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THE FEDERAL DISTRICT COURT AS A SMALL CLAIMS TRIBUNAL: AN ARGUMENT AGAINST THE HOLDING IN GUERNSEY v. RICH PLAN

Steven Naclerio*

In an unusual decision, a United States district court has recently held that dissatisfied consumers may bring suit for compensatory and injunctive relief under section 5 of the Federal Trade Commission Act¹ in instances where the Federal Trade Commission has previously imposed sanctions against the sales practice at issue. If allowed to stand, this decision should exercise a profound influence upon trade regulation practice in this country. Since there is neither explicit statutory nor decisional authority for private enforcement of the Trade Commission Act, the court relied upon a rule of statutory construction known as the doctrine of implication to fashion the right. The rationale for the decision arguably supports much broader protection than that actually conferred; its reasoning should, therefore, be carefully explored to determine both its correctness and its scope.

In Guernsey v. Rich Plan,² plaintiffs brought a class action alleging twelve violations of federal and state laws in connection with their purchase of a food and freezer service agreement. It appears that the agreement provided that, in consideration for an initial payment of $499 and a contract for regular purchases, defendants promised to provide groceries at stated prices and guaranteed maintenance for those purchasers who also obtained a freezer from the organization. A companion agreement offered an additional twenty-dollar-per-person bounty for each customer who could tender new membership. Plaintiffs, contending the plan was worthless, sought to invoke provisions of the Fede-

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¹ 15 U.S.C. § 45 (Supp. V 1975) provides, in pertinent part:
   (a) Declaration of unlawfulness; power to prohibit unfair practices.
      (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
      (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

² 408 F. Supp. 582 (N.D. Ind. 1976).
ral Trade Commission Act, the Sherman Act, the Securities Act of 1933, the Truth in Lending Act, and six state laws regarding fraud, misrepresentation and violations of the Indiana Deceptive Sales Practices Act. Their prodigious complaint was met by a motion to dismiss based upon the absence of subject matter jurisdiction and failure to state a cause of action, and a request that the court abstain from resolving the controversy inasmuch as the grievance involved primarily state law.

Ruling on the motion to dismiss, the court decided (1) to sustain jurisdiction over the counts alleging violations of the Federal Truth in Lending Act and the Indiana state laws, (2) to dismiss the allegations involving violations of the Sherman Act and of the Securities Act of 1933 and, most notably, (3) to assume jurisdiction over the private cause of action alleging unfair trade practices in violation of the Federal Trade Commission Act. The district court's rationale for assuming jurisdiction over the alleged violation of the Federal Trade Commission Act rested upon a pro forma analysis of the Act as one which regulates commerce or protects trade and commerce against restraints and monopolies. The novel cause of action was created by invoking the doctrine of implication and reasoning that it would apply since the plaintiffs were part of the class the Act was designed to protect and the statute's purposes would be effectuated if they succeeded in achieving judgment. The court acknowledged that no federal court has held that a "private action could be implied from the Federal Trade Commission Act." The primary basis for the Guernsey holding, however, emerges from the criticism which has been visited upon the Federal Trade Commission for failing to deter consumer fraud. Citing a series of law review articles, one example of unusually protracted litigation, and the Nader Re-

port on the Federal Trade Commission, the Guernsey court condemned the agency's efforts in policing the marketplace.

The court's more restrictive holding was reached by referring to a Commission consent decree, which was agreed to by defendant's parent and which prohibited nearly identical trade practices to those pleaded. According to the court, this evidenced a unity of interest between the plaintiff and the Commission's "expert judgment." All doubts concerning potential damage to federal and state regulatory structures by allowing private actions were resolved in favor of increased consumer protection. Finally, the Guernsey court curiously noted that because the Commission has created a multitude of precedents through the years of its existence, "[b]oth businessmen and courts should have no trouble determining the precise structure of the Act."13

The court has thus decided that (1) district courts have jurisdiction to construe substantively the Federal Trade Commission Act; (2) the doctrine of implication should be invoked to grant new federal consumer rights in spite of recent Supreme Court opinions limiting such rights in other instances;14 (3) it is appropriate for article III courts to assume regulatory jurisdiction when they become suspicious of an agency's efficiency; and (4) no insurmountable problems arise from situations where any disappointed consumer may sue in federal court, individually or as a class representative, to demand construction of alleged false advertisements or other deceptive practices.

As demonstrated below, each of the foregoing conclusions does mischief and will likely create greater problems than now exist for the administration of such claims. Besides its relevance to those who may be called to prosecute or defend the multitude

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13. Id. This finding highlights the broad implications of the court's decision. If only concerned with the right of a consumer to enter federal court to enforce prior Commission orders, there should normally be no consideration given to defining the acts which exceed statutory mandates since these are normally determined in the Commission proceeding and delineated in its order. Commission decrees generally encompass broad proscriptions which proceed far beyond the actual practices found, or alleged, to be deceptive. Such decrees are often criticized by past respondents who claim that the decrees can be unintentionally violated or that they bear no relation to the case that was tried. See, e.g., ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976); National Dynamics Corp. v. FTC, 492 F.2d 1333 (2d Cir. 1974).
of private suits which may arise under section 5, the decision is of general interest since its rationale supports a variety of new rights at both the state and federal level.\footnote{15. E.g., Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4374 (Supp. V 1975).}

JURISDICTION

Title 28, section 1337,\footnote{16. 28 U.S.C. § 1337 (1970).} confers original jurisdiction upon federal district courts to hear disputes “arising under any Act of Congress regulating commerce or protecting trade or commerce against restraints and monopolies” without regard to the amount in controversy. This broad grant of jurisdictional authority\footnote{17. See, e.g., Sosa v. Fite, 465 F.2d 1227 (5th Cir. 1972); Murphy v. Colonial Fed. Sav. & Loan Ass'n, 388 F.2d 609 (2d Cir. 1967).} is particularly attractive to disaffected consumers because most can be “made whole” by sums far more modest than the $10,000 jurisdictional amount required to sustain jurisdiction under either 28 U.S.C. § 1331 (federal question)\footnote{18. 28 U.S.C. § 1331 (1970).} or 28 U.S.C. § 1332 (diversity).\footnote{19. 28 U.S.C. § 1332 (1970).}

Federal district courts are courts of limited jurisdiction and must look to Congress for evidence of their authority to adjudicate.\footnote{20. Weinberger v. Salfi, 422 U.S. 749 (1975); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Kline v. Burke Constr. Co., 260 U.S. 226 (1922).} In this respect, the Constitution gives inferior courts capacity to take jurisdiction, but an act of Congress is required to confer it as either limited, concurrent or exclusive.\footnote{21. 1 J. MOORE, FEDERAL PRACTICE ¶0.60[2], at 605 (2d ed. 1975).} Supplementing express statutory grants of jurisdiction are court-created doctrines such as pendent jurisdiction which confer jurisdiction on the federal courts and are said to aid in the efficiency with which claims are adjudicated by allowing the consolidation of state and federal claims in a single forum.\footnote{22. Hum v. Oursler, 289 U.S. 238 (1933); Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949). See also 1 J. MOORE, FEDERAL PRACTICE ¶0.60[1], at 602 (2d ed. 1975); Note, Implying Civil Remedies From Federal Regulatory Statutes, 77 HARV. L. REV. 285, 289 (1963).} While many statutes which regulate commerce expressly confer jurisdiction upon the district court,\footnote{23. See, e.g., The Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970). Clayton Act, 15 U.S.C. § 15 (1970).} others are silent. In the instance of such a “silent act,” jurisdictional questions may be decided either by looking to the

\[\text{http://scholarlycommons.law.hofstra.edu/hlr/vol5/iss2/4}\]
act's provisions to determine whether the act can be classified as one which regulates commerce, or by determining whether Congress intended to deny jurisdiction to the district courts by conferring it elsewhere. This type of analysis appears particularly appropriate since in one instance a court is obliged to assume jurisdiction if it views the statute as merely regulating commerce while in the other it could find that Congress nowhere intended to confer jurisdiction in the district court and could decline to entertain the matter.24

Recent decisions on the jurisdictional issue have discussed the matter in a variety of ways. For example, in Holloway v. Bristol-Myers Corp.,25 the court assumed jurisdiction under section 1337 on the ground that the pleading was not plainly insubstantial or frivolous, but it refused to imply a private right under the Federal Trade Commission Act.26 In Carlson v. Coca Cola,27 however, the majority dismissed the case for lack of section 1337 jurisdiction because precedents had established that there was no "colorable right to a remedy under the particular federal statute."28 The most recent Supreme Court decisions in the area29 do not clearly address the issue. In National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak),30 for example, the district court dismissed the action and held that plaintiff lacked standing to sue. The District of Columbia Circuit reversed and held that plaintiff had both standing and an implied cause of action.31 The jurisdictional issue was finessed in the Supreme Court:

The issue has been variously stated to be whether the Amtrak Act can be read to create a private right of action to enforce

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24. Breathing life into the jurisdictional inquiry is also appropriate in light of the complex excursions into legislative history necessitated by the Supreme Court's cause of action criteria. See text accompanying note 32 infra.
27. 483 F.2d 279 (9th Cir. 1973).
28. Id. at 280. One commentator has characterized the jurisdictional versus the cause-of-action inquiry as "largely formal." Note, 77 HARV. L. REV., supra note 22, at 289.
compliance with its provisions; whether a federal district court has jurisdiction under the terms of the Act to entertain such a suit; and whether the respondent has standing to bring such a suit. But, however phrased, the threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it.

Finding no cause of action, the majority found it unnecessary to consider the jurisdictional issue. The dissent concurred on this point since it believed that, in this context, issues of "right of action," "standing" or "jurisdiction" were "only a matter of semantics."

The easy analysis employed by courts to assume federal jurisdiction over implied rights cases is derived from Justice Black's opinion in Bell v. Hood, which held that novel questions thought to arise under the Constitution should not be dismissed prior to a determination of the complaint's sufficiency. This, of course, means that any decision to dismiss is, in effect, a decision on the merits. In this context, Bell virtually eliminates an inquiry into the limited jurisdiction of the district court. And, as the dissent noted, in those instances where the sufficiency of the federal cause of action is not determined at the outset, related state court claims may nevertheless find a federal forum.

Whatever the merits of Bell in its specific context, it is clear that in that case the Supreme Court dealt with law routinely construed by the courts. An implied claim under the Trade Commission Act could, until recently, be readily distinguished from

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34. 327 U.S. 678 (1946).
35. Id. at 686.
36. The action involved the propriety of an implied right for damages from one who deprived plaintiff of fourth and fifth amendment rights. Bell v. Hood, 327 U.S. 678 (1946).
the type of claims raised in *Bell*, since the government does not litigate its cease and desist orders in district court. Rather, the Federal Trade Commission is expected to proceed before itself with exclusive jurisdiction vested within the several circuit courts to affirm, modify or set aside Commission orders. It cannot be said, however, that the district court has no role in enforcement. The Federal Trade Commission Act does provide for several housekeeping chores to be performed by the courts in aid of Commission proceedings, and it also confers jurisdiction on the district courts to adjudicate penalty suits brought by the Attorney General or the Commission itself. Moreover, the most recent amendments to the Act give the district courts several new functions. Of particular interest is the authority given to the Commission to enforce, in district court, violations of cease and desist orders against persons who are not bound by the order itself. In these instances, the party to be charged must have committed a knowing violation of the Act, as interpreted and as provided by section 45(m)(2):

If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

The foregoing language gives jurisdiction to the district court during the penalty proceeding to construe section 5 to determine if the allegedly unfair practice actually violates its proscriptions. This substantive jurisdiction is altogether novel as, in the past, penalty suit defendants were not heard to controvert anew whether their practices violated the Act.

Arguably, then, in the *Guernsey* situation one can find evidence of a congressional grant of jurisdiction for district court adjudication after the Commission has made its determination.

that the practice violates section 5. However, in the area to which the Guernsey decision is likely to be expanded (i.e., actions to recover damages under section 5 when the Commission has not acted), it would seem improper to adjudicate such disputes without further evidence of Congressional delegation. The statutory forerunners of 28 U.S.C. § 1337 precede the enactment of the Federal Trade Commission Act, yet one searches the Congressional Record in vain for any connection with those Acts. While the court in Guernsey was probably correct in assuming jurisdiction, its section 1337 analysis would give courts jurisdiction to examine a wider range of complaints than Congress intended. Because the Commission cannot come into district court seeking novel constructions of section 5, it would seem anomalous for the private litigant to be in a better position than the government to recover damages.

**The Implication of Private Rights Under Section 5**

The district court in Guernsey measured the merit of plaintiffs' claim for an implied right under two expressed standards: whether "(1) the provision violated was designed to protect a class of persons including the plaintiffs from the harm of which the plaintiffs complain," and whether "(2) it is appropriate in light of the statute's purposes to afford plaintiffs the remedy sought." The Supreme Court's most recent teaching on implicit private remedies, *Cort v. Ash,* however, details four criteria thought to be prerequisites to the activation of the doctrine. These criteria can be summarized as follows:

1. The plaintiff must be a class member for whose especial benefit the statute was enacted;
2. There ought be some indication of a legislative intent, implicit or explicit, either to create such a remedy or deny it;
3. The implicit right should be consistent with the underlying purposes of the legislation; and

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44. *E.g.*, 36 Stat. 1091 (1911); 38 Stat. 219 (1913).
45. By analogy, when the Commerce Court (created by the Interstate Commerce Commission Act of 1887) was abolished, Congress specifically transferred jurisdiction to the several district courts. 38 Stat. 219 (1913).
46. At least one former staff attorney has argued that Congress ought to amend the Act so that cease and desist determinations would be made in district court. White, 61 A.B.A.J. 1242, 1245 (1975).
Private Actions Under the F.T.C.A.

(4) The cause of action should not be one which has been traditionally relegated to state law.49

The Cort opinion relied heavily on two other recent decisions, National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrack)50 and Securities Investor Protection Corp. v. Barbour,51 both of which denied federal rights. In Amtrak, the Court refused to imply a private right of action in favor of dissatisfied passengers who sought to prevent a line abandonment. Clear statutory language granting rights to the Attorney General and to those dissatisfied with labor agreements was held to be exclusive. The Court also deferred to the judgment of the administrators who opposed private action, as well as to those elements of the legislative history which demonstrated that private causes of action for individual passengers were specifically rejected by Congress.52

In Barbour a receiver unsuccessfully sought to invoke a private right under the Securities Investor Protection Act of 1970 (SIPA),53 which was created to provide a special type of bankruptcy procedure for insolvent securities dealers. The Court recognized that SIPA's primary purpose was the protection of investors; however, that did not mean that every investor was entitled to bring his own lawsuit. Rather, it found that express statutory provision establishing one form of administrative proceeding ordinarily would limit relief to that which could be granted in such proceeding. The Court, however, citing Amtrak, noted that "[t]hat implication would yield . . . to 'clear contrary evidence of legislative intent.' "54

(1) The Especial Class

The Supreme Court's recent analysis in Cort v. Ash55 of the

49. Cort v. Ash, 422 U.S. 66, 78 (1975). It should be noted that the Cort opinion nowhere authorized judicial intervention in instances where a court may discover lethargy or incompetence in administrative bodies. In fairness to the district court, its opinion reflected other aspects of the Supreme Court's criteria, albeit without specific reference to the Cort opinion.
55. 422 U.S. 66, 78 (1975). This element is said to derive from Texas & Pac. Ry. v.
especial class criterion seems particularly appropriate for the Guernsey situation since the class which the Federal Trade Commission Act seeks to protect includes every—or virtually every—resident of the country. In Cort, for example, the Third Circuit, applying criteria similar to those used by the Guernsey court, held that a private cause of action could be inferred for either injunctive or compensatory relief. The Supreme Court reversed the court of appeals’ determination on several grounds, one of which was that a criminal statute, enacted for the protection of society as a whole, cannot serve as a foundation for inferences of private rights. The Supreme Court did not care to exclude every prayer for implied rights based upon criminal statutes. It did, however, express its belief that a criminal statute should be “sufficiently protective of some special group so as to give rise to a private cause of action by a member of that group.”

On the basis of Cort, it seems apparent that the law requires something more than a general statutory proscription enacted for the benefit of the citizenry before a private right of action would be appropriate. While penalty provisions of the Federal Trade Commission Act provide the government with a potential means of securing civil relief, the “special” group protected encompasses every national consumer and business interest. Therefore, to infer a private right of action from section 5 would create a federal remedy for every victim of a commercial tort.

Besides the number of potential claims created by categorizing all consumers as a special class, the range of potentially cognizable claims makes class treatment inappropriate. There is no

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Rigsby, 241 U.S. 33 (1916), acknowledged to be the first case in which the Supreme Court had implied private rights from a federal regulatory statute. See Note, 77 Harv. L. Rev. 285, supra note 22.

56. Ash v. Cort, 496 F.2d 416 (3d Cir. 1974). In Ash v. Cort, plaintiff shareholder’s suit for compensatory and punitive damages for director-approved political advertising was based upon a “bare” criminal statute prohibiting corporate contributions in federal elections.

57. 422 U.S. 66 (1975).


59. Cort v. Ash, 422 U.S. 66, 80 (1975). Commentators have argued because one general purpose of the 1938 Wheeler-Lea amendments was consumer protection, it necessarily follows that their numbers deserve “class” treatment. See, e.g., Gard, supra note 9, at 279. Such analysis seems to intertwine criteria (1) and (3) without properly recognizing either the special group caveat or the recognition of all relevant purposes for the legislation.

60. There would be no jurisdictional minimum for such suits. See text accompanying note 16 supra.
doubt, for example, that consumer harm can result from a variety of practices, including the use of misleading advertising for low-priced, short-lived products and the use of other fraudulent sales practices. Injury from some deceptive sales claims can be "remedied," for example, by a consumer's refusing to invest sixty-nine cents when the product needs to be replenished, but other deceptive claims leave purchasers with long-term installment purchase obligations. Some deceptive practices are discoverable almost immediately, while others may never be detected. Additionally, some claims might be deceptively misleading to only the very credulous while other claims may deceive the great majority of consumers. It seems error to hold, therefore, that the Federal Trade Commission Act protects some special class since such an interpretation would create private rights of action for consumers complaining of a wide variety of evils—a group which cannot be combined into a homogeneous class. It would appear that section 5 is more aptly analogized to those bare criminal statutes which do not serve as the basis for implied causes of action.

(2) The Legislative Intent

Whether one can find an indication in the legislative history of the Federal Trade Commission Act either to create or to deny a private right of action has been extensively analyzed. In

61. Compare Bristol-Myers Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶20,900 (FTC 1975), where the Commission refused to remand a decision to its administrative law judge because (1) no health or safety considerations were present, (2) the advertisements did not appeal to a particularly vulnerable group, (3) there was no significant economic harm done, (4) the advertisements were discontinued, (5) there was no evidence of competitive harm, (6) nor intentional wrongdoing, with Ford Motor Co.; J. Walter Thompson Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,621 (FTC 1974), where respondents consented to abandon certain advertising which claimed that the steel guard rails in the side doors of Ford LTD and Galaxie automobiles were as strong as a typical highway guard rail and Chrysler Corp. and Ford Motor Co., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,671 (FTC 1974), where respondent GM consented to abstain from making deceptive fuel economy claims for any of its automobiles and from disparaging competing automobiles on this basis.

62. See generally Interview with Joan Z. Bernstein, Acting Director of FTC's Consumer Bureau, reported in 38 FTC REPORTS A-5 (Mar. 8, 1976).

63. The Analgesic complaints, Bristol-Myers Corp.; American Home Prods. Corp.; Sterling Drug Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,263 (FTC 1973), now nearing initial hearing in the Commission, afford ready examples. The claim "twice as fast as aspirin" could never be objectively determined by a consumer, particularly if the speed is measured in seconds. A companion claim—"contains the pain reliever doctors prescribe most"—can be easily understood by reading the product label.

64. See, e.g., Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Gard,
Holloway v. Bristol-Myers Corp., for example, the court compared the legislative history of the Federal Trade Commission Act with the provisions of the Clayton Act of the same Congress, and concluded that Congress intended the Trade Commission Act to be a unique statute which established a specialized agency to take preemptive action against monopolistic practices and restraints of trade. Because the language of section 5 was left in the broadest terms, no monetary or penal sanctions were imposed for initial violations. The Holloway court also found that the 1938 Wheeler-Lea amendments to the Federal Trade Commission Act offered a remedy for problems associated with finding adverse competitive impact as a prerequisite to enforcement. While these amendments evidenced an intention to further the protection afforded consumers, administration of the additional powers was deliberately given to the Commission. Congress did nothing to alter the Supreme Court’s earlier holding in Moore v. New York Cotton Exchange that private parties could not enforce the Act. From all of the foregoing, the District of Columbia Circuit

supra note 9; Note, 22 HASTINGS L.J. 1268, supra note 33; Comment, 69 NW. U.L. REV. 462, supra note 9; Note, 25 SYRACUSE L. REV. 747, supra note 33.

That branch of the test which looks for specific evidence of a denial of private rights would appear irrelevant to the 1914 legislative history since the decision in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916), was written two years after the statute was enacted.

66. The Clayton Act provides in pertinent part:
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.
69. The Guernsey court criticized the Moore opinion because the Supreme Court did little to explain what it no doubt perceived to be an obvious conclusion. The lower court spoke more clearly on the issue:
   It is plain that the bill cannot be maintained under the Federal Trade Commission Act of 1914 . . . . That act declares that unfair methods of competition in commerce are unlawful and the Commission is empowered to prevent persons, partnerships, or corporations, with certain exceptions, from using such methods of competition. But as the only relief that act provides is before the Federal Trade Commission, it affords no support whatever for the bill now before us.
in Holloway concluded 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."70

Those commentators who argue for federal implied rights seem to have adopted a view of the legislative history which is overly sympathetic to consumer interests. An article by Stephen Gard in Northwestern University Law Review,71 for example, quotes a passage from the House Report on the Wheeler-Lea Act which states that these amendments were intended to make the consumer of equal concern with the injured competitor.72 To put the statement to which Gard alludes in context, however, requires reading the paragraphs of the House Report which immediately precede it (which state an intention to reverse the holding in FTC v. Raladam Co.73 limiting FTC jurisdiction to "methods of competition in commerce")74 in conjunction with the sentences surrounding the Gard quotation, which speak of Commission power and procedure:

By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors.

. . . .

This amendment will also enable the Commission to act more expeditiously and save time and money now required to show actual competition and the injurious effect thereon of the unfair methods in question.75

While Gard draws an inference from his excerpt that a federal common law of consumer protection was perhaps contemplated, an equally plausible interpretation of the statement might be that Congress attempted only to remove an impediment to Com-

71. Gard, supra note 9, at 288.
72. H.R. Rep. No. 1615, 75th Cong., 1st Sess. 3 (1937). "[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." Gard, supra note 9, at 288. See also C. Dunn, supra note 67, at 167.
mission jurisdiction and further sought to facilitate the Commission's proceedings.

A Comment in Northwestern University Law Review, on the other hand, has chosen to review a portion of the original congressional debate which quotes Senator Newlands as stating:

[T]his particular method of enforcing that law through the operation of a commission is applied only to corporations.

... I imagine the method of enforcing that law against individuals or firms would be an action for damages or perhaps by a suit in equity for an injunction, but there the individual having a complaint against an individual or a firm would have to institute the action himself and pay the costs of the proceedings.

From these casual remarks the author deduced that a private party could "seek redress on his own if he were willing to bear the expense." Undoubtedly he could, through a common law action for fraud or unfair competition. Moreover, with regard to situations similar to Guernsey where a prior decree is in evidence, the same author quotes congressional remarks which seek to distinguish between violations committed by the well-intentioned businessmen and those afflicted with moral turpitude. However well reasoned the distinction, the congressional majority nevertheless rejected it and gave the Commission only the authority to issue cease and desist orders. Penalty provisions were enacted in 1938, increased to $10,000 per violation in 1973, and broadened in 1975 to apply to knowing violations. While Congress has repeatedly recognized the problems posed by the intentionally deceptive trader, it has not seen fit to deter such action by allowing federal consumer suits. Therefore, one can disagree readily with the Northwestern author's conclusion that, based upon an "equivocal" legislative history, "Congress expected private remedies to exist in at least some cases."

It is also apparent that the sixty-third Congress delineated specific federal roles for the aggrieved consumer—the right to

77. Id. at 472. The distinction between corporations and individuals or partnerships was not carried forward in the version of § 5 which was enacted.
78. Id.
79. Id. at 471-72.
82. Comment, 69 Nw. U.L. Rev., supra note 9, at 471.
petition the Commission for the issuance of a complaint and the right to intervene in proceedings for good cause shown.\textsuperscript{83} Those who would opt for more vigorous action were left with the alternative of state court litigation inasmuch as nothing in the Act was ever thought to preempt available remedies. The language which grants these rights has never been amended.

The district court in \textit{Guernsey} dismissed all of the above, reasoning that while it cannot be doubted that the Commission was empowered to enforce the Act, Congress never explicitly stated that a consumer could not sue; rather, according to \textit{Guernsey}, the congressional debates were only concerned with what the Commission could or could not do.\textsuperscript{84} This conclusion, however, appears ingenuous; one can cite a number of historical situations where, although Congress did not specifically exclude a particular class from enforcement responsibilities, no private suits have been allowed. For example, there appears to be nothing in the history of the 1962 amendments to the Food, Drug and Cosmetic Act\textsuperscript{85} which can be said to preclude consumer suits; this is not because Congress intended to leave open the possibility but rather because it may have seemed obvious to all that private enforcement was not in order.\textsuperscript{86}

For those who would agree with the \textit{Guernsey} court that the legislative history is ambivalent, a review of the early decisions recounting the history of the Act appears to rebut any implication of private relief. A leading decision, \textit{FTC v. Gratz},\textsuperscript{87} was the first Supreme Court opinion to construe section 5. While the majority in \textit{Gratz} upheld the lower court decision vacating a Commission order on the theory that the administrative complaint was not properly drawn, Justice Brandeis favored the bar with a reasoned dissent in which he explained the genesis of the Act. The Brandeis opinion seems particularly helpful in understanding the legislative history since section 5 was originally "said to have been urged by Mr. Brandeis and to have been approved by the President."\textsuperscript{88}

\textsuperscript{86} See Florida \textit{ex rel. Broward County v. Eli Lilly & Co.}, 329 F. Supp. 364 (S.D. Fla. 1971), and cases cited therein for judicial rejection of private causes of action arising under the FDA statute. For the legislative history of the 1962 amendments, see \textit{The Drug Amendments of 1962} (compiled by the Pharmaceutical Mfrs. Ass'n).
\textsuperscript{87} 253 U.S. 421 (1920).
\textsuperscript{88} W. THORNTON, COMBINATIONS IN RESTRRAINT OF TRADE 1055 (1928).
In that opinion, Brandeis disagreed with those who believed that courts could properly review the sufficiency of an administrative pleading, particularly if it conformed to standards set by the Interstate Commerce Commission, the acknowledged model for the Trade Commission. For present purposes, however, Brandeis’ more important contribution lies in his explication of the history of the Act and the type of adjudication it sought to promote:

The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public.88

Brandeis believed that Congress had created an administrative novelty in the Commission and that it sought to build upon a system whereby competitive conditions were presumably restored through court adjudication.89 Because there was a feeling of general dissatisfaction with existing statutes, Congress passed the Clayton Act to effectuate the remedies provided by the Sherman Act and the Trade Commission Act to create an administrative tribunal to regulate competition. This resort to administrative, as opposed to judicial, regulation was one of three ways in which the provisions of the Federal Trade Commission Act differed from previous methods designed to deal with restraints and monopolies. Another innovative concept involved sanctioning anticipatory administrative action against incipient restraints rather than requiring the use of traditional measures such as compensatory or injunctive relief. As Brandeis explained, “[T]he act undertook to preserve competition through supervisory action of the Commission. . . . Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure.”91

A third remarkable aspect of the legislation was that the initial definition of opprobrious acts was left to the agency, the Federal Trade Commission.92 This flexibility was deemed neces-

89. Id.
90. Id. at 435.
91. “Recognizing that the question whether a method of competitive practice was
sary to protect the public from novel anticompetitive practices and to protect businessmen from suffering unjust hardships which might result if practices deemed anti-competitive in one industry were innocuous elsewhere. The grant to the Federal Trade Commission of the right to exercise administrative discretion in defining unfair methods of competition paralleled a similar grant of power to the Interstate Commerce Commission to declare preferences or advantages unreasonable. 9

Several other early decisions discussed the origin of the Trade Commission Act and its uniquely constructed section 5. 94 No decisions, however, found a Congressional intent to create private rights under the Act. 95 As discussed in Holloway v. Bristol-Myers Corp. 96 and elsewhere, 97 the Wheeler-Lea amendments sought to protect against consumer fraud. Again, however, one searches the Congressional Record in vain for any specific statement favoring private enforcement. Given the legislative history surrounding the original enactment of the Federal Trade Commission Act, it would be expected that strong evidence of a congressional desire to give consumers a federal right heretofore denied injured competitors would come forward. Nothing of this sort emerges from the record.

Recent Supreme Court decisions cited above give vitality to the maxim expressio unius est exclusio alterius, a principle of statutory construction which yields only in cases where clear contrary evidence of legislative intent exists. 98 The Guernsey court

unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts . . . " Id. at 437.

93. Beech-Nut Packing Co. v. FTC, 264 F. 885, 890 (2d Cir. 1923) (Manton, J., concurring).


95. The absence of judicial findings that Congress intended to create private rights under the Act arguably indicates that the courts drew particular significance from those Commission proceedings which were dismissed as not having been brought in the public interest. See, e.g., Gratz v. FTC, 253 U.S. 421 (1920); New Jersey Asbestos Co. v. FTC, 264 F. 509 (2d Cir. 1920). See also C. McFarland, supra note 94, at 60-61. If the private rights were intended, one would reasonably expect judicial comment advising complainants that they could privately sue to enforce that which the government ought not pursue. Such language, however, seems to be absent in the reported decisions. The early commentators, likewise, fail to discuss the possibility of private enforcement. See, e.g., C. McFarland, supra note 94; W. Thornton, supra note 88.


97. See, e.g., Gard, supra note 9, at 288.

did not apply this restrictive test. Rather, based on the theory that the Commission was endowed with primary but not exclusive jurisdiction, it found no evidence on which to exclude a private cause of action. Its holding, therefore, appears erroneous in this respect. In fact, one court has declined to follow the Guernsey ruling. In Bott v. Holiday Universal, Inc., the District of Columbia District Court found the Guernsey decision to be “contrary to the legislative history and intent of the FTC Act and subsequent amendments, as examined in the Holloway decision.”

Further, the Bott court felt “bound by the decision of the Court in Holloway, not only because it is the law of this Circuit, but also because it is the correct decision.”

(3) The Legislative Purpose

The Guernsey court considered the third criterion enunciated in Cort v. Ash—that the implied remedy must be consistent with the underlying purpose of the legislative scheme—when it reasoned that to give the Commission exclusive jurisdiction in compliance procedures “would frustrate the purposes of the Act [and] would deny consumers who were victimized by further violations any recovery.” This argument, of course, turns the inquiry upon its head since it assumes consumer jurisdiction. Recovery can be said to be denied when the Commission enters a case only if jurisdiction had previously existed and was somehow ousted by the institution of administrative proceedings.

In Amtrak, Barbour and Cort, the underlying purpose criterion was developed so as to exclude private enforcement. In Amtrak the majority pointed to a legislative purpose of achieving “economic viability” by a “paring of uneconomic routes” without requiring resort to lengthy procedures before administrative agencies. The Court in Amtrak believed that if private suits could

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99. 2 Trade Cas. ¶ 60,973 (D.D.C. 1976).
100. 2 Trade Cas. ¶ 69,301 (D.D.C. 1976).
101. Id.
be maintained the new legislation would only have substituted district courts for the heretofore inefficient agencies and would have generated additional problems by allowing multiple lawsuits and inconsistent determinations.\textsuperscript{108} In \textit{Barbour} the Court acknowledged that while SIPC's primary purpose was the protection of investors, "[i]t does not follow . . . that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose."\textsuperscript{109} In fact, the majority sanctioned SIPC's policy of abstention or deferred intervention as a means of fostering the public's interest against precipitous action.\textsuperscript{110} In \textit{Cort} the Court held that derivative suits for damages would not enhance the primary congressional goal of eliminating corporate funds from election campaigns inasmuch as directors could still "borrow" funds and repay them at a later date.\textsuperscript{111} Presumably, the threat of criminal penalties was considered the exclusive deterrent for this activity.

It seems clear, therefore, that the ultimate purpose test espoused by Justice Douglas in \textit{Amtrak}\textsuperscript{112} was specifically rejected and that the Court mandated that judicial inquiry must instead focus upon all congressional purposes sought to be furthered by the statute at issue. Applying this latter method of analysis to the Trade Commission Act, considerations such as the informality and flexibility of administrative procedures and the vagueness purposely created in section 5 would be ignored by allowing private suits seeking monetary reward for initial violations.\textsuperscript{113}

Moreover, in situations where the Commission's expert judgment has taken the form of an order to cease and desist, courts cannot ignore the importance that consent procedures have traditionally played in section 5 enforcement. Since 1961, at least 2800 consent orders have been negotiated by the Commission.\textsuperscript{114} Each

\textsuperscript{108} Id. at 462-64. Justice Douglas' lone dissent, which berated the majority for its "dedication to legalisms," charactized the congressional purpose as only "to protect the people who ride the trains." Id. at 471 (Douglas, J., dissenting). Such interpretation, ignoring all but the ultimate beneficiary of congressional endowment, would, no doubt, create a private right from every statute enacted for the public welfare.

\textsuperscript{109} Id. at 421-24.

\textsuperscript{110} Id. at 421-24.

\textsuperscript{111} Id. at 422 U.S. 66, 84 (1975).

\textsuperscript{112} Id. at 471 U.S. 453, 471-72 (1974).


\textsuperscript{114} Consent orders have been sequentially numbered since 1961. 3 \textit{Trade Reg. Rep. (CCH)} ¶ 24,011. The consent order issued on August 11, 1976, in Andrix Industries Corp., 3 \textit{Trade Reg. Rep. (CCH)} ¶ 21,188, is numbered C-2831. Thus, since 1961, at least 2800 consent orders have been negotiated by the FTC.
of those respondents presumably relied upon precedents holding that only the Commission could enforce its orders; the availability of private damages will undoubtedly impose greater burdens upon the Commission as it may be forced to litigate a greater proportion of its complaints after private parties consider the possibility of Guernsey suits and decide to defend. It is also possible that the Commission may have to accept narrowly drawn consent decrees so that respondents' exposure in private litigation would be minimized. Finally, applying the somewhat strained Cort analysis, one might conclude that consumer fraud which cannot be deterred by the substantial penalties available to the Commission will not be deterred by actions for individual damages.115

(4) State Law Harmony

The final criterion enunciated in Cort—that the implied cause of action should not be one traditionally within the ambit of state law—was not confronted by the district court in Guernsey. In Cort the Court attached significance to the traditional use of state law to regulate corporate government and consequently stated that there must be clear evidence of a congressional purpose to intrude into those relationships before an implied right would be recognized.116 Similarly, there is nothing in the history of either the Trade Commission Act or its amendments that indicates an intention to vary the traditional means of compensating misled consumers. Indeed, the Guernseys themselves pleaded pendent claims for fraud and misrepresentation as well as for violations of Indiana's Deceptive Sales Practice Act.

Those who support private rights make much of the inadequacies of common law actions for fraud and deceit to buttress their arguments for federal intervention.117 However inadequate the common law remedies may appear, the proper readjustment of consumer rights is more properly accomplished by state legisla-

115. 15 U.S.C.A. § 45(f) (1976) provides for penalties of up to $10,000 for each separate violation. The Commission often takes a broad view as to the number of violations which have occurred from a single deceptive practice. See United States v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974).
116. The Court distinguished its prior holding in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), because, in the Court's view, congressional concern over the use of misleading proxy statements represented a clear exercise of federal jurisdiction.
tures or state courts. Many legislatures have moved in that direction, giving to the consumer those advantages conferred by section 5.118 While courts should be alert to the need to correct jurisprudential gaps wrought by a federal system of government, not every injustice warrants federal intervention. This would seem particularly true in the area of consumer protection because that rubric encompasses a wide variety of uneven interests.

An excellent example of the foregoing principles can be found in the recent New York case of Star Credit Corp. v. Ingram.119 As in Guernsey, consumers in Star Credit alleged fraudulent conduct in the sale of a food and freezer service agreement and sought compensatory and punitive damages. Also, as similarly alleged in Guernsey, defendants continued their sales practices even after an investigation by New York’s Attorney General resulted in a consent injunction against a predecessor corporation.120 On the basis of New York precedent which extends the availability of punitive damages to consumer fraud cases,121 the court found that since neither prior verdicts nor consent injunctions were effective deterrents to consumer fraud, punitive damages were in order. Furthermore, in assessing the appropriate award, the court rejected the notion that a “reasonable relationship” should exist between actual and exemplary damages: “If these damages are to be awarded to protect the public from continuation of a fraudulent consumer scheme, the damages must be taxed in an amount which will accomplish the purpose of providing a deterrent to improper behavior.”122 Thus, by creative utilization of common law concepts, misled consumers were able to achieve splendid results in a lower state tribunal. Also noteworthy in this regard is the Star Credit court’s admission of evidence of prior fraud-

118. See, e.g., MASS. ANN. LAWS ch. 93A, § 9 (1), (3) (1973); N.M. STAT. ANN. § 49-15-9 (1973). It has been noted that more than half the states have enacted statutes similar to section 5. Comment, FTC Rulemaking v. Private Enforcement, 69 NW. U.L. REV. 462, 477 (1974).

119. 75 Misc. 2d 299, 347 N.Y.S.2d 651 (Civ. Ct. 1973). New York City’s Civil Court, having jurisdiction over claims not exceeding $10,000, is particularly suited for adjudication of consumer actions. This jurisdiction relieves the state supreme court of many cases otherwise within its jurisdiction; there is, of course, generally no federal analogue. N.Y. CIV. CT. ACR § 202 (29A McKinney 1963).


122. Star Credit Corp. v. Ingram, 75 Misc. 2d 299, 302, 347 N.Y.S.2d 651, 654 (Civ. Ct. 1973). Furthermore, the court’s only announced constraint in awarding $15,000 for punitive damages was the amount prayed for in the counterclaim.
lent conduct and of the consent injunction on the issue.\textsuperscript{123} If these evidentiary rulings are followed elsewhere, the need for relaxed substantive standards may be diminished.

**INJUNCTIVE RELIEF**

The Supreme Court's ruling on the propriety of injunctive relief in \textit{Cort v. Ash}\textsuperscript{124} also bears upon a similar claim by the Guernseys. In \textit{Cort} the Court recognized an intervening statute\textsuperscript{125} which established a grievance procedure making injunctive relief available to the government in appropriate instances. While that statute expressly vested the Commission with primary jurisdiction,\textsuperscript{126} the Court stated that "the statute requires that a private complainant desiring injunctive relief against alleged future violations of § 610 must at least exhaust his statutory remedy under the Amendments when and if such violations occur."\textsuperscript{127}

While the \textit{Guernsey} court determined that prior case law construed Trade Commission jurisdiction to be primary rather than exclusive, the decision does not reveal whether plaintiffs sought Commission intervention prior to filing. A requirement that a complaint be filed with the Commission before judicial relief was sought would have the obvious public benefit of drawing illicit conduct to the Commission's attention, particularly when substantial civil recovery is also available. In instances where preliminary injunctive relief is not necessary, it would seem appropriate to invoke the exhaustion doctrine to define governmental interest in the matter.\textsuperscript{128}

Comparing the analysis in \textit{Cort} with that in \textit{Guernsey}, it is evident that the Supreme Court has adopted a more restrictive view of the doctrine of implication. While the district court in \textit{Guernsey} relied on the \textit{Bivens}\textsuperscript{129} and \textit{Borak}\textsuperscript{130} decisions to define plaintiffs' cause of action, the Supreme Court in \textit{Cort} distin-

\begin{itemize}
\item \textsuperscript{123} Star Credit Corp. v. Ingram, 75 Misc. 2d 299, 347 N.Y.S.2d 651 (Civ. Ct. 1973).
\item \textsuperscript{124} 422 U.S. 66 (1975).
\item \textsuperscript{126} \textit{Id.} at § 310 (b).
\item \textsuperscript{127} \textit{Cort v. Ash}, 422 U.S. 66, 76 n.9 (1975).
\item \textsuperscript{128} Prior to \textit{J.I. Case v. Borak}, 377 U.S. 426 (1964), the SEC argued that private enforcement must follow an unsuccessful attempt to interest the Commission in the matter. See \textit{Phillips v. United Corp.}, 5 S.E.C. 445 (S.D.N.Y. 1947). The view has since been abandoned due to the time factors involved in proxy contests. See \textit{generally E. ANANOW & H. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL} 463-67 (1988).
\item \textsuperscript{129} \textit{Bivens v. Six Unknown Named Agents of the FBI}, 403 U.S. 388 (1971).
\item \textsuperscript{130} \textit{J.I. Case Co. v. Borak}, 377 U.S. 126 (1964).
\end{itemize}
guished those cases on the basis that the Bivens holding was based upon plaintiff's clearly articulated constitutional rights and Borak followed pervasive federal legislation directed at regulating rights and obligations between the private plaintiff and the alleged wrongdoer.\textsuperscript{131} There is, of course, no comparable constitutional protection for consumer protection and no solid evidence of congressional intention—by statute or otherwise—to preempt fundamental state regulation of buyer-seller relationships. Thus, it is entirely proper for appellate benches to follow these recent decisions and the Holloway line of cases, which leave consumers to traditional avenues of redress.

**Subsequent Case Law**

Lower court cases decided after Cort,\textsuperscript{132} Amtrak\textsuperscript{133} and Barbour\textsuperscript{134} have properly expressed conservative views towards creating new federal rights through the doctrine of implication. In the Seventh Circuit, for example, the circuit in which the Guernsey court sits, precedent was explicitly followed in Goldman v. First Federal Savings & Loan Association.\textsuperscript{135} Ironically, perhaps, precedent led the Goldman court to hold that a private cause of action did exist to enforce a regulation drawn pursuant to the Home Owners Loan Act.\textsuperscript{136} Judge (now Justice) Stevens was uneasy, however, with that aspect of the court's decision. Noting that it is "perhaps arguable" that no private right ought be implied, he stated: "If the statute expressly authorizes proceedings to enforce its provisions and the regulations promulgated under it, ordinarily it will be inferred that no other means of enforcement, such as by private cause of action, was intended by the legislature."

McNamara v. Johnston,\textsuperscript{137} another Seventh Circuit case de-

\begin{itemize}
\item \textsuperscript{131} Cort v. Ash, 422 U.S. 66, 82 (1975). But see Allen v. State Bd. of Elections, 393 U.S. 544 (1969). This case may be distinguished by the fact that the Court dealt with voting rights in local elections—a situation where prompt action was needed to protect precious rights.
\item \textsuperscript{132} Cort v. Ash, 422 U.S. 66 (1975).
\item \textsuperscript{134} Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975).
\item \textsuperscript{135} 518 F.2d 1247 (7th Cir. 1975).
\item \textsuperscript{137} Goldman v. First Fed. Sav. & Loan Ass'n, 518 F.2d 1247, 1250 n.6 (7th Cir. 1975). The court went on to note that it may be necessary to exhaust administrative remedies before a private filing would be sustained. Id.
\item \textsuperscript{138} 522 F.2d 1157 (7th Cir. 1975).
\end{itemize}
decided since Cort, held that district courts had no original jurisdiction in suits brought to enjoin violations of the Federal Corrupt Practices Act. In McNamara individuals dissatisfied with union allocation of political funds were directed (as in Cort) to the administrative agency which had been conferred with primary jurisdiction for civil enforcement of the statute. While both the legislative history and statutory language of the 1974 Campaign Act amendments appear less ambiguous than they do in the Federal Trade Commission Act on this issue, the discrepancy may only reflect a sense of Congressional caution derived from judicial expansion of federal rights rather than a Congressional desire to create rights in one instance and to deny them in another.

Another recent Seventh Circuit decision, McDaniel v. University of Chicago, found a private cause of action arising under the Davis-Bacon Act. The circuit court's decision, however, was vacated by the Supreme Court in a memorandum opinion which called the court's attention to Barbour and Cort. A fourth case, Schreiber v. Lugar, found it unnecessary to decide whether an implied cause of action may be found under the Revenue Sharing Act, but allowed that "a strong contrary argument can be made." The Third Circuit's contribution to the new trend, Polansky v. Trans World Airlines, Inc., denied private causes of action under both 49 U.S.C. § 1374(b) and section 1381 to plaintiffs who asserted that fraudulent representations induced them to participate in a substandard European tour. While private rights had previously been inferred from the Federal Aviation Act, the Third Circuit applied Cort criteria to ascertain whether the particular type of disadvantage suffered was cognizable. Reasoning that 49 U.S.C. § 1374 only protects passengers from discriminatory access to air facilities, that the remedy sought would not aid the statutory goal of freedom of transit and that state remedies for breach of contract, breach of warranty and fraudulent misrepresentation were readily available, the court determined that

140. McNamara v. Johnston, 522 F.2d 1157, 1162 n.5 (7th Cir. 1975).
141. 512 F.2d 583 (7th Cir. 1975).
143. 518 F.2d 1099 (7th Cir. 1975). The case was dismissed for want of jurisdiction.
144. Id. at 1104 n.16.
145. 523 F.2d 332 (3d Cir. 1975).
146. See, e.g., Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956).
plaintiffs had failed three of the four Cort tests.

The court’s analysis of implied private rights under 49 U.S.C. § 1381 is perhaps even more instructive, as that section authorizes the Civil Aeronautics Board to investigate firms engaged in unfair or deceptive practices or unfair methods of competition and to issue cease and desist orders in those instances where the Board disapproves of the method of operation. Significantly, section 1381 was modeled after section 5 of the Federal Trade Commission Act. This heritage was discussed in Pan American Airways, Inc. v. United States,147 where the Supreme Court concluded that neither section “embrace[s] a remedy for private wrongs.”148 The circuit court in Polansky, following the earlier Supreme Court language, concluded that “[t]o vindicate a public right, Congress created a specialized agency, the Civil Aeronautics Board. This agency, alone, is provided with enforcement powers under § 1381.”149

Finally, the Ninth Circuit’s decision in Lopez v. Arrowhead Ranches150 followed that part of the Cort holding which refused to find private rights derived from a general penal statute. Thus, each circuit court which has considered an implication issue since the Cort decision has either begrudgingly followed precedent, rejected the contention that an implied right of action exists or has been asked by the Supreme Court to reconsider its holding in light of the new criteria.

District courts have appeared less niggardly in their treatment of implied claims. For example, the court in Sierra Club v. Morton151 acknowledged a private right of action under sections 9 and 10 of the Rivers and Harbors Act of 1899,152 a statute which specifically directs the Attorney General to enforce its provisions. Although the district court followed a Ninth Circuit pre-Cort decision,153 it nevertheless applied the Cort criteria in reaching its determination. The Sierra court found that the Rivers and Harbors Act was derived for plaintiffs' especial benefit, that there

148. Id. at 306.
150. 523 F.2d 924 (9th Cir. 1975).
153. Sierra Club v. Morton, 400 F. Supp. 610, 622 (N.D. Cal. 1975) (citing Alameda Conservation Ass’n v. California, 437 F.2d 1087, 1094-95 (9th Cir. 1971)).
was nothing in the Act's history to preclude private rights, and that the Act contained no grant of exclusive jurisdiction. Moreover, the court concluded that there was a compelling need to vindicate the federal interest in preserving navigable waterways in the face of a doubtful state law remedy, and that the Attorney General's limited resources were insufficient to redress all private injuries.

In re Paris Air Crash of March 3, 1974, 154 and Rauch v. United Instruments, Inc., 155 following precedent, 156 found private rights for enforcing aeronautical wrongful death and economic injury claims, respectively. Paris and Rauch, however, like Sierra Club 157 but unlike Guernsey, operate in areas of pervasive federal regulation with expressed judicial doubts as to whether any state remedies are potentially available.

Vasquez v. Ferre, 158 a final post-Cort case granting private rights, closely followed precedent 159 in sustaining a cause of action under the Wagner-Peyser Act, 160 a statute which had created a federal employment service to match workers in one state with jobs elsewhere. Here the court found that the statutory remedies created by Congress, as opposed to the way in which they were administered by the agency, were inadequate.

Two recent cases in the District of Columbia have also followed Cort's reasoning but have denied private rights. In Nader v. Butz 161 the court refused jurisdiction and directed America's foremost consumer advocate to bring his case before the Federal Elections Commission which, in the court's opinion, had primary jurisdiction over complaints seeking injunctive relief against persons or committees believed to be engaging in illegal conduct. In Network Project v. Corporation for Public Broadcasting, 162 the court refused to imply a private right of action under sections 396 and 398 of the Public Broadcasting Act of 1967. 163 Although the statute and its history evidenced an intent to benefit television

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viewers, the court cautioned that "[i]n determining whether an alleged implied right of action exists in this case it is important to keep in mind not only what Congress sought to accomplish but the means they provided to accomplish their declared purposes."\(^{165}\) Finding a congressional purpose to provide maximum assistance to noncommercial broadcasting and no evidence of intention to provide private remedies for dissident viewers, no private right was held to exist, in part because "it would inevitably enmesh the courts in supervision of the detailed day to day operations of [the Corporation for Public Broadcasting]."\(^{165}\)

Other recent lower court opinions rejecting implied rights include *Moen v. Las Vegas International Hotel*\(^{166}\) and *Traylor v. Safeway Stores, Inc.*\(^{167}\) In *Moen* the court refused to imply a private right of action from a misdemeanor penalty statute prohibiting the confiscation of employee gratuities. The court observed that the Act at issue\(^{168}\) was passed to protect the general public, its history implicitly demonstrated an intent to deny private causes of action, and private enforcement would be inconsistent with its purpose of denying to employers the benefit of such largesse; it, therefore, granted summary judgment. In *Traylor* the court found that the right which the plaintiffs sought to create (damages for breach of an Executive Order establishing requirements for nondiscriminatory employment opportunities) was disruptive of an administrative scheme and the regulations promulgated thereunder. It noted that "the numbers of potential claims involved here are astronomical,"\(^ {169}\) and explained that "[t]he existence of a private cause of action under the executive order would vastly complicate the administrative process contemplated by the order, and would impose a potentially immense burden on the federal court system."\(^ {170}\)

Finally, *Jones v. United States*\(^{171}\) denied plaintiff's attempt to bring a civil action for jury tampering under 28 U.S.C. § 1346(b) on the grounds that he was not within the especial class for whose protection the statute was enacted, and that the pur-

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\(^{165}\) Id. at 1339.


\(^{170}\) Id.

poses of the Act could be fulfilled by invoking plaintiff's constitutional right to a fair trial. Criminal penalties associated with the statute were thought to be sufficient to protect the fair administration of justice.

Thus, with the exception of Guernsey, administration of the implication doctrine since Cort has reflected a rather pronounced disinclination toward the creation of new federal rights. Indeed, those district courts which have sustained private rights explicitly followed precedent in areas traditionally governed by federal regulation, regardless of whether state remedies were available by law to aggrieved plaintiffs.

**The Guernsey Court's "Fifth" Criterion**

Recent Supreme Court decisions such as Amtrak, Barbour and Cort, and lower court decisions which have adopted their reasoning, have abridged the doctrine of implication with the result that federal penal and regulatory statutes are not routinely construed to create rights of federal redress for private injuries. These decisions were ignored by the Guernsey court principally, it seems, because of its distaste for the way in which the Trade Commission has managed its affairs. Indeed, the Guernsey opinion is permeated with observations regarding the problems the agency has investigating consumer complaints. The opinion also questions the efficacy of the agency to deter consumer fraud, the value of cease and desist orders and the "ponderous administrative processes" employed by the agency to prosecute and adjudicate violations. Concern for the ways in which the Commission does business is nearly as old as the Commission itself; nevertheless, more violence is done by sharing enforcement of the Act with private parties than with straightforward congressional reform of the Commission.

From the outset, controversy has followed the Trade Commission in its attempts to regulate business practices. In *FTC v.*

176. The specific criticism that "[t]he Federal Trade Commission currently receives about 9,000 complaints a year and is only able to investigate one out of eight or nine of these, and, of the small fraction investigated, only one in ten results in a cease and desist order" presupposes the meritorious nature of each complaint. Guernsey v. Rich Plan, 408 F. Supp. 582, 586 (1976). Additionally, that statistic is irrelevant to the Guernsey situation since not every inquiry relates to the enforcement of prior decrees.
Justice Brandeis recounted the original debate in Congress between those who wanted a purely investigatory agency and others who wanted a commission which could prohibit unfair practices so as to eliminate monopolistic conduct before it had an opportunity to achieve its intended purposes. While the Interstate Commerce Commission was created to cure only one particular type of unreasonable competition (shipping rebates), the Federal Trade Commission was burdened with the responsibility for every other type of practice potentially available to the unfair trader. Congress, aware that the nature of unfair trade practices could change with time, deliberately left the Act's definition of unfair practices vague so that the creative deceiver could be brought to justice. This, of course, created problems for those charged with enforcement responsibilities, especially since appellate benches often second guessed the Commission's expert judgments.

However well intentioned the Congress, problems arose almost immediately regarding the scope of section 5. In FTC v. Gratz, the Supreme Court dismissed the suit because the Commission did not properly frame its pleading. Later, in L.B. Silver Co. v. FTC, a majority of the Court of Appeals for the Sixth Circuit agreed with certain aspects of the Commission's resolution of the controversy at issue, but it was nevertheless forced to acknowledge that "this controversy does not vitally concern the general purchasing public. On the contrary, it is a controversy largely between rival breeders of hogs . . . ."

The dissent went further and thought a thorough review of the Commission's power under section 5 was in order, particularly since the Commission was proceeding against unfair methods of competition having little to do with restraints and monopolies. A careful review of the Congressional Record led Judge Denison

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177. See text accompanying notes 87-91 supra.
178. See text accompanying notes 87-95 supra.
180. 253 U.S. 421 (1922).
181. Id. Additional early cases which consider section 5 are reviewed in L. B. Silver Co. v. FTC, 289 F. 985 (6th Cir. 1923).
182. 289 F. 985 (6th Cir. 1923).
183. The Commission was asked to determine whether Ohio-improved Chester hogs were falsely proffered as superior to the improved Chester White strain.
184. 289 F. 985, 989 (6th Cir. 1923).
185. The 1938 Wheeler-Lea amendments remove all doubt that the Commission ought proceed against unfair methods of competition which do not involve competitive injury.
to conclude that the Commission should be free of private quarrels and controversies and should not act in those matters which, although perhaps unfair to competitors, do not detrimentally affect the public.\(^\text{186}\) In *New Jersey Asbestos Co. v. FTC,\(^\text{187}\) the case was dismissed because the practice involved (commercial bribery) was not a matter of public interest; and in *Kinney-Rome Co. v. FTC\(^\text{188}\) the Commission’s order, which prohibited a manufacturer from giving necktie sets to employees of retail merchants on completion of a successful sale, was struck down simply because the court felt that the practice did not amount to unfair competition.

Thus, from the outset, the parameters of the vast responsibilities given to the Commission have been the subject of heated debate. Further, as recounted by the court in *Guernsey*, a variety of courts and critics have taken up arms against Commission inefficiencies through the years. Criticism continues to this day.\(^\text{189}\)

It should also be noted that a new group of critics has emerged in recent years which has challenged innovative Commission interpretations of its responsibilities. This group takes issue with the Commission’s power to order "corrective" advertising,\(^\text{190}\) consumer rescission,\(^\text{191}\) substantive trade regulation rules,\(^\text{192}\)

\(\text{\textsuperscript{186}}\) 289 F. 985 (6th Cir. 1923) (Denison, J., dissenting).
\(\text{\textsuperscript{187}}\) 264 F. 509 (2d Cir. 1920).
\(\text{\textsuperscript{188}}\) 275 F. 665 (7th Cir. 1921).
\(\text{\textsuperscript{190}}\) Corrective advertising orders require an advertiser to confess error for certain claims previously made for his product. While several manufacturers have accepted corrective advertising provisions as part of consent decrees, Warner-Lambert, Co. [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,956 (FTC 1975), was the first litigated proceeding in which the Commission imposed such sanction. That order is now on appeal to the District of Columbia Circuit.
\(\text{\textsuperscript{191}}\) See Koscot Interplanetary, Inc., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,056 (FTC 1975). 15 U.S.C.A. § 57 (b) (1976) gives the Commission authority to proceed against parties violating trade regulation rules or cease and desist orders for rescission, reformation, refund of money, damages and for other relief in either federal or state court. While these provisions specifically provide for notice to be given for injured parties, they do not enlarge remedies available to such persons.

\(\text{\textsuperscript{192}}\) National Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert.
"line of business" reporting and other activities ostensibly designed to promote fair trading. As contrasted with the somewhat dated criticism cited in Guernsey, the new critics complain of too much, rather than too little, Commission enforcement.

In addition, it is appropriate to note that the Commission has recently made extensive efforts to proceed against those who have violated its cease and desist orders. In contrast to past awards, the current trend, aided by a recent amendment which has increased maximum penalties for each violation from five to ten thousand dollars, is toward substantial fines. Furthermore, the Commission's Compliance Division insists on detailed reports demonstrating fidelity to its orders; there is also recent evidence that the Commission is actively pursuing its new power to proceed against knowing violators of its orders.

Other courts have grappled with the plight of injured consumers who are faced with a seemingly unresponsive bureaucracy. Wherever the equities may lie as between consumer and producer in specific situations, it does violence to the concept of separation of administrative and judicial functions for a court to rule, as the Guernsey court did, that the administrative process has failed so abysmally that matters must be taken into judicial hands. The court in Holloway v. Bristol-Myers Corp. properly denied, 415 U.S. 951 (1974), rev'g 340 F. Supp. 1343 (D.D.C. 1972) (holding that the Commission inherently possessed this power). See Comment, 69 NW. U.L. Rev., supra note 9, at 476-88. This power has been codified in recent amendments to the Act. 15 U.S.C.A. § 57 (a) (1976).

193. See 754 Antitrust & Trade Reg. Rep. (BNA) A-5 (1976), wherein the line of business reporting program was criticized as both potentially unreliable and dangerous if reported data does not remain confidential.


200. Id.
refused to take such action; it looked to Congress to alter statutory causes of action rather than to create them without congressional blessing. Congressional attention has turned to the Commission on many occasions, yet its displeasure has never reached the level of transferring enforcement power to the federal courts. \(^{201}\)

**CONCLUSION**

In analyzing the *Guernsey* ruling, it is appropriate to estimate the potential benefits to be achieved by establishing a private cause of action under the Federal Trade Commission Act. Presumably, plaintiffs would hope to establish a body of law construing the Act so that they would be relieved of proving certain elements necessary to establish common law fraud and deceit. When the Commission proceeds administratively, staff counsel do not have to prove that representations or practices were established with the intent to deceive, it is irrelevant whether the statement or practice could be interpreted as a mere opinion, and no proof is needed regarding the misleading nature of the communication or of the fact that anyone had been deceived by or acted in reliance upon the representation. The basis for these rules originates from the legal fiction that the Commission has developed its own expertise in such matters and that its prophylactic function should not be hindered by waiting until it could prove that significant problems had developed within the marketplace.

It can be questioned whether we need a kind of "no fault" consumer protection which would enable any litigant to sue for damages even where an alleged misrepresentation in advertising is an innocent mistake, where there is no evidence that anyone was misled and where only a dispute over a low-cost item with discernible characteristics is involved. Indeed, such causes could only be economically prosecuted as class actions, about which there is probably more controversy than there is about the Trade Commission. \(^{202}\) With the type of judicial consideration given to

\(^{201}\) Compare Title I of Pub. L. No. 93-637 (Jan. 4, 1975), which specifically gives consumers the right to sue in federal district court for warranty claims if each individual claim exceeds the sum of $25 and the matter in controversy exceeds $50,000, with Title II, which gives the Commission the authority to proceed against knowing violators of the section 5 orders. The legislative history of Pub. L. No. 93-637 is collected at 4 U.S. Code Cong. & Ad. News 7702 (1974).

\(^{202}\) For decisions limiting the availability of class actions, see *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974) (plaintiff must bear the entire cost of notice to the class);
the plight of the consumer by the New York City Civil Court in *Star Credit*, future plaintiffs may well be better advised to press common law claims to avoid the procedural burdens and expense that class actions inevitably engender.

In broader context, recent Supreme Court decisions narrow considerably the availability of implied rights from federal regulatory statutes. The Federal Trade Commission Act, repeatedly amended since 1914 without congressional authorization for private causes of action, seems a poor candidate to serve as the basis for expansion of that doctrine. Rather, one might expect that recognition of implied federal rights will be confined to those areas in which they now exist until such time as the Supreme Court gives new evidence of liberalizing its requirements.

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204. See, e.g., *Dolgow v. Anderson*, 438 F.2d 825 (2d Cir. 1971).