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Obtaining Monetary Redress for Consumers through Action by the Federal Trade Commission

John A. Sebert Jr.

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I. INTRODUCTION

One of the frequently cited obstacles to the Federal Trade Commission's becoming an effective forum for the redress of consumer grievances has been the limited nature of the remedies available under the Federal Trade Commission Act. The Act merely provides that, upon finding a violation of the basic prohibition against unfair methods of competition and unfair or deceptive acts or practices,[1] the Commission shall order the respondent to "cease and desist from using such method of competition or such act or practice."[2] It has regularly been assumed that this power to issue a cease and desist order does not provide a basis for ordering a respondent to compensate any individuals who might have been injured as a consequence of a violation of the Act.[3] In addition, it is fairly well settled that private individuals do not have a private cause of action for restitution,

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** Associate Professor of Law, University of Minnesota. I wish to express my sincere appreciation to Larry Neilson, a second year student at the University of Minnesota Law School, who assisted greatly in the preparation of this study. Thanks also are due a number of my colleagues on the faculty of the University of Minnesota Law School who made many helpful comments on an earlier version of this Article.

1. 15 U.S.C. § 45(a)(1) (1970).
2. 15 U.S.C. § 45(b) (1970).
3. *See, e.g.*, Wade & Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective through Suit by Government Agency*, 37 GEO. WASH. L. REV. 1031, 1057-58 (1969), suggesting legislation to authorize the FTC to order restitution, but recognizing that the Commission might have the power to order restitution under a "broad view" of its present authority.

damages or an injunction based upon violations of the Act.[4] Thus, a merchant who violates the FTC Act faces only the possibility of an order prohibiting such conduct in the future and runs little risk of monetary liability to those who have suffered as a result of his deceptive practices. The only monetary liability that he might incur under the FTC Act itself is a civil penalty of $5,000 for each violation of a final cease and desist order.[5] This remedial scheme, in addition to providing no redress for injured individuals, is inadequate in that, lacking any substantial threat of monetary liability, it does not provide an effective deterrent against even those practices which are clear and settled violations of the Act.

The unavailability of individual redress under section 5 of the FTC Act has been recognized as a serious defect by a number of commentators[6] and by the FTC itself. During hearings conducted in 1970 on proposed legislation to strengthen the Federal Trade Commission, Caspar Weinberger, then chairman of the Commission, proposed that the FTC be given the authority to award damages to consumers who have been injured by practices which the FTC finds to be in violation of the law.[7] The chairman's recommendation was reiterated in 1971 by the present chairman, Miles W. Kirkpatrick, who described a provision in pending legislation that would have authorized the FTC to order redress for individual consumers as "a very keystone portion of the act. . . ."[8]

In addition to these requests for expanded legislative authority, the Commission later in 1971 took a potentially major

4. *See, e.g.*, Holloway v. Bristol-Myers Corp., 327 F. Supp. 17 (D.D.C. 1971); Carlson v. Coca-Cola Co., 318 F. Supp. 785 (N.D. Cal. 1970).

5. 15 U.S.C. § 45(l) (1970). But a violation of § 12(a) of the FTC Act, 15 U.S.C. § 52(a) (1970), governing false advertising of food, drugs or cosmetics, may in some circumstances result in the imposition of a fine and/or imprisonment regardless of whether a final cease and desist order had been entered or was violated. *See* 15 U.S.C. § 54(a) (1970).

6. *E.g.*, Wade & Kamenshine, *supra* note 3, at 1057-58; REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 63-64 (1969) [hereinafter cited as ABA REPORT].

7. *Hearings on H.R. 14931 before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce,* 91st Cong., 2d Sess., ser. 91-43, at 54-55 (1970) [hereinafter *1970 House Hearings*]; *see also* the statement of then-Commissioner Philip Elman, *id.* at 65-66.

8. *Hearings on S. 986 before the Consumer Subcommittee of the Senate Committee on Commerce,* 92d Cong., 1st Sess., ser. 92-8, at 44 (1971) [hereinafter cited as *1971 Senate Hearings*].

step toward providing some redress for individual consumers under its existing statute. In *Curtis Publishing Co.*,[9] the Commission found that Curtis had committed a deceptive act in violation of section 5 of the FTC Act when, after suspending publication of the *Saturday Evening Post* because of the magazine's precarious financial condition, Curtis had offered subscribers substitute magazines for the unexpired portions of their *Post* subscriptions without also informing them that they were entitled to refunds if they did not wish to accept the substitute magazines. The Commission then asserted, in an opinion by Commissioner Paul Rand Dixon, that it had the statutory authority in certain circumstances to require a respondent to refund money or property that it had obtained from its customers as a result of deceptive acts or practices. One such circumstance, according to Commissioner Dixon, is when restitution is necessary to dissipate the anticompetitive effects of unlawful conduct (such as if, as a result of deceptive acts, a respondent received substantial monetary gains that placed him in a significantly superior financial position to competitors who did not engage in such conduct).[10] The other major instance in which Commissioner Dixon felt a restitution order would be justified is when restitution is necessary to terminate an otherwise continuing unfair practice (such as if a consumer pays in advance for goods or services that are never received or that are essentially worthless, in which case the respondent's retention of the advance payment would constitute a continuing violation of section 5).[11]

Despite these conclusions, the Commission refused to exercise the power it said it had. It declined to enter the order proposed by complaint counsel, which would have compelled Curtis affirmatively to seek out former *Post* subscribers and offer them cash refunds, and instead dismissed the complaint. The Commissioners differed, however, on the reasons for their action. Commissioner Dixon justified the denial of restitution on the grounds that the subscribers' rights to a refund depended on state law. He also asserted that, in any event, Curtis' good faith offer of substitute magazines and the fact that the money received from subscriptions covered only a small part of the cost of publishing the *Post* negated any suggestion of unjust enrich-

9. 3 TRADE REG. REP. ¶ 19,719 (FTC 1971) [hereinafter cited as *Curtis*]. Chairman Kirkpatrick did not participate in the decision.
10. *Curtis* at 21,758.
11. *Id.*

ment.[12] Commissioners Dennison and Jones argued that the Commission could take notice of the subscribers' rights to a refund under general contract law and that the retention of advance subscription payments was a continuing unfair practice for which a restitution order would normally be an appropriate remedy. However, they concluded that a restitution order would not be appropriate in this particular case because Curtis' shaky financial condition and the size of its debt to secured creditors made it unlikely that refunds could ever be made to subscribers.[13]

The conclusion that the FTC may compel a respondent to return money or property acquired by means of an unfair practice is not in itself totally unique. The Commission has previously ordered respondents to return advance payments or deposits made by purchasers when the purchased merchandise was not delivered within a reasonable time due to the seller's fault,[14] or when purchasers induced to buy by misrepresentations found to violate section 5 requested cancellation of their contracts.[15] The refund orders in all of these cases, however, appear to have applied only in favor of persons who purchased after the FTC's cease and desist orders had become final.[16] Thus, refund provisions like these are intended merely to provide for restitution in the event of a repetition of the conduct proscribed in the basic cease and desist order. What is new and significant about *Curtis*, then, is that the FTC has for the first time asserted the power to compel a respondent to seek out and offer refunds to persons prejudiced by respondent's actions *prior* to the entry of any final FTC order. A *Curtis*-type refund order is intended, at least in part, to protect individuals who incurred losses as the result of the very actions that led to issuance of the cease and desist order. It is this shift in focus, from protection of those who deal with the respondent in the future to protection of

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12. *Curtis* at 21,760.
13. *Curtis* at 21,761-62.
14. Interstate Home Equip. Co., 40 F.T.C. 260 (1945); Cookware Associates, 40 F.T.C. 654 (1945); *cf.* Success Portrait Co., 35 F.T.C. 227 (1942).
15. Windsor Distrib. Co., [1967-70 Transfer Binder] TRADE REG. REP. ¶ 19,157 (FTC 1970), *aff'd*, Windsor Distrib. Co. v. FTC, 437 F.2d 443 (3d Cir. 1971); Universal Electronics Corp., 3 TRADE REG. REP. ¶ 19,575 (FTC 1971).
16. This is expressly made clear in the FTC's opinion on reconsideration in Universal Electronics Corp., 3 TRADE REG. REP. ¶ 19,575 (FTC 1971). The Commission also stated that the order in *Universal Electronics* was identical to that entered in *Windsor Distrib. Co.*

those who have dealt with him in the past, that has caused some to question whether the FTC has, or should have, the power to grant such a remedy.[17]

Since *Curtis*, FTC hearing examiners have issued initial orders to cease and desist that required restitution in two adjudicated cases[18] and there has been at least one consent order which provided for restitution.[19] As of this writing, however, neither of the adjudicated cases had been decided by the Commission. Thus the full Commission has not spoken further on its newly-found power to order restitution to injured consumers. Moreover, the courts of appeal have not had an opportunity to rule on the issue because the FTC's decision not to order refunds in *Curtis* resulted in the dismissal of the *Curtis* complaint. This Article will discuss and evaluate the existing statutory authority for *Curtis*-type restitution orders and, in addition, will examine and make recommendations concerning various proposals for expanding the FTC's power to obtain monetary relief for individual consumers.

II. THE FTC'S POWER TO OBTAIN MONETARY REDRESS FOR INDIVIDUALS UNDER EXISTING STATUTES

A. THE BASIC FRAMEWORK

The principal source of the Federal Trade Commission's power with respect to consumer protection matters is section 5(a)(1) of the FTC Act, which declares unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . . ."[20] The statutory language is, like that of the Sherman Act, almost constitutional in breadth, and the reports of both the Senate and the House committees

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17. *See* Note, *The Limit of the FTC's Power to Issue Consumer Protection Orders*, 40 GEO. WASH. L. REV. 496, 525 (1972), in which the author rather summarily dismisses the FTC's reasoning in *Curtis* with the single statement that, since restitution orders are retrospective and compensatory, they are outside the FTC's power.

18. Universal Credit Acceptance Corp., 3 TRADE REG. REP. ¶ 19,938 (FTC 1972); Credit Card Service Corp., 3 TRADE REG. REP. ¶ 19,967 (FTC 1972).

19. Union Mortgage Co., 37 Fed. Reg. 7787-88 (1972); *cf.* United States v. Silver Star Chinchilla, Inc., 1972 Trade Cas. ¶ 74,128 (D. Minn. 1972), a civil penalty proceeding brought for violation of an outstanding cease and desist order in which the defendant consented to entry of a final judgment that provided for both a $2,500 penalty payable to the United States and a payment of $2,000 for distribution by the court to each of 10 named complainants.

20. 15 U.S.C. § 45(a)(1) (1970).

when the FTC Act was passed in 1914 make crystal clear Congress' intent that the FTC have broad discretion to determine what constitutes a violation of section 5.[21] Recent decisions of the Supreme Court also have reaffirmed the FTC's power to proscribe practices which are unfair or deceptive to the consumer regardless of whether any adverse affect on competition is shown.[22]

In contrast to this broad power to determine substantively what constitutes a violation of section 5, the FTC's powers to create a remedy for a violation appear, at least at first blush, much more circumscribed. The only formal power that the Commission has to deal with violations is to order the respondent to "cease and desist from using such method of competition or such act or practice."[23] The legislative history contains no statements concerning the discretion of the Commission to fashion a remedy that are in any way similar to those made about its power to determine substantive violations. Little weight has been attached to that omission, however, largely because the enforcement provisions of the FTC Act received little attention during the extensive floor debates. Those who supported the bill accepted the enforcement provisions with little comment, and those who opposed the bill concentrated their attack on the substantive provisions of section 5, particularly the broad authority granted the FTC to determine what constitutes an unfair method of competition.[24] Thus the legislative history concerning the scope of the FTC's cease and desist power is at best sketchy and inconclusive.

The case supporting remedial innovations by the FTC, such

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21. *See* H.R. REP. No. 1142, 63rd Cong., 2d Sess. 18-19 (1914); S. REP. No. 597, 63rd Cong., 2d Sess. 13 (1914). There was no indication of any intent to change that grant of broad discretion when, in the Wheeler-Lea Act of 1938, Act of March 21, 1938, c.49, § 3, 52 Stat. 111, what is now section 5(a)(1) of the Act was amended to read essentially as it now does by adding "unfair or deceptive acts or practices in commerce" to the original proscription against unfair methods of competition.

22. *See* FTC v. Sperry & Hutchinson, 405 U.S. 233 (1972); *cf.* FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966).

23. 15 U.S.C. § 45(b) (1970).

24. *See* Kauper, *Cease and Desist: The History, Effect and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1102 (1968). That article contains an exhaustive review of FTC orders under the Clayton Act and also discusses in some detail the legislative history of the enforcement provisions of the FTC Act. What discussion there was in 1914 concerning enforcement powers focused primarily on the FTC's inability to impose "sanctions." *E.g.* 51 CONG. REC. 12,145; 12,652; 14,932 (1914).

as that undertaken in *Curtis*, finds its greatest support in a long line of decisions by both the Supreme Court and the courts of appeal that have established a general principle of judicial deference to the FTC's choice of remedy, a deference that approaches that accorded the FTC's determination that a particular practice violates section 5. *Jacob Siegel Co. v. FTC*[25] is the case most frequently cited for the proposition that the FTC, as the administrative agency with the expertise and responsibility to enforce the FTC Act, has broad discretion in its choice of remedy. The Court there considered an FTC order banning the use of the trade name "Alpacuna" for respondent's coats, the FTC having found the trade name deceptive because the coats in fact contained no vicuna. Although it eventually remanded the case to the FTC for reconsideration because the Commission had not explored other, less drastic, remedial alternatives before prohibiting the use of the valuable trade name, the Court made the following broad statement concerning the FTC's remedial powers:

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.[26]

In a subsequent case, the Court repeated the *Siegel* test and stated that the issue on review of the FTC's chosen remedy had been narrowed to the question: "Does the remedy selected have a 'reasonable relation to the unlawful practices found to exist'?"[27] Thus a reviewing court cannot merely substitute its judgment for that of the FTC in the matter of remedies.[28]

Although these broad propositions are of limited utility in resolving a specific case, they are indicative of the general judicial attitude toward FTC orders. There have been relatively few instances in which an FTC order under section 5 has been overturned on the ground that the remedy chosen by the FTC was entirely unauthorized by the Act.[29] Those few cases in which

25. 327 U.S. 608 (1946).

26. 327 U.S. 608, 612-13 (1946).

27. FTC v. National Lead Co., 352 U.S. 419, 429 (1957), *citing Siegel; see also* FTC v. Ruberoid Co., 343 U.S. 470 (1952); FTC v. Cement Institute, 333 U.S. 683 (1948).

28. *See* Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir. 1963); Carter Prods., Inc. v. FTC, 186 F.2d 821 (7th Cir. 1951).

29. *See* Comment, *Permissible Scope of Cease and Desist Orders: Legislation and Adjudication by the FTC*, 29 U. CHI. L. REV. 706, 710-11 (1962).

the FTC's chosen remedies have been overturned have largely been cases, like *Siegel*, in which the court decided that the FTC did not give sufficient consideration to less drastic remedies than the one it chose.[30] Nonetheless, the FTC's good track record in having its orders upheld on appeal does not necessarily mean that restitution orders will be upheld, for, until recently, the FTC has not been notably innovative in fashioning remedies. Most FTC orders have been relatively traditional in nature, merely prohibiting the respondent from repeating in the future acts similar to those it was found to have committed in the past. The bulk of the cases upholding FTC orders and emphasizing the agency's "wide latitude" in fashioning a remedy have involved such traditional orders, sustaining them against claims that the orders were too broad in scope.[31]

Concentrating solely on the broad issue of whether the Commission's order has "some reasonable relation to the unlawful practices" found to have existed, a restitution order in a case like *Curtis* appears sustainable. It will be recalled that Commissioners Dennison and Jones concluded that the precise unfair practice in *Curtis* was retention of the advance subscription payments when the *Post* had ceased publication.[32] Such an unfair practice can be deemed a continuing one, and it does not seem unreasonable to conclude that one way to assure that the practice cease is to require Curtis to offer refunds to its subscribers. Thus the "reasonable relation" test appears to be met.

There are, however, other asserted limitations upon the

30. *See, e.g.*, Magnaflo Co. v. FTC, 343 F.2d 318 (D.C. Cir. 1965); Elliot Knitwear, Inc. v. FTC, 266 F.2d 787 (2d Cir. 1959).

31. Many of the "wide latitude" pronouncements have appeared in cases holding only that the FTC may prohibit practices other than the precise ones that respondent had previously committed and that even otherwise lawful practices may be banned if necessary to assure that the effects of prior illegal acts are dissipated or that such acts are not effectively continued in a different form. *See, e.g.*, FTC v. National Lead Co., 352 U.S. 419 (1957); FTC v. Ruberoid Co., 343 U.S. 470 (1952); S & S Pharmaceutical Co. v. FTC, 408 F.2d 487 (5th Cir. 1969). On the permissible scope and breadth of FTC orders generally, *see* 1 K. DAVIS, ADMINISTRATIVE LAW § 8.19 (1958, Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION ch. 8 (1965) [hereinafter cited as L. JAFFE]. Kauper, *supra note* 24, in a study focusing primarily upon Clayton Act orders issued by the FTC, concludes that reviewing courts have been far too willing to defer to the FTC's discretion in choosing a remedy, resulting in judicial approval of orders that are unnecessarily broad and vague. Such criticisms relating to the scope and precision of FTC orders, however, are not very relevant to the problem of whether the statute authorizes a restitution order.

32. *Curtis, supra* note 9, at 21,762.

FTC's power to frame a remedy, some of which may present more substantial difficulties with respect to the propriety of a restitution order. The hearing examiner in *Curtis*, who held that there was no authority for a restitution order, asserted that the FTC lacked the power to require affirmative action by a respondent.[33] It might be further asserted that a restitution order violates the principle that the FTC may not provide remedies for essentially private wrongs.[34] It is also generally recognized that the FTC has no power to impose "penalties" for violation of the Act,[35] and the hearing examiner viewed the restitution order in *Curtis* as a penalty.[36] Finally, a restitution order might be viewed as operating retrospectively, thus violating the maxim (closely intertwined with the prohibition against penalties) that FTC orders may operate only prospectively.[37] The remainder of this portion of the Article will be devoted to an analysis of the above objections to a restitution order.

B. OBJECTIONS TO RESTITUTION ORDERS

1. *Affirmative Action*

The contention that restitution orders are improper because the FTC lacks the authority to compel any affirmative action on the part of a respondent is wholly without merit. It has been clear for years that the FTC's authority to issue cease and desist orders is not limited to the issuance of prohibitory injunctions. Essentially mandatory injunctions requiring a respondent to undertake specific acts in the future regularly have been upheld in the courts.[38] The numerous advertising disclosure cases, in which the FTC has required a respondent to include various statements in future advertising in order to cure deception found to exist in past ads, are important examples of affirmative requirements imposed by the FTC.[39] The FTC has also success-

33. Curtis Pub. Co., 3 TRADE REG. REP. ¶ 19,376 (FTC 1970) (initial decision to cease and desist).
34. *See* FTC v. Klesner, 280 U.S. 19 (1929).
35. *See* FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).
36. Curtis Pub. Co., 3 TRADE REG. REP. ¶ 19,376 (FTC 1970) (initial decision to cease and desist).
37. *See, e.g.*, FTC v. Cement Institute, 333 U.S. 683, 706 (1948); Eugene Dietzgen Co. v. FTC, 142 F.2d 321, 331 (7th Cir. 1941); Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963).
38. *See* Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 511-12 (1964).
39. *E.g.*, J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir.), *order modified*, 72 F.T.C. 865 (1967), affirming in all but one minor respect an FTC order requiring respondent to disclose in its advertising for

fully required compulsory licensing of drug patents that had been used in violation of section 5 of the FTC Act.[40]

One type of affirmative order closely analogous to a restitution order is an antitrust divestiture order.[41] Section 11(b) of the Clayton Act, which the FTC also enforces, expressly authorizes divestiture as a remedy for violation of that Act.[42] The FTC Act contains no express mention of divestiture, however, and the Supreme Court once held that the FTC had no authority to order divestiture as a remedy for anticompetitive practices

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Geritol that, in most instances, fatigue is not caused by iron deficiency that could be cured by Geritol. *See also* ITT Continental Baking Co., 36 Fed. Reg. 18,522 (1971), a consent order requiring respondent to include in 25% of its advertising a statement that Profile bread is not effective for reducing weight.

In some recent complaints, the FTC has sought a different form of affirmative advertising disclosure: a statement that the FTC had found claims in prior advertising for the product to have been deceptive. The principal example of such an attempt is the attack on the vitamin C content claims made for Hi-C drink. 3 TRADE REG. REP. ¶ 19,351 (FTC 1970) (complaint). The administrative law judge recently filed an initial decision to dismiss, having found that the Hi-C advertising was not deceptive. 3 TRADE REG. REP. ¶ 20,108 (FTC 1972). The current controversy over corrective advertising orders in general, and particularly Hi-C type orders requiring disclosure that the FTC had found past advertising deceptive, is discussed in three recent student comments: 72 COLUM. L. REV. 415 (1972); 40 GEO. WASH. L. REV. 496 (1972); 85 HARV. L. REV. 477 (1971).

Because of *J.B. Williams Co.* and other cases approving affirmative action requirements, it seems unlikely that these orders will be attacked successfully merely because they require some affirmative action. *See* All-State Industries of North Carolina, Inc. v. FTC, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970) (affirming an FTC order requiring disclosure to customers that their installment sales contracts might be assigned to third parties with a resulting loss of defenses against the assignee); Portwood v. FTC, 418 F.2d 419 (10th Cir. 1969) (affirming an FTC order requiring a mail order company to inform mailees that they are under no duty to return or preserve unsolicited merchandise, and that they have no duty to pay for the merchandise unless they decide to purchase it).

It appears from *Siegel* (*see supra* notes 25-27, *infra* note 59, and accompanying text) that the cease and desist power extends only to actions reasonably necessary to prevent the continuation of unfair practices, or to dissipate the effects of past practices. From this, it can be argued that the permissible objectives can be met by advertising statements that merely correct the substantive misconceptions fostered by prior ads (*e.g.*, "Hi-C really does not contain as much vitamin C as orange juice") without the additional and stigmatizing statement that the FTC had formally determined the prior ads to have been deceptive.

40. *See* American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

41. Both require respondent to disgorge benefits acquired through violations of the Act.

42. 15 U.S.C. § 21(b) (1970).

that violated only section 5 of the FTC Act, stating that the FTC had only those remedial powers expressly granted by the Act.[43] That early decision has proven somewhat of an aberration and was essentially laid to rest in *Pan American World Airways, Inc. v. United States*.[44] The Court there held that the Civil Aeronautics Board, under a statute that authorized only the issuance of cease and desist orders and that was patterned after section 5 of the FTC Act, did have the authority to order divestiture as a remedy for unfair methods of competition. The Court has since stated that its early decision denying the FTC divestiture power has been rejected,[45] and an FTC order requiring divestiture in a section 5 case has recently been upheld by a court of appeals.[46] Thus the advertising disclosure cases and, particularly, the divestiture cases make entirely untenable the contention that restitution orders are improper because they require affirmative action.

2. *Remedies for Private Wrongs*

Justice Brandeis once stated, in *FTC v. Klesner*,[47] that the FTC Act "does not provide private persons with an administrative remedy for private wrongs."[48] It is obvious from a reading of *Klesner*, however, that the actual limitation on the FTC's power is not nearly as broad as the maxim. The FTC had ordered Klesner to cease using the name "Shade Shop" for his business, a name which he had adopted for the express purpose of ruining the business of one Sammons, who also operated a "Shade Shop" and with whom Klesner had had a business dispute. The Court considered the FTC without authority to act in the matter and reversed. But the reversal was not based on the fact that Sammons would benefit directly from the FTC's order. Rather, the decision was based on what is now section 5(b) of the FTC Act, which provides that, before issuing a complaint, the Commission must find that a proceeding by it would

43. FTC v. Eastman Kodak Co., 274 U.S. 619 (1926).
44. 371 U.S. 296 (1963). *See also* Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962), holding that § 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4), which empowers the Interstate Commerce Commission to take whatever action is necessary to prevent continuance of violations, authorizes the ICC to order divestiture.
45. FTC v. Dean Foods, Inc., 384 U.S. 597, 606 n.4 (1966).
46. L. G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971); *see also* Golden Grain Macaroni Co., 3 TRADE REG. REP. ¶ 19,521 (FTC 1971).
47. 280 U.S. 19 (1929).
48. 280 U.S. 19, 25 (1929).

be "in the interest of the public . . . ."[49] The Court emphasized the absence of any evidence that Klesner's product was inferior to Sammons' or that the consuming public had suffered, and concluded that the required showing of a "specific and substantial" public interest in the proceeding had not been made.[50] But if the requisite public interest had been present, Justice Brandeis appeared to recognize that the FTC could have acted, and that some direct benefit to a specific individual such as Sammons might be permissible as an appropriate "incident" to protection of the public at large.[51]

There have been very few cases since *Klesner* in which an FTC order has been overturned for failure to demonstrate the requisite public interest in the proceeding. But in those cases in which the requisite public interest was deemed lacking, the reviewing courts have always emphasized the Commission's failure to show any substantial or meaningful injury to the public arising from the respondent's supposedly deceptive practices.[52] Moreover, at least one respected court has expressly stated that although the FTC's determination of the existence of a "public interest" is reviewable, strong deference should be given to that determination. It felt that only the FTC had the information and experience to decide whether action in a particular case will serve to promote the general objective of attaining higher standards of business conduct.[53] The minimal nature of the restraint actually imposed upon the FTC by the public interest requirement is also demonstrated by the trivial nature of many of the unfair trade practices that the FTC has successfully attacked in the past.[54]

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49. 15 U.S.C. § 45(b) (1970).

50. 280 U.S. 19, 28-9 (1929). Justice Brandeis also stressed the fact that Klesner had used the supposedly deceptive trade name for 5 years before the FTC issued its complaint.

51. 280 U.S. 19, 25 (1929).

52. *See, e.g.*, Burton-Dixie Corp. v. FTC, 240 F.2d 166 (7th Cir. 1957); Flynn & Emrich Co. v. FTC, 52 F.2d 836 (4th Cir. 1931).

53. Exposition Press, Inc. v. FTC, 295 F.2d 869, 873-74 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

54. Professor Posner, one of the sharpest critics of the FTC's actions in the 1960's, examined the more than 200 consumer fraud orders issued by the Commission in fiscal 1963. He concluded that 40 per cent of those orders involved "no fraud worthy of the name," and that, in another 40 per cent, if there was any fraud involved, the problems should have been handled by private legal remedies, rather than by FTC action entailing an unnecessary expenditure of public funds. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 71-77 (1969). Although one may disagree with Professor Posner's precise figures, it is clear that the FTC has taken action, without any significant judicial

It must again be emphasized that the statutorily-required determination of a "public interest" must be made at the time *a complaint is issued.* Thus the question primarily is whether *any* action by the FTC in the matter would be in the public interest. Once the respondent's acts are shown to have prejudiced, or to have the potential for prejudicing, even a relatively small portion of the consuming public, the applicable public interest standard appears to be met, and the fact that the FTC's order may particularly benefit a few individuals will not deprive the FTC of its power to act.[55] Assuming, then, that a respondent's practices have affected a substantial part of the public (which certainly seems to have been the case in *Curtis*[56]), an order for restitution that is necessary either to restore the competitive status quo or to prevent the continuance of an unfair practice (in *Curtis*, the continued refusal to make refunds that were due) appears to meet any applicable public interest standard.

3. *Penalties and the Prospective/Retrospective Distinction*

The most serious challenge to FTC orders requiring restitution is based on the generally accepted principle that FTC orders may not be "punitive" or "retrospective" in their application.[57] Despite frequent repetition of this principle, there is little guidance to be found in the opinions of either the FTC or the reviewing courts as to what actually constitutes an impermissible penalty or retrospective order since, in almost all of the cases involving alleged punitive or retrospective aspects of FTC orders, the remedy selected has eventually been upheld.[58] It is my contention that the so-called punitive and retrospective limitations on FTC orders should be viewed essentially as a stylized way of repeating, with a negative rather than a positive focus, the "reasonable relation" test enunciated in *Siegel.* The thrust of *Siegel* is that the FTC may select any remedy that is reasonably related to the basic statutory purpose of preventing the continuation or

restraint being imposed through the public interest requirement, in many cases where the practices being attacked were of marginal or no general significance. *See generally*, ABA REPORT, *supra* note 6.

55. *See* E.B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944), holding that the substantial benefit that one company would gain by an FTC order prohibiting the company's only other two competitors from conspiring to eliminate competition did not prevent the Commission from acting.

56. In May 1968, the *Post's* circulation was about 7½ million. *Curtis, supra* note 9, at 21, 755.

57. *See* cases cited at notes 35 & 37 *supra.*

58. *Id.*

recurrence of an unfair practice.[59] But it may do no more. And any Commission order that attempts to do more, any order that is not reasonably necessary to eliminate the unfair practice in question, is likely to be deemed "punitive" or "retrospective" and thus impermissible.

One source of the proposition that FTC orders may not be punitive is the numerous statements made during the floor debates by proponents of the original FTC Act that the FTC would be unable to impose "sanctions".[60] These statements about sanctions, however, invariably referred to the inability of the proposed FTC to impose fines or imprisonment for violations of the Act,[61] sanctions which the Act expressly leaves to the courts.[62] Other possible sanctions, such as the awarding of damages or restitution, do not appear to have been much discussed. It has regularly been assumed since that time, however, that the FTC's cease and desist powers are not broad enough to encompass the award of compensatory damages to persons injured as a result of a respondent's violation of the FTC Act.[63] Although the Supreme Court has never spoken expressly to the FTC's power to award compensatory damages, it has stated that the Civil Aeronautics Board, which operates under a statute similar in many important respects to section 5 of the FTC Act, has no power to award compensatory damages.[64] That conclusion seems equally

59. *See* text accompanying note 26 *supra.*

60. *E.g.*, 51 CONG. REC. 12,145, 12,652, 14,932 (1914).

61. *See* particularly the remarks of Senator Cummins, 51 CONG. REC. 12,652 (1914).

62. Federal district courts may impose a civil penalty of up to $5,000 a day for violation of a final order, 15 U.S.C. § 45(l) (1970), and may in some circumstances punish a defendant found guilty of false advertising of food, drugs or cosmetics by a fine of up to $5,000 and/or imprisonment for up to 6 months. 15 U.S.C. § 54(a) (1970). Legislation passed by the Senate in 1971 (but which died for lack of House action) would have authorized the FTC to bring civil actions in the federal district courts to collect civil penalties of no more than $10,000 for any violation of section 5(a)(1) of the FTC Act if the defendant knew, or could be "fairly implied" to have known, that he was violating the Act. *See* S. 986, 92d Cong., 1st Sess. § 202, *as reported in* S. REP. No. 92-269, 92d Cong., 1st Sess. 37 (1971).

63. *See, e.g.*, the statement of FTC Chairman Weinberger in *1970 House Hearings, supra* note 7, at 54-55.

64. Pan American World Airways, Inc. v. United States, 371 U.S. 296, 311 (1963). One of the few federal administrative agencies with the power to award damages is the Interstate Commerce Commission, which can compel a carrier found to have violated the Interstate Commerce Act to pay damages to any persons injured by the violation. *See* 49 U.S.C. § 16(1) (1970). The fact that the ICC expressly possessed this power when the FTC Act was passed in 1914 and that similar language was not included in the FTC Act lends some additional support

applicable to the FTC and is consistent with the proposition that an FTC-imposed remedy may be only so great as is reasonably necessary to prevent the continuation or recurrence of an unfair practice. The only apparent relationship between an award of compensatory damages for past violations and the permissible statutory purpose of preventing the continuation or recurrence of an unfair practice is that the prospect of a damage award might deter future violations. A more specific nexus than that must be shown if the limitation on the FTC's power is to have any meaning at all.

Though a compensatory damage award is impermissible, an order for restitution of money or property acquired by a respondent through an unfair practice is arguably a far different matter. In contract law, compensatory damages and restitution are considered distinctly different remedies. The former is intended to place the plaintiff in as good a position as if the contract had been performed, while the latter is intended only to reverse unjust enrichment and restore the status quo by requiring the defendant to disgorge only those benefits he had directly received from the plaintiff.[65] Thus restitution is frequently available in situations in which compensatory damages are not.[66] In the normal sense of the word, then, a restitution order cannot be said to be a disguised award of compensatory damages. Nor should restitution be considered punitive. A penalty normally connotes a payment required irrespective of or in addition to any actual loss incurred,[67] whereas a restitution order would merely return to injured persons money or property of theirs that respondent had improperly retained. Restitutionary remedies in similar contexts have been upheld against charges that the remedies were punitive.[68]

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to the proposition that the FTC is not authorized to award compensatory damages.

65. *See* RESTATEMENT OF CONTRACTS § 326 and comment (b), § 329 (1932); RESTATEMENT OF RESTITUTION § 1, comment (e) (1937).

66. Restitution is available, for example, to a person who has conferred benefits upon another in the performance of a contract that is void because of lack of agreement, lack of consideration, incapacity of one of the parties, or similar reasons. *See* RESTATEMENT OF RESTITUTION § 47 (1937).

67. *See, e.g.*, the civil penalty provisions of the FTC Act cited at note 62 *supra*.

68. *See* SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971); *see also* Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 293 (1960), in which the Court rejected the contention that an order for payment of unpaid minimum wages to employees who had been discriminatorily discharged was "punitive" and thus outside the juris-

The fact that the FTC is empowered to order divestiture as a remedy for anticompetitive practices that violate section 5 of the FTC Act[69] provides some of the strongest support for the view that a restitution order in a case such as *Curtis* is authorized and is not improperly "retrospective". Both restitution and divestiture orders are retrospective in that they are based upon past acts and, in fact, are intended to require the undoing of past acts and the restoration of the status quo. Divestiture is upheld because it may be the only effective remedy to ensure that unfair trade practices will not continue in the future or that the anticompetitive effects of past unfair practices have been neutralized.[70] A similar argument may be made in favor of restitution in a case like *Curtis*. Since the unfair practice found in *Curtis* was the retention of advance subscription payments after the *Post* suspended publication without offering subscribers refunds, the restitution order can be viewed as an effective and appropriate means of ensuring the discontinuance of the violation (the improper retention of advance subscription payments).

It might be argued, however, that divestiture is different from restitution in two important respects, and that these differences justify upholding the former remedy and rejecting the latter. First, a restitution order operates in favor of a particular class of persons (in *Curtis*, the former subscribers) and thus is for their benefit and arguably not "in the public interest". This argument has been discussed previously, and it was concluded that once respondent's practices are shown to have affected a substantial part of the public, an order for restitution to a specified class of individuals would not violate the public interest requirement.[71]

Second, a divestiture order is seemingly less prejudicial to the respondent because the previously acquired business presumably can be sold on the market for fair value, thus providing the respondent the opportunity to reduce or minimize out-of-pocket losses. However, a respondent subject to a restitition order is not in a significantly less favorable position. If the respondent has provided goods or services to individuals entitled to restitution under an FTC order, the respondent normally

diction of a court of equity. For a more complete discussion of *De Mario*, *see* text accompanying notes 74-81 *infra*.

69. *See* notes 41-46 *supra* and accompanying text.

70. *See* L. G. Balfour Co. v. FTC, 442 F.2d 1, 23 (7th Cir. 1971); *cf.* Gilbertville Trucking Co. v. United States, 371 U.S. 115, 129 (1962).

71. *See* notes 52-56 *supra* and accompanying text.

would be entitled to the return of the goods, or to offset the value of the goods or services against its restitution liability.[72] If, on the other hand, the respondent has not provided goods or services of any value, he can hardly complain at having to return money or property obtained in return for nothing (or for the promise of nothing). Thus, from the standpoint of potential prejudice to the respondent, divestiture and restitution orders do not appear significantly different.[73]

Another line of cases that might provide some support for the FTC's power to grant restitution are those upholding the authority of a federal executive or administrative agency to obtain restitution for individuals in federal court proceedings brought under statutes that, by their terms, only authorize the agency to obtain an injunction. The first of these cases was *Porter v. Warner Holding Co.*,[74] a case involving World War II price controls in which the price administrator sought not only an injunction against violation of the Act but also an order requiring that the excessive rents previously charged be refunded to the tenants involved. The Supreme Court held that such a restitution order was permissible under the Act on two grounds. First, the Court relied in part on statutory language that authorized the district courts to grant an injunction "or other order" at the request of the Administrator.[75] Second, the statutory authorization of an injunction was viewed as effectively invoking all of the traditional equitable powers of the district court, including the power to grant restitution.[76] Until 1960, however, *Porter* tended to be viewed as an aberrational wartime decision or, at best, as dependent on the unique "other order" language of the Price Control Act.[77] Thus the rule announced

72. *See* Wade & Kamenshine, *Restitution for Defrauded Consumers: Making the Remedy Effective Through Suit by Government Agency*, 37 GEO. WASH. L. REV. 1031, 1041-42, 1056 (1969), and authorities cited therein.

73. In the case of both divestiture and restitution, respondent stands to lose the administrative costs incurred in the initial transaction and in completing the subsequent divestiture or restitution.

74. 328 U.S. 395 (1946).

75. 328 U.S. 395, 399 (1946). The statute involved was § 205(a) of the Emergency Price Control Act of 1942, Act of Jan. 30, 1942, c.26, Title II, § 205(a), 56 Stat. 23, 33.

76. 328 U.S. 395, 398 (1946). To the effect that restitution is traditionally an equitable remedy, see United States v. Carter, 197 F.2d 903 (10th Cir. 1952); Leesburg State Bank v. Lyle, 99 Fla. 535, 126 So. 791 (1930).

77. *See* United States v. Parkinson, 240 F.2d 918 (9th Cir. 1956), refusing to permit the Food and Drug Administration to obtain restitution for defrauded consumers in an action brought to enjoin the market-

in *Porter* was not widely applied to actions by other federal agencies.

This situation changed in 1960, when the Supreme Court held that the Fair Labor Standards Act (FLSA), which authorized the district courts to restrain violations of the Act at the request of the Secretary of Labor, also authorized the Secretary to obtain, in the same action, reimbursement to employees of wages they lost as a result of discharges unlawful under the Act.[78] The Court reaffirmed the correctness of *Porter* and made it clear that the decision did not necessarily depend on the peculiar language of the statute. It concluded that when Congress granted the district courts power to enjoin violations of the FLSA, it must have been aware of the "historic power of equity" to provide complete relief and that, absent a clear prohibition in the statute, the full range of equitable powers would attach to the extent necessary to effectuate the purposes of the statute.[79] In recent years restitution has been allowed on a similar theory in suits brought by the Securities and Exchange Commission under the securities acts[80] and by the Secretary of Labor under the Labor-Management Reporting and Disclosure Act.[81]

Although the principle announced in *Porter* is extremely useful in supporting the authority of government agencies to obtain restitution for consumers in some circumstances, its value in support of administrative restitution orders by the FTC is rather limited. The real basis of *Porter* and its progeny is twofold. First, the federal district courts already possessed general equitable jurisdiction[82] and, second, a government agency seeking an injunction in such a court is invoking the entire equitable jurisdiction of the court, including the traditional equitable power to order restitution. The problem with applying this theory to actions of an administrative agency like the FTC, then, is that the FTC does not possess any broad grant of equitable

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ing of misbranded drugs under what is now § 332(a) of the Food, Drug and Cosmetic Act, 21 U.S.C. § 332(a) (1970).

78. Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960). For an excellent discussion of *Porter, Parkinson* and *De Mario*, see Wade & Kamenshine, *supra* note 72.

79. 361 U.S. 288, 291-92 (1960).

80. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971); SEC v. Wong, 252 F. Supp. 608 (D.P.R. 1966); *see* Comment, 65 MICH. L. REV. 947 (1967).

81. Wirtz v. Independent Workers Union of Florida, 272 F. Supp. 31 (M.D. Fla. 1967), interpreting § 401 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481 (1970).

82. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

jurisdiction similar to that of the federal district courts. The FTC's enforcement power arises solely from its section 5 power to order a respondent to cease and desist. While there is broad language in some judicial and agency opinions analogizing the remedial powers of administrative agencies to those of an equity court,[83] those statements largely compare administrative agency powers with the powers of equity courts to frame injunctive decrees and not with other equitable powers, such as the granting of restitution.[84] Thus one cannot really make the argument that is central in *Porter* apply to the FTC—that is, one cannot say that Congress, in granting the FTC the power to issue a cease and desist order, was granting that power to an agency which it knew already independently possessed a broad range of equitable powers.[85]

One federal agency that clearly does have the authority administratively to order individual redress, and which might provide a useful analogy in evaluating the FTC's claimed power to order restitution, is the National Labor Relations Board. The Labor Board has long been considered authorized to order the hiring or reinstatement of an employee who was discriminatorily denied employment or fired, and the Board's order in such a case may include an award of back pay to the employee.[86] Recently, it has also been held that the Labor Board has the power to order an employer who has refused to bargain with a union in violation of section 8(a)(5) of the NLRA[87] to "make his employees whole" by paying them amounts based on the Board's assessment of the contract terms to which the union and employer would have agreed had the employer bargained in good faith.[88]

83. *E.g.*, Pan American World Airways, Inc. v. United States, 371 U.S. 296, 312 n.17 (1963); Ecko Products Co., 65 F.T.C. 1163, 1212-15 (1964).

84. *See* Pan American World Airways, Inc. v. United States, 371 U.S. 296, 312 n.17 (1963).

85. The *Porter* line of decisions is extremely useful, however, to a state attorney general who wants to argue that a statute authorizing him to obtain an injunction against an unfair trade practice also authorizes restitution to defrauded consumers.

86. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). Such a back pay award is arguably more punitive to the employer than a *Curtis-type* restitution order, since the employer must pay the wages without having received the services. The punitive aspects are lessened, however, by the requirement that the employee's interim earnings and any losses wilfully incurred (*e.g.*, by unexcused failure to obtain substitute employment) be deducted from the award.

87. 29 U.S.C. § 158(a)(5) (1970).

88. International Union of Electrical, Radio & Machine Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, Tidee Prods., Inc. v.

In a sense, the Labor Board's statutory authority for back pay and "make whole" awards is more substantial than that of the FTC: section 10(c) of the NLRA authorizes the Board not only to order a respondent to cease and desist from violations of the NLRA, but also to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]."[89] This language clearly authorizes back pay awards, and the express authorization of affirmative action has been relied upon to support "make whole" awards.[90] If, however, the basis of these "make whole" awards is merely the Labor Board's express statutory authority to issue affirmative orders, as opposed to traditionally negative cease and desist orders, the Labor Board's authority in that respect is not substantially greater than the FTC's. It has long been clear, as indicated previously, that the FTC's statutory authority to issue cease and desist orders also encompasses the authority to issue affirmative orders necessary to effectuate the broad policies of the FTC Act.[91]

Nonetheless, the express mention of back pay awards in the NLRA does provide express evidence of a Congressional intent that the Labor Board's "affirmative action" should include requiring compensation to individuals for losses incurred as a result of past violations of the NLRA. It might be argued that the FTC lacks the power to order a respondent to make restitution because the FTC Act lacks any similar expression of an intent to provide compensation for past violations. But while the FTC Act admittedly contains no such express evidence of an intent

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International Union, 400 U.S. 950 (1970). The Labor Board subsequently disagreed with the D.C. Circuit and concluded that it lacked the power to issue such a "make-whole" order, in part because such an order would violate the prohibition in section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1970), against compelling either party to agree to a specific proposal. Ex-Cell-O Corp., 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970); *cf.* H.K. Porter, Inc. v. NLRB 397 U.S. 99 (1970). On review, the D.C. Circuit agreed that a make-whole order was not appropriate in *Ex-Cell-O* because the employer's refusal to bargain was there based on a good faith assertion of fairly debatable objections to the union's designation as the bargaining representative. Nevertheless, the court reiterated its belief that the NLRB could issue make-whole orders in appropriate circumstances. Ex-Cell-O Corp. v. NLRB, 449 F.2d 1058 (D.C. Cir. 1971). For a detailed discussion of make-whole remedies in which the author concludes that such remedies are within the power of the NLRB, see St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968).

89. 29 U.S.C. § 160(c) (1970).

90. International Union v. NLRB, 426 F.2d 1243, 1248-49 (D.C. Cir. 1970).

91. *See* notes 38-46 *supra* and accompanying text.

to authorize compensation, FTC restitution orders also do not go nearly as far as NLRB back pay or "make whole" orders. They do not amount to the award of compensatory damages, as the NLRB orders do.[92] Moreover, the restitution orders so far issued by the Trade Commission have been designed to prevent continuing violations of the FTC Act in the form of continuing retention by the respondent of payments to which he was not entitled.[93] Such restitution orders, being intended at least in part to prevent continuing violations, could be sustained under the basic "cease and desist" provisions of the FTC Act, even without any express indication, such as there is in the NLRA, of a Congressional intent to authorize the award of compensation for losses incurred as a result of past violations of the Act.

C. Scope of the FTC's Restitution Authority

A very strong argument can be made for the proposition that the FTC indeed does presently possess the statutory authority to order a respondent to make restitution to past victims of his unfair or deceptive practices, at least in some circumstances. That argument, as discussed in the preceeding pages, is based upon (1) the FTC's basic cease and desist authority, (2) the traditionally wide latitude that appellate courts have given the FTC in fashioning remedies for violations of section 5, (3) analogies to the divestiture power that the FTC clearly has under section 5 and (4) some of the remedies, especially "make-whole" orders, that have been held authorized under the National Labor Relations Act. The only argument of any substance that can be raised against restitution orders generally is the assertion that such orders are essentially punitive and retrospective in that they attempt to provide a remedy for past violations rather than to prevent future ones. Even that argument fails, however, in a situation such as that presented in *Curtis*, where the respondent retained advance subscription payments after discontinuing publication of the magazine. Retention of these advance payments without returning the value for which the payments were made may reasonably be deemed a continuing unfair practice in

92. *See* notes 63-66 *supra* and accompanying text for a discussion of restitution and compensatory damages.

93. FTC restitution orders are distinguishable from NLRB "make-whole" orders in another important respect. An order for restitution of money or property does not raise the potentially substantial problem of speculativeness necessarily involved when the Labor Board must base an award on its estimate of what contract terms the parties would have agreed to had there been good faith collective bargaining.

violation of section 5. Once that conclusion is reached, a restitution order may easily be supported as a remedy that has an eminently reasonable relation to the permissible purpose of preventing the continuance or recurrence of a violation of the Act.

A restitution order is obviously not an appropriate or permissible remedy for *every* violation of section 5. Under the *Siegel* test, the FTC's chosen remedy must be reasonably related to preventing the continuation or recurrence of an unfair practice.[94] In order to meet that test and survive attacks based upon the prohibition against punitive or retrospective remedies, restitution orders may have to be limited to situations in which it can fairly be said that retention of the money or property by the respondent amounts to a continuing violation of the FTC Act.[95] The easiest situations in which to support a restitution order are therefore those in which the respondent has never delivered the goods or services for which value has been paid[96] or in which the respondent's unfair practices have deceived purchasers into paying value for goods or services that are essentially worthless.[97]

The restitution remedy is also easiest to administer in these situations. Restitution implies returning both parties to the status quo that existed prior to the transaction. Thus any party seeking restitution normally must return to the other party the specific thing that he received in the transaction[98] or, in some

94. *See* text accompanying notes 26-27, 59 *supra.*

95. In *Curtis, supra* note 9, at 21,757-58, Commissioner Dixon suggested that restitution to consumers also would be appropriate if necessary to dissipate anticompetitive effects of unlawful conduct. However, if the respondent's continued retention of consumer money or property were not unfair to consumers as well as to competitors, the consumers would receive a windfall if the respondent were ordered to make restitution to them. Because of this, it seems highly unlikely that restitution to consumers would be ordered unless the respondent's retention of the consumer's money or property were unfair to those consumers. Thus the possibility of competitive injury to *competitors* does not provide much of a basis for restitution to *consumers.*

96. *Cf.* Cookware Associates, 40 F.T.C. 654 (1945), in which respondents were found to have continued to accept advance payments for aluminum cookware despite wartime restrictions on the civilian use of aluminum, and to have then offered substitute cookware or promised aluminum cookware at some indefinite future date.

97. *See, e.g.,* Credit Card Service Corp., 3 TRADE REG. REP. ¶ 19,967 (FTC 1972), ordering a respondent engaged in offering insurance against losses arising from lost or stolen credit cards to make refunds to persons who bought the service after the effective date of federal legislation limiting a cardholder's liability for lost or stolen cards to $50, since respondent did not advise its customers of this legislation.

98. *See* RESTATEMENT OF RESTITUTION §§ 65-67 (1937).

cases where specific restoration is impossible, must at least return the value of what he received.[99] Assuring the required specific restoration or determining the value of the benefit conferred by the respondent to be used as an offset to the restitution award can often present some difficult problems. But when the respondent has not performed at all or has rendered an essentially worthless performance, the problems associated with restoring the respondent to the status quo are minimized.[100]

Although the FTC's opinion in *Curtis* states only that restitution would be an appropriate remedy in cases of non-performance or an essentially worthless performance,[101] the underlying principle of that decision logically extends to a far broader class of cases. That principle seems to be that an unfair trade practice is a continuing one if it results in a respondent retaining consumer payments that substantially exceed the value of the performance rendered. Logically, then, there would be a continuing unfair trade practice, with restitution as a permissible remedy, in any case in which misrepresentations of the quality or characteristics of respondent's goods or services resulted in the payment by consumers of a price that substantially exceeded the value of the goods or services. This would be true even if the performance actually rendered did have substantial value.

Under this broader view of *Curtis*, restitution could be considered a permissible remedy in a relatively significant portion of the Commission's deceptive practice cases. To appreciate the potential reach of this doctrine, one merely has to examine some of the types of practices that the FTC previously has found unfair. It has been held unfair, for example, to represent old or used merchandise as new;[102] to misrepresent the durability of a product;[103] to advertise prices as "discount" when they are in

99. *See id.* § 66 and comment d.

100. A restitution order in such a case should involve few major difficulties and should in fact almost be self-executing—the respondent could be ordered to make full refunds to all customers who had not received the promised performance. The FTC or its administrative law judge probably would not have to make any determination as to the entitlement of a specific individual unless a dispute arose during implementation of the order. Restitution orders in such cases would be based largely on the respondent's own records and would involve no more difficulty than do back pay orders regularly issued by the NLRB.

101. *Curtis* at 21,758.

102. *E.g.*, Double Eagle Lubricants, Inc. v. FTC, 360 F.2d 268 (10th Cir. 1965); Parliament T.V. Tube Sales, Inc., 59 F.T.C. 127 (1960) (consent).

103. *E.g.*, Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964).

fact higher than the prevailing market price for the product;[104] or to imply that a patent medicine will cure a particular symptom when, in most instances, it will not.[105] In all of these cases, it may well have been possible to have established that the respondent's misrepresentations about his product caused consumers to pay substantially more than its actual value. The logical implication of *Curtis* in such situations is that the respondent's retention of the difference between the value paid and the actual value of his performance would have amounted to a continuing unfair trade practice, and that restitution of that difference would have been a permissible remedy under the FTC Act. Such a result would be consistent with generally existing private rights under state law, where rescission and restitution are normally available in the event of material misrepresentations, even if innocent.[106]

In this situation, where a respondent has rendered performance of some substantial value, the difficulties of administering mass restitution through an FTC order could become quite substantial. One of the complicating factors is the slowness of FTC proceedings, which may result in a restitution order coming, if at all, years after the events complained of.[107] Such a delay would often mean that, if the transaction involves goods, rescission could not be effected merely by ordering the respondent to take back the goods and refund the price, since the goods would not be returned in as good a condition as when they were purchased. Thus, in order to establish the restitution award in such cases, the FTC would have to determine the precise value of the performance rendered by the respondent and offset that value against the payments received by the respondent.

When respondent has rendered performance of some substantial value, there also are some potentially difficult problems involving the reliance and materiality that normally are prerequisites to restitution in misrepresentation cases.[108] To

104. *E.g.*, Leon A. Tashof, [1967-70 Transfer Binder] TRADE REG. REP. ¶ 18,606 (FTC 1968), *aff'd* 437 F.2d 707 (D.C. Cir. 1970).

105. *E.g.*, the celebrated case of "Geritol," J.B. Williams Co., 68 F.T.C. 481 (1965), *aff'd* in all but one respect, 381 F.2d 884 (6th Cir. 1967), *order modified*, 72 F.T.C. 865 (1967).

106. *See* RESTATEMENT OF RESTITUTION, § 28 (1937); RESTATEMENT OF CONTRACTS § 476 (1932).

107. *See* note 117 *infra* and accompanying text for a discussion of delay in FTC proceedings.

108. *See* RESTATEMENT OF CONTRACTS § 476 (1932), stating that a transaction is voidable for material misrepresentation or fraud only if the party was induced to enter the transaction by such misrepresentations or fraud.

justify a restitution order, the FTC should have to find that the unfair or deceptive practice involved was material and did contribute to the respondent's acquiring or retaining the money or property that is to be returned by the restitution order. Otherwise, an order compelling restitution to a person to whom respondent's alleged violations were not significant may represent a windfall not justified by any of the policies of the FTC Act. Where the respondent has not performed at all, or where his performance has been essentially worthless, it is not difficult to conclude that, since his customers presumably paid their money in the expectation of receiving something of substantial value, the reliance and materiality requirements have been met. But if the respondent has rendered performance of substantial value and the section 5 violation involves alleged misrepresentations about the quality and characteristics of that performance, the determination of materiality and reliance is at least more difficult.[109]

Although it obviously will be more difficult to formulate and administer a restitution order when a respondent has in fact rendered a performance of some substantial value than when the performance, if any, has been worthless, it is not suggested that the FTC's restitution authority is, or should be, limited to the latter class of easy cases. The logic of *Curtis* extends equally to cases where valuable performances have been rendered, and the Commission should feel free to order restitution in these cases where appropriate. I feel strongly, however, that the potential "administrative" difficulties associated with crediting a respondent with the value of his performance, and with determining materiality and reliance, should be weighed carefully when the decision of whether or not to seek a restitution order is made. I shall discuss in the next section a number of other factors that, in my view, should also be considered in reaching that decision.

Before beginning that discussion, however, it is important to recognize that there are many types of deceptive practices for

109. Reliance and materiality are intimately tied together. *See* RESTATEMENT OF CONTRACTS § 479 (1932), stating that when the misrepresentation is material it is presumed to have induced the transaction absent facts showing the contrary. *Cf.* UNIFORM COMMERCIAL CODE § 2-313, Comment 3, dealing with whether a seller's affirmation of fact amounts to an express warranty and stating that once an affirmation has been made, "clear affirmative proof" is required to prevent the statement from being considered part of the "basis of the bargain" and thus an express warranty.

which restitution would not be a permissible remedy. This is so because in many situations a respondent will not have received or retained payments substantially exceeding the value of his performance, even though he acted improperly. Restitution is therefore unlikely when the unfair practice in question does not affect the quality or value of respondent's goods or services. For example, "bait and switch" sales tactics—"baiting" customers with low-priced advertised specials and then "switching" them to higher priced goods by disparaging or refusing to sell the low-priced items—are improper.[110] Restitution theoretically could be justified in such a case if it were shown that the bait and switch tactics led a customer to buy an item he otherwise would not have purchased. But the requirement of returning the respondent to the status quo normally would mean that restitution could be ordered only if the price paid for the high-priced item substantially exceeded the value of that item.[111]

Even if the deceptive practice relates directly to the quality of a respondent's performance, such as a misrepresentation of the attributes of his product, restitution often would not be available. The misrepresentation, when considered in full context, might not be material, thus negativing the inference that customers purchased in reliance upon it. Absent such a showing of reliance, restitution would not be justified.[112] One example of such a situation might be the infamous "Rapid Shave" case, in which the FTC found deceptive a television commercial that attempted to demonstrate Rapid Shave's moisturizing qualities by a mock-up purporting to show that sand could be shaved off sandpaper to which Rapid Shave had been applied.[113] One might well question whether the deception in this case was significant enough to warrant any attention by the FTC. But assuming a prospective cease and desist order was warranted, it still would have been quite difficult to show that the deception was so material that substantial purchases were made in reliance upon the deceptive commercial.

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110. *See, e.g.,* Better Living, Inc. v. FTC, 259 F.2d 271 (3d Cir. 1958); *see generally* FTC Guides Against Bait Advertising, 16 C.F.R. § 238 (1972).

111. The assumption is that merely returning the item to the respondent for a refund of the price would not suffice, since the item would likely be consumed or not in nearly as good a condition as when purchased by the time the FTC acted.

112. *See* notes 108-09 *supra* and accompanying text.

113. Colgate-Palmolive Co., 59 F.T.C. 1452 (1961), *rev'd and remanded,* 310 F.2d 89 (1st Cir. 1962), *modified,* 62 F.T.C. 1269 (1963), *rev'd,* 326 F.2d 517 (1st Cir. 1963), *enforced,* 380 U.S. 374 (1965).

The need to show that the customer paid substantially more than the value of the goods or services received would also present a substantial obstacle to entry of a restitution order in the Rapid Shave case and in many other cases where the practices being attacked are exaggerated product claims. Such claims are often made in an attempt to differentiate a product that otherwise is similar in price and quality to competing products. If this is the case, and if customers do not pay more for Rapid Shave than they would for other products of similar quality, then there would be no price-value differential to be returned through a restitution order.[114]

D. GUIDELINES FOR THE EXERCISE OF DISCRETION

If, as suggested, restitution may be a permissible remedy for a relatively broad range of FTC Act violations—such as all violations that result in a respondent retaining payments that substantially exceed the value of his performance—this newly-found restitution remedy has the potential of causing major changes at the FTC. Not all of those changes would necessarily be salutary, however, for widespread use of restitution orders would entail substantial costs for the FTC. High among those costs would be the additional time and resources that would have to be devoted to potentially complicated determinations of materiality, reliance and value that have not heretofore been central to the FTC's activities.

Another potential cost inherent in the increased use of restitution orders is that it may be significantly more difficult to get a respondent to consent to an order containing a restitution provision than to a more traditional cease and desist order. The direct and immediate monetary consequences of a restitution order may well lead many respondents to insist on litigating a restitution order, at least through the initial hearing stage, even though they might otherwise have consented to a traditional order. Thus widespread use of restitution orders by the FTC might well reverse the recent trend toward consent rather than contested orders.[115] Admittedly, this trend away from contested

114. The customers' expectations of superior quality might be frustrated, but those expectations generally are not compensated in a restitution action. *See* RESTATEMENT OF CONTRACTS § 347 and comment b (1932).

115. In fiscal 1969, the last year for which a breakdown between consent and contested orders is available, the FTC's Bureau of Deceptive Practices issued 65 complaints: 54 were consented to and only 11 were contested. In fiscal 1967, by contrast, 40 of 108 complaints were

orders may not be entirely salutary. Obtaining orders by consent is not always a goal to be sought, and an unusually large preponderance of consent orders may indicate that the agency is not being innovative enough or is not attacking practices of sufficient importance.[116]

On the other hand, a consent order has one immense advantage over a contested order—the delay between issuance of a complaint and issuance of a final order, which may amount to a period of three to five years, is reduced almost to zero.[117] Thus, in some cases, it may appear that insistence on restitution as part of a proposed order would make the difference between an immediate consent order and a protracted contested case. The FTC must then decide whether the benefits of a restitution order (which would fall largely to the individual consumers who have dealt with the respondent in the past) would outweigh the benefits of an immediately effective but entirely "prospective" cease and desist order (which would at least prevent any more persons from being injured by respondent's acts).[118]

These costs and the limited resources available to the FTC make it extremely unlikely that restitution could be sought in all, or even a very large portion, of the cases in which restitution might, under a logical extension of *Curtis*, be permissible. To

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contested, and 68 were consented to. *See* ABA REPORT, *supra* note 6, at 20.

116. *Id.* Witness the extremely high percentage of consent orders reported for textile and fur matters.

117. The three to five year estimate is referred to in Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 N.W.U.L. REV. 281, 299 (1971), *citing* Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. COM. B. J. 548, 561 (1964). The ABA Commission reported that, in fiscal 1969, 81% of the deceptive practices complaints pending before the FTC were under two years old, and the remaining 19% were two to four years old. ABA REPORT, *supra* note 6, at 31. The ABA Commission's figures, however, do not reflect the additional delay incurred before an FTC order becomes final if a respondent decides to seek judicial review. Thus despite substantial improvement in reducing the backlog of deceptive practice complaints during the 1960's (in fiscal 1963, for example, 28% of the deceptive practice complaints before the FTC were two to four years old, and 4% were four to six years old, ABA REPORT, *supra* note 6, at 31), the three to five year estimate still may not be too far off.

118. Of course, the prospect of a restitution order does minimize one previously important incentive that a respondent had to contest an FTC order and thus delay its final imposition. The respondent is no longer assured of being able to continue to profit from his unfair or deceptive practice during the pendency of the FTC proceeding and any subsequent judicial review. But additional consumers will continue to be deceived during that period, and even if a restitution order is finally issued, will be repaid only after a substantial delay.

attempt to do so might seriously impair the FTC's historic and still primary role of establishing standards for future conduct in the marketplace by diverting substantial resources from traditional cease and desist activities. In order to avoid such an unhappy result, the FTC must view restitution as truly ancillary to its primary prophylactic functions. In each instance in which restitution is a potentially permissible remedy, the FTC must consider the individual case in the context of overall FTC enforcement policies in order to make a sound determination on the propriety of a restitution order. When that determination is made, the following factors deserve particular consideration, although it certainly is not contended that they represent an exclusive listing:

1. *Nature of the offense.* One of the principal advantages of restitution orders from the FTC's point of view is that they may provide an additional and very useful deterrent against FTC Act violations. But a sanction can act as a deterrent only if the substantive standards are well known. In order to maximize the deterrent effect, then, it would seem that restitution orders should be used primarily against acts or practices that are clear violations of settled principles under section 5.[119] Restitution, if otherwise appropriate, might be particularly justified as a remedy for acts that violate existing FTC Trade Regulation Rules.[120] By concentrating on clear violations, the FTC also would minimize the likelihood of imposing substantial monetary liability upon a respondent who believed in good faith that he was complying with the law.

2. *Seriousness of the offense.* Involved here would be a somewhat subjective judgment concerning the nature and effect of the acts challenged. In part, the focus would be on the mate-

119. A somewhat similar approach has been adopted by the D.C. Circuit with respect to "make-whole" remedies for a refusal to bargain in good faith under the National Labor Relations Act. In Ex-Cell-O Corp. v. NLRB, 449 F.2d 1058 (D.C. Cir. 1971), the court decided that, although the employer had violated his duty to bargain in good faith, a make-whole remedy was not appropriate because the employer's refusal to bargain was based upon an assertion of fairly debatable objections to the union's designation as the bargaining representative. For a general discussion of NLRB make-whole remedies and their relationship to restitution orders, see notes 86-93 *supra* and accompanying text.

120. There presently is some uncertainty about the authority of the FTC to issue rules that have the effect of substantive law. *See* note 239 *infra.* Even if this issue is resolved against the FTC, it presumably still could issue guidelines listing types of violations that it felt were quite clear and for which restitution would ordinarily be considered an appropriate remedy.

riality of the acts and the likelihood of prejudice to those who have dealt with the respondent.[121] More than the actual impact on a respondent's customers should be considered, however. It may well be that certain classes of offenses would be viewed as serious enough, without regard to the consumer's purely monetary injury, that restitution should normally be sought, again largely in an attempt to deter such offenses.[122]

3. *The victims.* As a general rule, the public interest in obtaining restitution will be greater as the class of potential beneficiaries of a restitution order increases. Thus the more widespread the respondent's practices have been, the more reasonable it will be for the Commission to conclude that whatever additional time and effort is involved in obtaining restitution is justified.[123] On the other hand, there may be situations in which the size of the potential class of beneficiaries is so great as to make restitution unmanageable.[124] In any case, sheer size of the potential class ought not be conclusive. The Commission also can and should consider more qualitative characteristics of the class of potential beneficiaries. If the respondent has dealt largely with low income consumers, for example, the Commission might well be justified in seeking a restitution order more readily, on the ground that such individuals might be less able and less likely to assert whatever private rights they might have in either individual or class actions.

4. *Amount of individual loss.* As a general matter, the larger the average individual loss suffered as a result of a respondent's unfair practices, the more serious the injury and the more reason for the FTC to seek restitution. There may be some situations, of course, in which the size of the individual loss combined with the type of consumers affected may make it likely that the consumers will seek redress through private ac-

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121. The standard of materiality necessary to justify a prospective cease and desist order may be substantially lower than that necessary to justify imposition of direct monetary liability in a mass restitution action. *See* notes 112-13 *supra* and accompanying text.

122. One possible example of such an offense might be false advertising of drugs. Evidence of a stronger Congressional policy against such offenses can be found in the fact that civil penalties may in some circumstances be imposed for initial violations. *See* note 5 *supra*.

123. In *Curtis*, for example, the proposed restitution order might have benefitted as many as 7½ million former subscribers of the *Saturday Evening Post*. *See Curtis*, *supra* note 9, at 21,755.

124. This would be particularly true if the FTC had to make individual determinations of materiality, reliance, and of the value of the respondent's performance.

tions under state law. The likelihood of such private actions, and whether such actions would essentially be duplicated by an FTC restitution order, should weigh in the FTC's determination of whether to require restitution in its order.

5. *Anticompetitive effects of respondent's unfair acts.* It was previously suggested that the anticompetitive effects of respondent's unfair acts normally would not alone justify restitution to consumers.[125] But if restitution to consumers is otherwise an appropriate remedy, the FTC should be more willing to undertake the effort to order restitution if the respondent's retention of consumer payments would give him a significant and unfair advantage over his competitors.

6. *Effect on the respondent.* Mass restitution through an FTC order could have a disasterous effect upon a respondent, possibly precipitating bankruptcy, or at least seriously crippling the respondent. This is a factor that the FTC should consider, as it did in *Curtis*, in deciding whether to order restitution.[126] But obviously the FTC should not always refrain from action merely because of potential damage to the respondent. Rather, the effect of a restitution order on the respondent must be considered in light of other factors, particularly the nature and seriousness of the offense and the degree of prejudice to the consuming public.

7. *Difficulties of proof and administration.* If the respondent has partially performed and rendered benefits of some substantial value to his customers, a restitution order involves potential difficulties in determining materiality and reliance and in assuring specific restoration of those benefits to the respondent or crediting him with the value of his performance.[127] These difficulties suggest that stronger independent reasons for seeking restitution should be required when the respondent has rendered a performance of substantial value than when he either has not performed at all or has rendered an essentially worthless performance.

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125. *See* note 95 *supra*.

126. The reason that Commissioners Dennison and Jones gave for denying restitution was not only that it probably would cause bankruptcy, but also that subscribers would likely have obtained nothing in a bankruptcy distribution because all of Curtis' assets probably would have been depleted in satisfying prior secured claims. *See* note 13 *supra* and accompanying text. The recommendation here, however, is that the FTC consider the potential effect of a restitution order upon a respondent even if it is likely that substantial amounts actually could be recovered for consumers.

127. *See* notes 98-100, 107-09 *supra* and accompanying text.

8. *Delay.* As suggested above, if the decision to seek a restitution remedy is likely to make the difference between a protracted contested case and a relatively quick and inexpensive consent order, the relative benefits of those two results, both in the particular case and in the overall enforcement context, must be carefully weighed.[128]

9. *FTC resources.* The limited resources that the FTC has available for national enforcement of the FTC Act and a multitude of other statutes[129] is obviously a primary reason underlying the necessity for exercising sound judgment in deciding whether or not to seek a restitution order, just as it underlies the need for sound judgment in deciding initially whether to issue a complaint. The specific factors that have just been suggested as relevant to the determination of whether or not to seek a restitution order are intended primarily as aids toward the ultimate goal of the most rational and effective use of the FTC's limited resources. But the effective use of resources deserves specific mention by itself, if only for emphasis.

III. PROPOSALS FOR STATUTORY CHANGE

A. THE 92d CONGRESS

> "I believe that doubts as to the extent of our remedial powers have too frequently required us to stop short of completely fulfilling our responsibility to the consumer." Miles W. Kirkpatrick, Chairman of the Federal Trade Commission.[130]

This statement by Chairman Kirkpatrick illustrates one of the important underpinnings of the legislative proposals that have been made in recent sessions of Congress to revise the remedial provisions of the FTC Act. These proposals, however, have generally gone substantially beyond mere attempts to provide express statutory authority for remedies, such as restitution orders, that the FTC is arguably already empowered to use under its existing statute.

The legislative proposal that would have had the most far-reaching effect upon the remedial powers of the FTC itself was

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128. *See* note 118 *supra* and accompanying text.

129. *E.g.,* Consumer Credit Protection Act, 15 U.S.C. §§ 1601-65 (Supp. 1972); fair packaging and labeling, 15 U.S.C. §§ 1451-61 (1970); Lanham Trademark Act, 15 U.S.C. § 1064 (1970); fabrics & textile matters, 15 U.S.C. 68-70, 1191-1204 (1970).

130. Statement made March 9, 1971, during the Senate hearings on legislation to expand the powers of the Federal Trade Commission, *1971 Senate Hearings, supra* note 8, at 35.

S. 986.[131] As originally introduced early in 1971, that bill would have empowered the FTC to order any respondent who had committed a violation of Section 5(a)(1) of the Act that was "unfair or deceptive to consumers" to "take any other action necessary to redress the injury caused by such acts or practices to consumers."[132] This broad language would have permitted the Commission to order the payment of restitution or compensatory damages to an injured consumer, and might even have supported an order requiring specific performance. Shortly thereafter, and apparently before full committee consideration, the section dealing with the FTC's remedial powers was revised. The revised version authorized the Commission to order further actions that it deemed reasonable and appropriate to remedy injury to consumers, expressly mentioning rescission, refund of money and return of property. Curiously enough, no express mention was made of the award of damages. The revised version also provided that the FTC's decision as to the reasonableness and appropriateness of such additional remedies was subject to de novo review by the courts of appeal.[133]

The power to award compensatory damages in an FTC proceeding was sought in 1970 by Caspar Weinberger, then Chairman of the FTC,[134] and the consumer redress provisions of S. 986 were supported by Chairman Kirkpatrick in 1971.[135] Both industry and the administration opposed granting the FTC the power to order redress for individual consumers. They argued that the standards for liability under the FTC Act are too vague to support any type of relief other than a purely prospective cease and desist order[136] and that FTC procedures, being sub-

131. 92nd Cong., 1st Sess. (1971) (as introduced, Feb. 25, 1971) [hereinafter cited as S. 986 (original)].

132. S. 986 (original), § 202; *see also id.* § 203. Other provisions of Title II of this bill, not directly relevant to the present discussion, would have expanded the FTC's jurisdiction to cover acts and practices "affecting commerce" rather than just those "in commerce" (§ 201); authorized the FTC to seek preliminary injunctions against unfair or deceptive practices in some circumstances (§ 212) and to obtain civil penalties of up to $10,000 for "knowing" violations of the FTC Act itself, instead of only for violations of outstanding cease and desist orders (§ 202); and would have clearly granted the FTC power to make "legislative" rules (§ 208). Title I of S. 986 dealt with consumer product warranties and would have, *inter alia*, established federal minimum standards for such warranties.

133. *See* S. REP. No. 92-269, 92d Cong., 1st Sess. 59 (1971).

134. *1970 House Hearings*, *supra* note 7, at 54-55.

135. *1971 Senate Hearings*, *supra* note 8, at 44.

136. *See* letter of William N. Letson, General Counsel, Dep't of Commerce, in S. REP. No. 92-269, *supra* note 133, at 54.

stantially different from those of a court of law, are not adequate to protect the respondent if direct monetary liability is to be imposed.[137]

Having heard this opposition, the Senate Commerce Committee further revised S. 986's provision for consumer redress by deleting the authority to grant individual redress in an FTC order itself. A new provision was substituted which would authorize the FTC to institute civil actions in the federal courts to obtain redress for consumers injured by a respondent's deceptive acts or practices. The specific provision reported out by the Senate Commerce Committee is as follows:

> After an order of the Commission to cease and desist from engaging in acts or practices which are unfair or deceptive to consumers and proscribed by section 5(a)(1) of this Act has become final. . . , the Commission, by any of its attorneys designated by it for such purpose, may institute civil actions in the district courts of the United States to obtain such relief as the court shall find necessary to redress injury to consumers caused by the acts or practices which were the subject of the cease and desist order, including but not limited to, rescision [*sic*] or reformation of contracts, the refund of money or the return of property, public notification of the violation, and the payment of damages.[138]

It should be noted that the Committee version specifically authorizes the FTC to obtain money damages for injured consumers and permits the FTC to use its own attorneys rather than be represented in court by the Justice Department, as is the normal practice. The Committee version also provides that the FTC may seek court redress for consumers only after an FTC cease and desist order against the defendant covering the practices in question has become final.

In November, 1971, the Senate passed S. 986 by a vote of 76-2.[139] The only change from the consumer redress provision

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137. *See* statement of Richard McLaren, Assistant Attorney General, *1971 Senate Hearings, supra* note 8, at 225; letter of William N. Letson, S. Rep. No. 92-269, *supra* note 133, at 54; *see also* statement of Gilbert Weil, *1971 Senate Hearings, supra* note 8, at 79-80; memorandum from National Association of Food Chains, *id.* at 193; text following note 150 *infra*.

138. S. 986, § 203 in S. Rep. No. 92-269, *supra* note 133 at 37-38. This section is very similar to a provision that the Senate Commerce committee had reported favorably to the Senate late in the 91st Congress, except that S. 986 limits the FTC's power to seek judicial redress to cases in which the FTC has obtained a final cease and desist order. *See* S. 3201, 91st Cong., 2d Sess. § 103 (1970), reprinted in S. Rep. No. 91-1124, 91st Cong., 2d Sess. 21 (1970). No floor action was taken on S. 3201.

139. 117 Cong. Rec. 17,887 (daily ed. Nov. 8, 1971).

reported by the Committee was the addition of a statute of limitations—the FTC must institute an action for consumer redress within two years after the FTC order on which the action is based has become final.[140] Despite this relatively early Senate passage, the House Committee on Interstate and Foreign Commerce did not report out either S. 986 or any of its House companion bills, and thus the bill died without House action when the Congress adjourned in October 1972.

The Senate Committee report does not reveal why the committee rejected the original proposal to permit FTC orders themselves to require the payment of damages or to grant other individual consumer redress. It is doubtful that this change was in response to the previously-mentioned administration and industry complaints that the FTC Act was too vague to justify imposition of other than purely prospective sanctions.[141] Under the Committee proposal, the FTC could not institute an action until after it had entered a final cease and desist order; once it had obtained such a final order, however, it clearly could seek damages from the defendant for consumer injuries caused prior to entry of the order or even prior to the issuance of a complaint by the FTC.[142] Moreover, the claim that standards of liability under the FTC Act are too vague is seriously exaggerated. Despite the generality of the statutory language, there has developed an extensive body of FTC and judicial decisions that identify with relative clarity many types of practices that are prohibited by the FTC Act.[143] It is not unreasonable to assume that FTC consumer redress suits under the proposed statute would be brought primarily against such clearly prohibited practices.[144]

The other major industry and administration criticism of the original version—that FTC procedures are not presently adequate to protect a respondent if monetary liability is to be directly imposed by the FTC[145]—may have carried more weight

140. The provision for a two year statute of limitations was added as a result of a floor amendment offered by Senator Spong, who initially proposed § 203 in committee. *See* 117 CONG. REC. 17,875 (daily ed. Nov. 8, 1971).

141. *See* text following note 135 *supra*.

142. *See* S. 986, 92d Cong., 1st Sess. § 203 (1971) (as enacted by Senate). Hereinafter the version of S. 986 passed by the Senate will be cited: S. 986 (Senate version).

143. *See, e.g.,* the practices mentioned in the text accompanying notes 102-04 *supra*. Guidance may also be obtained from FTC rules and guides, such as the Guides Against Bait Advertising, *supra* note 110.

144. *See* notes 119-20 *supra* and accompanying text.

145. *See* text following note 135 *supra*.

with the committee. Some based their criticism in this regard on constitutional grounds, arguing that the constitutionally-protected right to a jury trial[146] in common law actions involving over twenty dollars would be violated if the FTC were empowered to award compensatory damages in its administrative proceedings.[147] That constitutional argument appears unlikely to prevail. The Supreme Court has already held that the seventh amendment's jury trial guarantee does not apply to back pay awards of the Labor Board, on the grounds that the award of such damages was incidental to equitable relief (an order to cease and desist from discriminatory firings) and that the proceedings were statutory and did not exist at common law.[148]

The award of damages by the FTC in a section 5 proceeding appears to be a quite similar case. The damage award would be incidental relief in a proceeding involving historically equitable relief (a cease and desist order), and the proceeding would be for the purpose of enforcing statutorily-created rights (derived from section 5's prohibition against unfair and deceptive trade practices) that did not exist at common law.[149] Thus as long as the award of damages by the FTC is an integral part of its enforcement activities under the comprehensive statutory scheme that is committed to the FTC, there seems to be little likelihood that the jury trial guarantee of the seventh amendment would be held applicable.[150]

The claim that FTC procedures are not adequate to insure procedural fairness if direct monetary liability is to be imposed

146. U.S. CONST. amend. VII.

147. *See* memorandum from National Assn. of Food Chains, *1971 Senate Hearings, supra* note 8, at 193.

148. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

149. *Cf.* Grand Trunk Western Ry. Co. v. Industrial Comm'n, 291 Ill. 167, 125 N.E. 748 (1919); Walters v. Blackledge, 220 Miss. 485, 71 So. 2d 433 (1954), upholding the administrative award of damages under state workmen's compensation statutes against challenges based upon state constitutional jury trial guarantees. These cases and the general problem of the jury trial guarantee and relief in administrative proceedings are discussed in L. JAFFE, *supra* note 31, at 90-91, 98-99.

150. Some additional support for the proposed award of damages by the FTC may be found in the long-standing power of the Interstate Commerce Commission to order a carrier who has violated provisions of the Interstate Commerce Act to make refunds or pay damages to persons injured thereby. 49 U.S.C. §§ 8, 16(1) (1970). In a subsequent proceeding to enforce such an award, however, the ICC order has only prima facie effect. *See* 49 U.S.C. § 16(2) (1970). It has been held that such prima facie effect insulates the statutory scheme from attacks based on the right to a jury trial. *See* note 212 *infra* and authorities cited therein.

may be based on the lack of separation of investigatory, prosecutory and adjudicatory functions in the FTC. The alleged unfairness of combining these functions in one agency has been the subject of extended debate over the years,[151] and this is not the place to attempt to resolve, or even to delve very deeply into, that debate. It does seem, however, that the award of restitution or compensatory damages is not significantly more prejudicial to a respondent than are other types of remedies frequently granted by the FTC, such as orders banning the use of a valuable trade name,[152] or compelling divestiture,[153] or requiring "corrective" advertising.[154] Unless the present combination of functions is to be altered with respect to all, or at least most, actions presently under the jurisdiction of the FTC, the alleged unfairness of combining prosecutorial and adjudicatory functions in one agency does not, of itself, justify denying the FTC the additional power to award compensatory damages.

However, there may be other considerations which, combined with this debate about the fairness of FTC procedures, provide a basis for preferring the federal courts to the FTC as the forum for granting direct consumer redress such as damages. These considerations will be dealt with later.[155] First, consideration will be given to some difficulties that might be encountered under the bill that the Senate did approve, which would have authorized the FTC to sue in federal court for damages and other direct redress on behalf of injured consumers.

B. Analysis of the Senate Provision

1. *Relation to FTC Refund Orders*

As passed by the Senate, the consumer redress provision of S. 986 would have expressly authorized the FTC to institute federal court actions to obtain, *inter alia*, "recision [*sic*] or reforma-

151. *See, e.g.*, Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); and Minow, *Suggestions for Improvement of the Administrative Process*, 15 AD. L. REV. 146 (1963), suggesting that the adjudicatory functions of the CAB and the FCC, respectively, be assigned to separate administrative courts; *but see* W. CARY, POLITICS AND THE REGULATORY AGENCIES 125-34 (1967), in which the former chairman of the SEC criticizes the Hector-Minow proposals for separating the administrative and adjudicatory functions.

152. *E.g.*, FTC v. Algoma Lumber Co., 291 U.S. 67 (1934). *See also* textual discussion of *Jacob Siegel Co. v. FTC* following note 25 *supra*.

153. *E.g.*, Golden Grain Macaroni Co., 3 TRADE REG. REP. ¶ 19,521 (FTC 1971). *See* text accompanying notes 41-46 *supra*.

154. *E.g.*, J. B. Williams Co., Inc. v. FTC, 381 F.2d 884 (6th Cir. 1967).

155. *See* notes 224-25 *infra* and accompanying text.

tion of contracts, the refund of money or return of property, public notification of the violation, and payment of damages . . . ."[156] The specific reference to authority to seek court-ordered rescission and refund of money and property immediately raises the question of the effect of this section, if enacted, upon the professed authority of the FTC to order a respondent to make refunds of money or property in certain circumstances.[157] There is language in the report of the Senate Commerce Committee that may have been intended to resolve this question. Regarding section 203, the Committee stated:

> This section would not affect whatever power the Commission may have under section 5 to fashion relief in its initial cease-and-desist order, such as corrective advertising or any other remedy, which may be appropriate to terminate effectively unfair or deceptive acts or practices. Section 203 is applicable to those situations where the Commission acts to make specific consumers whole and not to general actions designed to dissipate the prior effects of unfair or deceptive acts or practices.[158]

It will be recalled that one of the principal instances in which the FTC in *Curtis* considered a refund order appropriate was when the retention of money or property by the respondent was itself a continuing unfair practice, which a refund order would effectively terminate.[159] Thus the first sentence of the above extract could indicate a committee intent not to disturb the result in *Curtis* (although not endorsing that result either). On the other hand, the only FTC remedy that the committee expressly mentioned as one it did not intend to disturb was corrective advertising. This fact, taken together with the additional statement that section 203 applies "where the Commission acts to make specific consumers whole", could be read to indicate that any action seeking specific consumer redress (including merely a refund) must come under the judicial relief provisions of section 203. The earlier statement about not disturbing the Commission's existing authority to grant relief necessary to terminate unfair or deceptive practices would thus be viewed as applying only to "prospective" relief ordered by the FTC for the benefit of the public at large, such as corrective advertising necessary to dissipate misconceptions about a product's qualities caused by previous deceptive advertising.

Absent further evidence, however, speculation about the

156. S. 986, § 203 (Senate version).
157. *See Curtis, supra* note 9; *see generally* part II of this report, *supra*.
158. S. Rep. No. 92-269, *supra* note 133, at 25.
159. *Curtis, supra* note 9, at 21,758.

Committee's or the Senate's intent with respect to FTC refund orders is not very useful.[160] In fact, it is entirely plausible that, when the report was written, the Committee did not know that the FTC claimed the power to order refunds and therefore had not expressly considered the possible difficulties of meshing section 203 with FTC refund orders. For the Committee report was dated July 16, 1971, and there is no reference anywhere in it to refund orders or to *Curtis*, which was decided only slightly over two weeks earlier, on June 30, 1971.

Nonetheless, the emergence of restitution orders under *Curtis* does create a potential ambiguity that should be resolved before any consumer redress provision such as section 203 is enacted. In my judgment, the basis of which will be explained later, there are valid reasons for denying the FTC the power to award compensatory damages in its proceedings and instead requiring it to seek such consumer redress in the courts, but those reasons are not nearly as applicable when the relief being sought is merely a refund or restitution.[161] Thus any provision authorizing the FTC to obtain consumer redress in the federal courts should expressly confer on the FTC the power to order restitution.[162] This will alleviate the general uncertainty about the FTC's remedial powers of which Chairman Kirkpatrick has complained[163] and will make it clear that Congress, in granting the FTC the power to obtain consumer redress in the courts, did not thereby deprive it of the authority to require restitution in an FTC order.

2. *Effect of an FTC Suit on Individual Causes of Action*

Senator Marlow Cook, who unsuccessfully tried to delete section 203 from S. 986 on the Senate floor,[164] pointed out a number of potentially serious deficiencies in the section. One such defect is the failure to deal expressly with the possible effect of an FTC consumer redress suit upon the causes of action that individual consumers might have against the defendant under state law, whether they be tort actions for deceit, contract ac-

160. No reference to this problem was found in the debates on the Senate floor.

161. *See* text accompanying notes 224-28 *infra*.

162. For further recommendations concerning the nature and scope of this power, see notes 226-28 *infra* and accompanying text.

163. *See* text accompanying note 130 *supra*.

164. Senator Cook's attempt to delete section 203 was defeated, 49-30. 117 CONG. REC. 17,875 (daily ed. Nov. 8, 1971).

tions, or suits under state deceptive practice statutes.[165] In the main, the problem has two aspects. First, may a consumer who has recovered as the result of a consumer redress action prosecuted by the FTC continue to press and ultimately collect in an action based upon the same facts but founded upon the provisions of state law rather than upon section 5 of the FTC Act? Second, if the FTC seeks redress for a consumer and loses because the court concludes that the consumer was not in fact injured by the defendant's actions, may the consumer still recover in an action under state law based upon the same facts?

When initially queried on this subject on the Senate floor, Senator Spong, the author of section 203 in committee, stated that FTC actions under the section would have no res judicata effect on private suits. He reasoned that since there was no private right of action under the FTC Act, any consumer suit would have to be based upon a different cause of action, and thus res judicata would be inapplicable.[166] When pressed by Senator Ervin about the danger of a double recovery by a consumer, Senator Spong indicated that an individual who had previously recovered would be precluded from a second recovery to avoid "unjust enrichment".[167] But, according to Senator Spong, an individual dissatisfied with the result of an FTC suit could still recover under state law for acts that were the subject of the FTC suit, limited only by the necessity of having to deduct from his recovery in the state action amounts actually received as a result of the FTC suit.[168]

Assuming that the danger of a direct double recovery is eliminated, the Spong position is not entirely unreasonable. In

165. *See, e.g.,* Senator Cook's remarks at 117 CONG. REC. 17,865 (daily ed. Nov. 8, 1971).

166. 117 CONG. REC. 17,872 (daily ed. Nov. 8, 1971). As to res judicata, strictly speaking, Senator Spong would be correct, since res judicata serves only to preclude further litigation on the same cause of action. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.401 (2d ed. 1965). There remains, however, the question whether collateral estoppel would preclude a consumer from re-litigating in a subsequent action an issue actually determined in a prior FTC suit.

167. 117 CONG. REC. 17,872 (daily ed. Nov. 8, 1971).

168. *See id.,* 17,872-73. However, if the consumer had previously recovered from the defendant in a private suit in which the consumer directly participated, collateral estoppel might well operate to preclude relitigating in a later FTC suit any issue actually determined in the earlier private suit. *See* RESTATEMENT OF JUDGMENTS § 68 (1942). A possible difficulty in reaching this conclusion is that the consumer would not technically, under the Senate version, be a "party" to the subsequent FTC suit. The recovery is for his benefit, however, and the policy against relitigating seems equally applicable.

fact, it is quite similar to the "one-way intervention" that was allowed in so-called "spurious" class actions under the former version of Rule 23 of the Federal Rules of Civil Procedure. Unnamed members of the class were not bound by the judgment but could intervene after the judgment to obtain its benefits.[169] Such "one-way intervention" would necessarily be the result under the version of the consumer redress section passed by the Senate. Since no provision was made for notice to or intervention by consumers on whose behalf the FTC would be suing, such consumers would have no opportunity to control or remove themselves from the litigation. The requirements of due process would preclude binding such consumers by adverse determinations in an FTC consumer redress suit.[170] In a time of increasingly crowded judicial dockets, however, such "one-way intervention" begins to be suspect, particularly if it would result in two or more courts having to decide the same issue (such as whether consumer X was damaged by defendant's unfair trade practice).

One sensible solution to this difficulty, arguably the most sensible, is to apply to an FTC consumer redress action many of the rules and procedures established for private class actions under new Federal Rule 23.[171] During the floor debate on S. 986, the supporters of the bill protested vigorously that the consumer redress section was not a "class action" provision.[172] Technically, they are correct, since Rule 23 refers to actions brought by one or more "members of a class" as representatives of all the class members. Except in the most unusual of circumstances, the FTC would not qualify as a "member" of the class of consumers for whom it seeks redress. Thus the proposed FTC consumer redress action is not a true "class action" and therefore Rule 23 would not be likely to be considered controlling in such an action unless Congress expressly so provided.

Moreover, some of the provisions of Rule 23 would be inappropriate to apply to an FTC consumer redress action. For example, Rule 23 establishes criteria for determining whether a

169. *See* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. denied,* 371 U.S. 801 (1962); *see generally* Starrs, *The Consumer Class Action—Part II: Considerations of Procedure,* 49 B.U.L. REV. 407, 467-68 (1969).

170. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Hansberry v. Lee, 311 U.S. 32 (1940).

171. FED. R. CIV. P. 23 [hereinafter cited as Rule 23].

172. *See, e.g.,* remarks of Senator Moss, 117 CONG. REC. 17,859 (daily ed. Nov. 8, 1971).

class action may be maintained. Particularly when the reason for maintaining a class action is the existence of common questions of law or fact, the court is given relatively broad discretion to permit or reject a class suit depending on whether the class suit is "superior" to other methods of adjudicating the controversy.[173] In an FTC consumer redress suit under the proposed statute, however, these provisions regarding the maintainability of a class action would be superfluous. For the proposed statute expressly authorizes the FTC to sue for consumer redress, and there is no indication that the courts were to have any discretion to refuse to hear the merits of an FTC suit on grounds similar to those found in Rule 23.[174]

While Rule 23's provisions regarding the maintainability of a class action are inappropriate to an FTC consumer redress action, the other provisions in Rule 23 governing notice, the conduct of the action, and the scope of the judgment seem both appropriate and useful in an FTC action. These rules are intended to give the court sufficient powers to handle adequately a mass redress action and to ensure that the interests of non-participating members of the class are fairly and adequately represented. Ultimately, the rules are intended to provide the basis for finding the class judgment binding upon non-participating members.[175] To this end, Rule 23 requires that the best practicable notice be given to members of the class.[176] Class members are

173. *See* Rule 23(b) (3).

174. Questions concerning the manageability and appropriateness of such a mass recovery action would presumably be considered by the FTC, and it may have been assumed that the FTC's limited time and resources would deter the bringing of entirely unmanageable actions. *Cf.* Senator Spong's statement that he thought the proposed authority for consumer redress suits would be used infrequently. 117 CONG. REC. 17,870 (daily ed. Nov. 8, 1971).

175. This is the intent, even though it is recognized that the precise res judicata effect of a judgment may be determined only in a subsequent action. *See* Advisory Committee's Note, 39 F.R.D. 106 (1966).

176. Whether individual notice to all identifiable members of the class is necessary is a matter of current dispute. The language of Rule 23(c) (2)— "including individual notice to all members who can be identified through reasonable effort"—seems relatively clear, but at least one court has held that individual notice to identifiable persons with a large stake in the outcome and to a statistically-selected sample of the remainder of a large class would suffice. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 265-68 (S.D.N.Y. 1971). The decision in *Eisen* is endorsed in 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1786, at 148-50 (1972). *See also* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 645-46 (1971); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 396 (1967).

given the chance to opt-out of the suit by requesting exclusion by a certain date.[177] But the rule also provides that the judgment in a class action is to cover all class members who do not exclude themselves, thus establishing the basis for using the judgment as res judicata against class members who do not opt out.[178]

If such procedures and such a relatively broad res judicata effect are appropriate in private class actions, they appear at least equally so in an FTC-initiated consumer redress action where the "class representative" is not a private party seeking its own recovery, but rather the FTC acting in a "parens patriae" role. For one of the most difficult recurring problems in class action litigation is that of assuring that the class representative fairly and adequately represents the interest of the other members of the class.[179] Of particular concern are the competence of the representative party's attorney and the conflicts of interest that might exist between the representative party and members of the class. When the class representative is a government agency such as the FTC, however, the concerns about the competence and fairness with which non-participants' interests are protected become less substantial since the FTC, with no claim of its own to press, is less likely than a private representative party to have interests that conflict with those of other class members.[180]

177. Rule 23(c)(2). Members are further advised that they may enter an appearance through counsel if they desire.

178. Rule 23(c)(3). For a case applying res judicata against class members who had not opted out when given notice of a settlement with respect to their class in the tetracycline litigation, *see In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 296 (S.D.N.Y. 1971), *aff'd* 450 F.2d 1119 (2d Cir. 1972).

179. *See generally* 7A C. WRIGHT & A. MILLER, *supra* note 176, §§ 1766-69; Starrs, *supra* note 169, at 500-04.

180. It might be thought that the FTC, lacking any claim of its own, might prove generally less vigorous than a private representative party in pressing a suit. That has not proven to be the case, however, with respect to the enforcement of private rights by other government agencies, such as NLRB actions for back pay or Labor Department actions for unpaid minimum or overtime wages (*see* notes 181-87 *infra* and accompanying text). Likewise, once the FTC decides to bring a consumer redress action, there is no general reason to suppose that it will be less vigorous than would a private representative party. Nonetheless, some conflict between the interests of the FTC and of consumer class members still might arise, particularly if the FTC desires to dismiss or compromise an action because, for example, the action is more complex and will require more FTC resources than was initially contemplated. In such a case, interests of the class members could be protected by application of Rule 23(e), requiring notice to class members concerning, and court supervision of, proposed dismissals and compromises.

Another model that might be used for solving the potential conflict between an FTC consumer redress suit and private actions is found in a federal statute authorizing the Secretary of Labor to sue an employer to collect unpaid minimum wages or overtime compensation for the benefit of his employees.[181] Under that particular statute, the Secretary could sue only if he had received a written request from an employee that the Secretary prosecute his claim. But with such a written request, the employee waived the rights the statute also gave him[182] to sue on his own behalf for unpaid minimum wages or overtime compensation.[183]

There are two essential differences between this model (the "labor model") and the Rule 23 model. First, under the labor statute, the Secretary could sue only upon request of named employees. Imposing such a requirement in an FTC consumer redress action appears unwise, if only because the individuals for whom relief is being sought may be much more numerous and difficult to identify early in an FTC action than in a Labor Department action for wages due employees of a specific employer. Moreover, the consent requirement apparently was considered a mistake even in the Labor Department actions—a change in another section of the labor statutes has now effectively dispensed with individual consent as a prerequisite to Labor Department recovery for individual employees.[184]

A second difference between the labor model and the Rule 23 model is that suit by the Secretary under the labor statutes effectively terminates the employee's individual right of action.[185] An employee apparently has no right to opt out of the Secretary's mass litigation, even if the suit is brought, as is now possible, without his specific consent or request.[186] Whatever

181. 29 U.S.C. § 216(c) (1970 Supp. 1972).

182. *See* 29 U.S.C. § 216(b) (1970).

183. 29 U.S.C. § 216(c) (1970 Supp. 1972).

184. 29 U.S.C. § 217 (1970) authorizes the Secretary to sue, without the request of any employee, to enjoin an employer from refusing to pay minimum and overtime wages due. It is now generally held that the Secretary may actually recover unpaid wages for employees in such injunctive proceedings, since a statutory prohibition against such recovery was repealed in 1961 (75 Stat. 74). *See, e.g.,* Wirtz v. W.G. Lockhart Constr. Co., 230 F. Supp. 823 (N.D. Ohio 1964). An injunction suit by the Secretary terminates the employee's individual right to sue. *See* 29 U.S.C. § 216(b) (1970).

185. 29 U.S.C. § 216(b)-(c) (1970); *id.* § 216(c) (Supp. 1972).

186. *See* Jones v. American Window Cleaning Corp., 210 F. Supp. 921 (E.D. Va. 1962), upholding the constitutionality of so terminating the employee's right of action on the ground that, since the right of re-

the propriety of such a result under the labor statutes, where the only cause of action that the employee loses is a federal statutory cause of action for recovery of minimum or overtime wages, a similar rule should not apply to FTC consumer redress suits.

There is no reason that the mere filing by the FTC of a suit seeking mass redress for a violation of the FTC Act should immediately deprive all members of the affected class of their rights to pursue possible recoveries based upon applicable state law, such as tort, contract or state consumer fraud statutes. While the federal government might be able to pre-empt state regulation of deceptive practices and the provision of remedies therefor, it has clearly not done so,[187] and the magnitude of the problem would make such pre-emption entirely unrealistic. The termination of state law rights of action by the filing of an FTC consumer redress suit would undercut to a significant degree the intent to have state law continue to operate in the area of deceptive practices. Thus the greatest effect that reasonably can be sought for an FTC action is that the consumers for whom redress is sought be given sufficient notice and have their interests adequately safeguarded so that they may ultimately be bound by the judgment in the FTC action under normal principles of collateral estoppel.

One purpose of examining the statutes authorizing the Secretary of Labor to sue for employees' minimum and overtime wages has been to point out that the Congress has previously recognized and expressly dealt with the problem of conflict with private causes of action when it has created in a federal government agency the power to sue to enforce the rights of individuals. The proposal for FTC consumer redress suits passed by the Senate in 1971 is clearly deficient in not even attempting to resolve that problem. One possible solution, and apparently the one intended by the sponsors,[188] is essentially the "one-way in-

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covery was created by federal statute, the Congress could limit that right. When the Senate Commerce Committee proposed authorizing private class rights of action under the FTC Act, it included a provision requiring that any such class action be stayed and consolidated with any action brought by the FTC or the Attorney General seeking redress for the same class of consumers. *See* S. 3201, § 206(b) in S. REP. No. 91-1124, *supra* note 138, at 26.

187. Witness the widespread existence of "Little FTC Acts" in the states. *See* COUNCIL OF STATE GOVERNMENTS, 1970 SUGGESTED STATE LEGISLATION 141-42 (1969). The FTC has also been placing some increased emphasis on federal-state cooperation. *See* ABA REPORT, *supra* note 6, at 50.

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

tervention" rule formerly applicable to spurious class actions—the judgment in the FTC suit would not be binding at all on consumers, who would not be parties to the suit. If this is the intent, it should be expressly indicated in the statute to avoid confusion. Such a result, however, may be unfair to defendants and may engender unnecessary multiple litigation, especially since a defendant who established in the FTC suit that consumer X was not injured by his actions would not be protected from a subsequent suit by consumer X to recover for the same acts under state law and in which the precise same issue of whether X was injured must be relitigated.

In order to avoid this result, it is suggested that the close analogy between the proposed FTC consumer redress suit and a Rule 23 class action be recognized. The provisions of Rule 23 governing notice to class members, opting out of the class, scope of the judgment and court supervision should be made expressly applicable to FTC consumer redress suits. Consumers who do not opt out would then be considered members of a "class" represented by the FTC. As such, they would be considered parties by representation in the FTC suit and bound by the judgment therein as if they were actual parties.[189] In any subsequent suit brought by consumer class members under state law, then, the class members would be bound, under the doctrine of collateral estoppel, as to issues actually litigated and necessarily determined in the FTC suit.[190]

3. *Effect of an FTC Order in a Subsequent Consumer Redress Action*

Under the Senate version of the consumer redress provision, the FTC could initiate an action for consumer redress only after

189. *See* RESTATEMENT OF JUDGMENTS § 86 and comment i (1942); 7A C. WRIGHT & A. MILLER, *supra* note 176, § 1789, at 178-79. Class members could, of course, attack the binding effect of the judgment on the grounds that their interests had not been adequately represented by the FTC, or that they had not received the requisite notice. *See* 7A C. WRIGHT & A. MILLER, *id.*

190. *See* RESTATEMENT OF JUDGMENTS § 68 (1942); *see generally* 1B J. MOORE, *supra* note 166, ¶¶ 0.401, 0.405; 7A C. WRIGHT & A. MILLER, *supra* note 176, § 1789, at 180. In any subsequent state court action the constitutional requirement of full faith and credit would normally require that the subsequent court give the same res judicata and collateral effect to the first judgment as would be given in the jurisdiction rendering the first judgment. *See* 9 C. WRIGHT & A. MILLER, *supra* note 176, § 2372, at 232, *citing* RESTATEMENT OF JUDGMENTS § 47, comment c (1942).

Expressly making the consumer class members parties by representation in the FTC suit would also ensure that recovery is not obtained an FTC order concerning the acts or practices in question had become final.[191] During the debate on the Senate floor, Senator Cook raised the question of what effect the FTC final order would be given in the subsequent consumer redress suit and charged that the provision was defective for not answering that question.[192] The failure to deal with this matter in the legislation, however, is not necessarily as serious as Senator Cook suggested. Even absent specific legislation, a fairly reasonable resolution of this issue could be reached by application of established doctrines of collateral estoppel.

Collateral estoppel effect, or a very similar effect, is already given to final orders of the Federal Trade Commission in a number of situations. One instance is when the government brings a civil penalty suit[193] for violation of a final[194] cease and desist order. It is well settled that the defendant cannot relitigate in the penalty suit the question whether the acts that were the subject of the order were violations of the FTC Act; nor may he in the subsequent penalty suit challenge the propriety of the original order.[195] In these situations at least, it is clear that final FTC orders have a conclusive effect upon some subsequent litigation.

Another important example of subsequent litigation in which a final FTC order has significant effect is a private antitrust treble damage action based upon antitrust violations that previously were the subject of a final FTC order. Section 5(a) of the Clayton Act provides that final judgments or decrees obtained by the Government in antitrust cases shall be "prima facie evidence" against the defendant in a subsequent private antitrust suit.[196] Recent decisions have uniformly held that FTC final orders with respect to Clayton Act violations are final judgments obtained by the Government within the meaning of section 5(a) of the Clayton Act and thus are admissible as prima

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in the FTC suit for a consumer who lost on the precise same issue in a prior state law action between him and the defendant. As a party to both suits against the defendant, collateral estoppel would clearly apply against the consumer. *See* note 168 *supra.*

191. S. 986, § 203 (Senate version).

192. Remarks of Senator Cook, 117 CONG. REC. 17,865 (daily ed. Nov. 8, 1971); *see also* remarks of Senator Hruska, *id.* at 17,867.

193. Under 45 U.S.C. § 45(l) (1970).

194. The finality provisions are found in 45 U.S.C. § 45(g) (1970).

195. *See* United States v. Wilson Chemical Co., 1962 Trade Cas. ¶ 70,478 (W.D. Pa. 1962), *aff'd per curiam,* 319 F.2d 133 (3d Cir. 1963) (original order had been contested); United States v. Vitasafe Corp., 212 F. Supp. 397 (S.D.N.Y. 1962) (original order by consent).

196. 15 U.S.C. § 16(a) (1970).

facie evidence of a violation in subsequent private actions.[197] Obviously, those decisions and the prima facie evidence provision of section 5(a) of the Clayton Act are not directly dispositive with respect to the effect of an FTC final order in a subsequent consumer redress suit. The Clayton Act provision deals only with the effect of a Government-obtained antitrust judgment in a subsequent antitrust treble damage action, and there is no similar provision in the FTC Act giving prima facie effect to final FTC orders under section 5(a) of the FTC Act.[198]

The Clayton Act prima facie effect provision and the decisions under it are, nonetheless, very instructive for present purposes. The Clayton Act provides that prima facie effect is to be given "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ."[199] The Supreme Court has stated that the intent of this provision was to confer on private parties as large an advantage as the estoppel doctrine would have afforded had the Government brought suit.[200] This amounts to recognition that, even absent a statutory provision such as section 5(a) of the Clayton Act, collateral estoppel would apply if the subsequent litigation were between the same parties. This would be the case in a consumer redress action brought by the FTC after the finalization of an FTC cease and desist order.[201] Moreover, collateral estoppel effect has been given to final orders of other adminis-

197. *E.g.*, Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969); Purex Corp., Ltd. v. Procter & Gamble Co., 308 F. Supp. 584 (C.D. Cal. 1970).

198. The obvious reason for this omission is that there is no private right of action for violations of § 5(a) of the FTC Act. *See* authorities cited in note 4 *supra*.

199. 15 U.S.C. § 16(a) (1970).

200. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951).

201. The reason for the specific statutory provision governing the effect of Government-obtained judgments in private treble damage actions apparently is two-fold. First, it may have been necessary to avoid the possible application of the often criticized (and in recent years increasingly rejected) doctrine of mutuality, which precluded the application of collateral estoppel unless the first judgment could have been used as an estoppel by both parties to the second action. For an interesting treatment of the general problem, *see* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties,* 68 COLUM. L. REV. 1457 (1968). Second, the Congress apparently desired to make the judgment in the Government suit only prima facie (and thus rebuttable) evidence in a subsequent private suit, rather than to make it conclusive (which would have been the result if collateral estoppel were applied). *See* Purex Corp. Ltd. v. Procter & Gamble Co., 308 F. Supp. 584, 589 (C.D. Cal. 1970).

trative agencies without any express statutory provision dealing with the applicability of collateral estoppel.[202]

Thus, absent any governing statute, an FTC final order probably would have a collateral estoppel effect in a subsequent consumer redress action brought by the FTC against a party who was a respondent in the FTC proceeding.[203] The FTC order would be conclusive between the parties as to issues actually raised and necessarily decided in the FTC proceeding.[204] The collateral estoppel effect would be substantially different, however, depending upon whether the FTC order was a contested one or one entered by consent. A contested order, based upon FTC findings that the respondent committed certain acts or practices that violated section 5,[205] would be conclusive as to the fact that the respondent committed such acts or practices and as to the conclusion that those acts or practices violated the FTC Act. In the subsequent redress suit, the FTC still would have to establish that the defendant engaged in the prohibited acts or prac-

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202. *E.g.,* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (Nat'l Bituminous Coal Comm'n decision against company binding on company in subsequent action by Internal Revenue Service); *In re* Federal Water & Gas Corp., 188 F.2d 100 (3d Cir.), *cert. denied,* 341 U.S. 953 (1951) (final SEC order is "res judicata" in proceeding brought by SEC to enforce a subsequent SEC dissolution order); *cf.* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) (involving a final workman's compensation award).

203. Consumers, of course, would not normally be parties to or bound by adverse determinations in any FTC cease and desist proceeding against a respondent. Since those consumers are the real parties in interest if the FTC brings a subsequent consumer redress action against the respondent, it might be argued that the lack of mutuality between the respondent and the consumers makes collateral estoppel inapplicable. Regardless of whether mutuality is still a requirement for collateral estoppel generally (see Semmel, *supra* note 201), the mutuality argument has little appeal in this situation. Although consumers would not be bound by adverse determinations in an FTC proceeding to which they were not parties, they also presently have no right of action for recovery under the FTC Act other than as beneficiaries of the proposed FTC consumer redress suit. *See* authorities cited note 4 *supra.* Moreover, the FTC (the consumers' "representative") *would* be bound by adverse determinations arising out of the FTC proceedings. The FTC would be bound not only through normal principles of collateral estoppel but also under the express provisions of the proposed statute, which would limit the FTC's power to sue for consumer redress to instances in which there is a final FTC order against the defendant covering the practices for which recovery is sought. *See* S. 986, § 203 (Senate version).

204. That collateral estoppel applies only as to issues actually raised and necessarily decided, see Yates v. United States, 354 U.S. 298, 338 (1957); Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 78-79 (1st Cir. 1969); *see generally* authorities cited note 190 *supra.*

205. Such findings are required by 45 U.S.C. § 45(b) (1970).

tices in dealings with the consumers for whom recovery is sought, would have to prove the nature and extent of the injury caused, and would have to show that the remedy being sought was "necessary" to redress that injury.[206]

On the other hand, a consent order entered prior to the taking of evidence by the administrative law judge would have almost no collateral estoppel effect in a subsequent consumer redress suit. It could not be said that any issue had been "actually raised and necessarily decided". Moreover, FTC consent order procedures provide that the agreement to the order may contain a statement (which regularly is included) that agreement to the order does not constitute an admission of any violations alleged

206. It is assumed that the FTC would normally have to show the nature and extent of injury to particular consumers, and that the damages recovered, if any, would normally be the sum of the damages established for individual consumers. In a few massive private class actions, however, some courts have recently approved "fluid class recoveries" in which a figure was first established for defendant's monetary liability to the class as a whole. That "pot" was then to be distributed first by awards to individual class members, to the extent that their individual entitlements could be established, with any remaining amounts in the fund to be distributed in a manner likely to be beneficial to the class members generally (such as in the form of price reductions to future customers of the defendant, if a substantial degree of concurrence between the class and defendant's future customers is likely). *E.g.*, Bebchick v. Public Utilities Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied,* 373 U.S. 913 (1963); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971) (settlement); *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 1971 Trade Cas. ¶ 73,482 (S.D.N.Y. 1971); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971) (fluid class recovery is a possibility); *see generally* Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions,* 70 MICH. L. REV. 338, 364-73 (1971). If such fluid class recoveries are occasionally appropriate in private class actions (a matter too complex to be discussed at this time), they may also be appropriate in FTC consumer redress suits.

If a "fluid class recovery" is to be employed in an FTC consumer redress suit, there is even greater reason to require that the steps necessary to bind the non-participating members of the consumer class be taken. If the judgment in the FTC suit is not binding on the consumer class members, there would exist a substantial danger of imposing double liability upon the defendant, who could be subject in the FTC suit to a fluid class judgment intended to cover his entire liability to the consumer class and later subject to separate judgments in suits brought under state law by individual members of the class who did not receive any direct recovery as a result of the FTC suit. Such a situation could arise, for example, in the case of an individual consumer who failed to make a timely claim for a share in the FTC-obtained judgment. For a general discussion of the res judicata effect of a judgment in the proposed FTC consumer redress action, *see* notes 164-90 *supra* and accompanying text.

in the complaint.[207] Thus the consent order could not raise an estoppel as to whether the respondent committed the acts alleged, nor could it be viewed as an admission that the acts alleged necessarily constitute violations of the FTC Act.[208]

In considering whether an adjudicated FTC final order should be given the conclusive effect in a subsequent consumer redress action that it would have if collateral estoppel applied, certain differences between the FTC administrative proceeding and the consumer redress action should be considered. First, although the formal parties would be the same in both proceedings, consumers and not the FTC would be the real party in interest in the consumer redress action. Second, there is a significant difference in the remedies available in the two proceedings—money damages in the consumer redress action as opposed to, usually, a prospective cease and desist order in the FTC proceeding. Such differences are also apparent in the case of private treble damage actions litigated subsequent to a government-obtained antitrust decree. In that situation the government-obtained decree (including an FTC order) is given only prima facie effect and is thus at least rebuttable.[209] In view of the similar function of treble damage actions and the proposed consumer redress actions, there seems little reason to give an FTC order greater effect in a consumer redress action.[210]

In addition, there are positive reasons for giving an FTC order something less than conclusive effect in a subsequent consumer redress action. Depending upon the precise nature of the cease and desist order sought in an FTC proceeding, the natural tendency of a respondent might be to resist less strongly or less fully in that proceeding than he might if large monetary

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207. 16 C.F.R. § 2.33 (1972).

208. It correctly is said that agreement to a consent order precludes a defendant from asserting in a later civil penalty suit that the acts alleged in the complaint were not violations of section 5. *See, e.g.*, United States v. Vitasafe Corp., 212 F. Supp. 397 (S.D.N.Y. 1962). But in such cases the defendant is attempting to avoid a penalty for violating a final order by challenging collaterally the validity of that order on the ground that his acts did not justify the original imposition of the order. In a consumer redress suit, the defendant should be able to admit the validity of the order to which he agreed (possibly for reasons unrelated to the validity of any specific allegation in the complaint) and still retain his right to a full adjudication when the relief being requested is beyond that called for by the consent order.

209. *See* notes 196, 201 *supra* and accompanying text.

210. *Cf.* § 207(b) of S. 3201, as reported in S. REP. No. 91-1124, 91st Cong., 2d Sess. 27-28 (1970), which would have given final FTC orders prima facie effect in the private actions for violations of the FTC Act that would have been authorized by S. 3201.

liability could be imposed upon him. The fear of the effect of an FTC order in a possible (but by no means certain) consumer redress action may thus impel more respondents to exert their all in the FTC proceeding. This might be both unfortunate for the FTC, resulting in further delays in FTC proceedings, and unfair to the respondents, who would have to conduct themselves before the FTC with too strong an eye on the possible effect of the FTC proceeding on a consumer redress suit that has not been and may well never be brought.[211]

On the other hand, since the FTC proceeding does provide the respondent with the chance to litigate fully the issue of whether he violated the FTC Act, he may not be that seriously prejudiced if substantial weight is given to the FTC order in a subsequent redress suit. It obviously would be highly inefficient to give the findings and conclusions of the FTC no effect in the subsequent action. Giving the FTC proceedings prima facie effect in a subsequent consumer redress suit appears to be an appropriate compromise, by which the respondent would at least retain some opportunity to rebut the FTC's findings and conclusions if he has to defend a consumer redress suit.[212] For this reason and also to avoid unnecessary uncertainty about the effect of an FTC order, it is recommended that any statute authorizing the FTC to bring consumer redress actions contain a provision similar to that of section 5(a) of the Clayton Act[213] giving an FTC order prima facie effect in any subsequent consumer redress action.

C. WHICH ROAD TO CONSUMER REDRESS—THE FTC OR THE COURTS?

The need for some means by which individuals may obtain

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211. Concern for the respondent is particularly justified when, as would be the case under the proposed consumer redress authority, he has no power to request or compel consolidation of the cease and desist and consumer redress proceedings.

212. Giving the FTC order prima facie effect also would clearly insulate the statutory scheme from attack on the ground that defendant's right to a jury trial is being violated. *See* Meeker & Co. v. Lehigh Valley R.R., 236 U.S. 412, 430 (1915), holding that giving an administrative order prima facie effect in a subsequent jury trial does not abridge the jury trial guarantee, since the prima facie case is rebuttable; *see also* Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 76 (1st Cir. 1969). Although it was argued above that the FTC could be empowered to award compensatory damages without abridging the constitutional right to a jury trial (*see* notes 148-50 *supra* and accompanying text), the defendant might be more likely to be found entitled to a jury trial if the action is initially tried in a court. *See* L. JAFFE, *supra* note 31, at 99, n.49.

213. 15 U.S.C. § 16(a) (1970).

redress for injury caused by unfair or deceptive practices violating the FTC Act is generally recognized.[214] Private redress not only would provide a method for compensating individual injured consumers, but also would create a salutary additional deterrent against violations of the FTC Act. Even the present administration, which opposed empowering the FTC to grant redress to individual consumers,[215] supported legislation that would have permitted private class actions to recover for specified violations of the FTC Act after the Department of Justice or the FTC had obtained a final judgment or order against the defendant.[216] Thus the present dispute is over the means for providing this consumer redress.

One possible method for providing consumer redress is to authorize private class actions for violations of the FTC Act. The focus of this Article, however, is the potential for obtaining individual consumer redress through action by the Federal Trade Commission. This, then, is not the place to evaluate extensively the wisdom of the private class action proposals. But whatever the overall merits of private class actions, they do involve a number of complex problems that have aroused much debate. For example, private class suits raise fears of harassment and "strike" suits brought primarily in the hopes of obtaining a nuisance value settlement, involve occasionally serious questions concerning the interests of the private attorneys representing the plaintiff class, and require careful scrutiny to ensure that the interests of the class members have been fairly and adequately represented in the litigation.[217] These particular difficulties, however, either do not exist or are substantially less serious when a redress claim on behalf of a consumer class is prosecuted by a government agency such as the FTC.[218]

214. *See, e.g.*, ABA REPORT, *supra* note 6, at 63, recommending the creation of a private right of action but taking no position on whether that right should be effectuated through private class actions or through the FTC or some other public authority acting as parens patriae.

215. Letter from the General Counsel of the Department of Commerce in S. REP. No. 92-269, 92d Cong., 1st Sess. 54 (1971).

216. Letter from the Attorney General in S. REP. No. 91-1124, *supra* note 210, at 39-40.

217. *See, e.g.*, testimony of Milton Handler, reprinted in 117 CONG. REC. 17,867-68 (daily ed. Nov. 8, 1971); separate views of Senator Marlow Cook on the private class action provision of S. 3201, S. REP. No. 91-1124, *supra* note 210, at 77-78; Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971, 974-75 (1971).

218. *See* notes 179-80 *supra* and accompanying text. Even Senator Cook, an opponent of both private class actions and FTC consumer redress suits, once recognized that there is much less potential for abuse

Proposals to permit private class actions for monetary relief under the FTC Act also have been opposed because businessmen might be subject to potentially substantial monetary liability for acts that they had no reason to believe were in violation of the broad prohibitions of the FTC Act.[219] Whatever the general validity of this concern,[220] the problem again becomes less substantial when, as under S. 986, the class redress action may be brought only by the FTC, which presumably would consider whether the practices involved were relatively clear violations in deciding whether to bring the redress action.[221] On a number of grounds, then, there may be a substantial basis to prefer an FTC-initiated consumer redress action to a private class action, at least as a first step.[222]

Two principal avenues of FTC-obtained consumer redress have been suggested—FTC administrative proceedings and federal court actions brought by the FTC. Each has its advantages. Authorizing the FTC to grant individual consumer redress, including compensatory damages, in its own administrative proceedings would result in the entire matter being settled in one action. The respondent in the FTC proceeding would not have to worry about the potential effect of that proceeding upon some future but problematic suit by the FTC for consumer redress, as he would under a statute authorizing FTC-initiated consumer redress suits only after finalization of an FTC order. In addi-

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of class actions when they are brought by a public official whose actions must be guided by the public interest. *See* S. REP. No. 91-1124, *supra* note 210, at 77. Other problems that normally arise in class actions, such as the calculation and distribution of damages, would theoretically be the same whether the action was brought by a private party or the FTC. But the FTC might reasonably be expected, in the exercise of its discretion, to concentrate its mass redress activities on cases in which these problems are relatively less serious.

219. See the testimony of Assistant Attorney General McLaren on the private class action provision of S. 3201, 91st Cong., 2d Sess. (1970), in *Hearings Before the Consumer Sub-Committee of the Senate Committee on Commerce,* 91st Cong., 1st & 2d Sess., ser. 91-48, part I, at 18 (1969-70).

220. It must again be emphasized that judicial and FTC interpretation has identified a large variety of practices that are relatively clear violations of the FTC Act. *See* note 143 *supra* and accompanying text.

221. *See* notes 119-20 *supra* and accompanying text.

222. Of course, both methods of individual redress could eventually be provided, although the statute should then deal expressly with the problem of conflicting actions brought by individuals and by a government agency. *Cf.* 29 U.S.C. §§ 216-17 (1970) granting both individual employees and the Secretary of Labor (suing on behalf of the employees) the right to bring actions to collect unpaid minimum or overtime wages, discussed *supra* notes 181-86 and accompanying text.

tion, consumers might obtain their recovery faster if the award could be made in an FTC proceeding itself rather than in a court action that could not even be begun until an FTC order concerning the acts or practices in question had become final.[223]

Nonetheless, other and more significant reasons appear to favor obtaining individual consumer redress through separate court actions brought by the FTC. One important justification for committing the adjudication of a particular controversy to an administrative tribunal such as the FTC is that the administrative tribunal has certain advantages over a court that will lead to better or more consistent decisions: either the agency has technical expertise necessary to deal with the problems involved or it has developed (or is supposed to develop) a specialized legal competence with respect to the issues committed to its jurisdiction. If the issue, then, is whether a party violated section 5 of the FTC Act, the specialized competence of the FTC in interpreting section 5 and the desire for uniform interpretation of the section provide at least some basis for committing the resolution of that issue to the FTC, subject to appropriate judicial review. But when consumer redress is sought, the issue is whether an individual consumer has been injured by a violation of the FTC Act and, if so, what relief is appropriate to compensate him for that injury. The FTC possesses no particular expertise on these issues when compared with ordinary courts, in which issues of the extent of an injury, causation and the appropriate compensatory remedy are decided daily. Since the positive reasons for FTC jurisdiction are lacking when individual consumer redress is sought, it is submitted that consumer redress actions should be brought in the courts, where the defendant can have the advantage of whatever additional procedural safeguards there are in court proceedings.[224]

223. One possible solution to the delay problem created by separate consumer redress suits would be to permit the FTC to bring such suits whether or not there was a final order against the defendant. That approach apparently was favored by the Senate Commerce Committee in 1970. *See* § 103 of S. 3201, as reported in S. REP. No. 91-1124, *supra* note 210, at 21. Such a scheme would be wasteful, however. The question whether a defendant had violated the FTC Act would have to be litigated fully in the consumer redress suit while that very question was still being considered by the FTC itself or by the courts on appeal from an FTC order. Thus if the FTC must initiate a separate action for consumer redress, it is eminently more reasonable to postpone any such suit until an FTC order against the defendant has become final.

224. One such procedural safeguard is the right to a jury trial. *See generally* notes 148-50, 212 *supra* and accompanying text. Another problem is reflected in the debate over the propriety of combining

This split procedure, involving separate forums for determining the existence of a violation and for awarding redress to consumers, has the added advantage that FTC administrative law judges would not have to devote a potentially large amount of time to the adjudication of damage questions as to which they have no particular expertise. Moreover, it is not entirely clear that consumer redress would be obtained any less quickly through FTC-initiated court action than through an administrative proceeding. Even in FTC proceedings it might be reasonable to adjudicate the issues of statutory violation first and then, only if the respondent is finally found to have violated the FTC Act, to remand the proceeding to the administrative law judge or a master to determine the separate issues of the extent of individual consumer injury and the nature of the appropriate redress.[225] Thus no matter which route is selected, there may often be two separate proceedings, one adjudicating statutory violation and the other deciding issues of remedy. I would therefore recommend that individual consumer redress, such as compensatory damages, for violation of the FTC Act be obtained through FTC-initiated suits in the federal district courts rather than through administrative orders of the FTC itself.

However, if the only relief being sought is essentially restitution, such as the refund of advance payments made by consumers for products they never received, the considerations are sufficiently distinguishable, in my view, to lead to a different result. First, the restitution interest being protected is gener-

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prosecutory and adjudicatory functions in an administrative agency. *See* note 151 *supra* and accompanying text.

One intermediate solution to these problems, a solution proposed in 1970 by the Senate Commerce Committee, would be to permit the FTC to order individual redress but to make its order subject to de novo review as to the remedy provisions. *See* note 133 *supra* and accompanying text. Under that proposal the defendant would, in theory, be free of the substantial evidence rule and the deference otherwise accorded the findings and conclusions of the FTC. But de novo review of a remedy by the court of appeals would still have to be based upon the record made before the Commission. Once the concept of de novo review is accepted, it seems far preferable to have the entire question of consumer redress litigated initially before a tribunal that is equipped to hold a full evidentiary hearing—the district court. A prior decision by the FTC on the issue of relief would thus be superfluous.

225. A comparable procedure is frequently employed in class actions seeking monetary relief. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971). Such a split adjudication might also lead to the earlier entry of a final prospective cease and desist order, thus having the advantage of at least preventing the respondent at an early date from continuing his unfair practices.

ally conceded to be deserving of greater protection by our legal system than is the consumer's interest in obtaining compensatory damages.[226] Second, the difficulties in determining the appropriate award (and thus the need for the relative expertise of the courts in dealing with such issues) frequently are not nearly as great when restitution alone is involved.[227] In many cases, appropriate restitution awards might be agreed to merely on the basis of the respondent's customer lists. Finally, since a respondent's retention of money or property advanced by consumers may often be a continuing violation of section 5 of the FTC Act, the FTC arguably needs the power to order restitution to fulfill its traditional function of adequately assuring the discontinuance of prohibited practices. On the other hand, the ability to provide purely compensatory relief is not likely to be necessary for that purpose. Thus, while restitution should certainly be an available remedy under any statute authorizing the FTC to bring court actions to obtain consumer redress, the statute should also authorize the FTC to compel restitution by its own orders, at least where such restitution is necessary to terminate a continuing unfair practice.[228]

The option the FTC would have to obtain restitution for consumers, either by its own order or by a court proceeding, would be best exercised as follows: If relief in addition to restitution (such as compensatory damages) is to be sought from a respondent, efficiency would normally dictate that the entire matter of consumer redress be decided in court proceedings brought by the FTC. Even if only restitution were being sought, the FTC might well decide to seek restitution in the courts if the process of determining the amount of or persons entitled to such relief appeared potentially complex. Thus the FTC might well award restitution in its own proceedings only if restitution is the only relief being sought and there are no particular difficulties in determining individual restitution awards.

D. Recommendations for Congressional Action

In order to at least partially meet the generally recognized need for some mechanism by which individuals may obtain redress for injuries suffered as a consequence of violations of section 5 of the FTC Act, the Congress should enact a provision

226. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 56-57 (1936).
227. *See* notes 96-99 *supra* and accompanying text.
228. *See* text accompanying notes 162-63 *supra*.

similar to that passed by the Senate in 1971. Such a provision would authorize the FTC to initiate suits in the federal district courts to obtain redress for individual consumers, including restitution, compensatory damages, and other appropriate relief. The FTC's authority should be limited, as it was in section 203 of S. 986, to cases in which the FTC had previously obtained a final cease and desist order against the respondent covering the acts or practices for which redress is sought.[229] In other respects, however, substantial changes should be made from the provision that the Senate passed. In order to dispel any question concerning the FTC's existing powers, at least as enunciated by the FTC in *Curtis*, and to resolve possible questions concerning the effect of the new provision on that authority, the provision should expressly authorize the FTC to compel restitution by its own order when such restitution is necessary to terminate a continuing violation of section 5.

Another problem not adequately dealt with in the Senate version of S. 986 is the effect of a judgment in an FTC consumer redress suit on consumer rights of action under state law. Since the consumer redress suit is essentially a consumer class action, except that the representative party is the FTC rather than a private party, this fact should be recognized. The provisions of Federal Rule 23 governing notice to class members, opting out of the class, scope of the judgment, and court supervision of the action and any settlements should expressly be made applicable to consumer redress suits. Thus the consumers for whom redress is sought would be parties by representation in the FTC suit and the foundation would be laid for applying collateral estoppel to bind those members of the consumer class with respect to issues actually raised and necessarily decided in the FTC consumer redress suit.[230]

Finally, any provision authorizing the FTC to bring a consumer redress suit should deal expressly with the question of the effect in that suit of a final FTC order previously entered against the defendant involving the same acts or practices. It is

229. § 203 of S. 986 (Senate version) also contained a requirement that the FTC commence suit within two years after the FTC order had become final. There should be some such statute of limitations, and the two year period basically appears reasonable, but I express no final opinion as to the appropriate length of the limitations period.

230. On the general problem of the effect of an FTC consumer redress action on private causes of action, see notes 164-90 *supra* and accompanying text, particularly the text accompanying notes 175-80 *supra*.

recommended that the statute contain a provision, similar to that of section 5(a) of the Clayton Act, under which final FTC orders would be given prima facie effect in any subsequent consumer redress action.[231]

IV. SUMMARY AND REFLECTION ON PRIORITIES

This Article has dealt with only one relatively narrow means of assuring consumer redress—obtaining monetary recovery for individual consumers through action by the Federal Trade Commission. I have argued that, even under its existing statute, the FTC does have the authority to order a respondent to make restitution of money or property received from injured consumers when such a restitution order is appropriate to terminate a continuing unfair practice. This could include an instance in which an unfair practice resulted in a respondent retaining consumer payments that substantially exceeded the value of his performance.[232] I have also recommended that the FTC be authorized to initiate suits in the federal district courts to obtain monetary redress, including both restitution and compensatory damages, for consumers.[233]

Having said all of this, it is necessary to recognize the obvious. That is, investing the FTC with the power to obtain relief for individual consumers is no panacea for the general problem of providing effective consumer redress. The typical individual redress proceeding, whether administrative or judicial, is likely to consume far more FTC time and staff resources than the typical prospective cease and desist proceeding. Too substantial a focus on obtaining monetary redress would be a highly inefficient use of the FTC's limited resources because it would divert the FTC's attention from what should remain its primary goal—the establishment of standards to guide future conduct in the marketplace. Even the Senate proponents of S. 986 recognized that the FTC probably would use sparingly any new authority to obtain monetary redress for consumers.[234]

231. *See generally* notes 191-213 *supra* and accompanying text, particularly the text accompanying notes 209-13 *supra*.

232. *See* part II *supra*.

233. *See* notes 214-31 *supra* and accompanying text.

234. See remarks of Senator Spong, 117 CONG. REC. 17,870 (daily ed. Nov. 8, 1971); *see also* the following statement in the Senate Commerce Committee's report on S. 3201, 91st Cong., 2d Sess. (1970), which also contained a provision authorizing the FTC to sue in the federal courts to obtain relief for individual consumers:

It was not the purpose of the Committee, in granting the

I previously suggested a number of factors the FTC should weigh in deciding whether to seek restitution through administrative orders under *Curtis.*[235] Most of those factors appear equally relevant in the determination to prosecute a consumer redress suit under the proposed legislation, although the relative importance of the various considerations may vary slightly. The concern about the possible drain on FTC resources raised by the need to resolve new and complex issues of materiality, reliance and value of performance may be reduced, for example, because the courts, rather than FTC administrative law judges and members, would be deciding those issues.[236] Nonetheless, the primary objective of any action to obtain monetary recoveries, whether administrative or judicial, should continue to be the furtherance of the basic prophylactic purposes of the FTC Act. The FTC should concentrate on obtaining redress where such actions, in addition to providing relief for consumers, will significantly deter future violations[237] or eliminate otherwise anticompetitive effects of past unfair practices.

The proposed authority of the FTC to obtain compensatory damages for injured consumers raises several additional considerations. Although an FTC suit for damages might be justified in some situations—particularly if a clear violation of the Act resulted in substantial out-of-pocket reliance losses to consumers—there are a number of reasons for the FTC to seek damages much less frequently than restitution. First, the restitution interest is generally conceded to deserve greater protection by our legal system than do the interests satisfied by compensatory damages, since restitution involves both out-of-pocket loss and

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> FTC this authority, to transform the Commission into a gigantic government-financed law firm operating on behalf of all cheated or defrauded consumers. . . . Thus, it is anticipated that the Commission will institute such court action . . . only in the cases which fall within its priorities relating to the significance of the impact of the act or practice involved on the marketplace. Actions for relief will necessarily be ancillary to the primary function of the Commission.

S. REP. No. 91-1124, *supra* note 210, at 10.

235. *See* notes 119-29 *supra* and accompanying text.

236. Obviously, the FTC still should avoid burdening the courts with unmanageable problems of this nature.

One other concern present if the FTC seeks to impose restitution administratively and absent in a consumer redress suit is the problem of delay in obtaining a prospective cease and desist order, which would have been secured prior to any decision to institute a consumer redress suit.

237. The focus of FTC redress actions in this respect should be upon clear and serious violations of section 5. *See* notes 119-22 *supra* and accompanying text.

unjust enrichment.[238] Second, it normally will be more difficult to determine the appropriate individual compensatory damage award than to determine restitution, partly because proof of damages would likely depend more substantially upon facts peculiar to specific individuals, and partly because the measurement of damages is often speculative. Third, the monetary impact upon the defendant is likely to be more serious if damages are awarded. Finally, and most important from the FTC's standpoint, restitution alone, although not always fully compensating the consumer, will normally be sufficient to achieve the public objective of deterrence by depriving the defendant of the benefits of his unfair practice.

The costs and difficulties inherent in a federal administrative agency attempting to provide monetary redress for consumers throughout the country indicate quite clearly that obtaining such individual redress must remain a relatively minor and ancillary function of the FTC. It should continue to concentrate its adjudicatory efforts on quickly obtaining largely prospective cease and desist orders for the principal purpose of protecting the consuming public from future repetitions of unfair practices. Moreover, a sound argument can be made that the FTC should devote less of its overall efforts to case-by-case adjudication and more to general rule making.[239] Expanded rule making may often be the most efficient means of establishing with certainty the major requirements of section 5, informing the business community of those requirements, and thereby promoting broad nationwide compliance with the FTC Act.[240]

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238. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages,* 46 YALE L.J. 52, 56-57 (1936).

239. This proposition has been forcefully urged by a former member of the Federal Trade Commission. *See* Elman, *Administrative Reform of the Federal Trade Commission,* 59 GEO. L.J. 777, 826 (1971). The FTC claims that it presently has the authority to make substantive rules, relying in substantial part upon § 6(g) of the FTC Act, 15 U.S.C. § 46(g) (1970), which authorizes the promulgation of rules for the purpose of carrying out the provisions of the Act. *But see* National Petroleum Refiners Ass'n v. FTC, 1972 Trade Cas. ¶ 73,910 (D.D.C. 1972), holding that the FTC lacks authority to make such rules. The matter has been discussed by a number of commentators. *See, e.g.,* Auerbach, *The Federal Trade Commission: Internal Organization and Procedure,* 48 MINN. L. REV. 383, 455-59 (1964); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485, 490-96 (1970). *Cf.* § 206 of S. 986 (Senate version) which would have expressly granted the FTC substantive rule-making authority with respect to acts or practices deceptive to consumers.

240. Robinson, *supra* note 239, at 513-28, criticizes what he deems

If the real objective is to provide an effective means for securing monetary redress to all consumers injured by unfair or deceptive practices, however, it will be necessary to look beyond the FTC. One approach might be to authorize private class actions to recover damages for FTC Act violations, but such proposals raise other problems of propriety and control,[241] and previous attempts to obtain Congressional approval of such private actions have been notably unsuccessful.[242] Another possibility might be to authorize state government agencies to obtain monetary redress for consumers under state consumer fraud statutes. Such authority presently exists in a number of states, and substantial amounts have been recovered for consumers.[243] But the result has often been excessive concentration on individual complaints and on obtaining individual redress, with a consequent failure of state enforcement agencies to plan their activities effectively and to perform their basic function of establishing standards for the marketplace in general.[244]

Other proposals for providing mechanisms for consumer redress may have greater potential, but they can only be listed here. Some, for example, have suggested plans for compulsory arbitration of consumer-merchant disputes,[245] while others have suggested a nationwide system of small claims courts for the adjudication of consumer controversies.[246] Workable systems

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overbroad generalizations concerning the efficacy of rule-making and suggests the need for more careful analysis with respect to the choice of procedure employed by an administrative agency. Many of his comments are well taken, and it is not contended here that adjudication is an inappropriate activity of the FTC, but only that it should consider rule-making more often when such a procedure in fact has advantages.

241. *See* notes 217-22 *supra* and accompanying text.

242. *See* S. 3201, 91st Cong., 2d Sess. (1970), reported by the Senate Commerce Committee in S. REP. No. 91-1124, 91st Cong., 2d Sess. (1970). No floor action was taken, and the provision for a private class action was dropped by the Committee from the successor bill to S. 3201, S. 986.

243. *E.g.*, ILL. ANN. STAT. ch. 121½, § 267 (Smith-Hurd 1972); N.J. REV. STAT. § 56:8-8 (Supp. 1971). Thirteen states responding to a 1972 survey reported obtaining over $100,000 annually for consumers, and three reported recoveries approaching or exceeding $1 million annually. *See* NATIONAL ASS'N OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL AND CONSUMER PROTECTION COMMITTEE, STATE PROGRAMS FOR CONSUMER PROTECTION 52-53 (1972).

244. Most states concentrated on informal mediation to obtain restitution and rarely engaged in formal enforcement activities. *See* NATIONAL ASS'N OF ATTORNEYS GENERAL, *supra* note 243, at 45-51.

245. *See, e.g.*, Eovaldi & Gestrin, *Justice for Consumers: The Mechanism of Redress*, 66 N.W.U.L. REV. 281, 306-19 (1971).

246. *See, e.g.*, separate views of Senator Cook, S. REP. No. 92-269, *supra* note 215, at 61.

along either of these lines would have the major advantage of relieving government agencies responsible for the enforcement of deceptive practice statutes from the pressure to provide individual relief.

Even if such systems are adopted, however, the power to obtain redress for consumers in selected cases would be a useful adjunct to the remedial powers of the FTC, principally because the judicious use of that authority by the FTC could have a substantial deterrent effect and aid substantially in effectuating the overall enforcement policies of the Commission. Moreover, pending the adoption of other systems for assuring effective consumer redress, actions by the FTC to obtain monetary relief will at least provide recovery for some consumers who otherwise might have gone uncompensated for losses they suffered as a result of acts or practices that violated the FTC Act.