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# Recent Cases

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# RECENT CASES

## Private Nuisance—Urban Redevelopment—Owner of Abandoned Building in Improved Neighborhood Must Compensate Neighbor for Diminution in Value of Neighbor's Land

### I. INTRODUCTION

Outside the realm of eminent domain and zoning, the law of private nuisance provides judicial response to problems of conflicting land uses. As the private landowner's legal weapon for eliminating a use incompatible in the neighborhood, private nuisance law affords an effective remedy because the unreasonable, nonconforming use can be enjoined or its perpetrator subjected to liability for damages. Nevertheless, indiscriminate application of existing doctrine might jeopardize fair and efficient resolution of problems of land use control. Considered in the light of equity and economics, a recent New York decision reveals the need to scrutinize more closely private nuisance actions and the remedies flowing therefrom.

### II. THE INSTANT DECISION

In *Puritan Holding Co. v. Holloschitz*,[1] plaintiff, owner of a recently renovated apartment building in New York City, sought damages in a private nuisance action against a neighboring landowner whose abandoned, deteriorating premises had become infested with derelicts.[2] Plaintiff claimed that the abandonment caused a decline in the market value of his renovated building,[3] thwarting urban redevelopment efforts in the neighborhood.[4] Since defendant failed to appear, the New York Supreme Court[5] accepted the uncontroverted proof and held for plaintiff.[6] Characterizing the

1. 82 Misc. 2d 905, 372 N.Y.S.2d 500 (Sup. Ct. 1975).

2. The buildings owned by plaintiff and defendant are almost directly across from each other on West 93d Street in Manhattan. *Id.* at ____, 372 N.Y.S.2d at 501.

3. Plaintiff offered proof of a $30,000 to $35,000 diminution in the value of his property since defendant's abandonment. Moreover, plaintiff alleged that the condition of defendant's property precluded plaintiff from obtaining a mortgage. *Id.*

4. The parcels in question are located in Manhattan's West Side Urban Renewal Area. *Id.* at ____, 372 N.Y.S.2d at 502.

5. The Supreme Court in New York is the equivalent of a county trial court.

6. Although the court found defendant in violation of a city ordinance requiring vacant buildings to be either guarded or sealed, its holding was not predicated on the violation of

case as one of first impression, the court applied general principles of private nuisance law[7] educed from prior New York decisions.[8] Because those decisions found location of the purported nuisance crucial, the court considered the neighborhood surrounding the parties and concluded that even though an idle, degenerate building might be permissible in a slum, the same building was objectionable in a rejuvenated area.[9] As a point of policy, the court opined that one deviant building should not be allowed to ruin an entire upgraded neighborhood.[10] The court determined, therefore, that the concept of private nuisance should subsume a vacant, deteriorating building in a revitalized urban locale.[11] Consequently, plaintiff was awarded compensatory damages equivalent to the diminution in the market value of his property.[12]

## III. THE LAW OF PRIVATE NUISANCE

Rooted in English common law,[13] the concept of private nuisance[14] has grown into the tort principles that restrict a landowner

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the ordinance. *Id.* at ___, 372 N.Y.S.2d at 502; *see* NEW YORK, N.Y. ADMIN. CODE tit. C, § C26-80.0 (1970).

7. The court, quoting from Annot., 4 A.L.R.3d 902, 908 (1965), relied on a definition of nuisance that subjects to liability one whose " 'unreasonable, unwarrantable, or unlawful use' " of his property materially interferes with the rights of another. 82 Misc. 2d at ___, 372 N.Y.S.2d at 501. Althougb plaintiff alleged a private nuisance, the court did not distinguish between public and private nuisances in its reasoning. *See* note 14 *infra*.

8. 82 Misc. 2d at ___, 372 N.Y.S.2d at 501-02. Cases cited by the court involving adjacent or proximate landowners include Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 58 N.E.2d 517 (1944) (blasting); Mandell v. Pasquaretto, 76 Misc. 2d 405, 350 N.Y.S.2d 561 (Sup. Ct. 1973) (odors from a tire sbop); Shearing v. City of Rocbester, 51 Misc. 2d 436, 273 N.Y.S.2d 464 (Sup. Ct. 1966) (open burning in a city landfill).

9. 82 Misc. 2d at ___, 372 N.Y.S.2d at 502.

10. For an appreciation of the court's fear that one abandoned building would ruin an entire neighborhood see Nachbaur, *Empty Houses: Abandoned Residential Buildings in the Inner City*, 17 How. L.J. 3, 10-14, 15-25 (1971); NEWSWEEK, Jan. 12, 1970, at 36; TIME, Mar. 16, 1970, at 88; U.S. NEWS & WORLD REP., Jan. 26, 1970, at 55.

11. Because of the high number of annual abandonments in New York City and because of the City's financial incapability to police delinquent landowners, the court predicted that a flood of litigation might spring from its opinion. The court referred to the City's Housing and Development Administration estimate of 12,000 units per year abandoned. 82 Misc. 2d at ___, 372 N.Y.S.2d at 502. Statistics on abandonment of buildings in other metropolitan areas may be found in Edson, *Housing Abandonment—The Problem and a Proposed Solution*, 7 REAL PROP., PROB. & TR. J. 382 (1972); Nachbaur, *supra* note 10; TIME, Mar. 16, 1970, at 88.

12. The plaintiff was awarded $30,000 as compensatory damages. 82 Misc. 2d at ___, 372 N.Y.S.2d at 502.

13. RESTATEMENT (SECOND) OF TORTS § 821D, comment *a* at 41-42 (Tent. Draft No. 16, 1970); W. PROSSER, LAW OF TORTS §§ 86-87 (1971) [hereinafter cited as PROSSER]; Comment, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47, 54-56 (1970).

14. Public nuisance, distinguishable from private nuisance, concerns an interference with rights common to at least a large class of people. Whereas plaintiff's interest in land is

from using his property to his neighbor's detriment.[15] Those principles dictate that a landowner's right to use his property is not absolute; rather, it is qualified by competing claims of neighbors to be free from disturbances in the enjoyment of their land.[16] Since interference with rights to use and enjoy land is the essence of a private nuisance, emphasis is primarily upon invasion of interests instead of tortious conduct.[17] Even so, the reasonableness and utility of the defendant's activity is significant in determining liability and remedies.[18]

Defined as an interference with an individual's rights in land,[19] private nuisance focuses on the plaintiff landowner and the harm suffered by him. Although the plaintiff need not own or possess land, he must have some interest in the land affected by the purported nuisance to maintain a cause of action.[20] The plaintiff ordinarily is established in the community before he complains of a neighboring use. Nevertheless, according to the prevailing view, a newcomer also may obtain relief, even though he knows of a preexisting and potentially harmful use.[21] Based on the theory that tri-

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basic to a private nuisance, in a public nuisance action plaintiff's land ownership is inapposite. The distinction between public and private nuisances rests not on the defendant's activity but on the nature of the interest invaded. RESTATEMENT (SECOND) OF TORTS §§ 821B, 821C (Tent. Draft No. 16, 1970); PROSSER §§ 86, 88 at 573, 582. One activity may constitute both a public and a private nuisance; a public nuisance becomes also a private nuisance to any landowner injured by the defendant's use beyond the injury felt by the public at large. RESTATEMENT OF TORTS, Introductory Note to Chapter 40 at 216-18 (1939).

15. RESTATEMENT (SECOND) OF TORTS §§ 821D-26 (Tent. Draft No. 16, 1970); RESTATEMENT OF TORTS §§ 822-31 (1939); PROSSER § 89.

16. PROSSER § 89; Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 COLUM. L. REV. 383, 383-84 (1917); *see* Booth v. Rome, W. & O.T.R.R., 140 N.Y. 267, 274-75, 35 N.E. 592, 594 (1893); Cross, *The Diminishing Fee*, 20 LAW & CONTEMP. PROB. 517 (1955); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

17. RESTATEMENT (SECOND) OF TORTS § 821D (Tent. Draft No. 16, 1970); RESTATEMENT OF TORTS, Introductory Note to Chapter 40 at 218-22 (1939); PROSSER § 87 at 573-74; *see* text accompanying notes 19-25 *infra*.

18. *See* text accompanying notes 26-36 *infra*.

19. RESTATEMENT (SECOND) OF TORTS § 821D (Tent. Draft No. 16, 1970); RESTATEMENT OF TORTS § 822 (1939); PROSSER § 89 at 591.

20. RESTATEMENT (SECOND) OF TORTS § 821E (Tent. Draft No. 16, 1970); RESTATEMENT OF TORTS § 823 (1939); PROSSER § 89 at 593-94.

21. Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972); Mahone v. Autry, 55 N.M. 111, 227 P.2d 623 (1951); RESTATEMENT (SECOND) OF TORTS § 840D (Tent. Draft No. 16, 1970); 1973 UTAH L. REV. 55, 57; 26 VAND. L. REV. 193, 196 (1973). *Contra*, Dill v. Excel Packing Co., 183 Kan. 513, 331 P.2d 539 (1958). A plaintiff's coming to the nuisance ordinarily is regarded as one of the circumstances to consider in determining whether the defendant is reasonably using his land. RESTATEMENT (SECOND) OF TORTS § 840D (Tent. Draft No. 16, 1970); 26 VAND. L. REV. 193, 196 (1973); *see* text accompanying notes 27-33 *infra*.

fling inconveniences are necessary evils, the law requires that the plaintiff incur a substantial invasion of rights before recovering.[22] The invasion, however, may be nontrespassory; mere depreciation in the value of land because of a neighboring use generally entitles the plaintiff to his day in court.[23] Similarly, invasions offending a landowner's sense of smell or aesthetics, arousing fear of harm, or otherwise disturbing peace of mind have been held actionable.[24] In any event, the invasion must offend a person of normal sensibilities or interfere with a normal use of land; hypersensitivity in persons or property is not protected.[25]

Although the plaintiff's predicament underlies a private nuisance action, consideration also must be granted to the nature of the defendant's conduct and the social value of his activity.[26] Broadly stated, reasonable use of land by the defendant insulates him from liability.[27] A determination of reasonableness, a question for the trier of fact,[28] comprehends weighing the utility of the defendant's conduct against the severity of the plaintiff's injury.[29] Utility depends largely on the extent to which the defendant's activities contribute favorably to society,[30] and on the character of the neighborhood encompassing the land of plaintiff and defendant.[31] Considerations governing the severity of the plaintiff's injury include the extent and character of harm, the social value of the plaintiff's use, and the suitability of the use to the neighborhood.[32] If the balancing

22. RESTATEMENT (SECOND) OF TORTS § 821F, comment c at 55 (Tent. Draft No. 16, 1970); RESTATEMENT OF TORTS § 822, comments *g & j* at 229-30, 231-32 (1939); PROSSER § 87 at 577-80; Comment, *supra* note 13, at 66-68.

23. PROSSER § 89 at 591-93. *But see* Comment, *supra* note 13, at 60 & n.37.

24. RESTATEMENT (SECOND) OF TORTS § 821D, examples at 45-46 (Tent. Draft No. 16, 1970); PROSSER § 89 at 591-93; Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 733-35 (1973); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U.L. REV. 1075 (1970); Comment, *supra* note 13, at 60-66; 12 ALBERTA L. REV. 542 (1974).

25. RESTATEMENT (SECOND) OF TORTS § 821F, comment *d* (Tent. Draft No. 16, 1970); PROSSER § 87 at 578-79. Normalcy depends upon the prevailing standards in the community.

26. RESTATEMENT (SECOND) OF TORTS § 822 (Tent. Draft No. 17, 1971); RESTATEMENT OF TORTS §§ 822(d), 824-25 (1939); PROSSER §§ 87, 89 at 580-82, 596-602.

27. RESTATEMENT (SECOND) OF TORTS § 822 (Tent. Draft No. 17, 1971); RESTATEMENT OF TORTS § 822(d) (1939); PROSSER § 89 at 596-602; Smith, *supra* note 16; Comment, *supra* note 13, at 68-75; 50 KY. L.J. 104 (1961).

28. Smith, *supra* note 16, at 384.

29. RESTATEMENT (SECOND) OF TORTS § 826 (Tent. Draft No. 17, 1971); RESTATEMENT OF TORTS § 826 (1939); PROSSER § 87 at 580-81.

30. RESTATEMENT (SECOND) OF TORTS § 828(a) (Tent. Draft No. 17, 1971); RESTATEMENT OF TORTS § 828(a) (1939); PROSSER § 89 at 597-99.

31. RESTATEMENT (SECOND) OF TORTS § 828(b) (Tent. Draft No. 17, 1971); RESTATEMENT OF TORTS §§ 828(b), 831(b)-(c) (1939); PROSSER § 89 at 599-601.

32. RESTATEMENT OF TORTS § 827 (1939).

process prefers the plaintiff, the defendant will be subject to liability because his use is unreasonable.[33] Another prerequisite of liability is that the defendant's activity be the legal cause of the plaintiff's injury.[34] This does not mean, however, that passive land ownership exculpates the defendant. An inactive landowner may be liable for a private nuisance if his inactivity, unreasonable under the circumstances, injures a neighbor.[35] For liability to attach in this kind of situation, the law requires that the defendant possess either actual or imputed knowledge of the result of his passivity.[36]

Assuming that the plaintiff proves a private nuisance, the court still must impose an appropriate remedy.[37] In this regard the plaintiff's prerogative significantly limits the court's discretion. The successful plaintiff might seek and obtain damages for personal or intangible interests that have been disturbed or for depreciation in the value of his land.[38] When damages are an inadequate remedy, the plaintiff might turn to equity for an injunction. A prayer to enjoin the defendant necessitates a balancing of interests between the incompatible landowners, and if compliance with an injunction unduly will oppress the defendant, the court might deny relief. If the plaintiff's predicament warrants an equitable remedy, however, the court can mold a decree to comport with the particular situation.[39]

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33. RESTATEMENT OF TORTS § 826 (1939). A split of authority exists concerning which party has the burden of proof on the issue of reasonable use. *See* PROSSER § 87 at 581 n.6. What is unreasonable under one set of facts might be reasonable under another. McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 46, 81 N.E. 549, 550 (1907); Smith, *supra* note 16, at 385.

One commentator advocates that a standard of "unneighborliness" replace the unreasonableness standard. His general rule for determining liability is that a landowner is liable for a change in land use only if the change is perceived as unneighborly according to contemporary community preferences. This rule, he says, is more democractic and dynamic than existing law and would foster equity and efficiency in controlling conflicting land uses. Ellickson, *supra* note 24, at 731-32.

34. RESTATEMENT OF TORTS § 822(c) & comment *h* at 230 (1939).

35. RESTATEMENT (SECOND) OF TORTS §§ 838-39 (Tent. Draft No. 16, 1970); RESTATEMENT OF TORTS §§ 824(b), 838-39 (1939). If a landowner fails to maintain in a normal way an improvement on his property, "he is liable for failure to abate the harmful conditions created." Ellickson, *supra* note 24, at 727-28; *see* caveat to § 838 of RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 16, 1970).

36. *See* authorities cited note 35 *supra*. Knowledge of deterioration usually is imputed to an urban landowner because of the intensive use of urban property. Ellickson, *supra* note 24, at 728; *see* RESTATEMENT (SECOND) OF TORTS § 839, comment *i* (Tent. Draft No. 16, 1970).

37. For a discussion of plaintiff's extrajudicial remedy of abatement see PROSSER § 90 at 605-06.

38. Baltimore & P.R.R. v. Fifth Baptist Church, 108 U.S. 317 (1883); Kentucky W. Va. Gas Co. v. Lafferty, 174 F.2d 848 (6th Cir. 1949); Spaulding v. Cameron, 38 Cal. 2d 265, 239 P.2d 625 (1952); RESTATEMENT OF TORTS §§ 929-30 (1939); PROSSER § 90 at 602-03; Ellickson, *supra* note 24, at 725-26.

39. Purcell v. Davis, 100 Mont. 480, 50 P.2d 255 (1935); H. MCCLINTOCK, EQUITY §§ 130-

Endued with broad powers of equity, the court can enjoin the defendant in accordance with the plaintiff's complaint and simultaneously mandate that the plaintiff compensate the defendant for economic loss in relocating or otherwise abating the nuisance. This latter remedy was adopted in *Spur Industries, Inc. v. Del E. Webb Development Co.*,[40] a recent decision in which the plaintiff was required to purchase his injunction.[41] Prevailing doctrine, however, would deny injunctive relief altogether rather than sell the injunction.[42]

Despite its longevity and viability, private nuisance law has not encountered frequently an urban developer bringing his indolent neighbor to court. This dearth of decisional law is surprising in light of twentieth century efforts towards urban redevelopment. General principles of private nuisance law, however, seem to provide in their abstractions adequate guidance for resolving a suit with such a novel set of facts. *Puritan Holding Co. v. Holloschitz* marks one court's attempt to apply these general principles to the neighborhood conflict of developer versus abandoner.

## IV. *Puritan Holding Co.* AND THE PROBLEM OF LAND USE CONTROL

Although on initial inspection the instant decision might appear a trifling extension of private nuisance law, it heralds serious consequences in areas of land use control and land development. If followed as authority for nuisance actions that might arise from the numerous situations involving urban building abandonments,[43] the decision could foster wide-spread renovation of inner cities. Relying on the court's judgment, landowners who want to improve their parcels and revitalize their neighborhood now more confidently can work their will. They can force recalcitrant neighbors, who face a threat of damages in a private nuisance suit, either to improve their lots or to sell out. Thus private concerns more effectively can take initiative in promoting localized urban redevelopment in spite of a lethargic or tightly budgeted public sector. Because of the evils inherent in urban deterioration, increased redevelopment would seem desirable. Nevertheless, this result may be less desirable if the

43 (1936); PROSSER § 90 at 603-04; deFuniak, *Equitable Relief Against Nuisances*, 38 KY. L.J. 223 (1949-50); Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1940).

40. 108 Ariz. 178, 494 P.2d 700 (1972).

41. 1973 UTAH L. REV. 55; 26 VAND. L. REV. 193 (1973); *see* Ellickson, *supra* note 24, at 738-48.

42. *See* 26 VAND. L. REV. 193, 198 & n.33.

43. *See* note 11 *supra*.

courts unfairly penalize the nonconforming landowner. Even though he is the misfit, a just result requires that his predicament be afforded more attention than that given in *Puritan Holding Co.*

On the surface, the instant court properly adhered to existing doctrine in declaring the abandoned building a private nuisance for which one remedy was damages;[44] New York common law alone affords ample precedent for such a judgment.[45] Plaintiff[46] had suffered substantial harm[47] because of defendant's use[48] of land, a use that plausibly was unreasonable[49] in the neighborhood. Although the court seems correct in labeling the abandonment a private nuisance, its cursory, almost mechanical treatment of the question of remedies seems inadequate. Any remedy imposed by the court not only will affect severely the instant parties but also will serve as an example upon which future legal actions and business judgments will be based. Thus an award of damages to the prevailing plaintiff should not be automatic. Depending on the particular circumstances, a more appropriate remedy might be to deny damages, thereby forcing the plaintiff into equity for injunctive relief. Equitable flexibility then would allow the court latitude to deny the injunction, issue the injunction cost-free, or issue the injunction contingent upon the plaintiff's indemnifying the defendant. To approximate justice, equity, and economy more effectively, choice of a remedy in private nuisance cases should entail studied consideration by the court of the greater problem of land use control and development. Adequate accounting for the problem of land use control and development in turn comprehends consideration of constitutional proscriptions regarding just compensation and analysis of economic theories concerning efficient land use allocation.

Although the fifth amendment's prohibition against taking private property for public use without just compensation usually re-

44. *See* text accompanying note 38 *supra*. From the tone of the court's opinion, appearance by defendant probably would not have altered the result of the case.

45. *See* note 8 *supra* and accompanying text.

46. Plaintiff's efforts at neighborhood improvement might he deemed a "coming to the nuisance" if he knew of defendant's delinquency when he improved his lot. This would not bar plaintiff's relief, however, unless by making improvements plaintiff transformed his property into a hypersensitive use. *See* notes 21 & 25 *supra* and accompanying text.

47. *See* note 22 *supra* and accompanying text.

48. *See* notes 34-36 *supra* and accompanying text.

49. Perhaps intuitively the court weighed the utility of defendant's activity against the severity of plaintiff's injury in assessing the reasonableness of defendant's use. *See* notes 28-33 *supra* and accompanying text. Considering the high numher of annual abandonments in New York City and elsewhere, it may be the reasonable, prudent landlord who abandons. In many situations economic pinch compels abandonment. *See* Nachbaur, *supra* note 10, at 15-25, 30-50; authorities cited note 11 *supra*.

stricts governmental power of eminent domain,[50] a landowning defendant in a private nuisance action might be able to employ the just compensation clause to soften the blow of an impending injunction or to defeat plaintiff's claim for damages. Made applicable to the states by virtue of the fourteenth amendment,[51] the fifth amendment generally limits only state action; however, the limitations govern private action when a sufficient nexus exists between the private concern and the state. This nexus sometimes is found when the judiciary enforces on behalf of a private party an act inimical to freedoms protected by the Constitution.[52] Assuming that judicial enforcement provides sufficient state action in a private nuisance suit, the fifth amendment will operate in the defendant's favor only if his private property is to be taken for public use. Traditionally, taking private property has meant condemnation and acquisition by the state of tangible property, usually land.[53] Nevertheless, Justice Holmes and other legal scholars have argued for extending the taking concept to cover intangible property such as rights incidental to land ownership.[54] If extension were granted, the landowner whose rights to enjoyment were to be infringed by a nuisance injunction or by an award of damages to the plaintiff could maintain that his property would be taken without just compensation in violation of the fifth amendment. The landowner might be successful if his expropriated property were intended for public use. Almost all courts broadly interpret the public use requirement to denote that private property be used in furtherance of public welfare, rather than that the property be used by the public.[55] In this vein a landmark New

50. U.S. CONST. amend. V; *see* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

51. U.S. CONST. amend. XIV; Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

52. Shelley v. Kraemer, 334 U.S. 1 (1948). *But cf.* Evans v. Abney, 396 U.S. 435 (1970). Judicial enforcement as a means of invoking state action is a problematic, unsettled area of law. *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1108-20 (1960); Note, *supra* note 50.

53. Mugler v. Kansas, 123 U.S. 623 (1887); *see* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 105-38 (1973).

54. United States v. Dickinson, 331 U.S. 745 (1947); United States v. Causby, 328 U.S. 256 (1946); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415-16 (1922); Ragsale & Sher, *The Court's Role in the Evolution of Power Over Land*, 7 URBAN LAW. 60, 78-79 (1975). *But see* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958). *See generally* O'Reilly, *The Non-Conforming Use and Due Process of Law*, 23 GEO. L.J. 218 (1935); *Torts Symposium—Nuisance—As a "Taking" of Property*, 17 U. MIAMI L. REV. 537 (1963).

55. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 626-33 (1940); *Special Project—The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681, 701-05 (1974).

York case[56] holds that condemnation for slum clearance is equivalent to taking for public use because the eradication of slums enhances the health, safety, and welfare of the people; that the land is not used for a public facility subsequent to clearance is inapposite. Private urban redevelopment schemes fostered by the instant plaintiff and those of similar ilk also enhance the public welfare—the entire community gains by neighborhood improvement—and arguably could be considered a public use. Therefore, the Constitution might require that a plaintiff compensate justly a neighboring defendant whose landowning rights are impinged by a nuisance injunction issued in plaintiff's favor.[57]

The argument that the plaintiff in a private nuisance action should be bound by the essentially governmental restrictions contained in the Constitution is tenuous on two counts. First, concomitant with the doctrine of judicial enforcement as a means of invoking state action is the undesirable possibility that all private litigants be controlled by proscriptions intended for the state.[58] Secondly, extension of the taking concept to include infringement of rights runs afoul of established governmental powers to regulate without compensating the person regulated.[59] Zoning ordinances provide a prime example of infringement of property rights without compensation by the government. Another problem with extending the taking concept concerns defining the point at which a taking occurs. In light of the broad language of the fourteenth amendment, one could argue that any deprivation of liberty warrants compensation; carried to its logical conclusion, however, this argument becomes absurd. Despite the weakness of the proposition that the just compensation clause attaches to private nuisance actions, courts might further the cause of equity by analogizing to the constitutional prohibition. The purchased injunction remedy imposed in *Spur Industries, Inc. v. Del E. Webb Development Co.*,[60] indicates

56. New York City Housing Auth. v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936).

57. An alternative rationale for requiring that compensation flow from the prevailing plaintiff to the defendant distinguishes between an injunction that primarily eliminates harm perpetrated by the defendant and one that primarily benefits the plaintiff; compensation should be required only in the latter circumstance. Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW. No. 1, at 36 (1969). Applied to the facts of the instant case but assuming plaintiff sought an injunction, this rationale probably would result in the denial of any claim by defendant for compensation because enjoinment of his use would eliminate a harm and benefit the whole neighborhood, rather than benefit plaintiff only. *See also* Michelman, *Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

58. *See* note 52 *supra*.

59. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

60. *See* notes 40 & 41 *supra* and accompanying text.

that courts might comport better with the demands of fairness by paralleling the just compensation requirement, especially in situations in which the plaintiff comes to the nuisance.

Economic theories aimed at efficiently resolving problems of conflicting land uses also should bear on selection of a judicial remedy. Assuming that resources would be allocated more efficiently if conflicting uses were eliminated, economic theory suggests that the prevailing use should be the one to which its owner attaches the higher value.[61] If *A* and *B* are owners of conflicting uses and if *A* legally is entitled to his existing use, nevertheless the law should assign to *B* the right to undisturbed use of his land if in the marketplace *B* would have purchased that right from *A*.[62] In other words, a court should find *A's* use a private nuisance. Upon such a finding, remedies available to the court consist of awarding the plaintiff damages, awarding the plaintiff injunctive relief, and awarding an injunction only if the plaintiff compensates the defendant.[63] An award of damages carries the desirable effect of determinating the value of the right transferred; if left to the marketplace to negotiate valuation, the parties might incur costs that exceed litigation expense because of one party's stubbornness or unreasonable subjectivity. Excess negotiation costs more productively could be expended elsewhere.[64] Moreover, by fixing valuation the court will force the defendant to engage in a cost-benefit analysis whether to pay future damages[65] or adopt measures to abate the nuisance.[66] Assuming that the defendant is a rational economic being, he will adopt the cheaper alternative, which presumably is the more beneficial to society. If the plaintiff subjectively determines that an injunction is worth more to him than the amount of damages recoverable, he will try to enjoin the defendant's use. The court seeking efficiency should grant injunctive relief only in situations in which the defendant's costs in eliminating the nuisance are perceived to be less than the benefit to be derived by the plaintiff.[67] This balanc-

61. R. POSNER, ECONOMIC ANALYSIS OF LAW 10-13 (1972) [hereinafter cited as POSNER]. Wealth distribution preferences also affect assignment of property rights. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097-101 (1972).

62. POSNER 18.

63. *See* Calabresi & Melamed, *supra* note 61, at 1115-16; Ellickson, *supra* note 24, at 738-48.

64. Calabresi & Melamed, *supra* note 61, at 1106; Ellickson, *supra* note 24, at 739.

65. A continuing nuisance might suhject the defendant to periodic liability for damages to the plaintiff who periodically sues. *See* authorities cited at note 38 *supra*.

67. POSNER 29; Calabresi & Melamed, *supra* note 61 at 1118; Ellickson, *supra* note 24, at 743.

ing test, however, entails judicial expense and promotes uncertainty in the resolution process.[68] For these reasons the purchased injunction remedy might be preferable because it would deter the plaintiff at the outset from pursuing an inefficient injunction; the plaintiff presumably will refuse to pay the defendant an amount greater than the benefits expected from the injunction. Thus the purchased injunction remedy might mitigate litigation expense. If the plaintiff pursues a remedy in a judicial forum, however, the purchased injunction remedy further can lend itself to a more economically efficient solution than a straight cost-free injunction. Assume that the defendant will receive compensation only if and to the extent that the benefits he derives from the nuisance activity exceed the costs that the activity inflicts upon neighbors. If the defendant's benefits are greater that his neighbors' costs, the defendant should receive compensation to the extent of the lesser of his expense in relocating or in curtailing the nuisance activity. If the defendant's benefits are less than his neighbors' costs, he should receive no compensation.[69] Thus the purchased injunction remedy, by its responsiveness to varying factual situations, can promote resolution of conflicting neighborhood uses more expediently than can the straight injunction remedy. The use or set of uses perceived to be more efficient prevails under the purchased injunction remedy, but not without allowance of the costs, if any, to the owner of the preempted use.

The foregoing discussion regarding economic efficiency merely delineates possible shortcomings in mechanically imposing a private nuisance remedy. Because fairness dictates that protection consistently be afforded the landowner who reasonably uses his land, application of economic theories alone cannot supply the ultimate solution. Nevertheless, potential exists in nuisance law for an active interplay between law and economics.[70] Although in the short

68. Ellickson, *supra* note 24, at 739.

69. Ellickson, *supra* note 24, at 738-48. For a discussion of economic and practical problems of employing the purchased injunction remedy in class actions see Calabresi & Melamed, *supra* note 61, at 1116-17.

In cases in which the plaintiff moves to the nuisance, a purchased injunction might provide the most economic remedy in terms of locational choice. If a landowner wants to develop a use incompatible with a preexisting neighoring use and if the landowner knows tbat he might have to compensate his neighbor for relocating or for ceasing operations, he will choose to carry out his plans only if that is the cheaper alternative to him and thus to society. If he can locate in an area devoid of incompatible uses with less expense, the developer will do so. Placing a price on the injunction tbereby appears to foster efficient land use allocation. Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293, 303-09 (1969).

70. *See* POSNER; Calabresi & Melamed, *supra* note 61; Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON.

run the costs of supplementing jurisprudence with the science of economics might appear high, these costs seem trifling if in the long run conflict resolution processes can be enhanced to promote a more efficient land use allocation.

That nuisance remedies can be employed by an enlightened court to reach an equitable and economic resolution does not foreclose manipulation of nuisance law to the undue advantage of land developers. A wealthy developer might move into an area, improve the majority of it in order to set the neighborhood character, and then rid himself of any proximate incompatible uses by private nuisance actions. Under the purchased injunction theory, which provides the most equitable remedy from the defendant's position, the developer will have to pay his way, but in effect nuisance law will have bestowed upon the private developer with adequate capital use of the public power of eminent domain. Even if the developer chooses to seek damages, he still might be able to force his way on a recalcitrant neighbor almost as effectively as by injunction. For example, inability or unwillingness of the defendant to pay the judgment debt will allow the developer to levy upon the defendant's land and purchase it at an execution sale, subject to the claims of mortgagees and other lien creditors. Alternatively, the two parties might negotiate a settlement whereby the defendant complies with the developer's wishes in exchange for cancellation of the judgment debt.[71] To prevent usurpation of power by the land developer, courts must be sensitive to the demands of fairness. Considerations of fairness underlie application of nuisance law because the trier of fact must weigh the relative merits of plaintiff's and defendant's situations. Although formulas have been devised to objectify this balancing process, visceral reactions of the fact finder always will play a large part in determining whether harm to the plaintiff is substantial and whether land use by the defendant is reasonable. Thus subjectivity of a third party can check a land developer's scheme and shield a defendant whose use patently was reasonable before the arrival of the developer. An additional check arises if the plaintiff seeks injunctive relief; then equity will compel another balancing of interests before the defendant's rights are infringed.

## V. CONCLUSION

When conscientiously and prudently applied, nuisance law can

REV. 347 (1967) (Vol. 2—Papers and Proceedings); Ellickson, *supra* note 24. *See generally* E. MISHAM, COST-BENEFIT ANALYSIS 101-37 (1971).

71. *See* Ellickson, *supra* note 24, at 741-42.

be an expedient means of land use control.[72] Although zoning ordinances historically have provided the means by which cities have controlled use of the land they encompassed, zoning is adaptable primarily to pervasive problems of land management. More localized problems should be assigned to the realm of nuisance law because of the flexibility[73] inherent in applying nuisance doctrine. What is an unreasonable and intolerable use of urban land varies with the vicissitudes of time, and nuisance law adequately allows for change to be reflected in its balancing process. Unless courts are willing to study diligently each new case, however, the efficacy of nuisance doctrine will be vitiated. Only a deliberate application of existing law can harmonize discordant land uses in the neighborhood while furthering justice. Moreover, just resolution of the conflict can be enhanced by economic analysis of private nuisance remedies in an effort to avoid waste.

DAVID G. RUSSELL

# Administrative Law—Federal Trade Commission Act—Consumer Private Right of Action Recognized Under Section 5

## I. FACTS AND HOLDING

Plaintiff consumers brought a class action in federal district court[1] for damages and injunctive relief alleging that defendant retailer had engaged in unfair and deceptive acts or practices in commerce in violation of section 5(a)(1) of the Federal Trade Commission Act (FTCA).[2] The practices of which plaintiffs complained were

72. Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440; Ellickson, *supra* note 24; Comment, *supra* note 13.

73. Concomitant with the advantage of being flexible, nuisance law as a means of land use control carries the disadvantages of being unstable and unpredictable. If nuisance law remains unsettled, incentives to invest in neighborhoods containing an incompatible use will be impaired. POSNER 20-21.

1. Subject matter jurisdiction was based on 28 U.S.C. § 1337 (1970), which provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Federal jurisdiction is thus obtained irrespective of either the amount in controversy or the citizenship of the parties.

2. As recently amended by the Federal Trade Commission Improvement Act (Magnuson-Moss Warranty), § 5(a)(1) provides, "Unfair methods of competition in com-

the subject of a consent order,[3] allegedly applicable to defendant,[4] entered by the Federal Trade Commission (FTC) in 1963. Defendant argued that because the Act contains no provision for private enforcement, the FTC alone is authorized to enforce the broad proscriptions of the FTCA. Plaintiff contended that an implied private right of action is necessary to supplement the Commission's enforce-

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merce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (Supp. IV, 1974). The amendment added the words "or affecting."

3. The order provides in part as follows:

> *It is ordered*, That respondent Rich Plan Corporation, a corporation, and its officers . . . and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of freezers, food or freezer-food plans . . . do forthwith cease and desist from:
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> 1. Representing directly or by implication that:
>
> a. Purchasers of the freezer-food plan will receive the same amount of food and a freezer for the same or less money than the purchasers have been paying for food alone.
>
> . . .
>
> . . .
>
> 4. Inducing individuals to sign any negotiable instrument in connection with a freezer or food plan if said instrument is to be sold to a finance company or other commercial institution unless it is clearly and conspicuously stated on the face of said instrument that it is to be sold to a finance company or other commercial institution and that the payer or payers thereof will be obligated to make full payment on said instrument without regard to any personal defense that said payer or payers could assert against respondents.

*In re* Rich Plan Corp., 63 F.T.C. 1099, 1104-05 (1963).

An FTC consent order is the product of a nonadjudicative proceeding which commences with notification of a person or company by the Commission of its intention to issue a complaint charging a violation of the law. Within 10 days the person or company may then agree to have the proceeding disposed of by executing with the FTC an agreement containing a consent order to cease and desist. While as a matter of course the consent order stipulates that the signing of the agreement "is for settlement purposes only and does not constitute an admission by respondents that the law has been violated," it has the same force with respect to compliance as a cease and desist order produced by a more formal adjudicative proceeding. The latter requires a full-blown agency hearing before an administrative law judge.

4. Plaintiffs alleged in their complaint that defendant Rich Plan of The Midwest was operated as a franchise of Rich Plan Corporation, the concern against which the FTC's order was specifically entered. If the allegation is true, the order would seem clearly to be applicable to defendant.

Joined with Rich Plan as defendants were three individuals. While plaintiffs seek to hold them liable on other theories, they apparently ask no recovery from defendant natural persons based upon a private action under the FTCA. This is presumably the result of considerable doubt that the 1963 consent decree is applicable to them.

In addition to their claim under the FTCA, plaintiffs alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970), the Securities Act of 1933, 15 U.S.C. § 77 (1970), the Truth in Lending Act, 15 U.S.C. § 1601 (1970), and the Indiana Deceptive Sales Practices Act, IND. STATS. ANN. § 26-1-2-313 (1974). Plaintiffs further charged common law fraud and misrepresentation. The instant court granted defendants' motion to dismiss the antitrust and securities law counts, but assumed jurisdiction over the claims based upon the Truth in Lending Act and state and common law.

ment activities and thus to effectuate the purpose of the Act to protect consumers from fraudulent business practices. On defendant's motion to dismiss for failure to state a claim upon which relief could be granted,[5] the United States District Court for the Northern District of Indiana *held*, motion denied. When the Federal Trade Commission has ruled that a business enterprise has engaged in unfair or deceptive acts or practices in violation of section 5(a)(1) of the Federal Trade Commission Act, a consumer's complaint alleging injury by the acts or practices states a cause of action. *Guernsey v. Rich Plan of The Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976).

## II. Legal Background

In 1914 Congress enacted the Clayton[6] and Federal Trade Commission[7] Acts to supplement the antitrust provisions of the Sherman Act.[8] In contrast to the relatively specific prohibitions of the Clayton Act,[9] section 5 of the FTCA declared unlawful "unfair methods of competition in commerce."[10] The FTCA's broad and flexible language was desigued to prevent circumvention of the Clayton Act's specific prohibitions and to reach potentially anticompetitive business schemes in their incipiency.[11] In further contrast to the Clayton Act and its wide range of enforcement devices, including private actions for treble damages,[12] the FTCA established and committed its enforcement to the FTC.[13] By the 1914 Act Congress authorized the FTC, upon finding a violation of section 5, to issue a cease and desist order against the offending person, partnership, or corporation.[14] Subsequent amendments to the Act have expanded significantly both the scope of the section 5 prohibition and the FTC's enforcement powers. The Wheeler-Lea Act of 1938[15] amended section 5 of the FTCA to declare unlawful "unfair or deceptive acts or

5. Fed. R. Civ. P. 12(b)(6).

6. Ch. 323, 38 Stat. 730 (1914), *as amended* 15 U.S.C. §§ 12-27, 44 (1970).

7. Ch. 311, 38 Stat. 717 (1914), *as amended* 15 U.S.C. §§ 41-51 (1970).

8. Ch. 647, § 1, 26 Stat. 209 (1890), *as amended* 15 U.S.C. §§ 1-7 (1970).

9. The Clayton Act prohibits, *inter alia*, price discrimination, tie-in sales, anticompetitive stock acquisitions, and interlocking directorates. 15 U.S.C. §§ 12-27 (1970).

10. Ch. 311, 38 Stat. 719 (1914), *as amended* 15 U.S.C. § 45 (1970).

11. *See* G. Henderson, The Federal Trade Commission (1924).

12. 15 U.S.C. § 15 (1970).

13. Section 5, Ch. 311, § 5, 38 Stat. 719, 15 U.S.C. § 45 (1970), provides in part: "The commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce."

14. Ch. 311, 38 Stat. 720 (1914).

15. Ch. 49, 52 Stat. 111 (1938).

practices in commerce"[16] in addition to "unfair methods of competition." The effect of the amendment was to overrule legislatively the case of *FTC v. Raladam Co.*,[17] in which the Supreme Court, narrowly construing "methods of competition," held that the FTC had no power to issue an order when an unfair practice injured only consumers and not competitors.[18] By the 1938 amendment, therefore, Congress clearly extended the jurisdiction of the FTC to protect consumers from fraud.[19] The most significant expansion of the FTC's enforcement powers came in the most recent amendment,[20] which authorizes the FTC, under certain circumstances, to bring an action in either state or federal court to secure redress for injured consumers.[21]

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16. *Id.*

17. 283 U.S. 643 (1931).

18. *Id.* at 652-54.

19. By the proposed amendment to § 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

H.R. REP. No. 1613, 75th Cong., 1st Sess. (1937).

20. Federal Trade Commission Improvement Act (Magnuson-Moss Warranty), 15 U.S.C. § 45(a)(1) (Supp. IV, 1974).

21. Section 17b of the FTCA, 15 U.S.C. § 57b (Supp. IV, 1974), now provides in part as follows:

(a) . . .

(1) If any person, partnership, or corporation violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) of this section in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of Section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies tbe court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

(b) . . .

The court in any action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice . . . .

The amendment also significantly expands the FTC's authority to enforce civil penalties. The Commission now may bring an action for violation of a rule promulgatsd by it upon a

The cases in which private parties have sought to assert a right of action under section 5 of the FTCA fall into two groups readily distinguishable on the basis of the nature of the plaintiff. The first group of plaintiffs involves business competitors of the defendant. Thus, in *Atlanta Brick Co. v. O'Neal*[22] plaintiff, a brick manufacturer, alleged that defendant, a competing manufacturer, had misrepresented the quality of plaintiff's product and thereby had caused it to be rejected by architects on several projects. Plaintiff sought recovery under the FTCA or, in the alternative, treble damages for defendant's alleged violation of the antitrust laws. Reasoning that the purpose of section 5's broad language was to strengthen the power of the FTC, the *O'Neal* court held that the FTCA grants no private right of action to a person injured in his business by unfair trade practices.[23] Another district court reached the same result in *Samson Crane Co. v. Union National Sales, Inc.*,[24] citing as authority a case in which the Supreme Court summarily rejected an attempt to allege "unfair methods of competition" in an antitrust complaint.[25] All other decisions in this group are in accord.[26]

The second group of cases in which private parties have sought to establish a right of action under the FTCA involves consumers as plaintiffs. In the leading case, *Holloway v. Bristol-Myers Corp.*,[27] plaintiff consumers brought a class action alleging that defendant had engaged in false advertising in violation of sections 5(a)(1) and 12(a)(1)[28] of the Act. Concluding from an examination of the Act

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showing of "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that an act or practice engaged in is unfair or deceptive and prohibited hy the rule. In addition, with respect to an act or practice concerning which a final cease and desist order has been entered, the FTC may bring a civil penalty action against anyone who engages in the practice with actual knowledge that the practice was unfair or deceptive and unlawful. The penalty is $10,000 for each violation or, in the case of a continuing violation, $10,000 per day. 15 U.S.C. § 45(m) (Supp. IV, 1974).

22. 44 F. Supp. 39 (E.D. Tex. 1942).

23. *Id.* at 42.

24. 87 F. Supp. 218 (D. Mass. 1949).

25. Moore v. New York Cotton Exch., 270 U.S. 593 (1926). Without discussion, the Court stated: "There is an attempt to allege unfair methods of competition, which may be put aside at once, since relief in such cases under the Trade Commission Act must be afforded in the first instance by the commission." *Id.* at 603.

26. *See, e.g.*, La Salle St. Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004 (N.D. Ill. 1968); Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302 (N.D. Ill. 1965); National Fruit Prod. Co. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942).

27. 485 F.2d 986 (D.C. Cir. 1973).

28. Section 12(a)(1), 15 U.S.C. § 52(a)(1) (1970) provides as follows:

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

and its legislative history that Congress intended to make the administrative program of enforcement an exclusive one, the *Holloway* court held that consumers have no right of action under the FTCA.[29] The court reasoned that the FTC's expertise and discretion in the use of its flexible enforcement powers are fundamental to the careful legislative balance of consumer and business interests. Private lawsuits, the court asserted, would disrupt the FTC's coordinated enforcement activities and therefore upset that balance.[30] In addition, pointing to the distinctive functions of the Securities and Exchange Commission and the FTC,[31] the *Holloway* court distinguished *J.I. Case Co. v. Borak*,[32] in which the Supreme Court held that private parties have a right to bring suit for violation of the proxy solicitation rules promulgated by the SEC.[33] The only other reported cases in which consumers have sought a private remedy under the FTCA are in accord.[34] Prior to the instant decision, therefore, the courts consistently refused to recognize a private right of action, by either business competitors or consumers, under section 5 of the FTCA.

## III. THE INSTANT OPINION

The instant court initially enumerated two requisites for finding an implied private right of action under a federal regulatory statute. First, the statute must have been designed to protect a class of persons of which plaintiffs are members from the harm of which they complain. Secondly, a private civil remedy must be consistent with the purposes of the statute. Assuming without direct discussion that the first requisite was met, the instant court then recognized

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(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics . . . .

Section 12(b) declares such false advertising to be an unfair or deceptive act or practice within the meaning of § 45.

29. 485 F.2d at 987-88.

30. *Id.* at 997-99.

31. The court stated:

The SEC is primarily a clearance agency, and once its clearance responsibilities have been carried out and the proxy statement, registration statement, or the like has been permitted to become effective, there is little danger that an intervening private suit will derail the Commission's ongoing administrative processes. In the case of the Trade Commission, the corporation's dissemination of materials represents not the end of a (clearance) proceeding but the beginning of administrative scrutiny and a potential enforcement problem.

*Id.* at 1001.

32. 377 U.S. 426 (1964).

33. *Id.* at 430-31.

34. Bott v. Holiday Universal, Inc., 45 U.S.L.W. 2071 (U.S. July 14, 1976); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973).

that federal courts historically have refused to recognize a private right of action under the FTCA. Thus addressing the requirement that private enforcement be consistent with the purpose of the FTCA, the court asserted that because the FTC has been ineffective in protecting consumers from ongoing fraud,[35] the Act as enforced by the Commission is "an empty promise to consumers."[36] The court therefore determined that an implied private right of action was necessary to effectuate the purposes of the FTCA. The court then distinguished *Holloway v. Bristol-Myers Corp.*[37] as presenting a factual context significantly different from that of the instant case. While the FTC had taken no action with respect to the acts or practices at issue in *Holloway*, the court emphasized, the Commission had examined the practices alleged by plaintiffs in the instant case and, in a consent order applicable to defendant, had ruled them violative of the statute. The court maintained that when, as in the instant case, the FTC has ruled on the acts or practices involved, the argument commonly advanced against private enforcement of the FTCA—that the FTC, "with its overview of the national economy, is in a better position than a private litigant to gauge the injury a deceptive practice will cause the public and to balance this against the likely cost of elimination of the practice"[38]—is without force. The court therefore held that plaintiff consumers' complaint, alleging violations of section 5(a)(1) of the FTCA, stated a cause of action.

## IV. COMMENT

The precise scope of the instant court's decision, the first to recognize an implied private right of action under the FTCA, is not entirely clear. Certainly one limitation on the scope is that the FTC must have ruled on, and found violative of the statute, the acts or practices of which the plaintiff complains. Most narrowly construed, the instant decision would require in addition: (1) that the FTC's determination be in the form of a cease and desist order; (2) that the order be applicable to the defendant; and (3) that the plaintiff's injury result from a violation of the order, rather than

35. The court noted that the FTC is able to investigate only 1 out of 8 or 9 of the 9,000 complaints it receives each year. Moreover, the court stated, even in those cases, rougbly 1 out of 10, in which an investigation results in the issuance of a cease and desist order, the extent to which consumers are thereby protected is suspect. Guernsey v. Rich Plan of The Midwest, 408 F. Supp. 582, 586 (1976).

36. *Id.* at 587.

37. *See* notes 27-32 *supra* and accompanying text.

38. 408 F. Supp. at 588.

from the defendant's acts or practices that antedate issuance of the order. The court's rationale, however, seems to countenance a broader right of action. If, as the court asserts, the primary impediment to private enforcement of the FTCA is that properly the FTC should determine which acts or practices require elimination,[39] then none of these three limitations logically follows. Rather, from this conception of the impediment it would seem to follow that as long as the FTC has made a definitive determination with respect to a particular act or practice, whether by way of a cease and desist order entered or a rule promulgated by the Commission, a private action for damages would be maintainable by a consumer against any business enterprise that had engaged in the act or practice. Given this broader interpretation the instant decision raises problems not considered by the court concerning the standard of liability to be applied. When determining the standard of liability, however, a court presumably would look for guidance to the recently enacted amendment to the FTCA.[40] Thus, with reference to the amendment, a court might hold a defendant liable to a consumer for violation of a rule promulgated by the FTC upon a showing of actual or implied knowledge that the act or practice was unfair or deceptive and prohibited by the rule. It is noteworthy, however, that the FTCA authorizes the FTC to seek redress for injury to consumers resulting from acts or practices declared unlawful by a cease and desist order only against a person, partnership, or corporation subject to the order.[41] While the court's reasoning, therefore, seems to recognize a private right of action broader in scope than the FTC's authority to seek redress for consumers, it is questionable whether the instant court actually would go so far.

Whatever its scope, the instant decision may be viewed as an attempt to strike a reasonable compromise between the FTC's role in the enforcement of the FTCA and effective consumer protection at the federal level of government. By limiting the private remedy to cases in which the Commission already has ruled violative of the statute the acts or practices of which the plaintiff complains, the instant court has avoided the most obvious problem otherwise presented by private actions under the FTCA. As limited by the court, private enforcement would not conflict with the FTC's authority to define, through adjudication and rulemaking, the contours of the broad statutory proscription. In short, the instant decision is desira-

39. *See* text accompanying notes 37 & 38 *supra*.
40. *See* note 21 *supra* and accompanying text.
41. *Id.*

ble to the extent that it does not call upon federal courts to fashion a federal common law of consumer fraud. Nonetheless, other problems with respect to interference with the FTC's role remain.

Limiting the implied private right of action to cases in which the FTC has ruled on the practices involved, the instant court clearly recognized that the FTC's expert judgment and inherent agency discretion in defining "unfair or deceptive acts or practices" are central to the statutory framework. The court failed to recognize, however, that the Commission's expertise and discretion are no less applicable to the exercise of its enforcement powers: the statutory scheme clearly comprehends that administrative flexibility will be brought to bear both in defining violations and in dealing with violators. With the FTC's flexibility in the latter regard, equally central to the FTCA, even limited private enforcement is inconsistent. Moreover, private enforcement may well cause a loss of whatever effectiveness the Commission now can claim in securing compliance with the Act through nonadjudicative proceedings[42] because under the instant court's rationale, entering into a consent agreement with the FTC would seem tantamount to inviting a lawsuit.

The FTC has been the target of severe criticism in recent years for its ineffectiveness in the area of consumer protection.[43] Largely as a result of this criticism and of an increased national awareness of the need for more effective protection of consumer interests, a number of proposed amendments to the FTCA have been submitted to Congress. While, interestingly, one proposal expressly would have authorized treble damage actions by consumers for violations of section 5,[44] the congressional response was more consistent with a scheme to which administrative flexibility is central.[45] Thus, although the result reached in the instant case is an intuitively attractive one, it is inconsistent with a deliberate, if somewhat less than wholly effective, legislative design for the protection of consumers.

THOMAS J. HARTLAND, JR.

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42. *See* note 3 *supra*.

43. *See* E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); ABA COMM. ON THE FEDERAL TRADE COMMISSION REPORT (1969).

44. S. 1823, 92d Cong., 1st Sess. (1971). The amendment was introduced by Sen. Hart.

45. *See* note 21 *supra* and accompanying text.

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