JUDICIAL REFUSAL TO IMPLY A PRIVATE RIGHT OF ACTION UNDER THE FTCA

The District of Columbia and the Ninth Circuit Courts of Appeals have recently held in *Holloway v. Bristol-Myers Corp.*[1] and *Carlson v. Coca-Cola Co.*[2] that private parties, be they individuals or consumer interest groups, cannot maintain actions to vindicate rights asserted under the Federal Trade Commission Act (FTCA).[3] In *Holloway,* two individuals and two consumer groups brought a class action in federal district court[4] against Bristol-Myers, the manufacturer of Excedrin, a non-prescription analgesic compound. The plaintiffs' claim was based primarily[5] on FTCA provisions which prohibit unfair or deceptive trade practices[6] and false advertising which induces or is likely to induce the purchase of drugs.[7] Specifically, the plaintiffs alleged that Bristol-Myers had made false statements in claiming that Excedrin is more than twice as effective an analgesic as aspirin and that this claim had been substantiated by a study of pain among patients in a hospital. The district court dismissed the action, holding that the FTCA does not create a right of action for private parties.[8] In affirming the lower

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1. 485 F.2d 986 (D.C. Cir. 1973), *aff'g* 327 F. Supp. 17 (D.D.C. 1971).

2. 483 F.2d 279 (9th Cir. 1973), *aff'g* 318 F. Supp. 785 (N.D. Cal. 1970). The two decisions are independent. *Holloway* was decided July 26, 1973 (rehearing denied, Nov. 7), and *Carlson* was decided only five days later on July 31, 1973. The *Carlson* opinion was amended on August 20, presumably by adding *Holloway* to its citations. *Id.* at 280.

3. 15 U.S.C. §§ 41-58 (1970).

4. Holloway v. Bristol-Myers Corp., 327 F. Supp. 17 (D.D.C. 1971).

5. In addition, plaintiffs asserted an equitable cause of action for fraud and nuisance and a common law cause of action for deceit. *Id.* at 19.

6. Section 5 of the FTCA states in part: "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (1970).

7. Section 12 of the FTCA states in part:

> (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
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> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or
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> (2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics. *Id.* § 52(a).

Subsection (b) provides that a violation of subsection (a) shall constitute an unfair or deceptive act or practice in commerce within the meaning of section 5.

Section 14 of the Act further provides that violations of section 12 are misdemeanors punishable by fine or imprisonment. *Id.* § 54(a).

8. The cause of action under the FTCA was therefore dismissed for failure to

court's decision, the court of appeals concluded that both the history and structure of the FTCA indicate that the right to enforce its provisions lies solely in the administrative agency created by that Act, the Federal Trade Commission (FTC).[9] *Carlson*, the second of these cases, was a class action brought against Coca-Cola and Glendenning Companies, Inc., its advertising agency, alleging that a nationwide promotional game, Big Name Bingo, was deceptively structured so as to deprive many participants of prizes to which they were entitled under the published rules of the game.[10] Plaintiffs' claim that the scheme therefore constituted a violation of section 5 of the FTCA was rebuffed by both the district court and a majority of the Court of Appeals for the Ninth Circuit, which held that since no private right of action exists under the FTCA, the plaintiffs had failed even to establish the requisite basis for federal jurisdiction.[11] In a vigorous dissent,

state a claim upon which relief could be granted. The court then found itself without jurisdiction over the common law causes of action which had also been pleaded by the plaintiff, see note 5 *supra*, since the basis under which it had presumably assumed jurisdiction over the FTCA claim, 28 U.S.C. § 1337 (1970), see note 11 *infra*, only grants the federal district courts jurisdiction over civil actions "arising under any *Act of Congress* regulating commerce or protecting trade and commerce against restraints and monopolies," *id.* (emphasis added), and since the court could find no other jurisdictional basis for the common law claims. 327 F. Supp. at 22. Because, as the court judicially noticed, the damages from the plaintiff's purchase of six fifty-tablet bottles of Excedrin did not equal or exceed $10,000, no jurisdiction for her common law claim could be found under the District of Columbia's counterpart to federal question jurisdiction, § 11-521, D.C. Code (1967), 28 U.S.C. § 1331 (1970). *See* 327 F. Supp. at 22. Nor did the court find the occasion a proper one for the exercise of its equitable jurisdiction over certain of the plaintiffs' claims. *Id.* at 22-23.

9. It did not follow from the dismissal of the *Holloway* litigation that no other action has or will be taken against the questionable advertising involved in that case since the dismissal in no way precludes the FTC from taking action against the defendants. Normal FTC procedure calls for the filing of a complaint, notice to the party whose conduct is in question, adjudication before the FTC, and the possible issuance of a cease and desist order. Appeal from a final FTC order may be taken to a circuit court of appeals. For the details of FTC procedures and its rules of practice, see 16 C.F.R. ch. 1, subch. A (1973).

Nine years before the *Holloway* action was instituted, the FTC began a comprehensive industry-wide investigation of advertising representations of the efficacy of nonprescription analgesic preparations. FTC Release, 3 TRADE REG. REP. ¶ 10,116 (June 27, 1962). The first publication of the FTC's intention to take action in the area came in a 1972 announcement of its intent to issue a complaint. Bristol-Myers Co., [1970-1973 Transfer Binder] TRADE REG. REP. (FTC Complaints and Orders) ¶ 19,962 (April 19, 1972). In 1973, the FTC finally issued a formal complaint against Bristol-Myers and others. *Id.* ¶ 20,263 (Feb. 23, 1973).

10. The *Carlson* plaintiffs claimed that, although a "correct" card was defined as requiring only *one* correct answer under the rules of the game as established by the defeudants; the defendants had, with respect to one question, refused to certify cards submitted to them as correct cards unless they contained *two* correct answers. 318 F. Supp. at 785.

11. The *Carlson* plaintiffs sought federal jurisdiction under 28 U.S.C. § 1337

however, Judge Solomon argued that even though the Act does not expressly provide for a private right of action, the court should have implied such a right "based on the established principle that a party has a cause of action when damaged by conduct that violates a statute enacted for his protection."[12]

As originally enacted in 1914,[13] the Federal Trade Commission Act was directed at "unfair methods of competition in commerce"[14] and was intended, together with the Clayton Act,[15] passed in the same year, to strengthen antitrust legislation.[16] The Clayton Act enumerated specific types of prohibited conduct[17] and specified various means of enforcement, including express authorization of private suits for damages[18] and injunctive relief.[19] In contrast, the sweeping language

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(1970), which gives the district court jurisdiction over any action arising under a federal statute regulating commerce. See note 8 *supra*. However, the court of appeals noted that

> [t]o acquire federal jurisdiction a plaintiff must assert a colorable right to a remedy under a particular federal statute. The statutory provision (Section 5 of the FTCA) invoked by the appellants in this case provided them with no direct remedy, either explicitly or implicitly. This conclusion is supported by solid authority of long standing. 483 F.2d at 280.

Thus, the *Carlson* majority concluded that the absence of a colorable claim under section 5 precluded § 1337 jurisdiction.

> In contrast the *Holloway* court concluded that
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> although . . . we hold that the Act does not ground a private action, appellants' invocation of the Act in support of a claim that is not plainly insubstantial or frivolous on its face suffices as an invocation of § 1337 jurisdiction. 485 F.2d at 988 n.2.

12. 483 F.2d at 283 (dissenting opinion).

13. Act of Sept. 26, 1914, ch. 311, §§ 1-11, 38 Stat. 717, *as amended*, 15 U.S.C. §§ 41-58 (1970).

14. Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719.

15. Act of Oct. 15, 1914, ch. 323, §§ 1-26, 38 Stat. 730, *as amended*, 15 U.S.C. §§ 12-27 (1970).

16. Act of Sept. 26, 1914, ch. 311, § 11, 38 Stat. 717, 724. *See* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 351-52 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965). For the definitive treatment of the origins of the FTCA, see G. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 1-48 (1924).

17. As originally enacted, the Clayton Act prohibited (1) price discrimination to lessen competition, (2) agreements not to use or deal in competitors' goods, (3) corporation purchases of stock in competing corporations, (4) interlocking directorates among banks, (5) embezzlement by officers of common carriers, and (6) common carriers' dealing with corporations having interested officers. Act of Oct. 15, 1914, ch. 323, §§ 2-3, 7-10, 38 Stat. 730-34.

18. Section 4 of the Clayton Act provided: "[A]ny person who shall be injured in his business or property . . . may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Id.* § 4, at 731.

19. Section 16 provided: "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States hav-

of the FTCA's prohibition against unfair methods of competition in commerce was coupled with the creation of the FTC as the appropriate mechanism for enforcement.[20] Indeed, numerous passages in the original Act emphasize that enforcement was to be solely in the hands of the Commission.[21] The FTC's authority was severely limited in 1931, however, when the Supreme Court in *FTC v. Raladam Co.*[22] read the language of the Act narrowly and held that unfair methods of competition in commerce could be attacked by the FTC only where substantial competition, present or potential, was involved. After *Raladam*, the FTC could not proceed against even the most grossly unfair methods of doing business absent the element of competition.

Congress overruled *Raladam* legislatively by the 1938 Wheeler-Lea amendments[23] to the FTCA, and in the process it also included several key amendments to the Act. These amendments altered section 5 to prohibit "[u]nfair methods of competition in commerce, *and unfair or deceptive acts or practices in commerce*"[24] and added sections 12-15, which prohibit "any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics."[25] With the addition of the 1938 amendments, the Act not only

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ing jurisdiction over the parties, against threatened loss or damage by violation of the antitrust laws . . . ." *Id.* § 16, at 737.

20. Act of Sept. 26, 1914, ch. 311, §§ 1-2, 5-6, 38 Stat. 717-22, *as amended*, 15 U.S.C. §§ 41-42, 45-46 (1970).

21. The Act's basic grant of authority to the Commission did not itself imply that the FTC was to be the sole entity vested with that authority: "The commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition . . . ." Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717, 719, *as amended*, 15 U.S.C. § 45(a)(6) (1970). However, the Act then continued by stating that the FTC can instigate proceedings against violations "if it shall appear *to the commission* that a proceeding *by it* . . . would be to the interest of the public." Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717, 719, *as amended*, 15 U.S.C. § 45(b) (1970) (emphasis added). And within the same subsection, Congress limited private participation in enforcement to permissive intervention in FTC proceedings: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed *by the commission*, to intervene and appear in said proceeding . . . ." *Id.* (emphasis added).

22. 283 U.S. 643 (1931). Because of the absence of present or potential competition, the *Raladam* Court held that an FTC cease and desist order which prohibited the advertising of a preparation, designed for internal use and denominated an "obesity cure," was beyond FTC jurisdiction.

23. Act of March 21, 1938, ch. 49, 52 Stat. 111.

24. *Id.* § 5, at 112 (emphasis added to indicate new language).

25. *Id.* § 12, at 114-15.

These amendments resulted from the complex political maneuvers which accompanied passage of the Food, Drug, and Cosmetic Act of 1938. 21 U.S.C. §§ 301-92 (1970). *See* Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 LAW & CONTEMP. PROB. 2 (1939).

protected the businessman who might be threatened or injured by a dishonest competitor, but also protected the consumer.[26] The amendments did not, however, expressly alter the FTCA's enforcement mechanism, and there is substantial legislative history which indicates that Congress intended that enforcement should remain solely in the hands of the FTC.[27] The breadth of the Commission's mandate had thus been extended. Yet although the Act provided for enforcement of FTC findings and penalties for violations of its orders,[28] it failed to mention the possibility of a private right of action to enforce its provisions.[29] Consequently, possible support for the proposition that a private right of action exists under the FTCA must be sought in applicable case law.

The pertinent judicial authority begins in 1926, before the 1938

26. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972); FTC v. A.P.W. Paper Co., 328 U.S. 193, 199 (1946); Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 160-61 (3d Cir. 1941). Even prior to the Wheeler-Lea amendments, the Court suggested that the Act was intended to protect consumer interests. *See* FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934). On the other hand, at least one commentator has argued that the 1938 amendments constitute a radical transformation of the intent of the FTCA.

> [W]hen Wheeler-Lea amended Section 5 FTC Act to make "unfair *or deceptive acts or practices*" unlawful, [the nature of the interests protected by the Act] was radically transformed. First, a wholly new class of citizens—consumers—became legally protected. Second, a more precise species of unlawful conduct—deceptive acts or practices—was proscribed, a type of unlawful conduct not normally related to antitrust violations. Hence the old reasons for not making Section 5 privately actionable no longer govern, and private enforceability of the consumer rights created under Wheeler-Lea really deserves new, separate and independent consideration. Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271, 278-79 (1971).

27. In the course of extended floor debate, proponents of the amendments stressed the wisdom of restricting enforcement powers to the FTC. *See, e.g.*, 83 CONG. REC. 391-425, 3252-56, 3287-93 (1938). The remarks of Representative Halleck, an active participant in the congressional debates on the amendments, show that Congress was well aware that placing provisions for the regulation of food and drug advertising in the FTCA meant that enforcement would be limited to normal FTC procedures (outlined briefly in note 9 *supra*):

> I believe there is another reason why the Federal Trade Commission is the proper authority to have this power. These provisions, as you gather from the debate, are generally the subject of quasi judicial action and determination, with decisions to be made affecting the rights not only of consumers but of producers and distributors. The Federal Trade Commission is a quasi judicial organization. It is independent and goes on and on year after year pursuing its activities.
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> To my mind that is a clear reason why this legislation should delegate the additional authority to the Federal Trade Commission. *Id.* at 401.

28. 15 U.S.C. §§ 47, 53-54, 56 (1970).

29. Moreover, unlike many other federal regulatory statutes, *see, e.g.*, Securities Act of 1933 § 22, 15 U.S.C. § 77v (1970), Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1970), the FTCA still did not contain any express grant of jurisdiction to the federal courts for actions brought under it which grant might provide an indication of congressional intent to allow private parties to enforce the substantive provisions of the FTCA. See note 48 *infra* and accompanying text.

Wheeler-Lea amendments, with an offhand dismissal of the possibility of a private right of action in *Moore v. New York Cotton Exchange*:[30] "There is an attempt to allege unfair methods of competition, which may be put aside at once, since relief in such cases under the Trade Commission Act must be afforded in the first instance by the commission."[31] The cryptic limitation "in the first instance" detracts from the clarity of the Supreme Court's otherwise explicit statement and could be interpreted to suggest that there is a private right to enforce the FTCA after exhausting the possibilities of doing so through the Commission itself. When faced, however, in *FTC v. Klesner*[32] with a private dispute between one-time business associates who engaged in extensive litigation over the use of a trade name, Justice Brandeis stated flatly: "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs."[33] *Klesner* illustrates how completely the Court foreclosed the possibility of resolving a private conflict under the FTCA. Here, the Commission—not a private party—was instigating judicial action. It had issued a complaint and sought to enforce its resulting order in the courts. Whereas the court of appeals had considered and reversed the agency determination on the merits, the Supreme Court said that the merits were beside the point. Since the FTC complaint addressed what the Court found to be a purely private dispute, the Court held that it had been improvidently issued and that the action should have been dismissed as soon as the private character of the controversy became apparent.

Although *Moore* and *Klesner* clearly show that no private right of action was found to exist under the original FTCA, they were decided before the enactment of the 1938 Wheeler-Lea amendments,

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30. 270 U.S. 593 (1926). Moore, president of the Odd-Lot Cotton Exchange of New York, failed in his attempt to attack, primarily under the Sherman Act, a contract between the New York Cotton Exchange and Western Union which called for distribution of Exchange quotations only to such persons as were approved by the Exchange.

31. *Id.* at 603.

32. 280 U.S. 19 (1929).

33. *Id.* at 25. Justice Brandeis continued:

> The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it. *Id.* at 25-26 (footnotes omitted).

which evince some congressional concern for protection of consumers. This concern suggested to hopeful litigants that a private right of action might be implicitly available under the amended Act.[34] But in *Atlanta Brick Co. v. O'Neal*,[35] the district court refused to imply a private right of action under the FTCA, that the "Act nowhere gives an additional right of action to persons injured by unfair trade practices."[36] In another 1942 case, *National Fruit Product Co. v. Dwinell-Wright Co.*,[37] a Massachusetts district court found that by enacting the FTCA

> Congress indicated that it preferred to have such uniform federal rules as might be appropriate initially devised and applied not by federal courts but by a federal adminstrative agency. . . . [I]t cannot fairly be said that Congress went further and . . . authorized the federal courts to develop a rounded federal common law of unfair competition.[38]

Subsequent decisions have repeatedly held no private right of action is available under the FTCA to either individual or corporate plaintiffs.[39]

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34. *See* Lovett, *supra* note 26, at 279: "If any modern, fair minded review is given to the question of whether a private right of action should be implied now for deceptive trade practices . . . it seems likely that an effective private remedy could be created by court interpretation . . . ." Such arguments date back many years. *See, e.g.*, Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987, 994-98 (1949).

35. 44 F. Supp. 39 (E.D. Tex. 1942).

36. *Id.* at 42.

37. 47 F. Supp. 499 (D. Mass. 1942) (trademark infringement action under the Trade-Mark Act of 1905, ch. 595, 33 Stat. 724, *repealed*, Act of July 5, 1946, ch. 540, § 46(a), 60 Stat. 444, concerning use of the trademark "White House" on foodstuffs).

38. 47 F. Supp. at 504.

39. Marquette Cement Mfg. Co. v. FTC, 147 F.2d 589 (7th Cir. 1945) (action against combination among Portland cement producers; FTC is "the only tribunal clothed with the power and charged with the responsibility of protecting the public against unfair methods of competition," *id.* at 594); LaSalle St. Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004 (N.D. Ill. 1968), *aff'd in part and rev'd in part on other grounds*, 445 F.2d 84 (7th Cir. 1971) (patent infringement case; claim under FTCA dismissed); Smith-Victor Corp. v. Sylvania Elec. Prod., Inc., 242 F. Supp. 302 (N.D. Ill. 1965) (private false advertising and antitrust action against manufacturer of lamps used in taking motion pictures; FTCA count summarily dismissed); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 118 F. Supp. 251 (E.D. Pa. 1953), *rev'd on other grounds*, 214 F.2d 649 (3d Cir. 1954) (dress manufacturer used competitor's garment in advertising his own cheaper imitation; FTCA held not, of itself, to confer federal jurisdiction of unfair competition in dress advertising); Samson Crane Co. v. Union Nat'l Sales, Inc., 87 F. Supp. 218 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950) (allegedly false advertising implying defendant's store was being operated by unions or for their benefit; no private right under FTCA and even if one were found to exist it must involve interstate commerce).

In spite of this line of authority, some judicial uncertainty has persisted. In a February 20, 1973 decision, a sophisticated court could still write: "It is not clear that a private action can be brought in Federal District Court under the Federal Trade

Although courts have thus far been unwilling to imply a private right of action under the FTCA, there are numerous instances in which private remedies have been implied as judicially fashioned corollaries to various federal statutes. As early as 1916, the Supreme Court found that when a violation of a federal statute had caused personal injury, "[t]he inference of a private right of action . . . is rendered irresistible . . . . "[40] Since then, both the Supreme Court[41] and lower federal courts[42] have implied private rights of action under various fed-

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Commission Act . . . ." Lawson Fabrics, Inc. v. Akzona, Inc., 355 F. Supp. 1146 (S.D.N.Y. 1973).

40. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 40 (1916) (Safety Appliance Act). In *Rigsby*, the court refers to the maxim *ubi jus ubi remedium* (where there is a right, there is a remedy). *Id.* In *Carlson*, Judge Solomon cites this passage in his dissent from the majority's refusal to imply a private cause of action under the FTCA. Carlson v. Coca-Cola Co., 483 F.2d 279, 283 n.3 (9th Cir. 1973) (dissenting opinion). See notes 10-12 *supra* and accompanying text for a discussion of the *Carlson* opinion. The validity of applying this maxim to this problem, however, is doubtful. The question is not one of implying a remedy where there is a right, but rather whether there is a private right of action in the first place. *See generally* Comment, *Federal Jurisdiction in Suits for Damages Under Statutes not Affording Such Remedy*, 48 COLUM. L. REV. 1090 (1948); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Comment, *Private Rights from Federal Statutes: Toward a Rational Use of* Borak, 63 NW. U.L. REV. 454 (1968).

41. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (Exchange Act § 10(b)); Allen v. State Bd. of Elections, 393 U.S. 544 (1949) (Voting Rights Act of 1965 § 5) (the statutory guarantee "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement . . . ." 393 U.S. at 557); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (Rivers and Harbors Appropriation Act of 1899 § 16); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (Labor Management Relations Act § 301(a)); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) (Railway Labor Act). *Contra,* Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) (no private right of action for violation of Federal Power Act).

42. The leading circuit court decision is Judge Learned Hand's opinion holding that a civil action for damages could be maintained for a violation of § 605 of the Communications Act of 1934. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947). *See also* Moses v. Burgin, 445 F.2d 369 (1st Cir. 1971) (Investment Company Act of 1940); Burke v. Compania Mexicana De Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970) (National Railway Labor Act); Herpich v. Wallace, 430 F.2d 792 (5th Cir. 1970) (Securities Exchange Act of 1934; no standing found under Investment Company Act of 1940); Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970) (Securities Exchange Act of 1934 § 7(c)); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969) (Waguer-Peyser National Employment System Act of 1933); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) (Civil Aeronautics Act of 1938 § 404(b)). *Contra,* Intracoastal Transp., Inc. v. Decatur County, 482 F.2d 361 (5th Cir. 1973) (Bridge Act of 1906); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972) (Rivers and Harbors Appropriation Act of 1899); Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir.), *cert. denied,* 409 U.S. 1042 (1972) (Immigration and Nationality Act); McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971) (Federal Aviation Act of 1958); B.F. Goodrich Co. v. Northwest Indus., Inc., 424 F.2d 1349 (3d Cir. 1970)

eral statutes.[43] Possibly the most significant modern case to imply a private right of action under a federal regulatory statute is *J. I. Case Co. v. Borak*,[44] in which the Court held that a private individual could

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(Interstate Commerce Act § 5); Royal Serv., Inc. v. Maintenance, Inc., 361 F.2d 86 (5th Cir. 1966) (Small Business Act); Blaney v. Florida Nat'l Bank, 357 F.2d 27 (5th Cir. 1966) (Federal Reserve Act); Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 F.2d 543 (9th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955) (Motor Carrier Act).

Several district court decisions have implied private rights of action. *See* Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670 (D. Neb. 1972) (Natural Gas Act § 717f(b)); Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971) (Corrupt Practices Act §§ 608-09); Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969) (Fair Labor Standards Act § 15(a)(3)); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961) (Federal Aviation Act § 404(b)). *Contra*, Acorn Iron & Supply Co. v. Bethlehem Steel Co., 96 F. Supp. 481 (E.D. Pa. 1951) (Defense Production Act of 1950).

In Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670 (D. Neb. 1972), the court analyzed the field of judicial implication of private rights of action under federal regulatory and criminal statutes and formulated a five-part test:

> Before a specific private remedy, either equitable or legal, may be found in a congressional Act not expressly granting one, it must appear that (1) the plaintiff is within a class intended to be protected by the Act, (2) private enforcement will further the congressional policy of the Act, (3) the duty breached was created by the Act, rather than by state statutory or common law, (4) the violation of the duty affected the plaintiff directly, and (5) no other remedy is available to guard adequately the right asserted. *Id.* at 679.

The court continued: "Equitable remedies may be inferred more readily than damage remedies, and no remedy will go further than necessary to achieve protection of the asserted right." *Id.*

Compare Farmland's test *with* RESTATEMENT (SECOND) OF TORTS § 286 (1965), which provides:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
> (a) to protect a class of persons which includes the one whose interest is invaded, and
> (b) to protect the particular interest which is invaded, and
> (c) to protect that interest against the kind of harm which has resulted, and
> (d) to protect that interest against the particular hazard from which the harm results.

If one accepts the argument that, absent other remedies, the defrauded consumer has an action in tort under this section, the interesting question then presents itself as to whether the action "arises under" the FTCA so as to open the doors of the federal courts to plaintiffs under 28 U.S.C. § 1337 (1970). See note 11 *supra*.

43. Also typical of the Supreme Court's growing willingness to extend the implication of private rights of action is Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), where it found an implied private right of action for damages sustained in connection with violations of constitutional (fourth amendment) rights. *Accord*, United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972) (fifth amendment); Butler v. United States, 42 U.S.L.W. 2257 (D. Hawaii, Nov. 8, 1973) (first amendment). *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

44. 377 U.S. 426 (1964), *aff'g* 317 F.2d 838 (7th Cir. 1963). For an early example of judicial willingness to entertain a private action for damages, albeit an unsuc-

bring an action for damages against a defendant who had violated section 14(a) of the Securities Exchange Act of 1934.[45] Although section 14(a), which governs proxy disclosure, contains no specific reference to a private right of action, the Court reasoned that the broad purpose behind the section—the protection of investors—"implies the availability of judicial relief where necessary to achieve that result."[46] Finding that this purpose could not be fully effectuated by the Securities Exchange Commission alone and that private enforcement of proxy rules would be a useful complement to agency regulation, the Court held that a private right of action was "necessary to make effective the congressional purpose."[47] Unlike the FTCA, the Securities Exchange Act contains a section which specifically grants federal district courts jurisdiction over "all suits . . . brought to enforce any liability or duty created" under the Act.[48] However, the thrust of the Court's opinion suggests that a private right of action was implied from the underlying statutory purpose rather than as a result of statutory interpretation of this general jurisdictional provision.[49]

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cessful one, under the Securities Exchange Act, see Baird v. Franklin, 141 F.2d 238, 244-45 (2d Cir.) (dissenting opinion), *cert. denied*, 323 U.S. 737 (1944) (dismissed on the issue of causation).

45. Section 14(a) provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title. Securities Exchange Act of 1934, ch. 404, § 14(a), 48 Stat. 895, *as amended*, 15 U.S.C. § 78u(a) (1970).

46. 377 U.S. at 432.

47. *Id.* at 433. *See* Comment, *Private Actions and the Proxy Rules: The Basis and the Breadth of the Federal Remedy*, 31 U. CHI. L. REV. 328, 337-39 (1964).

48. Section 27 of the Securities Exchange Act provides in part:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. 15 U.S.C. § 78aa (1970).

49. In his concurring opinion in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), Justice Harlan wrote:

> The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. There we "implied"—from what can only be characterized as an "exclusively procedural provision" affording access to a federal forum—a private cause of action . . . . We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative machinery had been provided. The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction; nor did the *Borak* court purport to do so. The notion of "implying" a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to

It was in light of this background that the *Holloway*[50] and *Carlson*[51] courts refused to imply a private right of action under the Federal Trade Commission Act. Reviewing the legislative history of the FTCA,[52] the *Holloway* court determined that "[t]he conclusion is inescapable that Congress intended enforcement of the Wheeler-Lea Amendments to rest wholly and exclusively with the Federal Trade Commission, following the pattern laid down in the 1914 Act."[53] Moreover, the court rejected the argument that, notwithstanding the language of the statute, a private right of action should be judicially implied in order to provide meaningful enforcement of consumer protection objectives underlying the Act. Rather, the court found "the administrative means of achieving those objectives are inseparably interwoven into a unified and comprehensive statutory fabric."[54] Permitting private parties to initiate actions in federal courts, the court observed, would fundamentally alter the balanced enforcement scheme embodied in the Act in two significant ways. First, "piecemeal lawsuits reflecting disparate concerns" would replace "a coordinated enforcement program" based upon the sound discretion and expert judgment of the agency.[55] Second, the courts would be forced to interpret and apply the FTCA without the benefit of prior agency proceedings.[56] In dismissing the appellants' broad attack on the

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the substantive social policy embodied in an act of positive law. *Id.* at 402-03 n.4 (citations omitted) (emphasis in original).

See also Comment, *Private Rights from Federal Statutes*, *supra* note 40, at 461-62.

50. 485 F.2d 986 (D.C. Cir. 1973). See notes 1, 4-9 *supra* and accompanying text.

51. 483 F.2d 279 (9th Cir. 1973). See notes 2, 10-12 *supra* and accompanying text.

52. See note 27 *supra*.

53. 485 F.2d at 997.

54. *Id.*

55. *Id.* at 997-98. The court stressed the advantages of relying on an agency-directed program of discretionary enforcement:

> Inherent in the exercise of this discretion is the interplay of numerous factors: the relative seriousness of the departure from accepted trade practices, its probable effect on the public welfare, the disruption to settled commercial relationships that enforcement proceedings would entail, whether action is to be taken against a single party or on an industry-wide basis, the form such action should take, the most appropriate remedy, the precedential value of the rule of law sought to be established . . . . Above all there is the need to weigh each action against the Commission's broad range policy goals and to determine its place in the overall enforcement program of the FTC. *Id.* at 997.

Moreover, the court expressed concern that the FTC's ability to act in an advisory capacity and thus encourage voluntary compliance would be severely endangered by the threat of unrestricted private actions. *Id.* at 998.

56. The court noted that

> the role of the courts in the enforcement of the Federal Trade Commission Act is one that comes into play primarily only after the Commission

claimed ineffectiveness of the FTC, the court noted that, while such claims were not novel, "Congress, has not [yet] seen fit to alter the statutory plan established in 1938."[57] The invocation of *J. I. Case Co. v. Borak*[58] by the appellants was answered in two ways. The presence in the Securities Exchange Act of 1934 of section 27,[59] the provision giving federal courts jurisidction over violations of that Act, reduced the "degree of 'judicial implication' brought to bear in developing a private remedy."[60] Moreover, the court observed that the nature of the function performed by the SEC was such that there is little danger that litigation would disrupt the Commission's administrative processes, whereas the creation of a private right of action under the FTCA "may disrupt or incommode the FTC's own investigative or prosecutorial activities . . . . "[61] Taken together, these considerations convinced the court that the legislative design had been "deliberately wrought" to achieve a balance of competing interests, which should not be disregarded by judicial implication of a private right of action.[62]

The *Carlson* majority did not labor nearly so long in reaching its similar conclusion. After noting appellants' assertion of federal jurisdiction of their claim as one "arising under" the FTCA, it pointed to numerous decisions holding that no private right of action exists under the FTCA[63] and completed the syllogism by summarily affirming the district court's dismissal of the action for failure to establish a requisite basis for federal jurisdiction: "Section 5(a)(1) equips the Federal Trade Commission with a flexible tool with which to combat

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> has set its administrative processes in motion. The court's role is not one of direct enforcement but one related to the administrative process—in part supervisory and in part collaborative. *Id.* at 1002 (footnote omitted).

See note 9 *supra*. This is in accord with Professor Jaffe's thesis that administrative agencies and the courts form a partnership. *See generally* L. JAFFE.

57. 485 F.2d at 1001 (footnote omitted).

58. 377 U.S. 426 (1964). See note 44 *supra* and accompanying text.

59. 15 U.S.C. § 78aa (1970). For the relevant text of this section, see note 48 *supra*.

60. 485 F.2d at 1001.

61. *Id.* at 1002. It will be recalled that normal FTC procedure, unlike that followed by the SEC, calls for the filing of a complaint and adjudication within the agency before resort is taken to the federal courts. See note 9 *supra*.

62. The court apparently ignored the contention of Justice Harlan in his concurrence in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 402-03 n.4, that the implied remedy created in *Borak* did not depend on section 27, but rather rested upon the need to provide an effective means of effectuating the purpose behind the Act. See note 49 *supra*. *See also* Comment, *Private Rights from Federal Statutes*, *supra* note 40, at 461-62.

63. 483 F.2d at 280.

unfair trade practices. Consumers cannot transmute that tool into a crowbar for prying open door 1337 to the federal courthouse."[64]

In contrast, Judge Solomon's dissent stressed the alleged inability of the FTC to effect the congressional purpose of consumer protection. Emphasizing the ineffectiveness of FTC cease and desist orders as deterrents against consumer fraud and the inadequacy of FTC resources to deal with its workload,[65] Judge Solomon argued that the intent behind the FTCA can become reality only through the courts' recognition of a right in private parties to enforce its provisions. Finally, his dissenting opinion referred to "the established principle that a party has a cause of action when damaged by conduct that violates a statute enacted for his protection."[66] His arguments failed to persuade his brethren, however, and in stating that a private right of action does exist under the FTCA, his dissent stands alone among the body of judicial opinion which has considered the subject.[67]

The underlying purpose of the 1938 amendments to the FTCA which gave the FTC the power to deal with deceptive business practices, was to "afford a protection to the consumers of the country that they had not heretofore enjoyed."[68] Yet, like Judge Solomon, numerous critics have asserted that the FTC has been ineffective in its role as protector of consumer interests,[69] thus indicating the need for judicial

64. *Id.* at 281.

65. Judge Solomon noted that the *Borak* court had stressed the practical inability of the SEC to enforce effectively proxy statement regulations in providing a private remedy. He argued that

> [t]he FTC's ability to protect consumers is even more severely circumscribed. In 1972, the FTC received 9,000 "applications for a complaint" each month. At that time there were only 27 attorneys in the Commission's Division of Food and Drug Advertising. With this disparity between need and resources, only a few consumer complaints could be considered and even fewer complaints issued. In fiscal 1971, the Commission's Division of Food and Drug Advertising issued only twelve complaints under Section 5 of the Trade Act. Four of these were contested and eight were settled by consent decrees. *Id.* at 282 (footnote omitted).

66. *Id.* at 283, *citing* RESTATEMENT (SECOND) OF TORTS § 286 (1965).

67. See notes 30-39 *supra* and accompanying text.

68. 83 CONG. REC. 392 (1938) (remarks of Congressman Lea).

69. The FTC has no power of its own to imprison, fine, assess or award damages for violations of the Act's prohibitions of unfair or deceptive trade practices. It may merely issue a cease and desist order, which can be appealed to a federal court of appeals, against the continuation of the particular activity. 15 U.S.C. § 45(b) (1970). If this order is affirmed by the court, the FTC may seek fines up to $10,000 a day for any violation of the order. Pub. L. No. 93-153, § 408(c) (Nov. 16, 1973), *amending* 15 U.S.C. § 45(*l*).

The ineffectiveness of the cease and desist order to achieve results is shown in the extended course of dealings between the FTC and the J.B. Williams Co. in regard to its advertising of the health tonic Geritol. The FTC began its investigation in 1959, issued its complaint iu 1962, and entered a cease and desist order in 1965. The order

implication of a private remedy for violations of the Act's provisions prohibiting deceptive or unfair business practices.[70] The immediate impact upon consumers of the *Holloway* and *Carlson* courts' refusal to imply such a private remedy is apparent. Private parties injured by unfair or deceptive business practices will be unable to utilize section 5 of the FTCA as a means of redressing their grievances, and they may therefore be denied the same degree of protection from unlawful practices as that afforded by other federal regulatory laws for which more effective means of enforcement are available.[71]

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was affirmed by the Sixth Circuit in 1967. J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967). Williams submitted a compliance report early in 1968. Late that year, the FTC held a hearing to determine the fact of compliance and found that the new advertising still violated the order. A second compliance report was requested. In March, 1969, the FTC found continuing violations of its 1965 order. *See* REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 43-44 (1969). Not until April 20, 1970, was a civil penalty suit filed. 3 TRADE REG. REP. at 24,451 (Docket No. 8547). The government's motion for summary judgment in this suit was granted in 1973, fourteen years after the original FTC investigation was begun. Penalties of $456,000 were assessed against Williams. United States v. J.B. Williams Co., 354 F. Supp. 521, 523 (S.D.N.Y. 1973). The impact of this penalty can be put in perspective only in the context of Williams' advertising expenditures of more than $7,000,000 per year devoted to Geritol liquid and tablets during the period 1969-71. *Id.* at 549 n.24. In this context, the $456,000 penalty for disobeying the cease and desist order was but a relatively minor added advertising expense.

A thoroughgoing study concluded that FTC efforts in the field of consumer protection have been "inadequate" and that "FTC resources may not match the scope of the problem . . . ." REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 37 (1969). The ABA Commission is not alone in its criticism of FTC effectiveness. *See, e.g.*, E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 390-93 (1964). *See also* G. ALEXANDER, HONESTY AND COMPETITION: FALSE-ADVERTISING LAW AND POLICY UNDER FTC ADMINISTRATION (1967); Kirkpatrick, *The Federal Trade Commission as a Consumer Protection Agency*, 15 ANTITRUST BULL. 333 (1970).

70. One commentator has even asserted that a court may imply a private remedy notwithstanding a lack of congressional intent to provide one. *See* Comment, *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U.L. REV. 413, 429-44 (1972).

71. Consumers may bring a common law action for deceit against false or deceptive advertisers, but this alternative has substantial limitations, not the least of which is overcoming difficulties of proof in meeting the technical requirements for a common law cause of action. Furthermore, since the possibly more effective means of aggregating claims embodied in the FED. R. CIV. P. 23 class action mechanism would not be available with respect to a common law claim raised in a state court, the litigation expense in many such cases may be clearly out of proportion to the monetary stake. The district court in *Holloway* took judicial notice of the minimal damages which could have been suffered by plaintiff Holloway, the only plaintiff who claimed to have purchased defendant's product (six fifty-tablet bottles) as a result of the deceptive advertising. 327 F. Supp. at 22.

The importance of affording the disgruntled individual some avenue of relief was

However, the *Holloway* and *Carlson* courts correctly recognized that even if the FTC is indeed infected by such administrative inadequacy, it does not necessarily follow that the proper remedy is judicial implication of a private right of action under the FTCA. It is difficult to dismiss the *Holloway* majority's concern[72] that such actions would have the effect of undermining the system of coordinated enforcement emphasizing voluntary compliance which the legislative history of the FTCA clearly demonstrates forms the heart of the Act's regulatory scheme.[73] Moreover, the allowance of suits by private

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pointed out years ago when it was observed that "the claim of the individual to enforce somewhere in some way what is apprehended psychologically as a 'right' is an important claim . . . ." Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485, 531 (1940).

These psychological fires can easily be fueled by an emotionally appealing argument, using *Borak*, to the effect that the affluent are better protected from securities fraud than are ordinary citizens from consumer fraud. *See* Lovett, *supra* note 26, at 277:

> A remarkable contrast now exists in the law; whereas those citizens affluent enough to be deceived in their purchase of stocks and bonds enjoy an implied private right of action under federal securities law, the same type of legal protection is denied the ordinary run of citizens who are the victims of deceptive trade practices in making consumer purchases. It would seem that our law accords a distinct preference and a superior level of protection to the "better class" of citizens, i.e., those prosperous enough to purchase corporate securities.

See the following passage quoted by Judge Solomon:

> Crime is crime whether it be at the tip of a gun or the tip of a pen and the tip of a tongue of a fraudulent sales operator. All reasonable forces for years have decried consumer fraud. It is long past time we turned orations into actions, lament into law, exhortation into fraud elimination. Carlson v. Coca-Cola Co., 483 F.2d 279, 283 (9th Cir. 1973) (dissenting opinion).

72. See notes 55-56 *supra* and accompanying text.

73. The *Holloway* court noted that the agency-directed enforcement scheme was the product of a legislative balance which took into account not only consumer protection but also interests of the businesses affected, with particular concern for tempered enforcement, the orderly development of commercial standards, and freedom from multiplicious litigation. 485 F.2d at 997.

The legislative history of the 1938 amendments supports this view of the FTC's role in seeking compliance with the mandate of section 5. The following comments by Congressman Lea, the primary House sponsor of the amendments, clearly reveal a concern about subjecting businessmen to immediate prosecution for the Commission of unfair or deceptive trade practices:

> The question of penalties is involved. An amendment is about to be proposed here under a claim of making the penalties more severe. The proposal is that every violation of the advertising section shall be prosecutable in the courts in the first instance to collect a fine of not exceeding $3,000. Every violation would be made subject to a civil action to secure $3,000 in the courts instead of leaving the businessman as he is now left under the Federal Trade Commission procedure, to go to the Commission, where, if he can convince them of his honesty and purpose to conform to the law, the matter is closed so far as the future is concerned, unless he continues to commit his offense.
>
> The effect of making every case a court case would be to clog the courts. The thousands of cases which are now disposed of without burdening the courts would clog the courts, create needless litigation and expense, or else

parties would, as the *Holloway* majority suggested, fundamentally alter the relationship between the courts and the Commission in that it would shift the court's role from that of reviewing a prior administrative adjudication of a disputed claim to that of making a de novo determination of the validity of a claim, including the finding of facts as well as the formulation of conclusions of law. These problems may well account for the fact that, although various bills have been proposed to amend the FTCA by creating a private right of action thereunder, none has yet emerged from committee.[74] Consequently, in responding to the current dissatisfaction with existing restraints on false advertising,[75] it would seem necessary to seek other means of ensuring that the public is adequately protected from such practices.[76] Some state consumer legislation expressly provides for private rights of action;[77] how-

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the law would become a joke.

In addition these penalties would in effect largely destroy the usefulness of the Federal Trade Commission for ironing out difficulties with business instead of taking them into court. The great majority of businessmen in this country are honest. Any assumption that business as a whole is organized crime or graft is simply not true to the facts. The great majority of people who advertise want to do the right thing, and if the Government points out to them where they are making a mistake and are in violation of the law, they are willing to conform to the law. The man with good intentions should not be penalized before he has had a chance to correct his mistake. 83 CONG. REC. 392 (1938).

74. *See* S. 1823, H.R. 1078, 5368, 92d Cong., 1st Sess. (1971), *as cited in* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 1001 n.69 (D.C. Cir. 1973). For a sample of the conflicting views which have thwarted congressional action thus far, *compare* Eckhardt, *Federal Leverage*, 6 TRIAL 14 (April/May 1970) *with* McLaren, *An Essential Filter*, 6 TRIAL 18 (April/May 1970).

75. The limitations of the common law remedy for false advertising, an action for deceit, are discussed in note 71 *supra*.

76. One imaginative consumer class action has attempted to obtain relief for damages caused by allegedly false advertising by using section 43(a) of the Lanham Trade-Mark Act. Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971) (Justices Douglas and Stewart were of the opinion that certiorari should have been granted). *Colligan* concerned allegations of false descriptions and misrepresentations of defendant's interstate ski tour service club. The court held that the consumers lacked standing to bring the action. The Lanham Act provides:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by use of any such false description or representation. 15 U.S.C. § 1125(a) (1970).

See 46 N.Y.U.L. REV. 807 (1971) (discussion of the *Colligan* case).

77. *See* CAL. CIV. CODE § 1780 (West 1973); HAWAII REV. STAT. § 480-13 (Supp. 1972); MASS. ANN. LAWS ch. 93A, § 9 (Supp. 1972); N.M. STAT. ANN. 49-15-8 (Supp.

ever, such legislation does not seem likely to become universal despite the current widespread concern for consumer protection.

One step in a more viable approach to ensuring effective protection of rights of the consuming public might be to increase the resources devoted to the policing of false or deceptive advertising by the FTC. While some observers have concluded that the FTC is woefully incapable of dealing with even its current workload,[78] certainly in recent years the agency has assumed a more active and vigorous role in this area.[79]

1973); N.C. GEN. STAT. § 75-16 (Supp. 1971); ORE. REV. STAT. § 646.638 (1971); S.D. COMP. LAWS ANN. § 37-24-31 (1972); VT. STAT. ANN., tit. 9, § 2461(b) (Supp. 1970); WASH. REV. CODE ANN. § 19.86.090 (Supp. 1972).

North Carolina, for example, at one time limited its right of action for violation of its monopolies and trusts law to "such person, firm or corporation" whose *business* was "broken up, destroyed or injured" thereby (emphasis added). N.C. GEN. STAT. § 75-16 (1965). In 1969, the legislature drastically altered the impact of this section by creating a right of action in "any person" so injured. N.C. GEN. STAT. § 75-16 (Supp. 1971). *See* Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896 (1970).

Even where state legislation does not create a private right of action in express terms, a state court may be willing to find an implied private remedy. In Rice v. Snarlin, Inc., 131 Ill. App. 2d 434, 266 N.E.2d 183 (App. Ct. 1970), the court held that a private action could be maintained by a model and her mother who invoked the Illinois Consumer Fraud Act, ILL. ANN. STAT. ch. 121 1/2, § 262 (Supp. 1973), to attack fraudulent misrepresentations in connection with the sale of a contract to place the model's name, address, and telephone number in a directory listing. The court found that the Illinois General Assembly had actually intended to create a private right of action when it enacted the Consumer Fraud Act. Rice v. Snarlin, Inc., 131 Ill. App. 2d at 442, 266 N.E.2d at 188. For a criticism of the "statutory interpretation approach," see Comment, *Private Remedies Under the Consumer Fraud Acts*, *supra* note 70. The author asserts that the *Rice* court arrived at the right result for the wrong reasons, whereas the district court in *Holloway* got the wrong result using the preferable "doctrine of implication approach." *Id.* at 422.

78. See notes 65, 69 *supra*.

79. Evidence of the FTC's intent to devote more attention to advertising practices can be found in its new advertising claim substantiation program. *See* 36 Fed. Reg. 12,058, 14,680 (1971). In January, 1974, it announced that it had "streamlined and tightened its advertising substantiation program." 2 TRADE REG. REP. ¶ 7573.70 (1974).

For examples of FTC action against false advertising and for discussion of the range of breadth in FTC enforcement orders, see FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392-95 (1965) (broad FTC order against use of simulated sandpaper in shaving cream advertisement upheld); Jacob Seigel Co. v. FTC, 327 U.S. 608 (1946) (FTC's total prohibition against use of trade name "Alpacuna" held too broad); Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973) (broad FTC order against wrongdoer as well as associates upheld); Consumer Prods., Inc. v. FTC, 400 F.2d 930 (3d Cir. 1968), *cert. denied*, 393 U.S. 1088 (1969) (order regarding interstate sale of encyclopedias held neither too broad nor too generalized); Erickson v. FTC, 272 F.2d 318, 322 (7th Cir. 1959) (broad restrictions on advertising by hair and scalp specialist upheld). *See generally* Note, *The* Pfizer *Reasonable Basis Test—Fast Relief for Consumers But a Headache for Advertisers*, 1973 DUKE L.J. 563.

Furthermore, recent developments have significantly clarified and enhanced the FTC's regulatory authority and indicate that the Commission may become a more effective protector of consumer rights. In *National Petroleum Refiners Association v. FTC*,[80] the Court of Appeals for the District of Columbia Circuit upheld the Commission's authority to promulgate trade regulation rules which have the effect of substantive law. The ability to make rules which can be used in the FTC's adjudicatory proceedings as prima facie evidence of the required standard for business activity should have the effect of helping to streamline agency enforcement action.[81] In *Universal Credit Acceptance Corp.*,[82] the FTC itself asserted a right to order restitution.[83] Although this development does not amount to an empowering of the Commission to assess damages, it nonetheless puts a remedy stronger than the cease and desist order in its hands. Yet another boost to FTC enforcement power came in November, 1973, with the FTCA amendments attached as a rider to the Alaska Pipeline Bill.[84] These

80. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 42 U.S.L.W. 3485 (U.S. Feb. 26, 1974), *rev'g* 340 F. Supp. 1343 (D.D.C. 1972). The significance of the rulemaking power goes beyond enforcement to other considerations. *See, e.g.*, Professor Davis' statement that "[p]erhaps the most promising way to control prosecutors' discretion is through administrative rule making." K. DAVIS § 4.08, at 191 (Supp. 1970). *See* Note, *FTC Substantive Rulemaking Authority*, 1974 DUKE L.J. 297, in *1973 Developments*.

81. In affirming the power of the FTC to promulgate substantive rules, the *National Petroleum Refiners* court observed that the Commission

> has remained hobbled in its task by the delay inherent in repetitious, lengthy litigation of cases involving complex factual questions under a broad legal standard . . . .
>
> There is little disagreement that the Commission will be able to proceed more expeditiously, give greater certainty to businesses subject to the Act, and deploy its internal resources more efficiently with a mixed system of rulemaking and adjudication than with adjudication alone. With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up. 482 F.2d at 690.

82. 32 AD. L.2d 454 (FTC 1973) (franchise scheme involving a plan whereby merchants could honor all types of credit cards held to violate FTCA § 5).

83. The FTC order was not merely prospective in effect. It also directed refund of all monies paid by franchisees and retail merchant members for franchise fees, down payments, or travel expenses incurred in connection with franchise applications, as well as membership fees, dues, and discount fees during the period from Jan. 1, 1967, to the effective date of the order. *Id.* at 457. A related class action, independent of the FTC proceedings, Headley v. Continental Credit Card Corp., was filed in United States District Court for the Northern District of California. In that case, the stipulated amended judgment gave an award of $3,937,994.67 to certain franchisees and other members of the class. *Id.* at 472 n.29. The agreement on this stipulated judgment makes it unlikely that the FTC decision on restitution will be appealed, and the possibility of a judicial test from this case of the FTC's power to order restitution is, therefore, remote.

84. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408 (Nov. 16, 1973).

amendments are designed to give the FTC "the requisite authority to insure prompt enforcement of the laws the Commission administers by granting statutory authority to directly enforce subpoenas issued by the Commission and to seek preliminary injunctive relief to avoid unfair competitive practices."[85] Considered together, these developments indicate a willingness on the part of the courts, the Commission, and Congress to strengthen FTC enforcement powers and suggest the prospect of increased protection for consumer interests.

Even in light of these developments, more potent additions to the FTC's authority may be required if the FTC is to fulfill effectively its mission under the Act. Accordingly, the most attractive method of transforming the FTCA into an effective instrument of consumer protection may be legislative action designed to increase further the capacity of the FTC to deal effectively with deceptive business practices. Granting the Commission the power to award damages and to impose criminal sanctions for violations of the FTCA's consumer protections provisions would greatly strengthen the agency's hand and serve as a significant deterrent for would-be violators. Such an approach would avoid the dangers inherent in creating, either judicially or legislatively, a private right of action under the FTCA.[86] The Commission would

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85. *Id.* § 408(b). The first of these purposes is carred out primarily by section 409(b) of the Trans-Alaska Pipeline Authorization Act, which adds 44 U.S.C. § 3512 (d) governing the obtaining of information for independent regulatory agencies. The amended provision shifts from the Comptroller General to the independent regulatory agencies authority to make the final determination as to whether information sought by the agency is necessary in carrying out its statutory responsibilities and whether to collect such information.

The second principal purpose is realized through section 408(f) of the Act. Under this subsection, the FTC may now bring suit in the district courts to obtain temporary restraining orders and preliminary injunctions wherever it

> has reasons to believe (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public . . . . Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(f) (Nov. 16, 1973).

Finally, the amendments also provide for increased fines for violations of Commission orders. *Id.* § 408(c). Furthermore, due to the amendments it is no longer necessary for the FTC to go through the Attorney General in every case to bring a court action; if the Attorney General fails to act for the Commission within ten days after its formal notification and consultation with him about court action it desires to take, the Commission can appear in court in its own name and by its own attorneys. *Id.* § 408(d).

86. The dangers inherent in the creation of such a private right of action under the FTCA and Congress' failure to act as yet on several bills proposing such an amendment to the Act are discussed in uotes 73-74 *supra* and accompanying text.

be able to develop a coordinated enforcement program while maintaining its procedures for voluntary compliance, and the courts would continue to have the benefit of prior agency consideration of issues which are brought before them. Strengthening the hand of the FTC in this fashion would be likely to provide substantial protection for the American consumer and would likewise provide for the orderly development of enforcement standards under the direction of an agency sensitive to both the rights of consumers and the problems of industry.