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# Private Rights of Action Under the Commodity Futures Trading Commission Act of 1974: The Curran Decision

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# PRIVATE RIGHTS OF ACTION UNDER THE COMMODITY FUTURES TRADING COMMISSION ACT OF 1974: THE *CURRAN* DECISION

Commodity futures[1] trading has undergone a fundamental transformation over the last decade in both the nature of the trade[2] and in the unheralded expansion of the industry itself.[3] The public, however, has lost faith in the concept of industry self-regulation[4] in light of recent allegations of fraud,[5] financial ruin,[6] and most notably, market manipulation.[7] Although subject to extensive governmental regulation and remedial protection for investors,[8] the trading of commodity futures remains the "least forgiving business."[9] After the creation of the Com-

1. A commodity futures contract is a contract to sell (a short contract) or buy (a long contract) a fixed quantity of goods at a uniform grade to be delivered in the future. Because the quantity and quality are fixed, commodity futures contracts are fungible, and are frequently traded before delivery. *See The Commodity Futures Trading Commission Act of 1974: Hearings Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 128-29, 134-37 (Comm. Print 1974) [hereinafter cited as *Senate Committee Print*]; J. BURNS, A TREATISE ON MARKETS 31-33 (1979).

2. Early commodities trading involved agricultural commodities, conducted principally by producers and industrial consumers. During this period the primary aim of the trade was hedging; that is, fixing profits or costs in the future. Beginning in the late 1960s, the character of the trade shifted from hedging to speculation. The decline of agricultural surpluses and the influx of foreign buyers into the market removed the cushion that had discouraged market manipulation in the past. With the growth in speculation came increased participation of traders without any connection to the production or distribution of agricultural commodities. *See generally Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 3 (1973) [hereinafter cited as *1973 House Hearing*]; H.R. REP. NO. 975, 93d Cong., 2d Sess. 36-39 (1974); S. REP. NO. 1131, 93d Cong., 2d Sess. 11-15, 18-19 *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 5843, 5852-56, 5858-59.

3. At the time the Commodity Futures Trading Commission Act (CFTCA) was passed in 1974, fewer than 20 million regulated and unregulated futures contracts were traded, with a total worth of approximately $300 billion. By 1978, the number of contracts traded had grown to 75 million, with a total worth in excess of $1.6 trillion. *See Extend Commodity Exchange Act: Hearings Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture,* 95th Cong., 2d Sess. 269 (1978).

4. *See 1973 House Hearings, supra* note 2, at 11.

5. *See infra* note 15.

6. *See infra* note 170.

7. *See infra* note 15.

8. *See infra* notes 19-30 & 46-58 and accompanying text.

9. D. MORGAN, MERCHANTS OF GRAIN 405-42 (1979). Commodity brokers usually require a demonstrated net worth of $50,000 or more of liquid assets before they will open a trading account for a customer. In part, this is necessary to meet margin calls, but it also reflects the fact

modity Futures Trading Commission (CFTC) in 1974, aggrieved traders increasingly argued that courts should imply a private right of action against futures commission merchants,[10] exchanges,[11] and fellow traders under the CFTC Act of 1974.[12] Because of the Act's unique trader protections[13] and judicial reluctance to imply private rights of action from sparse statutory language,[14] the lower federal courts divided on the question of whether a private right of action could be implied.[15] The Supreme Court answered the question affirmatively in

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that four out of five first-time traders lose money. *See Commodity Futures Trading Commission Act: Hearings Before the Senate Comm. on Agriculture and Forestry,* 93d Cong., 2d Sess. 514-17 (1974) [hereinafter cited as *Senate Hearings*].

10. Futures commission merchants are

> individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

7 U.S.C. § 2 (1976 & Supp. V 1981).

11. There are ten regulated exchanges in the United States and three unregulated exchanges. *See Senate Committee Print, supra* note 1, at 133. To be registered, a board of trade applies for a designation as a contract market with the Commodity Futures Trading Commission and agrees to enforce rules designed to maintain on orderly market. 7 U.S.C. § 8 (1976 & Supp. V 1981).

12. 7 U.S.C. §§ 1—24 (1976 & Supp. V 1981).

13. *See infra* notes 58-59 and accompanying text.

14. *Id.*

15. Several district courts have found a private right of action for fraud. *See* Shelley v. Noffsinger, 511 F. Supp. 687, 689 (N.D. Ill. 1981); Christensen Hatch-Farms v. Peavey, 505 F. Supp. 903, 910 (D. Minn. 1981); Berenson v. Madda, COMM. FUT. L. REP. (CCH) ¶ 20,689 (D.D.C. 1980); Grayson v. ContiCommodity Serv., COMM. FUT. L. REP. (CCH) ¶ 21,033 (D.D.C. 1980), *aff'd*, 688 F.2d 846 (9th Cir. 1982); Witzel v. Chartered Sys., 490 F. Supp. 343, 345 (D. Minn. 1980); Croll v. Maduff, 487 F. Supp. 1381, 1382 (C.D. Cal. 1980); Navigator Group Funds v. Shearson Hayden Stone, Inc., 487 F. Supp. 416, 418 (S.D.N.Y. 1980); Alken v. Lerner, 485 F. Supp. 871, 879 (D.N.J. 1980); Demoe v. Dean Witter & Co., 476 F. Supp. 275, 278 (D. Alaska 1979); R.J. Hereley & Son Co. v. Stotler & Co., 466 F. Supp. 345, 349 (N.D. Ill. 1979); Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 221 (D. Kan. 1979); Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart Inc., 465 F. Supp. 585, 590 (M.D. La. 1979); Milani v. ContiCommodity Serv., 462 F. Supp. 405, 407 (N.D. Cal. 1979); Gravois v. Fairchild, COMM. FUT. L. REP. (CCH) ¶ 20,706 (E.D. La. 1978); Hofmayer v. Dean Witter Reynolds, Inc., 459 F. Supp. 733, 737-38 (N.D. Cal. 1978); Kelley v. Carr, 442 F. Supp. 346, 354 (W.D. Mich. 1977); Shearson Hayden Stone, Inc. v. Lumber Merchants, Inc., 423 F. Supp. 559, 561 (S.D. Fla. 1976); E.F. Hutton & Co. v. Lewis, 410 F. Supp. 416, 419 (E.D. Mich. 1976).

Similarly, courts have held exchanges liable for failure to prevent market manipulation. *See* Strax v. Commodity Exch., Civ. No. 79-5366 (S.D.N.Y. 1981); Pollock v. Citrus Assocs., 512 F. Supp. 711 (S.D.N.Y. 1981); Smith v. Groover, 468 F. Supp. 105 (N.D. Ill. 1979).

On the other hand, a significant minority of district courts have denied a private right of action under the CFTCA. *See, e.g.,* Paine, Webber, Jackson & Curtis, Inc., v. Conaway, 515 F. Supp. 202, 209 (N.D. Ala. 1981) (no private right of action for contract dispute; reparations procedure

*Curran v. Merrill Lynch, Pierce, Fenner & Smith*.[16]

This Note proposes that the civil and criminal remedies created in 1974 provide adequate protection for the trading public and the integrity of the commodity markets, and that the courts have created a superfluous remedy in the private right of action. The first section of the Note traces the historical development of commodity regulation and the recently created claim settlement procedures of the CFTC Act (CFTCA). The second section discusses *Curran* in light of prior commodity law and in the broader context of statutory construction. The third section examines the indicia of congressional intent for creating a private right of action as a remedy for violations of the Act. Finally, the Note considers the impact of the recently implied private right of action on the regulation and conduct of commodity markets and trade.

## I. THE DEVELOPMENT OF COMMODITY FUTURES TRADING REGULATION

Federal regulation of commodity futures trading began sixty years ago with the Grain Futures Act of 1922.[17] Prompted by concern over the adverse impact of price volatility and anticompetitive practices on producers and consumers,[18] Congress focused on the control of specu-

the exclusive remedy); Walsh v. International Precious Metals Corp., 510 F. Supp. 867, 870-71 (D. Utah 1981) (no private right of action for broker fraud); Commodity Futures Trading Comm'n v. Carter, Rodgers & Whitehead & Co., 497 F. Supp. 450, 452-53 (E.D.N.Y. 1980) (no claim that reparations inadequate); Gonzalez v. Paine Webber, Jackson & Curtis, Inc., 493 F. Supp. 499, 503 (S.D.N.Y. 1980) (same); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1358 (D. Nev. 1980) (same); Stone v. Saxon & Windsor Group Ltd., 485 F. Supp. 1212, 1216-19 (N.D. Ill. 1980) (no private right of action for violation of options trading prohibition); Alkan v. Rosenthal, COMM. FUT. L. REP. (CCH) ¶ 20,797 (D.D.C. 1979) (no private right of action for failure to execute a trading order); Fischer v. Rosenthal, 481 F. Supp. 53, 55-57 (N.D. Ill. 1979) (no private right of action for excessive speculation and market manipulation) Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311, 321-23 (S.D. Ohio 1979) (no private right of action for broker fraud and account churning); Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc., 436 F. Supp. 447, 454 (N.D. Ohio 1976) (broken fraud); Bartels v. International Commodities Corp., 435 F. Supp. 865, 868-70 (D. Conn. 1977) (same); Bache Halsey Stuart, Inc., v. French, 425 F. Supp. 1231, 1234 (D.D.C. 1977) (failure to execute trading order).

16. 102 S. Ct. 1825 (1982). The Court held that customers could bring a private right of action against brokers for fraud and deceptive practices and against commodity exchanges for failure to prevent market manipulation. *See infra* notes 108-27 and accompanying text.

17. Grain Futures Act, ch. 369, 42 Stat. 998 (1922) (current version at 7 U.S.C. §§ 1—24 (1976 & Supp. V 1981)).

18. Section 3 of the Grain Futures Act declared:

> [T]he transactions and prices of grain on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices

lation and market manipulation in drafting the Act of 1922.[19] The Act empowered the Secretary of Agriculture to restrict grain trade to boards of trade which had been designated "contract markets."[20] The Secretary implicitly relied on self-regulation when designating and supervising contract markets.[21] In 1936, the Commodity Exchange Act (CEA)[22] laid the foundation of modern substantive protection for the trading public. By prohibiting fraudulent practices among members of the contract markets,[23] delegating administrative discretion to set limits on speculative trading,[24] and mandating the registration of futures commission merchants and floor brokers,[25] the 1936 Act marked a shift in regulatory emphasis from the control of market forces to the protection of investors.

The enforcement procedures of the 1936 Act, however, contemplated violations which offended the public generally rather than a particular trader. For example, trading professionals who violated the Act risked

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thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or consumer and the persons handling grain and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

*Id.* § 3, 42 Stat. 999 (1922) (current version at 7 U.S.C. § 3 (1976).

19. *Id.*

20. *Id.* § 6, 42 Stat. 1001 (1922) (current version at 7 U.S.C. § 8 (1976 & Supp. V 1981)).

21. *See supra* note 4.

22. Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936) (current version at 7 U.S.C §§ 1—22 (1976 & Supp. V 1981)).

23. *Id.* § 4b, 49 Stat. 1493 (1936). Section 4b of the Commodity Exchange Act read in relevant part:

> It shall be unlawful for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or in the making of (1) any contract of sale of any commodity in interstate commerce, or, (2) any contract of sale of any commodity for future delivery made, or to be made, on or subject to the rules of any contract market for or on behalf of any person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such person;
>
> (B) willfully to make or cause to be made to such person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such person . . . ; or
>
> (D) to bucket (receipt of orders to purchase and sell stock without intention of actually executing such orders) such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

*Id.* (current version at 7 U.S.C. § 6b (1976)).

24. *Id.* § 4a, 49 Stat. 1492-93 (1936) (current version at 7 U.S.C. § 6a (1976)).

25. *Id.* §§ 4e, f, 49 Stat. 1495-96 (1936) (current version at 7 U.S.C. §§ 6e, 6f (1976)).

suspension or revocation of their trading privileges,[26] rather than liability to individual parties. Similarly, the Act empowered the Secretary of Agriculture to refuse trading privileges to "any person" involved in market manipulation or violation of any provision of the Act.[27] The Secretary could suspend or revoke a board of trade's designation as a contract market for failure to enforce rules mandated by the Act or the Department of Agriculture.[28] The Secretary could also issue cease and desist orders to boards of trade or their agents if either violated the provisions of the Act,[29] or if they failed to enforce their own rules.[30]

The emphasis on proscriptive statutes and the coercion of futures trading professionals left the settlement of private grievances in the hands of the contract markets.[31] Because traders in the market were principally interested in the hedging and actual delivery of the underlying commodity, the statutory remedies and contract market regulations provided sufficient protection for individual traders.[32] Subsequently, however, a new class of traders, less interested in the hedging of commodity transactions and more interested in the speculative opportunities of the trade, began entering the market.[33] Dissatisfied with

26. *Id.* § 4g, 49 Stat. 1496 (1936) (current version at 7 U.S.C. § 6g (1976)).

27. *Id.* § 8, 49 Stat. 1498 (1936) (current version at 7 U.S.C. § 8(a) (1976 & Supp. V 1981)).

28. *Id.* § 5b, 49 Stat. 1498 (current version at 7 U.S.C. § 13a (1976 & Supp. V 1981)).

29 *Id.* § 6b, 49 Stat. 1500 (1936) (current version at 7 U.S.C. § 13a (1976 & Supp. V 1981)).

30. Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258, § 12, 82 Stat. 26, 29 (current version at 7 U.S.C. § 7a(8), (12) (1976 & Supp. V 1981)).

31. The exchanges developed their own informal settlement procedures which included arbitration and mediation of customer grievances. In addition, exchanges would deny trading privileges to floor brokers and commodity merchants who violated the exchange's informal and formal rules of conduct. *See generally 1973 House Hearings, supra* note 2. Each of the exchanges called before the House Agricultural Committee noted that the informal procedures were incorporated into their exchange's rules. *See, e.g., id.* at 73, 97, 118, 131, 138, 197 (statements of various exchange officers).

32. *See supra* note 2 and accompanying text. In part, the limited number of traders and the fact that the buyer and seller usually knew each other produced the efficacy of self-enforcement. Indeed, it was more than 30 years after the Commodity Exchange Act was passed before a private right of action was first asserted in Goodman v. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).

33. *See supra* note 2. *See also* S. REP. No. 1131, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843. The Senate Report indicated that since 1968 the function of the commodity markets had shifted from surplus allocation to a market-oriented economy in which markets establish price as well as organize the marketing of commodities. Such a shift led to increased speculation in the market.

> The shift to market-oriented economy has brought the general public into the futures markets in growing numbers. Speculators are attracted to the futures markets by the wide price swings and the possibility of large profits. Such an increase in trading by the speculative public, while useful to hedgers, brings with it potential market problems. If individual speculators or groups operating in concert obtain control of the futures mar-

industry settlement of their complaints, aggrieved traders sought federal court relief for violations of the Commodity Exchange Act.

The first recognition of a private right of action under the Act came in *Goodman v. Hentz*.[34] Adopting a tort theory of liability for the implication of a private right of action, the *Goodman* court reasoned that the violation of a legislative act designed to protect the interest of another created a cause of action in favor of the protected party.[35] Federal courts unanimously held thereafter that individuals could maintain a private right of action under the Commodity Exchange Act on allegations of broker fraud[36] or account churning[37] as well as for a market's failure to enforce its own rules or those of the Department of Agriculture.[38]

The imposition of liability on exchanges for failing to enforce their

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kets, price manipulation, corners and squeezes can occur, with adverse effects on producers and consumers alike.

*Id.* at 5859.

34. 265 F. Supp. 440 (N.D. Ill. 1967).

35. According to the *Goodman* court:

> Violations of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect . . . . Violation of the standard of conduct set out in Section 6b of the Commodity Exchange Act is a tort for which the plaintiffs, as members of the class Congress sought to protect from the type of harm they allege here, have a federal civil remedy in the absence of specific mention of a civil remedy in the Commodity Exchange Act.

*Id.* at 447 (citations omitted).

36. The decision in *Goodman* was followed by a line of cases all asserting that the *Goodman* decision controlled on the question of the availability of a private right of action for broker fraud. *See, e.g.,* Arnold v. Bache & Co., Inc., 377 F. Supp. 61, 65 & n.11 (M.D. Pa. 1973); Johnson v. Arthur Epsey, Shearson, Hammill & Co., 341 F. Supp. 764, 766 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338, 1342 (E.D. La. 1972); Anderson v. Francis I. DuPont & Co., 291 F. Supp. 705, 710 (D. Minn. 1968). *See also* United Egg Producers v. Bauer Int'l Corp., 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970) (finding a private right of action for dissemination of false information).

37. "Churning" refers to rapid, successive trading of a customer's account—an account typically discretionary or within the broker's control. After churning, the customer may find the account is exhausted by commission fees. In Johnson v. Arthur Epsey, Shearson, Hammill & Co., 341 F. Supp. 764, 766 (S.D.N.Y. 1972), the court described such excessive trading as fraud and deceit within the meaning of 7 U.S.C. § 6b. When presented with allegations of churning, courts implied a private right of action under the 1936 Act. *See* Johnson v. Arthur Epsey, Shearson, Hammill & Co., 341 F. Supp. 764 (S.D.N.Y. 1972); Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968).

38. *See, e.g.,* Case & Co. v. Board of Trade, 523 F.2d 355, 362-63 (7th Cir. 1975) (temporary suspension of price fluctuation rule); Deaktor v. Schreiber, 479 F.2d 529, 534-35 (7th Cir. 1973) (failure to prevent price manipulation), *rev'd on other grounds sub nom.* Chicago Mercantile Exch.

own rules or to maintain an "orderly market" marked the beginning of a breakdown in industry self-regulation.[39] Responding to judicial willingness to imply a private right of action for violation of exchange rules, the exchanges began eliminating unenforceable rules in an effort to limit their liability.[40] The decline in exchange vigilance, coupled with a decrease in commodity surpluses in the 1970's, made the commodity exchanges more susceptible to manipulation and abuse.[41] Traders, increasingly dissatisfied with the deterioraton of industry self-regulation, urged government regulators to increase supervision of the

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v. Deaktor, 414 U.S. 113 (1973); Seligson v. New York Produce Exch. 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974) (failure to maintain an orderly market).

In *Deaktor*, the court held that a private right of action was available against an exchange that failed to prevent price manipulation and market cornering in pork bellies futures. 479 F.2d at 534. The principal issue, however, was whether the Commodity Exchange Commission should exercise primary jurisdiction in the enforcement of contract market duties. *Id.* at 531-34. The Supreme Court had previously held, in Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973), that the Commodity Exchange Commission had primary jurisdictional control over the regulated exchanges. The Supreme Court reversed *Deaktor* and held that parties seeking damages because of exchange actions must first resort to the Commission's hearing procedure. 414 U.S. at 115.

39. The contract market provides as its principal duty an orderly point of concentrated futures marketing activities. The primary general duties include responsibility for the prevention of false rumors and inaccurate reports, 7 U.S.C. § 7(c), and the prevention of price manipulation and cornering, 7 U.S.C. § 7(d). Economically, however, "orderly market" refers to the ability of a contract market to indicate prices which accurately reflect supply and demand.

> "Disorderly" refers to a situation in which a market is not operating properly within a given economic environment. Under such circumstances, the optimal benefits of the market cannot be realized. At least three types of disorderly market conditions may be usefully distinguished:
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> 1. A disorderly condition may exist when the price of a transaction is off a market's demand and/or supply schedules. Artificial barriers to market entry—through monopolies or monopsonies—are examples of such a condition.
>
> 2. In certain circumstances, a market may be susceptible to manipulation, not because of artificial barriers to market entry, but rather because of artificial barriers to market information that allow false rumors to circulate . . . .
>
> 3. A wide price swing occasioned by overreaction to a prior price trend may also create a disorderly market. This condition has often been characterized as destabilizing speculation. Such price behavior, however, could be brought about by any type of trader—commercial firm or speculator—in the market.

J. BURNS, *supra* note 1, at 10-11.

40. Some observors believe that the provision of the 1968 amendments requiring exchanges to enforce their own rules, thereby *implicitly giving private parties the right to sue for nonenforcement*, has had a perverse effect. To avoid risk of litigation, exchange authorities have been encouraged to reduce rather than strengthen rules designed to insure fair trading.

120 CONG. REC. 10,748 (1974) (remarks of Rep. Thone) (emphasis added).

41. The trend coincided with the first major Russian wheat purchases in 1972 and the temporary embargo on soybean shipments to Japan in 1973. The Japanese soybean embargo came in response to the trebling of soybean prices over the period of several months. *See 1973 House Hearings*, *supra* note 2, at 3.

markets and to modernize statutory regulation.[42] On the other hand, federal regulators questioned the efficacy of drastic coercive sanctions as enforcement tools when compared to civil damages.[43] Designed to strengthen the regulation of commodity trade under the 1936 Act,[44] the enactment in 1974 of the CFTCA marked a shift in the emphasis of commodity rule enforcement. Although federal law still required the exchanges to make and enforce rules, Congress gave the newly created Commodity Futures Trading Commission primary rulemaking authority.[45] The CFTCA substantially increased fines and penal sanctions for larceny and embezzlement,[46] unfair trade practices,[47] broker misconduct,[48] and nonenforcement of rules by the exchanges.[49]

In contrast to the informal settlement procedures previously con-

42. *See id.* at 11 (statement by Rep. Smith).

43. As noted by Representative Smith:

> In many instances, the CEA at the present time must, as a practical matter, either impose or threaten severe sanctions or nothing at all. The authority to impose civil money penalties or more modest sanctions would, in all likelihood, be used more and be a greater *deterrent* toward preventing some of the abuses under the present situation.

*Id.* at 12. (emphasis added).

44. Congress declared the purpose of the Act as follows: "An Act to amend the Commodity Exchange Act to strengthen the regulation of futures trading, to bring all agricultural and other commodities traded on exchanges under regulation, and for other purposes." Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389.

45. The Commodity Futures Trading Commission replaced the Commodity Exchange Commission which had been composed of the Secretaries of Agriculture and Treasury and the Attorney General. The new Commission is an independent agency composed of five appointed commissioners. 7 U.S.C. § 49(a)(1) (1976 & Supp. V 1981). Its duties include the approval of exchange rules, 7 U.S.C. § 7a(8), (12) (1976 & Supp. V 1981), which effectively removes rulemaking authority from the exchanges and places it in the hands of the Commission.

46. Congress made the offenses felonies, punishable, in the case of an individual, by a fine of not more than $100,000 or imprisonment for not more than five years, or both, and in all other cases by a fine of $500,000 or the same term of imprisonment, or both. 7 U.S.C. § 13(a) (1976 & Supp. V 1981).

47. Price manipulation, cornering, and the dissemination of false information were made felonies subject to a fine of $500,000, five years imprisonment, or both. 7 U.S.C. § 13(b) (1976 & Supp. V 1981).

48. A knowing violation of 7 U.S.C. § 6 (1976), which regulates the conduct of brokers, is a felony punishable by a fine of not more than $500,000 or imprisonment not exceeding five years, or both. 7 U.S.C. § 13(b) (1976 & Supp. V 1981). If the violation is by an individual, the fine shall not exceed $100,000. 7 U.S.C. § 13(b) (1976 & Supp. V 1981).

49. If the Commission finds that a contract market or its agents fail to enforce their own rules or have violated any section of the Act, the Commission may assess a fine of $100,000 for each violation and issue a cease and desist order. Significantly, in assessing fines against the exchanges, the Commission must "consider whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties." 7 U.S.C. § 13a (1976 & Supp. V 1981).

ducted by the contract markets, the CFTCA called for formal structures for the settlement of customer claims. The Act required contract markets to establish an arbitration procedure for the settlement of disputes between customers and members of the contract markets.[50] That requirement, however, simply recognized in law the procedure that the contract markets had provided informally. The nonbinding effect of the arbitration procedures, and their jurisdiction over only small claims,[51] limits the effectiveness of arbitration and has done little to strengthen enforcement.[52] More importantly, the CFTCA increased the protection of individual traders by creating a private right of action before administrative law judges.[53] The Act allows persons complaining of violations of the CFTCA or exchange rules to petition the Commission for an investigation and hearing.[54] Upon finding a violation, the Commission can order the payment of damages,[55] which is

50. 7 U.S.C. § 7a(11) (1976 & Supp. V 1981) reads in relevant part:

> Each contract market shall—
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> (11) provide a fair and equitable procedure through arbitration or otherwise . . . *Provided*, That (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or floor broker.

51. *Id.*

52. *See supra* note 1 and accompanying text.

53. 7 U.S.C. § 18 (1976 & Supp. V 1981).)

54. 7 U.S.C. §§ 18(a), (b) (1976 & Supp. V 1981) provide in relevant part:

> (a) any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the *cause of action* accrues, apply to the Commission by petition which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable period to be prescribed by the Commission.
>
> (b) If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating the complaint and may, if in its opinion the facts warrant such action, have such complaint served by registered mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge . . . .

*Id.* (emphasis added).

By its terms, 7 U.S.C. § 18(a) (1976 & Supp. V 1981) permits recovery of damages only from futures commission merchants, floor brokers, and commodity trading advisors or commodity pool operators. *See* 7 U.S.C. §§ 6(d), (e), (f) (1976). Reparations proceedings are thus not available to parties claiming damages either from other large traders or from exchanges for manipulation or permitting the manipulation of market prices. Both offending parties, however, would be subject to criminal and monetary penalties. *See supra* notes 48-50.

55. 7 U.S.C. § 18(e) (1976) states:

> If after a hearing on a complaint . . . the Commission determines that the respondent

enforceable in federal district courts[56] and reviewable in federal circuit courts.[57]

From 1974 until the recent decision in *Curran*, lower federal courts attempted to ascertain whether Congress intended the reparations proceedings as the exclusive remedial device to be exhausted before resort to the courts. The Court in *Curran* held that it did not.[58]

### *A. The Development of an Implied Right of Action Under the CFTCA—the Search for Jurisdiction*

Initial interpretations of the CFTCA focused on the balance of jurisdiction between the courts and the Commission.[59] The confusion arose from the peculiar wording of section 2 of the Act. Section 2 gave the Commission "exclusive jurisdiction" over the regulation of all contracts for future delivery, but preserved the "jurisdiction conferred on federal and state courts."[60] This ambiguous statutory language forced courts to consider whether the private right of action previously implied sur-

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has violated any provisions of this chapter, or any rule, regulation, or order thereunder, the Commission shall, . . . determine the amount of damages, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay such person complaining such amount on or before such date fixed in the order.

56. 7 U.S.C. § 18(f) (1976).

57. 7 U.S.C. § 18(g) (1976).

58. *See supra* note 16.

59. Early interpretations of the Act divided on the question of whether the CFTC had primary jurisdiction for the enforcement of the Act. The courts that maintained that judicial enforcement was available in the first instance often asserted that section 2 of the Act preserved jurisdiction, or more generally, that courts had a right under 28 U.S.C. § 1337 to review any act of Congress regulating interstate commerce. *See* Kelley v. Carr, 442 F.Supp. 346, 354 (W.D. Mich. 1977) (private right of action exists independently); Shearson Hayden Stone, Inc. v. Lumber Merchants, Inc., 423 F. Supp. 559, 561 (S.D. Fla. 1976) (reparations not mandatory); E.F. Hutton & Co. v. Lewis, 410 F. Supp. 416, 419 (E.D. Mich. 1976) (courts have jurisdiction to hear issues arising under an Act of Congress).

In contrast, other courts suggested that Congress designed the new enforcement superstructure to serve as the initial forum for grievances. *See* Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc., 346 F. Supp. 447, 454 (N.D. Ohio 1976) (necessary to exhaust administrative remedies); Bache Halsey Stuart v. French, 425 F. Supp. 1231, 1234 (D.D.C. 1977) (Congress intended public enforcement); Arkoosh v. Dean Witter & Co., 415 F. Supp. 535, 540 (D. Neb. 1976) (statutory violations remedied by recourse to administrative remedies).

60. 7 U.S.C. § 2 (1976 & Supp. V 1981) provides in relevant part:

the Commission shall have exclusive jurisdiction with respect to . . . transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title and any other board of trade, exchange, or market, and any transactions subject to regulation by the Commission . . . . Nothing is this section shall supercede or limit the jurisdiction conferred on the courts of the United States or any State.

vived the CFTCA. Typically, courts either decided to defer to the Commission's "primary jurisdiction"[61] or asserted that decisions prior to the enactment of the CFTCA that implied a private right of action still control.[62]

In 1977, the court in *Bartels v. International Commodities Corp.*[63] held that the CFTCA extinguished an independent private right of action. Reasoning that a customer must first invoke the reparations procedure before seeking a judicial remedy, the *Bartels* court concluded that no private right of action exists under the Act until the plaintiff exhausts administrative remedies.[64] After *Bartels*, other courts construed the reparations procedure as an expression of congressional intent to provide an initial forum for settlement of claims.[65]

Other courts relied on *Cort v. Ash*,[66] a case involving a federal campaign contribution statute,[67] for guidance in determining whether a plaintiff could invoke the jurisdiction of a federal court under the CFTCA. The Supreme Court identified four factors that courts should consider in analyzing whether a statute implies a private right of action: whether the plaintiff belonged to that class for whose benefit the statute was enacted; whether legislative history indicates an intent to create a private right of action; whether such a remedy is consistent with the purposes of the statute; and whether such private rights of action are

61. *See supra* note 59. *See also* Gravois v. Fairchild, COMM. FUT. L. REP. (CCH) ¶ 20,706, at 22,872 (E.D. La. 1978) (reparations proceedings not an exclusive remedy for common-law misrepresentation); Hofmayer v. Dean Witter & Co., 459 F. Supp. 733, 737-38 (N.D. Cal. 1978) (section 2 preserves court jurisdiction when there is no indication of an intent to require exhaustion of administrative remedies); Milani v ContiCommodity Serv., Inc., 462 F. Supp. 405, 407 (N.D. Cal. 1976) (violations should be heard by courts, not private arbitrators).

62. *See supra* note 60. *See also* Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 216-23 (D. Kan. 1979); Poplar Grove Planting & Ref. Co., v. Bache Halsey Stuart, Inc., 465 F. Supp. 585, 590 (M.D. La. 1979); Kelley v. Carr, 442 F. Supp. 346, 354 (W.D. Mich. 1976).

63. 435 F. Supp. 865 (D. Conn. 1977).

64. *Id.* at 870.

65. *See, e.g.*, Paine Webber, Jackson & Curtis, Inc. v. Conaway, 515 F. Supp. 202, 210 (N.D. Alaska 1981); Stone v. Saxon & Windsor Group, Ltd., 485 F. Supp. 1212, 1221 (N.D. Ill. 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56-57 (N.D. Tex. 1979); Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc., 436 F. Supp. 447, 454-55 (N.D. Ohio 1976); Bache Halsey Stuart, Inc. v. French, 425 F. Supp. 1231, 1234 (D.D.C. 1977).

66. 422 U.S. 66 (1975).

67. Plaintiffs in *Cort* were stockholders in a corporation whose directors allegedly authorized corporation campaign contributions in violation of 18 U.S.C. § 610. The Court held that the criminal statute created no private right of action for stockholders suing derivatively or for citizens generally. 422 U.S. at 69.

traditionally or appropriately relegated to state law.[68] In *Liang v. Hunt*,[69] the Northern District of Illinois denied a private right of action to investors alleging injury from market manipulation.[70] Specifically, the *Liang* court argued that, under the first of the *Cort* factors, the antimanipulation statute was not created for the especial benefit of investors, but rather for the protection of producers and consumers.[71] Two other courts reasoned that, under the second of the *Cort* factors, the existence of the reparation procedures in the CFTCA obviated the need to imply a private right of action.[72]

Nevertheless, a majority of district courts held that Congress intended the reparations proceedings to merely supplement judicial vindication of private rights, and that plaintiffs need not exhaust the administrative remedies of the Act[73] before seeking relief from the courts. Courts frequently utilized one of two arguments. First, some

68. *Id.* at 78.

69. 477 F. Supp. 891 (N.D. Ill. 1979).

70. Liang v. Hunt, 477 F. Supp. 891 (N.D. Ill. 1979). The controversy in *Liang* involved the Hunt family's purchase of 23 million bushels of soybeans—20 million in excess of the speculative limit. The court held that the price manipulation provision of the CFTCA was a criminal statute for the benefit of the general public, not an especial class. *Id.* at 893. The court further held that Congress did not intend the provision to expose alleged manipulators to widespread liability. *Id.* at 894. For an excellent account of the Hunt soybean episode and grain trading generally, see D. MORGAN, *supra* note 9.

71. 477 F. Supp. at 893.

72. *See* Commodity Futures Trading Comm'n v. Carter, Rodgers & Whitehead & Co., 497 F. Supp. 450, 452 (E.D.N.Y. 1980); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1347 (D. Nev. 1980).

The *Mullis* court noted:

> the broad range of enforcement powers granted to the CFTC, the provisions for private administrative remedies and the Congressional instruction that the CFTC erect a 'sound and strong federal regulatory policy governing futures trading' . . . all indicate that a private right of action is neither necessary to . . . nor consistent with the legislative scheme.

492 F. Supp. at 1357 (citations omitted).

73. Courts initially recognized the availability of a judicial forum of first instance in broker fraud actions. *See* Shelley v. Noffsinger, 511 F. Supp. 687, 689-90 (N.D. Ill. 1981); Christensen Hatch-Farms, Inc. v. Peavey Co., 505 F. Supp. 903, 907-08 (D. Minn. 1981); Berensen v. Madda, COMM. FUT. L. REP. (CCH) ¶ 21,033, at 24,082 (D.D.C. 1980); Croll v. Maduff & Sons, Inc., 487 F. Supp. 1381, 1384 (C.D. Cal. 1980); Navigator Group Funds v. Shearson Hayden Stone, Inc., 487 F. Supp. 416, 421 (S.D.N.Y. 1980); Alken v. Lerner, 485 F. Supp. 871, 879 (D.N.J. 1980); R.J. Hereley & Son v. Stotler & Co., 466 F. Supp. 345, 347-48 (N.D. Ill. 1979).

During the period between 1974 and the decision in *Curran*, courts frequently rationalized the rejection of the exhaustion of remedies requirement because of the language of 7 U.S.C. § 18, which declares that a complaining party "may" petition the Commission for an investigation and reparations hearing. *See supra* note 54. Conceivably, the significance of the contingent language in section 18 begs the question because Congress did not declare what, if any, alternatives to

courts asserted that the reenactment of legislation incorporates prior judicial interpretations and that Congress' silence indicated approval of prior judicial interpretations.[74] Arguing that Congress was aware of judicial implication of private rights of action under the Commodity Exchange Act, these courts concluded that congressional failure to disapprove these decisions implied sub silentio approval.[75] The second argument focused on the language of section 2 of the Act.[76] In *Hofmayer v. Dean Witter & Co.*,[77] the Northern District of California rejected the exhaustion of remedies requirement first enunciated in *Bartels*.[78] Specifically, the court held that because Congress was aware of the prior construction of the Commodity Exchange Act, it intended the second provisio of section 2 to preserve federal court jurisdiction to hear private claims under the new Act.[79]

### *B. The Second and Sixth Circuits: A Narrowing of Issues*

By 1980, federal courts of appeals began to address the issue of whether private rights of action could still be maintained under the CFTCA. In *Leist v. Simplot*,[80] the Second Circuit recognized a private right of action against contract markets, brokers, and other traders for violations of the antimanipulation provisions of the Act.[81] Similarly, the Sixth Circuit held in *Curran v. Merrill Lynch, Pierce, Fenner &*

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reparations procedures exist. In other words, the choice may be between seeking an administrative remedy or no remedy at all.

74. For an early statement of this position, see Van Vranken v. Helvering, 115 F.2d 709 (2nd Cir. 1940) (Hand, L., J.).

75. The argument that Congress knew of prior constructions of the Act and approved the holdings without mentioning them conflicts with the concept of sub silentio approval. Defined as "(u)nder silence; without any notice being taken," BLACK'S LAW DICTIONARY 1281 (5th ed. 1979), sub silentio approval of private rights of action without congressional notice contradicts the premise of the reenactment maxim—Congress is presumed to know prior constructions of the reenacted act. Nevertheless, courts still employ the argument. *See* Christensen Hatch-Farms, Inc. v. Peavey Co., 505 F. Supp. 903, 907-08 (D. Minn. 1981); Witzel v. Chartered Systems Corp., 490 F. Supp. 343, 346 (D. Minn. 1980); Navigator Group Funds v. Shearson Hayden Stone, Inc., 487 F. Supp. 416, 421 (S.D.N.Y. 1980); Alken v. Lerner, 485 F. Supp. 871, 875 (D.N.J. 1980).

76. *See supra* note 60.

77. 459 F. Supp. 733 (N.D. Cal. 1978).

78. *Id.* at 738. *See also* R.J. Hereley & Son v. Stotler & Co., 466 F. Supp. 345, 347 (N.D. Ill. 1979).

79. 459 F. Supp. at 737. *See also infra* notes 116-18.

80. 638 F.2d 283 (2nd Cir. 1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825 (1982).

81. *Id.* at 322-23.

*Smith, Inc.*[82] that allegations of fraud and deceptive practices could support an implied private right of action.[83]

In *Leist*, the court reviewed the history of commodity regulation and enforcement under the Commodity Exchange Act.[84] It then considered the continued existence of a private right of action under the CFTCA within the analytic framework of *Cort*. The court distinguished *Cort* because, unlike the history of judicial interpretation of the CFTCA, no line of cases implying private rights had developed prior to the enactment of the statute under consideration in *Cort*.[85] This distinction led the court to reason that the proper inquiry was not whether Congress intended to *create* a private right of action under the CFTCA, but whether it intended to *extinguish* sub silentio an interpretation uniformly given the provisions prior to the 1974 amendments.[86] Noting that speculators serve an important function in commodity markets[87] and that their growing numbers and associated losses had prompted passage of the CFTCA,[88] the court concluded that aggrieved speculators met the first prong of the *Cort* test, because the statute was enacted for a complaining party's especial benefit.[89]

The *Leist* court then conducted an extensive investigation of the existence of any indicia of legislative intent to preserve a private right of action.[90] Judge Friendly, writing for the majority, emphasized that the legislative history of the Act revealed congressional awareness of

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82. 622 F.2d 216 (6th Cir. 1980), *aff'd*, 102 S.Ct. 1825 (1982).

83. *Id.* at 229-36.

84. *Id.* at 293-302.

85. *Id.* at 303.

86. *Id.* According to the majority:

> The question would thus not be whether Congress intended to create a new private right of action in 1974, but rather, whether it intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act . . . . The burden thus lies on those who urge that the 1974 amendments demonstrate an intention to change prior law.

*Id.*

87. *Id.* at 304. The court noted that while Congress often criticized speculation in grain trade because of the deleterious effects on the market—especially manipulation—Congress recognized the necessity of speculators in the market so as to bear the risks of price shifts which hedgers were trying to avoid. *Id.* at 305-07. Moreover, the court sought to differentiate "big speculators" from small investors, arguing that the big speculator was not the object of congressional protection. *Id.* at 304-05.

88. *Id.* at 305-06.

89. In something of a tautology, the court suggested that "[i]t is almost self-evident that legislation regulating future trading was for the 'especial benefit' of futures traders." *Id.* at 306-07.

90. *Id.* at 307-21.

implied rights of action under the Commodity Exchange Act.[91] In reaching this conclusion the court relied on statements made during House[92] and Senate hearings,[93] and the House report,[94] as indications of congressional awareness of judicial intervention in the enforcement of the Commodity Exchange Act. Given Congress' express knowledge of prior judicial construction, the majority concluded that reenactment of various portions of the Commodity Exchange Act created "an almost irrebuttable presumption"[95] that Congress intended to incorporate a judicially implied private right of action into the CFTCA. The creation of a private right of action in reparations proceedings did not, according to the majority, rebut the presumption.[96] In particular, the court argued that three factors supported the presumption. First, the CFTCA limited the availability of reparations proceedings to claims against only some of the potential market defendants.[97] Second, the court concluded that Congress added the reparations proceedings as an additional, nonexclusive remedy for the enforcement of a preexisting duty.[98] Finally, the court noted that an inconsistency would result if, after finding that the purpose of the Act was to strengthen commodity

91. *Id.* at 308-09.

92. In particular, the court relied on Committee Chairman Poage's statements on the House floor that "when the Commodity Exchange Act was enacted, courts implied a private remedy for individual litigants in the Commodity Exchange Act." *Id.* at 308 (quoting 119 CONG. REC. H41,333 (1973)). The court further suggested that congressional awareness of a private right of action was a necessary step in the logic which impelled Congress to give the Commission power to impose rules on the exchanges. Implied rights of action based on violations of exchange rules caused the exchanges to retreat from rulemaking. Without this knowlege, Congress would not have compelled the adoption of beneficial rules. *Id.* at 309.

93. 638 F.2d at 309-10 (quoting *Senate Hearings, supra* note 9, at 205, 317, 415, 737, 746).

94. 638 F.2d at 307-08.

95. *Id.* at 310 (quoting Bennett v. Panama Canal Co., 475 F.2d 1280, 1282 (D.C. Cir. 1973)). The court noted that a contrary presumption, though possible, would "require an exceedingly strong showing of an intention to *abolish* the private cause of action." *Id.* at 311 (emphasis added).

96. *Id.* at 312-14.

97. The CFTCA makes available the reparations procedure only against those registered or required to be registered under sections 6d, 6e, 6j or 6m. These classes include futures commission merchants (§ 6d), floor brokers (§ 6e), futures commission merchants and floor brokers trading on their own account (§ 6j), and trading advisors or commodity pool operators (§ 6m). *See supra* note 54.

98. 638 F.2d at 313. As the majority stated:

> The case differs fundamentally from instances . . . where Congress, operating on a *tabula rasa*, provided a new duty and certain express remedies to enforce that duty, and the court applied the maxim *expressio unius est exclusio alterius*. When as here Congress adds a new remedy to enforce a preexisting duty, where other remedies had been clearly recognized, it would be expected to say so if it meant the new remedy to be exclusive.

*Id.* at 312-13. Expressio unius est exclusio alterius is "[a] maxim of statutory interpretation mean-

futures regulation, it concluded that the Act extinguished private rights of action.[99] In a lengthy dissent, Judge Mansfield criticized the majority's theory of sub silentio approval of private rights of action and argued that the "pervasive panoply" of judicial and administrative enforcement procedures obviated the need for such rights.[100]

In *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[101] the Sixth Circuit recognized the continued existence of a private right of action for broker misconduct in the handling of a discretionary trading account.[102] In addition to a brief analysis of the four factors identified in *Cort*,[103] the *Curran* court emphasized the legal context in which Congress enacted the CFTCA. Specifically, the court argued that congressional knowledge of an implied right of action under the Commodity Exchange Act coupled with the congressional intent of strengthening commodity regulatory enforcement made it unlikely that Congress intended to extinguish private rights of action.[104] The court argued that Congress intended the exclusive jurisdiction provisions of section 2 of the CFTCA to be a method of dividing regulatory jurisdiction between

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ing that the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

99. 638 F.2d at 613. Simply put, the majority's position was that the elimination of a remedy did not strengthen enforcement. As a purely logical matter, however, a numerical reduction of remedies is not inconsistent with stronger regulation.

100. *Id.* at 329-31 (Mansfield, J., dissenting). Rather than requiring the defending party to prove that Congress intended to *extinguish* a previously implied private right of action after amendment of a statute supporting such rights, Judge Mansfield insisted that the party asserting such rights must prove the Congress intended to *create* anew such rights after amendment. The majority's position, according to Judge Mansfield, "puts the cart before the horse" when Congress has expressly provided remedies for violations of the statute. *Id.* at 340.

Beyond the theory of statutory construction, Judge Mansfield maintained that each of the four *Cort* factors dictated a result opposite to the majority's. He argued that Congress has never viewed speculators as a class in need of especial benefit and that Congress reflected this view in designing the structure of the CFTCA to benefit the general public. *Id.* at 334-39. Further, Judge Mansfield argued that the court should not infer an intent of Congress to preserve private rights of action when the case originally implying such rights was incorrectly decided. He observed that Goodman v. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967), implied a private right of action under the Commodity Exchange Act without ever purporting to examine legislative intent. Instead, the *Goodman* court implied a private right of action from the now-discarded tort theory of liability. *Id.* at 341-42. *See supra* notes 34-38 and accompanying text.

101. 622 F.2d 216 (6th Cir. 1980), *aff'd*, 102 S. Ct. 1825 (1982).

102. *Id* at 230.

103. *Id.* at 233-35. The court urged that investors as a class satisfied the first prong of *Cort*—the especial class requirement. *Id.* at 233-34. Thus defined, this could conceivably include a larger group of speculators than was protected in *Leist*. *See supra* note 87.

104. 622 F.2d at 234-35.

the CFTC and the Securities and Exchange Commission. It was not intended as an implicit rejection of private rights of action.[105] Moreoever, the court concluded that courts should not invoke the primary jurisdiction of the CFTC,[106] especially in light of the CFTC's view that an implied right of action survived the CFTCA.[107]

## II. THE *CURRAN* DECISION

### *A. The Majority Opinion and the "contemporary legal context"*

The Supreme Court consolidated the *Leist* and *Curran* cases for the specific purpose of considering the continued existence of a private right of action under the CFTCA.[108] In declaring that such rights continued to exist, the majority clarified and refined its enunciated principles of judicial construction. Although arguing that the tests developed in *Cort* still applied to the question of implied private rights of action, the Court stated that subsequent incremental erosion of the *Cort* decision had reduced the test to a single-factor inquiry: "the intent of Congress."[109] More important, the Court maintained that congressional intent must be determined by focusing on the state of the law at the time of enactment—the "contemporary legal context" in which a statute is enacted.[110] Such an examination, the Court argued, is important for determining what Congress' perception of the law was at the time of enactment. In short, the majority held that if Congress reenacted a statute with knowledge of an available private right of action under a

105. *Id.* at 234 & nn.27, 28.

106. *Id.* at 235.

107. *Id.* at 235-36. The court argued that primary jurisdiction was properly invoked only when private civil enforcement complicated the agency's regulatory role. *Id.* at 235. Given the CFTC's acquiescence in the implication of private rights of action, *see id.* at 232, the court apparently believed that the CFTC's regulatory role would be unimpaired. *Id.* at 236.

108. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825 (1982).

109. *Id.* at 1839 (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981)).

110. *Id.* (quoting Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979)). The Supreme Court in *Curran* stated:

> [W]e must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the preexisting remedy.

*Id.*

provision of the statute, then the inquiry should focus on the intent to preserve, not the possible creation of, a private right of action.[111] Because courts uniformly implied a private right of action prior to the CFTCA, this rule constituted a part of the contemporary legal context in 1974. The Court then concluded that the reenactment of provisions supporting a private right of action provided evidence that Congress intended to preserve such rights.[112]

An examination of the legislative history of the CFTCA led the majority to the same conclusion. The Court noted that during the 1973 hearings on the CFTCA, the exchanges complained about the effects of private liability for nonenforcement of their rules.[113] The Court found that Congress' decision to place supplemental rulemaking authority in the hands of the new Commission, instead of eliminating the private remedy, was consistent with the goal of the CFTCA to strengthen commodity regulatory enforcement.[114] Echoing the Second Circuit's reasoning in *Leist*, the majority considered the structural changes instituted in the CFTCA in light of this goal. The Court concluded that reparations proceedings were intended to supplement, not supplant, a private right of action; their nonavailability against exchanges and jurisdictional limitation are inconsistent with regulatory strengthening.[115]

Ultimately, however, the Court found direct evidence that Congress preserved a private right of action in the jurisdictional savings clause of section 2 of the Act.[116] Noting the Senate's concern that the Commission's jurisdictional exclusivity might deprive the courts of jurisdiction, the Court argued that Congress added the second proviso of section 2 for the express purpose of preserving the private remedy previously implied.[117] In addition, the enhanced enforcement value associated with

111. *Id.*

112. *Id.* at 1839-40.

113. *Id.* at 1841-42.

114. *Id.* at 1842. The Court also found it to be significant that Congress refused to explicitly repudiate a private right of action to ease the enforcement burden on the exchanges despite the opportunity to do so. *Id.*

115. *Id* at 1842-43.

116. *Id.* at 1843. The Court explained that Congress added the clause in response to concerns expressed in the Senate that conferring exclusive jurisdiction on the CFTC might deprive courts of jurisdictional authority to hear commodity cases in the first instance. After such concerns were expressed in the Senate, the House responded by adding the jurisdictional savings clause. *Id.* at 1843 & nn. 81-85.

117. *See supra* note 116.

a continued private remedy led the Court to the compelling inference that Congress intended to preserve a private right of action.[118]

### *B. The Dissent: Attacking "A Novel Legal Theory"*

Justice Powell and three other dissenters[119] attacked the majority's position as contrary to the doctrine of separation of powers. Justice Powell argued that the majority's position requires Congress to respond to all facets of the contemporary legal context when reenacting provisions of a statute.[120] Arguing that no such duty exists or could be imposed on Congress, the dissent urged that the majority was doubly remiss because the contemporary legal context in 1974 was in a state of confusion and error.[121] Specifically, Justice Powell argued that "the law" in 1974, characterized only by a uniform agreement in the federal district courts that an implied right of action existed under the Commodity Exchange Act, was based entirely on an erroneous decision rendered in *Goodman v. Hentz*.[122] The assertion that Congress has a duty to respond to every judicial construction of superceded legislation—even erroneous construction—was, in the dissent's view, inconsistent with the division of power in government.[123]

Moreover, an examination of traditional indices of congressional intent persuaded the dissent that, preservation of private remedies aside, Congress did not intend to create a private right of action by implication. The existence of an express remedy and a monetary limit on lia-

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118. 102 S. Ct. at 1843-44.

119. Chief Justice Burger and Justices Rehnquist and O'Connor joined Justice Powell in his opinion.

120. 102 S. Ct. 1848, 1851-52. As Justice Powell explained, the theory unjustifiably elevates the importance of lower federal courts:

> Fewer than a dozen district courts wrongly create a remedy in damages under the CEA; Congress fails to correct the error; and congressional silence binds this Court to follow the erroneous decisions of the district courts and courts of appeals . . . . Congress itself surely would reject emphatically the *Goodman* view that federal courts are free to hold, as a general rule of statutory interpretation, that private rights of action are to be implied unless Congress "evidences a contrary intention."

*Id.* at 1851-52.

121. *Id.* at 1849-51.

122. *Id.* Justice Powell argued that the error in the *Goodman* case, and the line of cases rendered prior to the CFTCA, was that those cases based their decision solely on an inquiry into whether a statute conferred a benefit on the class asserting the private right. Such an inquiry, while appropriate for common-law courts, was inappropriate for implying private rights under a federal statute where there is no federal common law. *Id.* at 1849-51. *See supra* notes 34-38 and accompanying text.

123. *See supra* note 120.

bility provided persuasive evidence from which the Court could infer that Congress did not intend to imply a private right of action against the exchanges.[124] Justice Powell questioned, even in light of the stated goal of strengthening enforcement, the necessity of an implied right of action when Congress provided an express, duplicative remedy in reparations proceedings.[125] Finally, Justice Powell pointed out that the majority ignored the only unambiguous evidence of congressional intent: a chart comparing features of several proposed versions of the CFTCA with the Commodity Exchange Act. This chart failed to indicate the availability of an implied private right of action under the old Act.[126] The dissent concluded that such traditional evidence of congressional intent, coupled with the novelty of the majority's theory of statutory construction, merely indicates that Congress failed to disapprove *Goodman*, not that it approved of the decision's effect.[127]

### C. *The Course of Recent Supreme Court Construction of Private Rights of Action*

The decision in *Curran* represents an aberration in an otherwise uninterrupted trend in the Supreme Court toward a narrow and strict construction of the availability of implied private rights of action. In the area of economic regulation, the Supreme Court's willingness to imply a private right of action reached a highwater mark in *J.I. Case v. Borak*.[128] In *Borak*, the Court reasoned that when Congress has legislated against a specific evil and a private right of action would aid enforcement, the courts should imply such a right.[129] The Court's decision in *Cort v. Ash*[130] signalled the emergence of a stricter standard for the implication of private rights. The four factors—an especial class, legislative intent, consistency with the statutory purposes, and

124. 102 S. Ct. at 1852-53. Specifically, Justice Powell noted that Congress provided explicit sanctions for nonenforcement of exchange rules. He found it unusual that Congress would at once place a limit on the statutory liability at $100,000 under 7 U.S.C. § 13a so as not to impair the exchanges' ability to regulate trade, and yet continue to permit private rights of action to be maintained when such unlimited liability could financially cripple the exchanges. 102 S. Ct. at 1852-53.

125. *Id.* at 1853.

126. *Id.* at 1853, 1855. The chart appeared in *Senate Hearings, supra* note 1, at 194. Under the designation "Civil money penalties," the chart indicated that no such remedies existed under the Commodity Exchange Act. 102 S. Ct. at 1855.

127. 102 S. Ct. at 1854.

128. 377 U.S. 426 (1964).

129. *Id.* at 431-33.

130. 422 U.S. 66 (1975). *See supra* notes 65-68.

federal preemption—[131]all demanded a sharper analytic focus on the suitability of a private right of action to a particular statutory scheme. In the last several years, however, the Court has taken an even stricter approach to implying private rights. In particular, the Court has held that of the four *Cort* factors, congressional intent to create a private right of action primarily controls.[132] Reflecting recent conservative criticism of "judicial legislating"[133] and a return to "plain language" construction,[134] the Supreme Court has announced its unwillingness to imply remedies when the statutory language and legislative history are silent.[135] Indeed, the Court's recent construction of each of the first three *Cort* factors suggests that it has imposed a greater burden of proof on parties asserting private rights of action.

With respect to the first *Cort* factor, the Court has begun to apply literally the requirement that a complaining party belong to an especial beneficiary class under the statute. If Congress intended the statute to benefit the general public, especially when the basis of the asserted right is a criminal statute, then the Court will refuse to infer especial benefit.[136] Further, if the parties asserting private rights are members of the class that Congress sought to regulate, then ascribing especial

131. *See supra* note 68.

132. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979); Cannon v. University of Chicago, 441 U.S. 677, 688 (1979); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974). In *Transamerica*, the Court summarized its predominant attitude by stating that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 444 U.S. at 458 (1974). *See also* T.I.M.E., Inc. v. United States, 359 U.S. 464, 471 (1959); Botany Mills v. United States, 278 U.S. 282, 289 (1929).

133. *See* Cannon v. University of Chicago, 441 U.S. 677, 743-47 (1979) (Powell, J., dissenting).

134. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

135. Justice Rehnquist, in Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), argued that the failure of Congress to provide a damage remedy for violation of federal securities laws controlled the implication of private rights of action when Congress demonstrated no intent to create such rights. According to Justice Rehnquist:

> If there is to be any federal damage remedy under these circumstances, Congress must provide it. "[I]t is not for us to fill any *hiatus* Congress has left in this area." Obviously, nothing we have said prevents Congress from creating a private right of action . . . . But if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent.

*Id.* at 575 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)) (emphasis in original).

136. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1976); Cort v. Ash, 422 U.S. 66 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

benefit to such parties is illogical and inconsistent with congressional intent.[137]

Prior to *Curran*, the Supreme Court had emphasized that when a statute provides express remedies, the Court would not imply additional remedies.[138] Thus, contrary to its holding in *Curran*, the Court construed the omission of a particular remedy among other express remedies as an indication, in the plain language of the statute, that Congress intended to exclude additional remedies.[139] Further, the Court has held that a sufficiently broad scope of express remedies negated an inferred congressional intent implying private rights of action.[140] The Court has also held that instead of a defendant bearing the burden or proving the exclusivity of a remedy, the complaining party must prove that Congress intended to create a private right.[141] By criticizing agency interpretations[142] and isolated sponsor remarks[143] as unreliable indicia of intent, the Court pared those sources which might demonstrate that Congress intended a private right of action. When Congress has chosen not to speak, the Court has refused to speak in its stead; more significantly, it has refused to continue to imply a right existing under a previous enactment.[144] Finally, the Court has refused

137. "[A] party whose previously unregulated conduct was purposely brought under federal control by the statute . . . can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection." Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37 (1977).

138. *See* Kissinger v. Reporters Comm., 445 U.S. 136, 148 (1980); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974).

139. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979).

140. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979).

141. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979). *See also* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419 (1975).

142. Although agency pronouncements often indicate the proper interpretation of a statute, *see* Cannon v. University of Chicago, 441 U.S. 677, 706-08 (1979), the Supreme Court has held that where the narrow issue presented is whether jurisdiction of federal courts should be invoked to hear an implied right of action, courts are more competent to resolve the matter. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 (1977).

143. *See, e.g.,* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 31—32 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203-04, 203 n. 24 (1976).

144. *See* T.I.M.E., Inc. v. United States, 359 U.S. 464, 472-75 (1959). In *T.I.M.E.*, the Court held that without a clear indication that Congress intended to preserve a private right of action implied under a predecessor act, the Court should not imply one under an amended act. Interestingly, the statute involved in *T.I.M.E.*, the Motor Carrier Act, had created reparations proceedings for the settlement of claims alleging unreasonable rate charges. There, the Court noted that a

to confer new rights on the basis of congressional silence.[145] In short, absent express statutory language, pre-*Curran* complaining parties had to demonstrate a positive congressional intent to create or preserve a private right of action.[146]

## III. Legislative Intent to Create a Private Right of Action Under the CFTCA

Whatever may be said for the validity of the Court's "contemporary legal context" theory of statutory construction, an examination of the legislative history of the CFTCA reveals that Congress did not view the continued existence of an implied private right of action as necessary or proper.

As noted previously,[147] courts have indicated that Congress knew of decisions implying a private right of action under the Commodity Exchange Act. The construction of the CFTCA thus depends, as the majority in *Leist* indicated, on whether Congress intended to preserve a private right of action.[148] Further, because Congress created a private right of action before administrative law judges in reparations proceedings,[149] but included no statutory language on court enforcement of private rights under the Act,[150] the *Cort* test seemingly requires an additional showing of legislative intent to create a private right of action. Statutory silence alone does not necessarily mean that Congress intended to deny such rights.[151] An examination of the structure and legislative history of the Act, however, reveals neither an intent to create a private right of action nor an intent to preserve rights previously implied under the Commodity Exchange Act. In addition, the general purposes of the Act reveal that private rights of action are inconsistent with, and superfluous to, the enforcement mechanisms provided by Congress.

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court adjudication in light of available reparations proceedings would be redundant and "anomalous." *Id.* at 474.

145. *See supra* notes 132 & 135 and accompanying text.

146. *See supra* note 144.

147. *See supra* notes 64-68.

148. *See supra* notes 84-86 and accompanying text.

149. *See supra* note 55 and accompanying text.

150. *See* 7 U.S.C. §§ 1—24 (1976 & Supp. V 1981).

151. "[T]he failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979).

Initially, as noted by the majority in *Leist*,[152] Congress was concerned with the influx of speculators into the commodity markets, and their subsequent losses.[153] Responding to constituents' perceptions that the claim settlement procedures were inadequate under the 1936 Act,[154] Congress completely overhauled the enforcement provisions of the Commodity Exchange Act[155] by strengthening governmental regulation of the exchanges[156] and mandating the creation of new procedures for the settlement of customer grievances.[157] Congress did not indicate that it viewed speculators as a class more in need of protection than other classes in or out of the market.[158] Indeed, Congress reiterated its

152. *See supra* notes 87-89 and accompanying text.

153. *See* H.R. REP. No. 975, 93d Cong., 2d Sess. 39 (1974). According to the House Report, an exodus of speculative traders from the securities markets to the commodities markets was one of the "specific situations mandat[ing] a comprehensive rewrite of futures trading regulation." *Id. See also* 119 CONG REC. H41,332 (1973) (remarks by Rep. Poage). Representative Poage, Chairman of the House Agriculture Committee, noted that trading in commodities options on unregulated exchanges, as well as poor bookkeeping practices among registered merchants, had resulted in merchant bankruptcies and the loss of customers' money. In one instance cited, $71 million in customers' accounts were lost in the failure of an options trading firm. *Id.*

154. The major objection to the claim settlement procedures appeared to be grounded in customer perceptions of industry bias. As stated in the House Report:

> [B]ecause not all commodities are covered under the present Act, many attempts at self-regulation in those exchanges have been and continue to fail. Attempted investigations in regulated exchanges are often characterized by the unwillingness of the investigating committees composed of exchange members to inquire too closely into the possible excesses of their own brethren. In one or more unregulated exchanges it is continually charged that the owners of the exchange manipulate and evade the traditional rules for their own gain. Brokers, customers, and, eventually, the American economy suffers in this atmosphere of so-called "self-regulation" where tradition and self-interest has been allowed to displace the public interest.

H.R. REP. No. 975, 93d Cong., 2d Sess. 38 (1974).

155. Outlining the purposes of the Act, the House Report described the Act as "the first complete overhaul of the Commodity Exchange Act since its inception, and proposes a *comprehensive regulatory structure* to oversee the volatile and esoteric futures trading complex." *Id.* at 1 (emphasis added).

156. *See supra* notes 44-57 and accompanying text.

157. *See supra* notes 50-57 and accompanying text.

158. The Congress could at best be described as ambivalent about speculators. On the one hand, Congress recognized that speculators performed a useful function in the market by accepting part of the risk in futures contracting. *See, e.g.,* 119 CONG REC. H41,332 (1973) (statement by Rep. Poage); 120 CONG. REC. H10,736 (1974). Typical is the statement of Representative Mayne:

> While the speculator has been much maligned to the point where some critics of the present marketing system have tried to make "speculator" a dirty word, we must not forget that the speculator performs an important economic function in futures markets . . . . There are of course bad speculators as well as good but . . . we should not let the rotten apples in the barrel poison our impression of the entire lot. H.R. 13113 will provide those regulations which are reasonably necessary to guide the activities of specula-

long-standing criticism of the effect of speculators on commodity markets.[159] Moreover, Congress expressed concern that conflicting interpretations of the Commodity Exchange Act hampered the regulation of the increasingly important commodity markets.[160] Consistent with this concern, Congress sought to confine the enforcement of the CFTCA to the newly created Commodity Futures Trading Commission. By giving the Commission exclusive jurisdiction[161] over the regulation of commodity futures contracts, Congress sought to create a consistent body of law[162] and to promote stricter enforcement of the rules by exchanges.[163] Rather than rejecting the concept of industry self-regulation in favor of broad-based private enforcement of the Act, Congress designed the CFTCA to correct malfunctions in exchange self-regulation.[164]

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tors as well as other segments of the market and *no legitimate speculator or other market participant* should object to the provisions.

120 CONG. REC. H10,739 (1974) (emphasis added).

On the other hand, Congress clearly thought it necessary to regulate the activities of speculators, not regulate the market for the benefit of speculators. As the language emphasized above indicates, Congress did not view speculators as a class more *especial* than "other market participants." Indeed, Senator Talmadge explained several times that the purpose of the CFTCA was "to further the fundamental purpose of the Commodity Exchange Act in insuring fair practice and honest dealing on the commodity exchanges and providing a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." S. REP. No. 1131, 93d Cong., 2d Sess. 1 (1974); CONG. REC. S30,458 (1974).

159. *Id. See also supra* note 18.

160. Specifically, Congress observed that two trends had caused confusion in commodity regulation. First, Congress feared that states were beginning to regulate areas not covered by federal law. Second, Congress noted that conflicting court interpretations on the jurisdiction of commodity and security regulators and exchange antitrust liability had confused the regulation of commodities. H.R. REP. No. 975, 93d Cong., 2d Sess. 48 (1974).

161. *See supra* note 60 and accompanying text.

162. One of the considerations prompting the House to propose changes in the regulatory structure was "[c]onfusion in court decisions" on the jurisdiction of securities and commodities regulators and the regulatory activities of the exchanges. H.R. REP. No. 975, 93d Cong., 2d Sess. 48 (1974). Viewed four years later, the chairman of the CFTC, William Bagley, saw consistency of interpretation as the advantage of reparations proceedings. "One of the values of a reparations process of private claim adjudication by the CFTC is that over the years we will be able to develop for the public a body of law." *Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture,* 95th Cong., 2d Sess. 632 (1978).

163. *See supra* notes 124 & 155 and accompanying text.

164. This sentiment was implicit in the Act's new method of approving exchange rules. *See supra* note 47. More directly, the House Report concluded:

> The Committee bill does not propose that self-regulatory activities of the exchanges be abolished in favor of continued and direct federal regulation of all aspects of futures

The creation of reparations proceedings constituted the most important corrective measure for enforcement procedures. Congress was informed that because of weaknesses in the Commodity Exchange Act, private rights of action were being implied against trading professionals and exchanges.[165] The weaknesses in the old Act led Congress to

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trading . . . . Self-regulation is a commendable and noble concept and useful in such a complex atmosphere as that which surrounds futures trading. It cannot continue to function without a strong Federal regulatory umbrella over self-regulatory activities of the industry . . . . Yet, with proper Federal supervisory authority, needed self-regulatory efforts of the exchanges can live a useful life into the 21st century and, hopefully, beyond.

H.R. REP. No. 975, 93d Cong., 2d Sess. 48 (1974).

165. The remarks made by Representatives and Senators were usually stated in conclusory fashion. Typical was Chairman Poage's statement that "the courts began to look upon exchange self-regulation as a guarantee to the public that its members would not violate its code of conduct. Additionally, when the Commodity Exchange Act was enacted, courts implied a private remedy for individual litigants in the Commodity Exchange Act." 119 CONG. REC. H41,333 (1973). *See, e.g.,* H.R. REP. No. 975. 93d Cong., 2d Sess. 24-26, 45-48 (1974) (explaining the relation between court-imposed liability and exchange rulemaking); S. REP. No. 1131, 93d Cong., 2d Sess. 202, 205, 415, 524, 526, 737, 746 (1974) (alluding to the availability of a private right of action under the Commodity Exchange Act); *1973 House Hearings, supra* note 1, at 121, 123 (detailing exchange liability for nonenforcement of rules).

Interestingly, Senator Talmadge, the Chairman of the Senate Agriculture Committee, although recognizing that individuals had previously taken their claims to court, suggested that the proposed reparations procedure, impliedly a forum of first instance, would reduce the burden on the courts. He stated that:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of *final* determination by the courts are expressly preserved.

120 CONG. REC. S30,459 (1974) (emphasis added). The majority in *Leist*, examining the same language, concluded that Senator Talmadge must not have thought reparations an exclusive remedy because exclusivity would *certainly* reduce the burden on the courts. Leist v. Simplot, 638 F.2d 283, 313 (2d Cir. 1980). The reasoning is flawed for two reasons. First, because all adversely affected parties may appeal a reparations order, the burden could conceivably remain the same. Second, Senator Talmadge's reference to the preservation of appellate review was ignored by the *Leist* majority. The reference indicates that the Senator's tentative conclusion was based on the availability of appellate review, not the continued existence of a private right of action. At the very least, the "hope" expressed by Senator Talmadge suggests that he believed the availability of reparations proceedings would eliminate the need to continue to imply private rights of action.

Actually, Representative Poage indicated with greater clarity the role of the courts under the CFTCA. That role, alluded to by Senator Talmadge, was appellate, nor original. From the floor of the House, Chairman Poage indicated:

> The Commission will have original jurisdiction to consider all such complaints which have not been resolved through the informal settlement procedures required of the contract markets and registered futures associations under the bill . . . . Initially, complaints would be considered by an Administrative Law Judge and then reviewed by the Commission before a final order is entered.
>
> A special judicial review of Commission decisions will be established for these pro-

strengthen enforcement[166] by providing a private right of action in reparations proceedings.[167] Viewed in this context, creation of an express remedy by Congress after notice that rights had been implied under the 1936 Act suggests congressional dissatisfaction with implied rights. Indeed, members of Congress did criticize implied rights of action.[168] Moreover, it would be anomalous to conclude that Congress, after providing a method for traders to recover unlimited damages and secure a complete remedy, would then sanction an additional, redundant forum. Finally, Congress rejected several Senate bills which expressly allowed private suits for violations of the Act.[169]

Similarly, the civil penalty and exclusive jurisdiction provisions of the CFTCA are inconsistent with implying private rights. In reference to the former, Congress indicated that the civil penalties imposed for breaches of prescribed duties were intended to deter, not compensate.[170] Perhaps the strongest indication of this intention was the framing of the provisions in terms of duties, not rights.[171] Further, congressional reluctance to impair the function of exchanges by imposing heavy fines also indicates that Congress was concerned with the

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ceedings which will allow either party adversely affected to appeal to the U.S. District Court.

119 CONG. REC. H41,334 (1974). *See also* 120 CONG. REC. H10,737 (1974) (statement by Rep. Poage).

166. *See supra* note 44.

167. *See supra* notes 53-57 and accompanying text.

168. The complaint that the exchanges were not effectively policing the market was premised on the liability imposed by courts for nonenforcement of rules. *See supra* note 42. In this instance, private rights of action produced deleterious effects on the regulatory structure. *See also infra* note 172. Similarly, the enactment of reparations proceedings without statutory mention of private rights of action suggests by implication that reparations proceedings were viewed as a superior remedy. Indeed, the House Report contemplated reparations proceedings as "a separate remedy designed to supplement the informal 'settlement procedures' contemplated by the contract markets," not as a supplement to private rights of action. H.R. REP. NO. 975, 93d Cong., 2d Sess. 22 (1974).

169. Although it is true that two Senate bills would have authorized treble damages in private actions, the Senate made no attempt to strike the treble damage feature from either or incorporate the provision into the House version, despite the urging of several witnesses. *See, e.g., 1974 Senate Hearings, supra* note 9, at 737, 746 (statement of Professor Schotland).

170. Congress found that one of the difficulties in past enforcement procedure was that the severity of the sanctions did not deter violations because the Commodity Exchange Commission was reluctant to impose a sanction that often meant ruining a merchant's business. According to the House Report, the availability of money penalties "would enable Administrative Law Judges . . . to levy a sanction which better fits the violation." H.R. REP. NO. 975, 93d Cong., 2d Sess. 51 (1974). *See supra* note 43.

171. *See supra* notes 23-30 and accompanying text.

effects of implied rights against exchanges.[172]

The Commission's exclusive jurisdiction under section 2 of the CFTCA[173] is likewise inconsistent with an implied private right of action. Congress viewed exclusive jurisdiction as necessary to the development of a consistent body of law.[174] Moreover, Congress did not intend for the jurisdictional savings clause in the second proviso of section 2 to preserve jurisdiction for the courts which arose from previous judicial findings of a implied private right of action.[175] Congress added the proviso only at the insistence of House Judiciary Chairman Rodino after he expressed concern that the original section 2 might deprive the federal courts of jurisdiction to hear antitrust cases.[176] In addition, the

172. Congress pointedly criticized private rights of action against exchanges. One of the "additional considerations" which prompted the House to act was the "[g]rowing difficulties facing exchanges engaged in self-regulatory actions as a result of private plaintiffs seeking damages against self-regulatory activities of the markets. As examples, exchanges are sued for actions taken in emergency situations even when the action has been taken at the request (or order) of CEA." H.R. REP. No. 975, 93d Cong., 2d Sess. 48 (1974). Congress was also aware of the effect such claims had on exchanges. A representative of several New York commodity exchanges informed the House Committee that the Chicago Board of Trade, acting at the request of the CEA, imposed limits on soybean trading. As a result, the Board became the target of $200 million class action suit by persons claiming to have been injured by the imposition of those limits. *1973 House Hearings, supra* note 2, at 121. Viewed in this context, the penalties imposed by the CFTCA obviate any intent of Congress to allow unlimited civil damages to be claimed by private litigants. Besides limiting the maximum penalty to $100,000, the statute commands that the Commission "in the case of a contract market shall further consider whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties." 7 U.S.C. § 13a (1976 & Supp. V 1981). Moreover, the 1978 amendments to the CFTCA authorized a private right of action in the form of parens patriae suits, but specifically exempted contract markets. 7 U.S.C. § 13a-2 (1976 & Supp. V 1981).

173. *See supra* note 60 and accompanying text.

174. *See supra* note 145 and accompanying text.

175. When Congress commanded that the CFTCA would not "supercede or limit the jurisdiction conferred" on any court, it did not have the preservation of private rights of action in mind. 120 CONG. REC. H34,737 (1974). In the first place, jurisdiction was never conferred by the statute. More important, however, was the underlying intent of Congress. Congress was concerned that a regulatory lag would develop between the time of enactment and implementation of the CFTCA. The reparations procedure would not become effective until one year after the enactment of the CFTCA. 120 CONG. REC. S34,996 (1974) (statement of Senator Curtis). In the interim, Congress did not want to withdraw jurisdiction from pending cases. As detailed by Chairman Poage:

> [S]ection 412 was included in the bill to make clear that all pending proceedings, including ongoing investigations, as well as court proceedings, should continue unabated by any provision of the act. This also is necessary to prevent the creation of regulatory gaps, particularly during the time between the adoption of this legislation and the full implementation of its provisions by the CFTC.

120 CONG. REC. H34,737 (1974).

176. Chairman Rodino expressed concern that the exclusive jurisdiction provision might deprive state courts of their jurisdiction to enforce many of the contracts "under recognized commer-

preservation of federal and *state* court jurisdiction indicates that Congress intended to preserve court jurisdiction to hear common-law contract cases, not cases arising from violations of the Act.[177] Finally, the new enforcement procedures, in conjunction with the Commission's exclusive jurisdiction, suggest that judicial reliance on the incorporation or prior constructions of the CFTCA is inapposite.[178] Although Congress reenacted certain provisions in essentially the same form,[179] it substantially changed the enforcement procedures of the Act.[180] In sum, Congress, dissatisfied with past enforcement of commodity regulations, erected a new and complete structure for the enforcement of duties and the vindication of rights.

## IV. CONCLUSION

Several factors weigh heavily against the implication of private rights of action under the Commodity Futures Trading Commission Act. From the standpoint of statutory construction, the case for a private right of action is doubtful at best. The legislative history reveals, on the one hand, a congressional knowledge of implied rights of action under the Commodity Exchange Act, and on the other, criticism of such rights and a complete restructuring of the enforcement procedures.[181]

Private rights of action under the Act, rather than strengthening commodity regulatory enforcement, may have a deleterious effect. The private right of action could subject exchanges to unlimited and ruin-

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cial law and contract principles," as well as federal courts of their jurisdiction to hear antitrust claims and review administrative procedures. *1974 Senate Hearings, supra* note 9, at 260.

177. The statutory reference to contract claims, 7 U.S.C. § 6b (1976), distinguishes claims of contract fraud in the factum or inducement and contract breaches. Contract fraud, which is the predominant basis for the claim of a private right of action, was placed within the CFTC's enforcement purview. *See supra* note 23 and accompanying text. A breach of contract claim, which, by the nature of the contract, would mean that a party had refused to deliver or accept delivery of the commodity, is apparently left to the jurisdiction of the states. Nevertheless, it is highly unlikely that such a claim would arise without fraud, or, as in the *Leist* case, market manipulation. In the first place, a party promising delivery can "buy back" the contract for delivery and thereby cancel the obligation. Second, a long or short position unable to meet a margin call on a contract would have its position liquidated by the futures commission merchant handling the account.

178. The CFTCA was more than a reenactment. The House Report described the Act as an "overhaul" designed to create a "comprehensive regulatory structure." H.R. REP. No. 975, 93d Cong., 2d Sess. 1 (1974). *See supra* note 155.

179. *Id. See also supra* notes 45-55.

180. *Id.*

181. *See supra* notes 168 & 178 and accompanying text.

ous liability,[182] impairing the stability of the commodity market and the exchanges themselves. Further, the continued existence of private rights of action makes the civil enforcement procedures of the Act redundant. Potential plaintiffs will have no reason to seek an administrative remedy subject to judicial appeal when the courts may be entered in the first instance. The costs of private enforcement in both time and money may considerably exceed the costs of public enforcement. In addition, a divergence of competence and multiplicity of opinion will lead to the lack of uniform interpretation of commodity regulations that Congress tried to avoid.[183] Moreover, the CFTC enforcement staff will become increasingly confined to criminal sanction enforcement. Whether this will lead to a net improvement in regulatory enforcement is not clear. Now operating under a two year extention of existence,[184] the CFTC will continue to be a subject of congressional and industry scrutiny as continued growth and trading innovations dictate.

*H. Mark Vieth*

182. The Chicago Board of Trade and the Commodity Exchange of New York (Comex) are presently defending a class action suit for more than a billion dollars arising from the Hunt brothers' alleged manipulation of the silver futures market during 1980. *See* Amicus Curiae Brief for Nine United States Commodity Exchanges in Support of Petition for Writ of Certiorari, New York Mercantile Exch. v. Leist, No. 80-757 (1980), 456 U.S. 353 (1982) (referring to the action in Strax v. Commodity Exch., Civ. No. 79-5366 (S.D.N.Y. 1981)).

183. *See supra* notes 159-66 and accompanying text.

184. *See* Futures Trading Act of 1982, Pub. L. No. 97-444, § 228 (1983).

The question of whether a private right of action continues to exist was resolved during the reauthorization. In an ironic twist, Congress apparently responded to the *Curran* decision by codifying the private right of action recognized by the Supreme Court. *See id.* at § 235 (to be codified at 7 U.S.C. § 25).