THE FEDERAL TRADE COMMISSION TODAY: THE NEW IMPROVED IMPROVEMENTS ACT

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I. Background to the Federal Trade Commission

The Federal Trade Commission is a federal agency created to oversee the protection of both consumers and businesses. The F.T.C. administers a broad range of legislative programs in an attempt to effectuate its goals. Among the statutes administered or enforced by the F.T.C. are the Clayton Act,[1] as amended by the Robinson-Patman Price Discrimination Act,[2] which attempts to protect general business competition through control of unfair restraints of trade and monopolies; such narrowly applied acts as the Flammable Fabrics Act,[3] the Wool Products Labeling Act,[4] the Lanham Trademark Act of 1946,[5] and the Truth-in-Lending Act;[6] as well as the Federal Trade Commission Act,[7] which establishes a comprehensive statutory scheme aimed at protecting consumers and competitors from unfair methods of competition and unfair or deceptive acts or practices.

The methods by which the F.T.C. has sought to enforce these various programs have depended upon the specific statute in question. Several of the F.T.C.'s customary methods of enforcement have operated through its authority to enter into informal settlements,[8] give advisory opinions,[9] or issue guides,[10] rules,[11] or cease and desist

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1. 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1970).
2. 15 U.S.C. §§ 13-13b, 21a (1970).
3. 15 U.S.C. §§ 1191-1204 (1970).
4. 15 U.S.C. §§ 68-68j (1970).
5. 15 U.S.C. §§ 1051-72, 1091-96, 1111-21, 1123-27 (1970).
6. 15 U.S.C. §§ 1601-13, 1631-41, 1661-65 (1970).
7. 15 U.S.C. §§ 41-46, 47-58 (1970), *as amended* §§ 45-58 (Supp. V, 1975).
8. 16 C.F.R. §§ 2.31-.35 (1976).
9. 16 C.F.R. §§ 1.1-.4 (1976).
10. 16 C.F.R. §§ 1.5-.6 (1976).
11. 16 C.F.R. §§ 1.11-.12 (1976).

orders.[12] The last three are similar procedures that all label some act unfair or deceptive or establish a standard of conduct requiring compliance. The effect of each is quite different, however. Guides are drafted on an industry-wide basis, but do not have the force of law.[13] Cease and desist orders and rules, on the other hand, do have the force and effect of law.[14] Cease and desist orders are aimed at the conduct of a particular party, ordering them henceforth to refrain from committing the proscribed act or practice. They have customarily been applicable only to the party specifically named in the order.[15] A trade regulation rule has the same purpose of proscribing unfair or deceptive acts, but rules are generally broader in their coverage than orders in terms of the number of parties affected. A rule may be either generally applicable or limited to particular areas, products, or industries. If an order or rule is violated, a separate procedure is then required to enable the agency to seek penalties for the violation, providing the statute involved allows for the recovery of penalties.

This note will focus on the F.T.C.'s enforcement of the Federal Trade Commission Act and specifically the Act's provisions dealing with unfair or deceptive acts or practices. Since the creation of the F.T.C. in 1914, Congress has made only two major revisions of the Federal Trade Commission Act. The first was made in 1938 under the Wheeler-Lea Act,[16] which amended the Federal Trade Commission Act to include within the F.T.C.'s jurisdiction unfair or deceptive acts or practices and clearly charged the commission with protecting consumers as well as competitors. The second major revision did not occur until 1974, when the 93rd Congress, not previously distinguished by its concern for the consumer, enacted the Magnuson-Moss Warranty —Federal Trade Commission Improvements Act,[17] a powerful, almost radical addition to existing F.T.C. legislation. On January 4, 1975, the Improvements Act became effective. This new legislation expressly granted broad substantive rulemaking authority to the F.T.C.,[18] pro-

12. 15 U.S.C. § 45(b) (Supp. V, 1975).

13. *See* F.T.C. v. Mary Carter Paint Co., 382 U.S. 46, 47-48 (1965).

14. 15 U.S.C. § 45(b) (Supp. V, 1975).

15. *But see* 15 U.S.C. § 45(m)(1)(B) (Supp. V, 1975). This section is unique in that a cease and desist order may be applied against any person, not just the one named in the order, providing the requirements of § 45(m)(1)(B)(1) and (2) are satisfied. For further discussion, see text accompanying notes 41-44 *infra*.

16. Act of March 21, 1938, Pub. L. No. 75-447, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. § 45 (1970).

17. 15 U.S.C. §§ 45-58 (Supp. V, 1975), *amending* 15 U.S.C. §§ 45-58 (1970).

18. 15 U.S.C. § 57a (Supp. V, 1975).

vided severe penalties for violations of these rules[19] and for violations of cease and desist orders issued by the commission,[20] and for the first time, allowed the F.T.C. to seek consumer redress.[21]

The first part of this note will examine the language of the Improvements Act, highlighting its more important provisions. The second part will analyze these provisions in light of the constitutional limitations on administrative procedure, particularly procedural due process.

II. Highlights of the Improvements Act of 1975

While the powers granted in the Improvements Act are not completely new, the act provides the F.T.C. with better procedural ammunition and meaningful penalty provisions to enforce section 5(a) of the act. Section 5(a)(1) is the heart of the Federal Trade Commission Act and declares that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" are unlawful.

A. Jurisdiction

The Improvements Act expands the jurisdiction of the F.T.C. from those businesses which are "in commerce" to those "affecting commerce."[22] Even a casual knowledge of the extent to which the commerce clause[23] has been expanded into areas that affect commerce readily discloses that courts have found nearly any conceivable business to have some effect on interstate commerce.[24] The practical effect of this is that the F.T.C.'s jurisdiction will be limited only by logistics.

B. Rulemaking

Probably one of the most important provisions of the 1975 act is

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19. 15 U.S.C. § 45(m)(1)(A) (Supp. V, 1975).

20. 15 U.S.C. § 45(m)(1)(B) (Supp. V, 1975).

21. 15 U.S.C. § 57b (Supp. V, 1975). See text accompanying notes 45-50 *infra*.

22. 15 U.S.C. § 45(a)(1) (Supp. V, 1975). This change is significant because two recent Supreme Court decisions based their holdings on the distinction between acts "in commerce" and acts "in or affecting" commerce. *See* United States v. American Building Maintenance Indus., 422 U.S. 271 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

23. U.S. CONST. art. I, § 8.

24. *See* Daniel v. Paul, 395 U.S. 298 (1969); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

section 17A, concerning the rulemaking powers of the F.T.C. Although rulemaking is not new to the F.T.C., its previous use was markedly different from its present application. Typically, agency rules of the 1960's dealt with minor procedural issues or trade regulation of very narrow scope and minimal importance.[25] In the 1970's the F.T.C.'s rulemaking shifted to more significant areas of industry. Nevertheless, it was not until the court of appeals decision in *National Petroleum Refiners Association v. F.T.C.*[26] that the F.T.C.'s power to promulgate rules of substance rather than merely rules of procedure was firmly established.[27]

Section 17A(a) establishes the F.T.C.'s power to make substantive rules and clearly broadens the scope of such rules, permitting not only "rules which define with specificity acts or practices which are unfair or deceptive" but also rules "for the purpose of preventing such acts or practices."[28] While the 1975 act did not create rulemaking power, the codification of this power carries tremendous significance.

25. *E.g.*, 16 C.F.R. § 404 (1976).

26. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

27. *National Petroleum* involved the precise issue of whether the Federal Trade Commission Act empowered the commission to issue substantive rules defining illegal conduct. The case arose after the F.T.C. issued a rule declaring that "failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice." 482 F.2d at 674. 16 C.F.R. § 1.12(c) (1973). National Petroleum brought suit against the F.T.C. claiming that the rule was invalid because it was beyond the F.T.C.'s statutory authority, was an unconstitutional usurpation of congressional power, and was arbitrary and capricious. The district court decided the case in favor of National Petroleum solely on the ground that the F.T.C. did not have the statutory authority to issue such rules. The F.T.C. appealed and the District of Columbia Circuit Court of Appeals reversed and remanded, holding that the congressional language and background of the statute clearly empowered the F.T.C. to issue substantive rules. It based this decision primarily on the plain language of section 6(g) of the Federal Trade Commission Act, which states that the commission may from time to time "make rules and regulations for the purpose of carrying out the provisions of [the act]." The circuit court concluded that substantive rulemaking was not inconsistent with other provisions of the act and that similar provisions in the authorizing statutes of other administrative agencies have been judicially determined to encompass substantive rulemaking.

28. The relevant parts of section 17A state: "(1) The Commission may prescribe—(A) interpretive rules and general statements of policy with respect to unfair and deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act), and (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices. (2) The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act). The preceding sentence

The rulemaking section sets forth detailed procedures through which the rulemaking power must be exercised in order to comply with procedural due process requirements of notice and hearing.[29] Notice of the proposed rule must be published in the Federal Register in accordance with the Administrative Procedure Act.[30] In addition, the basic procedural requirements for rulemaking under section 17A(b) provide that the commission shall 1) publish notice of the proposed rule stating the reason for it; 2) allow an opportunity for written comment; 3) provide an opportunity for an informal hearing; and 4) promulgate the final rule based on the rulemaking record along with a statement of basis and purpose.[31] The section also sets out the specific procedures required for the informal hearings, including provisions regarding such matters as cross-examination and rebuttal.[32] Section 17A(d)(3) states that once the rule takes effect, a violation thereof becomes an unfair or deceptive act or practice within the meaning of section 5(a)(1).[33]

C. Judicial Review of Rules

Section 17A also provides the manner and scope of judicial review of the rulemaking process. Under its provisions any interested person, including a consumer or consumer organization, may, within sixty days after a rule is promulgated, file a petition in a United States court of appeals for judicial review.[34] The court has the option of remanding the action to the commission for the submission of further evidence[35]

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shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce." As can be seen, the section divides rulemaking into two areas: rules with respect to unfair or deceptive acts or practices, and those with respect to unfair methods of competition. The Improvements Act expressly excludes the latter from consideration, leaving unaffected any F.T.C. rulemaking powers in the field of unfair competition. 15 U.S.C. § 57a(a)(2) (Supp. V, 1975). The field of unfair competition is beyond the scope of this note. The major piece of legislation concerning the F.T.C.'s regulation of unfair competition is the Clayton Act, 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1970). Rulemaking under this act is governed by the Administrative Procedure Act, 5 U.S.C. § 553 (1970).

29. See text accompanying notes 31 and 32 *infra*.

30. 5 U.S.C. § 553 (1970). 15 U.S.C. § 57a(b) (Supp. V, 1975) requires that when a rule is prescribed under this section, "the Commission shall proceed in accordance with section 553 of Title 5 . . . ," the section governing rulemaking under the Administrative Procedure Act.

31. 15 U.S.C. § 57a(b) (Supp. V, 1975).

32. 15 U.S.C. § 57a(c) (Supp. V, 1975).

33. 15 U.S.C. § 57a(d)(3) (Supp. V, 1975).

34. 15 U.S.C. § 57a (Supp. V, 1975).

35. *Id.*

or invoking its jurisdiction to review the rule in accordance with section 706 of the Administrative Procedure Act.[36]

Under the latter section, the court of appeals may reverse a decision of the commission when it finds that the administrative determination was:

> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
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> (b) contrary to constitutional right, power, privilege, or immunity;
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> (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
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> (d) without observance of procedure required by law.[37]

In addition to these specific grounds, the court may set aside the rule if it finds that the action is not supported by substantial evidence in the rulemaking record as a whole, or that the commission has precluded discovery of material facts necessary for a fair determination under a subsection (c) procedure.[38] The section on judicial review concludes with a statement vesting the exclusive power of review in the United States courts of appeals.[39]

D. Civil Penalties

One significant section of the Improvements Act is section 5(m), providing for civil penalties in the event of violation of the prescribed rules or a commission cease and desist order. One of the major deficiencies of the F.T.C.'s enforcement of the act before these amendments lay in the F.T.C.'s inability to curtail acts or practices that it had determined to be deceptive.[40] Under the Improvements Act, the

36. 5 U.S.C. § 706 (1970).

37. *Id.*

38. 15 U.S.C. § 57a(c) (Supp. V, 1975). This subsection prescribes the procedures that must be strictly followed whenever the commission conducts informal hearings.

39. 15 U.S.C. § 57a(e) (Supp. V, 1975).

40. One famous example of this was the protracted F.T.C. battle against Carter Products and its "little liver pills." In Carter Products, Inc. v. F.T.C., 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959), Carter Products was charged with violating section 5 of the Federal Trade Commission Act for allegedly engaging in unfair and deceptive acts or practices regarding its advertising claims for "Carter's Little Liver Pills." The original complaint was filed in 1943. Numerous hearings were conducted before the F.T.C. issued a cease and desist order against Carter Products. The case was eventually appealed to the United States Supreme Court, which remanded the case for further hearings. In 1956, at the conclusion of approximately 149 hearings, the F.T.C. issued a second cease and desist order against Carter Products. Carter Products again appealed and in 1959, sixteen years after the initial complaint, the Ninth Circuit denied the petition to set aside the order.

commission may commence a civil action on its own behalf to recover a civil penalty not to exceed $10,000 for each violation of a rule, providing that the defendant acts with actual or implied knowledge that such act is unfair or deceptive and is prohibited by such rule.[41]

The Improvements Act also states that if a cease and desist order becomes final respecting an act or practice that the commission has found to be unfair or deceptive, the commission may commence a civil action to recover a civil penalty of $10,000 per violation from *anyone* who engages in such act or practice, provided that such person is chargeable with actual knowledge that such act or practice is unfair or deceptive and is unlawful under section 5(a)(1) of the Federal Trade Commission Act.[42] The Improvements Act further specifies that each additional day of failure to comply with the rule or with section 5(a)(1) shall be treated as a separate violation, and that in fixing the penalty, the court should take into consideration such things as the degree of culpability, history of similar misconduct, ability to pay, the effect on the ability to remain in business, and such other matters as may be just.[43]

An important section of the penalty provisions provides that if the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the particular defendant in the civil penalty action, then "the issues of fact in such action against such defendant shall be tried de novo."[44] This allowance of a trial de novo is significant because section 5(c) states that F.T.C. findings in a cease and desist order shall be conclusive. The trial de novo provision is designed to protect potential defendants. Some issues, such as whether a particular act or practice falls within the proscribed conduct of the cease and desist order, may already be determined in a civil penalty action because of the conclusiveness provision. Each defendant's particular fact situation shall nevertheless be considered separately and without regard to factual determinations against prior defendants. Whether the defendant in fact committed the alleged act or practice and whether the requisite standard of knowledge was present will merit separate consideration.

The penalty provisions of the Improvements Act are both the most controversial[45] and the most important concerning the real power of the

41. 15 U.S.C. § 45(m)(1)(A) (Supp. V, 1975).
42. 15 U.S.C. § 45(m)(1)(B) (Supp. V, 1975).
43. 15 U.S.C. § 45(m)(1)(C) (Supp. V, 1975).
44. 15 U.S.C. § 45(m)(2) (Supp. V, 1975).
45. See text accompanying notes 121-37 *infra*.

F.T.C. Without meaningful penalties there is little to induce compliance with the regulations. The policing of deceptive acts and practices has been no exception.

E. Consumer Redress

In addition to the action for civil penalties against violators, the Improvements Act provides for an action on behalf of consumers by the F.T.C.[46] Specifically, the Improvements Act provides that the commission may commence a civil action for consumer redress against any person, partnership, or corporation in a United States district court or state court of competent jurisdiction if that party violates any rule under the act.[47] Similarly, if a party engages in any unfair or deceptive act or practice with respect to which the commission has issued a final cease and desist order against that particular party, and the commission "satisfies the 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 commission may bring a suit for redress.[48]

The court is specifically given jurisdiction to grant redress in the form of rescission or reformation of a contract, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or unfair or deceptive practice. The section expressly prohibits exemplary or punitive damages.[49]

The Improvements Act also sets forth rules concerning the conclusiveness of the commission findings regarding violations of cease and desist orders,[50] and follows with a provision regarding the notice that is to be given to the injured parties.[51]

F. Summary of Amendments

The Improvements Act expands the jurisdiction of the F.T.C. to acts affecting commerce as well as those in commerce, provides express

46. 15 U.S.C. § 57b (Supp. V, 1975).

47. 15 U.S.C. § 57b(a)(1) (Supp. V, 1975).

48. This is to be contrasted with the civil penalty provisions of 15 U.S.C. § 45(m)(1)(A) (Supp. V, 1975), where cease and desist orders can be used against any person. Section 57b(a)(2) requires the defendant to be the party named in the order.

49. 15 U.S.C. § 57b(b) (Supp. V, 1975).

50. 15 U.S.C. § 57b(c)(1) (Supp. V, 1975).

51. 15 U.S.C. § 57b(c)(2) (Supp. V, 1975). This section states that notice should be given in a manner that is reasonably calculated to apprise the injured parties of the pending action, and that such notice may be given by publication in the discretion of the court.

substantive rulemaking powers to the commission, and provides procedural guidelines for establishing those rules. Additionally, the 1975 amendments provide meaningful civil penalties for knowing violations of promulgated rules or final cease and desist orders—perhaps the most significant new addition—greatly facilitating enforcement of the Federal Trade Commission Act. Another major benefit is the relief to consumers provided by the consumer redress provision.

Although express rulemaking powers are not the only notable provisions of the act, this note places emphasis on rulemaking because of the uniqueness of those provisions in relation to the rest of the act. Rulemaking is presently an important power of the commission because it has survived a court testing.[52] Additionally, rulemaking is important because rules should be much more widely applicable than cease and desist orders, which single out individual defendants, and because the rulemaking procedures, as set out in section 17A, make rulemaking a very inviting procedure from the standpoint of the F.T.C. Rulemaking will quite likely comprise the bulk of future F.T.C. activity.[53]

III. Constitutional Implications of the Improvements Act

The legislative history of the Federal Trade Commission Improvements Act reveals an intense concern for the establishment of adequate

52. See note 27 *supra.*

53. The rulemaking procedures in 15 U.S.C. § 57a (Supp. V, 1975) appear to be superior to cease and desist order proceedings in almost every context in which they might be utilized. They clearly broaden the scope of trade rules, permitting not only "rules which define with specificity acts or practices which are unfair or deceptive," but also rules "for the purpose of preventing such acts or practices." 15 U.S.C. § 57a(a)(1)(B) (Supp. V, 1975). This should allow for more comprehensive and widely applicable enforcement of the Federal Trade Commission Act than is available through cease and desist orders. Careful analysis of the rulemaking procedures in section 57a and the cease and desist order provisions in section 45(b) and (c) reveals that the F.T.C. has much more control over the informal hearing procedures of rulemaking. For example, more stringent limitations are placed on the rights of cross-examination and rebuttal in rulemaking hearings, 15 U.S.C. § 57a(c) (Supp. V, 1975), while standards regarding admissible evidence are more relaxed. 15 U.S.C. § 57a(e) (Supp. V, 1975). Another advantage is the knowledge requirement that accompanies rulemaking in suits for civil penalties. 15 U.S.C. § 45(m)(1)(A) (Supp. V, 1975). The standard of knowledge required is less severe than the knowledge requirements necessary for civil penalty suits arising from cease and desist orders. 15 U.S.C. § 45(m)(1)(B) (Supp. V, 1975). Similar advantages exist under section 57b, the consumer redress provision. The standards for allowing redress are easier for rule violations and seem to have less ambiguous language. *Compare* 15 U.S.C. § 57b(a)(1) (Supp. V, 1975) *with* 15 U.S.C. § 57b(a)(2) (Supp. V, 1975). On the whole, the rulemaking provisions seem to avoid many of the procedural complications and potential constitutional problems found in other sections of the Improvements Act.

procedural safeguards for those subject to the regulatory powers of the F.T.C. The provisions regarding rulemaking,[54] judicial review,[55] and notice[56] were of primary concern. With the exception of rulemaking, the constitutionality of the new provisions has yet to be tested. This section will identify some of the areas that may generate due process problems, and analyze these problems in light of the legislative history and present case law.

A. Due Process Standards

Although properly within the scope of Congress' delegable powers,[57] the Improvements Act may still be vulnerable to constitutional attack for deprivation of procedural due process. Two doctrines, however, serve as built-in safeguards for persons affected by this act. First, all delegated powers must satisfy the due process provisions of the Constitution. *Morgan v. United States*[58] discusses the issue of procedural due process within administrative agencies and sets forth a mandatory standard. In that case the Court declared:

> [I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.
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> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes

54. H.R. REP. No. 1606, 93d Cong., 2d Sess. 32 (1974). This report carefully sets out the conference substitute that adds the new rulemaking section to the act and lists the steps necessary for complete compliance with the rulemaking provision.

55. H.R. REP. No. 1107, 93d Cong., 2d Sess. 45, 46 (1974). The report discusses the necessity of judicial review provisions within the act to provide greater procedural safeguards in view of the potentially pervasive effect of rules.

56. S. REP. No. 151, 93d Cong., 1st Sess. 28 (1973).

57. In Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935), the Supreme Court discussed the issue of congressional delegation and stated: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."

58. 304 U.S. 1 (1937).

> and to be heard upon its proposals before it issues its final command.[59]

This fundamental requirement of fairness has been applied to all administrative agency proceedings, whether in the nature of rulemaking or adjudication.[60]

Second, once an agency has established procedures for the protection of constitutional rights, the agency may not deviate from them even if the procedures go beyond what is constitutionally required.[61] If a procedural error does occur and the defendant is prejudiced as a result of that error, there has been a denial of due process and the agency proceeding will not be allowed to stand.[62]

B. Cease and Desist Orders

There are several different methods by which the F.T.C. may seek to enforce section 5(a), which makes unfair or deceptive acts or practices unlawful. The first procedure that governs the issuance of cease and desist orders against persons believed to be in violation of the act is set forth in section 5(b) of the act. This subsection calls for the giving of notice to any person believed to be violating section 5(a) and requires a hearing in which the party is given an opportunity to show cause why a cease and desist order should not be entered against him. The F.T.C. is required to state its findings as to the facts, and if the order is issued, the party has sixty days after the service of the order to seek review in the appropriate United States court of appeals under section 5(c).

The issuance of cease and desist orders is a long established practice of the F.T.C. The only constitutional question that might be generated by this section is the possible abridgment of the right to a jury trial provided by the Seventh Amendment[63] and Federal Rule of

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59. *Id.* at 14-15, 18-19.

60. Hoffman-LaRoche, Inc. v. Kleindienst, 478 F.2d 1, 12 (3d Cir. 1973). *See* Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968).

61. In Pacific Molasses v. F.T.C., 356 F.2d 386, 389 (5th Cir. 1966), the court of appeals stated: "When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed [citation omitted]. This is so even when the defined procedures are . . . generous beyond the requirements that bind such agency [citation omitted]."

62. *Id.* at 387.

63. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. This right to a jury trial in civil actions has never been applied to the states through the Fourteenth Amendment, and is viewed

Civil Procedure 38.[64] Under subsection 5(b), the commission is made the finder of fact at both the hearing level and at the review level in the court of appeals, thereby precluding the determination of facts by a jury. Settled case law establishes that an administrative agency hearing does not abridge the Seventh Amendment and Rule 38 rights to a jury trial, but constitutes an exception to the right.[65]

While the issue of jury versus administrative fact finding does not normally merit much attention, it is significant here because section 5(c) requires that the commission's findings be conclusive upon judicial review. This conclusive factual determination at the agency level is of great importance in view of sections 5(m)(1)(B) and 17B(a)(2), which allow the imposition of potentially severe sanctions for the violation of a cease and desist order based on such findings.

The right to a jury trial became firmly established by the adoption of the Seventh Amendment in 1791. Since that time, however, the scope of the Seventh Amendment right in suits at common law has been expanded beyond the common law forms of action recognized at the time of its adoption,[66] and courts today routinely apply the Seventh Amendment to causes of action based on statutes.[67] The question arises whether proceedings stemming from causes of action based upon section 5(b) of the Improvements Act come under the definition of

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as a somewhat less fundamental part of due process than other provisions in the Bill of Rights.

64. "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." FED. R. CIV. P. 38.

65. See text accompanying notes 73-76 *infra*.

66. Mr. Justice Story in Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830), founded this principle: "The phrase 'common law,' found in this clause, is used in contra-distinction to equity, and admiralty, and maritime jurisprudence. . . . By *common law*, [the framers of the Amendment] meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contra-distinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . ." *Id.* at 446-47. Many years later in Ross v. Bernhard, 396 U.S. 531 (1970), the Court blurred this distinction between legal and equitable claims regarding the right to a jury trial and ultimately held that "the Seventh Amendment question depends upon the nature of the issue to be tried rather than the character of the overall action." *Id.* at 537-38.

67. *See, e.g.*, Curtis v. Loether, 415 U.S. 189 (1974), where the Court dealt with the issue of whether the Seventh Amendment right to a jury trial applied to a case brought under a federal statute. The Court held that the defendant was entitled to a jury trial under this cause of action because "legal" rights and remedies were at issue, and noted that "although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes." *Id.* at 193 (citations omitted).

suits at common law under modern application of the Seventh Amendment. The Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*[68] established a test for determining which statutory causes of action come under the Seventh Amendment. In that case it was found that a jury would substantially interfere with the NLRB's role in the statutory scheme.[69] The Court made the important distinction between actions that invoke an administrative proceeding and those that do not, and held that when there is a functional justification for not granting a jury trial, it will not be required.[70] *Jones & Laughlin Steel* has been interpreted to stand for the proposition that "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication."[71] A proceeding under section 5(b) is an action that invokes an administrative procedure under the *Jones & Laughlin Steel* standard. The proceeding is conducted entirely within the agency and does not invoke the original jurisdiction of the federal court. Furthermore, the agency proceedings must be completed before the case can reach the court of appeals on review. Numerous policy considerations militate against intervention by a jury. These include the need for consistency in the administration of agency procedure and the need for uniformity regarding conduct that has been defined as unfair or deceptive, as well as increasing recognition of the F.T.C.'s expertise.[72] Both the legislative history of the Improvements Act and case law show that commission fact finding is required to satisfy the comprehensive scheme of administrative adjudication under this act. It can be argued that allowing jury trials would undermine the act's effectiveness because of the need for uniform national policy for the fair administration of consumer protection law and for the guidance of the business community. Some consistency is required to allow the development of reasonable expectations regarding the legal standards set by the commission.[73] This is extremely important when the expectations often lead parties to consent to cease and desist orders.[74] Jury intervention could substantially interfere with this important procedure because of

68. 301 U.S. 1 (1937).

69. *Id.* at 48-49.

70. *Id. See* Rogers v. Loether, 467 F.2d 1110, 1116 nn.16 & 18 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).

71. Curtis v. Loether, 415 U.S. 189, 194 (1974).

72. See note 76 and text accompanying notes 73-76 *infra*.

73. *See* H.R. REP. No. 1107, 93d Cong., 2d Sess. 63 (1974).

74. *See* United States v. St. Regis Paper Co., 355 F.2d 688, 689 n.13 (2d Cir. 1966).

the very real possibility that the jury might disregard the commission's interpretations of what constitutes a violation of section 5(a). The consent procedure is a significant part of the enforcement scheme of the Federal Trade Commission Act and could obviously be disrupted by a jury determination of the facts in an administrative proceeding.

Commentators have suggested that there is congressional intent to defer to agency expertise rather than jury determination of facts. As Judge Oakes pointed out in his dissenting opinion in *United States v. J.B. Williams Co.*:[75] "The case law on this 'expertise' is unequivocal and so voluminous that it is necessary only to illuminate the point."[76] The judicial interpretation of congressional intent is quite clear in promoting the view that the commission, because of its expertise and effectiveness, should be the fact finder in administrative proceedings such as cease and desist order hearings under section 5(b).

On appeal, a cease and desist order issued under section 5(b) is reviewed by the United States court of appeals under section 5(c), and the F.T.C.'s statement of facts is conclusive if supported by "evidence." This standard for review has been judicially interpreted to be synonymous with the "substantial evidence" standard for judicial review set out in section 706 of the Administrative Procedure Act.[77] According to *Carter Products, Inc. v. F.T.C.*,[78] F.T.C. decisions must "be supported

75. 498 F.2d 414 (2d Cir. 1974).

76. *Id.* at 445 (Oakes, J., dissenting). Judge Oakes quoted from the Supreme Court's decision in F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965): "This statutory scheme necessarily gives the Commission an influential role in interpreting section 5 [15 U.S.C. § 45 (Supp. V, 1975)] and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are the courts to determine whether a practice is 'deceptive' within the meaning of the Act." 498 F.2d 414, 445-46 (2d Cir. 1974). Likewise, in Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973), the court stated: "The enforcement scheme embodied in the Federal Trade Commission Act, stresses the Commission's role in providing certainty and specificity to the board [sic] proscriptions of the Act. The FTC, as a quasi-judicial tribunal, has the ability to provide for the centralized and orderly development of precedent applying the regulatory statute to a diversity of fact situations. . . . The courts, on the other hand, have at their disposal only relatively rudimentary devices to promote settlements. More important, they lack the expertise and knowledge of business practices needed to evaluate whether any settlement by the parties is in furtherance of the broad public interest that is the foundation of the Act." *Id.* at 998.

77. Section 701 of the Administrative Procedure Act provides that section 706 shall apply to administrative agencies "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Neither of these two exceptions is relevant to the review of cease and desist orders. 5 U.S.C. § 701 (1970).

78. 268 F.2d 461 (9th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959).

by substantial evidence 'on the record considered as a whole.' If, after canvassing and fairly assessing the entire record, a reviewing court cannot conscientiously find that the evidence supporting an agency decision is substantial, 'good conscience' dictates that the agency decision be reversed."[79] Because of this interpretation of "evidence" as meaning the same thing as substantial evidence, the omission of the word "substantial" from section 5(c) does not seem to be of any consequence.

The cease and desist order provisions seem to present no other significant constitutional problems. Personal service of process is required by section 5(f) and the hearing itself, conducted under section 5(b), has long been an accepted procedure of the F.T.C. and comes within the administrative procedure exception to the Seventh Amendment right to jury trial. Judicial review may be had by right in the court of appeals and through certiorari to the Supreme Court. These procedures are designed to protect fully the constitutional rights of parties to an action, and the F.T.C. may not deviate from them.[80]

C. Rulemaking

The Improvements Act provides, for the first time in statutory form, for the promulgation of rules that "define with specificity acts or practices which are unfair or deceptive" as well as rules for the "purpose of preventing such acts or practices."[81] Specific guidelines were delineated[82] to insure that the "fundamental requirements of fairness" mandated in all administrative proceedings[83] would be met. As stated in *Morgan v. United States*,[84] this includes the right to a fair and open hearing with reasonable opportunity to be advised of agency proposals and to present evidence regarding them.

While the rulemaking section does provide an opportunity for an informal hearing[85] and the presentation of evidence[86] after a rule is proposed, strict limitations are placed on the extent to which an interested party may participate in a hearing.[87] Section 17A also eases the standard of evidence necessary to uphold a rule upon judicial review.

79. *Id.* at 493.
80. See text accompanying notes 57-62 *supra.*
81. 15 U.S.C. § 57a(a)(1)(B) (Supp. V, 1975).
82. 15 U.S.C. § 57a(b) (Supp. V, 1975).
83. *See* Hoffman-LaRoche, Inc. v. Kleindienst, 478 F.2d 1 (3d Cir. 1973).
84. 304 U.S. 1, 18-19 (1937).
85. 15 U.S.C. § 57a(c) (Supp. V, 1975).
86. *Id.*
87. 15 U.S.C. § 57a(c)(1) and (2) (Supp. V, 1975).

Subsection 17A(e) defines evidence as "any matter in the rulemaking record." Subsections 17A(c) and (e) help insulate rules from challenge and invalidation.[88] It is therefore questionable whether these provisions comply with the spirit of due process expressed in *Morgan*. They do, however, appear to satisfy the requirements of the Administrative Procedure Act.[89]

An analysis of section 17A's guidelines reveals no notice problem. In addition to publishing notice of proposed rules in the Federal Register, the practice of the commission is to issue additional news releases regarding proposed rules and to send a weekly capsule of F.T.C. news to any interested party who requests to be on the mailing list. As to the determination of facts regarding the promulgation of a rule, section 17A(c) requires informal hearings, subsection (e) provides for judicial review of any rule, and subsection (h) allows for compensation for reasonable attorney's fees and expert witness fees and other costs of participation to any person who represents an interest that is not otherwise adequately represented and cannot afford to pay the costs for participation in such a proceeding.[90] The substantial evidence rule[91] applies to the commission's findings here. Consequently, the court will set aside findings only if they are not supported by substantial evidence or if there has been a violation of the rulemaking procedure[92] that incorporates relevant sections of the Administrative Procedure Act.[93]

D. Civil Penalties

1. *Violation of a Rule*

A major method by which the F.T.C. enforces compliance with the Federal Trade Commission Act is provided in the Improvements Act under section 5(m)(1)(A). This section allows the F.T.C. to bring a civil action in district court to recover a penalty for the violation of any rule under the act. While the substantive power granted by this section is not new,[94] the procedural power is. As amended, this section provides for the prosecution of a rule violation before issuance of a cease and desist order. Dropping the prerequisite cease and desist

88. See note 53 *supra*.
89. 5 U.S.C. §§ 553, 556(d) (1970).
90. 15 U.S.C. §§ 57a(c), (e) and (h) (Supp. V, 1975).
91. See text accompanying notes 77-79 *supra*.
92. 15 U.S.C. § 57a(e)(3) (Supp. V, 1975). See text accompanying notes 29-33 *supra*.
93. 5 U.S.C. § 701 (1970). *See* 15 U.S.C. § 57a(b) (Supp. V, 1975).
94. See note 27 *supra*.

order eliminates one of the procedural steps required in *National Petroleum*.[95] The question then arises whether this procedural short cut in any way violates due process requirements.

Section 5(m)(1)(A) allows an action only when a person violates the rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." The Improvements Act requires publication of all rules,[96] and the actual practices of the F.T.C. generate even more widespread publication than is procedurally required. Therefore, notice of any new rule is widely disseminated and easily acquired by those concerned in the business community. Obviously, there is no denial of due process if the party has actual notice of the rule and knowledge that the act in question violates such rule. It appears clear that this meets the standards set out in *Morgan v. United States*,[97] and that the party is "fairly advised" of what the F.T.C. has proposed to be an illegal act or practice.

The implied knowledge standard also does not seem to infringe on due process rights. Congress has indicated a general standard for determining whether knowledge is to be fairly implied. "[I]t is intended that the courts hold a defendant responsible where a reasonable and prudent man under the circumstances would have known of the existence of the rule and that the act or practice was in violation of its provisions."[98]

While a violator of a rule in most cases could be charged with "knowledge fairly implied from objective circumstances" based on notice through publication, the party against whom the action was brought will in all cases have the opportunity to "show why he should not have been expected to have knowledge of the Commission rule or that the rule itself is invalid."[99] Given the mandatory notice requirements of the Improvements Act[100] and the efforts of the F.T.C. to publicize the rules as much as possible, due process appears to have been provided.

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95. National Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

96. 15 U.S.C. § 57a(b) (Supp. V, 1975).

97. 304 U.S. 1, 18-19 (1937).

98. H.R. REP. No. 1606, 93d Cong., 2d Sess. 40 (1974). *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). "Just as everyone is charged with knowledge of the U.S. Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. 49 Stat. 502, 44 U.S.C. § 307." *Id.* at 380, 384-85.

99. S. REP. No. 151, 93d Cong., 1st Sess. 27 (1973).

100. 15 U.S.C. § 57a(b) (Supp. V, 1975).

Another area of potential dispute under this procedure is the issue of fact finding and the right to a jury trial. This issue comes up again because, unlike section 5(b) cease and desist order hearings, which are exempt from jury trials, section 5(m)(1)(A) actions are not administrative and are within the original jurisdiction of the federal district court.

Despite the fact that the right to a jury trial appears to be well settled,[101] the statutory scheme of the Federal Trade Commission Act suggests that there may still be room for dispute. One argument that appears to be valid is that the right to a jury trial would "subvert the entire statutory structure"[102] of the F.T.C. It has been asserted that the major function of the F.T.C. is deciding what is and is not deceptive.[103] It has also been emphasized that the F.T.C.'s civil penalty section is not "an isolated 'civil action' provision but rather is a provision conceived with and embedded in a complex statutory scheme that is the very foundation of an administrative agency's power."[104]

The language of section 17A(a), which authorizes the commission to define with specificity acts or practices that are deceptive, raises some as yet unanswered questions. Such issues arise about whether this provision not only extends to the promulgation of valid rules, but can be used as well to determine under what factual situations the rules have been violated. Similarly, it can be questioned whether the emphasis in many earlier cases regarding the F.T.C.'s expertise on fact finding extends to this provision, and whether the previous dicta regarding the weight that should be given to F.T.C. expertise provides adequate justification in the *Jones & Laughlin Steel*[105] sense, so that a proceeding under section 5(m)(1)(A) is not really a suit in the nature of an ordinary civil proceeding. The court in *United States v. St. Regis Paper Co.*[106] stated that "the Commission alone knows the scope of its orders."[107] The court there clearly acknowledged the expertise of the F.T.C. in interpreting its own cease and desist orders. It could also

101. See text accompanying notes 109-11 *infra*.

102. United States v. J.B. Williams Co., 498 F.2d 414, 440 (2d Cir. 1974) (Oakes, J., dissenting).

103. *Id.* at 440-41.

104. *Id.* at 451.

105. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See text accompanying notes 68-72 *supra*.

106. 355 F.2d 688 (2d Cir. 1966).

107. *Id.* at 696.

be argued that only the F.T.C. knows the scope of its rules and therefore ought to be allowed to use its expertise to interpret them.[108]

United States v. J.B. Williams Co.[109] dealt directly with the issue of the right to a jury trial in an action brought by the F.T.C. in a district court.[110] The majority opinion in *Williams* determined that the defendant in the civil action was entitled to the Seventh Amendment right to a jury trial under Federal Rule of Civil Procedure 38. *Williams* was decided in 1974, prior to passage of the Improvements Act, but its applicability to F.T.C. federal court proceedings remains clear, since the Improvements Act has not changed the nature of court proceedings except to allow the commission to bring suits on its own behalf, rather than having to go through the Attorney General's office as previously required under the Federal Trade Commission Act.[111]

Since *Williams,* the right to a jury trial in a district court action brought by the F.T.C. has been well established.[112] This right is based upon three grounds discussed in *Williams.* First, proceedings under section 5(m) of the Improvements Act (which are the equivalent of the pre-amendment section 5(*l*) suit in *Williams*) are ordinary ones in the nature of suits at common law; second, there is no functional justification for the denial of a jury trial as in *Jones & Laughlin Steel*; and third, since there has been no prior agency proceeding regarding the recovery penalties, a jury trial cannot be denied.

Three criteria for finding a proceeding to be an ordinary civil suit were stated in *Rogers v. Loether*:[113]

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108. See note 76 *supra.*

109. 498 F.2d 414 (2d Cir. 1974).

110. In *Williams,* the F.T.C. originally filed a complaint against Williams alleging false representations in the advertising of Geritol. A cease and desist order was issued. After several years the F.T.C. ordered a hearing to determine whether Williams' new commercials complied with the order. Concluding that they did not, the commission brought an action in district court to recover civil penalties. The district court judge granted summary judgment for the United States and Williams appealed. The United States court of appeals reversed, finding the defendants were entitled to a jury trial under the Seventh Amendment in the district court proceeding. This holding should be equally applicable to civil penalty actions for violations of rules because it is based upon issues of fact heard in the district court for the first time, rather than upon any distinctions between rules and orders.

111. *Compare* 15 U.S.C. § 45(1) (1970) *with* 15 U.S.C. § 45(m) (Supp. V, 1975).

112. Spokespersons for the F.T.C. have declared that defendants have a right to a jury trial on all disputed issues of fact relating to whether the practices in question violate the act. E. Rubin, *Enforcement of FTC Orders and Rules: A Staff Perspective,* in THE FEDERAL TRADE COMMISSION IN 1975, at 132 (1975).

113. 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974). The action in *Rogers v. Loether* was brought for an alleged violation of the

> First . . . ;[t]he proceeding is judicial in character rather than administrative or "statutory . . . ." Second, the remedy sought . . . is the relief most typical of an action at law. . . . Finally, the nature of the substantive right asserted, although not specifically recognized at common law, is analogous to common law rights.[114]

This quotation is an accurate description of F.T.C. proceedings under section 5(m), as well as the action in *Williams.* In civil penalty suits the proceeding is judicial in character, the relief sought is damages, and the substantive right asserted is analogous to common law rights.[115]

The second argument in *Williams* which supports the right to a jury trial in district court penalty actions is the claim that a jury would not substantially interfere with the role of this particular agency proceeding in the statutory scheme of the Federal Trade Commission Act.[116] A jury trial in civil penalty suits would not deny the commission its major function of defining unfair or deceptive acts or practices, but would only permit the jury to determine disputed issues of fact as to whether there was a violation of a valid order or rule.[117] The majority in *Williams* stated further that the statutory scheme will not be upset because there is no congressional mandate in the Federal Trade Commission Act that requires "deference to the agency's claim that its order has been violated"[118] when the issue of a violation of the order or rule is between the agency and the judiciary.

The third argument for the right to a jury trial under section 5(m)(1)(A) proceedings to recover penalties for a rule violation is that there has been no prior administrative hearing, and the defendant is being heard for the first time in district court to determine whether a statute has been violated. The dissenting opinion in *Williams* distinguished between agency actions that had prior administrative proceedings and those that did not.[119] The dissent asserted that a jury was

Civil Rights Act of 1968. The court held that although the action was statutorily based, it was a judicial proceeding in the nature of an ordinary civil suit and not a statutory proceeding. 467 F.2d at 1117.

114. *Id.* at 1116-17.

115. Additional support for the position that the suit in *Williams* is an ordinary civil suit is found in the Supreme Court's decision in Pernell v. Southall Realty, 416 U.S. 363 (1974), which held that "ordinary civil actions" require a jury trial on demand and that "section 5(*l*) of the FTC Act provides just such a 'civil action.'" *Id.* at 383.

116. 498 F.2d 414, 424 (2d Cir. 1974).

117. *Id.* at 426.

118. *Id.* at 429 [citation omitted].

119. *Id.* at 451 (Oakes, J., dissenting). The action in *Williams* was brought under 15 U.S.C. § 45(*l*) (Supp. V, 1975) and the defendant was subject to a cease and desist order and therefore to a prior administrative proceeding.

inappropriate in the *Williams* case because the defendant had participated in a prior administrative proceeding. This argument clearly does not apply to section 5(m)(1)(A) suits that enjoy the original jurisdiction of the district court and have no prior agency hearings regarding the conduct of the defendant.

In spite of questions regarding the scope of the commission's function in prohibiting unfair and deceptive practices and the weight that should be given the commission's expertise, these issues will probably not create problems in light of the commission's prevailing attitude regarding the right to jury trials.[120]

2. Violation of a Cease and Desist Order

Improvements Act section 5(m)(1)(B) provides an apparently novel procedure for enforcing the prohibition against unfair or deceptive practices. It provides for a civil suit in district court to recover a penalty against *any* person who violates a final cease and desist order, whether that person was named in the order or not. Actual knowledge that the act or practice is unlawful under section 5(a)(1) is required, however. If the cease and desist order was not issued against the defendant in the civil action, subsection 5(c)(2) provides that issues of fact shall be tried de novo. This section, in effect, gives the commission additional power to promulgate substantive rules of general force and effect. Through the issuance of a cease and desist order it is possible for the commission to control the conduct of an entire industry or area if the requisite knowledge is present. This section is valuable to the commission because it increases its effectiveness by eliminating the previously necessary step of issuing cease and desist orders against each particular defendant before a cause of action is created for which the commission can recover a civil penalty.

This section of the Improvements Act is probably the most vulnerable of all to constitutional attack for violation of due process. Several constitutional problems inhere in this provision respecting the right of a party to be heard. The potential problems focus upon the commission's practices regarding intervention, consent orders, and de novo hearings. It is likely that under this section not all parties will be afforded a full opportunity to be heard.

It is possible that the F.T.C. might issue cease and desist orders against small businesses, such as "Mom and Pop" stores, which have limited ability and funds for effectively participating in commission

120. See note 112 *supra*.

hearings, and then, under section 5(m)(1)(B), apply these orders against big businesses—which would probably not be allowed to intervene in the original proceeding wherein the cease and desist order was issued. Although intervention is allowed under section 5(b), it is discretionary with the F.T.C.[121]

The constitutionality of this section must be examined in light of the protections that the concept of due process affords to all persons.[122] The principal guideline is that the party involved in an action under section 5(m)(1)(B) must be afforded the right of adequate notice and an opportunity to be heard. Naturally, when the defendant is the named party in a cease and desist order, these requirements are satisfied by the defendant's participation in the original proceeding resulting in the order.[123] For those not a party to the original order, notice should not be a problem because section 5(m)(1)(B)(2) requires nothing less than actual knowledge that the practice is unlawful. This conclusion is supported by the contrasting language of "actual knowledge or knowledge fairly implied on the basis of objective circumstances"[124] that is required in a suit for the violation of a rule. While cease and desist orders, especially against small businesses, might not receive much publicity, the requirement that a party have actual knowledge that the act is unfair or deceptive and is considered unlawful under section 5(a) would satisfy due process protections relating to notice. The precise language of this section provides an adequate guarantee.[125]

The requirement of a hearing, section 5(m)(2), mandates that "the issues of fact in such action against such defendant shall be tried de novo" in district court. This section provides the defendant with an opportunity to be heard. A trial under section 5(m)(2) would be essentially the same as one under section 5(m)(1)(A),[126] with no pre-

121. 15 U.S.C. § 45(b) (Supp. V, 1975) states: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person."

122. *See* Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944). "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. . . . Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." *Id.* at 246-47.

123. 15 U.S.C. § 45(b) (Supp. V, 1975).

124. 15 U.S.C. § 45(m)(1)(A) (Supp. V, 1975).

125. 15 U.S.C. § 45(m)(1)(B) (Supp. V, 1975).

126. See text accompanying notes 110-18 *supra*.

vious agency proceeding against the defendant. Therefore, the right to a jury trial should be the same.

This right to a trial de novo on issues of fact encompasses only the issue of whether the defendant's acts did or did not violate the provisions of the order, and does not involve the issue of whether the act in the original cease and desist order is in actuality one that is unfair or deceptive. The validity of the original order is not in question in a section 5(m)(1)(B) proceeding.[127] That issue is res judicata and should preclude a defendant from attacking the validity of conclusions of law made in a prior cease and desist order proceeding against other defendants. It could also deny a defendant a full trial in a situation where he may seek to argue that the "prior order proceeding establishe[d] only prima facie illegality of conduct which may not be unlawful in his particular circumstances."[128] This is a potentially serious problem since intervention by interested parties in cease and desist order hearings is merely discretionary.

Although any dispute regarding the unlawfulness of the act or practice should already have been settled in an agency hearing as provided in section 5(b), where the party served with a cease and desist order had the opportunity to show cause why it is not unlawful, in many cases this very issue of validity has not been argued at all. In most instances, before a complaint is issued under section 5(b), "the party involved is given an opportunity to consent to a formal cease and desist order."[129] While the consent order refers only to future practices,[130] proposed regulations of the F.T.C. provide:

> Every agreement shall contain, in addition to an appropriate order, either an admission of the proposed findings of fact and conclusions of law submitted simultaneously by the Commission's staff or an admission of all jurisdictional facts and an express waiver of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law. In addition, every agreement shall contain waivers of rights to seek judicial review or otherwise to challenge or contest the validity of the order.[131]

This procedure allows for the establishment of an act or practice as unlawful without any adjudicated findings of fact or conclusions of law that it is unlawful. Uncertainty remains about whether such a cease and desist order derived by consent may then be applied against other par-

127. J. Rill, *Civil Penalties Under Section 5(m) of The Federal Trade Commission Act*, in THE FEDERAL TRADE COMMISSION IN 1975, at 151 (1975).

128. *Id.*

129. H.R. REP. No. 1107, 93d Cong., 2d Sess. 34 (1974).

130. *Id.*

131. 16 C.F.R. § 2.32 (1976).

ties in a suit for civil penalties or redress. While the F.T.C. has indicated that this practice would not be permitted,[132] the statute is silent on the issue.

The potential constitutional problem could be significant because of the large percentage of defendants who consent during an agency action. F.T.C. statistics show that approximately two-thirds to three-quarters of the complaints issued by the commission result in consent orders.[133] These figures reveal that if the F.T.C. does issue a cease and desist order against smaller businesses the possibility that they will consent to the order is great, especially because of their limited resources to fight. However, large businesses are also encouraged to consent. Though they may have greater resources, large firms very often decline to spend the time and money in view of the adverse publicity that often accompanies an agency proceeding to determine the validity of a cease and desist order. Congressional discussion prior to the enactment of the Improvements Act recognized both this problem and the potential for finding an act or practice unlawful without having a determination of facts regarding the practice.[134]

> The consent order process differs from an adjudication in that the guarantee of a comprehensive consideration of fact publicly adduced, evaluated, and relied upon in fashioning relief may be lacking. For instance if a major corporation with a large, nationwide share of a market were sued for violation of the provisions of a consent order entered against a much smaller regional establishment, it might be argued that the respondent agreed to consent merely to avoid the time, money and effort involved in adjudication, and not because of legal culpability. Under these circumstances it could be effectively argued that the Commission had engaged in no less than rulemaking through the consent order process and, thus, circumvented the required public notice and participation.[135]

While the problem was recognized, neither the Improvements Act nor the legislative history seems to provide a means for preventing it from occurring. Once recognized, the implications of the problem appear to have been ignored. It has even been suggested that consent orders are no different from other commission orders and that *all* final orders are immune from collateral attack.[136] Although section 17B

132. *See* E. Rubin, *Enforcement of FTC Orders and Rules: A Staff Perspective*, in THE FEDERAL TRADE COMMISSION IN 1975, at 135 (1975).

133. H.R. REP. No. 1107, 93d Cong., 2d Sess. 62 (1974); F.T.C. ANN. REP. 31-32 (1964).

134. *See* H.R. REP. No. 1107, 93d Cong., 2d Sess. 62-64 (1974).

135. *Id.* at 63.

136. *Id.* at 62-63.

seems to make a distinction between final orders that have been subject to judicial review and those that have not (including consents to cease and desist orders),[137] no attempt was made in section 5(m)(1)(B)(1) to distinguish final orders in any way or to determine whether they have become final after a full hearing or by consent. This lack of distinction lends support to the view that all final orders might receive the same treatment and have the same force and effect under section 5(m)(1)(B). It seems quite likely that the constitutionality of this provision will be challenged if final consent orders are used in such a manner.

Section 5(m)(1)(B) will have serious impact on the commission. It will almost certainly encourage intervention by interested parties and discourage consents to orders issued under section 5(b).[138] Given the long duration of F.T.C. proceedings and the consequently small number of cases which the commission has the ability to litigate,[139] this procedure could easily create a workload beyond the commission's capacity.

E. Consumer Redress

Another method the F.T.C. may use to enforce section 5(a) is found in the new and powerful consumer redress provision, section 17B of the Improvements Act. This section gives the F.T.C. great flexibility. It allows the commission to bring a civil suit for damages in federal district court or any competent state court against any party who either violates any rule issued under this act or violates the terms of a final cease and desist order that was issued against him under section 5(b) of the act. Section 17B(b) provides for such relief as the court finds necessary to redress injuries to consumers resulting from the violation. This section does not, however, authorize exemplary or punitive damages.

The consumer redress section is a unique provision in that it is the only section of the act that provides an immediate benefit to the consumer for violations of the Federal Trade Commission Act. How-

137. See text accompanying notes 140-42 *infra.*

138. *See* H.R. REP. No. 1107, 93d Cong., 2d Sess. 62 (1974).

139. *See* F.T.C. ANN. REP. 39-61 (1966). "In fiscal 1966, the General Counsel, through the Division of Appeals, handled 112 cases. Litigation was completed in 46 of these, of which 20 were restraint of trade matters; 12 involved deceptive business practices; 1 concerned the Commission's subpoena powers; and 13 were extraordinary matters such as suits against the Commission for declaratory judgment or injunction." *Id.* at 40.

ever, the application of this provision may run into difficulties resulting from the use of ambiguous language. Subsection 17B(a)(2) refers to acts that a "reasonable man would have known under the circumstances [were] dishonest or fraudulent . . . ." This is the only provision in the Improvements Act in which the phrase "dishonest or fraudulent" appears, and the exact meaning of these terms is unknown at this time. It seems quite likely that this language will raise the F.T.C.'s burden of proof somewhat above the unfair or deceptive behavior standard used throughout the rest of the act. It is also unclear how much weight should be given the reasonableness phrase in determining whether the right to a jury should be required in this context.

An action for consumer redress may arise in two different situations. One is through section 17B(a)(1), after the defendant violates a rule. Due process is afforded the defendant here through a civil suit in either a district or competent state court.[140]

A section 17B suit may also arise under section 17B(a)(2) when the defendant violates the terms of a final cease and desist order issued specifically against him. Relief may be granted if "the Commission satisfies the 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. . . ."[141] The reasonable man standard incorporated here seems to indicate that the defendant would be entitled to a jury to apply this reasonableness test. However, subsection (c)(1) requires that if an order becomes final "then the findings of the Commission as to the material facts in the proceeding under 45(b) [5(b)] . . . shall be conclusive unless . . . the order became final by reason of section 45(g)(1) [5(g)(1)] . . . ." It can be argued that orders which become final under section 5(g)(1)[142] include consent orders. The act does not specifically mention any method by which consent orders become final. Since they become final without a petition for review having been filed,[143] it seems logical that section 5(g)(1) should apply here.

The last sentence of section 17B(c)(1) provides, however, that commission findings will be conclusive if supported by evidence, if the

140. The applicability of the right to a jury trial has been discussed previously. See text accompanying notes 109-12 *supra*.

141. 15 U.S.C. § 57b(a)(2) (Supp. V, 1975).

142. 15 U.S.C. § 45(g)(1) (1970) reads: "Upon expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time . . ." a cease and desist order shall become final.

143. 16 C.F.R. § 2.32 (1976). See text accompanying note 131 *supra*.

order becomes final as a result of section 5(g)(1). Arguably, this provision applies to consent orders and therefore circumvents some of the due process problems that arose under section 5(m)(1)(B) in relation to consent orders.[144] The phrase "conclusive if supported by evidence" brings into play the substantial evidence rule, which is the proper standard for evaluating evidence on review and will satisfy due process requirements.[145]

The apparent rationale for this exception to the conclusiveness of findings resulting from F.T.C. orders, which become final under section 5(g)(1), seems to be the hope that if the findings are rebuttable, parties will continue to consent to orders and will refrain from constantly seeking judicial review.[146] "It is not the intent . . . to encourage respondents to resist the finalization of cease-and-desist orders because of fear of the effects of an FTC order in a possible consumer redress action under section 203 [section 17B]."[147]

One safeguard for a defendant against whom an order has become final under section 5(g)(1), and who is now subject to a consumer redress suit, is found in section 5(b). This section states:

> [T]he Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside . . . any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require. . . .[148]

Sections 17B(c)(1) and 5(b) seem to provide adequate opportunity to be heard in consumer redress suits, even if the party previously consented to the cease and desist order. However, there may be some question regarding the requirement of notice. Notice to the defendant is, of course, necessary to satisfy due process. The Improvements Act provides for mandatory notice to consumers as well. Section 17B(c)(2) states:

> The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.[149]

144. See text accompanying notes 129-35 *supra.*
145. See text accompanying notes 77-79 *supra.*
146. S. REP. No. 151, 93d Cong., 1st Sess. 29 (1973).
147. *Id.*
148. 15 U.S.C. § 45(b) (Supp. V, 1975).
149. 15 U.S.C. § 57b(c)(2) (Supp. V, 1975).

While notice is mandatory, notice by publication is permissible. Only in recent years has the power of a court to give notice through publication become an issue. The Supreme Court decision in *Eisen v. Carlisle & Jacquelin*[150] established a new procedural due process standard for notice, and the question arises whether the *Eisen* decision extends beyond the class action situation. The legislative history of the Improvements Act makes this question particularly relevant to section 17B.[151] It was suggested there that although an action under section 17B is "not a class action, it may be useful for the court to be guided by some of the provisions of Federal Rule of Civil Procedure 23."[152]

In *Eisen*, the Supreme Court determined that to comply with rule 23 individual notice must be provided to all class members identifiable through reasonable effort. This decision was based upon the "express language" of the rule and congressional intent as found in the advisory committee's note to rule 23.[153] Quite significantly, in cases where the Court has required individual notice to class members,[154] the decision has *not* rested upon the due process clause.[155] The Court's concern in *Eisen* with the advisory committee's note indicates that it is not due process, but the rule itself, that requires individual notice in all circumstances. There is a strong argument that the individual notice required in class action suits flows not from the Constitution, but rather from rule 23.

It is significant that the basic reason for the notice requirement of rule 23(c)(2) is not present in section 17B. The rationale for the

150. 417 U.S. 156 (1974).

151. S. REP. No. 151, 93d Cong., 1st Sess. 28 (1973).

152. *Id.* Rule 23 in relevant part states that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2).

153. *See Advisory Committee's Notes to Proposed Rules of Civil Procedure*, 39 F.R.D. 69 (1966). The Supreme Court's decision that individual notice is mandatory under Rule 23(c)(2) has raised considerable debate concerning the accuracy of the Supreme Court's interpretation of the advisory committee's intent, and more importantly, whether the decision announces a constitutional standard. *See* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1024 (2d Cir. 1973) (Oakes, J., dissenting), *vacated*, 417 U.S. 156 (1974); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues*, 25 HASTINGS L.J. 1351 (1974) [hereinafter cited as McCall].

154. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

155. McCall, *supra* note 153, at 1408. *See* 38 J. Moore, FEDERAL PRACTICE 23.55 (2d ed. 1969).

class action notice requirement is that members of a class are bound by the judgment unless they have requested exclusion.[156] However, with respect to the Improvements Act, the House conference report reaches the conclusion that there should be no bar to an action by a consumer after a commission consumer redress action.[157]

The most persuasive reason for not requiring mandatory notice under rule 23(c)(2) is simply that an action under section 17B is not a class action, although its purpose and ultimate effect may be similar. While the consumer redress section of the Improvements Act is obviously patterned after the class action model, the legislative history of the act and judicial interpretation of the Federal Trade Commission Act have made it clear that the act does not allow for a private right of action.[158]

While the notice requirements for class action suits have been drastically altered by the *Eisen* decision, there is no indication that the requirements should apply to the Improvements Act, and, therefore, the discretionary power of the court to allow notice by publication in section 17B should be constitutionally permissible.

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156. FED. R. CIV. P. 23(c)(2).

157. H.R. REP. No. 1606, 93d Cong., 2d Sess. (1974). "It is not the intention of the conferees that private actions for redress based on the acts or practices which are the subject of a Commission consumer redress action be barred by a Commission action. In any such case the defendant in the private action would be able to assert a defense of payment or similar defenses. Failure of a consumer to appear or accept settlement would therefore not affect private rights. Nor would an action under these consumer redress provisions prevent the FTC from bringing an action under section 5(m) of the Federal Trade Commission Act for a civil penalty. Similarly, actions by the Commission under section 5(m) of the Act would not affect the Commission's authority to seek consumer redress nor the court's authority to grant such redress under this section." *Id.* at 41. While the commission seems to be entitled to bring two actions against the same defendant for the same act, this is not really double recovery because the act is the basis for two separate causes of action—one to penalize the defendant for the violation and the other to compensate the consumer in some way for the unfair practice to which the consumer was subjected.

158. According to one of the sponsors of the bill: "There is no right of any consumer to form a class and bring an action under this bill. . . . The Commission itself, the FTC, may bring an action but it is not a class action. . . . Where the consumers themselves get together and form a class and bring a suit—that is what you talk about in a class action. This is something entirely different." 117 CONG. REC. 39,849 (daily ed. Nov. 8, 1971) (remarks of Senator Moss). The court in Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973), determined that consumers or members of the public had no standing to enforce section 5(a) of the Federal Trade Commission Act. The court found no basis whatsoever for a private right of action either to enforce section 5(a) or to seek damages for a violation of the act. 485 F.2d 986, 988 (D.C. Cir. 1973).

Conclusion

With the enactment of the 1975 Improvements Act, the Federal Trade Commission has finally been empowered to protect consumers and competitors from unfair or deceptive acts or practices. Its rule-making provisions give the F.T.C. a flexible alternative to issuance of cease and desist orders and promise a fairer and more efficient alternative to adjudication through promulgation of comprehensive guidelines covering significant areas of industry.

The civil penalty and consumer redress provisions of the 1975 act lend significant credibility to the F.T.C.'s efforts to prohibit unfair or deceptive acts by strengthening sanctions against such acts and by providing consumers injured by such acts relief through the federal courts.[159]

While the drafters of the Improvements Act have set out well defined and significant powers for more effective enforcement of the Federal Trade Commission Act, the new provisions have not yet been subjected to a court test of their constitutionality. Until the Improvements Act has been interpreted by the federal courts, its scope and impact will be somewhat uncertain. On the whole, it appears that the act has been drafted with due process considerations well in mind, but there are some inherent constitutional questions remaining. In particular, the provisions regarding civil penalties and consumer redress following the issuance of a cease and desist order seem most vulnerable to constitutional attack. However, regardless of the probability of future judicial interpretation regarding the scope of the Improvements Act, it seems likely that the act will have an immediate, significant impact. There are indications the commission intends to be quite ambitious in its enforcement and will focus upon violations having significant impact on consumers and causing substantial economic injury.[160] The Improvements Act seems to provide at last the necessary procedural ammunition to facilitate this goal and to make the deterrence of unlawful practices a realistic expectation.

159. This is significant in view of the fact that class actions have been virtually eliminated as a means by which consumers can obtain relief in federal court for small losses. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969).

160. *See* THE FEDERAL TRADE COMMISSION IN 1975, at 123, 198, 199 (1975).