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Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran: Establishing an Implied Private Right of Action Under the Commodity Exchange Act

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Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran: Establishing an Implied Private Right of Action Under the Commodity Exchange Act

In the case of Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, *the United States Supreme Court held that there is an implied private right of action under the Commodity Exchange Act, as amended. As a result of this holding, a private party may maintain an action for damages caused by a violation of the Commodity Exchange Act.*

In this article, the author examines the Supreme Court's analysis and explores the future impact of the decision in light of the role the judiciary has in legislative matters.

I. INTRODUCTION

There is a substantial risk involved when one invests in a futures trading market,[1] more commonly known as a commodity exchange. The potential for price manipulation, as well as fraudulent and deceptive conduct, is readily apparent, and perhaps inevitable.[2] Consequently, the need for legislative action has increased with the growth of futures trading in recent years.[3] Federal regulation of the Commodity Exchange has attempted to circumvent the opportunities for fraudulent and deceptive conduct. However, Congress has been silent on the issue of a private right of action for damages resulting from a violation of the Commodity Exchange Act (CEA).[4]

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,*[5] the Supreme Court held that the legislative intent of the CEA provided for an implied private right of action for investors partici-

1. Speculators absorb the substantial risk involved with futures trading. *See generally Department of Treasury and Federal Reserve Bd. Study of Treasury Futures Markets, reprinted in* COMM. FUT. L. REP. (CCH) ¶ 20,823 (May 14, 1979); *see also* H.R. REP. NO. 975, 93d Cong., 2d Sess. 132 (1974) [hereinafter cited as 1974 House Report].

2. Hudson, *Customer Protection in the Commodity Futures Market,* 58 B.U.L. REV. 1, 18-35 (1978) (evaluating the effects of various deceptive practices); *see also* S. REP. NO. 1131, 93d Cong., 2d Sess. 94, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5843, 5856 [hereinafter cited as 1974 Senate Report].

3. 1974 Senate Report, *supra* note 2.

4. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825, 1833 (1982).

5. *Id.*

pating in futures contract trading.[6] Congressional silence has not always been construed as permitting implied rights of action in the past.[7] The approach taken in *Curran* illustrates the Court's inclination to look beyond the context of a statute for legislative intent when important issues are not enunciated in the statutory scheme. The *Curran* decision resolves the dilemma of a private investor who suffers damages under the CEA.[8]

The purpose of this article is to provide the historical background leading up to *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* to examine the analysis utilized by the Court, and to speculate as to what future impact the decision will have.

II. Historical Background of the Implied Rights Doctrine

The implied rights doctrine did not appear in American courts until 1916.[9] However, the significant period of development began with the case of *J.I. Case Co. v. Borak.*[10] In *Borak,* the Court found an implied right of action under section 14(a) of the Securities Exchange Act of 1934 and utilized the liberal test of whether the remedies within the statute were sufficient in light of the legislative purpose.[11] The eleven years following *Borak* represent a period of liberal application of the doctrine with several decisions finding an implied private right of action.[12]

In 1975, the Supreme Court in *Cort v. Ash*[13] departed from its previous course of hostility towards implied private rights of ac-

6. *Id.* at 1844. Trading in futures contracts involves the selling or purchasing of commodities for a variable price at a future time specified in the futures contract. *See* Note, *The Role of the Commodity Futures Trading Commission Under the Commodity Futures Trading Commission Act of 1974,* 73 Mich. L. Rev. 710, 711 (1975). For a general history of futures trading, see S. Rep. No. 850, 95th Cong., 2d Sess. 3-13, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2093-2101 [hereinafter cited as 1978 Senate Report].

7. Several 1981 cases failed to find an implied right of action. *See* Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); California v. Sierra Club, 451 U.S. 287 (1981); Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

8. 102 S. Ct. at 1848.

9. *See* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916). Using a "statutory tort" approach, the court in *Rigsby* found that private citizens have a right of action implied from the language of the Federal Safety Appliance Acts.

10. 377 U.S. 426 (1964).

11. *Id.* at 433.

12. *See* Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash,* 1 J. Corp. L. 371 (1976).

13. 422 U.S. 66 (1975) (holding that no private action for damages against corporate directors should be implied in favor of corporate shareholders under Federal Election Campaign Act). *See also* Prentice, *Implied Rights of Action: Of Commodities and the Future,* 17 Wake Forest L. Rev. 911, 913-14 (1981).

tion. In *Cort,* the Supreme Court established a stringent test[14] for determining whether an implied cause of action[15] would exist.[16] The case of *Cannon v. University of Chicago*[17] best illustrates this increasingly conservative approach adopted by the Court to solve this problem. Although the majority opinion in *Cannon* found an implied private right of action, it was the dissenting opinion of Justice Powell which has had a significant impact on subsequent decisions.[18] Justice Powell favored an emphasis on searching for the legislative intent that was clearly evidenced rather than that which was only speculated. According to Justice Powell, the *Cannon* and *Cort* decisions "invite independent judicial lawmaking"[19] which he did not support.

The impact of Justice Powell's dissent was demonstrated in the case of *Touche Ross & Co. v. Redington,*[20] decided one month after the *Cort* decision. In *Redington,* the Court focused on the importance of legislative intent in the determination of the issue.[21] In the same year, the Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*[22] specifically quoted from Justice Powell's dissent in *Cannon,* reinforcing the emphasis on legislative intent as the prevalent factor in the determination of whether to imply a pri-

14. *See supra* note 4, at 1836 n. 51, where four factors in the *Cort* test were stated and explained: 1) Is the plaintiff one of the class for whose benefit the statute was enacted?; 2) Is there any indication of legislative intent?; 3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?; and 4) Is the cause of action one traditionally relegated to state law?

15. *See supra* note 13, at 913, where the author notes that the more conservative approach established in *Cort* was apparently the result of the discomfort of several members of the court with the rapid pace at which courts seemed to be implying private causes of action.

16. *See* Note, *A New Direction for Implied Causes of Action,* 48 FORDHAM L. REV. 505, 507 (1980).

17. 441 U.S. 677 (1979).

18. After criticizing the analysis suggested in the *Cort* decision, Justice Powell stated that "[w]e should not condone the implication of any private right of action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist." *Id.* at 749 (Powell, J., dissenting).

19. *Id.* at 740 (Powell, J., dissenting).

20. 442 U.S. 560 (1979) (Justice Powell did not participate in the decision). *Redington* involved the issue of whether customers of a securities brokerage firm have an implied private right of action under securities laws; *See* Note, *Recent Developments in Commodities Law,* 37 WASH. & LEE L. REV. 986, 1001-02 n. 124, 132-33 (1980) [hereinafter cited as *Recent Developments*].

21. *See Recent Developments, supra* note 20, at 1001.

22. 444 U.S. 11 (1979). *See generally* Underwood, *TransAmerica Mortgage Advisors, Inc. v. Lewis: An Analysis of the Supreme Court's Definition of an Implied Right of Action,* 7 PEPPERDINE L. REV. 533 (1980).

vate right of action.[23] Legislative intent has continued to be the focus in evaluating implied rights of action cases leading up to and including *Curran.*[24]

III. Legislative History of the Commodity Exchange Act

The first legislative action addressing futures trading occurred in 1921.[25] It imposed a prohibitive tax on grain futures transactions. In *Hill v. Wallace,*[26] the tax was found unconstitutional, but the regulatory Provisions were reenacted in the Grain Futures Act.[27]

In 1936 Congress enacted several amendments[28] to the Grain Futures Act, including a change in the name to the Commodity Exchange Act. Additional provisions authorized a commission to oversee limits on the amount of speculative trading in a futures contract, and made it a violation to defraud participants in futures

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23. 444 U.S. at 15-16. *See generally* Prentice, *supra* note 13, at 916-18.

24. 102 S. Ct. at 1841. "A review of the legislative history of the statute persuasively indicates that preservation of the remedy was indeed what Congress actually intended." *Id.*

25. *See* The Futures Trading Act, 42 Stat. 187 (1921).

26. 259 U.S. 44 (1922).

27. 42 Stat. 998 (1922).

28. Pub. L. No. 675, 49 Stat. 1491 (1936). The new provision, § 46, 7 U.S.C. § 6(b) (1976 ed., Supp. III), provides:

> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof —
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> (A) to cheat or defraud or attempt to cheat or defraud such other person;
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> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
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> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or
>
> (D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Id.

trading.[29]

The CEA was amended once again in 1968.[30] The 1936 amendments were clearly insufficient to provide the control and protection necessary to render the Commodity Exchange effective. The general purpose of the 1968 amendments was to provide "additional enforcement authority"[31] in an effort to prevent fraudulent and deceptive activity under the CEA.

In 1974, the Commodity Futures Trading Commission Act[32] was enacted by Congress in response to the growth in trading in both regulated and unregulated commodities. Once again, the purpose of the Act was "to lessen the potential for abuses in the commodity options markets."[33] The 1974 Act implemented

> a wide variety of control mechanisms, including the licensing of contract exchanges and trading personnel, and a full panoply of enforcement powers, both administrative and judicial, including procedures for the award of damages in reparations proceedings, arbitration, imposition of civil fines of up to $100,000 for violations, issuance of cease and desist orders with fines of up to $100,000 per day for non-compliance, conduct of investigations with power to compel attendance of witnesses and production of documents, revocation of an exchange's designation, suspension of members of exchanges from trading privileges, institution of proceedings in federal court to compel compliance with orders or to enjoin violations of the Act, and the assessment of criminal penalties for . . . price manipulation, felonies punishable by a fine of not more than $500,000 or imprisonment up to five years, or both.[34]

The Futures Trading Act of 1978[35] is the most recent amendment to the CEA, and provides the states with enforcement power, authorizing them to bring *parens patriae* actions seeking injunctive or monetary relief for injuries to citizens for certain violations of the CEA.

The actual direction of legislation concerning the CEA was not

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29. *Id.*

30. Pub. L. No. 90-258, 82 Stat. 26 (1968) (amending § 2(a) of the CEA, codified as amended, 7 U.S.C. § 2 (1976 ed., Supp. III)).

31. 102 S. Ct. at 1832.

32. Pub. L. No. 93-463, 88 Stat. 1389 (codified at 7 U.S.C. §§ 1-23 (1976 ed., Supp. III). The 1974 amendments established the Commodity Futures Trading Commission and gave the commission exclusive jurisdiction over futures trading in all commodities. *See* 7 U.S.C. § 2, 4(a) (1976 ed., Supp. III).

33. *Recent Developments, supra* note 20, at 997.

34. Leist v. Simplot, 638 F.2d 283, 328 (2d Cir. 1980) (Mansfield, J., dissenting).

35. Pub. L. No. 95-405, 92 Stat. 865 (1978) (codified at 7 U.S.C. (1976 ed., Supp. III)); *See generally* Schneider & Santo, *Commodity Futures Trading Commission: A Review of the 1978 Legislation*, 34 BUS. LAW. 1755 (1979); Lower, *State Enforcement of the Commodity Exchange Act*, 27 EMORY L.J. 1057 (1978).

clear to the courts in the post-1974 era.[36] The legislative intent was clearly focused on a more uniform and comprehensive regulatory scheme of futures contract trading, as evidenced by the 1974 amendments.[37] However, the scope of the remedies available to investors remained undetermined. Subsequent to the enactment of the 1974 amendments, the trend followed by most courts indicated skepticism towards implied remedies under the CEA.[38] This was due in part to the failure of Congress to adopt proposals which would have specifically provided private remedies to investors.[39] Congress' reluctance to resolve the controversy provided critics of the implied rights doctrine with substantial support for their position.[40] The *Curran* decision illustrates that legislative intent is to be interpreted from a broad perspective, and not from specific legislative actions.

In the cases decided before the enactment of the 1974 Act, implied private rights of action were consistently found to exist under the CEA.[41] However, in light of the comprehensive nature

36. Fischer v. Rosenthal & Co., 481 F. Supp. 53, 55 (N.D. Tex. 1979) (emphasizing post-1974 trend against implying private right of action). Five cases before the Supreme Court in 1981 denied the implied remedy. *See supra* note 7. *But see* Leist v. Simplot, 638 F.2d 283 (2d. Cir. 1980), *cert. granted,* 101 S. Ct. 1346 (1981); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), *cert. granted,* 101 S. Ct. 1971 (1981).

37. *See supra* note 34.

38. Fein, *Receding U.S. Judicial Influence Marked by Rulings in 1980-81 Term,* NAT'L L. J., Aug. 17, 1981, at 23, col. 1.

39. 481 F. Supp. at 56-57. In *Fisher,* the court examined the legislative history of the 1974 amendments and concluded that there was no congressional intent to provide a private cause of action. The opinion emphasized that numerous Senate bills which would have provided for private recovery were rejected by the Senate Agricultural and Forestry Committees.

40. *See* Shipe, *Private Litigation Before the Commodity Futures Trading Commission,* 33 AD. L. REV. 153, 167-168 (1981); Davis, *The Commodity Exchange Act: Statutory Silence is Not Authorization for Judicial Legislation of an Implied Private Right of Action,* 46 MO. L. REV. 316, 330-35 (1981); Frankhauser, *Private Action Under the Commodity Exchange Act: Implying Less and Enjoying It More,* 35 BUS. LAW. 847 (1980). *But see* Note, *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., The Continued Validity of an Implied Private Right of Action Under the Commodity Exchange Act,* 22 WM. & MARY L. REV. 579 (1981); Schreiber & Teweles, *Commodities and the Commodities Futures Trading Commission Act of 1974,* 10 BEV. HILLS B.J. 16 (1976); Hudson, *Customer Protection in the Commodity Futures Market,* 58 B.U.L. REV. 1 (1978).

41. The first case to imply a private right of action under the CEA was Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967). In *Goodman,* the court found that implied rights of action are not dependant upon the precise language of the statute and may be implied unless the legislature has shown a contrary intent. *Id.* at 447. Similar cases also found implied rights of action prior to the 1974 amendments: Deaktor v. L. D. Schreiber & Co., 479 F.2d 529, 534 (7th Cir. 1973), *rev'd on other grounds sub nom.* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973); Booth v. Peavey Co. Commodity Serv., 430 F.2d 132, 133 (8th Cir. 1970); Seligson v. New York Produce Exch., 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), *aff'd sub nom.* Miller v. New York Produce Exch., 550 F.2d 762 (2d Cir. 1977), *cert. denied,* 434 U.S. 823 (1977); Arnold v. Bache & Co. Inc., 377 F. Supp. 61, 65 (M.D. Pa. 1973);

of the 1974 Act,[42] the role of implied rights of action became increasingly questionable.[43] Congress addressed a wide range of remedies in the 1974 Act, but remained silent on private rights of action.[44] As a result of this development, the case of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*[45] became crucial in resolving the legislative intent issue derived from the CEA, as amended.

IV. STATEMENT OF FACTS

The Supreme Court's opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran* involved four cases which were decided together. One of the suits involved an action brought by customers against a futures commission broker for alleged fraud and deceptive conduct.[46] The remaining three involved speculators who brought actions against the mercantile exchange and brokers for damages resulting from alleged price manipulation, fraud, and failure to enforce exchange rules.[47]

In the first case of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v.*

Gould v. Barnes Brokerage Co., 345 F. Supp. 294, 295-96 (N.D. Tex. 1972); Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 764, 766 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338, 1342-43 (E.D. La. 1972), *aff'd per curiam*, 477 F.2d 113 (5th Cir. 1973); United Egg Producers v. Bauer Int'l Corp., 311 F. Supp. 1375, 1384 (S.D.N.Y. 1970); Anderson v. Francis I. duPont & Co., 291 F. Supp. 705, 710 (D. Minn. 1968); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 437 (N.D. Cal. 1968) *modified*, 430 F.2d 1202 (9th Cir. 1970). *See also* Judge Friendly's opinion in Leist v. Simplot, 638 F.2d 283, 297 n. 12, where he stated that the Supreme Court had yet to refuse to request to imply a cause of action under the securities laws. Both securities and commodities laws have been compared and contrasted on a regular basis. *See generally* Goodell, 1978-1979 *Securities Law Developments: Implied Private Rights of Action*, 36 WASH. & LEE L. REV. 847 (1979).

42. *See* 7 U.S.C. §§ 6, 7(b), 9, 13(a), 13(a)(1) (1976 ed., Supp. III).

43. Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,885 (N.D. Ill. Jan. 8, 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 55 (N.D. Tex. 1979); National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1260 (S.D.N.Y. 1979).

44. 102 S. Ct. at 1833. The implication of this silence has been argued to be proof that there is no legislative intent to imply a private cause of action. It has also been argued, however, that since Congress knew of the case law implying causes of action, their silence in legislation indicates support of it.

45. *Id.* at 1825.

46. *Id.* at 1833.

47. Three of the actions result from "when the sellers of almost 1,000 contracts failed to deliver approximately 50,000,000 pounds of potatoes, resulting in the largest default in the history of commodities futures trading in this country." *Id.* (citing 638 F.2d at 285 (quoting 470 F. Supp. at 1258)).

Curran,[48] respondents were customers of the petitioner, a futures commission broker. Respondents deposited $100,000 with the petitioner in 1973 for the purpose of trading. As a result of significant losses, the account with petitioner was closed.

An action was brought in 1976 in the United States District Court for the Eastern District of Michigan, alleging violations of the CEA, the federal securities laws, and state statutory and common law. Respondents claimed that the petitioner, as their broker, made material misrepresentations and participated in a substantial amount of trading for the purpose of generating commissions.[49] The district court dismissed the federal securities law claims[50] and stayed all other proceedings pending arbitration. The Sixth Circuit affirmed the dismissal of the securities law claims, but held that the provisions requiring disputes to be settled through arbitration were unenforceable. The conclusion of the Sixth Circuit was that there was an implied private right of action under the CEA.[51] The United States Supreme Court granted certiorari to resolve the issue of whether the CEA creates an implied private right of action for fraud in favor of a customer against his broker.[52]

The remaining three cases, *New York Mercantile Exchange v. Leist, Clayton Brokerage Co. of St. Louis, Inc. v. Leist,* and *Heinhold Commodities, Inc. v. Leist,* were the result of a common fact situation and were consolidated in the case of *Leist v. Simplot.*[53] A particular futures contract was traded on the New York Mercantile Exchange. Under this contract, 50,000,000 pounds of Maine potatoes were to be delivered between May 7, 1976, and May 25, 1976 by railroad. The contract had a trading period beginning in the early part of 1975 and ending on May 7, 1976. During

48. 622 F.2d 216 (6th Cir. 1980), *cert. granted*, 451 U.S. 906 (1981).

49. *Id.* at 220. These allegations would constitute violations of the CEA if found to be true.

50. *Id.* at 221-24.

51. Judge Engel wrote the opinion and stated:

> Although the CEA does not expressly provide for a private right of action to recover damages, an implied right of action was generally thought to exist prior to the 1974 amendment of the Act. Consistent with this view, no issue concerning the continuing validity of the implied right of action was raised in the court below, nor in this appeal. Nevertheless, to provide direction to the district court upon remand and to avoid further delay in this already protracted litigation, we review this issue and specifically agree that an implied private right of action survived the 1974 amendments to the Act.

Id. at 230 (footnotes omitted).

52. 451 U.S. 906 (1981).

53. 638 F.2d 283 (2nd Cir. 1980), *cert. granted*, 450 U.S. 910 (1981). The New York Mercantile Exchange, Clayton Brokerage of St. Louis, Inc., and Heinhold Commodities, Inc. were listed as appellees in *Leist* and are the named petitioners in *Curran.*

this trading period, the Department of Agriculture issued reports indicating that Maine potato stocks were substantially down from the preceding year. The impact of these reports resulted in increasing the number of investors trading for May Maine potato futures contracts with the objective of making profit from a shortage of potatoes in May.[54]

A conspiracy of large processors of potatoes was formed to lower the price of the May Maine potato futures contract. To achieve this objective, the conspirators developed a large short position[55] in the May contract, and did not make offsetting purchases of long contracts at a price in excess of a certain amount. A short position exists where an investor has a contract to sell in the future at a given price; a long position exists where an investor has physical possession of a commodity of a contract to buy in the future at a given price. They also agreed to default on short commitments if necessary. These conspirators also flooded the Maine cash markets with unsold potatoes.[56] The purpose of these activities was to give the Growers Association reason to believe that there would not be a shortage of Maine potatoes.

Another group was aware of the short conspiracy and, in an attempt to counteract as well as to enhance the price short conspirators would have to pay to liquidate their short positions, they developed a large long position which violated trading limits of the CEA.[57] These long conspirators also created an artificial shortage of railroad cars during the contract delivery period.[58]

The respondents in all three actions were speculators who invested long in Maine potato futures contracts. These speculators claimed that absent the price manipulation, they would have realized a substantial profit. The petitioners in the case of *New York Mercantile Exchange v. Leist* were the New York Mercantile Exchange and its officials. Respondents alleged that the Exchange

54. 102 S. Ct. at 1834-35.

55. "The tendency is for a speculator to take a position, test the waters for a definite price trend and withdraw quickly if a favorable price trend does not develop." Hudson, *supra* note 40, at 6.

56. The complaint alleged that all of these activities violated §§ 4(b) and 9(b) of the CEA, 7 U.S.C. § 6(b), 13(b) (1976 ed., Supp. III); § 4(a), 7 U.S.C. § 6(a) and §§ 5(d) and 5(a)(8), 7 U.S.C. §§ 7(d), 7(a)(8).

57. 102 S. Ct. at 1835. The purpose of trading limits is to limit and prevent large scale fraudulent and deceptive activity.

58. 102 S. Ct. at 1835 n. 45.

had failed to exercise its power and duty to prevent such price manipulation resulting in a lack of enforcement of CEA rules.[59] Petitioners in the case of *Clayton Brokerage Co. of St. Louis, Inc. v. Leist* and *Heinhold Commodities, Inc. v. Leist* were the firms of futures commission brokers which the short conspirators utilized to achieve their short position. Respondents alleged that these brokers and their firms were part of the conspiracy and, as a result, violated position and trading limits under the CEA which requires liquidation of contracts that clearly are impossible to fulfill. In addition, petitioners did not report any violations of CEA rules to the Commission, thus allegedly violating their statutory duty. These three actions were filed in 1976 in the United States District Court for the Southern District of New York. The court held that Congress did not intend a private right of action in the CEA.[60] Accordingly, the court granted summary judgment on all three actions. On appeal, the Court of Appeals for the Second Circuit reversed, finding that there was legislative intent implying a private right of action.[61] The Second Circuit based its decision on "the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and [its] desire to preserve them."[62]

The United States Supreme Court granted certiorari to resolve all four actions which revolved around the issue of implied private rights of action.[63] Justice Stevens wrote the opinion and held:

> (1) there is an implied private right of action under the Commodity Exchange Act, even following the 1974 amendment; (2) plaintiffs had standing to assert claims for fraudulent and deceptive practices and price manipulation; (3) characterization of plaintiffs as "speculators" does not remove them from the class intended to be protected by the Act; (4) action could be maintained against the exchange; and (5) persons who are participants in a conspiracy to manipulate the market in violation of an exchange's rules are subject to suit by futures traders who can prove injury from those violations.[64]

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59. *Id.* at 1835.

60. National Super Spuds, Inc. v. New York Merchantile Exch., 470 F. Supp. 1257, 1259-63 (S.D.N.Y. 1979). Relying on the *Cort* test, the court concluded "that there is no private right of action under the Act because the two critical elements of the test, congressional intent and consistency with the statutory scheme, weigh strongly against the implication of such a right." *Id.* at 1261.

61. 638 F.2d 283-322 (2d Cir. 1980). The court of appeals also utilized the four factor *Cort* test but reached the conclusion that a private right of action was implied. *Id.* at 322.

62. *Id.* at 307.

63. 450 U.S. 910 (1981).

64. 102 S. Ct. at 1825.

V. THE COURT'S ANALYSIS

A. Legislative Intent in Light of a Recognized Remedy

In *Curran,* the Court held that there is an implied private right of action under the CEA, as evidenced by legislative intent. The rationale for the Court's decision was supplied by two factors. First, prior to the 1974 amendment, private rights of action were routinely implied providing for a recognized remedy.[65] Second, the 1974 amendment did not substantially alter the CEA as previously interpreted.[66] Thus, it is the logical inference that had Congress intended to prevent this implied remedy, specific language would have been incorporated into an amendment to alter what had been common practice in the past. Absent any such language in either the 1974 or 1978 amendment,[67] the Court decided that Congress, by implication, lent its support to the remedy of an implied private right of action.[68]

The 1974 amendment provided for various judicial remedies,[69] but was silent on the issue of a private right of action. Although prior to 1974 the courts had resolved this issue in favor of finding such a remedy,[70] the enactment of the 1974 amendment and its comprehensive nature re-opened the controversy.[71] A primary concern of the Court in *Curran* was the state of the law in 1974. The Court stated that "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted."[72] The state of the law immediately prior to the enactment of the 1974 amendment is demonstrated by a number of district court decisions which consistently found implied private rights of

65. *See supra* note 41.

66. "[T]he fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy." 102 S. Ct. at 1841.

67. The Supreme Court took the approach that silence is the equivalent to acquiescence.

68. 102 S. Ct. at 1841-44.

69. *See supra* note 28.

70. *See supra* note 41.

71. *See, e.g.,* National Super Spuds, Inc. v. New York Mercantile Exch., 470 F. Supp. 1256, 1259 (S.D.N.Y. 1979); Smith v. Groover, 468 F. Supp. 105, 107-08 (N.D. Ill. 1979); Hofmayer v. Dean Witter & Co., Inc., 459 F. Supp. 733, 737 (N.D. Cal. 1978).

72. 102 S. Ct. at 1839.

action.[73]

Congress was aware that the courts were routinely implying private rights of action prior to 1974.[74] As stated in *Cannon,* "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law."[75] The significance of the state of the law in 1974 is increased by the fact that it is "difficult to characterize anything in the legislative history of the 1974 amendments as constituting congressional approval of the implied action cases under the CEA."[76] In addition, the Court emphasized that the 1974 amendment was enacted "to supplement rather than supplant the implied judicial remedy."[77]

The inclusion of a savings clause in section 2(a)(1) of the 1974 amendment was of significance to the Court in its evaluation. The savings clause provides that "[n]othing in this section shall supercede or limit the jurisdiction conferred on courts of the United States or of any State."[78] The Court interpreted this clause as direct evidence of legislative intent authorizing implied private rights of action.[79] Although the 1974 amendment did not expressly mention private rights of action, the Court held that congressional intent supports such a remedy. As expressed by a recent Supreme Court decision, "[t]he key to the inquiry is the intent of the Legislature."[80]

B. Characterization as Speculators

The Court in *Curran* held that even speculators may maintain an action for damages under the CEA. The Court stated that "[t]he 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 transactions over exchanges necessarily must conform to the same trading rules."[81] Specifically, the antifraud provisions of the CEA — making it unlawful for any person to deceive or defraud any other person in connection with any futures contract — are direct

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73. *See supra* note 41.

74. *See* Rivers v. Rosenthal & Co., 634 F.2d 774, 779 (1980), where the court cited numerous cases holding that a private cause of action was available under the CEA prior to 1974.

75. Cannon v. University of Chicago, 441 U.S. at 696-97.

76. Prentice, *supra* note 13, at 933.

77. 102 S. Ct. at 1842.

78. 7 U.S.C. § 2 (1976 ed., Supp. III).

79. 102 S. Ct. at 1843.

80. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981); *see also* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981).

81. 102 S. Ct. at 1844.

evidence that all persons are protected under the CEA.[82] The legislative history of federal regulation of futures contract trading clearly indicates the intention of Congress to protect all persons involved. It has been stated that "[i]t is almost self-evident that legislation regulating future trading was for the 'especial benefit' of futures traders,"[83] which includes speculators.

C. Liability of Exchanges

Suits by investors against exchanges were well recognized prior to the enactment of the 1974 amendments. The issue of the liability of exchanges to private investors was of some concern to the legislature, as evidenced in hearings, preceding the 1974 amendments.[84] As a consequence of the self regulatory nature of the CEA, the threat of private actions against the Commodity Exchange became a substantial concern.[85] The result of this development was to make the Commodity Exchange cautious in rulemaking since it potentially increased its liability.[86]

Congress could have avoided this problem by explictly eliminating private causes of action.[87] Congress, however, resolved the problem by allowing the Commodity Futures Trading Commission to supplement exchange rules.[88] The result of this action

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82. *See supra* note 28. *See also* 102 S. Ct. at 1844-45.

83. 638 F.2d at 306-07. For a general discussion of investor protection see Hudson, *supra* note 40.

84. *See, e.g., Hearings on H.R. 11955 before the House Committee on Agriculture,* 93rd Cong., 2d Sess., 62 (1974); *Hearings on Review of Commodity Exchange Act and Discussion of Possible Changes before the House Committee on Agriculture,* 93rd Cong., lst Sess., 121 (1973).

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

120 CONG. REC. 10,748 (1974). *See also* 119 CONG. REC. 41,333 (1973).

86. 119 CONG. REC. 41,333 (1973):

> Attorneys for exchanges are now advising their clients to prune out rules or regulations where the enforcement capability is questionable. Instead of a situation where self-regulatory activities should be expanding for a given contract market, the exchange can now provide solid reason for shrinking the protection given the customer and the public through self-regulation.

Id.

87. *See, e.g., Hearings on Review of Commodity Exchanges Act and Discussion of Possible Changes before the House Committee on Agriculture,* 93rd Cong., lst Sess., 121 (1973).

88. *See* § 8(a)(7) of the CEA, 7 U.S.C. § 12(a)(7) (1976 ed., Supp. III).

preserved the implied private right of action, and provided a solution to excessive litigation against exchanges. There appears to be substantial evidence of congressional intent authorizing an implied private right of action. If Congress intended otherwise, it should have said so.

Private rights of action against exchanges serve as an enforcement mechanism and reflect the legislative purpose of strengthening the regulatory scheme of the CEA.[89]

VI. Dissenting Opinions

Justice Powell dissented[90] in *Curran* because he held a different view of the law prior to the 1974 amendments, he thought the majority's analysis was weak, and he felt that Congress should adopt legislation creating a private right of action.

With regard to the state of the law prior to 1974, Justice Powell emphasized that fewer than a dozen district courts had created a remedy under the CEA[91] and, in his opinion, these decisions were in error. He stressed that even though this error had not been corrected by Congress, the Court need not be bound by it.[92]

Justice Powell also noted that the majority relied on certain 1974 additions to the CEA demonstrating evidence of weak analysis. The first addition of significance was section 8a(7) of the Act, which "authorized the Commodity Futures Trading Commission to supplement the trading regulations established by individual commodity exchanges."[93] Justice Powell suggested that this legislative enactment neither approved nor disapproved of an implied remedy.[94]

The second type of statutory addition allegedly relied upon in error by the Court involved "two sections creating procedures for

89. "Congress wished to preserve the private cause of action as a tool for enforcement of the self-regulation concept of the CEA." 102 S. Ct. at 1847. The Court also concluded that if exchanges can be held liable for failure to enforce their own rules, price manipulators in the market are also subject to liability. *See, e.g.,* Deaktor v. L. D. Schreiber & Co., 479 F.2d 529 (7th Cir.), *rev'd on other ground sub nom.* Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973).

90. 102 S. Ct. at 1848. Chief Justice Burger, Justice Rehnquist and Justice O'Connor joined in the dissent.

91. *See id.* at 1850.

92. Justice Powell argued that several cases erroneously followed the case of Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967), since *Goodman* did not address the crucial issue of whether Congress intended to create a private remedy under the CEA. *Id.*

93. 102 S. Ct. at 1852.

94. *Id.* The majority opinion argued that the enactment of this section was clear legislative intent to preserve the implied remedy established by the courts.

reimbursing victims of CEA violations."[95] The dissent interjected that this section does not demonstrate the general intent to provide additional relief to private parties, claiming that the majority ignored "settled rules for identification of congressional intent."[96]

The addition of the "savings clause" in the 1974 amendments was a significant aspect of the majority opinion, and was of concern to the dissenting justices. This section provides jurisdiction to federal courts for judicially cognizable claims.[97] Justice Powell argued that this section evidenced no support for private remedies. The Court was expanding the meaning of the savings clause beyond its bounds.[98]

Perhaps the most appealing argument made by the dissenting Justices was that proposals for including a private remedy in the CEA were not adopted by Congress.[99] The argument was best summarized by Justice Powell: "There simply is no persuasive evidence of affirmative Congressional intent to recognize rights through the enactment of statutory law, even under the Court's unprecedented theory of congressional ratification by silence of judicial error."[100]

VII. AUTHOR'S ANALYSIS

The result in *Curran* was not an expected one.[101] With regard to the growing trend of stringent interpretation of the implied

95. 102 S. Ct. at 1853. Justice Powell claimed that this "statutory change cited by the Court actually undercuts rather than supports its case." *Id.*

96. *Id.* "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979).

97. *See supra* note 79.

98. 102 S. Ct. at 1853-54. Justice Powell's argument is overwhelmingly logical. The "savings clause" does not indicate any legislative intent towards implying a private remedy. However, the Court claims that it indirectly supports the implied remedy. This analysis is weak at best.

99. *See supra* note 39. *But see* Navigator Group Funds v. Shearson Hayden Stone, 487 F. Supp. 416, 423 (S.D.N.Y. 1980). The court stated that it is not "useful to speculate on the significance of bills which were never debated on the floor of Congress or made the subject of committee reports." *Id. See generally Hearings on S. 2485, S. 2578, and S. 2837,* 93d Cong., 2d Sess. 737 (1974) [hereinafter cited as 1974 *Hearings*].

100. 102 S. Ct. at 1854.

101. Shipe, *supra* note 40, at 167-68. "Hence, unless Congress takes further action on the matter, the probability is that the Supreme Court will find that court private rights of action are no longer available." *Id.*

rights doctrine,[102] it was logical to assume that the Supreme Court would require a clear showing of congressional intent as a prerequisite for implying a private remedy. Contrary to this logic, the Supreme Court focused on the fact that no affirmative action was taken by Congress to eliminate the implied remedy which had been established by the courts.[103] This analysis did not indicate a clear intent of any kind.[104] The argument that congressional silence established congressional intent to imply a private right of action demonstrates a lack of analysis by the Court. The decision exemplifies the objective of the Court to give content to congressional silence to protect investors in the futures market.[105]

Congress' failure to enact legislation which would have provided for a private right of action under the CEA evidences a legislative intent much clearer than that recognized by the Court.[106] However, the majority did not mention this fact.[107] In 1973, bills were introduced in both the House and Senate providing for a private action under the CEA.[108] They were rejected, however, by Congress. In particular, Representative Neal Smith introduced a bill which provided in part as follows: "Any person violating any provision of this Act or any regulation thereunder shall be liable to any person injured thereby for treble the amount of the damages sustained as a result of such violation."[109] There can be little

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102. Implied private remedies were denied in the post-1974 period in the following cases: Paine, Webber, Jackson & Curtis, Inc. v. Conaway, 515 F. Supp. 202 (N.D. Ala. 1981); Walsh v. International Precious Metals Corp., 510 F. Supp. 867 (D. Utah 1981); Gonzalez v. Paine, Webber, Jackson & Curtis, Inc., 493 F. Supp. 499 (S.D.N.Y. 1980); Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 492 F. Supp. 1345 (D. Nev. 1980); Stone v. Saxon & Windsor Group, Ltd., 485 F. Supp. 1212 (N.D. Ill. 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).

103. *See supra* note 41.

104. The Court interpreted legislative intent by negative implication. It is doubtful, in the author's opinion, that Congress would encourage courts to interpret legislative silence in this manner.

105. Perhaps the Court viewed congressional silence as an "open door" to the judiciary to fill in any gaps that it deemed necessary.

106. *See supra* note 99.

107. *Id.* It is important to note, however, that each of the bills provided for treble damages which could have been the reason for their defeat.

108. In the Senate, bills were introduced by Senators Hart, Humphrey and McGovern. *Hearings on S. 2837, S. 2485, S. 2378 before the Senate Committee on Agriculture and Forestry,* 93d Cong., 2d Sess., 77, 118 (1973). In the House, Representative Neal Smith introduced H.R. 11195. *Hearings on H.R. 11195 before the House Committee on Agriculture,* 93d Cong., 2d Sess., (1973) [hereinafter cited as *House Report*].

109. *See House Report, supra* note 108. *See also* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56-57 (N.D. Tex. 1979).

doubt that the deliberate refusal to adopt proposals such as that of Representative Smith demonstrates congressional intent.

There is a policy argument in favor of the Court's decision in *Curran.* The general purpose of the 1974 amendments to broaden the scope of remedies and provide comprehensive regulations for the CEA is clearly in harmony with the Court's decision.[110] The *Curran* Court apparently interpreted congressional silence in favor of the general purposes of the 1974 amendment. Arguably, the extension of these purposes to create a private remedy is fair and just for all. It would seem, however, that the fairness provided by *Curran* lies at the expense of legislative influence.[111]

Although the approach of the *Curran* Court indicates an active future for the judiciary in legislative matters, it may provide the appropriate balance between "legislative lobbying" and "judicial justice."

VIII. IMPACT OF THE DECISION

The Supreme Court's decision in *Curran* is a significant indication of future interaction between the judicial and legislative branch. While the inclination of the Court to look beyond the context of a statute has not always been clear,[112] the *Curran* decision imparts unequivocal evidence that the Supreme Court will undertake such action in resolving issues of importance.

The Court has demonstrated that violations of the exchange rules will result in litigation by private investors suffering damages. The Court recognized the importance of protecting all participants in futures trading.[113] *Curran* is part of the continuing trend towards comprehensive regulation of futures contract trading as a result of the inherent risks involved.[114] This decision will influence future legislation concerning private investors' rights and will progressively reduce the unnecessary risks commonly associated with futures contract trading.[115]

110. *See generally,* Hudson, *supra* note 40.

111. "The Court propounds a test that taxes the legislative branch with a duty to respond to opinions of the lower federal courts." 102 S. Ct. at 1855 (Powell, J., dissenting).

112. *See, e.g.,* Rostker v. Goldberg, 453 U.S. 57 (1981) (Court acted in deferrence to congressional discretion on issues of military nature and was hesitant to give in depth analysis).

113. *See supra* note 83.

114. 102 S. Ct. at 1841.

115. It is doubtful, if not impossible, to eliminate all risks in trading of such a

The decision will further the protection-oriented purpose of the CEA.[116] In particular, the opinion may deter fraudulent and deceptive conduct in futures contract trading.[117] As a result of the potential liability now firmly established, exchanges and brokers will conduct their business in a more cautious manner. Exchanges will be inclined to enforce their rules more effectively and brokers will be wary of activity which is against the best interests of their clients.[118] This result is not only in the best interests of the investors; it will strengthen the reputation of futures trading in general, benefiting all participants.[119]

In a broader sense, the *Curran* decision contributes to the foundation for an increasingly active role of the judiciary in the legislative arena.[120] Congressional silence will no longer be a barrier to judicial activity. The Supreme Court has undertaken the responsibility of interpreting legislative intent and will probably continue to build upon this responsibility in the future.

IX. Conclusion

Although *Curran* established an implied private right of action under the CEA, the decision is not supported by the legislative history.[121] The failure to adopt bills expressly providing for a private remedy unquestionably demonstrates legislative intent contrary to the result in *Curran.* In furtherance of the trend of comprehensive regulation of futures contract trading, the Court found an implied private right of action. Even though the decision may not be logically consistent, it provides a remedy for private investors who would otherwise be at a severe disadvantage.[122]

Curran represents the increasing interaction between the judicial and legislative branches.[123] The Court appears to look beyond the context of the CEA and focus on what should have been

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nature, however, the importance of reducing the unnecessary risks of fraudulent and deceptive activity is clearly recognized.

116. *See supra* note 110.

117. *See generally* 1974 Senate Report, *supra* note 2, at 18, recognizing that futures trading is susceptible to fraudulent and deceptive activity.

118. A typical abuse by brokers is to generate substantial trading with a client's account for the purpose of generating commissions. This occurred in *Curran. See* 102 S. Ct. at 1834.

119. It is logical to assume that reducing the risks involved with futures trading will inspire more persons to participate, which in turn, generates more business for brokers.

120. *See supra* note 112.

121. *See supra* note 108.

122. Although the 1974 and 1978 amendments provide for various remedies, they remained silent on the issue of a private right of action.

123. *See supra* note 120.

the legislative intent.[124] This is a significant step in the Court's role in legislative matters. In light of the inevitable failure of Congress to anticipate each and every potential controversy, perhaps this "active role" of the Court is needed. The judicial interpretation of legislative intent should be exercised cautiously, however, in order to preserve the effectiveness of congressional action upon which the Court may not be adequately informed.

HOWARD E. HAMANN

124. The *Curran* Court bases its decision on the ultimate purposes of the Court, rather than legislative intent.