions in *Beacon Theaters*, *Dairy Queen*, and *Parklane*, have been read not as protecting a judge's discretion to provide a jury trial where possible, but as holding that a plaintiff's entitlement to collateral estoppel is a trump card. Rightly or wrongly, that outcome means that private plaintiffs are not without a means to obtain an expeditious judgment on liability following a related bench trial if they meet the elements of common law collateral estoppel. In 1914, that was not the case. In short, the entire problem that Section 5(a) was designed to cure – the need to provide incentives to plaintiffs to bring antitrust treble damage cases – no longer exists. It is hard to identify any benefits that the prima facie standard aspect of Section 5(a) adds that outweigh the challenges that we have identified here.

A step in the right direction would be to give judges back the discretion to hold jury trials that litigants have construed *Parklane* and its progeny as taking away. Rather than stating that a finding of liability will be prima facie evidence of liability, Congress could suggest in Section 5(a) that it is within the judge's discretion to decide whether the competing objectives of expediency (which plaintiffs desire) and due process (which

defendants desire) are better served by a bench trial or a jury trial. At a minimum, this would give those defendants that are not subject to collateral estoppel an opportunity to argue for the full hearing to which, but for the government suing first, they would otherwise be entitled to have.