

Spring 1981

## Commodity Exchange Act: Statutory Silence Is Not Authorization for Judicial Legislation of an Implied Private Right of Action, The

Roy J. Davis

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Roy J. Davis, *Commodity Exchange Act: Statutory Silence Is Not Authorization for Judicial Legislation of an Implied Private Right of Action, The*, 46 MO. L. REV. (1981)

Available at: <https://scholarship.law.missouri.edu/mlr/vol46/iss2/2>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# THE COMMODITY EXCHANGE ACT: STATUTORY SILENCE IS NOT AUTHORIZATION FOR JUDICIAL LEGISLATION OF AN IMPLIED PRIVATE RIGHT OF ACTION

ROY J. DAVIS\*\*†

I. <i>Preface</i> .....	316
II. <i>Introduction to the Commodities Market</i> .....	317
III. <i>Overview of the Act</i> .....	319
IV. <i>Litigation in the Commodities Area</i> .....	321
V. <i>General Principles Applied by the Supreme Court in Finding a Private Right of Action</i> .....	323
VI. <i>The Implied Right of Action under the CFTC Act</i> .....	330
VII. <i>Conclusion</i> .....	335

## I. PREFACE

The advent of a panoply of federal regulatory statutes establishing standards of behavior and proscribing certain conduct in a variety of economic, political, and social circumstances has produced volumes of litigation concerning the scope of these statutes. One of the most pervasive questions facing the courts has been what causes of action are available to persons who claim to be aggrieved by the violation of a particular statute, such as the Commodity Exchange Act (CEA).<sup>1</sup> This Article will discuss whether a private cause of action may be implied under the Act in light of

---

\*Andrews, Davis, Legg, Bixler, Milsten & Murrah, Oklahoma City, Okla. B.S., 1965, Oklahoma State University; J.D., 1968, University of Oklahoma.

\*\*The author acknowledges the assistance of Ms. Gretchen Harris in the preparation of this Article.

†Subsequent to the author's preparation of this Article, the United States Court of Appeals for the Fifth Circuit handed down the decision of *Rivers v. Rosenthal & Co.*, No. 79-1313 (5th Cir. Dec. 16, 1980). In that decision the court held that no private right of action exists under the Commodity Exchange Act. While this holding is consistent with the viewpoint advanced by the author of this Article, it creates a conflict among the federal courts of appeals. The decisions rendered prior to *Rivers* are discussed in this Article.

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

its statutory language and the legislative history surrounding the comprehensive 1974 amendments to the Act, otherwise known as the Commodity Futures Trading Commission Act (CFTC Act).<sup>2</sup>

## II. INTRODUCTION TO THE COMMODITIES MARKET

The commodities market is volatile and subject to rapid fluctuation in price.<sup>3</sup> A brief review of commodity transactions is in order. The term "commodity" is generally taken to describe all the raw materials, and certain processed materials, which are bought and sold in commerce. The CEA, as amended, defines a "commodity," in substance, to include all "goods and articles" and all "services, rights and interests" which may now or in the future be the subject of futures contracts.<sup>4</sup> Commodities currently traded include, among others, basic grains such as wheat, corn, oats, and soybeans and soybean products; livestock and meat; orange juice, potatoes, sugar, cocoa, and coffee; cotton, wool, lumber, and plywood; and metals such as copper, silver, gold, platinum, lead, tin, aluminum, nickel, and zinc. In addition, commodity futures exchanges presently conduct trading in currency and interest rate futures.<sup>5</sup>

Substantially all trading in commodities has as its basis a contract to purchase or to sell a specified quantity and quality of a particular commodity for delivery at a specified time.<sup>6</sup> Generally speaking, if current delivery of the "physical" commodity (which might be, for instance, Treasury bills or foreign currency) is contemplated, the trading is "cash"

2. Pub. L. No. 93-463, 88 Stat. 1389 (1974) (current version at 5 U.S.C. §§ 5108, 5314-5316 (1976 & Supp. III 1979); 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979)). The United States Court of Appeals for the Fifth Circuit has determined recently that no private right of action exists under the CEA. *Rivers v. Rosenthal & Co.*, No. 79-1313 (5th Cir. Dec. 16, 1980).

3. Prices, which are listed in most major daily newspapers, fluctuate rapidly and over wide ranges. Small price changes can result in large gains or losses. The market is subject to the many psychological factors working on each buyer and seller, as well as to crop conditions, inflation and other economic factors, strikes (especially in the transportation and commodity storage industries), world conditions, wars or threats of war, balance of payments (surplus or deficit) of particular countries, political instability, treaties, government policies and exchange controls, inflation rates, interest rates, and other "fundamental" factors. Any prediction of commodity prices is subject necessarily to all of these and other factors, any one of which can change at any time. Even if the current and correct information to substantially all factors is known, prices still may not react as predicted.

4. 7 U.S.C. § 2 (Supp. III 1979).

5. See Johnston, *Understanding the Dynamics of Commodity Trading: A Success Story*, 35 BUS. LAW. 705 (1980).

6. 1 A. BROMBERG & L. LOWENFELS, *SECURITIES FRAUD & COMMODITIES FRAUD* § 4.6, at 421 (1979).

or "spot"; if delivery in the future is agreed on, with the likelihood that the necessity for delivery will be eliminated by later agreement, the contract to sell or buy is a "futures" contract or "forward" contract.<sup>7</sup> The kinds of futures contracts in which active trading occurs today are generally standardized contracts traded on organized commodity exchanges.<sup>8</sup> Under the CEA, trading of commodity futures contracts in the United States may only be done on "designated contract markets," *i.e.*, exchanges registered with the Commodity Futures Trading Commission under the Act.<sup>9</sup> Futures trading involves trading in contracts for future delivery of standardized, rather than specific, lots of particular commodities.<sup>10</sup>

In market terminology, a trader who "purchases" a futures contract, *i.e.*, obligates himself to accept delivery and pay the agreed purchase price, is "long" in the futures market.<sup>11</sup> Conversely, a trader who "sells" a futures contract, *i.e.*, obligates himself to make delivery against payment to him of the agreed purchase price, is "short" in the futures market.<sup>12</sup> A commodity futures contract is a binding contractual obligation which, if held to maturity, will result in the obligation to make or accept delivery of the physical commodity in exchange for the agreed on price. Prior to the contractually specified delivery time, however, the contractual obligation may also be satisfied (and usually is) by "offsetting" the obligation through the sale or purchase of an equivalent commodity contract on the same exchange. Before a trader closes out his long or short position by an offsetting sale or purchase, his outstanding contracts are known as "open trades" or "open positions."<sup>13</sup>

Two broad classifications of persons who trade in commodity futures are hedgers and speculators. The goal of the purchaser or investor, known as a speculator, is to sell futures contracts for a higher price than was initially paid, thus earning a profit on his investment.<sup>14</sup> The speculator rarely takes delivery of the commodity, but instead closes out the futures position by entering into offsetting purchases or sales of futures contracts.<sup>15</sup>

Commercial interests, which produce, market, process, or otherwise deal in the underlying physical commodities, use the futures markets primarily for hedging.<sup>16</sup> Hedging is a protective procedure designed to

7. *Id.*

8. *Id.*

9. *Id.* 7 U.S.C. §§ 6, 6h (1976 & Supp. III 1979).

10. 1 A. BROMBERG & L. LOWENFELS, *supra* note 6, § 4.6, at 421.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* See T. HIERONYMUS, *ECONOMICS OF FUTURES TRADING* 41 (1979).  
See also *Leist v. Simplot*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,158 n.2 (2d Cir. 1980).

16. 1 A. BROMBERG & L. LOWENFELS, *supra* note 6, § 4.6, at 421.

assure the expected business profit from the production or dealer activity by foregoing additional profits and avoiding or minimizing losses which may occur because of subsequent price fluctuations (*e.g.*, between the time a merchandiser or processor makes a contract to sell his goods and the time he must perform the contract). The usual objective of the hedger is to protect the profit, which he expects to earn from his manufacturing, production, merchandising, processing, or other operations involving the physical commodity, computed in a particular currency, rather than to profit from his futures trading.<sup>17</sup>

Because of the unique nature of the commodities market, Congress began regulating the area in 1921<sup>18</sup> and has continually updated those regulations. Today, a comprehensive statutory scheme provides for standards in commodities activities and the thorough monitoring of those activities.

### III. OVERVIEW OF THE ACT

In 1921 Congress made its first effort to regulate commodity futures trading.<sup>19</sup> The Future Trading Act levied a tax on all grain futures contracts that were not traded on a designated contract market, and the Secretary of Agriculture, Secretary of Commerce, and the Attorney General were empowered as a commission to enforce the 1921 Act.<sup>20</sup> The 1921 Act, however, did not enjoy a long tenure as it was declared unconstitutional by the United States Supreme Court.<sup>21</sup> Congress deleted immediately the tax provisions and enacted the Grain Futures Act in 1922.<sup>22</sup> The 1921 Act and the 1922 Act both had provisions for fines and imprisonment for violations.<sup>23</sup>

Congress, in 1936, increased the commodities subject to trading on designated markets by enacting the Commodity Exchange Act.<sup>24</sup> The CEA, *inter alia*, contained antifraud and antimanipulation provisions with fines and imprisonment sanctions extended beyond those set forth in the 1921 and 1922 Acts.<sup>25</sup> The Commission designated in the 1921 Act re-

---

17. *Id.* See *Leist v. Simplot*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,159 (2d Cir. 1980); Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges*, 73 YALE L.J. 171, 173 (1963).

18. See Future Trading Act, ch. 86, 42 Stat. 187 (1921).

19. *Id.*

20. *Id.* § 6(a), 42 Stat. 188.

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

22. Ch. 369, 42 Stat. 998 (1922) (codified in scattered sections of 7 U.S.C.).

23. *E.g., id.* § 9, 7 U.S.C. § 13 (Supp. III 1979).

24. Ch. 545, 49 Stat. 1491 (1936) (codified in scattered sections of 7 U.S.C.).

25. *Id.* § 9, 49 Stat. 1499-1500 (current version at 7 U.S.C. §§ 10a, 13a (1976 & Supp. III 1979)).

mained empowered to enforce the 1936 Act.<sup>26</sup> In 1968<sup>27</sup> Congress again decided that additional commodities should be covered by the Act, and the power of the Secretary of Agriculture over a futures commission merchant was increased.<sup>28</sup>

By 1974 consumers who had not traded previously in commodities had become increasingly aware that traditional investment mediums were being affected adversely by the spiraling rate of inflation and the continuing decline in the value of the dollar, and accordingly, began to turn to commodities investments. This consumer change created a need for stronger regulatory control over the commodities markets.<sup>29</sup> Thus, Congress amended the CEA through enactment of the Commodity Futures Trading Commission Act of 1974,<sup>30</sup> in an effort to strengthen the regulation of commodity transactions on ten commodity exchanges. The CFTC Act broadened the coverage from agricultural products to any goods and articles in which contracts for future delivery might be traded.<sup>31</sup> Senator Talmadge, a key sponsor of the CFTC Act, stated that the purpose of the Act was to create in the commodity area "an agency comparable in statute and responsibility to the Securities and Exchange Commission."<sup>32</sup>

The CFTC Act strengthened considerably the regulatory control of the commodities markets by creating the Commodity Futures Trading Commission (CFTC) as an independent federal regulatory agency with exclusive jurisdiction over commodity futures trading.<sup>33</sup> The CFTC is to administer and enforce the Act's provisions with specific authority from Congress to go directly into federal courts to seek injunctive relief restraining any person from violating the Act.<sup>34</sup> Additionally, the CFTC has authority, after a hearing, to impose a civil penalty up to \$100,000 for each violation of the Act.<sup>35</sup> The CFTC is also authorized to administer a comprehensive reparations procedure to provide compensatory and punitive damages for aggrieved investors.<sup>36</sup> This new authority, in addition to authority held

26. *Id.* § 5, 49 Stat. 1492-97 (current version at 7 U.S.C. §§ 6a-6i (1976 & Supp. III 1979)).

27. An Act to Amend the Commodity Exchange Act, Pub. L. No. 90-258, 82 Stat. 26 (1968) (codified in scattered sections of 7 U.S.C.).

28. *Id.* §§ 7-8, 82 Stat. 28 (current version at 7 U.S.C. §§ 6f-6g (1976 & Supp. III 1979)).

29. *See* S. REP. NO. 850, 95th Cong., 2d Sess. 18, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2087, 2106; H.R. REP. NO. 975, 93d Cong., 2d Sess. 37 (1974).

30. Pub. L. No. 93-463, 88 Stat. 1389 (current version at 5 U.S.C. §§ 5108, 5314-5316 (1976 & Supp. III 1979); 7 U.S.C. §§ 1-24 (1976 & Supp. III 1979)).

31. 7 U.S.C. § 2 (Supp. III 1979).

32. 120 CONG. REC. 34,997 (1974) (remarks of Sen. Talmadge).

33. 7 U.S.C. § 2 (Supp. III 1979).

34. *Id.* § 13a-1 (1976).

35. *Id.* § 9.

36. *Id.* § 18 (1976 & Supp. III 1979).

by the Commodity Exchange Commission prior to 1974, includes the power to issue cease and desist orders, prohibit futures trading by persons on any futures exchange, and suspend or revoke the registration of persons registered with the Commission.<sup>37</sup> In each of the 1936, 1968, and 1974 enactments, Congress expanded the commodities to be regulated and manifested a desire that the regulatory authority have sufficient penalties available to punish violators in order to carry out congressional intent.

#### IV. LITIGATION IN THE COMMODITIES AREA

Congress, in the Future Trading Act, the 1936 Commodity Exchange Act, and the 1968 amendments thereto, did not articulate whether persons seeking to vindicate rights under the CEA could do so in court. Thus, any private cause of action had to be implied by the court. Prior to 1974, in the continuing litigation arising from these regulations, a private cause of action was assumed routinely by the federal courts hearing commodities cases in which a plaintiff sought to enforce rights authorized under the Act or collect damages for violations of its rules and regulations.<sup>38</sup>

This pre-1974 litigation in the commodities futures field was concerned generally with fraud by a broker against his customer or churning by the broker of his customer's account.<sup>39</sup> Prior to the 1967 decision in *Goodman v. H. Hentz & Co.*,<sup>40</sup> however, no court had ever decided the specific issue of whether an implied right of action under the Commodity Exchange Act should be recognized despite the fact that violations of the Act were otherwise enforceable through the Secretary of Agriculture and the Commodity Exchange Commission. *Goodman* was a suit in fraud by two customers against a broker-dealer under section 4b<sup>41</sup> of the Act. The United States

37. *Id.*

38. *See, e.g.,* Deaktor v. L.D. Schreiber & Co., 479 F.2d 529, 534 (7th Cir.), *rev'd on other grounds per curiam sub nom.* Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113 (1973); Seligson v. New York Produce Exch., 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), *aff'd sub nom.* Miller v. New York Produce Exch., 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); Arnold v. Bache & Co., 377 F. Supp. 61, 65 (M.D. Pa. 1973); Gould v. Barnes Brokerage Co., 345 F. Supp. 294, 295 (N.D. Tex. 1972); Johnson v. Arthur Epey, Shearson, Hamill & Co., 341 F. Supp. 764, 766 (S.D.N.Y. 1972); McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338, 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. duPont & Co., 291 F. Supp. 705, 710 (D. Minn. 1968); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 437 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

39. *See, e.g.,* Anderson v. Francis I. duPont & Co., 291 F. Supp. 705, 710 (D. Minn. 1968); Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 437 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

40. 265 F. Supp. 440 (N.D. Ill. 1967).

41. 7 U.S.C. § 6b (1976), which prohibits fraud in dealings subject to regulation by the CEA.

District Court for the Northern District of Illinois implied a private remedy based on a violation of a statutory tort.<sup>42</sup> The *Goodman* court further relied on the dissent in the 1961 United States Supreme Court decision of *Wheeldin v. Wheeler*,<sup>43</sup> which asserted that private rights are "implied unless the legislation evidences a contrary intention."<sup>44</sup> Of course, in 1967 the CEA did not indicate whether there was an implied right. The *Goodman* decision was relied on in many later decisions by district courts and the federal courts of appeals which found an implied right of action under the Act,<sup>45</sup> even though the Supreme Court had never decided the issue.

Several cases outside the broker-customer relationship<sup>46</sup> were also litigated. In *Deaktor v. L.D. Schreiber & Co.*,<sup>47</sup> the United States Court of Appeals for the Seventh Circuit implied a private right of action in favor of a trader against an exchange. The plaintiffs alleged that the defendants had manipulated the futures market for frozen pork bellies, and that this activity had raised artificially the price, resulting in damages.<sup>48</sup> The plaintiffs further claimed that the exchanges monopolized trading in the fresh egg futures market, causing the price to fall.<sup>49</sup> The Seventh Circuit refused to defer to the primary jurisdiction of the Commodities Exchange Commission and held that the plaintiffs stated a cause of action under the Act.<sup>50</sup> Although the United States Supreme Court did not decide the issue whether there was an implied right of action under the Act, it reversed the Seventh Circuit decision in *Deaktor*, holding that the Commodity Exchange Commission retained primary jurisdiction over the plaintiffs' claims against the exchanges and that the plaintiffs had to proceed through the Commodity Exchange Commission and not the courts.<sup>51</sup> *Deaktor* was decided less than a year before the CFTC Act.

Other decisions, however, recognized an implied cause of action out-

42. 265 F. Supp. at 443.

43. 373 U.S. 647, 661-62 (1963) (Brennan, J., dissenting).

44. *Id.* at 661 (Brennan, J., dissenting).

45. See, e.g., *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds per curiam sub nom.* *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113 (1973); *United Egg Producers v. Bauer Int'l Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970).

46. *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds per curiam sub nom.* *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113 (1973); *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 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); *United Egg Producers v. Bauer Int'l Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970).

47. 479 F.2d 529 (7th Cir.), *rev'd on other grounds per curiam sub nom.* *Chicago Mercantile Exch. v. Deaktor*, 414 U.S. 113 (1973).

48. *Id.* at 530.

49. *Id.*

50. *Id.* at 534.

51. 414 U.S. at 115.

side the broker-customer relationship. An implied cause of action under the CEA criminal penalty provision<sup>52</sup> for manipulation of the Act was recognized for injunctive relief on behalf of various egg producers against an import-export firm in *United Egg Producers v. Bauer International Corp.*<sup>53</sup> In reviewing *Seligson v. New York Produce Exchange*,<sup>54</sup> the United States Court of Appeals for the Second Circuit implied a cause of action in favor of the trustee in bankruptcy of a brokerage house against an exchange, exchange officials, and a clearinghouse.<sup>55</sup>

In 1974, with the comprehensive amendments to the CEA, the question whether an implied right of action existed was addressed anew by various federal courts. Irreconcilable decisions have been promulgated.<sup>56</sup> Because Congress in the CFTC Act failed once again to articulate a definitive statement concerning a private right of action, any such right must now be implied in light of the statutory language and legislative history of the CFTC Act and the principles of statutory construction delineated by the United States Supreme Court.

#### V. GENERAL PRINCIPLES APPLIED BY THE SUPREME COURT IN FINDING A PRIVATE RIGHT OF ACTION

A cause of action has been defined by the United States Supreme Court as the authority to invoke judicial power to enforce legal rights and duties.<sup>57</sup> As such, a cause of action is distinct from any question of what "rights" or "duties" are created under a particular statute.<sup>58</sup> "The fact that a federal statute has been violated and some person harmed does not automatically give rise to a . . . cause of action in favor of that person."<sup>59</sup> Instead, in the federal system causes of action are normally created by Congress as part of a statutory scheme to enforce the rights and duties it has created.<sup>60</sup> Thus, when Congress provides explicitly for a cause of action<sup>61</sup> for a particular aggrieved party, a court recognizes that cause of action,

52. 7 U.S.C. § 13(b) (Supp. III 1979).

53. 311 F. Supp. 1375 (S.D.N.Y. 1970).

54. 378 F. Supp. 1076 (S.D.N.Y. 1974), *aff'd sub nom.* *Miller v. New York Produce Exch.*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977).

55. 550 F.2d at 765.

56. *See Shearson Hayden Stone, Inc. v. Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976) (private right of action was implied). *But see National Super Spuds, Inc. v. New York Mercantile Exch.*, 470 F. Supp. 1256 (S.D.N.Y. 1979) (private right of action was denied).

57. *Davis v. Passman*, 442 U.S. 228, 239 (1979).

58. *Id.*

59. *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979).

60. 442 U.S. at 241.

61. *See, e.g., Commodity Exchange Act*, 7 U.S.C. § 13a-2 (Supp. III 1979) (providing explicitly that state attorneys general may institute an action in federal district court on behalf of aggrieved citizens).

evaluates the parties' relative rights and duties, and determines appropriate remedies. When, however, Congress has not provided explicitly for nor denied explicitly a cause of action, the question of judicial implication of a cause of action arises. This judicial implication has had a long and often uncertain history in the United States Supreme Court.

The first case decided by the Supreme Court which implied a cause of action arising from a statute in which none was provided expressly was *Texas & Pacific Railway v. Rigsby*.<sup>62</sup> *Rigsby* sustained the right of a switchman to recover damages for violation of the Federal Safety Appliance Act, although the only express sanctions in the Act were penal. The Court stated:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . . in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."<sup>63</sup>

Following *Rigsby*, the Supreme Court recognized implied causes of action on numerous occasions.<sup>64</sup> One of the most often quoted rationales used by the Court is found in *J.I. Case Co. v. Borak*.<sup>65</sup> In that action the plaintiff, a stockholder of the company, sought to invalidate a merger between Case and another corporation, and requested damages resulting from the merger. No section of the Securities Exchange Act of 1934,<sup>66</sup> however, expressly permitted private damage actions by injured shareholders. The statutory enforcement mechanism only provided for injunctions against prohibited activities prosecuted at the discretion of the SEC,<sup>67</sup> and criminal fines against individuals and exchanges.<sup>68</sup> In implying a private right of action, the Court stated that "it . . . [was] the duty of the courts to be alert to provide such remedies *as are necessary to make effective the congressional purpose*."<sup>69</sup> The Court found that because the SEC had limited resources private enforcement actions were a necessary supplement to the public enforcement mechanism.<sup>70</sup>

62. 241 U.S. 33 (1916).

63. *Id.* at 39 (citation omitted).

64. For a complete discussion of early decisions, see Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

65. 377 U.S. 426 (1964).

66. 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979).

67. *Id.* § 78ff (Supp. III 1979).

68. *Id.*

69. 377 U.S. at 433 (emphasis added).

70. *Id.* at 432.

In two cases following *Borak*, the Court continued to imply a cause of action.<sup>71</sup> In *Wyandotte Transportation Co. v. United States*,<sup>72</sup> the Court implied a private cause of action where there was no evidence that Congress intended to create such a right. There was, however, no legislative history demonstrating an intent to preclude such a right.<sup>73</sup> Moreover, in *Allen v. State Board of Elections*,<sup>74</sup> the Court expanded *Borak* to imply a cause of action where the effectiveness of the statute would be "severely hampered" without an implied right of action.<sup>75</sup>

There were occasions, however, when the Court refused to imply a private right of action.<sup>76</sup> In *Securities Investor Protection Corp. v. Barbour*<sup>77</sup> and *National Railroad Passenger Corp. v. National Association of Railroad Passengers*<sup>78</sup> (*Amtrak* case), the Court held that because the express language of the statute provided for a particular mode of enforcement, no other mode was to be implied. In *Amtrak*, the Court held that the United States Attorney General had authority to police the Amtrak system, and that the enforcement scheme provided for substantial supervision of the rail passenger system, thus necessitating no private right of action to private parties.<sup>79</sup> In *Barbour*, the Court used the same rationale, finding that Congress had vested a public body (the SEC) with enforcement of the Act<sup>80</sup> and that "there is no indication in the legislative history of the . . . [Security Investors Protection Act] that Congress ever contemplated a private right of action parallel to that expressly given to the SEC."<sup>81</sup> The Court concluded in *Barbour*, as it had in *Amtrak*, that "ex-

71. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (suit by individual voters challenging local voting enactments under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976)); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) (suit by the government to recover expenses incurred in removal of sunken barge).

72. 389 U.S. 191 (1967).

73. *Id.* at 200.

74. 393 U.S. 544 (1969).

75. *Id.* at 556-57.

76. *See, e.g.*, *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974); *Wheeldin v. Wheeler*, 373 U.S. 647 (1963); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

77. 421 U.S. 412 (1975). The question involved was whether the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-78lll (1976 & Supp. III 1979), provided an implied right of action for customers against broker-dealers.

78. 414 U.S. 453 (1974). The plaintiffs asserted an implied right of action under the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501-650 (1976 & Supp. III 1979), to prevent discontinuance of rail service.

79. 414 U.S. at 464-65.

80. 421 U.S. at 420.

81. *Id.* at 421.

press statutory provisions for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature."<sup>82</sup>

The Supreme Court similarly refused to imply a private right of action in *T.I.M.E., Inc. v. United States*.<sup>83</sup> In *T.I.M.E.*, a shipper attempted to bring a private action against a motor carrier for charging unreasonable rates in violation of Part II of the Interstate Commerce Act.<sup>84</sup> The Court examined the Act, noting that Parts I and III of the Act provided expressly a right of action to shippers against rail (Part I) and water (Part III) carriers, but stated that such an action was conspicuously absent in Part II, which applied to motor carriers.<sup>85</sup> The Court then refused to extend the private right of action to motor carrier shippers under the Act.<sup>86</sup> Moreover, the Court rejected the contention that the Act preserved a common law right to bring an action.<sup>87</sup> The Court rejected the proposition that because Congress had been aware of a common law action prior to the enactment of the Interstate Commerce Act, its failure to legislate abrogation of that right implied approval and acceptance of it.<sup>88</sup>

In summary, prior to 1975 the Court implied rights of action where it was "necessary to effectuate the intent of the statute," where there was no legislative history which evidenced an intent to preclude a cause of action, or where Congress had enacted no alternative means for enforcement of the statute which would substantially redress grievances.<sup>89</sup> The Court, however, refused to grant a cause of action where a comprehensive enforcement procedure existed<sup>90</sup> and, in at least one case, where no private rights were delineated in one section of an Act but were specifically enumerated in other sections.<sup>91</sup>

In 1975 the Court assimilated the reasoning which had emerged in the prior cases concerning an implication of a cause of action in the seminal case of *Cort v. Ash*.<sup>92</sup> In determining whether a private remedy was implicit in a statute not expressly providing one, the Court identified four factors to be used:

82. *Id.* at 419. See *Amtrak*, 414 U.S. at 458.

83. 359 U.S. 464 (1959).

84. 49 U.S.C. §§ 301-327 (1976) (current version included at 49 U.S.C. §§ 10521-11916 (Supp. III 1979)).

85. 359 U.S. at 470.

86. *Id.* at 472.

87. *Id.* at 474.

88. *Id.* at 478.

89. See text accompanying notes 62-75 *supra*.

90. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975).

91. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

92. 422 U.S. 66 (1975). In *Cort*, the plaintiff, a shareholder of a corporation, alleged that political advertisements by the corporation during the 1972 presidential election violated a criminal provision of the Federal Election Campaign Act, 18 U.S.C. § 610 (repealed 1976).

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby* . . . — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers* . . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e.g., *Amtrak* . . . ; *Securities Investor Protection Corp. v. Barbour* . . . ; *Calhoon v. Harvey* . . . . 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? See *Wheeldin v. Wheeler* . . . ; cf. *J.I. Case Co. v. Borak* . . . ; *Bivens v. Six Unknown Federal Narcotics Agents* . . . .<sup>93</sup>

Until 1979 the approach delineated in *Cort* enjoyed a general acceptance. In *Santa Clara Pueblo v. Martinez*,<sup>94</sup> *Santa Fe Industries, Inc. v. Green*,<sup>95</sup> and *Piper v. Chris-Craft Industries, Inc.*,<sup>96</sup> the Court utilized consistently the four-pronged analysis. The Court's analysis was particularly articulate in *Piper*.<sup>97</sup> The Court first examined the language of the statute<sup>98</sup> and, finding it silent as to a private right, turned to the legislative history and purpose and the necessity of implying a private cause of action to effectuate Congress' goals.<sup>99</sup> The Court determined ultimately that a tender offerer was not a member of the class for whose benefit the Williams Act was enacted,<sup>100</sup> that the legislative history evinced no intent to imply a private right of action,<sup>101</sup> that a private remedy was, in fact, inconsistent with the legislative scheme,<sup>102</sup> and that relegating a complainant to state law was appropriate.<sup>103</sup>

The Court continued the *Cort* methodology but reached a different result in *Cannon v. University of Chicago*,<sup>104</sup> implying a private right of ac-

93. 422 U.S. at 78 (citations omitted).

94. 436 U.S. 49 (1978). The Supreme Court held that no private right of action was implied by Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1976), which provides that no tribe shall deny to its members equal protection of the laws.

95. 430 U.S. 462 (1977). The Court found no private right of action for minority stockholders under the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1976), absent misrepresentation or lack of disclosure.

96. 430 U.S. 1 (1977). The act in question was the Williams Act, 15 U.S.C. § 78n(e) (1976).

97. 430 U.S. at 24-42.

98. *Id.* at 25.

99. *Id.* at 26-37.

100. *Id.* at 37.

101. *Id.* at 38-39.

102. *Id.* at 39-40.

103. *Id.* at 40-41.

104. 441 U.S. 677 (1979).

tion under Title IX of the Education Amendments Act of 1972.<sup>105</sup> The plaintiff, a female who was refused admission to two private medical schools, alleged sex discrimination in her denial. While Title IX authorized federal agencies to withhold funds from offending programs,<sup>106</sup> no private cause of action or other enforcement mechanism was expressly provided for in the statute.

The Court, explicitly referring to *Cort*, concluded that the plaintiff was an especial beneficiary of Title IX and that sex discrimination traditionally had been relegated to federal rather than state law. Additionally, the Court felt that there was sufficient evidence of congressional intent to create a private right of action.<sup>107</sup> The Court found persuasive legislative history which compared Title IX to Title VI of the 1964 Civil Rights Act,<sup>108</sup> and determined that Congress had relied on a judicial construction of Title IX consistent with the private right of action which had been implied under Title VI.<sup>109</sup> The Court stated that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law."<sup>110</sup> The Court, quoting *Cort v. Ash*, concluded that where, "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."<sup>111</sup>

Finally, the Court in *Cannon* evaluated an implied cause of action in light of its necessity or contribution to the accomplishment of the statutory purpose.<sup>112</sup> The Court determined that the express administrative remedy, a cutoff of federal funds to the offending institution, would not adequately redress the grievances of a private plaintiff complaining of sex-based discrimination.<sup>113</sup> Moreover, the Court found that the Department of Health, Education and Welfare was unable administratively to vindicate individual rights.<sup>114</sup>

While *Cannon* seemed to portend an expansive interpretation of *Cort*, the concurring and dissenting opinions indicated that several members of the Court were dissatisfied with the *Cort* analysis. Justices Rehnquist and Stewart, while concurring, said that *Cannon* presented an extraordinary case for implication, perhaps because of its civil rights connotations, and that Congress should not continue to rely on the courts to decide when private actions were appropriate.<sup>115</sup> Justices White and Blackmun

105. 20 U.S.C. §§ 1681-1686 (1976).

106. *Id.* § 1682.

107. 441 U.S. at 694-701.

108. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

109. 441 U.S. at 696.

110. *Id.*

111. *Id.* at 694 (quoting *Cort*, 422 U.S. at 82).

112. *Id.* at 703.

113. *Id.* at 705.

114. *Id.* at 707-08 n.42.

115. *Id.* at 718 (Rehnquist, J., concurring).

dissented, arguing that Congress intended the withholding of funds to be the exclusive means of enforcing the statute.<sup>116</sup> Justice Powell, in dissent, directly challenged the *Cort* analysis, arguing that any analysis other than a search for legislative intent violated the principle of separation of powers.<sup>117</sup>

Subsequent to the decision in *Cannon*, the Supreme Court in *Touche Ross & Co. v. Redington*,<sup>118</sup> *Transamerica Mortgage Advisors, Inc. v. Lewis*,<sup>119</sup> and *Kissinger v. Reporters Committee for Freedom of the Press*<sup>120</sup> indicated a retreat from the expansive language of *Cannon*. In *Touche Ross*, a private plaintiff sought to bring an action under section 17(a) of the Securities Exchange Act of 1934<sup>121</sup> against an accounting firm for false financial statements resulting from an audit of a firm covered by the federal securities acts. In holding that no private cause of action existed, the Court did not apply the first, third, or fourth factors of *Cort*, but instead, looked only to the language of the statute. The Court stated that section 17(a) did not create any private rights in any identifiable class or proscribe any conduct as unlawful, nor did the legislative history of the section speak to the issue of private actions.<sup>122</sup> The Court found that the four *Cort* factors were not entitled to equal weight, but that the central inquiry was whether Congress intended to create, either expressly or impliedly, a private cause of action.<sup>123</sup>

In *Transamerica*, the newly restrictive approach articulated by the dissent in *Cannon* and the majority in *Touche Ross* continued. The Court refused to imply a private cause of action under section 206 of the Investor Advisors Act of 1940.<sup>124</sup> The Court articulated the principle enunciated in *Amtrak*:

Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."<sup>125</sup>

The *Transamerica* Court found that specific sections of the Investors Protection Act provided for an adequate means of enforcing compliance with the Act,<sup>126</sup> and citing *Cannon*, stated that where there are alternative remedies "it is highly improbable that 'Congress absentmindedly forgot to

116. *Id.* at 718-19 (White, J., dissenting).

117. *Id.* at 731 (Powell, J., dissenting).

118. 442 U.S. 560 (1979).

119. 444 U.S. 11 (1979).

120. 445 U.S. 136 (1980).

121. 15 U.S.C. § 78q(a) (1976).

122. 422 U.S. at 569-71.

123. *Id.* at 575.

124. 15 U.S.C. § 80b-6 (1976).

125. 444 U.S. at 19-20 (citations omitted).

mention an intended private action.'"<sup>127</sup> Moreover, the Court found that where such alternative remedies exist, the resultant restrictive statutory construction will yield only "to *persuasive* evidence of a contrary legislative intent."<sup>128</sup>

The analysis of *Transamerica* was upheld in *Kissinger v. Reporters Committee for Freedom of the Press*,<sup>129</sup> an action brought pursuant to a section of the Freedom of Information Act.<sup>130</sup> The *Kissinger* Court held that where the statute in question proscribed conduct and did not create or alter civil liabilities, and where administrative remedies were provided, no private cause of action could be implied, particularly where the legislative history showed no intent to establish such a right.<sup>131</sup>

The present state of judicial interpretation of a private cause of action indicates that, absent express statutory language or legislative intent, a statute must confer private rights in certain individuals or proscribe certain conduct as illegal in order for a private action to exist.<sup>132</sup> Moreover, if a statute which confers private rights provides alternative administrative remedies and there exists no persuasive legislative history to the contrary, no private cause of action may be implied.<sup>133</sup> Additionally, the rationale of *Cannon* may apply only in the "extraordinary" civil rights case or, at least, where there is persuasive evidence of legislative intent to create a private right of action, and then only when alternative remedies are demonstrably inadequate to redress *specific* private rights provided in a particular statute.

## VI. THE IMPLIED RIGHT OF ACTION UNDER THE CFTC ACT

The 1974 CFTC Act contains no language that remotely suggests congressional intent to create an implied right of action. Some courts, however, have implied certain types of private rights of action under the Act,<sup>134</sup> while some have denied such a right.<sup>135</sup> In 1980 the United States Court of Appeals for the Second Circuit, in *Leist v. Simplot*,<sup>136</sup> and the United States Court of Appeals for the Sixth Circuit, in *Curran v. Merrill*

127. *Id.* (quoting *Cannon*, 441 U.S. at 742 (Powell, J., dissenting)).

128. *Id.* (emphasis added) (citations omitted).

129. 445 U.S. 136 (1980).

130. 5 U.S.C. § 552 (1976).

131. 445 U.S. at 149-50.

132. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

133. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

134. *See, e.g., Hofmayer v. Dean Witter & Co.*, 459 F. Supp. 733 (N.D. Cal. 1978); *Shearson Hayden Stone, Inc. v. Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976).

135. *See, e.g., Liang v. Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979).

136. 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 (2d Cir. 1980).

*Lynch, Pierce, Fenner & Smith, Inc.*,<sup>137</sup> implied private rights of action under the CFTC Act. Both courts held that the failure of Congress in the 1974 amendments to extinguish expressly an implied private right of action in light of the previously recognized right provided a sufficient basis to recognize an implied right.<sup>138</sup> This reasoning, however, ignores the 1959 decision of the United States Supreme Court in *T.I.M.E., Inc. v. United States*,<sup>139</sup> where the Court held that congressional silence with respect to a private right of action under a statute cannot be interpreted as approval by Congress that the courts are to recognize a private right of action.<sup>140</sup> The rule adopted in *T.I.M.E.* remains valid, as indicated by the recent decision of the Supreme Court in *SEC v. Sloan*.<sup>141</sup> In *Sloan*, the Court rejected the SEC's argument that Congress, by being aware of the Commission's prior construction of a particular statute, had approved therefore the Commission's construction by not rejecting specifically the construction in the adoption of the statute.<sup>142</sup> The Supreme Court noted that it was "extremely hesitant" to presume that Congress was fully aware of the Commission's construction based on only a few isolated statements in thousands of pages of legislative documents.<sup>143</sup> The Supreme Court stated:

For here its invocation would result in a construction of the statute which not only is at odds with the language of the section in question and the pattern of the statute taken as a whole, but also is extremely far reaching in terms of the virtually untrammelled and unreviewable power it would vest in a regulatory agency.

Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of re-enactment would be tantamount to amendment of what we concede to be the rather plain meaning of the language of § 12(k).<sup>144</sup>

As a result of congressional failure to provide specifically for a private cause of action under the CFTC Act, *Transamerica Mortgage Advisors, Inc. v. Lewis*<sup>145</sup> dictates that the language of the statute must be examined to determine if an alternative remedy exists which would thus *preclude* a private right of action.<sup>146</sup> Congress has prescribed redress for violations of the CFTC Act in specific statutory language therein. The CFTC was authorized in 1974 to conduct customer reparation proceedings.<sup>147</sup> A com-

137. 622 F.2d 216 (6th Cir. 1980).

138. 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,173; 622 F.2d at 235-36.

139. 359 U.S. 464 (1959).

140. *Id.* at 478.

141. 436 U.S. 103 (1978).

142. *Id.* at 119-20.

143. *Id.* at 121.

144. *Id.*

145. 444 U.S. 11 (1979).

146. *Id.* at 19-20.

147. 7 U.S.C. § 18 (1976 & Supp. III 1979).

modity customer who believes that a violation of the CFTC Act or Commission regulations has been caused by a person registered under the Act, or one who should have registered, may within two years file a complaint with the CFTC for damages.<sup>148</sup> Should the person who has been ordered to pay damages fail to do so within the time specified in the CFTC's order, the court in the United States district in which such person resides may be used to enforce the reparation award.<sup>149</sup> It is further provided that any Commission order is reviewable by the United States court of appeals.<sup>150</sup> Thus, there seems to be little need to imply private rights of action when an alleged wrong can be heard by those familiar with the subject of commodities<sup>151</sup> and when damages, both compensatory and punitive, may be awarded. Additionally, an administrative civil penalty of up to \$100,000 for each violation is set forth in the Act.<sup>152</sup>

The CFTC has exclusive jurisdiction with respect to accounts and agreements where transactions for the sale of commodity futures contracts are involved.<sup>153</sup> Congress, however, admittedly created an ambiguity by placing a "savings clause" in the jurisdictional provision of the CFTC Act.<sup>154</sup> The savings clause provides that the jurisdictional provision is not to be interpreted as superseding or limiting the jurisdiction of the SEC or any other regulatory agency of the United States or of any state.<sup>155</sup> Additionally, the savings clause concludes that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State."<sup>156</sup>

The dissent in the Second Circuit decision of *Leist v. Simplot*<sup>157</sup> contended that the savings clause was added to clarify the House of Representatives version of the jurisdictional provision of the CFTC Act, which was interpreted by some members of the House as prohibiting state courts from acting in contract claims and the federal courts from exercising jurisdiction over antitrust claims and suits seeking review of administrative hearings.<sup>158</sup> Even if this argument is not adopted, it is clear nonetheless that the savings clause is a jurisdictional matter, and as the Supreme Court held in

148. *Id.* § 18(e) (1976).

149. *Id.* § 18(f).

150. *Id.* § 18(g).

151. *Id.* § 18(a) (Supp. III 1979).

152. *Id.* § 9 (1976).

153. *Id.* § 2 (Supp. III 1979).

154. *Id.*

155. *Id.*

156. *Id.*

157. 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,214-15 (2d Cir. 1980) (Mansfield, J., dissenting).

158. See *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 & H.R. 13113 Before the Senate Comm. on Agriculture & Forestry, 93d Cong., 2d Sess. 259-60 (1974)* (statement of Rep. Rodino).

*Touche Ross & Co. v. Redington*,<sup>159</sup> "[T]he source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . [Act] which they seek to enforce, not in the jurisdictional provision."<sup>160</sup>

Finally, the CFTC Act does not have the counterpart that is enjoyed by the Securities Exchange Act of 1934,<sup>161</sup> which grants the federal courts exclusive jurisdiction for violations of the Act and its regulations. Since Congress was so precise in giving federal courts jurisdiction for violations of the Securities Exchange Act of 1934, it is difficult to understand why they would not have been as clear with the CFTC Act if they desired to create private rights of action.

A review of the legislative history, as necessitated by the *Cort* analysis, does not assist in determining whether or not Congress intended to recognize a private right of action under the CFTC Act.<sup>162</sup> The Senate Committee Report regarding the CFTC Act is devoid of a single mention of private civil actions.<sup>163</sup> Senator Hart did introduce a bill which would have expressly authorized private civil suits for violations of the Act and treble damages for willful violations,<sup>164</sup> but Congress rejected the bill even after the Senate Committee heard testimony from witnesses appearing specifically to urge adoption of the private right of action.<sup>165</sup>

There are several references to an implied private right of action in the history of the legislation of the Act before the House of Representatives.<sup>166</sup> The majority in *Leist v. Simplot*<sup>167</sup> found legislative support for the proposition that Congress intended to continue to recognize a private right of action in the comments of several members of Congress.<sup>168</sup> As suggested by the dissent in *Leist*, however, speeches by the Congressmen were little more than recognition that some courts were implying a private right of

159. 442 U.S. 560 (1979).

160. *Id.* at 577.

161. 15 U.S.C. § 78aa (1976).

162. See H.R. REP. NO. 975, 93d Cong., 2d Sess. (1974); S. REP. NO. 1131, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843.

163. S. REP. NO. 1131, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843.

164. S. 2837, 93d Cong., 2d Sess. §§ 505(a)-505(b) (1973), reprinted in *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 & H.R. 13113 Before the Senate Comm. on Agriculture & Forestry*, 93d Cong., 2d Sess. 79 (1974).

165. *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 & H.R. 13113 Before the Senate Comm. on Agriculture & Forestry*, 93d Cong., 2d Sess. 205, 317, 415, 737, 746 (1974).

166. H.R. REP. NO. 975, 93d Cong., 2d Sess. 26 (1974); 119 CONG. REC. 41,333 (1973).

167. 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 (2d Cir. 1980).

168. 120 CONG. REC. 30,459 (1974) (remarks of Sen. Talmadge); *id.* at 10,737 (remarks of Rep. Poage).

action and should not be deemed as approval of an implied right of action.<sup>169</sup>

Those who argue that Congress intended to imply a private right of action have interpreted statements of Chairman Poage in the House to mean that the remedies created by the 1974 amendments were not in addition to the express remedies already contained in the Commodity Exchange Act, but rather, were supplementary to an implied private right of action.<sup>170</sup> As Judge Mansfield, however, stated in *Leist*:

The few comments relied upon by the majority as evidence of Congress' intent to approve a private right of action are also too vague and abstruse to entitle them to any appreciable weight. First, the majority overstates the significance of Chairman Poage's statement that the act "sets up new consumer protection features." . . . It is not surprising that Chairman Poage used the term "new" to describe the Act's enforcement provisions, including the CFTC's authority to bring suits and levy civil penalties and the reparations procedure, since these provisions were "new." By the use of the term "new" Chairman Poage did not mean that the remedies were "in addition to" or "supplementary" to *implied private right of action*. At most he meant that the remedies were in addition to the express remedies already contained in the Act. Had he intended that these remedies supplement implied private rights of action, he would have said so directly, not through an ambiguous reference to "new" remedies.<sup>171</sup>

There is no *express* statement in any of the legislative history to affirm any private right of action. In light of the statement in *Transamerica* that there must be *persuasive* legislative history of a contrary intent to grant a private right of action where there is an express remedy provided,<sup>172</sup> none can be implied.

In 1978 Congress made further amendments to the CFTC Act.<sup>173</sup> Again, there is no reference to a private right of action despite Congress' awareness that lower courts had commenced to deny private rights of action under the Act.<sup>174</sup> Congress also must have been aware in 1978 of the United States Supreme Court's adoption of stricter principles governing the implication of private causes of action.<sup>175</sup> The most noticeable amend-

169. 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,190-91 (Mansfield, J., dissenting). See also *T.I.M.E., Inc. v. United States*, 359 U.S. at 475.

170. 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,212 n.19.

171. *Id.* (citation omitted).

172. 444 U.S. at 19-20.

173. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (codified in scattered sections of 7 U.S.C.).

174. See, e.g., *Bartels v. International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (N.D. Ohio 1976); *Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976), *aff'd on other grounds*, 571 F.2d 437 (8th Cir. 1978).

175. See text accompanying notes 92-103 *supra*.

ment by Congress was to eliminate the hearing requirement of the CFTC Act for reparation claims which were less than \$5,000.<sup>176</sup> In addition, Congress empowered the states to bring suits in federal courts to enjoin alleged violations of the Act or to obtain monetary damages.<sup>177</sup> Even after Senator Huddleston pointed out that courts were no longer uniformly implying a private action,<sup>178</sup> Congress did not create such a right. There can be little doubt that by 1978 Congress was aware of how to create a private right of action in favor of a person alleging violations of the Act, and would have done so if it wished.<sup>179</sup>

The statutory construction principles of *Cort v. Ash*,<sup>180</sup> *Transamerica Mortgage Advisers, Inc. v. Lewis*,<sup>181</sup> and *Touche Ross & Co. v. Redington*<sup>182</sup> indicate that no private right of action should be implied under the CFTC Act. Some courts, however, may be inclined to imply a private right of action under the CFTC Act based on the decision in *Cannon v. University of Chicago*.<sup>183</sup> Caution must be exercised because *Cannon* can be distinguished on several grounds. First, *Cannon* was a civil rights case, and the statute that was the subject of the litigation in *Cannon*, Title IX,<sup>184</sup> was re-enacted in almost identical form to a prior civil rights statute.<sup>185</sup> The 1974 CFTC Act was not a re-enactment of the Commodity Exchange Act, but rather, took a completely different approach. The civil rights statute that was the subject of litigation in *Cannon* in no way provided relief as the CFTC Act does. HEW was not given any authority to proceed against alleged violations as was the CFTC, nor did Congress give HEW any reparation procedure to remedy violations. It is, rather than *Cannon*, *Transamerica*<sup>186</sup> and *Touche Ross*<sup>187</sup> which should control any analysis of the implication of a private right of action.

## VII. CONCLUSION

The 1974 amendments to the Commodity Exchange Act created a uniform and comprehensive system to regulation of commodities. A review of those amendments does not support the view that private rights of action are consistent with that purpose.

In recent years judges have been heard to complain of the burdens their courts suffer from an overcrowded docket; yet, when judges have the

---

176. 7 U.S.C. § 18(b) (Supp. III 1979).

177. *Id.* § 13a-2.

178. 124 CONG. REC. 10,537 (1978) (remarks of Sen. Huddleston).

179. *Transamerica Mortgage Advisers, Inc.*, 444 U.S. at 22 n.13.

180. 422 U.S. 66 (1975).

181. 444 U.S. 11 (1979).

182. 442 U.S. 560 (1979).

183. 441 U.S. 677 (1979).

184. 20 U.S.C. §§ 1681-1686 (1976).

185. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

186. 444 U.S. 11 (1979).

187. 442 U.S. 560 (1979).

opportunity to reduce their burden, such as denying a private right of action when one is not specifically granted, they refuse to do so. Congress, in its best effort in the 1974 amendments, gave the courts every reason to deny a private right of action. At least two courts of appeals, however, have taken an ambiguity and construed the statute to create more litigation, resulting in the further overburdening of our court system.<sup>188</sup> With an elaborate reparation procedure available under the CFTC Act, there seems little need for consumer-implied rights to be recognized by the courts, and the logic of the recent Supreme Court decisions in *Touche Ross* and *Transamerica* indicates strongly that a private right of action under the CEA should be denied by the courts.

---

188. See cases cited notes 136 & 137 and accompanying text *supra*. But see *Rivers v. Rosenthal & Co.*, No. 79-1313 (5th Cir. Dec. 16, 1980).