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PRIVATE RIGHTS OF ACTION UNDER THE COMMODITY EXCHANGE ACT— THE SUPREME COURT DECIDES

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INTRODUCTION

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*,[1] the Supreme Court held that a private right of action exists under the Commodity Exchange Act (CEA).[2] This decision is significant because it indicates that the Court may have abandoned its painstakingly developed test for implying private rights of action set forth in *Cort v. Ash*,[3] and has reversed the recent trend in denying private remedies under sister legislation, the federal securities laws.[4]

The purpose of this article is to analyze *Curran* by examining the arguments relevant to the implication of a private right

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1. 456 U.S. 353, 102 S. Ct. 1825 (1982). *Curran* was consolidated with New York Mercantile Exch. v. Leist, 638 F.2d 283 (2d Cir. 1980), *cert. granted*, 450 U.S. 910 (Feb. 23, 1981) (No. 80-757); Clayton Brokerage Co. v. Leist, 638 F.2d 283 (2d Cir. 1980), *cert. granted*, 450 U.S. 910 (Feb. 23, 1981) (No. 80-895); Heinold Commodities, Inc. v. Leist, 638 F.2d 283 (2d Cir. 1980), *cert. granted*, 450 U.S. 910 (Feb. 23, 1981) (No. 80-936).

2. 7 U.S.C. §§ 1—24 (1976 & Supp. III 1978).

3. 422 U.S. 66 (1975). *See infra* notes 120-40 and accompanying text.

Indeed, some district courts have read *Curran* as establishing a new test to determine whether a private right of action should be implied in certain legislation. These courts simply look to "the contemporary legal context" in which Congress was legislating. If judicial opinions allowed a private right of action under existing legislation, and Congress took no subsequent legislative action to the contrary, the existence of a private right of action could continue as being "sanctioned" in the "contemporary legal context" of the legislation. *See, e.g.*, Jacobs v. Pabst Brewing Co., 549 F. Supp. 1050 (D.C. Del. 1982). Further analysis of this recent interpretation of *Curran* is outside the scope of this article. However, whether the Court meant to supplant the detailed *Cort* analysis with *Curran's* simplistic approach will probably be determined when the Court next considers the implied private action issue.

4. *See* Cort v. Ash, 422 U.S. 66 (1975). *See also infra* notes 120-40 and accompanying text.

of action under the CEA. As a prelude, a discussion of commodity futures trading and a historical overview of the governing law will be presented. The appellate decisions in the two principle consolidated actions, *Curran* and *Leist*, that affirmed the implication of a private right of action will be summarized. In addition, *Rivers v. Rosenthal and Co.*,[5] a related Fifth Circuit case where *certiorari* was pending at the time *Curran* was decided, will also be discussed. *Rivers* is interesting because the Fifth Circuit denied a private right of action under the CEA, perhaps adding impetus to the Court's grant of *certiorari* in the principal cases.[6]

The appellate courts in the foregoing actions each applied *Cort* and reached different results. Therefore, a thorough understanding of the issues requires that the development of *Cort* be traced, that its test be set forth, and its progeny analyzed. The CEA, too, will be examined with special reference to the private right of action issue. With the foregoing as background, the arguments considered by the Supreme Court in *Curran* will be discussed.

A significant body of argument and authority suggests that *Curran* was wrongly decided. Justice Stevens' majority opinion deviates from the principles enunciated in *Cort* and from recent precedent where private rights of action were denied under various provisions of the federal securities laws. Had the facts and arguments in *Curran* and *Leist* been analyzed using the *Cort* criteria, a different and better result would have obtained. The article will conclude with a suggestion for congressional action.

BACKGROUND

Commodity Futures Trading

A commodity futures contract is a standardized executory agreement covering a fixed quantity of a particular commodity.[7] The seller of a contract is bound to deliver the specific quality or grade of a commodity at a fixed future date at a fixed delivery point.[8] The only variable is the price. The value of the commodity subject to the futures contract is determined by the laws of

5. 634 F.2d 774 (5th Cir. 1980), *petition for cert. filed*, 490 U.S.L.W. 2505 (U.S. March 10, 1982) (No. 80-1542). *Rivers* was subsequently vacated and remanded to the appellate court for further consideration in light of *Curran*. — U.S. —, 102 S. Ct. 2228 (1982). *On remand*, 686 F.2d 297 (5th Cir. 1982).

6. — U.S. —, 102 S. Ct. 1825, 1828 n.5 (1982).

7. Clark, *Genealogy and Genetics of "Contract of Sale of a Commodity for Future Delivery" in the Commodity Exchange Act*, 27 EMORY L. J. 1175, 1178 (1978).

8. T. HIERONYMUS, ECONOMICS OF FUTURES TRADING 36-40 (2d ed. 1977).

supply and demand as expressed in trading on one of the nation's contract markets (an exchange).

A transaction in a commodity futures contract is initiated when a customer contacts a futures commission merchant (FCM) and places an order to either purchase or sell a designated futures contract for his account. The FCM is responsible for executing and confirming the order and maintaining a record of its customer's positions and completed transactions.[9] The FCM is registered with the Commodity Futures Trading Commission (CFTC).[10] The FCM transmits its customer's order to the floor of the exchange. A floor broker positions himself at the trading pit where other traders and floor brokers are trading the same commodity. A contract is formed when two parties in the pit, either acting for their respective accounts (traders or locals), or on behalf of a customer (floor broker), reach an agreement as to price. The transaction is recorded and disseminated over the exchange's price reporting system.

All trades made each day are processed in the exchange's clearing house.[11] The role of the clearing house is to match all purchases and sales and determine the FCM's daily margin requirement; that is, the good faith deposit posted to assure fulfillment of the futures contract.[12] A FCM's daily margin requirement will vary; sometimes the FCM will require a deposit of additional funds, while at other times the FCM will have a credit balance in its clearing house account. The FCM, in turn, requires margin from its customers. The margin requirements are a small percentage of the total value of the futures contract. As the price of the futures contract fluctuates, one party to the trade has a profit, the other a loss. The FCM will demand additional margin from the customer on the losing end of the trade. The buyer of the contract is said to be "long," the seller "short." If after the transaction the price of the futures contract increases, the buyer has a profit; the difference between his purchase price and the current, higher price. The seller has a loss in the same amount. On the other hand, if the price of the contract declines after the transaction, the seller has a profit, which is the difference between his sale price and the current, lower price. The buyer then has the loss.

Since the futures contracts are standardized, they are fungi-

9. Greenberg, *On Being Regulated: Remarks By A Futures Commission Merchant*, 6 HOFSTRA L. REV. 143, 145 (1977).

10. *Id.* at 144.

11. Not all FCMs are members of the clearing house. In such cases, the FCM must contract with a member FCM to clear its trades.

12. Bianco, *The Mechanics of Future Trading: Speculation and Manipulation*, 6 HOFSTRA L. REV. 27, 34 (1977).

ble.[13] The original parties to the transaction can close out their positions by making an offsetting trade in the market. A party who has a profit can realize it by placing an order opposite the one he originally placed. A party with a losing position can cut his loss by placing his order to offset his original position. Stated simply, a buyer with a profitable position will place a sell order; a seller with a profitable position will place a buy order.[14] If the party with the loss cannot deposit the maintenance margin demanded, the FCM will liquidate the contract on the exchange, and that party will be liable to the FCM for the deficit in his account.

In reality, only about three per cent of all futures contracts result in delivery. The vast majority of positions are offset or liquidated prior to the contract expiration date.[15] The value of commodity futures trading is in its price discovery and risk-shifting functions. Producers, manufacturers, processors, consumers, and others utilize the futures markets to determine future prices and thus "hedge" their market risk. Balancing the equation is the speculator, who will assume the risk the hedger seeks to avoid by taking the other side of a hedger's trade in the hope of realizing a profit.[16]

History of Commodity Futures Legislation

The Futures Trading Act[17] was Congress' first attempt to regulate commodity futures transactions. This legislation was the result of demands for control due to post-World War I speculative excesses on the grain exchanges.[18] The Act was quickly declared unconstitutional in *Hill v. Wallace*[19] because it was based on the taxing power of the federal Constitution. A tax was levied on all futures contracts not traded on a designated exchange.[20] The Act was redrafted to eliminate the penalty for failure to pay the tax, substituting the penalty for unlawfully dealing in commodity futures off a designated exchange. The

13. Leist v. Simplot, 638 F.2d 283, 286 (2d Cir. 1980). Fungible goods are those capable of being exchanged or substituted for another, equivalent unit. BLACK'S LAW DICTIONARY 607 (rev. 5th ed. 1979).

14. Bianco, *supra* note 12, at 34.

15. H.R. REP. NO. 975, 93d Cong., 2d Sess. 130 (1974).

16. Clark, *supra* note 7, at 1205.

17. Act of August 24, 1921, ch. 86, 42 Stat. 187 (1921), *superseded by* The Grain Futures Act, ch. 545, 42 Stat. 998 (1922).

18. The purpose of the Futures Trading Act was to tax grain futures contracts which were traded on nonlicensed exchanges. S. REP. NO. 1131, 92d Cong., 1st Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843 [hereinafter cited as 1974 U.S. CODE CONG. & AD. NEWS].

19. 259 U.S. 44 (1922).

20. *Id.*

other provisions of the 1921 Act[21] were maintained, and the Act was renamed the Grain Futures Act.[22]

Under the Grain Futures Act, the U.S. Department of Agriculture was vested with the authority to investigate possible price manipulations.[23] As a result of the Department's recommendations for additional legislation, Congress conducted hearings from 1934 to 1936. The 1936 amendments resulted in renaming the legislation the Commodity Exchange Act (CEA).[24] The CEA adopted most of the previous Acts' provisions in which the only regulated commodity was grains. Cotton, butter and eggs, however, were added to the commodities covered by the new legislation.[25]

The CEA gave a Commission, which consisted of the Secretaries of Agriculture and Commerce and the Attorney General, authority to fix quantitative limits on an individual's trading of commodity futures contracts.[26] An antifraud section was created,[27] and registration of FCMs and floor brokers was required.[28] The purpose of the Act was:

> to deal with market abuses by traders generally as well as exchange members, to prosecute price manipulation as a criminal offense, to curb excessive speculation by the large market operator, and to extend regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud, and fictitious transactions in futures which were seriously impairing the services of the market.[29]

Between 1936 and 1968, only minor amendments to the CEA were made, basically adding additional commodities to the Act's coverage.[30]

The 1968 amendments made several changes: FCMs were required to meet minimum specified financial standards;[31] live-

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21. Both the 1921 and 1922 Acts limited commodity futures trading to designated contract markets, vested the Secretary of Agriculture with the power to designate a contract market, and created a penalty for contract markets which failed to prevent price manipulation by their members.

22. Rainbolt, *Regulating the Grain Gambler and His Successors*, 6 HOFSTRA L. REV. 1, 7 (1977). The Grain Futures Act was held constitutional in Board of Trade v. Olson, 262 U.S. 1 (1923).

23. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 18, at 5855.

24. 7 U.S.C. § 1 (1936).

25. *Id.* at § 2. *See also* 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 18, at 5855.

26. 7 U.S.C. § 6a(1) (1936). The power is based on the burden on interstate commerce which would result from any manipulation, the same rationale as that used in the Grain Futures Act.

27. *Id.* at § 6b.

28. *Id.* at §§ 6d-e.

29. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 18, at 5855.

30. 1974 U.S. CODE CONG. & AD. NEWS, *supra* note 18, at 5855.

31. 7 U.S.C. § 6f (1964 & Supp. IV 1968).

stock and livestock products were included under the Act;[32] contract markets were required to keep adequate records of matters discussed and actions taken;[33] and the Secretary of Agriculture was given the power to issue cease-and-desist orders.[34] No private right of action, however, was expressed in the amendments.[35]

The 1974 amendments constituted a radical departure from the existing legislative scheme. The Act's scope, originally limited to agricultural commodity futures, was increased to include all types of goods or services which are or might be sold by future delivery.[36] The newly established Commodity Futures Trading Commission was given control over all operations of the Commodity Exchange Commission and the Secretary of Agriculture under the CEA, including pending administrative proceedings.[37] The CFTC was given the power to bring an action to enjoin a violation of the Act and to compel compliance through a writ of mandamus. In addition, the Commission could disapprove rules and regulations made by a contract market.[38] New recourse procedures for those aggrieved in commodity futures transactions were established. Requirements for voluntary arbitration procedures for settlement of customer grievances and claims not exceeding $15,000 were adopted.[39] A party claiming damages due to a violation of the CEA could initiate a reparations proceeding against any person registered pursuant to certain sections of the Act.[40] Penalties for manipulation and embezzlement were increased.[41] Again, no private right of action was expressed in the amendments.[42]

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32. *Id.* at § 2.

33. *Id.* at § 7a.

34. *Id.* at § 13a.

35. Even though the 1968 amendments did not expressly grant a private right of action for parties injured as a result of CEA violations, courts did imply a private remedy. *See, e.g.*, Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973), *rev'd on other grounds sub nom.* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973); J.R. Booth Co. v. Peavey Co. Commodity Serv., 430 F.2d 132 (8th Cir. 1970); Arnold v. Bache & Co., 377 F. Supp. 61 (M.D. Pa. 1973); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338 (E.D. La. 1972); United Egg Producers v. Bauer Int'l Corp., 311 F. Supp. 1375 (S.D.N.Y. 1970); Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).

36. 7 U.S.C. § 2 (1974).

37. *Id.* at § 4a.

38. *Id.* at § 12a(7).

39. *Id.* at § 7a(11).

40. *Id.* at § 18(e). The alleged violation may be of the Act itself or any rule, regulation, or order thereunder.

41. *Id.* at § 13a.

42. Post-1974 cases were split on whether a private right of action should be implied. Cases in favor of a private remedy include Pollack v.

The 1978 amendments were designed principally to strengthen the regulation of the commodity futures industry.[43] In this connection, Congress prohibited any CFTC commissioner and certain employees from transacting business with the CFTC for one year after leaving the CFTC[44] and applied antifraud provisions to registered and nonregistered advisers or commodity pool operators.[45] Further, the amendments created a statutory cause of action under the CEA or CFTC regulations whereby a state may seek injunctive relief in addition to proceedings under the applicable state criminal or civil antifraud laws.[46] Criminal penalties for FCMs convicted of embezzlement or manipulation were increased from $100,000 to $500,000.[47]

CURRAN AND *LEIST*: THE APPELLATE DECISIONS

Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.[48]

In *Curran*, the plaintiffs were customers of the defendant Merrill Lynch, a futures commission merchant. They alleged a substantial financial loss as a result of the defendant's mismanagement of their discretionary commodity futures trading accounts.[49] The plaintiffs had opened accounts with Merrill Lynch in order to trade commodity futures contracts. The written agreement presented to and signed by the plaintiffs contained a clause in which the plaintiffs agreed to submit any dispute arising out of the commodity account contract to arbitration within one year after the claim arose. The plaintiffs alleged that they were fraudulently induced to open discretionary accounts, and that after opening the accounts the broker mismanaged them.

Citrus Assoc., 512 F. Supp. 711 (S.D.N.Y. 1981); Witzel v. Chartered Sys's Corp., 490 F. Supp. 343 (D. Minn. 1980); Jones v. B.C. Christopher & Co., 466 F. Supp. 213 (D. Kan. 1979); R.J. Hereley & Son & Co. v. Stotler & Co., 466 F. Supp. 345 (N.D. Ill. 1979); Hofmayer v. Dean Witter & Co., 459 F. Supp. 733 (N.D. Cal. 1978). Cases rejecting implied private rights of action include Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980); Stone v. Saxon & Windsor Group, Ltd., 485 F. Supp. 1212 (N.D. Ill. 1980); Liang v. Hunt, 477 F. Supp. 891 (N.D. Ill. 1979); National Super Spuds, Inc., v. New York Mercantile Exch., 470 F. Supp. 1256 (S.D.N.Y. 1979); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311 (S.D. Ohio 1979); Bartels v. International Commodities Corp., 435 F. Supp. 865 (D. Conn. 1977).

43. S. REP. NO. 850, 95th Cong., 2d Sess. 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2087, 2089.

44. 7 U.S.C. § 4a(f)(2) (Supp. II 1978).

45. *Id.* at § 6o.

46. *Id.* at § 13a-2.

47. *Id.* at § 13.

48. 622 F.2d 216 (6th Cir. 1980). The Supreme Court opinion is found at 456 U.S. 353, 102 S. Ct. 1825 (1982). *See infra* notes 280, 296-321 and accompanying text.

49. 622 F.2d at 219.

They also claimed that the accounts diminished in value due to the broker's excessive trading and failure to observe "stop loss" orders. Finally, despite plaintiffs' repeated requests, the broker either refused to close the accounts or convinced the plaintiffs not to do so.[50]

When the accounts were finally closed out, their value had declined greatly, and the defendant had accrued a sizeable sum in commissions.[51] In response to the complaint, Merrill Lynch asserted an affirmative defense, stating that any customer participating in the accounts had been advised to be prepared to risk the amount invested. Further, though Merrill Lynch agents offered advice, the customer had the final decision whether to buy or sell.[52]

The district court in *Curran* did not apply the *Cort* test in granting Merrill Lynch partial summary judgment.[53] On appeal, although several other issues were raised,[54] the Sixth Circuit focused on the question of implying a private right of action under the CEA.[55] This issue was brought to the fore when the court considered whether the arbitration agreement between the parties was the plaintiffs' exclusive remedy.[56] The Sixth Circuit applied *Cort* and determined that, notwithstanding the agreement to arbitrate, a private right of action could be implied.[57]

Leist v. Simplot

The consolidated action of *Leist v. Simplot*[58] arose out of the May, 1976, "Maine Potato" default on the New York Mercantile Exchange.[59] According to the Second Circuit's recitation of the

50. *Id.* at 220.

51. *Id.*

52. *Id.*

53. *Id.* at 230 n.19. *See infra* notes 122, 200-02 and accompanying text.

54. 622 F.2d at 219. Specifically, the other issues were whether a discretionary commodity futures trading account was a security entitling the plaintiffs to the protection of the federal securities laws, and the propriety of a stay pending arbitration.

55. *Id.* at 230. *See infra* note 204 and accompanying text.

56. *Id.* at 226-27.

57. *Id.* at 236.

58. 638 F.2d 283 (2d Cir. 1980).

59. The first action was National Super Spuds, Inc. v. New York Mercantile Exch., 470 F. Supp. 1256 (S.D.N.Y. 1979). This was a consolidation of Leist v. Simplot, 76 Civ. 4350; Incomco v. New York Mercantile Exch., 76 Civ. 2648; National Super Spuds, Inc. v. New York Mercantile Exch., 76 Civ. 2375. 470 F. Supp. at 1257-58 n.1. In *Leist*, an action was brought against the defendant traders (short traders) and the FCMs that executed their trades, stating that the group violated 7 U.S.C. § 13, which prohibits price manipulation. The FCMs were accused of failing to liquidate their customers' positions when the possible default became clear. An antitrust claim was also brought. The long traders were charged with conduct violating 7 U.S.C.

facts[60] in the original action, the defendants were individual traders[61] and several FCMs who executed their purchase orders.[62] The defendant traders established substantial short positions[63] in the May contract, allegedly to depress the price of Maine-grown potatoes.[64] The short traders, it was asserted, sold positions with the intent not to liquidate at a price higher than they had previously agreed upon, and to default on deliveries if necessary.[65] The plaintiffs alleged that the FCMs knew or should have known that their customers (the short traders) either could not or would not be able to cover their positions by purchasing May contracts.[66]

The plaintiffs, long traders who speculatively purchased positions in the original action, were professional market traders or dealers.[67] The long traders anticipated that the May contract price would increase, and they would be able to liquidate their positions at a profit.[68] They acquired long positions which they

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§§ 1—13. The exchange was charged with failing to maintain an orderly market.

In *Incomco*, the complaint was brought against the long traders and the exchange. The long traders were accused of creating an artificial railroad car shortage in violation of the CEA. A charge against the exchange accused it of acting in concert with the long traders and failing to follow its rules. In *National Super Spuds*, a class action was brought against the short traders for violating applicable Exchange Rules and the CEA. The exchange was accused of violating its own rules.

60. 638 F.2d 283, 285 (2d Cir. 1980).

61. *Id.* at 289. The individual defendants, Simplot and Taggares, were both described as Idaho entrepreneurs who, with their separate processing companies and their combined growing and warehousing operations, controlled the largest purchases of potatoes in the Northwest.

62. *Id.* at 289-90. The FCMs included the Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.

63. *Id.* at 289. A short position would require the holder to deliver Maine potatoes to the holder of the long position or else be in default on the contracts.

64. The court of appeals found:

> The activities of the short conspirators were designed to counteract the impact of these reports and other market information and rumors tending to raise the price of Maine futures. A decline in the price of potato futures would suggest to those dealing in the cash market . . . that supplies of Maine potatoes would be greater than earlier anticipated, and that prices in spot transactions or negotiations for all potatoes should correspondingly recede.

Id. at 289.

65. *Id.* The result of such tactics, allegedly, was to create the impression of a large supply of Maine potatoes, which, in turn, should depress the price of the contract.

66. *Id.* at 290.

67. *Id.* These plaintiffs were Leist, a member of the exchange trading on his own account, and Incomco, an FCM partnership managed by Smith.

68. *Id.* at 290-91. The court of appeals found that the plaintiffs were victims of a Maine growers' and traders' counter-conspiracy. The counter-con-

were forced to sell at a loss[69] when the defendant short traders did not offset their positions by the date the May contract trading ended. The "shorts" defaulted on their obligations to deliver.[70] The "long" plaintiffs alleged that since the defendant traders consolidated all their short contracts with the defendant FCMs on the last day the May contracts could have been traded, the FCMs either knew or should have known of the traders' intent to default.

Before the last trading date for the May contracts, the CFTC warned the defendant traders that it was aware of their short positions and possible price manipulation of the commodity, a violation of the CEA.[71] The CFTC's warning was not an accusation of price manipulation, but a threat that if any artificial pricing ensued during liquidation, a charge of price manipulation under the CEA would be considered.[72] The New York Mercantile Exchange, also a defendant in the original action, was aware of the defendant traders' actions. The Exchange's president met with members of the eastern region of the CFTC but did not disclose the meetings to the Exchange's board of governors until after the May contract date had expired.[73] The plaintiffs alleged that the Exchange did not reprimand the defendant traders and did not follow its own rules, which required the Exchange to buy in the cash market for the defendant traders' account the amount of contracts necessary to cover the shorts.[74]

The district court used the test elaborated by the Supreme Court in *Cort v. Ash*[75] to deny a private right of action.[76] The plaintiffs appealed and over a strong dissent by Judge Mansfield, the Second Circuit reversed on the basis of *Cort*.[77]

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spirators purchased long contracts and arranged to tie up the railroad cars which could have delivered the May contract potatoes. Their intent was to squeeze the defendants into taking a loss on the short contracts. The court determined that the plaintiffs were caught in the middle of these factions, neither of which would give in to the other.

69. *Id.* The court of appeals also noted that because the counter-conspiracy had effectively tied up available railroad cars, plaintiff Incomco could not deliver its warehouse potatoes, leaving some 1.5 million pounds to rot as the warm weather set in.

70. *Id.*

71. *Id.* at 290. The warning was given via telegram.

72. *Id.*

73. The appellate court found that "[t]he Exchange failed to declare an emergency situation pursuant to its rules to facilitate an orderly liquidation, and, once trading had closed, failed to take appropriate steps such as permitting delivery by truck or buying potatoes to cover the default of the shorts." *Id.* at 291.

74. *Id.* at 292.

75. 422 U.S. 66 (1975). *See infra* notes 120-40 and accompanying text.

76. 470 F. Supp. 1256, 1263 (S.D.N.Y. 1979).

77. 638 F.2d 283, 322-23 (2d Cir. 1980).

Meanwhile, the Fifth Circuit in *Rivers v. Rosenthal & Co.*[78] had reversed the district court and had held that no private right of action could be implied under the CEA.[79] In *Rivers*, two customers of a brokerage house alleged that they suffered substantial losses in their commodity futures trading transactions as a result of the actions of the FCM's agent.[80] The customers brought an action against the agent and the brokerage house as his principal.[81] A petition for a writ of *certiorari* was granted by the Supreme Court, but the action was temporarily stayed.[82]

Thus, resolution of the disparate conclusions reached by the Second Circuit in *Leist*, the Sixth Circuit in *Curran*, and the Fifth Circuit in *Rivers* hinged on the Supreme Court's pending decisions in *Leist* and *Curran*. The Supreme Court approached the problem of determining whether an implied private right of action existed by applying a historical perspective, but it reached a surprising and, to many, a disconcerting result.

Origin and Development of the Implied Private Right of Action Doctrine

The Supreme Court first sanctioned the doctrine of implied private rights of action in *Texas & Pacific Railway Co. v. Rigsby*.[83] In *Rigsby*, an injured railroad employee brought an action for damages against his employer arising out of a violation of the Federal Safety Appliance Act.[84] The Court found that the purpose of the Act was "to promote the safety of employees and travelers,"[85] and that a proviso of the 1910 supplement to the Act created a "liability in any remedial action for the death or injury of any railroad employee."[86] The Act did not expressly confer a private right of action for the death or injury of an employee.[87] However, in light of its purpose, the Court found that if there is a violation of the Act, which "results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."[88]

78. 634 F.2d 774 (5th Cir. 1980), *vacated*, — U.S. —, 102 S. Ct. 2228, *on remand*, 686 F.2d 297 (5th Cir. 1982).

79. 634 F.2d at 777.

80. *Id.*

81. *Id.*

82. Rivers v. Rosenthal & Co., — U.S. —, 102 S. Ct. 2228 (1982).

83. 241 U.S. 33 (1916).

84. *Id.* at 36. *See* 45 U.S.C. §§ 1—43 (1910).

85. 241 U.S. at 39.

86. *Id.*

87. *Id.*

88. *Id.* This language appeared again in Cort v. Ash, 422 U.S. 66, 78 (1975), as the first factor in a four-prong test which determines whether a

Despite the *Rigsby* holding, the application of a tort principle[89] to create an implied private right of action was not widely used by federal courts until the late 1940's.[90] Under this approach, a court would look for whom and for what purpose the statute was enacted.[91] If a statute was enacted to prohibit an activity and a person was injured due to a violation of the statute, the injured party would have a remedy if he fell within the protected class.[92] This approach could mean that a private right of action may be implied in favor of *any* party injured as a result of a violation of *any* federal statute proscribing some activity.[93]

The doctrine of implied private rights of action recognized in *Rigsby* was extended to securities legislation in *J.I. Case Company v. Borak*.[94] There the Court held that a private action can be brought by a shareholder against a corporation under section 14(a) of the Securities Exchange Act of 1934 (Exchange Act).[95] The shareholder alleged a deprivation of his preemptive rights as a result of a corporate merger.[96] The plaintiff also claimed a violation of section 14(a) of the Exchange Act based on the fraudulent proxy materials which encouraged support for the merger.[97] The shareholder sought both a declaratory judg-

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private right of action may be implied under a statute. *See infra* notes 120-40 and accompanying text.

The *Rigsby* Court based its opinion on an earlier, similar case, Southern Ry. Co. v. United States, 222 U.S. 20 (1911). The Act's scope covered interstate commerce and the railroad disclaimed any liability because the violation of the Act occurred during an intrastate journey. The Court dismissed the distinction, stating that the same cars were used for both inter- and intrastate commerce and the cars were often interchanged. *Id.* at 27.

89. This principle was later adopted by RESTATEMENT (SECOND) OF TORTS § 286 (1965).

90. *See, e.g.*, Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). *See also* Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929).

91. *See, e.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). This action alleged a violation of § 10(b) and Rule 10b-5 of the Securities Exchange Act. The federal court held that an implied private right of action existed because the broad purpose of the Securities Exchange Act was to regulate securities transactions so that manipulations or deceptive practices could either not take place or not go unpunished. *Id.* at 514.

92. Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916).

93. In Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944), the Court stated: "We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as a bargaining representative, is a federal right implied from the statute and the policy it has adopted." *Id.* at 213. The violation of a statutorily created "duty" gives rise to liability.

94. 377 U.S. 426 (1964).

95. *Id.* at 432.

96. *Id.* at 429-30.

97. *Id.* at 429.

ment that the merger was void and damages for himself and other similarly situated shareholders.[98] The Court found that the main purpose of section 14(a) was to protect investors such as the plaintiff from false or misleading proxy solicitations.[99] A denial of a private right of action would render a result contrary to this purpose.[100] The Court's opinion in *Borak* mirrored its opinion in *Texas & Pacific Railway*.[101] Both cases established that if a statute's purpose is to benefit a special class and the plaintiff is a member of that class injured by a harm the statute had been designed to protect against, the plaintiff is then entitled to bring a private action.

The Supreme Court further refined its approach to the implied private right of action issue in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*.[102] The Court's previous tests would almost always result in the implication of a private right of action, but here it adopted a more stringent test which signalled the start of a new trend.[103] In *National Railroad*, the National Association of Railroad Passengers (NARP) sought to enjoin the cancellation of several passenger train services based upon a prohibition in the Rail Passenger Service Act of 1970.[104] NARP claimed that railroad passengers were the Act's intended beneficiaries and that a private action to force compliance with the Act should be allowed.[105] The Court rejected this argument, stating that "the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."[106] In the Court's opinion, an

98. *Id.* at 430. The Court found that the damages which the plaintiff suffered were the result of the corporation's actions against all shareholders; therefore, a derivative action was allowed.

99. *Id.* at 432.

100. *Id.* However, there is an ambiguity within the *Borak* opinion. The Court does not expressly state whether an implied private right of action arose because § 27 of the Exchange Act grants exclusive jurisdiction over "all suits in equity and actions at law brought to enforce a liability or duty created" under the Act, *id.* at 430, 431, or merely because of the purpose of § 14(a).

101. 241 U.S. 33 (1916). *See supra* notes 83-93 and accompanying text.

102. 414 U.S. 453 (1974).

103. In Cort v. Ash, 422 U.S. 66 (1975), the Court saw *National Railroad* as a signal to lower courts to defer from implying private remedies.

104. 45 U.S.C. §§ 501-645 (1976). This Act prohibited railroads from stopping intercity passenger train service prior to January 1, 1975, unless the railroad had entered into a contract with Amtrak pursuant to § 561(a)(1). Since the railroad discontinued service without having entered into such a contract, the NARP alleged that it did so in violation of the Act.

105. 414 U.S. 453, 457 (1974).

106. *Id.* at 458.

action brought by the NARP would not achieve this result.

In determining whether the remedies created under the Rail Passenger Service Act were the exclusive means of enforcement, the Court applied the principle *expressio unius est exclusio alterius*,[107] and answered in the affirmative.[108] This approach yielded a result in conflict with *Borak*, which placed the interests of the beneficiary at the forefront of any consideration.[109] Thus the intent of the legislature became crucial in determining whether a private right of action should be implied. Employing this new consideration, the majority found that the statute in question contemplated that the Attorney General would be the exclusive authority to enforce the Act.[110] Private actions could be brought for labor issues only by "duly authorized employee representatives."[111] The NARP could not, in light of the statute's language and legislative intent, bring a private action to compel compliance with the Act.[112] As a direct result of this decision, *Borak* was clearly diminished in importance.

Legislative intent was again considered by the Supreme Court in *Securities Investor Protection Corp. v. Barbour*.[113] In *Barbour*, the issue was whether customers of a failed securities brokerage house had an implied private right of action against the Securities Investor Protection Corp. (SIPC). The SIPC is a nonprofit membership corporation created by statute to provide financial relief to customers of failed brokerage houses with whom the customer has deposited cash or securities.[114] The Court commented that, as with *National Railroad*,[115] Congress created a corporate entity, vested with enforcement powers, to solve a public problem. The implication of a private right of action would be inconsistent with both legislative intent and the Act's purposes.

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107. "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (rev. 5th ed. 1979). Stated simply, this rule of construction dictates that when a statute expressly provides for one alternative, any other alternative is impliedly rejected.

108. 414 U.S. at 461.

109. 377 U.S. 426 (1964). *See supra* notes 94-100 and accompanying text. This consideration would become the second and most important prong of the *Cort* test. *See* Cort v. Ash, 422 U.S. 66, 78 (1975). *See also infra* notes 120-40 and accompanying text.

110. 414 U.S. at 464.

111. *Id.* at 460.

112. *Id.*

113. 421 U.S. 412 (1975). *See also* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981).

114. 15 U.S.C. §§ 78aaa-lll (1976).

115. 414 U.S. 453 (1974). *See supra* notes 102-12 and accompanying text.

Lower federal courts followed the Supreme Court's attitude about implying a private right of action where other federal statutes were at issue. In *Taylor v. Brighton Corp.*,[116] discharged employees who reported unsafe working conditions brought an action against their former employer under the Occupational Safety and Health Act.[117] The Sixth Circuit, focusing on legislative intent, found that Congress intended only the Secretary of Labor to have enforcement powers. To allow a private right of action would be inconsistent with the statute's enforcement provisions.

The Sixth Circuit also denied an implied private right of action under the Bankruptcy Act.[118] In *Ryan v. Ohio Edison Co.*,[119] debtors who had been discharged in bankruptcy filed a class action against a utility company when the company used informal methods of collecting the debts from them. The court determined that the congressional intent underlying the Bankruptcy Act was to proscribe lawsuits in the state courts against discharged debtors. The court refused to expand this purpose by implying a private right of action to enjoin informal collections.

THE *CORT V. ASH* TEST

A more elaborate test to determine whether a private action should be implied evolved in *Cort v. Ash*.[120] The Court refined the criteria previously adopted and added two new elements.[121] The new test consists of four independent determinations:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create a remedy or 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 cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[122]

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116. 616 F.2d 256 (6th Cir. 1980).

117. 29 U.S.C. § 660(c) (1979). This statute prohibits any retaliatory discharge of or discrimination against employees who report OSHA violations, and charges the Secretary of Labor to investigate and prosecute meritorious claims of retaliation.

118. 11 U.S.C. §§ 101-109 (1982).

119. 611 F.2d 1170 (6th Cir. 1979).

120. 422 U.S. 66 (1975).

121. 422 U.S. at 78. The four prongs of the test are not necessarily given equal weight.

122. *Id.* The *Cort* test would seem to be a synthesis and refinement of previous decisions. Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1915) and J.I. Case Co. v. Borak, 377 U.S. 426 (1964) serve as the basis for the first prong—

In *Cort*, a shareholder of Bethlehem Steel Corp. brought an action against the board of directors seeking both damages in favor of Bethlehem and injunctive relief based on a violation of federal law,[123] alleging that the board of directors used corporate funds to pay for 1972 presidential election advertisements. This was alleged to be violative of federal criminal statutes prohibiting corporations from making contributions in conjunction with specified federal elections.[124] The district court granted the defendants' motion for summary judgment,[125] but the court of appeals reversed, finding a private cause of action could be implied under the statute.[126] The Supreme Court, applying its new test, found that a private right of action could not be implied under the statute.[127]

Under the *Cort* facts, the Court found that the shareholder was not a member of the class for whose "especial" benefit the statute was enacted.[128] The Court stated that "the legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders."[129] Elaborating more on the standards used to determine whether a private remedy should be implied, the Court commented that there were two situations where such a right would be appropriate: where there existed either a "clearly articulated federal right in the plaintiff,"[130] or a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard."[131]

Further, the second prong of the test, requiring an express or implied indication of congressional intent to vest a private right in the plaintiff, was not met.[132] A plaintiff who is clearly

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whether plaintiff is a member of the class for whose benefit the statute was enacted. Cort v. Ash, 422 U.S. 66, 78 (1975). *See supra* notes 83-101 and accompanying text. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1973) gave rise to the second and third prongs. The fourth requirement is also found in *Borak*.

123. 422 U.S. 66 (1975).

124. *Id.* The statute at issue was 18 U.S.C. § 610 (1976).

125. Ash v. Cort, 350 F. Supp. 227 (E.D. Pa. 1972).

126. 496 F.2d 416 (3d Cir. 1974). Even though the election had taken place, the matter was deemed not to be moot. *Id.* at 424.

127. 422 U.S. 66 (1975).

128. *Id.* at 82.

129. *Id.*

130. *Id.*

131. *Id.* at 82. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See also supra* notes 94-101 and accompanying text.

132. 422 U.S at 82. *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974). *See also supra* notes 102-12 and accompanying text.

within the class granted certain rights does not have to prove the intent to create a private cause of action.[133] It is instead the legislative intent to deny a private right of action which is controlling.[134] Since the plaintiff did not adduce any evidence of intent in favor of an implied private remedy, the Court found the existence of a congressional intent to deny the right and to continue the application of state law to the relationship between corporation and shareholder.[135]

The plaintiff also failed to satisfy the third prong of the new test.[136] The primary congressional goal—preventing the use of corporate funds in campaigns for federal offices—would not be achieved by implying a private right under the statute.[137] The Court noted that the impact of the action would be minimal because the board of directors could circumvent the issue by "borrowing" from the corporation's funds and repaying the funds only if compelled to do so at a later date.[138]

Finally, the Court found that under the fourth prong of the test it would be inappropriate to infer a federal remedy. Corporations were found to be "creatures of state law."[139] The existence of state law remedies precluded the need for protection under federal law.[140]

THE APPLICATION OF *CORT V. ASH* TO OTHER LEGISLATION

The *Cort* decision demonstrated the Supreme Court's unwillingness to imply private rights of action. Case law involving other types of legislation indicates that, absent express statutory language creating private remedies or other compelling circumstances, Congress' silence on the issue will lead to the conclusion that no private right of action should be implied.

In two recent decisions, *Touche Ross & Co. v. Redington*[141] and *Transamerica Mortgage Advisors, Inc. v. Lewis*,[142] the Supreme Court continued its campaign to limit implied private rights of action. Both cases were brought under the federal se-

133. 422 U.S. at 82.
134. *Id.*
135. *Id.* at 83.
136. *Id.* at 84.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 85. The Court recognized that this point was considered in J.I. Case Co. v. Borak, 377 U.S. 426, 434-35 (1964), where it was reasoned that when no state law remedy exists, the purpose of the federal statute would be thwarted if a private remedy was not implied.
141. 442 U.S. 560 (1979).
142. 444 U.S. 11 (1979).

curities laws.[143] In *Touche Ross*, the Court commented:

> To the extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today. The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.[144]

In *Touche Ross & Co. v. Redington*,[145] the Supreme Court held that no implied right of action existed under section 17(a) of the Exchange Act.[146] This was an action by a court-appointed trustee in liquidation and the SIPC[147] against an accounting firm which audited the insolvent brokerage house's books. The plaintiffs alleged that had the accounting firm performed a proper audit, the precarious financial position of the brokerage house would have been discovered, and the customers would not have suffered losses.[148]

Section 17(a) of the Exchange Act[149] requires broker-dealers to keep such records and file such reports as the SEC prescribes. Conceding that in the past private remedies had been implied in certain instances, the Court noted that this particular statute had neither "prohibited certain conduct [n]or created federal rights in favor of private parties," but required only that certain records be maintained.[150] An examination of the legislative history revealed nothing relating to remedies.[151] Under these circumstances, the Court would not infer a private remedy.[152] The existence of express private remedies in other sections of the Act provided the Court with further justification for denying the claim.[153]

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143. In both cases the legislation at issue proscribed certain conduct for the regulated parties but contained no express provision for civil liability.

144. 442 U.S. 560, 578 (1979).

145. 442 U.S. 560 (1979).

146. *Id.* at 569. This section is codified at 15 U.S.C. § 78q(a) (1976).

147. The SIPC, or Securities Investor Protection Corporation, was created by the Securities Investor Protection Act, 15 U.S.C. § 78aaa (1976). *See supra* note 114 and accompanying text. The SIPC is a nonprofit organization comprised of securities dealers. These dealers contribute to a fund which is used to compensate brokerage firm customers who have incurred losses as a result of securities broker-dealer insolvencies. 442 U.S. 560, 564 n.5 (1979). *See also* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975).

148. 442 U.S. 560, 566 (1979).

149. 15 U.S.C. § 78q(a) (1976).

150. 442 U.S. at 569. *See* Cannon v. University of Chicago, 441 U.S. 667 (1979); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

151. 442 U.S. at 571.

152. *Id.*

153. *Id.* at 572.

In *Transamerica Mortgage Advisors, Inc. v. Lewis*,[154] a shareholder of Morgan Trust of America brought a derivative action against several trustees, an investment adviser, and two corporations affiliated with the investment adviser.[155] The suit alleged three causes of action arising out of violations of the Investment Advisers Act of 1940.[156] The Court noted that the Act did not expressly provide for any private cause of action and only one section authorized the SEC to bring suit in a federal district court to enjoin any violations.[157]

The Court found that a statute which proscribes certain conduct and does not create or alter civil liabilities does not give rise to an implied private remedy.[158] The section of the statute which voids the rights of those contracting in violation of the Investment Advisers Act was construed to give the injured party the right to rescind the contract.[159] The majority found this to be the only private remedy available under the Act.[160] Therefore, no private right of action for damages was implied.

In an earlier case, *Piper v. Chris-Craft Industries, Inc.*,[161] the Court applied the *Cort* test and held that an unsuccessful tender offeror was not entitled to a private right of action for damages under section 14(e)[162] of the Securities Exchange Act or under SEC rule 10b-6.[163] On the section 14(e) issue, the Court found that Chris-Craft (the tender offeror) was not a member of the class for whose especial benefit the statute was enacted, but was rather a member of the class that Congress intended to regulate.[164] In addition, no legislative intent was demonstrated to indicate that tender offerors should be given "additional weapons

154. 444 U.S. 11 (1979).

155. *Id.* at 13.

156. Investment Advisers Act of 1940, § 206, 15 U.S.C. § 80b-6 (1976). The statute provides, in part, that it is unlawful for an investment adviser "by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud any client or prospective client; [and] (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client . . . ." *Id.*

157. 444 U.S. at 14. The Court was referring to 15 U.S.C. § 80b-9 (1976).

158. 444 U.S. at 19.

159. *Id.* The Court was referring to § 80b-15, which provides that contracts whose performance or formation would violate the Act "shall be void . . . as regards the rights of . . ." the violator or anyone acquiring rights thereunder with knowledge of the facts making performance of the contract a violation.

160. 444 U.S. at 20.

161. 430 U.S. 1 (1977).

162. 15 U.S.C. § 78n(e) (1976).

163. 17 C.F.R. § 240.10b-6 (1981).

164. 430 U.S. at 37.

in the form of an implied cause of action for damages."[165] The Court also reasoned that an implied private action would not be consistent with the "underlying purposes of the legislative scheme."[166] Finally, the Court stated that the defeated tender offeror had opportunities for remedies under state laws, *i.e.*, "interference with a prospective commercial advantage."[167] The Court also found that Chris-Craft lacked standing to sue under rule 10b-6.[168]

Title IX of the Education Amendments of 1972[169] provided yet another opportunity for the Court to apply *Cort*. In *Cannon v. University of Chicago*,[170] the Supreme Court found the requisite legal intent to create a private right of action in favor of a medical school applicant who claimed discrimination based on gender. In applying *Cort*, the Court first determined that Title IX expressly conferred a benefit on applicants discriminated against by sex and that this applicant was a member of the class for whose especial benefit the statute was enacted.[171] Second,

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165. *Id.* at 38.

166. In reaching this conclusion, the Court cited the Williams Act, which amended the Securities Exchange Act of 1934 by adding §§ 13(d) and (e), and §§ 14(d), (e), and (f). 15 U.S.C. §§ 78m(a) and (e) and §§ 78n(d), (e), and (f) (1976), respectively. The Court stated, "As a disclosure mechanism aimed especially at protecting shareholders of target corporations, the Williams Act cannot consistently be interpreted as conferring a monetary remedy upon regulated parties, particularly where the award would not redound to the direct benefit of the protected class." 430 U.S. at 39.

167. *Id.* at 40-41. The Supreme Court stated that, "Congress is, of course, free to create a remedial scheme in favor of contestants in tender offers . . . ." *Id.* The conclusion was that it was "entirely appropriate" to relegate the tender offeror to whatever state law remedies were available. *Id.* at 41.

168. *Id.* at 45. The dissent argued that § 14(e) implicitly granted a private right of action and that the determinative issue was who may invoke this remedy. It was contended that the plaintiff met the *Cort* test because it was a member of the class the statute was intended to benefit. *Id.* at 55 (Stevens, J., dissenting). In the alternative, the dissent claimed that *Borak*, rather than *Cort* was controlling. The distinction between the two cases was only one of approach; *i.e.*, a derivative suit or a suit brought in the corporation's own right. *Id.* at 67. The dissent reasoned that the purpose of § 14(e) is to protect shareholders, including tender offerors; this was especially true for those who had accepted Chris-Craft's offer, thereby tendering their shares. *Id.* at 69.

169. Title IX of the Education Amendments of 1972, § 901, 86 Stat. 235, 20 U.S.C. §§ 1681—1686 (1976). The relevant portion of the statute provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (1976).

170. 441 U.S. 677 (1979). The district court dismissed the action because Title IX does not expressly authorize a private right of action, and none could be implied. *Id.* at 683. The court of appeals affirmed. *Id.* at 680.

171. *Id.* at 694. The Court also commented,

> Not surprisingly, the right—or duty—creating language of the statute has generally been the most accurate indicator of the propriety of impli-

the Court stated it is "always appropriate to assume" that Congress was aware of prior case law and was therefore cognizant of previous judicial treatment of statutes.[172] Combining both Congress' knowledge of the law and its intent to create Title IX remedies comparable to Title VI remedies, which authorize a private right of action for those discriminated against, the majority concluded that Congress also intended that a private right of action be implied in this case.[173] The Department of Health, Education, and Welfare's opinion that an implied private remedy would not frustrate the underlying purpose of the statute satisfied the *Cort* test's third prong.[174] The fourth requirement was met on the ground that the expenditure of federal funds and the roles of the federal government and courts as protectors against discrimination supported the utilization of a federal remedy.[175]

Justice Powell's dissent focused on his perception of the unconstitutional course the Court initiated in *Cort*.[176] He stated:

> *Cort* allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch. It also invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with the attendant prejudice to everyone concerned. Because the courts are free to reach a result different from that which the normal play of political forces would have produced, the intended beneficiaries of the legislation are un-

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> cation of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial inference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

Id. at 690 n.13.

172. *Id.* at 697-98. The Court went further and stated that not only is it inappropriate but also unrealistic to presume Congress is not familiar with Supreme Court and federal court precedents. *Id.* at 699.

173. *Id.* at 703.

174. *Id.* at 706. The Court stated,

> It has been suggested that, at least in absence of an exhaustion requirement, private litigation will interfere with HEW's enforcement procedures. . . . The simple answer to this suggestion is that the Government itself perceives no such interference under the circumstances of this case, and argues that if the possibility of interference arises in another case, appropriate action can be taken by the relevant court at that time.

Id. at 706 n.41.

175. *Id.* at 708-09. The Supreme Court added that the matter was not of state concern because, "[s]ince the Civil War, the Federal Government and the federal courts have been the 'primary and powerful reliances' in protecting citizens against such discrimination." *Id.*

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

able to ensure the full measure of protection their needs may warrant.[177]

THE COMMODITY EXCHANGE ACT

The first federal court to deal with the issue of implied private remedies under the Commodity Exchange Act used the same tort principle enunciated in *National Railroad*.[178] In *Goodman v. H. Hentz and Co.*,[179] a district court found that defrauded commodity investors were within the class of persons Congress sought to protect when it enacted section 6b of the CEA.[180] The absence of any congressional intent to the contrary led the court to find the existence of an implied private remedy.[181] The *Goodman* court analogized from a similar remedy available under section 10(b) of the Exchange Act, and determined the same remedy should be available under the antifraud provision of the CEA.[182]

The holding in *Goodman* became the basis for other federal court decisions which affirmed the existence of private actions under the CEA.[183] Subsequent case law generated little analysis on the issue; courts merely assumed, based on *Goodman*, that such a private remedy existed. In *Deaktor v. L. D. Schreiber and Co.*,[184] the Seventh Circuit extended the *Goodman* holding by recognizing a private right of action against manipulative and

177. *Id.* at 743. Justice Powell considered the statutory remedy of fund termination sufficient to deter violations of Title IX by educational institutions. *Id.* at 748-49. He warned that overlapping judicial and administrative enforcement of the statute would lead to "conflicts and confusion," thereby thwarting the statute's goals. *Id.* at 749. *Cf.* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) (no private right of action under the Equal Pay Act, 29 U.S.C. § 206d (1976), and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1976 and Supp. 1979)); Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981) (no implied remedy under Davis-Bacon Act, 40 U.S.C. § 276a (1976)).

178. 414 U.S. 453 (1974). *See supra* notes 102-12 and accompanying text.

179. 265 F. Supp. 440 (N.D. Ill. 1967).

180. *Id.* at 447. The section states it is unlawful for an employee of a member of a commodity market to defraud an investor. 7 U.S.C. § 13a (1976).

181. 265 F. Supp. at 447.

182. *Id.* at 444.

183. *See* Miller v. New York Produce Exch., 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); Booth v. Peavey Co. Commodity Serv., 430 F.2d 132 (8th Cir. 1970); Seligson v. New York Produce Exch., 378 F. Supp. 1076 (S.D.N.Y. 1974); Johnson v. Arthur Epsey, Shearson, Hamill & Co., 341 F. Supp. 764 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer, 340 F. Supp. 1338 (E.D. La. 1972); United Egg Producers v. Bauer Int'l Corp., 311 F. Supp. 1375 (S.D.N.Y. 1970); Anderson v. Francis I. duPont & Co., 291 F. Supp. 705 (D. Minn. 1968); Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968).

184. 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom.*, Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973).

fraudulent practices by floor brokers.[185]

Closely related to the question of the existence of a private remedy was the question of whether federal courts had jurisdiction over commodity law violations or whether the Commodity Exchange Commission[186] had primary jurisdiction.[187] The issue became more important after the 1974 amendments to the CEA. The passage of the Commodity Futures Trading Commission Act[188] (CFTCA) created questions regarding the survival of private remedies.

The purpose of the Commodity Futures Trading Commission (CFTC) was to support the commodity exchanges' regulatory efforts at eliminating unfair trading practices by providing a "strong Federal regulatory umbrella."[189] The CFTC was empowered to do the following: compel exchanges to enforce their own rules;[190] alter or supplement such rules upon due notice;[191] initiate administrative proceedings against anyone who violates statutes or exchange regulations and assess penalties;[192] and issue cease-and-desist orders.[193] In addition, the Commission was given jurisdiction over administrative reparations proceedings.[194]

The judicial responses to the 1974 amendments conflicted in several respects. Some courts determined that the remedies created by the 1974 amendments were supplemental rather than exclusive, thereby permitting the commencement of private actions without exhaustion of administrative remedies.[195] In some cases the continued existence of an implied private remedy was presumed without a *Cort* analysis.[196] Other courts held that private actions were not extinguished by the 1974 amendments but that the plaintiff must first exhaust his administrative reme-

185. 479 F.2d at 534. The Seventh Circuit has consistently found an implied private right of action under the CEA. *See, e.g.*, Hirk v. Agri-Research Council, Inc., 561 F.2d 96 (7th Cir. 1977); Case & Co., Inc. v. Board of Trade, 523 F.2d 355 (7th Cir. 1975).

186. The Commodity Exchange Commission was the precursor of the Commodity Futures Trading Commission (CFTC), created in 1974.

187. Deaktor v. L.D. Schreiber & Co., 479 F.2d 529, 532 (7th Cir. 1973). *See also* Ricci v. Chicago Mercantile Exch., 409 U.S. 289 (1973).

188. 7 U.S.C. §§ 1—24 (1976).

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

190. 7 U.S.C. § 7a(8) (1976).

191. 7 U.S.C. § 12a(7) (1976).

192. 7 U.S.C. § 9 (1976).

193. 7 U.S.C. § 13a (1976 & Supp. V 1980).

194. 7 U.S.C. § 18(c) (Supp. 1980).

195. Smith v. Groover, 468 F. Supp. 105 (N.D. Ill. 1979).

196. Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174 (2d Cir. 1977). *See also supra* cases cited at note 42.

dies.[197] Finally, a number of courts found that both the 1974 amendments and the *Cort* test eliminated the implied private remedy.[198]

Two courts which found implied private remedies under the CEA held that such actions could be brought without first exhausting administrative remedies, *i.e.*, reparations proceedings. In *Smith v. Groover*[199] and *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[200] the courts found that the basic congressional policy contemplated in the amendments was that the "jurisdiction conferred on Federal and State courts . . . under the laws of the United States or any State are retained."[201] The power of the CFTC to bring a variety of administrative proceedings has been described in the following manner:

> vesting in the Commission . . . the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is *likewise not intended to interfere with the courts in any way*. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved.[202]

Even the CFTC interpreted the CFTCA as implicitly authorizing private actions. It also asserted that this right survived the 1974 amendments because Congress did not expressly abolish private remedies at that time.[203]

After finding that the CFTC did not have exclusive primary jurisdiction, the *Smith* and *Curran* courts questioned whether a private right of action existed. Both decisions applied the *Cort* test and answered in the affirmative.[204] The first element of the test, whether the plaintiff is a member of the class for whose especial benefit the statute was enacted, was satisfied by an ex-

197. *See, e.g.*, Bartels v. International Commodities Corp., 435 F. Supp. 865 (D. Conn. 1977).

198. *See, e.g.*, Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311 (S.D. Ohio 1979). *See also supra* cases cited at note 42.

199. 468 F. Supp. 105, 112 (N.D. Ill. 1979).

200. 622 F.2d 216, 232 (6th Cir. 1980).

201. Smith v. Groover, 468 F. Supp. at 111 (quoting Senator Hubert H. Humphrey, 120 CONG. REC. 35,000 (1974)). *See also* Witzel v. Chartered Sys's Corp., 490 F. Supp. 343 (D. Minn. 1980); Navigator Group Funds v. Shearson Hayden Stone, Inc., 487 F. Supp. 416 (S.D.N.Y. 1980); Alken v. Lerner, 485 F. Supp. 871 (D.N.J. 1980); Jones v. B.C. Christopher & Co., 466 F. Supp. 213 (D. Kan. 1979).

202. 468 F. Supp. 105, 111 (N.D. Ill. 1979) (quoting remarks of Senator Talmadge, 120 CONG. REC. 30,459 (1974)) (emphasis added by court).

203. Statement of the CFTC Concerning Referral of Private Litigation Under the Doctrine of Primary Jurisdiction, 41 Fed. Reg. 18471 (1976).

204. Smith v. Groover, 468 F. Supp. 105 (N.D. Ill. 1979); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980). *See also* Navigator Group Funds v. Shearson Hayden Stone, Inc., 487 F. Supp. 416 (S.D.N.Y. 1980).

amination of legislative history. Senator Dole considered the purpose of the 1974 amendments to be "to protect any individual who desires to participate in the futures market trading."[205] The second factor, whether there is any explicit or implicit indication of legislative intent to grant or deny a private right of action, was also found in the legislative history of the 1974 amendments, which indicated that Congress was aware of the fact that courts had been implying the existence of a private remedy under the CEA. Chairman Poage stated that "courts [had] implied a private remedy for individual litigants in the Commodity Exchange Act."[206] Senator Huddleston, sponsor of a later 1978 bill dealing with the reparations remedy, commented:

> 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 Commodity Exchange Act, or which in the future courts may recognize for other provisions of the Act.[207]

The *Smith* and *Curran* courts found that the third element, whether the implication of a private right of action would be consistent with the underlying purposes of the Act, was satisfied because the CFTC "consistently interpreted the reparations section as permitting commodity customers an election of forums in which to pursue their claims."[208] The fourth factor, whether an implied private action would infringe on an area of state concern, was met because regulation of commodities was found to be a federal matter.[209] The *Smith* and *Curran* courts therefore held that an implied private right of action under the CEA survived the 1974 amendments and that the enactment of the reparations proceedings section was intended only as a supplemental remedy.[210]

In *Leist v. Simplot*,[211] the district court found that the plaintiffs met the requirements of the first prong of the test. The court quoted Senator Dole, who recognized that the primary

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205. 622 F.2d 216, 233 (6th Cir. 1980). *See* 120 CONG. REC. 30,467 (Sept. 8, 1974).

206. 622 F.2d at 234 n.27, *citing Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 249, 321 (1973) (remarks of Rep. Poage).

207. Smith v. Groover, 468 F. Supp. 105, 114 (N.D. Ill. 1979) (citing 124 CONG. REC. S10,537 (July 12, 1978)).

208. Smith v. Groover, 468 F. Supp. 105, 115 (N.D. Ill. 1979). *See* 41 Fed. Reg. 3994 (1976).

209. 468 F. Supp. at 115.

210. *Id. See also* Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980).

211. 470 F. Supp. 1256 (S.D.N.Y. 1979).

purposes of the 1974 amendments were "[to protect] against manipulation of markets and to protect any individual who desires to participate in futures market trading."[212] The second prong of *Cort* proved troublesome. Looking to the 1974 amendments, the establishment of administrative reparation proceedings, and the vesting of disciplinary and regulatory power in the CFTC, the court could not find any legislative intent to imply a private right of action.[213] Congressional awareness of the need, and its failure to expressly provide for it, reinforced the court's decision.[214] The court determined that the third prong of *Cort* is met only when the implication of the private right of action is necessary to further the purposes of the statute at issue. The FCMs were subject to reparation proceedings and therefore no need for judicially implied remedies existed.[215] Finally, the court determined that the fourth prong was met because the regulation of commodity futures trading was a federal rather than a state concern.[216] Therefore, because all parts of the *Cort* test had not been satisfied, the defendants' motion for summary judgment was granted.

The Second Circuit reversed,[217] again using the *Cort* test. It held that the first prong was satisfied based on the Senate Re-

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212. *Id.* at 1260 (citing 120 CONG. REC. 30,466 (—, 1974)).

213. The district court stated:

> We believe that under the maxim of "*expressio unius est exclusio alterius*," the establishment of administrative reparation proceedings and the plenary grant of disciplinary and regulatory power to the CFTC evidences a congressional intent to deny a private right of action under the Act. This conclusion is reinforced by the fact that Congress was informed of the need for a private right of action under the Act but rejected a bill which would have expressly established such a right of action.

470 F. Supp. at 1260.

214. *Id.*

215. *Id.* Since there are limitations on the amount of civil penalties which may be assessed against a contract market (an overall limitation of $100,000) and since the CFTC is required to consider whether the amount of the penalty would "materially impair" the market's ability to carry on its operations, the district court concluded that the implication of further penalties was unnecessary.

216. *Id.* *See* Smith v. Groover, 468 F. Supp. 105 (N.D. Ill 1979); Gravois v. Fairchild, Arabatzis & Smith, 2 COMM. FUT. L. REP. (CCH) ¶ 20,706 (E.D. La. Nov. 9, 1978).

217. 638 F.2d 283 (2d Cir. 1980). *See* Pollock v. Citrus Assoc., 2 COMM. FUT. L. REP. (CCH) ¶ 21,165 (S.D.N.Y. Apr. 1, 1981) which followed *Leist*. In *Pollock*, the defendants included a broker-dealer and sales representative who allegedly manipulated orange juice future contract prices upward. The plaintiffs had sold November contracts and did not liquidate them prior to November 16, 1977. The plaintiffs also alleged that the exchange failed both to perform its regulatory duties and to prevent the alleged manipulation. The court found that a private right of action existed against the broker-dealer and sales representative under § 96 of the CEA and also against the exchange under §§ 5(d) and 5a(8) of the CEA.

port on the 1922 Act, which indicated that the Act's purpose was to protect investers.[218] The majority also cited the House Report on the 1978 amendments, which states that "the community protected under federal commodity laws was expanded to include speculators."[219] This persuaded the court that the plaintiffs were within the protected class. In addition, the court noted that Congress explicitly recognized that most futures trading was transacted by speculators.[220] Turning to the statements of Chairman Poage of the Committee on Agriculture, that speculators "provide a very real service to the market and its users by providing liquidity,"[221] the majority firmly concluded that the plaintiffs met the requirements of the first prong of the *Cort* test.[222]

The second *Cort* prong, relating to congressional intent, proved more difficult. The legislative history of the Act indicated that the 1974 amendments "signaled a dramatic shift from the theory of exchange self-regulation to authorization of the CFTC to compel the exchanges to alter or adopt rules."[223] The majority commented, "[N]o amount of labored parsing can obscure the self-evident truth that Congress knew the courts were implying private rights of action and did nothing to alter this."[224] House and Senate hearings were found to be "replete" with references to the maintenance of private causes of action under the Act.[225] Therefore, the majority invoked the canon of construction which provides that the reenactment of a statute incorporates prior judicial interpretations,[226] and found that this supported an implied private right of action.

The reparations procedure was found not to be the sole remedy for an injured party for several reasons. This method is of

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218. 638 F.2d at 304 (quoting S. REP. NO. 871, 67th Cong., 2d Sess. 3 (1922)).

219. 638 F.2d at 283 (quoting H.R. REP. NO. 1181, 95th Cong., 2d Sess. 84 (1978)).

220. 638 F.2d at 305 (citing H.R. REP. NO. 743, 90th Cong., 1st Sess. 2 (1967); S. REP. NO. 947, 90th Cong., 2d Sess., *reprinted in* 1968 2 U.S. CODE CONG. & AD. NEWS 1675).

221. 638 F.2d at 306 (quoting 119 CONG. REC. 41,332 (Dec. 13, 1973) and 120 CONG. REC. 10,739 (April 11, 1974) where Rep. Wampler stated that the "speculator performs an important economic function in futures markets.")

222. 638 F.2d at 306.

223. *Id.* at 309.

224. *Id.*

225. *Id. See also Hearing on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 121 (1973); *Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 249 (1974); *Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 294 (1974).

226. *See* Van Vankren v. Helvering, 115 F.2d 709, 710 (2d Cir. 1940).

limited scope since it is available only against those individuals who are or should be registered. Legislative history described the reparations procedure as a "new" remedy,[227] thus implying that the "old" remedies, *i.e.*, implied private judicial actions, continued to exist. The amendments did not provide an express preemption of a court's jurisdiction to hear such cases. Lastly, the "savings clause" inserted into the amendments specifically stated that the legislation did not "supersede or limit the jurisdiction conferred" on the courts.[228] The majority brushed aside the argument that Congress could have expressly enacted legislation to grant private remedies by stating that "objection to the particular terms and inertia in the way of correction . . . , or just plain loss in the legislative shuffle"[229] could explain the void. These factors led the majority to conclude that only express legislation could have destroyed the judicially created private remedy.

The third *Cort* prong was also found to be satisfied, based largely on the court's analysis of the second prong.[230] With regard to the fourth prong, the majority found that the federal statutes had preempted state laws.[231] Therefore, an implied private remedy was allowed in *Leist*.

Several courts have presumed the existence of a private right of action under the CEA without resorting to a *Cort* analysis. Based upon the pre-1974 case of *Deaktor*, the Seventh Circuit found without discussion that such an action existed.[232] In *E.F. Hutton & Co. v. Lewis*,[233] the district court found it had jurisdiction because of a federal statute giving district courts original jurisdiction in any matter concerning the regulation of commerce or protecting trade against restraints or monopolies.[234] The court also concluded that implied private remedies under the Act were appropriate because other courts had implied them.[235]

In *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[236] the court summarily found that an implied private right of action existed.[237] The *Ames* court refused either to compel the plaintiff

227. Leist v. Simplot, 638 F.2d 283, 313 (2d Cir. 1980).
228. *See* 7 U.S.C. § 2 (1976).
229. 638 F.2d at 318.
230. *Id.* at 321.
231. *Id.* at 322.
232. Case & Co., Inc. v. Board of Trade, 523 F.2d 355 (7th Cir. 1975).
233. 410 F. Supp. 416 (E.D. Mich. 1976).
234. *See* 28 U.S.C. § 1337 (1976).
235. 410 F. Supp. at 419.
236. 567 F.2d 1174 (2d Cir. 1977).
237. *Id.* at 1176.

to pursue agreed arbitration remedies or to stay the federal court action.[238] *R.J. Hereley & Son Co. v. Stotler & Co.*[239] followed *Ames* and reached the same result. The *Hereley* court also found that the express remedies provided in the CEA were not exclusive.[240] In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*[241] and *Hirk v. Agri-Research Council, Inc.*[242] the Seventh and Eighth Circuits summarily stated in *dictum* that implied private right remedies existed under the CEA.[243] None of these courts relied on *Cort*, yet they still found implied private rights of action.[244]

Some courts required that a plaintiff exhaust administrative remedies before they would hear the private action issue. In *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*,[245] the court found that under the CEA, it was constrained from exercising jurisdiction until the statutorily granted remedies were exhausted. Furthermore, the court looked to a 1974 amendment to the CEA which stated that the CFTC was specifically empowered to bring legal action for CEA violations in the proper court to either enjoin the action or force compliance; in lieu of bringing such action itself, the CFTC could request that the Attorney General do so.[246] The court therefore held that no other party was authorized to bring suit.

In *Bartels v. International Commodities Corp.*,[247] a district court found that Congress' enactment of a reparations procedure required a plaintiff to first exhaust his administrative remedies before bringing an action to invoke private remedies.[248] The court found that the passing of the CFTCA took commodity futures options away from the coverage of the federal securities

238. *Id.* at 1181.

239. 466 F. Supp. 345 (N.D. Ill. 1979).

240. *Id.* at 347.

241. 593 F.2d 129 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979).

242. 561 F.2d 96 (7th Cir. 1977).

243. 593 F.2d at 133 n.7; 561 F.2d at 103 n.8.

244. Other decisions which failed to use the *Cort* analysis include Witzel v. Chartered Sys's Corp., 490 F. Supp. 343 (D. Minn. 1980) and Grayson v. ContiCommodity Serv's Inc., 2 COMM. FUT. L. REP. (CCH) ¶ 21,033 (D.D.C. May 23, 1980). In *Witzel*, the court perfunctorily cited the *Cort* factors but did not use them in finding the existence of a private remedy. The *Grayson* court, without analysis, simply relied on earlier authority to imply a private right of action. *See also* Case & Co., Inc. v. Board of Trade, 523 F.2d 355 (7th Cir. 1975); Kelley v. Carr, 442 F. Supp. 346 (W.D. Mich. 1977); E.F. Hutton & Co. v. Lewis, 410 F. Supp. 416 (E.D. Mich. 1976).

245. 436 F. Supp. 447 (N.D. Ohio 1976).

246. *Id.* at 454, *citing* 7 U.S.C. § 13a-1 (1974).

247. 435 F. Supp. 865 (D. Conn. 1977).

248. *Id.* at 868.

laws, including the private right of action previously implied.[249] The court stated that a defrauded commodity invester would no longer be able to bring an action under SEC rule 10b-5 because the CEA reparations procedure "clearly displaced" the previous action.[250] A defrauded plaintiff must first invoke the reparations procedure, or any other remedy granted in the CEA, before initiating a private right of action under the CEA antifraud provisions.[251]

Those courts completely denying an implied private right of action did so under a *Cort* analysis.[252] The courts were divided on whether the plaintiff in each case was a member of the class for whose especial benefit the statute was enacted. In *Berman v. Bache, Halsey, Stuart, Shields, Inc.*,[253] the court found that plaintiff was a member of the class protected by the antifraud provision of the CEA.[254] In *Liang v. Hunt*,[255] however, plaintiff was not a member of the class protected by the anti-price manipulation or excessive speculation provisions of the CEA. In *Fischer v. Rosenthal and Company*,[256] the court was willing to concede "arguendo" that plaintiff was a member of the class protected by the CEA antifraud provision.[257] There was no split over deciding whether there was any explicit or implicit indication of legislative intent to grant or deny a private remedy. In *Berman*, the CFTC was viewed as the "single expert agency"

249. *Id.* The jurisdiction of cases involving various aspects of commodity futures is undecided. The respective chairmen of the SEC and CFTC entered into an "accord," resulting in a division of jurisdiction over this area. *See* SEC and CFTC Jurisdiction Agreement, Proposed Legislation, 2 COMM. FUT. L. REP. (CCH) ¶ 83,096 (Feb. 2, 1982). The Seventh Circuit, in Chicago Board of Trade v. SEC, — F.2d —, 2 COMM. FUT. L. REP. (CCH) ¶ 21,365 (7th Cir. Mar. 24, 1982), ruled that options on GNMA are commodities. This decision materially affects the "accord." This entire area must now await congressional action. *See* S. 2260 and S. REP. No. 390, 97th Cong., 2d Sess. 1, 3 (1982).

250. 435 F. Supp. 865, 869. *See also* Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc., 436 F. Supp. 447 (N.D. Ohio 1976) (no private right exists to stay an arbitration proceeding and compel litigation in district court).

251. 435 F. Supp. at 870.

252. *See* Stone v. Saxon & Windsor Group Ltd., 485 F. Supp. 1212 (N.D. Ill. 1980); Walsh v. International Precious Metals Corp., 2 COMM. FUT. L. REP. (CCH) ¶ 21,186 (D. Utah Mar. 25, 1981); Hensley v. Maduff & Sons, 2 COMM. FUT. LAW REP. (CCH) ¶ 21,017 (D.C. Cal. Apr. 1, 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53 (N.D. Tex. 1979); Liang v. Hunt, 477 F. Supp. 891 (N.D. Ill. 1979); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311 (S.D. Ohio 1979).

253. 467 F. Supp. 311 (S.D. Ohio 1979). *See* Hensley v. Maduff & Sons, 2 COMM. FUT. L. REP. (CCH) ¶ 21,017 (D.C. Cal. Apr. 1, 1980).

254. 467 F. Supp. at 322.

255. 477 F. Supp. 891 (N.D. Ill. 1979).

256. 481 F. Supp. 53 (N.D. Tex. 1979).

257. *Id.* at 56.

empowered by Congress with the responsibility for regulating commodity futures trading.[258] However, the courts were at odds on whether an implied private remedy was consistent with the purpose of the statute. The *Berman* court found that a private action would deprive the CFTC of its opportunity to build a strong federal regulatory policy.[259] Conversely, the *Liang* court determined that such a remedy would have only an incidental effect on enforcing provisions of the CEA.[260] As to the fourth prong, the regulation of commodity futures trading was found in *Liang* to be a federal matter.[261] However, the *Berman* court determined this to be subject to state regulation, with federal regulation as an alternative.[262]

Additional arguments in opposition to an implied private remedy are found in the Second Circuit's dissent in *Leist*.[263] There Judge Mansfield focused on the absence of congressional intent to create a private remedy in the plaintiffs' favor, stating that the CEA, "when analyzed according to well-settled principles of construction established by the Supreme Court in *Cort v. Ash*, . . . fails completely to reveal any [c]ongressional intent to approve, much less create, an implied private right of action in favor of these plaintiffs. . . ."[264] The majority's use of a "now-outmoded" tort theory and congressional silence to support implying a private remedy was also criticized. Congress was not under any obligation either to state that the remedies created by statute were exclusive or to expressly disavow itself from previous judicial decisions implying a private remedy. Reliance on a presumption that Congress was aware of previous judicial decisions and approved of them "is to substitute sheer speculation for hard evidence of intent."[265]

According to Judge Mansfield, the plaintiffs must bear the burden of proving that "Congress had an unexpressed intent in

258. 467 F. Supp. at 322. *See also* Liang v. Hunt, 477 F. Supp. 891, 893 (N.D. Ill. 1979).

259. 467 F. Supp. at 323.

260. 477 F. Supp. at 894.

261. *Id.*

262. 467 F. Supp. at 323.

263. 638 F.2d 283, 323-56 (2d Cir. 1980) (Mansfield, J., dissenting).

264. *Id.* at 323.

265. *Id.* at 324. Judge Mansfield also stated that none of the pre-1974 decisions upon which the majority relied were ever cited or discussed by Congress. The only pre-1974 case that implied a private remedy was Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom.* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973), but Congress has never cited it for this proposition.

favor of such a remedy."[266] He argued that the majority incorrectly presumed that a private right could be implied in the absence of any congressional comment to the contrary. Any creation of an implied remedy, absent clear congressional intent, usurped the legislative branch's powers and ran afoul of the doctrine of separation of powers. Congress' silence and supposed knowledge of judicial decisions implying a private right of action under commodities laws since 1967 could not be taken as an expressed intent to continue the implication of such a remedy. The dissent concluded that the plaintiffs had failed to sustain their burden of proof to adduce evidence of such intent either on the face of the Act or by legislative history.[267]

The statute's expressly stated remedies and means of enforcement precluded a judicially created remedy, the dissent argued.[268] Any investigation of Congress' intent by means of examining the legislative history could "run the danger of attributing to Congress thoughts it never actually had."[269] Therefore, if such were attempted, the dissent argued, "primary weight should be placed on the language of the statute and on clear, unequivocal statements by those responsible for its enactment."[270] Judge Mansfield contended that the antifraud statute relied upon by the plaintiffs was enacted to protect broker-dealer customers, not the plaintiffs here, and was not necessary since the administrative remedies (reparations) were available to the plaintiffs. In fact, a private action would be duplicative because the administrative remedies were available.[271]

The dissent also argued that neither the language nor structure of the CEA indicated any express or implied intent to benefit a special class of individuals. The Act was designed to protect the public, primary producers, and customers from huge price fluctuations in the commodities markets.[272] The debates on the 1974 amendments also included protecting hedgers, but not speculators such as the plaintiffs here.[273] The 1978 amendments

266. 638 F.2d at 324. *See* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974).

267. 638 F.2d at 324.

268. Judge Mansfield stated that "the broader the scope and type of the expressly-provided remedies, the less is the need or justification for implying an unmentioned additional private remedy." *Id.* at 327.

269. *Id.* The dissent also stated that "[E]xtrapolations based on gossamer-thin fabric, requiring speculative assumptions as to Congress' intent are to be avoided." *Id.*

270. *Id.*

271. *Id.* at 329-31.

272. *Id.* at 334.

273. *Id.* at 334-35.

also failed to include speculators as those protected under the Act, despite the fact that some lower courts were denying an implied private remedy.[274]

The second and third prongs of the *Cort* test were the focus of the Fifth Circuit in *Rivers v. Rosenthal and Co*.[275] The court found that the CFTCA was not a reenactment of previous statutes, differing from the *Leist* premise, and denied the presumption of incorporation of "judicial baggage" that arose from those statutes. Therefore, because the 1974 amendments were a "complete overhaul," plaintiff was required to provide " 'clear contrary evidence of legislative intent' affirmatively to provide such an implied right in addition to the express remedies."[276] The Fifth Circuit commented that even if the plaintiff's references to Congress' awareness of prior judicial recognition of implied private remedies was assumed, no indication of congressional approval of these decisions was cited. The court believed that both factors must exist in order to find legislative intent, and here it found neither. The failure of the plaintiff to convince the court that statements made by House or Senate members sufficiently supported a private remedy, combined with congressional failure to approve any of three bills expressly providing for a private remedy, helped the court to conclude that no legislative intent to allow such a remedy existed.[277] The court also rejected the plaintiff's contention that legislative intent could be inferred from the "context or *zeitgeist* in which the legislation was enacted."[278] With respect to whether implication of a private remedy would be consistent with legislative intent, the court concluded that Congress perceived that any action claiming an implied private remedy would be a "threat to the goal of developing a coherent and consistent body of law."[279]

These differing decisions rendered by federal district and appellate courts merely multiplied confusion. Practitioners had hoped that from this hodge-podge of conflicting case law the Supreme Court would settle the issue once and for all. *Curran* was to have been the decisive case.

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274. *Id.* at 353.

275. 634 F.2d 774 (5th Cir. 1980), *vacated*, — U.S. —, 102 S. Ct. 2228, *on remand*, 686 F.2d 297 (5th Cir. 1982). The defendant conceded to the first and fourth prongs. *Id.* at 782 n.13. *See also* Walsh v. International Precious Metals Corp., 510 F. Supp. 867 (D. Utah 1981) (the court specifically followed *Rivers*).

276. 634 F.2d at 784 (quoting National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974)).

277. 634 F.2d at 788.

278. *Id.* at 789.

279. *Id.* at 791.

THE SUPREME COURT DECISION

Justice Stevens, formerly of the Seventh Circuit Court of Appeals which sits in Chicago, Illinois, the home of the world's two largest commodity futures exchanges, wrote the majority opinion in *Curran*. Interestingly, little effort was expended in applying *Cort*. Rather, *Cort* was acknowledged, the "intent of Congress" was pronounced paramount, and Justice Stevens stated that "[t]he key to this case is our understanding of the intent of Congress in 1974 when it comprehensively reexamined and strengthened the federal regulation of futures trading."[280] To better understand the basis for the decision, it will be helpful to present first the principal arguments the Court rejected.

The Supreme Court was faced with a bevy of arguments against an implied private action. At the outset, one must concede that the plaintiffs in *Curran* and *Leist* were ". . .of the class for whose especial benefit the statute was enacted," and that commodity futures regulation is a federal rather than a state concern. Thus the first and fourth prongs of *Cort* were satisfied. However, the main arguments against a private right of action and their bases are rather straightforward. The fundamental principle, in line with *Cort*, is that under the system of separation of powers a cause of action should be created by Congress.[281] If Congress had wanted a private damage action to exist, it could easily have provided one.[282] Moreover, while *Cort* had not been decided at the time of the 1974 amendments to the CEA, the judiciary had on numerous occasions indicated its reluctance to imply private rights of action.[283] Congress, it must be assumed, knew of those pronouncements when it enacted the amendments.[284]

It has been argued that since a private right of action had been implied as early as 1967 in *Goodman v. H. Hentz and Co.*,[285] the 1974 amendments implicitly carry the judicial baggage attached to the statute. This view is sound when subsequent legislation supplements a statute. Where, as here, however, the 1974 amendments completely overhauled the CEA, existing judicial baggage must be jettisoned with the outmoded legislation. To characterize the 1974 amendments as anything less than a

280. Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran, 456 U.S. 353, 102 S. Ct. 1825 (1982).

281. Cannon v. University of Chicago, 441 U.S. 677, 742 (1979); Rivers v. Rosenthal & Co., 634 F.2d 774, 781 n.11, 789 (5th Cir. 1980).

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

283. *See supra* notes 176-77 and accompanying text.

284. *See supra* notes 176-77 and accompanying text.

285. 265 F. Supp. 440 (N.D. Ill. 1967).

substantial revision of the CEA is folly. After all, a new regulatory agency was created, the CFTC, which was vested with exclusive jurisdiction over commodity futures. Reparations, a new forum for the resolution of disputes, was created along with a host of other new provisions.[286] Thus, prior judicial decisions, at least on the question of private rights of action, should not have been perpetuated.[287]

Another compelling factor available for the Court's consideration was Congress' unwillingness to enact H.R. 11195,[288] S. 2837,[289] and S. 2578,[290] each of which contained language providing for an express private right of action and treble damages for violations of the CEA. It has been argued that unsuccessful attempts to enact legislation are not the best guide to legislative intent.[291] Nevertheless, when unenacted legislation is coupled with everything else attendant to the 1974 amendments, the failure to enact those bills specifically providing for private rights of action must carry greater weight. Nothing can be a greater expression of congressional intent with respect to private damage actions than an outright rejection of three bills which would have created such a right.[292]

The foregoing, viewed in conjunction with the novel creation of a reparations procedure designed expressly for the commodity futures industry, evidences the congressional intent that reparations, along with contract market arbitrations, must have been precisely what Congress intended as the sole and exclusive forum for the resolution of commodity futures trading disputes. In this connection, it must be noted that the reparations procedure was first proposed in H.R. 11955.[293] This bill appeared almost immediately after the failure of H.R. 11195 which provided an express private right of action.[294] Further, it can be inferred from those proposals that Congress intended the body of decisional law in this area, except for cases under the $15,000 arbitration jurisdictional limits, to be developed exclusively in

286. *See generally* H.R. REP. NO. 975, 93d Cong. 2d Sess. 48 (1974); Rivers v. Rosenthal & Co., 634 F.2d 774, 784 (5th Cir. 1980).

287. 634 F.2d at 784.

288. 93d Cong., 1st Sess. § 17(3) (1973).

289. 93d Cong., 1st Sess. § 505 (1973).

290. 93d Cong., 1st Sess. § 203(3) (1973).

291. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969).

292. Rivers v. Rosenthal & Co., 634 F.2d 774, 788-89 (5th Cir. 1980).

293. The version of legislation that later passed in the House was H.R. 13113, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843.

294. S. REP. NO. 250, 93d Cong., 2d Sess. 48, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 2087, 2114.

the CFTC's forum.[295] While *Cort* does provide four considerations, "legislative intent" is the linchpin.[296] The foregoing should make clear that whatever arguments one advances, strict adherence to *Cort* would not have provided sufficient support to imply a private right of action under the CEA.

The majority's decision in *Curran* to imply a private right of action under the CEA was based on several arguments. First, Congress intended to allow private rights of action when the 1974 amendments were enacted.[297] Second, Congress was presumed to be aware of the judicial implication of private remedies when it enacted the 1974 amendments.[298] In addition, the court found that the 1974 amendments were intended to supplement, not supplant, the existing legislation under which a private right of action had been implied.[299] Fourth, the enactment of the "savings clause"[300] was intended to preserve implied private remedies.[301] Finally, since congressional intent for implying a private right of action existed, the respondents (plaintiffs in the original actions) had standing to sue both the exchanges and the participants in the conspiracy under the CEA.[302]

Examining the "congressional perception" of the 1974 amendments, the majority focused upon whether Congress intended to preserve the pre-existing judicial implication of private remedies. Citing *Cannon*, the *Curran* Court stated that Congress was presumed to know the law; that is, that federal courts were implying a private right of action under the CEA.[303] The "pre-1975 routine recognition" of such a remedy constituted the "contemporary legal context" under which the 1974 amendments were enacted. The majority therefore concluded that Congress' thorough re-examination of the CEA, followed by its failure to amend the statutes under which implied private remedies had been granted, meant that Congress intended to preserve such a remedy.[304]

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295. Rivers v. Rosenthal & Co., 634 F.2d 774, 782 (5th Cir. 1980).

296. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353,—, 102 S. Ct. 1825, 1839 (1982).

297. *Id.*

298. *Id.* at —, 102 S. Ct. at 1841.

299. *Id.* at —, 102 S. Ct. at 1842.

300. 7 U.S.C. § 1 (1976 & Supp. III 1978).

301. 456 U.S. at —, 102 S. Ct. at 1843.

302. *Id.* at —, 102 S. Ct. at 1847.

303. *Id.* at —, 102 S. Ct. at 1839-49. The majority also made an analogy to cases under SEC rule 10b-5 and congressional awareness of the courts' actions. *Id.*

304. *Id.* at —, 102 S. Ct. at 1841. Although the majority stated that legislative history supports this conclusion, it failed to cite specific examples.

The Court found that the new procedures for seeking redress of CEA violations established by the 1974 amendments "were intended to supplement rather than supplant the implied judicial remedy."[305] The creation of the CFTC, whose functions among other things were to supplement the exchanges' rules, to ensure the exchanges' enforcement of their rules, and to establish administrative procedures, was seen by the majority as proof of Congress' desire to preserve the implied private remedy as another method to assure compliance with the CEA.[306] In so doing, the Court cited Senator Talmadge's statement that the newly established administrative remedies were "not intended to interfere with the courts in any way."[307]

The enactment of the "savings clause" was found to be "direct evidence of legislative intent" that implied private remedies be preserved.[308] Since the purpose of the savings clause was to continue the courts' jurisdiction over commodity futures trading violations, Congress must have had the preservation of judicially-implied private remedies in mind. Congress' immediate action to dispel any notion that the clause was intended only to consolidate the CFTC's rulemaking power by separating its jurisdiction from the SEC was found to serve as additional proof.

The statutory language of the antifraud provision of the CEA was found to include the respondents (plaintiffs in the original actions), thus giving them standing to sue since the majority found congressional intent for implying a private right of action.[309] The Court focused upon other actions against the ex-

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305. *Id.* at —, 102 S. Ct. 1842. The majority found that the new procedures created by Congress in the 1974 amendments (reparations and arbitration) were not intended as a substitute for the implication of a private remedy. The majority pointed to the fact that a reparations proceeding is not available against the exchanges. The arbitration proceeding is narrower in scope and is available only against members and employees of the contract market.

306. *Id.*

307. *Id.* at —, 102 S. Ct. at 1843 (quoting statement of Sen. Talmadge in 120 CONG. REC. 30,459 (1974)). Senator Talmadge was Chairman of the Senate Committee on Agriculture and Forestry.

308. *Id.* The Court noted that Talmadge and Poage reported that

> the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the 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 the jurisdiction of the CFTC.

120 CONG. REC. 34,737, 34,997 (1974).

309. 456 U.S. at —, 102 S. Ct. at 1844. The majority stated that

> the characterization of persons who invest in futures contracts as "speculators" does not exclude them from the class of persons protected by the CEA. The statutory scheme could not effectively protect the producers and processors who engage in hedging transactions without also protecting the other participants in the market whose transac-

changes which were allowed to be brought, and surmised that Congress intended private action brought against the exchanges to be another means of enforcement of the CEA's self-regulation concept.[310]

Congress' consistent strengthening of the "regulation scheme" without specifically voiding the judicial tradition of implying private remedies was the final support for the holding. Without comment the Court also concluded that "participants in a conspiracy to manipulate the market in violation of those rules are also subject to suit" by the traders they injure.[311]

The dissent, written by Justice Powell, stated that the majority erred in both its reliance on pre-1974 district court decisions implying a private remedy and in its conclusion that Congress impliedly endorsed those decisions by failing to amend the CEA in 1974. The dissent also opposed the finding that Congress in 1974 intended to retain judicially implied private remedies under the CEA. Justice Powell pointedly commented that the majority reached the latter conclusion "without even token deference to established tests for discerning congressional intent."[312]

The majority, the dissent argued, based its implication of a private right of action on congressional inaction and erroneous decisions by the lower federal courts.[313] The basis for such "erroneous" lower federal court decisions was *Goodman*.[314] The majority concluded that Congress was aware of *Goodman* and the other decisions in 1974 when it did not expressly eliminate this judicial remedy. The dissent attacked this reasoning, commenting that the majority did not produce any "evidence of the kinds generally recognized as most probative of congressional intent."[315]

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tions over exchanges necessarily must conform to the same trading rules.

Id.

310. *Id.* at —, 102 S. Ct. at 1847.

311. *Id.* The majority found that as with "the analogous Rule 10b-5," privity of dealing is not necessary in order to maintain an action. As with rule 10b-5, the courts must "fill in the interstices" of the implied cause of action under the CEA. *Id.*

312. *Id.* at —, 102 S. Ct. at 1848 (Powell, J., dissenting). Joining in the dissent were Chief Justice Burger and Justices Rehnquist and O'Connor.

313. *Id.*

314. *See* Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967).

315. 456 U.S. at —, 102 S. Ct. at 1852. In fact, the dissent found "persuasive evidence on the face of the statute that Congress did not contemplate a judicial remedy for damages against exchanges." *Id.* The 1974 amendments expressly subject the exchanges to fines and sanctions for noncompliance with their own rules. *See* 7 U.S.C. § 13a (1976). Any implication of

The dissent also criticized several other foundations of the majority's argument. Authorizing the CFTC to create additional regulations for exchanges does not expressly contemplate an implied judicial remedy.[316] Nor does the addition of an administrative reparations procedure. In fact, reparations denies a private right of action. Moreover, the majority did not answer the question of why an administrative remedy would be created while implications of judicial actions continue.[317] Last, the savings clause does not of itself bestow a *substantive* right to sue for damages.[318]

The dissent also supplied a chart which it claimed evidenced Congress' intent in enacting the 1974 amendments.[319] The chart displayed the features of each proposed bill. The dissent argued that since none of the proposed bills listed any "implied damages actions," the majority could at most argue that in 1974 Congress did not disapprove of *Goodman*.[320] Justice Powell's final argument was that the judicial creation of implied remedies could disrupt the functions of federal regulatory agencies and could create a burden for Congress by requiring constant awareness of the decisions of lower federal courts.[321] The dissent concluded that there was no evidence of congressional intent to recognize the implication of a private remedy.

Conclusions and Recommendations

The *Curran* decision does not advance *Cort* although *Cort* should be the controlling case in this area. Had *Cort* been meticulously applied in *Curran*, no private right of action would have been implied under the CEA. Such a conclusion is clearly

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private remedies could expose the exchanges to greater fines than that contemplated by Congress when it enacted the legislation.

316. 456 U.S. at —, 102 S. Ct. at 1852-53.

317. *Id.* The dissent concluded that the majority ignored the judicial canon of statutory construction which states that where a statute expressly provides a remedy, a court must be wary of incorporating other remedies into the statute.

318. *Id.* at —, 102 S. Ct. at 1854. The dissent found that the enactment of the clause was not probative of whether or not a remedy should be implied. The savings clause neither creates nor preserves any substantive right to sue for damages.

319. *Id.* at —, 102 S. Ct. at 1855, Appendix A. *See also* Commodity Futures Commission Act: *Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 194 (1974).

320. 456 U.S. at —, 102 S. Ct. at 1851-52.

321. *Id.* at —, 102 S. Ct. at 1855. The dissent concluded that such an act by the majority will tax the legislature by making it respond to lower federal court decisions. Otherwise, inaction, or silence, will be considered approval of the courts' actions.

consistent with recent decisions which deny private rights of action under various provisions of the federal securities laws. Here, the Court's interpretation of Congress' understanding of the law in 1974 is mere conjecture; other courts have reached opposite conclusions regarding congressional intent with equal facility. The slender reed of speculation does not justify subjecting a major national industry to multiple adversary forums.

As a result of *Curran*, the commodity futures industry has become exposed to litigation in state courts, CFTC reparations proceedings, exchange arbitration forums, and the federal courts. Few industries are so exposed. That the risk shifting, price discovery and hedging activities of the commodity futures industry which is so important to the nation should become subject to law generated in four separate and distinct forums can only result in confusion and hardship to the courts, to the public, and to the industry. Further, the sanctioning of tribunals which derive their authority from different articles of the Constitution may well violate the separation of powers doctrine.

Congress can remedy the situation with a few pen strokes. Unfortunately, it appears that Congress has opted to provide an express private right of action in the Futures Trading Act of 1982 without limiting or eliminating the jurisdiction of other forums.[322] It would be preferable that new legislation should confine the resolution of commodity futures trading disputes to the CFTC's reparations forum or exchange arbitrations since the $15,000 jurisdictional ceiling amount for exchange arbitration has been removed.[323] Such a limitation will have several beneficial results. First, the industry's exposure will be reduced, not as to liability, but as to choice of forum and inconsistency of rulings. Second, the development of a unified and consistent body of case law, at least in the reparations area, will be promoted. Third, the just resolution of disputes in this highly complex area will be ensured because both the CFTC administrative judges who hear reparations cases and the exchange members serving on arbitration panels possess the expertise necessary to resolve such disputes. Finally, removing these cases from federal (if not

322. *See* § 235 of the Futures Trading Act of 1982, Conference Report to Accompanying H.R. 5447, 97th Cong., 2d Sess. 3 (1982). *Compare* Futures Trading Act of 1982, H.R. 5447, 97th Cong., 2d Sess. § 236, Pub. L. 97-444, — Stat. —, to be codified at 7 U.S.C. § 1- — (Jan. 11, 1983), which is intended to amend the CEA by adding a new § 22, Private Rights of Action, *with* S. 2109, 97th Cong., 2d Sess. (1982) which does not contain a similar provision.

323. *See* § 217 of the Futures Trading Act of 1982, Conference Report to Accompany H.R. 5447, 97th Cong., 2d Sess. 3 (1982); H. REP. NO. 964, 97th Cong., 2d Sess. 3 (1982) to amend section 22(a)(1) of the Act. The CFTC issued a release encouraging the public to use exchange arbitration facilities. 46 F.R. 60834, 2 COMM. FUT. L. REP. (CCH) ¶ 21,286 (Dec. 14, 1981).

state) courts will ameliorate some of the pressure on the already overburdened judiciary.[324]

324. *See* Burger, *Annual Report on the State of Judiciary*, 66 A.B.A.J. 295 (1980).