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Section 13(d) pf the '34 Act: The Inference of a Private Cause of Action for a Stock Issuer

SECTION 13(d) OF THE '34 ACT: THE INFERENCE OF A PRIVATE CAUSE OF ACTION FOR A STOCK ISSUER

The inference of private causes of action under federal statutes has been a continuing source of litigation and legal comment.[1] Since 1975 the Supreme Court has taken an increasingly restrictive attitude toward inferring private causes of action[2] and most recently, has illustrated this strict view in *Touche Ross & Co. v. Redington*[3] and *Transamerica Mortgage Advisors, Inc. v. Lewis*.[4] Accordingly, in light of the standards set forth in *Redington* and *Transamerica*, courts are re-examining prior decisions that inferred private causes of action under various federal laws.[5] Recently, two district courts declined to infer a private cause of action by a stock issuer for injunctive relief under section 13(d) of the Securities Exchange Act of 1934 ('34 Act).[6] Several other federal courts, however, have recently inferred such a private cause of action under section 13(d).[7] The disagreement among the federal courts reflects the in-

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[1] *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979) (inferring private cause of action for contract recission and injunctive relief under Investment Advisor's Act of 1940 ('40 Act) § 215, 15 U.S.C. § 80b-15 (1976), but not for damages under § 206 of '40 Act, 15 U.S.C. § 80b-6 (1976)); Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979) (refusing inference of private cause of action under § 17(a) of Securities Exchange Act of 1934 ('34 Act), 15 U.S.C. § 78g(a) (1976)); Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (inferred private cause of action under § 901(a) of Title IX of Education Amendments of 1972, 20 U.S.C. § 1681(a) (1976)); N.E. Underwood, Transamerica Mortgage Advisors, Inc. v. Lewis: *An Analysis of the Supreme Court's Definition of an Implied Right of Action*, 7 PEPPERDINE L. REV. 533 (1980) [hereinafter cited as Underwood]; Comment, *Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme*, 1980 DUKE L.J. 928 [hereinafter cited as *Implied Rights*]; Note, *The Federal Securities Acts: the Demise of the Implied Private Rights Doctrine?*, 1980 U. ILL. L.F. 627 [hereinafter cited as *Federal Securities Acts*].

[2] *See* text accompanying notes 28-40 and 66-76 *infra*.

[3] 442 U.S. 560, 579 (1979) (refusing private cause of action under § 17(a) of '34 Act, 15 U.S.C. § 78g(a) (1976)).

[4] 444 U.S. 11, 24 (1979) (inferring private cause of action for contract recission and injunctive relief under § 215 of '40 Act, 15 U.S.C. § 80-15 (1976), but not for damages under § 206 of '40 Act, 15 U.S.C. § 80b-6 (1976)).

[5] *See* text accompanying notes 74-76 *infra*.

[6] *See* Gateway Indus., Inc. v. Agency Rent-A-Car, Inc. 495. F. Supp. 92, 96-100 (N.D. Ill. 1980); Sta-Rite Indus., Inc. v. Nortek, Inc., 494 F. Supp. 358, 362-63 (E.D. Wis. 1980); text accompanying notes 93-114 and 133-39 *infra*.

[7] *See* Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1224 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3488 (1981); Saunders Leasing System, Inc. v. Societe Holding Gray D'Albion, SA [Current] FED. SEC. L. REP. (CCH) ¶ 97,881 (N.D. Ala. Jan. 30, 1981); Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488, 492 (W.D. Mich. 1980); text accompanying notes 77-92 and 140-49 *infra*. *See also* Deneau v. Amtel, Inc., [1980] FED. SEC. L. REP. (CCH) ¶ 97,645, 98,459 (S.D.N.Y. 1980) (court denied motion for summary judgment because of present confusion surrounding inference of private cause of action under § 13(d)); Frome, *Buying and Selling Securities*, 184 N.Y.L.J. 1 (1980) (present state of confusion over inference of private cause of action for stock issuer under § 13(d)).

herent conflict between the judicial desire to implement the legislative purpose underlying a statute, and the judicial desire to refrain from legislating through judicial decisions.[8] In the case of section 13(d) the conflict is particularly acute because the statute cannot be fully enforced without either the inference of a private cause of action or a further statutory enactment creating a private remedy.[9]

Section 13(d) of the '34 Act[10] and accompanying regulations[11] require that any person holding more than five percent[12] of the stock of any corporation must file copies of a Schedule 13D[13] with the Securities and Exchange Commission (SEC) and the stock issuer within ten days after such acquisition.[14] Section 13(d) is a provision of the Williams Act,[15] which Congress adopted to provide for full disclosure in connection with cash tender offers[16] and other techniques for accumulating large blocks of stock of publicly held corporations.[17] Congress did not enact section 13(d) to regulate tender offers, but rather to provide notice to the investment community of potential shifts in corporate control.[18]

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[8] *See* text accompanying notes 166-73 *infra*.

[9] *See* text accompanying notes 174-92 *infra*.

[10] 15 U.S.C. § 78m(d) (1976 & Supp. III 1979).

[11] 17 C.F.R. §§ 240.13d-1 to 102 (1980).

[12] *See generally* GAF v. Milstein, 453 F.2d 709, 715 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); Bath Indus., Inc. v. Blot, 427 F.2d 97, 108-12 (7th Cir. 1970); Fogelson, Wenig & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act*, 17 HARV. L. LEGIS. 409, 413-16 (1980) [hereinafter cited as Fogelson].

[13] 15 U.S.C. § 78m(d)(1)(A)-(E) (1976 & Supp. III 1979); *see* 17 C.F.R. § 240.13d-101 (1980) (Schedule 13D filing requirements and form).

[14] 15 U.S.C. § 78m(d)(1) (1976 & Supp. III 1979).

[15] Act of July 29, 1968, Pub. L. No. 90-439, § 2, 82 Stat. 454, *amending* 1934 Act, 15 U.S.C. §§ 78a to kk (1976).

[16] *See generally* Brown, *Changes in Offeror Strategy in Response to New Laws and Regulations*, 28 CASE W. RES. L. REV. 843 (1978); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317 (1967) [hereinafter cited as Fleischer & Mundheim]. Congress adopted §§ 14(d), (e) and (f) to regulate cash tender offers. *See* H.R. REP. NO. 1711, 90th Cong. 2d Sess. (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2811, 2819-21 [hereinafter cited as H.R. REP. NO. 1711 and paginated to [1968] U.S. CODE CONG. & AD. NEWS 2811] (legislative history of §§ 14(d), (e) & (f); 15 U.S.C. §§ 78n(d), (e) & (f) (1976)).

[17] *See* H.R. REP. NO. 1711, *supra* note 16, at 2811. Congress considered the disclosure required under the Williams Act essential for shareholders to make intelligent investment decisions. *Id.* at 2813. *See generally* Comment, *The Williams Amendments: An Evaluation of the Early Returns*, 23 VAND. L. REV. 700 (1970) [hereinafter cited as *Williams Amendment*]; Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966); Manne, *Cash Tender Offers For Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231; Swanson, *S.510 and the Regulation of Cash Tender Offers: Distinguishing St. George From the Dragon*, 5 HARV. J. LEGIS. 431 (1968).

[18] H.R. REP. NO. 1711, *supra* note 16, at 2818. Congress designed the § 13(d) notice of potential shifts in corporate control to allow the stock market to adjust evaluations of a corporation's worth. *Id.* at 2813; *see* text accompanying note 21 & note 121 *infra*. *See generally* Comment, *Private Right of Action for Damages Under Section 13(d)*, 32 STAN. L. REV. 581 (1980) [hereinafter cited as *Private Rights*]; Comment, *Section 13(d) and Disclosure of Corporate Equity Ownership*, 119 U. PA. L. REV. 853 (1971).

Congress did not expressly provide for private enforcement of section 13(d).[19] Until recently, however, most federal courts have allowed a stock issuer to seek injunctive relief against a stockholder who either allegedly failed to file the required information or who filed a Schedule 13D containing alleged misrepresentations or misleading omissions.[20] Courts based the inference of a private cause of action under section 13(d) on an interpretation of section 13(d) creating an obligation to file a complete and truthful Schedule 13D.[21] Courts therefore reasoned that in order to force the purchaser to comply with the section 13(d) requirements, a stock issuer had standing under the section to seek an injunction following the filing of an inadequate or false Schedule 13D.[22]

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[19] *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 62 (1975). The Supreme Court has never directly addressed the issue of an inferred private cause of action under § 13(d). The Court, however, apparently assumed the existence of such an action for injunctive relief in Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975). The Court expressly recognized that the plaintiff was asserting an inferred private cause of action and noted that the defendant did not challenge Mosinee's standing to bring the action. *Id.* at 162; *see* text accompanying note 4 *supra*. *See generally* Porter & Hyland, Rondeau v. Mosinee Paper Company *and the Williams Act Injunction*, 58 MARQ. L. REV 741 (1976) [hereinafter cited as Porter & Hyland]; Note, Rondeau v. Mosinee Paper Corporation *and Implied Private Rights of Action*, 28 HASTINGS L.J. 93 (1976) [hereinafter cited as *Rights of Action*].

[20] *See, e.g.*, General Aircraft Corp. v. Lampert, 556 F.2d 90, 94 n.5 (1st Cir. 1977); GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc., 466 F. Supp. 800, 803 (D. Neb. 1979); Scott v. Multi-Amp Corp., 386 F. Supp. 44, 50 (D.N.J. 1974). In addition to inferring a private cause of action for stock issuers seeking injunctive relief under § 13(d), courts have inferred an action by stockholders. *See, e.g.*, Myers v. American Leisure Time Enterpr., Inc. 402 F. Supp. 213, 214 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 312 (2d Cir. 1976); Scott v. Multi-Amp Corp., 386 F. Supp. 44, 50 (D.N.J. 1974); Grow Chem. Corp. v. Uran, 316 F. Supp. 891, 892 (S.D.N.Y. 1970). *Contra* Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92, 100 (N.D. Ill. 1980). Most courts, however, have limited damage actions for violations of § 13(d) to suits brought by shareholders under § 18(a) of the '34 Act, 15 U.S.C. § 78r(a) (1976). *See* Berman v. Metzger, 593 SEC. REG. & LAW REP. (BNA) A-6, A-6 to A-7 (D.C. Feb. 2, 1981); Issen v. GSC Enterpr., Inc., 592 SEC. REG. & LAW REP. (BNA) A-8, A-10 (N.D. Ill. Jan. 26, 1981); Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92, 95 n.7 (N.D. Ill. 1980); Myers v. American Leisure Time Enterpr., Inc., 402 F. Supp. 213, 214-15 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 312 (2d Cir. 1976). *Contra* General Aircraft Corp. v. Lampert, 556 F.2d 90, 97 & n.12 (1st Cir. 1977); Grow Chem. Corp. v. Uran, 316 F. Supp. 891, 892 (S.D.N.Y. 1970). *See generally* Robinson & Mahoney, *Schedule 13D: Wild Card in the Takeover Deck*, 27 BUS. LAW 1107, 1128-35 (1972); *Private Rights*, *supra* note 18.

[21] *See* GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). The *Milstein* court stated that Congress intended § 13(d) to alert investors to potential changes in the control of a corporation. *Id.* Section 13(d) notice allows investors and potential investors to properly evaluate the company. A Schedule 13D which is false or misleading, therefore, subverts the purpose of § 13(d). *Id.*; *see* text accompanying notes 16-18 *supra*; note 121 *infra*.

[22] *See* General Aircraft Corp. v. Lampert, 556 F.2d 90, 94 n.5 (1st Cir. 1977); GAF Corp. v. Milstein, 453 F.2d 709, 719-21 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); W.A. Krueger Co. v. Kirkpatrick, Pettis, Smith, Polian, Inc., 466 F. Supp. 800, 803 (D. Neb. 1979). *Milstein* was the first case to hold expressly that a stock issuer could seek injunctive relief under section 13(d). *See* 453 F.2d at 720. *See also* Note, *Federal Securities Regulation—Section 13(d)*, 17 VILL. L. REV. 734 (1972) (discussion of *Milstein*). Two federal courts, prior to

In 1964 the Supreme Court in *J.I. Case & Co. v. Borak*[23] provided the basic foundation for the decisions inferring a private cause of action under section 13(d).[24] In *Borak*, the Supreme Court inferred a private cause of action under section 14(a) of the '34 Act.[25] The Court's inquiry into whether section 14(a) gave rise to a private cause of action focused on the adequacy of existing liability provisions to implement the congressional purpose.[26] The Court emphasized that the federal courts had a duty to provide remedies which would fulfill Congress' purpose in enacting a particular statute.[27]

Since 1975, however, the Supreme Court's decisions concerning the inference of private causes of action under federal statutes have taken a more restrictive approach.[28] The Court's analysis has emphasized determining whether Congress intended to grant a private cause of action to persons in the particular circumstances of a plaintiff.[29] In *Cort v.*

Milstein, assumed the existence of a private cause of action for stock issuers under § 13(d), without directly addressing the issue. *See* Bath Indus., Inc. v. Blot, 427 F.2d 97, 111 (7th Cir. 1970); Ozark Airlines, Inc. v. Cox, 326 F. Supp. 1113, 1114-15 (E.D. Mo. 1964).

[23] 377 U.S. 426 (1964).

[24] *See* GAF Corp. v. Milstein, 453 F.2d 709, 719-21 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972). The court in *Milstein* relied on *Borak* for the proposition that courts have a duty to provide remedies necessary to implement Congress' purpose in adopting a statute. *Id.* Additionally, the *Milstein* court relied on *Borak* for the conclusion that private enforcement of § 13(d) provides a necessary supplement to SEC action. *Id.* at 721; *see* text accompanying notes 25-27 *infra*.

[25] 377 U.S. at 430-31; *see* 15 U.S.C. § 78n(a) (1976) (§ 14(a) of '34 Act). The Supreme Court in *Borak* limited the inferred private cause of action under § 14(a) to a stockholder's action for injunctive relief or damages. 377 U.S. at 428, 431. The stockholder could bring the action either derivatively or directly. *Id. See also* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916) (first Supreme Court case inferring private cause of action under federal statute; injured railroad worker could bring action against employer under Federal Safety Appliance Act, 45 U.S.C. §§ 1-7, 11-15 (1976)). *See generally* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841 (1977); Mowe, *Federal Statutes and Implied Private Actions*, 55 ORE. L. REV. 3 (1976); Note, *Implying Civil Remedies for Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

[26] 377 U.S. at 433; *see, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 556-57 (1967) (inferring private cause of action under § 51 of Voting Rights Act of 1965); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 200-24 (1967) (criminal sanction not exclusive remedy under § 15 of Rivers and Harbors Act of 1899); *see also Implied Rights*, *supra* note 1, at 930; Note, *Implication of Private Actions from Federal Statutes: From* Borak *to* Ash, 1976 J. CORP. L. 371, 371 [hereinafter cited as *Implication of Private Actions*].

[27] 377 U.S. at 432.

[28] *See Implied Rights*, *supra* note 1, at 932-35.

[29] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 457-58 (1974). In *National R.R. Passenger Corp.* the Court employed a restrictive statutory construction principle which states that when legislation expressly provides a particular remedy or remedies, a court should not infer other remedies. *Id.* at 458. The Court stated, however, that the presumption that Congress did not intend an additional inferred remedy, would yield to "clear contrary evidence of legislative intent." *Id.*; *see Implication of Private Actions*, *supra* note 26, at 380-81.

Recent Supreme Court decisions have consistently ignored the previous emphasis on

Ash[30] the Supreme Court established a four-pronged test to determine whether Congress intended to grant a private cause of action under a federal statute.[31] The first factor of the *Cort* test is whether the plaintiff is among the class for whose especial benefit the statute was enacted.[32] Secondly, a court is to examine legislative intent, explicit or implicit, either to create or deny a private remedy.[33] The third factor involves the consistency of a private remedy with the legislative purpose of the statute.[34] Finally, a court is to discern whether the area is one tradition-

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the existence of an adequate statutory remedy for injured plaintiffs. *See Implied Rights, supra* note 1, at 933; *Federal Securities Acts, supra* note 1, at 633-35. *See also* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 47 (1977) (no inferred cause of action for defeated tender offeror under § 14(c) of '34 Act, 15 U.S.C. § 78n(c) (1976) or rule 10b-6, 17 C.F.R. § 240.10b-6 (1980)); Cort v. Ash, 422 U.S. 66, 68-70 (1975) (no inferred private cause of action for corporate stockholder under Federal Election Campaign Act of 1971, 18 U.S.C. § 610 (1970) (repealed 1976)); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 425 (1975) (no inferred private cause of action for brokerage house customers under Securities Investor Protection Act of 1970, 15 U.S.C. § 78ggg(b) (1976)).

[30] 422 U.S. 66, 68-70 (1975) (no inferred private cause of action for corporate shareholders under Federal Election Campaign Act of 1971, 18 U.S.C. § 610 (1970) (repealed 1976)).

[31] 422 U.S. at 78. *See generally* 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 (1977-1978); *Implication of Private Actions, supra* note 26, at 382-94. The Supreme Court has only occasionally employed the full four-pronged test set forth in *Cort v. Ash. See* Cannon v. University of Chicago, 441 U.S. 677, 688-89 (1979) (employed complete *Cort* test). *But see* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979) (did not use full *Cort* test); *see* text accompanying notes 66-73 *infra.*

[32] 422 U.S. at 78. The Court in *Cort* phrased the first factor alternatively as whether the statute creates a federal right in favor of the plaintiff. *Id.* To discern whether the plaintiff in *Cort* was a special beneficiary of § 610 of the Federal Election Campaign Act of 1971 (FECA), the Court relied primarily on the language of § 610, while also examining the section's legislative history and purpose. 422 U.S. at 80-82. The Court characterized § 610 as a criminal statute designed to benefit the public at large. *Id.* at 78-80. The Court stated that, although a statute was enacted for the protection of the public rather than a specific group of people, the Court still might infer a private cause of action. *Id.* at 79; *see* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201-02 (1967); J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964); Texas & Pac. R. Co. v. Rigsby, 241 U.S. 33, 40 (1916). The Court in a subsequent case stated that the statutory language creating a right or duty was generally the most accurate indicator of the propriety of inferring a private cause of action. Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979); *see* text accompanying notes 72-73 *infra.*

[33] 422 U.S. at 78. The Court in *Cort* examined the legislative history of the FECA to determine the existence of legislative intent to deny or allow a private cause of action. *Id.* at 82-84. The Court also considered the statutory provisions for enforcement of the FECA. *Id.* at 82 n.14; *see* note 29 *supra.*

[34] 422 U.S. at 78. The Court in *Cort* equated the third factor with the Court's prior statement that courts have a duty to provide remedies necessary to implement the congressional purpose underlying a statute. *Id.* at 84; *see* text accompanying notes 26-27 *supra.* In subsequent decisions the Supreme Court framed the third *Cort* factor as whether an inferred private cause of action is necessary to implement congressional purpose. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979).

ally relegated to state law.[35] The Supreme Court, however, did not indicate in *Cort* what weight, if any, each of the four enumerated factors carried.[36]

The recent Supreme Court decisions in *Touche Ross & Co. v. Redington*[37] and *Transamerica Mortgage Advisors, Inc. v. Lewis*[38] reiterated the restrictive approach to the inference of private causes of action under federal statutes.[39] Furthermore, these cases modified the four-pronged analysis provided in *Cort*.[40] In *Redington*, the plaintiff brought suit against Touche Ross & Co. (Touche Ross), an independent certified public accounting firm, for violations of section 17(a) of the '34 Act.[41] Under section 17(a) brokerage firms must file certified financial reports with the SEC.[42] Section 17(a) does not, however, expressly make accountants liable for certifying a financial statement containing false or misleading statements.[43] The Supreme Court held that section 17(a) did not give rise to a private cause of action for damages.[44]

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[35] 422 U.S. at 78. The Court stated in *Cort* that if the cause of action in question is primarily the concern of the states, inference of a cause of action under a federal law is inappropriate. *Id.* To evaluate the fourth factor in *Cort*, the Supreme Court examined whether state law provided a remedy for the plaintiff's allegations. *Id.* at 64-65.

[36] Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979); *see* Cort v. Ash, 422 U.S. at 78-85; text accompanying notes 66-73 *infra*.

[37] 442 U.S. 560 (1979).

[38] 444 U.S. 11 (1979).

[39] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979). *See generally* Underwood, *supra* note 1, at 541-48; *Federal Securities Acts*, *supra* note 1, at 638-48. Just prior to *Redington* and *Transamerica*, the Supreme Court decided two other cases involving the inference of private causes of action under federal statutes. *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (inferred private cause of action under § 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1976)); Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979) (no inferred private cause of action under § 1905 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976)). *See generally Federal Securities Acts*, *supra* note 1, at 635-38. *See also* Davis v. Passman, 442 U.S. 228, 230 (1979) (inferred private cause of action for damages under Fifth Amendment Due Process Clause, U.S. CONST. amend. V). However, neither *Chrysler* nor *Cannon* are as illustrative of the Supreme Court's increasingly strict view of inferred private causes of action as *Redington* and *Transamerica*. Moreover, neither *Cannon* nor *Chrysler* provide significant guidance for the application of the four-pronged *Cort* test. In *Cannon*, the Court employed all four *Cort* factors, and stated that there was no need to weigh the factors because all indicated positive congressional intent. 441 U.S. at 709. The Court applied the *Cort* test in *Chrysler*, but the discussion of an inferred private cause of action was brief. *See* 441 U.S. at 280-81. In *Chrysler*, the Court did not discuss whether the cause of action was one traditionally relegated to state law, the fourth *Cort* factor. *See id.* at 281. Arguably, discussion of the fourth factor was unnecessary in *Chrysler* because the FOIA concerns only federal agency information. *See id.* at 285.

[40] *See* text accompanying notes 65-76 *infra*.

[41] 442 U.S. at 565; *see* 15 U.S.C. § 78q(a) (1976).

[42] 442 U.S. at 563-64 n.3.

[43] *Id.* at 566-65.

[44] *Id.* at 567. The district court in *Redington* held that § 17(a) did not give rise to a private cause of action and therefore dismissed the plaintiff's complaint. *Id.* at 566. A divided panel of the Second Circuit in *Redington* reversed the district court and concluded that § 17(a) did give rise to a private cause of action. *Id.* at 566-67.

Examining the language of section 17(a), the Court found that the section did not confer rights in favor of any particular class.[45] Rather, the Court concluded that section 17(a) was simply a bookkeeping provision designed to prevent insolvencies, and not a provision to remedy the consequences of an insolvency.[46] Therefore, the Court did not find an especially benefitted class under section 17(a).[47] The Court also noted the absence of legislative history relating to a private remedy.[48] The statutory enforcement scheme of the '34 Act lends additional support to the Court's denial of an inferred cause of action under section 17(a).[49] The '34 Act provides for private enforcement of section 17(a) under section 18(a) of the '34 Act.[50] Consequently the Court found that Congress did not intend the existence of an inferred private action under section 17(a).[51] The *Redington* Court did not consider the last two *Cort* factors and therefore did not examine the necessity of inferring a private cause of action to implement the purpose of section 17(a) or whether the cause of action is one traditionally relegated to state law.[52] Having determined from the first two *Cort* factors that Congress did not intend section 17(a) to give rise to a private action, the Court stated that the inquiry had ended.[53] In *Redington*, the Court therefore concluded that there was no need to examine the remaining two *Cort* factors.[54]

In *Transamerica*, a shareholder of a real estate investment trust brought a derivative suit on behalf of the trust and a class action on behalf of the trust's shareholders, for violations of the Investment Advisors Act of 1940 ('40 Act).[55] Named defendants were the trust's trustees

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[45] *Id.* at 569.

[46] *Id.* at 570-71.

[47] *See* text accompanying note 32 *supra.*

[48] 442 U.S. at 571. Because the language of § 17(a) weighed against the inference of a private remedy, the Court in *Redington* found that the silence of the legislative history as to private enforcement of § 17(a) supported the Court's refusal to infer a private cause of action. *Id.* at 571-72.

[49] *Id.*

[50] *Id.* at 572-74. Section 18(a) of the '34 Act provides a private cause of action for purchasers or sellers of securities who relied on materially misleading statements contained in a filing required under the '34 Act. 15 U.S.C. § 78r(a) (1976). A plaintiff who brings an action under § 18(a), directs the action against the person who made, or caused to be made, the misleading statements. *Id.* The Court in *Redington* concluded, therefore, that an accountant who made and certified a financial statement containing false or misleading statements could be held liable under § 18(a). 442 U.S. at 572. The '34 Act also provides for private enforcement of sections other than § 17(a). *Id.* at 571-72; *see* § 16(b), 15 U.S.C. § 78p(b) (1976); § 9(4), 15 U.S.C. § 78i(e) (1976); § 20, 15 U.S.C. § 78t (1976) (provisions of '34 Act providing express private remedies). The Court in *Redington* stated that the express private remedies in other '34 Act provisions indicate that Congress will provide a private remedy when such a remedy is desired. 442 U.S. at 572.

[51] 442 U.S. at 574.

[52] *See id.* at 575-76.

[53] *Id.* at 576.

[54] *Id.*

[55] 444 U.S. at 13-15; *see* 15 U.S.C. §§ 80b-1 to 21 (1976). *See generally* Note, *Private Causes of Action Under Section 206 of the Investment Advisors Act*, 74 MICH. L. REV. 308,

and investment advisors.[56] The plaintiffs sought injunctive relief and monetary damages.[57] The Supreme Court inferred a limited private remedy under section 215 of the '40 Act.[58] The Court examined two sections of the '40 Act, section 215 and section 206.[59] Initially, the Court concluded that the plaintiffs, as clients of investment advisors were within the group especially benefitted by sections 215 and 206.[60] Because section 215 provides that contracts in violation of the section are void, the Court concluded that Congress must have intended the customary legal consequences of a void contract, including recission and injunction.[61] However, in examining section 206, which prohibits fraudulent practices by investment advisors, the Court did not find a congressional intent to create a private cause of action.[62] The legislative history of the '40 Act was silent as to a private cause of action under section 206,[63] and furthermore, the '40 Act provides express remedies for the enforcement of section 206.[64] As in *Redington*, the Court in *Transamerica* refused to consider the remaining *Cort* factors, and therefore did not examine whether a private remedy was necessary to implement the purpose of section 206 or whether the private cause of action was traditionally relegated to state law.[65]

In both *Redington* and *Transamerica* the Court stated that statutory construction governs whether a statute gives rise to an inferred cause of

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308-12 (1975); Comment, the *Investment Advisors Act of 1940*, 1 VAND. L. REV. 68 (1947). The plaintiffs in *Transamerica* alleged that the defendants were guilty of various frauds and breaches of fiduciary duty in the management of the real estate trust, 444 U.S. at 13-15.

[56] 444 U.S. at 13.

[57] *Id.* at 14. The plaintiffs in *Transamerica* sought to enjoin further performance of the advisory contract and to rescind the contract. *Id.* The plaintiff also sought restitution of fees and other considerations paid by the trust to defendants, an accounting of illegal profits, and an award of damages. *Id.*

[58] *Id.* at 24. The district court in *Transamerica* concluded that the '40 Act conferred no private cause of action and therefore dismissed the plaintiff's complaint. *Id.* at 14. The Court of Appeals in *Transamerica* reversed, holding that the '40 Act contained a private cause of action for injunctive relief and damages. *Id.*

[59] *Id.* at 16; *see* 15 U.S.C. § 80b-15 (1976) (voiding any contract whose formation or performance would violate '40 Act); 15 U.S.C. § 80b-6 (1976) ('40 Act prohibiting fraudulent practices by investment advisors).

[60] 444 U.S. at 17-18.

[61] *Id.* at 18-19. The Court in *Transamerica* found that the language of § 215 implied a private cause of action for recission and injunctive relief. *Id.* at 18. Therefore, in connection with § 215, the Court did not examine the statutory enforcement scheme of the '40 Act to discern further evidence of congressional intent concerning a private cause of action. *See id.* at 18-19.

[62] *Id.* at 24.

[63] *Id.* at 18.

[64] *Id.* at 19-20; *see* 15 U.S.C. § 80b-17 (1976) (criminal prosecution of '40 Act violations); 15 U.S.C. § 90b-9 (1976) (SEC injunctive action to force compliance with '40 Act); 15 U.S.C. § 80b-3 (1976) (administrative sanctions against violators of '40 Act).

[65] 444 U.S. at 23-24, *see* text accompanying notes 52-54 *supra*.

action.[66] Further, the Court held that the principles of statutory construction should be used to determine the existence of a congressional intent either to create or deny a private cause of action under a particular statute.[67] The Court's statutory construction analysis emphasizes the statute's language, legislative history and purpose, and enforcement scheme.[68] Courts traditionally employ these considerations to determine legislative intent.[69] Consequently, the remaining *Cort* factors of whether an inferred private cause of action is necessary to implement congressional purpose and whether such a cause of action is one traditionally relegated to state law, do not carry the same weight as the initial two *Cort* factors.[70] If analysis under the first two *Cort* factors reveals a congressional intent to deny an inferred private cause of action, *Redington* and *Transamerica* indicate that the remaining *Cort* factors become irrelevant.[71] Indeed, *Transamerica* suggests that even if the language of the statute creates an especially benefitted class which includes the plaintiff, examination of the third and fourth *Cort* factors is not necessary if a court does not find congressional intent to create a private cause of ac-

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[66] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979). In *Redington* the Court rejected the plaintiff's tort based arguments for the inference of a private cause of action. *Id.* at 568. The Court stated that even when someone violates a federal statute and harm results to an individual, the injured party does not automatically have a private cause of action under the violated statute. *Id.*; *see* Cannon v. University of Chicago, 441 U.S. 677, 688 (1979).

[67] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

[68] *See* text accompanying notes 45-54 and 60-65 *supra*.

[69] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979). The Court in *Redington* stated that as with any case involving statutory interpretation, a case concerning the inference of a private cause of action should begin with the analysis of the statute's language. *Id.* at 568. In *Transamerica*, the Court stated that when a statute expressly provides for a particular remedy or remedies, courts should be reluctant to read other remedies into the statutory scheme. 444 U.S. at 19.

[70] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 576-77 (1979).

[71] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979). The Supreme Court did not state in either *Redington* or *Transamerica* when or if a court may properly consider the last two *Cort* factors of whether an inferred private remedy is necessary to implement a statute's purpose and whether such an action is traditionally relegated to state law. Because neither *Redington* nor *Transamerica* overturned *Cort*, the last two *Cort* factors are still relevant consideration. *See Private Rights*, *supra* note 18, at 590. *But see* Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92, 96-97 (N.D. Ill. 1980) (Supreme Court in *Redington* and *Transamerica* rejected consideration of last two *Cort* factors). If a court discerns persuasive congressional intent to create a private remedy through examining the statute's language, legislative history and purpose, and enforcement provisions, further analysis under the remaining *Cort* factors may be unnecessary. However, if a court's examination of the first two *Cort* factors reveals less than persuasive or ambiguous congressional intent, then further analysis under the remaining *Cort* test might be appropriate to clarify the ambiguity.

tion.[72] Together, *Redington* and *Transamerica* indicate that a statute's language, legislative history and purpose, and enforcement scheme are the most reliable indicators of congressional intent.[73]

Redington and *Transamerica* reflect the Supreme Court's increasingly strict view of inferred private causes of action. The Court will infer a private remedy under a federal statute only with persuasive evidence of congressional intent to create such an action. The Supreme Court's view necessarily affects the validity of earlier lower court decisions inferring a private cause of action under section 13(d).[74] Courts therefore should reconsider the existence of a particular cause of action according to the analysis set forth in *Redington* and *Transamerica*. However, many lower courts considering the inference of a private cause of action under section 13(d) of the '34 Act have either assumed the existence of such an action,[75] or have simply accepted earlier judicial decisions which held that the action existed.[76]

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[72] *See* 444 U.S. at 24; text accompanying note 32 *supra*. The *Transamerica* Court, relying on *Redington*, stated that even when a statute was designed to protect especially designated persons, the Court would not automatically infer a private cause of action on their behalf. *Id.* at 24; *see* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). The *Transamerica* Court's reliance on *Redington* is unsound, however, because the *Redington* Court found that the statute in question did not create an especially benefitted class containing the plaintiff. *Id.* at 570-71; *see* text accompanying notes 45-47 *supra*. Moreover, with the exception of Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978), in which the statute indicated a special policy against judicial interference, the Supreme Court until *Transamerica* had never refused to infer a cause of action where the statute created an especially benefitted class to which the plaintiff belongs. *See* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13.

[73] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979).

[74] The Supreme Court in both *Redington* and *Transamerica* severely limited the precedential value of J.I. Case & Co. v. Borak, 377 U.S. 426 (1964), the case which provided the foundation for lower court decisions inferring a private cause of action under § 13(d). *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 576-78 (1979); text accompanying notes 23-29 *supra*. In *Redington*, the plaintiffs argued that the Supreme Court's analysis in *Borak* required an inferred private cause of action under § 17(a) of the '40 Act. 442 U.S. at 576-77. The *Redington* Court rejected the plaintiffs' contentions and stated that although the Court did not question the actual holding in *Borak*, the Court refused to read the *Borak* opinion to require that virtually every provision of the securities acts gives rise to an inferred private cause of action. *Id.* at 577. The *Redington* Court explained the difference between the analysis in *Borak* and that in *Redington* by stating that the Court now followed a more strict standard for the inference of a private cause of action than in *Borak*. *Id.* at 578.

The Court in *Transamerica* dismissed the analysis employed in *Borak*. *See* 444 U.S. at 15-16. The *Transamerica* Court, citing *Borak*, stated that although some prior opinions had emphasized the desirability of inferring a private cause of action, that a court should base a decision on whether Congress actually intended to create the private remedy. *Id.* at 15.

[75] *E.g.*, Chromally Am. Corp. v. Sun Chem. Corp., 601 F.2d 240, 248 (8th Cir. 1979); Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388, 396-97 (8th Cir. 1976); Stromfield v. Great Atl. & Pac. Tea Co., 484 F. Supp. 1264, 1273 (S.D.N.Y. 1980).

[76] *E.g.*, General Aircraft Corp. v. Lampert, 556 F.2d 90, 94 n.5 (1st Cir. 1977); Wellman v. Dickinson, 475 F. Supp. 783, 817 (S.D.N.Y. 1979); W.A. Krueger Co. v. Kirkpatrick, Pettis,

Dan River, Inc. v. Unitex, Ltd.[77] is one of the recent federal court decisions inferring a private cause of action for a stock issuer for injunctive relief under section 13(d).[78] The plaintiff corporation sought to enjoin defendants from purchasing additional shares of the corporation's stock.[79] The complaint alleged omissions and misleading statements in the defendant's Schedule 13D, which was filed after the initial stock purchases.[80] The district court initially granted a temporary restraining order pending further clarification of defendant's Schedule 13D.[81] Following amendment of defendant's Schedule 13D, the district court dismissed plaintiff's action on jurisdictional grounds.[82] On appeal, the Fourth Circuit held that the plaintiff, as a stock issuer, could seek injunctive relief under section 13(d) for alleged omissions or misleading statements in a filing.[83] Defendants did not question the existence of a private cause of action under section 13(d), but did challenge plaintiff's standing as a stock issuer to seek injunctive relief under the section.[84]

Smith, Polian, Inc., 466 F. Supp. 800, 803 (D. Neb. 1979); Meyers v. American Leisure Time Enterpr., Ltd., 402 F. Supp. 213, 214 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 312 (2d Cir. 1976); Scott v. Multi-Amp Corp., 386 F. Supp. 44, 50 (D.N.J. 1974).

[77] 624 F.2d 1216 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3488 (1981).

[78] *Id.* at 1224; *see* text accompanying notes 6-7 *supra*.

[79] 624 F.2d at 1219. The plaintiff in *Dan River* sought not only injunctive relief, but also declaratory relief and other equitable remedies. *Id.*

[80] *Id.* Mannip, a subsidiary of the *Dan River* defendants and also a defendant, filed a Schedule 13D. *Id.* The plaintiff alleged that defendants should have either joined the Mannip filing or filed their own Schedule 13D. *Id.*

[81] *Id.* at 1219-20. In *Dan River*, the plaintiff moved for a preliminary injunction and applied for a temporary restraining order pending a hearing on the motion for an injunction. *Id.* at 1219. The district court held that Dan River had a right to additional disclosure and therefore restrained the defendants from acquiring additional stock until after filing a new or amended Schedule 13D. *Id.* The district court specified the additional information that defendants were to include in their amended Schedule 13D. *Id.* at 1219-20.

[82] *Id.* at 1217-18. The defendants in *Dan River* filed a new Schedule 13D and at the same time moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction. *Id.* at 1220. The plaintiff then filed an amended complaint charging omissions, inconsistencies, and contradictions in the amended Schedule 13D. *Id.* at 1220-21. The district court dismissed the plaintiff's complaint following the hearing on the motion for preliminary injunction. *Id.* at 1221. The district court assumed that a stock issuer could bring an action to force a shareholder to file a Schedule 13D which on its face meets the requirements of § 13(d). *Id.* However, once a Schedule 13D was filed which on its face was accurate, the stock issuer had no right to question the truthfulness or completeness of the schedule. *Id.*

[83] *Id.* at 1224.

[84] *Id.* at 1222. In *Dan River* the district court relied on two Supreme Court cases, Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) and Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977), to support the proposition that stock issuers did not have standing under § 13(d). 624 F.2d at 1222. The Fourth Circuit distinguished both Supreme Court cases. *Id.* In *Piper* the Supreme Court denied a private cause of action for damages by a defeated tender offeror under § 14(e) of the '34 Act, 15 U.S.C. § 78n(c) (1976). 430 U.S. at 47. Although the Supreme Court in *Piper* demonstrated a more restrictive approach to the inference of private causes of action than in earlier cases, the Fourth Circuit in *Dan River* did not discuss the analysis employed by the Supreme Court in *Piper*. *See* 624 F.2d at 1222; text accompanying note 28 *supra*. *See generally Federal Securities Acts*, *supra* note 1, at 634; *The*

The defendants contended that section 13(d) was enacted for the sole benefit of stockholders and therefore a stock issuer was not within the class especially benefitted by section 13(d).[85]

The *Dan River* court did not consider the Supreme Court decisions in *Redington* and *Transamerica*, nor did the court apply the four-pronged test provided in *Cort*. Rather, the Fourth Circuit relied on prior lower court decisions allowing a stock issuer to seek injunctive relief under section 13(d).[86] These decisions were founded on the reasoning employed by the Supreme Court in *J.I. Case & Co. v. Borak*.[87] Even the more recent lower court decisions on which the Fourth Cirucit relied failed to consider Supreme Court cases subsequent to *Borak* which in-

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Supreme Court, 1976 Term, 91 HARV. L. REV. 274 (1977) [hereinafter cited as *1976 Term*]. Rather the Fourth Circuit relied on the Supreme Court's statement in *Piper* that the target corporation's standing to sue under § 14(e) was not an issue in the case. 624 F.2d at 1222; *see* 430 U.S. at 42 n.28 & 47 n.33. The *Dan River* court reasoned, therefore, that *Piper* was not contrary authority to the right of a stock issuer to seek injunctive relief under § 13(d). 624 F.2d at 1222.

Rondeau involved a stock issuer's suit for injunctive relief under § 13(d). 422 U.S. at 50. The issue in *Rondeau* was not the stock issuer's standing to bring an action under § 13(d), or the inference of a private cause of action under § 13(d), but whether a showing of irreparable harm was necessary to receive injunctive relief under the section. 422 U.S. at 50; *see* note 19 *supra*. *See generally* Porter & Hyland, *supra* note 19; *Rights of Action*, *supra* note 19; note 19 *supra*. In *Dan River* the court emphasized that the Supreme Court in *Rondeau* specifically noted that the decision had no bearing on whether a corporation could obtain a decree enjoining a shareholder who had violated § 13(d). 624 F.2d at 1222; *see* 422 U.S. at 59 n.9. The Fourth Circuit interpreted the Supreme Court's comment in *Rondeau* as a positive suggestion that a stock issuer does have standing under § 13(d) to seek injunctive relief, rather than as a neutral position on the inference of a private cause of action under § 13(d). 624 F.2d at 1222 n.5; *see Rights of Action*, *supra* note 19, at 112-14 (suggesting inferred cause of action under § 13(d) for stock issuer in *Rondeau* discussion). *But see* Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92, 95 n.6 (N.D. Ill. 1980); Sta-Rite Indus., Inc. v. Nortek, Inc., 494 F. Supp. 358, 360 (E.D. Wis. 1980) (Supreme Court in *Rondeau* did not address issue of inferred cause of action under § 13(d)).

[85] 624 F.2d at 1222. The defendants in *Dan River* inferred that a stock issuer would use a private cause of action under § 13(d) as armament for management in resisting takeovers or large accumulations of their corporation's stock. *Id.*; *see* note 105 *infra*.

[86] 624 F.2d at 1222-24; *see* Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 248 (8th Cir. 1979); General Aircraft Corp. v. Lampert, 556 F.2d 90, 94 n.5 (1st Cir. 1977); GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); text accompanying notes 20-22 & 75-76 *supra*. Because the district court in *Dan River* concluded that § 13(d) only required a filing that was accurate on its face, the Fourth Circuit focused on the judicial interpretation of § 13(d) which requires the filing of a complete and truthful Schedule 13D. 424 F.2d at 1222-24; *see* Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d at 248; SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1165 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); General Aircraft Corp. v. Lampert, 556 F.2d at 97; GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); text accompanying notes 20-22 *supra*. The Court in *Dan River* held, therefore, that if a stock issuer could establish that a defendant had filed an inaccurate, incomplete or misleading Schedule 13D, a court should grant the appropriate injunctive relief and require the filing of a truthful and complete schedule. 624 F.2d at 1224.

[87] *See* text accompanying notes 23-24 *supra*.

dicate a restrictive attitude toward inferred private causes of action.[88] By relying on prior lower court decisions allowing a stock issuer to seek injunctive relief under section 13(d), the Fourth Circuit focused on the necessity of such an action to implement the purpose of section 13(d).[89] This consideration alone, however, is insufficient support for the inference of a private cause of action.[90] Under the Supreme Court's analysis a court must determine whether Congress intended to create a private cause of action by examining the statute's language, legislative history and purpose, and enforcement provisions.[91] The Fourth Circuit failed to examine congressional intent through applying the analysis set forth in *Redington* and *Transamerica* and, therefore, the holding in *Dan River*, like the prior decision on which the Fourth Circuit relied, is suspect.[92]

In *Gateway Industries, Inc. v. Agency Rent-A-Car, Inc.*,[93] a district court reached a result contrary to *Dan River*.[94] The plaintiff sought injunctive relief as a result of defendant's alleged failure to comply with the requirements of section 13(d).[95] The defendant moved to dismiss the complaint on the grounds that section 13(d) did not give rise to an inferred private right of action for a stock issuer.[96] The court agreed with the defendant and dismissed plaintiff's complaints for failure to state a claim upon which relief could be granted.[97] The *Gateway* court concluded that the Supreme Court's strict approach toward inferred causes of action rendered prior cases inferring a private cause of action for stock issuers under section 13(d) less than compelling.[98] Therefore, the court analyzed section 13(d) in conjunction with *Redington* and *Transamerica* to determine whether Congress intended the inference of a private cause of action for stock issuers.[99]

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[88] *See* text accompanying notes 75-76 *supra*.

[89] *See* text accompanying notes 21-22 & 26-27 *supra*; text accompanying notes 178-85 *infra*.

[90] *See* text accompanying note 71 *supra*.

[91] *See* text accompanying notes 68-73 *supra*.

[92] *See* text accompanying notes 74-76 *supra*.

[93] 495 F. Supp. 92 (N.D. Ill. 1980).

[94] *See id.* at 95.

[95] *Id.* at 93-94. The complaint in *Gateway* alleged that Agency Rent-A-Car's Schedule 13D was incomplete and contained misrepresentations. *Id.* at 94. The plaintiff sought to force the defendant to sell all acquired shares of Gateway and to enjoin the defendant from acquiring additional shares of Gateway stock. *Id.* at 94 n.3. Additionally, the plaintiff sought to enjoin the defendant from voting any shares of Gateway stock or from exercising any influence on the management of Gateway. *Id.*

[96] *Id.* at 94.

[97] *Id.*

[98] *Id.* at 96. The court in *Gateway* reasoned that prior cases relying on J.I. Case & Co. v. Borak, 377 U.S. 426 (1964), to infer a private cause of action under § 13(d) were no longer persuasive because the Supreme Court had abandoned the *Borak* approach to inferring causes of action. *Id.*; *see* text accompanying notes 28-37 & 66-74 *supra*.

[99] 495 F. Supp. at 97-99. The court in *Gateway* not only concluded that stock issuers did not have standing to seek relief under § 13(d), but also concluded that § 13(d) did not give

The *Gateway* court examined section 13(d)'s language, legislative history and purpose, and the enforcement scheme of the '34 Act to ascertain the congressional intent concerning the existence of a private cause of action under section 13(d).[100] An examination of section 13(d)'s language and legislative history led the district court to conclude that stock issuers are not among the class especially benefitted by section 13(d).[101] The court held that Congress enacted section 13(d) for the benefit of shareholders only.[102] The *Gateway* court noted that the stated purpose of section 13(d) is "protection of investors"[103] and that the legislative history suggests that Congress enacted section 13(d) for the protection of only investors.[104] Additionally, the district court relied on legislative history stating that Congress designed the Williams Act to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.[105] Moreover, the *Gateway* court con-

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rise to a private cause of action for a shareholder. *Id.* at 100-01; *see* note 20 *supra*. Consequently, the *Gateway* court foreclosed the ability of a stock issuer to bring an action under § 13(d) for the benefit of the corporation's shareholders. *See* 495 F. Supp. at 100-01.

[100] 495 F. Supp. at 97.

[101] *Id.* at 98-99.

[102] *Id.* The *Gateway* court found support for the conclusion that Congress enacted § 13(d) for the protection of investors only in Piper v. Chris-Craft Indus. Inc. 430 U.S. 1 (1976). 495 F. Supp. at 98-99. In *Piper*, the Supreme Court, while questioning whether § 14(e) of the '34 Act gave rise to a private cause of action, concluded that the legislative history of the Williams Act indicated that Congress adopted the amendments to the '34 Act solely for the protection of investors. 430 U.S. at 35. At least one commentator has criticized the Supreme Court's conclusion in *Piper* that Congress adopted the Williams Act for the protection of only investors. *See 1976 Term*, *supra* note 83, at 281-82. The commentator contended that because the interests of shareholders and management are so closely aligned in takeover situations and the Williams Act operates to the benefit of both, the Supreme Court cannot single out shareholders as the specially benefitted class of the Williams Act. *Id.*; *see* notes 105 & 187 *infra*.

[103] *Id.* at 98; 15 U.S.C. § 78m(d) (1976 & Supp. III 1979).

[104] 495 F. Supp. at 98-99; *see* text accompanying notes 16-18 *supra*.

[105] 495 F. Supp. at 98; *see* H.R. REP. NO. 1711, *supra* note 16, at 2811, 2813. The court in *Gateway* emphasized that the early drafts of the Williams Act reflected hostility to attempted takeovers and therefore, some members of Congress thought the bill benefitted the stock issuer over the tender offeror. 495 F. Supp. at 98; *see, e.g.*, 113 CONG. REC. 857-58 (1978) (comments of Senator Kuchel); *Williams Amendments*, *supra* note 17, at 700-01. As the *Gateway* court noted, the legislative history of the Williams Act states that Congress designed the disclosure requirements for the benefit of investors, while providing the tender offeror and the stock issuer an equal opportunity to fairly present their positions. 495 F. Supp. at 98; *see* H.R. REP. NO. 1711, *supra* note 16, at 2811, 2813. Reasoning that an action under § 13(d) by a stock issuer would give management a competitive advantage over takeover groups, the court in *Gateway* concluded that actions by issuers would destroy the neutrality the Williams Act sought to achieve between stock issuers and tender offerors. 495 F. Supp. at 101; *see* note 85 *supra*. The Second Circuit, the first court to expressly hold that § 13(d) gives rise to a private cause of action for stock issuers, acknowledged in GAF Corp. v. Milstein, 453 F.2d 709 (1971), *cert. denied*, 406 U.S. 910 (1972) the possibility that management could abuse a § 13(d) action, but concluded that the courts could adequately counteract the danger by carefully scrutinizing a stock issuer's § 13(d) allegations. *Id.* at 719-20; *see* note 22 *supra*. The court in *Milstein* also noted that if management brought an

cluded that section 13(d) did not expressly create or alter civil liability.[106] The district court noted that section 13(d) was a disclosure statute similar to section 17(a) of the '34 Act, which the Supreme Court in *Redington* held did not give rise to a private cause of action.[107] The court in *Gateway* therefore concluded that section 13(d)'s language and purpose did not suggest a private cause of action for a stock issuer.[108]

The *Gateway* court found the legislative history silent as to a private cause of action under section 13(d), and reasoned that this silence supported the refusal to infer a cause of action under section 13(d).[109] Finally, the *Gateway* court concluded that the statutory scheme of expressed enforcement under the '34 Act weighed heavily against the inference of an additional remedy.[110] The '34 Act provides for SEC enforcement of section 13(d).[111] Purchasers and sellers of stock who detrimentally rely on false or misleading statements in a Schedule 13D may seek

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action under § 13(d) motivated by its own interest, rather than in the best interest of the corporation's shareholders, shareholders could seek redress under the theory of corporate waste. *Id.* at 720. Additionally, the requirement that the stock issuer must show irreparable harm resulting from the § 13(d) violations before a court will grant injunctive relief lessens the potential for abuse of § 13(d) by a stock issuer. *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 50-51 (1975).

[106] 495 F. Supp. at 99.

[107] *Id.*; *see* text accompanying notes 44-47 *supra* & 121-22 *infra*. The court in *Gateway* distinguished §§ 13(d) and 17(a) from § 215 of the '40 Act, which the Supreme Court in *Transamerica* concluded gave rise to a private cause of action. 495 F. Supp. at 99; *see* text accompanying notes 58-61 *supra*. The *Gateway* court reasoned that the language of §§ 13(d) and 17(a) did not compare with the language of § 215 of the '40 Act, which strongly indicated Congress' intent to create a private cause of action for contract recission. 495 F. Supp. at 99; *see* text accompanying note 61 *supra*.

[108] 495 F. Supp. at 99.

[109] *Id.* The *Gateway* court noted that in the legislative history the SEC stated that the Williams Act would add little, if any, to the cost of administering the securities laws. *Id.* at 99 n.11; *see* H.R. REP. No. 1711, *supra* note 16, at 2811, 2817. The district court acknowledged that a court could construe the SEC's position as indicating that private parties would carry the burden of enforcement rather than the SEC. 495 F. Supp. at 99 n.11. However, the *Gateway* court reasoned that the SEC's statement alone, as opposed to a congressional statement, could not uphold a conclusion that Congress intended private enforcement under § 13(d). *Id. But see* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41 n.27 (1976) (Court declines to accord deference to SEC view that Court should infer right of action for damages under § 14(e) of '34 Act for defeated tender offerors). *See also* note 128 *infra*.

[110] 495 F. Supp. at 98. The court in *Gateway* stated that the detailed enforcement scheme of the '34 Act indicated that Congress had considered enforcement of the Act. *Id.* the district court therefore reasoned that Congress did not "absentmindedly forget" to indicate an intended private right of action for injunctive relief under § 13(d). *Id.*

[111] *See* 15 U.S.C. §§ 78u(d), (e) (1976). Section 21 of the '34 Act authorizes the SEC to investigate possible violations of the '34 Act. 15 U.S.C. §§ 78u(a), (b) (1976). If the SEC concludes that someone violated or is about to violate the '34 Act, the agency may file suit for an injunction or writ of mandamus. *See* 15 U.S.C. §§ 78d(d), (e) (1976). Additionally, the Attorney General may institute criminal proceedings for a violation of the '34 Act. *See* 15 U.S.C. § 78u(d) (1976).

relief under section 18(a).[112] Section 13(d) contains no language creating a private remedy, unlike other provisions of the '34 Act.[113] The *Gateway* court therefore concluded that examination of section 13(d)'s language, legislative history and purpose, and the statutory enforcement scheme of the '34 Act, indicated that Congress did not intend to create a private cause of action for stock issuers under section 13(d).[114]

In *Gateway*, the court's analysis complies with that prescribed by the Supreme Court in *Redington* and *Transamerica*. The district court examined section 13(d)'s language, legislative history and purpose, and the enforcement scheme of the '34 Act, factors the Supreme Court considers most indicative of congressional intent.[115] Moreover, the *Gateway* court emphasized the role of congressional intent in determining whether a court can infer a private cause of action,[116] an emphasis which is consistent with the Supreme Court's analysis in *Redington* and *Transamerica*.[117] *Redington* and *Transamerica* also support the *Gateway* court's failure to examine the necessity of a private cause of action for the implementation of section 13(d) or whether such an action is one traditionally relegated to state law.[118] The Supreme Court held in both

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[112] *See* 15 U.S.C. § 78r(a) (1976); note 20 *supra*. The court in *Gateway* noted that in *Redington* the Supreme Court, while declining to decide the issue, observed that evidence exists which supports the view that Congress intend § 18(a) to provide the exclusive remedy for misstatements contained in reports filed under the '34 Act. 495 F. Supp. at 98; *see* Touche Ross & Co. v. Redington, 442 U.S. 560, 573-74 (1979); 78 CONG. REC. 2271 (1938) (remarks of Senator Fletcher); Hearings on S. Res. 84 et al. before the Senate Committee on Banking & Currency, 73d Cong., 1st Sess., pt. 15, p. 6638 (1934) (remarks of President New York Stock Exchange).

[113] *See* 15 U.S.C. §§ 78i(e), 78p(b) ('34 Act provisions that expressly provide for private rights of action).

[114] 495 F. Supp. at 99. The court in *Gateway* found additional support for the denial of an inferred cause of action under § 13(d) in that the injunctive relief which the plaintiff sought would not remedy the alleged harm from § 13(d) violations. *Id.* at 99 n.12. The plaintiffs alleged that the continued acquisition of *Gateway* stock by the defendants would result in delisting of the corporation. *Id.* The Court noted, however, that even if the defendants corrected their Schedule 13D, the defendants could still continue to acquire additional Gateway stock and delisting might yet occur. *Id.*

[115] *See id.* at 97; text accompanying notes 66-73 and 99-114 *supra*. The district court in *Gateway* carefully examined the Supreme Court's reasoning in *Redington* and *Transamerica* in order to determine the factors which the Supreme Court prescribed as proper considerations in a case involving an inferred private cause of action. 495 F. Supp. at 96-97.

[116] *See* 495 F. Supp. at 97; text accompanying notes 99, 114 *supra*.

[117] *See* text accompanying notes 66-73 *supra*. The Supreme Court's decisions in both *Redington* and *Transamerica* leave no question that Congress' intent as to a private cause of action under a federal statute is the ultimate consideration in cases involving inferred causes of action. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 1, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); text accompanying note 67 *supra*.

[118] *See* text accompanying notes 70-71 *supra*. The district court in *Gateway* specifically declined to consider whether a private cause of action under § 13(d) was necessary to implement the purpose of the section. 495 F. Supp. at 97. The court noted that the Supreme Court in both *Redington* and *Transamerica* had declined to consider the desirability of inferring a

cases that consideration of the last two *Cort* factors was not necessary when a court's examination of the first two *Cort* factors revealed congressional intent to deny the inference of a private cause of action.[119]

Although the *Gateway* court's analysis complies with that prescribed by the Supreme Court, the district court failed to consider several variables which undermine the conclusion that section 13(d) does not give rise to a private cause of action. In concluding that section 13(d) does not expressly create or alter civil liability,[120] the *Gateway* court failed to consider prior courts' interpretation of section 13(d). Courts have consistently interpreted section 13(d) as imposing a duty on a shareholder to file a complete and truthful Schedule 13D.[121] This interpretation distinguishes section 13(d) from section 17(a) which the Supreme Court in *Redington* held did not create a duty on the part of an accountant to file complete and accurate financial statements.[122] Additionally,

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private cause of action. *Id.* at 97; *see* text accompanying notes 52-54, 65, 70-71 *supra* & 119 *infra*. The *Gateway* court characterized the desirability of an inferred private cause of action as a factor which only tangentially bears upon the question of congressional intent to create or deny a private cause of action. 495 F. Supp. at 97.

[119] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979); text accompanying notes 53-54, 65 & 71 *supra*.

[120] 495 F. Supp. at 99; *see* text accompanying notes 106-07 *supra*.

[121] *See, e.g.*, Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1223-24 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3488 (1981); Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 248 n.16 (8th Cir. 1979); SEC v. Savoy Indus., 587 F.2d 1149, 1165 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972), text accompanying note 21 *supra*. As the district court in *Gateway* correctly noted, the inference of a private cause of action under § 13(d) in prior cases is suspect because these decisions are based on J.I. Case & Co. v. Borak, 377 U.S. 426 (1964). The Supreme Court in *Redington* and *Transamerica* severely limited the precedential value of *Borak*. *See* 495 F. Supp. at 96; text accompanying notes 23-27, 74, 98 *supra*. However, the prior courts' interpretation of § 13(d) as requiring the filing of a complete and truthful statement was not based on the *Borak* decision. The Second Circuit in *Milstein* based its conclusion that § 13(d) requires the filing of a complete and truthful Schedule 13D on the Supreme Court's instruction in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963) that courts should construe the securities acts flexibly to implement the acts' purposes. *See* 453 F.2d at 720. The *Milstein* court found additional support for the conclusion that § 13(d) mandates complete and accurate filing in § 13(d)(2), which places a continuing obligation on a shareholder to amend the Schedule 13D if there are material changes. *See id.*, 15 U.S.C. § 78m(d)(2) (1976 & Supp. III 1979). The D.C. Circuit accepted the interpretation of § 13(d) as requiring the filing of a complete and truthful Schedule 13D in a case which involved an action brought by the SEC against a shareholder. SEC v. Savoy Indus., Inc., 587 F.2d at 1165; *see* SEC v. CMC Int'l, Inc., 384 F. Supp. 889, 893 (N.D. Tex.), *aff'd mem.*, 505 F.2d 733 (5th Cir. 1974), *cert. denied sub nom.* Evans v. SEC, 420 U.S. 930 (1975) (reporting provisions of '34 Act are satisfied only by filing of complete, accurate, and timely reports).

[122] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 567, 569-70 (1979). The Second Circuit in *Redington* held that § 17(a) imposes a duty on accountants to file complete and accurate financial statements. *Id.* at 567. On appeal, the Supreme Court rejected the lower court's conclusion and held that § 17(a) simply requires the periodic filing of certain information with the SEC. *Id.* at 569-70. In *Gateway*, the plaintiffs asserted an inferred private

the *Gateway* court may have unjustifiably relied on the statutory enforcement scheme of the '34 Act as an indication of Congress' intent to deny a private cause of action under section 13(d).[123] Congress did not enact section 13(d) as part of the original '34 Act, but rather adopted section 13(d) over 30 years later.[124] During the years between the adoption of the '34 Act and the Williams Act, the Supreme Court cases indicated that courts should infer private causes of action under federal statutes when such actions implemented the purpose of the statute.[125] In fact, the Supreme Court decided *J.I. Case & Co. v. Borak* only a few years prior to the adoption of the Williams Act.[126] Congress was aware of Supreme Court decisions on inferred causes of action[127] and therefore could have concluded that an expressed private remedy under section 13(d) was not necessary.[128]

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cause of action for injunctive relief, whereas in *Redington*, the plaintiff sought damages under § 17(a). *See* 495 F. Supp. at 95; 442 U.S. at 562. The difference in the relief sought under § 13(a) and § 17(a) lessens the relevance of the *Redington* Court's analysis of § 17(a) and the Court's conclusion that the section did not give rise to an inferred private cause of action. The Supreme Court in *Redington* reasoned that because § 17(a) seeks to forestall insolvency and does not seek to provide recompense after insolvency occurs, the section did not give rise to a private cause of action for damages. *Id.* at 570-71. The *Redington* Court's finding does not apply directly to an action for injunctive relief because courts grant injunctive relief to deter or correct wrongful conduct, not to compensate an injured party. *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975).

[123] *See* text accompanying notes 110-13 *supra*.

[124] *See* text accompanying note 15 *supra*. *See also Private Rights*, *supra* note 18, at 592-93.

[125] *See* text accompanying notes 26-27 *supra*.

[126] The Supreme Court decided *Borak* in 1964 and Congress adopted the Williams Act in 1968. *See* 337 U.S. 426 (1964); Act of July 29, 1968, Pub. L. No. 90-439, § 2, 82 Stat. 454, *amending* 1934 Act, 15 U.S.C. §§ 78a to kk (1976).

[127] During the Senate hearings on the Williams Act, several legal authorities submitted written statements concerning the inference of private causes of action under similar statutes. *See Full Disclosure of Corporate Equity Ownership in Corporate Takeover Bids: Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 67, 140 (1967). The Supreme Court in Piper v. Chris-Craft Indus., 430 U.S. 1 (1977), found the statements concerning inferred causes of action under statutes similar to the Williams Act unpersuasive evidence that Congress considered the question of a private damage action because the legal authorities who made the statements were not subject to cross-examination or comment by the Senate subcommittee. *Id.* at 31-32. However, at least one commentator suggested at the time Congress adopted the Williams Act, that courts would infer private actions under the Act. *See* Fleischer & Mundheim, *supra* note 16, at 362.

[128] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 32 n.8 (1979) (White, J., dissenting); Cannon v. University of Chicago, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring); Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92, 101 n.15 (N.D. Ill. 1980). The district court in *Gateway* acknowledged that because the federal courts had freely inferred private causes of action under federal statutes prior to 1975, the courts had encouraged Congress to leave the question of a private cause of action under a particular statute to the courts. *Id.* The *Gateway* court, however, rejected the plaintiff's contention that denial of a private cause of action under § 13(d) was unfair because of Congress' reliance on the federal courts' prior liberal attitude. *Id.* The district court relied on the

In spite of the omissions in the *Gateway* court's analysis, the court's conclusion that section 13(d) does not give rise to a private cause of action by stock issuers for injunctive relief is correct. The Supreme Court in *Redington* and *Transamerica* indicated that in order to infer a private cause of action under a particular statute, a court must find strong evidence that Congress intended to create such an action.[129] Although the omissions in the *Gateway* court's analysis of section 13(d) render less persuasive the court's conclusion that Congress did not intend that the section give rise to a private cause of action, the omissions do not reveal strong evidence of Congress' intent to create such an action under section 13(d).[130] Moreover, because a stock issuer is not a member of the class especially benefitted by section 13(d),[131] a court could not properly infer a private cause of action for stock issuers under the section.[132]

Transamerica analysis and Congress' ability to amend a statutory scheme to provide for a private cause of action, to reject the plaintiff's argument. *Id.*

[129] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 568-78 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-24 (1979); text accompanying notes 66-73 *supra.*

[130] Arguably, a court may properly consider whether an inferred private cause of action by a stock issuer is necessary to implement the purpose of § 13(d) and whether such an action is traditionally relegated to state law. These considerations may be appropriate if a court discerns that § 13(d)'s language, legislative history and purpose, and the '34 Act's enforcement scheme do not clearly indicate congressional intent to create a private cause of action under the section, or at least do not indicate clear negative intent. *See* text accompanying notes 70-73 *supra.* Several lower court decisions suggest that a private action by a stock issuer is necessary to implement the congressional purpose underlying § 13(d). *See* text accompanying notes 20-22 *supra* & 175-85 *infra.* Additionally, although corporations are the creatures of state law and their internal affairs are within the purview of state law, federal laws generally cover the securities area. *See* Cort v. Ash, 442 U.S. 66, 85 (1975); *Private Rights, supra,* note 18, at 595. *See generally* Fogelson, *supra* note 11, at 440-51; Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered,* 88 YALE L.J. 510 (1979). State common law remedies are generally insufficient to compensate an injured party. *See Private Rights, supra* note 18, at 595. Where states have passed statutes regulating large acquisitions of stock, the disclosure requirements fall short of those required under § 13(d). *See id.* Moreover, several courts have declared unconstitutional state statutes regulating takeovers. *See, e.g.,* Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom.,* Leroy v. Great W. United Corp., 443 U.S. 173 (1979) (Idaho's takeover statute preempted by Williams Act and invalid under commerce clause); Dart Indus., Inc. v. Conrad, 462 F. Supp. 1, 1-2 (S.D. Ind. 1978) (Delaware takeover statute preempted by Williams Act and invalid under commerce clause); Fogelson, *supra* note 13, at 442-49. Additionally, Congress is presently considering legislation which would preempt state legislation overlapping the '34 Act. *See* S.3188, 96th Cong., 2d Sess., 126 CONG. REC. S.14,059-S.14,006 (daily ed. Oct. 1, 1980) [hereinafter cited as S. 3188 and paginated to CONG. REC.]; Fogelson, *supra* note 11, at 442-51.

[131] *See* text accompanying notes 101-05 *supra.*

[132] Congress arguably enacted § 13(d) for the benefit of the general public in addition to the specific group of investors. *See* 15 U.S.C. § 78n(d) (1976 & Supp. III 1979) (§ 13(d) requirements as necessary in "the public interest or for the protection of investors . . ."); text accompanying notes 101-05 *supra.* However, a court should be reluctant to infer a private cause of action under § 13(d) on the basis that stock issuers are members of the public without clear evidence that Congress intend to create such an action. *See* Cort v. Ash, 442

The court in *Sta-Rite Industries, Inc. v. Nortek, Inc.*,[133] concluded, as did the *Gateway* court, that Congress did not intend a private cause of action for injunctive relief under section 13(d) for a stock issuer.[134] In *Sta-Rite*, the plaintiffs, Sta-Rite Industries, Inc. (Sta-Rite), alleged violations of section 13(d) and, therefore, sought to enjoin the defendant from continuing to acquire Sta-Rite stock.[135] The defendant filed a motion to dismiss which challenged the plaintiff's standing to seek injunctive relief under section 13(d).[136] Having concluded that a stock issuer could not bring an action under section 13(d), the district court granted the motion to dismiss.[137] The court in *Sta-Rite* reasoned that the recent Supreme Court decisions in *Redington* and *Transamerica* required a re-examination of prior cases inferring a private cause of action under section 13(d).[138] Relying on the *Gateway* court's analysis, the court in *Sta-Rite* held that Congress did not intend a private remedy under section 13(d).[139]

Another district court case, *Kirsh Co. v. Bliss & Laughlin Industries, Inc.*,[140] rejected the *Gateway* court's reliance on *Redington* and *Transamerica* and held that stock issuers have a private cause of action for injunctive relief under section 13(d).[141] In *Kirsch*, the plaintiff, Kirsch Com-

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U.S. 66, 79 (1975). In *Cort*, the Court stated that although Congress enacted a statute for the benefit of the public, rather than a specific group of people, this fact would not automatically preclude the inference of a private cause of action. *Id.*; *see* note 32 *supra*. The Supreme Court, however, has been extremely reluctant to infer private causes of action under statutes benefitting the public at large and has done so on very few occasions. *See* Cannon v. University of Chicago, 441 U.S. 677, 690-93 n.13 (1979). Moreover, Congress did not enact § 13(d) solely for the benefit of the public, but singled out investors as the specially protected group. *See* text accompanying notes 93-105 *supra*. The Supreme Court has never inferred a private cause of action for a plaintiff under a statute which Congress enacted for the special protection of a particular group where the plaintiff did not come within the especially benefitted group. *See* Cannon v. University of Chicago, 441 U.S. at 690-93 n.13. Indeed, in *Transamerica* the Supreme Court acknowledged that the plaintiff was a member of the class especially benefitted by § 206 of the '40 Act, and yet declined to infer a private cause of action for the plaintiff under that section. *See* 444 U.S. 11, 17, 20 (1979); text accompanying notes 60-62 *supra*.

[133] 494 F. Supp. 358 (E.D. Wis. 1980).

[134] *Id.* at 362; *see* text accompanying notes 100-14 *supra*. The court in *Sta-Rite* rejected the conclusion reached in Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488, 492 (W.D. Mich. 1980), that § 13(d) gives rise to a private cause of action by stock issuers for injunctive relief. 494 F. Supp. at 362; *see* text accompanying notes 140-49 *infra*.

[135] 494 F. Supp. at 358-59. The plaintiff in *Sta-Rite* alleged that statements contained in defendant's Schedule 13D were materially false and misleading. *Id.* at 359.

[136] *Id.*

[137] *Id.* at 363.

[138] *Id.* at 360. The *Sta-Rite* court concluded that *Redington* and *Transamerica* indicated a narrowing of the Supreme Court's *Borak* standard for inferring a private cause of action. 494 F. Supp. at 360. The *Sta-Rite* court concluded that because earlier cases inferring a private cause of action under § 13(d) relied on *Borak*, the holdings in these cases were no longer applicable. *Id.* at 360; *see* text accompanying notes 74, 98 *supra*.

[139] 494 F. Supp. at 361-63; *see* text accompanying notes 100-14 *supra*.

[140] 495 F. Supp. 488 (W.D. Mich. 1980).

[141] *Id.* at 491-92; *see* text accompanying notes 100-14 *supra*. The court in Saunders Leasing System, Inc. v. Societe Holding Gray D'Albion S.A. [Current] FED. SEC. L. REP. (CCH) ¶

pany, brought an action against Bliss & Laughlin Industries, Inc. for injunctive relief against misrepresentations contained in the defendant's Schedule 13D.[142] The defendants, relying on *Gateway*, contended that the plaintiff lacked standing to bring an action under section 13(d).[143] The *Kirsch* court found the *Gateway* court's application of *Redington* and *Transamerica* unpersuasive.[144] First, the court noted that the Supreme Court cases involved actions for damages rather than for injunctive relief.[145] Secondly, the *Kirsch* court concluded that the statutes considered in *Redington* and *Transamerica* did not reflect a public interest requiring full and truthful disclosure as section 13(d) does.[146] The court in

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97,881 (N.D. Ala. Jan. 30, 1981), as did the *Dan River* and *Kirsch* courts, inferred a private cause of action under § 13(d) for stock issuers for injunctive relief. *Id.* at 90,452. The *Saunders* court noted that although the Fifth Circuit had not ruled on a stock issuer's standing to seek injunctive relief under § 13(d), the First, Second, Fourth and Eighth Circuits had held that a stock issuer could seek injunctive relief under § 13(d). *Id.* at 90,451-52; *see* Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1224 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3488 (1981); Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 248 (8th Cir. 1979); General Aircraft Corp. v. Lampert, 556 F.2d 90, 94 n.5 (1st Cir. 1977); GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); text accompanying notes 20, 77-85 *supra*. Based on what the court characterized as the persuasive authority from other circuits and the purpose behind § 13(d), the *Saunders* court held that stock issuers have a private cause of action for injunctive relief under § 13(d). ¶ 97,881, at 90,452. The *Saunders* court did not mention either the *Gateway* or *Sta-Rite* decisions, nor did the court consider the Supreme Court's decisions in *Redington* and *Transamerica*. *See id.*

[142] 495 F. Supp. at 589-90. The plaintiffs in *Kirsch* sought to enjoin the defendants from acquiring additional shares of *Kirsch* stock and from exercising any influence in the business or management of Kirsch. *Id.* The complaint also sought to enjoin defendant from voting any shares of Kirsch stock and from making any public statements relating to Kirsch. *Id.* Additionally, the plaintiff requested the court to order the defendant to file an amended Schedule 13D correcting the alleged misrepresentations and omissions. *Id.* at 490. Finally, the plaintiff asked the court to order the divestment of all Kirsch stock which the defendant controlled. *Id.*

[143] *Id.* The *Kirsch* defendant contended that the plaintiff not only lacked standing as a stock issuer under § 13(d), but also lacked standing to bring an action on behalf of its shareholders under § 13(d). *Id.* The defendant in *Kirsch* did not raise the issue of standing under § 13(d) until after conclusion of the district court's hearings on plaintiff's motion for preliminary injunction. *Id.* at 490 n.2. Defendant transmitted to the court a copy of the *Gateway* opinion, decided nine days prior, and a letter asking the court to take the *Gateway* opinion into consideration. Plaintiff responded shortly thereafter to the defendant's letter and the *Gateway* opinion. *Id.* Although the defendant did not file a motion to dismiss, the district court in *Kirsch* felt compelled to address the issue of standing under § 13(d). *Id.*

[144] *Id.* at 491. The *Kirsch* court noted that the Sixth Circuit had not ruled on the inference of a private cause of action under § 13(d) and that its decisions are not controlled by the decisions of other circuits. *Id.* at 492.

[145] *Id.* at 491. *But see* text accompanying notes 152-53 *infra*.

[146] 495 F. Supp. at 491. The *Kirsch* court gave no explanation for concluding that the statutes under review in *Redington* and *Transamerica* did not reflect a public interest requiring full and truthful disclosure. *See id. But see* text accompanying notes 155-59 *infra*. The *Kirsch* court may have been referring to the judicial decisions which held that § 13(d) required full and accurate disclosure by a shareholder. *See* text accompanying note 21 *supra*. The interpretation of § 13(d) as requiring complete and truthful disclosure distinguishes the section from § 17(a) of the '34 Act which was under review in *Redington*. *See* text accompanying note 20 *supra*.

Kirsch chose instead to rely on *Dan River* and prior judicial decisions inferring a private cause of action under section 13(d) for stock issuers seeking injunctive relief.[147] The court emphasized the inherent requirement of section 13(d) to file a complete and truthful Schedule 13D.[148] The court stated that to deny a stock issuer the right to seek injunctive relief under section 13(d) would defeat the purpose of section 13(d), as well as the purpose underlying the '34 Act.[149]

The district court in *Kirsch* considered the effect of *Redington* and *Transamerica* on the inference of a private cause of action under section 13(d).[150] However, the court's attempt to distinguish the Supreme Court cases on factual grounds is unpersuasive. Initially, the *Kirsch* court stated that *Redington* and *Transamerica* did not apply to section 13(d) because both cases involved actions for damages rather than for injunctive relief.[151] Although the Supreme Court declined to infer private causes of action for damages in both cases,[152] the Court in *Transamerica* inferred a private cause of action for injunctive relief.[153] The *Kirsch* court also contended that neither *Redington* nor *Transamerica* involved statutes which reflected a public interest requiring full and truthful disclosure, as section 13(d) does.[154] The statutes involved in *Transamerica* are not disclosure statutes like section 13(d),[155] but section 17(a) of the '34 Act, which the *Redington* Court held did not give rise to a private cause of action, is a disclosure provision similar to section 13(d).[156]

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[147] 495 F. Supp. at 491-92; *see* text accompanying notes 20, 77-85 *supra*.

[148] 495 F. Supp. at 491-92. The *Kirsch* court relied primarily on *Dan River* and earlier opinions for the proposition that § 13(d) requires not just the filing of a Schedule 13D, but the full and truthful disclosure of all information required under § 13(d).

[149] *Id.*; *see* text accompanying notes 21-22 & 89 *supra*. 495 F. Supp. at 492. The court in *Kirsch* found that Congress intended § 13(d) to provide accurate and complete information from which investors could assess the potential for change in corporate control and adequately estimate the company's worth. *Id.*; *see* text accompanying notes 16-18 *supra*.

[150] 495 F. Supp. at 490-91; *see* text accompanying notes 41-73 & 145-46 *supra*.

[151] 495 F. Supp. at 491; *see* text accompanying note 145 *supra*.

[152] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 571-74 (1979) (refusing inference of private cause of action for damages under § 17(a) of '34 Act, 15 U.S.C. § 78g(a) (1976)); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-22 (1979) (refusing inference of private cause of action for damages under § 206 of '40 Act, 15 U.S.C. § 80b-6 (1976)); text accompanying notes 39-64.

[153] *See* 444 U.S. 11, 18-19 (1979) (inferring private cause of action for contract recission and injunctive relief under § 215 of '40 Act, 15 U.S.C. § 80b-15 (1976)); text accompanying notes 58, 60-61 *supra*.

[154] 495 F. Supp. at 491; *see* text accompanying note 146 *supra*.

[155] *See* 444 U.S. 11, 16-17 (1979); 15 U.S.C. § 80b-15 (1976) (§ 215 of '40 Act voiding any contract whose formation or performance would violate '40 Act); 15 U.S.C. § 80b-6 (1976) (§ 206 of '40 Act prohibiting fraudulent practices by investment advisors); text accompanying notes 59-64 *supra*.

[156] *See* 442 U.S. 560, 569-71 (1979); 15 U.S.C. § 78g(a) (1976). Section 17(a) requires the security exchanges and the exchanges' members to make and keep accounts, correspondence and other records which the SEC prescribes. *Id.* Rule 17a-5 requires brokerage firms to file with the SEC annual financial reports which are certified by public accountants. 17 C.F.R. § 240.17a-5 (1980); *see* text accompanying note 41 *supra*.

Although the *Redington* court concluded that section 17(a) is essentially a bookkeeping provision,[157] the Court also indicated that the investment community had an interest in full and truthful disclosure under section 17(a).[158] The Supreme Court, however, held that the interest in full and truthful disclosure under section 17(a) did not warrant an inferred private cause of action.[159]

Even if the *Kirsch* court's distinction of *Redington* and *Transamerica* on factual grounds were correct, the analysis employed by the Supreme Court in both cases is applicable to any case involving the inference of a private cause of action under a federal statute.[160] In both *Redington* and *Transamerica*, the Supreme Court stated that a court should consider only congressional intent to create or deny a cause of action.[161] The court further indicated that a statute's language, legislative history and purpose, and enforcement scheme are the most accurate indicia of congressional intent concerning a private cause of action under the particular statute.[162] In *Kirsch*, the district court did not examine section 13(d)'s language, legislative history and purpose, or the enforcement scheme of the '34 Act. Moreover, the *Kirsch* court did not ascertain whether Congress intended that section 13(d) give rise to a private cause of action for stock issuers. Rather, the district court emphasized the necessity of a private action under section 13(d) to implement the section's purpose.[163] Although private enforcement of section 13(d) may be necessary to effectuate the purposes of the section, this justification alone is inadequate.[164] Because the *Kirsch* court failed to examine congressional intent as prescribed by *Redington* and *Transamerica*, the district court's conclusion that stock issuers may seek injunctive relief under section 13(d) is not convincing.[165]

The split in the federal court decisions concerning section 13(d) demonstrates that courts have difficulty resolving the conflict between the desire to provide remedies necessary to implement the purpose of

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[157] 442 U.S. 560, 569 (1979); *see* text accompanying notes 44-46 *supra*.

[158] *See* 442 U.S. 560, 569-71 (1979). Congress intended the information contained in § 17(a) reports to provide the SEC and other authorities with sufficient early warning to allow the authorities to take appropriate action to protect investors before the financial collapse of a brokerage firm. *See id.* at 570. Accurate and complete § 17(a) reports are essential if the SEC and other authorities are to adequately protect investors. *See id.* at 569-71.

[159] *Id.* at 570-72; *see* text accompanying notes 43-51 *supra*.

[160] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

[161] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); text accompanying notes 66-67 *supra*.

[162] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16-24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568-76 (1979); text accompanying notes 68-73 *supra*.

[163] 495 F. Supp. at 491-92; *see* text accompanying notes 148-49 *supra*.

[164] *See* text accompanying notes 66-73 *supra*; text accompanying notes 175-85 *infra*.

[165] *See* text accompanying note 7 *supra*.

section 13(d)[166] and the desire not to legislate through judicial decisions.[167] The Supreme Court's restrictive view of the inference of private causes of action reflects the Court's recognition of the separation of powers doctrine.[168] The Constitution of the United States vests Congress with the power to legislate,[169] whereas the judiciary is vested with the power to interpret the laws which Congress adopts.[170] The separation of powers doctrine mandates that the duties and powers of Congress and the judiciary remain separate.[171] Consequently, the inference of a private cause of action under a federal statute is proper when a court is interpreting congressional intent to create such an action.[172] However, if a

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[166] *See* Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1222-24 (1980), *cert. denied*, 49 U.S.L.W. 3488 (1981); Saunders Leasing System, Inc. v. Societe Holding Gray D'Albion S.A. [Current] FED. SEC. L. REP. (CCH) ¶ 97,881, 90,452 (N.D. Ala. Jan. 30, 1981); Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488, 491-92 (W.D. Mich. 1980); text accompanying notes 21-22, 77-85 & 140-49 *supra*.

[167] *See* Sta-Rite Indus., Inc. v. Nortek, Inc., 494 F. Supp. 358, 361-63 (E.D. Wis. 1980); Gateway Indus., Inc. v. Agency Rent-A-Car, Inc., 495 F. Supp. 92, 97-99 (E.D. Ill. 1980); Forkosch, *The Separation of Powers*, 41 U. COLO. L. REV. 529, 532-36 (1969) [hereinafter cited as Forkosch]; text accompanying notes 93-124 & 132-39 *supra*.

[168] In *Redington* the Supreme Court expressly recognized that the federal courts were not at liberty to legislate. 442 U.S. at 579. The Court stated that if there was to be a private cause of action for damages under § 17(a) of the '34 Act, Congress must provide it. *Id.*; *see also* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (not for courts to legislate).

[169] *See* U.S. CONST. art. I, § 8, cl. 18.

[170] *See* Marbury v. Madison, 1 Cranch 137, 177 (1803). *See generally* A. BRICKEL, THE LEAST DANGEROUS BRANCH 1-14 (1962) [hereinafter cited as BRICKEL]; Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004-08 (1965).

[171] *See* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting); TVA v. Hill, 437 U.S. 153, 194-95 (1978); BRICKEL, *supra* note 170, at 46-48; Forkosch, *supra* note 167, at 529-32. Article III of the Constitution vests only Congress with the responsibility for determining the jurisdiction of the lower federal courts. *See* U.S. CONST. art. III, § 1. However, when a court infers a private cause of action under a federal statute when Congress did not intend such an action to exist, a court is expanding its own jurisdiction. *See* Cannon v. University of Chicago, 441 U.S. at 730-31 (Powell, J., dissenting).

[172] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 579 (1979); Cannon v. University of Chicago, 441 U.S. 577, 730-31 (1979) (Powell, J., dissenting); Forkosch, *supra* note 167, at 532-36; Note, *The Phenomenon of Implied Private Action of Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORD. L. REV. 441, 456 n.110 (1974) [hereinafter cited as *The Phenomenon*]; text accompanying notes 66-67 *supra*.

[173] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979); Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting). Forkosch, *supra* note 167, at 532-36; *The Phenomenon*, *supra* note 172, at 456 n.110. Justice Powell in his dissenting opinion in *Cannon* vigorously criticized the four-pronged test which the Court provided in *Cort* to determine if a particular statute gave rise to a private cause of action. *Id.* at 739-49. Justice Powell stated that courts can too easily use the *Cort* test to deflect inquiry away from the intent of Congress and instead, substitute the court's own view as to the desirability of private enforcement. *Id.* at 740. Only the second *Cort* factor, whether legislative intent, explicit or implicit, exists to create or deny a private cause of action, passed scrutiny under Justice Powell's examination. *See id.* Justice Powell stated that the other factors invited judicial legislation. *Id.* Justice Powell concurred in the *Transamerica* opinion solely on the basis that he considered the majority opinion to reflect his dissenting opinion in *Cannon*. *See* 444 U.S. 11, 25 (Powell, J., concurring).

court infers a private cause of action under a federal statute solely on the grounds that such an action is necessary to implement the statute's purpose, the court is not interpreting a statute, but is legislating.[173]

As the *Gateway* and *Sta-Rite* decisions indicate, under the Supreme Court's prescribed analysis in *Redington* and *Transamerica* a court should not infer a private cause of action under section 13(d) for a stock issuer.[174] The denial of an inferred private cause of action for stock issuers under section 13(d), however, could frustrate the enforcement of the section and hence the section's underlying purpose.[175] This potential frustration of the purpose underlying section 13(d) led the courts in *Dan River* and *Kirsch* to infer a private cause of action under section 13(d) for stock issuers seeking injunctive relief. Both courts concluded that an inferred private cause of action for a stock issuer under section 13(d) was necessary to properly enforce the section.[176]

An examination of the current enforcement of section 13(d) supports the *Dan River* and *Kirsch* conclusions. The '34 Act authorizes purchasers and sellers of securities who detrimentally rely on false or misleading statements contained in a Schedule 13D, to seek relief under section 18(a).[177] However, the denial of a private cause of action under section 13(d) would result in an anomoly in the private enforcement of the section, because there is no comparable relief for private parties in the case of total failure to file a Schedule 13D.[178] The numerous filings required under the securities laws overburden the SEC and, therefore, the agency cannot adequately police Schedule 13D filings.[179] Stock issuers

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[174] *See* Sta-Rite Indus., Inc. v. Nortek, Inc., 494 F. Supp. 358, 360-63 (E.D. Wis. 1980); Gateway Indus., Inc., 495 F. Supp. 92, 97-99 (N.D. Ill. 1980); text accompanying notes 91-117 & 131-37 *supra*.

[175] *See* text accompanying notes 17-18 *infra*.

[176] *See* Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1222-24 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3488 (1981); Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488, 491-92 (W.D. Mich. 1980); text accompanying notes 90, 149 *supra*. *See also* Saunders Leasing System, Inc. v. Societe Holding Gray D'Albion S.A., [Current] FED. SEC. L. REP. (CCH) ¶ 97,881, 90,452 (N.D. Ala. Jan. 30, 1981); text accompanying notes 20-22 *supra*.

[177] *See* 15 U.S.C. § 78r(a) (1976); text accompanying notes 49 & 112 *supra*.

[178] *See Private Rights*, *supra* note 18, at 592-93. Section 18(a) relief is limited to purchasers and sellers of securities and consequently a stock issuer, or a shareholder who did not buy or sell securities in reliance on misstatements contained in a Schedule 13D, cannot bring an action under § 18(a). *See* 15 U.S.C. § 78r(a) (1979); text accompanying note 177 *supra*. Moreover, courts have interpreted § 18(a) as only providing an action for damages, and therefore, § 18(a) does not give rise to a cause of action for injunctive relief. *See* Sta-Rite Indus., Inc. v. Nortek, Inc., 494 F. Supp. 359, 362 n.1 (E.D. Wis. 1980); Gateway Indus., Inc. v. Agency Rent-a-Car, 495 F. Supp. 92, 100 n.13 (N.D. Ill. 1980).

[179] *See* GAF Corp. v. Milstein, 453 F.2d 709, 721 (1971), *cert. denied*, 406 U.S. 910 (1972); *Private Rights*, *supra* note 20, at 593-95. Under the '34 Act, each corporation must file a large and growing number of forms. For example, in 1969 251 Schedule 13D's were filed with the SEC, in addition to 70 Schedule 14D filings. In 1976 these figures had risen to 1,077 and 107 respectively. Amicus Curiae Brief for Securities and Exchange Commission at 96 n.260, Piper v. Chris-Craft Indus., 430 U.S. 1 (1977). In *Piper*, the SEC acknowledged that because of the complexities and speed of tender offers, government agencies, including the SEC, cannot discover and react to tender offers prior to completion. *Id.* at 97-98. Addition-

are a more appropriate party for enforcement of section 13(d) requirements than either the SEC or shareholders. The SEC is less familiar with day-to-day facts surrounding the filing of a Schedule 13D than a stock issuer.[180] Similarly, stockholders generally have less knowledge of the background in a Schedule 13D than stock issuers.[181] Section 13(d) requires a stockholder to send a copy of the Schedule 13D to the issuer,[182] who is likely to scrutinize the schedule because it indicates at least a five percent shift in corporate control.[183] The stock issuer, therefore, is more aware of the circumstances and has a definite interest in assuring that a particular Schedule 13D is complete and truthful.[184]

Although an inferred private cause of action by a stock issuer for injunctive relief is necessary to properly enforce section 13(d),[185] the Supreme Court's restrictive view toward the inference of such actions represents the court's judgment that Congress is the appropriate forum for creating private actions.[186] Because of the need for private enforcement of section 13(d), Congress is presently considering legislation which would amend the '34 Act to provide for an expressed private cause of action by stock issuers for violations of section 13(d).[187] The SEC fully supports this legislation and indeed drafted the original proposal.[188]

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ally the SEC has submitted legislation to Congress which would amend the '34 Act to provide expressly for private enforcement by stock issuers. *See* text accompanying notes 187-88 *infra*; *see also* J.I. Case & Co. v. Borak, 377 U.S. 426, 432 (1964).

[180] *See* GAF Corp. v. Milstein, 453 F.2d 709, 721 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

[181] *See id.*

[182] *See* 15 U.S.C. § 78n(d)(1) (1976 & Supp. III 1979); text accompanying notes 10-14 *supra*.

[183] *See* GAF Corp. v. Milstein, 453 F.2d 709, 721 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

[184] *See id.*

[185] *See* text accompanying notes 177-84 *supra*.

[186] *See* text accompanying notes 168-73 *supra*.

[187] *See* S.3188, *supra* note 130, at S.14,061-62, S.14,065. The proposed amendments to the Williams Act will modify § 13(d), but the basic application and requirements will not change. *See id.* at S.14,059-14,060; Fogelson, *supra* note 11, at 422-26. Proposed § 14(i)(1) provides for an express private cause of action in favor of a stock issuer, as well as a tendering or non-tendering shareholder, and a bidder or competing bidder in a tender offer, for violations of the proposed §§ 13(d), (e), or §§ 14(d), (e), (f), (g) or (h). *See* S. 3188, *supra* note 130, at S.14,061-S.14,062. The section-by-section analysis accompanying the proposed amendments states that stock issuers are secondary beneficiaries of the Williams Act and therefore Congress enacted the Act not only for the benefit of investors, but also for the protection of stock issuers. *See id.* at S. 14,065. Furthermore, stock issuers and tender offerors are often in a better position than the SEC to enforce the '34 Act's provisions. *See id.* The section-by-section analysis concluded, therefore, that a private cause of action by stock issuers will aid in carrying out the congressional policies underlying the Williams Act. *Id.* The section-by-section analysis also stated that Congress intended private causes of action under the Williams Act as originally adopted. *Id.* Therefore, the analysis concluded that the Supreme Court misinterpreted congressional intent in Piper v. Chris-Craft Indus., 430 U.S. 1 (1977), when the Court denied an inferred cause of action under § 14(e). S.3188, at S.14,065.

[188] *See* S.3188, *supra* note 130, at S.14,061-62.

However, until Congress adopts the proposed amendments to the '34 Act, the courts should not infer a private cause of action under section 13(d). The denial of such an action in *Gateway* and *Sta-Rite* gives effect to the Supreme Court's restrictive view towards the inference of private causes of action under federal statutes.[189] Because *Gateway* and *Sta-Rite* probably represent the trend of future court decisions,[190] a stock issuer has little chance of maintaining an action under section 13(d) in the federal courts.[191]

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[189] *See* Sta-Rite Indus., Inc. v. Nortek, Inc., 494 F. Supp. 358, 360-63 (E.D. Wis. 1980); Gateway Indus., Inc., 495 F. Supp. 92, 97-99 (D.N. Ill. 1980); text accompanying notes 93-119 & 133-39 *supra.*

[190] *But see* Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1222-24 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3488 (1981); Saunders Leasing System, Inc. v. Societe Gray D'Albion S.A. [Current] FED. SEC. L. REP. (CCH) ¶ 97,881, 90,451-52 (N.D. Ala. Jan. 30, 1981); Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488, 490-92 (W.D. Mich. 1980); text accompanying notes 78-86 & 140-49 *supra. See also* California v. Sierra Club, 49 U.S.L.W. 4441 (April 28, 1981) (no inferred private cause of action under Rivers and Harbors Appropriation Act of 1899); note 191 *infra.*

[191] Even after the *Gateway* and *Sta-Rite* decisions, courts have continued to infer a private cause of action under § 13(d) because of the decisions prior to *Gateway*, such as *Milstein* and *Dan River. See, e.g.*, Saunders Leasing System, Inc. v. Societe Holding Gray D'Albion S.A., [Current] FED. SEC. L. REP. (CCH) ¶ 97,881, 90,451-52 (N.D. Ala. Jan. 30, 1981); Kirsch Co. v. Bliss & Laughlin Indus., Inc., 495 F. Supp. 488, 490-92 (W.D. Mich. 1980); text accompanying notes 140-49 *supra. Saunders* and *Kirsch*, as well as *Dan River*, illustrate that courts are reluctant to deny an inferred private cause of action for stock issuers under § 13(d) because courts have allowed such an action almost since Congress adopted the Williams Act. *See* text accompanying notes 15, 20-22 *supra. See also* Rich v. NYSE, [1981] 595 SEC. REG. & L. REP. A-13 (S.D.N.Y. Feb. 3, 1981) (inferred private cause of action under § 6(b) of '34 Act because of 40 year precedent). The Supreme Court has inferred a private cause of action because of a 25 year precedent in the lower courts. *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) (inferring private cause of action under SEC Rule 10b-5). *See also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975). Additionally, although the Supreme Court did not directly address the issue, the Court recognized that the plaintiff in Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) was asserting an inferred private cause of action under § 13(d). *Id.* at 62; *see* note 19 *supra.*