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Recent Developments in Commodities Law

RECENT DEVELOPMENTS IN COMMODITIES LAW

A. *What is a Commodity?*

Prior to the passage of the Commodity Futures Trading Commission Act of 1974[1] ('74 Act), Congress only regulated commodity futures trading in certain domestic agricultural products.[2] By 1974, many persons were trading in futures based on commodities other than the traditional farming commodities.[3] Persons trading in unregulated commodity futures should receive the same congressional protection afforded persons trading in futures contracts based on one of the enumerated agricultural products.[4] Recognition of the growing number of commodities market users,[5] the dependence of commodity marketing on commodity futures trading,[6]

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[1] PUB. L. No. 93-463, 88 Stat. 1389 (codified at 7 U.S.C. §§ 1-23 (1976)).

[2] *See* 7 U.S.C.A. § 2 (West 1964). The regulated commodities under the Commodity Exchange Act, 7 U.S.C.A. §§ 1-17a (West 1964) included agricultural products like corn, cotton, eggs, grain, oats, and wool. *Id. See* S. REP. No. 1131, 93rd Cong., 2d Sess. 94, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5890 [hereinafter cited as 1974 Senate Report]; note 22 *infra. See generally* S. REP. No. 1194, 93d Cong., 2d Sess. 138-45 (1974) (summary of Commodity Exchange Act prior to '74 Act).

[3] 1974 Senate Report, *supra* note 2, at 18, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 5859. *See* note 5 *infra.*

[4] Letter from Acting Secretary of Dept. of Agriculture to Senator Herman E. Talmadge (May 15, 1974), *reprinted in* 1974 Senate Report, *supra* note 2, at 46-49, [1974] U.S. CODE CONG. & AD. NEWS at 5884-87.

[5] By 1974, merchandisers, processors and producers were turning to the futures markets to minimize potential risks due to adverse changes in price. 1974 Senate Report, *supra* note 2, at 18, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 5859. The unregulated commodities being traded included cocoa, coffee, copper, various foreign currencies, iced broilers, lumber, mercury, palladium, platinum, plywood, propane gas, silver, sugar and silver coins. *See* 1974 Senate Report, *supra* note 2, at 94, [1974] U.S. CODE CONG. & AD. NEWS at 5890.

[6] The advantages of trading in commodity futures include marketing efficiency, attraction of risk capital, public price determinations, lower costs of commodities to the consumer, and the capability to hedge against price fluctuations. H.R. REP. No. 975, 93d Cong., 2d Sess. 132 (1974) [hereinafter cited as 1974 House Report]. Futures markets reallocate marketplace risks for physical commodities from those who deal in the physical commodities to speculators who are more tolerant of price risks. *See* Dept. of Treasury and Federal Reserve Bd. Study of Treasury Futures Markets, *reprinted in* CCH [1977-1980 Transfer Binder] COMM. FUT. L. REP. ¶ 20,823 (May 14, 1979); note 7 *infra.* Hedging is one of basic economic functions of a commodity futures market. Hedging occurs when a businessman, such as a farmer, counterbalances his position in the physical or cash market with a purchase in the futures market. *See* 1974 House Report, *supra* at 129, 133. The speculator absorbs the substantial risk that the hedger avoids by entering the commodity futures market. Hedging reduces prices by reducing businessmen's risks. *See* Comment, *Reflections of 10b-5 in the "Pool" of Commodity Futures Antifraud,* 14 HOUS. L. REV. 899, 902 (1977) [hereinafter cited as *Commodity Futures Antifraud*]. *See generally* Power, THE ECONOMIC FUNCTION OF FUTURES AND OPTIONS MARKETS AND THE NEW FINANCIAL INSTRUMENT CONTRACTS IN COMMODITIES AND FUTURES TRADING 1977 11-17 (M. Frankhauser ed. 1977).

and the increased potential for abuse[7] led to the enactment of the '74 Act.[8]

The '74 Act broadly expanded the scope of commodity futures regulation. The '74 Act defined "commodity" to include the previously regulated agricultural commodities,[9] all other goods and articles, and all futures contracts[10] dealing with services, rights, and interests.[11] Congress granted the Commodity Futures Trading Commission (Commission) exclusive jurisdiction over accounts, agreements options,[12] and transactions

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[7] *See* text accompanying notes 44-46 *infra*. By 1974, speculators were trading in commodity futures in growing numbers. 1974 Senate Report, *supra* note 2, at 18, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 5859. Large swings in the price of commodities attract speculators because of the possibility of large profits, however, between 50 and 75% of the transactions result in a loss of the investment. PRACTICING LAW INSTITUTE, SEVENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 339 (1976).

[8] *See* 1974 Senate Report, *supra* note 2, [1974] U.S. CODE CONG. & AD. NEWS at 5859. Partly because of the '74 Act, the number of futures contracts in commodities not regulated by the Commodity Exchange Act grew rapidly. S. REP. No. 850, 95th Cong., 2d Sess. 13, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2101 [hereinafter cited as 1978 Senate Report]. The most active futures contracts in 1978 were based on financial instruments such as short-term commercial paper, Treasury bonds, and Treasury bills. *Id.*

[9] *See* note 2 *supra*.

[10] Futures contracts are agreements to deliver or receive a specified quantity and quality of a commodity at a certain price, with delivery at the seller's option sometime during a specified future delivery month. 1974 House Report, *supra* note 6, at 129 (Appendix I); *see* Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706 (E.D. La. 1978). Futures contracts are standardized contracts of adhesion, with a clearinghouse party to the contract as either buyer or seller. *See* Guttman, *The Futures Trading Act of 1978: The Reaffirmation of CFTC-SEC Coordinated Jurisdiction Over Security/Commodities*, 28 AM. U. L. REV. 1, 16 (1978) [hereinafter cited as Guttman]; Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. CORP. L. 217, 242 (1976) [hereinafter cited as Bromberg]. Only the price varies as a result of changing market conditions. A speculator or hedger usually satisfies a futures contract by taking an opposite and offsetting transaction in the same future prior to the trading month. *See* Cargill, Inc. v. Hardin, 452 F.2d 1154, 1156 (8th Cir. 1971). Alternatively, he may take delivery under the terms of the contract. *Id.* Futures contracts are not technically sold or traded. Rather, they are formed and discharged on designated contract markets. *See* Clark, *Genealogy and Genetics of a "Contract of Sale of a Commodity For Future Delivery" in the Commodity Exchange Act*, 27 EMORY L. REV. 1175, 1175-77 (1978) [hereinafter cited as Clark]; 1974 House Report, *supra* note 6, at 129.

[11] 7 U.S.C.A. § 2 (West Supp. 1979).

[12] A commodity option confers upon the holder the right, but not the obligation, to buy or sell a commodity or future contract. *See* text accompanying notes 57-62 *infra*. Section 4c(a) of the '74 Act prohibits option transactions with respect to the specifically designated commodities in 7 U.S.C.A. § 2 (West Supp. 1979). *See* 7 U.S.C. § 6c(a) (1976). Section 4c(b) prohibits transactions in options of commodities not enumerated in 7 U.S.C.A. § 2 if the Commission prohibits such transactions. *See* CFTC v. American Bd. of Trade, Inc., 473 F. Supp. 1177, 1179 (S.D.N.Y. 1979). The Commission, pursuant to its regulatory authority promulgated Rule 32.11, which generally suspended trading in any commodity option. *See* 17 C.F.R. § 32.11 (1979). A district court upheld Rule 32.11 in Rosenthal v. Bagley, 450 F. Supp. 1120, 1123 (N.D. Ill. 1978). Subsequently, in the Futures Trading Act of 1978, Congress confirmed Rule 32.11. *See* 7 U.S.C.A. § 6c(c) (West Supp. 1979).

involving futures contracts.[13] The '74 Act does not regulate the sale of any cash commodity for deferred delivery[14] or transactions in foreign currencies[15] not involving the sale of a commodity for future delivery.[16] The Commission and the courts recently interpreted the scope of the '74 Act

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[13] 7 U.S.C.A. § 2 (West Supp. 1979). The Commission's exclusive jurisdiction extends only to transactions involving futures contracts traded or executed on a designated contract market, or other board of trade, exchange, or market. *See* 7 U.S.C.A. § 2 (West Supp. 1979). A "board of trade" includes any exchange or association of persons engaged in the business of buying or selling any commodity or receiving any commodity for sale on consignment. *Id.; see* CFTC v. Savage, 611 F.2d 270, 274 (9th Cir. 1979).

The congressional grant of exclusive jurisdiction to the Commission over accounts involving futures contracts presented a conflict with the SEC over discretionary accounts involving commodity futures. A discretionary account involves a variety of situations in which the broker has discretion to trade for the customer's account. Milnarik v. M-S Commodities, Inc., 457 F.2d 274, 275, 279 (7th Cir.), *cert. denied*, 409 U.S. 867 (1972); *see, e.g.*, Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 100 (7th Cir. 1977) (discretionary account is an agency-for-hire); *cf.* Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706 at 22,871-72 (E.D. La. 1978) (commodity pool involves common fund traded by an account executive). Several courts have held that a discretionary account in commodity futures is also a security. SEC v. Continental Commodities Corp., 497 F.2d 516, 522 (5th Cir. 1974); *accord*, Marshall v. Lamson Bros. & Co., 368 F. Supp. 486, 488 (S.D. Iowa 1974); Berman v. Orimex Trading, Inc., 291 F. Supp. 701, 702 (S.D.N.Y. 1968). *See also* Moody v. Bache & Co., Inc., 570 F.2d 523 (5th Cir. 1978); SEC v. G. Weeks Securities, Inc., No. 79-2711 (W.D. Tenn. 1980). *Contra*, Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 101 (7th Cir. 1977); Milnarik v. M-S Commodities, Inc., 457 F.2d 274, 275, 279 (7th Cir. 1972), Berman v. Bache, Halsey, Stuart, Shields, 467 F. Supp. 311, 317 (S.D. Ohio 1979); Hofmayer v. Dean Witter & Co., 459 F. Supp. 733, 736 (N.D. Cal. 1978); Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706 at 22,874-75 (E.D. La. 1978); E.F. Hutton & Co., Inc. v. Schank, 456 F. Supp. 507, 512-14 (D. Utah 1976). Although one court reasoned that the Commission's exclusive jurisdiction precludes application of securities laws to discretionary commodity trading accounts, Hofmayer v. Dean Witter & Co., 459 F. Supp. 733, 736 (N.D. Cal. 1978), the '74 Act provides that the Commission jurisdiction shall not limit or supercede the SEC's jurisdiction. 7 U.S.C.A. § 2 (West Supp. 1979). *See* Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 VAND. L. REV. 1 (1976). The Commission should have jurisdiction over discretionary accounts where the broker trades exclusively in commodity futures or commodity options. *See* Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. CCH ¶ 20,706 at 22,873 (E.D. La. 1978) (purpose of Commission's exclusive jurisdiction to avoid regulatory conflict between Commission and SEC). Further, regulation of futures trading differs from regulation of securities trading because of the differences between a commodity future and a security. *See* Guttman, *supra* note 10, at 13 n.75. A commodities futures contract or an option involving commodities terminates at a time certain. *Id.* By contrast, a security is a certificate of tangible ownership which is permanent in nature. *Id. But see* Long, *Commodity Options—Revisited*, 25 DRAKE L. REV. 75, 130 (1975) [hereinafter cited as Long].

[14] A cash forward contract or a contract for deferred delivery is a fully negotiated commodity sales contract that provides for delivery of specific merchandise at a fixed price on a specified subsequent date. *See* Clark, *supra* note 10, at 1179-98 (1978); *see e.g.*, Cargill, Inc. v. Hardin, 452 F.2d 1154, 1156 (8th Cir. 1971).

[15] A transaction in foreign currency may involve exchange of cash for foreign currency, or a contract for sale of the foreign currency for future delivery. CFTC v. American Board of Trade, Inc., 473 F. Supp. 1177, 1182 (S.D.N.Y. 1979); *see* note 86 *infra*.

[16] 7 U.S.C.A. § 2 (West Supp. 1979).

by applying the statutory definition of "commodity" to cash commodities for deferred delivery,[17] to contracts for deferred delivery which had the characteristics of options[18] and to transactions in options involving foreign currency.[19]

In *In re Stovall*,[20] the Commission distinguished a regulated futures contract from a sale of a cash commodity for deferred delivery,[21] which the '74 Act excludes from regulation.[22] Stovall issued standardized contracts in commodities for future delivery to investors.[23] The Commission staff charged that Stovall violated the '74 Act by not registering as a futures commission merchant.[24] Stovall argued that he sold cash commodities for deferred delivery. The Commission rejected Stovall's argument and held that Stovall's transactions substantively were contracts for the sale of commodities for future delivery regulated by the '74 Act.[25] The Commission reasoned that Stovall directed his operation to the general public and wrote standardized contracts[26] which resembled futures contracts.[27] Further, only one party actually took delivery of the physical

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[17] *See* text accompanying notes 20-28 *infra*.

[18] *See* text accompanying notes 48-62 *infra*.

[19] *See* text accompanying notes 71-88 *infra*.

[20] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,941 (CFTC Dec. 6, 1979).

[21] *See* note 14 *supra*.

[22] *See* note 10 *supra*. Physical commodities are not commodities within the Commission's jurisdiction. Additionally, commodities are not securities within the SEC's jurisdiction. *See* Bromberg, *supra* note 10, at 221. Tangible commodities like corn, copper and cattle have inherent value, while securities are intangible and derive their value from the success of the issuer. *Id.* at 222; *see* Ga. Sec. Comm'r, Release No. 4, BLUE SKY L. REP. (CCH) ¶ 14,612 at 10,504 (items traded as commodities are tangible items, not securities). Moreover, a futures contract involving commodities is not itself a security. Moody v. Bache & Co., 570 F.2d 523, 525 (8th Cir. 1978); Berman v. Bache, Halsey, Stuart, Shields, 467 F. Supp. 311, 316 (S.D. Ohio 1979) (commodity futures contract little more than wager that market price will change by a specified date); Berman v. Dean Witter & Co., 353 F. Supp. 669, 670-71 (C.D. Cal. 1973); Stuckey v. duPont Glore Forgan, Inc., 59 F.R.D. 129, 131 (N.D. Cal. 1973); Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 253 F. Supp. 359, 366 (S.D.N.Y. 1966); Bromberg, *supra* note 10, at 222. *But see* Berman v. Dean Witter & Co., 44 Cal. App. 3d 999, 119 Cal. Rptr. 130, 134 (Ct. App. 1975) (interpreting California and New York law). An investment in a commodities future contract does not fall within the definition of a security because the contract does not represent an investment in a common enterprise. *See* Moody v. Bache & Co., 570 F.2d 523, 525-26 (5th Cir. 1978). An investor in commodity futures expects profits solely from the speculation that the market price will change. *See* note 6 *supra*. *See generally 1978-1979 Securities Law Developments: What Is A Security?*, 36 WASH. & LEE L. REV. 846, 847, 848 (1979).

[23] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,778. Stovall consistently promoted his operation as a means of speculating on changes in the price of cash commodities. *Id.*

[24] *Id.* at 23,776. The Commission charged Stovall with violating 7 U.S.C.A. § 6d (West Supp. 1979) (any contract of sale of commodity must be made through designated contract market).

[25] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,777.

[26] *See* note 10 *supra*.

[27] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,778-79.

commodity under the contract.[28]

The Commission balanced private buyers' and sellers' need to contract in commodities free from federal regulation with the need of the general public to be protected from potential abuses by those who publicly sell standardized contracts. The parties to a negotiated contract for the sale of a commodity for deferred delivery generally expect that the contract will lead to an exchange of the commodity for money.[29] The parties select each other and fully negotiate the contract terms.[30] By comparison, the futures contract is a standardized instrument that hedgers and investors buy from and sell to clearinghouses.[31] Rarely expecting delivery, the speculators and hedgers do not negotiate the terms of futures contracts.[32] Speculators and investors rely instead on persons, such as advisors and others associated with the clearinghouse,[33] over whom they have little control.[34]

Although nothing in the legislative history suggests that Congress intended that the Commission regulate actual sales of goods for future delivery,[35] Congress did intend to regulate transactions involving contracts like Stovall's.[36] The Commission formulated a reasonable test in *Stovall* to detemine whether transactions involving a contract for future delivery are within the Commission's jurisdiction.[37] The critical factor is the par-

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[28] *Id.* at 23,779.

[29] *Id.* at 23,778.

[30] *See* note 14 *supra.*

[31] *See* note 10 *supra.*

[32] *See* Guttman, *supra* note 10, at 17. Actual delivery of the underlying commodity involved in a futures contract takes place in only three percent of the contracts. *Id.* at 13.

[33] *Id.* A clearinghouse is always party to the standardized futures contract. *Id.* at 16.

[34] *See* 1974 Senate Report, *supra* note 2, at 18, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5859; note 131 *infra.*

[35] Congress enacted the '74 Act to regulate futures markets, not private contracts between buyers and sellers. *See* 1974 Senate Report, *supra* note 2, at 18, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5858. The Uniform Commercial Code (UCC) governs sales of commodities for deferred delivery where the parties reasonably expect that one party will deliver the commodity to the other. *See* U.C.C. § 2-105(2) (present sale of future goods operates as contract to sell); U.C.C. § 2-106(1); R.N. Kelly Cotton Merchant, Inc. v. York, 494 F.2d 41, 42 (5th Cir. 1974) (dictum); Taunton v. Allenberg Cotton Co., 378 F. Supp. 34 (M.D. Ga. 1973) (contract to sell cotton not yet planted enforceable under UCC). A buyer or seller who breaches a standardized futures contract with a clearinghouse might argue that his obligation is not enforceable under the UCC, since the parties never intended to deal in the physical commodity. *Cf.* U.C.C. §§ 2-204, 1-201(3), 2-106(1), 2-501. The parties did agree, however, on all the terms to enforce the contract against each other. *See* U.C.C. § 2-204; note 6 *supra.* If one party demands delivery and the other refuses, the former party may sue for damages under UCC § 2-711 (buyer's remedies); *cf.* U.C.C. § 2-703 (seller's remedies).

[36] *See* 1974 Senate Report, *supra* note 2, at 18-20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 5858-59; note 6 *supra.*

[37] [1977-1980 Transfer Binder] COMM. FUT. L. REP. at 23,778. The Commission recognized that delivery may be deferred for purposes of convenience or necessity as long as the underlying motivation for entering the contract is to acquire or dispose of the commodity. *Id.*

ties' general expectation of delivery of the underlying commodity.[38] The Commission may determine the parties' expectations by inquiring whether the contract is issued to the general public with standardized terms, and whether the parties have the ability to deliver or take delivery.[39] Thus, where the circumstances surrounding a customer's transactions with a merchant indicate that the parties will not deal in the underlying commodity, the Commission's exercise of jurisdiction over the transactions is proper.

Refusing to be bound by the label Stovall placed on the contracts, the Commission looked instead to the substance of Stovall's transactions.[40] In several recent cases dealing with commodity options, the Commission also has emphasized substance over form by arguing that the defendants' transactions were prohibited commodity options in substance even though the defendants labeled them as deferred delivery contracts.[41] Congress granted the Commission exclusive jurisdiction over agreements having the character of an option.[42] In the Futures Trading Act of 1978 ('78 Act), Congress prohibited transactions in commodity options[43] because options are particularly subject to abuse.[44] Limited risk options are deceptively attractive to unsophisticated investors.[45] In addition, the firms offering options often employ boilerroom sales practices.[46] Moreover, un-

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[38] *Id.* at 23,778-79.

[39] *Id. See generally* 1974 House Report, *supra* note 6, at 129.

[40] *See* text accompanying notes 25-28 *supra.*

[41] *See, e.g.,* CFTC v. United States Metals Depository Co., 468 F. Supp. 1149, 1151-52 (S.D.N.Y. 1979); CFTC v. Morgan, Harris & Scott, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,901 (S.D.N.Y. 1979).

[42] 7 U.S.C.A. § 2 (West Supp. 1979).

[43] *See* 7 U.S.C.A. § 6c(c) & (d) (West Supp. 1979). 7 U.S.C.A. § 6c(c) provides that no person may enter into any commodity option transaction involving any commodity which the Act regulates unless the commodity was regulated prior to the '74 Act, *see* note 2 *supra,* or the Act or Commission provides an exemption. *See* 7 U.S.C.A. § 6c(d); 17 C.F.R. § 32.12 (1979); [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,588 at 22,434 (Apr. 17, 1978) (Commission investigation of fraud in commodities industry). In the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865, Congress amended the Commodities Exchange Act by codifying Commission's Rule 32.11, 17 C.F.R. 32.11 (1979). 7 U.S.C.A. § 6(c) (West Supp. 1979). Section 6c(c) codified Rule 32.11 which made it unlawful after June 1, 1978 for any person to solicit or accept orders, money, or securities in connection with the purchase or sale of any commodity option. *See* 17 C.F.R. § 32.11 (1979). *See generally* CFTC v. Morgan, Harris & Scott, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,901 (S.D.N.Y. 1979); note 12 *supra.* The Commission permits certain businesses to continue to purchase options for use in connection with their business under the trade option exemption. *See* 17 C.F.R. § 32.4 (1979).

[44] *See* CFTC v. United States Metals Depository Co., 468 F. Supp. at 1155. *See also* CFTC v. Morgan, Harris & Scott, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,901 at 23,659-61 (S.D.N.Y. 1979); CFTC v. American Bd. of Trade, 473 F. Supp. 1177, 1184 (S.D.N.Y. 1979).

[45] 468 F. Supp. at 1155; *see* Kelley v. Carr, 442 F. Supp. 346, 349 (W.D. Mich. 1977) (ease of market entry for investors has attracted fly-by-night organizations).

[46] 43 Fed. Reg. 16,153, *reprinted in* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,588 (Apr. 17, 1978) (Commission investigation of fraud in the industry). Issuers

like the market for commodity futures, trading in commodity options serves no significant economic or commercial purpose.[47]

In *CFTC v. United States Metals Depository Corp.*,[48] Metals Depository Corporation (MDC) sold to the general public what MDC labeled as contracts for deferred delivery of gold and silver.[49] Purchasers paid MDC a fee for the right to buy certain amount of bullion for subsequent delivery.[50] MDC placed orders with an overseas bank to cover each sale.[51] The Commission complained that MDC had entered into contracts having the character of prohibited option transactions.[52] The *MDC* court held that MDC's deferred delivery contracts were sales of options and that MDC violated the '78 Act by selling the options.[53] The district court noted that Congress granted the Commission exclusive jurisdiction over agreements, including any transaction having the character of an option.[54] The *MDC* court differentiated options from deferred delivery and futures contracts.[55] Deferred delivery and futures contracts are transferable contractual agreements to buy or sell a fixed amount and grade of a certain commodity on a specified date.[56] By comparison, a commodity option confers upon the holder the right to buy or sell either a specified amount of a commodity or a futures contract within a certain period of time at a given price.[57] The court enumerated three functional distinctions between options and futures contracts.[58] Sellers of options charge an initial

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of options bombarded the public with phone solicitations and promotional material. S. REP. No. 850, 95th Cong., 2d Sess. 14, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2100; *see, e.g.*, note 63 *infra* (boilerroom operation).

[47] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,588 at 22,434; *cf.* note 6 *supra* (economic benefits of futures exchanges).

[48] 468 F. Supp. 1149 (S.D.N.Y. 1979).

[49] 468 F. Supp. at 1151-52.

[50] *Id.* at 1154.

[51] *Id.*

[52] *Id.* at 1152.

[53] *Id.* at 1153-54. Since the transactions in *MDC* had the character of options, MDC violated the Futures Trading Act by not filing for an exemption or registering under the Futures Trading Act. *Id.* at 1154; *see* note 43 *supra*.

[54] 7 U.S.C.A. § 2 (West Supp. 1979). The Commission's jurisdiction includes jurisdiction over transactions having the character of an "option," "privilege," "indemnity," "bid," "put," "call," "advance guaranty" or "decline guarantee." *Id.; see* CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911, 914 (S.D.N.Y. 1977).

[55] 468 F. Supp. at 1155. The contracts which defendant MDC described as deferred delivery contracts were considered by the *MDC* court to be futures contracts. *But see* text accompanying notes 20-39 *supra* (differences between deferred delivery contracts and futures contracts).

[56] *Id.; see* notes 10, 14 & 43 *supra*.

[57] 468 F. Supp. at 1155. *Accord,* CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911, 913-14 (S.D.N.Y. 1977); *see* British American Commodity Options Corp. v. Bagley, 552 F.2d 482, 484-85 (2d Cir.), *cert. denied,* 438 U.S. 938 (1977); Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706, at 22,870 n.3 (E.D. La. 1978). *See generally* Bromberg, *supra* note 10, at 256-59; Long, *supra* note 13.

[58] 468 F. Supp. at 1155.

nonrefundable premium to cover the sellers' commissions and costs,[59] whereas purchasers of futures contracts pay a "down payment" which the issuer applies against the ultimate sales price.[60] An option holder is not obligated to take possession of the commodity, while a holder of a futures contract is so obligated.[61] Purchasers of an option contract make a profit only when the price of the commodity increases beyond the initial premium paid to the seller, while purchasers of futures contracts make a profit when the sales price of the right to future delivery exceeds the purhcase price.[62]

The *MDC* court held that the investments sold by MDC were commodity options since the investments met all three option characteristics.[63] The *MDC* court considered the substance of a transaction over form.[64] The congressional grant of exclusive jurisdiction over agreements

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[59] The seller's initial charge for purchasing an option is often called a "contango fee." *Id.* The contango fee does not give the purchaser any equity in the underlying commodity. CFTC v. Goldex Int'l Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,839 (N.D. Ill. 1979).

[60] 468 F. Supp. at 1155.

[61] *Id.*

[62] 468 F. Supp. at 1155.

[63] *Id.* The *MDC* court held that the illegal sales of options in violation of Rule 32.11 would justify enjoining MDC from further sales. *Id.* However, the court also evaluated MDC's activities under the antifraud provisions of the Commodity Exchange Act. MDC trained its salesmen to use high-pressure sales techniques. The salesmen made an estimated 16,000 telephone calls a week to investors with whom the salesmen had no previous contacts. The salesmen frequently followed-up the phone calls by sending misleading pamphlets which understated the risks of investing in the gold market. The court permanently enjoined the defendant's boilerroom operation. 468 F. Supp. at 1157-63; *see* 7 U.S.C.A. § 13a-1 (West Supp. 1979); 17 C.F.R. 32.9 (1979). *See also* CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911, 918 (S.D.N.Y. 1977); Kelley v. Carr, 442 F. Supp. 346 (W.D. Mich. 1977). The *MDC* court ordered MDC to disgorge its illegal profits. 468 F. Supp. at 1163.

[64] 468 F. Supp. at 1154. *Accord,* CFTC v. Morgan, Harris & Scott, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,901 (S.D.N.Y. 1979). The *Morgan, Harris* court relied on the three-prong test of *MDC* to distinguish between options and futures contracts. The defendants in *Morgan, Harris* sold contracts for deferred delivery of commodities, including gold, silver, platinum, copper and various foreign currencies. *Id.* at 23,657. Purchasers of the contracts paid a transaction fee to gain "control" of a specified commodity for a specified term. The defendant sellers did not inform the customers that the fee was a nonrefundable premium providing no equity in the contract. The purchaser could take delivery of the commodity by rendering the full purchase price of the contract, in addition to the previously paid transaction fee. A purchaser could also liquidate or abandon his contract. The purchaser forfeited the entire transaction fee when he abandoned the contract. Although the verifications the defendant sellers issued to the purchasers contained a cancellation clause, the purchaser could not enforce the clause since it contained a one-day limitation. The purchasers' only risk was the fee paid. *Id.* at 23,657-60. The district court disregarded the self-serving nomenclature that the defendants placed on the contracts and held that the contracts were commodity options. *Id.* at 23,660 (citing CFTC v. United States Metals Depository Corp., 468 F. Supp. 1149 (S.D.N.Y. 1979)). *See also* CFTC v. Goldex Int'l Ltd., [1979-1980 Transfer Binder] COMM. FUT. L. REP. (CCH)¶ 20,839 (N.D. Ill. 1979); note 65 *supra.*

having the character of, or known in the trade[65] as, an option, and the general ban on option trading suggest that the courts and the Commission should interpret the definition of options broadly.[66] Sellers of options often deceive unsophisticated investors[67] through the use of boilerroom sales techniques[68] and the failure to disclose that the initial fee is nonrefundable.[69] The functional test that the *MDC* court applied to MDC's transactions[70] should aid the Commission's crusade to enforce the intent of Congress to deter widespread abuses in the sale of commodity options to the public.

The prohibition on trading in options was again at issue in *CFTC v. American Board of Trade, Inc.*[71] In *American Board of Trade,* the defendants dealt in silver bulion, silver coin, gold bullion and various foreign currency options.[72] The defendants conceded that the transactions were in commodity options,[73] but one defendant argued that options based on spot and cash markets were beyond the scope of the '74 Act.[74] The court in *American Board of Trade* rejected the defendant's argument.[75] The court reasoned that the statutes proscribing option transactions are not confined to options involving commodity futures.[76] The statute proscribing option trading prohibits "any commodity option transaction involving

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[65] In CFTC v. Goldex Int'l Ltd., the court noted that the '74 Act incorporates the trade knowledge and definition of a commodity option. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH)¶ 20,839 (N.D. Ill. 1979). Goldex sold contracts for "deferred delivery" of various commodities. *Id.* at 23,439. The Goldex contract conferred upon the purchaser the right, but not the obligation, to buy a specified quantity of gold, silver, or platinum bullion or coins, at a fixed price on or before a specified date. *Id.* at 23,440. The Goldex investor realized no profit unless the market value of the commodity exceeded the sum of the contract price and the contango fee (selling costs). *Id.* at 23,440-41; *see* note 59 *supra.* Based on expert testimony, the court held that the Goldex contracts met the trade definition of commodity option, regardless of the title Goldex placed on the contracts. *Id.* at 23,441.

[66] *See* note 43 *supra. See generally* Schneider & Santo, *Commodity Futures Trading Commission: A Review of the 1978 Legislation,* 34 BUS. LAW. 1755, 1766 (1979); *Commodity Futures Antifraud, supra* note 6, at 907 (1977).

[67] *See* text accompanying notes 43-47 *supra.*

[68] *See, e.g.,* note 63 *supra.*

[69] *See* note 59 *supra.*

[70] *See* text accompanying notes 58-62 *supra.*

[71] 473 F. Supp. 1177 (S.D.N.Y. 1979).

[72] *Id.* at 1180, 1181. The defendants in *American Board of Trade* included American Board of Trade, Inc. and affiliated corporations and officers. *Id.* at 1178. *See also* note 15 *supra.*

[73] *Id.* at 1181. The *American Board of Trade* defendants had neither registered with the Commission nor filed for an exemption as required when transacting in commodity options. *Id. See* notes 12 & 43 *supra.*

[74] *Id.* at 1181. Defendant Economou was president of American Board of Trade, Inc. *Id.* at 1177, 1178 n.6.

[75] *Id.* a 1182. Economou argued that interpreting the '74 Act to proscribe option transactions based on spot and cash markets would interfere with antitrust laws. *Id.* at 1182 n.14; *see* 7 U.S.C. § 19 (1976). *See also* Rosenthal v. Bagley, 450 F. Supp. 120, 1124-25 (N.D. Ill. 1978) (rejecting argument that Commission jurisdiction interferred with antitrust laws).

[76] 473 F. Supp. at 1182. *See generally* text accompanying notes 6-16 *supra.*

any commodity. . . ."[77] The court concluded that, despite the Commodity Futures Trading Commission's name, the '74 Act authorizes the Commission to regulate more than transactions in commodity futures.[78] The Commission may regulate transactions in any commodity option involving any commodity.

The defendants also asserted that the Commission did not have jurisdiction over option transactions pertaining to foreign currency.[79] The defendants based this argument on the statutory provision that nothing in the '74 Act applies to transactions in foreign currency.[80] The *American Board of Trade* court rejected the defendants' interpretation of the statutory limitation.[81] The court held that options involving the sale of foreign currency for future delivery are within the scope of the '74 Act.[82] The court distinguished between a contract for the underlying foreign currency and a transaction in options which only involves the foreign currency.[83] The *American Board of Trade* court reasoned that an option transaction involving a commodity is far removed from a transaction in that commodity. The parties to a transaction in foreign currency anticipate delivery of the foreign currency when one party pays the price.[84] By contrast, the court noted that the parties to an option involving foreign currency initially anticipate that the option purchaser will decide whether to exercise his right.[85] The option only involves the foreign currency.[86] The court further reasoned that the option purchaser might allow his option to expire by not acting when the specified date arrives.[87] Once the option purchaser decides to exercise his right, the option becomes a transaction in the foreign currency. The Commission has jurisdiction until the purchaser exercises his right.[88]

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[77] 7 U.S.C.A. § 6c(c) (West Supp. 1979). *See* note 12 *supra.*

[78] 473 F. Supp. at 1183.

[79] *Id.* at 1182.

[80] 7 U.S.C. § 2 (1976). Section 2 states that nothing in the Act governs transactions in foreign currency, security warrants or rights, resales of installment loan contracts, repurchase options, government securities, or mortgages, unless such transactions involve the sale of foreign currency for future delivery conducted on a board of trade. *Id.*

[81] 473 F. Supp. at 1183.

[82] *Id.*

[83] *Id.* at 1182-83.

[84] *Id.*

[85] *Id.*

[86] *Id.* The *American Board of Trade* court noted that the '74 Act does not exempt options involving foreign currency. *Id.* at 1183. Section 6c(b) specifically applies to transactions which involve any commodity regulated under the Act and which are of the character of an "option." 7 U.S.C. § 6c(b) (1976). *See also* 7 U.S.C. § 13(e) (1976). In passing the '74 Act, Congress noted that trading in foreign currency was supervised adequately by bank regulatory agencies. *See* 1974 Senate Report, *supra* note 2, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5863.

[87] 473 F. Supp. at 1183.

[88] 473 F. Supp. at 1182. The *American Board of Trade* court issued a preliminary injunction from further dealings in commodity options. *Id.* at 1184. The defendants argued that § 6c(d) violated their due process rights. *Id. cf.* 7 U.S.C.A. 6c(d) (West Supp. 1979)

The district court in *American Board of Trade* properly held that the Commission could regulate options involving commodities even though the commodity contracts were not for future delivery.[89] Under the *American Board of Trade* analysis, an option is comparable to a simple futures contract.[90] Purchasers dealing in either an option or a futures contract do not generally expect to deal in the underlying commodity.[91] The option or futures contract only involves the underlying commodity.[92] The difference between a futures contract and an option lies in the investor's obligation to take delivery.[93] An option does not obligate the holder to take delivery. A futures contract compels the investor to take delivery, unless he reversed his position by selling what he bought or buying what he sold.[94]

Although Congress broadly defined a commodity, Congress specifically exempted commodity transactions where the parties anticipate delivery of the physical commodity[95] at the time of contracting.[96] If a purchaser expects that payment of the purchase price will result in delivery of the foreign currency, then the transaction is in the foreign currency and is thus exempted from the Commission's regulation.[97] Similarly, if the parties expect delivery of the underlying commodity at the time they strike a contract, then the transaction is a sale of the physical commodity, not a

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(grantors with a net worth of $5,000,000 or more exempted); 17 C.F.R. § 32.12 (1979) (Commission lowered minimum net worth requirement to $1,000,000). The defendants contended that a requirement that grantors have a net worth of $5,000,000 is without rational basis. 473 F. Supp. at 1184. The court rejected this contention, holding that it was reasonable for Congress to find that persons with a net worth of $5,000,000 are less likely to be of questionable financial stability than persons with less net worth. *Id.*

[89] *See* 7 U.S.C.A. § 2 (West Supp. 1979); CFTC v. American Board of Trade, Inc., 473 F. Supp. at 1183 (American Board of Trade's options traded on various exchanges within Commission's jurisdiction which extends to contracts executed on any board of trade). The court in *American Board of Trade* stated that a purchase or sale of an option is not a transaction in the foreign currency but a transaction in options. 473 F. Supp. at 1183 n.17. *Accord,* CFTC v. Muller, 570 F.2d 1296 (5th Cir. 1978). In *Muller,* the Fifth Circuit held that options on futures contracts traded in London involve foreign commerce within the '74 Act. 570 F.2d at 1297. The *Muller* court noted that under § 2, "interstate commerce" includes commerce between foreign states. 570 F.2d at 1299 (citing 7 U.S.C.A. § 3). *See also In re* The Siegel Trading Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,862 (CFTC July 27, 1977) (futures contract in Mexican pesos concerns a market in interstate commerce for purposes of Commission jurisdiction).

[90] One court has stated that a commodity futures contract is an option. McCurnin v. Kohlmeyer & Co., 340 F. Supp. 1338, 1341 (E.D. La. 1972), *aff'd per curiam,* 477 F.2d 113 (5th Cir. 1973); *see* Moody v. Bache & Co., 570 F.2d 523, 526 (5th Cir. 1978).

[91] *See* notes 32 & 64 *supra.*

[92] The Commission clearly has jusrisdiction over the trading of commodity futures contracts involving commodities. *See* note 13 *supra. See also* 537 SEC. REG. & L. REP. E-3, E-5 (1980) (Commission's argument for jurisdiction over Value Line Composite Average).

[93] *See* text accompanying notes 57-62 *supra.*

[94] *Id.*

[95] *See* notes 22 & 33 *supra.*

[96] *See* text accompanying notes 20-31 *supra.*

[97] *See* text accompanying notes 81-88 *supra.*

futures contract within the Commission's regulation.[98] State and federal law prior to the enactment of the '74 Act adequately regulate transactions in physical commodities and foreign currencies.[99] Recent interpretations of the '74 Act's scope, therefore, have supported the '74 Act's desire to lessen the potential for abuses in the commodity options markets.

B. *Implied Private Rights of Action Under the Commodities Acts**

Trading in commodity futures contracts[100] has increased dramatically in recent years.[101] Expanded trade in such contracts provides significant economic benefits[102] but increases opportunities for commodity price manipulation, fraud and other deceptive trading practices.[103] In an effort to

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[98] *See* text accompanying notes 20-28 *supra*.

[99] *See* notes 35 & 86 *supra*.

* Since the writing of this subsection, the Second Circuit and the Sixth Circuit have determined that an implied private right of action exists under the Commodity Exchange Act. *See* Leist v. Simplot, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 at 24,189 (2d Cir. July 8, 1980); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2 COMM. FUT. L. REP. (CCH) ¶ 21,030 at 24,063 (6th Cir. May 12, 1980). *But see* Leist v. Simplot, 2 COMM. FUT. L. REP. (CCH) at 24,190- 24,219 (Mansfield, J. dissenting); Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2 COMM. FUT. L. REP. (CCH) at 24,068 (Phillips, J. dissenting).

[100] A commodity futures contract is a standardized agreement to purchase or sell a fixed amount of a commodity of a certain grade at a certain future date for a variable price. *See* Note, *The Role of the Commodity Futures Trading Commission Under the Commodity Futures Trading Commission Act of 1974*, 73 MICH. L. REV. 710, 711 (1975) [hereinafter cited as *Role of Commodity Futures Trading Commission]; see, e.g.*, United States Cotton Futures Act, 7 U.S.C. § 15b (1976) (statutory cotton futures contract terms). Commodity futures contracts are traded on commodity exchanges, or contract markets, by registered futures commission merchants and floor brokers. *See* 7 U.S.C. § 7 (1976); 7 U.S.C.A. § 6f (West Supp. 1979); *Role of Commodity Futures Trading Commission, supra* at 711-15. *See generally* 1978 Senate Report, *supra* note 8, at 3-13, [1978] U.S. CODE CONG. & AD. NEWS at 2093-101 (brief history of commodities trading and regulation); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. REV. 804, 806-08 (1975) [hereinafter cited as *Investors*] (summary of commodity futures trading business); note 102 *infra*.

[101] *See* 1978 Senate Report, *supra* note 8, at 13, [1978] U.S. CODE CONG. & AD. NEWS at 2101. Total trading volume in commodity futures contracts rose from 9.5 million contracts in 1967 to 42.1 million contracts in 1977. *Id.*, [1978] U.S. CODE CONG. & AD. NEWS at 2101. The dollar value of commodities trading in the futures market increased from approximately $500 billion in 1976 to $1 trillion in 1977. *Id.*, [1978] U.S. CODE CONG. & AD. NEWS at 2101.

[102] *See* Report of the Commodity Futures Trading Commission Advisory Committee on the Economic Role of Contract Markets 11-13 (July 17, 1976). Economic benefits of futures trading include accurate commodity pricing, efficient resource allocation and opportunity for risk-shifting or hedging. *Id.* Commodities purchasers can contract for future delivery of goods to coincide with projected needs. Producers and consumers can shift the risk of commodity price fluctuation to speculators who accept the risk in return for an opportunity to profit from favorable commodity price movement. *See id. See generally* Greenstone, *The CFTC and Government Reorganization: Preserving Regulatory Independence*, 33 BUS. LAW. 163, 171-77 (1977)[hereinafter cited as Greenstone]; Purcell & Valdez, *The Commodity Futures Trading Commission Act of 1974: Regulating Legislation for Commodity Futures Trading in a Market-Oriented Economy*, 21 S.D. L. REV. 555, 559-65 (1976).

[103] *See* Hudson, *Customer Protection in the Commodity Futures Market*, 58 B.U. L.

stabilize expanding commodity markets and curb trading abuses,[104] Congress enacted the Commodity Futures Trading Commission Act of 1974 ('74 Act),[105] which significantly amended the Commodity Exchange Act (CEA or Act).[106] The '74 Act established the Commodity Futures Trading Commission (Commission)[107] and granted the Commission broad regulatory and enforcement power over commodity trading.[108] The Futures

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REV. 1, 18-35 (1978) [hereinafter cited as Hudson] (discussion of churning, unauthorized trading, manipulation, and other deceptive practices). *See generally* McDermott, *Defining Manipulation in Commodity Futures Trading: The Futures "Squeeze"*, 74 NEV. U. L. REV. 202 (1979).

[104] *See* 1974 Senate Report, *supra* note 2, at 18, [1974] U.S. CODE CONG. & AD. NEWS at 5844, 5856. Prior to enacting the Commodity Futures Trading Commission Act of 1974 ('74 Act), *see* note 105 *infra*, Congress found that commodity futures were traded in large volume by the general public, as well as by persons engaged in buying and selling agricultural commodities in interstate commerce. 1974 Senate Report, *supra* note 2, at 18, [1974] U.S. CODE CONG. & AD. NEWS at 5856; *see* note 101 *supra*. Congress also found that transactions and prices in the commodities industry were susceptible to speculation, manipulation and control, and sudden, unreasonable price fluctuations. 1974 Senate Report, *supra* note 2, at 18, [1974] U.S. CODE CONG. & AD. NEWS at 5856. Such manipulation and variation in day-to-day market transactions burdened interstate commerce and created the need for regulation. *Id.*, [1974] U.S. CODE CONG. & AD. NEWS at 5856. Congress enacted the '74 Act to insure fair practice and honest dealing on commodity exchanges and to control speculation in order to prevent injury to producers, consumers and the exchanges themselves. *Id.*, [1974] U.S. CODE CONG. & AD. NEWS at 5856; *see* 7 U.S.C. § 5 (1976) (codification of legislative findings and purpose).

[105] Pub. L. No. 93-463, §§ 101-418, 88 Stat. 1389 (1974) (codified at 7 U.S.C. §§ 1-24 (1976)). The '74 Act established the Commodity Futures Trading Commission (Commission) and granted the Commission exclusive jurisdiction over futures trading in all commodities. *See* 7 U.S.C. §§ 2, 4a (1976). The '74 Act also established an elaborate enforcement scheme for the CEA. *See id.* §§ 7a, 7b, 8, 13a, 13a-1, 18; text accompanying notes 115-18 *infra*. *See generally* 1978 Senate Report, *supra* note 8, at 10-13, [1978] U.S. CODE CONG. & AD. NEWS at 2098-101 (summary of '74 Act); *Role of Commodity Futures Trading Commission, supra* note 100, at 718-19.

[106] 7 U.S.C.A. §§ 1-24 (West 1964 & Supp. 1979); *see* 1978 Senate Report, *supra* note 8, at 7-13, [1978] U.S. CODE CONG. & AD. NEWS at 2095-101 (history of CEA).

[107] *See* 7 U.S.C.A. § 4a (West Supp. 1979). The Commission is an independent federal regulatory agency charged with overseeing commodity futures trading and enforcing the CEA. *Id.* The Commission is composed of five members appointed by the President with the advice and consent of the Senate. *Id.* Commissioners serve staggered five year terms. *Id.* The '74 Act encourages the President to select Commissioners with expertise in futures trading. *Id. See generally* Greenstone, *supra* note 102, at 164, 185-201 (legislative history of Commission); *Role of Commodity Futures Trading Commission, supra* note 100.

[108] *See, e.g.*, 7 U.S.C. §§ 7b, 9, 13a, 13a-1 (1976). The Commission may suspend or revoke an exchange's right to operate if the exchange fails or refuses to comply with the CEA or the rules, regulations and orders promulgated by the Commission thereunder. *Id.* § 7b. The Commission may also bring administrative proceedings against any contract market that fails to enforce its rules, Commission regulations, or the Act. *Id.* § 13a. If the Commission has reason to believe that any person has manipulated the market price of a commodity or commodity futures contract, has made a material misrepresentation in filings with the Commission, or otherwise has violated the Act, the Commission may enjoin future violations, suspend or revoke such person's right to trade, and assess a civil penalty of not more than $100,000 for each violation. *Id.* § 9. The Commission or the Attorney General may bring an action in federal district court to enjoin violations of the Act or to enforce compli-

Trading Act of 1978 ('78 Act)[109] further amended the CEA and granted the states enforcement power to protect the interests of state residents under the Act.[110] Congress has not, however, expressly provided private plaintiffs with a federal cause of action to remedy violations of the CEA.[111] Thus, the courts have sought to determine whether the Act impliedly provides a private right of action.[112]

Prior to enactment of the '74 Act, several courts found an implied private cause of action under antifraud provisions of the CEA.[113] The recent '74 Act and '78 Act amendments to the CEA have been so extensive, however, that courts question whether the previously recognized implied cause of action has survived the amendments.[114] The '74 Act created a

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ance with the Act's provisions. *Id.* § 13a-1. *See* Stone v. Saxon & Windsor Group, Ltd. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000, 23,881-82 (N.D. Ill. Jan. 8, 1980).

[109] Pub. L. No. 95-405, §§ 2-28, 92 Stat. 865 (1978) (codified at 7 U.S.C.A. §§ 1-24 (West Supp. 1979)). The '78 Act provides that persons registered under the CEA may establish voluntary associations for regulating the trading practices of association members. *See* 7 U.S.C.A. § 21 (West Supp. 1979). The FTA creates a cause of action in favor of the states which may seek, on behalf of residents, injunctive relief from CEA violations. *See id.* § 13a-2. Under the '78 Act, Congress also amended the CEA to prohibit options trading in certain commodities. *See id.* § 6c(c). *See generally* Stone v. Saxon & Windsor Group, Ltd. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000, 23,882 (N.D. Ill. Jan. 8, 1980); 1978 Senate Report, *supra* note 8, at 1-4, [1978] U.S. CODE CONG. & AD. NEWS at 2089-92 (synopsis of '78 Act); Schneider & Santo, *Commodity Futures Trading Commission: A Review of the 1978 Legislation*, 34 BUS. LAW. 1755 (1979).

[110] *See* 7 U.S.C.A. § 13a-2 (West Supp. 1979). If the interests of state residents appear to have been threatened or affected adversely by violations of the Act, a state may bring an action in federal district court on behalf of state residents to enjoin such violations, to enforce compliance with the Act, and to recover damages. *Id.*

[111] *See generally* Alken v. Lerner, No. 79-0023 (D.N.J. Feb. 22, 1980); Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 (N.D. Ill. Jan. 8, 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53 (N.D. Tex. 1979).

[112] *See, e.g.*, Alken v. Lerner, No. 79-0023, slip op. at 5 (D.N.J. Feb. 22, 1980) (recognized implied private right of action); Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,885 (N.D. Ill. Jan. 8, 1980) (no implied private right of action); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56-57 (N.D. Tex. 1979) (no implied private right of action); Smith v. Groover, 468 F. Supp. 105, 107-08 (N.D. Ill. 1979) (recognized implied private cause of action). *See generally Hudson, supra* note 103, at 39-40; *Investors, supra* note 100, at 815-26 (analysis of implied private right of action under CEA prior to Cort v. Ash, 422 U.S. 66 (1975)).

[113] *See, e.g.*, Deaktor v. L.D. Schreiber & Co., 479 F.2d 529, 534 (7th Cir.), *rev'd on other ground sub nom.* Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973); Booth v. Peavey Co. Commodity Servs., 430 F.2d 132, 133 (8th Cir. 1970); Goodman v. H. Hentz & Co., 265 F. Supp. 440, 447 (N.D. Ill. 1967). *Goodman* first recognized an implied private remedy for commodity fraud. *Id.* The *Goodman* court, drawing an analogy to § 10(b) of the Securities Exchange Act of 1934 ('34 Act), 15 U.S.C. § 78j (1976), and the implied private right of action thereunder, found an implied cause of action under 7 U.S.C. § 6b (1976). 265 F. Supp. at 447.

[114] *See, e.g.*, Alken v. Lerner, No. 79-0023, slip op. at 4 (D.N.J. Feb. 22, 1980); National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1259 (S.D.N.Y. 1979); Smith v. Groover, 468 F. Supp. 105, 107-08 (N.D. Ill. 1979); Hofmayer v. Dean Witter & Co., Inc., 459 F. Supp. 733, 737 (N.D. Cal. 1978).

broad enforcement scheme for the CEA. As a result, the Act provides administrative reparations proceedings in which any person aggrieved by violations of the Act may seek compensation for damages.[115] In addition, commodity exchanges must provide equitable procedures for settlement of customer complaints against the exchanges and their employees.[116] The '74 Act also granted the Commission broad regulatory control over commodity trading and the power to enforce provisions of the Act.[117] The '78 Act provided the states with standing to seek judicial protection of state residents' interests under the Act.[118] In light of the express remedial protections which are now afforded producers, consumers and investors under the CEA, the existence of an implied private right of action under the Act is currently in doubt.[119]

In *Cort v. Ash*,[120] the Supreme Court outlined a four part analysis to

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[115] 7 U.S.C.A. § 18 (West Supp. 1979); *see* Alken v. Lerner, No. 79-0023, slip op. at 7-8 (D.N.J. Feb. 22, 1980); Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,881-82 (N.D. Ill. Jan. 8, 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56 (N.D. Tex. 1979); Hudson, *supra* note 103, at 37-38; Rosen, *Reparation Proceedings under the Commodity Exchange Act*, 27 EMORY L.J. 1005, 1005-56 (1978) [hereinafter cited as Rosen]. Persons aggrieved by violations of the CEA may seek a reparations hearing before the Commission. 7 U.S.C.A. § 18 (West Supp. 1979). If the Commission determines that the CEA has been violated by a person registered under the Act, the Commission may assess damages and order the offender to make reparation to the aggrieved party. *Id.* § 18(e). The Commission's order is enforceable in federal district court and reviewable in the federal courts of appeals. *Id.* § 18(f), (g). Several courts have concluded that administrative reparations proceedings are merely an alternative to an implied private cause of action under the Act. *See, e.g.*, Alken v. Lerner, No. 79-0023, slip op. at 8 (D.N.J. Feb. 22, 1980); Smith v. Groover, 468 F. Supp. 105, 114 (N.D. Ill. 1979). Within the jurisdiction of such courts, a person aggrieved by violations of the Act might choose to proceed in federal district court pursuant to his implied right of action or appear before the Commission in a reparations proceeding. *Id.*

[116] 7 U.S.C.A. § 7a(11) (West Supp. 1979); *see* Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,882 (N.D. Ill. Jan 8, 1980) (review of '74 Act enforcement provisions); Hudson, *supra* note 103, at 36-37; Rosen, *supra* note 115, at 1010-14. The CEA requires contract markets to provide arbitration proceedings or any other fair and equitable procedure for settlement of customer complaints. 7 U.S.C.A. § 7a(11) (West Supp. 1979). Such proceedings, however, are not available to resolve customer claims in excess of $15,000 and are not binding except as agreed between the parties. *Id.* Administrative reparations proceedings are available as an alternative to arbitration. *See id.* § 18 (West Supp. 1979).

[117] *See* 7 U.S.C. §§ 6, 7b, 9, 13a, 13a-1 (1976); Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,881-82 (N.D. Ill. Jan. 8, 1980) (review of Commission enforcement power); note 108 *supra*.

[118] 7 U.S.C.A. § 13a-2 (West Supp. 1979); *see* Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,882 (N.D. Ill. Jan. 8, 1980); note 110 *supra*.

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

[120] 422 U.S. 66 (1975). The *Cort* plaintiff brought suit against a corporation and its directors for violations of federal election laws. *Id.* at 70-72. Federal election law did not provide an express remedy for violations of election law provisions. The plaintiff, a share-

assist courts in determining whether federal law implies a private cause of action.[121] A court must determine whether the plaintiff is one of a class for whose special benefit the federal statute was enacted; whether Congress intended to create or deny a private remedy under the statute; whether implication of a private right of action is consistent with the underlying purpose of the statute; and whether the private remedy sought is one traditionally relegated to state law.[122] Applying the *Cort* analysis, federal courts nevertheless have disagreed on the implication of a private remedy under the CEA.[123] Recent Supreme Court decisions in *Touche Ross & Co. v. Redington*[124] and *Transamerica Mortgage Advisors, Inc. v. Lewis*[125] have narrowed the focus of the *Cort* analysis. Although some semblance of the *Cort* four-part test remains intact after these decisions, the Supreme Court has indicated that legislative intent, derived princi-

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holder of the defendant corporation, nevertheless sought both damages and injunctive relief through a private action. *Id.* The primary purpose of the election law was to control corporate influence over federal elections. *Id.* at 82. Protection of corporate shareholders was a purely secondary effect of the statute. *Id.* The Court found no legislative intent to create a private right of action under the statute and questioned the effect of recognizing an implied private remedy on the statutory enforcement scheme. *Id.* at 82-84. Finally, the Court noted that ultra vires acts of corporations were traditionally concerns of state law. *Id.* at 84. The Supreme Court, therefore, refused to recognize an implied private right in favor of the plaintiff under the federal election law. *Id.* at 85. *See generally* 1978-1979 *Securities Law Developments: Implied Private Rights of Action,* 36 WASH. & LEE L. REV. 944 (1979) [hereinafter cited as *Implied Private Rights*].

[121] 422 U.S. at 78; *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 245-49 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568-79 (1979); Cannon v. University of Chicago, 441 U.S. 677, 688-709 (1979); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 34-41 (1977). *See generally* Note, *Implication of Private Actions from Federal Statutes: From* Borak *to* Ash, 1 J. CORP. LAW 371, 382-88 (1976)[hereinafter cited as *Implication of Private Actions*]; *Implied Private Rights, supra* note 120, at 945-46.

[122] Cort v. Ash, 422 U.S. at 78; *see* note 121 *supra.*

[123] *Compare* National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1259-61 (S.D.N.Y. 1979) (no implied private remedy); Berman v. Bache, Halsey, Stuart, Shield, Inc., 467 F. Supp. 311, 322-23 (S.D. Ohio 1979) (no implied private remedy) *with* Smith v. Groover, 468 F. Supp. 105, 113-19 (N.D. Ill. 1979) (private right of action implied).

[124] 442 U.S. 560 (1979). The question addressed in *Redington* was whether customers of a securities brokerage firm have an implied right of action against brokerage firm auditors based on misstatements contained in brokerage firm financial reports filed with the Securities Exchange Commission (SEC) under § 17(a) of the '34 Act, 15 U.S.C. § 78q(a) (1976). 442 U.S. at 562-67. Analyzing legislative intent, the Court concluded that § 17(a) implies no private remedy. *Id.* at 568-79; *see Implied Private Rights, supra* note 121, at 950-51; text accompanying notes 128-37 *infra.*

[125] 100 S. Ct. 242, 245-49 (1979). In *Transamerica,* the plaintiff, a shareholder of a real estate investment trust, brought shareholder derivative and class action suits aginst the trust, individual trustees and the trust's investment advisor for violations of the Investment Advisers Act of 1940 (IAA), 15 U.S.C.A. §§ 80b-1 to 80b-2 (West 1971 & Supp. 1979). *Id.* at 243-44. The Court considered whether a private right of action existed under the IAA to remedy violations of IAA provisions. *Id.* Based on the statutory language and the legislative history of the IAA, the Court concluded that Congress did not intend to create a private right of action under the IAA. *Id.* at 245-49. The Court disposed of the case merely by determining legislative intent. *Id.* at 249; *see* text accompanying notes 138-48 *infra.*

pally from statutory language and legislative history, is determinative of the existence of implied private remedies under federal law.[126] Unfortunately, the "legislative intent" test of *Redington* and *Transamerica* has failed to resolve the courts' disagreement on implication of a private right of action under the CEA.[127]

In *Touche Ross & Co. v. Redington,* the Supreme Court considered whether an implied right of action exists under section 17(a), of the Securities Exchange Act of 1934 ('34 Act).[128] Analysis of congressional intent determines the existence of implied private remedies under federal law.[129] Although *Cort* set forth four factors considered relevant in determining legislative intent, the Supreme Court reasoned that the *Cort* factors are not necessarily entitled to equal weight.[130] The *Redington* Court limited analysis of legislative intent to consideration of the first and second *Cort* tests.[131] The Court considered whether plaintiffs were members of the class sought to be protected by section 17(a),[132] the language of section 17(a),[133] the legislative history of the section,[134] and the statutory

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[126] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 245-49 (1979); Touche Ross & Co. v. Redington, 422 U.S. 560, 568-79 (1979); notes 124 & 125 *supra;* text accompanying notes 128-48 *infra.* Legislative intent, as defined in *Transamerica* and *Redington,* is determined by analysis of the first two *Cort* factors. *See* 100 S. Ct. at 245-49; 442 U.S. at 568-79. The analysis does not, however, necessarily accord each of the *Cort* factors equal weight. *See* 100 S. Ct. at 249; 442 U.S. at 575-76. Statutory language and legislative history are the principal determinants of legislative intent. *See* 100 S. Ct. at 245-49; 442 U.S. at 568-79.

[127] *Compare* Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 (N.D. Ill. Jan. 8, 1980) (no implied private remedy under §§ 4c(b) and 4c(c) of the Act); Fischer v. Rosenthal & Co., 481 F. Supp. 53 (N.D. Tex. 1979) (no implied private remedy under § 4b of the Act) *with* Alken v. Lerner, No. 79-0023 (D.N.J. Feb. 22, 1980) (implied private remedy exists under § 4b of the Act). *See generally* text accompanying notes 150-229 *infra.*

[128] 442 U.S. at 563-67.

[129] *Id.* at 568; *see* note 126 *supra.*

[130] 442 U.S. at 575.

[131] *Id.* at 568-74. The Court concluded that plaintiffs were not members of the class sought to be protected by § 17(a) and found no support in the language of § 17(a), the legislative history or the statutory scheme of the '34 Act for the proposition that Congress intended to create a private remedy under § 17(a). *Id.* at 575-76. The Court therefore considered analysis of the third and fourth *Cort* factors unnecessary. *See id.;* text accompanying note 122 *supra;* note 135 *infra.*

[132] *See* 442 U.S. at 569-71. Section 17(a) expressly protects investors. *Id.* at 569. The term "investors" includes only purchasers and sellers of securities. *Id.* at 574. Since the *Redington* plaintiffs were neither purchasers nor sellers of securities, the Supreme Court concluded that the plaintiffs were not members of the class sought to be protected by § 17(a). *Id.* at 576.

[133] 442 U.S. at 568-71. The *Redington* Court concluded that the language of § 17(a) of the '34 Act did not purport to create a private right of action. *Id.* at 571. Section 17(a) contained no prohibition on which an implied right of action could be founded. *Id.* at 569. Congress intended § 17(a) to provide the SEC with information required to monitor the financial health of regulated broker-dealers. *Id.* at 569-70. The language of § 17(a) provided no basis for inferring the existence of a private right of action. *Id.* at 571.

[134] 442 U.S. at 571. The legislative history of the '34 Act is entirely silent on the availa-

scheme of the '34 Act.[135] The Court found no legislative intent to provide a private remedy under section 17(a).[136] Since analysis of the first two *Cort* factors indicated no private action under section 17(a), the Court declined to consider whether implication of a private remedy was necessary to effectuate the purpose of section 17(a) or whether the private remedy sought was traditionally relegated to state law.[137]

The Supreme Court decision in *Transamerica Mortgage Advisors, Inc. v. Lewis* followed closely after *Redington*: The *Transamerica* case involved claims under the Investment Advisers Act of 1940.[138] The Supreme Court considered whether section 206 of the Investment Advisers Act created an implied private right of action in favor of persons aggrieved by violations of Investment Advisers Act provisions.[139] As in *Redington*, the Court limited inquiry to a determination of legislative intent based on the language of the statute and legislative history.[140] Unlike the statute considered in *Redington*, section 206 expressly prohibited certain activity.[141] Although the Court found that section 206 clearly evidenced

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bility of a private remedy under § 17(a). *Id.*

[135] 442 U.S. at 571-74. Sections 9(e), 16(b) and 18(a) of the '34 Act expressly grant private causes of action. *Id.* at 571-72. Congress certainly could have created a private remedy under § 17(a). *Id.* at 572. Section 18(a) of the '34 Act also provides a remedy for a certain class of individuals harmed by violations of the type alleged by the *Redington* plaintiffs. *Id.* at 572-73; *see* note 132 *supra*. The Supreme Court was therefore reluctant to recognize an implied private cause of action which would protect a broader class of individuals than that sought to be protected by Congress. *Id.* at 574.

In *Cannon v. University of Chicago*, the Court considered the statutory enforcement scheme of Title IX in connection with its analysis of the third *Cort* factor. 441 U.S. 677, 704-08 (1979). The *Cannon* Court phrased the third *Cort* test as whether implication of a private remedy was "necessary or at least helpful to accomplishment of [Title IX's] purpose." *Id.* at 703; *see* Cort v. Ash, 422 U.S. 66, 84 (1975). Although not applying the third *Cort* test, the *Redington* court defined the third *Cort* test as whether implication of a private cause of action was "necessary to 'effectuate the purpose of the [federal law in question].' " 442 U.S. at 575. In *Transamerica*, the third *Cort* test was further modified. *See* 100 S. Ct. at 249. The *Transamerica* Court declined to consider the "utility" of a private remedy under section 17(a) of the IAA. *Id.*

The *Redington* Court may have declined to describe its consideration of the statutory enforcement scheme of the '34 Act under the guise of applying the third *Cort* test in order to avoid express inconsistency with the *Cannon* decision.

[136] 442 U.S. at 575-76.

[137] *Id.* at 576.

[138] 15 U.S.C. §§ 80b-1 to 80b-21 (1976); *see* note 125 *supra*. Congress enacted the IAA to deal with abuses in the investment industry. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 243 (1979).

[139] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 243 (1979). The *Transamerica* plaintiffs, shareholders of a real estate investment trust, brought derivative and class action suits against the trust, individual trustees, and the trust's investment advisor. *Id.* Plaintiffs alleged that the defendants were guilty of fraud and breach of fiduciary duty. *Id.* at 244. Plaintiffs sought an injunction, recission of the advisory contract, and damages. *Id.*

[140] *See id.* at 245-48; text accompanying note 126 *supra*.

[141] 15 U.S.C. § 80b-6 (1976). Section 206 of the IAA is a broad prohibition of fraudulent activity by investment advisors. *See* 100 S. Ct. at 245-46.

congressional intent to create enforceable fiduciary obligations between an investment advisor and his clients,[142] Congress did not necessarily intend enforcement of such obligations through a private cause of action in federal court.[143] Since Congress had expressly provided judicial and administrative methods for enforcing compliance with section 206,[144] the Court reasoned that Congress had not simply forgotten to mention an intended private remedy.[145] Certainly Congress knew how to create such a remedy.[146] Therefore, the failure of Congress to provide an express private right of action strongly suggested that Congress did not intend to include a private damage remedy within the enforcement provisions of the Investment Advisers Act.[147] The determination of congressional intent disposed of the case.[148]

Since the Supreme Court decisions in *Redington* and *Transamerica*, several district courts have reconsidered implication of a private right of action under the CEA.[149] In *Fischer v. Rosenthal & Co.*,[150] plaintiff Fischer, who held a commodity brokerage account with the defendant

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[142] 100 S. Ct. at 246. The Supreme Court has previously recognized that § 206 creates "federal fiduciary standards" to govern the conduct of investment advisors. *See id.;* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 471 n.11(1977).

[143] 100 S. Ct. at 246. Even though the IAA creates certain investment advisor fiduciary obligations, the IAA is silent on the question whether an individual amy utilize an implied private right of action to enforce the fiduciary obligations. *Id.*

[144] *See id.* at 247. Section 209 of the IAA authorizes administrative enforcement of IAA provisions in federal court. *See* 15 U.S.C. § 80b-9 (1976). Section 203 imposes administrative sanctions on persons violating the IAA. *See* 15 U.S.C. § 80b-3 (1976). Section 217 makes willful violation of the IAA a criminal offense, punishable by fine and/or imprisonment. *See* 15 U.S.C. § 80b-17 (1976). The *Transamerica* Court noted that "when a statute limits a thing to be done in a particular mode, [the statute] includes the negative of any other mode." 100 S. Ct. at 247 (quoting Botany Mills v. United States, 278 U.S. 282, 289 (1929)). The Court, however, conceded that "settled rules of statutory construction could yield . . . to persuasive evidence of a contrary legislative intent." 100 S. Ct. at 247.

[145] 100 S. Ct. at 247. The Court cited Cannon v. University of Chicago, 441 U.S. 677, 730-49 (Powell, J., dissenting). In his *Cannon* dissent, Mr. Justice Powell argued that the *Cort* analysis canot be squared with the doctrine of separation of powers and that the Supreme Court should reappraise the standards for judicial implication of private rights of action. *Id.* at 730. The *Cort* analysis is an open invitation to judicial legislation. *Id.* at 731. Since *Cort*, no fewer than twenty decisions by the courts of appeals have found implied private causes of action under federal statutes. *Id.* at 741. Justice Powell concluded that Congress could not have simply forgotten to mention an intended private right of action in each of these cases. *Id.* at 742. Thus, the courts "should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist." *Id.* at 749.

[146] 100 S. Ct. at 248 (quoting Touche Ross & Co. v. Redington, 422 U.S. at 572.).

[147] 100 S. Ct. at 248.

[148] *Id.* at 249.

[149] *See, e.g.*, Alken v. Lerner, No. 79-0023, slip op. at 5 (D.N.J. Feb. 22, 1980) (implied private right of action); Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,885 (N.D. Ill. Jan. 8, 1980) (no implied private remedy); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56-57 (N.D. Tex. 1979) (no implied private remedy).

[150] 481 F. Supp. 53 (N.D. Tex. 1979).

brokerage firm, complained that the defendant had sold commodity futures contracts contrary to plaintiff's express directions.[151] Fischer based his claim in part on section 4b of the CEA, an antifraud provision of the Act.[152] Applying a modified *Cort* analysis, the *Fischer* court determined that Congress had not intended to provide a private remedy under section 4b and denied Fischer standing to sue.[153]

The court conceded that Fischer might be a member of the class sought to be protected under section 4b of the Act.[154] Nevertheless, the extensive enforcement scheme of the CEA indicated that Congress had not simply forgotten to mention an intended private right of action under the Act and therefore, did not intend to create such a private remedy.[155] The court considered the legislative history of the '74 Act supportive of this conclusion.[156] In drafting the '74 Act, Congress considered several bills containing proposed amendments to the Act.[157] Two Senate bills expressly provided a private right of action and recovery of treble damages

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[151] *Id.* at 54..

[152] 7 U.S.C. § 6b (1976). Section 4b of the CEA provides that contract market members may not enter any transaction in commodity futures with any perssn to cheat or defraud such person or willfully to deceive such person in regard to any act of agency performed. *See id.;* notes 103 & 109 *supra.*

[153] 481 F. Supp. at 55-57. The *Fischer* court applied the four part *Cort* analysis to discover whether Congress intended to create an implied private remedy under the CEA. *See id.;* text accompanying notes 154-67 *infra.* The court, however, accorded greater weight to analysis of the statutory language and legislative history of the Act than to analysis of the other *Cort* tests. 481 F. Supp. at 155-57; *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. at 249; text accompanying note 126 *supra.*

[154] *See* 481 F. Supp. at 56. For purposes of analysis, the *Fischer* court assumed that the first *Cort* factor favored implication of a private remedy under the CEA. *Id.* Courts generally agree that persons aggrieved by violations of anti-fraud provisions of the Act are members of the class for whose benefit the CEA was enacted. *See* National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1259-60 (S.D.N.Y. 1979); Smith v. Groover, 468 F. Supp. 105, 113 (N.D. Ill. 1979); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311, 312, 320-22 (S.D. Ohio 1979). *But see* Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 at 23,885 (N.D. Ill. Jan. 8, 1980) (option contract purchaser not member of class sought to be protected under §§ 4c(b) and 4c(c) of the Act). The courts base their conclusion on extensive CEA protections against fraud and other deceptive trading practices. *See, e.g.,* 7 U.S.C. §§ 6b (contracts designed to defraud prohibited), 13b (prohibition of market price manipulation) (1976); 7 U.S.C.A. §§ 6a (excessive speculation prohibited), 6o (prohibition of all schemes to defraud) (West Supp. 1979). *See generally* 120 CONG. REC. 30466 (1974) (remarks of Sen. Dole); Hudson, *supra* note 103, at 8-12, 18-35.

[155] *See* 481 F. Supp. at 56. Following *Transamerica,* the *Fischer* court considered the second element of the *Cort* analysis, a determination of legislative intent, the most important in determining the existence of an implied private remedy under the CEA. *See id.* The court determined legislative intent by analyzing the language and legislative history of the Act. *Id.; see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. at 249. *See generally* text accompanying notes 108, 109 & 115-18 *supra.*

[156] 481 F. Supp. at 56.

[157] *See* 481 F. Supp. at 56-57. *See generally Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry,* 93d Cong., 2d Sess. 737 (1974) [hereinafter cited as *Hearings*].

for violations of the Act.[158] The House of Representatives bill, ultimately adopted with modifications by both the House and Senate, provided only for administrative reparation proceedings.[159] The *Fischer* court concluded that rejection of the Senate bills which contained an express private right of action indicated congressional intent to deny an implied private remedy.[160]

Section 2 of the CEA establishes areas of exclusive Commission jurisdiction and provides that the grant of exclusive jurisdiction does not supersede or limit jurisdiction conferred on courts of the United States or any state.[161] Plaintiff Fischer argued that the language of section 2 and its legislative history evidenced congressional intent to save an implied private remedy.[162] The *Fischer* court, however, reasoned that section 2 merely affirmed the judiciary's role as one of appeal and final determina-

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[158] *See Hearings, supra* note 157, at 77 (S. 2578 introduced by Sen. McGovern), 79 (S. 2837 introduced by Sen. Hart). Section 20(d)(3) of Senate Bill 2578 provided that any person violating any provision of the CEA would be liable to any person injured thereby for treble the amount of damages sustained as a result of the violations. *Id.* at 77. Section 505(a) of Senate Bill 2837 provided that any person injured by a violation of the Act could bring a civil action for restitution in any district court having jurisdiction of the party who caused the injury. *Id.* at 79. In the event of willful violation of the Act, an aggrieved party could recover treble damages. *See id.*

[159] *See* 7 U.S.C.A. § 18 (West Supp. 1979); *Hearings, supra* note 157, at 125; text accompanying note 115 *supra.*

[160] *See* 481 F. Supp. at 57. *But see* Smith v. Groover, 468 F. Supp. 105, 113 (N.D. Ill. 1979) (failure of Congress to include express private remedy which provided for treble damage awards represents congressional intent not to expand recovery under implied private action).

[161] 7 U.S.C.A. § 2 (West Supp. 1979). Section 2 provides "[t]hat the Commission shall have exclusive jurisdiction with respect to accounts, agreements . . ., and transactions involving contracts of sale of a commodity for future delivery" traded on contract markets (as defined in 7 U.S.C. § 7 (1976)) and certain other exchanges. *Id.* Section 2 delineates the jurisdiction of the SEC and other regulatory authorities. *Id.* The section then states that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." *Id.* Given the implication of a private right of action under the CEA prior to the 1974 amendments, several courts have argued that § 2 expressly saves the implied right. *See* text accompanying note 162 *infra.*

[162] 481 F. Supp. at 57; *see* R.J. Hereley & Son Co. v. Stotler & Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,773 at 23,172 (N.D. Ill. 1979); Smith v. Groover, 468 F. Supp. 105, 113-14 (N.D. Ill. 1979); Hofmayer v. Dean Witter & Co., Inc., 459 F. Supp. 733, 737-38 (N.D. Cal. 1978); Gravois v. Fairchild, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706 at 22,876 (E.D. La. 1978). In *Groover,* the court reasoned that since Congress knew that a private right of action had been implied under the CEA and had been warned during Senate committee hearings that provision for reparation proceedings might be interpreted by courts as a denial of an implied private remedy, the Senate committee drafting the '74 Act inserted the provision in § 2 granting federal court jurisdiction. 468 F. Supp. at 114; *see Hearings, supra* note 157, at 205 (statement of Sen. Clark), 737 (statement of Prof. Shotland); 119 CONG. REC. 41333 (1973) (remarks of Rep. Poage). The court supported its conclusion by reference to remarks made during floor debates on an amendment to the CEA which would speed disposition of reparations claims. 468 F. Supp. at 114; *see* 124 CONG. REC. S10537 (daily ed. July 12, 1978) (remarks of Sen. Huddleston).

tion after administrative reparation proceedings.[163] The language and legislative history of section 2 were, at best, ambiguous on the meaning of section 2.[164] The court considered review of the Act's legislative history supportive of the conclusion that Congress had not intended to provide a private remedy under the Act.[165]

Applying the third *Cort* test, the *Fischer* court stated that a private right of action should not be implied if unnecessary to fulfill the purpose of the CEA.[166] In light of the extensive remedial and enforcement scheme of the Act, implication of a private right of action was unnecessary, if not superfluous, to the effectiveness of the Act.[167] The *Fischer* court also observed that regulation of commodities trading is essentially a matter of federal concern.[168] The fourth *Cort* test was, therefore, irrelevant to the court's analysis of congressional intent.[169] The determination, based on

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[163] *See* 481 F. Supp. at 57. The *Fischer* court based its conclusion on the legislative history of § 2 of the CEA. *Id.* The court cited remarks of Senator Talmadge in which he concluded that the broad remedial provisions of the CEA were not intended to interfere with jurisdiction of the courts in reparation proceedings. *Id.; see* 120 CONG. REC. 30459 (1974). The *Fischer* court regarded Senator Talmadge's remarks as evidence that Congress intended § 2 merely to affirm the courts' jurisdiction in the reparations procedure. *Id.; see* 7 U.S.C.A. § 18(g) (West Supp. 1979).

[164] 481 F. Supp. at 57.

[165] *Id.*

[166] *Id.; see* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477 (1977). The third element of the *Cort* analysis considers whether implication of a private right of action is consistent with the underlying purpose of the Act's legislative scheme. Cort v. Ash, 422 U.S. at 78; *see* text accompanying note 122 *supra*. According to *Fischer*, the question raised by the third *Cort* factor is not whether implication of a private remedy would enhance regulatory effectiveness but whether such implication is necessary to the Act's legislative scheme of enforcement. 481 F. Supp. at 57; *see* Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979). *But see* Cannon v. University of Chicago, 441 U.S. 677, 703 (1979) (whether implication of private remedy would enhance enforcement of statute); Smith v. Groover, 468 F. Supp. 105, 115 (N.D. Ill. 1979) (implication compatible with CEA legislative scheme since implication of private remedy adds additional deterrent to abusive trading practice).

[167] 481 F. Supp. at 57; *see* National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1261 (S.D.N.Y. 1979). Contract markets, unlike brokers and floor commission merchants, are not "registered persons" under the Act and, therefore, are exempt from liability to individuals pursuing their claims in reparation proceedings. *Id.; see* 7 U.S.C.A. § 18(a) (West Supp. 1979). The Commission alone has the power to assess monetary civil penalties against a contract market. 470 F. Supp. at 1261; *see* 7 U.S.C.A. § 13a (West Supp. 1979). The *Super Spuds* court concluded that congressional exemption of contract markets from reparation liability is indicative of legislative intent to limit the exposure of contract markets to liability, thereby preserving contract market viability. 470 F. Supp. at 1261. *But see* Smith v. Groover, 468 F. Supp. 105, 117 (N.D. Ill. 1979) (no congressional intent to insulate contract markets from private civil damage liability). Thus, implication of a private remedy available against contract markets arguably would be inconsistent with the purpose of the CEA's legislative scheme. *See* 470 F. Supp. at 1261.

[168] 470 F. Supp. at 57; *see* National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1261 (S.D.N.Y. 1979); Smith v. Groover, 468 F. Supp. 105, 115 (N.D. Ill. 1979).

[169] 470 F. Supp. at 57; *see* Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311, 323 (S.D. Ohio 1979).

the language and legislative history of the Act, that Congress did not intend to create an implied private right of action under the Act, supported by the finding that implication of a private remedy was unnecessary to fulfill the purpose of the Act, led the *Fischer* court to the conclusion that no implied private action exists under section 4b of the CEA.

Unlike the *Fischer* court, the court in *Alken v. Lerner*[170] recently concluded that an implied private right of action exists under section 4b of the CEA.[171] The difference in result is attributable, in part, to the court's framing of the question presented for decision. Prior to the '74 Act, courts generally recognized an implied private action under antifraud provisions of the CEA.[172] The *Alken* court therefore sought to determine not whether Congress intended to create an implied private remedy under the CEA but whether Congress, through enactment of the '74 Act, intended to nullify prior court decisions which recognized an implied action under the CEA.[173]

Applying the four part *Cort* analysis,[174] the *Alken* court first considered whether section 4b of the Act was enacted for the special benefit of commodity market investors.[175] The language of section 4b expressly prohibits fraudulent trading practices by contract market members in their dealing with investors.[176] The legislative history of section 4b indicates that Congress enacted the section to protect commodities investors.[177] The *Alken* court concluded that analysis of the first *Cort* test favored implication of a private action under section 4b for the benefit of such investors.[178]

According to the *Alken* court, the legislative history of the CEA evidences congressional intent to continue the implied private action recog-

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[170] No. 79-0023 (D.N.J. Feb. 22, 1980). The plaintiff in *Alken* complained that defendants had fraudulently induced plaintiff's purchases of certain commodity futures contracts in violation of section 4b of the CEA. *See id.*, slip op. at 2, 3. Defendants moved for judgment on the pleadings, contending, as a matter of law, that no implied private right of action exists under section 4b of the Act. *See id.*, slip op. at 1, 4. Applying the *Cort* analysis, the *Alken* court determined that an implied private action exists under section 4b of the CEA and denied defendants' motion for judgment. *See id.*, slip op. at 5-9.

[171] *See* Alken v. Lerner, No. 79-0023, slip op. at 9 (D.N.J. Feb. 22, 1980).

[172] *See id.*, slip op. at 3-4; note 14 *supra.*

[173] *See* No. 79-0023, slip op. at 5.

[174] *See id.* The *Alken* court recognized that the sole determinant of the existence of implied actions under federal law is congressional intent to create or deny such actions. *See id.;* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979). Nevertheless, rather than apply the modified *Cort* analysis employed by the Supreme Court majorities in *Transamerica* and *Redington,* the court applied the full four-part *Cort* analysis to determine congressional intent with respect to private actions under the CEA. *See* No. 79-0023, slip op. at 5-9; Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 251-55 (1979) (White, J., dissenting). *See generally* text accompanying notes 120-26 *supra.*

[175] *See* No. 79-0023, slip op. at 5; note 154 *supra.*

[176] *See* 7 U.S.C. § 6b (1976); note 152 *supra.*

[177] *See* H.R. REP. No. 975, 93d Cong., 2d Sess. 35 (1974); 120 Cong. Rec. 30466 (1974) (remarks of Sen. Dole); *see generally* Hudson, *supra* note 103, at 18-35.

[178] *See* No. 79-0023, slip op. at 6.

nized by the courts prior to the '74 Act.[179] The *Alken* court conceded that section 4b of the Act merely prohibits certain conduct and does not purport to create or deny any civil liability.[180] The legislative history of the Act prior to '74 Act amendment is completely silent on the question whether Congress intended private individual enforcement of section 4b through an implied cause of action.[181] The court also acknowledged recent Supreme Court warnings that courts must be reluctant to find implied private actions in the absence of convincing evidence of congressional intent to create such actions.[182] Nevertheless, the court was unwilling to penalize private plaintiffs or fault Congress for the failure to foresee the Supreme Court's recent change in attitude toward implication of private actions.[183]

During preparation of the '74 Act, Congress knew of the judicial implication of a private cause of action under section 4b of the CEA.[184] That courts may have erred in the determination of the existence of such a private action was immaterial to the *Alken* court's inquiry.[185] The proper inquiry was whether Congress, in enacting the '74 Act, believed that an implied private action had become an integral part of the Act's enforcement scheme.[186] Concluding that Congress was familiar with judicial implication of a private remedy under antifraud provisions of the Act, the *Alken* court presumed that Congress expected the courts to interpret the '74 Act as retaining the implied right.[187] Only on a convincing showing

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[179] *See* No. 79-0023, slip op. at 7. *But see* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 57 (1979); text accompanying notes 154-65.

[180] No. 79-0023, slip op. at 6. *Compare* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 245 (1979) (statute in question prohibited fraudulent activity; prohibition alone does not necessarily give rise to implied private action) *with* Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979) (statute in question created no prohibition on which private remedy could be founded).

[181] No. 79-0023, slip op. at 6; *see* note 134 *supra.*

[182] *Id.; see* Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979); note 145 *supra.*

[183] *See* No. 79-0023, slip op. at 6.

[184] *See* No. 79-0023, slip op. at 6; Smith v. Groover, 468 F. Supp. 105, 113-14 (N.D. Ill. 1979); Hofmayer v. Dean Witter & Co., Inc., 459 F. Supp. 733, 737-38 (N.D. Cal. 1978); 119 CONG. REC. 41333 (1973) (remarks of Rep. Poage); *Hearings, supra* note 157, at 746 (statement of Prof. Shotland).

[185] No. 79-0023, slip. op. at 7.

[186] *Id.; see* Brown v. General Serv's. Adm., 425 U.S. 820, 828 (1976) (dictum—relevant inquiry not whether Congress correctly perceived state of law, but rather what Congress perceived to be state of law).

[187] *See* No. 79-0023, slip op. at 7. The *Alken* court cited Cannon v. University of Chicago, 441 U.S. 677, 710-12 (1979), for the proposition that where federal law confers a special benefit on an identifiable class of plaintiffs, a court need not find congressional intent to create a private remedy even though a finding that Congress explicitly sought to deny a private remedy would be controlling. No. 79-0023, slip op. at 7 n.5. In *Transamerica,* however, the Supreme Court found that § 206 of the IAA was enacted for the special benefit of a certain class of plaintiffs but denied the existence of an implied right of action. *See* 100 S. Ct. at 245-46, 249. The *Transamerica* Court, therefore, focused on the broad remedial and enforcement provisions of the IAA and considered the enforcement scheme of the IAA indicative of legislative intent to deny a private action. *Id.* at 247.

that Congress intended to deny a private remedy under the Act could the defendants rebut the presumption of implication.[188]

The court considered unpersuasive the defendants' argument that congressional consideration and rejection of legislation which expressly provided a private cause of action under the CEA indicated congressional intent to deny a private action.[189] Since the legislation also provided for recovery of treble damages, the *Alken* court interpreted congressional rejection of the legislation as evidence of congressional reluctance to expand recovery under the existing implied private action.[190] Additionally, the court considered the '74 Act reparations proceeding an alternative to the implied cause of action in federal court, not an exclusive private remedy.[191] The '78 Act provision for a state right of action merely evidenced congressional intent to supplement the implied private action.[192] The *Alken* court therefore concluded that Congress had not clearly expressed an intent to nullify federal court decisions which had recognized an implied remedy under the Act prior to the '74 Act and '78 Act amendments.[193]

Analyzing the third *Cort* factor, the *Alken* court considered whether implication of a private remedy was consistent with the underlying purpose of the CEA.[194] Rather than ask whether implication was necessary to accomplish the purpose of the Act, the *Alken* court questioned whether implication would be helpful in accomplishing the Act's purpose.[195] The court concluded that implication of a private action would bolster enforcement of the Act's provisions, further deter abusive commodities trading practices, and speed review of investor damage claims.[196]

Since regulation of commodities markets is a federal concern, the fourth *Cort* test also favored implication of a private right of action.[197] The *Alken* court's application of the *Cort* analysis thus failed to indicate congressional intent to deny an implied private remedy.[198] Therefore, the

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[188] No. 79-0023, slip op. at 7.

[189] *Id. But see* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56-57 (1979); text accompanying notes 154-65 *supra.*

[190] No. 79-0023, slip op. at 7; *see* text accompanying note 160 *supra.*

[191] *See* No. 79-0023, slip op. at 7-8. *See also* R.J. Hereley & Son Co. v. Stotler & Co., 466 F. Supp. 345, 347 (N.D. Ill. 979); Smith v. Groover, 468 F. Supp. 105, 114 (N.D. Ill. 1979). *But see* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56 (1979); National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1260 (1979).

[192] No. 79-0023, slip op. at 8; *see* note 118 *supra.*

[193] No. 79-0023, slip op. at 8.

[194] No. 79-0023, slip op. at 8-9; *see* Cort v. Ash, 422 U.S. 66, 78 (1975); text accompanying note 122 *supra.*

[195] No. 79-0023, slip op. at 8; *see* Cannon v. University of Chicago, 441 U.S. 677, 703 (1979). *But see* Fischer v. Rosenthal & Co., 481 F. Supp. 53, 57 (1979) (third *Cort* test framed in terms of necessity of implying private remedy); note 167 *supra.* In both *Transamerica* and *Redington,* the Supreme Court refused to consider the third *Cort* test in analyzing legislative intent. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 249 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979); note 135 *supra.*

[196] No. 79-0023, slip op. at 8-9.

[197] *Id.* at 9; *see* text accompanying notes 168 & 169 *supra.*

[198] No. 79-0023, slip op. at 9.

court recognized an implied private cause of action under section 4b of the Act.

In *Stone v. Saxon & Windsor Group, Ltd.*,[199] plaintiff Stone complained that the defendants had entered into commodity option contracts with the plaintiff for the sale of gold, silver bullion or kruggerands in violation of sections 4c(b) and 4c(c) of the CEA.[200] The defendants moved to dismiss the complaint on the ground that private plaintiffs have no standing to sue for violations of the Act.[201] In a narrowly drawn opinion, the *Stone* court determined that no implied private action exists under sections 4c(b) and 4c(c) of the Act and dismissed the complaint for lack of subject matter jurisdiction.[202]

Prior to the *Redington* and *Transamerica* decisions, Seventh Circuit courts consistently implied private actions under antifraud provisions of the Act.[203] The *Stone* case, however, involved private enforcement of a CEA ban on options trading, not private enforcement of antifraud provisions.[204] Thus, the *Stone* court did not consider pre-*Transamerica* Seventh Circuit precedent controlling.[205] Before addressing whether an implied private remedy exists under sections 4c(b) and 4c(c) of the CEA, the court reviewed recent Supreme Court modifications of the *Cort* analysis.[206] Analyzing the *Transamerica* decision, the court employed a three

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[199] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000 (N.D. Ill. Jan. 8, 1980).

[200] *Id.* at 23,879-80. A purchaser of a commodity option contract obtains the right to buy or sell a commodity at an agreed price within a specific time. *See* 1978 Senate Report, *supra* note 8, at 132, [1978] U.S. CODE CONG. & AD. NEWS at 2169 (option defined). Sections 4c(b) and 4c(c) of the Act, 7 U.S.C.A. §§ 6c(b), 6c(c) (West Supp. 1979). prohibit transactions in certain commodity futures option contracts. *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,881.

[201] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,880.

[202] *See id. But see* Kelley v. Carr, 442 F. Supp. 346, 354 (W.D. Mich. 1977) (implied private remedy under § 4c(b) of the Act).

[203] *See* Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 103 n.8 (7th Cir. 1977); Deaktor v. L.D. Schreiber & Co., 479 F.2d 529, 534 (7th Cir.), *rev'd on other grounds sub nom.* Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973); R.J. Hereley & Son v. Stotler & Co., 466 F. Supp. 345, 348 (N.D. Ill. 1979); Smith v. Groover, 468 F. Supp. 105, 115 (N.D. Ill. 1979); Goodman v. H. Hentz & Co., 265 F. Supp. 440, 447 (N.D. Ill. 1967).

[204] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,882.

[205] *Id.* at 23,882-83. The *Stone* court cited *Redington* for the proposition that a private right of action must be found, if at all, in substantive provisions of the CEA sought to be enforced, not by reference to other provisions of the Act. *Id.; see* Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979). In *Redington,* the Supreme Court denied an implied private right of action under § 17(a) of the '34 Act even though such an action had previously been found under §§ 10(b) and 14(a) of the '34 Act. *See id.*

[206] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,883-85. In Cannon v. University of Chicago, 441 U.S. 677 (1979), the Supreme Court recognized an implied private remedy under Title IX's prohibition of sex discrimination in education, 20 U.S.C. § 1681 (1976). 441 U.S. at 717. Analyzing the first *Cort* test, the *Cannon* Court found that the language of the statute expressly identified the class which Congress intended to benefit. *See id.* at 693-94. Where federal law expressly confers rights on a certain class of persons, the silence or ambiguity of legislative history would not preclude finding an implied cause of

factor analysis to determine the existence of an implied private remedy under sections 4c(b) and 4c(c).[207] First, the court analyzed the statutory scheme of enforcement of the Act.[208] Second, the court reviewed the language of sections 4c(b) and 4c(c) to determine whether plaintiff Stone was a member of the class sought to be protected.[209] Third, the court examined the legislative history of the Act to determine whether the legislative history supports the proposition that Congress intended to create a private right of action under sections 4c(b) and 4c(c).[210] Only if this three part analysis did not preclude the existence of an implied action, would the *Stone* court proceed to analysis of the third and fourth elements of the *Cort* analysis.[211]

The *Stone* court reviewed the elaborate CEA enforcement scheme[212] and noted that the Act specifies circumstances in which enforcement of CEA provisions may be obtained in federal court.[213] Additionally, the Act identifies the parties who may bring such proceedings.[214] Individuals aggrieved by violations of the Act may bring an action in federal court only for enforcement and review of reparations orders.[215] In *Transamerica,* the Supreme Court stated that where a statute expressly provides remedies,

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action to enforce such rights. *See id.* at 694-703. In *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979), the Supreme Court refused to find an implied private action under § 17(a) of the '34 Act. *Id.* at 579. Section 17(a) did not expressly confer rights on any particular class of individuals and the legislative history of the '34 Act was entirely silent on the implication question. *Id.* at 569-71. Given the *Cannon* and *Redington* decisions alone, the *Stone* court would have concluded that the first *Cort* test was the most important in determining the existence of implied private actions under federal law. *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,883.

[207] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,884-85. The *Stone* court interpreted *Transamerica* as deemphsizing the first element of the *Cort* analysis. *Id.* at 23,884. Even though the plaintiff in *Transamerica* was a member of the class sought to be protected under § 206 of the IAA, the Supreme Court concluded that implication of a private remedy was not Congress' intended method of protecting such plaintiffs. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 246 (1979); text accompanying notes 142 & 143 *supra.*

[208] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885; *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 247 (1979); text accompanying notes 144 & 145 *supra.*

[209] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885; *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 246 (1979); text accompanying note 142 *supra.*

[210] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885; *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 246-49 (1979); text accompanying note 142 *supra.*

[211] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885; *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 249 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 571-74 (1979).

[212] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885; *see* text accompanying notes 115-19 *supra.*

[213] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885.

[214] *Id.*

[215] *See id.;* 7 U.S.C. § 18(f), (g) (1976); note 115 *supra.*

courts must be reluctant to find implied remedies.[216] The *Stone* court concluded that the detailed enforcement scheme of the Act evidenced careful congressional consideration of enforcement and, thus, indicated that Congress did not intend to create an implied private action under the CEA.[217]

The court carefully limited analysis of the first *Cort* test. Conceding that Congress might have enacted certain provisions of the Act for the special benefit of commodities investors, the court focused on whether sections 4c(b) and 4c(c) were enacted for the special benefit of such investors.[218] The court found that the statutory language and legislative history of sections 4c(b) and 4c(c) suggested congressional intent to protect the general public, not just investors, from options trading abuses.[219] Since the statute did not single out commodity market investors for special protection, the court concluded that plaintiff Stone was not intended to be a special beneficiary of CEA sections 4c(b) and 4c(c).[220]

Where federal law includes an elaborate scheme of enforcement and fails to designate a particular protected class of plaintiffs, the legislative history of the federal law must clearly indicate congressional intent to provide a private right of action before a court may properly recognize such an action.[221] The legislative history of the CEA provides no evidence of legislative intent to create an implied private action under sections 4c(b) and 4c(c) of the Act.[222] The *Stone* court observed that Congress considered and rejected proposed amendments to the CEA which would

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[216] Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 247 (1979); *see* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885.

[217] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885; *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 247 (1979); Cannon v. University of Chicago, 441 U.S. 677, 742 (1979) (Powell, J., dissenting).

[218] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885; *see* note 176 *supra*.

[219] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885-86. Sections 4c(b) and 4c(c) of the Act prohibit options trading in certain commodities. *Id.* at 23,885; *see* 7 U.S.C.A. § 6c(b), (c) (West Supp. 1979). The language of these sections does not suggest special protection for commodity market investors. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,885. According to the *Stone* court, sections 4c(b) and 4c(c) suggest a purpose of protecting the general public from options trading abuses and offer no greater protection to any identifiable class or subset of the general public. *Id.* at 23,885-86. The legislative history of the '78 Act also suggests that sections 4c(b) and 4c(c) were enacted for the protection of the general public. *See* 1978 Senate Report, *supra* note 8, at 2, [1978] U.S. CODE CONG. & AD. NEWS at 2102. Although the legislative history of the '78 Act indicates that § 4c(b) and § 4c(c) were enacted to protect the general public, only those members of the public who invest in options subject to the '78 Act ban will ever benefit from the protections of § 4c(b) and § 4c(c). *See id.* The *Stone* court nevertheless concluded that Congress did not intend investors to be special beneficiaries of § 4c(b) and § 4c(c) protections. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,886.

[220] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,886.

[221] *See id.*

[222] *Id.*; *see* text accompanying notes 155-63 *supra*.

have established an express private right of action.[223] Although Congress recognized the existence of a large backlog of reparations cases pending before the Commission during congressional preparation of the '78 Act, Congress failed to alleviate the backlog problem by creating a private cause of action in federal court.[224] The court attributed little relevance to the fact that courts had found an implied private action under the CEA prior to enactment of the '74 Act.[225] Even if courts had universally accepted a private right of action prior to the '74 Act, the *Stone* court would not necessarily have concluded, in light of contrary statutory language, that Congress intended to perpetuate a private action by enacting the '74 Act and '78 Act.[226] The legislative history of the Act therefore failed to provide persuasive evidence of congressional intent to provide an implied private remedy under the Act.[227] Since the *Stone* court's three part analysis of legislative intent did not support implication of a private action, the court considered analysis of the third and fourth *Cort* factors unnecessary and refused to recognize an implied private remedy under sections 4c(b) and 4c(c) of the Act.[228]

As the *Fischer, Alken* and *Stone* decisions indicate, courts disagree on the proper interpretation of the Supreme Court's implication analysis af-

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[223] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,886; text accompanying notes 57-60 *supra.*

[224] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,886; *see* 124 CONG. REC. S10537 (daily ed. July 12, 1978) (remarks of Sen. Huddleston—backlog of reparations proceedings attributable to unfortunate position taken by some courts that no implied private remedy exists under CEA).

[225] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,886-87; note 113 *supra.*

[226] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,887. The *Stone* court cited SEC v. Sloan, 436 U.S. 103 (1978), for the proposition that congressional reenactment of a statute need not necessarily indicate congressional approval of judicial interpretation of the statute, especially where the language plainly indicates the contrary. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,887; *see* 436 U.S. at 121.

[227] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,887. The *Stone* court considered unpersuasive the argument that section 2 of the CEA expressly saves an implied private right of action under the Act. *See id.;* text accompanying notes 161-165 *supra.* The fact that the Commission has consistently interpreted the Act as allowing an implied private action also had no effect on the *Stone* court's conclusion. *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,887. *See also* Smith v. Groover, 468 F. Supp. 105, 115 (N.D. Ill. 1979). Several courts have concluded that the Commission's opinion is to be given considerable deference in determining whether an implied remedy exists under the CEA. *See, e.g., id.;* Hofmayer v. Dean Witter & Co., Inc., 459 F. Supp. 733, 738 (N.D. Cal. 1978). Other courts, however, have determined that the Commission's interpretation conflicts with the intent of Congress. *See, e.g.,* National Super Spuds, Inc. v. New York Mercantile Exchange, 470 F. Supp. 1256, 1262 (S.D.N.Y. 1979); Alkan v. Rosenthal & Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,797, 23,252 (S.D. Ohio 1979). While Commission views are important in areas of the Commission's particular expertise, interpretation of the CEA and determination of legislative intent are the province of the judiciary. *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,887; 470 F. Supp. at 1262; [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,252.

[228] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,887-88.

ter *Redington* and *Transamerica.* Although the courts agree that legislative intent is determinative of the existence of implied causes of action under federal law, courts are unable to agree on the elements of the legislative intent determination.[229] One element of the intent determination is whether plaintiff is a member of the class for whose benefit the CEA was enacted.[230] Commodities investors are members of the class for whose special benefit the antifraud and options trading ban provisions of the CEA were enacted.[231] After *Transamerica,* however, courts should not consider the special benefit analysis conclusive of legislative intent.[232]

Analysis of the language of the CEA is also an element of the legislative intent determination.[233] While prohibiting certain conduct, neither the antifraud nor options trading ban provisions of the Act expressly create or deny civil liability.[234] In addition, Congress has established a comprehensive remedial and enforcement scheme for the Act.[235] Since Congress easily could have created an express private cause of action under the CEA[236] and, in fact, considered legislation which would have provided such a cause of action,[237] the language of the Act indicates that Congress did not intend to create a private remedy under the Act.

Looking to the legislative history of the CEA, the *Alken* court noted that Congress knew of judicial implication of a private action under the CEA while considering enactment of the '74 Act.[238] The court concluded

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[229] *See* Alken v. Lerner, No. 79-0023, slip op. at 5 (D.N.J. Feb. 22, 1980) (applying four-part *Cort* analysis to determine legislative intent); Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000, at 23,885 (N.D. Ill. Jan. 8, 1980) (*Cort* test modified in light of *Transamerica*); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56-57 (N.D. Tex. 1979) (applying four-part *Cort* analysis).

[230] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 246 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979); text accompanying notes 132, 141 & 142 *supra.*

[231] *See* Alken v. Lerner, No. 79-0023, slip op. at 5 (D.N.J. Feb. 22, 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56 (N.D. Tex. 1979); note 219 *supra. But see* Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000, at 23,885-86 (N.D. Ill. Jan. 8, 1980) (investors not part of class sought specifically to be protected under §§ 4c(b) and 4c(c) of the Act).

[232] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 246 (1979) (§ 206 of IAA intended to benefit clients of investment advisors but Congress did not intend § 206 to be enforced through private right of action).

[233] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 246-47 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 569-70 (1979); text accompanying notes 133 & 140-47 *supra.*

[234] *See* Alken v. Lerner, No. 79-0023, slip op. at 6 (D.N.J. Feb. 22, 1980) (antifraud provisions of Act); Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000, at 23,885-86 (options trading ban provisions of Act).

[235] *See* Stone v. Saxon & Windsor Group, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,000, at 23,885 (N.D. Ill. Jan. 8, 1980); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 56 (1979); text accompanying notes 115-18 *supra.*

[236] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 248 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979).

[237] *See* text accompanying notes 157-60, 189 & 190 *supra.*

[238] Alken v. Lerner, No. 79-0023, slip op. at 6 (D.N.J. Feb. 22, 1980); *see* text accompa-

that Congress preferred to rely on judicial implication of a private action under the Act rather than include an express private remedy within the Act's provisions.[239] When considering enactment of the '78 Act, Congress also knew that some courts had denied an implied private remedy under the CEA.[240] Following the logic of the *Alken* court, if Congress considered judicial denial of an implied remedy under the Act erroneous, Congress would have provided an express private remedy within the provisions of the '78 Act. Therefore, the legislative history of the Act, otherwise silent on the implication question, is ambiguous on the question of congressional intent to create or deny an implied private remedy under the Act.

On essentially the same analytical foundation, the Supreme Court in *Transamerica* found no legislative intent to create a private action under section 206 of the Investment Advisers Act.[241] Since determination of legislative intent was dispositive of the implication question, the *Transamerica* Court considered analysis of the third and fourth *Cort* tests unnecessary.[242] Application of the *Transamerica* implication analysis therefore points to the conclusion that no implied private right of action exists under the CEA. Of course, Congress may legislate such a private action.[243] Absent such legislation, however, courts must be wary of granting private plaintiffs standing to sue under the CEA.[244]

C. *Proving Fraud Under the Commodities Acts*

The basic antifraud provisions of the commodities acts are sections 4b[245] and 4c[246] of the Commodity Exchange Act and section 4o of the '74 Act.[247] Under section 4b, persons generally connected with making futures contracts may not cheat, defraud, or willfully deceive others.[248] Section 4b requires the plaintiff to prove that the alleged violator acted willfully or knowingly.[249] Section 4c specifically prohibits wash sales, cross

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nying note 184 *supra*.

[239] Alken v. Lerner, No. 79-0023, slip op. at 7 (D.N.J. Feb. 22, 1980); *see* text accompanying notes 185-87 *supra*.

[240] *See* 124 CONG. REC. S10537 (daily ed. July 12, 1978) (remarks of Sen. Huddleston—criticizing court opinions holding that reparations proceeding is exclusive remedy).

[241] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 245-49 (1979); text accompanying notes 138-48 *supra*.

[242] *See* 100 S. Ct. at 249.

[243] *See* note 236 *supra*.

[244] 100 S. Ct. at 247.

[245] 7 U.S.C. § 6b (1976).

[246] 7 U.S.C. § 6c (1976).

[247] 7 U.S.C. § 6o (1976).

[248] 7 U.S.C. § 6b(A) & (C) (1976). Section 4b(B) provides that persons generally connected with making futures contracts shall not willfully make false reports. *Id.* § 6b(B). Section 4b(D) prohibits a broker from taking a market position opposite to that of his customer, offsetting orders or willingly and knowingly buying and selling orders without the customer's consent. *Id.* § 6b(D). *See generally Commodity Futures Antifraud, supra* note 6, at 903.

[249] *See* CFTC v. Savage, 611 F.2d 270, 283 (9th Cir. 1979); Master Commodities, Inc. v.

trades, accommodation trades of fictitious sales.[250] Somewhat broader than sections 4b and 4c, section 4o of the '74 Act generally prohibits commodity trading advisors or pool operators from defrauding any client or prospective client.[251] Section 4o is similar to both section 10(b) of the Securities Exchange Act of 1934[252] ('34 Act) and section 206 of the Investment Advisers Act of 1940.[253] By tracking specific federal securities statutes, Congress invited judicial application of the case law under federal securities acts to transactions under the commodities acts.

Two Supreme Court cases under the federal securities laws provide guidance in interpreting whether the sections require a plaintiff to prove scienter. Although section 4o is similar to sections 10(b) and 206, the Supreme Court has held that proof of a violation of section 10(b) requires a different standard than proving a violation of section 206. Section 10(b) provides that no person shall use or employ any manipulative or deceptive device in connection with the purchase or sale of any security.[254] Interpreting the statutory language of section 10(b), the Supreme Court in

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Texas Cattle Mgmt. Co., 586 F.2d 1352, 1356 (10th Cir. 1978) (private civil suit); Haltmier v. CFTC, 554 F.2d 556, 562 (2d Cir. 1977) (evil motive not necessary); Silverman v. CFTC, 549 F.2d 28, 31 (7th Cir. 1977) (unauthorized trading for customer's account).

[250] 7 U.S.C. § 6c(a) (1976); *see* S. REP. No. 850, 9th Cong., 2d Sess. 124-39, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2087 (glossary of terms). Section 6c(a)(B) & 6c(b)-(d) apply to transactions in commodity options. 7 U.S.C.A. §§ 6c(a) (B) & 6c(b)-(d) (West Supp. 1979); *see, e.g.*, CFTC v. U.S. Metals Depository Co., 468 F. Supp. 1149, 1152-53 (S.D.N.Y. 1979).

[251] 7 U.S.C. § 6o (1976). Section 4o provides that any commodity trading advisor or pool operator, directly or indirectly, shall not "employ any device, scheme or, artifice to defraud" any client or prospective client or "engage in any transaction, practice, or course of business" which defrauds or deceives any client or prospective client. *Id.* Under the '74 Act a commodity trading advisor includes any person who engages in the business of advising others, either directly or through publications, as to the value of commodities or trading in commodity futures. 7 U.S.C.A. § 2 (West Supp. 1979). The term excludes persons whose services are solely incidental to their business. *Id.* A commodity pool operator includes anyone who solicits funds or property from others for an investment trust or syndicate for the purpose of trading in any commodity for future delivery. 7 U.S.C.A. § 2 (West Supp. 1979). A commodity pool, like a mutual fund, requires investors to contribute to a common fund in which an account executive trades. Gravois v. Fairchild, Arabatzis, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,706 at 22,870 (E.D. La. 1978).

[252] 15 U.S.C. § 78j(b) (1976). Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976) provides that no person shall employ any manipulative or deceptive device in contravention of SEC rules and regulations. *Id.* Rule 10b-5 promulgated thereunder generally makes it unlawful for any person to employ any device, scheme, or artifice to defraud or to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security. 17 C.F.R. § 240, 10b-5 (1979); *cf.* 7 U.S.C. § 6o (1976) (unlawful for commodity trading advisor to employ any device, scheme or artifice to defraud any client). *See generally* Note, *Rule 10b-5: The Circuits Debate the Exclusivity of Remedies, the Purchaser-Seller Requirement, and Constructive Deception*, 37 WASH. & LEE L. REV. 877 (1980).

[253] *See* 15 U.S.C. § 80b-6 (1976); text accompanying note 118 *infra*. Section 4o(1) of the '74 Act tracks the language of 15 U.S.C. § 80b-6(1)-(2). *See also* 7 U.S.C. § 6o(1) (1976).

[254] *See* note 108 *supra*.

Ernst & Ernst v. Hochfelder[255] dismissed a private complaint alleging only negligence by an accounting firm.[256] The *Hochfelder* Court held that a private plaintiff must allege scienter in bringing an action under section 10(b).[257] The Supreme Court reasoned that the language in section 10(b), containing words such as "manipulative" or "deceptive," connotes a requirement of knowing or intentional misconduct.[258] The *Hochfelder* Court did not decide the question of whether the SEC need prove scienter in an injunctive action under section 10(b).[259]

The Supreme Court has decided, however, in *SEC v. Capital Gains Research Bureau, Inc.*[260] that the SEC does not have to show scienter in an injunctive suit under section 206.[261] Section 206 provides that an investment adviser shall not employ any device, scheme, or artifice to defraud any client or engage in a transaction which operates as a fraud or deceit upon a client.[262] Section 206 applies only to investment advisors,[263] while 10(b) applies to any person.[264] The *Capital Gains* Court held that an investment adviser's failure to disclose material facts constituted fraud under section 206.[265] The *Capital Gains* Court reasoned that the intent of

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[255] 425 U.S. 185 (1976).

[256] *Id.* at 215. In *Hochfelder*, the defendant Ernst & Ernst audited the books of a Chicago securities company. The securities company's president fraudulently induced customers to invest funds in a certain account which the president promised would return a high rate of return. The securities company's books never reflected the account. *Id.* at 188-89. A defrauded customer instituted suit under section 10(b) and Rule 10b-5 against Ernst & Ernst. The plaintiff alleged that the accounting firm was negligent in not discovering the failure to include an accounting of the fraudulent transactions. *Id.* at 189-201. Without remanding the case, the Supreme Court dismissed the plaintiff's action since the plaintiff disclaimed any fraudulent or intentional conduct by Ernst & Ernst. *Id.* at 215. *See generally* Johnson, *Applying* Hochfelder *In Commodity Fraud Cases*, 20 B.C. L. REV. 633, 633-36 [hereinafter cited as Johnson].

[257] 425 U.S. at 193. The *Hochfelder* court used the term "scienter" to refer to a mental state embracing intent to deceive, manipulate, or defraud. *Id.* at n.12. The court noted that requisite scienter is something less than specific intent, yet more than simple negligence. *Id.* at 193 n.12; *see 1978-1979 Securities Law Developments: Rule 10b-5*, 36 WASH. & LEE L. REV. 845, 923 (1979) [hereinafter cited as *1978-1979 Developments*]; Note, *Rule 10b-5 Liability After Hochfelder: Abandoning the Concept of Aiding and Abetting*, 45 U. CHI. L. REV. 218, 231 (1978). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 669-700 (4th ed. 1971) (scienter includes three states of mind: (1) knowing; (2) without belief in the truth; (3) reckless); *1978-1979 Developments* at 924 nn.169-70 (scienter includes misrepresentation or omission).

[258] 425 U.S. at 197.

[259] *Id.* at 193 n.12 (citing SEC v. Capital Gains Research Bur., 375 U.S. 180 (1963) for comparison).

[260] 375 U.S. 180 (1963).

[261] *Id.* at 181-82.

[262] 15 U.S.C. § 80b-6 (1976).

[263] *Id.*

[264] *See* note 108 *supra*.

[265] 375 U.S. at 200. The SEC may compel a registered investment advisor to disclose his practice of purchasing shares of a security for his own account shortly before recommending that security to customers for long-term investment. *Id.* at 181-82. The fact that Congress added the word "manipulative" to the Investment Advisers Act by a 1960 amendment, 15

Congress in enacting the remedial Investment Advisers Act was to allow the courts flexibility in avoiding frauds.[266] The Court noted that a requirement that the SEC must show deliberate dishonesty would result in nullifying the protective purpose of the statute.[267] The *Hochfelder* and *Capital Gains* decisions thus demonstrate that relevant considerations in determining whether an antifraud statute requires scienter include the statute's language and purpose and the identify of the complainant.

In *CFTC v. Savage*,[268] a case of first impression under section 4o, the Ninth Circuit applied *Hochfelder* and *Capital Gains Bureau* to determine whether the Commission must prove scienter in an injunctive action. The Commission alleged that Savage[269] offset transactions that customers of American International Trading Company (AITC)[270] made by being the buyer of AITC customer sell orders and the seller of AITC customer buy orders.[271] The alleged purpose of the offsetting transactions was to enable AITC to circumvent the Commission's segregation requirements.[272] The Commission complained that Savage violated sections 4b,[273] 4c,[274] and 4o.[275] In a motion for summary judgment, the Commis-

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U.S.C. § 80b-6(4), does not justify a narrow interpretation of the original enactment. *Id.* at 199. The word "manipulative" is no broader than deceptive or fraudulent where the plaintiff charges the advisor with failure to disclose information. *Id.* Thus, the *Capital Gains* court did not rely on the 1960 amendment in holding that section 206 does not require proof of scienter.

[266] 375 U.S. at 195.

[267] *Id.* at 200. In *Capital Gains*, the Supreme Court distinguished a private damage action from an injunctive action. *Id.* at 193. The Supreme Court noted that fraud has a broader meaning in equity than at common law and that the intention to defraud or misrepresent is not a necessary element of fraud in an equitable suit. *Id.*

[268] 611 F.2d 270 (9th Cir. 1979).

[269] Savage was a member of a Commission-registered contract market. *Id.* at 274.

[270] The American International Trading Company (AITC) was a registered futures commission merchant. 611 F.2d at 280; *see* 7 U.S.C.A. § 2 (West Supp. 1979). AITC managed approximately 900 customers in a managed account program. 611 F.2d at 280.

[271] 611 F.2d at 275. Savage sustained losses with respect to customers who had deficits in their accounts and enjoyed profits on transactions with customers who had credit balances in their accounts. *Id.*

[272] *Id.* The Commodity Exchange Act requires futures commission merchants to maintain net capital equal to a certain percentage of aggregate indebtedness. 7 U.S.C. § 6f (1976); 17 C.F.R. § 1.17 (1979). The percentage requirement is less if the merchant segregates the customers' funds. The '74 Act extended the definition of "commodity" to include all transactions in commodities for future delivery, including transactions in previously unregulated commodities. *See* text accompanying notes 9-11 *supra*. The '74 Act thus extended the segregation requirements to transaction regarding the previously unregulated commodities. *Cf.* 17 C.F.R. § 32.6 (1979) (segregation requirements regarding options). As a result, AITC needed an additional $10,000 to comply with the '74 Act. 611 F.2d at 275 n.5. AITC sought to reduce its requirements by reducing the amounts AITC owed the customers under the existing accounts. *Id.* Rather than raise additional capital, AITC allegedly effected transfers through Savage between customers' accounts having losses and gains. *Id.* The result was to reduce customers' aggregate account balances. *Id.*

[273] *See* text accompanying notes 218 & 219 *supra*.

[274] *See* text accompanying note 250 *supra*.

[275] *See* text accompanying notes 251-53 *supra*. The Commission complained that Sav-

sion requested the court to enjoin Savage from violating the antifraud sections.[276] The district court enjoined Savage from violating sections 4b and 4o.[277]

The Ninth Circuit affirmed the district court's summary judgment against Savage for violating section 4o.[278] The *Savage* court held that, in

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age acted as a commodity trading advisor without registering with the Commission. 611 F.2d at 274-75; *see* note 107 *supra*. Savage traded on the floor for his own account, but had not registered with the Commission. 611 F.2d at 274. The Commission alleged that Savage indirectly communicated information to discretionary account customers. *Id.* at 280; *see* note 13 *supra*. Savage communicated trading advice to the AITC employee responsible for making trading decisions for the managed account programs. 611 F.2d at 280. Savage did not directly communicate with the AITC customers, although Savage knew AITC acted upon his advice. *Id.* at 280-81. Savage claimed that he was exempt from registration because he did not hold himself out as a commodity trading advisor and had not furnished commodity trading advice for more than fifteen persons. *Id.* at 274; *see* 7 U.S.C. § 6m (1976). The Commission had denied Savage registration because Savage's previous felony conviction rendered him unfit to be a commodity trading advisor. *See* Savage v. CFTC, 548 F.2d 192, 197 (7th Cir. 1977); 7 U.S.C. § 8a(2)(B) (1976). The district court enjoined Savage from acting as a commodity trading advisor without registering. 611 F.2d at 280. The Ninth Circuit affirmed this decision and held that Savage knew that more than fifteen persons would rely on his advice. *Id.* The *Savage* court reasoned that an advisor may furnish information indirectly as well as directly. *Id.; see* CFTC Interpretive Letter No. 75-11, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,098 at 20,763 n.6 (1975) (registration of general partners of commodity pool as operators and trading advisors). *See also* CFTC Interpretive Letter No. 76-9 [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,151 (1976) (issue of paying or nonpaying clients relevant only to determination of whether person is advisor—not whether he is entitled to exemption). Further, the Ninth Circuit reasoned that courts should liberally construe remedial statutes. 611 F.2d at 280; *cf.* SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953) (public policy strongly supports SEC registration). Failure to require advisors to register permits advisors to circumvent procedural safeguards by relaying unqualified advice through an intermediary. 611 F.2d at 280. The *Savage* court noted that Savage provided advice to AITC and knew that AITC would incorporate that advice into transactions on behalf of AITC's customers. The Ninth Circuit reasoned that the congressional intent of the registration requirement was to protect ultimate customers from the potential risks of unqualified investors. *Id.; see, e.g.*, 7 U.S.C. §§ 6k (registration as associated with futures commission merchant) & 6n(1)(A)&(B) (reporting requirements of commodity trading pool) (1976).

[276] 611 F.2d at 274-75. In *Savage*, the Commission initially sought preliminary and permanent injunctions against Savage, AITC, and twelve other individual defendants who were employees of AITC and the Mid-America Commodity Exchange (MACE). *Id.* All of the defendants except Savage and two other individuals accepted consent decrees. *Id.*

[277] 611 F.2d at 276-77. The district court issued a preliminary injunction restraining Savage from making false reports, offsetting trades with a customer, and engaging in "wash" or accommodation trades in violation of sections 4b and 4o. The Commission filed a motion for summary judgment. 611 F.2d at 277. Savage denied arrangements with two defendants, denied "knowingly" entering into trades with AITC customers "away from market price," and denied entering into trades with the intention of transferring balances between AITC customers. *Id.* Based on the Commission's motion and affidavits, the district court entered an order and judgment of permanent injunction against Savage and the two remaining defendants. Savage appealed from that order. *Id.*

[278] 611 F.2d at 285-86. The Ninth Circuit agreed with the district court's finding of jurisdiction and venue based on telephone calls to the central district of California since the telephone calls Savage placed from Chicago to the central district of California were an

a Commission injunctive action, section 4o requires only that the violator act intentionally.[279] The court reasoned that a commodity trading advisor's intention to undertake the act which defrauds a client or prospective client violates section 4o.[280] The Commission need only prove that the advisor intended the act, not that the advisor intended to defraud or to deceive.[281] Since section 4o resembles several antifraud sections of the federal securities laws,[282] the *Savage* court analogized to the securities laws to hold that section 4o does not require scienter.[283] The Ninth Circuit distinguished the holding in *Ernst & Ernst v. Hochfelder*[284] that scienter was required in a private damage action under section 10(b).[285] The *Savage* court noted that, while section 10(b) has language similar to section 4o,[286] section 4o broadly prohibits any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client.[287] Section 10(b) does not contain a counterpart to this provision.[288] Section 4o is more like section 206 of the Investment Advisers Act of 1940.[289] The Ninth Circuit reasoned that, since the Supreme Court held in *Capital Gains*[290] that the SEC does not have to show scienter in an injunctive suit under section 206,[291] the Commission does not have to show scienter in an injunctive suit under section 4o.[292] Further, the Ninth Circuit reasoned that the Commission's action against Savage was an injunctive action like that in *Capital Gains* while *Hochfelder* involved an action for private damages.[293]

Although affirming the summary judgment against Savage for violat-

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integral part of a scheme centered upon AITC customers in California. *Id.* at 277-79; *see* 7 U.S.C.A. § 13a-1 (West Supp. 1979).

[279] 611 F.2d at 285.

[280] *Id.*

[281] *Id.* The Ninth Circuit found that Savage knew that AITC would use his advice when AITC traded for its customers. *Id.* at 286.

[282] *See* text accompanying notes 252 & 253 *supra.*

[283] 611 F.2d at 285-86.

[284] 425 U.S. 185 (1976).

[285] *See* text accompanying notes 254-59 *supra.*

[286] *See* text accompanying notes 252 & 254 *supra.*

[287] 611 F.2d at 285; *see* note 252 *supra.*

[288] 611 F.2d at 285. The *Savage* court observed that, unlike section 10(b), the language of Rule 10b-5 is almost identical to section 4o(1) under the '74 Act. *Id.; see* note 252 *supra.* The *Savage* court noted that the *Hochfelder* court read Rule 10b-5 as arguably proscribing conduct regardless of scienter. 611 F.2d at 285 n.15; *see* note 252 *supra.* Moreover, several courts have held that the SEC need not show scienter in enforcement actions under Rule 10b-5. 611 F.2d at 285; *see, e.g.,* SEC v. Aaron, 605 F.2d 612, 619, 624 (2d Cir.), *cert. granted,* 100 S. Ct. 227 (1979); SEC v. World Radio Mission, 544 F.2d 535, 541 n.10 (1st Cir. 1976). *But see* SEC v. Blatt, 583 F.2d 1325, 1322-23 (5th Cir. 1978) (knowing conduct satisfied scienter standard in SEC suit). *See generally 1978-1979 Developments, supra* note 257, at 932-37.

[289] *See* text accompanying notes 253, 262-64 *supra.*

[290] 375 U.S. 180 (1963).

[291] *See* text accompanying notes 260-63 *supra.*

[292] 611 F.2d at 285.

[293] *Id.*

ing section 4o, the Ninth Circuit held that summary judgment was improper against Savage for alleged violations of sections 4b and 4c.[294] The *Savage* Court reasoned that sections 4b and 4c require that the violator act with scienter.[295] The Commission must show that Savage knew he was cheating,[296] or knew his report was false,[297] or knew that he was deceiving,[298] or knew that he was taking the opposite side of a transaction.[299] The Commission may prove scienter and violation of section 4b if the violator acted in reckless disregard of the consequences of his acts.[300] In order to show a section 4c violation, the Commission must prove that Savage had knowledge of his involvement in an accommodation sale or a fictitious transaction.[301] Savage's denial or knowledge of violations of sections 4b and 4c raised a genuine issue of material fact and made summary judgment improper.[302]

The various applications of the antifraud provisions in *Savage* illustrate the differences between section 4b and section 4o. The Ninth Circuit properly held that a defendant has not violated section 4b unless he acts with scienter.[303] Each subsection of section 4b requires intentional conduct.[304] Section 4b uses words, such as "cheat," "defraud," and "willfully,"[305] which connote deliberate acts.[306] While Congress has not

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[294] *Id.* at 283-84.

[295] *Id.*

[296] 7 U.S.C. § 6b(A) (1976).

[297] 7 U.S.C. § 6b(B) (1976).

[298] 7 U.S.C. § 6b(C) (1976).

[299] 7 U.S.C. § 6b(D) (1976).

[300] 611 F.2d at 283; *see* note 257 *supra.*

[301] *Id.* at 284. The Ninth Circuit distinguished *Savage* from SEC v. Aaron, 605 .2d 612 (2d Cir. 1979). *Aaron* involved a securities fruad action in which the Second Circuit noted that the requirements of scienter in government enforcement suits differ from private damages actions. *Id.* at 621. The *Savage* court thus held that the explicit provisions of section 4b must be given more weight than the court's desire to encourage Commission enforcement actions. *Id.* at 284 n.14. *But see* CFTC v. United States Metals Depository Co., 468 F. Supp. 1149, 1156 (S.D.N.Y. 1979).

[302] 611 F.2d at 284. The Commission has the burden of showing the absence of a genuine issue of a material fact. *See* FED. R. CIV. P. 56.

[303] *See* note 256 *supra.*

[304] 611 F.2d at 641-43. Section 4b deals only with fraud between a principal (customer) and an agent (*e.g.*, salesman, floor broker). *Id.* at 636 n.22.

[305] The Commission deleted the word "willfully," as used in section 4b, in promulgating Regulation 30.02. *See* 17 C.F.R. § 30.02 (1979) (fraud in transactions on non-domestic contract markets). Otherwise, the regulation follows section 4b's language. One district court has held that Regulation 30.02 is void to the extent that it exceeds the scope of section 4b. Palmer Trading Company, Inc. v. Shearson Hayden Stone, Inc., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,900 (N.D. Ill. 1979) (private right of action).

[306] CFTC v. Savage, 611 F.2d at 283; *accord,* McCurnin v. Kohlmeyer & Co., 347 F. Supp. 573, 576 (E.D. La. 1972), *aff'd,* 477 F.2d 113 (5th Cir. 1973); *see* Silverman v. CFTC, 549 F.2d 28, 31 (7th Cir. 1977) (willful violation of § 4b where account executive intentionally transcted business not authorized by customer); Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961) (Goodman had ample reason to know limit of investment in rye futures). Evil motive is not a necessary element of § 4b fraud. Haltmier v. CFTC, 554 F.2d 556, 562

changed the restrictive language in section 4b since the original statute in 1936,[307] Congress has added section 4o in 1974.[308] Section 4o's broad language proscribing an advisor's act which defrauds a client justifies the Ninth Circuit's holding that the Commission does not have to show scienter to prove a violation.[309] Section 4o(1)(A) alone does not justify a finding that a plaintiff does not have to show scienter, particularly in light of *Hochfelder's* interpretation of similar words in the '34 Act.[310] The language in section 4o(1)(B), however, is broader than the language in section 10(b).[311] Nothing in section 4o(1)(B) suggests a requirement of scienter.[312] Section 4o(1)(B) prohibits a commodity trading advisor from engaging in any transaction or practice which operates as a fraud or deceit on any client.[313] The Commission may prove a section 4o(1)(B) violation by showing that the advisor intended to do the act and that the act results in a fraud on the client.[314]

Moreover, the purpose and scope of section 4o supports the *Savage* holding that the Commission need not prove that the defendant had knowledge that his action would defraud the client.[315] Congress confined section 4o, like section 206 of the Investment Advisers Act, to investment advisors, whereas Congress applied section 10(b) and Rule 10b-5 to any person.[316] Sections 4o and 206 hold persons whom the general public entrusts with investment matters to higher standards than section 10(b).[317] Section 4o, like the Investment Advisers Act and unlike section 10(b), implements the fiduciary obligations that characterize an advisor's relationship to his client.[318] Proof of actual knowledge of the consequences of one's act is less necessary with investment advisors than with others.[319]

(2d Cir. 1977). The plaintiff can prove the defendant's knowledge by demonstrating that the defendant knew that the acts were unauthorized. 549 F.2d at 31 (violation of § 4b where defendant engaged in unauthorized transactions in customer's account in hope of profit and subsequent approval by client).

[307] PUB. L. No. 675, 79 Stat. 1943 (1936); *see* Johnson, *supra* note 256, at 643.

[308] *See* text accompanying notes 251-53 *supra.*

[309] *See* text accompanying notes 278-93 *supra.*

[310] *See* text accompanying notes 254-59 *supra.*

[311] 611 F.2d at 285. Section 4o(1)(A), like section 10(b), makes it unlawful "to employ any device, scheme, or artifice to defraud any client." 7 U.S.C. § 6o(1) (1976). Section 4o(1)(A) seems superfluous. Section 4o(1)(B) should cover any activity that section 4o(1)(A) covers. Moreover, the interpretation given section 4o(1)(B) by the *Savage* court makes a section 4o(1)(B) violation easier to prove than a violation under section 4o(1)(A).

[312] 611 F.2d at 285.

[313] 7 U.S.C. § 6o(1)(B) (1976).

[314] 611 F.2d at 285.

[315] *See generally* text accompanying notes 266-67 & 178-181 *supra*

[316] *See* notes 252 & 265 *supra.*

[317] *See generally* text accompanying notes 266 & 267 *supra.*

[318] *See* CFTC v. Savage, 611 F.2d at 285; *In re* Savage, CCH [1975-1976 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,139 at 29,923-24 (1976). *See generally* Mitchell, *The Regulation of Commodity Trading Advisers,* 27 EMORY L.J. 957, 994 (1978).

[319] *See, e.g.,* Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961). The purpose of the '74 Act was to discourage fraudulent practices on futures contract market investors. *See*

Congress expects investment advisors to be knowledgeable in their areas.[320] The Ninth Circuit reasonably interpreted section 4o to require a standard of conduct which comports with traditional concepts of fiduciary obligations.[321]

D. *Emergency Power of the Commodity Futures Trading Commission*

Under the Commodity Futures Trading Commission Act of 1974 ('74 Act),[322] Congress granted the Commodity Futures Trading Commission (Commission)[323] power to deal with emergencies in commodities trading.[324] Whenever the Commission has reason to believe that an emergency

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1974 Senate Report, *supra* note 2, at 24, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 5874; *see, e.g.*, CFTC v. U.S. Metals Depository Co., 468 F. Supp. 1149, 1157-61 (S.D.N.Y. 1979).

[320] *See, e.g.*, 7 U.S.C.A. § 6m (West Supp. 1979) (registration); note 131 *supra*. *See also* 7 U.S.C. § 6l (1976) (congressional finding that commodity trading advisors and pool operators affect national public interest).

[321] The Ninth Circuit narrowed its holding in Savage to Commission injunctive actions. *See* text accompanying note 275 *supra*. Whether the Ninth Circuit would apply the same rule in a private damage action is uncertain. The Ninth Circuit distinguished *Hochfelder* in part because that decision applied to a private damage action. 611 F.2d at 284-85. The Ninth Circuit applied *Capital Gains* in part because that decision involved a government injunctive action. *Id.* at 285; *see* note 267 *supra*. The Second Circuit recently noted that the policy considerations governing SEC enforcement hearings are different from those governing private damage actions. SEC v. Aaron, 605 F.2d 612, 621 (2d Cir. 1979). Government enforcement actions attempt to provide maximum protection for the investing public. *Id.* Individual investors bring private actions to obtain monetary relief. *Id.* The effectiveness of government enforcement actions based on negligence alone outweighs the potential harms to those enjoined from violating securities laws. *Id. See also* SEC v. World Radio Mission, 544 F.2d 535, 541 n.10 (1st Cir. 1976); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972).

The type of the complainant should not determine whether the defendant breached the statute. *See* Ernst & Ernst v. Hochfelder, 425 U.S. at 217-18 (Blackmun, J., dissenting). The court should consider, however, the relief that the complainant seeks. *See, e.g.*, SEC v. Capital Gains Research Bur., Inc., 275 U.S. 180, 192 (1963) (SEC did not seek to require the fiduciary to disclose all his security holdings). Further, courts consider a number of factors before determining whether to issue a permanent injunction. A court considers the defendant's likelihood of violating the statute in the future, the degree of scienter involved, the defendant's sincerity, and the defendant's recognition of the wrongful nature of his conduct. *See* SEC v. Universal Major Indus. Corp., 546 F.2d 1044, 1048 (2d Cir. 1976), *cert. denied sub nom.* Homans v. SEC, 434 U.S. 834 (1977); *see, e.g.*, CFTC v. Crown Colony Commodity Options, Ltd., 434 F. Supp. 911, 920 (S.D.N.Y. 1977) (injunction appropriate for "pervasive wrongdoing" over extended period). *See generally* Markham, *Injunctive Actions Under the Commodity Exchange Act*, 504 SEC. REG. & L. REP. (BNA) B-1, B-4 to B-15 (1979) (surveying CFTC injunctive cases). The *Savage* court, however, noted the need to temper the desire to encourage Commission enforcement actions with an acknowledgement of the statute's explicit provisions. 611 F.2d at 284 n.14.

[322] Pub. L. No. 93-463, §§ 101-418, 88 Stat. 1389 (1974) (codified at 7 U.S.C.A. §§ 1-24 (West 1964 & Supp. 1979).

[323] *See* note 107 *supra*.

[324] *See* '74 Act, Pub. L. No. 93-463, § 215, 88 Stat. 1404-05 (codified at 7 U.S.C. § 12a(9) (1976)). An emergency situation may arise whenever any major market disturbance prevents commodity markets from accurately reflecting the forces of supply and demand for a com-

exists, the Commission may direct commodity exchanges to take any action necessary to maintaan or restore orderly trading in commodity futures contracts.[325] The term "emergency" encompasses threatened or actual market manipulations and corners,[326] acts of the United States or a foreign government affecting a commodity,[327] and any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for a commodity.[328] The emergency power conferred on the Commission is extraordinary.[329] Yet, Congress has not expressly provided for judicial review of the Commission's exercise of the emergency power.[330] The question therefore arises whether the Act im-

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modity. *Id.; see* text accompanying notes 326-28 *infra* (emergency defined). Market disturbances which may create an emergency include government imposition of commodity price controls or export trade embargoes, the intervention of a foreign government in the futures market, national emergencies including natural disasters, and futures contract price manipulation through deceptive trading practice. *See* H.R. REP. No. 975, 93d Cong., 2d Sess. 16 (1974) [hereinafter cited as 1974 House Report]. *See generally* 1978 Senate Report, *supra* note 8 at 5-13, [1978] U.S. CODE CONG. & AD. NEWS at 2093-101 (brief history of commodities trading and regulation); 1974 Senate Report, *supra* note 2, at 16-17, [1974] U.S. CODE CONG. & AD. NEWS at 5856-58 (mechanics of futures trading).

[325] 7 U.S.C. § 12a(9) (1976). The Commission may limit trading in a futures contract to liquidation, *see* note 333 *infra*, extend the expiration date of futures contracts, extend the time for making deliveries in fulfillment of futures contracts, or suspend trading in futures contracts. The Commission may also order exchanges to take any other action which, "in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract." 7 U.S.C. § 12a(9) (1976); 1974 Senate Report, *supra* note 2, at 8, [1974] U.S. CODE CONG. & AD. NEWS at 5850.

[326] 7 U.S.C. § 12a(9) (1976). The Commodity Exchange Act (CEA) prohibits all forms of manipulative trading practice. *Id.* §§ 6c, 9, 13b. The Commission may suspend or revoke the trading privileges of any person who has manipulated or attempted to manipulate the market price of a commodity. 7 U.S.C. § 9 (1976). In addition, the Commission may direct contract markets to take action necessary to maintain orderly trading in contracts subject to manipulation. *Id.* § 12a(9); *see* text accompanying note 325 *supra*. "Cornering" is securing such control over the supply of a commodity that its price can be manipulated. *See* 1978 Senate Report, *supra* note 8, [1978] U.S. CODE CONG. & AD. NEWS at 2161. *See generally* Hudson, *Customer Protection in the Commodity Futures Market*, 58 B.U. L. REV. 1, 18-35 (1978) (discussion of manipulative commodities trading practices).

[327] 7 U.S.C. § 12a(9) (1976). Government activities which may cause a market emergency include foreign government intervention in commodity markets, war, and imposition of trade embargoes or price controls. 1974 House Report, *supra* note 324, at 16 (1974).

[328] 7 U.S.C. § 12a(9) (1976). The phrase "major market disturbance" probably connotes market disruption similar to that caused by market manipulation or government activity affecting commodity trading. *See* 1974 House Report, *supra* note 324, at 15 (1974).

[329] *See* 1974 Senate Report, *supra* note 2, at 25, [1974] U.S. CODE CONG. & AD. NEWS at 5865. Recognition of the extraordinary nature of the Commission's emergency power prompted Congress to confine exercise of the power to three broadly defined categories of emergencies. *Id.;* text accompanying notes 326-28 *supra;* note 360 *infra.*

[330] *Compare* 7 U.S.C. § 12a(9) (1976) (Commission emergency powers) *with* Securities Exchange Act of 1934 § 12(k), 15 U.S.C. § 78l(k) (1976) (SEC power to suspend trading in securities). Section 12(k) of the Securities Exchange Act of 1934 ('34 Act) empowers the Securities and Exchange Commission (SEC) to suspend trading in any security for a 10-day period if the SEC determines that public interest and investor protection require such suspension. *Id.* Section 25(a)(1) of the '34 Act expressly provides for judicial review of SEC

pliedly provides for judicial review.

Only two courts have considered the reviewability of Commission emergency orders.[331] The Seventh Circuit addressed the question in *Board of Trade of Chicago v. Commodity Futures Trading Commission*[332] which involved a Commission emergency order to the Chicago Board of Trade to suspend trading in the March 1979 Wheat Futures Contract for the day of March 16, 1979.[333] The Commission found that transportation and warehouse facility shortages had caused a major market disturbance which prevented accurate market reflection of wheat supply and demand. The Commission also determined that the market disturbance created the threat of wheat market manipulation and corner.[334]

Pursuant to the Commission's order, the Board of Trade suspended trading in the wheat contract on March 16, 1979. Under exchange rules, the Board of Trade also limited further trading in the wheat conract to liquidation.[335] The Commission apparently considered the Board of

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orders. *See* 15 U.S.C. § 786(a)(1) (1976); SEC v. Sloan, 436 U.S. 103, 107 (1978).

[331] *See* Board of Trade of Chicago v. CFTC, 605 F.2d 1016, 1021-25 (7th Cir. 1979); Equitable Trust Co. v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,902, at 23,663 (W.D. Tex. 1979).

[332] 605 F.2d 1016 (7th Cir. 1979).

[333] *Id.* at 1018. On March 15, 1979, the Commission ordered the Board of Trade to suspend all trading in the March 1979 Wheat Futures Contract for the following day. *Id.* Under normal circumstances, trading in the contract would have stopped on March 21, 1979. The date set for delivery of wheat under the contract was March 30, 1979. *Id.* at 1019.

[334] *Id.* at 1018. The Commission based its emergency order on information obtained from market surveillance data, grain merchants, grain elevator operators, and futures commission merchants. *Id.* at 1018. The information gathered indicated that a small number of speculative traders were maintaining large, potentially dominant, long positions in the March wheat contract. *Id.* Traders holding long positions in a futures contract are obligated to pay for and take delivery of a commodity at a fixed future date. As a practical matter, a speculative trader will cover his obligation to pay by selling the contract and thereby avoid taking delivery of the commodity. *See* 1 COMM. FUT. L. REP. (CCH) ¶ 100, at 1011. On March 15, 1979, the combined interest of a small number of speculative buyers in the March wheat contract represented more than 80% of the total open interest in the contract. 605 F.2d at 1018. The combined interest in these traders substantially exceeded the total quantity of deliverable wheat. *Id.* Shortages of transportation and warehouse facilities precluded movement of additional wheat into position for delivery. *Id.* at 1018-19. The Commission concluded that these facility shortages produced an artificial imbalance between wheat supply and demand which would cause contract price distortions. *Id.* at 1019. The Commission also was concerned that speculative interests were in a position to manipulate the wheat contract price to their advantage. *Id.* at 1018; *see* note 326 *supra.*

[335] *See* 605 F.2d at 1019. The Board of Trade's liquidation order limited trading in the wheat contract to transactions that would offset or close out a futures contract position. *See* 1978 Senate Report, *supra* note 8, at 130, [1978] U.S. CODE CONG. & AD. NEWS at 2167 (liquidation defined). Contract markets, such as the Chicago Board of Trade, are authorized to promulgate and are required to enforce their own rules and regulations. *See* 7 U.S.C. § 7a(1), (8) (1976). Such rules and regulations, however, are subject to alteration or supplementation by the Commission. *Id.* § 12a(7). Pursuant to such authority, the Commission has promulgated regulations governing contract markets' actions in market emergencies. *See* 17 C.F.R. § 1.41 (1979). Subject to certain limitations, the regulations allow contract markets to establish temporary emergency rules to deal with defined emergency situations. *Id.* Presum-

Trade's additional limitation inadequate to deal with the continuing emergency. On the afternoon of March 16, 1979, the Commission issued a supplemental order requiring the Board of Trade to stop all trading in the wheat contract. The Commission directed the Board of Trade to permit deliveries of wheat to fulfill contract requirements at the settlement price in effect on March 15, 1979 and to settle any unfilled contract requirements on the contract's delivery date, March 30, 1979, at the March 15 settlement price.[336]

The Board of Trade instituted an action in federal district court seeking review of the Commission's emergency determination and a preliminary injunction of the Commission's supplemental order.[337] The Board of Trade asserted that the Commission's order was arbitrary, capricious, an abuse of discretion, and in excess of the Commission's authority since no emergency existed within the meaning of the Commodity Exchange Act (CEA or the Act).[338] The Commission asserted that the emergency determination was not judicially reviewable.[339] Based on the language of the Act, the district court concluded that Commission emergency orders are reviewable.[340] The court found no evidence of an emergency within the meaning of the CEA and granted the Board of Trade's motion for a preliminary injunction.[341]

The Commission filed notice of appeal and a motion for stay of the district court's order pending appeal.[342] At a hearing on the motion, a

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ably, the Board of Trade acted pursuant to this rule-making authority in limiting further trading in the wheat futures contract.

[336] *See* 605 F.2d at 1019. The Commission may alter or supplement contract market rules and regulations. 7 U.S.C. § 12a(7) (1976); *see* note 335 *supra*. The Commission issued the supplemental order on the belief that an emergency situation continued to exist and that the Board of Trade's provision for liquidation of open contract positions insufficiently dealt with the emergency. *See* 605 F.2d at 1019.

[337] *See* 605 F.2d at 1019; Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,780 (N.D. Ill. 1979).

[338] 605 F.2d at 1019; *see* Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,780, at 23,185-6 (N.D. Ill. 1979). The Board of Trade presented evidence tending to establish that no emergency existed. *Id.* The district court's opinion does not describe the Board of Trade's evidence.

[339] *See* 605 F.2d at 1019; Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,780 at 23,185-5 (N.D. Ill. 1979). The Commission argued that the emergency power was committed to Commission discretion and, therefore, was nonreviewable. *See* 5 U.S.C. § 701(a) (1976); text accompanying notes 350-53 *infra*.

[340] *See* Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,780, at 23,185-5 (N.D. Ill. 1979). Under the CEA, the Commission may direct a contract market to take emergency action whenever the Commission "has reason to believe that an emergency exists." *See* 7 U.S.C. § 12a(9) (1976). The district court determined that the language of the CEA provides an objective, "reasonable belief" standard for judicial review of Commission emergency action. [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,780, at 23,185-5 (N.D. Ill. 1979).

[341] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,780, 23,185-6; *see* 605 F.2d at 1019.

[342] *See* 605 F.2d at 1020; Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,781, at 23,185-7 to 23,186 (7th Cir. 1979).

Seventh Circuit panel determined that the Commission's order was judicially reviewable.[343] Since the Commission had failed to supply evidence supporting the emergency determination, the Seventh Circuit considered the Board of Trade's allegations undisputed and denied the Commission's motion for stay.[344] The Seventh Circuit denied the Board of Trade's subsequent motion to dismiss the appeal, however, since the order denying the motion for stay did not purport to rule on the merits of the case.[345]

On appeal, the Board of Trade argued that the Commission's claim was moot.[346] Since the district court's injunction order expired with the expiration of the wheat futures contract on March 30, 1979, circumstances giving rise to the Commission's cause of action no longer existed at the time of appeal.[347] The Seventh Circuit reasoned, however, that any emergency action taken by the Commission was likely to be of short duration and that similar controversies between the Board of Trade and the Commission would likely arise in the future.[348] A well-established exception to the mootness doctrine allows courts to hear cases capable of repetition, but evading judicial review.[349] The Seventh Circuit, therefore, denied the Board of Trade's motion to dismiss for mootness.

Considering the merits of the Commission's appeal, the Seventh Circuit determined that Commission emergency action is exempt from judicial review if precluded by the CEA or otherwise committed to the Commission's discretion by the Act.[350] Since the CEA does not expressly

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[343] *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,781, at 23,186 (7th Cir. 1979). The Seventh Circuit agreed with the district court's conclusion that the language of the CEA and the nature of the Commission's emergency determination permit the courts to review the alleged arbitrary nature of Commission emergency orders. *Id.*

[344] *See* Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,781, at 23,186 (7th Cir. 1979).

[345] *See* 605 F.2d at 1020.

[346] *See* 605 F.2d at 1020; Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374-79 (1974).

[347] *See* 605 F.2d at 1020.

[348] *Id.* at 1020-21.

[349] *Id.* at 1020. If a plaintiff bases a claim on conduct which ceases prior to litigation of the claim and the plaintiff may reasonably expect to be subjected to the same conduct again, a court may hear the plaintiff's claim even though the action is technically moot. SEC v. Sloan, 436 U.S. 103, 109-10 (1978); Weinstein v. Bradford, 423 U.S. 147, 148-49 (1975) (per curiam); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-15 (1911). In *Southern Pacific*, appellants sought to enjoin an order of the ICC requiring appellants to cease and desist for two years from preferring a certain shipper of cotton seed products. *Id.* at 499. Before hearing, the ICC order expired. *Id.* at 514. The Supreme Court, however, concluded that the case was not subject to dismissal on the ground of mootness since the controversy was "capable of repetition, yet evading review." *Id.* at 515.

[350] 605 F.2d at 1021; *see* 5 U.S.C. § 701(a) (1976). Federal law provides for judicial review of agency action unless a statute precludes judicial review or commits agency action to agency discretion. *Id.* The Commission argued that the emergency determination is committed to Commission discretion under the CEA. 605 F.2d at 1021 n.6. The Commission conceded, however, that emergency action, even if committed to agency discretion, is nevertheless judicially reviewable if challenged on constitutional grounds or on a claim of bad faith or arbitrariness. *Id.; see* Leedom v. Kyne, 358 U.S. 184, 188 (1958) (action by agency,

prohibit judicial review of Commission emergency action, the Seventh Circuit considered whether Congress impliedly intended to preclude judicial review.[351] The court noted that only on a showing of clear and convincing evidence of a contrary legislative intent should courts restrict access to judicial review.[352] Such legislative intent must be determined from the language and structure of the CEA, the Act's legislative history and the nature of the Commission's emergency powers in the regulatory scheme of the Act.[353]

The language of the CEA indicates that the Commission's emergency determination is committed to Commission discretion.[354] The Act provides that, whenever the Commission has reason to believe that an emergency exists, the Commission may direct exchanges to take action required to maintain orderly futures markets.[355] The Board of Trade argued that the words "reason to believe" provide an objective standard for review of Commission emergency action.[356] The Seventh Circuit, how-

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unlawful because in excess of delegated power and contrary to specific prohibition, is judicially reviewable); Coppenbarger v. FAA, 558 F.2d 836, 837-38 (7th Cir. 1977) (challenge to agency action based on violation of due process uniquely suited to judicial review); Ness Investment Corp. v. United States Dept. of Agriculture, Forest Service, 512 F.2d 706, 715 (9th Cir. 1975) (judicial review available in action based on agency's abuse of discretion where exercise of discretion exceeds constitutional, statutory or other legal mandates). *See generally* Schwartz, *Administrative Law in the Next Century*, 39 OHIO ST. L.J. 805 (1978).

[351] 605 F.2d at 1021-22. *See* Southern Ry. v. Seaboard Allied Milling Corp., 99 S. Ct. 2388, 2394 (1979); Barlow v. Collins, 397 U.S. 159, 165-66 (1970). *Southern Ry.* questioned whether the Interstate Commerce Commission's refusal to conduct an investigation provided for under the Interstate Commerce Act was impliedly subject to judicial review. *See* 99 S. Ct. at 2390-91. The Supreme Court found "persuasive reason" to believe that Congress intended the ICC's investigation decision to be nonreviewable. *Id.* at 2394. The Court considered the language of the statute in question permissive, not mandatory. *Id.* The language also was silent as to factors which the ICC should consider in making investigation decisions. *Id.* Furthermore, the Court noted that Congress expressly provided for judicial review of ICC action taken pursuant to other sections of the Interstate Commerce Act. *Id.* at 2395. Congressional failure to provide for judicial review of the ICC investigation decision indicated congressional intent to preclude such review. *Id.* Finally, the legislative history of the statute supported the Court's conclusion that the ICC investigation decision was nonreviewable. *Id.* at 2397.

[352] 605 F.2d at 1022; *see* Barlow v. Collins, 397 U.S. 159, 166-67 (1970) (administrative action subject to judicial review unless nonreviewability demonstrated); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967) (judicial review not precluded unless persuasive reason to believe such was purpose of Congress).

[353] 605 F.2d at 1022; *see* Southern Ry. v. Seaboard Allied Milling Corp., 99 S. Ct. 2388, 2394-97 (1979); note 28 *supra.*

[354] *See* text accompanying note 355 *infra.*

[355] 7 U.S.C. § 12a(9) (1976); *see* note 325 *supra.*

[356] *See* 605 F.2d at 1022 n.7. Both the Seventh Circuit panel which denied the Commission's motion for stay and the district court which granted the preliminary injunction agreed with the Board of Trade's assertion that the language of the Act provided a standard for review of the Commission's emergency determination. *See* Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,781, at 23,186 (7th Cir. 1979); Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,780, at 23,185-5 (N.D. Ill. 1979).

ever, interpreted the phrase "whenever [the Commission] has reason to believe that an emergency exists" as establishing a subjective standard of review.[357] The Board of Trade also argued that since the Act limits the situations in which the Commission may invoke its emergency powers,[358] Congress had provided standards for review of the Commission's emergency determination.[359] The court rejected the Board of Trade's argument and concluded that limiting the circumstances in which the Commission could use emergency powers did not indicate congressional intent to remove the emergency determination from Commission discretion.[360]

The structure of the CEA also indicates congressional intent to commit emergency determinations to Commission discretion.[361] The CEA provides the Commission with traditional, discretionary methods of enforcing the Act's provisions.[362] Since market emergencies are not necessarily the product of CEA violations, Congress sought to insure the Commission's regulatory effectiveness by providing the emergency power.[363] Although the *Board of Trade* opinion is unclear, the Seventh Circuit apparently determined that since CEA enforcement was committed to Commission discretion, Congress intended that the emergency power also be committed to Commission discretion.[364] Commission enforcement of the CEA is expressly subject to judicial review.[365] The Seventh Circuit con-

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[357] 605 F.2d at 1022 n.7.

[358] *See* 7 U.S.C. § 12a(9) (1976); text accompanying notes 5-7 *supra*. The Act's definition of emergency confines Commission exercise of the emergency power to three broadly defined situations. *Id.; see* note 360 *infra*.

[359] 605 F.2d at 1022 & n.8.

[360] *Id.* The legislative history of the '74 Act indicates that Congress recognized the extraordinary nature of the Commission's emergency power. *See* 1974 Senate Report, *supra* note 2, at 25, [1974] U.S. CODE CONG. & AD. NEWS at 5865. Consequently, Congress defined emergency in such a way as to limit the exercise of the emergency power. *Id.; see* text accompanying notes 326-28 *supra*. Congress, however, did not define categories of emergencies so narrowly as to preclude the "effective use of the emergency powers" by the Commission which "requires the careful exercise of expert and impartial judgment by the Commission." *See* CONF. REP. No. 1383, 93d Cong., 2d Sess. 38, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5894, 5900 [hereinafter cited as 1974 Conference Report]. Thus, the Seventh Circuit concluded that Congress utilized the CEA definition of emergency to designate the context in which the Commission might exercise discretionary emergency powers. 605 F.2d at 1022-23.

[361] 605 F.2d at 1023.

[362] *See* 7 U.S.C. §§ 9, 13a-1 (1976); *see* text accompanying notes 115-18 *supra*. The Commission may bring administrative proceedings against any person suspected of violating the Act. 7 U.S.C. § 9 (1976). The Act expressly provides for judicial review of such proceedings. *Id.* The Commission may also institute an action in district court to enjoin violations of the CEA. *Id.* § 13a-1.

[363] *See* 605 F.2d at 1023 (quoting 1974 Senate Report, *supra* note 2, at 25-26, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 5860); 7 U.S.C. § 12a(9) (1976). The definition of market emergency contemplates not only market manipulation and corners but also governmental actions affecting commodities and other major market disturbances which prevent accurate commodity pricing. *Id.; see* text accompanying notes 327 & 328 *supra*.

[364] *See* 605 F.2d at 1023.

[365] *See, e.g.*, 7 U.S.C. § 9 (1976) (administrative enforcement proceedings reviewable in

sidered the failure to provide judicial review of emergency action an indication of congressional intent to preclude such review.[366]

The Seventh Circuit observed that an emergency determination does not lend itself to judicial review.[367] Market emergencies may be unforeseen, complex and rapidly changing.[368] The availability of judicial review would neutralize the Commission's power to deal quickly with such emergencies.[369] Thus, the court concluded that the congressional grant of emergency power alone suggests an intent to commit emergency action to Commission discretion.[370]

Finally, the legislative history of the '74 Act indicates that the emergency determination is committed to Commission discretion.[371] Congress determined that commodity market volatility is detrimental to producers and consumers of commodities.[372] While considering enactment of the '74

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federal courts); 7 U.S.C.A. § 18(g) (West Supp. 1979) (commission reparations order reviewable in federal court). While Commission enforcement of the Act is expressly reviewable in the courts, the CEA does not provide expressly for judicial review of Commission emergency action. *See* 605 F.2d at 1023.

[366] *See* 605 F.2d at 1023.

[367] *Id.*

[368] *Id.; see* notes 324 & 326-28 *supra*. Market disruptions, including government imposition of price controls or trade embargoes, intervention of foreign governments in domestic futures markets, and national emergencies, may occur suddenly. Measures required to deal effectively with such disruptions may be complex. *See* text accompanying notes 333-36 *supra*. Thus, Congress established the Commission which is composed of individuals with commodity market expertise, and granted the Commission broad power to deal with market emergencies. *See* 7 U.S.C. §§ 4a, 12a(9) (1976).

[369] 605 F.2d at 1023. Judicial review of Commission emergency action would hamper the Commission's ability to move quickly to prevent or control commodity market emergencies. *Id.* During judicial review of Commission emergency orders, market disturbances might proceed unchecked. Judicial review effectively would deprive commodity markets of Commission members' expertise in dealing with market emergencies. *See id.* at 1023, 1025.

[370] 605 F.2d at 1023. In Morris v. Gressette, 432 U.S. 491 (1977), the Supreme Court considered the judicial reviewability of the United States Attorney General's action under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976). Section 5 establishes two alternative methods by which states can obtain federal review of a change in their voting laws. *Id.* Under one alternative a state may submit a change in voting laws to the Attorney General and may enforce the change if the Attorney General has not objected within 60 days. *Id.* The *Morris* case involved a challenge to the Attorney General's failure to object to a new South Carolina voting rights plan. 432 U.S. at 499. The Court reasoned that the nature of the § 5 remedy, which the Court had previously characterized as an unusual and severe procedure, strongly suggested that Congress did not intend the Attorney General's § 5 determination to be subject to judicial review. *Id.* at 501.

[371] 605 F.2d at 1023; *see* 1974 Senate Report, *supra* note 2, at 25-26, [1974] U.S. CODE CONG. & AD. NEWS at 5865-66, 5879; 1974 House Report, *supra* note 324, at 30 (1974); 1974 Conference Report, *supra* note 360, at 37-38, [1974] U.S. CODE CONG. & AD. NEWS at 5899-900.

[372] *See* 7 U.S.C. § 5 (1976). Commodity prices are susceptible to speculation. *Id.* Sudden and unreasonable fluctuations in the prices of commodities frequently occur as a result of such speculation. *Id.* Unreasonable market fluctuations are the product of inefficient commodity pricing which is detrimental to producers and consumers of commodities. *Id.* Congress decided to regulate commodity futures trading to protect the national public interest in stable, efficient commodity markets. *Id.; see* 605 F.2d at 1023-24.

Act, the Senate Committee on Agriculture and Forestry concluded that the Commission could not be expected to control rapidly expanding and complex futures markets without broad authority over commodity exchanges.[373] Based on a similar assessment of the Commission's regulatory role, the House Committee on Agriculture favorably reported a bill which granted the Commission emergency authority over exchanges whenever the Commission had reason to believe that market conditions threatened orderly trading in futures contracts.[374] The Senate Committee considered the House emergency authorization too broad, noting that the House bill would allow the Commission to use the emergency power in situations other than major market disturbances.[375] As a compromise, Congress adopted the current emergency provisions of the CEA which restrict Commission emergency authority over exchanges to specified circumstances.[376] Within the CEA definition of emergency, however, Congress committed effective use of the emergency power to careful exercise of expert and impartail judgment by the Commission.[377] The Seventh Circuit concluded that the legislative history of the '74 Act evidenced congressional intent to commit the emergency determination, within definitional boundaries, to the sole discretion of the Commission.[378]

Following the Seventh Circuit's lead, the court in *Equitable Trust Co.*

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[373] *See* 1974 Senate Report, *supra* note 2, at 19, [1974] U.S. CODE CONG. & AD. NEWS at 5859. The Senate Committee on Agriculture and Forestry felt that the Commission must have authority over exchanges in order to insure that contract markets perform their regulatory functions. *Id.* Only with such authority could the Commission effectively oversee commodity markets. *Id.*

[374] *See* H.R. 13113, 93d Cong., 2d Sess. § 215, 120 CONG. REC. 33038 (1974).

[375] *See* 1974 Senate Report, *supra* note 2, at 25, [1974] U.S. CODE CONG. & AD. NEWS at 5865-66. Since the House version of the emergency powers section granted the Commission emergency authority over exchanges whenever the Commission had reason to believe that market conditions threatened orderly trading in futures contracts, the Senate Committee felt that the House bill granted the Commission too much freedom in exercising the emergency power. *Id.* at 5865. The Senate Committee therefore proposed an amendment to the House definition of "emergency" to restrict the circumstances in which the Commission might exercise its emergency powers. The Senate Committee amendment also provided that, in order to qualify as an emergency, a market disruption must have a greater adverse impact on commodity markets than proposed Commission emergency action. *Id.*

[376] *See* 7 U.S.C. § 12a(9) (1976); 1974 Conference Report, *supra* note 360, at 37-38, [1974] U.S. CODE CONG. & AD. NEWS at 5899-900. House and Senate conferees adopted the Senate definition of "emergency" which limited exercise of Commission emergency power to three broad emergency categories. *Id.; see* text accompanying notes 326-28 *supra*. The Conference Committee deleted a portion of the Senate definition which required an emergency to have a greater adverse impact on commodity markets than action proposed by the Commission to control the emergency. 1974 Conference Report, *supra* note 360, at 38, [1974] U.S. CODE CONG. & AD. NEWS at 5899-900.

[377] 1974 Conference Report, *supra* note 360, at 38, [1974] U.S. CODE CONG. & AD. NEWS at 5900.

[378] 605 F.2d at 1025. The court stated that "judicial review of the Commission's emergency determination would thwart the very purpose for which Congress authorized the emergency powers." *Id.* The availability of judicial review would preclude the Commission's ability to take swift and effective action when a market emergency arises. *Id.*

v. Commodity Futures Trading Commission[379] concluded that Commission emergency orders are nonreviewable.[380] The plaintiff, Equitable Trust Company (Equitable), sought declaratory relief from a Commission emergency order.[381] The order recited the Commission's belief that foreign government activity in the coffee futures market was preventing accurate market reflection of coffee supply and demand. According to the Commission, the disruptive activity of foreign governments created a threat of coffee market manipulation and corner.[382] Consequently, the Commission ordered coffee traders to reduce their holdings of coffee futures contracts.[383] Equitable considered itself aggrieved by the Commission's order since parties to litigation then pending against Equitable might assert the emergency order as an excuse for breaching certain contracts with the company.[384] The district court dismissed Equitable's complaint, however, reasoning that the courts have no jurisdiction to review Commission emergency orders.[385]

The *Equitable Trust* court considered the language of the Act indicative of congressional intent to commit the emergency determination to Commission discretion.[386] The court observed that the Commission may direct exchanges to take such action as "in the Commission's judgment" is necessary whenever the Commission "has reason to believe that an emergency exists."[387] The court rejected the argument that the CEA emergency definition provides an objective standard by which to measure Commission action. The emergency definition provides only boundaries within which the Commission may exercise discretionary emergency authority.[388] The court also considered judicial review of the emergency de-

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[379] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,902 (W.D. Tex. 1979).

[380] *Id.* at 23,664. The district court stated that neither the emergency determination nor the remedial measures taken by the Commission are reviewable in the courts. *Id.* The district court based its conclusion of nonreviewability on the reasoning of the Seventh Circuit in Board of Trade of Chicago v. CFTC, 605 F.2d 1018 (7th Cir. 1979). *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664.

[381] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,663.

[382] *See id.* The Commission perceived the threat of manipulation and corner in the December 1977 Coffee "C" Futures Contract traded on the New York Coffee & Sugar Exchange. *Id.* Anticipated supplies of coffee were insufficient to fulfill the coffee futures contract requirements. *Id.* at 23,663 n.1. In addition, a small group of coffee traders controlled both large positions in the coffee futures contract and a significant percentage of the known coffee supply. *Id.* By manipulating the supply of coffee, these traders could manipulate the price of the coffee futures contract. *See* note 334 *supra.*

[383] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,663.

[384] *Id.* Equitable asserted that the Commission had no reason to believe that an emergency existed and that issuance of the emergency order was an abuse of discretion in excess of the Commission's statutory authority. *Id.*

[385] *Id.; see* text accompanying notes 386-90 *infra.*

[386] *See* Equitable Trust Co. v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,902, at 23,664 (W.D. Tex. 1979); text accompanying notes 355-60 *supra.*

[387] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664; *see* 7 U.S.C. § 12a(9) (1976); text accompanying notes 355-57 *supra.*

[388] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664; *see* text accompa-

termination inappropriate since such review might prevent the Commission from taking appropriate steps to remedy market disruptions.[389] Finally, the court reasoned that mere congressional provision for Commission emergency power suggests that Congress intended to commit emergency action to Commission discretion.[390]

Based on the language and structure of the CEA, the nature of the Commission's emergency determination, and the legislative history of the '74 Act, the *Board of Trade* and *Equitable Trust* courts concluded that Congress intended to commit the emergency determination to Commission discretion.[391] Although evidence of such legislative intent is less than clear and convincing,[392] the courts' conclusion is sound. Allowing those affected by Commission emergency orders, including contract markets, to seek judicial review of such orders would prevent the exercise of emergency power expressly conferred on the Commission.[393] Where an inference of judicial review would preclude proper operation of a federal statute, the inference should be avoided. Whether Congress should confer emergency power on the Commission, leave market regulation to the exchanges or allow market forces to correct market disruption is not in question. Given the existence of Commission emergency power, the question is simply whether the exercise of such power is judicially reviewable. The courts in *Board of Trade* and *Equitable Trust* have concluded that Commission exercise of emergency power is not reviewable.

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nying notes 358-60 *supra*. Since the effective use of the emergency powers requires the careful exercise of expert judgment by the Commission, the emergency determination must be left to Commission discretion. *See* [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664; 1974 Conference Report, *supra* note 360, at 38, [1974] U.S. CODE CONG. & AD. NEWS at 5900; note 360 *supra*.

[389] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664; *see* text accompanying notes 367-69 *supra*.

[390] [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664; *see* text accompanying note 370 *supra*.

[391] Board of Trade of Chicago v. CFTC, 605 F.2d at 1025; Equitable Trust Co. v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664.

[392] *See* The National Law Journal, Oct. 8, 1979, at 37; text accompanying note 352 *supra*.

[393] *See* 605 F.2d at 1025; [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) at 23,664.