Volume 50
Number 1 *Fall 2015*

*pp.*227-270

Fall 2015

The FTC Won't Let Me Be: The Need for a Private Right of Action Under Section 5 of the FTC Act

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THE FTC WON'T LET ME BE: THE NEED FOR A PRIVATE RIGHT OF ACTION UNDER SECTION 5 OF THE FTC ACT

I. INTRODUCTION

Allison Hernandez is a recent law school graduate.[1] Like the average graduate, Allison is burdened with a substantial amount of student loan debt. One day, Allison received a call from a fake collector. The caller assured Allison that they were affiliated with her student loan servicer and had the ability to decrease her student loans by seventy percent. Allison believed the caller and accepted the company's services. Allison promptly paid the company and expected to see her loans decrease dramatically. After sending thousands of dollars making these payments, the contract was sold to a third party. The third party did not pay Allison's lenders. Allison realized she had been deceived and demanded a refund, although to no avail.

Allison initiated a lawsuit against the company to get her money back. She also requested an injunction against the company to eliminate any future scams against innocent victims. Unfortunately, under Allison's state's consumer protection laws she cannot have an injunction issued against the company.[2] Moreover, she cannot allege a Section 5 violation of the Federal Trade Commission Act ("FTC Act"), which prohibits the deceptive acts of companies, because she is a private consumer.[3] Her only

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1 This is a hypothetical situation that is solely the work of the author. The facts of this hypothetical closely parallel the facts from *FTC v. E.M.A. Nationwide, Inc.* 767 F.3d 611, 621 (6th Cir. 2014). The defendants in *E.M.A. Nationwide, Inc.* created a scheme by which they had a series of American and Canadian corporations. *Id.* at 619–20. In order to effectuate the scheme, the corporations placed cold calls to struggling American consumers and made promises to consumers that were not kept. *Id.* at 620. The defendants would claim to be affiliated with the consumer's creditors or that they were calling on behalf of the government in order to advance the scheme. *Id.* at 621.

2 *See* ARK. CODE ANN. § 4-88-104 (2016) (stating that the Arkansas Attorney General can have an injunction issued against the telemarketer per the Arkansas Deceptive Trade Practices Act ("ADTPA"), which would end the deceptive practice). *See also* ABA SECTION OF ANTITRUST LAW, 2011 REVIEW OF CONSUMER PROTECTION LAW DEVELOPMENTS 259 (2011) [hereinafter 2011 REVIEW] (discussing private enforcement and remedies available to Arkansas consumers under the ADTPA). Under the ADTPA, even though private litigants can seek money damages, injunctive relief is not available to them. *Id.* In Allison's case, not having the option to have an injunction issued against the telemarketer may mean that the deceptive act or practice could continue.

3 *See infra* Part II.C (explaining the *Holloway* Court's interpretation of congressional intent regarding a private right of action under the FTC Act and examining the history of the Supreme Court's interpretation of Section 5 of the FTC Act in *Moore v. New York Cotton Exchange*); *Holloway* set the precedent that a private right of action does not exist for consumers under the FTC Act. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973).

option is to file an informal complaint with the Federal Trade Commission ("FTC") with the hope that the FTC commissioners will issue an injunction against the company to stop the company's deceptive practices.[4]

Section 5 of the FTC Act protects American consumers from deceptive acts or practices in or affecting commerce.[5] Since the FTC Act's creation, consumers have not been able to initiate lawsuits alleging Section 5 violations, due largely in part to the judicial interpretation in *Holloway v. Bristol-Myers Corporation*.[6] Currently, state consumer protection laws do not contain the broad enforcement provisions of Section 5, as a result, consumers are left without adequate protection as illustrated in Allison's case.[7]

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[4] *See infra* Part II.A (listing the steps that a consumer needs to take in order to submit a complaint with the FTC). In order to submit a complaint with the FTC, Allison has the option of logging on to the FTC's website and answering a list of questions regarding the act or practice that occurred. *See* FTC, *Submit a Consumer Complaint to the FTC,* http://www.ftc.gov/faq/consumer-protection/submit-consumer-complaint-ftc [https://perma.cc/632Y-D9TU] (illustrating the methods for a consumer to file a complaint, such as logging on to the FTC complaint assistant).

[5] *See* 15 U.S.C § 45(a)(1) (2012) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); *see also infra* Part II.A (describing Section 5 of the FTC Act, providing the legal history of the Act, and congressional intent for enacting Section 5).

[6] *See Holloway,* 485 F.2d at 989 (holding that consumers are not afforded a private right of action under the FTC Act); United States v. J.B. Williams Co., Inc., 498 F.2d 414, 463 (2d Cir. 1974) (holding that the FTC is in the best position to determine penalties for violating a cease and desist order, while citing to *Holloway*'s decision multiple times throughout its reasoning). *See also* Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 586 (N.D. Ind. 1976) (arguing that federal courts, using *Holloway* as reasoning, have historically found that no private right of action could be implied from the FTC Act). Conversely, *Guernsey* ultimately held that the plaintiffs adequately stated a claim under 15 U.S.C. § 45(a)(1) and had a cause of action. *Id.* at 589. *Guernsey* analyzed *Holloway*'s decision and determined that the government cannot possibly protect all consumers from ongoing fraud. *Id.* at 586. The court argued that unlike *Holloway* the plaintiff had established a claim for which relief could be granted. *Id.* at 588–89. The private right of action found by *Guernsey* is only available when the wrongful conduct is subject to an earlier cease and desist order issued by the FTC. Days Inn of Am. Franchising, Inc. v. Windham, 699 F. Supp. 1581, 1583 (N.D. Ga. 1988).

[7] *See infra* Part III.A (analyzing the effects of not having a private right of action on consumers based on the discrepancies between state and federal consumer protection law); *see also* John E. Villafranco & Daniel S. Blynn, *The Case of the Piggyback Class Action in a "Piggyback" Class Action Lawsuit, Who Bears the Burden of Proving Falsity?*, NUTRITIONAL OUTLOOK 22, 24 (2012) (arguing that because there is no private right of action under the FTC Act, any class action brought before the court by a private litigant relying on allegations made by the FTC in a previous action is impermissible); *infra* Part II.B (demonstrating that state consumer protection laws are based off of the FTC Act, and that Section 5 enforcement is broader than most state consumer protection laws).

To provide a private right of action, this Note proposes an amendment to Section 5 of the FTC Act to resolve the issue for consumers.[8] First, Part II discusses the FTC Act, Section 5 and its current regulations, as well as, who is protected by the FTC Act.[9] Then, Part III analyzes Section 5's problems and why a private right of action is needed under Section 5 based on *Holloway*.[10] Finally, Part IV proposes an amendment to Section 5 and suggests that Congress implement the phrase "private consumer-plaintiff" into the FTC Act.[11] These amendments will provide adequate consumer redress, and ultimately, result in stronger consumer protection law to resolve the problem of not having a private right of action under Section 5.[12]

II. BACKGROUND

The question of whether federal courts may recognize private rights of action in the face of legislative silence is "one of the most contentious and practically important debates about judicial authority in the administrative state."[13] The U.S. Supreme Court's ruling in *Moore v. New York Cotton Exchange* brought the issue of whether consumers have the

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8 *See infra* Part IV (introducing the proposed changed to 15 U.S.C. § 45 and suggesting that by adding the phrase "consumer-plaintiff" throughout the existing language, consumers will be afforded the same express right of action available to the FTC to file a claim against a Section 5 violator). The range of the problem extends to consumers across the United States and it is not an issue that one state can correct, but calls for a change in federal legislation. *Infra* Part IV.

9 *See infra* Part II.A–C (illustrating the components of the creation of the FTC Act, Section 5 of the FTC Act, the reasons for enacting both pieces of federal consumer protection legislation, and the Consumer Financial Protection Bureau ("CFPB")).

10 *See infra* Part III.A (analyzing the discrepancies between state and federal consumer protection law, how the differences have an impact on consumer protection, and concluding that as a result of the differences, consumers should be afforded an express private right of action under Section 5); *see also infra* Part III.B (examining why the holding in *Holloway* is incorrect based on the lack of application of all of the factors for implying a private right of action, and the improper analysis of determining congressional intent for not overturning the *Moore* decision).

11 *See infra* Part IV (suggesting an amendment to the FTC Act that would reconcile consumer protection deficiencies based on the broad protection that is afforded to the FTC under the FTC Act, and also providing commentary about the proposed amendment and suggesting arguments that critics may make about the change to the federal consumer protection legislation).

12 *See infra* Part III (examining the discrepancies between state and federal consumer protection law and how consumers are left without adequate redress due to not being afforded the same broad enforcement discretion that is available to the FTC).

13 *See* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 3 (2014) (arguing that the United States and the states regularly claim a right to judicial relief or a particular remedy that is not mandated by a statute or the Constitution, and thus, a discussion on implied public rights of action is needed).

ability to initiate a lawsuit under the FTC Act to the forefront of consumer protection law by determining that consumers are not able to initiate a lawsuit against the perpetrator of a crime prohibited under the FTC Act.[14] Years after *Moore,* federal courts have heard the issue of whether a private right of action can be implied from the congressional intent creating the FTC Act.[15] Ultimately, federal courts have determined that consumers are not afforded the right to initiate a lawsuit against a violator of the FTC Act.[16] This Note focuses on why consumers should be able to initiate a lawsuit against a violator of Section 5 based on the discrepancies between state and federal consumer protection law and the federal courts' reasoning for not implying a private right of action.[17]

First, Part II.A explains the components of federal consumer protection legislation, including Section 5 of the FTC Act and the Consumer Financial Protection Bureau ("CFPB").[18] Then, Part II.B assesses private rights of action and introduces state laws, specifically "Little FTC Acts," Uniform Deceptive Acts and Practices ("UDAP") laws, and addresses the current effects that a private right of action has on consumers.[19] Finally, Part II.C provides an overview of how courts interpret a private right of action under Section 5 and the Wheeler-Lea Amendments ("WLA").[20]

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14 *See* Moore v. N.Y. Cotton Exch., 270 U.S. 593, 603 (1926) (establishing the precedent that private litigants do not have the authority to initiate a lawsuit under the FTC Act based on the idea that consumer relief must be afforded by the FTC).

15 *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997 (D.C. Cir. 1973) (holding that consumers are not afforded a private right of action under Section 5 because a private right cannot be implied under the FTC Act, and because Congress did not overturn the *Moore* decision, Congress intended enforcement of Section 5 to rest exclusively with the FTC).

16 *See id.* at 987 (stating that consumers are not afforded a private right of action under the FTC Act); *see also supra* note 6 and accompanying text (providing a list of federal decisions that have followed *Holloway*'s precedent).

17 *See infra* Part III.A (examining the differences between state and federal consumer protection law and concluding that as a result of the FTC's broad discretion to enforce Section 5 and the consumers' ability to enforce a laundry list of practices under state consumer protection laws, the FTC Act should provide an express private right of action to consumers); *see also infra* Part III.B (assessing *Holloway*'s decision and finding that as a result of the court incorrectly balancing the five factors for implying a private right of action and erring in interpreting Congress' intent for not overturning the *Moore* decision, the court reached the wrong result in finding that a private right of action did not exist under Section 5).

18 *See infra* Part II.A (highlighting what the FTC is, whom it affects, Section 5 of the FTC Act, current tests under the FTC Act, and the CFPB).

19 *See infra* Part II.B (explaining what a private right of action is and describing state consumer protection legislation based off of the FTC Act).

20 *See infra* Part II.C (focusing on the relevant facts, legal history, and factors examined in *Holloway* and *Guernsey*).

A. Federal Consumer Protection Legislation

The FTC is the federal agency responsible for safeguarding consumers.[21] In 1914, the FTC Act established the FTC as an independent administrative agency composed of five commissioners appointed by the President and confirmed by the Senate.[22] The purpose of creating the FTC was to prevent unfair methods of competition due in part to an increase of monopolies.[23] As a result, the FTC is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices.[24] The FTC Act applies to all persons, partnerships, and corporations.[25] Congress also granted the FTC the power to conduct investigations of possible violations of foreign antitrust laws.[26] Further, the FTC is authorized to

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21 *See* Villafranco & Blynn, *supra* note 7, at 22 (discussing the FTC's role in consumer protection enforcement). *See also* II ABA ANTITRUST SECTION, MONOGRAPH 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: ITS STRUCTURE, POWERS AND PROCEDURES 3 (1981) [hereinafter ANTITRUST SECTION, VOL. II] (noting that the FTC also is authorized to gather information from businesses, make reports to the public and Congress, and recommend legislation). As part of its role in consumer protection, the FTC is able to conduct investigations consistent to the provisions of the FTC Act, and can prescribe rules and general statements of policy, as well as enforce compliance with Sections 2, 3, 7, and 8 of the Clayton Act. *Id.*

22 *See* ANTITRUST SECTION, VOL. II, *supra* note 21, at 3 (noting that the presidentially appointed commissioners are empowered to prevent unfair methods of competition and deceptive acts or practices). *See also* ROBERT V. LABAREE, THE FEDERAL TRADE COMMISSION: A GUIDE TO SOURCES 423 (Garland Publishing 423 Inc., 2000) (defining the duties of each of the commissioners). The first appointed commissioners continued in office for terms of three, four, five, six, and seven years, respectively. *Id.* The President designated the commissioners' terms. *Id.* Currently, however, commissioners are appointed for seven years unless the commissioner is appointed to fill a vacancy. *Id.* If the commissioner is appointed to fill a vacancy, he or she will serve only for the unexpired terms of the commissioner who he or she succeeded. *Id.*

23 *See* FTC, *About the FTC,* http://www.ftc.gov/about-ftc [http://perma.cc/XTG5-AGPM] (providing the legal history of the FTC). *See also* Todd H. Cohen, *Double Vision: The FTC, State Regulation, and Deciding What's Best for Consumers,* 59 GEO. WASH. L. REV. 1249, 1251 (1991) (describing the history of the FTC Act). Congress enacted the FTC Act as a response to an increase of monopolies and unsuccessful attempts of enforcing the Sherman Act. *Id.*

24 *See* ANTITRUST SECTION, VOL. II, *supra* note 21, at 3 (reviewing the role of the commissioners). Additionally, commissioners have the ability to gather information from businesses and report to the public and Congress. *Id. See also* Cohen, *supra* note 23, at 1251 (noting that Section 5(a)(2) of the FTC Act permits the FTC the ability to prevent unfair or deceptive acts).

25 *See* 15 U.S.C. § 45(a)(2) (2012) (listing the components of the FTC Act). The FTC has the ability to require that persons, partnerships, and corporations engaged in commercial business submit reports annually. *Id.* § 46(b).

26 *See id.* § 46(i) (affirming that the FTC has the ability to conduct investigations of possible violations of foreign antitrust laws). Under the FTC Act, the FTC has the ability to conduct investigations that are defined in Section 12 of 15 U.S.C. § 6211. *Id.* Additionally, the FTC Act gives the FTC authority to investigate trade conditions in and with foreign countries that

investigate, initiate complaints, adjudicate violations, and create remedies.[27]

In 1914, Congress passed the Clayton Act, with the purpose of protecting consumers from powerful producers and to preserve the freedom of economic opportunity.[28] As a result of the FTC Act, if an FTC commissioner believes that a violation of Section 5 of the FTC Act or Sections 2, 3, 7, or 8 of the Clayton Act occurred, he or she can investigate the claim, file a complaint, conduct administrative hearings, or issue cease

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may affect the foreign trade of the United States, and to report any recommendations to Congress. *Id.* § 46(h). *See also* 15 U.S.C. § 6211 (2012) (defining foreign antitrust conduct that the FTC has the ability to regulate); Makan Delarhim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. ANN. SURV. AM. L. 415, 417 (2005) (expounding on the idea that the Supreme Court determined that the Sherman Act applied to foreign conduct intended to produce, and actually produced, a substantial effect in the United States). The statute states "[t]he term 'foreign antitrust laws' means that the laws of a foreign state, or of a regional economic integration organization, that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws." 15 U.S.C. § 6211(7); *see also* 15 U.S.C. § 45(4)(A) (providing statutory authority for the types of foreign commerce that the FTC has the ability to regulate under the FTC Act). The FTC has the ability to regulate deceptive acts or practices, including "acts or practices involving foreign commerce that cause, or are likely to cause, reasonably foreseeable injury within the United States." 15 U.S.C. § 45(4)(A)(i)–(ii) Additionally the FTC may regulate deceptive acts that involve material conduct occurring within the United States. *Id.*

[27] *See* ANTITRUST SECTION, VOL. II, *supra* note 21, at 3 (highlighting the structure and organization of the FTC). The authority granted to the FTC through the FTC Act is the subject of controversy to legal commentators. *See* Andy J. Miller, *A Procedural Approach to "Unfair Methods of Competition"*, 93 IOWA L. REV. 1485, 1488 (2008) (arguing that the FTC took it upon itself to determine whether a broad interpretation of Section 5 should or should not be used). The controversy is due to the fact that the FTC has the sole authority to determine what constitutes a deceptive act or practice and what a violation of the FTC Act is. *Id. See also* Diana Gillis, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 149, 150 (2011) (reiterating the fact that the FTC must comply with the Administrative Procedure Act during its adjudication process). In 2008, the FTC issued a complaint against a health company challenging an acquisition that was occurring. *Id.* During the adjudication process, the FTC did not go through an administrative law judge ("ALJ"), but instead appointed FTC Commissioner Rosch, to serve as the ALJ over the matter. *Id.* The Administrative Procedure Act gave Commissioner Rosch authority to oversee the adjudication; however, commissioner adjudication is rare because the process normally occurs before an ALJ. *Id.* Legal commentators raised ethical concerns about the FTC's ability to adjudicate its own complaints because the FTC may rule in its own favor, whereas, an unbiased ALJ may rule against the FTC. *Id.* at 151–54.

[28] *See* Andrew Zuckerman, *Standing of Targets of Hostile Takeovers to Enjoin their Acquisition on Antitrust Grounds*, 1992/1993 ANN. SURV. AM. L. 447, 451 (1993) (describing the reasoning for enacting the Clayton Act in 1914). Congress passed the Clayton Act as a response to the ineffectiveness of the Sherman Act. *Id. See also* ABA SECTION OF ANTITRUST LAW, FTC PRACTICE AND PROCEDURE MANUAL 23–26 (2d ed., 2014) [hereinafter FTC MANUAL] (elaborating in detail the four sections of the Clayton Act that the FTC Commissioners have the responsibility of enforcing).

and desist orders.[29] Section 2 of the Clayton Act prohibits certain forms of price discrimination, which occur when a seller charges different prices to different consumers for the same good or services based on their willingness to pay.[30] Section 3 of the Clayton Act is typically applied to exclusive dealing prices, and tying, which occurs when a seller sells one product on the condition that the buyer purchases a second, tied, product.[31] Further, Section 7 of the Clayton Act prohibits mergers and acquisitions that result in creating a monopoly or substantially lessens competition.[32] Finally, Section 8 of the Clayton Act deters representatives of corporations from conspiring together to restrict trade.[33]

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29 *See* ANTITRUST SECTION, VOL. II, *supra* note 21, at 3 (discussing the statutory framework that governs the FTC). In 1973, the Alaska Pipeline Act was passed, which gave the FTC the authority to seek injunctions in federal court. *Id. See also* ABA ANTITRUST SECTION, MONOGRAPH NO. 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: THE ROLE OF SECTION 5 OF THE FTC ACT IN ANTITRUST LAW 1 (1981) [hereinafter ABA ANTITRUST SECTION, VOL. I] (describing the methods that the FTC relies on when enforcing Section 5).

30 *See* FTC MANUAL, *supra* note 28, at 23–24 (listing the factors of a Section 2 of the Clayton Act violation, the legal history of Section 2, and enforcement methods that the FTC can employ to prohibit violations). Section 2 of the Clayton Act was amended by the Robinson-Patman Act and prohibits certain forms of price discrimination. *Id.* at 23. The Robinson-Patman Act precludes a seller from price discrimination between buyers of goods of similar quality and grade when a substantial competitive injury might occur. *Id.* Thus, one of the basic provisions of Section 2 of the Clayton Act is that a seller is prohibited from discriminating in price between buyers when the discrimination would adversely impact competition. *Id. See* Mathew A. Edwards, *Price and Prejudice: The Case Against Consumer Equality in the Information Age*, 10 LEWIS & CLARK L. REV. 559, 560 (2006) (describing the theory of price discrimination). Critics argue that due to the technological advances and changes in markets for consumer goods and services, price discrimination has increased greatly in recent years. *Id.*

31 *See* FTC MANUAL, *supra* note 28, at 24 (discussing the history of Section 3 of the Clayton Act). Section 3 of the Clayton Act is applied to tying and tied products in the categories of merchandise, supplies, wares, or goods. *Id.* Section 3 of the Clayton Act prohibits the sale or lease of these items under the condition or understanding that the purchaser or lessee refrains from dealing with competitors, if the agreement substantially lessens competition. *Id.* Section 5 of the FTC Act actions can be brought if intangibles such as services are involved in tying or exclusive dealing practices. *Id.* If there is a tying arrangement under Section 3 of the Clayton Act or Section 5 of the FTC Act, the analysis for examining the arrangement is the same. *Id.*

32 *See id.* at 24–25 (describing the components of Section 7 of the Clayton Act, what it applies to, and the type of relief afforded if an action is brought under Section 7). Section 7 of the Clayton Act is equally applicable to mergers and to acquisitions, even if the acquisitions involve assets or stocks. FTC MANUAL, *supra* note 28, at 24–25. Section 7 has been applied to horizontal, vertical, and conglomerate mergers. *Id.* at 25. Additionally, the FTC Act limits the FTC's ability to enforce Section 7A of the Clayton Act, meaning that the FTC cannot extend its jurisdiction to Section 7A. *Id.* The FTC's jurisdictional limits under the FTC Act state that the FTC cannot enforce Section 7A of the Clayton Act against "common carriers subject to the Acts which regulate commerce." *Id.*

33 *See id.* at 25–26 (describing Section 8 of the Clayton Act, the type of behavior that it prohibits, and the type of relief that is available to the FTC for a violation of Section 8).

If a respondent to an FTC action elects to settle the charges against him, the respondent can sign a consent agreement without admitting liability and waive all right to judicial review.[34] Complaints will be adjudicated before an administrative law judge ("ALJ") or in front of the FTC, if the respondent chooses to dispute the charges.[35] If the FTC or the ALJ determines that a practice is unfair or deceptive and has issued a final cease and desist order, then the FTC can obtain civil penalties from non-respondents who subsequently violate the set standards.[36]

Any person who violates one of the FTC's trade regulation rules with actual knowledge, or knowledge that can be implied based on objective circumstances, is liable for civil penalties of up to $11,000 per violation, provided the act is unfair or deceptive.[37] To obtain civil penalties, or

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Specifically, Section 8 placed limitations on a person who serves as a director or board-elected or appointed officer of two or more corporations. *Id.* at 25. The primary purpose of Section 8 was to prohibit conspiracies restricting trade through the control of a common board. FTC MANUAL, *supra* note 28, at 25–26. One could be found liable of violating Section 8 of the Clayton Act if they are a representative of two corporations that have subsidiaries that compete—even if the main corporations are not in competition with each other. *Id.* at 26.

34 *See* What We Do, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC II.A.1.(a) (July 2008), http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [http://perma.cc/2RAY-EQHF] [hereinafter *A Brief Overview*] (listing the adjudication procedures within the FTC's administrative process).

35 *See id.* (clarifying the procedures for judicial enforcement of the FTC Act). Sixty days after an FTC Order is served, it becomes final and binding on the respondent, unless stayed by the FTC or by a reviewing court. *Id. See supra* note 27 and accompanying text (describing the FTC's powers when adjudicating disputes and the ethical questions raised by this process).

36 *See A Brief Overview*, *supra* note 34, at II.A.1(a) (noting that in order to gain civil penalties, the FTC will need to prove that the violator had "actual knowledge that such act or practice is unfair or deceptive and is unlawful under Section 5(a)(1) of the FTC Act"). *See also* Federal Trade Commission, *FTC Takes Action Against Two Auto Dealership Chains for Violating 2012 Orders Prohibiting Deceptive Advertising of Vehicle Costs* (Dec. 12, 2014), http://www.ftc.gov/news-events/press-releases/2014/12/ftc-takes-action-against-two-auto-dealership-chains-violating [http://perma.cc/2EUZ-FKBP] (reviewing the civil penalties obtained for a violation of an FTC's order). In 2012, an FTC order prohibited Billion Auto, an automobile dealership located in Iowa, Montana, and South Dakota, from misrepresenting material costs and terms of vehicle financing lease and offers pursuant to the Truth in Lending Act and the Consumer Leasing Act. *Id.* Billion Auto violated the order by focusing on a few attractive terms in its advertisements. *Id.* As a result of this violation, Billion Auto settled with the FTC in 2014, and agreed to pay $360,000 worth of civil penalties. *Id.*

37 *See A Brief Overview*, *supra* note 34, at II.A.1(a) (describing civil penalty enforcement methods for any person who violates one of the FTC's promulgated trade regulations). When seeking civil penalties, the FTC will file a suit in district court under Section 5(m)(1)(A) of the FTC Act. *Id. See also* 15 U.S.C. § 45(l) (2012) (providing statutory authority for the FTC's ability to receive a penalty for a violation of its order). The statute states:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect,

consumer compensation for violations, the FTC must seek the aid of a court.[38] Under the FTC Act, any person who violates a rule promulgated by the FTC, regardless of the state of their knowledge, is liable for the injury.[39] The FTC relies on permanent injunctions to challenge cases of basic consumer fraud and deception.[40] Finally, the FTC can impose monetary equitable relief to remedy past violations.[41]

Section 5 of the FTC Act is a federal law specifically prohibiting unfair or deceptive acts or practices and unfair methods of competition.[42]

> shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States[.]

Id.

38 *See A Brief Overview*, *supra* note 34, at II.A.2 (illustrating the FTC's methods for seeking the aid of the court). *See also* Gary Lawson, *The Rise and Fall of the Administrative State,* 107 HARV. L. REV. 1231, 1248 (1994) (arguing that the power given to administrative agencies conflicts with the Constitution). After the FTC administers a complaint, the behavior is prosecuted and adjudicated by the FTC. *Id.* Additionally, the FTC has the ability to choose to adjudicate before an ALJ rather than the FTC and if the ALJ finds for the respondent, the FTC can appeal to the Commission. *Id.* Then, if the FTC finds for the FTC after the appeal, the respondent can appeal to an Article III Court. *Id.* Finally, before the Article III Court, the FTC possesses "a very strong presumption of correctness on matters of both fact and law." *Id.* at 1248–49.

39 *See A Brief Overview, supra* note 34, at II.A.1(a) (describing civil penalty enforcement methods for any person who violates one of the FTC's promulgated trade regulations). *See also* 15 U.S.C. § 45(m)(1)(B) (elaborating on the penalties for a violation of a cease and desist order). A defendant must have actual knowledge that he is in violation of Section 5 when the FTC imposes penalties on him for violation of an order. *Id.* § 45(m)(1)(B)(2).

40 *See A Brief Overview*, *supra* note 34, at II.A.2 (noting that the FTC is able to use injunctions to enforce the FTC Act's provisions). *See also* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1184 (1992) (discussing judicial construction of Section 13(b) of the FTC Act). Section 13(b) of the FTC Act permits the FTC to seek preliminary and permanent injunctions. *Id.* at 1184–85. When the FTC first began issuing injunctions, an early issue was whether an order could include a freeze on the respondent's assets. *Id.* at 1185. The Fifth Circuit answered this question first in *FTC v. Southwest Sunsites, Inc.* and determined that the FTC could freeze assets because the relief was necessary to ensure that consumers would receive effective redress. *Id.*

41 *See* Ward, *supra* note 40, at 1143 (introducing the FTC's methods for obtaining equitable relief). Equitable relief from the FTC includes restitution and recession of bad agreements. *Id.* Courts also permitted the appointment of a receiver to grant ancillary equitable relief. *Id.* at 1143 n.19 (citing FTC v. Oil & Gas Corp., 748 F.2d 1431, 1432 (11th Cir. 1984)) (upholding the FTC's power to grant equitable relief).

42 *See* 15 U.S.C. § 45(a) (2012) (providing the statutory authority for Section 5). The statute states:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, saving loan institutions described in section 57a(f)(3) of this

President Wilson signed Section 5 into law on September 26, 1914, to provide the FTC with more flexible administrative authority.[43] Current regulations under Section 5 provide that an unfair act is one that causes, or is likely to cause: (1) substantial injury to consumers; (2) cannot be reasonably avoided by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition.[44] By contrast, a deceptive act occurs where a representation, omission, or practice misleads the consumer, the consumer interprets the characteristic in a reasonable manner, and the misleading characteristic is material.[45]

> title . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Id. § 45(a)(1)–(2); *see also* ABA ANTITRUST SECTION, VOL. I, *supra* note 29, at 3 (discussing the legal history of the FTC Act); Royce Zeisler, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 271–72 (2014) (describing the legal history of the FTC Act). Antitrust enforcement was uncertain after the passing of the Sherman Act, and the Act's perceived failure directly led Congress to passing the FTC Act and the Clayton Act. Zeisler, *supra* note 42, at 271–72.

[43] *See* James J. O'Connell, *Section 5, 1914, and the FTC at 100*, 29 ANTITRUST 5, 5 (2014) (providing the legal history of the FTC Act); Ruth Barber Timm, *The Intraenterprise Conspiracy Doctrine and the Pharmaceutical Benefit Management Industry: A Proposed Exception to the Copperweld Holding*, 31 VAL. U. L. REV. 309, 314 (1996) (noting that the FTC Act contains broad language, which permits the FTC to prohibit a substantial amount of anticompetitive activity). *See also* ABA ANTITRUST SECTION, VOL. I, *supra* note 29, at 8–9, 11 (providing a historical perspective on the legislation that created the FTC). Representative Raymond Stevens proposed the idea of having the commission monitor "unfair and oppressive" competition. *Id.* Representative Stevens' proposal was based off of a legislation proposal called the Covington Bill. *Id.* The Covington Bill did not contain any reference to unfair competition, but it was based off of conduct that was deemed to be unreasonable within the interpretation of the Sherman Act. *Id.* In a minority report, Representative Stevens recognized the issues inherent in his proposal by stating: "[I have] not attempted to define unfair or oppressive competition. That is a question of fact to be decided by the commission the same way that the Interstate Commerce Commission decides what rates and practices of the railroads are unreasonable and unfair." *Id.* Despite these issues, Representative Stevens' proposal was the basis for Section 5 of the FTC Act. *Id.* at 11.

[44] *See Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices*, FED. RESERVE 1, http://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf [http://perma.cc/NT8W-ALAL] [hereinafter *Federal Trade Commission Act*] (noting a three-part test to determine whether a representation, omission, or practice is "deceptive").

[45] *Id.* In applying the three-part test for deceptiveness, the FTC considers the overall effect of the advertisement or market statement. *Id. See also* Jon Mize, *Fencing off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653, 657 (2005) (describing the elements of a FTC Act Action as applied to false advertising). Additionally, the FTC considers what claims are conveyed in the advertisement, whether those claims are false or misleading, and whether those claims are material to prospective consumers. *Id.* Notably, the FTC does not need to show that the defendant in an FTC Act action did not intend to deceive consumers, that the defendant made a false statement, or that an injury occurred by the act. *Id.* at 657–58.

If a violation of the FTC Act is found, an examiner should consider whether other statutory violations have occurred.[46] The FTC has the burden to prove the act was deceptive and was reasonably relied upon.[47] Finally, Section 5 not only directly protects consumers, but also protects the competitive system by prohibiting certain unfair methods of competition.[48]

Congress provided broad and flexible authority to the FTC to ensure that society was protected against oppressive anticompetitive conduct.[49] Congress crafted the FTC to enforce Section 5 as a more flexible standard—meaning the FTC obtained the ability to prohibit emerging violations that were not yet defined as unfair or deceptive.[50] Currently,

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46 *See The Federal Trade Commission, supra* note 44, at 1 (stating that if a possible violation of the FTC Act is found, the examiner should consider whether other statutory or regulatory violations have occurred). *See also Federal Reserve Examination Procedures*, FEDERAL RESERVE 2 (2008), http://www.federalreserve.gov/boarddocs/caletters/2007/0708/07-08_attachment.pdf [http://perma.cc/4Y6G-WFL8] [hereinafter Federal Reserve] (listing specific practices that violate both Section 5 and other federal and state laws). If the commissioners find a potential unfair or deceptive act, they should be mindful of other violations to similar laws such as the Truth in Lending and Truth in Saving Act, Equal Credit Opportunity and Fair Housing Acts, and Fair Debt Collection Practices Act. *Id.* at 13–14.

47 *See* F.T.C. v. QT, Inc., 512 F.3d 858, 861 (7th Cir. 2008) (determining that the FTC Act differs from the Food and Drug Act because the burden falls to the FTC to prove that statements are false). *See also* Federal Reserve, *supra* note 46, at 11–12 (outlining the analysis that the FTC uses to determine whether an act is unfair or deceptive). When determining whether an act is deceptive, a three-part test is used. *Id.* at 12. First, the representation, omission, or practice must mislead the consumer. *Id.* Second, the consumer's understanding of the act must be deemed reasonable in light of the circumstances. *Id.* Third, the misleading act must be found to be material. *Id.*

48 *See* ABA ANTITRUST SECTION, VOL. I, *supra* note 29, at 1 (arguing that the FTC has a dual role in consumer protection because it directly protects consumers, but it also benefits consumers by protecting the competitive system). Prohibiting unfair methods of competition results in the distribution of resources that would be found in a freely competitive market. *Id.* It is difficult to draw the line between the FTC's role in consumer protection and protecting the competitive system. *Id.*

49 *See* Richard Dagen, *Rambus, Innovation Efficiency, and Section 5 of the FTC Act*, 90 B.U. L. REV. 1479, 1503 (2010) (describing the legal history and reach of Section 5). The Supreme Court held in *Sperry v. Hutchinson Company* that Section 5 permits the FTC to define and proscribe an unfair competitive practice, even though the practice does not violate antitrust laws. *Id. See also* ABA ANTITRUST SECTION, VOL. I, *supra* note 29, at 11 (discussing the legislative history of Section 5). Congress recognized that new types of unfair-competition might occur and decided to deal with the problem flexibly. *Id.* at 14. It is essentially impossible to adopt "any single formulation as to the intended limits or methods of Section 5." *Id.* at 14–15. Thus, the scope of unfair methods of competition is considered to be broad and has been referred to as covering every new condition that may be invented. *Id.* at 15.

50 *See* Adam Speegle, *Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process*, 110 MICH. L. REV. 847, 857 (2011) (analyzing *FTC v. Motion Picture Advertising Service Company*). The case states:

> It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop

the FTC has the sole authority to enforce it.[51] Under Section 5, it has been implied that the FTC can enforce more than unfair or deceptive methods of competition, such as using its authority to prohibit behavior that violates antitrust laws.[52] Additionally, it has been argued that the FTC has the power to enjoin unfair methods of competition conduct—violations that the antitrust laws cannot reach.[53] Further, it has been suggested that the FTC can prohibit conduct that does not violate antitrust laws, but may choose to prosecute pure Section 5 violations.[54] Finally, under Section 57

> in their incipiency acts and practices which, when full blown, would violate those Acts, as well as to condemn as "unfair methods of competition" existing violations of them.

Id. at 857–58 n.75 (internal citations omitted). Congress created and adopted the Sherman Act in 1890 due to a reaction to the power and wealth increasingly aggregated in large trusts. *Id.* at 854. Consisting of two basic components, the first component of the Sherman Act prohibits combinations or conspiracies restraining trade, while the second component prohibits monopolies. *Id.* The Clayton Act provides private rights of actions for treble damages and equitable relief by any person who is injured by an act that violates antitrust laws. Holloway v. Bristol-Meyers Corp., 485 F.2d 986, 990 (D.C. Cir. 1973). The Department of Justice files complaints in a federal district court to enforce the Sherman and Clayton Acts, although the FTC also has the authority to enforce the Clayton Act. *Id.*

51 *See* 15 U.S.C. § 45(a)(2) (2012) (empowering the FTC to prevent persons, partnerships and corporations from using unfair methods of competition in or affecting commerce and unfair and deceptive acts in or affecting commerce); Villafranco & Blynn, *supra* note 7, at 24 (clarifying that the FTC can enforce the terms of the FTC Act, but private litigants cannot). *But see* F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (affirming "that the [FTC] does not arrogate excessive power to itself"). When determining whether a practice is unfair, the FTC looks to the congressionally mandated standard of fairness, and considers pubic values beyond those inherit in antitrust law. *Id.*

52 *See* Miller, *supra* note 27, at 1488 (arguing that there are at least three different interpretations of the type of behavior that the FTC is able to prohibit under Section 5). In 2006, the FTC believed that it had the authority to use Section 5 as a stand-alone enforcement mechanism, meaning that the FTC only enforced behavior that violated antitrust laws. *Id.* at 1489. Critics argue that as a procedural matter, the FTC should always begin its Section 5 violation analysis by asking whether the conduct in question violates antitrust laws. *Id.* Legal scholars have commented on the fact that if the FTC condemns behavior violating antitrust laws under Section 5, the FTC should condemn the behavior simply as an antitrust violation. *Id.* at 1490.

53 *See id.* at 1489 (asserting that the FTC can prohibit behavior under Section 5 that antitrust laws cannot reach). Commissioner Rosch believes that there are pure Section 5 violations and suggests that the FTC should not condemn conduct that violates antitrust laws. *Id.* This interpretation of Section 5 appears correct to some legal commentators because the FTC has the ability to enjoin the unfair methods of competition that antitrust laws cannot reach. Miller, *supra* note 27, at 1489.

54 *See id.* (arguing that the FTC can choose to prosecute a price fixing scheme as an antitrust violation or can choose to prosecute it under Section 5). *See also* ABA ANTITRUST SECTION, VOL. I, *supra* note 29, at 2 (stating that because Section 5 of the FTC Act duplicates other antitrust legislation by encompassing violations of the Sherman Act, the Clayton Act, and the Robinson-Patman Act, there is debate concerning the scope and boundaries of Section 5). The FTC is the only agency involved in enforcement proceedings, which adds to the FTC's broad enforcement powers. *Id.*; Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using*

of the FTC Act, the Commission has the ability to create rules that specifically define various acts or practices that are unfair or deceptive.[55]

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DWPA") in July of 2010; another piece of legislation prohibiting unfair or deceptive acts or practices.[56] The DWPA addressed the failures of consumer protection legislation by establishing a new financial agency, called the Consumer Financial Protection Bureau ("CFPB").[57] The CFPB has the authority to prohibit unfair, deceptive, and abusive practices from financial lenders.[58] The unfairness and deceptive

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"Consumer Choice" Analysis, THE ANTITRUST SOURCE 1 (2009) (noting that the legislative history and Supreme Court decisions demonstrate that Section 5 intended to cover violations of other antitrust laws, conduct violating other antitrust laws, conduct violating recognized standards of business behavior, and conduct violating competition policy). In order to file a complaint with the FTC alleging Section 5 violations, a consumer has the option to visit the FTC's website, and respond to a questionnaire provided by the FTC. *See* FTC, *Submit a Consumer Complaint to the FTC*, http://www.ftc.gov/faq/consumer-protection/submit-consumer-complaint-ftc [http://perma.cc/V6AU-4D82] (listing the methods for a consumer to file a complaint). Another option consumers have for filing a claim with the FTC is to call the FTC directly. *Id.* The FTC accepts complaints related to identity theft, national Do Not Call Registry violations, the internet and online privacy, telemarketing scams, credit scams, immigration services, sweepstakes, lotteries and prizes, business opportunities and work-at-home schemes, health and weight loss products, debt collection, credit reports, and financial matters. *Id*. The consumer will be asked to choose from a variety of options about the nature of their claim and the elements of their claim. *See* FTC, *FTC Complaint Assistant*, https://www.ftccomplaintassistant.gov/#crnt&panel1-1 [http://perma.cc/5T4P-66X9] (allowing consumers to manually enter in the elements of their complaint and submit it with the FTC). Following an investigation, if the Commissioner determines that he or she believes that there has been a violation of the FTC Act, and that a proceeding would be in the public interest, the Commissioner can issue and serve an administrative complaint to the person, partnership or corporation. 15 U.S.C. § 45(b) (2012).

55 *See* 15 U.S.C. § 57a(a)(1)(A) (providing statutory authority that permits the FTC to prescribes rules that define the deceptive act or practice in question). The statute states, "except as provided in Subsection (h) of this section, the Commission may prescribe–(A) interpretive rules and general statement so of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . . ." *Id.*

56 *See* Consumer Financial Protection Bureau, *Creating the Consumer Bureau*, http://www.consumerfinance.gov/the-bureau/creatingthebureau/ [http://perma.cc/ER6X-8KZA] [hereinafter CFPB] (describing the creation of the CFPB). As a result of the severe financial crisis that the United States faced in 2007, many Americans were left with loans that they did not understand and in insurmountable debt. *Id.* Additionally, many Americans were misled and lured into unaffordable loans by promises of low payments. *Id.*

57 *See id.* (elaborating on the creation of the CFPB). Congress passed the CFPB to raise government accountability and to supervise and enforce laws over providers of consumer financial products and services that escaped Federal oversight. *Id.*

58 *See* Andrew Smith & James Nguyen, *Consumer Financial Protection Bureau: The First Year*, 44 UCC L. J. 371, 376 (2012) (noting that in 2012 the CFPB did not exercise its authority over these practices). *See also* CFPB, *supra* note 56 (describing the purpose of the CFPB). The agency has the responsibly to protect families from unfair, deceptive, and abusive financial

tests that the CFPB uses are substantially similar to the current unfairness and deceptive tests used by the FTC during Section 5 enforcement.[59] Legal commentators note that the CFPB's authority to prohibit acts that are substantially similar to Section 5 is controversial because of ill-defined terms and broad discretion given to the CFPB to determine established principals.[60] Like the FTC Act, under the CFPB, consumers are not afforded a private right of action.[61] As a result of this lack of private right of action under federal legislation, states responded by adding their own consumer protection statutes.[62]

B. State Consumer Protection Law

A private right of action under consumer protection law permits a consumer to file suit on his or her own behalf.[63] States have responded to a growing need for consumer protection by enacting laws modeled after the FTC Act, called Little FTC Acts, and state UDAP laws.[64] Most of these

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practices. *Id.* President Obama urged Congress to permit the agency with sufficient funding so that it can ensure that financial companies comply with consumer protection laws. *Id.*

59 *See* Smith & Nguyen, *supra* note 58, at 377 (discussing the unfairness test that the CFPB has the authority to use when determining whether an act is unfair, deceptive or abusive). Like the FTC's standards for unfairness, the CFPB must have a reasonable basis to find that an act causes injury to consumers, could not be reasonably avoided, and the injury could not be outweighed by countervailing benefits to consumers or to competition. *Id.* at 376–77. The CFPB does not have a standard definition for a deceptive act; however, the bureau is able to look to the FTC's established precedent of what a deceptive act or practice means. *Id.* at 377. Finally, the CFPB is able to enforce "abusive" practices, which is an entirely new standard that is unenforced by the FTC. *Id.*

60 *See id.* at 376 (noting that the term "Federal Consumer Financial Law" includes the provisions of the Dodd-Frank Act which includes the CFPB's authority to prohibit unfair, deceptive, or abusive practices). *But see* Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405, 415 (2013) (arguing that the CFPB was created in order to be more powerful than the FTC). Critics argued that Congress created the CFPB because of a growing realization that consumers need quicker and more effective enforcement of consumer protection laws. *Id.* at 415–16. Additionally, the CFPB is in the position to take advantage of the current shift of consumer behavior away from a rational consumer choice theory toward an evidence-based theory of behavior economics. *Id.* at 416.

61 Pridgen, *supra* note 60, at 415 (discussing the CFPB's ability to deter unfair, deceptive or abusive practices).

62 *See infra* Part II.B (describing the enactment of state consumer protection law).

63 *See* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 165 (2011) (elaborating on State Consumer Protection Acts ("CPAS")). The CPAS empower "consumer attorneys to act as private attorneys general." *Id.* Moreover, CPAS are not limited by political pressure or public duty, like the FTC Act. *Id.* CPAS protect consumers by allowing private litigants to bring smaller scale cases where consumer harm escapes the attention of the FTC. *Id.*

64 *See* Butler & Wright, *supra* note 63, at 164–65 (describing the historical perspective for state adoption of state consumer protection acts). Due to a perceived shift of the balance of

state laws are modeled after the FTC Act's method for protecting consumers under Section 5.[65]

In 2005, nearly twenty jurisdictions, state courts, and agencies were required by statute to follow the standards set by the FTC Act and interpreted by federal courts.[66] Since the 1970's, most every state, in one form or another, has enacted its own Little FTC Acts governing consumer protection law.[67] Although these Little FTC Acts are modeled after the

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power between consumers and merchants in the marketplace—which shifted towards the benefits of merchants—regulators determined that there was an increased need for consumer protection in the marketplace. *Id.* at 164. This trend for more consumer protection legislation began in the 1960's as traditional common law was inadequate to restore the balance of the marketplace. *Id. See also* D. Wes Sullenger, *Only We Can Save You: When and Why Non-Consumer Businesses Have Standing to Sue Business Competitors Under the Tennessee Consumer Protection Act,* 35 U. MEM. L. REV. 485, 489 (2005) ("Consumer protection laws arose as a response to the perceived inequities of the common law following America's change to a consumer society."). Legal scholars discuss that the growing trend in consumer protection began by Ralph Nader's high-profile campaign against automobile manufactures along with reports from the American Bar Association accusing the FTC of light enforcement of its consumer protection laws. *Id.* at 490. As a response to an over-whelming amount of consumer complaints to state authorities, virtually every state created a private right of action for consumers. *Id.* at 491.

65 *See* Butler & Wright, *supra* note 63, at 165 ("Most CPA's were originally designed to supplement the [FTC's] mission of protecting consumers from 'unfair or deceptive acts or practices'"); *see also* John E. Campbell & Oliver Beatty, *Huch v. Charter Communications, Inc.: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense*, 46 VAL. U. L. REV. 501, 522 (2012) (noting that "Little FTC Acts" or UDAP statutes are a supplement to common law fraud remedies, which ultimately provides a more flexible tool to hold companies accountable); Sullenger, *supra* note 64, at 492 (describing the legal history of consumer protection acts).

66 *See* Mize, *supra* note 45, at 665 (describing the Tennessee Code which provides, "[i]t is the intent of the general assembly that [the deceptive trade practices act] shall be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act"). Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Rhode Island, South Carolina, Tennessee, Texas, Vermont, and Washington were among the jurisdictions required to follow the standards set by the FTC Act. *Id. See also* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC as a Rule Model,* 52 OHIO ST. L. J. 437, 450 n.74 (1991) (listing the states that were required to follow the FTC Act standards in 2005); Sullenger, *supra* note 64, at 493 ("Twenty states have enacted the Little FTC Act.").

67 *See Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1622 n.6 (1983) [hereinafter *Toward Greater Equality*] (describing that as of 1980, forty-two states have created a statutory right for a private right of action for consumers). Within ten years of the passing of the development of the first model UDAP laws, virtually every state passed its own consumer protection act. *Id.* at 1622. These state statutes eliminate the common law principles barring recovery from consumers, but also provide remedies that are more favorable to consumers than remedies offered under common law. *Id.* This benefit for consumers is based around the idea that consumers are awarded either discretionary or mandatory attorneys' fees from state statutes. *Id.* Furthermore, under many state statutes consumers are awarded minimum and multiple

FTC Act, consumers have dissimilar resources, goals, and motives for bringing actions.[68] Moreover, there have been three different policy reasons for creating Little FTC Acts.[69]

First, state legislators enacted the laws to correct an imbalance of power between buyers and sellers in the marketplace.[70] The doctrine of *caveat emptor*, or let the buyer beware, is no longer valid, thus creating the need to enact state consumer protection statutes.[71] The second policy reason for enacting Little FTC Acts was because the acts made litigating consumer claims more economical.[72] Finally, states adopted state consumer protection statutes because they deter other potential unfair or deceptive practices.[73] In addition, states enacted uniform deceptive acts

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damages for prevailing on a claim. *Id.* *See also* S.D. CODIFIED LAWS § 37-34-31 (2016) (authorizing consumers under South Dakota law to bring a civil action for damages from an unfair or deceptive act). "Any person who claims to have been adversely affected by an act or a practice declared to be unlawful by § 37-24-6 shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." *Id.*

68 *See* Mize, *supra* note 45, at 665 (explaining the differences in consumer motivation). One of the main arguments for why the FTC and Little FTC Acts have different goals and motives is that the FTC faces political pressure because the commissioners are appointed by the President and confirmed by the Senate. *Id.* at 666. The issue with facing political pressure is that Congress may potentially "rein [in the commissioners] if they go too far," which results in the commissioners targeting cases that they have a high possibility of success of winning and to promulgate broad standards to achieve that success. *Id.* Additionally, there are various funding differences for state and federal governments in stopping deceptive practices. *Id.* For example, in 2004, the FTC had a $186,000,000 budget for regulating American advertisements. *Id.* The South Dakota Consumer Protection Department operated on a mere $6,576,463 budget in 2004. 2900 Legal Services Program, *Attorney General Governor's Recommended FY 2007 Budget*, (Nov. 29, 2005, 12:53:58 PM), http://bfm.sd.gov/budget/rec07/07r2900.htm [http://perma.cc/68X8-GHAT] (listing the empirical data of the South Dakota Consumer Protection operating budget for 2004). Lastly, the FTC is limited in the type of cases that it brings because it is only allowed to file complaints that are in the public's interest. Mize, *supra* note 45, at 666–67.

69 *See Toward Greater Equality, supra* note 67, at 1625 (describing the legal history of Little FTC Acts); *infra* notes 78–80 and accompanying text (distinguishing between the three different policy reasons for enacting FTC Acts).

70 *See Toward Greater Equality, supra* note 67, at 1625 (clarifying that historically the law considered buyers and sellers to have equal power, however, this equal balance of power no longer occurs). Traditionally, the law has recognized that buyers and sellers were on equal footing meaning that the "buyers were knowledgeable about the products that they purchased and maintained a long-term commercial relationships with local merchants." *Id.*

71 *See id.* (noting the reasons for the enactment of Little FTC Acts).

72 *See id.* at 1626 (focusing on the fact that traditionally, under the American rule, each party pays his own attorney's fees). The traditional American fee system would make litigating consumer claims unfeasible economically because litigation costs would likely outweigh recovery costs. *Id.* Legal commentators have argued, however, that attorneys' fees awarded to prevailing plaintiffs effectively vindicates defrauded consumers. *Id.*

73 *See Toward Greater Equality, supra* note 67, at 1626 (stating that successful private litigation will deter businesses from defrauding other consumers). Arguably, when

and practices to ensure that states responded to consumer protection needs.[74]

In the early 1960s, the National Conference of Commissioners on Uniform State Laws first approved a standard form of consumer protection called the Uniform Deceptive Trade Practices Act ("UDTPA").[75] The UDTPA created a standard for states to follow regarding deceptive trade practice enforcement.[76] Under the UDTPA, eleven deceptive trade practices were listed.[77] The UDTPA permitted a private right of action; however, the only remedy available for consumers was injunctive relief.[78] In addition to the UDTPA, the model statute that

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consumers have a private remedy, a merchant will not be able to rely only upon a FTC decision, but should know that any defrauded person or entity may file a suit. *Id.*

74 *See supra* Part II.B (providing legal history of state uniform deceptive acts and practices).

75 *See Toward Greater Equality, supra* note 67, at 1623 (examining the legal history and purposes of the Little FTC Acts). The UDTPA codified and standardized the consumer protection statutes. *Id.* Under the UDTPA, the principal beneficiary was the business competitor injured by the competition and not the consumer. *Id.* at 1624.

76 *See* Staci Zaretsky, *Trademark Law and Consumer Protection Law – Deception Is a Cruel Act: "Uniform" State Deceptive Trade Practices Acts and Their Deceptive Effects on the Trademark Claims of Corporate Competitors*, 32 W. NEW ENG. L. REV. 549, 562 (2010) (describing the legal history of the UDTPA). The UDTPA created a uniform standard by proscribing specific practices that may create the "likelihood of public deception." *Id.*

77 *See* Sullenger, *supra* note 64, at 491 n.38 (describing the legal history of the UDTPA laws). The types of acts that the UDTPA prohibits are:

> (1) passing off goods or services as those of another; (2) causing a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; (3) causing a likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another; (4) using deceptive representations or designations of geographic origin in connection with goods or services; (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities they do not have or that a person has a sponsorship, approval, status, affiliation, or connection he does not have; (6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand; (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; (8) disparaging the goods, services, or business of another by false or misleading representation of fact; (9) advertising goods or services with intent not to sell them as advertised; (10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity; and (11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions. (internal citations omitted)

Id. at 491–92.

78 *See* Butler & Wright, *supra* note 63, at 170 ("[T]he UDTPA granted a private right of action but limited the remedy to injunctive relief."). In response to injunctive relief not being

accompanies most consumer protection laws is the Model Unfair Trade Practices and Consumer Protection Law ("UTPCL").[79] Consumers can file actions under the UTPCL against acts defined as: (1) false; (2) misleading or deceptive; or (3) deceptive acts or practices in the conduct of any trade or commerce.[80] In addition to states granting a private right of action to strengthen consumer protection, courts have addressed the issue of whether a private right of action should be implied under Section 5 for the consumer's benefit.[81]

C. Judicial Interpretation of a Private Enforcement of Section 5

Moore v. New York Cotton Exchange was a seminal Supreme Court decision that decided whether a private right of action existed under the FTC Act.[82] In *Moore*, the New York Cotton Exchange allegedly created a monopoly on cotton.[83] The complaint purported the monopoly

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an adequate option for consumer redress, the UDTPA was amended in 1966 to authorize the granting of reasonable attorneys' fees. *Id.* "[Additionally,] [m]ost states that initially adopted the UDTPA . . . amended their consumer protection law to allow monetary relief to consumers." *Id.*

79 *See Toward Greater Equality, supra* note 67, at 1624 (summarizing the legal history of the UTPCL). The UTPCL was developed by the FTC and was originally published in 1967, but was amended in subsequent years. *Id.* at 1625. Under the UTPCL, state attorneys generals are authorized to sue to enjoin deceptive practices or anticompetitive practices that harm businesses. *Id.* Additionally, the act provides a cause of action for consumers. *Id.*

80 *See* Butler & Wright, *supra* note 63, at 171 (focusing on the legal history of the UTPCL and the causes of action a consumer can allege from it). As of 2011, five jurisdictions prohibit specific acts without a general "catch-all" provision once available. *Id.* at 172. Those five jurisdictions are Colorado, District of Columbia, Indiana, Mississippi, and New York. *Id.* at 172 n.63. Additionally, twenty-six jurisdictions adopted a laundry list approach to prohibiting anticompetitive behaviors, which included the prohibitions from the UDTPA and added a provision, which prohibited "any act or practice that was unfair to the consumer." *Id.* at 171–72. *See supra* note 77 and accompanying text (listing the eleven provisions in the UDTPA). Those twenty-six jurisdictions are Alabama, Arkansas, Arizona, California, Georgia, Guam, Hawaii, Idaho, Indiana, Kansas, Maryland, Michigan, Nebraska, Nevada, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Virgin Islands, and West Virginia. Butler & Wright, *supra* note 63, at 172 n.62.

81 *See infra* Part II.C (describing the *Moore, Holloway,* and *Guernsey* decisions, all of which discuss whether a private right to action should be granted to plaintiffs under the FTC Act).

82 *See* Moore v. N.Y. Cotton Exch., 270 U.S. 593, 603 (1926) (establishing the precedent that private litigants do not have the authority to initiate a lawsuit under the FTC Act and that relief to a consumer under the FTC Act must be granted by the FTC).

83 *See id.* at 602 (finding that the New York Exchange operated a monopoly). The monopoly that was created was located in the Odd-Lot Cotton Exchange. *Id.* The Odd-Lot Cotton Exchange was an organization whose members created contracts with themselves and for customers for the purposes of delivering cotton in lots. *Id.* at 601. After investigation, Odd-Lot had many members in its membership that took part in conducting a bucket shop, and Odd-Lot was organized as a cover up to enable its members to engage in illegal practices. *Id.* at 602.

constituted an unfair method of competition in violation of the FTC Act.[84] For the first time, the Court held that there was not a private right of action afforded to consumers under the FTC Act.[85] The Court reasoned that an attempt to allege unfair methods of competition must be set aside because relief in such cases should be afforded first by the FTC.[86]

After *Moore*, Congress passed the WLA in 1938 as a way to expand the FTC's jurisdiction for prohibiting unfair or deceptive acts.[87] One objective of the WLA was to streamline the procedure for enforcing the FTC's cease and desist orders.[88] The FTC sought legislation to establish its ability to combat deceptive acts without the requirement that they first must show a clear adverse impact to competition.[89] Prior to the enactment of the WLA, the Supreme Court interpreted Section 5 to mean that the FTC could only prohibit practices that injured competitors and not consumers.[90] Additionally, the FTC had to prove injury before it could establish a violation.[91] As a result of the WLA, the FTC was left with broadened

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84 *See Moore*, 270 U.S. at 603 (describing the procedural background). Federal jurisdiction was invoked under antitrust law of the United States. *Id.* at 602. The Odd-Lot Cotton Exchange entered into a contract with the Western Union in restraint of trade. *Id.* at 602–03.

85 *See id.* at 603 (stating that relief must be provided by the FTC). The court did not discuss its reasoning for determining that the FTC is required to provide relief at the first instance and instead decided the additional issues brought before the Court. *Id.*

86 *See id.* (reasoning that relief must be afforded by the FTC before a plaintiff can file a lawsuit against an FTC violation).

87 *See* Dale Pollack & Bruce Teichner, *The Federal Trade Commission's Deception Enforcement Policy*, 35 DEPAUL L. REV. 125, 127 (1985) (describing the WLA). The WLA broadened the FTC act by allowing the FTC to bar deceptive acts or practices in or affecting commerce. *Id.* Congress left it up to the FTC to decide what deceptive acts or practices were and since 1938, the definition of deception has evolved considerably. *Id.* at 127–28. *See also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 598 (2014) (noting that since the FTC was created in 1914, the agency's powers gradually increased over a number of years). "One of the most significant expansions [to the FTC's powers] occurred when Congress passed the Wheeler-Lea Amendments to the [FTC Act]." *Id.*

88 *See* United States v. J.B. Williams Co., 498 F.2d 414, 429 (2d Cir. 1974) (describing the objectives of the WLA). *J.B. Williams Co.* noted that Congress does not indicate that by providing a civil penalty enforcement procedure, Congress intended to transfer the responsibility for interpreting and investigating violations of the FTC Act to the Attorney General. *Id. See also* Pollack & Teichner, *supra* note 87, at 127–28 (elaborating on the FTC's increased power due to the passing of the WLA).

89 *See* Holloway v. Bristol-Meyers, 485 F.2d 986, 992 (D.C. Cir. 1973) (providing the legal history of the WLA). *See also* Arthur B. Cornell, Jr., *Federal Trade Commission Permanent Injunction Actions Against Unfair and Deceptive Practices: The Proper Case and the Proper Proof*, 61 ST. JOHN'S L. REV. 503, 515 (1987) (noting that Congress added the WLA to overturn Supreme Court interpretation).

90 *See* Cornell, *supra* note 89, at 515 (describing the history of the WLA).

91 *See id.* (introducing the concept that the FTC could not establish a claim without proving that injury occurred prior to the enactment of the WLA).

authority and greater responsibility because of the broad definition of "deceptive act or practice" left open by Congress.[92]

In 1971, *Holloway v. Bristol-Myers* cited to *Moore*, and determined that private parties were not afforded a private right of action under Section 5.[93] In *Holloway*, the appellant filed a complaint against Bristol-Myers Corporation, the manufacturer of Excedrin.[94] The complaint alleged that Bristol-Myers represented that Excedrin was a more effective pain reliever than aspirin and that *Holloway's* advertisements were "false, deceptive, and materially misleading."[95] Further, in reliance of the advertisements, consumers were—and would continue to be—induced to purchase the over-the-counter medicine.[96] The central question in the case was whether consumers and members of the general public have the ability to bring a private action to enforce Sections 5, 12, and 14 of the FTC Act.[97] The court determined that because Congress did not alter the *Moore* interpretation, private enforcement of Section 5 was precluded.[98] In its decision, the court discussed the option for judicial authority, which the court referred to as its judicial latitude, to imply private remedies.[99]

Since the FTC Act was and still is the product of a legislative balance of consumer protection and the interests of the businesses affected, the

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92 *See* Pollack & Teichner, *supra* note 87, at 127–28 (illustrating the FTC's increased power due to the passing of the WLA).

93 *Holloway*, 485 F.2d at 997. The *Holloway* court discussed *Moore's* decision when it was analyzing the growing consumer interests that took place after *Moore*. *Id.* *Holloway* noted that there was growth in consumer rights after the 1938 amendments (the WLA) to the FTC Act. *Id.*

94 *See id.* at 987 (providing the procedural background). The complaint was filed to represent the interest of the consuming public and advertising audience. *Id*. Excedrin is a non-prescription analgesic compound. *Id.*

95 *Holloway*, 485 F.2d at 988.

96 *See id.* (arguing that consumers suffered a pecuniary loss as a result of purchasing Excedrin). Furthermore, Holloway asserted that it would be to the detriment of consumers if they purchased Excedrin, because the consumers could have instead purchased other equally effective, and less expensive analgesics. *Id.* The appellants sought declaratory and injunctive relief based on the claim. *Id.*

97 *See id.* at 988 (holding that consumers do not have a private right of action). The court acknowledged that the issue has been discussed by many legal scholars and added its opinion "primarily to enlarge on the well-nigh dispositive history and structure of the legislation, and in part to amplify and redefine the core analysis." *Id.*

98 *See Holloway*, 485 F.2d at 997 (determining that Congress intended WLA enforcement to rest exclusively with the FTC). The court reached its conclusion by analyzing the intent of Congress by passing the amendments, and described that the FTC Act had been interpreted by *Moore* to mean that Section 5 claims must be brought by the FTC and not by private parties. *Id.*

99 *See id.* (analyzing whether the courts should look to the social objectives sought to be furthered by the statute). The court determined that the FTC Act is a product of a "legislative balance which took into account not only consumer protection but also the interests of the businesses affected . . . ." *Id.*

court determined that its judicial latitude for implying a private remedy was limited.[100] *Holloway* considered a variety of factors inherent in the FTC's ability to enforce the FTC Act and took into consideration the problems that might occur with public enforcement of it.[101] First, the court recognized that private litigants do not have the same ability as the FTC to enforce the FTC Act.[102] Second, the resulting consequence of private litigants not having coordinated enforcement programs may burden the defendants and the judicial system.[103] Finally, the court determined that the advantages of having the FTC as a quasi-judicial tribunal would be diminished if private litigants had the option to file suit under Section 5.[104]

The court ultimately reached its decision in *Holloway* by analyzing that the rationale for implying a private right of action rested upon five factors established in *J.I. Case Company v. Borak*.[105] The determination for implying a private right of action includes: (1) a federal prohibition against the acts complained; (2) inclusion of the defendant in the class in which compliance has been imposed; (3) legislative intent to place the injured party within the realm of the statute's protection; (4) whether the

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100 *See id*. (reasoning that because the court considered an act with social ends to be fostered through the administrative means of achieving those objectives are inseparably interwoven into a unified and comprehensive statutory fabric, the court must act carefully in deciding whether a plaintiff has a private right to action).

101 *See id.* (listing among those factors, "the relative seriousness of the departure from accepted trade practices, its probable effect on the public welfare, the disruption to settled commercial relationships that enforcement proceedings would entail, and weather action is to be taken against a single party on an industry-wide basis . . . "). The court also took into account the FTC's ability to determine "the form that an action should take, the most appropriate remedy, the precedential value of the rule of law sought to be established, and a host of other considerations." *Holloway*, 485 F.2d at 997.

102 *See id.* at 997–98 (reasoning that private litigants can create piecemeal lawsuits which do not reflect coordinated enforcement). *Holloway* also reasoned that private litigants are not subjected to the same constraints of weighing each action against the FTC's broad range policy goals. *Id.* at 998.

103 *See id*. (arguing that private litigants may institute disorganized lawsuits). The court discussed that disorganized lawsuits by private plaintiffs would reflect "disparate concerns and not a coordinated enforcement program." *Id.* at 997–98. The consequences of having a private right of action, according to the court, would burden the defendants in the case and the judicial system. *Id*.

104 *See Holloway*, 485 F.2d at 997–98 (stating that the advantages of the FTC tribunal would be jeopardized if it was replaced by various federal courts). *Holloway* considered procedural methods for class actions and the consolidation of multi-district litigation in reaching its decision. *Id.* The court also applied the principles of collateral estoppel for alleviating the differences of FTC enforcement versus private enforcement of Section 5. *Id.*

105 *See id*. at 989 (finding that *Borak* analyzed a number of the precedents brought forth in *Holloway*). The appellants argued that the court should recognize an implied private right of action, and pointed to instances where civil remedies have been implied to various federal regulatory statutes. *Id.*; J.I. Case Co. v. Borak, 377 U.S. 426, 435 (1964) (holding that there is federal jurisdiction over relief).

defendant proximately caused harm from a breach of duty; and (5) the unavailability or ineffectiveness of alternative avenues of redress.[106] *Holloway* cautioned that "these five factors are necessary, but not sufficient for implying a private right of action[.]"[107] Without stating a reason why, the court examined factors three and five of this test, but did not examine the remaining factors.[108] As a result, consumer-plaintiffs do not have a private right of action under the FTC Act and courts have consistently relied upon this decision when the issue is brought before them.[109]

Three years after *Holloway*, the United States District Court for the Northern District of Indiana determined in *Guernsey v. Rich Plan of the Midwest* that a private right of action existed under Section 5, but only when an act was subject to an earlier cease and desist order issued by the FTC.[110] In *Guernsey*, the Guernseys alleged that Rich Plan violated Section 5 by using sale practices that had been previously found unlawful by the FTC.[111] Rich Plan filed a motion to dismiss based on the theory that there is no private right of action under Section 5 and that the FTC had original jurisdiction over the case.[112] The court reasoned that to effectuate the

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106 *Holloway*, 485 F.2d at 989 (citing to the opinion of Judge Jones in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)). In addition to focusing on factors three and five, the *Holloway* court focused on the objectives that Congress sought to advance by enacting the FTC act. *Id.*

107 *See id.* (cautioning that the five factors are necessary, but not sufficient conditions, and their combined presence does not automatically warrant the implication of a private right).

108 *See id.* (determining that the analysis should be conjoined with analyzing the two factors, "legislative intent, and the ineffectiveness by Congress for effectuating its objective"). Additionally, the court noted that the issue should be treated with care, due to the fact that the statutory scheme was created by a delicate balance. *Id.* The balance that was created by the statutory scheme was a combination of public need and private interests. *Id.*

109 *See Holloway*, 485 F.2d at 989 (holding that consumers do not have a private right of action under the FTC Act); *see also* United States v. J.B. Williams Co., 498 F.2d 414, 444 (2d Cir. 1974) (discussing *Holloway*'s holding); Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973) (holding that Section 5 of the FTC Act does not provide plaintiffs with a private remedy); Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 586 (N.D. Ind. 1976) ("Federal Courts have historically found that no private action could be implied from the Federal Trade Commission Act"). *Supra* note 6 and accompanying text (listing subsequent cases that follow *Holloway*).

110 *See Guernsey*, 408 F. Supp. at 589 (holding that plaintiffs stated a claim upon which relief could be granted by alleging that the practices which defendant participated in are proscribed by the FTC Act); *see also* Days Inn of Am. Franchising, Inc. v. Windham, 699 F. Supp. 1581, 1583 (N.D. Ga. 1988) (analyzing *Guernsey*'s holding as the sole federal decision supporting the position that a private right of action exists under the FTC Act).

111 *See Guernsey*, 408 F. Supp. at 586 (describing the complaint, and the theories that Rich Plan's motion to dismiss were based upon).

112 *See id.* (noting that the FTC Act contains no provisions that provide for a private right of action).

purposes of the FTC Act the defendant's motion to dismiss should be denied.[113]

The basis of *Guernsey*'s reasoning was grounded in the fact that the FTC's ability to deter consumer fraud is questionable and that it has primary, rather than exclusive, jurisdiction over the FTC Act.[114] The court determined that the FTC's ability to resolve consumer complaints was problematic because the FTC could not resolve each individual consumer dispute that came before it.[115] At the time of *Guernsey*, the FTC received about 9000 consumer complaints each year and only investigated one out of nine of them.[116] Out of the complaints investigated, approximately ten percent resulted in a cease and desist letter.[117]

Distinguishing itself from *Holloway*, the Indiana court noted that the facts in each case are significantly different from one another based on the harm suffered.[118] In *Holloway,* the harm suffered was the difference between the price of a bottle of Excedrin and a bottle of aspirin.[119] However, in *Guernsey* the harm suffered was the violation of a cease and desist order.[120] *Guernsey* determined that in order to imply a private right of action from a federal regulatory statute the court should apply the

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113 *See id.* at 586–88 (discussing the fact that most defrauded consumers do not have a remedy because the FTC cannot act on behalf of every single consumer that is harmed, and that the FTC is only able to investigate only a small number of the complaints that it receives each year).

114 *See id.* at 588 (illustrating the fact that there is no legislative intent which indicates that the FTC should have exclusive jurisdiction over the FTC Act). *Guernsey* pointed out that *Holloway* did not cite to authority in reaching its conclusion that Congress intended sole enforcement power to the FTC. *Id.* at 588. Additionally, *Guernsey* noted that to infer that once the FTC has entered a case and enforced compliance with the Act, that subsequent consumer actions would frustrate the purposes of the Act and would deny consumers who were victimized by violations any recovery. *Id.*

115 *See Guernsey*, 408 F. Supp. at 586 (arguing that the voluminous complaints that the FTC receives makes it nearly impossible for the resolution of every one).

116 *See id.* (highlighting the FTC's enforcement methods and how the amount of complaints the agency received each year from consumers affected it and providing empirical data for how many complaints the agency received at the time).

117 *See id.* (describing the amount of complaints the FTC receives each year, and how it is difficult to enforce Section 5 in every case).

118 *See id.* at 587 (noting that the consumer in *Holloway* suffered minimal damages, while the consumers in *Guernsey* sought relief from harm that occurred after a cease and desist order was violated). The only harm that the plaintiff suffered in *Holloway* was the lost difference in price between six fifty-tablet bottles of Excedrin and the same number of aspirin tablets. *Id.*

119 *See id.* (distinguishing the plaintiffs in *Holloway* based on the fact that the harm suffered by the Guernseys was much greater than the harm suffered by the plaintiffs in *Holloway*).

120 *See Guernsey*, 408 F. Supp. at 587 (contrasting between the facts of *Holloway* and *Guernsey* and suggesting that the main difference is the harm that the plaintiffs suffered).

doctrine of implication.[121] The doctrine of implication requires that a court determine whether the provision violated was designed to protect a class of citizens from the harm that the plaintiffs complained.[122] If yes, then the court must determine if it is appropriate in light of the statute's purpose to afford the plaintiff the remedy sought.[123]

Guernsey concluded that because the FTC examined the complained-of practice and found the practice bad enough to issue a cease and desist order, the plaintiffs could bring an enforcement action.[124] Additionally, *Guernsey* stated that if Rich Plan violated the cease and desist order, it is apparent that the FTC Act, as the FTC enforces it, is an empty promise to consumers.[125] The court stated that when weighing the benefits to the consumer against any damage to the FTC's role in applying the broad provisions of the FTC Act, the court must rule in favor of the consuming public.[126] Finally, *Guernsey* determined that to conclude the FTC was in a better place than a private litigant to determine the cost of litigating a deceptive practice, ignored the theory of free enterprise economy.[127] In a free enterprise economy, the consumers have the ability to choose between merchants on the basis of price, service, and quality.[128]

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121 *See id.* at 586 (emphasizing the point that federal courts have historically found that there is no implication of a private right of action regardless of the doctrine of implication).

122 *See id.* (listing the first factor applicable under the doctrine of implication which is that a court must determine that the provision violated was designed to protect a class of persons, including the plaintiffs, from the harm that the plaintiffs complained of).

123 *See id.* (stating the second factor of the doctrine of implication which is that the court must determine that it is appropriate in light of the statute's purposes to afford plaintiffs the remedy sought).

124 *See id.* at 588 (reasoning that the FTC is in a better position to gauge the injury a deceptive practice will cause the public and to balance this injury against the likely cost of elimination of the deceptive act or practice).

125 *See id.* (determining that the FTC put its ponderous administrative process in motion to enforce the FTC Act against Rich Plan, and since the company violated the cease and desist order the FTC issued, the FTC failed at enforcing the Act).

126 *See Guernsey*, 408 F. Supp. at 588 (concluding that if the FTC does not allow a private right of action to enforce cease and desist orders, consumers are harmed and denied recovery).

127 *See id.* (describing *Holloway*'s reasoning for determining that the FTC is in a better position than private litigants to enforce the FTC Act because of its overview of the national economy).

128 *See id.* (arguing that by permitting the FTC to be the sole enforcer of the FTC Act, courts are denying the right afforded to consumers to participate freely in a free enterprise economy). *See also* William J. Curran III, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 31 ST. LOUIS U. L.J. 349, 350 n.8 (1987) (introducing the Supreme Court's view on antitrust, which is that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of a free enterprise [economy]"). According to the Supreme Court in *United States v. Tapco Associations, Inc.*, 405 U.S. 596 (1972), a free enterprise economy is important to the preservation of an economic freedom and our free-

Although *Guernsey* ruled in favor of consumers, the problem of not having a private right of action under Section 5 still exists because consumers are not afforded an express right under the FTC Act.[129] Thus, Part III of this Note analyzes the current legal framework between state and federal consumer protection laws and evaluates why *Holloway* reached the wrong decision by not implying a private right of action for consumers.[130] Only after examining the differences between consumer protection laws and examining why *Guernsey* was a step in the right direction for consumers, can one understand why amending Section 5 of the FTC Act is vital for consumer protection.[131]

III. ANALYSIS

The current legal framework available to consumers under state consumer protection laws differs noticeably from the legal framework available to the FTC under Section 5.[132] Consumers are not afforded the same broad enforcement abilities under state consumer protection laws as the FTC.[133] Additionally, the FTC's current enforcement of Section 5 leaves consumers susceptible to being injured by unfair or deceptive

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enterprise system as the Bill of Rights is fundamental to the protection of our individual freedom. *Id.* at 350.

129 *See supra* Part II.C (providing the basis for *Guernsey*'s holding which was largely based on the fact that the plaintiffs satisfied the doctrine of implication and by permitting the plaintiffs to have a cause of action under the FTC Act, the court was achieving the purpose of the FTC Act because the FTC had already deemed the defendant's acts unlawful which was evidenced by the FTC issuing a cease and desist order).

130 *See infra* Part III.A (examining the difference between state and federal consumer protection laws based on the fact that state laws are not as broad as the FTC's enforcement capabilities under the FTC Act); *see also infra* Part III.B (analyzing *Holloway*'s reasoning and how it was incorrect because the court did not properly analyze the factors for implying a private right to action, in addition to incorrectly analyzing congressional intent for not overturning *Moore*); *infra* Part III.C (assessing *Guernsey*, the Indiana decision determining that plaintiffs have a cause of action under Section 5 of the FTC Act, when asserting a claim against a defendant who violated an earlier cease and desist letter issued by the FTC, and concluding that the court reached the correct result based on congressional intent for creating the FTC Act and the ineffectiveness of the FTC in resolving consumer complaints).

131 *See infra* Part III (establishing how federal and state consumer protection laws differ, how *Holloway* reached the wrong decision, and how *Guernsey* was a step in the right direction for consumers).

132 *See infra* Part III.A (examining the differences between state and federal consumer protection law); *supra* Part II.A (discussing federal consumer protection law and the broad enforcement abilities of the FTC); *supra* Part II.B (describing state consumer protection law and the laundry list of actions that consumers are able to bring).

133 *See supra* Part II.A (introducing the FTC's abilities to enforce Section 5 and Congress' reasoning why the FTC has broad enforcement powers to prohibit unfair or deceptive conduct); *see also infra* Part III.A (analyzing the discrepancies between state and federal legislation and the impact that the differences between the two has on consumer protection).

conduct.[134] The current legislation governing private rights of action for consumers is inadequate compared to the legislation afforded to the FTC, thus, Congress should amend the FTC Act to provide a private right of action for consumers.[135]

First, Part III.A analyzes the problems consumers are faced with by not having a private right of action.[136] Second, Part III.B examines why the court's reasoning in *Holloway* was incorrect, based on the congressional intent for empowering the FTC with the ability to enforce Section 5.[137] Finally, Part III.C analyzes the court's reasoning in *Guernsey* and how the court's holding was correct, based on the FTC's inability to respond to consumer complaints and the implementation of the CFPB.[138]

A. Federal vs. State Consumer Protection Law

Consumers are not afforded enough protection because state consumer protection laws do not offer the same broad enforcement capabilities that are offered to the FTC.[139] States enacted Little FTC Acts and UDAP laws in an attempt to provide consumers with the same consumer protection enforcement capabilities as the FTC, but because these acts are qualitatively different than FTC enforcement, consumers

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134 *See supra* Part II.C (listing *Guernsey*'s reasoning for permitting consumers to enforce a cease and desist order due to the fact that FTC enforcement was lacking as a result of the amount of complaints that come before the FTC, and the inability for the agency to respond to the complaints); *see also infra* Part III.C (concluding that the FTC is unable to keep up with the current demands of consumer protection because the agency is not able to investigate every consumer complaint, therefore, Congress should amend Section 5 to include a private right of action so that consumers can enforce laws enacted for their protection).

135 *See infra* Part IV.A (suggesting an amendment to the FTC Act that would implement a private right of action for consumers).

136 *See infra* Part III.A (analogizing the discrepancies between state and federal consumer protection law and the impact that differences have on consumers because the FTC has broad enforcement capabilities while consumers are left with only being able to enforce certain practices under state consumer protection laws).

137 *See infra* Part III.B (examining why *Holloway* incorrectly reasoned that there is no implied private right of action under the FTC Act based on the fact that *Holloway* did not analyze all of the five factors for implying a private right of action and based on incorrectly interpreting the congressional intent for passing the WLA).

138 *See infra* Part IV (proposing that the phrase "consumer plaintiff" be added throughout the existing language of Section 5 in order to create an express private right of action for consumers, which would result in stronger consumer protection and adequate consumer redress); *supra* Part II.A (describing the enactment of the CFPB and the reasons for its creation).

139 *See supra* Part II.B (introducing state consumer protection laws and how some states do not permit consumers to have an injunction issued against a violator, additionally the FTC is able to enforce more than pure Section 5 violations, such as antitrust law violations, whereas consumers are not afforded this same opportunity).

should be provided a private right to enforce Section 5.[140] These state laws are qualitatively different because they are not as broad as Section 5.[141] Under Section 5, the FTC has the ability to enforce Sections 3, 5, 7, and 8 of the Clayton Act, while under most Little FTC Acts and UDAP laws, consumers only have the option to go after a proscribed list of practices.[142] The FTC also has the authority to enforce pure Section 5 violations and antitrust laws; consumers are not afforded this same protection under

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[140] *See* Butler & Wright, *supra* note 63, at 165 (arguing that state consumer protection acts, or Little FTC Acts were designed to supplement the FTC's mission of protecting consumers). There is a growing concern that enforcement under these state consumer protection acts is both qualitatively different than FTC enforcement and might also be counterproductive for consumers. *Id.* at 166. *See supra* Part II.B (describing the legal history of Little FTC Acts and UDAP laws); *see also supra* note 66 and accompanying text (listing the states that have enacted Little FTC Acts); *supra* note 80 and accompanying text (providing a list of the jurisdictions that have enacted UDAP laws); *supra* Part II.A (describing Section 5's passing and legal history especially noting that Section 5 was enacted to provide the FTC broad enforcement powers). The FTC enforces whatever action it decides is unfair or deceptive, while UDAP limits consumer enforcement of specific provisions of their states consumer protection laws, thus providing substantially different enforcement options. *See supra* note 77 and accompanying text (listing the types of acts that consumers are able to enforce under UDAP laws); ANTITRUST SECTION, VOL. I, *supra* note 29, at 64 (noting that "private plaintiffs asserting a cause of action based on Section 5 have generally failed to convince courts that a private right of action should be implied"); *supra* Part II.A (elaborating on Section 5 of the FTC Act and its legal history); *supra* Part II.C (providing the legal background of the *Moore* and *Holloway* decisions concluding that Section 5 does not provide a private right of action to consumers). *Moore* determined that an action for recovery under Section 5 could not stand because the FTC must first provide relief. Moore v. N.Y. Cotton Exch., 270 U.S. 593, 603 (1926).

[141] *See supra* Part II.A (listing the broad enforcement methods of the FTC). *See also supra* note 48 and accompanying text (describing the types of acts that the FTC can enforce aside from pure Section 5 violations such as foreign antitrust laws and Clayton Act violations). In addition to enforcing the express provision of Section 5, the FTC has the authority to go after behavior that violates antitrust laws. *Id.* Additionally, the FTC has the ability to decide what an unfair or deceptive act is, subject to the three-part test that the FTC uses to determine whether an act is unfair or deceptive. *Id.*

[142] *See supra* Part II.A (describing the enforcement authority of the FTC and its ability to enforce specific provisions of the Clayton Act); *see also supra* text accompanying note 30 (discussing the FTC's ability to enforce Section 2 of the Clayton Act). *See* Mize, *supra* note 45, at 665 (arguing that that state legislatures and judiciaries must recognize that the FTC and plaintiff consumers have goals which are unaligned with dissimilar motives and resources). The "FTC has pursued broad standards in prosecuting consumer deceptions because of restraints on the [Federal Trade] Commission." *Id.* at 666. *See also supra* Part II.A (providing the legal history of Section 5 and the reasons that Congress permitted the FTC to have broad enforcement of the FTC Act). These state acts do not offer as much protection as the FTC Act and Section 5 because they do not permit broad authority to go after acts that violate both consumer protection laws and antitrust laws. *See supra* Part II.B (explaining what Little FTC Acts and UDAP Laws are); *see also supra* note 77 and accompanying text (listing the eleven deceptive acts and practices that consumers are permitted to bring claims against); *see also supra* note 80 and accompanying text (noting the jurisdictions that follow a laundry list approach to filing claims against deceptive acts).

their state's laws.[143] Second, the FTC has the ability to file for injunctive and monetary relief under Section 5.[144] States, such as Arkansas, do not permit consumers to file for injunctive relief under state consumer protection laws.[145] As a result, consumers are at risk of being harmed by the same deceptive act or practice twice.[146] Therefore, state consumer laws are qualitatively different than Section 5 and a private right of action should be implemented into the FTC Act.

Further, having a private right of action under state consumer protection laws benefits consumers in two ways.[147] State consumer protection laws allow consumers to receive statutory damages, treble damages, and punitive damages.[148] Further, the majority of states do not require that a consumer show that he reasonably relied on the defendant's alleged deceptive act or statement.[149] These statutes provide a benefit because they make it easier for the consumer to prevail on a claim and

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143 *See supra* note 54 and accompanying text (arguing that it has been argued that the FTC has the authority to prosecute pure Section 5 violations, which antitrust laws do not touch); *see also supra* Part II.A (discussing the FTC's authority to enforce more than the express provisions in the FTC Act such as antitrust law violations, Clayton Act violations, and foreign antitrust laws).

144 *See supra* note 29 and accompanying text (describing the FTC's authority to file for injunctive relief in federal court, which was provided due to the passing of the Alaska Pipeline Act); *supra* Part II.A (providing examples of the relief that is afforded to the FTC as a result of a violation of the FTC Act such as injunctive relief, fines, cease and desist orders, and civil penalties for violating an order issued by the FTC).

145 *See* 2011 REVIEW, *supra* note 2, at 259 (asserting that "[a]lthough private plaintiffs can seek money damages, injunctive relief is unavailable to private plaintiffs under the [Arkansas Deceptive Trade and Practices Act]", however the Arkansas Attorney General can file for injunctive relief); *see also supra* Part II.B (explaining the remedies afforded to consumers under state consumer protection law).

146 *See* 2011 REVIEW, *supra* note 2, at 259 (proving that consumer plaintiffs are not provided the right to issue injunctions under state consumer protection laws, which could result in a consumer being harmed by the same act twice); *supra* Part II.B (providing the history and components of state consumer protection laws and noting the relief that is provided for consumers under these laws).

147 *See supra* notes 82–83 and accompanying text (analogizing between state consumer protection acts in comparison to the FTC Act and concluding that the FTC Act provides the FTC with broad enforcement capabilities, whereas, state consumer protection statutes do not provide broad protection for consumers).

148 *See* S.D. CODIFIED LAWS § 37-24-31 (2016) (explaining the ability for consumers to file an action for recovery of actual damages suffered as a result of being adversely affected by a deceptive act or practice); *Toward Greater Equality, supra* note 67, at 1625 (describing uniform UDAP laws along with the damages that are available for consumers under state laws).

149 *See* Mize, *supra* note 45, at 657–58 (asserting that because consumers do not need to prove intent under state consumer protection laws, the consumer benefits because it is easier to show that a consumer was harmed without needing to show that the defendant aimed at defrauding the consumer); *supra* Part II.A (offering the tests that the FTC uses to determine whether an act is unfair or deceptive in violation of Section 5 and determining that the FTC is responsible for proving that the defendant intended to cause harm).

recover damages since they remove the difficult requirement of proving that the consumer relied on the defendant's representation.[150]

State consumer protection laws also do not permit consumers the ability to enforce the FTC's past Section 5 decisions.[151] As a result, private consumers cannot rely on a determination from the FTC or an ALJ that a deceptive act or practice occurred.[152] This places a burden for private consumers to establish a claim that an individual or a corporation violated state law instead of being able to utilize an FTC decision.[153] In addition to consumers not having an express private right of action under Section 5,

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150 *See* Mize, *supra* note 45, at 657–58 (arguing that Little FTC Acts allow consumers to benefit by avoiding the difficulty of proving intent). For example, under the Tennessee Consumer Protection Act, a consumer needs to prove that a representation in question falls within a broad category, but does not need to prove that the defendant intentionally misrepresented a product in order to mislead a consumer and obtain an unfair advantage over the consumer. *Id.* at 664. This standard makes it easier for a consumer to prevail on a consumer protection statute because the consumer only needs to show that the defendant acted in a manner that violated a statute, but does not need to show the intent of the defendant to defraud. *Id.*

151 *See* Butler & Wright, *supra* note 63, at 165 (distinguishing the FTC Act from state consumer protection laws). Legal scholars argue that FTC enforcement and the combination of private rights of action offered under state consumer protection laws provides for generous remedies to consumers with a lack of expertise, and expansive definitions of illegal conduct, which catalyze consumers to file lawsuits. *Id.* at 166. However, because consumers are not permitted to enforce the FTC's decisions regarding Section 5 violations, consumers are not able to rely on the expertise of the FTC. *See* Mize, *supra* note 45, at 665 (arguing that "state legislatures and judiciaries must recognize that the FTC and plaintiff consumers have dissimilar goals which are unaligned with dissimilar motives and resources"). *See also* Villafranco & Blynn, *supra* note 7, at 22 (bringing to light the difficulty for consumers who try to piggyback off of an FTC claim). Critics argue that not being able to piggyback off of an FTC decision is unfavorable for consumer because there has been an increase of class actions filed by consumers, but courts especially in California, New Jersey, and Florida, dismissed the claims. *Id.* These claims are increasingly filed by advertisers in the food and dietary supplement industries, however, the FTC Act does not permit a private right of action, therefore, any class action brought by a private litigant relying entirely on allegations made by the FTC , or attempts to draw an alleged violation of the FTC Act, cannot stand. *Id.* at 22–24.

152 *See* Villafranco & Blynn, *supra* note 7, at 24 (criticizing the fact that consumers are not able to file a piggyback class action lawsuit based off an FTC ruling because consumers are not afforded a private right of action and cannot allege an FTC Act violation or rely on one that has been previously filed by the FTC); *supra* Part II.A (describing the enforcement authority of the FTC and its history, including the fact that consumers are not afforded a private right of action under the Act, and thus, consumers are not able to enforce past decisions from the commission or ALJ's ruling on behalf of the commission).

153 *See* Villafranco & Blynn, *supra* note 7, at 24 (expressing that as a result of consumers not having a private right of action, they are not allowed to piggyback off of earlier precedent established by the FTC); *supra* Part II.A (introducing the fact that the FTC is currently the only entity available to enforce the FTC Act, and thus, consumers are not able to rely on a past FTC or ALJ decision barring a deceptive act or practice).

courts have incorrectly held that consumers do not have an implied private right of action under the FTC Act.[154]

B. Why the Holding of Holloway v. Bristol-Myers Corporation *is Incorrect*

Holloway incorrectly held that the FTC Act does not create a right of action for private parties because the court did not review the five factors for implying a private right of action derived from *J.I. Case Company*.[155] Further, the *Holloway* Court incorrectly rejected the reasoning that private rights of actions can provide meaningful consumer protection against fraud.[156] *Holloway* also failed to take into account that Congress passed the WLA after the Court decided *Moore*.[157] The court should have reached a different conclusion had all of the factors been taken into consideration,

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[154] *See infra* Part III.B (analyzing the holding in *Holloway* as incorrect because it determined that only two of the five factors of the case needed to be analyzed and the court erred when it interpreted Congress' intent of not overturning *Moore*, which resulted in the finding that Congress intended the FTC to be the sole enforcer of Section 5); *supra* note 6 and accompanying text (introducing the *Holloway* decision and its impact on how courts decided the issue of whether consumers are afforded a private right of action under Section 5). *See also infra* Part IV.A (proposing the addition of language into the existing FTC Act to include an express private right of action for consumers).

[155] *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 987 (D.C. Cir. 1973) (holding that private actions to vindicate rights under the FTC Act cannot be upheld because a private right cannot be implied and Congress intended for the FTC to have the sole authority to enforce the FTC Act). The case states:

> The core of our decision rejecting implication of a private action lies in our analysis of the ramifications of the asserted private remedy and a comparison of these with the policies and objectives sought to be advanced by Congress. This analysis is conjoined with a further discussion of factors (3) and (5), legislative intent and ineffectiveness of the means provided by Congress for effectuating its objective.

Id. at 989. *Holloway* did not state a reason for not balancing the other three factors for implying a private right of action. *Id. See supra* note 106 and accompanying text (listing the five factors for implying a private right of action that were derived from the Supreme Court).

[156] *See Holloway*, 485 F.2d at 997 (reasoning that because the court has limited judicial constructs and Congress balanced the FTC's ability for consumer protection, the court needed to be careful in analyzing whether plaintiffs are afforded a private right of action under the FTC Act); *supra* Part II.A (introducing the reason for enacting the FTC Act and for passing the WLA, which was for stronger consumer protection and for allowing the FTC broad discretion to define unfair or deceptive conduct); *supra* Part III.A (distinguishing the importance of having a private right of action based off an analysis of how consumers benefit from having a private right of action under state consumer protection laws).

[157] *See Holloway*, 485 F.2d at 997 (arguing that the court's judicial latitude for implying a private right of action is limited because when creating the FTC Act, Congress balanced society's need for the act with the FTC's ability to enforce the act, therefore the court must carefully analyze the issue); *supra* Part II.A (introducing the WLA and the reasons for why they were created); *supra* Part II.C (providing the reasoning for *Holloway*'s decision).

and had the court in *Holloway* been given the benefit of correctly reviewing the WLA as they applied to *Moore*'s holding.[158]

First, *Holloway* should have examined the first factor of the rationale for implying a private right of action because it was satisfied in the case.[159] The factor rests upon whether there is a "federal statutory or constitutional prohibition against the acts complained of[;]" furthermore, the factor is necessary for a comprehensive analysis of determining whether a private right of action should be implied.[160] Section 5, a federal statute, prohibits unfair or deceptive acts in or affecting the marketplace and the plaintiffs in *Holloway* complained that the defendant's acts violated Section 5.[161] Therefore, since there is a federal statute prohibiting the acts complained of, the first factor was satisfied, and because the court did not examine this factor, *Holloway* erred in its analysis as each factor should be analyzed.[162]

The court also should have implied a private right of action by examining factor two of the rationale for implying a private right of action in its analysis.[163] First, the implication is based on the reasoning that a

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158 *See Holloway*, 485 F.2d at 997 (stating that Congress passed the WLA when *Moore* interpreted the FTC Act to mean that the FTC, not private parties, must bring Section 5 actions); *supra* Part II.C (explaining *Moore's* holding that the FTC must initiate an action for recovery under the FTC Act); *see also supra* Part II.A (laying out the history of federal consumer protection law and specifically after *Moore*, when the WLA were passed); *supra* Part II.C (listing the facts of *Holloway*, the courts holding, its reasoning, and how the court analyzed only two of the five factors for implying a private right of action without stating why).

159 *See Holloway*, 485 F.2d at 989 (introducing the first factor for implying a private right of action and cautioning that although the factors are necessary, they do not automatically warrant the implication of a private right of action); *supra* Part II.C (providing *Holloway*'s reasoning for determining that a private right of action did not exist, and how the court did not state a reason for not analyzing the remaining three factors of implying a private right).

160 *Holloway*, 485 F.2d at 989; *see also supra* Part II.C (giving the facts and case history of *Holloway* and the theories that the complaint was grounded based on the defendant's advertisement that the product was better than another equally effective product).

161 *See Holloway*, 485 F.2d at 988 (stating the cause of action against the defendants); *supra* Part II.A (providing the history and components of a Section 5 violation); *supra* Part II.C (introducing plaintiff's complaint in *Holloway* where the plaintiffs alleged that defendants alleged that Excedrin was a more effective pain relieving agent than aspirin in a false, deceptive, and materially misleading way, and that as a result on relying on the defendant's advertisements, the plaintiffs were harmed to their pecuniary loss).

162 *See Holloway*, 485 F.2d at 989 (determining that in its analysis *Holloway* was only analyzing factors three and five of the rationale for implying a private right of action along with a discussion about the legislative intent and ineffectiveness of the means provided by Congress for influencing the purpose of the FTC Act).

163 *See Judicial Refusal to Imply a Private Right of Action Under the FTCA*, 1974 DUKE L.J. 506, 508 (1974) [hereinafter *Judicial Refusal*] (arguing that even though the FTC Act does not expressly provide for a private right of action, one should have been implied due to the "established principle that a party has a cause of action when damaged by conduct that

litigant has a cause of action when damaged by conduct that violates a statute enacted for his or her protection despite the fact that the FTC Act does not expressly create a private right of action.[164] *Holloway* did not address nor take into account whether a plaintiff would have effective redress if a private right of action is not asserted.[165] The court also did not weigh the second factor of implying a private right of action, which is incorrect.[166] The second factor requires that the defendant fit into the class that statutory compliance has been imposed, and because Section 5 prohibits unfair or deceptive acts or practices the defendant falls within that class.[167] Accordingly, the *Holloway* court should have taken into

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violates a statute."); *supra* note 106 and accompanying text (listing the factors for implying a private right of action). Factor two is an "inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed." *Holloway,* 485 F.2d at 989.

164 *See Judicial Refusal, supra* note 163, at 508 (describing Judge Solomon's dissent from *Carlson v. Coca-Cola Company*). Judge Solomon argued in *Carlson* that even though the FTC Act does not provide for a private right of action expressly, "the court should have implied such a right based on the principle that a party has a cause of action when damaged by conduct that violates a statute." *Id.*; *see also* Carlson v. Coca-Cola Co., 483 F.2d 279, 283 (9th Cir. 1973) (stating that consumers are left with nowhere to turn for an effective remedy against dishonest merchants if there is not a private right of action under Section 5); *supra* Part II.A (outlining the components of a Section 5 violation and the practices that the federal statute prohibits).

165 *See Holloway*, 485 F.2d 988 (remaining silent on the issue of consumer redress although the appellants sought declaratory and injunctive relief, together with compensatory and punitive damages). *See also infra* Part III.C (analyzing the difference between state and federal consumer protection statutes and concluding that consumers benefit from having a private right of action under state consumer statutes; therefore, the court should have reached a different result if *Holloway* considered the benefits of giving consumers a private right of action along with analyzing the five factors for implying a private right of action and congressional intent for enacting the WLA).

166 *See Holloway*, 485 F.2d 988 (providing that the defendant, Bristol-Myers, represented a variety of advertisements in a false, deceptive, and materially misleading manner). This deceptive act by Bristol-Meyers is exactly the type of act that Section 5 prohibits (unfair or deceptive acts), which would place the defendant into the category that statutory compliance with Section 5 requires. *Id.*; *see also supra* Part II.A (providing the components of a Section 5 violation and its legal history); *supra* note 106 and accompanying text (listing the five factors for implying a private right of action). The second factor includes the defendant in the class upon which the duty of statutory compliance has been imposed. *Supra* note 106 and accompanying text; *see also Carlson,* 483 F.2d at 283 (opining that a plaintiff has a cause of action when harmed from a defendant's conduct); *Judicial Refusal*, *supra* note 163, at 508 (arguing that a cause of action should be implied in *Holloway* because a party has a cause of action against harmful conduct).

167 *See Holloway*, 485 F.2d at 987–88 (noting that Bristol-Meyers made representation in a variety of advertisements in a false, deceptive, and materially misleading manner); *see also* 15 U.S.C. § 45 (2012) (providing the statutory authority for Section 5); *supra* Part II.C (describing the facts of *Holloway*); *supra* note 106 and accompanying text (listing the factors for implying a private right of action).

account the second factor, and as a result, should have found that an inference for a private right of action did exist.[168]

Further, the court did not account for the fourth factor of the rationale and incorrectly reasoned that there was not an implication for a private right under Section 5.[169] This factor should have also been analyzed because the case satisfied the factor, and thus, would have likely resulted in finding an implied private right.[170] The defendant fulfilled the factor because the defendant proximately caused harm to the plaintiff by breaching its duty under Section 5 when it falsely advertised the capabilities of Excedrin.[171] Thus, the defendant directly caused plaintiff's injury by causing plaintiff to rely upon the truthfulness of the statements made in its advertisement, satisfying the fourth factor.[172]

Accordingly, *Holloway* reached the wrong result because it did not balance the five factors of the rationale for implying a private right of action respectively.[173] Had *Holloway* balanced the five factors for implying a private right of action, the court likely would have come up with a

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168 *See Holloway*, 485 F.2d at 989 ("This analysis is conjoined with a further discussion of factors (3) and (5), legislative intent and ineffectiveness of the means provided by Congress for effectuating its objective."). Although the five factors for implying a private right of action from *Borak*, they are not sufficient conditions to automatically provide an implication for a private right of action according to *Holloway*. *Id.* However, if the second factor would have been taken into account in *Holloway*'s reasoning, it is likely that a different result would have occurred and there would be an implication of a private right of action. *Id.*

169 *See id*. (discussing that *Holloway* will analyze factors three and five along with the congressional means of ensuring that the legislative intent for enacting the FTC Act is carried out). *Holloway* remained silent on analyzing factor four. *Id.*; *see also supra* Part II.C (describing the representations that the plaintiffs relied upon in *Holloway*). Although *Holloway* does not expressly state that defendant was the proximate cause of plaintiffs injury, it can be inferred that but for defendant's acts, plaintiff would not have been harmed by the advertisements. *Supra* Part II.C. Additionally, plaintiff's harm is a foreseeable harm that would occur as a result of defendant's breach of duty when creating advertisements that are not false or misleading. *Supra* Part II.C.

170 *See Holloway*, 485 F.2d at 989 (noting that the court will analyze factors three and five, but not four, and that the court will discuss the legislative intent and ineffectiveness of the means provided by Congress for effectuating the purpose of the FTC Act).

171 *See id.* at 988 (introducing plaintiff's complaint and the specific representations the court relied upon); *supra* Part II.C (describing the complaint and the defendant's assertions that plaintiff relied on, specifically discussing that plaintiffs relied upon defendant's assertions that Excedrin is a more effective pain reliever than common aspirin).

172 *See supra* Part II.C (reviewing the facts of *Holloway,* specifically discussing the claim that Excedrin relieved pain better than common aspirin, which the plaintiffs relied on to their financial loss, indicating that the defendant proximately caused plaintiffs' injury).

173 *See Holloway*, 485 F.2d at 989 (noting that only factors three and five were going to be analyzed, while not stating why the other three additional factors would not be taken into account); *see also supra* note 106 and accompanying text (listing the *Borak* factors derived from the Supreme Court to determine how to analyze an implication for a private right of action).

different result.[174] Although the five factors, if found together, do not automatically warrant the implication of a private right, they are necessary for a comprehensive analysis, and if sufficiently balanced would likely result in implying a private right of action.[175]

Further, the court's reasoning merely provided the subsequent legal history of the FTC Act and WLA.[176] The court narrowly reasoned that because Congress made no move to alter the *Moore* interpretation precluding private enforcement of Section 5, it intended the FTC's sole enforcement of the WLA.[177] At its core, the *Holloway* Court's reasoning was incorrect.[178] Simply because Congress made no move to alter the Supreme Court's interpretation of *Moore* does not mean that Congress did not intend for consumers to not have a private right of action under Section 5.

Congress enacted the WLA as a response to a growing concern for consumer protection.[179] In its analysis, *Holloway* failed to address the

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174 *See Holloway,* 485 F.2d at 989 (stating that the court was only going to balance two out of the five factors for implying a private right of action along with an analysis of the congressional means for effectuating the purpose of the FTC Act, and discussing the ramifications of the asserted private right of action while balancing them against policy reasons for enacting the FTC); *supra* Part II.C (reiterating the reasoning for *Holloway's* determination that a private right of action does not exist under the FTC Act).

175 *See Holloway*, 485 F.2d at 989 (determining that three out of the five factors for implying a private right of action were not going to be balanced, and admitting that all of the factors are necessary for implying a private right of action, but leaving out the reasoning for why the other factors would not be balanced).

176 *See id.* at 990–97 (providing the legal history of the FTC Act starting from the 1914 statute and continuing through the WLA of 1938 and concluding at the United States Supreme Court decision from *Moore*). *See also supra* Part II.A (introducing the reasoning for enacting the FTC Act and the congressional intent for passing the WLA to the Act, which was due largely in part to provide the FTC with greater authority to enforce the FTC Act as a result of the needs for stronger consumer protection).

177 *See Holloway*, 485 F.2d at 997 (stating that "[t]he conclusion is inescapable that Congress intended enforcement of the WLA to rest wholly and exclusively with the FTC, following the pattern laid down in the 1914 Act."); *supra* Part II.A (listing the reasoning for enacting the WLA and the date that they were enacted, which was after the *Moore* decision); *supra* Part II.C (reviewing the *Moore* decision and the court's reasoning for not allowing a consumer private right of action).

178 *See supra* Part II.A (describing the enactment of the WLA and that they were enacted to increase consumer protection); *supra* Part II.C (noting that *Holloway* reasoned that because Congress did not alter the *Moore* decision, Congress intended that a private right of action did not exist under Section 5; however, the court failed to distinguish that the WLA were enacted after *Moore,* and thus, Congress intended for stronger consumer protection which would occur through private rights of actions).

179 *See supra* Part II.A (discussing the history of federal consumer protection law and that Congress responded to a growing need for stronger consumer protection by enacting the WLA to provide the FTC with more enforcement power, but it did not expressly state that the FTC is the only entity capable of enforcing the WLA or the FTC Act).

perceived increase in demand for consumer protection legislation.[180] This reasoning is flawed because Congress did not expressly prohibit private actions under Section 5.[181] Section 5 remains silent on whether consumers have a private right of action.[182] To that end, the FTC Act does not expressly state that the FTC should be the sole enforcer of the FTC Act, but merely permits the FTC to enforce the provisions.[183]

The court also did not take into account that *Moore* was decided prior to the enactment of the WLA.[184] The WLA evidences part of the growing concern for the protection of consumers, which suggests a private right of

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180 *See supra* Part II.B (describing the passage of Little FTC Acts and UDAP Laws as a result of states needing protection similar to that of federal legislation due to an increase in demand from the consuming public); *see also supra* Part II.A (elaborating on the passage of the WLA for the purposes of providing the FTC with more broad and flexible power to enforce the FTC Act). Currently, there is still an increase in demand for stronger consumer protection as evidenced by Congress creating the CFPB. *See supra* Part II.B (introducing the creation of the CFPB and the reasoning for its enactment).

181 *See* 15 U.S.C. § 45(a)(1)(2012) (providing the statutory authority for the FTC to prohibit unfair or deceptive acts). Nowhere in the FTC Act itself does it state that consumers are precluded from bringing an action alleging Section 5 violations. *Id.* Courts such as *Holloway* have tried to interpret congressional intent by analyzing the enactment of consumer protection legislation. *See* Holloway v. Bristol Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973) (stating the reasoning for not implying a private right of action based on balancing the ramifications of a private right of action and comparing it with the policies and objectives sought to be advanced by Congress when it enacted the FTC Act and provided the FTC authority to enforce it).

182 *See* 15 U.S.C. § 45(a)(1) (describing the statutory authority that the FTC uses to bring a claim under Section 5, but remaining silent on whether consumers are precluded from bringing a claim under the federal law).

183 *See id.* § 45(b) (containing the statutory framework for Section 5). The statute provides:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in to the interest of the public, it shall issue and serve upon such person partnership or corporation a complaint stating its charges . . . .

Id. Nowhere in this statute does it state expressly that consumers are not permitted to file an action. *Id.*; *see supra* Part II.A (introducing the authority of the FTC to enforce the FTC Act and the power provided to the FTC by Congress).

184 *See Judicial Refusal*, *supra* note 163, at 511 (describing the history of the WLA and how it relates to the *Moore* decision). "Although *Moore* . . . clearly show[s] that no private right of action was found to exist under the original FTCA, [it] was decided before the enactment of the 1938 Wheeler-Lea amendments[.]" *Id.*; *see also supra* Part II.A (listing the timeline of the enactment of the WLA and the reasons for its creation). The WLA were passed in 1938 in order for the FTC to enforce unfair or deceptive conduct in addition to prohibiting anticompetitive behavior. Pollack & Teichner, *supra* note 87, at 127. *Moore* was decided in 1926, a considerable amount of time earlier than the enactment of the WLA. Moore v. N.Y. Cotton Exch., 270 U.S. 593, 593 (1926).

action should be implied under the amended FTC Act.[185] Had the court considered this fact, the end result likely would be different because discussion on the timing of the WLA would have revealed that Congress intended more protection for consumers instead of less protection.[186] While *Holloway* incorrectly did not imply a private right of action, *Guernsey* correctly determined that a private right of action was necessary for consumers under Section 5.[187]

C. Why Guernsey v. Rich Plan of the Midwest *is Correct*

First, *Guernsey* correctly determined that the FTC's ability to deter consumer fraud is questionable because the FTC cannot resolve every individual consumer complaint it receives.[188] Since the FTC receives numerous complaints each year, it is impossible for the agency to resolve each and every consumer dispute.[189] Having a private right of action

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185 *See Judicial Refusal*, *supra* note 163, at 511–12 (noting congressional concerns regarding consumer protection, and as a result of these concerns, Congress enacted the WLA); *see also supra* Part II.A (describing the passage of the WLA to provide the FTC with more power in enforcing the FTC Act).

186 *See supra* Part II.A (highlighting the legal history of Section 5 of the FTC Act and that the reason for enacting Section 5 was for the protection of consumers). *See also* Butler & Wright, *supra* note 63, at 164 (stating that during the 1960's, the American public and election officials increased demand for consumer protection litigation, which was thirteen years prior to the decision in *Holloway*). This change shows that there was an increasing concern in America for consumer protection laws, which lead some to believe that Congress was starting a trend for more stringent consumer protection law. *Id.* Additionally, during the time that *Holloway* was decided, states began enacting and utilizing Little FTC Acts and UDAP laws, showing an increase in demand for consumer protection law. *Id.* at 165. *See also supra* Part II.B (providing the history of Little FTC Acts and UDAP laws).

187 *See* Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 588–89 (N.D. Ind. 1976) (holding that plaintiffs had a cause of action alleging Section 5 of the FTC Act claims if the claim was brought by a plaintiff injured by defendant who violated a cease and desist letter issued by the FTC, and reasoning that the purpose of the FTC would be effectuated if a consumer was able to initiate a lawsuit against an act that the FTC previously deemed unlawful).

188 *See id.* at 586 (determining that if the FTC already issued a cease and desist order against an unfair or deceptive act, and defendants subsequently violate that order, plaintiffs have a cause of action). The court determined that most defrauded customers do not have a remedy, because the FTC cannot act in more than a small fraction of cases of deceit. *Id.*

189 *See id.* (arguing that when the case was decided, the FTC received over 9000 consumer complaints a year, but was only able to investigate and act upon a small number of those complaints); *see also supra* Part II.C (describing in depth the facts surrounding the FTC's lack of enforcement when the case was decided). Recently, in 2013, the Consumer Sentinel Network—a unique cyber tool that the FTC utilizes for receiving consumer complaints—received over two million complaints during 2013. FEDERAL TRADE COMMISSION, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2013 3 (Feb. 2014), http://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2013/sentinel-cy2013.pdf [http://perma.cc/H2WX-XN8N]. Fifty-

under Section 5 would result in stronger consumer protection because if a consumer has a legitimate claim, the consumer could obtain relief without having to go through the FTC.[190] Congress allowing the CFPB to enforce acts that are substantially similar to those that violate Section 5 questions the FTC's competency in resolving Section 5 complaints.[191] The enactment shows that Congress acknowledged the fact that stronger enforcement of Section 5 needs to occur.[192] Thus, *Guernsey* correctly concluded that the FTC, in its current state, cannot effectively resolve consumer complaints, and in order for the FTC Act to be used as intended by Congress, consumers should be afforded the ability to bring a claim against a Section 5 violator.[193]

Guernsey also properly applied the doctrine of implication.[194] The court correctly concluded that the plaintiffs cleared the first hurdle of private enforcement when the defendants violated a cease and desist order issued by the FTC and harmed the plaintiffs by actions that were

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five percent of those claims were fraud complaints. *Id.* In 2013, only sixty-one percent of consumers reporting a fraud related complaint also reported an amount paid to them as compensation for their claim. *Id.* This study indicates that the FTC could use additional assistance in enforcing Section 5 claims because a little over half of the consumers who filed a complaint with the FTC reported that they were compensated for their claim. *Id.; see supra* Part II.A (describing the enactment of the CFPB and the reasons for its creation). Additionally, Congress' recent enactment of the CFPB indicates that the FTC is not responding to consumer complaints, so Congress created an additional government agency to enforce acts that are substantially similar to acts that the FTC enforces under Section 5. *See* Pridgen, *supra* note 60, at 415 (criticizing the FTC's current enforcement methods).

190 *See infra* Part IV (providing a private right of action in Section 5).

191 *See supra* Part II.A (listing the reasoning for permitting the CFPB with the power to go after unfair and deceptive acts); *see also* Pridgen, *supra* note 60, at 415 (arguing that the CFPB was created to be a stronger enforcement power than the FTC); *supra* note 60 and accompanying text (noting that critics have argued that the CFPB was created due in part to a growing realization by Congress that consumers needed more effective enforcement of consumer protection laws).

192 *See* Pridgen, *supra* note 60, at 415 (discussing the fact that Congress created the CFPB to acknowledge the FTC's ineffectiveness at addressing consumer complaints as a result of an increase in consumer complaints based on lenders who made promises to homebuyers that were not kept and resulted in injury to consumers).

193 *See supra* Part II.A (describing the history of the FTC Act and the purpose for enacting it due to an increase in demand for the protection of the marketplace); *see also* ABA ANTITRUST SECTION, VOL. I, *supra* note 29, at 11 (reviewing the history of the Covington bill, which catalyzed the enactment of Section 5(e) and allows the FTC to regulate anticompetitive behavior).

194 *See Guernsey*, 408 F. Supp. at 586 (listing the components of the doctrine of implication); *see also supra* Part II.C (elaborating in detail how the *Guernsey* applied the doctrine of implication and that the court found that a private right of action should exist in order to accomplish the purpose of the FTC Act based on the fact that the defendants violated an order, which the FTC issued due to the defendant's unlawful conduct).

deemed previously unlawful by the FTC.[195] Thus, the plaintiffs were placed into the class of subjects that Section 5 was designed to protect.[196] *Guernsey* harnessed the purpose of the FTC Act by allowing the defendants to continue with their lawsuit because the FTC had already properly determined that the company's acts were unlawful.[197]

Further, *Guernsey* determined that plaintiffs have a private right of action under Section 5 in light of the statute's purpose because Congress intended Section 5 to strengthen consumer protection.[198] The Indiana court determined that Section 5's purpose is to deter consumer harm and by permitting consumers to have a private right of action, the purpose of the FTC Act was achieved.[199] Accordingly, *Guernsey* properly concluded

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195 *See Guernsey*, 408 F. Supp. at 588 (asserting that since the FTC had already found the defendant's behavior unlawful in violation of Section 5, the first hurdle that the FTC—with its broad overview of the national economy—is in a better position than a private litigant to gauge the injury of a deceptive practice will cause to the public has been cleared and that the court should rule in favor of the consuming public); *supra* Part II.C (noting one of the reasons for *Holloway*'s decision of not permitting a private right of action based on the theory that the FTC is in a better position than consumers to determine whether the benefit of stopping conduct that violates Section 5 outweighs the cost of stopping the conduct).

196 *See Guernsey*, 408 F. Supp. at 589 (holding that the plaintiffs had a cause of action under Section 5 based on the fact that the defendants violated an earlier cease and desist order issued by the FTC); *supra* Part II.C (describing the reasoning of *Guernsey* when it determined that the FTC had already used its position with an extensive overview of the national economy when it deemed the defendant's conduct unlawful and that as a result, plaintiffs cleared the first hurdle of private enforcement).

197 *See Guernsey*, 408 F. Supp. at 588–89 (determining that Section 5 was passed to deter fraud and unfair practices and that permitting the plaintiffs to have a cause of action under Section 5 properly executes the FTC Act). By permitting the plaintiffs to continue on with their lawsuit, *Guernsey* reasoned that it carried out the FTC Act because it ensured that the defendants complied with the FTC cease and desist order, which is the result of behavior that the FTC had previously found unlawful. *Id.* at 587–88.

198 *See id.* at 588 (reasoning that the defendants fit within the scope of the FTC's cease and desist order, and thus, allowing the plaintiffs to file an action against them for violating the order invoked Section 5 because the defendants violated a statute enacted for the plaintiff's protection); *supra* Part II.A (describing congressional intent for enacting Section 5, and the reasoning for its enactment, which was to provide the FTC with broad discretion to enforce unfair and deceptive acts and practices in addition to prohibiting unfair methods of competition); *supra* note 42 and accompanying text (providing the statutory framework of Section 5 that Congress created in order to deter individuals or corporations from using unfair methods of competition and unfair or deceptive acts or practices in commerce).

199 *See Guernsey*, 408 F. Supp. at 588–89 (holding that plaintiffs had a cause of action under Section 5 based on the fact that the defendants violated a cease and desist order issued by the FTC); *supra* Part II.A (describing the legal history of Section 5 and the purpose for its enactment, which was for stronger consumer protection and to permit the FTC with broad enforcement powers to prohibit anticompetitive behavior and unfair or deceptive acts and practices that harm consumers); *see also supra* note 43 and accompanying text (introducing the history of Section 5 and the basis for its enactment which the Covington Bill proposed).

that the plaintiffs had a cause of action under Section 5 if injured by defendants who violated an earlier cease and desist order from the FTC.[200]

Although *Guernsey* was a step in the right direction for private enforcement of Section 5, more action still needs to be taken.[201] Consumers should be afforded an express right to file a lawsuit against a deceptive or unfair act or practice.[202] Due to the increased demand for consumer protection, as evidenced by the creation of the CFPB, and the lack of proper redress afforded to consumers, an amendment needs to be made to the FTC Act.[203] Subsequently, the proposed amendment in Part IV implements a private right of action for consumers, and if passed by the legislature, would result in stronger protection for consumers.[204]

IV. CONTRIBUTION

A private right of action would effectively alleviate the problem for consumers who are left with limited state consumer protection law redress, even though there are consumer protection risks associated with having a private right of action under Section 5.[205] The problem exists

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200 *See Guernsey*, 408 F. Supp. at 589 (holding that private plaintiffs had a cause of action alleging Section 5 violations after they were harmed by a violation of an FTC cease and desist order); *supra* Part II.C (providing the facts of *Guernsey*, the holding, and the reasoning for the court's decision).

201 *See supra* Part II.C (introducing the facts, holding and reasoning for the *Guernsey* decision and how the court determined that plaintiffs had a cause of action based on the defendant's violation of an earlier cease and desist order issued by the FTC); *infra* Part IV (proposing that an amendment be made to Section 5 by adding the phrase "consumer-plaintiff" into the existing language of the FTC Act to create an express private right of action for consumers).

202 *See supra* Part III.A (examining the discrepancies between state and federal consumer protection law and reaching the conclusion that consumers should be given the same enforcement capabilities as the FTC because state consumer protection laws do not offer the same broad enforcement as the FTC); *infra* Part IV.A (introducing a proposed amendment to the existing language of the FTC Act to include an express private right of action for consumers); *infra* Part IV.B (reiterating the fact that consumers should be afforded an express private right of action under Section 5 and providing commentary on the proposed amendment to the language of Section 5 of the FTC Act).

203 *See supra* Part II.A (elaborating on the history of the CFPB and the reasons for its enactment, which is due in part to the FTC's inability to respond to consumer complaints that are substantially similar to those that violate Section 5, and because of the harm that occurred to consumers as a result of the deceptive behavior of lenders during the mortgage scandal in 2009).

204 *See infra* Part IV (proposing an amendment be made to 15 U.S.C. § 45 (2012)). The author has proposed the changes in italics.

205 *See supra* Part II.B (describing current state consumer protection law); *infra* Part IV.B (suggesting potential risks associated with having a private right of action under Section 5).

because there is not an express private right of action under Section 5.[206] Congress needs to amend the FTC Act and implement a private right of action to provide consumers with the ability to file a lawsuit alleging Section 5 violations.[207]

To begin, Part IV.A suggests that these amendments include the phrase "consumer-plaintiff" within the existing language of the FTC Act, which will allow consumers to file a lawsuit in any federal district court appropriate under venue rules.[208] Second, the amendment proposes implementing the phrase "consumer-plaintiff" into the existing FTC Act to allow consumers to receive the same redress that is currently available to the FTC. Finally, Part IV.B provides commentary regarding the proposed amendment and how critics may react to the change.[209] Furthermore, the adoption of the proposed amendment would render the *Holloway* and *Guernsey* decisions moot because courts will no longer need to determine if a private right of action under Section 5 should be implied.[210]

A. Proposed Amendments to 15 U.S.C. § 45

In order to accomplish the changes necessary, below is sample of how a private right of action can be implemented into Section 5 of the FTC Act.[211] The phrase "consumer-plaintiff" should be added after the word "Commission" throughout Section 5 to create an express right of action for consumers under Section 5.[212] A brief sample of how the FTC Act would read is as follows:

> **§ 45 Unfair methods of competition unlawful; prevention by Commission**
>
> **(b) Proceeding by Commission; modifying and setting aside orders**
>
> Whenever the Commission or *consumer-plaintiff* shall have reason to believe that any such person,

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206 *See supra* Part II.C (reviewing court decisions that have held that there is not a private right of action available to consumers).

207 *See infra* Part IV (composing an amendment to Section 5 of the FTC Act and providing commentary about what the amendment means for consumers).

208 *See infra* Part IV.A (providing an example of how a private right of action can be implemented within the existing FTC Act).

209 *See infra* Part IV.B (suggesting issues that may arise from providing consumers with a private right of action).

210 *See supra* Part III (examining the *Holloway* and *Guernsey* decisions).

211 In an attempt to preserve space, the author used an excerpt of the Section 5 as an example of how an express private right of action can be incorporated.

212 *See infra Part* IV.A (proposing an amendment to 15 U.S.C. § 45 (2012)).

> partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission or *consumer-plaintiff* that a proceeding by it in respect hereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect . . . [213]

B. Commentary

The proposed amendments to the statute correct two different issues within the FTC Act. First, the amendment expressly permits consumers to file an action in any appropriate federal court pursuant to the jurisdictional requirements under the Federal Rules of Civil Procedure. Second, the amendment allows for consumers to receive the same redress as the FTC. Together, these amendments allow consumers to effectively and adequately allege a Section 5 violation, and receive appropriate redress.[214]

Amending Section 5 of the FTC Act to create a private right of action will strengthen consumer protection by allowing consumers to file a lawsuit against a violator in lieu of going through the FTC. Under the amended FTC Act, a consumer can independently file a complaint against a violator.[215] An express private right of action will allow consumers to enforce past FTC decisions, which will enable them to use precedent already established by the FTC to stop the act from happening. In turn, this would ensure that consumers are able to use precedent already established to stop the act from happening on a case-by-case basis.[216] Additionally, adding an express private right of action strengthens consumer protection because it ensures that all legitimate consumer complaints are being resolved.[217] Finally, the proposed amendments require that consumers be afforded the same enforcement powers as the FTC, which means they will be entitled to receive the same redress as the

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213 15 U.S.C. § 45(b).

214 *See supra* Part II.A (describing the redress available to the FTC for a violation of Section 5). The same redress would be available to consumers if an express private right of action is granted.

215 *See supra* Part IV.A (proposing that the phrase "consumer-plaintiff" be added within the existing language of Section 5).

216 *See supra* Part III.A (arguing that the consumers are not able to enforce past FTC decisions which affects not only individual lawsuits, but class action lawsuits as well).

217 *See supra* Part III.C (analyzing the lack of enforcement of consumer complaints by the FTC due to the increase in the amount of complaints and the inability of the FTC to effectively respond to them).

FTC.[218] In short, this amendment permits a consumer to receive a uniform penalty for each violation, request an injunction, and recover $10,000 from a person or corporation who violates an issued order.[219]

Although the proposed amendments strengthen consumer protection, critics may argue that courts do not have the same expertise as the FTC to decide which actions warrant litigation and which actions should result in settlement.[220] To resolve this issue, courts can look to past FTC decisions to determine how the deceptive or anticompetitive conduct in question should be handled. Additionally, these amendments will not inhibit the FTC from enforcing Section 5 violations; it merely permits consumers to do the same. The FTC will still be a critical agency in enforcing the FTC Act, however, consumer protection will be strengthened because consumers can assist with enforcement. Therefore, the FTC is still able to use its expertise in stopping Section 5 violators from conducting business in the marketplace, and courts can examine how the FTC has handled similar cases.

Critics may also argue that a consumer has little incentive to sue for injunctive relief, which is permitted under the proposed amendments.[221] However, consumers will find incentive to file for injunctive relief under a private right of action to avoid being harmed in the future, which will also strengthen the marketplace for other consumers. Further, having a right of action should be a viable option for consumers if they want to enforce consumer protection statutes.[222] Thus, beyond the public policy concern to protect consumers, there is strong incentive for consumers to privately enforce injunctive relief to prevent harmful conduct.

The current state of consumer protection law requires that an amendment be made to Section 5 to ensure that consumers in the United States have a private right of action against violators. Together, the

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218 *See supra* Part II.A (listing the redress that the FTC is entitled to under Section 5 of the FTC Act).

219 *See* 15 U.S.C. § 45(m) (2012) (listing the statutory amount that the FTC is able to recover from a violation of the Section 5).

220 *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997 (D.C. Cir. 1973) (noting that the FTC has special expertise in determining what causes injury to consumers and the competitive system, and if the benefit of stopping the practice outweighs the cost). *Holloway* also noted that the FTC has special expertise in enforcing deceptive or anticompetitive trade practices, and thus, private litigants should not be able to enforce the statute. *Id.*

221 *See Toward Greater Equality*, *supra* note 67, at 1624 (discussing UDTPA laws). Individual consumers have little incentive to sue for injunctive relief because they are unlikely to be injured by the same deceptive or unfair act or practice twice. *Id.*

222 *See supra* Part III.C (examining the current state of FTC enforcement and how the FTC has been unable to keep up with the amount of consumers complaints that it receives, and by having a private right of action, consumers would be able to assist in enforcing consumer protection laws).

proceeding amendments would effectively provide consumers with appropriate redress from being harmed by a scam practice.[223] The differences between federal and state consumer protection law mandate that the legislature take steps to govern both similarly.[224]

V. CONCLUSION

Courts have failed to recognize the importance of having a private right of action under Section 5, preventing consumers from obtaining appropriate redress.[225] In addition, while the FTC Act protects consumers, its protections do not extend to private enforcement of Section 5.[226] The current consumer protection legislation fails to provide consumers with effective redress, and thus, the legislature should amend the current language of FTC Act, which will allow for an express private right of action, ultimately resulting in stronger consumer protection.[227]

Returning to Allison's situation, if a private right of action were available under Section 5, she would be able to recover the money that she paid to the telemarketer.[228] Even more, Allison would be able to have an injunction issued against the telemarketing company—an option that is not provided to her under her state consumer law. This option would prevent other victims from falling prey to this particular company's fraudulent scheme. This Note establishes the importance of creating a private right of action under Section 5 for consumers who are placed in a similar situation as Allison.[229] The proposed amendment would resolve the current discrepancies between state and federal consumer protection law and create the opportunity to properly compensate consumers who are harmed by a Section 5 violation.[230] Finally, implementing the proposed amendment would result in fulfilling an empty promise made to consumers by Congress for stronger consumer protection.[231] Thus, the

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223 *See supra* Part IV.A (suggesting a way to amend Section 5 of the FTC Act in order to create an express private right to action for consumers).

224 *See supra* Part III.A (analogizing the differences between state and federal consumer protection laws).

225 *See supra* Part II.C (describing the reluctance of courts to imply a private right of action under the FTC Act).

226 *See supra* Part II.A (listing current enforcement methods of the FTC Act).

227 *See supra* Part IV.A (proposing an amendment to 15 U.S.C. § 45 (2012)).

228 *See supra* Part I (introducing a common scheme in violation of Section 5 that affects Americans regularly).

229 *See supra* Part III.A (examining the differences between state and federal consumer protection law).

230 *See supra* Part IV (suggesting an amendment to 15 U.S.C. § 45).

231 *See* Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 588 (N.D. Ind. 1976) (arguing that because the FTC had already issued a cease and desist letter to the defendants

legislature should enact the proposed amendments to Section 5 of the FTC Act, and ensure that individuals like Allison have the opportunity to have a private right of action against scams.[232]

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for violating the FTC Act, then the conclusion is inescapable that the FTC Act, as enforced by the FTC, is an empty promise to consumers).

[232] *See supra* Part IV (proposing an amendment to Section 5 of the FTC Act).

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