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Comments

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COMMENTS

CONSTITUTIONAL LAW—EQUITABLE POWER OF FEDERAL COURTS: METROPOLITAN RELIEF MAY BE A PROPER REMEDY FOR INTRA-GOVERNMENTAL CONSTITUTIONAL VIOLATIONS. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

In *Hills v. Gautreaux*[1] the United States Supreme Court faced the question of whether a federal trial court may order remedial action outside the city limits of Chicago for constitutional violations by the Chicago Housing Authority (hereinafter referred to as CHA) and the United States Department of Housing and Urban Development (hereinafter referred to as HUD) within the city of Chicago. HUD and CHA had both been found guilty of statutory and constitutional violations in their selections of public housing sites.[2] By ruling that a federal trial court may order a plan encompassing metropolitan relief,[3] the Supreme Court meticulously distinguished *Milliken v. Bradley*.[4] As a result, the Court in *Gautreaux* more clearly identified and explained the circumstances sufficient to justify a court's consideration of an interdistrict remedy for violations occuring within a particular local governmental unit.

The Supreme Court resolved *Gautreaux* more than a decade after suits were initiated against CHA and HUD.[5] The most recent action, prior to acceptance on certiorari by the Supreme Court, was by the Court of Appeals for the Seventh Circuit in *Gautreaux v. Chicago Housing Authority*.[6] In an opinion written by retired Associate Justice of the Supreme Court Tom Clark,

1. 425 U.S. 284 (1976), *aff'g* Gautreaux v. Chicago Hous. Auth., 503 F.2d 930 (7th Cir. 1974).

2. The district court, 296 F. Supp. 907 (N.D. Ill. 1969), found CHA had deliberately selected family public housing sites to avoid placing black families in white neighborhoods. The court of appeals, 448 F.2d 731 (7th Cir. 1971), found HUD to have committed violations by sanctioning and aiding CHA's discriminatory program. *Id.* at 739-40. The Supreme Court dealt only with the appropriate scope of the remedy.

3. Metropolitan relief refers to a federal court's ordering an agency with authority solely or primarily within a municipality to take remedial action beyond the legal boundaries of that municipality.

4. 418 U.S. 717 (1974).

5. For a summary of the lengthy history of the Gautreaux cases, see Kishner and Werner, *Metropolitan Desegregation After* Milliken v. Bradley*: The Case for Land Use Litigation Strategies*, 24 CATH. U. AM. L. REV. 187, 197-200 (1975).

6. 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

sitting by designation, the court of appeals reversed the district court's decision denying relief beyond the city limits of Chicago.[7] The court of appeals remanded the case for consideration of a "comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the city of Chicago . . . but will increase the supply of dwelling units as rapidly as possible."[8] One month prior to the Seventh Circuit's opinion, the United States Supreme Court issued its decision in *Milliken v. Bradley*[9] reversing the Court of Appeals for the Sixth Circuit and holding that the multidistrict area-wide remedy to a single district segregation violation was an inappropriate exercise of the equitable authority of the federal courts.[10] In order for an interdistrict remedy to be appropriate, the *Milliken* Court said "it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation."[11]

The Seventh Circuit concluded that the equitable factors preventing metropolitan relief in *Milliken* were "simply not present"[12] in *Gautreaux v. Chicago Housing Authority.* Unlike the situation in *Milliken,* Justice Clark noted that public housing did not have a tradition of local control. Administrative problems involved in construction of public housing in the suburbs "are not remotely comparable to the problems of daily bussing thousands of children to schools in other districts . . . ."[13] Further, unlike the *Milliken* case, metropolitan relief had been under consideration for a long time in *Gautreaux v. Chicago Housing Authority.*[14]

The Supreme Court granted certiorari in *Hills v. Gautreaux* in May, 1975.[15] The case was argued January 20, 1976, and a

7. Gautreaux v. Romney, 332 F. Supp. 366 (N.D. Ill. 1971). The district court had found metropolitan relief unwarranted because the wrongs were committed within the limits of Chicago and solely against residents of the city. There was no allegation that HUD and CHA discriminated or fostered racial discrimination in the suburbs.

8. 503 F.2d at 939. "Given the eight year tortuous course of these cases, together with the finding and judgment orders of the District Court and the opinions of this court (now numbering five)," Clark said, "we believe the relief granted is not only much too little but also much too late in the proceedings." *Id.* at 932.

9. 418 U.S. 717 (1974).

10. *Id.* The court of appeals had approved a plan requiring consolidation of 54 school districts in the Detroit metropolitan area to remedy racial discrimination in the operation of the Detroit public schools. Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973).

11. 418 U.S. at 745.

12. 503 F.2d at 936.

13. *Id.*

14. *Id.* at 937.

15. 421 U.S. 962 (1975).

decision was announced April 20, 1976. The Court upheld the Seventh Circuit's decision but disagreed with its interpretation of *Milliken.* Justice Stewart, who delivered the opinion, determined that *Milliken* "was based on basic limitations on the exercise of the equity power of the federal courts and not on a balancing of particular considerations presented by school desegregation cases . . . ."[16] The Seventh Circuit's distinguishing of *Milliken* on the basis of differences between administering public schools and public housing was incorrect, the Supreme Court said.[17] Instead, the Court distinguished the two cases after considering the equitable powers of the federal courts in light of the particular facts in the Chicago housing situation.

In reversing the Sixth Circuit's approval of a district court order calling for metropolitan relief, the *Milliken* Court did not rule out the possibility that interdistrict remedies might be appropriate in some school discrimination cases. Such relief might be suitable, the *Milliken* Court said, "where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district or where district lines have been deliberately drawn on the basis of race."[18] The *Gautreaux* Court further recognized that the *Milliken* decision did not deny the federal courts' authority to order metropolitan remedies for constitutional violations within the boundaries of a municipality.[19] Applying this basic proposition, the Court discussed several factors that made metropolitan relief appropriate in *Gautreaux* whereas it was not proper in *Milliken.*

The Court found a significant difference between the Detroit school situation and the Chicago public housing program as to the role of local governmental officials and the significance of local district lines. While the *Milliken* Court noted that school districts in Michigan are instrumentalities of the state,[20] it also recognized a tradition of "local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process."[21] Thus, while the Court

16. 425 U.S. at 294.
17. *Id.* at 294-95 & n.11.
18. 418 U.S. at 745.
19. 425 U.S. at 297-98.
20. 418 U.S. at 726 n.5.
21. *Id.* at 741-42.

said local control was "not sacrosanct"[22] neither were district lines a "mere administrative convenience"[23] which could be casually ignored. In contrast, the *Gautreaux* Court stated that a metropolitan remedy "need not displace the rights and powers accorded suburban government entities under federal or state law."[24]

The *Gautreaux* Court did more than submit that a metropolitan remedy would cause no undeserved disruption. In contrast to the traditional local school autonomy in Michigan, the *Gautreaux* Court pointed out that Illinois statutes permit a city housing authority to exercise its power in the unincorporated area within three miles of the city's boundary.[25] Thus, the Court seemed to recognize that in the *Gautreaux* case the city limits of Chicago, unlike the traditional school district lines in *Milliken,* are not significant in the task of finding an appropriate remedy for the segregative housing violations.

A major reason that the Chicago city limits were not relevant to the *Gautreaux* Court's consideration of a metropolitan remedy is that nonlocal officials have a greater role in administering the programs found responsible for the constitutional violations. While the Michigan laws may have delegated final authority to the state, substantial independent control over schools remained with local officials. Therefore, a consolidation order directed at the state would by necessity abrogate the rights and powers of the suburban school districts. The *Gautreaux* Court recognized that state educational administrators simply do not control local school affairs in Michigan[26] and, thus, are not responsible for local violations under the *Milliken* requirements.[27] Even if the state were responsible for segregation within Detroit, the *Milliken*

22. *Id.* at 744.

23. *Id.* at 741. In dissent, Justice Marshall contended that "[s]chool districts are not separate and distinct sovereign entities under Michigan law, but rather are 'auxiliaries of the State,' subject to its 'absolute power.'" *Id.* at 794 (citations omitted). Marshall concurred in *Gautreaux* and agreed with the Court's decision except insofar as it reaffirmed *Milliken.*

24. 425 U.S. 298 n.13. A consolidation order in *Milliken,* the *Gautreaux* Court said, would of necessity have abrogated the rights and powers of suburban school districts under Michigan law.

25. *Id.* at 298-99 n.14. Further, the *Gautreaux* Court said, a city housing authority may act outside its area of operation by contract with another housing authority or with a state public body not within the area of operation of another housing authority. *Id.*

26. *Id.* at 298 n.13.

27. 418 U.S. at 756 (Stewart, J., concurring). The dissenters in *Milliken,* in contrast, would have held the state responsible for violations by local officials and ordered a metropolitan remedy. *Id.* at 757.

Court said, it does not follow that an interdistrict remedy is constitutionally justified or required without evidence of an interdistrict violation.[28]

While state authorities were found to be only minimally involved in *Milliken,* the *Gautreaux* Court found that the involvement of nonlocal officials was much more substantial which was further support for a decision necessitating metropolitan relief. The Court pointed out that both HUD and CHA have authority to operate outside the Chicago city limits.[29] HUD has traditionally operated on the basis of housing market areas which usually extend beyond the city limits and might include parts of several adjoining counties.[30] Since HUD had previously determined the appropriate housing market, a remedy in that area against HUD would be commensurate with the nature and extent of the constitutional violation, regardless of whether the violation occurred within the city limits of Chicago.[31] "The critical distinction between HUD and the suburban school districts in *Milliken,*" the *Gautreaux* Court declared, "is that HUD has been found to have violated the Constitution."[32]

The *Gautreaux* Court considered the social and political costs and benefits of requiring public housing to be placed in Chicago's suburbs, as opposed to requiring consolidation of fifty-four independent school districts as a basis for distinguishing the two cases. Despite strong dissent,[33] the *Milliken* Court stated that a metropolitan desegregation plan with its ensuing problems of financing, operations and transportation was not justified as a response to a constitutional violation found to have occurred within a single school district.[34] The *Gautreaux* Court, however, concluded that the " 'practicalities of the situation' "[35] in the Chicago metropolitan area did not justify an absolute denial of possi-

28. *Id.* at 748.

29. 425 U.S. at 298. *See* note 25 and accompanying text *supra.*

30. 425 U.S. at 299. HUD's responsibilities under federal regulations are in part to select sites for public housing to "promote greater choice . . . and avoid undue concentration of assisted persons in areas containing a high proportion of low-income people." *Id.* at 301-02.

31. *Id.* at 299-300.

32. *Id.* at 297.

33. For example, Justice White said the majority's remedy "is essentially arbitrary and will leave serious violations of the Constitution substantially unremedied." 418 U.S. at 780.

34. *Id.* at 755 (Stewart, J., concurring).

35. 425 U.S. at 297 (quoting Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971)).

bilities for a suburban remedy. The Court recognized that, similar to the suburban school districts in *Milliken,* the suburban governments and suburban housing authorities in Chicago had not been implicated in any unconstitutional conduct.[36] However, in *Gautreaux* the remedy was directed against HUD, which had authority beyond the Chicago city limits, rather than against any local governmental agency. Further, the *Gautreaux* Court said an order directed at HUD would not force local governments to act nor would it deny them their proper role in regulating development through zoning and other land use restrictions.[37] The *Gautreaux* Court had indicated that the question, whether an order against HUD affecting its conduct beyond Chicago's boundary would impermissibly interfere with local governments, was a more substantial issue than whether a federal court had the authority to make such an order.[38] Based on its evaluation of the structure of local governments and HUD in the Chicago area, the Court correctly recognized that such an order would cause no significant interference with local governmental entities.[39]

Other factors which distinguish *Gautreaux* and *Milliken* include the timing of the metropolitan remedy as well as the initiation of action against the affected governmental agencies. In the Detroit case, suburban school officials did not become involved until they were joined as necessary parties for relief by the Sixth Circuit.[40] In direct contrast, the Chicago suits were originally brought against HUD and CHA. The possibility of remedial action not confined to the city limits of Chicago was first raised at the district court level and was under consideration for years prior to its being ordered by the Seventh Circuit.[41] The Seventh Circuit stressed that this measure of relief had "been under consideration for a long time" to distinguish the recent decision in *Milliken.*[42]

36. 425 U.S. at 297.

37. *Id.* at 301 & 306.

38. *Id.* at 300.

39. *Id.* at 305-06.

40. 418 U.S. at 754 (Stewart, J., concurring). For two views on whether the *Milliken* outcome would have been different if the case were originally considered as one involving a metropolitan violation, see Beer, *The Nature of the Violation and the Scope of the Remedy: An Analysis of* Milliken v. Bradley *in Terms of the Evolution of the Theory of the Violation,* 21 WAYNE L. REV. 903 (1975) and West, *Another View of the* Bradley *Violation: Would a Different Evolution Have Changed the Outcome?,* 21 WAYNE L. REV. 917 (1975). These articles are part of a symposium devoted to *Milliken v. Bradley* and the future of urban school desegregation.

41. 425 U.S. at 289-91.

42. 503 F.2d at 937.

In upholding the Seventh Circuit's decision, however, the Supreme Court did not discuss the fact that a metropolitan remedy had been under consideration since the early stages of the litigation.[43]

The controlling principle in the exercise of the remedial power of the federal courts in cases involving constitutional violations, as articulated in *Swann v. Charlotte-Mecklenburg Board of Education,*[44] is that the "nature of the violation determines the scope of the remedy."[45] The *Milliken* Court recognized this principle by holding that violations occuring only within the Detroit school system required that the remedy must also be limited to the Detroit system. In applying the *Swann* standard to racial discrimination by HUD and CHA in Chicago public housing site selection, the *Gautreaux* Court pointed out that the authority of these two agencies to operate beyond the Chicago city limits was one of the circumstances which made a metropolitan remedial order reasonable.[46]

The major significance of the *Gautreaux* case is that by permitting a district court to order HUD to engage in metropolitan area-wide remedial efforts, the Court was able to distinguish the *Milliken* case and make clearer when cross-district relief would be appropriate. Rather than just attempting to apply the standards which were articulated in *Milliken* particularly for school desegregation cases, and which might not have led to metropolitan relief in *Gautreaux,* the *Gautreaux* Court found metropolitan relief would be appropriate because of the presence of a number of factors. First, the local governmental lines in *Gautreaux,* unlike the school district lines in Detroit, were not relevant to the remedy because officials of those local governments themselves were not responsible for the violations. Second, in *Gautreaux* there was no stong tradition of local district control of public housing; rather, the federal government had long been influential in administering the public housing program. Further, the viola-

43. One year earlier, in Buchanan v. Evans, 423 U.S. 963 (1975), the United States Supreme Court had affirmed without a full opinion a three-judge panel's order calling for consideration of interdistrict school desegregation remedies. The district court in that case, Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975) distinguished *Milliken* in part by pointing out that in the Delaware case the suburban districts were offered and took advantage of an opportunity to present their evidence prior to the remedies stage. 393 F. Supp. at 430.

44. 402 U.S. 1 (1971).

45. *Id.* at 16.

46. 425 U.S. at 297-300.

tions in *Gautreaux* were committed by officials whose authority extended beyond the limits of the local governmental unit. Finally, unlike *Milliken,* the governmental bodies from whom relief was sought were original parties in the suit and were not joined solely at the remedial stage of the hearing. While the Supreme Court itself did not place great weight upon this last distinction, it was discussed by the Seventh Circuit.[47] Weighing the impact of a metropolitan area remedy and the equitable standards expressed by the United States Supreme Court in *Swann,* the Court properly found that an interdistrict remedy was not inappropriate in *Hills v. Gautreaux.*

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47. This case also raises questions concerning the relationship between location of public housing and school desegregation which are beyond the scope of this comment. For a discussion of these questions, see Note, *Interdistrict Desegregation: The Remaining Options,* 28 STAN. L. REV. 521 (1976). *See also,* Evans v. Buchanan, 393 F. Supp. at 435, where the court considered the practices of the Wilmington Housing Authority in putting public housing units primarily in the inner city as part of the justification for ordering consideration of a metropolitan school desegregation plan.

CONSUMER PROTECTION—STANDING—CONSUMERS CAN BRING A PRIVATE ACTION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IF HARMED BY PERSISTENT SALES PRACTICES THAT WERE PREVIOUSLY DETERMINED VIOLATIVE OF SECTION 5(A)(1) BY THE FEDERAL TRADE COMMISSION IN A CONSENT ORDER DIRECTED AGAINST DEFENDANT'S FRANCHISOR. *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582 (N.D. Ind. 1976).

Section 5(a)(1) of the Federal Trade Commission Act (FTC Act)[1] declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[2] *Guernsey v. Rich Plan of the Midwest*[3] marks the first successful attempt to imply a private remedy under the FTC Act. Hitherto, section 5's broad dictates have been held to be within the exclusive enforcement province of the Federal Trade Commission (FTC).[4]

Guernsey holds that where a plaintiff alleges to have suffered from persistent conduct by a defendant, already the subject of a consent order issued by the FTC for the same violations, the plaintiff has stated a claim under the Act. As a result, relief may be merited, although nowhere in the Act are private parties expressly empowered to bring an action to enforce Commission consent orders.[5] In October of 1963 the FTC notified Rich Plan Cor-

1. 15 U.S.C.A. §§ 41-77 (West Supp. 1976).

2. 15 U.S.C.A. § 45(a)(1) (West Supp. 1976). Some states, including South Carolina, have consumer protection statutes which adopt wording very similar to sec. 5 of the FTC Act. *See* HAWAII REV. STAT. § 480-482 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 93A, § 1-2 (West Cum. Supp. 1976-77); S.C. CODE ANN. § 66-71.1(a) (Cum. Supp. 1975). These statutes specify that Federal Trade Commission and federal judicial decisions shall guide interpretations of their provisions. *E.g., id.* § 66-71.1(b). The South Carolina Act expressly permits consumer actions. *Id.* § 66-71.13(a). However, as yet there have been no reported consumer cases under the South Carolina statute that was adopted in 1971.

3. 408 F. Supp. 582 (N.D. Ind. 1976).

4. *See, e.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). A list of cases of this tenor can be found in Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973). 15 U.S.C.A. § 45(a)(6) (West Supp. 1976) provides:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

All attempts prior to 1970 by private litigants to imply a cause of action under the Act were by injured competitors, rather than by consumers. Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 587 (N.D. Ind. 1976).

5. Rising public sentiment in favor of increased consumer protection by way of expanded consumer remedies against deceptive sales and advertising techniques has generated a substantial number of commentaries calling for the judicial implication of an unqualified private cause of action under sec. 5 of the FTC Act. *See, e.g.*, Gard, *Purpose*

poration and Rich Plan of New Orleans, Inc., of its intention to institute proceedings[6] against the corporations for violating section 5's prohibition of unfair competition and deceptive practices in commerce. The corporations responded and executed a consent agreement with the FTC on October 31, 1963.[7] Among the practices found objectionable by the Commission were false representations concerning savings that could be made in connection with the purchase of a freezer-food plan, the availability of freezer servicing, and the attractiveness of company financing arrangements.[8]

Plaintiffs Eugene and Jacqueline Guernsey brought a class action against defendant Rich Plan of the Midwest, a franchisee of Rich Plan Corporation, and alleged injury from sales techniques identical to those condemned in the 1963 order. The court assumed subject-matter jurisdiction under 28 U.S.C. § 1337.[9] The

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and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act, 70 NW. U.L. REV. 274 (1975); Lovett, *Private Actions for Deceptive Sales Practices*, 23 AD. L. REV. 271 (1971); Note, *A Private Right of Action Under Section Five of the Federal Trade Commission Act*, 22 HASTINGS L.J. 1268 (1971); Note, *Private Rights of Action Under the Federal Trade Commission Act*, 11 HOUS. L. REV. 699 (1974). *But see*, Note, *Implied Civil Remedies for Consumers Under the Federal Trade Commission Act*, 54 B.U.L. REV. 758 (1974); Comment, *Private Enforcement and Rulemaking Under the Federal Trade Commission Act: Expansion of FTC Responsibility*, 69 NW. U.L. REV. 462 (1974). The issue of implying a consumer remedy to enforce a prior FTC consent order has received sparse treatment in these commentaries. *E.g.*, 54 B.U.L. REV., *supra* at 789-91; 69 NW. U.L. REV., *supra* at 478 n.96.

6. For a discussion of the FTC's administrative enforcement procedure, *see* G. HENDERSON, THE FEDERAL TRADE COMMISSION 49-163 (1924). *See generally* articles cited note 5 *supra*. A consent order results from the charged party's voluntary execution of an agreement with the FTC to cease and desist from the challenged practices. The defendant has ten days to respond after receiving notice by the Commission and a copy of the complaint. The alternative to settlement is a full adjudicatory proceeding before an administrative law judge, with rights of appeal before the full Commission and beyond. A determination in favor of the Commission prompts issuance of a formal cease and desist order. 16 C.F.R. §§ 2.0-3.72 (Supp. 1976). *See also* 16E J. VON KALINOWSKI, BUSINESS ORGANIZATIONS § 39.05[6] (1977).

7. *In re* Rich Plan Corp., 63 F.T.C. 1099 (1963). The order, in part, directed:

> That respondent Rich Plan Corporation, a corporation, and its officers, and respondent Rich Plan of New Orleans, Inc., 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from: [various misrepresentations and deceptive sales gimmicks].

Id. at 1104-05.

8. *Id.*

9. 28 U.S.C. § 1337 (1970) provides, "[t]he 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 restraint and monopolies." The court

plaintiffs used the procedural device, the doctrine of implication,[10] to assert a cause of action under the Act. Although the doctrine of implication, or a variation thereof, had been wielded successfully by claimants to imply civil remedies under a number of federal statutes,[11] as well as under the United States Constitution,[12] courts prior to *Guernsey* had refused to apply it to the FTC Act. For its formulation of the doctrine, the *Guernsey* court extrapolated from the cases of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[13] and *J.I. Case Co. v. Borak*,[14] and expressed the doctrine in the following form:

> In order to imply a remedy under the doctrine, the court must determine that
> (1) the provision violated was designed to protect a class of persons including the plaintiffs from the harm of which the plaintiffs complain, and that
> (2) it is appropriate in light of the statute's purposes to afford plaintiffs the remedy sought.[15]

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noted that under § 1337 no minimum dollar amount is necessary and that "the language of § 1337 applies to the Federal Trade Commission Act." 408 F. Supp. at 585. *See also* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988 n.2 (D.C. Cir. 1973). *Contra*, Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973).

10. *See generally* commentaries cited in note 5 *supra*. The doctrine originated in Couch v. Steel, 118 Eng. Rep. 1193 (Q.B. 1854). *See* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). The first American application of the doctrine was in Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916), where the Court considered the plight of an employee injured as a result of his employer's noncompliance with the Federal Safety Appliance Act and declared, "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of a class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . ." *Id.* at 39.

11. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (Voting Rights Act of 1965); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) (Rivers and Harbors Act of 1899); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Securities and Exchange Act of 1934); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944) (Railway Labor Act); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916) (Federal Safety Appliance Act); Gomez v. Florida State Empl. Serv., 417 F.2d 569 (5th Cir. 1969) (Wagner-Peyser Act); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947) (Communications Act of 1934).

12. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (fourth amendment).

13. *Id. Bivens* held that the plaintiff had stated a federal cause of action by alleging the violation of his fourth amendment rights when federal agents, acting under color of governmental authority, searched his apartment without a warrant and arrested him without probable cause.

14. 377 U.S. 426 (1964). In *Borak*, the plaintiff stockholder succeeded in establishing a private cause of action under sec. 27 of the Securities Exchange Act of 1934. The defendant corporation had issued misleading proxy solicitations in violation of sec. 14(a) of the statute. The Court emphasized that a primary purpose of the Act was the " 'protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." *Id.* at 432.

15. 408 F. Supp. at 586. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202

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It appeared clear to the court that the Guernseys met this two-pronged test. However, the court was confronted still with the problem of adverse precedent. *Holloway v. Bristol-Myers Corp.*[16] and *Carlson v. Coca-Cola Co.*[17] had both rejected consumer attempts to imply remedies under the FTC Act, although each had approached the issues from an entirely different perspective.

In *Carlson*, the Ninth Circuit dismissed the claim in peremptory fashion. In that case, the plaintiffs had been hoodwinked by a promotional game deceptively structured by the defendant to deprive participants of prize money believed won. The court refused to assume section 1337 jurisdiction[18] absent demonstration by plaintiffs of "a colorable right to a remedy under a particular federal statute."[19] Stare decisis appears to be the hidden rationale

(1967), may possibly lend more support for this particular formulation of the doctrine of implication than *Bivens* or *Borak*. Further refinement of the doctrine has occurred in two recent Supreme Court decisions both of which have refused to imply a private remedy. Cort v. Ash, 422 U.S. 66 (1975), held that a private cause of action was not consistent with the congressional purpose underlying 18 U.S.C. § 610 (1970 & Supp. III) which imposed a criminal penalty for corporate contributions to presidential and vice-presidential candidates. By unanimous decision, the Court distinguished *Borak* and *Bivens* and articulated four criteria as guidelines for the implication of private remedies in future cases: 1) Does the Statute create a federal right in favor of the plaintiff and members of his class, or is it part of a pervasive legislative scheme governing the relationship between the plaintiff and the defendant? 2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? 3) Is implication of a remedy consistent with the underlying purposes of the legislative scheme? 4) Is the cause of action one traditionally relegated to state law, in an area of state concern, so that it would be inappropriate to infer a cause of action based solely on federal law? *Id.* at 80-85. The Court accorded great weight to the fact that, in its view, protection of shareholders "was at best a subsidiary purpose" of the statute. *Id.* at 81.

In Piper v. Chris-Craft Indus., Inc., 97 S. Ct. 926 (1977), the Court refused to imply a cause of action for damages in favor of an unsuccessful tender offeror under sec. 14(e) of the Securities Exchange Act of 1934, *as amended by* the Williams Act of 1968, 15 U.S.C. §78 n(e). Plaintiff alleged that antifraud violations by its competitors had frustrated its attempts to gain control of Piper Aircraft Corporation. The Court applied the *Cort* implication test and concluded that the legislative history of the Williams Act compelled a ruling dictating that the purpose of the amended statute was to protect shareholders by insuring full disclosure rather than to protect a competing tender offeror. *Id.* at 4192-93. However, a strong dissent by Justices Brennan and Stevens indicated their adherence to a more liberal view of implying civil remedies, at least where it is apparent that the plaintiffs merit some degree of private protection under the statutory scheme. *Id.* at 4196-201. Compare the *Cort* doctrine of implication with that utilized by the United States Circuit Court of Appeals for the District of Columbia at note 24 *infra*.

16. 485 F.2d 986 (D.C. Cir. 1973).

17. 483 F.2d 279 (9th Cir. 1973).

18. Note 9 *supra*.

19. Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973). The court summarily concluded that "[t]he statutory provision invoked by appellants in this case provided them with no direct remedy, either explicitly or implicitly." *Id.*

for the *Carlson* holding. But the long list of cases cited as authority for the decision, with the possible exception of *Holloway*, does not dispose of the plaintiffs' claim as easily as the court's opinion implies.[20] The court concluded that "[t]he protection against unfair trade practices afforded by the Act vests *initial remedial power* solely in the Federal Trade Commission."[21] It is possible that due to *Carlson*'s use of these qualifying words, the *Guernsey* court did not consider it necessary to distinguish or otherwise treat that case in its opinion. Since the 1963 consent order represented initial action by the FTC in the *Guernsey* case, the court might have distinguished *Carlson* on that basis had it so desired.

In approaching the complex question of a consumer remedy under the FTC Act, the *Holloway* court is noteworthy for its exhaustive policy analysis.[22] Consumer plaintiffs in *Holloway* decried defendant Bristol-Myers' use of misleading advertisements depicting its analgesic *Excedrin* as more effective than its less expensive competitors. The court applied a more demanding doctrine of implication test[23] than did *Guernsey* and noted that

20. Most of the cases cited treated the issue in dicta and relied on Moore v. New York Cotton Exch., 270 U.S. 593 (1926), which treated the entire question by saying, "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. Note that *Moore*'s use of qualifying language, "in the first instance," seems to imply that in cases where the Commission has already acted, private relief would not be precluded necessarily. *See* Note, *Implied Civil Remedies for Consumers Under the Federal Trade Commission Act*, 54 B.U.L. REV. 758, 783 (1974). The fact that *Moore* was decided prior to the 1938 amendments to the FTC Act has discredited it further. *See* Carlson v. Coca-Cola Co., 483 F.2d 279, 281-83 (9th Cir. 1973) (Solomon, J., dissenting).

21. Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973) (emphasis added).

22. An indication of the impact of *Holloway* can be gleaned from the commentaries cited in note 5 *supra*. All of the cited articles that considered the question of an implied private remedy under the FTC Act after *Holloway* was decided in 1973 contain some discussion of the decision; most is unfavorable. For a defense of the *Holloway* decision, see Comment, *Private Enforcement and Rulemaking Under the Federal Trade Commission Act: Expansion of FTC Responsibilities*, 69 NW. U.L. REV. 462 (1974). *Cf.* Note, *Implied Civil Remedies for Consumers Under the Federal Trade Commission Act*, 54 B.U.L. REV. 758 (1974).

23. The foundations of the doctrine were framed as follows:

> (1) A Federal statutory or constitutional prohibition against the acts complained of; (2) inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed; (3) legislative intent to place the party claiming injury within the ambit of the statute's protection or to confer a substantive benefit or immunity upon him; (4) injury or threatened harm proximately resulting from the defendant's breach of duty; and (5) unavailability or ineffectiveness of alternative avenues of redress.

Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973).

even if the doctrine's technical requirements were met by plaintiffs, "[t]hese factors are necessary but not sufficient conditions, and their combined presence does not automatically warrant the implication of a private right of action."[24] In addition to the technical requirements of the doctrine, it was necessary to determine whether or not the implication of a private remedy under the Act would upset the "delicate balance of federal and state, public and private interests"[25] contained in the statutory scheme, keeping in view the social objectives sought to be advanced by Congress. On the one hand, *Holloway* weighed the social aims manifested by Congress in the 1938 Wheeler-Lea Amendments[26] to the Act and tempered this interest by its conception of the legislative intent underlying the amendments. Juxtaposed with this consumer interest were legitimate business interests, the necessity for the orderly evolution of precedent and commercial standards, and a desire to avoid unnecessary litigation. Relying heavily on its assessment of the legislative intent[27] behind both the original 1914

24. *Id.*

25. *Id.* Note that *Holloway*'s concern for the balanced nature of the legislative scheme constituted a distinct element in that court's analysis, whereas, with the current Supreme Court's approach to the implication of civil remedies, the legislative scheme is treated as part and parcel of the implication doctrine. *See* note 15 *supra*; Cort v. Ash, 422 U.S. 66, 84 (1975).

26. Pub. L. No. 447, § 3, 52 Stat. 111 (1938). The amendment added to sec. 5 of the 1914 Act the proscription of "unfair or deceptive acts or practices in commerce." The *Holloway* court conceded that "[t]he Wheeler-Lea Amendments represented a shift in emphasis from the control of deceptive advertising practices as an incident of antitrust regulation to the avowed purpose of protecting the consumer from fraud." 485 F.2d at 994.

27. *Holloway* repeatedly emphasized that no language in the Act permitted an inference of a specific congressional intent to bestow private remedies upon consumers. This approach has been criticized for its failure to consider adequately that the primary purpose of the 1938 amendments was to protect the consumer. That the court focused upon the somewhat ancillary and administrative designs of the Act, chiefly its procedural enforcement scheme, at the expense of the Act's primary remedial purpose, has been the subject of criticism. *See* Note, *Private Rights of Action Under the Federal Trade Commission Act*, 11 HOUS. L. REV. 699 (1974), which draws a distinction between the inference of congressional intent and congressional purpose, in the *Holloway* analytical context. In J.I. Case Co. v. Borak, 377 U.S. 426 (1964), the Supreme Court relied heavily on the apparent policy objective of the Securities Exchange Act to protect investors from misleading proxy solicitations. Perhaps the better approach to the question of legislative intent in a situation like *Holloway*, where legislative history yields no unequivocal indication, would be to regard congressional inaction, as opposed to express or implied preclusion of a private remedy, as a tacit deference to the longstanding judicial function of implying private remedy where reasonably necessary to effectuate the primary purpose of the statute. The Supreme Court has hinted that it may partially subscribe to such an approach. "In situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." Cort v. Ash, 422 U.S.

Act and the 1938 amendments, the court finally resolved its analysis in favor of its misgivings, "A fair reading of the statute and its legislative history evinces a plain intent by Congress to make the administrative program for enforcing the Federal Trade Commission Act an exclusive one."[28] Thus, the *Holloway* court determined that private enforcement of the broadly framed prohibitions of section 5(a) of the FTC Act would unbearably inhibit the administrative discretion deliberately vested in the FTC to proceed against what it considered to be violations of the Act. No exceptions were posited, and the ruling appeared to proscribe private actions in toto.

Blanket preclusion of private remedies in *Holloway* did not deter the United States District Court in *Guernsey*. The latter court did not directly assail the force of *Holloway*'s logic, but instead attempted to distinguish *Holloway* on its facts. Having introduced the doctrine of implication, the court in *Guernsey* then discussed the demonstrated ineffectiveness of the FTC as an enforcement agency.[29] Stressing resource limitations as a cause of the Commission's inability to secure compliance with its cease and desist orders, the court concluded that "the efficacy of the Federal Trade Commission in acting to deter consumer fraud is suspect. Most defrauded customers have no remedy at all . . . ."[30] For an example, the court mentioned the experience of Holland Furnace Company against whom a cease and desist order

66, 82 (1975). Similarly, one commentator has remarked, "In *Bivens* [403 U.S. 388 (1971)], the Supreme Court implied a private right of action under the fourth amendment. That case illustrates the irrelevance of legislative intent to the doctrine of implication inasmuch as it cannot seriously be contended that the founding fathers intended private enforcement of that amendment." Gard, *Purpose and Promise Fulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 NW. U.L. REV. 274, 286 (1975). For a discussion of the legislative history of the FTC Act, see generally articles cited note 5 *supra*; G. HENDERSON, THE FEDERAL TRADE COMMISSION 1-48 (1924); Lang, *The Legislative History of the Federal Trade Commission Act*, 13 WASHBURN L.J. 6 (1973).

28. Holloway v. Bristol-Myers Corp., 485 F.2d at 1002.

29. 408 F. Supp. at 586-87. Criticism of the FTC's enforcement capabilities is legion. *See, e.g.*, E. COX, R. FELLMETH & J. SCHULZ, THE "NADER REPORT" ON THE FEDERAL TRADE COMMISSION 35-96 (1969); G. HENDERSON, THE FEDERAL TRADE COMMISSION (1924); *Report of the American Bar Association to Study the Federal Trade Commission* (1969); Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAW. 663 (1970); White, *F.T.C.: Wrong Agency for the Job of Adjudication*, 61 A.B.A.J. 1242 (1975). Many commentators have also pointed out the extreme difficulty in sustaining a consumer cause of action against deceptive advertising under state consumer action statutes and through common law tort actions. *See generally* articles cited note 5 *supra*.

30. 408 F. Supp. at 586.

had remained unenforced for twenty-nine years.[31]

By emphasizing the lack of redress for injured consumers, the *Guernsey* court implicitly revealed that it substantially equated consumer protection with modern notions of the public interest.[32] *Holloway* had glossed over recurrent calls for expanded consumer remedies, directing its attentions to the legislative intent behind the 1914 and 1938 Acts and basing its inference of congressional intent on the balanced nature of the statutory scheme. However, this particular focus caused the *Holloway* court to lose sight of the broad remedial purposes of the 1938 Wheeler-Lea Amendments.[33] *Holloway* had neglected to balance adequately the consumer interest in its interpretation of the Act. This interest has been gathering increasing momentum since the 1938 amendments. In contrast, the *Guernsey* court disclosed its more pragmatic view of the remedial character of the FTC Act by avoiding strained attempts to discern legislative intent and by focusing instead upon the Commission's apparent inability to effectuate the purpose of the amended statute, the protection of the consumer from deceptive marketing techniques. Since business methods and marketing strategy have become more refined and sophisticated over the years, sometimes in deliberate response to attempted regulation, the need to protect the victimized consumer has increased correspondingly. Thus, the *Guernsey* court articulated its balancing test in a different manner than the *Holloway* court had. "In weighing the benefits to the consumer against any possible damage to the Federal Trade Commission's role in 'providing certainty and specificity to the broad proscriptions of the Act', . . . the court must opt in favor of the consuming public."[34]

Guernsey distinguished *Holloway* on two factual grounds. Unlike *Holloway*, in which the plaintiffs' injuries consisted only of the difference between the cost of *Excedrin* and the cost of its less expensive but equally effective substitutes, the plaintiffs in *Guernsey* suffered substantial financial damage.[35] In addition,

31. *In re* Holland Furnace Co., 341 F.2d 548 (7th Cir. 1965), *cert. denied*, 381 U.S. 924 (1965).

32. 15 U.S.C.A. § 45(b) (West Supp. 1976), empowers the Commission to act only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." *See* FTC v. Klesner, 280 U.S. 19 (1929).

33. Pub. L. No. 447, § 3, 52 Stat. 111 (1938). *See* note 26 *supra.*

34. 408 F. Supp. at 588 (quoting Holloway v. Bristol-Myers Corp., 485 F.2d at 998).

35. In addition to injunctive relief, the Guernseys were seeking $1,300 actual damages and $1,000,000 damages for the injured class. The measure of damages presumably would be the difference between the value of the goods and services advertised and the value of those actually received under the freezer-food plan.

the court recognized that the previous FTC order against Rich Plan Corporation largely removed the force of *Holloway*'s reasoning from the facts at bar. Mrs. Holloway had attempted to initiate a de novo judicial inquiry into the legality of Bristol-Myers' practices, whereas the Guernseys could and did allege the administrative discretion that was reflected in the FTC's consent order. Although the defendant in *Guernsey* was not a named target of the consent order, the court, nonetheless, noted that plaintiffs had alleged that defendant Rich Plan of the Midwest operated as a franchise of the Rich Plan Corporation. On its face, the order had applied to agents, employees, or representatives of Rich Plan Corporation.[36] Hence, the instant defendant, Rich Plan of the Midwest, was to the court's satisfaction sufficiently identifiable with Rich Plan Corporation to be regarded as a party to the order. The court also reasoned that the activities of the defendant, being nearly identical to those proscribed in the consent order, "would fall within the class defined in the consent decree."[37]

That the Commission had determined at one point that the defendant's alleged practices were illegal was, in the *Guernsey* court's view, dispositive of the case. *Holloway*'s interest analysis had treated the FTC's quasi-judicial and advisory role in the statutory framework as a congressional design. Consequently,

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

37. 408 F. Supp. at 587. The exact scope of the court's holding is unclear because of the court's failure to clarify whether the defendant's principal link with the 1963 order stemmed from its identity as a franchise or from the similarity of the alleged conduct to that proscribed in the order. Assuming that the limited private remedy under the FTC Act is to be amplified judicially in future cases, this distinction will have to be refined further. For example, the court seemed to suggest that defendant's culpability lay chiefly in the degree of the similarity of its alleged practices to those previously condemned. *Id.* If this is so, logical extension of this rationale would give consent orders the status of substantive legal precedent, and the fact that the *Guernsey* defendant was a franchisee of Rich Plan Corporation would lose its legal significance other than in terms of notice.

Similarly, if *Guernsey*'s holding is read broadly — that is, to permit private actions whenever the FTC had previously ruled conduct violative of sec. 5 — consumer suits to redress injuries suffered due to violations of cease and desist orders and trade regulation rules would appear to be sanctioned. The court's sweeping rationale seems to suggest this broad reading. On the other hand, a narrow construction of the holding would limit private enforcement to cases in which consumer injuries had resulted from noncompliance with the terms of a consent order by a party to the order or some party substantially identifiable with the transgressor. Routinely, consent agreements contain a provision that "the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated." *In re* Rich Plan Corp., 63 F.T.C. 1099, 1103 (1963). Narrowly construed, *Guernsey*'s holding is not inconsistent with this provision inasmuch as the compensable injury flows from noncompliance with the order itself, rather than from a violation of the FTC Act in a pure sense.

usurpation of the Commission's role by a court lacking the Commission's "expertise and knowledge of business practices"[38] should be avoided if at all possible. Part of the FTC's discretionary enforcement duty is to "gauge the injury a deceptive practice will cause to the public and to balance this against the likely cost of elimination of the practice."[39] To the extent that this function is not usurped and the Commission first performs in its discretionary capacity, no harm is done to the deliberately wrought legislative balance which concerned *Holloway*. Inasmuch as the FTC had initiated proceedings in 1963 against Rich Plan Corporation for the same practices that were to reappear later on the *Guernsey* record, it had to that degree utilized its special administrative competence.[40] The defendant in *Guernsey*, moreover, as a franchisee of Rich Plan Corporation, was arguably on notice of the 1963 consent order directed against its franchisor. Mrs. Holloway, on the other hand, could only allege that she was victimized by illegal business practices under section 5, and her forum was not willing to inquire into the substantive accuracy of her claim.

Because *Guernsey* limits the court's role to after-the-fact enforcement, the brunt of *Holloway*'s rationale against implication of a civil remedy is inapposite to the *Guernsey* situation. A federal court's appropriate role in providing supplemental remedies under a federal statute such as the FTC Act requires that it remain sensitive to the plethora of policy values embodied in the final legislative enactment. At the same time, the court must engage in a determination of whether or not judicial intervention in the particular case is warranted in order to further a strong congressional policy encompassing the Act as a whole. While the result of *Holloway*'s analysis is subject to criticism for being an inadequate judicial response to the broad legislative purposes of the FTC Act,[41] *Guernsey* can be no less vulnerable to criticism for

38. Holloway v. Bristol-Myers Corp., 485 F.2d at 998.

39. 408 F. Supp. at 588.

40. Throughout its opinion, the *Guernsey* court used the terms "consent order" and "cease and desist order" interchangeably, ignoring the technical distinction between these remedial devices. *See* note 6 *supra*. Arguably, the administrative discretion underlying a consent order is not as extensive as that behind a formal cease and desist order issued upon completion of a full administrative hearing. Yet it is equally arguable that the Commission's expert deliberations are largely complete once it has undertaken to challenge certain practices under sec. 5 of the FTC Act. The additional element present in a cease and desist order but which is lacking in the case of a consent order might be described simply as the respondent's choice to perfect fully its due process right to a full hearing before the Commission.

41. *See* note 27 and text accompanying notes 33 & 34 *supra*.

its lack of a deliberate policy analysis. Yet *Guernsey*'s ruling, admittedly an exercise of quasi-legislative power, remains within the parameters of the principles of federalism and separation of powers which inhibit the lawmaking prerogatives of the federal judiciary. The strong federal policy that *Guernsey* seeks to promote, by allowing supplementary enforcement of the FTC's final orders, permeates the amended FTC Act. With respect to the often exercised but seldom acknowledged coordinate lawmaking power[43] of the federal courts, one commentator has observed:

> That the court associates the remedy with a statutory provision affects the arguments for and against judicial lawmaking. The weaknesses of the court as lawmaker—the lack of debates and hearings, the retroactive effect of its solution, the uncertainty of its public mandate—are less serious when conduct has already been proscribed by the legislature and only an additional remedy is sought.[44]

The FTC is expressly authorized by statute to define the permissible limits of business behavior under section 5 of the Act. Once the Commission has indicated its disapproval of specific practices in a consent agreement, and the federal court's ruling creates only a limited supplemental remedy, the traditional arguments against this form of judicial activism lose most of their force.

Having distinguished *Holloway* to its satisfaction, the *Guernsey* court proceeded to attack the *Holloway* holding as overbroad.[45] As a final step in its reasoning, *Guernsey* sought to discredit *Holloway*'s blanket preclusion of private consumer remedies under the FTC Act.[46] *Holloway* had held essentially that FTC jurisdiction over unfair trade practices under section 5 was exclusive.[47] This conclusion was reached, the *Guernsey* court said, "without any citation of authority."[48] What *Guernsey* apparently

42. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Note, *Implied Civil Remedies for Consumers Under the Federal Trade Commission Act*, 54 B.U.L. REV. 758, 767-68 (1974).

43. Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963).

44. *Id.* Justice Harlan, concurring in *Bivens*, 403 U.S. 388, 398 (1971), and commenting upon J.I. Case Co. v. Borak, 377 U.S. 426 (1964), remarked, "The notion of 'implying' a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." 403 U.S. at 402-03 n.4.

45. 408 F. Supp. at 588.

46. Holloway v. Bristol-Myers Corp., 485 F.2d at 1002.

47. *Id.*

48. 408 F. Supp. at 588.

overlooked is that the *Holloway* court based its conclusion not upon precedent,but upon its own analysis of the statute, especially its reading of the Act's legislative history and congressional intent. However, *Guernsey* was correct in its assertion that the Commission's jurisdiction "has been held to be primary rather than exclusive."[49] This distinction had heretofore been of no moment, but in *Guernsey* a determination that the FTC's enforcement jurisdiction was purely exclusive may have justified the dismissal of plaintiffs' claim. The doctrine of primary jurisdiction,[50] a creature of administrative law, would not bar a private action to enforce an outstanding FTC ruling that defendant's practices were illegal under section 5.

Only once in its opinion did the *Guernsey* court directly criticize the reasoning of *Holloway*. In its discussion of the *Holloway* conception of the FTC as an expert tribunal vested with discretion to balance the injurious impact of a deceptive practice against the social costs of its elimination, the court noted that *Holloway*'s preoccupation with the Commission's statutory role caused it to "ignore the basic premise of the free enterprise economy—that consumers should have the opportunity to choose between competing merchants on the basis of price, quality, and service."[51] This appears to be a valid criticism and supports the argument[52] that *Holloway* had neglected to consider sufficiently the broad protective purposes of the amended FTC Act in its analysis. But this criticism should not be read as a *Guernsey* attempt to discredit the applicability of *Holloway*'s rationale to its own facts, inasmuch as these remarks were made in the context of *Guernsey*'s criticism that the *Holloway* holding was overbroad. If a future plaintiff, in a *Holloway* type situation where no previous FTC determination had taken place, should seek stand-

49. *Id.* (citing Moore v. New York Cotton Exch., 270 U.S. 593 (1926)). Both *Moore* and Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973), can be read to support this position. *See* note 20 and text accompanying note 21 *supra*. *See also* LaSalle Street Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004, 1006 (N.D. Ill. 1968) (private litigants may not seek relief under this statute because the [Federal Trade] Commission has original jurisdiction).

50. The doctrine, in general terms, requires courts to refrain from deciding issues falling within a sphere of regulation reserved by Congress to a particular administrative body until such time as that body, utilizing its special competence, has resolved the issues. *E.g.*, Far East Conference v. United States, 342 U.S. 570 (1952).

51. 408 F. Supp. at 588 (citing Gard, *Purpose and Promise Unfulfilled: A Different View of Private Enforcement Under the Federal Trade Commission Act*, 70 NW. U.L. REV. 274, 282-83 (1975)).

52. *See* note 27 *supra*.

ing under section 5 of the FTC Act, the court, in all likelihood, would distinguish *Guernsey* and apply *Holloway*'s rationale to dismiss the plaintiff's claim. *Guernsey*'s holding is indeed narrow in the sense that the court distinguished *Holloway* instead of attempting directly to remove the decision's logical underpinnings.

The recently enacted Magnuson-Moss Warranty—Federal Trade Commission Improvement Act[53] does not alter significantly the force of the *Guernsey* court's rationale. Admittedly, one of the Magnuson Act's foremost purposes is to "provide the Federal Trade Commission . . . with means of better protecting consumers."[54] To this end, the Commission's authority to promulgate substantive rules[55] defining certain unfair or deceptive commercial practices is clarified and confirmed, and the *Commission* is empowered to bring civil actions against knowing violators of a cease and desist order to obtain compensation for injured consumers.[56] Again, however, as in the 1938 amendments, there is no indication of a congressional intent to exclude any private actions which might be judicially implied, other than that detected in the strained reasoning of *Holloway*.[57] The narrow *Guernsey* ruling should simply be regarded as creating a convenient adjunct to assist the harried Commission in its enforcement duties, allowing the FTC to concentrate its resources more fully on performance of its specialized administrative tasks.

The Magnuson Act, nevertheless, may furnish a source of reference for the development of judicial limitations upon the standing concept enunciated in *Guernsey*. Section 5(m), for ex-

53. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C.A. §§ 45-77 (West Supp. 1976)) [Hereinafter cited as Magnuson Act]. The court in *Guernsey* simply made reference to the Magnuson Act and stated that it "does not alter the Federal Trade Commission Act as it relates to suits of this type." 408 F. Supp. at 587.

54. H.R. REP. No. 1107, 93d Cong., 2d Sess. 1, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702.

55. 15 U.S.C.A. § 57a (West Supp. 1976). The FTC's statutory authority to promulgate substantive rules was first judicialy recognized in National Petroleum Refiners Ass'n v. FTC, 485 F.2d 672 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951 (1974). Sec. 19 authorizes the Commission to obtain compensation for consumers injured by violations of these rules. 15 U.S.C.A. § 57b (West Supp. 1976).

56. 15 U.S.C.A. § 57b (West Supp. 1976).

57. That is, a negative implication arose from the fact that legislation which would have allowed private encorcement had been proposed but not adopted. Holloway v. Bristol-Myers Corp., 485 F.2d at 994-97. *See* note 27 *supra*. Note that sec. 19 of the new Act expressly states that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C.A. § 57b(e) (West Supp. 1976).

ample, requires a showing of actual or objectively implicit knowledge by a rule violator before the Commission can recover a civil penalty.[58] When the FTC seeks a penalty against a violator of a final cease and desist order, it must demonstrate that the violator has actual knowledge that the particular practice is unfair or deceptive and unlawful.[59] The success of Commission actions to obtain compensation for *consumers*, however, hinges upon proof "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 fradulent . . . ."[60] Thus, the degree of scienter required for consumer redress appears to be less than that necessary for exaction of a civil penalty. Since scienter in *Guernsey* was implicit in the existing franchise relationship, it was not necessary for the court to address that specific issue.[61] It appears likely that constitutional due process will be a factor in the ultimate judicial demarcation of the appropriate standard with respect to rule as well as order violations.

Private enforcement of consent orders, as distinguished from the enforcement of final cease and desist orders, may become a salient issue in future cases. Although *Guernsey* dealt with a consent agreement, its reasoning might apply even more forcefully to a cease and desist order issued after a full adjudicatory determination of the illegality of the practices.[62] The Magnuson Act appears to take into account this distinction.[63] A further criticism of *Guernsey* might be made on the ground that the holding may serve to discourage future settlements by raising the possibility of subsequent private litigation against the settling party. Since the consent order procedure is an important element of the statutory scheme, *Guernsey* would prove disruptive of the enforcement scheme if it had this impact. Yet this criticism presupposes that the defendant in a consent agreement seeks to continue the challenged practices with impunity; to the extent that the

58. 15 U.S.C.A. § 45(m)(1)(A) (West Supp. 1976).

59. *Id.* at § 45(m)(1)(B).

60. *Id.* at § 57b(a)(2). Note that with such damage actions, however, the statute limits recovery to actual damages. *Id.* at § 57b(b).

61. *See* text accompanying notes 36 & 37 *supra*. This consideration might have been deemed unnecessary by the court because it was ruling merely on defendant's motion to dismiss for failure to state a claim. 408 F. Supp. at 585.

62. *See* note 40 *supra*.

63. Sec. 5(m) appears to contemplate a full adjudicatory determination before the Commission. Sec. 5(l), however, would appear to be equally applicable to consent orders. 15 U.S.C.A. §§ 45(l)-45(m) (West Supp. 1976).

party intends to abide by the terms of the order, he need fear neither a serious private suit nor an enforcement suit by the Commission. The fact remains that the party to a consent order can present scant legal justification for a subsequent violation of the order's terms. Whatever *Guernsey*'s implications eventually prove to be, it seems that the FTC Act, in the near future, may cease to be "an empty promise to consumers."[64]

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64. 408 F. Supp. at 588. One decision rendered after *Guernsey* refused to allow a private action where defendants had violated an FTC consent order. Bott v. Holiday Universal, Inc., 5 TRADE REG. REP. (1976-2 Trade Cas.) ¶ 60,973 at 69,301 (D.D.C. July 14, 1976). The court simply refused to acknowledge the factual similarity to *Guernsey* and reaffirmed *Holloway*, which was also decided in the District of Columbia Circuit. In a brief, passing reference to *Guernsey*, the court remarked, "[t]his decision . . . is contrary to the legislative history and intent of the FTC Act and subsequent amendments, as explained in the *Holloway* decision." *Id.* at ¶ 69,302. Recent legislation proposed by Representative Bob Eckhardt (D-Tex.) would allow injured consumers and competitors to bring civil actions against violators of trade regulation rules and cease and desist orders. H.R. 1767, 95th Cong., 1st Sess. (1977). There is some indication that the FTC soon may be willing to support this or similar legislation. *See* 801 ANTITRUST & TRADE REG. REP. (BNA) A-5, 6 (Feb. 15, 1977).

This writer gratefully acknowledges the assistance of David B. Dempsey, a 1977 graduate of the University of South Carolina School of Law.

***Editor's Note**—As this Comment goes to press, the Ninth Circuit has handed down an opinion allowing consumers to bring private actions based on the doctrine of implication. In *Kipperman v. Academy Life Insurance Co.*, No. 75-3345 (9th Cir., filed May 24, 1977) (affirming dismissal of claim on other grounds), the court granted § 1337 jurisdiction from 39 U.S.C. 3009, a statute prohibiting the mailing of unordered merchandise, to allow a consumer declaratory and, if necessary, restitutionary relief for the unsolicited mailing of insurance promotional materials. This limited private right was permitted despite the language of § 3009(a) that a violation of 39 U.S.C. 3009 is an unfair trade practice under 15 U.S.C. 45(a)(1). *See* notes 17-21 and accompanying text *supra*.

CONTRACT LAW—THE STATUS OF THE BLUE PENCIL RULE AS APPLIED IN SOUTH CAROLINA TO COVENANTS NOT TO COMPETE

This comment examines the status of the South Carolina law pertaining to partial enforcement of employment covenants not to compete and offers guidelines in drafting these covenants. Decisions involving covenants not to compete ancillary to the sale of a business are considered to the extent they affect drafting covenants between the employee and employer. After it has been determined that a covenant contains an unreasonable time or geographic restriction,[1] the court must decide whether to enforce the covenant to a reasonable extent. Before one can analyze the South Carolina decisions addressing this subject, it is necessary to outline the basic principles in this area.

THE BLUE PENCIL RULE

When the time, space, or activity restriction in a covenant not to compete exceeds that which the court considers reasonable, the issue of severability arises. This problem can be illustrated by the following covenant:

> Employee agrees not to engage in competition with the employer in the exterminating business in cities *A*, *B*, and *C* and all territory within a 25 mile radius of each city.

If the employee had been assigned only to cities *A* and *B*, the court may determine that the inclusion of city *C* is unreasonable. The court then must consider whether to sever city *C* and enforce the remainder of the covenant. The traditional statement of the test of severability is contained in the blue pencil rule.[2] The elements of this rule were expressed in the English decision of *Attwood v. Lamont:*[3]

> Covenants of this kind are severable where the severance can be effected by striking out restrictions which are excessive with

1. For a discussion of the criteria used in South Carolina to determine the issue of reasonableness, see Note, *Enforceability of Covenants not to Compete Containing Unreasonable, Indivisible Restrictions as to Georaphic Area,* 11 S.C.L.Q. 343 (1959).

2. 5 S. WILLISTON, CONTRACTS § 1659 (Rev. ed. 1937).

3. Attwood v. Lamont, [1920] 2 K.B. 146, rev. [1920] 3 K.B. 571 (C.A.).

> respect to area or subject matter or classes of customers, provided any such restriction is so expressed that it can be dealt with as a separate negative obligation, but the courts will not split up a single restriction expressed in indivisible terms . . . the court will sever in a proper case where the severance can be performed by a blue pencil but not otherwise.[4]

Subsequent English cases have refined the blue pencil rule by requiring not only that the unenforceable clause be stated separately in order that it can be stricken from the covenant but also that the excessive limitation be merely an additional stipulation unessential to the purpose of the contract.[5] Unless both of these prerequisites are satisfied, the entire covenant fails even if the excessive restraint could be severed.[6]

The American Law Institute places paramount importance on whether the covenant is divisible in form:

> Where a promise in reasonable restraint of trade in a bargain has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms would involve unreasonable restraint the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint.[7]

Although the majority view of the American courts is said to be in accord with the position adopted by the American Law Institute,[8] "[t]he law on the question of rewriting a covenant not to compete to excise overbroad restrictions is still developing."[9]

The most recent American cases have evidenced a tendency to enforce an indivisible covenant to a lawful extent.[10] This view has been adopted by Williston[11] and Corbin[12] as the better ap-

4. *Id.* at 155 (Bailhache, J.).

5. British Reinforced Concrete Eng. Co. v. Schelff, [1921] 2 Ch. 563, 91 L.J. Ch. 114, (h.s.) (Younger, L.J.); 5 S. WILLISTON, CONTRACTS § 1659 (Rev. ed. 1937).

6. 5 S. WILLISTON, CONTRACTS § 1659 (Rev. ed. 1937).

7. RESTATEMENT OF CONTRACTS § 518 (1932).

8. *See generally* 6A A. CORBIN, CONTRACTS § 1390 (1951).

9. Alders v. AFA Corp. of Fla., 353 F. Supp. 654, 658 (S.D. Fla.), *aff'd*, 490 F.2d 990 (5th Cir. 1973).

10. *E.g.*, USAchem, Inc. v. Goldstein, 512 F.2d 163 (2d Cir. 1975); Alexander & Alexander, Inc. v. Drayton, 378 F. Supp. 824 (E.D. Pa.), *aff'd*, 505 F.2d 729 (3d Cir. 1974); Sidco Paper Co. v. Aaron, 465 Pa. 586, 351 A.2d 250 (1976); Jacobson & Co. v. International Environment Corp., 427 Pa. 439, 235 A.2d 612 (1967); Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950 (1960).

11. 5 S. WILLISTON, CONTRACTS § 1660 (Rev. ed. 1937). Although Professor Williston

proach. The rationale underlying this position rejects a dependence on form where differences in the wording of agreements identical in substance would result in the partial enforcement of one covenant, but in the complete invalidity of another.[13] This situation is illustrated by the following covenant: "Employee agrees not to engage in competition with the employer in the exterminating business in County *D.*" This covenant is indivisible in its terms, and the traditional blue pencil rule could not be applied even though County *D* may be composed exclusively of cities *A, B,* and *C.* Therefore, a covenant that names each city individually could be given partial enforcement by striking the excessive area; however, the covenant naming only County *D* would be indivisible and totally void. The modern trend is not to consider the question of divisibility; under this view the covenant naming only County *D* would be enforced to a reasonable extent.[14]

The primary objection to the blue pencil rule is that it encourages employers, often having superior bargaining power, to extract unreasonable restrictions:

> Courts should, however, be hesitant to tailor overly broad covenants. This is especially true where large employers are involved. If severance is easily afforded, employers will be able to limit greatly employee mobility by fashioning ominous covenants with confidence that, if challenged, they will be pared

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drafted § 518 of the *Restatement of Contracts,* he subsequently changed his view: "I have concluded and have so stated in §1660 of the Revised edition of my treatise on Contracts in spite of the contrary rule stated in §518 of the Restatement of Contracts, that in such a case the unquestionably legal part of this covenant should be enforced." Williston, *A Note on* Beit v. Beit, 23 CONN. B.J. 40, 41 (1949).

12. 6A A. CORBIN, CONTRACTS § 1390 (1951). Professor Corbin has argued that adoption of this position is not equivalent to drafting a new contract:

> This is not making a new contract for the parties; it is a choice among the possible effects of the one that they made, establishing the one that is the most desirable for the contractors and the public at large. Partial enforcement involves much less of a variation from the effects intended by the parties than total non-enforcement would.

Corbin, *A Comment on* Beit v. Beit, 23 CONN. B.J. 43, 50 (1949).

13. 5 S. WILLISTON, CONTRACTS § 1660 (Rev. ed. 1937).

14. This point is expressed colorfully in Sidco Paper Co. v. Aaron, 465 Pa. 586, 351 A.2d 250 (1976):

> The man who wildly claims that he owns all the cherry trees in the county cannot be denied protection of the orchard in his backyard. A restrictive covenant, when it comes under the scrutiny of a court of equity, will be held to reasonable geographical and chronological boundaries, according to the realities of the situation.

Id. at 596 n.8, 351 A.2d at 255 n.8 (quoting Barb-Lee Mobile Frame Co. v. Hout, 416 Pa. 222, 224, 206 A.2d 59, 60 (1965)).

down and enforced when the facts of a particular case are not unreasonable.[15]

STATUS OF THE BLUE PENCIL RULE IN SOUTH CAROLINA: EARLY DECISIONS

Carroll v. Giles[16] is the earliest South Carolina Supreme Court decision involving a restrictive covenant not to compete. The plaintiff furnished to the defendant the necessary items for a barber shop and the defendant agreed to refrain from working as a barber for anyone else or opening a shop for himself in Bennettsville at any time. The court, per Justice McGowan, held that the unlimited time stipulation was unreasonable and, consequently, the covenant could not be enforced.[17] The court did not discuss the possibility of limiting the time restriction to a reasonable extent.

The question of the validity of a restrictive covenant not to compete, ancillary to a sale of a business and its goodwill, came before the court in *Metts v. Wenberg.*[18] In consideration for selling the business, the defendant agreed not to engage directly or indirectly in the barber trade for five years within the city of Orangeburg. Because this covenant was determined to be reasonable, the court was precluded from reaching the issue of partial enforcement. Several years later in *Reeves v. Sargeant,*[19] the court again upheld a covenant included in a contract for the sale of a photography business with its trade name and goodwill. The seller had agreed never to engage in the same business in Richland County. These earlier cases provided little if any precedent for the supreme court when it faced the decision of whether to apply the blue pencil rule to employment covenants not to compete.

15. Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law,* 73 COLUM. L. REV. 1193, 1199-1200 (1973); *accord* Blake, *Employment Agreements Not to Compete,* 73 HARV. L. REV. 625, 683-84 (1960). Professor Blake believes, however, that the judicial blue pencil should be used if the covenant is drafted carefully and in good faith and is tailored to the facts concerning the business and the individual employee. *Id.* at 681. *See also* Alders v. AFA Corp. of Fla., 353 F. Supp. 654, 658 (S.D. Fla.), *aff'd,* 490 F.2d 990 (5th Cir. 1973).

16. 30 S.C. 412, 9 S.E. 422 (1889).

17. *Id.* at 418-19, 9 S.E. at 423.

18. 158 S.C. 411, 155 S.E. 734 (1930).

19. 200 S.C. 494, 21 S.E.2d 184 (1942).

RECENT DECISIONS

In *Delmar Studios of the Carolinas v. Kinsey*,[20] the South Carolina Supreme Court, applying North Carolina law, refused to uphold a covenant in an employment contract in which the employee, a photographer, had agreed not to engage in competition with the employer for a period of two years from the date of employment termination. The employee was not to become interested financially in the solicitation of business from schools within a territory covering three-fourths of North Carolina, all of South Carolina, and eleven counties in Georgia.[21] The employer's business extended into all of these areas; the employee, however, had worked exclusively in ten South Carolina counties and in six Georgia counties.[22] The court, per Justice Oxner, refused to blue pencil the areas in which the employee did not work and concluded that the territorial limits of the restrictive covenant were broader than reasonably necessary for the protection of Delmar's business. Refusing to divide the territory and thus enforcing what it considered would be a new contract, the court stated that the contract "must stand or fall integrally."[23] The decision relied heavily on the North Carolina case of *Noe v. McDevitt*.[24]

During the same term as the *Delmar Studios* decision, the supreme court considered the case of *Somerset v. Reyner*.[25] The covenant not to compete was contained in an option agreement. Under the terms of the instrument, the plaintiff agreed in further consideration of the sale not to engage in retail selling of jewelry, silverware, or similar items in South Carolina for a period of twenty years. The trade of the business was confined basically to the Columbia area. The court, therefore, had an opportunity as

20. 233 S.C. 313, 104 S.E.2d 338 (1958).

21. *Id.* at 316, 104 S.E.2d at 339.

22. *Id.*

23. *Id.* at 324, 104 S.E.2d at 344.

24. 228 N.C. 242, 45 S.E.2d 121 (1947). In this case, the plaintiff was engaged in the business of selling equipment and supplies used in the operation of beauty salons. The defendant was employed as a salesman in North Carolina and South Carolina. He had agreed in his contract of employment that he would not work as a salesman in a similar business or in the same territory for a period of five years following termination of his employment. Although his territory covered both states, the defendant worked exclusively in the eastern district of North Carolina. The court held the covenant to be void since the territory covered in the covenant was too extensive for the reasonable protection of the plaintiff's business. The plaintiff had not demonstrated that the inclusion of the broad territory would correlate with the protection needed by the employer.

25. 233 S.C. 324, 104 S.E.2d 344 (1958).

in *Delmar Studios* to pare down the territory clause of the covenant to include only that area which the business encompassed. In addressing the question of whether the covenant could be enforced within such an area that would be reasonably necessary for the protection of the covenantee, the court acknowledged the existence of considerable disagreement on the subject of partial enforcement.[26] Recognizing the blue pencil rule as the majority view,[27] the court then cited several authorities to support the position that a covenant not readily severable by its terms is entirely unenforceable.[28] Additionally, the court discussed the minority view that enforces so much of the covenant as will impose a reasonable restraint without regard to whether the form of the covenant is divisible.[29]

Without expressly committing itself to either view, the court refused to carve out a reasonable territory that would be enforceable. The court stressed that if the parties had desired a narrower provision they should have agreed initially upon it.[30] The court relied on Pollock's treatise on contract law:

> A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject matter, may be good as to part and bad as to part. But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that it can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants.[31]

Admitting that persuasive arguments exist to support both views, the court, however, refused to enforce the covenant to a reasonable territorial boundary, thereby rejecting the modern trend of the case law:

> The severability of the contract must be determined from its language and subject matter, and the court cannot create a new agreement for the parties in order to uphold the contract,

26. *Id.* at 331, 104 S.E.2d at 347.
27. *Id.*
28. *Id.* (citing 5 S. WILLISTON, CONTRACTS §§ 1659-1660 (Rev. ed. 1937)); RESTATEMENT OF CONTRACTS § 518 (1932).
29. 233 S.C. at 331-32, 104 S.E.2d at 347-48.
30. *Id.* at 331-32, 104 S.E.2d at 348.
31. *Id.* at 332, 104 S.E.2d at 347-48 (quoting F. POLLOCK, CONTRACTS 335 (11th ed. 1942)).

> where the severable character of the agreement is not determinable from the contract itself.[32]

The court concluded that it would only consider the validity of the original contract. If this initial covenant fails, the court would not make a new agreement for the parties. Furthermore, the appellant's present willingness to accept a reasonable restriction did not influence the court;[33] the covenant was considered clearly to be indivisible since it covered the entire state.[34]

The opportunity for partial enforcement of a covenant arose again in *Oxman v. Sherman*[35] where the court held that a covenant restricting an insurance agent from competing in "any territory in the State of South Carolina"[36] was unenforceable.[37] The agent's assigned territory, however, had been composed exclusively of Orangeburg and Calhoun counties.[38] The court did not discuss the possibility of rewriting the covenant to cover only these two counties. This decision evidenced a rejection of any propensity to follow the modern trend which narrows the scope of an indivisible covenant and enforces it to a reasonable extent.

In *Eastern Business Forms, Inc. v. Kistler,*[39] the court reviewed its position regarding the blue pencil rule. The employer sought to restrain and enjoin a former employee from violating the following covenant contained in an employment contract:

> It is further understood and agreed that upon the termination of this contract Salesman is not to sell printing products of the type produced or sold by Employer for a period of twelve (12) months within a 100-mile radius of the City of Greenville nor within a 100-mile radius of the central city of the assigned territory of Salesman.[40]

Because the former employee's assigned territory had consisted of three counties and all of his work had been basically within these counties, the covenant was found by the trial court to be unreasonable.[41]

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32. *Id.* (quoting 17 C.J.S. *Contracts* § 289(a) at p. 1224 (1963)).
33. *Id.* at 332-33, 104 S.E.2d at 348.
34. *Id.* at 332, 104 S.E.2d at 348.
35. 239 S.C. 218, 122 S.E.2d 559 (1961).
36. *Id.* at 222, 122 S.E.2d at 560.
37. *Id.* at 225, 122 S.E.2d at 562.
38. *Id.*
39. 258 S.C. 429, 189 S.E.2d 22 (1972).
40. *Id.* at 432, 189 S.E.2d at 23.
41. *Id.*

The supreme court framed its inquiry in terms of "whether the trial judge could, after holding that the 100-mile radius provision of the contract was unreasonable, sever that part of the contract and enforce the restrictive covenant contained in the contract only in the counties of Spartanburg, Cherokee and Union."[42] After defining the blue pencil rule in its traditional terms, the court then recognized that some jurisdictions apply the rule even though the provisions of the covenant pertaining to time or space are indivisible.[43] The result of such an application is that the covenant is enforceable for so much of the performance as would be reasonable. Furthermore, the *Kistler* court noted that the purpose in applying the blue pencil rule to indivisible promises is to insure that the "legality of the restraint should not turn on the mere form of the wording but upon the reasonableness of giving effect to the indivisible promise to the extent that would be lawful."[44] In rejecting this argument, the supreme court again referred to Pollock's treatise on contracts, which had been the justification for the court's earlier refusal to blue pencil the covenant in *Somerset*.[45]

The *Kistler* decision reflects the court's view that partial enforcement is equivalent to a judicial rewriting of the covenant:

> The severability of the contract must be determined from its language and subject matter; and where the severable character of the agreement is not determinable from the contract itself, the court, in order to uphold the contract, cannot create a new agreement for the parties, for example, so as to make the restraint a partial restraint within a lesser area than that specified in the covenant or for a lesser period of time.[46]

As applied to the covenant in question, the court found that the 100-mile radius stipulation provided no basis for dividing this territory into a reasonable portion.[47] Because the court believed the covenant displayed the intent of the parties to treat the area restraint as indivisible, the supreme court refused to enforce the covenant to a reasonable extent although the parties assented to

42. *Id.* at 433, 189 S.E.2d at 23.
43. *Id.*
44. *Id.*
45. *See* note 31 and accompanying text *supra.*
46. Eastern Business Forms, Inc. v. Kistler, 258 S.C. at 434, 189 S.E.2d at 24 (quoting 17 C.J.S. *Contracts* § 289(a) at p. 1224 (1963)). *But see* note 12 and accompanying text *supra.*
47. *Id.* at 434, 189 S.E.2d at 24.

such action.[48] This result is consistent with the earler *Somerset* decision.[49] The following statement from the *Kistler* opinion is indicative of the South Carolina Supreme Court's present response to the application of the blue pencil rule to covenants not to compete:

> The contract shows upon its face that it was the intent of the parties thereto that this covenant be treated as indivisible. It follows, that there is no basis for drawing a sharply defined line separating the excess territory. We cannot make a new agreement for the parties into which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally. The invalidity of the covenant is not aided by the respondent's willingness to accept a restriction that is proper in scope.[50]

Although the South Carolina Supreme Court appears to have left open the possibility of blue penciling a divisible covenant, the court emphasizes in the *Kistler* decision that the parties intended the covenant to be indivisible.[51] Therefore, although a covenant may appear in form to present a "sharply defined line"[52] by which the court can sever the provision, the intent of the parties to treat the contract as indivisible may provide the basis for refusing severance.

The remaining case to consider is *Almers v. South Carolina National Bank of Charleston.*[53] This action involved a forfeiture provision in a noncontributory pension plan which provided that if an employer left his job and went to work for a competitor, he would forfeit the amount paid into the pension plan by the employer. Because the clause was unlimited in its time and geographical restrictions, it was held to be unreasonably broad and, therefore, invalid. *Almers* did not address the issue of partial enforcement of the provision. The supreme court's decision to invalidate the clause can be attributed both to the nature of the restriction, a forfeiture of rights under a pension plan, and to the failure of the clause to protect any legitimate commercial interest of the bank.

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48. *Id.*

49. *See* notes 25-34 and accompanying text *supra.*

50. Eastern Business Forms, Inc. v. Kistler, 258 S.C. at 434, 189 S.E.2d at 24.

51. *Id.*

52. *Id.* This language appears to have been adopted from 5 S. WILLISTON, CONTRACTS § 1660 (Rev. ed. 1937).

53. 265 S.C. 48, 217 S.E.2d 135 (1975). A discussion of this case appears in *Contracts, 1975 Survey of S.C. Law,* 28 S.C.L. REV. 271, 279-83 (1975).

Because the South Carolina court continues to adhere to the view that the entire covenant is void when its terms are indivisible and unreasonably broad, the practitioner is in a precarious position when drafting these covenants. In representing the employer, the practitioner must attempt to draw the terms of the covenant as closely as possible to the boundary of permissible restraint without exceeding it. The result of improper draftsmanship is that the employer is left without any of the protection that the covenant is designed to provide. The South Carolina decisions appear to indicate that if the severable character is determinable from the contract, the judicial blue pencil may be applied so as to render the covenant partially enforceable.[54] Additionally, the supreme court has indicated its willingness to examine the intent of the parties as well as the form of the covenant in determining whether the covenant is divisible.[55]

A. Territorial Restrictions

Since the territorial restrictions in covenants not to compete have been vulnerable to attack, the petitioner must be exceedingly cautious in drafting these clauses. The South Carolina Supreme Court has centered its examination on the employee's assigned territory.[56] Further, the court has refined its analysis and focused on the specific area in which the employee has actually worked.[57] Therefore, if it is necessary to exceed the area in which the employee has worked in order to protect the employer, the justification for the enlarged territory should be incorporated into the covenant. Frequently, the covenants are drafted when the employee initially enters into employment with the covenantee. At that time, it cannot be precisely determined where the em-

54. *E.g.*, Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972). In Packard & Field v. Byrd, 73 S.C. 1, 51 S.E. 678 (1905), the court stated the following regarding severability:

> "Where there are several promises so that those which are legal can be separated from those which are illegal, the legal promises may be enforced. A lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration." Clark on Contracts, 474.

Id. at 7, 51 S.E. at 680.

55. *E.g.*, Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 344 (1958).

56. *E.g.*, Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972).

57. *Id.* at 432, 189 S.E.2d at 23.

ployee will be assigned in the future. Consequently, it is necessary to review periodically the territorial restriction in order to determine its continued validity.

B. Time and Activity Restrictions

The South Carolina Supreme Court has not specifically addressed the issue of whether the blue pencil rule is applicable to excessive time and activity restrictions. The court would, however, have difficulty in applying the blue pencil rule to an excessive time restraint since it would most likely not be divisible in form. Activity restraints have not received any attention by the South Carolina Supreme Court; consequently, caution should be exercised if a covenant restricts an employee from engaging in more than one activity. Language justifying this additional restraint should be incorporated into the covenant. Furthermore, a multiple activity restraint should be stated in a manner divisible in form, thereby preserving the argument that the blue pencil rule could be applied.

The supreme court has not yet considered a covenant not to compete involving an employee engaged in a technical field or an employee with extensive professional training. In such a situation, two principles come into conflict. First, the employer may be required to demonstrate a greater degree of justification for restraints.[58] This must be balanced against the fact that extensively educated persons are frequently placed in positions of special confidences and, therefore, may have access to trade secrets and customer lists.[59] Consequently, it is precisely these employees against whom the employer may need the protection afforded by a covenant not to compete. Furthermore, the courts have given

58. *E.g.*, Horne v. Radiological Health Servs., P.C., 83 Misc.2d 446, 371 N.Y.S.2d 948, *aff'd*, 51 App. Div. 2d 544, 379 N.Y.S.2d 374 (1975); Karpinski v. Ingrasci, 28 N.Y.2d 45, 320 N.Y.S.2d 1, 268 N.E.2d 751 (1971).

59. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 684 (1960). In reference to restrictions on the practice of physicians, it has been noted:

> It is a firmly established doctrine that a member of one of the learned professions, upon becoming assistant to another member thereof, may, upon a sufficient consideration, bind himself not to engage in the practice of his profession upon the termination of his contract of employment, within a reasonable territorial extent, as such an agreement is not in restraint of trade or against public policy.

Annot., 58 A.L.R. 156, 162 (1929). The need to protect technological and trade secrets has been recognized in recent decisions as a factor pertaining to the reasonableness of the restraint. Annot., 61 A.L.R.3d 397, 407 (1975).

additional weight to society's interests when covenants attempt to restrict professionally trained employees from being productive in their field.[60]

C. Consideration

Another drafting requisite is that the covenant include adequate consideration for the covenant not to compete.[61] It is advisable that the consideration for the covenant not to compete be stated separately from that given for the actual performance during employment. This can be accomplished by providing for compensation after termination. In *Alston Studios, Inc. v. Lloyd V. Gress*[62] the Fourth Circuit addressed the issue of adequate consideration. After termination of employment, the employee was to receive fifty percent of his first year compensation paid under the employment contract and his second year consideration was to be determined by one-half of that paid during the first year after termination. In striking down the covenant, the court scrutinized the limitless geographic area and the broad range of activities from which the employee was restricted. Even though the consideration was to some extent stated separately, the court found it to be interwoven with the void portion of the contract and could not be severed. Although this case was decided under Virginia law, its implications appear to be consistent with the principles enunciated in the South Carolina decision of *Packard & Field v. Byrd:*[63] "Where the consideration or promise is single, there is no difficulty in pronouncing the contract indivisible, and in declaring the whole void if there be illegality in the consideration or promise . . . ."[64]

D. Express Provisions for Partial Enforcement and Divisibility

Some employment contracts contain express provisions to the effect that if a restriction is determined to be unenforceable, it is to be reduced to enforceable limits. In *Credit Bureau Management Co. v. Huie,*[65] the contract stipulated that if the five year

60. Blake, *Employee Agreements Not to Compete,* 73 HARV. L. REV. 625, 684 (1960). *See also* Annot., 62 A.L.R.3d 1014 (1975).

61. *See generally* Annot., 5 A.L.R.3d 825 (1973).

62. 492 F.2d 279 (4th Cir. 1974).

63. 73 S.C. 1, 51 S.E. 678 (1905).

64. *Id.* at 6, 51 S.E. at 679.

65. 254 F. Supp. 547 (D. Ark. 1966).

restriction should result in the covenant's being unenforceable, the duration of the restriction could be reduced to an enforceable period. Additionally, if the restriction should be unenforceable from the standpoint of area, then the scope of this restriction would be reduced to reasonable limits. Although the case was decided on other grounds, the court indicated that the policy against rewriting contracts would not be as strong in light of these provisions. Express provisions have also been included which state that if an aspect of a covenant is found to be invalid, it can be eliminated and the remaining provisions enforced. The effect of this stipulation is to authorize the application of the blue pencil rule. Corbin has advocated that these provisions be given full effect when the only reason for refusing to enforce the covenant is the court's fear of " 'making a contract for the parties.' "[66]

CONCLUSION

The South Carolina Supreme Court has remained firm in its refusal to give partial enforcement to a covenant which is indivisible in form. Unlike the majority of jurisdictions, South Carolina has continued to refrain from exercising the judicial blue pencil even when a covenant is divisible. Since each provision of a covenant is vulnerable to attack, the practitioner must rely, therefore, upon accurate and precise draftsmanship rather than the blue pencil rule to render a covenant enforceable in South Carolina.

Kathleen E. Crum

66. 6A A. CORBIN, CONTRACTS § 1390 (1951 & Supp. 1964).