Pepperdine Law Review

Volume 7 | Issue 3 Article 2

4-15-1980

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Transamerica Mortgage Advisors, Inc. v. Lewis: An Analysis of the Supreme Court's Definition of an Implied Right of Action

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Although a definitive test has not been formalized, the United States Supreme Court has made further refinements to an area of increasing concern—the implied cause of action. In seeking statutory relief, a litigant has often been without redress as the Court has found inadequate ground for the plaintiff to assert an injury. However, litigation is currently developing new causes of action which are available to individuals. The author examines the case law which outlines a balancing tool incorporating the various factors which give rise to an action. Notwithstanding a seemingly well-defined approach, the courts have expressed a growing reluctance to judicially create legal remedies. Consequently, a strict statutory construction approach has been adopted as the Court, in Transamerica, *placed greater emphasis on the language embodied in the statute to determine whether it intended to authorize a cause of action.*

On November 13, 1979, the United States Supreme Court decided the case of *Transamerica Mortgage Advisors, Inc. v. Lewis*.[1] The issue presented in *Transamerica* was whether the Invest-

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1. 100 S. Ct. 242 (1979).

ment Advisers Act gave rise "to an implied private right of action for injunctive relief and damages on behalf of persons injured by violations of its provisions."[2] The issue of implied private causes of action is one that has been of great concern to the Supreme Court in recent years. The Court is in the process of formulating and refining a definitive test through which to analyze this question. Up to this point, however, the Court has dealt with cases in which a cause of action is clearly implied or clearly not implied. The *Transamerica* case falls into a gray area, which has required the Court to further detail the guidelines of the test.

I. BACKGROUND

One of the earliest cases dealing with implied causes of action in the securities area was *J. I. Case Co. v. Borak*.[3] In *Borak*, a stockholder of J. I. Case Company brought a civil action against the corporation for violation of section 14(a) of the Security Exchange Act of 1934.[4] This action was brought under the authority of section 27 of the Act, which grants to the United States District Courts exclusive jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."[5]

Borak claimed that the defendants were responsible for a proxy solicitation which was false and misleading and in violation of section 14(a) of the Act and Rule 14A-9. It was asserted that stockholders would not have approved the merger discussed in the proxy solicitation but for the false and misleading statements, and that the stockholders were thereby damaged by the merger. Borak asked that the merger be declared void and that the stockholders be awarded damages.[6]

While the corporation argued that Congress did not specifically

2. Lewis v. Transamerica Corp., 575 F.2d 237, 238 (1978).

3. 377 U.S. 426 (1964).

4. Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), provides: "It shall be unlawful for any person, . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. . . ."

5. Section 27 of the Act, 15 U.S.C. § 78, provides in part: "The district courts of the United States, the Supreme Court of the District of Columbia, and the United States Courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. . . ."

6. 377 U.S. at 429-30.

grant a private cause of action, the Court held that one was clearly implied for both derivative and direct causes of action. The Court, in *Borak*, pointed out that section 27 of the Act grants, to the Court, jurisdiction over "all suits in equity and actions at law brought to enforce any liabiltiy or duty created" under the Act. Thus, Congress would not have granted jurisdiction over "actions at law" if no such actions existed.[7]

More importantly, in its analysis the Court examined the purpose of section 14(a). The Court looked closely at both the language and legislative history of the Act and found that its main purpose was the protection of the public interest and the protection of investors.[8] "While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."[9]

The Court also examined the remedial scheme devised by the Act. While the Security Exchange Commission [hereinafter SEC] is charged with enforcement of the provisions, the Court concluded that the vast number of proxy statements submitted to the SEC each year renders this mechanism, by itself, ineffective. "Private enforcement of the proxy rules provides a necessary supplement to Commission action."[10]

The Court considered the possibility that the implied cause of action would interfere with state law but held that, although the regulation of corporations is a function of state law, "the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law . . . ."[11]

Thus, in recognizing an implied private cause of action, the Supreme Court examined: (1) the jurisdiction of the federal courts, (2) the legislative history of the Act, (3) the language of the Act, (4) the remedial scheme of the Act, (5) the interference with the operation of state law, and (6) the necessity of recognizing a private cause of action to carry out the purposes of the Act.

The Supreme Court did not again consider the issue of implied

7. *Id.* at 430.
8. *Id.* at 431-32.
9. *Id.* at 432.
10. *Id.*
11. *Id.* at 434.

rights of action until eleven years later when, in *Cort v. Ash*,[12] it established a four-part test which remains the basic analytical tool for examining the issue of implied private causes of action. In *Cort*, the plaintiff, a stockholder, alleged that the corporate directors had made illegal campaign contributions in violation of Title 18 U.S.C. § 610, a federal criminal statute which prohibits corporations from making certain political contributions. The Court directly addressed the issue of whether this *criminal* statute would allow the plaintiff a private cause of action to sue for injunctive relief and damages.[13]

The Court first considered the question of whether injunctive relief could be granted under section 610, and held that it could not.[14] The Court then addressed the issue of whether section 610 granted a private cause of action to the plaintiff-stockholder to sue derivatively for damages. The Court began this analysis by setting out a four-factor test:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' — that is, does the statue create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with 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?[15]

The Court applied this test to the facts in *Cort*, and held that the plaintiff did not have an implied private cause of action. First, the Court examined the policy underlying section 610 and found "that the protection of ordinary stockholders was at best a secondary concern."[16] Second, the Court found no suggestion in the

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12. 422 U.S. 66 (1975).

13. *Id.* at 68.

14. The Court directed its attention to the fact that at the time the suit was filed, there was no statutory provision for civil enforcement by private parties or by the federal government. *Id.* at 73. However, in the interlude between filing and arguments before the Court, new federal statutes had established a Federal Election Commission and an administrative procedure for processing complaints of alleged violations of § 610 after January 1, 1975. *Id. See also*, 2 U.S.C. § 437(c)(a)(1) (Supp. IV, 1970); 2 U.S.C. § 437g (Supp. IV, 1970), *as amended*, 2 U.S.C. § 410 and note following 2 U.S.C. § 431 (Supp. IV, 1970). This new law gave the Commission "primary jurisdiction" over violations of § 610. 422 U.S. at 75. The Court recognized that this "intervening law" must be given effect. *Id.* at 76. Since the injunctive relief which the Court was asked to grant would affect only future conduct of the corporations, this conduct would come under the purview of the new statute and administrative relief. Therefore, the Court refused to grant the private cause of action for injuctive relief. *Id.* at 76.

15. *Id.* at 78 (citations omitted).

16. *Id.* at 81.

legislative history that Congress intended any sort of civil cause of action. The Court wrote:

> [I]t is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling. But where, as here, it is at least dubious whether Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations, the fact that there is no suggestion at all that § 610 may give rise to a suit for damages or, indeed, to any civil cause of action reinforces the conclusion that the expectation, if any, was that the relationship between corporations and their stockholders would continue to be entrusted entirely to state law.[17]

Third, the Court found a civil cause of action would not aid in the enforcement of the statute, that is, it was determined that to permit a derivative suit for damages was not only unnecessary, but hindered the statutory scheme of enforcement.[18] Finally, the Court found a civil cause of action in this area should be governed by state law. "We are necessarily reluctant to apply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery."[19]

The Court distinguished the situation in *Cort* from that in *Borak*. In *Borak*, the statute, under which a private cause of action was implied, specified that an intrusion into the internal affairs of corporations and a private cause of action was necessary for the enforcement of the statute. In *Cort*, no such intrusion or necessity existed. Thus, the Court held that no private cause of action existed, "because injunctive relief is not presently available in light of the Amendments, and because implication of a federal right of damages on behalf of a corporation under § 610 would intrude into an area traditionally committed to state law without aiding the main purpose of § 610 . . . ."[20]

Since *Cort*, the Supreme Court has decided several cases which speak directly to the issue of implied rights of action. In 1979, the Supreme Court found an implied private remedy did exist under Title IX of the Education Amendments Act of 1972.[21] Even though the statute at issue was different because it did not involve securities regulation, the Court's discussion and analysis under the *Cort* test was applied to the Title IX case of *Cannon v.*

17. *Id.* at 83-84.
18. *Id.* at 84.
19. *Id.* at 84-85.
20. *Id.* at 85.
21. 99 S. Ct. 1946 (1979).

University of Chicago.[22] In *Cannon*, the plaintiff, a female, claimed that the University had excluded her from participation in its medical school programs because of her sex. The plaintiff also alleged that the University had accepted federal funding for its medical school program, so that its discriminatory actions violated Title IX of the Education Amendments Act of 1972. In its opinion, the Court accepted the plaintiff's allegations as true. Section 901(a) of Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .[23]

Thus, the Court faced the issue of whether this section of Title IX vested a private cause of action in the plaintiff.

The Court pointed out that the plaintiff had exhausted her administrative remedies as required by the University. She had applied to the federal Department of Health, Education and Welfare [hereinafter HEW] for administrative relief, but the action taken by the HEW did not serve to remedy her situation.[24] The district court and court of appeals both held that section 901 did not create a private cause of action. The decisions of these courts relied heavily upon their view that section 902 of Title IX created an "exclusive means of enforcement" under the Act.[25] However, in reversing the decisions of these courts, the Supreme Court stressed that, "[a]t least since September 17, 1974, HEW has taken the position that an implied cause of action does exist under Title IX in certain circumstances. . . . Since 1974, HEW has apparently never taken the position that exhaustion [of administrative remedies] is required in every case."[26] The court of appeals was cognizant of this position but disagreed with the HEW's interpretation of the Act.[27]

The Supreme Court went on to note that the determining factor of whether an implied private cause of action exists is whether Congress intended such an action to be implied. The Court stated that "before concluding that Congress intended to make a remedy

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22. *Id.* at 1949.

23. 20 U.S.C. § 901(a)(1972).

24. 99 S. Ct. at 1949-50. "HEW informed petitioner that the local stages of its investigation had been completed but that its national headquarters planned to conduct a further 'in depth study of the issues raised' because those issues were 'a first impression and national in scope.' . . . as far as the record indicates HEW has announced no further action in this case."

25. *Id.* at 1951. The Act gave HEW the power to terminate the funds allocated to a recipient which violated the anti-discrimination provisions of the Act. The Act also established administrative procedures to effect this termination. *See*, Education Amendments Act of 1972, § 902, 20 U.S.C. § 1682 (1973).

26. 99 S. Ct. at 1952 n.8.

27. *Id.* at 1952-53.

available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent."[28] The Court then followed the test in *Cort*, reasoning under the first factor, "the threshold question," the Court held that the statute was enacted for the benefit of a special class of which the plaintiff was a member.[29]

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefitted class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.[30]

The Court reviewed the second factor of *Cort* through an examination of legislative history and found that "the history of Title IX rather plainly indicates that Congress intended to create such a remedy."[31] The Court concluded that Title IX was patterned after Title VI with the word "sex" substituted for the words "race, color, or national origin."[32] Thus the Court held that, "[w]e have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood that Title VI is authorizing an implied private cause of action for victims of prohibited discrimination."[33]

The Court then considered the third factor in *Cort*, which is whether a private cause of action is consistent with the underlying purposes of the legislative scheme. The Court found that the administrative remedy provided for in the Act was too blunt an instrument to provide effective protection for the rights of individuals, which were the main focus of the Act. Thus, a private cause of action was not only consistent with the statutory scheme, but was a necessary mechanism in the plan.[34]

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28. *Id.* at 1953. The Court quoted the entire text in *Cort*.
29. *Id.* at 1954.
30. *Id.* at 1954-55.
31. *Id.* at 1956.
32. *Id.* at 1957. The two statutes, Title IX and Title VI, use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination. Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years. In 1972, when Title IX was enacted, the critical language of Title VI had already been construed as creating a private remedy.
33. *Id.* at 1961.
34. *Id.* at 1961-62.

Under the fourth factor of *Cort*, the Supreme Court easily found that the private cause of action stemming from this discriminatory conduct was within the purview of federal law, and did not impinge upon the jurisdiction of state law.[35]

Thus, the Court decided that an implied private cause of action did exist under Title IX. The Court stated that this was an atypically easy case since all of the factors in the *Cort* test supported the same result and no balancing of the various factors was necessary.[36]

The University of Chicago argued that no implied private cause of action should be recognized under Title IX and that a private cause of action would unduly burden the school's admission decisions by subjecting it to judicial scrutiny. The Court responded by stating that Congress, as a matter of policy, had already determined that the admissions process should be subjected to scrutiny. The University supported its argument solely on speculation and did not provide any data to show that the implication of a private cause of action would levy an additional burden on the University's admissions process.[37] Additionally, the University argued that *Cort* should not imply a private cause of action, inasmuch as Congress chose not to specify one when it had the opportunity. Citing *Borak*, the Court stated: "The fact that the other provisions of a complex statutory scheme create express remedies has not been accepted as sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section."[38] The Court went on to note:

> When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation.[39]

Justice Rehnquist, with whom Justice Stewart joined, wrote a concurring opinion which reflected some increasing pressure within the Court to narrow these guidelines.[40] Justice Rehnquist stated that the issue of whether an implied private cause of action exists should be decided through statutory construction. He urged the Court to refrain from creating causes of action and instead to enforce the law as written by the Congress as the appropriate branch of government. Justice Rehnquist wrote:

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35. *Id.* at 1963.
36. *Id.*
37. *Id.* at 1964.
38. *Id.* at 1965.
39. *Id.* at 1967-68.
40. *Id.* at 1968.

> We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress at least during the period of the enactment of the several titles of the Civil Rights Act tended to rely, to a large extent, on the courts to decide whether there should be a private right of action, rather than determining this question for itself. Cases such as *J.I. Case v. Borak* . . . and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary should undertake this task.
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> I fully agree with the Court's statement that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." It seems to me that the factors to which I have here briefly averted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it, "far better" for Congress to so specify when it intends private litigants to have a private cause of action, but for this very reason this Court in the future should be extremely reluctant to apply a cause of action absent such specificity on the part of the Legislative Branch.[41]

One month after the *Cannon* decision, the Supreme Court handed down a decision in *Touche Ross & Co. v. Redington*,[42] which reflects, to some extent, the adoption of the admonitions of Justice Rehnquist's concurring opinion in *Cannon*. Justice Rehnquist wrote for the majority and indicated that while the Court is wrestling with the issue of implied private causes of action, the question is really one of statutory construction.[43]

In *Redington*, the plaintiff sought to impose liability upon Touche Ross under section 17(a) of the Securities Exchange Act of 1934 for improperly auditing and certifying financial statements of Weis Securities, Inc. and for improperly preparing answers to the SEC financial questionnaire.[44] The statute at issue, section 17(a) states:

> Every national securities exchange, every member thereof . . . and every broker or dealer registered pursuant to . . . this title, shall make, keep and preserve for such periods, such accounts, correspondence . . . and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.[45]

The Court addressed the issue of whether this statute implies a private cause of action. Justice Rehnquist began the discussion of this question by emphasizing that the fact that a statute was violated or that a person incurred damages does not necessitate the implication of a private cause of action. "Instead, our task is lim-

41. *Id.* (citations omitted).
42. 99 S. Ct. 2479 (1979).
43. *Id.* at 2482 (emphasis added, citations omitted).
44. *Id.*
45. 15 U.S.C. § 789(a)(1970).

ited solely to determining whether Congress intended to create a private right of action asserted by SIPC and the Trustee."[46]

In analyzing the intent of Congress, the opinion follows and refines the test established in *Cort*. The decision first considered the language of the statute to ascertain whether the plaintiff was an intended beneficiary of the statute. The Court found that Congress did not intend for a certain class of persons to benefit from the statute, but that the statute merely set up a reporting mechanism which would provide information to government authorities which would allow them to perform effectively.[47] Some critics have urged that the Court could have stretched this intent to show that the effective performance of the government agencies would protect the class to which this plaintiff belonged. However, the Court was not willing to go this far. The Court reasoned:

> In terms, § 17(a) simply requires broker-dealers and others to keep such records and file such reports as the Commission may prescribe. It does not, by its terms, purport to create a private cause of action in favor of anyone. It is true that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one. *But in those cases finding such implied private remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private remedies. By contrast, § 17(a) neither confers rights on private parties nor prescribes any conduct as unlawful.*[48]

This statement emphasizes an extremely important distinction between *Cannon*, *Borak*, and other earlier cases. Unlike those cases, *Redington* placed new emphasis on the importance of statutory construction.

Proceeding along the guidelines of *Cort*, the Court in *Redington* examined the legislative history behind section 17(a) and found that it was silent as to the issue of a private remedy. Since the clear intent of the language of the statute was to deny a private remedy, the Court interpreted the silence as a further indication of Congressional intent to deny an implied cause of action.

> And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within this section.[49]

Thus, the finding that silence demonstrates an intention not to create a private remedy turns on the fact that the language of the statute shows a similar intent. This reasoning can be contrasted to the situation in *Cannon*, in which federal law granted a class of persons certain rights, and the silence in the legislative history as

46. 99 S. Ct. at 2485.
47. *Id.*
48. *Id.*
49. *Id.*

to a private cause of action in no way hindered the implication of such a remedy.[50] This interpretaton of the silence in the legislative history is not a more conservative approach in determining congressional intent, but indicates a different result in light of a new factual situation.

The Court then examined section 18(a) which creates a

> private cause of action against persons, such as accountants, who 'make or cause to be made' materially misleading statements in any report or other document filed with the Commission, although the cause of action is limited to persons who, in reliance on the statements, purchased or sold a security whose price was affected by the statements.[51]

The Court found that the class of persons to whom a cause of action under section 18(a) was granted did not include the plaintiffs in this case, and that the legislative history of section 18(a) demonstrated an intent on the part of Congress that this should be the exclusive private remedy under the act.

> For where the principal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of § 17(a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in § 17(a) that is significantly broader than the remedy that Congress chose to provide.[52]

Next, using point three of the *Cort* test, the Court addressed the issue of whether a private remedy under section 17(a) was "necessary" for the effective enforcement of the section. The Court held and strongly emphasized that "necessity" is irrelevant to the discussion in this case:

> It is true that in *Cort v. Ash*, *supra*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose are ones traditionally relied upon in determining legislative intent.[53]

This language seems to indicate that the "necessity" of a private remedy for enforcement of a statute is no longer a determining factor in deciding these cases. However, this holding is expressly

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50. *Id.* at 2486. Compare to *Cannon* where the court wrote "[t]herefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.' Cort v. Ash, 422 U.S. at 82" (emphasis in original). 99 S. Ct. at 1956.

51. 99 S. Ct. at 1956.

52. *Id.* at 2487 (citations omitted).

53. *Id.* at 2489 (citations omitted).

limited to the situation in this case where the statute proscribes no conduct and creates no rights in any class of persons.

> Here, the statute by its terms grants no private rights to any identifiable class or prescribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17(a). *At least in such a case as this*, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the cause of action under § 17(a).[54]

The Court noted that section 27 of the Act grants exclusive jurisdiction to the federal courts for "all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."[55] It was held that this provision is solely a jurisdictional section and creates no cause of action. "The source of plaintiff's rights must be found, if at all, in the substantive provision of the 1934 Act which they seek to enforce, not in the jurisdictional provision."[56] This statement is a modification of the standard enunciated in *Borak*.[57]

In its closing statement, the Court in *Redington* explained that this decision, as it differs from *Borak*, should be interpreted as "a stricter standard for the implication of private causes of action."[58] The Court was attempting to force Congress to create causes of action where it intended them, and to limit the Court's power and responsibility for judicial legislation. In light of this judicial purpose, the decision in *Redington* can be viewed as defining a more restrictive policy.[59]

The thrust of the decision in *Redington* was followed by the Court in its recent decision of *Transamerica*. This latest decision evidences the new policy of the Court to refrain from creating legal remedies judicially and to force Congress to expressly define its intention through legislation.

II. TRANSAMERICA MORTGAGE ADVISORS, INC. v. LEWIS

In *Transamerica Mortgage Advisors, Inc. v. Lewis*,[60] the share-

54. *Id.*
55. 15 U.S.C. 78AA (1960).
56. *Id.*
57. J.I. Case v. Borak, 377 U.S. at 430. The *Borak* court found that the jurisdictional language implied the existence of a private remedy.
58. 99 S. Ct. at 2490.
59. Two circuit court cases which the Court relied upon in the *Redington* decision have recently denied applying a private cause of action. *See*, Falzarano v. United States, 48 U.S.L.W. 2279 (1st Cir. 1979); Cedar-Riverside Assn., Inc. v. Minneapolis, 48 U.S.L.W. 2280 (8th Cir. 1979). In both of these cases, the courts applied the *Cort* test and found that none of the four factors indicated that Congress implied a private cause of action in the statute.
60. 100 S. Ct. 242 (1979).

holder of a real estate investment trust filed shareholder and derivative and class actions against the corporation for violation of the Investment Advisers Act and of common law fiduciary duties. The District Court found that section 206 of the Investment Advisors Act of 1940,[61] [hereinafter cited as the Advisors Act], affords no private cause of action, and thus, the federal court had no jurisdiction over this claim.[62] The plaintiff appealed to the Ninth Circuit Court of Appeals which faced the sole issue of whether the Advisors Act gave "rise to an implied private right of action for injunctive relief and damages on behalf of persons injured by violations of its provisions."[63] The Court of Appeals reversed the finding of the District Court and held that the Advisors Act did create an implied private cause of action. The Supreme Court affirmed in part and reversed in part.

The Supreme Court first heard oral argument on this case in March, 1979, without the participation of Justice Lewis F. Powell, Jr. The following month, the case was set for reargument. The opinion indicates that the bench was split, with Justice Powell entering the decisive concurring opinion. The decision reflects a movement by the Court toward the position outlined in Powell's dissent in *Cannon*.

The majority opinion relies primarily upon the reasoning outlined in *Redington*,[64] while the dissent relies primarily upon *Cort*.[65] As outlined above, *Cort* analysis provides a four factor test which is fairly precise. The test of *Redington* is less a test than an attitude founded on strict statutory construction. The Court began the opinion by stating that the "question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. . . . Accordingly, we begin with the language of the statute itself."[66] This statement is illustrative of the Court's intent to move from *Borak* while placing emphasis on the desirability of creating remedies

61. 15 U.S.C. § 80b-6 (1960).
62. Lewis v. Transamerica Corp., 575 F.2d 237 (9th Cir. 1978).
63. *Id.* at 238.
64. 99 S. Ct. 2479 (1979).
65. Cort v. Ash, 422 U.S. 66 (1975).
66. 48 U.S.L.W. 4001, 4002 (1979) (citing Touche Ross & Co. v. Redington, 99 S. Ct. 2479 (1979); Cannon v. University of Chicago, 99 S. Ct. 1946 (1979); National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974).

and to instead focus on the intent of Congress. The Court explained:

> While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute . . ., what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us.[67]

The attitude of Justice Rehnquist as expressed in *Redington*, is dominant throughout the Court's opinion[68] and is clearly evidenced in the above statement.

In *Transamerica*, the Court looked first to the language of the Advisors Act, focusing primarily on sections 215 and 206. Section 215 provides that, "contracts whose formation or performance would violate the Act 'shall be void . . . as regards the rights of' the violator and knowing successors-in-interest."[69] Section 206 described conduct of investment advisors which is prohibited by the Act.

The Court held that section 215 implies a private cause of action for contract rescission, injunctive relief or restitution but that section 206 does not imply a cause of action for damages. The Court found that the statutory language of section 215 implies a right to specific and limited relief in a federal court. This section declares certain contracts void and thus anticipates the civil litigation which is necessary to declare a particular contract void. The Court held:

> For these reasons we conclude that when Congress declared in Section 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution. Accordingly, we hold that the Court of Appeals was correct in ruling that the respondent may maintain an action on behalf of the Trust seeking to void the investment advisers contract.[70]

Thus, the Court ruled that the shareholders could file an action to have the advisory contract between the Trust and Transamerica declared void. As part of the contract action, shareholders could seek restitution sufficient to reimburse them for any losses incurred.

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67. *Id.* at 4002 (citations omitted).

68. Such attitude is seen in Justice Rehnquist's dissent in *Cannon v. University of Chicago*:

> [N]ot only is it, 'far better' for Congress to so specify when it extends private litigants to have a private cause of action, but for this very reason this Court in the future should be extremely reluctant to apply a cause of action absent such specificity on the part of the Legislative Branch.

Cannon v. University of Chicago, 99 S. Ct. 1946, 1968 (1979) (Rehnquist, J., dissenting).

69. 48 U.S.L.W. at 4003.

70. *Id.*

The Court then reviewed section 206 of the statute, stating,

> we view quite differently, however, the respondent's claim for damages and other monetary relief under Section 206. Unlike Section 215, Section 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must read it into the Act.[71]

The Court defended this position by citing certain facts. First, the Court pointed out the remedies expressly provided by the statute. Criminal penalties are available for prosecution of willful violations of the Act under section 217 and the SEC is authorized by section 209 to bring civil actions in federal court to compel compliance with the Act. In addition, administrative sanctions may be imposed by the SEC in accordance with section 203, for violations of the Act, including violations of section 206. Thus, the Court concluded, "in view of these express provisions for enforcing the duties imposed by section 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private remedy.' "[72]

Second, the Court explained that the existing circumstantial evidence weighs against the implication of a private right. "Under each of the securities laws that preceded the Act here in question, and under the Investment Company Act, which was enacted as companion legislation, Congress expressly authorized private suits for damages in prescribed circumstances."[73]

Finally, the Court noted that the original jurisdictional section, section 214, originally referred to "actions at law" and to "liability," but that both terms had been omitted from the bill after senators met with representatives of the investment advisers industry and the staff of the SEC. "The unexplained deletion of a single phrase from a jurisdictional provision is, of course, not determinative of whether a private remedy exists. But it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief."[74]

The Court specifically rejected the respondent's contention that the Court should consider, in addition to the intent of Congress, the utility of a private remedy. The Court stated:

> We rejected the same contentions last Term in *Touche Ross & Co. v. Redington*, *supra* where it was argued that these factors standing alone

71. *Id.*
72. *Id.*
73. *Id.* (citing Cannon v. University of Chicago, 99 S. Ct. 1946, 1971 (1979) (Powell, J., dissenting)).
74. *Id.* at 4004.

> justified the implication of a private right of action under Section 17(a) of the Securities Exchange Act of 1934. We said in that case: 'It is true that in *Cort v. Ash*, the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal wieght. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*-the language and focus of the statute, its legislative history, and its purpose, are ones traditionally relied upon in determining legislative intent.[75]

The Court is establishing a trend of strict statutory construction which appears to be superseding the four factors of the *Cort* test. In the above quote, the Court seeks to explain away the *Cort* test by saying that the four factors actually consist of an inquiry into congressional intent, which inquiry can best be maintained by strict statutory construction.

Clearly, the *Transamerica* case goes one step beyond *Redington* because, in the former, the evidence of Congressional intent does not mitigate as clearly in favor of denying the remedy sought by the respondent. The Court admits that the issue *sub judicia* is clouded by the fact that section 206 was intended to protect the victims of the fraudulent practices it prohibited. The Court signalled its move beyond *Redington* by stating that the statute was designed to protect advisor's clients does not require the implication of a private cause of action for damages on their behalf. The Court wrote:

> The statute in *Touche Ross* by its terms neither granted private rights to the members of any identifiable class, nor prescribed any conduct as unlawful. In those circumstances it was evident to the Court that no private remedy was available. Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf.[76]

Thus, the Court has exhibited an unwillingness to judicially create private rights of action. This attitude was urged by Justices Rehnquist and Stewart in their concurring opinion in *Cannon*. The approach was followed by the majority in *Redington* and emphasized by the Court in *Transamerica*. Moreover, the language of *Transamerica* is quite definite in this regard. When discussing the fact that Congress expressly authorized suits for damages in each of the securities laws which preceded the Advisors Act, the Court remarked, "[o]bviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."[77]

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75. *Id.* (citations omitted).
76. *Id.*
77. *Id.*

III. Other Recent Decisions

The adoption, by the Court, of strict statutory construction and its preference for refraining from engaging in judicially created legislation, could lead one to conclude that the Court will decreasingly imply rights of action. However, this conclusion is tempered by other recent decisions in which the Court "discovers" new implied rights of action where Congress had failed to expressly create the remedy. Such decisions include *Gladstone Realtors v. Village of Bellwood*;[78] *Davis v. Passman*;[79] *Reiter v. Sonotone Corp.*[80]

In *Gladstone Realtors v. Village of Bellwood*, the Supreme Court expanded the remedies available to individuals and municipalities pursuant to the Fair Housing Act of 1968. The Court held that the plaintiffs had standing to assert a violation of the Act for the alleged steering of prospective home buyers, even though the plaintiffs were not personally discriminated against or actual victims of the steering. The decision holds that the

> complaint alleging that violations by real estate brokerage firms and employees were depriving plaintiff residents of the village of 'social and professional benefits of living in an integrated society' was sufficient allegation of injury to the plaintiff individual residents of the described area, to confer standing, subject to requirements of proof.[81]

The Fair Housing Act of 1968 did not expressly create a private right of action, but such a remedy was inferred by the Court.

Davis v. Passman provides a broad new constitutional basis for sex and racial discrimination suits against members of Congress and other federal governmental employees. The decision holds that the fifth amendment provides a constitutional basis for individuals to sue federal officials for alleged deprivation of life, liberty or property without due process. The plaintiff brought this action in federal court against her former employer, a congressman, alleging that her employment as a deputy administrative assistant was terminated solely because of her sex.

In *Reiter v. Sonotone*, the Court unanimously ruled that Congress, in the 1914 Clayton Antitrust Act, intended to allow direct consumer purchasers (as well as larger entities) injured by price fixing, to bring treble damage suits against the manufacturers engaging in such anti-competitive activities.

78. 99 S. Ct. 1601 (1979).
79. 99 S. Ct. 2264 (1979).
80. 99 S. Ct. 2326 (1979).
81. 99 S. Ct. at 1602.

In deciding these three cases, the Court confused the issues by failing to restrict itself to an approach of strict statutory construction. An obvious distinction between *Gladstone*, *Davis*, *Reiter* and *Transamerica* lies in the fact that only *Transamerica* deals with a securities action and therefore may be interpreted solely within that realm. *Transamerica* does rely heavily upon the authority of *Redington* which was also an action based on securities statutes. However, such an explanation seems inadequate due to the fact that the Court in *Transamerica* developed its analysis through broad discussions of *Cort*[82] and *Cannon v. University of Chicago*,[83] neither of which involve construction of a securities statute. To resolve this contradiction requires some discussion of *Davis*, *Gladstone*, and *Reiter*.

In *Davis*, the Court specifically addressed the question of why, in that case, it was unnecessary to follow the reasoning of *Redington*.

> It is in this sense that the Court of Appeals concluded that petitioner lacked a cause of action. The Court of Appeals reached this conclusion through the application of the criteria set out in *Cort v. Ash* . . . , for ascertaining whether a private cause of action may be implied from 'a statute not expressly providing one.' The Court of Appeals uses criteria to determine that those in petitioner's position should not be able to enforce the Fifth Amendment's due process clause, and that petitioner therefore had no cause of action under the amendment. This was error for the question of who may enforce a *statutory* right is fundamentally different than the question of who may enforce a right that is protected by the constitution.[84]

While this distinction between rights of action implied by statutes and rights of action implied by the constitution appears legally sound, it is in fact merely the Court's avenue for reaching a desired result. The most incisive explanation for the contradictory aspects of *Davis* and *Transamerica* lies in the fact that, of the five justices who wrote the majority opinion in *Davis*, all but one dissented in *Transamerica*. Of the four dissenters in *Davis*, all were part of the majority in *Transamerica*. Justice Blackman was the only judge who stayed with the majority in both *Transamerica* and *Davis*. Thus, the attitude of the Court cannot be treated as a single entity, but rather must be described with reference to these two groups. Justices Stewart, Burger, Powell, and Rehnquist urge strict statutory construction, while Justices Brennen, Marshall, Stevens and White are less inclined to be bound by rigid tests of congressional intent.

Gladstone may, at first glance, appear to be a "discovery" by the Court of a new cause of action. However, the language of the

82. 422 U.S. 66 (1975).
83. 99 S. Ct. 1946 (1979).
84. 99 S. Ct. 2264, 2274 (1979) (citations omitted).

opinion is limited to the question of whether the respondents had standing to bring suit against the petitioners. The respondents, the Village of Bellwood (two blacks and four whites) acted as "testers" in an attempt to determine whether the petitioners (two real estate brokerage firms and nine of their employees) were engaging in racial steering. The Court in *Gladstone* does seek to determine whether the respondents have asserted a cause of action, but the determination depends upon whether the respondents have standing and not whether a right of action is implied by statute. Thus, *Gladstone* can be distinguished from *Transamerica* on these grounds.

In *Reiter*, the Court held that a consumer whose money had been diminished by reason of an antitrust violation on the part of the manufacturer was injured in his property within the meaning of the Clayton Act. The effect of this decision is to create a new cause of action by allowing a consumer to assert a violation of the Clayton Act. The opinion, written by Mr. Chief Justice Burger, is carefully restricted to a discussion of whether or not the clause "business or property" in section 4 of the Act was intended to limit standing to sue under the Act to those engaged in commercial ventures. The Court's analysis in *Reiter* does reflect some consistency with the language of *Transamerica*. The Court wrote, "as is true in every case involving the construction of the statute, our starting point must be the language employed by Congress."[85] The Court then outlined what it considered to be the "usual meaning of the phrase 'business or property.' " Thus, the Court stated that it would adhere to congressional intent, and it then proceeded to reach its own conclusion. It is important to note, however, that the Court felt it necessary to state that the inquiry rested upon the language employed by Congress. Justice Rehnquist seems to hint at the contradiction in his concurring opinion when he states, "I fully agree that we must take the statute as Congress wrote it, and I also fully agree with the Court's construction of the phrase 'business and property.' "[86]

While the result in *Reiter* is to create a new cause of action, the Court does seem to imply a willingness to maintain the approach of strict statutory construction. Thus, it is the manner in which

85. *Id.* at 2330 (1979).
86. *Id.* at 2334.

the Court reaches its decision which is most critical to an analysis of judicial attitudes.

IV. Conclusion

The recent decision of *Transamerica* does signal further adoption by the Court of an approach of strict statutory construction and an unwillingness by the Court to "discover" new causes of action which are not expressly created by Congress.

However, four of the nine justices presently on the bench seem less infatuated with the concept of strict statutory construction and seem inclined to adopt a more flexible test which allows some consideration of the equities of a particular case.

The Court has also indicated it will rely on the *Transamerica* principles of determining whether a right of action is implied only when it is seeking to determine whether Congress intended for a statute to provide such a remedy. The same rules do *not* apply to the determination of whether a particular group of litigants is entitled to assert an injury which is addressed by a particular statute. Additionally, the Court has, after confining itself to the language of the statute, allowed some leeway in determining what the statutory language means.