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Collateral Estoppel: Criminal Conviction Conclusively Establishes Underlying Facts in Subsequent Civil Action

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> [e]ach side is concerned with money, and damages cannot be separated from liability, even in the pretrial stages. . . . Just as the defendant knows the amount of plaintiff's claim and can compel the plaintiff to itemize his damages, the plaintiff should know whether, if he proves his case, the judgment will be collectable.[99]

The adoption of a rule similar to the one presently in force in the federal courts will help relieve calendar congestion by facilitating settlements of cases which cannot ultimately yield a monetary recovery demanded by the plaintiff ignorant of the defendant's policy limits.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Criminal conviction conclusively establishes underlying facts in subsequent civil action.

Traditionally, a criminal conviction has been considered merely prima facie evidence of its underlying facts in subsequent civil litigation. However, the foundation case for this rule, *Schindler v. Royal Insurance Co.*,[100] has been discredited by the abandonment of the doctrine upon which it was based, *i.e.*, the requirement of mutuality of estoppel,[101] in favor of the two-fold test of *Schwartz v. Public Administrator*.[102]

Adopting the rationale of a 1972 First Department case,[103] the Court of Appeals, in a unanimous opinion, recently put *Schindler* to rest by holding that a contractor's conviction in federal court of using interstate facilities to violate state bribery laws conclusively established the illegality of the contract in a subsequent civil action between the contractor and New York City. In *S. T. Grand, Inc. v. City of New*

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even in in personam cases. There is little dispute that the purpose of the role originally precluding the disclosure is that it would unduly prejudice the defendant's case in the eyes of the jury. As long as the policy and coverage is kept away from the jury, the reason for the preclusive rule falls. Judges are generally in agreement that knowledge of the policy limits often aids settlement talks. If that is so, there is every reason for permitting the disclosure.

7B MCKINNEY'S CPLR 3101, supp. commentary at 8 (1973).

99 Davis, *Pre-trial Discovery of Insurance Coverage*, 16 WAYNE L. REV. 1047, 1056-57 (1970).

100 258 N.Y. 310, 179 N.E. 711 (1932).

101 *See* Albero v. State, 26 N.Y.2d 630, 255 N.E.2d 724, 307 N.Y.S.2d 469 (1970) (mem.); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); B.R. De Witt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

102 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 144 (1969). The two prerequisites for the application of the doctrine of collateral estoppel are: first, the decisive issue in the present action and the previously decided issue must be identical; and second, there must have been a full opportunity to contest the issue now in dispute in the prior action.

103 *See* Vavolizza v. Krieger, 39 App. Div. 2d 446, 336 N.Y.S.2d 748 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 351, 308 N.E.2d 439, 352 N.Y.S.2d 919 (1974). The appellate division opinion is discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 594 (1973).

York,[104] the contractor had agreed to pay the city's Water Commissioner a "kickback" as consideration for the award of a reservoir cleaning contract. After the criminal conviction, the contractor sued the city for the balance due on the contract. Asserting contractual illegality as a defense, the city counterclaimed for the amount it had previously paid to the plaintiff. The Appellate Division directed judgment for the defendant as to both claims, holding the *Schwartz* test satisfied.[105] The Court of Appeals affirmed, stating that the vendor's procurement of an illegal municipal contract results in a complete forfeiture of its interest; the vendor not only loses any right to recover on the contract or in *quantum meruit*, but is also required to return to the municipality all monies paid on the contract.[106] The Court found the equitable exception of *Gerzof v. Sweeney*[107] to be inapplicable.

The holding in the instant case is an overdue and salutary one. The prior distinction for collateral estoppel purposes between a criminal conviction[108] and a civil adjudication was unfounded and illogical in light of the more rigorous standards of proof and procedural safeguards in criminal proceedings.[109]

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104 32 N.Y.2d 300, 298 N.E.2d 105, 344 N.Y.S.2d 938 (1973).

105 38 App. Div. 2d 467, 330 N.Y.S.2d 594 (1st Dep't 1972).

106 32 N.Y.2d at 305, 298 N.E.2d at 108, 344 N.Y.S.2d at 942, *citing* Gerzof v. Sweeney, 22 N.Y.2d 297, 239 N.E.2d 521, 292 N.Y.S.2d 640 (1968); Jered Contracting Corp. v. New York City Transit Authority, 22 N.Y.2d 187, 239 N.E.2d 197, 292 N.Y.S.2d 98 (1968); 15 S. WILLISTON, CONTRACTS § 1768A (Revised ed. 1938).

107 22 N.Y.2d 297, 239 N.E.2d 521, 292 N.Y.S.2d 640 (1968). In *Gerzof*, two bids were received by a village for a contract to install an electrical generator. The contract was awarded to the higher bidder, but, after completion, was found to be illegal in a taxpayer's suit. The court ordered the contractor to return to the village the difference between its bid and the lower bid. The court in *Grand* found this remedy to be unavailable for several reasons. In *Gerzof*, the village legitimately determined that it needed a new generator, whereas in the instant case there was no "untainted" determination that the cleaning project was necessary. Moreover, the court in *Gerzof* could fairly measure the municipality's damages because of the lower bid, while in *Grand*, there was no competitive bidding whatsoever. Finally, the illegality here went to the origins of the contracting process, not merely its final stages as in *Gerzof*. 32 N.Y.2d at 306-07, 298 N.E.2d at 109, 344 N.Y.S.2d at 943.

108 Whether a criminal conviction in this context should encompass a plea of guilty without trial is a debatable question. It can be persuasively argued that the realities of the plea bargaining system should preclude the use of a plea of guilty to establish the underlying facts as a matter of law.

This was recognized recently by the Court of Appeals in Vavolizza v. Kreiger, 33 N.Y.2d 351, 356, 308 N.E.2d 439, 442, 352 N.Y.S.2d 919, 923 (1974). The Court, referring to *Grand*, stated:

> We did not hold in that case, nor do we in this one, that a conviction after a plea of guilty can serve as a bar to subsequent civil litigation on the theory that the issues presented in the civil trial were, or could have been litigated in the criminal proceeding.

109 Note that this reasoning only applies to a finding of guilt in the criminal action. To apply the doctrine of collateral estoppel to a prior adjudication of innocence would be improper since the defendant has no burden of proof.