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Fraud in Commodity Futures Trading--An Examination of the Investor's Remedies

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NOTE

Fraud in Commodity Futures Trading—An Examination of the Investor's Remedies

I. INTRODUCTION

Trading by individual investors in commodity futures contracts[1] performs an essential price stabilization function in the distribution of agricultural and nonagricultural products[2] to consumers. By hedging,[3] producers, dealers, and processors of commodities are able to protect themselves from unwanted price fluctuations in the cash market for the commodity and thereby pass on lower prices to the consumer.[4] The investor in commodity futures is necessary to absorb the risks the hedgers wish to shift.[5] As the need

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1. "A commodity future is a standardized contract for purchase and sale of a fixed (usually large) quantity of a commodity of designated grade, for delivery in a specified future month, at a price agreed on when the contract is made." Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. CORP. L. 217, 242 (1976). *See generally* COMMODITY FUTURES TRADING COMMISSION, GLOSSARY OF SOME TERMS USED IN THE FUTURES TRADING INDUSTRY 13 (1979) [hereinafter cited as CFTC GLOSSARY].

Futures contracts should be distinguished from cash or forward contracts, which "are used for merchandising purposes, and may provide for either immediate or deferred delivery." Valdez, *Modernizing the Regulation of the Commodity Futures Markets*, 13 HARV. J. LEGIS. 35, 39 (1975). In contrast, "futures trading does not consist of sales of a commodity for later delivery. It consists, rather, of *formation of contracts for later sale* of a commodity." Clark, *Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 EMORY L.J. 1175, 1175 (1978) (emphasis added). A futures contract is not bought, sold, or traded in the traditional sense but, instead, is redeemed or discharged "by offsetting with an equal and opposite futures contract." *Id.* at 1176. Thus, actual performance of a futures contract—delivery of the specified amount of the commodity—rarely occurs. *Id.* at 1177. *See* note 10 *infra.*

2. Examples of nonagricultural commodities include precious metals and financial instruments. For a list of those commodities currently regulated under the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979), see note 43 *infra.*

3. "Hedging" has been defined as "taking a position in a futures market opposite to a position held in the cash market to minimize the risk of financial loss from an adverse price change." CFTC GLOSSARY, *supra* note 1, at 14. Basically, "anyone wanting protection against a price decline can achieve it by selling a futures contract, and anyone wanting protection against a price increase can achieve it hy buying a futures contract." Wilmouth, *Introducing the Markets*, 35 BUS. LAW. 699, 701 (1980).

4. Valdez, *supra* note 1, at 40.

5. *Id.*; Leist v. Simplot, 638 F.2d 283, 288 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

for protection against wide fluctuations in commodity prices increases,[6] it is essential that more investors engage in futures trading. In fact, it has been estimated that in order for the market to be viable, fifty to seventy-five percent of the volume of futures trading must come from investors willing to assume risk positions in the hopes of making a profit.[7] At the same time, however, a substantial risk of loss to the investor is inherent in futures trading because of low margin requirements and unexpected, volatile price fluctuations.[8]

In recent years, the volume of futures trading has increased at an unprecedented pace. During 1979 alone, 74.3 million futures contracts were traded, approximately forty-five percent more than in 1978.[9] The dollar figures are even more staggering. A spokesman for the Chicago Board of Trade, which alone accounts for about one-half of the total trading volume, estimated that futures transactions on its floor in 1980 would amount to more than one trillion dollars, an increase from thirty-seven billion dollars ten years ago.[10] Furthermore, the dramatic increase in trading volume also indicates a greater public participation in the futures markets.

Unfortunately, as more private individuals speculate in commodity futures, the potential for unethical and fraudulent business practices also enlarges considerably.[11] Although typically more so-

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6. A dramatic increase in the volatility of cash prices has occurred during the past ten years. For example, "grain prices that once fluctuated in an annual range of dimes per bushel now fluctuate in dollars per bushel. And even that is fairly tame compared with what has been happening recently to silver and gold prices, and also, for that matter, to interest rates." Wilmouth, *supra* note 3, at 701.

7. Jolmston, *Understanding the Dynamics of Commodity Trading: A Success Story*, 35 BUS. LAW. 705, 708-09 (1980).

8. Saitlin, *Exclusive CFTC Jurisdiction of Commodity Trading Vehicles May Depend Upon Form Over Substance*, 33 BUS. LAW. 241, 242 (1977).

> As a result of low margin requirements of typically 10 per cent or less of the contract value necessary to initially secure positions in the commodity markets, commodity trading traditionally features broad market fluctuation resulting in *dramatic profits and losses*. It is possible for a $10,000 speculator to double or even triple his investment in a short time frame or to suffer losses of two or three times his initial margin.

Id. (empbasis added).

9. COMMODITY FUTURES TRADING COMMISSION ANNUAL REPORT 70 (1980) [hereinafter cited as 1979 ANN. REP.]. Ten years earlier, in 1969, only 10.3 million futures contracts were traded. *Id.*

10. Wilmouth, *supra* note 3, at 702. It should be noted, however, tbat "dollar value" represents the value of futures transactions made, not the value of deliveries actually made on all futures contracts traded. *See* note 1 *supra*. "[F]ewer than 3% of all futures contracts culminate witb the delivery of the actual goods against the contract." 1 COMM. FUT. L. REP. (CCH) ¶ 301.

11. Statement by the President on Signing the [Commodity Futures Trading] Act [of

phisticated than investors in securities, the individual investor in commodity futures often lacks knowledge of and experience in the intricacies of commodity futures trading.[12] Therefore, he enters into an investment vehicle such as an discretionary account,[13] which places control over all trades in the hands of the broker. In this arrangement, an unscrupulous broker could easily deceive an unwary investor by engaging in fraudulent activities such as misrepresenting the status of the account or churning.[14] While the individual investor suffers financial loss, consumers often bear the ultimate burden of increased commodity prices that result from fraudulent and manipulative futures transactions.[15]

This Note examines the various avenues of redress available to the defrauded commodity futures investor. Initially, an examination of two remedies expressly provided in the Commodity Exchange Act (CEA)[16]—reparations and arbitration—demonstrates their current inefficiencies and inadequacies.[17] Next, the Note considers the possibility of recovery under the antifraud provision of the Securities Exchange Act[18] and argues that such a cause of action should still be available when the investor can show that the particular discretionary trading account is a security.[19] Finally, a discussion of an implied private right of action for violations of the antifraud provision of the CEA[20] reveals much confusion and dispute about its existence and concludes that it should not be permitted at the present time.[21] Ultimately, this Note suggests that

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1974] Into Law, While Expressing Reservations About Certain of Its Provisions, 10 WEEKLY COMP. OF PRES. DOC. 1366, 1367 (Oct. 24, 1974) [hereinafter cited as Statement].

12. Note, *Discretionary Accounts as "Securities": Applying the* Howey *Investment Contract Test to a New Investment Medium*, 67 GEO. L.J. 269, 269 (1978). For a discussion of a typical transaction in commodity futures trading, see Leist v. Simplot, 638 F.2d 283, 287 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

13. A discretionary account is "[a]n arrangement by which the holder of the account gives written power of atterney to someone else, often his broker, to buy and sell without prior approval of tbe bolder." CFTC GLOSSARY, *supra* note 1, at 10. This type of investment vehicle is "often referred to as the 'managed account' or Controlled Account." *Id.*

14. "Churning" of an account occurs when a broker or other account representative engages in excessive trades for the sole purpose of increasing his commissions.

15. Statement, *supra* note 11, at 1367.

16. 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979).

17. *See* part II *infra.*

18. Securities Exchange Act of 1934, § 10b, 15 U.S. § 78j(b) (1976).

19. *See* part III *infra.*

20. Commodity Excbange Act § 4b, 7 U.S.C. § 6b (1976). For the text of this provision, see note 35 *infra.*

21. *See* part IV *infra.*

the uncertainty surrounding these possible methods of recovery demands that Congress give further consideration to these issues.[22]

II. Express Remedies Under the CEA

A. Development of Commodity Futures Regulation

Since the first federal legislation regulating commodity futures trading, the Future Trading Act,[23] Congress has attempted periodically to strengthen supervision and control over the burgeoning commodity futures markets. Designed primarily to protect grain farmers from price manipulation,[24] the Future Trading Act[25] established a system of centralized trading on designated, self-regulating contract markets,[26] which has characterized all subsequent commodity futures legislation.[27] Because the Future Trading Act imposed a tax on grain futures not traded on designated exchanges to force compliance with its regulations, the Suppeme Court ruled that the legislation was an unconstitutional exercise of the federal taxing power.[28] In response, Congress promulgated the Grain Futures Act,[29] which prohibited a person from dealing in futures on a board of trade not federally licensed.[30]

Inadequacies in the Grain Futures Act and the experience of

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22. *See* part V *infra*. State causes of action for fraud, negligence, breach of contract, and breach of fiduciary duty may be available to the injured futures investor. A discussion of these potential claims, however, is beyond the scope of this Note.

23. Ch. 86, 42 Stat. 187 (1921) (superseded 1922). For an overview of commodity futures regulation, see Johnson, *The Changing Face of Commodity Regulation*, 20 Prac. Law., Dec. 1974, at 27, 35-42.

24. Bromberg, *supra* note 1, at 288.

25. Ch. 86, 42 Stat. 187 (1921) (superseded 1922).

26. The Act authorized the Secretary of Agriculture to classify a "board of trade" as a "contract market" if it provided for prevention of manipulation of prices. Future Trading Act, ch. 86, § 5(d), 42 Stat. 188 (1921) (superseded 1922). Although subject to Department of Agriculture supervision, responsibility for enforcing antimanipulative measures was, as a practical matter, vested in the exchanges themselves. Rivers v. Rosenthal & Co., 634 F.2d 774, 778-79 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542). A "board of trade" is currently defined as "any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling commodity or receiving the same for sale on consignment." 7 U.S.C. § 2 (Supp. III 1979). To qualify for designation as a "contract market," a board of trade must now meet the requirements enumerated in 7 U.S.C. § 7 (1976).

27. Leist v. Simplot, 638 F.2d 283, 293 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

28. Hill v. Wallace, 259 U.S. 44 (1922).

29. Ch. 369, 42 Stat. 998 (1922).

30. The Grain Futures Act survived constitutional scrutiny in Board of Trade v. Olsen, 262 U.S. 1 (1923). *See also* Rivers v. Rosenthal & Co., 634 F.2d 774, 778 n. 8 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542).

the Great Depression prompted Congress to enact the Commodity Exchange Act of 1936.[31] Designed to bolster regulation of commodity futures trading, the CEA expanded the scope of the commodities subject to regulation beyond grain futures to include cotton, butter, and eggs.[32] In addition, Congress empowered the Commodity Exchange Commission[33] to establish quantitative limits on speculative trading in futures.[34] The CEA also added an antifraud provision[35] and established registration requirements for both futures commission merchants[36] and floor brokers,[37] the individuals

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31. Ch. 545, 49 Stat. 1491 (current version at 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979)).

32. Johnson, *supra* note 23, at 35.

33. The Secretary of Agriculture, the Secretary of Commerce, and the Attorney General composed the Commodity Exchange Commission. Ch. 545, § 3(h), 49 Stat. 1492 (1936).

34. *Id.* The limitation provision is currently contained in § 4a of the CEA. 7 U.S.C. § 6a (1976).

35. The antifraud provision adopted in 1936 has been retained in essentially the same form and currently reads as follows:

> It shall be unlawful (1) for any member of a contract market . . . or (2) for any person, in or in connection with any order to make, or the making of, 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 other person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
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> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
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> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
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> (D) to bucket 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.
>
> Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Commodity Exchange Act § 4b, 7 U.S.C. § 6b (1976).

36. 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 . . . any contract market." Commodity Exchange Act § 2(a)(1), 7 U.S.C. § 2 (Supp. III 1979). Their registration requirements are contained in §§ 4d, 4f, 4k and 8a of the CEA, 7 U.S.C. §§ 6d, 6f, 6k, 12a (1976 & Supp. III 1979).

who actually execute the trades.

In defining the objective of the CEA, Congress stated, "The fundamental purpose of the measure is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves."[38] Thus, the CEA not only addressed the shortcomings of the Grain Futures Act; it also demonstrated a shift in congressional attitude from viewing commodity exchanges as primarily agricultural entities to a recognition of their importance as investment institutions.[39] Therefore, by 1936 Congress had acknowledged both the importance of the individual investor in futures trading and his need for protection.

In contrast to the quite limited amendments to the CEA adopted in 1968,[40] the Commodity Futures Trading Commission Act of 1974[41] (1974 Amendments) thoroughly revised the Act. The revolutionary nature of the 1974 Amendments is further indication

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37. A floor broker is defined as "any person who, in or surrounding any 'pit,' 'ring,' 'post,' or other place provided by a contract market . . . shall purchase or sell for any other person any commodity for future delivery on . . . any contract market." Commodity Exchange Act § 2(a)(1), 7 U.S.C. § 2 (Supp. III 1979). Their registration requirements are contained in §§ 4e, 4f, and 8a of the CEA, 7 U.S.C. §§ 5f, 6e, 12a (1976 & Supp. III 1979).

A futures commission merchant transmits orders, on behalf of its customer, to one of its floor brokers at the exchange. The floor broker carries out the order and then relays it to the futures commission merchant.

38. H.R. REP. No. 421, 74th Cong., 1st Sess. 1 (1935), *cited in* Leist v. Simplot, 638 F.2d 283, 304-05 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

This purpose provision currently reads as follows:

> Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade known as "futures" are affected with a national public interest . . . ; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity . . . and render regulation imperative for the protection of such commerce and the national public interest therein.

Commodity Exchange Act § 3, 7 U.S.C. § 5 (1976).

39. Johnson, *supra* note 23, at 35.

40. Pub. L. No. 90-258, 82 Stat. 26 and Pub. L. 90-418, 82 Stat. 413 (1968) (codified in scattered sections of 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979)). The 1968 Amendments added two new commodities to the scope of the Commodity Exchange Act: live cattle and pork bellies. In addition, the antifraud provision was extended to a broader class of persons. Johnson, *supra* note 23, at 36.

41. Pub. L. No. 93-463, 88 Stat. 1389 (codified in scattered sections of 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979)).

of congressional recognition that the futures industry is growing both in volume and complexity and that the industry's self-regulation neither adequately curbed market abuses nor protected investors.[42] First, Congress greatly expanded the coverage of the Act to encompass all types of futures contracts, including precious metals and financial instruments.[43] Second, the 1974 Amendments established the Commodity Futures Trading Commission (CFTC), an independent regulatory agency modeled after the Securities and Exchange Commission (SEC),[44] as the keystone of the new federal regulatory structure,[45] and thereby divested supervisory control from the Department of Agriculture.[46] Third, the mandate of the CFTC included exclusive jurisdiction over regulation of futures trading[47] and responsibility for enforcement of the CEA, including

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42. Rivers v. Rosenthal & Co., 634 F.2d 774, 779-80 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542).

43. The all-inclusive definition of "commodity" reads as follows:

> The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cotton seed oil, peanut oil, soybean oil and all other fats and oil), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, live-stock products, and frozen concentrated orange juice, and all other goods and articles, except onions . . . *and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.*

Commodity Exchange Act § 2(a)(1), 7 U.S.C. § 2 (Supp. III 1979) (emphasis added).

44. *See* S. REP. No. 1131, 93d Cong., 2d Sess. 18-19 (1974).

45. Rivers v. Rosenthal & Co., 634 F.2d 774, 780 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542).

46. The CFTC is composed of five individuals knowledgeable in futures trading and appointed by the President. Commodity Exchange Act § 2(a)(2), 7 U.S.C. § 4a(a) (Supp. III 1979). The powers and duties of the CFTC are set forth in § 2(a)(2)-(11) of the CEA, 7 U.S.C. § 4a (1976 & Supp. III 1979). For a discussion of the legislative history of the CFTC, see Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 VAND. L. REV. 1, 5-31 (1976).

47. Section 2(a)(1) of the CEA, 7 U.S.C. § 2 (Supp. III 1979) provides, in part, that "the [CFTC] shall have *exclusive jurisdiction* with respect to accounts, agreements . . . *and transactions involving contracts of sale of a commodity for future delivery.*" (emphasis added). It is generally agreed that the CFTC's authority to *regulate* commodity futures trading has preempted other governmental agencies, including the SEC, with a potential interest in regulating the field.

In addition, the legislative history of the 1974 Amendments reveals that the jurisdiction provision was "an attempt to avoid unnecessary overlapping and duplicative regulation" between the CFTC and the SEC. 120 CONG. REC. 34736 (1974). *See* Johnson, *supra* note 46, at 7-31. *See also* Greenstone, *The CFTC and Government Reorganization: Preserving Regulatory Independence*, 33 BUS. LAW. 163 (1977). Congress preserved the regulatory jurisdiction of the SEC and other governmental agencies to the extent that it did not interfere with the exclusive province of the CFTC: "*[E]xcept as hereinabove provided*, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the [SEC] or other regulatory authorities . . . or (ii) restrict the [SEC] and such other authorities from carrying out their duties and responsibilities . . . ." Commodity Exchange Act §

the power to bring actions to enjoin violations of the CEA,[48] to issue cease and desist orders, and to compel exchanges to adopt additional rules.[49] The insertion of a savings clause, however, preserved federal and state court jurisdiction.[50] Last, Congress created an administrative dispute settlement procedure—reparations[51]—and required individual contract markets to establish arbitration procedures to handle investors' grievances.[52]

The comprehensive changes of the 1974 Amendments were affirmed and somewhat refined when Congress examined the CFTC under "sunset review"[53] in 1978 and reauthorized the agency for another four years.[54] The Futures Trading Act of 1978 (1978 Amendments)[55] added a *parens patriae* provision to the CEA that enabled states to bring suit in federal court on behalf of their citizens to enforce compliance with the CEA.[56] Among other revisions,

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2(a)(1), 7 U.S.C. § 2 (Supp. III 1979). Although Congress intended to clarify the prohlem of overlapping jurisdiction between the SEC and the CFTC with the exclusive jurisdiction provision, its precise meaning is nevertheless uncertain. *See* Greenstone, *supra*, at 201-12; Guttman, *The Futures Trading Act of 1978: The Reaffirmation of CFTC-SEC Coordinated Jurisdiction over Security/Commodities*, 28 AM. U.L. REV. 1, 4 (1978).

For a discussion of the effect of the exclusive jurisdiction clause on recovery under the Securities Exchange Act, see notes 141-158 *infra* and accompanying text.

48. Commodity Exchange Act § 6(c), 7 U.S.C. § 13a-1 (1976).

49. Commodity Exchange Act § 6(a), 7 U.S.C. § 8 (Supp. III 1979).

50. "Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." Commodity Exchange Act § 2(a)(1), 7 U.S.C. § 2 (Supp. III 1979).

51. Commodity Exchange Act § 14, 7 U.S.C. § 18 (1976 & Supp. III 1979). *See* notes 60-73 *infra* and accompanying text.

52. Commodity Exchange Act § 5a(11), 7 U.S.C. § 7a(11) (Supp. III 1979). *See* notes 87-91 *infra*.

53. "Sunset" is the name given to the statutory method of forcing a legislature to make a periodic examination of a program or agency and a determination of whether it should continue. Young, *A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission*, 27 EMORY L.J. 853, 854 (1978). In establishing the CFTC in 1974, Congress provided only temporary authorization for the agency's activities, requiring an extensive evaluation of the CFTC after four years. *Id.* at 853.

54. "This legislation extends appropriation authority for the Commodity Exchange Act to strengthen regulation of the Nation's highly volatile futures trading industry and to improve the administration of the Commission." Statement on Signing S.2391 Into Law, 14 WEEKLY COMP. OF PRES. DOC. 1696 (Oct. 2, 1978).

55. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (codified in scattered sections of 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979)).

56. The *parens patriae* doctrine, permitting sovereigns to take action to protect those citizens who are unable to take care of themselves, originated in the English feudal system. The present-day *parens patriae* remedy allows a state to bring civil actions on behalf of its citizens to enforce certain laws and to recover damages. Lower, *State Enforcement of the Commodity Exchange Act*, 27 EMORY L.J. 1057, 1061-63 (1978). Under § 6d of the CEA, a state attorney general or other designated state official is empowered to institute suits seeking monetary or injunctive relief in a federal district court on behalf of the state's residents

the 1978 Amendments increased criminal penalties for violations of certain provisions of the CEA from $100,000 to $500,000.[57] In 1982, the CFTC is again scheduled for critical reexamination and reevaluation under sunset review. If the trend of periodic amendments to the CEA continues, Congress will undoubtedly consider additional measures or modifications of existing provisions that will provide more protection for the commodity futures investor. This Note next examines the remedies currently available to the investor under the CEA.

B. Express Remedies

Although the antifraud provision of the CEA does not provide an express private right of action for recovery by a defrauded commodity futures investor, he may seek damages within the procedural framework of the CFTC[58] for any violation of the Act committed by his broker.[59] The CEA expressly provides for two remedies: Reparations and arbitration.

1. Reparations

The 1974 Amendments created a "formal complaint procedure before the [CFTC] for the adjudication of grievances which result from violations of the Act."[60] Section 14 of the CEA[61] sets forth the guidelines for reparations—the administrative procedure through which a defrauded or otherwise injured commodity futures investor may seek recovery. The investor must file a complaint with the CFTC alleging a violation of the CEA, or a rule, regulation, or order issued thereunder, by a futures commission merchant, floor broker, commodity trading advisor,[62] or commodity

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against any person other than a contract market, clearing house, or floor broker for alleged violations of the statute or of the CFTC's rules and regulations. 7 U.S.C. § 13a-2 (Supp. III 1979).

57. Commodity Exchange Act § 6b, 7 U.S.C. § 13 (Supp. III 1979).

58. *See* notes 60-73, 87-91 *infra* and accompanying text.

59. Liability for violations of the CEA is not confined to a "broker." For example, the liability of a principal for acts of his agent in violation of the CEA is set forth in Commodity Exchange Act § 2(a)(1), 7 U.S.C. § 4 (1976).

60. H.R. REP. No. 975, 93d Cong., 2d Sess. 22 (1974).

61. 7 U.S.C. § 18(a) (Supp. III 1979).

62. As defined under Section 2(a)(1) of the CEA a "commodity trading advisor" is any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery . . . or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities.

pool operator[63] who is registered or required to be registered under the CEA.[64] If the CFTC determines that the facts warrant action, it forwards a copy of the petition to the alleged violator who must answer within a reasonable time.[65] The CFTC then conducts an investigation and may afford the alleged violator the opportunity for a hearing before an Administrative Law Judge.[66] Hearings, however, are not required when the claims amount to less than five thousand dollars.[67] The findings of the Administrative Law Judge are subject to review by the CFTC upon its own motion or upon application of the dissatisfied party.[68]

Once the procedures of the CFTC are exhausted and the determination of liability is made,[69] the commission then determines the amount of damages suffered and orders the offender to pay the sum to the complainant.[70] The complainant may apply to a federal district court for enforcement if his award is not paid within the specified time,[71] and failure to pay a reparations order may result in an automatic suspension of the violator's license.[72] A reparations order issued by the CFTC is reviewable in federal appellate court

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7 U.S.C. § 2 (Supp. III 1979).

63. As defined under § 2(a)(1) of the CEA, a "commodity pool operator" is,

> Any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery.

7 U.S.C. § 2 (Supp. III 1979).

64. Commodity Exchange Act § 14(a), 7 U.S.C. § 18(a) (Supp. III 1979). The 1974 Amendments were unclear whether reparations proceedings could be initiated against those who were required to register but did not do so. The 1978 Amendments clarified this issue by including in the class of potential defendants in a reparations proceeding "any person who is either *registered or required to be registered*" under the Commodity Exchange Act. Schneider & Santo, *Commodity Futures Trading Commission: A Review of the 1978 Legislation,* 34 BUS. LAW. 1755, 1758 (1979) (emphasis added).

65. Commodity Exchange Act § 14(a), 7 U.S.C. § 18(a) (Supp. III 1979); 17 C.F.R. §§ 12.21-.24 (1980).

66. Commodity Exchange Act § 14(b), 7 U.S.C. § 18(b) (Supp. III 1979); 17 C.F.R. §§ 12.25, 12.51, 12.71-.90 (1980).

67. *Id.*

68. Review by the CFTC, in any circumstance, is available ouly at the discretion of the Commission. Commodity Exchange Act § 14(b), 7 U.S.C. § 18(b) (Supp. III 1979); 17 C.F.R. § 12.101 (1980). *See* Graham, *Special "Reparations" Actions,* 35 Bus. LAW. 773, 774 (1980). For a thorough discussion of the reparations procedure, see Rosen, *Reparations Proceedings under the Commodity Exchange Act,* 27 EMORY L.J. 1005 (1978).

69. Commodity Exchange Act § 14(c), 7 U.S.C. § 18(c) (Supp. III 1979).

70. Commodity Exchange Act § 14(e), 7 U.S.C. § 18(e) (1976).

71. Commodity Exchange Act § 14(f), 7 U.S.C. § 18(f) (1976).

72. Commodity Exchange Act § 14(h), 7 U.S.C. § 18(h) (1976).

upon petition of the dissatisfied party.[73]

The reparations procedure of the CEA as enforced by the CFTC is not unlike administrative proceedings before other government agencies.[74] Because the agency must perform conflicting roles, the reparations remedy may not meet due process standards.

> An inherent and pervasive "undue process" exists at the CFTC and all comparable agencies when the Commission itself is rule maker, policeman, grand jury, prosecutor, judge and jury with *de novo* powers in the same case at virtually the same time. The agency has "heard" your case at least three and perhaps more times before you have a hearing. The minds of men are simply not supple enough to judge a defendant's culpability fairly when vindication of the Commission's own prosecution and reputation are also at stake in an adversarial proceeding.[75]

Other procedural limitations of the reparations proceeding also distinguish it from a proceeding in a traditional civil cause of action. Only those claims arising under the CEA can be adjudicated by the CFTC; therefore state statutory or common-law causes of action such as fraud, negligence, or breach of contract are outside the commission's jurisdiction. Limited discovery and relaxed evidentiary requirements characterize the hearings,[76] and the general standards of care developed by the Administrative Law Judges are rarely reviewed by either the CFTC or appellate courts.[77] Furthermore, judicial review of a CFTC determination in a specific reparations proceeding is limited. An aggrieved party may not apply to a federal district court for a trial de novo. He may appeal, however, to a United States Circuit Court of Appeals,[78] but the findings of fact made in the agency proceeding are

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73. Commodity Exchange Act § 14(g), 7 U.S.C. § 18(g) (1976).

74. Graham, *supra* note 68, at 774.

75. Bagley, *Introduction: A New Body of Law in an Era of Industry Growth*, 27 EMORY L.J. 849, 851 (1978). *See also* Valdez, *supra* note 1, at 61.

76. The permitted methods of discovery include the production of documents and tangible things, depositions upon written interrogatories, and admissions 17 C.F.R. §§ 12.62-.65 (1980). Evidence standards are contained in 17 C.F.R. § 12.80 (1980).

> [T]he problem with the reparations is, it is very sloppy, to put it bluntly. In federal court your have a very tight evidentiary practice and hearings . . . . In reparations, the only objections that are generally sustained are the breaks for lunch. Most of the time the [Administrative Law Judges] will permit anything and everything to come in before them.

Nastro, *Remedies & Redress in Commodity Disputes: Recourse in the Courts*, 35 BUS. LAW. 765, 768 (1980).

77. "We [commodity lawyers] know what they [Administrative Law Judges] are saying, but we do not know whether the [CFTC] will uphold them; nor do we know whether the appellate courts will uphold them. . . . [T]here has not yet been a substantive appellate court decision." Nastro, *supra* note 76, at 769-70.

78. Commodity Exchange Act § 14(g), 7 U.S.C. § 18(g) (1976). In some similar repara-

conclusive if substantiated by the evidence.[79] Two additional requirements may discourage a person from seeking an appeal to a circuit court: The appellant must post a bond equal to twice the amount of the reparations award and, should he not prevail, he must pay reasonable attorney's fees to the appellee.[80]

In addition to the potential violations of due process, difficulties in administration have also plagued the reparations remedy. Experience during the past six years has demonstrated the inability of the CFTC to provide investors with an efficient and inexpensive method to adjudicate their claims through the reparations proceeding.[81] First, the inherent complexity[82] and length of the reparations procedure has created an overwhelming backlog of cases before the CFTC.[83] For example, in 1979 the Hearings Section of the CFTC closed only 174 of the 535 reparations complaints forwarded to it. By the end of 1979, 740 reparations cases were pending although the procedure has been available only since 1979.[84] Second, an inexperienced staff at the CFTC and inadequate planning since the inception of the reparations program have been major factors in the failures of the reparations remedy.[85] Last, only four Administrative Law Judges are available to preside over the reparations hearings, and the Chief Administrative Law Judge has

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tions proceedings before other agencies, however, there is a right to de novo review in federal district court. Graham, *supra* note 68, at 774.

79. Graham, *supra* note 68, at 774-75.

80. Commodity Exchange Act § 14(g), 7 U.S.C. § 18(g) (1976).

81. Rosen, *supra* note 68, at 1055.

82. Approximately one-half of the reparations cases involve complex commodity options transactions, further contributing to delay. Graham, *supra* note 68, at 775. Commodity "options" are "call options to buy a designated commodity futures contract at a given price within a specified period, put options to sell, and double (or straddle options to do either)." Bromberg, *supra* note 1, at 257.

83. Rosen, *supra* note 68, at 1055.

84. 1979 ANN. REP., *supra* note 9, at 29. The following chart demonstrates the development of the case backlog before the Hearing Section of the CFTC.

	Docketed	Closed	Pending
1976	25	0	25
1977	319	70	274
1978	303	198	379
1979	535	174	740

Id.

85. *See Reauthorization of the Commodity Futures Trading Commission: Hearing Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry* (pt. 1), 95th Cong., 2d Sess. 16, 29, 38-39 (1978). *See also* Wall St. J., Mar. 4, 1981, at 8, col. 2. "Since its creation in 1974, the [CFTC] has been ridiculed and opposed by the freewheeling futures industry as understaffed, inexperienced and occasionally bumbling." *Id.*

estimated that each judge can handle only twenty-five to fifty reparations cases per year.[86]

2. Arbitration

The 1974 Amendments require all contract markets to provide an informal and impartial procedure "through arbitration or otherwise"[87] to resolve investor claims against any of its members[88] or employees. The arbitration procedure is voluntary and results in compulsory payment only upon agreement of the parties.[89] To ensure objectivity, the customer may choose an arbitration panel composed of a majority who are not associated with the contract market.[90] A registered futures association must also provide a similar noncompulsory dispute settlement device.[91]

Although theoretically the arbitration procedure should provide for an unbiased, rapid resolution of investor grievances by knowledgeable arbitrators, several limitations are inherent in the process. First, a predispute arbitration agreement is invalid unless it complies with several specific requirements established by the CFTC.[92] Second, arbitration is not available for claims in excess of fifteen thousand dollars.[93] Third, a variety of other arbitration forums are available[94] in addition to panels on the commodity ex-

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86. SUBCOMM. ON AGRICULTURE, RURAL DEVELOPMENT AND RELATED AGENCIES, 95TH CONG., 2D SESS., INVESTIGATIVE STUDY OF THE COMMODITY FUTURES TRADING COMMISSION 112 (Comm. Print 1978). *See generally* Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 AD. L. REV. 109, 130 (1981).

87. Commodity Exchange Act § 5a(11), 7 U.S.C. § 7a(11) (Supp. III 1979); 17 C.F.R. §§ 180.2, 180.3 (1980). The alternatives to arbitration include "delegation to a registered futures association having rules providing for such procedures." 7 U.S.C. § 7a(11) (Supp. III 1979). The "otherwise" language allows the contract market to fashion alternative methods of relief.

88. A member of a contract market "include[s] individuals, associations, partnerships, corporations, and trusts owning or holding membership in, or admitted to membership representation on, a contract market or given members' trading privileges thereon." Commodity Exchange Act § 2(a)(1), 7 U.S.C. § 2 (Supp. III 1979).

89. Commodity Exchange Act § 5(a)(11), 7 U.S.C. § 7a(11) (Supp. III 1979).

90. 17 C.F.R. § 180.2(a) (1980).

91. Commodity Exchange Act § 17(b)(10), 7 U.S.C. § 21(b)(10) (Supp. III 1979).

92. 17 C.F.R. § 180.3 (1980). For example, the notice requirements for a predispute arbitration agreement include, *inter alia*, (1) it cannot be a condition precedent to engaging the broker's services; (2) it must be contained in a separate document executed by the customer, or in a separately endorsed clause within the customer/broker contract; (3) it must include warnings in bold print that caution the investor that by signing the agreement he may be waiving his right to sue in a court of law; and (4) the warning statement must state that resort to the reparations procedure is not waived by signing the agreement. *Id.*

93. Commodity Exchange Act § 5(a)(11), 7 U.S.C. § 21(b)(10) (Supp. III 1979).

94. *See* Nastro, *supra* note 76, at 767-68. "Everyone thinks that you walk into an arbi-

changes. Fourth, some members of the commodity exchange panels, although impartial, may be inexperienced in the intricacies of commodity futures trading.[95] Fifth, virtually no opportunity exists for prearbitration discovery of the opponent's case.[96] Sixth, arbitration panels follow a loose standard of evidence.[97] Seventh, the panels have few binding legal precedents to look to for guidance.[98] Eighth, there is no appeal from the arbitrator's decisions to any other entity within the contract market.[99] Last, although the CFTC encourages arbitration, the agency allows the investor to first pursue the reparations procedure.[100] Because of all of these limitations, arbitration is seldom invoked.

C. *Analysis*

Neither of the two remedial procedures contained in the CEA—reparations and arbitration—provide an adequate opportunity for the resolution of customer claims and grievances. Each is limited in scope and contains several deficiencies.[101] The inadequacy of the current remedial procedures of the CEA, however, does not justify abandonment of the system.[102] An efficient and well-managed administrative system of resolving the claims of injured commodity futures investors is a desirable alternative to judicial remedies. It is both unnecessary and counterproductive to increase the already stifling backlog in civil courts with the addition of claims that properly should be adjudicated before the CFTC. Instead, when the CEA is subjected to sunset review in 1982, Congress should critically examine and amend the current procedures to provide the injured investor with more efficient and equitable methods to satisfy his claims.[103] Until then, however, the

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tration forum and the industry is there, ready to give you five minutes of their time, and simply render an award dismissing the complaint. That is not true." *Id.* at 767. Most often, an exchange panel will only arbitrate disputes arising out of that particular contract market. The majority of arbitration agreements however, call for arbitration before the American Arbitration Association, the New York Steck Exchange, or the National Association of Securities Dealers, particularly for more complex claims. *Id.* at 767, 770.

95. *Id.*

96. *Id.* at 768.

97. *Id. See* note 76 *supra.*

98. Frankhauser & Selig, *Private Actions Under the Commodity Exchange Act: Implying Less and Enjoying It More,* 35 BUS. LAW. 847, 861 (1980).

99. 17 C.F.R. § 180.2(f) (1980).

100. Nastro, *supra* note 76, at 767.

101. *See* notes 74-86, 92-100 *supra* and accompanying text.

102. *See* Graham, *supra* note 68, at 775.

103. Removal of cases involving options transactions from the reparations forum is a

investor must seek relief within the existing system, or, as this Note next discusses, under the federal securities laws or through an implied private right of action under the CEA.

III. Recovery Under the Federal Securities Laws

In addition to the avenues of redress explicitly provided in the CEA, under certain circumstances a defrauded commodity futures investor may seek recovery under the federal securities laws. Specifically, the investor may claim that commodity futures are subject to the well-established judicial remedy[104] of an implied cause of action under the antifraud provisions of the Securities Exchange Act of 1934.[105] The futures investor gains several advantages if he can assert a claim for redress under the federal securities laws. First, since there is a substantial body of securities case law concerning fraud and misrepresentation, the outcome of a suit brought under the securities laws is more predictable.[106] Second, federal securities regulation was designed principally for the protection of investors and thus contains a number of "pro-plaintiff" features, including a lighter burden of proof, liberal damages, and nationwide service of process.[107] Last, after establishing that registration requirements were not met,[108] an investor may recover the full value of his account.[109] Before the investor may assert his claims under the securities law, however, he must show that his particular commodity futures trading vehicle should be classified a security.

A. Discretionary Account—A Security?

Although it is well established that a commodity futures contract alone does not constitute a "security,"[110] certain discretionary accounts in futures may qualify for treatment as securities. There

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possible solution to the problem of delay. *Id.* A discussion of the procedures that Congress should adopt in order to improve the CEA is beyond the scope of this Note.

104. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971); Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946).

105. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976).

106. *See* Saitlin, *supra* note 8, at 243.

107. Bromberg, *Securities Law—Relationship to Commodities Law*, 35 Bus. Law. 787, 795 (1980). Other pro-plaintiff features include the "burden of proof shifted to the defendant in some causes of action, . . . broad venue, control person liability, and aiding and abetting concepts." *Id. See also* Bromberg, *supra* note 1, at 288.

108. Securities Act of 1933, § 5, 15 U.S.C. § 77e (1976).

109. *See* Note, *supra* note 12, at 273.

110. Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 235 F. Supp. 359 (S.D.N.Y. 1966) (contracts to purchase sugar for future delivery were not securities within the meaning of the securities laws).

are three general types of discretionary trading accounts:[111] (1) A pool of funds supplied by a number of investors having a common trading objective invested by a broker for their common benefit, (2) a joint account between the broker and his customer in which the broker conducts all transactions and receives a share of the profits, and (3) the investment of the customer's money at the discretion of a broker who earns commissions on each trade irrespective of whether a profit is made.[112] If a discretionary trading account constitutes an "investment contract," it is treated as a security under the Securities Exchange Act.[113]

The Supreme Court in *SEC v. W.J. Howey*[114] set forth a three-part test for characterizing a particular financial vehicle as a security. An "investment contract" requires (1) an investment of money, (2) in a "common enterprise," (3) with an expectation that profits will be derived from the efforts of a promoter or another third party.[115] The Court noted that the flexible concept of a "security" made the term applicable to many varied financial schemes.[116] The *Howey* test has been used to define an investment contract under both the 1933 and 1934 securities statutes.[117] In applying the *Howey* test the Court has indicated that the economic reality of the disputed investment rather than its form is central to

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111. For a definition of a discretionary trading account, see note 13 *supra*.

112. This categorization of discretionary accounts into three types was suggested in Note, *Discretionary Accounts*, 32 U. MIAMI L. REV. 401, 403-04 (1977).

113. Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1) (1976), includes "investment contract" in its definition of a "security." Substantially the same definition is contained in § 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10) (1976).

It is commonly agreed that the non-discretionary account, in which the investor retains some control over trading decisions, is not a security. *See, e.g.*, Walsh v. International Precious Metals Corp., 510 F. Supp. 867, 872 (D. Utah 1981); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1351 (D. Nev. 1980).

114. 328 U.S. 293 (1946). The Court in *Howey* held that the offering of units of a citrus grove development together with service agreements constituted an "investment contract" under § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1) (1976), and, thus, was subject to registration requirements of § 5 thereunder, 15 U.S.C. § 77e (1976).

115. 328 U.S. at 301.

116. "It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes by those who seek the use of the money of others on the promise of profits." *Id.* at 299.

117. *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332, 335-36 (1967). In *Tcherepnin* the Court held that withdrawable capital shares in a savings and loan association constituted investment contracts. Thus, the Court used the *Howey* test to imply a private cause of action for alleged false and misleading statements under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1980). *Howey* itself was a case under the Securities Act of 1933. *See* note 114 *supra*.

the determination of what is a security.[118]

The application of the *Howey* test to discretionary accounts in commodity futures has resulted in inconsistent conclusions concerning whether such accounts are "investment contracts" and therefore "securities."[119] The first element of the test, an investment of money, is easily fulfilled. Judicial examination of the common enterprise requirement, however, has produced much disagreement. The dispute over what constitutes a common enterprise concerns whether the vertical relationship hetween a broker and his client is sufficient or whether a horizontal relationship among many investors is necessary to fulfill the second prong of the *Howey* test. The third element, expectation of profits through the efforts of others, is dependent upon the resolution of the common enterprise element.

Satisfaction of the common enterprise requirement of the *Howey* test, according to one commentator, requires the presence of one or more of the following fact patterns:

> (1)[A] profit-sharing arrangement between the broker and his individual customer, (2) a pattern of trading in a uniform manner for all of tbe accounts managed by the broker, (3) a predetermined profit-sharing arrangement with other accounts managed by the same broker, [or] (4) a pooling of funds with other similar situated investors for a common objective.[120]

A majority of decisions, however, insist that only a finding of horizontal commonality among a number of investors satisfies the common enterprise requirement. For example, the Sixth Circuit defined a horizontal common enterprise as a relationship that ties the fortunes of each member of a group of investors to the success or failure of the overall venture.[121] Therefore, the requirement of a horizontal relationship precludes the designation of a contract between a single investor and his broker as a security.

In the leading case espousing the horizontal test, *Milnarik v. M-S Commodities, Inc.*,[122] the Seventh Circuit was unable to find the requisite commonality and, therefore, denied recovery under

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118. *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332, 335-36 (1967).

119. *Compare, e.g.*, Milnarik v. M-S Commodities Inc., 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972) *with* SEC v. Continental Commodities Corp., 497 F.2d 516 (5th Cir. 1974). *See generally* Note, *supra* note 12, at 275-82.

120. Hodes & Dreyfus, *Discretionary Trading Accounts in Commodity Futures—Are They Securities?*, 30 BUS. LAW. 99, 110 (1974).

121. Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 224 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981).

122. 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972).

the federal securities laws.[123] The plaintiff invested in a typical discretionary account: trading was at the broker's discretion, funds were not commingled with accounts of other investors, and the broker received a commission on each trade without regard to the profits. The court held that a commodity futures investor who granted discretionary authority to his broker merely created an agency relationship which did not join the broker's other customers with similar discretionary accounts in the kind of common enterprise required to constitute an investment contract.[124] The court thus suggested that only a pooling of investor interests could satisfy the second prong of the *Howey* test. The district court in *Wasnowic v. Chicago Board of Trade*[125] applied the *Milnarik* standard of a common enterprise and held that a similar discretionary account arrangement, without any pooling of funds or indicia of joint enterprise, did not constitute a security. In *Hirk v. Agri-Research Council, Inc.*[126] the Seventh Circuit expanded the *Milnarik* standard and held that even a profit splitting arrangement in which the broker received twenty-five percent of the accrued profits did not satisfy the common enterprise requirement.

The Sixth Circuit stringently applied the *Milnarik* horizontal commonality standard in *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[127] when it denied recovery under the federal securities laws to plaintiffs who had opened discretionary accounts in the defendant-broker's "Guided Commodities Account Program." All of plaintiffs' accounts were under the control of one trader, and the investors could not withdraw their funds for at least eighteen months. The total capital available and the buying power amassed by control over the group of accounts enabled the broker to

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123. *Id.* at 275. The court denied recovery for failure to fulfill the registration requirements of § 5 of the Securities Act of 1933, 15 U.S.C. § 77e (1976).

124. 457 F.2d at 277.

125. 352 F. Supp. 1066 (M.D. Pa. 1972), *aff'd mem.*, 491 F.2d 752 (3d Cir. 1973), *cert. denied*, 416 U.S. 994 (1974).

126. 561 F.2d 96 (7th Cir. 1977). Other earlier decisions applying the horizontal commonality approach and holding that the disputed discretionary account did not constitute a security include McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338, 1340 (E.D. La. 1972), *aff'd per curiam*, 477 F.2d 113 (5th Cir. 1973), Arnold v. Bache & Co., 377 F. Supp. 61, 63-65 (M.D. Pa. 1973), and Stuckey v. duPont Glore Forgan, Inc., 59 F.R.D. 129, 131 (N.D. Cal. 1973).

127. 622 F.2d 216 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981). *See also* Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1351-52 (D. Nev. 1980); Alkan v. Rosenthal & Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20, 797, at 23,252 (S.D. Ohio 1979); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311 (S.D. Ohio 1979).

purchase more efficiently and thus generate greater profits.[128] Despite these indicia of financial interdependence, the court held that no common enterprise existed because the investment vehicle neither pooled the funds nor distributed the profits pro rata.[129]

Emphasizing the investor's dependence on his broker and the control the broker exercises over all trading, the Ninth Circuit ruled that vertical commonality creates a common enterprise capable of satisfying the second requirement of the *Howey* test in the securities case *SEC v. Glenn W. Turner Enterprises.*[130] The court defined a common enterprise as an arrangement "in which the fortunes of the investor are interwoven with and dependent upon the efforts and successes of those seeking the investment or of third parties."[131] The Fifth Circuit adopted the *Glenn W. Turner* definition in another securities case, *SEC v. Koscot Interplanetary, Inc.*,[132] and ruled that the disputed pyramid scheme constituted an "investment contract." The *Koscot* court stressed in dictum that a pooling of funds of a number of investors was not necessary to satisfy the common enterprise requirement.[133]

The Fifth Circuit extended the *Koscot* rationale when, in *SEC v. Continental Commodities Corp.*,[134] it held that certain discretionary accounts in commodity futures contracts constituted securities. The discretionary trading accounts at issue were independent of one another, and brokers made all recommendations as to which futures contracts to buy or sell. Stressing the lack of knowledge of futures trading on the part of the investors, the court determined that the success of the investments depended directly on the ex-

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128. 622 F.2d at 220.

129. *Id.* at 222-23.

130. 474 F.2d 476 (9th Cir.), *cert. denied,* 414 U.S. 821 (1973).

131. *Id.* at 482 n.7. In *Glenn W. Turner,* the court found that self-improvement contracts which offered the purchaser the opportunity of selling similar contracts to others and earning commissions constituted "investment contracts." The court emphasized that the efforts of the managers were essential to the success of the scheme, although the purchasers were involved in the solicitations.

132. 497 F.2d 473 (5th Cir. 1974). *Koscot* involved a pyramid scheme of multi-level distributorships for selling cosmetics, wherein each investor realized profits only when those he solicited enlisted as distributors.

133. The court stated,

> the fact that an investor's return is independent of that of other investors in the scheme is not decisive. Rather, the requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy of the Koscot meetings and guidelines on recruiting prospects and consummating a sale.

Id. at 479.

134. 497 F.2d 516 (5th Cir. 1974).

pertise and advice of the brokers.[135] The court held that because the vertical relationships between individual customers and their brokers constituted a "common enterprise," the discretionary accounts were "investment contracts" and, therefore, recovery under the securities laws was warranted.[136]

The Ninth Circuit later reconsidered the vertical commonality standard it had pronounced in *Glenn W. Turner* and limited the instances in which discretionary accounts in commodity futures may be classified as investment contracts. In *Brodt v. Bache & Co.*[137] the plaintiffs opened a discretionary account with the defendant brokerage house at the suggestion of one of its registered representatives. After their broker left the employ of Bache, the plaintiffs learned that all of their money had been lost. The court recognized that the success or failure of such an investment vehicle was certainly affected by the individual broker's ability,[138] but it determined that a relationship sufficient to satisfy the requirements of a vertical common enterprise did not exist between the plaintiff and the defendant brokerage house. The court stated, "Merely furnishing investment counsel to another for a commission, even when done by way of a discretionary commodities account, does not amount to a 'common enterprise.' "[139]

The absence of a precise definition of a vertical relationship that will satisfy the common enterprise requirement has led the district courts into predictable confusion. Some courts, without articulating the vertical commonality rationale, have determined that the relationship created when the investor relinquishes all control to his broker satisfies the common enterprise requirement of *Howey*.[140] The *Brodt* decision indicates, however, that more than a control and dependence relationship between a customer and his broker may be necessary to constitute an investment contract even

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135. *Id.* at 522.

136. *Id.* at 521-23.

137. 595 F.2d 459 (9th Cir. 1978).

138. *Id.* at 461.

139. *Id.* at 462.

140. *See, e.g.*, Walsh v. International Precious Metals Corp., 510 F. Supp. 867, 871-73 (D. Utah 1981) (second element of *Howey* test met, but not third element, rendering the account nondiscretionary); Rochkind v. Reynolds Sec., Inc., 388 F. Supp. 254, 256-57 (D. Md. 1975). *See also* Marshall v. Lamson Bros. & Co., 368 F. Supp. 486, 487-90 (S.D. Iowa 1974) (emphasis on "pooling" of investors' funds is too strict or literal a definition of "investment contract"); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764, 765-66 (S.D.N.Y. 1972); Berman v. Orimex Trading, Inc., 291 F. Supp. 701, 702 (S.D.N.Y. 1968); Maheu v. Reynolds & Co., 282 F. Supp. 423, 429 (S.D.N.Y. 1968). For a thorough discussion of these earlier cases, see Hodes & Dreyfus, *supra* note 120.

in those jurisdictions adhering to the vertical commonality approach.

B. *Exclusive Jurisdiction of the CFTC*

Aside from the dispute concerning whether a commodity futures account is a security, the 1974 grant of exclusive jurisdiction to the CFTC over futures and discretionary accounts in futures[141] may also present an obstacle to an investor seeking recovery under the federal securities laws. It is generally agreed that the exclusive jurisdiction of the CFTC preempts the SEC and the states from *regulating* trading vehicles in commodity futures which may also constitute securities.[142] It is disputed, however, whether the savings clause,[143] which preserves judicial jurisdiction, permits the institution of private liability actions based on securities claims. The courts bave not adopted a uniform approach to the issues raised by the exclusive jurisdiction provision. Many decisions have ignored the jurisdiction issue and focused exclusively upon whether a discretionary account is a security and wlıat relief is available,[144] and other decisions have summarily dismissed securities claims involving commodities, relying upon the 1974 grant of exclusive jurisdiction as a bar to collateral relief.[145] Only a few courts have attempted a detailed analysis of the preemption question.[146]

Several compelling arguments support the position of some courts that the exclusive jurisdiction of the CFTC bars all claims under the federal securities laws. First, courts have argned that by vesting exclusive jurisdiction in the CFTC Congress acknowledged

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141. For text of this provision, see note 47 *supra*.

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

143. For text of the savings clause, see note 50 *supra*.

144. *See, e.g.*, Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981); Moody v. Bache & Co., 570 F.2d 523 (5th Cir. 1978); Hirk v. Agri-Research Council, Inc., 561 F.2d 96 (7th Cir. 1977).

145. *See, e.g.*, Gonzalez v. Paine, Webber, Jackson & Curtis, Inc., 493 F. Supp. 499 (S.D.N.Y. 1980); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610 (S.D.N.Y. 1979); E.F. Hutton & Co. v. Schank, 456 F. Supp. 507 (D. Utah 1976). For cases holding that the CFTC's "exclusive jurisdiction" preempts state securities laws, see International Trading, Ltd. v. Bell, 262 Ark. 244, 556 S.W.2d 420 (1977), *cert. denied*, 436 U.S. 956 (1978); Birenbaum v. Bache & Co., Inc., 555 S.W.2d 513 (Tex. Civ. App. 1977).

146. Walsh v. International Precious Metals Corp., 510 F. Supp. 867 (D. Utah 1981); Westlake v. Abrams, 504 F. Supp. 337 (N.D. Ga. 1980); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345 (D. Nev. 1980); Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706 (E.D. La. 1978); Hofmayer v. Dean Witter & Co., 459 F. Supp. 733 (N.D. Cal. 1978). *See generally* Saitlin, *supra* note 8; Johnson, *supra* note 46, at 32-36.

the inherent differences between securities and commodity futures markets that warrant their separation.[147] Essentially, the securities market is a capital raising device in which investment decisions are formulated upon an appraisal of the particular company's management, financial status, and future prospects.[148] The commodity futures market, on the other hand, is a price stabilization mechanism that ensures the availability of a commodity at a fixed price in the future.[149] Second, the CFTC itself has asserted that the 1974 Amendments vested it with exclusive jurisdiction over commodity futures accounts, which are "beyond the jurisdiction of any other state or federal agency."[150] Third, the CFTC has proposed to amend its antifraud rules, which currently parallel the language of rule 10b-5,[151] in order to avoid the application of certain securities principles that it deems inappropriate in the commodity futures context.[152] Fourth, the legislative history of the 1974 Amendments pertaining to the savings clause, although sparse, can be interpreted to support the preemption of private liability claims under the federal securities laws.[153] Last, some courts have contended that because the 1974 Amendments filled the regulatory gap that previously justified extension of the securities law to private liability claims for violations of the CEA, courts no longer need "to attempt to stretch the protection of the securities laws further than it may legitimately be extended."[154]

At least one district court, however, has held that the grant of

147. Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706, at 22,874 (E.D. La. 1978).

148. *Id.* at n.7. *See also* Greenstone, *supra* note 47, at 203-04.

149. *See* notes 2-8 *supra* and accompanying text.

150. CFTC INTERPRETATIVE LETTER No. 77-2, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,257, at 21,371 (1977).

151. 17 C.F.R. § 240.10b-5 (1980).

152. The CFTC has expressed particular concern over what it considers the inappropriate application of securities disclosure rules in the commodities markets. *See, e.g.*, Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706, at 22,874 (E.D. La. 1978); Greenstene, *supra* note 47, at 204-05. See generally Note, *Reflections of 10b-5 in the "Pool" of Commodity Futures Antifraud*, 14 HOUS. L. REV. 899 (1977).

153. *See, e.g.*, Hofmayer v. Dean Witter & Co. 459 F. Supp. 733, 736-37 (N.D. Cal. 1978). For a thorough discussion of pertinent excerpts of the legislative history of the 1974 Amendments, see Johnson, *supra* note 46, at 32-36, where the author notes that in congressional discussions on the savings clause, no one specifically mentioned that the preservation of court jurisdiction was necessary for the continued adjudication of claims involving commodity futures transactions based on violations of the federal securities laws. *Id.*

154. Walsh v. International Precious Metals Corp., 510 F. Supp. 867, 873 (D. Utah 1981).

exclusive jurisdiction to the CFTC does not preclude judicial application of securities laws in all disputes involving discretionary futures accounts. In *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[155] the court acknowledged that regulation of commodity futures by any other *agency* is undeniably preempted. The court, however, reasoned that the savings clause specifically retained *court* jurisdiction over cases arising under federal *statutes*.[156] The court cited portions of the legislative history of the 1974 Amendments relevant to the exclusive jurisdiction provision and the savings clause which, in its opinion, supported the distinctions between agency and court jurisdiction and between claims arising under the securities statutes and those arising from violations of rules and regulations.[157] The court summarized its reasoning as follows:

> The legislative history . . . very clearly makes the issue of court jurisdiction independent of the issue of agency jurisdiction. The over-all concept revealed in the language of the statute and the legislative history is: (1) The Commodity Exchange Act preempts any other federal or state statute dealing with commodity futures trading; (2) The jurisdiction of the CFTC preempts all other agency regulation in the commodities field, even regulation of a security, so long as the dominant purpose for the existence of the security is to trade in commodity futures; (3) The federal courts, however, specifically retain jurisdiction to decide cases arising under federal statutes. Therefore, the federal courts have jurisdiction to hear private liability claims based on the federal securities acts.[158]

C. *Analysis*

The circuit courts remain split on whether the federal securities laws provide an implied private right of action for investors in the commodity futures market.[159] The inadequate and inefficient procedures under the CEA present a compelling reason for a broad

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155. 492 F. Supp. 1345 (D. Nev. 1980).

156. *Id.* at 1349-51. *See also* Bromberg, *supra* note 107, at 795.

157. "Under the exclusive grant of jurisdiction to the [CFTC], the authority in the [CEA] (and the regulations issued by the [CFTC]) would *preempt the field insofar as futures regulation* is concerned." 492 F. Supp. at 1350 (quoting H. R. REP. No. 1383, 93d Cong., 2d Sess. (1974)).

158. 492 F. Supp. at 1350-51 (footnotes omitted); *accord,* Westlake v. Abrams, 504 F. Supp. 337, 344 (N.D. Ga. 1980). *But see* Hofmayer v. Dean Witter & Co., 459 F. Supp. 733, 737 n.2 (N.D. Cal. 1978); Bromberg, *supra* note 107, at 795 n.28.

159. One commentator stated,

> So far, the few courts that have considered whether there is still a securities cause of action for a commodity security interest have said "no." But those are lower courts and they [have not], in my mind, grappled very fully with the issue. I consider this still to be an open question.

Bromberg, *supra* note 107, at 795.

interpretation of an "investment contract" in order to allow a defrauded commodities investor a fair opportunity for redress. Yet, the inequity of an administrative procedure does not by itself justify extensive expansion of the securities law. Nevertheless, in some situations commodity futures investment vehicles warrant treatment under the federal securities law. This remedy, however, should be available only when a substantial interdependence can be found between the broker and the investor. In the absence of such interdependence, recovery should be limited to remedies under the CEA.

Even in circumstances in which a discretionary account in futures contracts constitutes a security, some commentators have suggested that the CFTC's grant of exclusive jurisdiction insulates the commodity futures trade from interference by the courts or by other federal agencies.[160] The crucial distinctions set forth by the *Mullis* court,[161] however, offer a logical framework whereby the CFTC, the SEC, and the courts may coexist without usurping one another's jurisdiction. The CEA preempts other agencies from *regulating* commodity futures trading vehicles. Preserving judicial jurisdiction to hear claims arising under other federal *statutes* does not interfere with the CFTC's *regulatory* domain. Furthermore, the *Mullis* rationale recognizes that the CFTC's exclusive jurisdiction does not preclude judicial jurisdiction over violations of the *rules* and *regulations* of other agencies. The *Mullis* court reasoned that the statutory/regulatory distinction is "a collateral but necessary corollary to the grant of exclusive jurisdiction to the CFTC so that the agency may achieve the clear supremacy [that] Congress intended."[162] Thus, a defrauded commodity futures investor whose trading vehicle is classified as a security should be permitted to maintain a cause of action under section 10(b) of the Securities Exchange Act if all other requirements of a securities claim are satisfied.[163] The development of legal precedent pertaining to discretionary commodity futures accounts that are securities will not interfere with the orderly development of legal precedent under the CEA or the administration of the regulatory scheme by the CFTC.

The Supreme Court addressed the general issue of maintain-

160. Johnson, *supra* note 46, at 35; Saitlin, *supra* note 8, at 246.

161. *See* notes 155-58 *supra* and accompanying text.

162. Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1351 (D. Nev. 1980).

163. 15 U.S.C. § 78j(b) (1976).

ing an action under the securities laws when a separate statutory scheme has been devised to resolve the particular dispute in *International Brotherhood of Teamsters v. Daniel.*[164] The Court determined that a noncontributory, compulsory pension plan did not constitute a "security" under the federal securities laws, noting that Congress specifically enacted ERISA[165] to regulate the use and terms of employee pension plans.

> Congress believed that it was filling a regulatory void when it enacted ERISA, a belief which the SEC actively encouraged. Not only is the extension of the Securities Acts by the Court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose. Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA.[166]

While demonstrating the existence of an important policy to prevent extension of the securities laws when a separate regulatory system exists to deal with a particular kind of interest, it is important to note that the Court's holding was based on a finding that noncontributory, compulsory pension plans were not "securities." The discretionary account in commodity futures, however, can be classified as a "security," at least in the "pooling" situation. *Daniel,* therefore, does not contradict this Note's conclusion that commodity futures investment vehicles which can be classified as a security deserve treatment under the securities laws.

Among those courts that have allowed commodity futures investers an implied right of action under the securities laws, the definition of a common enterprise necessary for designating a trading vehicle a "security" is far from consistent.[167] Neither those courts that require a pooling of investor funds nor those at the other extreme that find the simple vertical relationship between broker and investor sufficient have reached an acceptable solution. The *Continental Commodities*[168] application of the vertical commonality analysis is an unwarranted expansion of the definition of an "investment contract" as a security. The court's emphasis on investor dependence and broker discretion ignores the commonality requirement of the *Howey* test. The *Milnarik*[169] horizontal requirement, on the other hand, represents an unwarranted restric-

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164. 439 U.S. 551 (1979).

165. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. §§ 1000-1461 (1976 & Supp. III 1979).

166. 439 U.S. at 570 (citations omitted).

167. *See* notes 104-40 *supra* and accompanying text.

168. *See* notes 134-36 *supra* and accompanying text.

169. *See* notes 122-24 *supra* and accompanying text.

tion of the *Howey* common enterprise test. Because it recognizes as investment contracts only those accounts in commodity futures in which investors have pooled their funds, *Milnarik* overlooks certain discretionary accounts that logically should be classified as investment contracts. Moreover, the *Milnarik* horizontal commonality approach arguably not only obscures the flexible meaning of an "investment contract" intended by the *Howey* court, but also may thwart the fundamental purpose of the federal securities law: Investor protection.

The *Brodt*[170] decision may have approached a more acceptable interpretation of the "common enterprise" requirement. The court recognized that both the vertical and the horizontal components of an investment contract may contribute to the finding of a common enterprise. While acknowledging the importance of the relationship between broker and investor, the court realized that more than a strong vertical interdependence is necessary to satisfy the *Howey* common enterprise standard.

> Appellant's [investor's] enterprise was a "solitary" one. His profits were shared neither with other investors nor the appellee [brokerage house]; whether his investment flourished or perished was unrelated directly to either the general financial health of the appellee or the ability of the appellee to perform a duty, the purpose of which would be "to secure" to some extent the appellant's investment. Merely furnishing investment counsel to another for a commission, even when done by way of a discretionary commodities account, does not amount to a "common enterprise."[171]

Congress expressly designed the administrative remedy of the CEA to provide an avenue of relief for the defrauded commodity futures investor within the CFTC procedural framework. The inclusion of the savings clause in the CEA indicates a congressional awareness that some commodity futures investment devices are subsumed under the existing securities statutes and case law, and therefore, qualify as securities subject to judicial jurisdiction. Of course, Congress may choose to preclude relief under the federal securities laws after sunset review in 1982. Congress, however, should avoid causing a sudden halt to relief under the securities laws without the simultaneous reformation of CFTC procedures to facilitate the equitable disposition of claims. Until Congress acts to strengthen the currently ineffective CFTC, courts should, in appropriate situations, be open to implying a private right of action under the securities laws in order to effectuate the intent of the

170. *See* notes 137-39 *supra* and accompanying text.

171. Brodt v. Bache & Co., 595 F.2d 459, 462 (9th Cir. 1978).

CEA: Protection for the commodity futures investor.[172]

IV. Implied Right of Action Under the Commodity Exchange Act

A. *Pre-1974 Cases*

Notwithstanding the absence of an express private right of action for the defrauded commodity futures investor, prior to the passage of the 1974 Amendments many courts permitted a right of action[173] under various CEA provisions, particularly the antifraud provision. Section 4b of the CEA[174] makes it unlawful for a member of a contract market to cheat, defraud, or willfully deceive any person in connection with the making or sale of a commodity futures contract, and thus prohibits the common instances of fraud perpetrated by a broker upon his customer: Misrepresentation, conversion, churning,[175] and other unauthorized transactions. In addition, an analogous antifraud provision applies to commodity trading advisors and commodity pool operators.[176]

Decided in 1967, the first reported case holding that a private right of action may be implied under the antifraud provision of the CEA was *Goodman v. H. Hentz & Co.*[177] *Goodman* addressed the claims of two commodity investors who alleged that their broker-

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172. Although the treatment of commodity futures contracts under the securities laws is generally beneficial to customers and is endorsed by this Note in limited circumstances, certain complications may arise. For example, classification of a trading vehicle as a security may necessitate registration under § 5 of the Securities Act of 1933, 15 U.S.C. § 77e (1976), unless an exemption can be found. *See* Saitlin, *supra* note 8, at 244-45. Commodity dealers might also be forced to comply with state securities laws and regulations. *Id.* at 246-47. The costs of compliance with all state and federal securities rules would be high. Moreover, possible state restrictions, such as the imposition of minimum capitalization requirements for commodity pools, would decrease the attractiveness of commodity futures as investment vehicles. *Id.* at 247.

173. Private rights of action do not require express statutory authorization. Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). "[C]ourts may impose civil liability to aid the implementation of a statutory policy by compensating victims and deterring wrongdoers." Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. Rev. 804, 815 (1975) (footnote omitted).

174. 7 U.S.C. § 6b (1976). For text of the antifraud provision of the Commodity Exchange Act, see note 35 *supra*.

175. For a definition of churning, see note 14 *supra*. *See also* Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764, 765-67 (S.D.N.Y. 1972).

176. Commodity Exchange Act § 40, 7 U.S.C. § 60 (1976 & Supp. III 1979). For a definition of "commodity trading advisor," see note 62 *supra*. For a definition of "commodity pool operator," see note 63 *supra*. Section 40 applies to all commodity trading advisors and commodity pool operators, whether or not they are registered under the Commodity Exchange Act.

177. 265 F. Supp. 440 (N.D. Ill. 1967).

dealer had defrauded them. Relying on section 286 of the *Restatement of Torts*,[178] the court determined that complainants were members of the class of persons that Congress intended to protect by enacting section 4b of the CEA and that violation of that section constituted a tort for which the investors had a federal remedy, although none was specifically provided in the CEA.[179] The *Goodman* court asserted that private rights of action may be implied unless the legislation at issue demonstrates a contrary intent,[180] and found no indication in the CEA that Congress did not intend to allow defrauded commodity futures customers to recover damages. *Goodman* has thus become a leading case for the proposition that an implied cause of action for an injured commodity futures investor exists under the CEA.[181]

In 1973 the Supreme Court declined the opportunity to decide whether Congress had implicitly authorized a private damages action under the CEA. Determining that the plaintiff customer could recover damages against a board of trade and some of its members for manipulating the frozen pork bellies market, the Seventh Circuit in *Deaktor v. L.D. Schreiber & Co.*,[182] applied the statutory tort rationale of *Goodman* and its progeny to imply a private right of action under section 9h of the CEA, a criminal provision that prohibits price manipulation. The Supreme Court, however, reversed, holding that the case should have been stayed pending a determination by the Commodity Exchange Commission.[183] Thus,

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178. Violation 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.

Id. at 447.

179. *Id.*

180. *Id.*

181. Many courts have cited *Goodman* for this proposition. *See* Deaktor v. L.D. Schreiber & Co., 479 F.2d 529, 534 (7th Cir.), *rev'd sub nom.* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973) (per curiam); Booth v. Peavey Co. Commodity Servs., 430 F.2d 132, 133 (8th Cir. 1970); Seligson v. New York Produce Exch., 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), *aff'd sub nom.* Miller v. New York Produce Exch., 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); Arnold v. Bache & Co., 377 F. Supp. 61, 65 (M.D. Pa. 1973); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764, 766 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338, 1343 (E.D. La. 1972); United Egg Producers v. Bauer Int'l Corp., 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 437 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970); Anderson v. Francis I. duPont & Co., 291 F. Supp. 705, 710 (D. Minn. 1968).

182. 479 F.2d 529 (7th Cir.), *rev'd sub nom.* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973) (per curiam).

183. Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113, 114-16 (1973) (citing Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 305-07 (1973)) (deferral of suit involving antitrust

the Court, by invoking the doctrine of primary jurisdiction,[184] avoided the issue of implied rights under the CEA.

The extensive revisions of the 1974 Amendments created uncertainty about the continuing validity of a private right of action under the CEA.[185] Specifically, the reparations remedy[186] and the exclusive jurisdiction of the CFTC to adjudicate disputes under the CEA[187] arguably overrule pre-1974 judicial precedent that permitted private rights of action under the CEA. In order to resolve the dispute, it first must be determined whether Congress created reparations as an exclusive or a supplementary dispute settlement technique. Concomitantly, the doctrine of primary jurisdiction[188] may require that the injured commodity futures investor first invoke the reparations process before seeking redress in the courts. Furthermore, an examination of the possible existence of a judicial method of recovery must take into account recent Supreme Court restrictions on implied rights of action.[189]

B. Implication Analysis—The Cort *Test*

In *J.I. Case Co. v. Borak*[190] the Court implied a private right of action under section 14(a) of the Securities Exchange Act of 1934[191] in favor of a corporate stockholder who alleged that a false and misleading proxy statement had tainted a merger. The Court emphasized the need for a private remedy to achieve the underlying purpose of the statute. The Court, however, tempered the ex-

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violations by a board of trade to the Commodity Exchange Commission, the forerunner of the CFTC).

184. The doctrine provides, in very general terms, that

> when Congress has created an administrative agency to regulate within a particular sphere, and a complaint raises issues which lie within the sphere of regulation and require the special competence of the agency, state and federal courts are without jurisdiction to grant relief until these issues have been determined by the agency.

Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 295 (1963).

185. A court must apply the law as it exists at the time of its decision. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 110 (1801). Therefore, in considering the implication issue under the Commodity Exchange Act, the 1974 Amendments to the statute rather than pre-1974 case law must govern. For a discussion of the 1974 Amendment, see notes 41-52 *supra* and accompanying text.

186. *See* notes 60-86 *supra* and accompanying text.

187. *See* notes 141-158 *supra* and accompanying text.

188. *See* note 184 *supra*.

189. *See* notes 190-214 *infra*.

190. 377 U.S. 426, 430-31 (1964).

191. Securities Exchange Act of 1934, § 14(a), 15 U.S.C. § 78n(a) (1976).

pansive approach of *Borak* in *Cort v. Ash*[192] when it developed a method for evaluating whether a federal statute includes an implied private right of action. Instead of examining the need for or the underlying purpose of a statute in the *Borak* tradition, the *Cort* analysis stressed the language and structure of the statute at issue in view of the circumstances surrounding its passage.[193]

The test formulated in *Cort* contains four components, each incorporated from prior holdings of the Court.

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the canse of action one traditionally relegated to state law, in an area basically the concern of tlie States, so that it would be inappropriate to infer a cause of action based solely on federal law?[194]

The Court observed that the evaluation of implied rights is especially difficult because when a statute does not expressly include or abolish a private damages cause of action, the accompanying legislative history rarely provides any conclusive indication of congressional intent. To resolve tlie ambiguity, the Court, in effect, created a presumption in favor of an implied right to be used when evaluating statutes that clearly confer certain rights upon a class of persons. In such situations, tlie Court suggested that while a right could be implied in the absence of a showing of an intent on tlie part of Congress to *create* a private remedy, a demonstration of an express, contrary intent would be determinative.[195]

Recent decisions of the Supreme Court have refined the *Cort* implication analysis. For example, in *Cannon v. University of Chi-*

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192. 422 U.S. 66 (1975). The issue before the Court was whether a private cause of action for damages against corporate directors could be implied in favor of a corporate stockholder under 18 U.S.C. § 610, *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (repealed 1976). Section 610 was a criminal provision prohibiting corporations from making a contribution or expenditure in connection with any election at which Presidential electors will be chosen.

193. For a discussion of the development of the Supreme Court implication analysis in *Cort*, see Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980).

194. 422 U.S. at 78 (citations omitted).

195. *Id.* at 82. The Court concluded that implication of a private cause of action under 18 U.S.C. § 610 was neither suggested by the legislative history nor required to effectuate Congress' purpose in enacting the statute. In addition, the statutory provision was not directed at internal relations between corporations and their stockholders. Moreover, the cause of action alleged was traditionally relegated to the states. *Id.* at 79-85.

cago[196] the Court implied a private right of action under section 901(a) of Title IX of the Education Amendments of 1972,[197] which bans sex discrimination in certain federal financial aid programs. Initially, the Court noted that a violation of a federal statute that results in harm to an individual does not automatically give rise to a private action for damages; rather, the existence of a private remedy is a question of statutory construction.[198] Clarifying the threshold question of the *Cort* inquiry,[199] the Court stressed that a plaintiff urging an implied right of action must be a member of the *specific* class that the statute was enacted to protect.[200] In addition, the Court indicated that it would be difficult to imply a remedy under a statute enacted for the benefit of the general public, such as a criminal statute.[201] Moreover, the Court found that an examination of the legislative history of the Education Amendments of 1972 revealed ample evidence of congressional intent to *create* a private cause of action for violations of the discrimination provision.[202] Although indicating that Congress should expressly create private remedies when it intends them, the Court nevertheless concluded that the failure of Congress to expressly provide a private cause of action was not inconsistent with an intent to make private remedies available.[203] Justice Powell, however, convincingly asserted in dissent that it was doubtful that "Congress absentmindedly forgot to mention an intended private action."[204]

During the same term, the Court elaborated on the second

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196. 441 U.S. 677 (1979). The complaint in *Cannon* was brought by a female applicant against two medical schools that denied her admission.

197. Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (1972) (current version at 20 U.S.C. § 1681(a) (1976)).

198. 441 U.S. at 688.

199. *See* text accompanying note 194 *supra*.

200. 441 U.S. at 689-94.

201. The court said,

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.

Id. at 690-93.

202. Furthermore, the Court stated that the legislative history demonstrated that Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), and that it was expressly assumed that Title IX would be enforced in the same manner as Title VI, under which courts had implied a private remedy for victims of discrimination on the basis of race, religion, or national origin. 441 U.S. at 694-703.

203. *Id.* at 717.

204. *Id.* at 742 (Powell, J., dissenting).

prong of the *Cort* test—the congressional intent requirement—in *Touche Ross & Co. v. Redington.*[205] Reluctant to imply a private right in the face of congressional silence,[206] the Court denied the existence of a cause of action for damages under a disclosure provision of the Securities Exchange Act of 1934.[207] The Court stressed that the proper inquiry concerned the question of congressional intent—not "whether [the] Court thinks that it can improve upon the statutory scheme."[208] Emphasizing that the implication analysis focused on whether Congress intended, explicitly or implicitly, to *create* a private damages action, the Court indicated that application of the last two elements of the *Cort* test was unnecessary when no such legislative intent could be found.[209]

The Court further limited the *Cort* analysis in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis.*[210] Affirming the principles of *Cannon* and *Touche Ross,* the Court declared that congressional intent to *create* a private right of action was the dispositive issue.[211] Although implying a private remedy to void an investment adviser's contract, the Court held that no implied cause of action exists under section 206 of the Investment Advisers Act of 1940,[212] which proscribes certain fraudulent and deceptive conduct. In the latter determination the Court considered the effect of express provisions within the statute for judicial and administrative enforcement of section 206 in light of the elemental canon of statutory construction, *expressio unius est exclusio alterius*—"[w]hen a statute limits a thing to be done in a particular mode, it includes

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205. 442 U.S. 560 (1979). In *Touche Ross* the trustee of an insolvent brokerage firm brought suit alleging that its auditors had conducted an improper audit.

206. "[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Id.* at 571.

207. Securities Exchange Act of 1934, § 17a, 15 U.S.C. § 78q(a) (1976). Section 17a requires broker-dealers to keep such records and reports as the SEC deems necessary.

208. 442 U.S. at 578.

209. *Id.* at 575-76.

210. 444 U.S. 11 (1979). In *Transamerica* a shareholder of a real estate investment trust filed shareholder derivative and class action suits, alleging that certain of its trustees, its investment adviser, and two corporations affiliated with the latter were guilty of various frauds and breaches of fiduciary duty in violation of certain provisions of the Investment Advisers Act of 1940, ch. 686, §§ 201-220, 54 Stat. 847 (current version at 15 U.S.C. § 80b-1 to -20 (1976 & Supp. III 1979)).

211. 444 U.S. at 15-16, 24.

212. Investment Advisers Act of 1940, ch. 686, § 206, 54 Stat. 852 (current version at 15 U.S.C. § 80b-6 (1976)), makes it unlawful for investment advisers "to employ any device, scheme, or artifice to defraud . . . ; to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;" or to engage in various transactions without making required disclosures.

the negative of any other mode."[213] The Court expressed a willingness to yield to persuasive evidence of contrary legislative intent, but found that the evidence of congressional intent militated against implying a private remedy for monetary damages. In addition, the Court inferred that the more comprehensive the express remedies under a statute, the less likely a need for an implied private right of action will be found.[214] The clear trend of the Supreme Court, as demonstrated by *Cannon*, *Touche Ross*, and *Transamerica*, is to adopt an increasingly restrictive approach to implying rights under federal statutes.

C. *Post-1974 Cases*

Against the background of the innovative 1974 Amendments and the Supreme Court's restrictive implication analysis, the lower courts have adopted four distinct and inconsistent approaches to the resolution of whether an implied private right of action exists under the CEA.[215]

1. The *Hutton* and *Bartels* Approaches

A few courts have merely presumed that a private right of action is still valid without addressing the 1974 Amendments or the *Cort* test. The district court in *E.F. Hutton & Co. v. Lewis*,[216] for example, recognized that courts have consistently implied a private cause of action under the Act, but made no reference to the *Cort* decision. The plaintiff in *Hutton* was denied recovery because the alleged offenses were not actionable under the CEA's antifraud provision.[217]

A second approach, typified by *Bartels v. International Com-*

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213. Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929), *quoted in* 444 U.S. at 20.

214. 444 U.S. at 20.

215. A four-part categorization of these cases was suggested by the court in Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 233 n.25 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981).

216. 410 F. Supp. 416 (E.D. Mich. 1976). *See also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman, 593 F.2d 129, 133 n.7 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979); Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1176 (2d Cir. 1977); Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 103 n.8 (7th Cir. 1977); Poplar Grove Planting & Ref. Co., v. Bache Halsey Stuart Inc., 465 F. Supp. 585, 589-90 (M.D. La. 1979).

217. 410 F. Supp. at 419, 422. In *E.F. Hutton* a securities dealer filed a complaint against one of its account executives, seeking recovery of losses suffered by a customer as a result of the broker's allegedly improper and unauthorized transactions in pork belly futures. The court held that the broker had sold short without authorization but that such conduct was not a "manipulative device" prohibited under § 6b of the CEA. *Id.* at 422.

modities Corp.,[218] has held that while the 1974 Amendments do not extinguish the previously acknowledged implied right of action, a plaintiff must first exhaust his administrative remedies before resorting to the courts. The district court in *Bartels* determined that a defrauded commodity options customer has no private right of action under the CEA before he pursues the CFTC's reparations process.[219] Finding that the doctrine of primary jurisdiction[220] controlled, the *Bartels* court found no need to fully explore the continuing validity of an implied right of action under the CEA or to consider the *Cort* test.[221]

The *Hutton* and *Bartels* approaches to the question whether an implied private right of action exists under the current CEA are both unconvincing and unsupported by sound legal analysis. The procedures introduced in the 1974 Amendments and the analysis announced in the *Cort* decision so changed the complexion of the dispute that their impact must be addressed before any conclusion may be reached as to the validity of a private remedy under the CEA.

2. The Reenactment Approach—Implying a Right of Action

Applying the *Cort* analysis, a third line of authority holds that Congress' reenactment of the CEA without expressly prohibiting the continued implication of a private right of action indicates implicit congressional approval of the implied action. Courts that adopt this reenactment approach find the first element of the *Cort* test—whether the plaintiff is a member of the specific class that Congress intended to protect—easily satisfied. These courts begin their analysis with the language of the CEA itself, and find in its antifraud provision, section 4b,[222] a broad proscription against cheating, defrauding, or willfully deceiving any person in connection with the making or sale of a commodity futures contract. Therefore, these courts find that the intention to benefit commodity futures customers is apparent on the face of the statute.[223]

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218. 435 F. Supp. 865 (D. Conn. 1977). The complaint in *Bartels* alleged fraud in connection with commodity options, which are also within the scope of § 2(a)(1) of the CEA, 7 U.S.C. § 2 (Supp. III 1979). For a definition of a commodity "option," see note 82 *supra*.

219. 435 F. Supp. at 870.

220. For an explanation of the doctrine of primary jurisdiction, see note 184 *supra*.

221. 435 F. Supp. at 870. *See also* Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc., 436 F. Supp. 447 (N.D. Ohio 1976).

222. For text of § 4b of the CEA, 7 U.S.C. § 66 (1976), see note 35 *supra*.

223. Leist v. Simplot, 638 F.2d 283, 304-07 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981); Curran v. Merrill Lynch, Pierce,

Moreover, the courts read the legislative history of the 1974 Amendments to support the contention that Congress intended the CEA to protect individuals investing in commodity futures.[224]

Turning to the second *Cort* element, the courts following the reenactment approach phrase their inquiry as whether the legislative history of the 1974 Amendments indicates a congressional intent to *deny* or *nullify* the previously recognized judicial remedy.[225] Because a judicially created private cause of action preceded the 1974 Amendments and because the existence of the implied right had been repeatedly brought to the attention of Congress, these courts argue that Congress' reenactment of the statute coupled with the absence of a declaration rejecting the precedent indicates implicit approval of a private cause of action.[226]

Fenner & Smith, Inc., 622 F.2d 216, 233-34 (6th Cir. 1980), *cert. granted,* 101 S. Ct. 1971 (1981).

224. For relevant citations from the legislative history of the 1974 Amendments, see Leist v. Simplot, 638 F.2d 283, 305-07 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

225. For instance, the court in Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981), phrased its inquiry as "whether [Congress] intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the [CEA]." *Id.* at 303.

226. *Id.* "Congress was well aware that a number of federal courts had implied a private right of action under the [CEA]. If it had wanted to abrogate this right of action, Congress would have expressed this intention in some way." Alken v. Lerner, 485 F. Supp. 871, 878 (D.N.J. 1980).

The court in *Leist* cited passages from the legislative history of the 1974 Amendments to support its contention that Congress was aware of and intended to preserve a previously implied private cause of action for damages. Included among these passages are remarks by Professor Schotland of Georgetown University, a commodities law expert, who expressed the opinion that private claims were available under the CEA. 638 F.2d at 310 (construing *Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13,113 Before the Senate Comm. on Agriculture and Forestry,* 93d Cong., 2d Sess. 205, 737, 746 (1974) [hereinafter cited as *Hearings on S. 2485*]). The court also cited the comments of a grain exchange representative who proposed that contract markets be required to submit to arbitration only those claims that would otherwise constitute an "economic impediment to [c]ourt litigation." *Id.* (coustruing *Hearings on S. 2485, supra,* at 415). In addition, the court quoted a Kansas City Board of Trade spokesman who had unsuccessfully argued for legislation to protect exchanges "from unnecessary and costly defenses of lawsuits" brought under the CEA. *Id.* (quoting *Hearings on S. 2485, supra,* at 317). The *Leist* court also cited the remarks of Rep. Poage, Chairman of the House Conference Committee, who, during debates on the 1974 Amendments, had stated that "when the [CEA] was enacted, courts implied a private remedy for individual litigants in the [CEA]." *Id.* at 308 (quoting 119 CONG. REC. 41333 (1973)). The Second Circuit relied on Poage's statement to explain why new legislation creating a central administrative agency was required at that time: to compel exchanges to adopt or change certain rules because the threat of private litigation had caused the exchanges to shirk this responsibility. *Id.* at 309.

Additionally, several courts have cited passages from the House Report, which indicated that the threat of private damages suits was in part responsible for the decreased

In order to reach this conclusion, the courts that imply a private right of action under the CEA have cited the canon of statutory contruction that creates a presumption that the reenactment of a statute in substantially the same form incorporates previous judicial and administrative interpretations of the statute,[227] including decisions of the lower courts as well as the Supreme Court.[228] Thus, by assuming congressional cognizance of prior case law acknowledging an implied judicial remedy, the absence of any indication of legislative intent to abrogate a private cause of action permits these courts to infer that Congress intended for the implied private right of action to survive the passage of the 1974 Amendments. The courts then place the burden of proof on those who

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effectiveness in the system of exchange regulation, to support their contention that Congress was aware of an implied private right of action.

> In the few years this provision has been in the present [CEA], there is growing evidence to indicate that, as opposed to strengthening the self-regulatory concept in present law, such a provision, coupled with only limited federal authority to require the exchanges to make and issue rules appropriate to enforcement of the Act—may have actually have worked to weaken it. With inadequate enforcement personnel the Committee was informed that attorneys to several hoards of trade have been advising the boards to *reduce*—not expand exchange regulations designed to insure fair trading, since there is a growing body of opinion that failure to enforce the exchange rules is a violation of the Act which will support suits by private litigants.

Id. at 308 (quoting H.R. REP. No. 975, 93d Cong., 2d Sess. 46 (1974) (emphasis in original). The report later mentioned that one of the specific problems brought to its attention was the "[g]rowing difficulties . . . [that have developed] as a result of private plaintiffs seeking damages against . . . the markets." *Id.* (quoting H.R. REP. No. 975, 93d Cong., 2d Sess. 48 (1974)). Several courts have suggested that the House Report, which did not express dissatisfaction with a private right of action, focused instead on the reduction of rulemaking on the exchanges. *Id.*; Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 231 n.21 (6th Cir. 1980), *cert. granted,* 101 S. Ct. 1971 (1981); Smith v. Groover, 468 F. Supp. 105, 109-10 (N.D. Ill. 1979).

Courts following the reenactment approach have also cited portions of the legislative history pertaining to the institution of the reparations procedure and the addition of the judicial savings clause to support their assertion that Congress was aware of an implied private right of action. *See* notes 239-243 *infra.*

227. When "Congress adopts a new law incorporating sections of prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581 (1977), *cited in* Leist v. Simplot, 638 F.2d 283, 303, 310-11 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981). "Congress is presumed to have been aware of existing constructions of statutes and does not intend to overrule them if the provision is re-enacted in substantially the same form." Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 234 n.27 (6th Cir. 1980) (citing Alabama Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve Sys., 533 F.2d 224 (5th Cir. 1976)), *cert. granted,* 101 S. Ct. 1971 (1981).

228. Van Vranken v. Helvering, 115 F.2d 709, 710 (2d Cir. 1940), *cert. denied,* 313 U.S. 585 (1941), *cited in* Leist v. Simplot, 638 F.2d 283, 310, *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

assert that no private right exists to demonstrate a congressional intent to change prior law. The courts that follow this approach, of course, find that no such showing can be made.[229]

The Second Circuit's majority opinion in *Leist v. Simplot*[230] is representative of the reenactment approach. In *Leist,* plaintiffs sought recovery for damages allegedly arising out of the sellers' default on a May 1976 potato futures contract. Plaintiffs asserted that the antifraud and antimanipulative provisions of the CEA created an implied private right of action and thereby conferred jurisdiction upon the court to adjudicate their claim. The court emphasized both the longstanding judicial recognition, beginning with *Goodman,*[231] of an implied private right of action and the Supreme Court's holding in *Chicago Mercantile Exchange v. Deaktor.*[232] The *Leist* majority noted that the *Deaktor* circuit court had relied upon the existence of an implied remedy under the antifraud provision of the CEA in finding a similar remedy under the provision prohibiting price manipulation.[233] Therefore, *Leist* suggested that the Supreme Court had reversed the *Deaktor* lower court merely because the Court believed that an initial factual determination by the Commodity Exchange Commission[234] of whether an exchange rule had been violated would assist later courts hearing similar claims. Furthermore, according to *Leist,* the Court never expressly declined to decide the issue of an implied private right of action, but instead assumed that such a remedy could be implied under both the antifraud and antimanipulation provisions as the Seventh Circuit had previously held.[235]

To reconcile the continued existence of an implied cause of action with the various changes in the statutory scheme of the

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229. *See, e.g.,* Leist v. Simplot, 638 F.2d 283, 303 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981). The *Leist* court, for example, suggested that if Congress had intended to alter a principle of law established by the judicial branch, either the statute or its legislative history would have expressly abrogated the judicial precedent. *Id.* Conversely, "[w]hen a principle has become settled through court decisions, there is no occasion for Congress to speak unless it wishes a change." *Id.*

230. 638 F.2d 283 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

231. *See* notes 177-81 *supra* and accompanying text.

232. 414 U.S. 113, *rev'd per curiam,* Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973). *See* notes 182-84 *supra* and accompanying text.

233. In *Deaktor* the Supreme Court held that the Seventh Circuit should have stayed the civil suit and deferred to the primary jurisdiction of the Commodity Exchange Commission. *See* notes 182-84 *supra* and accompanying text.

234. The case was referred to the Commodity Exchange Commission, the predecessor of the CFTC. *See* note 33 *supra* and accompanying text.

235. 638 F.2d at 300-01.

CEA accomplished by the 1974 Amendments, the reenactment approach emphasizes the permissive language[236] of the reparations procedure and views it as a supplementary rather than an exclusive remedy. Thus, according to this view, an injured commodity futures investor is not obligated to pursue the reparations process prior to or in lieu of judicial remedies.[237] The *Leist* court distinguished the creation of an administrative remedy under the CEA from other cases in which application of the maxim *expressio unius est exclusio alterius* precluded implication of a judicial remedy.

> 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.[238]

Thus, according to the reenactment approach, congressional silence should be interpreted as approval. Furthermore, these courts have found support within the legislative history of the 1974 Amendments for their conclusion that Congress created the reparations procedure as an additional remedy.[239]

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236. "Any person complaining of any violation of any provision of this chapter . . . *may*, at any time within two years after the cause of action accrues, apply to the [CFTC]." Commodity Exchange Act § 14(a), 7 U.S.C. § 18(a) (Supp. III 1979) (emphasis added). For a discussion of the reparations process, see notes 60-73 *supra* and accompanying text.

237. *See* 638 F.2d at 312-13; Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 234 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981); Alken v. Lerner, 485 F. Supp. 871, 879 (D.N.J. 1980); Smith v. Groover, 468 F. Supp. 105, 113-14 (N.D. Ill. 1979); R.J. Hereley & Son Co. v. Stotler & Co., 466 F. Supp. 345, 347-48 (N.D. Ill. 1979). *See generally* Rosen, *supra* note 68.

238. 638 F.2d at 312-13 (citations omitted).

239. For instance, the *Leist* court cited certain remarks of Senator Talmadge:

> The vesting in the [CFTC] 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 [CFTC] 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.

638 F.2d at 313 (quoting 120 CONG. REC. 30459 (1974)). The court in Smith v. Groover, 468 F. Supp. 105 (N.D. Ill. 1979), referred to remarks made by Senator Huddleston during floor debates:

> Thus, an aggrieved commodity customer will be able to obtain more expeditious treatment of his claim should the customer elect to pursue a claim in reparations rather than proceed to arbitration or pursue in court the private right of action which has been judicially implied for violations of certain provisions of the [CEA], or which in the future courts may recognize for other provisions of the Act.

468 F. Supp. at 114 (quoting 124 CONG. REC. S.10,537 (daily ed. July 12, 1978)).

Addressing the exclusive jurisdiction provision,[240] the reenactment line of cases contends that Congress intended only to establish CFTC supremacy over the SEC and other potential *regulators* of transactions involving commodity futures, and, therefore, did not intend to limit the ability of the courts to hear disputes arising from violations of the CEA.[241] These cases read the savings clause and the legislative discussions of its purpose as providing additional support for the assertion that Congress intended to preserve court jurisdiction.[242] *Leist*, for example, stated that when the legislative history is coupled with "Congress' recognition that jurisdiction over private causes of action have been held to have been conferred, the conclusion that Congress desired their continued

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240. For text of the exclusive jurisdiction provision, see note 47 *supra*. *See also* notes 141-58 *supra* and accompanying text.

241. Leist v. Simplot, 638 F.2d 283, 314-15, *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 232 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981); Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 218-19 (D. Kan. 1979).

242. For text of the savings clause, see noto 50 *supra*. The *Leist* majority cited several portions of the legislative history relevant to the adoption of the savings clause. Testimony given during Senate hearings postulated that reparations coupled with the CFTC's exclusive jurisdiction might nnintentionally result in repeal of the previously recognized private action for damages. "Unfortunately . . . section 201 [exclusive jurisdiction] may prohibit all court actions. The staff of the House Agriculture Committee has said this was done inadvertently and they hope it can be corrected in the Senate." Leist v. Simplot, 638 F.2d 283, 315 (2d Cir. 1980) (quoting *Hearings on S. 2485, supra* note 226, at 205 (remarks of Sen. Clark)), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981). Professor Schotland suggested that if the reparations process were added, a provision should also be included containing "explicit language . . . that Federal and State courts are still open if a complainant prefers to go to trial there." *Id.* (quoting *Hearings on S. 2485, supra* note 226, at 737). The *Leist* majority also noted that in his testimony before the Senate Committee on Agriculture and Forestry, Representative Rodino expressed concern tlnat the exclusive jurisdiction provision, standing alone, mighit prohibit stato courts from exercising jurisdiction over claims arising under state commercial law and might "oust even federal courts of jurisdiction." *Id.* at 314 (quoting *Hearings on S. 2485, supra* note 226, at 260). He suggested an amendment to "define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions." *Id.* (quoting *Hearings on S. 2485, supra* noto 226, at 259-60).

The *Leist* majority cited various explanations offered for adopting the savings clause provision to demonstrate congressional intent to preserve judicial jurisdiction.

> [T]he conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of tlie United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within tlie jurisdiction of the CFTC.

Id. at 315 (quoting 120 CONG. REC. 34997 (1974) (remarks of Sen. Talmadge), 120 CONG. REC. 34737 (1974) (remarks of Rep. Poage)). Moreover, the Senato Report stated that the savings clause was inserted to "make clear that . . . Federal and State courts retain tlieir jurisdiction." *Id.* (quoting S. REP. No. 1131, 93d Cong., 2d Sess. 6 (1974)).

recognition is nigh irresistible."[243]

Several courts that subscribe to the reenactment approach have held that the doctrine of primary jurisdiction is not determinative of the implication question. For example, in *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[244] the Sixth Circuit found that resort to the CFTC's reparations process was unnecessary because private suits would not interfere with an orderly development of precedent or the administration of the regulatory scheme by the CFTC.[245] The court also stated that the adjudication of claims of broker fraud as opposed to claims concerning more complex legal and factual issues, such as price manipulation, did not require the special expertise of the CFTC for a just resolution.[246]

Another argument advanced by the reenactment approach is that great deference should be accorded the CFTC opinions that recognize the continued existence of an implied private right of action.[247] The district court in *Smith v. Groover*[248] emphasized the CFTC's consistent interpretation of the reparations section as permitting commodity investors an election of forums in which to seek relief. In *Alken v. Lerner*[249] the district court noted that the CFTC considered inappropriate the application of the doctrine of primary jurisdiction to private actions in fraud, although the commission recognized that issues of regulatory policy should be deferred to agency determination.[250] The *Leist* majority stressed the CFTC's

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243. 638 F.2d at 315.

244. 622 F.2d 216 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981). In *Curran*, plaintiffs sought damages from defendant brokerage house for alleged false representations by its agents who had induced them to open discretionary trading accounts in commodity futures in defendant's "Guided Commodities Account Program." *Id.* at 219-20.

245. *Id.* at 235-36; *accord*, Smith v. Groover, 468 F. Supp. 105, 121-22 (N.D. Ill. 1979); Hofmayer v. Dean Witter & Co., 459 F. Supp. 733, 738 (N.D. Cal. 1978).

246. 622 F.2d at 236. *See also* Alken v. Lerner, 485 F. Supp. 871, 881-82 (D.N.J. 1980).

247. "[T]he consistent construction of a statute 'by [the] agency charged with its enforcement is entitled to great deference by the courts.' " Alken v. Lerner, 485 F. Supp. 871, 882 (D.N.J. 1980) (quoting United States v. Consumer Life Ins. Co., 430 U.S. 725, 752 (1977)); *accord*, Leist v. Simplot, 638 F.2d 283, 321 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981); Curran v. Merrill Lynch, Pierce, Fenner & Smith, 622 F.2d 216 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981). *See also* Cannon v. University of Chicago, 441 U.S. 677, 706-08 (1979).

248. 468 F. Supp. 105, 115 (N.D. Ill. 1979); *accord*, Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

249. 485 F. Supp. 871 (D.N.J. 1980). In *Alken* plaintiff sought recovery for losses resulting from the raising of the margin requirement of his account without his knowledge.

250. The CFTC has said,

> [P]rivate litigation seeking damages for alleged violations of provisions of the Act will rarely, if ever, involve issues appropriate for review by the [CFTC] under the doctrine

admission that its inadequate resources prevented it from policing all commodity related transactions. The *Leist* court also cited the CFTC's acknowledgement that private damages actions would be helpful in carrying out the statutory purpose of investor protection.[251]

The courts that follow the reenactment approach interpret the failure of Congress to pass any of three bills[252] introduced in 1973 that provided for an express private right of action as supportive of their conclusion that an implied right of action survived the 1974 Amendments. The *Alken* court contended that the failure of legislation in Congress is not always a reliable indicator of congressional intent.[253] Instead, the *Alken* court theorized that because each bill provided for treble damages, a remedy previously unavailable to claimants suing under the antifraud provision of the CEA, their rejection by Congress merely indicates reluctance to expand the parameters of the damage award rather than evidence of an express intent to nullify an implied private right of action.[254] The *Leist* court suggested that the bill's rejection might be the result of a congressional belief that sufficient remedies already existed.[255]

While recognizing that subsequent legislation is of very limited weight in ascertaining Congress' intent in enacting earlier laws,[256] the reenactment approach views the *parens patriae* provi-

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of primary jurisdiction. The judicial resolution of a private fraud action, for example, requires only the application of specific statutory standards to the particular conduct alleged. The issues raised by a particular fraudulent scheme, however complicated, are entirely within the conventional utility of the courts to resolve and should therefore not occasion referral to the [CFTC].

Statement of the Commodity Futures Trading Commission Concerning Referrals of Private Litigation Under the Doctrine of Primary Jurisdiction, 41 Fed. Reg. 18,471, 18,472 (1976), *quoted in* 485 F. Supp. at 881. *See also* Curran v. Merrill Lynch, Pierce, Fenner & Smith, 622 F.2d 216, 236 (6th Cir. 1980), *cert. granted*, 101 S. Ct. 1971 (1981).

251. Leist v. Simplot, 638 F.2d 283, 321 (2d Cir. 1980), *cert. granted sub nom.* New York Merantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

252. H.R. 11195, 93d Cong., 1st Sess. § 17(3) (1973); S. 2837, 93d Cong., 1st Sess. § 505 (1973); S. 2378, 93d Cong., 1st Sess. § 20(3) (1973). For a brief description of these bills, see Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1356 (D. Nev. 1980).

253. 485 F. Supp. at 877 (citing Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 18-19 (1979)).

254. *Id.*

255. Leist v. Simplot, 638 F.2d 283, 318 (2d Cir. 1980), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

256. *Id.* at 319 (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980)).

sion,[257] adopted in 1978,[258] as some evidence of Congress' intent to adopt an *additional* judicial remedy. The *Leist* and *Alken* courts suggested that the inclusion of state enforcement powers do not indicate congressional intent to abrogate the existing private damages action; instead Congress sought to protect commodities investors from the growing incidence of fraud in other than the regulated contract markets[259] and to affirm the power of the states to enforce their own contract and consumer laws.[260] Accordingly, these courts argue that the legislative history of the exemption of contract markets from the *parens patriae* provision is further indication of congressional awareness of the implied private right of action available to the investor in a contract market.[261] The *Leist* majority noted that the sunset review[262] of the CFTC in 1978 primarily focused on the creation of the *parens patriae* remedy and did not purport to revise the CEA as extensively as the 1974 Amendments. Therefore, the *Leist* majority contended that despite possible congressional awareness of a few district court decisions denying the existence of an implied right, the limited scope of the 1978 Amendments foreclosed any opportunity to expressly create a private right of action under the CEA.[263]

In addition, the reenactment line of cases have relied on the general judicial recognition of implied causes of action under provisions of the Securities Exchange Act of 1934.[264] The majority in *Leist* noted that the Supreme Court did not deem the existence of an implied private right of action worthy of extensive debate in its review of damages suits alleging violations of the antifraud provisions of the federal securities laws.[265] The securities statutes con-

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257. Commodity Exchange Act § 6d, 7 U.S.C. § 13a-2 (Supp. III 1979). *See* note 56 *supra* and accompanying text.

258. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (codified in scattered sections of 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979)).

259. Leist v. Simplot, 638 F.2d at 319-20; Alken v. Lerner, 485 F. Supp. at 878.

260. *See* Commodity Exchange Act § 6d(5), 7 U.S.C. § 13a-2(5) (Supp. III 1979).

261. *Leist* quoted from the legislative history:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by [CFTC] regulation, institution of [CFTC] enforcement proceedings, and *the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the [CEA]*.

638 F.2d at 320 (quoting 124 CONG. REC. S.16527 (daily ed. Sept. 28, 1978)) (emphasis supplied).

262. *See* notes 53-56 *supra* and accompanying text.

263. 638 F.2d at 319-21.

264. 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979).

265. 638 F.2d at 297. A discussion of securities case law on this point is beyond the

tain a variety of other remedies—civil fines, criminal penalties, and express action—which are at least as extensive as those included in the CEA. Thus, the *Leist* court suggested that Congress might have justifiably assumed that courts would follow securities law precedents in this area and, accordingly imply a private right of action under the CEA.[266]

Furthermore, the reenactment approach insists that the restrictive trend of the Supreme Court's implication analysis[267] did not become apparent until Justice Powell's dissent in *Cannon* in 1979.[268] In the four years between the *Cort* and *Cannon* decisions, the majority in *Leist* noted that the federal appellate courts had implied private rights of action in no less than twenty instances.[269] The *Leist* court pointed out that the Supreme Court's refusal to imply a private cause of action in favor of plaintiffs in such cases as *Blue Chip Stamps v. Manor Drug Stores*[270] and *Piper v. Chris-Craft Industries*[271] resulted from its findings that the plaintiffs did not fall within the protective ambit of the federal securities laws. The *Leist* court further emphasized that any indication of a severely limiting trend could not have been perceived "by anyone reading the Court's opinions without an exceedingly high powered magnifying glass."[272] Therefore, when reviewing the CEA in 1974, Congress was most likely unaware of this "well-publicized" restrictive approach.[273]

Having thus demonstrated to their own satisfaction the requisite congressional intent, the courts following the reenactment approach conclude that the third prong of the *Cort* analysis—whether a private right of action is consistent with the underlying statutory scheme—is easily satisfied. Arguing that the legislative history of the 1974 Amendments demonstrates congressional intent to continue a private cause of action for damages, these courts conclude that implication of a judicial remedy is natu-

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scope of this Note.

266. *Id.* at 297-98.

267. *See* notes 335-41 *infra* and accompanying text. *See generally* notes 167-214 *supra* and accompanying text.

268. Leist v. Simplot, 638 F.2d at 303 (citing Cannon v. University of Chicago, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)).

269. " 'In the four years since we decided *Cort*, no less than 20 decisions by the Courts of Appeals have implied private actions from federal statutes.' " 638 F.2d at 320 (quoting Cannon v. University of Chicago, 441 U.S. 677, 741 (1979) (Powell, J., dissenting)).

270. 421 U.S. 723, 730 (1975).

271. 430 U.S. 1 (1977).

272. 638 F.2d at 321.

273. *Id.* at 320.

rally compatible with investor protection.[274] The courts argue that providing an aggrieved futures investor with an election of alternative remedies—reparations, arbitration, and private suits—may deter future fraudulent activities on the part of the broker[275] and thus promote a fair and honest environment for commodity futures trading, a principal goal of the CEA.[276]

Finally, the reenactment approach finds that the fourth requirement of the *Cort* test—whether an implied private right infringes upon an area of traditional state concern—presents no obstacle to a finding of an implied right. The regulation of commodity futures trading has been considered a federal matter since the first federal legislation enacted nearly sixty years ago.[277] Thus, the courts find ample support for their conclusion that a private right of action is implicit under the CEA. Although the reenactment approach dutifully addresses the *Cort* test, another line of authority has employed the *Cort* framework and concluded that no basis exists for an implied private right of action under the CEA after the passage of the 1974 Amendments.[278]

3. The Strict Construction Approach—No Right of Action

The fourth, and final, line of authority applying the *Cort* test to determine whether an implied right of action exists under the current CEA has found that the private right did not survive the 1974 Amendments. This strict construction approach concedes that the first element of the *Cort* test is met—commodity futures

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274. *See, e.g., id.* at 321; Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 233-34 (6th Cir. 1980), *cert. granted,* 101 S. Ct. 1971 (1981).

275. *See, e.g.,* Leist v. Simplot, 638 F.2d at 321; Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 234-35 (6th Cir. 1980), *cert. granted,* 101 S. Ct. 1971 (1981); Alken v. Lerner, 485 F. Supp. 871, 878 (D.N.J. 1980); Smith v. Groover, 468 F. Supp. 105, 115 (N.D. Ill. 1979).

276. For text of the current purpose provision of the CEA, see note 38 *supra.*

277. *See, e.g.,* Leist v. Simplot, 638 F.2d at 322; Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 235 (6th Cir. 1980), *cert. granted,* 101 S. Ct. 1971 (1981); Navigator Group Funds v. Shearson Hayden Stone, Inc., 487 F. Supp. 416, 425 (S.D.N.Y. 1980); Alken v. Lerner, 485 F. Supp. 871, 878 (D.N.J. 1980); Smith v. Groover, 468 F. Supp. 105, 115 (N.D. Ill. 1979).

278. *See, e.g.,* Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542); Leist v. Simplot, 638 F.2d at 323-56 (Mansfield, J., dissenting); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 237 (6th Cir. 1980) (Phillips, J., dissenting), *cert. granted,* 101 S. Ct. 1971 (1981); Walsh v. International Precious Metals Corp., 510 F. Supp. 867 (D. Utah 1981); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345 (D. Nev. 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53 (N.D. Tex. 1979).

investors are included within the ambit of the CEA's protection.[279] Addressing the issue posed by the second element required by *Cort*, these courts have phrased their inquiry into the legislative history as whether there is any evidence of an explicit or implicit intent to *create* or *approve* an implied private cause of action under the CEA. Unable to satisfy themselves that Congress expressed an affirmative intent to create an implied private right of action, these courts conclude that no such remedy should be implied.[280] Unlike the *Curran* and *Leist* courts, the Fifth Circuit, in *Rivers v. Rosenthal & Co.*[281] discerned no congressional intent to approve or create a private cause of action in its examination of the legislative history.

> Stated charitably, we are less certain than . . . several of our sister courts that these few fleeting references—sometimes cryptic and all comparatively isolated among the hundreds of pages of testimony and debate that comprise the legislative history of the 1974 [Amendments]—are sufficient to establish that the *entire* Congress was even aware of and duly considered the existence of any previously inferred cause of action in its deliberations and vote upon the [1974 Amendments]. . . .
>
> Nonetheless, even assuming that these remarks demonstrate Congress' awareness of the prior judicial recognition of an implied right under the CEA . . . these passages unquestionably give no indication that Congress *approved of* and intended to perpetuate such actions as a part of the elaborate express enforcement scheme that it was in the process of fashioning.[282]

The strict construction approach, therefore, expressly rejects

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279. *See, e.g.*, Rivers v. Rosenthal & Co., 634 F.2d 774, 782 n.13 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542). *See also* Leist v. Simplot, 638 F.2d at 326 (2d Cir. 1980) (Mansfield, J., dissenting) (questions whether plaintiffs are within the ambit of the antimanipulative provisions).

280. *See, e.g.*, Rivers v. Rosenthal & Co., 634 F.2d 774, 781-86 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542). *See also* Leist v. Simplot, 638 F.2d at 323-25 (2d Cir. 1980) (Mansfield, J., dissenting); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 237 (6th Cir. 1980) (Phillips, J., dissenting), *cert. granted*, 101 S. Ct. 1971 (1981).

281. 634 F.2d 774 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542).

282. *Id.* at 786 (emphasis in original) (footnotes omitted); *accord*, Leist v. Simplot, 638 F.2d at 327 (2d Cir. 1980) (Mansfield, J., dissenting); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1353-58 (D. Nev. 1980). These opinions construe the same portions of legislative history discussed in notes 226, 239, and 242 *supra* and accompanying text.

The *Rivers* court relied upon SEC v. Sloan, 436 U.S. 103, 119-23 (1978), in which the Supreme Court rejected the contention of the SEC that its construction of § 12K of the Securities Exchange Act of 1934 had been virtually incorporated into that section by Congress' reenactment of the provision in substantially the same form. The *Sloan* Court was reluctant "to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." 634 F.2d at 786 n.20 (quoting SEC v. Sloan, 436 U.S. 103, 121 (1978)).

the premise of the reenactment approach that the *absence* of evidence of intent to deny or nullify a judicial remedy indicates congressional approval of an implied private right of action. Instead, the strict construction approach requires affirmative proof that Congress intended to confer jurisdiction of the CEA not only to the CFTC but also to the judicial branch. Thus, the *Rivers* court and the *Leist* dissent emphasized that, without evidence of *clear* congressional intent, attempts by the courts to create a private right equal judicial legislation.[283]

The courts that follow the strict construction approach criticize the reenactment approach's reliance on *Goodman*.[284] Judge Mansfield, dissenting in *Leist*, determined that *Goodman* was wrongly decided in light of *Cort* and its progeny and the then existing law.[285] According to Judge Mansfield, the statutory tort rationale used in *Goodman* to imply a federal remedy on behalf of a defrauded customer is now an outmoded analysis.[286] The rationale, he stated, failed to meet even the less rigorous then prevailing Supreme Court standards established in *J.I. Case Co. v. Borak*,[287] which required a showing of the necessity of a private right of action to effectuate the statutory purpose.[288] Moreover, he claimed that the proposition asserted in *Goodman*, that an implied private remedy is inherent unless Congress evinced a contrary intention, lacks support in case law.[289] Because *Goodman* is a relatively recent case, Judge Mansfield determined that cases following its holding do not constitute a "longstanding" history upon which to base a presumption that Congress intended for an implied private

283. Leist v. Simplot, 638 F.2d at 327 (Mansfield, J., dissenting) (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); Rivers v. Rosenthal & Co., 634 F.2d at 781-82 n.11.

284. *See* notes 177-81 & 231 *supra* and accompanying text. *See generally* Frankhauser & Selig, *supra* note 98.

285. Leist v. Simplot, 638 F.2d at 341 (Mansfield, J., dissenting). The *Rivers* court stated that while

> the correctness of these decisions is dubious when measured against the present wisdom for determining the existence of implied rights of action . . . this course of allowing the victims of violations to take the initiative and hail their trespassing tormentors before the courts was basically consistent with that era's fundamental approach of relying principally upon the self-policing of the futures trade by those involved in it.

634 F.2d at 779 (citations omitted).

286. Leist v. Simplot, 638 F.2d at 324, 341, 356 (Mansfield, J., dissenting); *see* notes 177-81 *supra* and accompanying text.

287. *See* notes 190-91 *supra* and accompanying text.

288. Leist v. Simplot, 638 F.2d at 341-42 (Mansfield, J., dissenting).

289. *Id.* at 341.

remedy to survive the 1974 Amendments.[290] The *Leist* dissent challenged the majority's contention that the Supreme Court's reversal of *Deaktor* supported the implication of a private right of action under both the antifraud and antimanipulative provisions[291] and criticized their interpretation as logically inconsistent with the Court's decision not to decide either issue.[292]

The strict construction analysis asserts that it is inappropriate to apply the reenactment doctrine to the passage of the 1974 Amendments to find congressional intent to continue an implied private right of action[293] because the doctrine is merely an aid to statutory construction, not a conclusive presumption or rule of substantive law.[294] The *Rivers* court noted that as a canon of construction, the doctrine is applicable to the interpretation of statutes reenacted in substantially the same form. Although many of the substantive provisions of the CEA, including the antifraud section, were virtually unchanged, the court determined that the 1974 Amendments did not constitute a mere reenactment, but rather were a dramatic revision of the regulatory scheme.[295] Examples of the changes in the CEA cited by the *Rivers* court include the expansion of the scope of the statutes beyond agricultural futures,[296] the extensive reform of the regulatory oversight and enforcement systems evidenced by the creation of the CFTC, the shift in emphasis from exchange self-regulation to affirmative federal responsibility for commodity futures legislation,[297] and, most importantly, the creation of the arbitration and reparations procedures.[298] The *Rivers* court stated, "So significant a transfiguration of the extant statutory framework is, itself, a wholesale obliteration of the prior status quo and sufficient reason for declining to adopt plaintiffs' analytical approach, grounded as it is in the reenactment doctrine

290. *Id.* at 340. *Goodman* was decided in 1967.

291. *Id.* at 343; *see* notes 182-84 & 233-35 *supra* and accompanying text.

292. Judge Mansfield questioned the practice of inferring a rule of law from a Supreme Court opinion when the Court had expressly chosen not to consider the issue. 638 F.2d at 343 (Mansfield, J., dissenting).

293. *See* notes 225-29 *supra* and accompanying text.

294. *See* Rivers v. Rosenthal & Co., 634 F.2d 774, 783 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3712 (U.S. Mar. 10, 1981) (No. 80-1542).

295. *Id.* at 783-84.

296. *Id.* at 780. *See* note 43 *supra* and accompanying text.

297. 634 F.2d at 780. *See also* notes 42-52 *supra* and accompanying text.

298. 634 F.2d at 784-85. *See, e.g.*, Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1355-56 (D. Nev. 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53 (N.D. Tex. 1979).

. . . ."[299]

Consistent with the maxim *expressio unius est exclusio alterius*, the *Rivers* court held that the creation of the arbitration and reparations procedures resulted in a presumption against implying a private damages suit.[300] Citing *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*,[301] the *Rivers* court insisted that clear proof of an affirmative congressional intent both to allow an implied right of action and to provide the express remedies is required to rebut the presumption.[302] Similarly, the court in *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[303] asserted that because arbitration and reparations were unavailable under the Investment Advisers Act but available under the CEA, there was less reason to imply a private right of action under the CEA than there was in *Transamerica*, a case in which the remedy was denied. The courts following the strict construction approach have also intimated that the express remedies are sufficiently broad and varied to preclude the necessity and utility of an implied right of action.[304] These courts have also suggested that it is unlikely "that Congress absentmindedly forgot to mention an intended private action."[305] The dissent in *Leist* maintained that Congress was under no duty to state that the remedies it provides in a statute are exclusive.[306]

Addressing the savings clause added by the 1974 Amendments, the *Rivers* court contended that the language of the provision fails to demonstrate an intent to preserve an implied right of action, and criticized the reliance of the reenactment approach upon speculative legislative history.[307] Instead, the strict construction approach contends that Congress did not intend the savings clause to dilute the CFTC's grant of exclusive jurisdiction. The *Mullis* court determined that Congress included the savings clause

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299. 634 F.2d at 784.

300. *Id.*

301. 444 U.S. 11 (1979). *See* notes 210-14 *supra* and accompanying text.

302. 634 F.2d at 784-85; *accord,* Leist v. Simplot, 638 F.2d 283, 340 (2d Cir. 1980) (Mansfield, J., dissenting), *cert. granted sub nom.* New York Mercantile Exch. v. Leist, 101 S. Ct. 1346 (1981).

303. 492 F. Supp. 1345, 1355-56 (D. Nev. 1980).

304. *See, e.g.,* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 55-56 (N.D. Tex. 1979).

305. *E.g., id.* at 56 (quoting Cannon v. University of Chicago, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)).

306. 638 F.2d at 324 (Mansfield, J., dissenting) (citing T.I.M.E., Inc. v. United States, 359 U.S. 464 (1958)). *See also* Rivers v. Rosenthal & Co., 634 F.2d at 784 n.16.

307. 634 F.2d at 787. In a footnote, the court also observed that "a provision such as that in § 2, which explicitly directs the retention of jurisdiction, need not also denote the retention of an individual cause of action." *Id.* at n.25.

to ensure that all proceedings pending at the time of the 1974 Amendments, both investigations and court actions, could continue without interference.[308] Both *Mullis* and *Fischer v. Rosenthal & Co.*[309] indicated that at least one purpose of the savings clause was to guarantee appellate jurisdiction to review reparations decisions.[310] Alternatively, the dissent in *Leist* suggested that the clause may have been inserted to preserve federal court jurisdiction over antitrust claims and state court jurisdiction over contract claims.[311] Citing *Touche Ross*, the *Leist* dissent also noted that as a jurisdictional provision, the savings clause could not provide the basis on which to presume or preserve an implied right of action.[312]

The strict construction approach rejects the deference the reenactment approach accords to the opinions of the CFTC that acknowledge the continued existence of a private damages action.[313] Citing *Piper v. Chris-Craft Industries*,[314] the *Rivers* court observed

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308. 492 F. Supp. at 1356. "[S]ection 412 (§ 2) 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 [1974 Amendments]. This also is necessary in order to prevent the creation of any regulatory gaps." 120 CONG. REC. 34997 (1974) (remarks of Sen. Talmadge), *cited in* 492 F. Supp. at 1356 n.21.

309. 481 F. Supp. 53 (N.D. Tex. 1979).

310. Mullis v. Merrill Lynch, Pierce, Fenner & Smith, 492 F. Supp. at 1356; Fischer v. Rosenthal & Co., 481 F. Supp. at 57. "It is hoped that giving the [CFTC] this authority will somewhat lighten the burden on the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved." 120 CONG. REC. 30459 (1974) (remarks of Sen. Talmadge), *cited in* Mullis v. Merrill Lynch, Pierce, Fenner & Smith, 492 F. Supp. at 1356 n.22; Fischer v. Rosenthal & Co., 481 F. Supp. at 57.

311. Leist v. Simplot, 638 F.2d at 351 (Mansfield, J., dissenting). Judge Mansfield cited the following remarks of Rep. Rodino:

> Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption . . . .
>
> In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. . . . That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exemption provision: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws.

Hearings on S. 2485, supra note 226, at 259-60, *cited in* 638 F.2d at 351 n.21 (Mansfield, J., dissenting).

312. 638 F.2d at 352-53 (Mansfield, J., dissenting). "The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [Act] which they seek to enforce, not in the jurisdictional provision." Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979), *cited in* 638 F.2d at 352-53 (Mansfield, J., dissenting).

313. *See* notes 247-51 *supra* and accompanying text.

314. 430 U.S. 1 (1977). In *Piper* the Court refused to imply a private right of action under § 14(e) of the Securities Exchange Act of 1934 because the plaintiff, an unsuccessful

that the Supreme Court had ignored the urgings of the relevant agency when dealing with the implication issue under a provision of the securities statutes.[315] In *Piper* the Court recognized that the SEC's interpretation of the federal securities laws deserved some deference, but in determining whether a private cause of action could be implied, a matter peculiarly reserved for judicial resolution, the SEC's expertise was of little value.[316] Similarly, the *Leist* dissent noted that in the past the Court had declined to invoke the administrative deference rule even when the SEC's opinion supported the Court's conclusion.[317] Therefore, the dissent in *Leist* inferred that the CFTC's position on the implication issue was not determinative.[318]

Another persuasive argument proffered by the strict construction approach emphasizes the failure of Congress to expressly provide a private damages action in 1974 and 1978. The rejection in 1974 of three bills,[319] each granting a private right of action, constituted "clear evidence" to the *Mullis* court and the *Leist* dissent of congressional intent to repudiate such a remedy.[320] Moreover, the *Mullis* court reasoned, if the treble damages provision contained in each bill was objectionable, it could have been deleted without having to reject the entire measure.[321] In addition, by 1978 Congress was aware that several courts had denied the existence of implied damages suits under the CEA and could have instituted an express right of action had it so desired. The only judicial remedy Congress enacted in response, however, was the *parens patriae* clause.[322] Enactment of the statutory cause of action for state enforcement further supported the contention of the *Leist* dissent that "when Congress intended to create a right of action under the

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tender offeror, was not included within the protective ambit of the statute.

315. 634 F.2d at 783 n.14; *accord,* Leist v. Simplot, 638 F.2d at 331 n.4 (Mansfield, J., dissenting).

316. 430 U.S. at 41 n.27 (1977).

317. 638 F.2d at 331 n.4 (Mansfield, J., dissenting).

318. *Id.*

319. *See* note 252 *supra* and accompanying text.

320. Leist v. Simplot, 638 F.2d at 345 (Mansfield, J., dissenting); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. at 1356; *accord,* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56-57 (N.D. Tex. 1979). The *Rivers* court, however, stated that no clear indication of Congress' intent could be discerned from its failure to enact any of the three proposed bills. 634 F.2d at 788.

321. 492 F. Supp. at 1356.

322. *See* Leist v. Simplot, 638 F.2d at 353 (Mansfield, J., dissenting); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. at 1357. *See also* note 56 *supra* and accompanying text.

[CEA] it did so expressly, not by implication."[323]

The *Rivers* court, acknowledging that views of subsequent Congresses are entitled to less weight than the enacting Congress when examining the intent behind a statute,[324] noted that remarks of at least two legislators in 1978 indicate their awareness of an implied private cause of action under the 1974 version of the CEA.[325] The court determined, however, that other portions of the legislative history of the 1978 Amendments evidence the absence of such an awareness throughout Congress.[326] First, a Senate report listing investor protections under the CEA contained no mention of an implied private cause of action.[327] Second, the *Rivers* court noted that the *parens patriae* provision provided for exclusive jurisdiction in the federal courts whereas no similar provision can be found in the CEA generally. The court stated that "it would be anomalous indeed for Congress to require exclusive jurisdiction only of these relatively infrequent suits by states while continuing to countenance an implied cause of action, without such a restriction, for any individual who cares to sue."[328] Therefore, the court inferred that no individual causes of action were contemplated by Congress in 1974.[329]

The strict construction approach attacks the analogy drawn by the reenactment approach between implied rights under the CEA and those under the federal securities laws.[330] First, no "longstanding" history of an implied right can be found under the antifraud provision of the CEA, unlike the twenty-five year history of lower courts implying a private cause of action under section 10(b) and rule 10b-5 of the Securities Exchange Act.[331] Second, although the federal securities laws contain express remedies, there exists no administrative proceeding similar to reparations in which to recover

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323. 638 F.2d at 354 (Mansfield, J., dissenting). *See also* Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. at 1357.

324. 634 F.2d at 789 (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980)).

325. *Id.* at 790 n.30 (citing 124 CONG. REC. 10,537 (1978) (remarks of Sen. Huddleston), 124 CONG. REC. S16,527 (daily ed. Sept. 28, 1978) (remarks of Sen. Leahy)).

326. *Id.* at 790.

327. *Id.*

328. *Id.* at 791.

329. *Id.* at 791-92.

330. *See* notes 264-66 *supra* and accompanying text.

331. 15 U.S.C. § 78j(b) (1976); 17 C.F.R. § 240.10b-5 (1980). *See* Leist v. Simplot, 638 F.2d at 343 (Mansfield, J., dissenting) (citing Superintendent of Ins. v. Banker's Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971)).

compensatory damages.[332] Therefore, because the express remedies under the securities laws are punitive and remedial, they are less complete than the compensatory remedies under the CEA, and any analogy between the judicial history of private rights under the two regulatory schemes is, therefore, of limited relevance.[333] Last, unlike the CEA, the Securities Exchange Act grants *general* jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty."[334]

Recognizing that statutory construction must be based on the law in effect at the time of their decision,[335] several courts have stressed the Supreme Court's recent restrictive approach towards implying private rights of action under federal statutes.[336] Citing *National Railroad Passenger Corp. (AMTRAK) v. National Association of Railroad Passengers*[337] and *Transamerica*, the courts following the strict construction approach have noted the reluctance of the Supreme Court to imply a private suit to recover damages under a statute containing express remedial provisions and have adopted the Court's rationale that the granting of judicial relief in such situations is unnecessary to fulfill the statute's purpose.[338] The *Mullis* court indicated that, in light of *Touche Ross* and *Transamerica*, a high level of proof of satisfaction of the congressional intent element of the *Cort* test is necessary.[339] The *Leist* dissent advised that mere speculation of congressional intent was totally unsatisfactory and must be avoided.[340] Justice Rehnquist's

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332. Leist v. Simplot, 638 F.2d at 344 (Mansfield, J., dissenting).

333. *Id.*

334. Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976).

335. *See, e.g.*, Leist v. Simplot, 638 F.2d at 325 (Mansfield, J., dissenting) (citing Cort v. Ash, 422 U.S. 66, 77 (1975)).

336. *E.g.*, 638 F.2d at 325 (Mansfield, J., dissenting); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d at 237 (Phillips, J., dissenting); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. at 1354; Fischer v. Rosenthal & Co., 481 F. Supp. 53 (N.D. Tex. 1979).

337. 414 U.S. 453 (1974). In *Amtrak*, the Court refused to imply a private cause of action to challenge the discontinuance of train service under § 307(a) of the Rail Passenger Service Act of 1970, 45 U.S.C. § 547 (1976), which confers enforcement powers upon federal district courts on petition of the U.S. Attorney General.

338. "The courts, in adopting a restrictive approach to the implication of private actions, should pay particular attention to whether the private remedy is necessary to effectuate Congressional goals." Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345, 1354 (D. Nev. 1980). *See also* Leist v. Simplot, 638 F.2d at 333 (Mansfield, J., dissenting); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 55 (N.D. Tex. 1979).

339. Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. at 1355.

340. "Extrapolations based on gossamerthin fabric, requiring speculative assumptions as to Congress' intent are to be avoided. To rely upon such weak inferences is to indulge in judicial legislation." 638 F.2d at 327 (Mansfield, J., dissenting). *See also* Curran v. Merrill

concurring opinion in *Cannon* succinctly summarizes the current trend of the Supreme Court:

> Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.[341]

Once a court concludes that no clear affirmative congressional intent to either approve or create an implied private right of action under the CEA has been demonstrated, no further consideration of the *Cort* test is necessary.[342] The *Mullis* and *Fischer* courts, however, addressed the third element of the Court's implication analysis—whether a private right of action is consistent with the underlying statutory scheme—and concluded that the CFTC's enforcement powers and the existence of the administrative reparations procedure are inconsistent with an implied private remedy.[343] The *Rivers* court acknowledged that an implied private right of action would be helpful and consistent with the investor protection purpose of the CEA, but it noted that Congress also intended for the 1974 Amendments to create a "uniform regulatory structure" to develop a coherent and consistent body of law. Viewing the implication of a private damages suit as a potential barrier to achieving this congressional objective, the *Rivers* court stressed that the courts should be especially reluctant to imply a private right of action in the face of congressional silence when the promotion of one statutory purpose would disserve another.[344]

Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 237 (6th Cir. 1980) (Phillips, J., dissenting), *cert. granted,* 101 S. Ct. 1971 (1981).

341. Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring), *cited in* Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 237 (6th Cir. 1980) (Phillips, J., dissenting), *cert. granted,* 101 S. Ct. 1971 (1981).

342. Transamerican Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 22-24 (1979).

343. Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. at 1357; Fischer v. Rosenthal & Co., 481 F. Supp. at 57.

344. Rivers v. Rosenthal & Co., 634 F.2d at 791 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978)); *accord,* Mullis v. Merrill Lynch, Pierce, Fenner & Smith, 492 F. Supp. at 1357.

The fourth prong of the *Cort* analysis—whether the cause of action would infringe upon an area traditionally of state concern—can be resolved rather easily by the strict construction approach, and has received little attention by these courts. In *Rivers,* the defendants conceded that commodities regulation was traditionally a matter of federal concern, and the court did not discuss the issue further. 634 F.2d at 782 n.13. The *Fischer* court conducted a perfunctory examination of the issue and concluded that it had no relevance. 481 F. Supp. at 57. Neither the *Mullis* court, the dissent in *Curran,* nor the dissent in *Leist* gave any consideration to the fourth factor.

D. Analysis

The second element of the *Cort* analysis—whether "there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"[345]—is the focal point of the division between the reenactment and the strict construction approaches. The nature of the inquiry by each approach determines the resolution of whether an implied private right of action exists under the CEA. Because several courts determined that a private remedy existed prior to passage of the 1974 Amendments, the reenactment approach[346] asks whether the legislative history contains any indication of an intent to abolish the preexisting private right of action. Conversely, the strict construction approach[347] asks whether the legislative history indicates an intent to *create* or *approve* an implied private right of action. In fact, the sparse and inconclusive legislative history provides no concrete basis upon which courts can make a conclusive determination. Each approach uses the sparcity of the legislative history to its advantage: the reenactment approach finds no evidence of an intent to abolish an implied action and the strict construction approach finds no evidence of an intent to create an implied action.

An examination of recent Supreme Court decisions, however, indicates that the *Curran* and *Leist* majority decisions espousing the reenactment approach are inconsistent with the *Cort* analysis as refined by the Court in *Cannon*, *Touche Ross*, and *Transamerica*. Recent decisions of the Court have made clear that the critical inquiry into the congressional state of mind is a search for legislative intent to *create* a private right of action under the relevant statute;[348] the latter part of the second *Cort* factor—"or to deny"—is no longer emphazied by the Court. The difficulty of establishing a congressional intent to create an implied right of action is enhanced by the need to resolve several complex issues. First, at what point does prior judicial precedent reach the status of a "longstanding" rule of law[349] in order to place an affirmative burden upon Congress to expressly overrule it? Second, what weight is given to whether the "longstanding" precedent is from a

345. Cort v. Ash, 422 U.S. 66, 78 (1975).

346. *See* notes 222-278 *supra* and accompanying text.

347. *See* notes 279-344 *supra* and accompanying text.

348. *See* notes 202, 209 & 211 *supra* and accompanying text.

349. While an implied right of action under the securities laws has long been recognized by the courts, *see* text accompanying notes 104-05 *supra*, such a longstanding history of an implied remedy does not exist under the CEA, *see* text accompanying note 290 *supra*.

lower or appellate court? Third, when should remarks by legislators be considered conclusive? Last, when is it proper for the courts to establish the dimensions of an implied remedy, such as the scienter and materiality requirements?[350]

The courts that would imply a private right of action improperly apply the reenactment doctrine in their attempt to justify the conceptual leap from a finding of congressional awareness of an existing private right of action to the presumption that Congress intended for the judicial remedy to survive the comprehensive 1974 Amendments.[351] The inapplicability of the reenactment doctrine is evidenced by Congress' refusal to reenact a substantially similar law and its dramatic restructuring of the regulatory scheme to include administrative procedures to redress aggieved commodity futures investors.[352] Furthermore, the relatively small number of lower federal court cases that had unequivocally implied a private right of action before 1974 does not justify imputing awareness of this remedy throughout Congress.

The dismissal by *Leist* and *Alken* of the importance of Congress' failure to adopt any of the three bills creating a private right of action[353] is unjustified. Certainly an objectionable treble damages provision would have been removed if it were the only barrier to the legislation.[354] If the reenactment approach's premise that Congress was aware of a judicially implied remedy prior to 1974[355] is accepted, then it is at least arguable that Congress should have been prompted to institute an express private right of action in 1978 in order to overrule post-1974 decisions that denied a private remedy under the CEA. Moreover, the creation of a *parens patriae* remedy in 1978 is indication of Congress' recoguition that a judicial remedy was warranted in *limited* circumstances.

In addition to the inherent weaknesses of the reenactment approach, the logical consistency of the *Rivers* line of authority demands the conclusion that the strict construction approach offers the correct analysis. *Rivers*, *Mullis*, and *Fischer* demonstrate a faithful adherence to the Supreme Court's restrictive approach towards implication analysis by phrasing their inquiry in accordance with *Cannon*, *Touche Ross*, and *Transamerica*. The strict con-

350. *See* Note, *supra* note 184, at 296-97.
351. *See* notes 225-29 *supra* and accompanying text.
352. *See* notes 41-52 *supra* and accompanying text.
353. *See* notes 252-55 *supra* and accompanying text.
354. *See* notes 320-21 *supra* and accompanying text.
355. *See* note 226 *supra* and accompanying text.

struction approach is unwilling to find Congressional approval of an implied right of action from sparse and inconclusive legislative history.[356] Consistent with *Transamerica*, the *Rivers* court correctly attributed great significance to the broad enforcement scheme and express remedies of the 1974 Amendments as indications of congressional intent *not* to create a private right of action.[357]

Obvious policy considerations, however, make an implied private right of action a desirable and needed remedy under the CEA. In particular, the inefficient and inadequate procedures currently available under the CFTC[358] encourage courts to provide an alternative remedy. The existence of a judicial remedy could conceivably instill confidence and encourage investors to enter the market.[359] As the number of participants in the commodity futures market increases, greater price stabilization results and consumers are thereby protected from sharp price fluctuations.[360] Notwithstanding the compelling policies that support the implication of a private right of action, it is improper for the judicial branch to substitute its judgment for that of the legislative branch in devising laws. Indeed, the implication of a private remedy without convincing evidence of congressional intent amounts to judicial usurpation of the legislative function. Therefore, whatever policy considerations exist in favor of an implied private right of action must give way to the courts' constitutionally assigned role.

V. CONCLUSION

This Note has explored and evaluated some of the more pressing issues in commodities law. In light of the upcoming congressional reauthorization hearings, it is important that the deficiencies in the current regulatory scheme be discussed and clearly identified. Congress should take these discussions into account and act to refine those areas that have proven the most troublesome to the defrauded or otherwise injured commodity futures investor.

Congress must address several matters when it considers the CEA in 1982 under sunset review. First, Congress should remedy the current deficiencies in the reparations and arbitration procedure. Second, for those circumstances in which commodities fu-

356. *See* notes 282-83 *supra* and accompanying text.
357. *See* notes 295-300 *supra* and accompanying text.
358. *See* notes 58-103 *supra* and accompanying text.
359. Note, *supra* note 173, at 822-23.
360. *See* notes 4-7 *supra* and accompanying text.

tures contracts qualify for recovery under the Securities Exchange Act, Congress should resolve the problem of overlapping SEC and CFTC jurisdiction. Last, and most important, Congress should carefully evaluate the enforcement and remedial provisions under the CEA and determine whether an implied right of action is warranted.

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