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# COMMENTS

## CIVIL PENALTIES AND THE FEDERAL TRADE COMMISSION IMPROVEMENTS ACT

by Neal B. Shniderman

The Federal Trade Commission announced<sup>1</sup> the initiation of a pilot program<sup>2</sup> to seek civil penalties from anyone who engages in conduct which violates a prior cease and desist order. Under the program eighty-eight businesses were notified by letter<sup>3</sup> of the potential \$10,000 per violation penalty for engaging in practices which had been determined to be unfair or deceptive by prior cease and desist orders.<sup>4</sup> The notified businesses were not named in the prior Commission orders. Commission authority to seek these penalties was predicated upon section 205 of the Magnuson-Moss

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1. FTC News No. JO48-S.205 (Jan. 5, 1976). See also Shifrin, *FTC Institutes New Enforcement Plans*, The Washington Post, Jan. 7, 1976, § C, at 7; The Wall Street Journal, Jan. 6, 1976, at 6, col. 1.

2. The pilot program will address:

- (1) business opportunities advertising (misrepresentation of potential earnings);
- (2) advertising of merchandise not readily available for sale, and use of bait and switch tactics;
- (3) false and misleading practices in collecting debts;
- (4) selling damaged or defective merchandise without disclosing such fact, substituting inferior or different goods for those ordered, and failing to replace or refund monies for defective goods;
- (5) selling used or rebuilt merchandise as new;
- (6) unfairness or deception in marketing freezer meats;
- (7) failure to comply with requirements of the Truth in Lending Act in consumer credit advertising;
- (8) deceptive demonstrations, testimonials, or endorsements; and
- (9) false claims for cosmetics and tires.

FTC News, *supra* note 1.

3. The letters sent by the Commission state:

Dear \_\_\_\_\_:

On January 4, 1975, the Federal Trade Commission Act was amended to provide that a person, partnership or corporation is liable for civil penalties of \$10,000 per violation for engaging in acts or practices which the Commission has determined to be deceptive or unfair in prior cease and desist proceedings. (15 U.S.C. § 45(m)(1)(B)). A copy of the relevant statutory provision is attached.

This letter together with the enclosed Federal Trade Commission decisions is to inform you of certain [debt collections, sales and advertising, bait and switch, credit advertising] business opportunities advertising practices [*sic*] which the Commission has found unlawful under Section 5(a) (1) of the Federal Trade Commission Act and to notify you of the potential liability of a business for civil penalties under the above described statutory provision if a business is in fact engaged in them.

In order to avert possible action by the Federal Trade Commission you should immediately insure that you are not engaged in any of the practices proscribed by the enclosed decisions.

Please contact \_\_\_\_\_ of this office if you have any questions regarding the applicable law or your possible liability.

4. Among the material included with the letter of warning issued by the Commission is a statement of previously adjudicated Commission determinations upon which a penalty action will be based. The following is a portion of one statement:

Warranty-Federal Trade Commission Improvements Act (FTCIA)<sup>5</sup> which amends section 5 of the Federal Trade Commission Act (FTCA).<sup>6</sup>

This Comment will address that portion of section 205 of the FTCIA<sup>7</sup> which authorizes the Commission to seek civil penalties against persons, partnerships, or corporations not named as respondents in a Commission cease and desist order, but who have actual knowledge of Commission-adjudicated law.<sup>8</sup> Certain ambiguities in the statutory language which give rise to the due process problems of adequate representation, adequate notice, and the restriction of judicial review are explored, and an attempt is made to clarify the meaning of the statutory language and to provide solutions for the due process problems presented.

## I. THE FEDERAL TRADE COMMISSION ACT

Section 5 of the FTCA originally proscribed those activities constituting "unfair methods of competition."<sup>9</sup> The United States Supreme Court initially construed the section 5 prohibition to apply only when the challenged practices were unjust to competitors; consumer exploitation alone was insufficient.<sup>10</sup> To overcome this rule Congress enacted the Wheeler-Lea Amendments to the FTCA,<sup>11</sup> through which the phrase "unfair or deceptive acts or practices" was incorporated into the statutory language. This phrase

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### SYNOPSIS OF FEDERAL TRADE COMMISSION DECISIONS CONCERNING THE ADVERTISING AND SALE OF COSMETICS

The Federal Trade Commission has determined that the following acts or practices in the advertising and sale of cosmetics are deceptive or unfair and are unlawful under Section 5 of the Federal Trade Commission Act.

It is an unfair or deceptive act or practice to represent, directly or by implication, that a cosmetic will rejuvenate the skin or will restore youth or the appearance of youth to the skin. [*In re Charles of the Ritz Distrib. Corp.*, 34 F.T.C. 1203 (1942), *aff'd*, 1944-1945 Trade Cas. ¶ 57,267 (2d Cir. 1944)].

It is an unfair or deceptive act or practice to represent, directly or by implication, that a cosmetic having no systemic effects will cure, mitigate, treat or prevent a skin condition that is systemically caused. [*In re Charles of the Ritz Distrib. Corp.*, 34 F.T.C. 1203 (1942), *aff'd*, 1944-1945 Trade Cas. ¶ 57,267 (2d Cir. 1944)].

It is an unfair or deceptive act or practice to represent, directly or by implication, that any externally applied product will nourish the hair, hair shaft or hair follicles. [*In re Clairol, Inc.*, 33 F.T.C. 1450 (1941)].

5. Act of Jan. 4, 1975, Pub. L. No. 93-637, §§ 201-07, 88 Stat. 2194, amending 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57, 58 (1970) (codified at 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a, 57b, 57c, 58 (Supp. IV, 1974)).

6. Federal Trade Commission Act §§ 1-11, 15 U.S.C. §§ 41-58 (1970), formerly ch. 311, §§ 1-11, 38 Stat. 717 (1914).

7. 15 U.S.C. § 45(a) (Supp. IV, 1974); see note 68 *infra*.

8. This Comment does not analyze the civil penalty provisions provided for in section 205 of the FTCIA, 15 U.S.C. § 45 (Supp. IV, 1974), for violation of a rule promulgated by the FTC through a rulemaking proceeding.

9. Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719. The statute provided "[t]hat unfair methods of competition in commerce are hereby declared unlawful." *Id.*

10. *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934); *FTC v. Raladam Co.*, 283 U.S. 643 (1931); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

11. 15 U.S.C. §§ 41-58 (1970), as amended, (Supp. IV, 1974). This Act provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." *Id.* § 45(a)(1).

was intentionally<sup>12</sup> left undefined by Congress in an attempt to avoid restricting Commission action unnecessarily. As a result, the Wheeler-Lea Amendments have tended to promote free competition<sup>13</sup> and to proscribe acts or practices adversely affecting the consumer.<sup>14</sup>

*Procedure.* The Commission seeks to encourage compliance with the FTCA through both formal<sup>15</sup> and informal<sup>16</sup> means. Of particular importance are the consent order and formal adjudication procedures in section 5 of the FTCA and parts 2 and 3 of the Commission's rules<sup>17</sup> under which a cease and desist order may eventuate. When the Commission suspects that a person, partnership, or corporation is violating the FTCA, an investigation may be made pursuant to the Commission rules.<sup>18</sup> During this investigatory period the party suspected of a violation may be able to negotiate the entry of a cease and desist order.<sup>19</sup> While the entry of an order by consent is not considered an admission of a violation, it has serious consequences. Once the cease and desist order becomes final<sup>20</sup> the right to a statement of the findings of fact and conclusions of law, and the rights to judicial review or other challenges to the order, are waived. The agreement submitted to the Commission by the bureau<sup>21</sup> responsible for the negotiation will be placed, if accepted, on the public record for sixty days. During this time the Commission will receive any public comments on the proposed order.<sup>22</sup> Only rarely, however, does the Commission modify the order pursuant to these comments.<sup>23</sup>

12. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972); *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304, 310-12 (1934); S. Rep. No. 597, 63d Cong., 2d Sess. 18-19 (1914); ABA SECTION ON ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 165 (1975). Compare *FTC v. Gratz*, 253 U.S. 421 (1920) (providing restrictive interpretation of power), with *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966) (rejecting restrictive interpretation of *Gratz*).

13. See *Toledo Pipe-Threading Mach. Co. v. FTC*, 11 F.2d 337, 342-43 (6th Cir. 1926).

14. *Korber Hats, Inc. v. FTC*, 311 F.2d 358, 360 (1st Cir. 1962); *National Candy Co. v. FTC*, 104 F.2d 999, 1006 (7th Cir. 1939); see Note, *FTC Substantive Rulemaking: An Evaluation of Past Practice and Proposed Legislation*, 48 N.Y.U.L. REV. 135 (1973).

15. See 40 Fed. Reg. 15234 (1975), amending 16 C.F.R. §§ 3.1-.72 (1975). See also notes 36-42 *infra*.

16. If the infraction is minor, the Commission may attempt to obtain an assurance of voluntary compliance pursuant to 16 C.F.R. § 2.21 (1975); see Note, *Voluntary Compliance: An Adjunct to the Mandatory Process*, 38 IND. L. REV. 377 (1963). In addition, the Commission may employ rulemaking authority pursuant to section 202 of the FTCIA, 15 U.S.C. § 57a (Supp. IV, 1974), as implemented by regulations set out in 3 TRADE REG. REP. ¶¶ 9801.07-26 (1975), trade practice conferences, industry guides pursuant to 16 C.F.R. §§ 1.5-.6 (1975), and advisory opinions pursuant to 16 C.F.R. §§ 2.31-.35 (1975), as amended, 40 Fed. Reg. 15235 (1975).

17. 16 C.F.R. §§ 2.1-3.61 (1975).

18. *Id.* §§ 2.1-.15.

19. 40 Fed. Reg. 15235 (1975), amending 16 C.F.R. § 2.31 (1975).

20. 40 Fed. Reg. 15235-36 (1975), amending 16 C.F.R. § 2.32 (1975). The order resulting from a consent negotiation has the same force and effect as an order entered after a full adjudication on the merits. *Id.* at 15235; see *National Candy Co. v. FTC*, 104 F.2d 999, 1006 (7th Cir. 1939). Cease and desist orders become final pursuant to Federal Trade Commission Act §§ 5(g)-(i), 15 U.S.C. §§ 45(g)-(i) (1970).

21. Organizationally there are two bureaus of importance here—Competition and Consumer Protection.

22. 40 Fed. Reg. 15236 (1975), amending 16 C.F.R. § 2.34 (1975).

23. *MacIntyre & Volhard, Intervention in Agency Adjudications*, 58 VA. L. REV. 230, 249 (1972). But see *Xerox Corp.*, 3 TRADE REG. REP. ¶ 20,728 (FTC 1975)

Should the proposed cease and desist order not be accepted at the outset by the party<sup>24</sup> or subsequently by the Commission,<sup>25</sup> formal proceedings<sup>26</sup> may be initiated if the Commission determines the public interest requires this action.<sup>27</sup> Absent remand pursuant to rule 3.25(b),<sup>28</sup> the right to enter into consent negotiations is foreclosed thereafter.<sup>29</sup> Prior to the commencement of formal proceedings there need be no established standards for deceptive practices<sup>30</sup> since a cease and desist order does not punish previous practices;<sup>31</sup> only future violations of a cease and desist order are punishable.

While the Commission ideally ought not direct a complaint solely against a *minor* member of an industry,<sup>32</sup> a proceeding may be initiated against only *one* member of an industry engaging in the alleged illegal practice.<sup>33</sup> Without a showing of abuse of discretion,<sup>34</sup> the respondent may not assert successfully the defense that he has been placed at a competitive disadvantage because other members of the industry engaging in the same practice have not been served or joined.<sup>35</sup>

When formal cease and desist proceedings are brought, the alleged violator is given an opportunity to rebut the Commission's charges in a hearing. An opportunity is provided for discovery,<sup>36</sup> compulsory process for witnesses,<sup>37</sup> and the introduction of evidence.<sup>38</sup> "Every party, except

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(withdrawal from adjudication to consider proposed consent order), *approval withdrawn*, 3 TRADE REG. REP. ¶ 20,833 (FTC 1975), *renegotiated order accepted*, 3 TRADE REG. REP. ¶ 20,868 (FTC 1975), *consent order finalized*, 3 TRADE REG. REP. ¶ 20,955 (FTC 1975).

24. The person, partnership, or corporation subject to the FTCIA and named in a complaint will be referred to as a party or respondent throughout.

25. After the 60-day publication period, the Commission may withdraw its acceptance of the order during the next 30 days. 40 Fed. Reg. 15236 (1975), *amending* 16 C.F.R. § 2.34 (1975).

26. The procedure for formal Commission proceedings is set out in the Federal Trade Commission Act § 5, 15 U.S.C. § 45(b) (Supp. IV, 1974), and 40 Fed. Reg. 15234, 33970 (1975), *amending* 16 C.F.R. §§ 3.1-.72 (1975).

27. *Id.* In order to show the commencement of a proceeding was not in the public interest, an abuse of discretion must be shown. *See, e.g.,* Slough v. FTC, 396 F.2d 870 (5th Cir. 1968).

28. 40 Fed. Reg. 15236 (1975), *formerly* 16 C.F.R. § 3.25(b) (1975).

29. 40 Fed. Reg. 15235 (1975), *amending* 16 C.F.R. § 2.31(b) (1975); *see* *Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Lehigh Portland Cement Co.*, 75 F.T.C. 1080 (1969).

30. *National Clearance Bureau v. FTC*, 255 F.2d 102 (3d Cir. 1958); *see* Note, *Effective Guidance Through Cease and Desist Orders: The T-V Commercial*, 38 IND. L.J. 442, 450 (1963).

31. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

32. *FTC v. Universal Rundle Corp.*, 387 U.S. 244, 251 (1967); *Sandura Co.*, 61 F.T.C. 756 (1962), [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,945, *modified*, 339 F.2d 847 (6th Cir. 1964); *see* Baum & Baker, *Enforcement, Voluntary Compliance and the Federal Trade Commission*, 38 IND. L.J. 322, 345 (1963); note 112 *infra*.

33. *National Candy Co. v. FTC*, 104 F.2d 999 (7th Cir. 1939), citing *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934), and *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

34. *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958) (per curiam) (no abuse shown).

35. *Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Advertising Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108 (1st Cir. 1956); *International Art Co. v. FTC*, 109 F.2d 393, 397 (7th Cir. 1940).

36. 40 Fed. Reg. 15234, 33970, *amending* 16 C.F.R. § 3.21 (1975) (pre-hearing conferences); 16 C.F.R. §§ 3.22 (motions), 3.31 (request for admissions), 3.33 (depositions) (1975); *see* ABA SECTION OF ANTITRUST LAW, *supra* note 12, at 219.

37. 16 C.F.R. §§ 3.34-.39 (1975).

38. *Id.* § 3.43.

intervenors," must be given due notice, the right of cross-examination, objection, "and all other rights essential to a fair hearing."<sup>39</sup>

Following a formal hearing on the cease and desist order, the decision of the administrative law judge becomes the decision of the Commission<sup>40</sup> unless a party perfects an appeal pursuant to the Commission's rules.<sup>41</sup> When such an appeal is taken to the Commission briefs are filed, oral argument is heard, and the Commission is authorized to "adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision . . . ."<sup>42</sup>

Should the Commission render a decision adverse to the respondent, section 5(c) of the FTCA permits "[a]ny person, partnership, or corporation required by an order of the Commission to cease and desist from using any . . . act or practice" to appeal to the appropriate court of appeals.<sup>43</sup> The respondent is required to exhaust his administrative remedies before an appeal properly lies in the court of appeals<sup>44</sup> except in certain circumstances when review may be sought in the district court.<sup>45</sup> As in other cases of judicial review of administrative actions,<sup>46</sup> the Commission's finding of fact, if supported by substantial evidence, is conclusive despite conflicting evidence which could lead to a different result.<sup>47</sup> The judiciary is, however, the ultimate arbiter on questions of law; courts must determine whether the acts or practices which were found by the Commission to have occurred are indeed unfair or deceptive, giving due weight to the Commission's expertise in this area.<sup>48</sup>

*Scope and Nature of the Cease and Desist Order.* The cease and desist order, whether entered pursuant to an informal or formal proceeding, may be viewed as the Commission's most significant weapon.<sup>49</sup> The order is publicized and serves as notice to others engaged in similar conduct, thereby

39. *Id.* § 3.41(c); the rights of intervenors are set out in the Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b) (Supp. IV, 1974), and 16 C.F.R. § 3.14 (1975); see notes 154-79 *infra* and accompanying text.

40. 16 C.F.R. § 3.41(a) (1975).

41. *Id.* §§ 3.42-.55.

42. *Id.* § 3.54(b).

43. 15 U.S.C. § 45(c) (1970). This section designates the appropriate court of appeals to be where the method of competition or act or practice in question was used, or where the respondent before the Commission resides or carries on business.

44. *Miles Laboratories v. FTC*, 140 F.2d 683 (D.C. Cir.), *cert. denied*, 322 U.S. 752 (1944).

45. *Jewel Cos. v. FTC*, 432 F.2d 1155 (7th Cir. 1970); *Annot.*, 16 A.L.R. FED. 361 (1973). Generally these instances are limited to when the FTC acts outside the scope of its authority, when FTC action has international implication, or when the agency fails to act or takes an unusually long time to act.

46. See, e.g., National Labor Relations Act § 101(f), 29 U.S.C. § 160(f) (1970); Social Security Act § 205, 43 U.S.C. § 405(g) (1970); see K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.02 (1958).

47. *Standard Distributions, Inc. v. FTC*, 211 F.2d 7 (2d Cir. 1954); accord, *American Home Prods. Corp. v. FTC*, 402 F.2d 232 (6th Cir. 1968), *modifying final order*, 421 F.2d 845 (6th Cir. 1970); cf. Federal Trade Commission Act § 5(c), 15 U.S.C. § 45(c) (1970).

48. *Grove Laboratories v. FTC*, 418 F.2d 489 (5th Cir. 1969); see *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936).

49. Cf. McKay, *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441, 471 (1964).

increasing "the in terrorem margin of the administrative agency."<sup>50</sup>

In *FTC v. National Lead Co.*<sup>51</sup> the Supreme Court determined that the Commission has wide discretion regarding the breadth of the cease and desist order entered when exercising the power granted by the FTCA.<sup>52</sup> This discretion is not unbridled, however, for the cease and desist order must have a reasonable relation to the unlawful practice,<sup>53</sup> and must be sufficiently clear and precise to preclude questions of meaning and application.<sup>54</sup> While recognizing the reasonable relation doctrine, courts have avoided tying the Commission's hands. Although the Commission's findings of fact were restricted to a particular practice, courts have held cease and desist orders need not be limited to the specific practice found<sup>55</sup> and have permitted orders banning general anti-competitive schemes<sup>56</sup> and similar types of advertising.<sup>57</sup> The use of orders prohibiting nationwide use of a practice discovered in only one geographic area has also been sanctioned.<sup>58</sup> Commission orders are not restricted to the prohibition of activity but may require affirmative action, such as the inclusion in advertising of disclosures of the limited usefulness of a product in curing or retarding baldness,<sup>59</sup> or the effectiveness of an iron substitute in alleviating fatigue.<sup>60</sup>

## II. CIVIL PENALTIES

The enforcement process under section 5 of the FTCA as originally

50. Cf. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 317 (1965); Note, *supra* note 30, at 449-50.

51. 352 U.S. 419 (1957).

52. *Id.* at 428; see *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).

53. 352 U.S. at 428. In *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933), the Court stated, "The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." See *Niresk Indus., Inc. v. FTC*, 278 F.2d 337 (7th Cir. 1960).

54. *American Home Prods. Corp. v. FTC*, 402 F.2d 232, 237 (6th Cir. 1968), *modifying final order*, 421 F.2d 845 (6th Cir. 1970); *William H. Rorer, Inc. v. FTC*, 374 F.2d 622 (2d Cir. 1967), *overruled on other grounds*, *Rabriner & Jontow, Inc. v. FTC*, 386 F.2d 667 (2d Cir. 1967); see *FTC v. Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962) (dictum). *But see FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965) (permitting respondents to seek advisory opinions to clarify Commission orders).

55. *FTC v. Henry Broch & Co.*, 368 U.S. 360 (1962); *FTC v. Mandel Bros.*, 359 U.S. 385, 392-93 n.7 (1959); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Slough v. FTC*, 396 F.2d 870 (5th Cir.), *cert. denied*, 393 U.S. 980 (1968); see Note, *supra* note 16, at 384.

56. *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *cert. denied*, 386 U.S. 908 (1967).

57. *Nirisk Indus., Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960).

58. Cf. *Grove Laboratories v. FTC*, 418 F.2d 489 (5th Cir. 1969); *National Dairy Prod. Corp. v. FTC*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); see Note, *supra* note 16, at 384. In addition, the cessation of a particular practice does not preclude the issuance of a cease and desist order if the practice is capable of being resumed. *Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Marlene's, Inc. v. FTC*, 216 F.2d 556 (7th Cir. 1954); *Hershey Chocolate Corp. v. FTC*, 121 F.2d 968 (3d Cir. 1941). In *National Lead Co. v. FTC*, 227 F.2d 825 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957), and *Bell & Howell Co.*, 54 F.T.C. 108 (1957), the issuance of a cease and desist order was not allowed because circumstances precluded resumption of the activity.

59. See, e.g., *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960). See generally Note, *Corrective Advertising and the FTC: No Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374 (1971).

60. See, e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

enacted<sup>61</sup> required the Commission to enter a cease and desist order against the respondent which would lead first to the issuance of an appellate enforcement order upon a showing that the respondent had violated the order, and finally to a penalty in the form of a contempt citation, should the enforcement order be violated. The Wheeler-Lea Amendments<sup>62</sup> to the FTCA altered the enforcement procedure by eliminating the need for an appellate enforcement order before permitting commencement of a penalty action for breach of a final order.<sup>63</sup> The defendant in such a civil penalty proceeding was liable to the extent of "not more than \$5,000 for each violation . . . ."<sup>64</sup> This provision, however, has been amended twice. The first made each day of a "continuing failure or neglect to obey a final order of the Commission . . . a separate offense."<sup>65</sup> The second amendment increased the maximum penalty from \$5,000 to \$10,000 per violation, and empowered district courts to grant injunctive and other equitable relief to enforce a final order.<sup>66</sup>

Section 5(m) of the FTCA was replaced by section 205 of the FTCIA.<sup>67</sup> The new statutory language, designated section 5(m) of the FTCA,<sup>68</sup> should not alter the courts' authority to assess civil penalties for a violation of a cease and desist order against the named respondent. Since the respondent in a Commission proceeding has actual knowledge of the order, no further notice is required prior to the initiation of a civil penalty proceeding in federal district court.<sup>69</sup> Once a civil suit to recover the penalties is

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

62. Federal Trade Commission Act §§ 41-58 (1970), *as amended*, (Supp. IV, 1974).

63. 15 U.S.C. § 45(g)-(i) (1970). The cease and desist order becomes final when the respondent fails to pursue his rights to appeal or when the courts rule against the respondent.

64. Federal Trade Commission Act § 5(1), 15 U.S.C. § 45(1) (1970), *as amended*, (Supp. IV, 1974).

65. Oleomargarine Tax Act, ch. 61, § 4(c), 64 Stat. 21 (1950), *as amended*, 15 U.S.C. § 45(1) (1970).

66. Trans-Alaskan Pipeline Authorization Act, 87 Stat. 591 (1973), *as amended*, 15 U.S.C. § 45(1) (Supp. IV, 1974).

67. Federal Trade Commission Act § 5(m), 15 U.S.C. § 45(m) (Supp. IV, 1974), *formerly* ch. 311, 38 Stat. 719 (1914), *as amended*, 64 Stat. 21 (1950), *as amended*, 87 Stat. 592 (1973).

68. Section 5(m) now states in relevant part:

[1] (B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and (2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(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.

15 U.S.C. § 45(m) (Supp. IV, 1974).

69. *United States v. Beatrice Foods Co.*, 493 F.2d 1259 (8th Cir. 1974), *cert. denied*, 420 U.S. 961 (1975).



commenced, a court or jury will determine if the party has violated the order.<sup>70</sup> The scope of the district court's inquiry, however, will be restricted to a determination of compliance with the order,<sup>71</sup> and not whether the order is valid.<sup>72</sup> If the courts in an enforcement proceeding were required to review the facts supporting the order and the conclusion that these facts constitute an unfair or deceptive practice, the effective administration of the FTCA would be frustrated.<sup>73</sup> Such frustration would be inevitable since the courts, lacking the fact finding expertise of the Commission, would traverse the ground already covered by the Commission, thereby delaying the implementation of appropriate orders and enforcement of the Act.

The most significant change in civil penalty proceedings will result from the new sections 5(m)(1) and 5(m)(2) of the FTCA.<sup>74</sup> Under section 5(m)(1)(B)(1) the Commission may bring an action in federal district court to recover civil penalties up to \$10,000 per violation. The action may be brought against *any* person, partnership, or corporation engaging in an act or practice prohibited by a final cease and desist order<sup>75</sup> "with actual knowledge that such practice is unfair or deceptive and unlawful under [section 5(a)(1)],"<sup>76</sup> irrespective of whether the defendant is named in the cease and desist order in question. If the party proceeded against was not *actually* subject to the order involved, section 5(m)(2) provides that "the issues of fact in such action against such defendant shall be tried de novo."<sup>77</sup> Stated simply, the Commission may obtain a cease and desist order against the ABC Corporation for engaging in a particular type of advertising. Since Commission orders may be broadly worded,<sup>78</sup> the Commission could invoke these provisions against either IBM or Ma and Pa's Grocery Stores for engaging in advertising similar to that prohibited by the order against ABC Corporation. Proof of actual knowledge can be obtained easily. If the Commission upon its own initiative or the receipt of a complaint from a consumer or competitor decides to act against Ma and Pa, a copy of the order entered against ABC Corporation could be served on Ma and Pa by a procedure similar to section 5(f) of the FTCA.<sup>79</sup> Naturally, Ma and Pa

70. *United States v. J.B. Williams Co.*, 1974-1 Trade Cas. ¶ 75,041 (2d Cir. 1974); *United States v. Home Diathermy Co.*, 1960 Trade Cas. ¶ 69,601 (S.D.N.Y. 1959); *United States v. Purofied Down Prod. Corp.*, 1956 Trade Cas., ¶ 68,353 (E.D.N.Y. 1956); *see United States v. Hindman*, 1960 Trade Cas. ¶ 69,656 (D.N.J. 1960). *But see United States v. Vulcanized Rubber & Plastics Co.*, 288 F.2d 257, 258-59 n.2 (3d Cir.), *cert. denied*, 368 U.S. 821 (1961) (dictum).

71. Questions of intent, good faith, and extent of the injury resulting are not relevant to the determination of liability for violating the order, but are appropriate in the mitigation of penalty. *United States v. Karns*, 1963 Trade Cas. ¶ 70,950 (S.D.N.Y. 1963); *United States v. Vitasafe Corp.*, 212 F. Supp. 397 (S.D.N.Y. 1962).

72. *United States v. H.M. Prince Textiles, Inc.*, 262 F. Supp. 383 (S.D.N.Y. 1966); *United States v. Wilson Chem. Co.*, 1962 Trade Cas. ¶ 70,478, at 76,957 (W.D. Pa. 1962), citing *Piuma v. United States*, 126 F.2d 601 (9th Cir.), *cert. denied*, 317 U.S. 637 (1942); *see Miles Laboratories, Inc. v. FTC*, 1944-1945 Trade Cas. ¶ 57,206 at 57,223 (D.C. Cir. 1944).

73. *FTC v. Morton Salt Co.*, 334 U.S. 37, 54 (1948).

74. Act of Jan. 4, 1975, Pub. L. No. 93-637, § 205(a), 88 Stat. 2201, *amending* 15 U.S.C. § 45 (1970) (codified at 15 U.S.C. §§ 45(m)(1), 45(m)(2) (Supp. IV, 1974)); *see note 55 supra*.

75. *See note 65 supra* and accompanying text.

76. 15 U.S.C. § 45(m)(1) (Supp. IV, 1974).

77. *Id.* § 45(m)(2); *see Administrative Procedure Act*, 5 U.S.C. § 706 (1970).

78. *See notes 49-60 supra* and accompanying text.

79. 15 U.S.C. § 45(c) (1970). The FTC appears to agree with this suggestion. In

would then have notice and would be liable to pay penalties for continuing to engage in the prohibited practices after receipt of such notice.<sup>80</sup>

There can be little doubt Commission Chairman Engman was correct in asserting that these amendments "will change the entire thrust of consumer protection law enforcement at the Federal Trade Commission."<sup>81</sup> Prior to the enactment of the FTCIA each party was entitled to take two bites of the apple: each potential respondent could engage in a practice without suffering a penalty until a proceeding was filed and a final cease and desist order was issued; later each would incur a penalty only after enforcement proceedings were initiated.<sup>82</sup> Only one party is currently entitled to two bites. Once an order is obtained everyone else with actual knowledge of the order becomes liable for civil penalties after only one period of participation in unlawful trade practices.

Whether or not the FTCIA eliminates the opportunity to take a second bite is dependent upon the interpretation given to the statutory language which states that "the issues of fact in such action against such defendant shall be tried de novo."<sup>83</sup> Is this to be interpreted restrictively so that the district court in a civil penalty proceeding against a non-party to the cease and desist order will determine only (1) whether the defendant acted as alleged, and (2) whether the alleged acts violated the previous cease and desist order? If so, the trial court is barred from examining the conclusion of law reached by the Commission that such acts are unfair and deceptive,<sup>84</sup> although, upon determining that violations have occurred, the amount of the civil penalty may be determined by the court. Alternatively, under a permissive interpretation this language may mean that the district court proceeding will be substituted for the administrative process. The court would judge the facts (what acts were performed), draw its own conclusions of law (whether the act or practice is unfair or deceptive), and assess a penalty.

Although sparse, the legislative history<sup>85</sup> suggests Congress intended the "restrictive" interpretation. First, the statements in the conference report

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his opinion dissenting from the initiation of the pilot program, Commissioner Nye discussed the notification sent to the selected businesses:

Thus, in subsequent civil penalty proceedings, there should be little room for argument that those in receipt of the Commission's notice did not have the 'actual knowledge' required by the Act that the acts or practices involved are prohibited by Section 5(a)(1).

*In re* Implementation of Section 205 Enforcement Program 2-3 (FTC, Jan. 5, 1976) (Nye, Comm'r, dissenting). However, Commissioner Nye properly notes that receipt of notice is not "a condition precedent to the imposition of civil penalties, inasmuch as the statutory test is 'actual knowledge,' however acquired." *Id.* at 5; *see* note 1 *supra*.

80. *See* Note, *supra* note 30.

81. Address by Lewis A. Engman, Chairman of the Federal Trade Commission, before the Section of Antitrust Law of the ABA, Washington D.C., April 11, 1975, *reprinted in* ANTITRUST & TRADE REG. REP., Apr. 15, 1975, at D-1.

82. While the respondent may engage in the unlawful practice after a cease and desist order has been issued, he is subject to the assessment of a penalty for such practices.

83. 15 U.S.C. § 45(m)(2) (Supp. IV, 1974); *see* notes 68, 77 *supra*.

84. *See* notes 43-48, 55-58 *supra* and accompanying text.

85. *See* S. 356, 93d Cong., 1st Sess. § 202 (1973):

The Commission may initiate civil actions in the district courts of the United States against persons, partnerships, or corporations engaged in

address only questions of fact and not conclusions of law.<sup>86</sup> Second, when discussing the conference committee version, Representative Broyhill stated, "I might add, of course, that these persons [who were not respondents in a Commission proceeding] will be entitled to their day in court before being assessed with penalties, and for that reason are granted a *de novo* trial on all *factual issues* in the penalty action."<sup>87</sup> Nothing was said concerning the ability of the district court to review the conclusion of law reached by the Commission. Third, the denial of the right to challenge the conclusion of law in an enforcement proceeding under the new amendments is carried over from the previous law.<sup>88</sup> Finally, the purpose of the FTCIA, which includes the new provisions, is apparently to provide a greater degree of protection for the consumer by speeding up a determination that a practice is unfair or deceptive.<sup>89</sup> There are indications that the Commission accepts the restrictive interpretation.<sup>90</sup>

To interpret the statute as precluding the district court from reviewing the conclusion of law that a particular act or practice is unfair or deceptive may give rise to several due process problems. Although these problems may not be insurmountable, the presence of such due process considerations seems to be the most significant justification for an interpretation permitting full review of law and fact by the district court.

### III. PROBLEMS OF DUE PROCESS AND THE FTCIA

Three due process problems arise by interpreting the FTCIA to preclude the district court from reviewing conclusions of law contained in a previously entered cease and desist order during a civil penalty proceeding initiated against persons who were non-parties in the previous Commission proceed-

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any act or practice which is unfair or deceptive to a consumer and is prohibited by subsection [5] (a)(1) of this section with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by subsection [5] (a)(1) of this section, to obtain a civil penalty of not more than \$10,000 for each such violation.

This version of the civil penalty section provides a much "cleaner" approach to assessing civil penalties than the enacted version. Previous Commission orders would have been only an objective circumstance showing intent to violate the Act. In addition, the district court would provide a trial *de novo* rendering its own findings of fact and conclusions of law in each penalty suit initiated, rather than using the Commission's conclusions of law as the enacted version suggests. Therefore, under the Senate version previous orders appear not to be conclusive presumptions, but merely evidentiary. H.R. 7917, 93d Cong., 2d Sess. (1974).

86. H.R. REP. NO. 93-1606, 93d Cong., 2d Sess. 40 (1974):

The conference substitute adds a new provision clarifying that where a defendant in such an action was not subject to a cease and desist order, the issues of fact shall be tried *de novo* in the district court. Of course, where the defendant was the subject of a final cease and desist order regarding such acts or practices by the Commission, the determination of the Commission as to the facts would normally be conclusive if supported by substantial evidence.

See notes 69-73 *supra* and accompanying text. The substantial evidence rule would be applied in the court of appeals when the order was originally challenged, or in a consent proceeding this determination would be waived. See notes 20, 42-47 *supra* and accompanying text.

87. 120 CONG. REC. H12349 (daily ed. Dec. 19, 1974) (emphasis supplied).

88. See notes 69-73 *supra* and accompanying text.

89. The Wall Street Journal, Jan. 6, 1976, at 8, col. 1.

90. See Engman Address, *supra* note 81.

ing: the adequacy of representation, the adequacy of notice, and the ability of Congress to restrict judicial review. Rule 23 of the Federal Rules of Civil Procedure provides insight into the adequacy of representation and notice since a Commission cease and desist order issued against one party will be used against others. The order thereby creates an action in the nature of a defendants' class action. The respondent in the original cease and desist order proceeding has the right to obtain judicial review of the validity of the order in the court of appeals. Once the order becomes final and is employed in a civil penalty suit against those who were not parties to the earlier Commission proceeding, the non-parties' interest in having the order declared invalid overlaps the interests of the named respondent, although non-parties may have had no notice or opportunity to be heard in the prior proceeding. Since only the named respondent can challenge the Commission's conclusions of law in the original proceeding, and the defendant's opportunity to challenge these conclusions in a civil penalty action is foreclosed by the statute, the previous efforts of the named respondent were dispositive of the non-parties' interests. Hence, a group akin to a defendants' class is formed and the decision becomes binding on this group in the same manner as a class action would operate.

*Collateral Estoppel.* The result achieved under the restrictive interpretation of the FTCIA may also be analogized to the use of collateral estoppel.<sup>91</sup> In proceeding I, an administrative cease and desist order proceeding,<sup>92</sup> the FTC obtained a final cease and desist order<sup>93</sup> against party I. In proceeding II, a civil penalty action under the FTCIA against party II, the FTC will allege that party II is collaterally estopped from challenging the issue of the legality of the cease and desist order issued against party I, since that issue was essential to the prior determination and actually litigated in the prior proceeding.<sup>94</sup>

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91. One definition for collateral estoppel states:

Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended.

1B J. MOORE, FEDERAL PRACTICE ¶ 0.441[2], at 3777 (2d ed. 1974).

92. This "proceeding" may be a consent proceeding or an administrative adjudicative proceeding resulting in a final cease and desist order. See notes 15-48 *supra* and accompanying text. See also note 94 *infra*.

93. See note 63 *supra*.

94. See, e.g., *Cromwell v. County of Sac*, 94 U.S. 351 (1876). Using the theory of collateral estoppel to explain the procedure prescribed by the FTCIA may be acceptable when the prior cease and desist order resulted from litigation. Serious questions arise, however, over the viability of using cease and desist orders entered by consent as the basis for collaterally estopping a defendant in a civil penalty proceeding. Professor Moore notes that the use of consent judgments as a basis for collateral estoppel has evoked mixed reaction by the courts. 1B J. MOORE, *supra* note 91, ¶ 0.444[3], at 4009, citing James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173 (1959). Moreover, the general federal rule appears to be that a consent judgment cannot predicate the inference that findings were formulated on any issues. *Id.* at 4018. Therefore, if the courts are willing to accept the collateral estoppel analogy to the FTCIA, the use of consent cease and desist orders may not be accepted. The class action analogy, however, does not appear to be subject to the same objection.

While application of collateral estoppel by a single plaintiff against numerous defendants is not typical,<sup>95</sup> situations have arisen where the plaintiff in suit I asserts collateral estoppel in suit II against a stranger to the first suit.<sup>96</sup> Professor Vestal suggests these cases may be classified according to several rationales: privity, muniments of title, and, theoretically, when the interests of the defendant in suit II were adequately represented by the defendant in suit I.<sup>97</sup> He considers the "classic" example of the privity rationale to be the transfer by defendant I of his interest by sale or assignment after the commencement of suit I.<sup>98</sup> If defendant I loses, his assignee (vendee) is precluded from defending in a subsequent suit against the matter previously settled.<sup>99</sup>

A second rationale, "muniments of title,"<sup>100</sup> is suggested and exemplified by the decision in *Perkins v. Benquet Consolidated Mining Co.*,<sup>101</sup> a suit concerning the title to stock. In suit I the husband sued his estranged wife for title and possession of certain securities. Having defeated her husband's claim in suit I, the wife filed suit against the issuing corporation for dividends improperly paid to her husband and for the reissuance of stock certificates in her name. The court concluded that the defendant corporation, although a stranger to suit I, was collaterally estopped from denying the wife's right to the dividends and certificates.<sup>102</sup>

95. See Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel By a Nonparty*, 35 GEO. WASH. L. REV. 1010, 1032 (1967).

96. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964).

97. *Id.* at 60.

98. *Id.* at 60-61.

99. *Id.* at 61, citing, *inter alia*, *United States v. New York Terminal Warehouse Co.*, 233 F.2d 238 (5th Cir. 1956); *accord Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Jernigan*, 410 F.2d 718 (5th Cir. 1969); *Merchants Corp. of America v. 9655 Long Tons, No. 2 Yellow Milo*, 238 F. Supp. 572 (S.D. Tex. 1965). See also Vestal, *Res Judicata/Preclusion: Expansion*, 47 So. CAL. L. REV. 357, 366-67 (1974), citing *Procter & Gamble Co. v. Byers Transp. Co.*, 355 F. Supp. 547 (W.D. Mo. 1973).

This same rationale is applicable to lessor and lessee, mortgagor and mortgagee, governmental agencies, guardian and ward, corporation and stockholder, bankrupt and trustee, and decedents and successors in interest. Vestal, *supra* note 96, at 61, citing, *inter alia*, *Kruger & Burch, Inc. v. Du Boyce*, 241 F.2d 849 (3d Cir. 1957) (lessor-lessee); *Dumitt v. Jefferson County*, 300 Ky. 514, 189 S.W.2d 602 (1945) (government agencies); *Frederick v. First Liquidating Corp.*, 317 Mich. 637, 27 N.W.2d 117, *cert. denied*, 332 U.S. 772 (1947) (guardian-ward); *Reconstruction Fin. Corp. v. Central Republic Trust Co.*, 128 F.2d 242 (7th Cir. 1942) (corporation-stockholder); *Detroit Trust Co. v. Schantz*, 14 F.2d 225 (E.D. Mich. 1926) (bankrupt-trustee); *Lesser v. Migden*, 328 F.2d 47 (2d Cir. 1964) (decedent-successor in interest).

However, the courts have failed to find a sufficiently close relationship to warrant the conclusion that privity existed between co-tenants, tenants in common, husband and wife, master and servant, parent and child, partners, and joint tortfeasors. Vestal, *supra* note 96, at 61, citing, *inter alia*, *Robinson v. Seales*, 243 S.W. 649 (Tex. Civ. App.—Galveston 1922, no writ) (cotenants); *Glover v. McFaddin*, 99 F. Supp. 385 (E.D. Tex. 1951), *aff'd*, 205 F.2d 1, *cert. denied*, 346 U.S. 900 (1953) (tenants in common); *Fleming v. Cooper*, 225 Ark. 634, 284 S.W.2d 857 (1956) (husband and wife); *Deorosan v. Haslett Warehouse Co.*, 165 Cal. App. 2d 599, 332 P.2d 422 (1958) (master-servant); *Sayre v. Crews*, 184 F.2d 723 (5th Cir. 1950) (parent-child); *McLelland v. Ridgeway*, 12 Ala. 482 (1847) (partners); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912) (joint tortfeasors).

100. Vestal, *supra* note 96, at 64.

101. 55 Cal. App. 2d 720, 132 P.2d 70 (1942).

102. Professor Vestal suggests the decision in *Perkins* may also be explained on the basis of privity between the husband and the corporation, or because the corporation's claim was a derivative of the husband's claim. Vestal, *supra* note 96, at 65.

The final rationale posited, which is theoretical, bases an offensive use of collateral estoppel upon the adequate representation of the defendant in suit II by the defendant in suit I.<sup>103</sup> The only case cited for this proposition<sup>104</sup> is a condemnation action where the court held the estoppel argument did not require resolution and a decision was rendered on alternate grounds.<sup>105</sup>

Absent a showing by the Commission that the defendant in the civil penalty proceeding under the FTCIA was sufficiently related to the respondent in the cease and desist order proceeding to warrant a finding of privity, only the theory of adequate representation would appear to permit the offensive use of collateral estoppel. This theory is not without pitfalls. First, the theory of adequate representation is subject to the arguments raised below concerning the analogy of the FTCIA to a defendant's class action.<sup>106</sup> Second, while not specifically addressing this point, the United States Supreme Court has suggested<sup>107</sup> that the offensive use of collateral estoppel against a stranger to the first suit cannot be squared with the due process clause.<sup>108</sup>

Because the analogy between the FTCIA and the offensive use of collateral estoppel presents an atypical type of estoppel, only the theory of adequate representation would appear to justify the use of collateral estoppel. The argument that collateral estoppel justifies the procedure authorized under the FTCIA, therefore, adds nothing in support of the Commission's position since the analogy to a defendants' class is also dependent upon the same principle: they will sink or swim together. But the collateral estoppel argument does raise questions. Assuming the courts sustain the restrictive interpretation of the FTCIA, will the courts sustain the defensive use of collateral estoppel in the subsequent civil penalty or other proceeding? Will the courts also sustain its use in the administrative process should the Commission or any other agency with concurrent jurisdiction lose its bid to obtain a final cease and desist order or civil penalties?<sup>109</sup>

*Adequacy of Representation.* A threshold issue under federal rule 23<sup>110</sup> is

103. *Id.* at 65-66. See Vestal, *supra* note 99, at 370-71.

104. *United States v. An Article Labeled in Part "The Ellis Micro-Dynameter,"* Libel No. 54 of 1962 (E.D. Pa. 1963) (opinion by Judge Luongo) (unreported).

105. Vestal, *supra* note 96, at 66.

106. See notes 110-31 *infra* and accompanying text.

107. The Court stated:

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

*Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971) (dictum), citing *Hansberry v. Lee*, 311 U.S. 32 (1940).

108. U.S. CONST. amends. V, XIV.

109. For discussions on the defensive use of collateral estoppel see Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25 (1965); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Vestal, *supra* notes 96, 99; Note, *supra* note 95; Note, *Res Judicata and Administrative Jurisdiction—A Proposal for Resolving Conflicts Between Agencies with Overlapping Jurisdiction*, 35 GEO. WASH. L. REV. 1056 (1967); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974). See also Annot., 31 A.L.R.3d 1044 (1970).

110. FED. R. CIV. P. 23(a)(4).

whether the named party adequately represents in a constitutional sense those individuals who will be bound by the decision. This same question must be asked under the FTCIA procedure because the conduct of the named respondent will determine the rights in a later civil penalty action of those who are non-parties to the proceeding. As in federal class action practice, in order for prospective parties to have adequate representation the interests of the respondent in a cease and desist proceeding may not be antagonistic to those of the described class. Even if the interests are not antagonistic, representation is not adequate unless the interests are coextensive with future defendants' interests.<sup>111</sup>

The interests of the respondent and potential defendants may not be coextensive if a small corporation in an industry which follows similar practices throughout is singled out for the issuance of a proposed complaint.<sup>112</sup> The respondent will not always desire to litigate the issue and may indeed lack the resources to do so.<sup>113</sup> As a result, the relatively weak respondent will enter into a consent order without fairly litigating the issue of whether the alleged acts are deceptive or unfair. While the respondent need not admit a violation, the consent order has the same effect and finality as an adjudicated order.<sup>114</sup> Other individuals engaged in identical or similar acts or practices, therefore, will be bound in spite of an inability to protect their own interests. To give effect to the consent order in a civil penalty proceeding in this situation would seem to violate due process.<sup>115</sup>

Even if the Commission issues a proposed complaint against a major enterprise with substantial resources and highly skilled counsel, adequate representation may be precluded by conflicts of interest among members of an industry. Diverse and potentially conflicting interests within the class are incompatible with adequate representation and need not be related to the issues raised in the suit.<sup>116</sup> Since a cease and desist order can be quite broad despite a finding of fact restricted to a particular practice,<sup>117</sup> conflicts of interest may arise as a result of each class member's desire to obtain to its benefit limiting modifications of the order. Each member of the class is likely to be engaged in similar but distinctive practices. Consequently, the

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111. *P.W. Huserl, Inc. v. Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); *accord*, *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973).

112. Two commentators cite a statement in the *Wall Street Journal*, Jan. 20, 1975, at 12, col. 4, that the Commission has under consideration obtaining a cease and desist order against a small company and using that order "to whipsaw the big boys into line." Kintner & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 *MERCER L. REV.* 651, 682 (1975). The only way to accomplish this is through the restrictive interpretation. See Engman Address, *supra* note 81.

113. See *P.D.Q., Inc. v. Nissan Motor Corp. in U.S.A.*, 61 F.R.D. 372 (S.D. Fla. 1973).

114. See notes 18-20 *supra* and accompanying text.

115. See *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *Buchholtz v. Swift & Co.*, 62 F.R.D. 581 (D. Minn. 1973); *Thomas v. Clarke*, 54 F.R.D. 245 (D. Minn. 1971), citing *Herbert v. Able*, 47 F.R.D. 11, 15 (S.D.N.Y. 1969), and *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); note 118 *infra*.

116. *du Pont v. Wyly*, 61 F.R.D. 615 (D. Del. 1973). One instance of such conflict occurs when members of the class are involved in other litigation as adversaries.

117. See notes 49-60 *supra* and accompanying text.

individual non-parties' interests in pursuing the modification will differ and may diverge from the interests of the named respondent. Under due process principles which have been applied to defendants' class actions the Constitution would seem to preclude in such a case the binding effect of the cease and desist order on parties with interests different from the named respondent.<sup>118</sup>

*Adequacy of Notice.* The general principles of due process prohibit a binding adjudication of the rights of parties not before the court.<sup>119</sup> Because class action litigation is an exception to these principles, and due to its "formidable, if not irretrievable, effect on substantive rights," special care must be taken to comply with the spirit and letter of procedural safeguards.<sup>120</sup> The absentee member of a class of defendants upon whom the present litigation will be binding need not be named or joined formally,<sup>121</sup> but the Constitution requires that an opportunity *must* be made to provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>122</sup>

If the courts accept the statutory interpretation precluding judicial review of the Commission's conclusions of law in civil penalty actions, the requirements of adequate notice for class action litigation appear by analogy to be applicable to the FTCIA. This is particularly true if the district courts are precluded as well from reviewing the Commission order in a subsequent declaratory judgment action brought by the non-party potential defendant.<sup>123</sup>

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118. See *Hansberry v. Lee*, 311 U.S. 32 (1940). Commissioner Nye, dissenting from the initiation of the pilot program, may have been concerned with the due process rights of non-parties when he stated the Commission should not have used the unappealed orders of an Administrative Law Judge, which the Commission itself refuses to consider binding precedent, in the notices sent to the selected businesses. *In re Implementation of Section 205 Enforcement Program* (FTC, Jan. 5, 1976) (Nye, Comm'r, dissenting). Commissioner Nye concedes that in the normal course of events there is no need for the Commission to review "*sua sponte*, unappealed initial decisions of the administrative law judge." *Id.* at 3. However, he does not think predicating a civil penalty proceeding against persons not in "any way involved" in the earlier proceeding before the Commission is appropriate for three reasons. First, he has doubts as to the constitutionality of delegating to administrative law judges the power to make rules governing unfair and deceptive trade practices, a power which has been delegated from Congress to the Commission. *Id.* at 4. Second, among the previous unreviewed decisions of the Commission there are bound to be incorrect statements of law for which the informal review by the Commission staff, in an attempt to weed out these statements, cannot constitute a Commission determination in an adjudicative proceeding within the statutory requirements. *Id.* at 4-5. Third, Commissioner Nye finds it "anomalous" that the Commission will permit civil penalty actions under the new section 5(m) of the FTCA to be based on a decision which the Commission deems to "become effective" and not which is "adopted and issued as the decision of the Commission." *Id.* at 5. The Commission has drawn this distinction to avoid the conclusion that an unappealed decision carries "the precedential weight of *stare decisis*." *Id.*

119. *Yazzie v. Morton*, 59 F.R.D. 377 (D. Ariz. 1973), citing *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

120. *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973).

121. *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225, 1232 (6th Cir. 1969).

122. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *accord*, *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973); *Wagner v. Little Rock School Dist.*, 373 F. Supp. 876 (E.D. Ark. 1973).

123. See notes 199-206 *infra* and accompanying text.



The form and nature of the notice may present a variety of difficulties since "a mere gesture" of notice would be insufficient under class action principles.<sup>124</sup> Clearly, if the Commission is aware of the individuals or enterprises who are engaged in a particular practice which it seeks to eliminate, personal notice of the Commission proceeding rather than notice by publication should be required.<sup>125</sup> For those individuals or corporations engaging in a particular act or practice without the Commission's knowledge, notice by publication in the Federal Register, trade publications, and other journals or publications likely to acquaint the business man with the pendency of the action would apparently suffice.

Since there are *indications* that the Commission intends to utilize determinations made in consent orders,<sup>126</sup> notice would have to be given before the actual negotiations commence in order to provide prospective defendants with an adequate opportunity to act. Should the Commission decide to forego the use of consent orders in applying the FTCIA, then timely notice should be required once a decision is made to initiate a formal proceeding.

An analogy may be drawn between the binding effect of injunctions and cease and desist orders on others than the named parties. A cease and desist order, like an injunction,<sup>127</sup> is issued on the basis of in personam jurisdiction.<sup>128</sup> Generally these two orders function in a similar manner; each commands a person, partnership, or corporation to cease<sup>129</sup> acting in a particular fashion. The history of injunctive actions and the well developed body of the law in this area indicate that courts may not enjoin the whole world.<sup>130</sup> Generally, an injunction limits only the parties-defendant, those in privity with them, those represented by them, and those individuals subject to their control.<sup>131</sup> In the context of the FTCIA a cease and desist order should be similarly restricted because of the failure to provide adequate notice and representation.

*Restriction of Judicial Review.* The restrictive interpretation of the FTCIA denies the district court the ability to review in a civil penalty suit the conclusions of law reached by the Commission.<sup>132</sup> A question arises whether a grant of jurisdiction over a particular subject made to a federal

124. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

125. *Id.* at 319-20; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (II), 479 F.2d 1005 (2d Cir. 1973) (III), *vacated on other grounds*, 417 U.S. 156 (1974). Undoubtedly, service of notice would be sufficient if the Commission complied with the Federal Trade Commission Act § 5(f), 15 U.S.C. § 45(f) (1970).

126. Engman Address, *supra* note 81.

127. *See, e.g.*, *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431 (1934).

128. *See, e.g.*, *California Lumberman's Council v. FTC*, 115 F.2d 178 (9th Cir. 1940), *cert. denied*, 312 U.S. 709 (1941).

129. While it is true that in most instances both orders are prohibitory, affirmative acts may occasionally be required. *See* notes 59-60 *supra* and accompanying text.

130. *Kean v. Bailey*, 82 F. Supp. 260 (D. Minn. 1949), *aff'd sub nom. Kean v. Hurley*, 179 F.2d 888 (8th Cir. 1950); *accord, Wright v. County School Bd.*, 309 F. Supp. 671, 676-77 (D. Va. 1970), *rev'd on other grounds sub nom. Wright v. Council of City of Emporia*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972). *See C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE* § 2956 (1973).

131. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945); *see Sebrone Co. v. FTC*, 135 F.2d 676 (7th Cir. 1943).

132. *See* notes 69-73, 78 *supra* and accompanying text.

district court with a restriction on the court's scope of inquiry is consistent with the due process clause of the fifth amendment. The decisions by the Supreme Court in *Yakus v. United States*<sup>133</sup> and *Bowles v. Willingham*<sup>134</sup> suggest an answer to this question.

During World War II Congress, as a temporary measure, enacted the Emergency Price Control Act<sup>135</sup> to establish a comprehensive scheme for controlling the prices of commodities and rents. As part of this legislation the Emergency Court of Appeals was created with exclusive jurisdiction to review the validity of regulations and orders issued pursuant to the Act.<sup>136</sup> During enforcement proceedings which were either criminal, equitable, or civil in nature the district court's inquiry was statutorily restricted solely to the question of compliance with the Act and regulations and orders issued pursuant thereto. Yakus, the petitioner, violated a regulation issued on the price of wholesale beef and was charged with a criminal violation of the statute. Having failed to utilize the available administrative procedure to challenge the regulation, he was prevented from raising the issue of the regulation's validity when tried in the district court. The Court held Yakus was not deprived of his fifth amendment due process rights because judicial review was available to test the regulation's validity and Congress had the right to provide exclusive jurisdiction in the Emergency Court of Appeals for such purpose.<sup>137</sup> In failing to utilize the constitutional procedures established, Yakus was held to have waived his right to challenge the regulation.

Justice Rutledge, dissenting, argued that Congress could not grant the district courts jurisdiction over enforcement proceedings and then direct the manner in which the jurisdiction was to be exercised;<sup>138</sup> to permit such a restriction would result in the courts' being required to enforce unconstitutional laws.<sup>139</sup> He noted that the majority's position was predicated upon the right to review in the Emergency Court of Appeals, and agreed that Congress could not deprive all courts of the ability to review the validity of the order.<sup>140</sup> However, the thrust of the dissent's argument was the contention that the right to protest the regulations administratively and in the Emergency Court of Appeals was ineffectual,<sup>141</sup> and, therefore, constituted a denial of due process.

In *Willingham* the Office of Price Administration issued an order reducing the rents which Willingham could collect due to the location of the apart-

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133. 321 U.S. 414 (1944).

134. 321 U.S. 503 (1944).

135. Ch. 26, 56 Stat. 23, as amended, ch. 578, 56 Stat. 765 (1942).

136. Emergency Price Control Act, ch. 26, §§ 204(c), (d), 56 Stat. 32, as amended, ch. 578, 56 Stat. 765 (1942).

137. 321 U.S. 414 (1944).

138. *Id.* at 468 (Rutledge, J., dissenting).

139. *Id.* at 470, 484.

140. *Id.* at 447, 469; see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

141. 321 U.S. at 437-47. "Both are short-cut proceedings, trimmed almost to the bone of due process, even for wholly civil purposes, and pared down even further by a short statute of limitations." *Id.* at 474. The protest was required to be filed in 60 days or the right was waived. The protestant was restricted to the submission of written evidence, there was no right of cross-examination, and most significantly, the regulation and orders could not be stayed.

ments in specified defense areas.<sup>142</sup> The appellee filed a protest with the OPA, but pursuant to statutory authority the Administrator issued an order reducing the rent, thereby making the order subject to challenge in the Emergency Court of Appeals.<sup>143</sup> The Court held that judicial review subsequent to the issuance of the order satisfied the fifth amendment due process clause despite the lack of stay pending the outcome of the litigation.<sup>144</sup> Justice Rutledge, concurring, accepted the majority's position because this was a civil rather than a criminal proceeding as was *Yakus*. He expressed the view, however, that there are three limitations on such a holding: (1) the order or regulation may not be patently invalid; (2) the previous opportunity to initiate a challenge administratively must be constitutionally adequate; and (3) the circumstances and nature of the problem must justify the special remedy and its exclusiveness.<sup>145</sup>

*Yakus* and *Willingham* appear to control the application of the FTCIA. If the non-party subject to the cease and desist order is given no opportunity administratively and judicially to test the validity of the order, then these decisions suggest the constitutional invalidity of the statute.<sup>146</sup> However, should the non-party be permitted to intervene in the administrative process with rights equal to the respondent, then sufficient opportunity is provided to challenge the order administratively. Under *Yakus*, therefore, the statute would be valid. While Justice Rutledge's dissent in *Yakus* is technically distinguishable from the present situation due to the civil nature of the FTCIA, the potentially severe penalties under the FTCIA may warrant application of his rationale with a resulting conclusion of unconstitutionality. There appears to be little doubt that his concurrence in *Willingham* suggests the FTCIA is unacceptable. The special wartime circumstances supporting the enactment of the Emergency Price Control Act are absent when considering the FTCIA. Therefore, even if the full right of intervention at the outset of an administrative proceeding were granted, the statute would be inadequate under his view. Conceivably, anything less than a full right of intervention would also invalidate the statute. This is not to say, however, that the majority of the courts which decided *Yakus* and *Willingham* would accept the FTCIA in any event, for the nature of war affects the decisions of courts on subjects directly related to the war effort.<sup>147</sup>

*Commission Orders as "Statutory Enactments."* The Commission may attempt to suggest that the discussion of the adequacy of representation and notice and the restriction of judicial review is irrelevant since Congress has

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142. *Id.* at 508.

143. *Id.* at 509-10.

144. *Id.* at 520. Quoting Justice Brandeis in *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931), the Court stated: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of liability is adequate. . . . Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied." 321 U.S. at 520.

145. 321 U.S. at 526 (Rutledge, J., concurring).

146. See note 141 *supra*. See also H. HART, H. WECHSLER, P. BATOR, P. MISHKIN & D. SHAPIRO, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 309-72 (2d ed. 1973).

147. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 55-95 (1970).

"enacted into law the standards of commercial conduct which the Commission has developed . . ." <sup>148</sup> This point is well taken with respect to decisions of the Commission prior to the passage of the FTCIA because Congress has the right to enact definitions for "unfair or deceptive acts or practices." However, as Chairman Engman notes, the statute only *appears* to have enacted these decisions. <sup>149</sup> Whether the Chairman's dubious conclusion is valid is yet to be determined. More explicit statutory language to indicate the validity of this assertion would have been desirable. <sup>150</sup>

Should the court accept the Commission's position, cease and desist orders obtained through both formal adjudication and consent negotiations prior to the enactment of the FTCIA would be applicable standards in later civil penalty suits. The problems of adequate representation and notice would not apply to these decisions since they would assume the character of "statutory definitions."

One problem which should be considered is whether and to what extent these decisions, which are arguably "statutory definitions," can be expanded by future orders. If these "definitions" are permitted to be expanded, the original "statutory" language would conceivably cease to resemble the expanded version. While Congress, as representative of the people, may enact legislation, the Commission is not representative in the same fashion when fulfilling its adjudicatory functions. Members of the Commission are one step removed from popular control. Although this status is essential to preserve the integrity of independent regulation from interference by partisan political groups, effective control of the Commission by citizen voters, including the consumers who are the objects of the Commission's labors, is less direct than that held over Congress. Naturally, the "legislation" enacted by the Commission is predicated upon one instance of deceptive practice determined in an adjudicatory atmosphere, not in a rule-making proceeding <sup>151</sup> with all interested parties having an opportunity to be heard. <sup>152</sup>

#### IV. PROPOSED SOLUTIONS TO THE DUE PROCESS PROBLEMS

Two potential solutions to the due process problems raised by an interpretation of the FTCIA which precludes judicial determination of the nature of unfair or deceptive acts or practices are: (1) intervention by potential

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148. Engman Address, *supra* note 81.

149. *Id.* (emphasis added).

150. See TEX. BUS. & COMM. CODE ANN. § 17.46(c) (Supp. 1975-76) which provides: "It is the intent of the legislature that in construing . . . this section the courts to the extent possible will be guided by . . . the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. § 45(a)(1)]." The Commission appears to recognize the fallacy of this argument since the Commission has begun a program to codify former adjudicated orders into rules under its rulemaking authority. FTC News No. L035-CODE (Dec. 30, 1975).

151. The provisions governing rulemaking by the FTC are set out in 15 U.S.C. § 57a (Supp. IV, 1974) and 40 Fed. Reg. 33966-70 (1975), amending 16 C.F.R. §§ 1.11-.20 (1975).

152. For a general discussion of the distinction between rulemaking and adjudication see Burrus & Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 GEO. L.J. 1106 (1966).

defendants in the administrative cease and desist proceeding; and (2) the use of collateral attack on the Commission's order, particularly in the form of a declaratory judgment action, to cure the lack of judicial review in an enforcement proceeding.

*Intervention.* Intervention into a Commission proceeding is governed by section 5(b) of the FTCA<sup>153</sup> and section 3.14 of the Commission's rules<sup>154</sup> which require under the statutory standard a showing of good cause. The criteria announced in *Firestone Tire & Rubber Co.*<sup>155</sup> for demonstrating good cause are: (1) the raising of *substantial* issues of law or fact which would not otherwise be properly raised or argued; (2) the significance of these issues such that the Commission's additional expenditure of limited resources for the longer, more complicated proceeding is warranted; (3) the ability of the applicant to contribute to the case; (4) the need to expedite the case; and (5) the potential resulting prejudice to the rights of the named respondent.<sup>156</sup> The Commission notes, however, that satisfaction of these criteria will not automatically result in permission to intervene; the Commission retains the discretion to deny intervention in any case.<sup>157</sup> The Commission may determine, for example, not to permit intervention in a consent proceeding since such intervention might frustrate the attempt to obtain an order. This may be justified by the fact that an opportunity for public comment is provided.<sup>158</sup> In *Action on Safety & Health v. FTC*<sup>159</sup> the District of Columbia Circuit held that such a determination was within the discretion of the agency and, therefore, exempt from judicial review under the Administrative Procedure Act (APA).<sup>160</sup> This decision was rendered prior to the enactment of the FTCIA. Hence, the Commission's stated justification and the court's holding should be scrutinized carefully in light of the FTCIA and the due process problems it raises, especially since public comment rarely results in any change.<sup>161</sup>

In the event intervention is granted the statute and the rule do not automatically grant the intervenor all of the rights conferred on the respondent.<sup>162</sup> In *Campbell Soup Co.*<sup>163</sup> Students Opposing Unfair Practices, Inc. (SOUP) was permitted to intervene only to the extent of submitting written

153. 15 U.S.C. § 45(b) (Supp. IV, 1974): "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."

154. 16 C.F.R. § 3.14 (1975). See generally Note, *Federal Agency Assistance to Impecunious Intervenor*, 88 HARV. L. REV. 1815 (1975).

155. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,373 (FTC 1970).

156. *Id.* at 21,501, 21,502.

157. *Id.* at 21,501. See *Standard Sewing Equip. Corp.*, 4 Ad. L.2d 382 (FTC 1954) (denying intervention when the intervenor favored the Commission position); *MacIntyre & Volhard*, *supra* note 23, at 253.

158. See notes 21-23 *supra* and accompanying text.

159. 34 Ad. L.2d 691 (D.C. Cir. 1974); see *MacIntyre & Volhard*, *supra* note 23, at 250.

160. 5 U.S.C. §§ 701-06 (1970); see 34 Ad. L.2d at 691.

161. See notes 21-23 *supra* and accompanying text.

162. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 727 (1968); see *The Chicago Junction Case*, 264 U.S. 258 (1924).

163. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,261 (FTC 1970).

briefs, while in *Firestone Tire & Rubber Co.*<sup>164</sup> the Commission's grant of intervention extended to presenting non-repetitive relevant evidence, the filing of briefs on this evidence, and discovery rights regarding such evidence.<sup>165</sup>

While in the past the Commission has had the authority to restrict the rights of intervenors at its discretion, under the FTCIA this discretionary authority may be held not to exist, or at least to be limited. If the presence of the right to intervene is relied upon to remove due process problems created by the statutory procedures, the FTC should certainly have no discretionary authority to deny intervention to potential litigants adverse to its petition. This answer, however, still does not resolve the issue of whether the Commission's discretionary authority concerning the extent of intervention must also be withdrawn. At first blush it seems that FTC discretion over the nature and amount of intervention must also be curbed in order for intervenors to protect their rights adequately. Further consideration of this issue suggests that the Commission and the courts may balance the interests of the parties in each case and determine that some degree less than the full extent of intervention satisfies due process. One possible justification for such an approach is the pragmatic concern that every potential defendant in a penalty action may attempt to intervene in the administrative proceeding to protect its interest. In this situation the cease and desist order proceeding would become a Pandora's box; a proceeding essentially in the nature of rule-making would result, although governed by adjudicatory rules. Little imagination is required to suggest the unmanageability of such a proceeding.

Aside from the question of the rights of intervenors during the initial administrative hearing, problems exist concerning the right of the intervenor to appeal an adverse administrative law judge's decision. Appeal to the Commission is governed by Commission rule 3.52(a)<sup>166</sup> which restricts the right of appeal to parties, and rule 3.14(c)<sup>167</sup> which suggests an intervenor is not a party.<sup>168</sup> While these sections lend credence to the conclusion that an intervenor may not appeal as a matter of right, Chief Judge Friendly states in *Pepsico, Inc. v. FTC*<sup>169</sup> that the Commission would "withhold such a right at its peril" when property rights are at stake.<sup>170</sup> Should the Commission fail to heed this warning, the intervenor may successfully raise the failure of the administrative procedures to assure adequate representation.<sup>171</sup>

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164. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,373 (FTC 1970).

165. *Id.*; see *Kennecott Copper Corp.* [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,281 (FTC 1970).

166. 16 C.F.R. § 3.52(a) (1975).

167. *Id.* § 3.41(c).

168. See *Pepsico, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973). In *Pepsico*, Chief Judge Friendly finds rule 3.41(c) ambiguous. *Id.* at 184.

169. *Id.* at 179.

170. *Id.* at 184 & n.4, citing 14 C.F.R. §§ 302.14(b), .15 (1975) (Civil Aeronautics Board) and 47 C.F.R. §§ 1.223, .225 (1975) (Federal Communications Commission) as examples of rules distinguishing between those individuals with a property interest at stake and, therefore, entitled to all the rights of a party, and those persons with a more generalized interest whose participation can be restricted.

171. See notes 110-18 *supra* and accompanying text.

The intervenor's second problem concerns the ability to appeal from an adverse Commission determination to the court of appeals. Prior to the FTCIA the courts did not find that standing to intervene automatically conferred standing to obtain judicial review of an adverse Commission decision; only those required to cease and desist from engaging in a practice were permitted to perfect an appeal.<sup>172</sup> The question presented is whether an intervenor, as a potential defendant in a civil penalty action under the FTCIA, fits within the scope of this requirement. The intervenor may contend that permission to intervene with full rights equal to those of the named respondent was given by the Commission during the administrative cease and desist order proceeding to assure adequate representation.<sup>173</sup> In essence, therefore, to fulfill this purpose the intervenor was made a party to the action; he will be bound by the decision, and must necessarily have the right to appeal. In the alternative, the intervenor may assert that the potential imposition of penalties against non-parties pursuant to the FTCIA requires the non-parties to cease and desist from engaging in a practice despite the fact that the complaint was issued against someone else and the intervenor was not technically a party to the proceeding. Although not named as a party because of these consequences, the intervenor meets the requirements of standing to seek judicial review, and individual review should be granted for full protection of intervenor's rights.

The Commission may take issue with these assertions by contending that the Commission's rules do not explicitly make an intervenor a "party,"<sup>174</sup> and since only parties are permitted to perfect an appeal, the intervenor should not be permitted to appeal. Even if the two premises are correct,<sup>175</sup> the conclusion that follows is not necessarily valid. The failure of the intervenor to be a technical party bound by the decision under the theory of *res judicata*, which would appear to confer a right to appeal, is not dispositive of the right to take an appeal. In *Atlantic Refining Co. v. Standard Oil Co.*<sup>176</sup> the District of Columbia Circuit Court of Appeals rejected a test based on the applicability of *res judicata* for determining who would be subject to an order. The court adopted a test which relies on a determination of whether a decision will effectively preclude the ability to seek redress. Under the restrictive interpretation of the FTCIA<sup>177</sup> the intervenor-potential defendant in a civil penalty action may be precluded from later obtaining a review of the Commission's conclusions of law. Therefore, the intervenor's right to redress will be effectively denied; the

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172. *Consumer Fed'n of America v. FTC*, 515 F.2d 367 (D.C. Cir. 1975). See also *MacIntyre & Volhard*, *supra* note 23, at 240-42.

173. See notes 110-18 *supra* and accompanying text.

174. See notes 166-68 *supra* and accompanying text.

175. See *Pepsico, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973). The court stated in part, "The notion that being a 'party' before an agency . . . is a necessary condition of the right to judicial review has in fact been dead since *Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479, 486 [1930] . . . although courts have not always appreciated this." *Id.* at 186.

176. 304 F.2d 387 (D.C. Cir. 1962); *accord*, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 281-84 (1946); *International Mortgage & Inv. Corp. v. Von Clemm*, 301 F.2d 857 (2d Cir. 1962).

177. See notes 86-90 *supra* and accompanying text.

intervenor will be subject to the order and will thereby satisfy the requirement for standing established in *Consumer Federation of America v. FTC*.<sup>178</sup>

Should the courts deny the right of appeal to an intervenor, under the restrictive interpretation of the FTCIA the problem of adequate representation remains unresolved. The named respondent in a Commission cease and desist proceeding may decide not to pursue his right to appeal, thereby leaving the potential defendant in a position similar to the non-named members of the class in *Gonzales v. Cassidy*.<sup>179</sup>

*Declaratory Relief.* A second possible solution to due process problems raised by the FTCIA is the availability of declaratory relief to individuals engaging in acts or practices within the scope of an existing cease and desist order. For such individuals a declaratory judgment action begun prior to the institution of a civil penalty suit could provide an opportunity to obtain a full and adequate hearing on whether the acts and practices which are the subject of a cease and desist order are indeed unfair or deceptive.

In *Pepsico, Inc. v. FTC*<sup>180</sup> Chief Judge Friendly suggested that "review would be available" to the intervenor in the district court pursuant to section 702 of the APA if the intervenor were denied the right of appeal and the respondent failed to appeal an adverse Commission decision, thereby being precluded from intervening at the appellate level pursuant to rule 15(d) of the Federal Rules of Appellate Procedure.<sup>181</sup> Although this suggestion concerned persons who did intervene, to extend this "option" to those who were denied intervention would not appear unreasonable. To extend this suggestion to those who failed to intervene could result in claims of waiver by the Commission. Such a defense is objectionable, however, in light of the discretionary nature of the Commission's power to deny intervention.

If this suggested approach is still applicable in light of the FTCIA,<sup>182</sup> the denial of due process to defendants unable to obtain an administrative hearing and not parties to the original cease and desist proceeding could be negated by providing subsequent judicial review.<sup>183</sup> There is precedent for

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178. 515 F.2d 367 (D.C. Cir. 1975).

179. 474 F.2d 67 (5th Cir. 1973); see notes 110-97 *supra* and accompanying text.

180. 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973). The FTC sought to prevent Pepsico from allegedly hindering competition by restricting the geographic area in which the bottlers could distribute Pepsico's syrups and soft drink products. The bottlers and their association intervened in the administrative proceeding to protect their interest in the exclusive contracts by alleging Pepsico's inability to represent the bottlers' interests adequately. This action arose in federal district court when Pepsico sought to enjoin further Commission proceedings until all of the bottlers were joined as parties to the administrative proceeding. *Id.* at 183. Pepsico alleged that a failure to join all of the bottlers would subject it to liability by an unjoined bottler whose territory had been invaded. *Id.* at 187. The intervenor bottlers alleged that they also might be held liable for selling the soft drink or syrups in the territory of an unjoined bottler. *Id.* The court discussed the intervenors' rights to review because the intervenors had an interest which Pepsico could not adequately represent.

181. *Id.* at 185-86. 5 U.S.C. § 702 (1970) provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

182. See notes 199-206 *infra* and accompanying text.

183. K. DAVIS, *supra* note 46, § 7.10.



such review in the assertion of jurisdiction by federal district courts of actions seeking declaratory and other relief from agency determinations pursuant to the APA<sup>184</sup> and Declaratory Judgment Acts.<sup>185</sup>

Significant obstacles to obtaining declaratory relief are the need for standing and the constitutional requirement of a "case or controversy."<sup>186</sup> In *Brandenfels v. Day*<sup>187</sup> the court determined that no case or controversy was presented when the FTC had taken no action against the plaintiff other than to initiate an investigation, and the nature of the charges, which might never be filed, were speculative. Similarly, a Delaware district court denied a manufacturer's request for a stay of statutory penalties for violation of a cease and desist order since the Commission had not made a decision as to whether the order had been violated.<sup>188</sup>

A justiciable case or controversy is presented and declaratory relief is appropriate upon a showing that the potential defendant is bound by a particular order or that Commission action poses an actual or threatened interference with the potential defendant's rights.<sup>189</sup> Under the FTCIA Commission action should satisfy the requirement of a case or controversy if notice of the previous order is served on the potential defendant,<sup>190</sup> because the potential defendant in such a case can assume that a penalty action will be initiated. In addition, the Commission in these circumstances has probably taken affirmative action toward establishing proof of a violation, and the nature of the charge—that the potential defendant had violated the previously entered order—is clear.

The requirement of standing should be satisfied if the standards established in *Abbott Laboratories v. Gardner*<sup>191</sup> are fulfilled. There the Court found that the plaintiff had standing to challenge administrative action if (1) the order was directed to the plaintiff, (2) the order required changes in the everyday business practice of the plaintiff, and (3) failure by the plaintiff to comply with the order would result in clear exposure to strong sanctions.<sup>192</sup> Under the FTCIA the cease and desist order previously issued is directed to everyone who may engage in the same practice. If the potential defendant is required to alter advertising or some other practice, the alteration will clearly have an effect on the everyday business practice of the plaintiff, and failure to comply with the previously entered order will subject the potential defendant to a civil penalty action. Consequently, the elements of standing

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184. 5 U.S.C. §§ 701-06 (1970); see, e.g., *Bowles v. Willingham*, 321 U.S. 503 (1944). For a discussion of *Willingham* see notes 142-45 *supra* and accompanying text.

185. 28 U.S.C. §§ 2201-02 (1970); see note 39 *supra*.

186. For a detailed discussion of the cases and theory on the problems of standing and the need for a case or controversy see K. DAVIS, *supra* note 46, §§ 22.01-.18, and G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1544-93 (9th ed. 1975).

187. 316 F.2d 375 (D.C. Cir.), *cert. denied*, 375 U.S. 824 (1963).

188. *Continental Baking Co. v. Dixon*, 283 F. Supp. 285 (D. Del. 1968). See also *FTC v. Nash-Finch Co.*, 288 F.2d 407 (D.C. Cir. 1961); *Helco Prod. Co. v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943).

189. See cases cited note 188 *supra*.

190. See note 79 *supra*.

191. 387 U.S. 136 (1967).

192. *Id.* at 154.

stated in *Abbott Laboratories* are met in the situation presented by the FTCIA.

If an enterprise is aware of the previous order but there is no indication that the Commission is aware of its engaging in the practice, the party still may desire to seek relief by declaratory judgment. The tactical hazard of alerting the Commission may be outweighed by "striking first" before the Commission is fully prepared to bring a penalty action. Needless to say, it would seem that this opportunity should not be taken unless the enterprise is certain the Commission will eventually take action. Of course, if Commission action is not imminent, the declaratory judgment procedure may not be available. Actual knowledge of a prior cease and desist order is evident from the filing of the complaint in the declaratory judgment action, and it is improbable that the Commission would assert that it had no intention to collect penalties in such a case.<sup>193</sup> Therefore, it is clear that a dispute under the FTCIA is present and even likely to occur; the requirements for establishing a case or controversy are apparently satisfied.<sup>194</sup>

Courts have indicated that judicial interference in this type of situation is not warranted unless the order issued would be invalid as a result of the prior proceedings, and statutory review is inadequate.<sup>195</sup> Absent full rights upon intervention, statutory review appears inadequate due to the lack of adequate representation and notice.<sup>196</sup> To show the invalidity of the order, a patent violation of statutory or constitutional rights must be proved.<sup>197</sup> In this instance the lack of adequate representation or notice, or both, and the resulting constitutional deficiency of such proceedings<sup>198</sup> may be a sufficiently clear violation of constitutional rights so that justification exists for judicial intervention through the vehicle of declaratory judgment.

Assuming that the constitutional "standing" and "case or controversy" hurdles are crossed, questions of statutory interpretation must still be addressed in seeking declaratory relief. The most significant issue concerning the use of sections 702<sup>199</sup> and 703<sup>200</sup> of the APA to obtain declaratory

193. Full enforcement of the statute would seem to require that the FTC seek to collect civil penalties unless potential defendants' acts or practices were not in the Commission's judgment within the scope of the previously entered cease and desist order.

194. See notes 186-88 *supra* and accompanying text.

195. *Knoll Associates, Inc. v. Dixon*, 232 F. Supp. 283 (S.D.N.Y. 1964). See also *R.H. Macy & Co. v. Tinley*, 249 F. Supp. 778, 782 (D.D.C. 1965).

196. See notes 110-31 *supra* and accompanying text.

197. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 226-27 (1961) (dictum); *Lehigh Portland Cement Co. v. FTC*, 291 F. Supp. 628 (E.D. Va.), *aff'd*, 416 F.2d 971 (4th Cir. 1968); *Seeburg Corp. v. FTC*, 1966 Trade Cas. ¶ 71,955 (E.D. Tenn. 1966). Compare *Jewel Cos. v. FTC*, 432 F.2d 1155 (7th Cir. 1970), with *Maremont Corp. v. FTC*, 431 F.2d 124 (7th Cir. 1970).

198. See notes 110-52 *supra* and accompanying text.

199. 5 U.S.C. § 702 (1970). This section provides, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

200. 5 U.S.C. § 703 (1970):

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity

relief is whether the language or intent of the FTCIA precludes application of these sections. The APA has general application in reviewing administrative action "except to the extent that . . . statutes preclude judicial review . . . ." <sup>201</sup> If the applicable statute does not explicitly preclude judicial review, the Supreme Court has held that clear and convincing evidence of a congressional intent to deprive the courts of review must be discerned from the entire legislative scheme. <sup>202</sup>

The opponents of employing the APA when the FTCIA has been invoked may contend that statutory language providing for the finality of Commission orders <sup>203</sup> indicates a congressional intent to preclude application of the APA. However, in *Brownell v. Tom We Shung* <sup>204</sup> the Supreme Court held statutory language on the finality of administrative orders referred only to administrative finality and not to the applicability of the APA. The finality language of the Immigration and Nationality Act of 1952 was similar to the FTCA provision on the finality of Commission orders and the principle stated in *Tom We Shung* would apparently allow resort to the APA for judicial review of Commission orders. Moreover, language on the finality of FTC orders was apparently included to expedite enforcement of the FTCA by eliminating the need to obtain an enforcement order. <sup>205</sup>

In an attempt to preclude the use of a declaratory judgment action, the Commission may argue that use of the APA in this manner frustrates the intent of the legislation <sup>206</sup> since the FTCIA is intended to accelerate enforcement of the FTCA by eliminating the need to litigate the issues administratively more than one time. To permit the potential defendant to seek declaratory relief may retard the desired speed of enforcement. Recognition should be given to the fact that the declaratory action may, in the long run, actually speed up the process if this action can be conducted as a plaintiffs' class action and the problems of notice and adequate representation can be resolved.

The use of a declaratory judgment action to test the validity of a Commission order issued in light of the FTCIA is a matter of necessity. This action appears to provide the most suitable means to test the validity of a cease and desist order. While the courts must make the determination as to whether the language of the APA is sufficiently flexible to permit this type of action, a restrictive interpretation of the APA renders the FTCIA very vulnerable.

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for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

201. 5 U.S.C. § 701 (1970).

202. *Association of Data Processing Serv. Organization, Inc. v. Camp*, 397 U.S. 150 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

203. See note 63 *supra* and accompanying text.

204. 352 U.S. 180, 181 (1956) (Immigration and Nationality Act of 1952, § 242(b), 8 U.S.C. § 1252(b) (1970)); see L. JAFFE, *supra* note 50, at 372, 376. *But see* *Hallowell v. Commons*, 239 U.S. 506 (1916) (decision of the Secretary of the Interior was non-reviewable regarding determination of the heir of a deceased Indian).

205. See notes 61-67 *supra* and accompanying text.

206. See notes 81-90 *supra* and accompanying text.

## V. CONCLUSION

The Federal Trade Commission has been given the difficult task of ensuring that unfair methods of competition and unfair or deceptive acts or practices are prevented. Congress has attempted to provide the Commission with powerful tools to obtain compliance with the FTCA in a speedy, yet fair, manner. Through the use of informal and formal proceedings the Commission may issue broadly worded orders to preclude unlawful practices.

To provide the necessary coercion to act lawfully the FTCA permits the Commission to institute suits for civil penalties against those persons violating Commission orders. Passage of the FTCIA indicates a congressional desire to expedite enforcement of the FTCA. The FTCIA creates the equivalent of a defendants' class action and permits the offensive use of collateral estoppel by permitting a cease and desist order to become the basis for a civil penalty action despite the fact that the defendant was not named in the original order. In an attempt to clarify the defendant's rights in such a civil penalty suit Congress has clouded the application of the statute by allowing a trial *de novo* on issues of fact in the civil penalty proceeding.

The statutory language providing for trial *de novo* may be interpreted to permit the district court to make its own determination on fact and law, although such an interpretation appears contrary to the scheme of the legislation. A restrictive interpretation, which permits the district court to entertain argument only on questions of fact and not conclusions of law, raises serious problems of due process regarding adequate representation, adequate notice, and restriction of judicial review. These problems arise, however, only if the potential defendant is not provided with an opportunity to intervene early with the full rights of a party in the administrative proceedings. To permit full intervention has serious weaknesses since the number of intervenors would probably result in a proceeding similar to rule-making. If the courts reject this approach, an alternative is to permit the potential defendant to obtain declaratory relief in the district court pursuant to the APA. This approach, however, is not flawless since application of the APA is prevented if a statute precludes judicial review. While the FTCIA does not expressly preclude the use of the APA, the purpose of the legislation strongly suggests this result.

Congressional clarification of the FTCIA is clearly warranted. Without such clarification the courts will be required to test the constitutional validity of the statute with the potential results of (1) severely altering Commission procedures, (2) altering the expediting purpose of the FTCIA, or (3) declaring the statute unconstitutional. Since the courts are reticent to find legislation unconstitutional, either of the first two results, although unintended by Congress, is more likely to occur. Prognostication of judicial action is hazardous at best, but it seems certain that the validity of this statute will be heavily litigated.