

MAKING CRIME PAY-
WHAT EVERY CIVIL LITIGATOR NEEDS TO KNOW
ABOUT THE COLLATERAL ESTOPPEL EFFECT
OF CRIMINAL CONVICTIONS

“It is no secret that organized crime in America takes in over forty billion dollars a year. This is quite a profitable sum, especially when one considers that the Mafia spends very little for office supplies.”¹ Since the government can’t tax these proceeds, they have set out to make sure that criminals do not benefit from their crimes.

The Florida Legislature made it easier to successfully sue criminal offenders by enacting Florida Statute §775.089(8). The impact the resolution of a criminal charge makes on a civil case is greater than you may think. Sure, impeaching a civil defendant with a prior criminal conviction can be effective, fun, painful or devastating depending on where you are sitting in the courtroom. But when a civil suit is based on the same facts underlying a criminal case, a criminal conviction can be used to far greater effect.

Florida Statute §775.089(8) provides:

“The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of the offense in any subsequent civil proceeding. An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.”

This statute is intended to give collateral estoppel effect to a criminal conviction when used to establish the essential elements of a subsequent civil suit for damages based on the same underlying allegations. The traditional intent of collateral estoppel is to prevent identical parties from re-litigating issues that were previously decided between them. Usually, collateral estoppel requires the parties and issues to be identical and the facts be fully and fairly litigated. These strict limitations have been relaxed by the legislature and the courts. This statute broadens the scope of collateral estoppel by giving estoppel effect to criminal convictions that give rise to restitution even though the parties are different and the issues vary slightly.²

In order to invoke collateral estoppel under Florida Statute 775.089(8), a plaintiff must establish the following:

¹ From *Getting Even* by Woody Allen

² *Paterno v. Fernandez*, 569 So.2d 1349 (Fla. 3d DCA 1990)

- 1) the plaintiff is the victim of a prosecuted crime;
- 2) the defendant in the criminal proceeding was convicted;
- 3) the prosecuted crime is one which gives rise to restitution to the victim;
- 4) the civil suit is based on the same essential allegations as the criminal offense.

Once these elements are established, the plaintiff may estop the civil defendant from denying the essential allegations of the criminal offense.

A conviction for purposes of this statute is substantially broader than practitioners may think. The Courts will give collateral estoppel effect to a criminal judgment when the court adjudicates the defendant guilty and orders restitution. It does not matter if the defendant was convicted by a jury³, enters a plea of guilty⁴ or enters a plea of nolo contendere.⁵ When the court adjudicates a defendant guilty to a crime which gives rise to restitution, collateral estoppel will apply.

Collateral estoppel can also apply even in the absence of adjudication. The Courts will also give collateral estoppel effect to a criminal judgment even though adjudication of guilt was withheld in the criminal proceeding.⁶ When a defendant pleads guilty or a jury finds a defendant guilty, collateral estoppel will apply, even if the court withholds adjudication.⁷

The question remains, can collateral estoppel be based upon a criminal proceeding where the defendant pled no contest to the allegations and the Court withheld adjudication and imposed restitution. Following the case law above, estoppel can be argued. It may seem odd that a criminal case in which the defendant did not admit to the offense and the court did not make a formal finding of guilt still results in estoppel in the civil case. This outcome conflicts with traditional concepts of nolo contendere pleas and sentencing. However, it is consistent with the legislature's intent to make it easier to successfully sue criminal defendants.

Practice Tips for Using Collateral Estoppel in a Civil Case

Given the powerful effect of estoppel, it would be prudent to allow a criminal case to be filed and run its course prior to filing a civil suit. When time

³ *Board of Regents of the State of Florida v. Taborsky*, 648 So.2d 748 (Fla. 2d DCA 1994)

⁴ *Paterno v. Fernandez*, 569 So.2d 1349 (Fla. 3d DCA 1990)

⁵ *Sokoloff v Saxbe*, 501 F.2d 574 (2d Cir. 1974)

⁶ *Smith v. Bartlett*, 570 So.2d 360 (Fla. 5th DCA 1990)

⁷ See *State v. Gazda*, 257 So.2d 242 (Fla.1971)

allows, let the State do its job and then file the civil case. Restitution in the criminal case can be set off against a civil recovery, but it will not be a bar to pursuing a civil claim.⁸

The plaintiff's attorney should take great care in preparing the initial complaint. The civil complaint should track the essential elements of the criminal charge. Review both the elements of your civil case and the elements of the criminal charge. Careful pleading can work to ensure the huge advantage of collateral estoppel.

Raising collateral estoppel in a civil case is accomplished by filing a Motion for Summary Judgment.⁹ The plaintiff in the Motion for Summary Judgment should review the essential elements of the criminal offense as codified in the charged statute. The liability issues of a civil complaint that rely upon the same essential allegations of a criminal offense should go no further than summary judgment. Once the plaintiff tenders competent evidence to support the motion (essentially a judgment and sentence from the underlying offense), the opposing party must produce evidence of a genuine issue of material fact. The collateral estoppel effect of the statute takes away any opportunity of the defendant to show the existence of an issue of material fact ensuring Summary Judgment in the plaintiff's favor. For an excellent example and discussion of use of Florida Statute §775.089(8), see *Peterson v. Therna Builders, Inc.*, 2007 WL 1452164, 32 Fla. L. Weekly D1310 (Fla.App. 2 Dist. May 18, 2007).

A Sidenote for Criminal Defense Attorneys

Given the potential impact resolving criminal charges can have on civil litigation it is important to consider creative sentencing options. It may not be enough to resolve charges with a withhold of adjudication on a plea of nolo contendere. It is advised to attempt to have the State amend the charges to something that will not give collateral estoppel effect. For example, you may want to see if a battery charge can be amended to disorderly conduct.

If you are looking at a disposition that may invoke collateral estoppel ramifications, make sure to disclose the issue to your client. Since there are already a few other attorneys involved in the case, the last thing you want to see is another one who handles malpractice cases.

⁸ *State v. Hitchman*, 678 So.2d 460 (Fla. 3d DCA 1996)

⁹ Fla. R. Civ. P. 1.510(d)