Volume 23 | Issue 1 Article 8

1977

Antitrust - Private Actions - Treble Damages - Group Boycott - No-Switching Agrements among Competitors is a Per Se Offense - Plaintiff Who Failed to Gain Employment Thereby Is Injured within His Business or Property and States a Claim upon Which Relief May Be Granted

J. Kurt Straub

ANTITRUST — PRIVATE ACTIONS — TREBLE DAMAGES — GROUP BOYCOTT — "NO-SWITCHING" AGREEMENTS AMONG COMPETITORS IS A PER SE OFFENSE — PLAINTIFF WHO FAILED TO GAIN EMPLOYMENT THEREBY IS INJURED WITHIN HIS BUSINESS OR PROPERTY AND STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Quinonez v. National Association of Securities Dealers, Inc. (5th Cir. 1976)

Plaintiff brought a private antitrust action[1] against defendants[2] for treble damages[3] and injunctive relief[4] in the United States District Court for the Northern District of Texas.[5] Plaintiff was accepted by Merrill Lynch, Pierce, Fenner, & Smith, Inc. (Merrill Lynch) into a program designed to

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1. Plaintiff alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970). Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc., 540 F.2d 824, 826 (5th Cir. 1976). The facts set forth in Chief Judge John R. Brown's opinion allegedly revealed a group boycott prohibited by section 1. *Id.* at 827-28. The § 2 claim was not clearly set forth but most likely alleged a conspiracy to monopolize.

Plaintiff also alleged that the member firms (the National Association of Securities Dealers, Inc., (NASD), New York Stock Exchange (NYSE), American Stock Exchange, Chicago Board of Trade, Chicago Mercantile Exchange, and probably others) had monopolized the securities business which constituted a separate section 2 violation. *Id.* at 827. Plaintiff apparently did not press this claim, because the Fifth Circuit did not discuss it.

2. Among the named defendants were: NASD; Bache & Co.; DuPont; A. G. Edwards Co.; Institutional Equity Corp.; Merrill Lynch Pierce, Fenner & Smith, Inc. (Merrill Lynch); and Shearson, Hammill & Co. (Shearson). 540 F.2d at 826.

3. Treble damages are authorized by § 4 of the Clayton Act, 15 U.S.C. § 15 (1973), which states: "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 . . . ." *Id.*

4. Injunctive relief is authorized by § 16 of the Clayton Act which reads in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

15 U.S.C. § 26 (1970).

In addressing the plaintiff's claim for relief under § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), the Fifth Circuit dealt solely with the "business or property" requirement for treble damage litigants. It did not consider the plaintiff's cause of action for the requested injunctive relief under the different statutory standard of § 16 of the Clayton Act, 15 U.S.C. § 26 (1970), which does not, notably, require an injury to "business or property." *See id*; *In re* Multidist. Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), *cert. denied sub. nom.* Morgan v. Automobile Mfr. Ass'n, 414 U.S. 1045 (1973). The Ninth Circuit stated that

> section 16 lacks mention of 'business or property', an omission signalling different standing requirements. This treatment is fully justified by the difference between the remedies available under each section. In contrast to section 4, section 16 does not involve punitive and potentially disastrous judgments for treble damages and attorneys' fees; neither is there the potential threat of duplicative recoveries.

481 F.2d at 130. *See also* Hawaii v. Standard Oil Co., 431 F.2d 1282, 1284-85 (9th Cir. 1970), *aff'd*, 405 U.S. 251, 261-64 (1972); Bratcher v. Board of Realtors, 381 F.2d 723, 724 (6th Cir. 1967).

5. Appended to plaintiff's federal claim were alleged violations of state antitrust law, a negligence claim, and a breach of contract claim. 540 F.2d at 826 n.1.

train applicants to become registered securities representatives under industry-wide standards and was assigned to their Panama office.[6] However, his employment was terminated when Merrill Lynch reconsidered plaintiff's prior involvements with criminal charges as noted on his employment application.[7] Subsequently, plaintiff obtained a trainee position with Shearson, Hammill & Co. (Shearson).[8] Once again he was discharged, but not prior to passing the New York Stock Exchange (NYSE)/National Association of Securities Dealers (NASD) examinations with high marks.[9] Plaintiff asserted that employment applications sent to other defendant broker-dealer firms were rejected because of an alleged "no-switching" agreement among defendants, *i.e.,* that none would employ any person previously fired or rejected by another member firm.[10] Defendants' motion to dismiss for failure to state a claim upon which relief could be granted[11] was sustained in district court.[12] On appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded for trial, *holding* that plaintiff's complaint alleged a per se offense under the Sherman Act which caused injury to his "business or property" within the meaning of section 4 of the Clayton Act sufficient to state a claim upon which relief could be granted.[13] *Quinonez v. National Association of Securities Dealers, Inc.,* 540 F.2d 824 (5th Cir. 1976).

Certain forms of business activities, encompassing concerted refusals to deal or "group boycotts", are per se violations under section 1 of the Sherman Act.[14] While private treble damage litigants who allege acts which are per se unlawful under the Sherman Act need not prove an injury to the public aside from their own damages,[15] they must prove injury to their "business or property" within section 4 of the Clayton Act.[16] The prevailing

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6. *Id.* at 827.
7. *Id.*
8. *Id.*
9. *Id.* Shearson had informed plaintiff that he would not be hired, but allowed him to be certified for his exams. *Id.* at 827 n.5.
10. *Id.* at 827.
11. FED. R. CIV. P. 12(b)(6).
12. 540 F.2d at 826. The district court opinion is not reported.
13. The Fifth Circuit reached this result despite the fact that plaintiff never had a client or earned a sales commission as a securities representative. 540 F.2d at 827. Plaintiff completed his necessary training and was certified, but was never given clients. *Id.* It is submitted that the fact that plaintiff had no work product to speak of with any firm is crucial to the issue presented in the instant case. *See* notes 43-45 and accompanying text *infra.*
14. Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 468 (1941) (reasonableness of boycott as irrelevant as the reasonableness of prices fixed by conspiracy); E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612-13 (1914) (group boycotts are in the class of prohibited restraints).

Section 1 of the Sherman Act reads in pertinent part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1970).
15. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
16. *See* note 3 *supra.* In fact, some courts have construed the "business property" requirement as a standing rule. *See* Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362 (N.D. Ga.), *aff'd,* 535 F.2d 313 (5th Cir. 1975); Raubal v. Engelhard Minerals & Chemicals Corp., 364 F. Supp. 1352 (S.D.N.Y. 1973).

construction of the word "business" by the courts has been a commercial venture or an ongoing business enterprise.[17] The major exception to the "ongoing commercial enterprise" test has been where the plaintiff alleged that he was prevented from establishing a new business by means of a group boycott.[18] The Fifth Circuit in *Martin v. Phillips Petroleum Co.*,[19] stated this rule as follows:

> [O]ne need not have an actual ongoing business to obtain standing, but an attempt to enter a business is sufficient. . . . However, [the] decisions lay down two significant requirements. First, there must be the intention to enter the business; and second, there must be a showing of preparedness to enter the business.[20]

Another exception to the "ongoing commercial enterprise" test permits recovery of treble damages by reason of loss of employment caused by an antitrust violation where the plaintiff has been a commission salesman who has cultivated a clientele.[21] While all the other courts employing this exception stressed the fact that plaintiffs were commission salesmen with

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17. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). In *Hawaii,* the only Supreme Court decision on this issue, the Court stated: "Like the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises." *Id.* at 264. This is the settled view of the lower federal courts. *See In re* Multidist. Vehicle Air Pollution M. D. L. No. 31, 481 F.2d 122, 126 (9th Cir.) *cert. denied sub. nom,* Morgan v. Automobile Mfr. Ass'n., Inc., 414 U.S. 1045 (1973); GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757-58 (2d Cir. 1972); Rossman v. Pullman Co., 15 F. Supp. 325, 332 (S.D.N.Y. 1936) (the seminal post-Clayton Act case on the question).

18. *See* Martin v. Phillips Petroleum Co., 365 F.2d 629, 633-34 (5th Cir. 1966); Duff v. Kansas City Star Co., 299 F.2d 320, 323 (8th Cir. 1962); Peller v. International Boxing Club, 227 F.2d 593, 596 (7th Cir. 1955); Triangle Conduit & Cable Co. v. National Elec. Prod. Corp., 152 F.2d 398, 399 (3d Cir. 1945) ("intent and preparedness" rule first formulated, denying relief to the plaintiff).

19. 365 F.2d 629 (5th Cir. 1966).

20. 365 F.2d at 633. In this case, the plaintiff Martin had a suboption to purchase a gasoline processing plant, but needed financing which was being arranged by the defendant Chemical Bank of New York. *Id.* at 631. Negotiations fell through when the bank informed Martin that it would require that defendant Phillips Petroleum Company operate the plant and be given a 50% interest. *Id.* at 632. The bank claimed that Martin, an independent oil and gas explorer and producer, had insufficient experience to run a refinery. *Id.* Martin objected, claiming a conspiracy between the bank and Phillips, a large depositor. *Id.* Martin was unable to get financing from other sources before his suboption expired. *Id.* In deciding that Martin did not satisfy the "intent and preparedness" rule, the Fifth Circuit stressed the fact that Martin had no prior experience, no ability to finance, and had not invested in the proposed business. *Id.* at 633-34.

The *Martin* court went on to say that "[s]ome of the elements considered by the courts include . . . affirmative action by plaintiff to enter the business . . . and the background and experience of plaintiff in the prospective business . . . ." *Id.* (citations omitted). For other statements concerning the meaning of the "intent and preparedness" rule, *see* cases cited in note 17 *supra.*

21. *See* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967); Nichols v. Spencer Int'l Press, 371 F.2d 332, 334 (7th Cir. 1967); Vines v. General Outdoor Advertising Co., 171 F.2d 487, 491 (2d Cir. 1948); Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942); Image & Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237, 239 (D. Mass. 1956).

established clients,[22] the Seventh Circuit in *Nichols v. Spencer International Press*[23] minimized the importance of those facts:

> [W]e readily conclude that one who has been damaged by loss of employment as a result of a violation of the antitrust laws is "injured in his business or property" and thus entitled to recover, under 15 U.S.C.A. § 15. Work as the employee of another is not, indeed, an independent business enterprise, and an opportunity to perform such work may not be property in the ordinary sense, but the interest invaded by a wrongful act resulting in loss of employment is so closely akin to the interest invaded by impairment of one's business as to be indistinguishable in this context.[24]

The Seventh Circuit's rationale for treating *all* losses of employment as injuries to a "business or property" interest for Clayton Act purposes was implicitly rejected by the Fifth Circuit five months later in *Daily v. Quality School Plan, Inc.*[25] In *Dailey,* plaintiff was a successful commission sales supervisor discharged by Educational Reader's Service, Inc.[26] The *Dailey* court held that plaintiff's position was a "business or property" interest giving him a claim upon which treble damage relief could be granted for alleged section 1 Sherman Act and section 7 Clayton Act violations,[27] because of the crucial fact that plaintiff was a commission sales agent.[28] Thus, the Fifth Circuit's disposition of *Quinonez* was the first time a federal court of appeals held that the term "business or property" recognized exclusion from potential employment to be a legal injury as distinguished from the *loss* of existing employment.[29]

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22. *See* note 21 *supra.*

23. 371 F.2d 332 (7th Cir. 1967). The facts of *Nichols* were remarkably similar to the instant case. There, plaintiff was a sales supervisor employed by defendant P. F. Collier, Inc., encyclopedia distributors, until he was discharged without notice or cause. *Id.* at 333. He was later employed in a similar capacity by a competitor of Collier's, defendant Spencer International Press, but was discharged after a month, allegedly because of adherence to a "no-switching" policy in the industry. *Id.* The only real difference between the plaintiff in *Nichols* and the plaintiff in the instant case is that the former had established sales commissions and clients while the latter did not. *Id.* at 333-34.

24. *Id.* at 334.

25. 380 F.2d 484 (5th Cir. 1967).

26. *Id.* at 485-86. In 1965, Educational Reader's Service was acquired by a competitor, defendant Quality School Plan, Inc. *Id.* at 485. Together, the two firms had 82% of the relevant market. *Id.* at 486. Plaintiff was fired later in 1965 so that Quality personnel could take over his sales area. *Id.*

27. 380 F.2d at 487.

28. *Id.* The *Dailey* court stated that:

> These commission sales agent cases where a territory has been developed and where the courts treat the employment] relationship as the business of the salesman or sales manager are to be distinguished from those cases where the business or property is that of the corporation and the claim asserted by stockholders or creditors or employees is derivative.

Id. at 487. By stressing plaintiff's position as a commission sales agent with an established clientele, the court implicitly declined to embrace the broad dicta in *Nichols* that brought *all* employment relationships within the Clayton Act. *See* text accompanying note 24 *supra.*

29. 540 F.2d at 830.

The *Quinonez* court also found that the complaint stated a per se claim under the Sherman Act.[30] Invocation of the per se rule meant that the complaint could state a claim without any allegation of public injury,[31] thereby leaving only the "business or property" Clayton Act requirement to fulfill.

The court's holding that Quinonez had stated a claim upon which relief could be granted was based on the following crucial language: "Defendants attempt to distinguish *Vines, Nichols,* and *Roseland* . . . on the basis that in those cases the plaintiffs were commission salesmen who had established their own clientele which gave them a more clearly defined claim to income generated from those sources. *But this is a distinction without a difference* . . . ."[32] The court asserted that Quinonez was likewise deprived of "income earning potential" due to "his demonstrated capacity for immediate entry into this business."[33] In support of its holding, the Fifth Circuit also cited the *Nichols* dicta[34] which contended that *any* loss of employment is injury to "business or property."[35] Finally, the court found that Quinonez had satisfied the "intent and preparedness" rule:[36] "Clearly, the conduct of the plaintiff in accepting employment with Merrill Lynch and subsequently Shearson demonstrated not only intent but the fact that the plaintiff satisfactorily completed the examinations necessary to become a registered representative."[37]

It is submitted that the reasoning of the Fifth Circuit in *Quinonez* is subject to criticism for its questionable interpretation of precedent[38] and its failure to consider two additional issues. First, the court held that a "no-switching" agreement between competitors was similar to a group boycott and therefore was a per se Sherman Act offense.[39] However, in support of this conclusion, the court cited precedents which stand for the opposite proposition, namely that such agreements were to be tested under the "rule

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30. *Id.* at 828-29. *See* note 40 *infra.* The court sought to frame its opinion around the standards for a dismissal for failure to state a claim upon which relief could be granted, FED. R. CIV. P. 12(b)(6). The court stated: "A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim." 540 F.2d at 826-27, *quoting* Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506 (5th Cir. 1971).

31. *See* note 15 and accompanying text *supra.*

32. 540 F.2d at 829-30 (emphasis added). *See* note 21 and accompanying text *supra*; *see also* notes 44 & 45 and accompanying text *infra.*

33. *Id.* at 830.

34. *See* text accompanying note 24 *supra.*

35. 540 F.2d at 830.

36. *Id., citing* Martin v. Phillips Petroleum Co., 365 F.2d 629 (5th Cir. 1966), *and* North Texas Producers Ass'n v. Young, 308 F.2d 235 (5th Cir. 1962). However, only *Martin* speaks of the "intent and preparedness" rule. 365 F.2d at 633. *See* note 18 and accompanying text *supra.*

37. 540 F.2d at 830. Even while holding that the plaintiff stated a claim upon which relief could be granted and remanding for trial, the court expressed some skepticism of plaintiff's ability to *prove* a right to recover in the conclusion of its opinion. *Id.* at 830-31.

38. *See* notes 40 & 44 *infra.*

39. 540 F.2d at 828.

of reason."[40] Secondly, the court did not discuss plaintiff's claim for injunctive relief.[41] Finally, in its discussion of relief, the Fifth Circuit did not address the possibility of injury to plaintiff's "property" as distinct from his "business".[42]

However, the crucial question in the case sub judice was whether Quinonez's loss of employment represented an injury to his "business" interest. While prior courts that allowed recovery in loss of employment

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40. *Id.* Although the Fifth Circuit had little difficulty in characterizing plaintiff's complaint as establishing a per se violation, 540 F.2d at 828, *citing* McBeath v. Inter-Am. Citizens for Decency Comm., 374 F.2d 359, 361 (5th Cir. 1967), this is at least a debatable issue. Application of the Sherman Act requires some adverse effects upon competition, which can either be proved as unreasonable, Board of Trade of Chicago v. United States, 246 U.S. 231 (1918) (the "rule of reason"), or presumed — per se offenses — because of their "pernicious effect on competition", Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). Since plaintiff at best was merely an employee, and not a competitor, it is submitted that his alleged banishment from his chosen occupation cannot be a per se offense. *See* GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757-58 (2d Cir. 1972). The question of whether it is a per se offense to exclude a noncompetitor from the market should be distinguished from an attempt by a noncompetitor to exclude businesses from the market, which has been held within the per se rule. See McBeath v. Inter-Am. Citizens For Decency Comm., 374 F.2d 359 (5th Cir. 1967).

The per se rule was not applied to a case alleging loss of employment because of a group boycott in Radovich v. NFL, 352 U.S. 445 (1957). In *Radovich,* plaintiff alleged that all NFL team owners conspired to blacklist him from playing professional football due to his prior participation in another competitive league. *Id.* at 446-47. The Supreme Court reversed the dismissal of his complaint and remanded for trial stating that: "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade' . . . . We think Radovich is entitled to an opportunity to prove his charges." *Id.* at 453-54 *quoting* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 614 (1953). Thus, under *Radovich,* plaintiff Quinonez' complaint would not make out a per se violation; he should be required to prove an adverse, anticompetitive effect upon the *market,* in addition to his own damages. The court's reliance on *Radovich* thus appears incorrect since *Radovich* stated that when a group boycott causes loss of employment, the claim must be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade . . . ." *Id.* at 453.

The Fifth Circuit also relied on Nichols v. Spencer Int'l Dress Inc., 371 F.2d 332 (7th Cir. 1967), in support of its proposition that such "no-switching" agreements by competitors are per se violations. 540 F.2d at 829. However, what the Seventh Circuit actually said in *Nichols* was:

> If, from the facts developed upon further proceedings, it does appear that the 'no-switching' agreement impairs competition in the supply of encyclopedias and reference books, a question of degree may well arise, or of whether reasonable latitude may be afforded to protect some legitimate interest of the employers. . . . Agreements not to compete are *tested by a standard of reasonableness.*

371 F.2d at 337. (emphasis added).

Hence, on the closer readings of *Radovich* and *Nichols,* it is submitted that the Fifth Circuit in *Quinonez* apparently erred as a matter of law in holding that the complaint stated a per se offense.

41. *See* note 4 *supra.* Arguably, this would have been a more satisfactory way for the litigation to proceed. Although a court of equity will not specifically enforce employment contracts, here the same result could have been achieved by enjoining the "no-switching" agreement between member firms of the NASD. Damages, being wholly prospective, would be difficult to prove. *See* text accompanying note 33 *supra.* Injunctive relief would allow for plaintiff's employment as a securities representative.

42. *See* note 3 *supra.* The statute uses the disjunctive "or" to describe the interests protected whose violation gives standing to the treble damage litigant. A plaintiff may state a claim for injury to either "business" interests *or* "property" interests. 15

cases stressed that plaintiffs were commission salesmen with established clientele,[43] the Fifth Circuit asserted that the absence of an established clientele was *a distinction without a difference.*[44] In light of existing federal court decisions, including a recent Supreme Court pronouncement that "business or property" means an ongoing commercial enterprise,[45] the Fifth Circuit's dismissal of defendants' primary argument, as a "distinction without a difference," seems to be unwarranted.

U.S.C. § 15 (1970). The word "property" has been interpreted separately and more expansively by the courts, so as to include executory contracts. *See* North Texas Producers' Ass'n v. Young, 308 F.2d 235, 243 (5th Cir. 1962); Peller v. International Boxing Club, 227 F.2d 593, 596 (7th Cir. 1955); Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

Other forms of economic interests have been held not to be within the scope of "property" as used in the Clayton Act. *See* Duff v. Kansas City Star Co., 299 F.2d 320, 325 (8th Cir. 1962) (trademark and goodwill not used for eight years); Martens v. Barrett, 245 F.2d 844, 846 (5th Cir. 1957) (stock); Peter v. Western Newspaper Union, 200 F.2d 867, 872 (5th Cir. 1953) (stock).

Here, discussion of whether plaintiff had an employment contract with Merrill Lynch or Shearson giving rise to a protectable "property" interest for antitrust purposes would probably have required an examination of the applicable state common law of contracts.

43. *See* note 21 and accompanying text *supra.* While the courts have never specifically articulated the reasons for giving treble damage standing to commission salesmen in loss of employment cases, there is ample justification for this special treatment. First, the commission salesman deals directly with an ascertainable segment of the public and derives his remuneration in proportion to his sales to his clientele. Thus, while a salesman is not a competitor with his employer, his loss of employment is an easily quantifiable competitive injury to the public. *See* GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757-58 (2d Cir. 1972). Additionally, from the point of view of the commission salesman plaintiff, his loss of employment is particularly disastrous because he has lost his clientele and his entire investment of goodwill. He must build his "business" up from scratch again. This is in contrast to the ordinary employee's position, whose switch of employers does not involve forfeiture of any goodwill investment. In this sense, Quinonez is in the same position as an ordinary employee, since he had no clients with whom to build up goodwill. Likewise, he had never earned a commission and had not actually demonstrated any ability to serve the public or improve the competitiveness of the securities business.

44. 540 F.2d at 830. The Fifth Circuit's reliance, *id.*, upon the *Nichols* dicta (*see* text accompanying note 24 *supra*) was especially inappropriate insofar as it was inconsistent with Dailey v. Quality School Plan, 380 F.2d 484 (5th Cir. 1967) (*see* notes 25-28 and accompanying text *supra*) where, subsequent to the *Nichols* decision, the Fifth Circuit reaffirmed the importance of the fact that plaintiff was a commission salesman with a clientele. *Id.* at 487. In Image and Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237 (D. Mass. 1956), the court denied treble damage standing to a plaintiff who was a newly incorporated franchisor of sound engineering services, but was unable to solicit any franchisees for his business. *Id.* at 238-39. The court stated: "*Vines* . . . [is] not in point . . . [there] . . . the plaintiff had been engaged in a *business* and the alleged injury was *to a going concern.*" 148 F. Supp. at 239 (emphasis added). *See* note 21 and accompanying text *supra.* The point is, that far from being a "distinction without a difference", the courts have treated commission salesmen with an established clientele as the equivalent of an ongoing commercial enterprise, notwithstanding the formal employment relationship. *See* note 43 *supra.*

45. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972). It is at least arguably justifiable to treat a commission salesman with an established clientele as an ongoing commercial enterprise. *See* note 43 *supra.* Several courts have so decided. *See* note 21 *supra.* However, this should be clearly distinguished from the dicta in *Nichols* that *all* employment loss cases should qualify for § 4 Clayton Act relief. *See* text accompanying note 24 *supra.*