SMU | Dedman School of Law

SMU Law Review

Volume 36 | Issue 4 Article 5

January 1982

Implied Private Right of Action under the Commodity Exchange Act: Merrill Lynch, Pierce, Fenner & (and) Smith, Inc. v. Curran

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IMPLIED PRIVATE RIGHT OF ACTION UNDER THE COMMODITY EXCHANGE ACT: *MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. V. CURRAN*

JOHN J. Curran and Jacquelyn Curran opened several commodity[1] accounts with Merrill Lynch in 1973. The Currans deposited $100,000 with a broker who made all trading decisions and exercised complete control over the accounts.[2] Initially, the Currans realized profits from the accounts and made some withdrawals. Later, as the accounts sharply declined in value, they requested the accounts be closed. The broker at first refused, but assented in 1974 after the Currans' capital declined to $6,000.[3] Alleging that the broker made false representations concerning the accounts, failed to observe safeguards and loss limits, and made trades with the sole intention of generating commissions, the Currans brought an action for damages against Merrill Lynch. They alleged violations of the Commodity Exchange Act,[4] federal securities law,[5] and state law.[6] The

1. Section 2 of the Commodity Exchange Act, as amended in 1978, defines commodity to include all goods and articles and all services, rights, and interests that are the subject of future contracts. 7 U.S.C. § 2 (1976 & Supp. IV 1980). A commodity future is a standardized contract for purchase or sale of a specified quantity and grade of a commodity for delivery at a specified future date at the price agreed upon in the contract. Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. CORP. L. 217, 242 (1976). *See generally* Hudson, *Consumer Protection in the Commodity Futures Market*, 58 B.U.L. REV. 1 (1978) (describing commodity trading in general and various types of fraudulent activities by brokers); Wolff, *Comparative Federal Regulation of the Commodities Exchanges and the National Securities Exchanges*, 38 GEO. WASH. L. REV. 223 (1969) (discussing regulatory provisions of the Commodity Exchange Act and Securities Exchange Act that protect public interest).

2. This type of account is termed a discretionary account. The customer makes a deposit and gives the broker authority to buy and sell at the broker's discretion without consulting the customer. These accounts are more common in commodities trading than in the trading of securities because, unlike the securities market, prices in the commodities market may move sharply, requiring fast trading action. Bromberg, *supra* note 1, at 248. Merrill Lynch disputed this description of the Currans' accounts, but agreed to the classsification of the accounts as discretionary for the purposes of this appeal on questions of law. Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 220 (6th Cir. 1980), *aff'd*, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982).

3. The record does not reveal the Currans' total investment in the accounts after the initial deposit of $100,000. At one point they did withdraw $101,000. The Currans alleged that by the time the accounts were closed, the accounts had declined in value $175,000 and only $6,000 in capital remained. 622 F.2d at 220.

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

5. Specifically, the Currans alleged violation of rule 10b-5, 17 C.F.R. § 240.10b-5 (1981) and § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 77(q)(a) (1976). 622 F.2d at 219.

6. The complaint alleged violations of § 410(a)(2) of the Michigan Uniform Securities

district court granted defendant's motion for partial summary judgment and dismissed the claims brought under federal securities law.[7] The Court of Appeals for the Sixth Circuit affirmed the dismissal of the federal securities law claims.[8] Although the issue was not raised on appeal, the Sixth Circuit also considered the question of whether an implied right of action exists under the Commodity Exchange Act. After finding that such a right does exist, the appellate court ruled that the action could properly be maintained on remand to the district court.[9] The United States Supreme Court granted certiorari in this and three companion cases involving similar disputes.[10] *Held, affirmed*: A private party may maintain an action for damages incurred as a result of violation of the Commodity Exchange Act although the Act contains no express provision for such a remedy. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982).

I. COMMODITY EXCHANGE ACT: DEVELOPMENT OF THE STATUTORY SCHEME

The Commodity Exchange Act[11] has its origins in the Future Trading

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Act, MICH. COMP. LAWS ANN. § 451.501 (1967 & Supp. 1982). 622 F.2d at 219.

7. 622 F.2d at 218-19. The district court ruled that a discretionary commodity account is not a security and is not subject to provisions of federal securities laws. *Id.* at 219.

8. *Id.* at 222. In determining whether a discretionary commodity account is an investment contract and thus subject to claims under securities laws, the Sixth Circuit used the standard set forth in SEC v. W.J. Howey Co., 328 U.S. 293 (1946). In *Howey* the Court defined an investment contract as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Id.* at 298-99. After finding the *Howey* common enterprise element missing, the Sixth Circuit in *Curran* held that a discretionary commodity account is not a security. 622 F.2d at 222. The court adopted the reasoning of Milnarik v. M-S Commodities, Inc., 457 F.2d 274 (7th Cir.) (common enterprise only present in horizontal relationship between pool of investors and not in vertical arrangement betweeen one investor and the broker), *cert. denied*, 409 U.S. 887 (1972).

9. The court stated that remand to the district court for additional proceedings necessarily raised the question of whether the action could be maintained. 622 F.2d at 230. Recognizing that a court of appeals should ordinarily limit its review to the questions raised, *id.* at 230 n.17, the court nevertheless decided the question in order to offer direction to the district court and avoid further delay, *id.* at 230.

10. Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980) (consolidating New York Mercantile Exch. v. Leist; Clayton Brokerage Co. v. Leist; Heinhold Commodities, Inc. v. Leist), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982). These three cases arose from trading in futures contracts for Maine potatoes in May 1976. Plaintiffs, as speculators, alleged damages from two separate conspiracies to manipulate prices. In both alleged conspiracies, the traders amassed contracts in excess of the number allowed by Exchange rules. Plaintiffs sued the New York Exchange and its officials alleging that the violations were not reported to the Commission and that the Exchange did not use its power to avert the price manipulation. They also sued the brokers alleged to have participated in the conspiracy as well as other speculators. These cases pose the same general question of whether an implied private right of action exists under the Commodity Exchange Act.

11. 7 U.S.C. §§ 1-24 (1976 & Supp. IV 1980). For discussion of the Act's statutory history, see Davis, *The Commodity Exchange Act: Statutory Silence is Not Authorization for*

Act of 1921,[12] Congress's first effort to regulate commodity futures trading. Although limited to grain futures, this statute established the pattern of restricting trading to central exchanges designated by the Secretary of Agriculture and subject to government supervision. The 1921 statute charged these contract markets with policing themselves by adopting measures to prevent price manipulation. Violators were subject to a fine or imprisonment. After the Supreme Court declared this initial legislation unconstitutional,[13] Congress enacted the virtually identical Grain Futures Act of 1922.[14]

In 1936 Congress significantly expanded the coverage of the statute to other commodities[15] and changed its name to the Commodity Exchange Act.[16] The 1936 additions include section 4b,[17] the antifraud provision, and section 4a,[18] which empowers the Commission to set quantitative limits on speculative trading. Another added section requires registration of merchants and brokers.[19] Congress extended the fines and imprisonment sanctions to cover anyone attempting to manipulate or manipulating the price of any commodity.[20] In 1968 amendments to the Act extended regulation to additional commodities,[21] and added a provision, section 5a(8),[22] requiring an exchange to enforce its rules. Increased penalties made price manipulation a felony.[23]

Prior to 1974 Congress enacted the major provisions upon which implied causes of action might be based.[24] Although the Commodity Futures Trading Commission Act of 1974 significantly changed the Act,[25] the amendments did not affect these provisions. In 1974, however, Congress broadened coverage of the Act to include not only agricultural goods, but all goods or services in which futures contracts are dealt.[26] Congress trans-

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Judicial Legislation of an Implied Private Right of Action, 46 Mo. L. REV. 316 (1981); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U.L. REV. 804 (1975).

12. Ch. 86, 42 Stat. 187 (declared unconstitutional).

13. Hill v. Wallace, 259 U.S. 44 (1922) (unconstitutional exercise of taxing power to assess penalty for failure to comply with regulatory statute).

14. Ch. 369, 42 Stat. 998 (codified in scattered sections of 7 U.S.C. (1976)).

15. § 3(a) of the 1936 amendments extended coverage to cotton, rice, butter, eggs, and Irish potatoes. Ch. 545, § 3(a), 49 Stat. 1491 (1936) (current version at 7 U.S.C. § 2 (Supp. IV 1980)).

16. 7 U.S.C. § 1 (1976).

17. *Id.* § 6b.

18. *Id.* § 6a.

19. *Id.* §§ 6d(1), 6e (1976 & Supp. IV 1980).

20. *Id.* § 13 (Supp. IV 1980).

21. The additions included livestock and livestock products. Pub. L. No. 90-258, § 1, 82 Stat. 26 (1968) (current version at 7 U.S.C. § 2 (Supp. IV 1980)).

22. 7 U.S.C. § 7a(8)-(9) (1976).

23. *Id.* § 13 (Supp. IV 1980).

24. Sections forming the bases for implied causes of action in the cases before the Court include Commodity Exchange Act §§ 4a, 4b, 5a(8), 5d, 9(b), 7 U.S.C. §§ 6a, 6b, 7, 7a, 13 (1976 & Supp. IV 1980).

25. *See* Rivers v. Rosenthal & Co., 634 F.2d 774, 780 (5th Cir. 1980) (quoting H.R. REP. No. 975, 93d Cong., 2d Sess. 1 (1974), which called the 1974 amendments "the first complete overhaul" of the Act), *vacated and remanded*, 102 S. Ct. 1228, 72 L. Ed. 2d 841 (1982) (remanding for consideration in light of *Curran* decision).

26. Pub. L. No. 93-463, §§ 202-203, 88 Stat. 1395 (1974) (current version at 7 U.S.C. § 2

ferred responsibility for enforcement from the Secretary of Agriculture to a newly created Commodity Futures Trading Commission having broad regulatory powers.[27] The Commission's powers include the power to sue in federal court for injunctive relief from conduct of markets or traders in violation of the Act[28] and to conduct disciplinary proceedings against exchange members who violate regulations.[29] Congress increased civil fines for individuals or exchanges who violate the Act.[30] Additionally, the 1974 Act provides procedures for individuals injured by violation of the Act. The Act requires each exchange to offer arbitration for settlement of customer claims involving less than $15,000.[31] The Act also provides for an administrative procedure that allows complaints to be filed and eventually ruled upon by an administrative law judge authorized to order payment of damages.[32]

II. CONFLICT AMONG THE CIRCUITS: HISTORY OF THE CASE LAW

When Congress enacts a statute, such as the Commodity Exchange Act, making certain activities unlawful without incorporating a specific provision that allows private rights of action, the Supreme Court will provide a remedy if it finds implicit intent by Congress to create that remedy. The Court first recognized an implied private cause of action[33] under a federal statute in 1916 in *Texas & Pacific Railway v. Rigsby*.[34] In *Rigsby* the Court upheld the right of a railroad switchman to recover damages for injuries that resulted from a violation of federal safety standards. The safety statute provided penal sanctions, but not a private remedy. Relying on common law principles,[35] the Court emphasized that when a member of the special class for whose benefit the statute was enacted is damaged, then a

(Supp. IV 1980)). Under this broader definition, the Commodity Exchange was extended to cover trading in plywood, metals such as copper, gold, and silver, currency, and interest rate futures. *See* Davis, *supra* note 11, at 317.

27. 7 U.S.C. § 4a (Supp. IV 1980).

28. *Id.* § 13a-1 (1976).

29. *Id.* § 12c (1976 & Supp. IV 1980).

30. *Id.* §§ 13a, 13b.

31. *Id.* § 7a(11) (Supp. IV 1980).

32. *Id.* § 18 (1976 & Supp. IV 1980).

33. Various commentators have traced the history of the development of implied causes of action. *See* Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 WASH. & LEE L. REV. 783 (1980); McMahon & Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

34. 241 U.S. 33 (1916). For cases attributing the origin of implied actions to *Rigsby*, see Cannon v. University of Chicago, 441 U.S. 677, 689 n.10 (1979); Cort v. Ash, 422 U.S. 66, 78 (1975); Leist v. Simplot, 638 F.2d 283, 298 (2d Cir. 1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982). *But see Cannon*, 441 U.S. at 732 (Powell, J., dissenting). Justice Powell argued that the use of "implied private right of action" in *Rigsby* carried a different connotation and could not be taken as authority for its present meaning. *Id.*

35. Implied rights have their origin in English common law. In *Rigsby* the Court quoted the maxim, attributed to Blackstone, "where there is a right there is a remedy." 241 U.S. at 39-40; *see* McMahon & Rodos, *supra* note 33, at 168.

private remedy is implicit.[36]

Applying the *Rigsby* reasoning, the courts frequently implied private rights of action in the years that followed.[37] The courts, however, could no longer find an implied private right of action based on common law principles after the Supreme Court in *Erie Railroad v. Tompkins*[38] declared that no federal general common law exists. Because federal jurisdiction after *Erie* could only be based on the Constitution or federal statutes, the Court couched its subsequent opinions in terms of enforcing federal statutory rights. The Court, therefore, acted on the basis of its understanding of congressional intent to create private rights of action under a given statute.[39]

Particularly in the area of securities regulation,[40] a strong precedent developed for recognizing private rights of action.[41] In *J.I. Case Co. v.*

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36. 241 U.S. at 39.

37. Implied causes of action were sustained under a number of different statutes. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); Like v. Carter, 448 F.2d 798 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972); Guernsey v. Rich Plan, 408 F. Supp. 582 (N.D. Ind. 1976). For discussion of implied causes of action in a specific context, see Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of Cort v. Ash*, 23 VILL. L. REV. 657 (1978); Sales, *Does the FDC Act Create a Private Right of Action?*, 28 FOOD DRUG COSM. L.J. 501 (1973); Comment, *Private Rights of Action Under Title IX*, 13 HARV. C.R.-C.L. L. REV. 425 (1978); Note, *Implied Civil Remedies Under Section 17(a) of the Securities Act of 1933*, 53 B.U.L. REV. 70 (1973). For general discussion of early decisions, see Note, *supra* note 33.

38. 304 U.S. 64 (1938). *Erie* held that in the absence of a constitutional or statutory provision, state law is binding on federal courts. The Constitution does not grant power to federal courts to decide cases based on a general federal common law. *Id.* at 78.

39. For discussion of the various rationales for implying causes of action, see Note, *An Implied Private Right of Action Under Section 16(a) of the Securities Exchange Act of 1934*, 23 CASE W. RES. L. REV. 155 (1971); Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441 (1974).

40. Implied causes of action have been upheld under different sections and rules of the Securities Exchange Act of 1934. *See* Goldenberg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959) (§ 7 margin rules); Fishman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951) (§§ 10 and 15(c)(1) antifraud provisions); Baird v. Franklin, 141 F.2d 238 (2d Cir.) (§ 6(a)(1) requiring exchanges to enforce rules), *cert. denied*, 323 U.S. 737 (1944); Opper v. Hancock Sec. Corp., 250 F. Supp. 668 (S.D.N.Y.) (rules 15cl-2 and 10b-5), *aff'd*, 367 F.2d 157 (2d Cir. 1966); Standard Fruit & S.S. Co. v. Midwest Stock Exch., 178 F. Supp. 669 (N.D. Ill. 1959) (§ 12(f) requiring authorization before stock could be traded); Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane, 85 F. Supp. 104 (W.D. Ark. 1949) (rule 17a-5 requiring filing certified statements and § 11(d)(2) requiring certain confirmations). *See generally* Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules*, 66 COLUM. L. REV. 12 (1966); Maher, *supra* note 33.

41. Recognition of private rights of action under rule 10b-5, 17 C.F.R. § 240.10b-5 (1981), has had by far the greatest impact in terms of the enormous volume of litigation brought under this rule. 1 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 2.4(110) (1982); *see* 6 L. LOSS, SECURITIES REGULATION 3869-73 (1969).

An implied cause of action under rule 10b-5 was first recognized in Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), in which the court decided that the general purposes of the Securities Exchange Act compelled that conclusion. *Id.* at 514. After J.I. Case Co. v Borak, 377 U.S. 426 (1964), which was not a 10b-5 case, the enormous popularity of rule 10b-5 actions developed. Until 1971 these cases were litigated in the lower federal

Borak[42] a shareholder charged that proxy solicitation material for securing shareholder approval of a corporate merger was false and misleading in violation of SEC rules.[43] The Court noted that although Congress made no specific reference to private rights under the section prohibiting false and misleading statements, Congress did grant jurisdiction to district courts over all suits brought to enforce any liability created under the Securities Exchange Act.[44] The Court further noted that the purpose of the statute was to protect investors from deceptive practices by management or others seeking to secure proxy votes.[45] Reasoning that the standards set by Congress evidenced the broad remedial purposes of the statute, the Court implied a private right of action on the theory that it had a duty to provide the remedies necessary to carry out the congressional purpose.[46] Following the *Borak* ruling, courts routinely recognized private rights of action in securities cases.[47]

In other types of cases, however, the Supreme Court refused to imply a cause of action.[48] Thus the question of when an implied right would be recognized went unanswered. In resolving this question in specific cases, the Court focused on the remedies provided in the statute. In *Securities Investor Protection Corp. v. Barbour*[49] and *National Railroad Passenger*

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courts without explicit recognition by the Supreme Court that an implied right of action exists under rule 10b-5. Maher, *supra* note 33, at 795. In Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971), the Court first recognized an implied right of action under rule 10b-5 in a footnote. Id. at 13 n.9. The Court has continued to recognize private rights of action under rule 10b-5, but has in some cases restricted private suits on other grounds, such as standing. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). This recognition of an implied right may, however, reflect the unique history of rule 10b-5 without articulating standards of general applicability. *Cf.* Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.19 (1979); Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (both stating that the Court simply acquiesced in the 25-year-old acceptance by lower courts of an implied action under rule 10b-5).

42. 377 U.S. 426 (1964).

43. *Id.* at 429, 429 n.4 (alleging violation of rule 14a-9, 17 C.F.R. § 240.14a-9 (1981)).

44. 377 U.S. at 431.

45. *Id.*

46. *Id.* at 433. In Allen v. State Bd. of Elections, 393 U.S. 544 (1969), the Court expanded this reasoning to imply a cause of action if the effectiveness of the statute would be severely hampered without an implied right of action. *Id.* at 556-57.

47. Noting that implied causes of action have been almost unanimously recognized under the Securities Exchange Act, Judge Friendly drew heavily on the analogy to securities law in arguing for the majority in Leist v. Simplot, 638 F.2d 283, 296-97 (2d Cir. 1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982). *But see* Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891, 892-900 (1977) (suggesting that a stricter approach to private causes of action is developing).

48. *See* Calhoon v. Harvey, 379 U.S. 135 (1964) (no private right under a statute guaranteeing union members right to vote in union election, because administrative procedures provided); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (no private cause of action to recover unreasonable charges from motor carrier, because sections of statute other than section on motor carriers included remedies); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958) (no private right of action against violators of Clayton Act who made sales at unreasonable prices to eliminate competition); Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) (no private cause of action for recovery of past unreasonable utility rate charges under Federal Power Act).

49. 421 U.S. 412 (1975). The Court held that no private right of action existed by which

Corp. v. National Association of Railroad Passengers (Amtrak)[50] the Court concluded that if the language of a statute expressly provided for one method of enforcement, then other methods, including private actions, were necessarily excluded.[51] According to the Court, in both of these instances, Congress established comprehensive enforcement procedures. Because enforcement was vested in the Securities Exchange Commission and the Attorney General, respectively, the Court refused to imply a private right of action.[52]

In this same context, the Court, in 1975, handed down *Cort v. Ash*.[53] In *Cort* the Court, incorporating elements of previous decisions, identified four factors to be considered in determining whether a private right of action should be recognized although it is not expressly provided in a statute.[54] First, is the plaintiff a member of the class Congress intended to benefit by the statute?[55] Second, is there evidence that Congress intended to create a remedy or to deny one?[56] Third, is implying a remedy consistent with the underlying purpose of the act?[57] Fourth, would allowing a private action invade an area traditionally covered by state law?[58]

The plaintiff in *Cort* was a shareholder of a corporation that sponsored political advertisements during the 1972 presidential election. Alleging violation of the criminal provisions of the Federal Election Campaign Act,[59] Ash brought an action against corporate directors for damages. Applying the four-pronged analysis, the Court refused to imply a right of action on the behalf of the stockholder.[60] The Court first determined that the purpose of the legislation was to prevent the possible corrupting influence of

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customers of a failing brokerage firm could compel the Securities Investor Protection Corporation to initiate liquidation proceedings. *Id.* at 421.

50. 414 U.S. 453 (1974). The Court refused to entertain a suit brought by aggrieved rail passengers seeking to enjoin discontinuation of rail service. *Id.* at 464-65.

51. 414 U.S. at 458. This principle is based on the tenet *expressio unius est exclusio alterius* (expression of one thing is the exclusion of the other). BLACK'S LAW DICTIONARY 521 (rev. 5th ed. 1979); *see* Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929).

52. *Barbour*, 421 U.S. at 420; *Amtrak*, 414 U.S. at 458.

53. 422 U.S. 66 (1975). Numerous commentators have written on the impact of *Cort*. *See, e.g.*, Maher, *supra* note 33, at 796-99; Comment, *Private Rights of Action Under* Amtrak *and* Ash: *Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975); Note, *Implication of Private Actions from Federal Statutes: From* Borak *to* Ash, 1 J. CORP. L. 371 (1976); Note, *Emerging Standards for Implied Actions Under Federal Statutes*, 9 U. MICH. J. L. REF. 294 (1976).

54. 422 U.S. at 78.

55. *Id.* For this proposition the Court cited Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916). This factor essentially involves standing to sue.

56. 422 U.S. at 78 (citing *Amtrak*, 414 U.S. at 455).

57. 422 U.S. at 78 (relying upon *Barbour*, 421 U.S. at 412; *Amtrak*, 414 U.S. at 455; Calhoon v. Harvey, 379 U.S. 134 (1964)); *cf.* Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962) (Court should only imply remedy after considering what effect remedy will have on regulatory scheme).

58. 422 U.S. at 78 (citing Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963)).

59. 18 U.S.C. § 610 (repealed 1976) (prohibited corporations, banks, and labor organizations from making expenditures in connection with presidential elections and provided criminal penalties).

60. 422 U.S. at 80-85.

corporate wealth in elections.[61] Given this purpose, the Court argued that stockholders were not the intended beneficiaries of the Act.[62] Next, the Court found no indication of congressional intent to create a private right to damages.[63] Finally, the Court concluded that implying a remedy would not further the purpose of the legislation and would intrude into an area traditionally committed to state law.[64]

Despite the apparent clarity of the four-part analysis outlined by the Court in *Cort*, application of the criteria proved difficult. Several split decisions by the Supreme Court[65] and confusion among the circuits resulted.[66] In 1979 three decisions involving implied causes of action were handed down by the Supreme Court. In the first, *Cannon v. University of Chicago*,[67] the plaintiff was refused admission to medical school, allegedly as a result of sex discrimination. She sought to bring an action under title IX of the Education Amendments of 1972.[68] Title IX provides for administrative action to cut off federal funding to institutions engaged in discrimination, but does not provide private remedies.[69] The Court found an implied cause of action under the *Cort* test, but the opinion spoke for only three Justices.[70] The impact of the more restrictive *Cort* analysis was evident, however. The opinion emphasized that the Court will imply a private remedy only under certain limited circumstances in the absence of clear congressional intent to create private rights.[71]

In the other two 1979 decisions that applied the *Cort* test, the Court refused to find an implied right of action. In *Touche Ross & Co. v. Redington*[72] the Court held that the four factors of the *Cort* analysis were not entitled to equal weight. While reaffirming the *Cort* reasoning, the Court placed special emphasis upon the legislative intent factor.[73] *Redington* involved an action against an accounting firm that had prepared reports on an insolvent brokerage firm's financial condition. Customers of the brokerage firm brought suit under section 17(a) of the Securities Exchange Act, the recordkeeping and reporting provision.[74] Finding no affirmative evidence in the legislative history of intent to create private remedies

61. *Id.* at 80.
62. *Id.* at 82.
63. *Id.* at 82-83.
64. *Id.* at 84-85.
65. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Sante Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977).
66. After *Cort* some lower courts continued to recognize implied rights of action under federal statutes. *See, e.g.*, Riggle v. California, 577 F.2d 579 (9th Cir. 1978); New York Stock Exch., Inc. v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); Hughes v. Dempsey-Tegeler & Co., 534 F.2d 156 (9th Cir.), *cert. denied*, 429 U.S. 896 (1976).
67. 441 U.S. 677 (1979).
68. 20 U.S.C. § 1681 (1976).
69. *Id.*
70. Three Justices concurred specially and three dissented. Justice Powell traced the history of implied causes of action in his lengthy dissent. 441 U.S. at 730.
71. *Id.* at 717.
72. 442 U.S. 560 (1979).
73. *Id.* at 575-76.
74. 15 U.S.C. § 78q(a) (1976).

under this section, the Court refused to imply a cause of action.[75]

Continuing this more restrictive approach, the Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*[76] held that no right to private actions for damages is implied under the Investment Advisors Act of 1940.[77] Although the Investment Advisors Act was intended to benefit clients by establishing standards of conduct for their investment advisors, it does not expressly provide for private remedies; rather, it expressly provides for other means of enforcement. The Court emphasized that when Congress provides adequate means of enforcement in a statute, and alternate remedies exist, these remedies are exclusive in the absence of contrary legislative intent.[78]

Prior to *Curran* no Supreme Court decisions dealt with the validity of a private right of action under the Commodity Exchange Act.[79] A number of district courts and circuit courts, however, addressed the question. Decisions prior to 1974 constituted the contemporary legal context in which Congress enacted the 1974 amendments.[80] *Goodman v. H. Hentz & Co.*[81] was the first decision to address specifically the issue of implied rights of action under the Commodity Exchange Act. In this buyers' action for fraud against a broker-dealer, the district court held that an implied right exists under the Commodity Exchange Act.[82] The *Goodman* court based its ruling on state common law tort principles and the fact that the Act did not prohibit private actions.[83] Subsequent cases decided before the 1974 amendments to the Commodity Exchange Act followed the *Goodman* ruling, typically without comment.[84]

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75. 442 U.S. at 569-71; *cf.* Goodman v. H. Hentz & Co., 265 F. Supp. 440, 444 (N.D. Ill. 1967) (right implied if act does not prohibit private actions).

76. 444 U.S. 11 (1979).

77. 15 U.S.C. § 80b-6 (1976).

78. 444 U.S. at 20. The Court continued to use this restrictive approach in several later cases. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981); California v. Sierra Club, 451 U.S. 287 (1981).

79. One case involving implied rights of action under the Commodity Exchange Act came before the Court. The case, however, was decided on primary jurisdiction grounds. Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973), *rev'g* Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973). The Court decided that the Commodity Exchange Commission had primary jurisdiction and directed the plaintiffs to proceed before the Commission. The meaning of the *Deaktor* decision was the subject of disagreement in *Curran*. The *Curran* majority said that *Deaktor* did not question the availability of private rights of action under the Commodity Exchange Act. 102 S. Ct. at 1840 n.65, 72 L. Ed. 2d at 203 n.65. The dissent pointed out that *Deaktor* could also mean that no private rights of action can arise in the courts because of the procedures for relief available through the Commission. *Id.* at 1850 n.6, 72 L. Ed. 2d at 214 n.6.

80. *Curran*, 102 S. Ct. at 1839, 72 L. Ed. 2d at 201.

81. 265 F. Supp. 440 (N.D. Ill. 1967).

82. *Id.* at 447.

83. *Id.*

84. *See* Booth v. Peavey Co. Commodity Serv., 430 F.2d 132, 133 (8th Cir. 1970); Seligson v. New York Produce Exch., 378 F. Supp. 1076 (S.D.N.Y. 1974), *aff'd sub nom.* Miller v. New York Produce Exch., 550 F.2d 762, 768 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); Arnold v. Bache & Co., 377 F. Supp. 61, 65 (M.D. Pa. 1973); Gould v. Barnes Brokerage Co., 345 F. Supp. 294, 295 (N.D. Tex. 1972); Johnson v. Arthur Epsey, Shearson, Hamill & Co., 341 F. Supp. 764 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338,

Cases decided after 1974 were not in agreement, however, on the question of whether private rights of action survived the amendments of that year.[85] The *Cort* four-pronged analysis may also have contributed to the confusion.[86] The Sixth and Second Circuits found an implied right of action,[87] while the Fifth Circuit refused to imply such a right in a similar case.[88] The United States Supreme Court granted certiorari in *Curran* for the purpose of resolving the conflict among the circuits.

III. *MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. V. CURRAN*

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran* the Supreme Court held that a private party may maintain an action for damages as a result of violation of the Commodity Exchange Act.[89] In so holding the Court narrowed its *Cort* analysis to congressional intent[90] as the dispositive question in deciding if a private right of action should be implied under the Commodity Exchange Act after the 1974 amendments. The Court elaborated a two-part analysis for determining congressional intent. First, the Court focused on the state of the law at the time of the legislation.[91] Then, the Court examined the legislative history of the 1974 amendments.[92]

The majority opinion, written by Justice Stevens,[93] reaffirmed the Court's adherence in theory to the strict approach of *Cort v. Ash*,[94] while at

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1343 (E.D. La. 1972), *aff'd*, 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. du Pont & Co., 291 F. Supp. 705, 710 (D. Minn. 1968); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 430 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970).

85. Some courts presumed the continuing validity of private actions under the Act after 1974. *See* Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1176-77 (2d Cir. 1977); Case & Co. v. Board of Trade, 523 F.2d 355, 360 (7th Cir. 1975); E.F. Hutton & Co. v. Lewis, 410 F. Supp. 416, 419 (E.D. Mich. 1976). Other courts determined that the 1974 amendments extinguished private rights of action. *See* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 54-55 (N.D. Tex. 1979); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311, 321 (S.D. Ohio 1979).

86. *See* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 55-57 (N.D. Tex. 1979); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311, 321-23 (S.D. Ohio 1979).

87. Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980); Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980). These two cases were consolidated by the Supreme Court as Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 102 S. Ct. 1826, 72 L. Ed. 2d 182 (1982).

88. Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980) (emphasizing the comprehensive regulatory scheme of 1974 amendments and powers vested in Commodity Futures Trading Commission to enforce rules and engage in arbitration of private claims), *vacated and remanded*, 102 S. Ct. 1228, 72 L. Ed. 2d 841 (1982) (remanding to Fifth Circuit for further consideration in light of *Curran*).

89. 102 S. Ct. 1826, 72 L. Ed. 2d 182 (1982).

90. "The key to this case is our understanding of the intent of Congress in 1974 when it comprehensively reexamined and strengthened the federal regulation of futures trading." *Id.* at 1839, 72 L. Ed. 2d at 187.

91. *Id.* at 1839-41, 72 L. Ed. 2d at 201-03.

92. *Id.* at 1841-44 nn.81-86, 72 L. Ed. 2d at 206 nn.81-86.

93. Justices Brennan, White, Marshall, and Blackmun joined the opinion of the Court.

94. 102 S. Ct. at 1827, 72 L. Ed. 2d at 187. The Court implied that the *Cort* test was strict and would result in fewer instances in which the Court would imply a private right of action. *Contra* Cannon v. University of Chicago, 441 U.S. 677, 740 (1979) (Powell, J., dis-

the same time abandoning three of the four *Cort* criteria in favor of the single criterion of congressional intent.[95] The Court concluded that once it resolved the dispositive question of legislative intent, no need to consider the other three factors remained.[96]

Justice Stevens argued that in determining congressional intent the initial inquiry must be into the state of the law at the time Congress passed the legislation. Specifically, the Court must inquire into Congress's perception of the law it was reshaping.[97] If the courts already recognized an implied remedy, then the question was whether Congress intended to preserve the remedy.[98] Finding that cases prior to 1974 uniformly recognized an implied cause of action under the Commodity Exchange Act,[99] Justice Stevens concluded that such an implied right was clearly part of the contemporary legal context in which Congress had acted.[100] Because the Court presumed that Congess was aware of the judicial interpretation of its statutes, the Court charged Congress with knowledge of these cases.[101] Justice Stevens further noted that Congress left intact the provision under which the courts had implied a cause of action[102] while at the same time enacting amendments to other parts of the Act. The majority argued that this evidenced Congress's affirmative intention to preserve the remedy.[103]

In the second part of its congressional intent analysis the majority examined the legislative history of the 1974 amendments. Referring to statements made in committee hearings and in the *Congressional Record*, the majority concluded that Congress generally understood that the amendments would not interfere with private rights of action.[104] The majority also cited the addition of a savings clause[105] as a compelling inference that

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senting) (suggesting that *Cort* invited courts to legislate). *See supra* notes 53-64 and accompanying text.

95. The Court in *Redington* and *Transamerica* had moved toward special emphasis on legislative intent, but had not eliminated consideration of the other three factors. *See supra* notes 72-78 and accompanying text.

96. 102 S. Ct. at 1844, 72 L. Ed. 2d at 207 (citing California v. Sierra Club, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring)).

97. 102 S. Ct. at 1839, 72 L. Ed. 2d at 201.

98. *Id.*

99. *Id.* at 1839-40, 72 L. Ed. 2d at 201-02. *But see* cases cited *supra* note 48.

100. 102 S. Ct. at 1844, 72 L. Ed. 2d at 207.

101. *Id.* at 1841 n.66, 72 L. Ed. 2d at 203 n.66. The Court cited Lorillard v. Pons, 434 U.S. 575, 580-81 (1978), for the proposition that when Congress adopts a new law incorporating an old law, Congress is presumed to be aware of the judicial interpretation. *Id.* The dissent pointed out that Congress did not reenact the provisions in question in 1974, but rather failed to amend them. *Id.* at 1852 n.11, 72 L. Ed. 2d at 216 n.11.

102. Most of the litigation concerned violations of the antifraud provisions of the Commodity Exchange Act, §§ 4a, 4b, 6b, 7 U.S.C. §§ 6a, 6b, 8 (1976 & Supp. IV 1980). *See* cases cited *supra* note 84.

103. 102 S. Ct. at 1844, 72 L. Ed. 2d at 207.

104. *Id.* at 1839-41, 72 L. Ed. 2d at 204-06; *cf.* Rivers v. Rosenthal, 634 F.2d 774, 786 (5th Cir. 1980) (references to implied causes of action in legislative history relatively isolated among hundreds of pages of testimony), *vacated and remanded*, 102 S. Ct. 1228, 72 L. Ed. 2d 841 (1982).

105. The savings clause provides that "nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States of any State." 7 U.S.C. § 2 (Supp. IV 1980).

Congress intended to preserve preexisting remedies.[106] The Court concluded that congressional intent to preserve a private cause of action was compelling and could only have been made clearer by an express provision that was considered unnecessary given the legal context in 1974.[107]

Having determined that Congress intended to preserve an implied private right of action under the Commodity Exchange Act, the Court turned to the question of standing to sue. The three companion cases, involving the potato futures conspiracy, raised this question. Noting that the *Cort* test does not reach this question,[108] the Court concluded that speculators, as the intended beneficiaries of commodities regulation, have standing to sue.[109] The Court concluded further that the implied right, which survived the 1974 amendments, included the right to sue an exchange or anyone involved in violating exchange rules.[110]

Justice Powell in dissent, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, argued that a handful of district court decisions, which erroneously implied a cause of action based on common law principles not applicable in federal court, could not possibly have constituted the law in 1974.[111] The dissent further argued that the Court could not presume that Congress approved those decisions by failing to amend certain sections of the Commodity Exchange Act.[112] Thus the dissent charged that the majority, while asserting fidelity to the principles of recent Court decisions, actually failed to apply them.[113]

In *Curran* the Court signalled a return to less stringent requirements for implying a cause of action. While voicing its adherence to recent decisions, the Court nevertheless demonstrated a willingness to infer congressional intent from less definitive indicators than those required in its other decisions since *Cort*.[114] The strict approach of *Cort* gave way in *Curran* to an examination of evidence requiring judicial interpretation.

After *Curran*, Congress is charged with knowledge of how the courts, even lower federal courts, have interpreted statutes. In addition, Congress is presumed to have approved the interpretation if it leaves those parts of the statute intact at the time of amendment. Less clear after *Curran* is the question of whether the same analysis can be applied to situations in which the statute in question was passed after 1975 and the *Cort* decision.[115] In

106. 102 S. Ct. at 1843, 72 L. Ed. 2d at 206; *cf.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 15-17 (1981) (no right of action implied from savings clause).

107. 102 S. Ct. at 1843-44, 72 L. Ed. 2d at 206-07.

108. *Id.* at 1846 n.92, 72 L. Ed. 2d at 209 n.92.

109. *Id.* at 1845, 72 L. Ed. 2d at 208.

110. *Id.* at 1847, 72 L. Ed. 2d at 211.

111. *Id.* at 1848, 72 L. Ed. 2d at 211-12. Justice Powell called this theory "incompatible with our constitutional separation of powers, and in my view it is without support in logic or in law." *Id.*

112. *Id.* at 1852, 72 L. Ed. 2d at 216.

113. *Id.* at 1849, 72 L. Ed. 2d at 213.

114. *See* Transamerica Mortgage Advisors, Inc., v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

115. Because the Court presumed that Congress has knowledge of the *Cort* decision and

Curran the Court's finding that an implied cause of action was part of the contemporary legal context in 1974 was based partly on the absence of any dispute over that proposition prior to *Cort*.[116]

Specifically, with regard to the Commodity Exchange Act, the *Curran* opinion opens the way once again for private litigation based on implied causes of action with assurance of consistency in results among the circuits.[117] Extending this ruling to other federal regulatory statutes, the *Curran* opinion will clearly have wide ranging impact. In *Curran* the hallmark of the test of legislative intent was the state of the law at the time Congress passed the statute. Because most major federal regulatory statutes were passed during the time when private rights of action were generally implied by the courts, the practical effect of the ruling may be a reversal of the recent trend to deny private actions.

IV. CONCLUSION

In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran the Court held that private parties may sue for damages resulting from violations of the Commodity Exchange Act. In finding an implied right under a statute that does not directly address private rights, the Court modified its recent trend toward strict statutory interpretation. In *Curran* the Court went beyond the statute to consider congressional intent in determining if a private right is implicit in a statute. The Court construed congressional intent in terms of the state of the law, including judicial interpretations, at the time the statute was passed. Moreover, under the *Curran* reasoning, congressional silence was construed as intent to maintain the preexisting state of the law. The Court's decision removes any doubt regarding the implied rights of investors to bring actions under the Commodity Exchange Act. If the principles elaborated by the Court in *Curran* are applied outside the commodities area, these less stringent standards for finding implied congressional intent would leave the courts free to recognize private rights in most cases.

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the Court's restrictive approach to inferring intent, in the future Congress must affirmatively indicate any intent to create private rights of action.

116. 102 S. Ct. at 1841, 72 L. Ed. 2d at 203.

117. The Supreme Court's opinion in *Curran* bears out Judge Friendly's observation that "the rumors about the death of the implied cause of action which have been circulating in the wake of these decisions [*Cannon*, *Redington*, and *Transamerica*] are exaggerated . . . ." *Curran*, 638 F.2d at 316.