Advertising, Product Safety, and a Private Right of Action under the Federal Trade Commission Act

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Advertising is undoubtedly one of the most pervasive forces in American life:1 It has been defined as “the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public especially by means of printed or broadcast paid announcements.”2 In today’s society it is a necessary tool of the manufacturer and the retailer. Whether its form be a commercial on nationwide television or a street sales pitch, it is their means of communicating to the consumer the various attributes of their products or services. As such, it may be beneficial to both business and consumers, letting business inform the public of the better mousetraps which it has to offer and letting the consumer hear of and choose from the various products and services offered.

However, certain factors may tend to threaten the benefits to the consumer and to the business community as a whole, if advertisers allow such factors to unduly influence them in their advertising practice. First, it must be recognized that perhaps the primary objective of advertising is to convince the consumer of what is most likely to make him spend his money on the advertiser’s product or service.3 After all, the advertiser is in business to make money. Second, many products are not actually very different from those with which they compete, no matter what advertisers claim.4 Consequently, advertisers may go to great lengths to portray their products as having superior qualities which will make the consumer rush out and buy them.5 This promotion of products may often take the form of exceptionally high praise or slight exaggeration, known as “puffing”.6 Sometimes, however, adver-

3. See generally False Advertising, supra note 1, at 600.
4. See The “NADER REPORT”, supra note 1, at 17.
5. Id. at 29-28.
6. Puffing is a technique which has been fully accepted as allowable by industry and the courts. See, e.g., Goodman v. Federal Trade Comm’n., 244 F.2d 584 (9th Cir. 1957);
tisers may resort to the use of statements which are either untrue, half true, or misleading.\textsuperscript{7} Herein lies deceit, "deceit of the buyer who is thereby led to purchase a product or service which he would not purchase if he were fully informed with respect to all the relevant facts."\textsuperscript{8}

If allowed to go unchecked, false and misleading advertising may merely induce a consumer to spend a bit more money on a product than he would have, had he known the truth.\textsuperscript{9} However, the problem may take on dimensions of much greater proportions for the individual consumer if an unsafe product is advertised as being safe, or if an unsafe utilization of a product is portrayed. A consumer may then rely on the demonstrated safety of a product or of a particular use of a product and may consequently suffer serious physical harm.\textsuperscript{10} The problem may be particularly acute where advertising directed at children is involved.\textsuperscript{11} In any instance, the potential for injury would seem to impel the creation of means for stopping this type of misleading advertising. In such situations, these questions arise: What sanctions can be enforced against the advertiser who represents the use of his product in a manner claimed to be safe, when such use actually presents a danger to the consumer? How can the consumer be protected from being misled by such advertising?


7. To be misleading, an advertisement need only carry an innuendo which the consumer may be likely to read into it. If two inferences reasonably may be drawn from an advertisement, one true and one misleading, the presumption is that the advertisement is misleading. See, e.g., Montgomery Ward & Co. v. Federal Trade Comm'n, 379 F.2d 666 (7th Cir. 1967); Regina Corp. v. Federal Trade Comm'n, 322 F.2d 765 (3d Cir. 1963); Country Tweeds, Inc. v. Federal Trade Comm'n, 326 F.2d 144 (2d Cir. 1964).

8. False Advertising, supra note 1, at 601.

9. See, e.g., Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973), discussed infra. Note that although the individual consumer may lose only a few pennies, a company may support itself very well as the result of millions of consumers losing those pennies.

10. See, e.g., Commission Issues a Complaint Against Maker of "Burnor" Contact Lenses; Court Injunction Granted, Federal Trade Commission News (Jan. 23, 1974) ("safe" contact lenses could actually cause serious eye damage if used as advertised); Federal Trade Comm'n. v. Toshiba America, Inc., [1970-1973] Transfer Binder] TRADE REG. REP. ¶ 20,010, at 22,008 (FTC 1972) (microwave oven emitting unsafe level of X-rays, when advertised as meeting HEW standards); West v. Alberto Culver Co., 486 F.2d 459 (10th Cir. 1973) (shampoo, used as advertised, ruined hair); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (home permanent advertised as "gentle" caused hair to fall out); Wright v. Carter Products, Inc., 244 F.2d 53 (2d Cir. 1957) (deodorant advertised as "safe" and "harmless" caused severe contact dermatitis).

I. THE FEDERAL TRADE COMMISSION ACT

A. History and Structure

In 1914, Congress passed “An Act to Create a Federal Trade Commission, to define its power and duties and for other purposes” [hereinafter cited as the FTC Act]. Section 5 of that Act proclaimed “[t]hat unfair methods of competition in commerce are hereby declared unlawful”, and empowered the Federal Trade Commission (FTC) to prevent the use of unfair methods of competition. Enforcement of this section by the Commission was limited to issuance of cease and desist orders, appealable to federal appeals courts. While false or misleading advertising was not specifically mentioned in the Act, there is little doubt that this was one of the problems against which Section 5 was aimed. Indeed, two of the first complaints issued by the Trade Commission were against textile manufacturers who used misleading advertising in representing what materials were used in their fabrics.

In 1931, in Federal Trade Commission v. Raladam Co., the Supreme Court limited the scope of FTC enforcement by indicating that “methods of competition” as mentioned in Section 5 necessitated the showing of economic injury in fact to a competitor as a prerequisite to the institution of Section 5 proceedings. Partially in response to this, Congress, in 1938, passed the “Wheeler-Lea Amendments” to the FTC Act. In addition to “unfair methods of competition”, “unfair or deceptive acts or practices in commerce” were declared unlawful. To give more bite to the Commission’s enforcement procedures a civil penalty of not more than $5000, accruable to the United States, was added for violation of finalized cease and desist orders. Also, dissemination of false advertising “for the purpose of inducing, directly or indirectly, the purchase of

15. See False Advertising, supra note 1, at 605.
17. 283 U.S. 643 (1931).
foods, drugs, devices, or cosmetics”, whether the advertising or the purchase be in commerce, was specifically made unlawful and specifically made an unfair or deceptive act or practice within the meaning of Section 5(a) of the Act.\footnote{21} Violation of this section was made a misdemeanor carrying a maximum penalty of $5,000 and six months imprisonment for a first offense if the violation “is with intent to defraud or mislead” or may be injurious to health, and a maximum penalty of $10,000 and one year imprisonment for any subsequent offense with the same intent or potential effect.\footnote{22}

\section*{B. FTC Enforcement of the Act}

Thus, it would seem that Congress has provided the means necessary to combat false and misleading advertising. However, these tools are of little use to the consumer if they are not or can not be used. Under the FTC Act, the Federal Trade Commission is apparently meant to be the primary enforcer of its provisions. Over the years, though, the FTC has gained notoriety for its lack of effectiveness in enforcing the provisions of the Act.\footnote{23} This reputation is not necessarily the result of a lack of desire on the part of the FTC for enforcement. Rather, it may more likely be a function of both the restricted enforcement powers available to the Commission and the magnitude of the deceptive advertising problem, a problem compounded by having been placed in the hands of a governmental agency with limited resources and varied responsibilities.

The primary enforcement weapon available to the FTC is the cease and desist order. Such an order may be issued by the Commission after it has held investigations, issued a complaint, and held a hearing.\footnote{24} Every violation of a final cease and desist order subjects a company to a fine of up to $5,000.\footnote{25} However, enforcement of such an order is subject to much abuse, as the order does not become final until complete court review has been had of it.\footnote{26}

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Thus, a company may drag a case through the courts for a number of years before it actually has to comply with a cease and desist order. A deceptive advertising campaign of a few months duration could easily avoid the wrath of the FTC.

As has been shown in the past, even an advertising campaign lasting for quite a few years may elude banishment at the hands of the FTC. One such example was the Carter’s Little Liver Pills advertising scheme. In that case, the FTC alleged and the court found, contrary to Carter’s advertising, that Carter’s pills contained a strong medicine which was not “safe to use under all circumstances”, that they did not cure the many ills which they were claimed to cure, and that they had the potential to cause serious physical problems, if taken as directed. The FTC issued its first complaint in 1943, although a cease and desist order did not become final until sixteen years later, when the Supreme Court denied certiorari in 1959.

The FTC itself recognized that it was being dwarfed by the size of the deceptive advertising problem when it noted in its 1972 annual report that a

concerted effort to ensure maximum utilization and benefit from its limited resources of dollars and manpower has become increasingly urgent in the face of a continued rise in the number of consumer protection matters requiring the Commission’s attention under the multiple statutes it administers.

The difficulty can be read from the face of statistics. For example, in fiscal 1972 the FTC was able to issue 281 consumer protection complaints, of which 118 were under § 5 of the FTC Act. However, the Commission received 9,000 applications per month from consumers asking for complaints during the same time period.
So, what does one do? Congress has recognized the existence of a deceptive advertising problem and has legislated against it. But, the administrator of the legislatively created agency has shown that it just does not have the capabilities to attack the problem with a real degree of success. Is there a way to take up the slack left by the Federal Trade Commission?

III. PRIVATE RIGHTS OF ACTION

If one suffers actual injury through reliance on deceptive advertising, he might recover money damages in a cause of action based on that advertising. One method of recovery may be through a breach of warranty action. Otherwise, one may wish to bring a cause of action in tort based on misrepresentation, perhaps utilizing the FTC Act to shift the burden of proof of fault to the advertiser.

However, either one of these causes of action may involve problems of proof. Also, neither of these actions provides a basis for the actual control of deceptive advertising. They do not stop the deceptive practices, nor do they protect consumers who may be injured in the future through use of a product as advertised. The individual injured may be recompensed, but perhaps the injury could have been prevented entirely had the deceptive advertising been dealt with beforehand.

A possible solution to the dilemma may emerge, if consumers were granted a private right of action to “enforce” the FTC Act. Therein, would an individual consumer be able to take the words of the FTC Act declaring deceptive advertising to be unlawful and use them, as would the FTC itself normally, to ask a court

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34. See generally Products Liability Based Upon Violation of Statutory Standards, 64 Mich L. Rev. 1388, 1425 (1966); Restatement (Second) of Torts §§ 286 et seq., §§ 310-311 (1965). If the statute may be so utilized, it may indicate negligence per se, prima facie evidence of negligence, or mere evidence of negligence on the part of the advertiser, depending on the state's law applied in the individual case. The statute would act as a legislatively defined standard of conduct, to which courts would look to see if a defendant had been negligent.

to enjoin deceptive advertising and assess appropriate civil and criminal penalties. In addition, the aggrieved consumer may be able to recover the purchase price of goods bought in reliance on deceptive advertising.6 This may provide a substantial deterrence factor, particularly if consumers would be able to bring class actions for recoveries.7

A. General Recognition

Although the FTC Act nowhere specifically provides for private rights of action, the idea of being able to judicially imply such rights of action has found a niche in the law in the twentieth century.8 In the United States, the Supreme Court is generally acknowledged to have first recognized the viability of implying private rights of action in Texas & Pacific Railway Company v. Rigsby.9 There, a railway worker was injured as the result of a defective ladder on a train. He sued the Railway Company for damages, basing his claim on the Federal Safety Appliance Acts, although the Acts provided only for penal sanctions.10 The Court noted:11

None of the Acts, indeed, contains express language conferring

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6. Recently, "restitution" has been recommended as a remedy that should be available under Section 5 of the FTC Act, even without consideration of giving consumers a private right of action. See Commissioner Thompson of FTC Suggests New Approach to Deal with Deceptive Advertising, Federal Trade Commission News (Oct. 27, 1973):

In his first major speech since being sworn in as a commissioner last July 2, [Commissioner] Thompson stated that he had grave doubts about the effectiveness of the traditional "cease-and-desist" order. Speaking of restitution he stated: "I have already told my colleagues at the FTC that I am strongly in favor of a remedy called restitution, an order requiring the violator of our statutes to return to his victims the full fruits of his illegal practices . . . . I really don't understand how you can expect to stop rustling if you don't at least make the rustler give the cows back . . . . So long as there is a net profit to be realized from the practice, deceptive advertising is presumably going to be with us. If we want to deter it on a really broad scale, we have to take away its profitability."

7. In the past few years there has been an upsurge in class action suits for damages. This type of suit could be particularly useful in the field of deceptive advertising of unsafe products, as the amount of recovery for the individual before the occurrence of actual physical injury would, in most instances, be minimal. See generally Dole, The Settlement of Class Actions for Damages, 71 Colum. L. Rev. 971 (1971); Public and Private Consumer Remedies in New York, 34 Alb. L. Rev. 326, 337 (1970); Dole, Consumer Class Actions Under the Uniform Deceptive Trade Practices Act, 1968 Duke L.J. 1101.

8. See generally, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv. L. Rev. 285 (1963) [hereinafter cited as IMPLYING CIVIL REMEDIES].


10. 27 Stat. 531 (1893); 32 Stat. 943 (1903); 36 Stat. 298 (1910).

11. 241 U.S. 33, 39 (1916). While Rigsby has generated many private right of action cases, there apparently is no longer such a right of action under the Safety Appliance Acts.
a right of action for the death or injury of an employee; but the
safety of employees and travelers is their principal object, and
the right of private action by an injured employee...has never
been doubted...A disregard of the command of the statute
is a wrongful act, and where it results in damage to one of the
class for whose special benefit the statute was enacted, the right
to recover the damages from the party in default is implied...
“So, in every case, where a statute enacts, or prohibits a thing
for the benefit of a person, he shall have a remedy upon the same
statute for the thing enacted for his advantage, or for recom-
pense of a wrong done to him contrary to the said law.”

Rigsby has fathered many progeny, including cases allowing
private rights of action under the Railway Labor Act,42 the Com-
 munications Act of 1934,43 the Civil Aeronautics Act,44 the Air
Commerce Act,45 the Federal Aviation Act,46 the Rivers and Har-
bors Act,47 the Wagner-Peyser Act,48 and the Securities Exchange
Act.49 The criteria outlined in these cases as being necessary for
the implication of a private right of action are that the plaintiffs
must be in the class of people sought to be protected by an act,
that the plaintiffs suffer some degree of physical or economic
injury, and that the plaintiffs’ injury flows from conduct by the
defendants in contravention of the protecting act.

Such actions may be viewed as having the same effect as
common law tort actions which use statutes to define a standard
of conduct constituting per se negligence, i.e., creation of a strict
liability where it would not have otherwise existed.50 However, the
private right of action under a statute must at the same time be
distinguished from a common law tort action.51 The implied pri-

See Jacobson v. New York, New Haven, & Hartford Ry., 206 F.2d 153 (1st Cir. 1953), aff’d,
per curiam, 347 U.S. 909 (1954). The circuit court found that a private right of action
under these Acts would conflict with their function relative to the Employers’ Liability
42. See Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstell v. Brother-
hood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944).
43. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).
45. Roosevelt Field Inc. v. Town of North Hempstead, 84 F. Supp. 456 (E.D. N.Y.
1949).
50. See Implying Civil Remedies, supra note 38, at 286.
51. Cf. Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches
of Statutory Interpretation and Implication, 67 Nw. L. Rev. 413 (1972) [hereinafter cited

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Private right of action is a new cause of action in and of itself, not an application of a new standard to an already available cause of action. This is of particular importance when a federal statute is involved, for a uniformly applicable federal cause of action is created. A plaintiff need not look to the treatment of statutes in an individual state's tort law; he need only look to the federal statute itself for relief.**

### B. Historical Context of Private Actions Under the FTC Act

While implication of a private right of action has certainly proven to be a realistically workable tool,** courts will not allow all plaintiffs to claim a right of action under all statutes. This is particularly true when a statute provides an adequate administrative remedy.**

Indeed, two cases decided by the Supreme Court in the 1920s refused to allow a private right of action under §5 of the FTC Act. In *Moore v. New York Cotton Exchange*,** the president of the Odd Lot Cotton Exchange, an organization which bought and sold cotton for various groups, sued the New York Cotton Exchange for refusing to enter into a contract whereby the Odd Lot organization could receive price quotations from the New York Exchange. The complaint was principally bottomed in an antitrust cause of action. However, the Court summarily dismissed an alternate cause of action based on unfair methods of competition as proscribed in §5 of the FTC Act, saying only that "relief in such cases under the Trade Commission Act must be afforded in the first instance by the commission."**

In *Federal Trade Commission v. Klesner*,** the defendant used the name of a competitor's shop in conducting his own business. At the instigation of the competitor, the FTC brought suit to ask for an order commanding Mr. Klesner to cease and desist from using the name. The Supreme Court decried the use of the FTC for the redressing of anything but essentially public grievances.**

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**See Implying Civil Remedies, supra note 38, at 286-287.
52. See note 35 supra.
54. 270 U.S. 593 (1926).
55. Id. at 603.
56. 280 U.S. 19 (1929).
57. Id. at 25.
Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. 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.

The Court acknowledged that, usually, the Commission has discretion in determining which suits are in the public interest. However, here, the Court reviewed the specific facts of the case on its own and ruled as a matter of law that the plaintiff's suit was not in the public interest.

While Moore and Klesner dealt with private rights of action under §5 of the FTC Act, their application as analytical tools to a present day suit seeking a private right of action under Section 5's deceptive advertising sanctions is questionable. Both were unfair competition cases. Neither case dealt with protection of consumers. Both were decided before adoption of the sweeping consumer protection and deceptive advertising provisions in the Wheeler-Lea Amendments. Neither case touched on the issue of the ineffectiveness of the Federal Trade Commission. Moore did not involve advertising at all, and Klesner did only in an oblique sense. Moore provided no analysis of the merits of a private right of action, and Klesner really analyzed only the Commission's ability redress an essentially private wrong.

Nevertheless, Moore and Klesner have regularly been upheld in cases denying the existence of a private right of action under §5 of the FTC Act. However, most of these cases have not dealt with consumers or with advertising. Furthermore, some of the courts have supported the Moore and Klesner holdings only in dicta, while the others have dealt with the private right of action issue

59. See notes 18-22 supra and accompanying text.
60. See, e.g., Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 268 (1940) (analogizing the FTC Act with the NLRB Act); United States v. St. Regis Paper Co., 355 F.2d 688, 693 (2d Cir. 1966) (holding that attorney general cannot act when an FTC order has been violated, unless the FTC has so requested); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 352 (3d Cir. 1964) (dealing with the statute of limitations under the Clayton Act); Atlanta Brick Co. v. O'Neal, 44 F. Supp. 39 (E.D. Tex. 1942) (dealing with the interrelation of the FTC Act and the Sherman Act).
Two cases handed down within the past year in two federal circuit courts did deal directly with false advertising and private suits brought by consumers under the FTC Act. Although neither case dealt with unsafe products, both *Carlson v. Coca-Cola Company* and *Holloway v. Bristol-Myers Corporation,* in their denial of a private right of action under §5 of the FTC Act, raised the type of issues and provided the type of analysis which must be taken into consideration in propounding a theory of private consumer action.

C. *Carlson v. Coca-Cola Company*

In *Carlson,* the plaintiffs alleged that defendant had made misrepresentations in conducting a national sales promotion contest. They claimed that the defendant had improperly made unclear the number of correct answers per question which the contest necessitated for the winning of prize money. The plaintiffs, acting individually and as members of the class of contest entrants, grounded their complaint on a cause of action under §5 of the FTC Act. The court dismissed the complaint for want of jurisdiction. Judge Solomon entered a vigorous dissent favoring a private right of action under §5 of the Act.

Citing various cases which held that there was no private right of action, the *Carlson* majority reasoned that the plaintiffs had failed to state a claim “arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies,” since “[t]o acquire federal jurisdiction, a plaintiff must assert a colorable right to a remedy under a particular federal statute.”

The decision of the majority in *Carlson* is somewhat problematic, in that the court seemed to say that it did not have jurisdiction to decide the issue of a private right of action because the resolution of this issue on its merits would have come out against the plaintiffs; there was no jurisdiction to determine

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62. 483 F.2d 279 (9th Cir. 1973) (dissenting opinion).
64. See notes 60 and 61 supra and accompanying text.
65. 483 F.2d 279, 280 (9th Cir. 1973) citing 28 U.S.C. § 1337.
66. *Id.*
whether a private right of action existed under the Act because there was no private right of action under the Act.

Under 28 U.S.C. §1337 federal district courts are given “original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies”.

Admittedly, determining exactly what “arises under” an Act of Congress may be difficult. However, the problem usually arises in determining whether the action flows directly from a federal statute, or whether the federal question involved is collateral to the action itself. Is this basically a state cause of action in which the federal question is used merely as an excuse for getting into federal court? Or, does the statute involved create a federal duty? In Carlson, the issue is whether or not the plaintiffs have a remedy under a particular federal statute; thus the issue clearly involves a federal question.

Granting of jurisdiction by a federal court would seem mandated in this type of situation by the holdings in Bell v. Hood and Wheeldin v. Wheeler. In Bell, the plaintiffs sued agents of the Federal Bureau of Investigation, alleging that damages had been suffered as the result of the defendants’ search of the plaintiffs’ premises and imprisonment of the plaintiffs in violation of their Fourth and Fifth Amendment rights. The plaintiffs claimed that federal courts should have jurisdiction of the matter under 28 U.S.C. §24, since the case was one arising under the Constitution and more than $3,000 damages were alleged. The Supreme Court made it clear that jurisdiction should be granted in such a case under the Constitution or federal statutes, unless the federal claim was immaterial or wholly insubstantial and frivolous:


70. 373 U.S. 647 (1963); cf. T.B. Harms Co. v. Eliscu, 339 F.2d 823, 828 (2d Cir. 1964); Hanna V. Home Ins. Co., 281 F.2d 298 (5th Cir. 1960).

71. 36 Stat. 1091 (1911), as amended, 28 U.S.C. § 41(1) (1940). The statute vested the federal district courts with jurisdiction over civil cases where the amount in controversy exceeded $3,000 and where the case arose under the Constitution, laws, or treaties of the United States. That portion of the statute is now incorporated in 28 U.S.C. § 1331 (1970) with an increased jurisdictional amount of $10,000. The words “arises under” in 28 U.S.C. § 1331 and 28 U.S.C. § 1337 are to be construed in the same manner. See note 68 supra. The Carlson court also noted this. 483 F.2d 279, 280 n. 1 (9th Cir. 1973).

72. 327 U.S. 678, 682 (1946).
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Jurisdiction. . . is not defeated. . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

In Wheeldin, the plaintiff claimed that he had been unlawfully served a subpoena by an investigator for the House Un-American Activities Committee in violation of the Legislative Reorganization Act of 1946. He also alleged that the statute which enabled the Committee to issue subpoenas was unconstitutional. The Supreme Court, while eventually deciding that a federal cause of action for damages did not exist, noted that "on the face of the complaint the federal court had jurisdiction." Quoting from Bell, the Court noted that "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction."

The point is that a federal court does have jurisdiction to decide whether a particular remedy may be granted under a particular federal statute. Thus, the Carlson court probably should have retained jurisdiction in order to construe the FTC Act as either permitting or denying a private right of action.

D. Holloway v. Bristol-Myers Corporation

Holloway involved a claim by individuals purporting to represent consumers in general, the advertising audience in general, and those consumers who had been deceived into buying the defendant's non-prescription analgesic through reliance upon the defendant's allegedly false advertising of the product as having

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75. Id. at 649, citing Bell v. Hood, 327 U.S. 678, 685 (1946).
76. Although it is the opinion of the author that the issue should have required detailed analysis by the court, it should be noted that the conclusion of the foregoing discussion would not have precluded the Carlson court from retaining jurisdiction, and then summarily dismissing the complaint, citing the cases that it did for the proposition that, on the merits, § 5 of the Act does not allow a private right of action.
77. 485 F.2d 986 (D.C. Cir. 1973).
superior pain relieving qualities. Grounding their complaint on a cause of action under §§5, 12, and 14 of the FTC Act, a common law action for deceit, and an equitable action alleging that the defendant’s advertising presented a public nuisance, the plaintiffs sought a declaration and injunction against the defendant’s advertising, as well as compensatory and punitive damages. The court dismissed the common law claim for lack of jurisdictional amount and the equitable claim as a “radical doctrine,” which “could brook much mischief, including a multitude of inconsistent state prohibitions and requirements.” Although the statutory claim was also ultimately dismissed, it was at least given extensive consideration by the court.

The court admitted at the outset that jurisdiction should lie in the federal courts to determine whether or not a private right of action should exist under the FTC Act. Speaking of the language of 28 U.S.C. § 1337, the court noted:

Plainly, this language applies to the Federal Trade Commission Act. Such jurisdiction lies without regard to the amount in controversy or the citizenship of the parties... [A]ppellants’ invocation of the Act in support of a claim that it is not plainly insubstantial or frivolous on its face suffices as an invocation of §1337 jurisdiction.

The major thrust of the opinion was a two-pronged analysis of the private right of action issue. The approaches which the court took have been previously classified as “statutory interpretation” and the “doctrine of implication.” The statutory interpretation approach looks to whether it was the specific intent of Congress to create a private right of action when it enacted a statute. The doctrine of implication approach looks to whether

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78. See notes 18-22 supra and accompanying text.
79. 485 F.2d 986, 1002. Under 28 U.S.C. § 1332 (1970) a plaintiff may get into federal court on a common law cause of action if there is diversity of citizenship between the parties. However, there must also be at least a $10,000 amount in controversy and plaintiffs cannot aggregate claims in a class action to reach that amount. See Snyder v. Harris, 394 U.S. 332 (1969).
80. 485 F.2d 986, 1002.
81. Id. at 988 n. 2.
82. See Implying Civil Remedies, supra note 38. For a discussion of these two approaches as applied to private rights of action under consumer fraud statutes in general, see Private Remedies, supra note 51. A major part of that article is a comparison of the district court’s decision in Holloway, 327 F. Supp. 17 (1971) with Rice v. Snarlin, Inc., 13 Ill. App. 2d 434, 266 N.E.2d 183 (1970). The Holloway district court denied relief to plaintiffs. Rice involved a suit by a consumer who had contracted to buy the defendant’s services as a supposed model agency. The plaintiff alleged that it had been misrepresented to her that her name, address, picture, and phone number would be placed in a directory.
the general purposes of a statute would be furthered and whether the public interest would be served if a private right of action were allowed.\textsuperscript{83}

1. Statutory Interpretation

Engaging first in the statutory interpretation approach, the court analyzed the legislative history of the FTC Act, both before and after the adoption of the Wheeler-Lea Amendments. A careful review of Congressional committee reports and Congressional debate which accompanied the 1914 Act and the 1938 amendments was made. A search was conducted through a quagmire of historical materials to determine the answer to what might appear to be a close question: Did Congress intend to create a private right of action under the FTC Act?

The answer that the court found (and rightly so) was an emphatic no. Congress sought to protect people and business from unfair competition, from deceptive advertising, and from frauds perpetrated against consumers. But, it sought to vest enforcement powers in an agency which would have expertise in the area, which would be able to develop a centralized body of law in the area, and which would act as a buffer between the public and the business community:\textsuperscript{84}

A large class of businessmen who have never been subject to criminal procedure will have the opportunity to go to the Federal Trade Commission and conform to the requirements of the law without being brought into court or branded as criminals. . .

The idea that Congress would have specifically intended to include a private right of action in a regulatory statute in which no mention of such a right was made is an interesting one. How-

\textsuperscript{83} See Private Remedies, supra note 51, at 421.

\textsuperscript{84} 485 F.2d 986, 996, citing Remarks of Rep. Lea, 83 Cong. Rec. 392, 406 (1938). A reading of the Holloway decision with its accompanying citations out of context from various Congressional reports and debates may leave one somewhat in doubt as to whether
ever, it is most likely one with little merit. In certain instances Congress has specifically provided for private rights of action. One must wonder why it would not mention such rights of action in other statutes if it intended that they should be included. A reading of the legislative history of the FTC Act makes one realize that mention of such rights of action was specifically excluded because it was intended that they should not exist.

2. The Doctrine of Implication

At the start of its doctrine of implication analysis, the Holloway court stated the plaintiffs' contention as to the applicability of implication, "that the courts should look not to the form of the statute but to the social objectives sought to be furthered by it, and . . . that only through private rights of action can meaningful consumer protection against fraud and deceptive advertising be achieved." The court countered by noting that it was limited by an Act in which ends and means, the social ends to be fostered and the administrative means of achieving those objectives, are inseparably interwoven into a unified and comprehensive statutory fabric. Both are 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 multiplicitous litigation.

In so arguing, however, the court failed to consider adequately points which could have been fatal to its analysis:

First, the "unified and comprehensive statutory fabric" has worn thin. The thread of administrative means of achieving the desired social ends can no longer support those ends. Neither

Congress had an actual negative intent concerning a private right of action under the FTC Act. A reading of the debates in the Congressional Record leaves no doubt in one's mind. In fact, the idea of providing a private right of action was suggested and rejected. See House Debates on the Wheeler-Lea Amendments to the Federal Trade Commission Act, 83 Cong. Rec. 391-424 (1938).


87. See note 84 supra.

88. 485 F.2d 986, 997.

89. Id. at 997.

90. See notes 23-32 supra and accompanying text.
consumers nor business can be adequately shielded from the storm of abuse blowing through the tattered veil of protection.

Second, the "legislative balance" which took consumer and business interests into account did not consider the resulting ineffectiveness of its product. As one proponent of the Wheeler-Lea Amendments stated: "If I did not believe the provisions of the bill now before the House would enable the Federal Trade Commission to enforce effectively the advertising provision, I would be the first to oppose its enactment." A House Committee report related its belief that "[t]he Federal Trade Commission has the machinery and the trained personnel to investigate a proceeding against false advertising of all industries and all commodities" and went on to say that "[e]fficiency, uniformity, and economy" suggested use of the FTC as the enforcer of enactments aimed against false advertising.

Third, the court assumed that permitting a private right of action would upset the "balance" which Congress had sought. It failed to reckon with the possibility that allowing a private right of action could actually serve to bring the balance about.

These points are of importance, as they represent the seeds from which the doctrine of implication sprouts. To apply the doctrine, a court must look beyond the shortsighted intent of Congress. A court must look to the general objectives envisioned in the enactment of a statute, to how well those objectives have been served, and to whether those objectives might better be served through implication of a private right of action.

Probably the leading case which applied the doctrine of implication to find a private right of action devolving from federal regulatory statute was J. I. Case Co. v. Borak. There, a stockbroker brought a suit in which he claimed that a merger involving the company in which he held stock had been effected through the distribution of false and misleading proxy statements. The stockholder alleged that such a distribution constituted a violation of §14(a) of the Securities Exchange Act and claimed

91. 83 Cong. Rec. 399 (1938) (remarks of Representative Reece).
93. Id.
94. Private Remedies, supra note 51, at 421.
95. 377 U.S. 426 (1964).
It shall be unlawful for any person, by 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

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a private right of action under that Act. The Supreme Court allowed such an action to be brought, noting that the "broad remedial purposes"\textsuperscript{97} sought by Congress were "evidenced in the language of the section"\textsuperscript{98} and that "[w]hile this language makes no specific references to a private right of action, among its chief purposes is the 'protection of investors', which certainly implies the availability of judicial relief where necessary to achieve that result".\textsuperscript{99} The Court considered a private right of action to be "a necessary supplement to Commission action" because of the inability of the Securities and Exchange Commission (SEC) to examine adequately the vast volume of proxy statements issued each year.\textsuperscript{100}

At least on its face an action seeking private redress under the FTC Act would seem to fulfill the criteria which the Borak court laid out as being necessary for the implication of a private right of action. Broad remedial purposes certainly seem to be evidenced by an act which proscribes "unfair or deceptive acts of practices in commerce"\textsuperscript{101} and which declares that "[i]t shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement. . . for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of foods, drugs, devices, or cosmetics."\textsuperscript{102} Also, such a right would seem necessary to supplement the Trade Commission's enforcement procedures, because of the Commission's relative ineffectiveness and its inability to properly screen all advertising or even all complaints which it receives.\textsuperscript{103}

The Holloway court contended that it gave "full consideration" to Borak.\textsuperscript{104} However, an analysis of that "consideration" finds much at fault:

First, the court in Holloway maintained that the Borak decision relied essentially on §27 of the SEC Act which provides that:\textsuperscript{105}

\begin{itemize}
  \item Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit . . . any proxy . . . in respect of any security . . . registered pursuant to section 78 of this title.
  \item 377 U.S. 426, 431.
  \item Id. at 431-32.
  \item Id. at 432.
  \item Id.
  \item See notes 23-32 supra and accompanying text.
  \item 485 F.2d 986, 1001-02.
\end{itemize}
Advertising and Product Safety

The district courts of the United States...shall have exclusive jurisdiction of violations of this chapter...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.

The FTC Act has no such jurisdictional provision. But, as was recognized by Judge Solomon in his dissent in Carlson in response to a similar claim there, "[t]he Borak decision does not rest on that provision." The Borak court utilized that section merely as a basis for allowing federal jurisdiction to hear the merits of whether there was a private right of action under §14(a). Section 27 of the SEC Act served the same function for the plaintiffs in Borak that 28 U.S.C. §1337 did for the plaintiffs in Holloway—it got them into federal court.

Second, the Holloway court apparently gave weight to the administrative burden placed on the SEC as noted in Borak. It sympathized with an agency which faced thousands of proxy statements with limited resources. Yet, the court failed to recognize that the Federal Trade Commission faces a burden of perhaps greater weight.

Next, the court in Holloway found it significant that the SEC had intervened in Borak and had asked for recognition of supplemental private actions, whereas the FTC had not intervened in Holloway and had left reason for the belief that a private remedy might not mesh with the Trade Commission's enforcement procedures. Admittedly, the FTC did not intervene in Holloway. However, as one observer has noted, through recommendations for enactment of state consumer protection acts, "the FTC, like the SEC in the Borak case, has made it known that it too desires the establishment of private consumer remedies."

Finally, the Holloway court tried to distinguish Borak as involving an agency which is primarily a clearinghouse for proxy and registration statements and the like. It was contended that once the SEC has completed its clearance of proxy and registration statements its job is done and that there then is no danger of a private suit disrupting SEC administrative procedures. In reality, the SEC's regulatory powers are much broader than the

106. 483 F.2d at 282.
108. See note 81 supra and accompanying text.
109. See notes 23-32 supra.
110. Private Remedies, supra note 51, at 435. In particular, the FTC has recom-


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Holloway court would have had us believe. While Borak did deal only with proxy solicitations, other cases have allowed private rights of action under the SEC Act’s broader rulemaking and enforcement provisions. In particular, private enforcement has been allowed under § 10b of the SEC Act, for violations of Rule 10b-5 of the SEC Act proscribing the use of fraud or deceit in connection with any sale or purchase of a security.

A fuller consideration of Borak by the Holloway court could have brought all of this out. The broad remedial provisions of the FTC Act and the apparent necessity of supplementary enforcement would have dictated the appropriateness of a private right of action. In addition, a careful analysis would have recognized the striking similarity between the factors taken into consideration in allowing a private right of action under the SEC Act and the factors that should have been taken into consideration in reviewing the merits of allowing a private right of action under the FTC Act.

3. Other Factors

The deficiencies of the Holloway court’s analysis of its analogy with Borak become more manifest when one looks at other parts of the Holloway decision. As an instance, the court looked at what it considered to be “problems of compatibility” between private and FTC enforcement. The court asserted that private actions might conflict with the following: 1) The Commission’s discretionary use of its flexible enforcement powers, which takes into account broad range policy goals. (Private parties might insert state passage of the Unfair Trade Practices and Consumer Protection Act which specifically allows private rights of action. See W. McSweeney, Remedies of Private Persons—Individual and Class Actions, in J. Van Cise and M. Matison, Chairmen, The New FTC Approach to Advertising Regulation (1971).

111. 15 U.S.C. § 78j (1970). This section provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—. . . To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance 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.


iate piecemeal, uncoordinated actions. 2) The Commission’s ability to provide certainty and specificity in an orderly and centralized development of a body of precedent. 3) The Commission’s ability to apply contemporaneously its expertise and its various devices for the promotion of settlements without resorting to litigation. 4) The FTC’s ability to apply its developed fund of knowledge and special expertise to a particular fact situation.

The fact is that all of these “problems” may exist with private enforcement of the SEC Act also. The Securities Exchange Commission is also an agency with special expertise, with an opportunity to use flexible enforcement procedures, and with an ability to develop in an orderly fashion a centralized body of precedent.116 Yet, despite all of this potential conflict, private actions have been allowed under the SEC Act.

It is a bit perplexing that the Holloway court found these problems of compatibility controlling when the FTC, the body with expertise in the area, has recommended the inclusion of private rights of action under state deceptive trade practice acts.117 The perplexity is compounded when one realizes that inclusion of such rights of action is becoming increasingly popular with new trade practice enactments and that such rights of action have proven to be quite successful.118

Additionally, the point must be made that allowance of private rights of action would not suddenly or totally preclude separate FTC action. Private action would merely be a supplement to FTC enforcement. The FTC would still have enforcement procedures; it would still have its flexibility in its promotion of settlements. The FTC would continue to serve as an expert agency with an ability to develop centralized and orderly precedent. It is towards the FTC, its rules, and its procedures that a court would look before deciding a case brought under the FTC Act.

The Holloway court seemed to miss the point in its analysis of two additional issues. First, it dismissed the notion that there is a need for a damages remedy under the FTC Act.119 Although it recognized that, in general, private actions may tend to foster the objectives sought by statutory prohibitions, the court maintained that this consideration had been overridden in the instance of the FTC Act through Congressional choice. But, such

116. See note 110 supra.
118. 485 F.2d 996, 999-1000.
an argument ignores the doctrine of implication approach; it looks strictly to specific legislative intent, rather than to the general objectives sought through enactment of the statute. The court felt itself controlled additionally by the Congressional intent that the FTC Act should not serve as a means of redress for private wrongs. But, again the court was looking merely at specific intent, not at general purposes. Also, the assumption that a private action would serve to redress primarily private grievances may be invalid. The assumption certainly would not seem to hold where a class action was involved. Where the action is brought as a strictly private suit, not only may the plaintiffs receive compensation that might otherwise be unavailable to them,\textsuperscript{119} but the action may serve as a deterrent factor,\textsuperscript{120} one which could fill the gap left by the ineffectiveness of FTC action.\textsuperscript{121}

When speaking of advertising products in an unsafe manner, the damages issue is of particular importance. If a person suffers physical injury because of an unsafe product, the amount of pecuniary loss may be considerably more significant than if a consumer suffers injury merely through purchase of an overpriced item. If there exist problems with attaining compensation through other means,\textsuperscript{122} a private right of action under the FTC Act may serve a particularly useful purpose, one which would seem to outweigh undue protection of the wrongdoer-advertiser. Also, deterrence from further misleading advertising would become a goal acutely desired. The more serious that the foreseeable injury may be, the more desirous should one become of stifling that which fastens it. Here, even if pecuniary loss up to the present is comparatively small, the potential for harm involved may dictate the taking of strong steps in order to prevent that harm.

Secondly, the Holloway court spoke of the FTC's ineffectiveness.\textsuperscript{123} In particular, it noted that the Commission began an investigation of analgesics in the 1950’s, issued complaints against Bristol-Myers and other manufacturers in 1961, withdrew those complaints, began rule making proceedings in 1967, ended those proceedings in 1971, and issued new complaints against Bristol-Myers and other drug manufacturers in February of

\textsuperscript{119} See notes 33-35 supra and accompanying text.
\textsuperscript{120} The Holloway court recognized the potential deterrent effect of allowing private damages, but dismissed it as a possible valid purpose for allowing private actions, citing congressional intent. 485 F.2d 986, 1000.
\textsuperscript{121} See notes 24-32, supra and accompanying text.
\textsuperscript{122} See notes 33-35 supra and accompanying text.
\textsuperscript{123} 485 F.2d 986, 1000.
While the Bristol-Myers product is not necessarily one which may be characterized as unsafe to use as advertised, a delay of over thirteen years occurred before complaints were effectively issued. The court contended, however, that the plaintiffs' charges concerning the effectiveness of the FTC were being brought up in the wrong place at the wrong time, inasmuch as the charges amounted to attacks against the FTC as a body, and the FTC was not a party to the suit at hand. But, the attacks were not actually against the FTC; they were against the FTC's ineffectiveness, an ineffectiveness not necessarily the result of FTC inefficiency, but perhaps a result of factors over which the FTC has no control. And, this was the place and time to bring up this issue, for ineffectiveness is a key to the implication of a private right of action by the court; it is the force which keeps the FTC from serving its general objectives.

**CONCLUSION**

To conclude is but to begin. The issue has been presented: deceptive advertising exists and it is widespread. It serves its master, but at the expense of the multitudes. When it causes or has the potential to cause physical harm, its purpose becomes particularly nefarious. Congress has recognized it in our midst and has attempted to eradicate it; but the agent chosen as the spearhead of the attack has met with but the meekest of resources an enemy of unexpected proportions.

But, there does seem to be a way to allow aid to flow to the chosen agent, through the granting of a private right of action under the FTC Act. That road has been tried by numerous plaintiffs but has turned out be a dead end up to the present. But, need it always be so? It would seem that the tools are present to open the way, if one may be allowed to use those tools. Although it has failed up to now, perhaps courts will eventually see that the power to aid in the eradication of the evil is within their grasp. All that is necessary to start is that courts do see that they are by no means foreclosed from providing the needed relief.

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124. Note that the appeal in *Holloway* was argued in September, 1972.
125. *See* notes 24-32 *supra* and accompanying text.
126. *See* note 83 *supra* and accompanying text.