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# Antitrust

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# ANTITRUST

## OVERVIEW

The Tenth Circuit considered four antitrust appeals during the period covered by this survey. All four cases reached the court on appeal from defendants' successful motions for summary judgment. Three of the cases are routine in their application of well-established legal principles and will be examined briefly in this overview; the final case is of much greater import and will be discussed at length in the comment that follows.

## I. FARNELL V. ALBUQUERQUE PUBLISHING COMPANY

Farnell, a former employee of the publishing company, brought this action under the Sherman[1] and Clayton Acts.[2] He sought recovery of treble damages for alleged antitrust injuries. The trial court granted defendant's motion for summary judgment and plaintiff appealed.[3] At issue was plaintiff's standing to sue. Farnell had been employed as a district manager whose duties were performed in the company's circulation department. In addition to his employment, in the capacity of an independent contractor, he operated several vending machines that sold single copies of the company's newspaper. The company discontinued its dealings with independent contractors, and on several occasions requested that Farnell cease his outside operations. He refused and was eventually terminated for this and other allegedly insubordinate conduct. Subsequently, he brought this action, alleging that his termination and the discontinuation of his single-copy sales activities were the result of antitrust violations by his former employer.[4]

Affirming the summary judgment, the Tenth Circuit applied a two-pronged test to determine whether plaintiff had standing to sue. The court found that the first requirement was met, in that plaintiff was injured in his business or property. However, the court found that he failed to meet the second requirement, in that he could show no connection between his alleged injuries and any violation of the antitrust laws.[5]

## II. FITZGERALD V. GENERAL DAIRIES, INC.

In *Fitzgerald*, the Tenth Circuit reversed the district court's granting of defendant's motion for summary judgment.[6] At issue was whether the statute of limitations had run on the incidents and events providing the basis for the action. Viewing the matter as a small series of isolated events, the dis-

1. 15 U.S.C. §§ 1, 2 (1976).
2. 15 U.S.C. §§ 14, 15 (1976).
3. Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978).
4. *Id.* at 500.
5. *Id.* at 501.
6. Fitzgerald v. General Dairies, Inc., 590 F.2d 874 (10th Cir. 1979).

trict court found that the statute had run, and plaintiff was barred from recovery.

However, because the plaintiff had alleged a continuing conspiracy, the Tenth Circuit reversed and remanded the matter for trial.[7] Quite properly, the court recognized that prevention of reentry into the market is evidence of a continuing comspiracy.[8] Plaintiff had been a competitor of the defendants until he was forced to file for bankruptcy. He claimed that were it not for the defendants' conspiracy to keep him out, he *might* have reentered the market. The court found that plaintiff had raised sufficient issues to justify the granting of a trial.

## III. NATRONA SERVICE, INC. V. CONTINENTAL OIL CO.

Plaintiff, Natrona Service, appealed the granting of summary judgment to defendants, and the Tenth Circuit affirmed, holding that plaintiff had failed to show, after extensive discovery proceedings, that any valid cause of action existed.[9]

It is interesting to note that plaintiff, an oil exploration service, had enjoyed a market position amounting to a monopoly for many years. This is evidenced by the fact that it was able to raise its prices twenty-five per cent without losing a customer.[10] The court noted that Natrona was really seeking damages for profits it would have made had it not lost its monopoly on the claim staking and validation business in Wyoming. As the court succinctly stated, "Anti-trust laws have been enacted for the protection and preservation of competition, not for the protection of competitors."[11]

## IV. *A JURISDICTIONAL BARRIER TO THE PRIVATE TREBLE DAMAGE ACTION*: MAC ADJUSTMENT, INC. V. GENERAL ADJUSTMENT BUREAU, INC.

### A. *Introduction*

Because the boycott, a concerted refusal by some traders to deal with other traders,[12] is a particularly malignant form of antitrust injury, the law has created a series of exceptions which enable the courts to deal swiftly and effectively with the problem. *Mac Adjustment, Inc. v. General Adjustment Bureau, Inc.*[13] clearly illustrates the problems created when a court fails to recognize the exceptions and attempts to apply the general law of antitrust to a specific problem.

Mac, an independent insurance adjusting service, and its owner were allegedly put out of business as a direct result of defendant's actions. Acting in concert, the defendants apparently were successful in their attempts to persuade Mac's clients to use another adjuster. Defendants purportedly rep-

7. *Id.* at 876.
8. *Id.*
9. Natrona Service, Inc. v. Continental Oil Co., 598 F.2d 1294 (10th Cir. 1979).
10. *Id.*
11. *Id.* at 1297-98.
12. Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).
13. 597 F.2d 1318 (10th Cir. 1979).

resented that Mac was too generous in adjusting claims. After his business had dwindled to almost nothing, Mac brought this action.

Both the trial court and the Tenth Circuit failed to recognize that the private plaintiff who is injured by a boycott is not required to show that he is engaged in interstate commerce, or that such commerce has in fact been substantially affected by the alleged injury.[14] The Tenth Circuit's decision was further complicated by the court's attempt to reconcile its finding that Mac was not within the "business of insurance" as it is defined by the McCarran-Ferguson Act[15] with its conception of the requirements of the Sherman Act.

The Tenth Circuit remanded the case to the trial court for further determination of whether Mac was carrying on business in interstate commerce.[16] Before the matter reached trial, defendants petitioned the Supreme Court for certiorari.

B. *The Background*

1. The Sherman Act

The private plaintiff who sought redress under the Sherman Act[17] had first to prove a resulting public injury in order to establish the court's jurisdiction in the matter. In 1911, the Supreme Court voiced the requirement that the proscribed acts must be of "such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public."[18] The effect of this requirement was to preclude recovery by small businesses because their injuries could not be sufficiently large so as to affect the economy, despite the magnitude of the effect on the business itself.

*Standard Oil*[19] also established the "rule of reason" as the standard the Court would use exclusively for the next seventeen years in antitrust litigation. Under this rule, if an arrangement such as price-fixing was reasonable, the Court would find no antitrust violation.

The doctrine of per se illegality was first used in *United States v. Trenton Potteries Co.*,[20] to declare illegal a price-fixing arrangement, despite its "reasonableness." Under this doctrine, certain restraints would be held illegal in themselves, regardless of whether the complainant could show a resulting public injury.

The group boycott was held to be per se illegal in *Klor's v. Broadway-Hale Stores, Inc.*[21] Klor's was a small retail appliance store, one of many such

14. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

15. 15 U.S.C. § 1012 (1976) (originally enacted as Act of Mar. 9, 1945, ch. 20 § 2, 59 Stat. 34).

16. 597 F.2d at 1323.

17. 15 U.S.C. § 1 (1976).

18. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911).

19. *Id.* at 62.

20. 273 U.S. 392, 401 (1927).

21. 359 U.S. 207 (1959).

dealers in the San Francisco area. Defendant Broadway-Hale, a large department store chain, operated a store next door to that of Klor's. Both stores competed in the sale of household appliances.

Klor's alleged that, in an attempt to handicap its ability to effectively compete, defendant Broadway-Hale and ten appliance manufacturers and distributors who were also named as defendants, conspired among themselves to ensure that the manufacturers and distributors would either refuse to sell to Klor's, or to sell to it only at discriminatory prices and unfavorable terms.[22] Broadway-Hale was able to use its "monopolistic buying power" to bring about this result,[23] and at the time Klor's brought suit this had already resulted in "a great loss of profits, goodwill, reputation and prestige."[24]

The district court granted summary judgment for the defendants, and the Ninth Circuit affirmed, on the ground that the dispute was nothing more than a "purely private quarrel"[25] which failed to amount to a public wrong proscribed by the Sherman Act.

In reversing, the Supreme Court emphasized that a boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."[26]

Klor's business was entirely intrastate in character. The Supreme Court determined that because the manufacturing, distributing and selling of household appliances was within interstate commerce, Klor's had established the requisite jurisdiction. Under these guidelines, Mac would appear to be able to satisfy the interstate commerce requirements of the Sherman Act.

The basic premise of *Klor's* has been applied by the Supreme Court in a situation where the complainant's business is almost entirely intrastate,[27] which is analogous to the *Mac* situation. And, the Supreme Court recently relied on *Klor's* in a decision[28] involving the boycott exception to the McCarran-Ferguson Act.[29]

Regardless of whether Mac was found to be within the business of insurance, reliance by the Tenth Circuit on *Klor's* would have produced the correct solution to the enigma that the *Mac* case creates. The Tenth Circuit, by equating involvement in interstate commerce with the business of insurance, precluded Mac's recovery unless it could prove that it was indeed engaged in interstate commerce. This holding therefore compels further examination of the McCarran-Ferguson Act, as well as resulting case law.

2. The McCarran-Ferguson Act

When the Sherman Act was enacted in 1890, the question as to whether

22. *Id.* at 209.
23. *Id.*
24. *Id.*
25. *Id.* at 210.
26. *Id.* at 213.
27. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).
28. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978).
29. 15 U.S.C. § 1013(b) (1976).

the sale of insurance was a transaction in interstate commerce was already well-settled. In fact, the Supreme Court, on four previous occasions,[30] had held such sales not to constitute commerce at all. It was not until 1943 that the Court reversed this position, in *United States v. South-Eastern Underwriters Association*.[31]

The Association, which had a membership of nearly two hundred fire insurance companies and twenty-seven individuals, was charged with price fixing under section 1 and monopolization under section 2 of the Sherman Act.[32] The case reached the Supreme Court on direct appeal from the district court, which had sustained the defendant's demurrer on the ground that the business of insurance was not commerce, either interstate or intrastate.[33]

In reversing, the Supreme Court held that the Sherman Act was intended to apply to the fire insurance business.[34] In the future, the business of insurance would be considered interstate commerce.

Within nine months of the *South-Eastern Underwriters* decision, Congress enacted the McCarran-Ferguson Act.[35] The Act provided that the regulation and taxation of the insurance industry would be left to the states, but that federal antitrust legislation[36] would apply to the extent that state legislation did not.[37] However, an exception was made for acts or agreements of boycott, coercion or intimidation.[38] In these areas alone, the Sherman Act would continue to apply.

More than twenty years elapsed before the Supreme Court began to narrow the sweeping language of the McCarran-Ferguson Act. In *SEC v. National Securities, Inc.*,[39] an injunction was sought to invalidate and unwind a merger of insurance companies.

The Arizona insurance commissioner, believing he possessed the requisite regulatory authority, approved the merger. Despite the fact that an Arizona statute conferred upon the commissioner the authority to approve or disapprove mergers, the Court held that the "business of insurance" did not include the power to investigate and regulate mergers.[40] The Court stated that the purpose of the McCarran-Ferguson Act was to return to the states the status quo enjoyed by them prior to the *South-Eastern Underwriters* decision. As the states never possessed the authority to regulate mergers, they did not obtain it under the Act.[41]

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30. Philadelphia Fire Ass'n v. N.Y., 119 U.S. 110 (1886); Ducat v. Chicago, 77 U.S. (10 Wall.) 410 (1870); Liverpool & London Ins. Co. v. Massachusetts, 77 U.S. (10 Wall.) 566 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

31. 322 U.S. 533 (1944).

32. 15 U.S.C. §§ 1, 2 (1976).

33. 322 U.S. at 536.

34. *Id.* at 539.

35. 15 U.S.C. §§ 1011-1015 (1976) (originally enacted as Act of Mar. 9, 1945, ch. 20, §§ 1-5).

36. *Id.* at § 1012(b).

37. *Id.*

38. *Id.* at § 1013(b).

39. 393 U.S. 453 (1969).

40. *Id.* at 469.

41. *Id.* at 459.

In reversing the Ninth Circuit, the Court held that the Securities and Exchange Commission had the authority to regulate securities issues involving insurance companies, for such matters were not part of the insurance business. The Court went further and itemized the matters properly within the "business of insurance." The list included the fixing of rates, the selling and advertising of policies, and the licensing of companies and their agents.[42] Also included was the relationship between the insurer and the insured, the type of policy that could be issued, and its reliability, interpretation and enforcement.[43]

The power of the states to regulate the relationship between insurer and insured, as set forth in *National Securities*[44] was significantly eroded in *St. Paul Fire & Marine Insurance Co. v. Barry*.[45] Plaintiffs, a group of physicians, brought a class action under section 1 of the Sherman Act[46] alleging a boycott by four insurance companies. They claimed that three of the companies refused to sell them malpractice insurance, so as to compel them to submit to "new ground rules of coverage set by the fourth."[47]

The district court granted defendants' motion to dismiss,[48] holding that the boycott exemption to the McCarran-Ferguson Act did not include the insurer-insured relationship. The First Circuit reversed,[49] and the Supreme Court granted certiorari, in order to resolve the conflicting interpretations of section 3(b) of the Act that had been adopted by several circuits.[50]

The Court held that the scope of section 3(b) was not limited to boycotts of competing insurance companies or agents, but included *any* act amounting to a boycott, including a boycott by insurance companies against their insureds.[51]

In view of the Court's extension of the boycott to include any such act,[52] it becomes apparent that Mac, an adjuster, would also be protected by section 3(b), had he been found to be within the business of insurance.

### C. *The Case*: Mac Adjustment, Inc. v. General Adjustment Bureau, Inc.

#### 1. Facts

This antitrust action was brought in the district court by Mac Adjustment, Inc., and B. J. Gosting, its president.[53] Plaintiffs alleged that defendants, General Adjustment Bureau, Inc. and Property Loss Research Bureau, acted in concert to induce insurance companies not to use Mac's independ-

42. *Id.* at 460.
43. *Id.*
44. *Id.*
45. 438 U.S. 531 (1978).
46. *Id.* at 533.
47. *Id.*
48. *Id.* at 536.
49. *Id.*
50. *Id.* at 536 n. 5.
51. *Id.* at 554.
52. *Id.* at 550.
53. 597 F.2d at 1320, Mac Adjustment, Inc. v. General Adjustment Bureau, Inc., No. CIV-76-0848-E, mem. op. at 2 n. 1 (W.D. Okla. Aug. 23, 1977).

ent adjusting service.[54] Defendants were further alleged to have accomplished this by falsely representing that Mac was too generous in adjusting losses.[55] Shortly after defendants made the allegedly false statements, plaintiff's business began to decline. This decline continued for about three years, until the business was almost totally destroyed.[56]

Mac and Gosting thereafter brought suit, claiming that they had been injured as a result of a conspiracy, a section 1 Sherman Act violation.[57] Following an *in limine* hearing conducted solely for the purpose of eliciting evidence of Mac's engagement in interstate commerce,[58] the district court decided that it did not have jurisdiction in the matter. The decision was reached because the court found that interstate commerce had not been substantially affected.

The trial court's holding that it did not have the requisite jurisdiction because the acts that injured Mac did not have an effect on interstate commerce was appealed; however, its companion holding that these acts were not in the business of insurance was not.[59]

The Tenth Circuit subsequently held that as a consequence of the district court holding that plaintiffs were not in the business of insurance, they would now be required to establish that they were, a conclusion apparently based on the court's misperception of the holding in *United States v. South-Eastern Underwriters*,[60] and of the district court holding itself, for the district court did not hold that Mac was not engaged in interstate commerce.

The judgment of the district court was properly reversed, but the case was remanded for the wrong reason—so that plaintiffs could prove at trial that they were indeed engaged in interstate commerce.[61] Subsequently, defendants petitioned the Supreme Court for certiorari.[62]

2. Analysis

The progress of this case through the courts may almost be likened to a comedy of errors. The first error was that of the trial court, in its granting of summary judgment. As Judge Doyle, writing for the Tenth Circuit, indicated, ". . . summary judgment is appropriate if . . . there is no genuine issue as to any material fact. . . ."[63] In addition, the Supreme Court's caution that summary judgment should be rarely granted in antitrust matters[64]

54. *Id.* at 1319.
55. *Id.*
56. *Id.*
57. 15 U.S.C. § 1 declares illegal: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . ." Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), establishes a private treble damage action for conduct proscribed by antitrust statutes.
58. 597 F.2d at 1318.
59. *Id.* at 1321.
60. 322 U.S. 533 (1944). The Court held that the sale of fire insurance policies was a transaction within interstate commerce.
61. 597 F.2d at 1322.
62. Mac Adjustment, Inc. v. General Adjustment Bureau, Inc., 1979-1 Trade Cases ¶ 62,599 (petition for certiorari, U.S. S. Ct. No. 79-311).
63. 597 F.2d at 1322.
64. *Id.*; Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1961).

was properly applied by the Tenth Circuit in *Mac*. Thus, the district court erred in holding that the injuries complained of had no impact on interstate commerce. This contention should have been considered after trial, not following a limited pretrial hearing. Yet, the trial court was correct in looking at the impact of defendants' activities on interstate commerce rather than Mac's engagement therein.[65]

It is more difficult to ascertain the propriety of the district court's finding that the activities of defendants were not in the "business of insurance" as defined by the McCarran-Ferguson Act. In view of the recent strictures placed on this definition by the Supreme Court,[66] this holding is probably correct.

The problem with the decision was created not by the district court, but by the Tenth Circuit because of its interpretation of the district court's holding. After determining that the district court had found Mac not to be within the business of insurance,[67] the Tenth Circuit held that it was now necessary for Mac to show that it was, in order to satisfy the interstate commerce requirements of the Sherman Act.[68]

Inasmuch as there is ample precedent[69] to justify a holding that the injured party in a boycott action need not prove his engagement in interstate commerce, based on the doctrine of per se illegality, which allows the presumption of public injury, the Tenth Circuit created an unnecessary burden for plaintiffs by equating the business of insurance with interstate commerce. In view of the fact that Mac's activities were found not to be within the business of insurance, the court could have proceeded directly to *Klor's* and *Radiant Burners*, and considered the vital issue of the illegality of defendant's actions.

Of course, had Mac been found to be in the business of insurance, recovery under the Sherman Act would not have been precluded, in view of the boycott exception to the McCarran-Ferguson Act.[70] However, the Tenth Circuit appears to have placed Mac in a losing position, despite whatever finding the district court might reach on remand.

Notwithstanding the fact that the case was remanded on such narrow and faulty grounds that defendants were almost certain to prevail,[71] defend-

65. 15 U.S.C. § 1012 (1945).

66. *See generally* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979) in which the Court held that agreements between insurors and pharmacies were not within the business of insurance. The Court further held that references to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act strongly suggest that Congress understood the business of insurance to be the *underwriting and spreading of risk*. *See also* Proctor v. State Farm Mut. Auto Ins. Co., 440 U.S. 942 (1979) in which the D.C. Circuit's holding that agreements between automobile casualty insurors and automobile repair shops were within the business of insurance was vacated by the Supreme Court and remanded for further consideration in the light of *Group Life*.

67. 597 F.2d at 1321.

68. *Id.* at 1321-22.

69. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

70. 15 U.S.C. § 1013(b) (1976).

71. 597 F.2d at 1321-22.

ants petitioned for certiorari on August 27, 1979.[72] Perhaps they are attempting to postpone the day when plaintiffs or the court will discover that *Klor's* is directly on point.

Both plaintiffs and defendants in their briefs appear to have avoided the real issue in this case. In their petition for certiorari defendants questioned the propriety of the evidentiary hearing conducted by the district court. Their main question, however, asked "[w]hether the plaintiff in a Sherman antitrust case must show, in response to a Motion for Summary Judgment which challenges only the jurisdictional predicate of plaintiff's action, the existence of a sufficient nexus with interstate commerce to warrant the exercise of federal jurisdiction."[73] Plaintiff, in its response, asked the Court to deny certiorari because in its view the decision of the Tenth Circuit was proper.[74]

It is noteworthy that plaintiff apparently was not concerned with the limited question to be decided on remand. Nor did plaintiff raise the question of the applicability of the doctrine of per se illegality to the instant case.

Because the request for certiorari was based upon such a narrow issue, it would appear that no question of sufficient import has been raised which would justify its being granted. If so, the practitioner in the Tenth Circuit may have to wait a bit longer for the day when the Circuit's conception of the juridictional requirements for the plaintiff injured by a per se Sherman Act violation is subject to question.

### D. *Conclusion*

The Tenth Circuit's holding in *Mac* places a hurdle in the path of the private plaintiff who is injured by a violation of the antitrust statutes at a time when the general trend is to eliminate such restraints. In *Gulf Oil Corp. v. Copp Paving Co.*,[75] the Supreme Court held that the private plaintiff who brings an action under the Sherman Act need not himself be "within the flow of interstate commerce,"[76] while the plaintiff who brings his action under the Clayton Act[77] or the Robinson-Patman Act[78] must be.[79] Inasmuch as Mac alleged a Sherman Act violation, the Supreme Court's holding in *Copp* would appear to relieve it of the burden of showing that it is engaged in interstate commerce.

The Court in *Copp* further held that for the private plaintiff to sustain his burden of proof he had to show that the effect on interstate commerce was both substantial and adverse.[80] However, in *Hospital Building Co. v.*

72. Mac Adjustment, Inc. v. General Adjustment Bureau, Inc., 1979-1 Trade Cases ¶ 62,599 (petition for certiorari, U.S. S. Ct. No. 79-311).
73. Brief for petitioners at 2.
74. Brief for respondents at 7.
75. 419 U.S. 187 (1974).
76. *Id.* at 195.
77. 15 U.S.C. §§ 14, 18 (1976).
78. 15 U.S.C. § 13(a) (1976).
79. 419 U.S. at 195.
80. *Id.*

*Trustees of Rex Hospital*,[81] the Court undertook to define these terms, with the result of significantly relaxing the requirements for the plaintiff. Thus, a substantial effect on interstate commerce was found, although plaintiff could not show any effect on market prices. The required nexus with interstate commerce was satisfied because plaintiff hospital bought supplies from out of state distributors, received some patients from other states, obtained revenues from other states, financed its expansion by borrowing from out of state lenders, possessed an out of state parent company, and most important for the purpose of this comment, received revenues from out of state insurance companies.[82] If similar guidelines had been applied in *Mac*, the necessary effect on interstate commerce should not have been difficult to establish.

The Tenth Circuit included both *Copp* and *Rex Hospital* in its opinion in *Mac*, and correctly recognized that they were useful indicators of "what is necessary in order to satisfy the commerce requirement of the Sherman Act"[83] but failed to distinguish between a private plaintiff's *being engaged* in interstate commerce and his injury having a *substantial effect* on such commerce. Because Mac could not meet the first requirement, but would have an excellent chance of meeting the second, the Tenth Circuit, by using *Copp* and *Rex Hospital* in the wrong context severely limited Mac's chances of eventual recovery.

Further evidence of the current trend toward reducing jurisdictional requirements for the private antitrust plaintiff can be detected in *Goldfarb v. Virginia State Bar*,[84] where plaintiffs were a married couple who purchased a home. They brought an action under section 1 of the Sherman Act[85] alleging that the minimum fee schedule of the Bar violated the Act. The essence of the charge was that the Bar was engaged in price fixing, a Sherman Act violation that, like the boycott, is per se illegal. Plaintiffs' engagement in interstate commerce was properly never at issue.

In *St. Paul Fire & Marine Insurance Co. v. Barry*,[86] plaintiffs, a group of physicians, sued four insurance companies who boycotted them by attempting to compel them to purchase a new type of coverage offered by one of the companies. Based on the boycott exception to the McCarran-Ferguson Act,[87] the plaintiffs prevailed. Justice Powell, writing for the Court, never referred to plaintiffs' engagement in interstate commerce.

Had the Tenth Circuit followed the current trend in this area, the question of Mac's engagement in interstate commerce would not have been raised. The McCarran-Ferguson Act boycott exception[88] apparently was the red herring in the Mac case, and it drew the court's attention from the real issue: whether a full trial was required in order to give Mac the necessary opportunity to show that defendants' acts met the Sherman Act require-

81. 425 U.S. 738 (1976).
82. *Id.* at 741.
83. 597 F.2d at 1322.
84. 421 U.S. 773 (1975).
85. 15 U.S.C. § 1 (1976).
86. 438 U.S. 531 (1978).
87. 15 U.S.C. § 1013(b) (1976).
88. *Id.*

ments, *i.e.*, that they were a contract, combination or conspiracy in restraint of trade,[89] and that their effect was to monopolize or attempt to monopolize any part of interstate commerce.[90]

Relying on this language, the Supreme Court in *Klor's*[91] found that the business of the defendants, *i.e.*, the "business of manufacturing, distributing and selling household applainces"[92] was in interstate commerce and provided a sufficient nexus with that commerce so as to permit Klor's to recover.

The effect of *Klor's*, where the Court declared the boycott to be per se illegal, was to dispense with the requirement that plaintiff prove public injury. Because of the seriousness of the violation, public injury would be presumed. All the plaintiff in a boycott case had to show was some relationship with interstate commerce.

The idea, enunciated first in *Klor's*, that the victim of a boycott need not himself be engaged in interstate commerce, should have been applied with equal force to *Mac*. Had *Klor's* never been decided, the Tenth Circuit's decision in *Mac* would have been correct, but in the light of *Klor's* and the cases following it, it appears that the Tenth Circuit should reevaluate its position.

The effect of the Tenth Circuit's decision in *Mac* is to preclude recovery for antitrust injury when the plaintiff's business is essentially local in nature, and where the volume of business is small. A careful analysis of the economics of the holding leads inescapably to the conclusion that it is this very type of plaintiff who is most in need of the protection of the antitrust laws.

Justice Jackson, in outlining the proper role of the court in antitrust matters in *International Salt Co. v. United States*[93] observed: "Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement."[94]

The approach postulated by Justice Jackson was utilized by the Supreme Court in *Klor's*, and it is relied on by courts today as the accepted view. Had the Tenth Circuit accepted this approach, and relied on the principle of per se illegality, as it was applied to the boycott in *Klor's*, the results in Mac should have been different.

It is possible that, on remand, the required nexus with interstate commerce still could not have been established. While remand for the correct reason still would not have assured a victory for the plaintiff, certainly the

89. 15 U.S.C. § 1 (1976).
90. 15 U.S.C. § 2 (1976).
91. 359 U.S. 207 (1959).
92. *Id.* at 209.
93. 332 U.S. 392, 396 (1947).
94. *Id.* at 396.

burden on Mac and the future private plaintiff who brings his case in the Tenth Circuit's domain would have been a lighter one.

*Petition for certiorari was denied on October 29, 1979.*[95]

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95. 100 S. Ct. 271 (1979).