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THE ASPHALT CLAUSE—A NEW WEAPON IN ANTITRUST ENFORCEMENT

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In October, 1960, the words "asphalt clause" were added to anti-trust terminology. This phrase is the appellation of a potentially powerful weapon for future enforcement of the Sherman Act¹—the basic antitrust statute. The term "asphalt clause" refers to a specific provision in a consent decree² terminating a civil antitrust case brought by the federal government. The clause provides that the decree shall have a specified prima facie effect in favor of the plaintiffs in certain subsequent private treble damage actions for the same violation. Its existence is the result of administrative and judicial, rather than congressional action. This article will discuss the origin of the asphalt clause, some of the problems it raises, and its likely effect.

Recovery of damages by private parties is an integral part of any truly effective policy of antitrust enforcement.³ Congress has specifically provided in Section 4 of the Clayton Act:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.⁴

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¹ 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958). This article deals primarily with § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

² For a general survey of antitrust consent decrees, see Phillips, *The Consent Decree in Antitrust Enforcement*, 18 Wash. & Lee L. Rev. 39 (1961).

³ The private antitrust suit blends antitrust policy with private compensatory law: on the one hand . . . such suits aim to enlist "the business public . . . as allies of the Government in enforcing the antitrust laws"; the means chosen, on the other hand, is to give "the injured party ample recompense for the wrong suffered" by allowing threefold recovery of damages.

Report of the Attorney General's National Committee to Study the Antitrust Laws 378 (1955); hereinafter cited as Att'y Gen. Nat'l Comm. Antitrust Rep.

"The private antitrust suit is a curious combination of public regulatory and private compensating law." Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 Yale L.J. 1010, 1011 (1952).

⁴ 38 Stat. 731, 15 U.S.C. § 15 (1958).

To aid such litigation, section 5(a) of the Clayton Act provides:

A final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken⁵

Thus, the private plaintiff may use to his advantage a final judgment or litigated decree obtained by the federal government in a prior proceeding dealing with the same conspiracy. However, a *nolo contendere* plea accepted by the court in a criminal case, or a consent decree entered by the court⁶ in a civil case, has no such prima facie effect.⁷ As a practical matter, the negotiation of consent decrees has been confined to discussions between the Antitrust Division of the Department of Justice and the defendant, subject to the court's final approval of the decree presented to it.⁸

Any discussion of the asphalt clause is rendered more fruitful by reviewing some past activity in the use of private actions for damages arising out of violations of the antitrust laws. First, despite the liberal provisions for treble damages, costs, and attorney's fees, private antitrust suits were but sparingly initiated until 1940. Since then, there has been a steady increase in the number of such suits.⁹ Secondly, and of special significance, successful termination of private treble damage actions seems to have been largely dependent upon the existence of the prima facie case afforded by a prior government judgment or decree.¹⁰ The basic reason for this dependence has been the diffi-

⁵ 38 Stat. 731, as amended, 15 U.S.C. § 16(a) (1958).

⁶ Phillips, *supra* note 2, at 41. The court can withhold its assent. *United States v. Pan Am. World Airways, Inc.*, Trade Reg. Rep. (1959 Trade Cas.) ¶ 69,300 (S.D.N.Y. 1959).

⁷ See statute cited note 5 *supra*; see also Comment, 61 Yale L.J. 1010, 1040 & n.203 (1952). However, there is authority for the proposition that a conviction based on a *nolo contendere* plea may be used as evidence to impeach a witness. See *Pfotzer v. Aqua Systems, Inc.*, 162 F.2d 779 (2d Cir. 1947).

⁸ McHenry, *The Asphalt Clause—A Trap for the Unwary*, 36 N.Y.U.L. Rev. 1114, 1117-18 (1961).

⁹ See Comment, 61 Yale L.J. 1010, 1011 (1952); and Att'y Gen. Nat'l Comm. Antitrust Rep. 378.

¹⁰ . . . [P]rivate suits generally are not brought until the government wins a suit against a violator, after which the private plaintiff can not only take ad-

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culty of proving the claim for such damages. To prove his claim, the plaintiff must establish three elements: (a) that there was a violation of the statute, *e.g.*, a conspiracy in restraint of trade;¹¹ (b) that he was damaged in his business or property by the violation;¹² and (c) the extent to which he was so damaged.¹³ It is a fact of life in antitrust litigation that the first step, proof of a violation, is almost always a costly, time-consuming and difficult matter. It is generally recognized that in many situations only the federal government has the resources and the competency for the full investigation and analysis on which to base proof of a violation of the antitrust laws.¹⁴ While the courts have been liberal in the standards of proof they require to establish the fact and extent of damage,¹⁵ the plaintiff must still meet the rigorous standards of proof of the violation itself.¹⁶ Thirdly, it has been decided that a public body is a private person within the meaning of Sections 4 and 5 of the Clayton Act.¹⁷

It was against this background that the asphalt clause emerged. In August and October, 1959, the United States filed criminal and civil antitrust actions against a number of defendants for alleged price-fixing and bid-rigging in the sale of asphalt, road tar, and bituminous concrete to governmental bodies in the New England area.¹⁸ Principal victims appeared to be the Commonwealth of Massachusetts and many of its cities and towns. In the criminal cases, which are normally disposed of before the consideration of consent decrees,¹⁹ the defend-

vantage of Section 5 of the Clayton Act, but can also rely on the successful legal theory developed in the government's case.

Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 Mich. L. Rev. 363 (1954). See also McHenry, *supra* note 8, at 1116 & n.10.

¹¹ See Comment, 61 Yale L.J. 1010, 1011-16 (1952).

¹² *Id.* at 1016-21.

¹³ *Id.* at 1022-26.

¹⁴ Bicks, *Antitrust Today*, 1961 N.Y. State B.A. Antitrust Law Symposium 15, 19: But, often a state or city may not have the resources to investigate and prove the antitrust conspiracy from which the damages stemmed In these circumstances . . . the primary responsibility for securing an adjudication of liability may devolve on the federal government.

¹⁵ See, *e.g.*, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); see also Comment, 61 Yale L.J. 1010, 1016-22, 1026 (1952).

¹⁶ See Comment, 61 Yale L.J. 1010, 1011-16 (1952).

¹⁷ *Georgia v. Evans*, 316 U.S. 159 (1942). This was another case involving a violation of the Sherman Act in the sale of asphalt to a state.

¹⁸ *United States v. Bituminous Concrete Ass'n*, Cr. No. 59-165-M (D. Mass. 1959); *United States v. Allied Chem. Corp.*, Cr. No. 59-166-M (D. Mass. 1959); *United States v. Lake Asphalt & Petroleum Co.*, Cr. No. 59-167-M (D. Mass. 1959)—Cases 1472, 1473 and 1474, Trade Reg. Rep. (10th ed.) (Cases Instituted) ¶ 45,059.

United States v. Allied Chem. Corp., Civ. No. 59-784-M (D. Mass. 1959); *United States v. Bituminous Concrete Ass'n*, Civ. No. 59-785-M (D. Mass. 1959); *United States v. Lake Asphalt & Petroleum Co.*, Civ. No. 59-786-M (D. Mass. 1959)—Cases 1480, 1481 and 1482, Trade Reg. Rep. (10th ed.) (Cases Instituted) ¶ 45,059.

¹⁹ McHenry, *supra* note 8, at 1118.

ants sought to change their original pleas of not guilty to *nolo contendere*. At this point, Attorney General Edward J. McCormack, Jr. of the Commonwealth of Massachusetts sought to appear in opposition to the acceptance of such pleas.²⁰ The *nolo* pleas were accepted and fines totalling 466,000 dollars were imposed.²¹ Attorney General McCormack then directed his attention to the negotiation for consent decrees which were being carried on between the Antitrust Division and the defendants. In a letter to United States Attorney General William P. Rogers, he urged that some protective provisions for the injured public bodies be included in any consent decree that might be entered. He stated that "to accept a *nolo* plea in a criminal case and then a consent decree in a civil action completely destroys for all intents and purposes the rights of the treble damage litigant which, in this case, happens to be sister-governments, *i.e.*, the State of Massachusetts and the cities and towns therein."²² He maintained that "in accepting *nolo* pleas and consent decrees—the greatest deterrent to antitrust is being vitiated and the effectiveness of enforcement weakened."²³ Assistant Attorney General Robert Bicks, head of the Antitrust Division, gave the matter serious consideration. In the meantime, on April 1, 1960, McCormack filed treble damage suits on behalf of the Commonwealth of Massachusetts.²⁴ In October, 1960, a decree was entered containing the asphalt clause:

. . . [D]efendants signatory hereto having admitted the allegations contained in the Government's complaint herein solely for the purpose and to the extent necessary to give to

²⁰ The court did not allow the Commonwealth to argue on the ground that it was not a party. Stenographic Record 9-10.

²¹ Cases 1472, 1473 and 1474, cited note 18 *supra*. In accepting the *nolo* pleas, the court recognized that the federal government still had civil suits pending. Stenographic Record 21-22. A similar sentiment was expressed in *United States v. Cigarette Merchandisers Ass'n*, 136 F. Supp. 212, 213 (S.D.N.Y. 1955): ". . . [U]pon the further assumption that the Attorney General will proceed with trial of the civil action, consent is granted to the acceptance of the pleas of *nolo contendere*. . . ."

²² Letter From Massachusetts Attorney General Edward J. McCormack, Jr., to United States Attorney General William P. Rogers, Feb. 13, 1960.

²³ Statement of Massachusetts Attorney General McCormack at Antitrust and Consumer Protection Conference, Department of Justice, Washington, D.C., March 10, 1960.

²⁴ *Commonwealth of Massachusetts v. Bituminous Concrete Ass'n*, Civ. No. 60-227-S (D. Mass. 1960); *Commonwealth of Massachusetts v. Allied Chem. Corp.*, Civ. No. 60-228-S (D. Mass. 1960); *Commonwealth of Massachusetts v. Lake Asphalt & Petroleum Co.*, Civ. No. 60-229-S (D. Mass. 1960).

Suits were later filed by the Attorney General on behalf of a number of Massachusetts cities and towns. The applicability of the *prima facie* effect of the consent judgment to these suits is as yet undetermined. See McHenry, *supra* note 8, at 1119 n.18.

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the following adjudication the prima facie effect stated in Section I below in the suits specified below, and for no other purpose. . . .

That on the basis of said limited admission the defendants . . . have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act . . . this adjudication being for the sole purpose of establishing the prima facie effect of this Final Judgment, in the suits specified below, and for no other purpose. . . .

Each defendant is enjoined . . . from denying that this Final Judgment has such prima facie effect in any such suit. . . . The specified suits . . . are the suits instituted in this Court by the Commonwealth of Massachusetts . . . and any other suit instituted by any Massachusetts city or town against any of the defendants signatory hereto prior to the date of entry of this Final Judgment²⁵

Evaluation of this new weapon in antitrust enforcement must rest at least in part, on the answer to two questions: First, is its use consistent with the policy of enforcement expressed by Congress? Secondly, is it an effective, fair and practical method of enforcement?

Enforcement of Section 1 of the Sherman Act takes its cue from the character of the statute. Couched in general terms, it has been compared to a constitutional provision.²⁶ Its general objective is the "promotion of competition in open markets."²⁷ Its essential standard is reasonableness.²⁸ Adaptability to new developments and new needs is a chief source of its strength.²⁹ Congress has recognized the desirability of a variety of methods for administering and enforcing the antitrust laws. There are statutory provisions for criminal sanctions, civil actions by the federal government, private remedies with governmental help, and administrative action.³⁰ The courts, in turn, have

²⁵ *United States v. Lake Asphalt & Petroleum Co.*, Trade Reg. Rep. (1960 Trade Cas.) ¶ 69,835, at 77,272 (D. Mass. 1960). See McHenry, *supra* note 8, at 1119 n.18, for a different disposition as to the two defendants. The bituminous concrete and road tar cases were terminated with similar decrees. *United States v. Allied Chem. Corp.*, Trade Reg. Rep. (1961 Trade Cas.) ¶ 69,923 (D. Mass. 1960); *United States v. Bituminous Concrete Ass'n*, Trade Reg. Rep. (1960 Trade Cas.) ¶ 69,878 (D. Mass. 1960).

²⁶ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

²⁷ Att'y Gen. Nat'l Comm. Antitrust Rep. 1.

²⁸ *Supra* note 26, at 360.

²⁹ See Arnold, *Economic Purpose of the Antitrust Laws*, 26 *Miss. L.J.* 207, 210 (1955).

³⁰ See Loevinger, *The Free Enterprise System* 223 (1949).

allowed wide latitude in discovery proceedings³¹ and in proof of damages.³²

Private suits for treble damages have always been regarded as one of the strongest methods of securing compliance with the Sherman Act³³ and as an integral part of enforcement policy.³⁴ "As between enforcement action by government agencies and by private parties, there are a number of reasons to believe that action by private parties is both more desirable and more effective."³⁵ Successful private actions for recovery of damages add a large and badly needed enforcement tool, are more flexible and less authoritarian than solely federal action, and repair to some extent the injury done.³⁶ Perhaps of greater importance, the recovery of damages, more than any other means of enforcement, cancels the gains received from the violation and thereby minimizes the incentive to violate.³⁷ The motivation for a conspiracy in restraint of trade is essentially financial. A financial penalty would thus seem to be an essential deterrent and, in some circumstances, afford a stronger therapeutic effect than criminal penalty or injunctive relief.³⁸

Sections 4 and 5 of the Clayton Act constitute a statutory recognition of these considerations.³⁹ However, the effectiveness of private actions in enforcement policy depends upon the degree of success enjoyed by the plaintiffs in such actions. Success of the plaintiffs, in turn, depends very often upon the availability of a *prima facie* case from prior governmental proceedings.⁴⁰ The antitrust plaintiff is faced

³¹ *Leonia Amusement Corp. v. Loew's Inc.*, 16 F.R.D. 583, 584 (S.D.N.Y. 1954); *Banana Service Co. v. United Fruit Co.*, 15 F.R.D. 106 (D. Mass. 1953).

³² *Bigelow v. RKO*, *supra* note 15.

³³ See *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947); Comment, 61 *Yale L.J.* 1010, 1011, 1061 (1952); Neale, *The Antitrust Laws of the U.S.A.* 388 (1960).

³⁴ *Att'y Gen. Nat'l Comm. Antitrust Rep.* 378.

³⁵ Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 *Antitrust Bull.* 167, 168 (1958).

³⁶ *Ibid.*

³⁷ *Id.* at 168-69. For a discussion of the deterrent effects on corporate officials personally, see Whiting, *Antitrust and the Corporate Executive*, 47 *Va. L. Rev.* 929 (1961). It is assumed that the real objective of enforcement is prevention rather than punishment.

³⁸ See Comment, 61 *Yale L.J.* 1010, 1061 (1952); Loevinger, *supra* note 36, at 168.

³⁹ Congressional reports and debates on the proposal which ultimately became § 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions.

Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

⁴⁰ See Comment, 61 *Yale L.J.* 1010, 1060 (1952).

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with a burdensome problem of proof,⁴¹ and the prima facie case helps to overcome this hardship.⁴²

Since the asphalt clause has reference to recovery of damages by states and municipalities, its significance as an enforcement tool is tied to the amount of use it is given by such bodies. An increasing volume of purchases by all governmental agencies is apparent. In 1960, state and local governments purchased goods and services amounting to 14.8 billion dollars and 32 billion dollars, respectively.⁴³ It follows that the prevention and elimination of restraints of trade in this area of the market place are vital to the maintenance of a free competitive system.⁴⁴ While the states and municipalities are public bodies, they, like other non-federal litigants, feel the need for a prima facie case.⁴⁵ Its availability increases the probability that they will take steps to recover their damages; its absence acts as a discouraging factor, leading to inaction.

An important by-product to the encouragement given the states by an asphalt clause is increased state antitrust activity. In recent years, state use (in actions for damages) of both federal and state antitrust laws has been recognized as essential to a comprehensive antitrust program for the country.⁴⁶ The resources of the Antitrust Division of the Department of Justice are limited. Many restraints, because they are primarily of local impact, are more appropriately dealt with on a state, rather than a federal level,⁴⁷ and those not in interstate commerce must be reached on a state level, if they are to be reached at all.⁴⁸ A truly effective national enforcement program must reach these local and intrastate restraints as well as those of broader impact.⁴⁹

⁴¹ Loevinger, *The Free Enterprise System* 248 (1949); Neale, *op. cit. supra* note 33, at 388-89; 51 Cong. Rec. 1964 (1914).

⁴² *Ibid.*; Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

⁴³ H.R. Rep. No. 989, 87th Cong., 1st Sess. 4-5 (1961).

⁴⁴ Bicks, *Antitrust Goals and Current Enforcement Programs*, 15 U. Miami L. Rev. 225, 230 (1961).

⁴⁵ McHenry, *supra* note 8, at 1114 n.2; Bicks, *supra* note 14; text accompanying note 22 *supra*.

⁴⁶ For a discussion of state antitrust activity, see series of articles in 39 Texas L. Rev. (1961).

⁴⁷ See statement by George A. Reycraft, Chief of Section Operations, Antitrust Division, Department of Justice, at Antitrust and Consumer Protection Conference, Washington, D.C., Nov. 13, 1961; Bicks, *supra* note 44, at 231.

⁴⁸ Stern, *A Proposed Uniform State Antitrust Law: Text and Commentary On a Draft Statute*, 39 Texas L. Rev. 717 (1961).

⁴⁹ . . . [A] balanced enforcement program should include national and local restraints within the reach of Federal antitrust. Industry wide and regional proceedings, of course, play a crucial enforcement role. However, the importance of striking down "local" restraints within the reach of the commerce clause is not to be minimized. Such market clogs may be of great importance to the people and the economy of a particular area. Often these restraints, carried out

There are also other advantages of state antitrust activity. It leads to a healthy diversity of approach, which is a recognized advantage of the federal system; it also stimulates exchange of information among federal and state governments, thus promoting more efficient detection and analysis of restraints.⁵⁰ The asphalt clause has been called the "most dramatic single step taken to encourage state antitrust activity."⁵¹ Cooperation between the federal and state governments since Attorney General McCormack's appeal to the Antitrust Division has been increasing.⁵²

As against such advantages for effective antitrust enforcement, what disadvantages are likely to accompany the asphalt clause?⁵³ Of primary significance is the effect on the use of consent decrees. The consent decree is a handy device for expediting settlement of cases.⁵⁴ Its true value, however, depends on whether it removes the abuses for which the action was brought, and on whether it acts as an adequate deterrent against future violations.⁵⁵ Obviously, no statistical conclusions can be drawn from only one experience; but defendants

by small concerns without experienced antitrust counsel, are of a flagrant type which antitrust compliance has largely removed from national markets. Since State antitrust laws, with few exceptions, have not been fully developed or enforced, national antitrust policy must make adequate provision for dealing with all market restraints within its ambit.

Att'y Gen. Nat'l Comm. Antitrust Rep. 349.

⁵⁰ Reycraft, *supra* note 47. It is significant that antitrust laws had their antecedents in state decisions and statutes. See Wilson, *The State Antitrust Laws*, 47 A.B.A.J. 160 (1961).

⁵¹ Sieker, *The Role of the States in Antitrust Law Enforcement—Some Views and Observations*, 39 *Texas L. Rev.* 873, 874 (1961).

⁵² On November 13 and 14, 1961, all state Attorneys General were invited to a National Conference on Antitrust Problems and Consumer and Investor Protection at the Department of Justice, Washington, D.C. Some topics discussed were: Antitrust Problems; A Federal-State-Local Program for Reporting of Identical Bids; Recent State Legislation Relative to Federal Programs; and Developing an Antitrust Damage Claim.

On April 12, 1961, Presidential Executive Order No. 10936 (26 *Fed. Reg.* 3555) invited state cooperation in the reporting of identical bids. The "electrical" cases [Cases 1496-1508, 1517-30, 1539-42, 1548-51, 1556 and 1567 *Trade Reg. Rep.* (10th ed.) (Cases Instituted) ¶ 45,060] also contributed greatly to the impetus for cooperation. There does not appear to be any problem of federal pre-emption of the antitrust field. See Stern, *supra* note 51; and Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 *Texas L. Rev.* 753, 756-57 (1961); see also statement by the Head of the Department of Justice, Office of Legal Counsel to Subcommittee No. 3 of the House Judiciary Committee, *Trade Reg. Rep.* No. 26, March 12, 1962.

⁵³ See McHenry, *supra* note 8.

⁵⁴ Phillips, *supra* note 2, at 42.

If the government obtains the same or similar relief by means of a consent settlement, not only can time and funds be saved by all concerned, including the public, but undesirable practices in an industry can be quickly curtailed.

Id. at 46.

⁵⁵ Comment, 55 *Mich. L. Rev.* 92 (1956). For a critical analysis of the effectiveness of consent decrees, see Phillips, *supra* note 2.

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will undoubtedly be more reluctant to enter into a consent decree with an asphalt clause than without one. It has been pointed out that the insistence on an asphalt clause would have particular relevance in a close case.⁵⁶ Ordinarily, in a close case, defendants may be willing to enter into a consent decree to save the time and expense of preparation and trial, and the publicity attendant on trial. If, however, an asphalt clause is to be included, defendants, anticipating subsequent treble damage actions, may well decide to run the risk of litigation with the possibility of complete or partial vindication. This may lead to fewer consent decrees and more protracted litigation in cases initiated by the federal government but in which the defendants nevertheless are convinced that they have a good chance of winning. If the defendants, however, do recognize that the government has a strong case, they may feel that even an asphalt clause is preferable to the expense of trial, and the probability of private damage actions resulting from the attendant added publicity, and full disclosure of the evidence. The problem is thus avoided if the use of the asphalt clause is confined to strong government cases.

If, on the other hand, the insistence on an asphalt clause by the Antitrust Division does lead to more litigation of government civil suits, such a result does not mean that the asphalt clause should not be used. The ultimate test of a consent decree is whether it will benefit the public. The question is whether, in the particular case under consideration, the public interest is best served by insistence on an asphalt clause. If the considered judgment of the Antitrust Division is that the public interest in enforcement of the antitrust laws demands an asphalt clause, the resultant burden on the courts must be faced and solved without sacrificing antitrust enforcement activity.⁵⁷ In fact, the argument has been made that "the Court's resources would seem best spared by contest of the liability issue in the federal case—where evidence is already together and experienced antitrust litigators more likely."⁵⁸

A further objection to the asphalt clause may be that the federal government is taking positive steps to further the collection of damages by a certain favored class of litigants,⁵⁹ *i.e.*, public bodies. First, it must be recognized that a *prima facie* case by no means hands damages

⁵⁶ McHenry, *supra* note 8, at 1123.

⁵⁷ In *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 172 (S.D.N.Y. 1955), the court recognized that the judgment of the Attorney General is an important element to be considered in deciding whether to accept a *nolo contendere* plea.

⁵⁸ Bicks, *Significant New Antitrust Developments*, 17 A.B.A. Antitrust Section 268, 271 (1960).

⁵⁹ McHenry, *supra* note 8, at 1125.

to the state or municipality on a silver platter. The burden of proof of all three elements is still on the plaintiff, who thus faces formidable obstacles despite the effect of the asphalt clause as a prima facie case on the issue of the existence of a violation.⁶⁰ Secondly, states and municipalities, while "persons" within the meaning of the Clayton Act, are not really private parties. The damages they sustain and the recovery they obtain, do not contribute to private loss or private gain.

An additional area of concern may be in the lack of standards governing the insistence of the Antitrust Division on an asphalt clause.⁶¹ Defendants may properly argue that looseness in application will result in some defendants being subjected to asphalt clauses while others are not, because of different enforcement policies by the federal authorities at different times. To date, the Antitrust Division has attempted to meet this criticism by indicating the guides it will use in determining whether to insist on an asphalt clause. In an address shortly before the entry of the asphalt clause, Mr. Bicks suggested:

. . . [T]here [are] four limiting factors to be considered with regard to the new policy: (1) the "primary brunt" of the violations must have been borne by very few states; (2) the asphalt clause should run only to states and their political subdivisions; (3) the state or other entity must have filed a damage action or indicated an intent to do so; and (4) even when the above three factors are present an asphalt clause might not always be appropriate.⁶²

Again in an address in 1961, he stated:

In this area we have conducted and are conducting a number of experiments aimed at preserving for injured cities and states the benefits they could secure through an adjudication of liability pursuant to Section 5 of the Clayton Act. In the New England road paving cases, where we had been less successful in opposing *nolo* pleas, we were able in the companion civil cases to obtain litigated judgments or consent decrees which, in addition to restoring competitive conditions, could be used by the states and local governments who had brought damage actions as proof of the conspiracy.

As I indicated, this program has been experimental in

⁶⁰ See Comment, 61 Yale L.J. 1010, 1040, 1055-56 (1952). For a discussion of limitations on the use of prior government decrees in subsequent treble damage actions, see Timberlake, The Use of Government Judgments or Decrees in Subsequent Treble Damage Action Under the Antitrust Laws, 36 N.Y.U.L. Rev. 991 (1961).

⁶¹ McHenry, *supra* note 8, at 1124-25.

⁶² *Id.* at 1120-21.

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nature and has been limited to cases where the focus of the conspiracy was the states and municipalities less able to fend for themselves in damage actions but willing and able to commence such proceedings and prosecute them to the limits of their resources. Thus primarily benefiting in the New England road paving cases was the State of Massachusetts, and a number of its subdivisions which had filed damages actions prior to final resolution of the civil case. And the States of California and Wisconsin have similarly filed damages actions in the "bleachers" cases where we are also insisting that we will agree to a consent decree only if it adequately protects State interests.

Our aim has been cooperation, not assumption of the duties and responsibilities of our coordinate sovereignties. But we have felt that one of the factors properly to be considered by the Department of Justice and the courts alike in determining whether consent decrees should be accepted is the impact of any such acceptance upon the practical ability of the states and municipalities to secure recompense for the losses suffered by their citizenry. Protected by such procedure is a defendant's right to a day in court on any and all issues. He is free to contest via trial the issue of antitrust liability. He is free, if he chooses, to try out the fact and extent of damage to States or Cities. But if a defendant chooses to litigate his antitrust liability, he must do so in the context of the federal proceeding—where evidence is already garnered and legal issues are familiar to enforcement officials. Thus we seek to make effective the right granted by Congress to the States to secure appropriate recompense.⁶³

If the use of the asphalt clause is limited to the area and circumstances suggested by these statements, it is entirely consistent with general antitrust policy and effective enforcement. The most serious objection is that its use may vary with changes in administrative personnel, depending on their view of the role of public bodies in relation to private damage actions. This is an objection that may ultimately require a legislative solution.⁶⁴

⁶³ Bicks, *Antitrust Today*, 1961 N.Y. State B.A. Antitrust Law Symposium 15, 19-20.

⁶⁴ It has been reported that the House Judiciary Committee is studying the justification for the absence of a prima facie effect in a *nolo contendere* plea. *Lawyers Weekly Report* § 2 (P-H Feb. 12, 1962).

On June 29, 1961, the Attorney General issued an order that all proposed consent judgements in antitrust cases "be made public at least 30 days before they are entered

CONCLUSION

The asphalt clause, within the bounds of its presently anticipated use, is an effective and desirable new weapon for enforcement of the Sherman Act. Private treble damage actions have always been recognized as an important link in the chain of antitrust effectiveness. The use of the asphalt clause to aid states and municipalities in recovering damages for antitrust violations is a logical strengthening of this link. Because of uncertainty in its use, however, further experience may indicate the necessity of legislative standards governing its employment.

in court. The purpose was said to be to provide opportunity for comment or criticism from persons or firms who are not parties to the action." 19 A.B.A. Antitrust Section 95 (1961): Legislation has been introduced in Congress which would make such publication mandatory. *Id.* at 209.