Washington and Lee Law Review

Volume 40 | Issue 3 Article 5

Summer 6-1-1983

Conflict Resolved: An Implied Remedy Under Section 10(B) Of The '34 Act Survives Despite The Existence Of Express Remedies

NOTES

CONFLICT RESOLVED: AN IMPLIED REMEDY UNDER SECTION 10(b) OF THE '34 ACT SURVIVES DESPITE THE EXISTENCE OF EXPRESS REMEDIES

Section 10(b)[1] of the Securities Exchange Act of 1934 ('34 Act) and Securities Exchange Commission (SEC) Rule 10b-5[2] are conspicuous amidst the complex body of federal securities regulations as the subjects of considerable commentary.[3] Congress enacted section 10(b) to protect investors by deterring deceptive and unfair practices in the securities markets.[4]

---

[1] 15 U.S.C. § 78j (1976) ('34 Act, § 10(b)). Section 10(b) of the Securities Exchange Act of 1934 ('34 Act), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or of any facility of any national securities exchange . . .
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

[2] 17 C.F.R. § 240.10b-5 (1982). The Securities Exchange Commission (SEC) rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) 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.

Id.

[3] *See* A. JACOBS, THE IMPACT OF RULE 10b-5 (1980) [hereinafter cited as JACOBS] (comprehensive study of rule 10b-5). *See generally* Bahlman, *Rule 10b-5: The Case For Its Full Acceptance As Federal Corporation Law*, 37 U. CIN. L. REV. 727 (1968); Jacobs, *The Role of the Securities Exchange Act Rule 10b-5 in the Regulation of Corporate Management*, 59 CORNELL L. REV. 27 (1973); Project, *Recent Developments in Securities Law: Causes of Action Under Rule 10b-5*, 26 Buffalo L. Rev. 503 (1977); Note, *The Prospects for Rule X-10B-5: An Emerging Remedy for Defrauded Investors*, 59 YALE L.J. 1120 (1950). [hereinafter cited as *Emerging Remedy*].

[4] *See* S. REP. No. 792, 73d Cong., 2d Sess. 3-5 (1934); H.R. REP. No. 1383, 73d Cong., 2d Sess. 10 (1934), *reprinted in* 5 J. ELLENBERGER & E. MAHOR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, items 17, 18 (1934) (manipulative practices banned to insure investors of fair and honest markets); *see also Hearings on Stock Exchange Regulation Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (remarks of T. Corcoran) (§ 10(b) allows SEC to regulate

Section 10(b) prohibits the use of manipulative or deceptive devices in connection with the purchase or sale of a security.[5] Although section 10(b) does not provide explicitly for a private right of action, courts consistently have implied a remedy for defrauded private investors under the statute.[6] Certain limitations, however, surround implied private actions under section 10(b).[7] For example, the purchaser-seller requirement

---

practices to prevent manipulative schemes and devices). *See generally* JACOBS, *supra* note 3, § 5.01 (concise examination of sparse legislative history surrounding § 10(b)).

[5] 15 U.S.C. § 78j(b) (1976). The language of 10(b) is subject to thorough examination in widespread litigation, allowing courts to delineate precise categories and limitations that apply under § 10(b). *See* Ketchum v. Green, 557 F.2d 1022, 1026 (3d Cir.) (interpretation of "in connection with" clause of § 10(b)), *cert. denied*, 434 U.S. 940 (1977); Sargent v. Genesco, Inc., 492 F.2d 750, 763 (5th Cir. 1974) (interpretation of "purchase or sale" clause of § 10(b)); Sanders v. John Nuveen & Co., 463 F.2d 1075, 1077 (7th Cir.) (interpretation of "security"), *cert. denied*, 409 U.S. 1009 (1972).

[6] *See* Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 241 (2d Cir. 1974) (implied right of action exists for violation of § 10(b)); Sargent v. Genesco, Inc., 492 F.2d 750, 760 (5th Cir. 1974) (implementation of § 10(b) is dependent on implied private action); James v. Gerber Prods. Co., 483 F.2d 944, 950 (6th Cir. 1973) (implied right of action under § 10(b) to reduce incidence of fraud). The Supreme Court initiated the implication of private rights of action based on the general tort principle that liability should attach to wrongful conduct despite the absence of a statute specifically providing injured persons a cause of action. Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916). The *Rigsby* Court implied a private right of action under the Federal Safety Appliance Act even though the statute did not provide an explicit remedy. *Id.* In 1946, a district court first recognized an implied right of action under § 10(b). Kardon v. National Gypsum, Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946). The *Kardon* Court justified an implied right of action on the common-law principle that wrongful conduct in violation of a statute necessitated a remedy for the wronged party. *Id.* The Supreme Court eventually recognized the existence of an implied right of action under § 10(b) without employing any specific analysis. *See* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). In the realm of federal securities laws, the Supreme Court has evidenced a trend towards expansive statutory interpretation permitting implied rights of action. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 429-30 (1964). In *Borak*, the Court inferred a cause of action for damages in favor of shareholders relying on misleading proxy statements distributed in violation of § 14(a) of the '34 Act. *Id.* Although § 14(a) created no specific remedy, the *Borak* Court determined that private actions were necessary supplements to SEC suits to achieve the congressional goal of preventing proxy fraud. *Id.* at 432-33. The Court also stated that federal courts should provide remedies for violations of federal statutes. *Id.* Moreover, the Court in *Borak* encouraged lower courts to imply private remedies under other sections of the securities laws. *Id.* at 433. The liberal approach delineated in *Borak* waned in later Supreme Court decisions that evinced a trend toward limiting implied rights of action. *See, e.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 420-21 (1975) (no private right of action implied under Securities Investor Protection Act of 1970); National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers, 414 U.S. 453, 458 (1974) (no implied right of action permitted under Rail Passenger Service Act of 1970). *But see* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381 (1982) (right of action implied under Commodity Exchange Act). *See generally* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963) [hereinafter cited as Note]; Comment, *Private Rights of Action Under* Amtrak *and* Ash: *Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1393 (1975).

[7] *See, e.g.*, Chiarella v. United States, 445 U.S. 222, 231-32 (1980) (must have fiduciary relationship to create duty to disclose under § 10(b)); Santa Fe Indus. v. Green, 430 U.S.

specifies that only actual purchasers and sellers of securities have standing to sue under section 10(b).[8] Another limitation is the scienter requirement, which stipulates that a plaintiff must demonstrate that the defendant acted with the intent to defraud.[9] Since section 10(b) serves as a broad antifraud provision, however, the scope of the statute often overlaps the express remedies of the Securities Act of 1933 ('33 Act) and the '34 Act.[10] When both the express and implied antifraud remedies are available to plaintiffs injured by the same actionable conduct, the question arises which remedy the plaintiffs may elect.[11] The Supreme Court recently resolved the conflict between section 10(b) and express liability provisions in *Huddleston v. Herman & MacLean*,[12] and concluded that an implied right of action under section 10(b) exists despite the presence of an express remedy governing the defendant's conduct.[13]

Both the '33 and '34 Acts provide several express remedies allowing private actions for damages.[14] Congress designed the '33 Act to regulate

---

462, 477 (1977) (deception or manipulation required for action under § 10(b)); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (scienter required in cause of action under § 10(b)); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (only purchasers and sellers maintain standing to sue under § 10(b)).

[8] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-55 (1975) (only plaintiffs who actually purchase or sell securities can obtain standing under § 10(b)). *But see* A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD AND COMMODITIES FRAUD § 8.8 (1982) (suggesting considerable evidence exists that § 10b's purchaser-seller requirement is subject to attrition). *See generally* Note, *Standing Under Rule 10b-5 After* Blue Chip Stamps, 75 MICH. L. REV. 413, 431-37 (1976) (discussion of exceptions to purchaser-seller rule after *Blue Chip*).

[9] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); *infra* note 27 (scienter requirement).

[10] *See* United States v. Naftalin, 441 U.S. 768, 777-78 (1979) (applying § 17(a) of '33 Act to conduct also prohibited by § 10(b) of '34 Act). In *Naftalin*, the Supreme Court admitted that the '34 Act and the '33 Act prohibit some of the same conduct. *Id.* In finding that defendant guilty of securities fraud under § 17(a) of the '33 Act, the Court recognized that the overlap between the securities laws does not limit the broad sanctions of § 17(a)'s antifraud provisions). *Id.* In *SEC v. National Sec., Inc.*, the Supreme Court described the overlap of remedies as neither unusual nor unfortunate. 393 U.S. 453, 468 (1969). In the savings clauses included in the '33 and '34 Acts, Congress rejected the notion that express remedies of the securities laws would preempt all other rights of action. *See* Huddleston v. Herman & MacLean, 51 U.S.L.W. 4099, 4101 (U.S. Jan. 24, 1983). Section 16 of the '33 Act states that the right and remedies provided in the '33 Act are additional to all other rights and remedies existing in equity or law. *See* 15 U.S.C. § 77p (1976). The '34 Act contains a similar provision in § 28(a), stating that the remedies under the '34 Act recognized any and all additional remedies. *See* 15 U.S.C. § 78bb(a) (1976).

[11] *See* Ross v. A.H. Robbins Co., 607 F.2d 545, 554 (2d Cir. 1979) (existence of express remedy under § 18 of '34 Act does not preclude implication of § 10(b) private right of action). *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, 877-88 (1980) (examining conflict between express remedy under § 18 and implied remedy under § 10(b)) [hereinafter cited as *The Circuits Debate*].

[12] 51 U.S.L.W. 4099 (U.S. Jan. 24, 1983).

[13] *Id.* at 4102-03.

[14] *See infra* text accompanying notes 37-48 (examination of express remedies available

corporations offering new issues of securities on the market.[15] By controlling new offerings of securities, Congress sought to curb fraud in the sale of securities[16] and to provide public investors with full and fair disclosure of information regarding the securities.[17] Recognizing a need for additional investor protection,[18] however, Congress implemented the '34 Act, which requires issuers to furnish full and accurate corporate reports about securities on a continuous basis.[19] Congress formulated the remedies of both the '33 and '34 Acts primarily to deter illicit business practices in the securities markets rather than to compensate injured parties.[20] Yet, Congress responded to pressures from the business section which feared rigid regimentation by imposing numerous limitations on the express remedies under both the '33 and '34 Acts.[21]

Despite the existence of express remedies in the '33 and '34 Acts, courts often have implied private rights of action under other sections of the Acts.[22] A widely litigated implied remedy is section 10(b), which

---

under '33 and '34 Acts); *see also* 3 L. LOSS, SECURITIES REGULATION 1692-1754 (1961) (providing detailed discussion of express remedies under '33 and '34 Acts).

[15] *See* H.R. REP. No. 85, 73d Cong., 1st Sess. 5 (1933). Congress intended the '33 Act to affect new offerings of securities and not the ordinary redistribution of securities. *Id.*

[16] *See* S. REP. No. 47, 73d Cong., 1st Sess. 1 (1933). Congress described the aim of the '33 Act as the prevention of further public exploitation through the sale of unsound, fraudulent, and worthless securities by securities dealers. *Id.*; *see also* Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 172 (1933) ('33 Act sought to minimize risks in market by imposing severe penalties for fraudulent transactions).

[17] *See* SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963). A fundamental purpose of the '33 Act centered on replacing the *caveat emptor* philosophy with a philosophy of full disclosure aimed at achieving a higher standard of business ethics in the securities industry. *Id.* The keystone of the entire structure of federal securities legislation is disclosure. *Report of Special Study of Securities Markets of the Securities and Exchange Commission*, H.R. DOC. No. 95, 88th Cong., 1st Sess. 1 (1963); *see* Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 563-68 (E.D.N.Y. 1971) (detailed analysis of disclosure requirement as means of investor protection); Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 610 (1964) (greater opportunity for fraud when less information available).

[18] *See* S. REP. No. 792, 73d Cong., 2d Sess. 1 (1934) (excessive speculation prompted reexamination of securities laws to formulate measures aimed at continually providing investors with additional information after initial offering of stock). The '34 Act sought to establish an enduring system of national regulation of securities exchanges providing information to private investors on a continuous basis. *See* Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1355 (1966) ('34 Act established continuous disclosure system for issuers).

[19] *See* S. REP. No. 792, 73d Cong., 2d Sess. 10-11 (1934) ('34 Act designed to provide adequate information reasonably up-to-date for as long as security is traded or exchanged); H.R. REP. No. 1383, 73d Cong., 2d Sess. 11-13 (1934) (proper and adequate reporting is necessary to prevent manipulation and dishonest practices in marketplace).

[20] *See* S. REP. No. 792, 73d Cong., 2d Sess. 1 (1934) ('34 Act prevents inequitable and unfair practices on exchanges); Shulman, *Civil Liability and the Securities Act*, 43 YALE L.J. 227, 227 (1933) (provisions for civil liability under '33 Act characterized as preventive rather than redressive).

[21] *See* S. REP. No. 792, 73d Cong., 2d Sess. 3 (1934) (Congress designed securities laws to benefit business by making necessary changes).

[22] *See, e.g.*, Kirshner v. United States, 603 F.2d 234, 241 (2d Cir.) (private right of ac-

Congress designed as an open-ended provision aimed at deterring fraud.[23] Under section 10(b), Congress expressly vested the SEC with the power to enjoin manipulative and deceptive conduct in cases of fraud that Congress did not envision during the formulation of the statute.[24]

Although section 10(b) does not enumerate specifically the requirements for a cause of action, courts have delineated the distinct elements constituting an implied private right of action under the provision.[25] For example, a plaintiff must show that the defendant engaged in manipulative or deceptive conduct which injured the plaintiff in connection with the purchase or sale of any security.[26] In addition, the plaintiff must prove that the defendant acted with scienter.[27] A plaintiff in a section 10(b) material misrepresentation case must provide evidence of reliance,[28] though courts generally presume reliance once a plaintiff

---

tion implied under § 17(a) of the '33 Act), *cert. denied*, 442 U.S. 909 (1978); GAF Corp. v. Milstein, 453 F.2d 709, 720 (2d Cir. 1971) (private right of action for stockholders inferred under § 13(d)), *cert. denied*, 406 U.S. 910 (1972).

[23] 15 U.S.C. § 78j(b) (1976); *see supra* text accompanying notes 4-6 (description of § 10(b) provisions) and *infra* text accompanying notes 25-36 (same).

[24] 15 U.S.C. § 78j(b) (1976). Section 10(b) expressly designates the SEC as the enforcement agency responsible for curtailing manipulative and deceptive devices in the market place. *See* S. REP. No. 792, 73d Cong., 2d Sess. 5-6 (1934). Congress provided no guidance, however, in the area of private civil remedies under § 10(b). *See* Ernst & Ernst v. Hochfelder, 425 U.S. 183, 196 (1976).

[25] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975). The elements comprising an implied right of action under § 10(b) evolved through judicial interpretation and construction. *Id.; see also* Note, *Implied Liability Under the Securities Exchange Act*, 61 HARV. L. REV. 858, 861-64 (1948) (examination of judicially-created elements of implied remedy under § 10(b)). *See generally* Comment, *Rule 10b-5: Elements of a Private Right of Action*, 43 N.Y.U. L. REV. 541 (1968) (thorough discussion of elements of implied cause of action under § 10(b)).

[26] 15 U.S.C. § 78j(b) (1976); *see* Santa Fe Indus. v. Green, 430 U.S. 462, 474 n.14 (1977) (§10(b) prohibits material misstatement or omission); *see also* LOSS, *supra* note 14, at 1682-1805 (elaborate discussion of implied remedy under § 10(b) involving elements of cause of action). *See generally Emerging Remedy, supra* note 3.

[27] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197-214 (1976). The Supreme Court in *Hochfelder* concluded that plaintiffs must prove scienter as opposed to negligence. *Id.* at 199. The Supreme Court characterized scienter as a mental state embracing an intent to deceive, manipulate, or defraud. *Id.* The *Hochfelder* Court did not resolve the question whether reckless conduct is sufficient to establish liability under § 10(b). *Id.* at 193 n.12. Nevertheless, courts have permitted a showing of recklessness to satisfy the scienter requirement. *See* Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977) (reckless behavior sufficient to constitute scienter); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1976) (recklessness is functional equivalent of intent to defraud), *cert. denied* 434 U.S. 875 (1977); *see also* Franks v. Midwestern Oklahoma Dev. Auth. [1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,786 at 90,850 (W.D. Okla. 1976). The *Franks* Court defined recklessness as a highly unreasonable omission, invoking not merely simple negligence, but an extreme departure from the standards of ordinary care, presenting an obvious danger of misleading buyers or sellers. *Id.*

[28] *See, e.g.*, Titan Group, inc. v. Faggan, 513 F.2d 234, 239 (2d Cir.) (reliance is demonstrable in cases of affirmative misrepresentation), *cert. denied*, 423 U.S. 840 (1975);

demonstrates a material omission.[29] To obtain standing to sue, a plaintiff must qualify as a purchaser or seller of a security.[30] From the standpoint of the plaintiff, a section 10(b) suit is attractive since courts provide a variety of remedies including damages, equitable relief, and restitution.[31] The traditional measure of damages in section 10(b) suits is the out-of-pocket scheme, which awards plaintiffs the fair value paid for the security at the time of the transaction.[32] Moreover, the plaintiff in a section 10(b) action benefits from a relatively long statute of limitations[33] and is not required to post a security bond for costs.[34] In contrast to many ex-

---

List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir.) (test of reliance is whether misrepresentation is substantial factor in determining course of conduct which results in loss), *cert. denied*, 381 U.S. 908 (1965).

[29] *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972). In *Affiliated Ute*, the Supreme Court examined an instance of total nondisclosure, determining that since evidence of reliance was not feasible, materiality served as the decisive element. *Id.* The test for materiality was whether a reasonable man would attach importance to the alleged omission in guiding his investment conduct. Titan Group, Inc. v. Faggan, 513 F.2d 234, 239 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975). In nondisclosure cases, materiality rather than reliance is a determinative factor in causation. *See* Metro-Goldwyn-Mayer, Inc. v. Ross, 509 F.2d 930, 933 (2d Cir. 1975). The Second Circuit has determined that a determination of materiality permits a logical inference of reliance. *See* Chris-Craft Indus. v. Piper Aircraft Corp., 480 F.2d 341, 378 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584, 590-91 (1975).

[30] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729-31 (1975) (Supreme Court limited application of § 10(b) only to actual purchasers or sellers of securities).

[31] *See* JACOBS, *supra* note 3, § 260.01, at 11-9 (discussing panoply of remedies available under § 10(b)).

[32] *Id.* § 260.03(c)(ii) (out-of-pocket measure of damages). The out-of-pocket measure of damages under § 10(b) allows the defrauded seller to recover the fair value of the security the seller sold minus the fair value of the consideration received, all measured at the time of the transaction. Jacobs, *The Measure of Damages in Rule 10b-5 Cases*, 65 GEO. L.J. 1093, 1099 (1977). A defrauded buyer may recover the fair value of the consideration the buyer paid for the security minus the fair value of the security received, again all measured at the time of the transaction. *Id.* A plaintiff under § 10(b) typically uses the out-of-pocket measure of damages. *See, e.g.*, Madigan, Inc. v. Goodman, 498 F.2d 233, 239 (7th Cir. 1974) (out-of-pocket measure is traditionally only measure in fraud actions); Arber v. Essex Wire Corp., 490 F.2d 414, 422 (6th Cir.) (out-of-pocket expenses traditional measure), *cert. denied* 419 U.S. 830 (1974); Myzel v. Fields, 386 F.2d 718, 745 (8th Cir. 1967) (same), *cert. denied*, 390 U.S. 951 (1968).

[33] *See* Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). Since § 10(b) does not provide expressly for a statute of limitations, courts have interpreted the silence of Congress to indicate that federal policy sanctions the adoption of the statute of limitations of the particular forum state. *Id.* The applicable state statute of limitations remains an open question, though most states apply the statute of limitations governing common-law fraud in § 10(b) suits rather than the limitation applicable under the blue sky laws. *See* LOSS, *supra* note 14, at 1771-75. Courts generally apply the longer statute of limitations to give defrauded investors every opportunity to file suit because the purpose of the securities law embraces fairness and protection for private investors. *See* Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68, 74-78 (1953).

[34] *See* Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 788-89 (2d Cir. 1951) (valid claim under § 10(b) confers no authority on judge to require bond for expenses).

press remedies, plaintiffs under section 10(b) possess a broad venue option.[35] As a further advantage, prejudgment interest is available to plaintiffs who prevail in section 10(b) suits.[36]

Notwithstanding the broader implied remedy under section 10(b), the express remedies of the '33 and '34 Acts focus on specific types of conduct that Congress sought to eliminate in the securities markets.[37] For example, section 11 of the '33 Act creates an express private remedy for material misstatements or omissions in registration statements.[38] In contrast to section 10(b), however, section 11 contains a restrictive statute of limitations and requires plaintiffs to post a security bond to cover costs.[39]

---

[35] *See* 15 U.S.C. § 78aa (1976). Section 27 of the '34 Act is the venue provision governing § 10(b) suits. Section 27 grants venue wherever the defendant is located, resides, or transacts business, or where the offer or sale took place. *Id. Compare Id.* (broad venue provisions available under § 10(b)) *with Id.* § 77v(a) (stricter venue provision applicable to §§ 11 and 12(2) of '33 Act).

[36] *See* Cant v. A. G. Becker & Co., 384 F. Supp. 814, 815 (N.D. Ill. 1974) (prejudgment interest awarded if plaintiff deprived of beneficial use of funds). *But see* Thomas v. Duralite Co., 524 F.2d 577, 589 (3d Cir. 1975) (courts must exercise discretion in awarding prejudgment interest since interest recovered as matter of fairness and not merely as compensation for money withheld). *See generally* Jacobs, *The Measure of Damages in Rule 10b-5 Cases*, 65 GEO. L.J. 1093, 1160-63 (1977).

[37] *See infra* notes 38-48 and accompanying text (discussion of express remedies).

[38] 15 U.S.C. § 77k (1976). The scope of § 11 extends to the underwriters of the offering, any member of the board of directors of the company at the time of the offering, officers of the company who signed the registration statement, and any expert involved in the preparation of the registration statement. *Id.* The attorney participating in the preparation of a registration statement is not an expert for § 11 purposes. *See* BLOOMENTHAL, 1982 SECURITIES LAW HANDBOOK, § 11.03, at 175 [hereinafter cited as BLOOMENTHAL]. Rather, an attorney acts as an agent in compiling and presenting information, and therefore is not ordinarily liable under § 11 in his capacity as an attorney. *See* Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 683 (S.D.N.Y. 1968). *See generally* Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 171-210 (1933) (general discussion of express remedies under '33 Act, including § 11). To comport with the congressional purpose of full disclosure, § 11 allows purchasers of securities to assert claims against the issuer and other defendants involved in the preparation of false registration statements. 15 U.S.C. § 77k (1976); *see* Barnes v. Osofsky, 373 F.2d 269, 273 (2d Cir. 1967) (class of plaintiffs under § 11 limited to defrauded purchasers). As an additional aspect of § 11, plaintiffs do not have to show that the defendant acted with scienter since liability is virtually absolute given evidence of a material misstatement or omission. *See* Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 (2d Cir. 1951) (§ 11 protects private investors regardless of fraud); Beecher v. Able, 374 F. Supp. 341, 346 (S.D. N.Y. 1974) (scienter is not element of § 11 action); Stewart v. Bennett, 359 F. Supp. 878, 884 n.16 (D. Mass. 1973) (same).

[39] 15 U.S.C. § 77m (1976) (statute of limitations provision applicable to § 11); *id.* 77k(e) (provision allowing court to impose security bond in § 11 suit). The statute of limitations contained in § 13 of the '33 Act provides that plaintiffs proceeding under § 11 must bring suit within one year after the discovery of the untrue statement or omission and within three years after the issuer offered the security to the public. *Id.* The earliest date from which the three-year limitation could run is the effective date of the registration statement. *See* Morse v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 619, 620 (S.D.N.Y. 1977). Section 11(e) permits a court to attach a security bond for costs, including attorney's fees. 15 U.S.C. § 77k(e) (1976). In addition, a court may award security for expenses under § 11(e)

Moreover, as an affirmative defense, defendants can obtain exoneration by showing the exercise of due diligence in inspecting the registration statement[40] before publication. Other express remedies of the securities acts possess similar limitations and defenses carefully delineated by Congress.[41] Both sections 12(1) and 12(2) of the '33 Act limit the remedy of the purchaser to only the immediate seller.[42] Furthermore, section 12 contains a restrictive statute of limitations and requires the plaintiff to post a security bond for costs.[43] Also, the defendant can avoid liability

---

to the successful party if the court determines a suit or a defense is without merit. *See, e.g.*, Rucker v. Laco, Inc., 496 F.2d 850, 853 (8th Cir. 1974) (defendant awarded security in suit determined as frivolous); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1309 n.33 (2d Cir. 1973) (costs assessed against defendant offering defense bordering on frivolity); Miller v. Schweickart, 413 F. Supp. 1059, 1062 (S.D.N.Y. 1976) (costs awarded in case of frivolity or bad faith).

[40] 15 U.S.C. § 77k(b)(3)(A) (1976). Congress established different standards of due diligence for expert versus nonexpert defendants, which if met would exonerate defendants from liability under § 11. *See* JACOBS, *supra* note 3, § 3.01(o). To establish a due diligence defense in a § 11 suit, the defendant must demonstrate under any unexpertized portion of the registration statement that the defendant believed, after reasonable investigation, that the registration statement was accurate. 15 U.S.C. § 77k(b)(3)(A) (1976). The standard of care used to determine whether the defendant has satisfied the due diligence defense is that required of a prudent man in the management of his own property. *Id.* § 77k(c).

[41] *See, e.g.*, 5 U.S.C. § 77l(1) (1976) (§ 12(1) provides absolute liability for defendants who fail to comply with registration requirement); *id.* § 77l(2) (§ 12(2) provides that any person who sells securities by means of prospectus or oral communication concerning material misstatement or omission is liable to purchaser of securities). The plaintiff establishes a prima facie case creating absolute liability under § 12(1) by merely proving that he purchased the security, and that the required registration statement was not in effect. *Id.* § 77l(1); *see* Lewis v. Walston & Co., 487 F.2d 617, 621 (5th Cir. 1973) (absolute liability attaches when requisite elements of cause of action proved). In contrast to § 10(b), the plaintiff in a § 12(1) suit does not have to prove the defendant acted with scienter since a violation of § 12(1) establishes absolute liability, making the defendant's intent and knowledge irrelevant. *See* LOSS, *supra* note 14, at 1718 (seller's intent and knowledge irrelevant in § 12(1) action). Unlike § 11, § 12(2) applies to all transactions and securities and not merely those including registration statements. 15 U.S.C. § 77l(2) (1976). Section 12(2) is applied despite exemptions and whether or not defendant filed a registration statement. *See* Kroungold v. Triester, 407 F. Supp. 414, 418 (E.D. Pa. 1975) (§ 12(2) has as much applicability to unregistered securities as to securities for which defendant has filed registration statement); Dorfman v. First Boston Corp., 336 F. Supp. 1089, 1098 (E.D. Pa. 1972) (exempted securities still subject to requirements and liabilities of § 12(2)).

[42] 15 U.S.C. § 77l(2) (1976). The strict privity requirement of § 12 arises from the introductory language to both §§ 12(1) and 12(2) which refers to any person who offers or sells, and from the language which provides that sellers found in violation are liable to persons purchasing from them. *Id.* § 77l(1), (2); *see, e.g.*, Lorber v. Beebe, 407 F. Supp. 279, 287 (S.D. N.Y. 1975) (§ 12 actions generally limited to immediate seller); B & B Inv. Club v. Kleinert's, Inc., 391 F. Supp. 720, 725 (E.D. Pa. 1975) (buyer-seller relationship necessary in § 12 actions); Hardy v. Sanson, 356 F. Supp. 1034, 1038 (N.D. Ga. 1973) (§ 12 allows action only against immediate seller).

[43] *See* 15 U.S.C. § 77m (1976) (statute of limitations); *id.* § 77k(e) (security bond). The applicable statute of limitations for §§ 11, 12 and 15 exists under § 13 of the '33 Act. *Id.* Under § 12(1), a plaintiff must institute an action within one year after the violation and

by proving that the defendant did not know and, in the exercise of reasonable care, could not have known of the material misstatement or omission.[44]

Congress also furnished several express, yet limited remedies in the '34 Act under sections 9(e), 16(b), and 18(a).[45] Both sections 9(e) and 18 provide relatively short statutes of limitations and permit a court to require the posting of a security bond.[46] Although section 16(b) does not require a plaintiff to post a security bond for costs, section 16(b) does provide a restrictive statute of limitations, forcing plaintiffs to commence suit no more than two years after a violation.[47] In addition, section 18(a) allows the defendant to claim as an affirmative defense that the defendant acted in good faith and possessed no knowledge of a violation of section 18(a).[48]

Aside from specific civil liability provisions, the '34 Act also contains

---

within three years after the initial offering to the public. *Id.* Under § 12(2), a plaintiff must bring suit within one year after discovering the misrepresentation and within three years of the sale. *Id.* A general provision in § 11(e) gives courts discretion to require a security bond for costs for plaintiffs suing under §§ 11, 12 and 15. 15 U.S.C. § 77k(e); *see supra* note 26 (discussion of security requirement under § 11(e)).

[44] 15 U.S.C. § 77*l* (1976).

[45] *See id.* § 78i(e) (§ 9(e) allows any person who purchases or sells a listed security to recover damages from any person who willfully manipulates price of the security); *id.* § 78p(b) (§ 16 affords issuers remedy against insiders who use information unfairly to obtain short-term profits); *id.* § 78r(a) (§ 18 permits action by anyone who purchased or sold securities in reliance on false or misleading statement of material fact included in document or report filed with national securities exchange).

[46] *Id.* § 78i(e) (§ 9(e)); *id.* § 78r(a) (§ 18(a)). Section 9(e) authorizes a court to require an undertaking for the payment of the expenses incurred in the suit and to assess reasonable costs, including attorney's fees, against either party. *Id.* § 78i(e). Additionally, a plaintiff must file a § 9(e) action within one year after the discovery of the facts constituting the violation and within three years after such violation. *Id.* Under § 18(a), the plaintiff must bring an action within one year after the discovery of the facts constituting the cause of action and within three years after the cause of action accrued. *Id.* § 78r(c); *see* Jacobson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518, 527 (S.D. N.Y. 1977). Section 18(a) also permits a court to require a plaintiff or defendant to post a security bond for expenses in the event of bad faith. 15 U.S.C. § 78r(c); *see* S. REP. No. 792, 73d Cong., 2d Sess. 21 (1934). Congress provided for protection against strike suits by authorizing a court to assess costs, including attorney's fees, against either party. 15 U.S.C. § 78r(c); *see* S. REP. No. 792, 73d Cong., 2d Sess. 21 (1934).

[47] 15 U.S.C. § 78p(b) (1976).

[48] *Id.* § 78r(a). Under § 18(a), good faith is an absolute defense to allegations by the plaintiff that he relied on a false or misleading statement of material fact in a filed report in purchasing or selling a security. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200 (1976). As an additional onus under § 18(a), the plaintiff must demonstrate that the false or misleading statement affected the purchase or sale price of the security. 15 U.S.C. § 78r(a) (1976). Congress inserted the clause requiring the plaintiff to show that the misstatement affected the price of the security to compel the showing of a causal connection between the untruth and the fall in value that allegedly caused the plaintiff's loss. *Id.*; *see also* 78 CONG. REC. 7708 (1934) (discussion of § 18(a) express remedy). *See generally* Comment, *Civil Liability for Misstatements in Documents Filed Under Securities Act and Securities Exchange Act*, 44 YALE L.J. 456, 460-62 (1935).

a general provision enabling an innocent party to void a contract.[49] Section 29(b) voids every contract made or performed in violation of the '34 Act and negates the rights of any person making or performing that contract.[50] Judicial interpretation of section 29(b) has established that the violative contract is voidable at the option of the innocent party rather than void as a matter of law.[51] Further judicial interpretation has shown that a plaintiff can avoid a contract under section 29(b) by demonstrating that the contract involved a prohibited transaction[52] and that the plaintiff maintained contractual privity with the defendant.[53] In addition, the plaintiff must show membership in the class of persons that Congress envisioned protecting under the '34 Act.[54] Although the specific language of section 29(b) does not provide any affirmative defenses, courts have permitted defendants to raise the equitable defenses of waiver and estoppel in attempting to avoid rescission of the contract.[55]

In comparison to section 10(b), the express liability provisions stand

---

[49] 15 U.S.C. § 78cc(b) (1976).

[50] *Id.; see* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-87 (1970). The *Mills* Court suggested that an aggrieved party invoking a remedy under § 29(b) may preclude the guilty party from enforcing a contract. *See also* Gruenbaum & Steinberg, *Section 29(b) of the Securities Exchange Act of 1934: A Viable Remedy Awakened*, 48 GEO. WASH. L. REV. 1, 13 n.65 (1979) (holding in *Mills* regarding § 29(b)).

[51] *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-87 (1970) (contract voidable at option of innocent party); Greater Iowa Corp. v. McLendon, 378 F.2d 783, 792 (8th Cir. 1967) (same); Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 213 (9th Cir. 1962) (same); Bankers Life & Cas. Co. v. Bellanca Corp., 288 F.2d 784, 787 (7th Cir. 1961) (same). Section 29(b) vests all of the options in the innocent party and leaves none for the guilty party. *See* Gruenbaum & Steinberg, *supra* note 50, at 8. *Contra* Myzel v. Fields, 386 F. 2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). The *Myzel* Court reasoned that § 29(b) mandated that contracts are void as a matter of law. *Id.* The holding in *Myzel*, however, is inconsistent with the language of § 29(b), which suggests that the contract is not ipso facto void, but that the rights of the guilty party are void. *See* Gruenbaum & Steinberg, *supra* note 50, at 6 n.22.

[52] *See* Eastside Church of Christ v. National Plan, Inc., 391 F.2d 357, 362 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968). Section 29(b) contemplates a civil suit for relief by way of rescission and damages when transaction are void. 15 U.S.C. § 78cc(b) (1976); *see* Osborne v. Mallory, 86 F. Supp. 869, 879 (S.D. N.Y. 1949).

[53] *See* Regional Properties v. Financial & Real Estate Consulting Co., 678 F.2d 552, 559 (5th Cir. 1982) (contractual privity is element of cause of action under § 29(b)); Gruenbaum & Steinberg, *supra* note 50, at 31-36 (discussion of contractual privity requirement).

[54] *See* Regional Properties, Inc. v. Financial & Real Estate Consulting Co., 678 F.2d 552, 559 (5th Cir. 1982) (must show membership in class statute designed to protect to invoke § 29 relief).

[55] *Id.* at 562-63; *see* Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 212-14 (9th Cir. 1962). In *Royal Air Properties, Inc.*, the defendant sought to introduce evidence in the trial court to establish the affirmative defenses of estoppel, waiver, and laches. *Id.* at 212. The district court decided that the proffered defenses were not available in a § 29(b) action. *Id.* at 213. The Ninth Circuit, however, held that since courts generally interpret statutes in the context of the common law and Congress has not denied specifically the availability of equitable defenses, no reason exists to preclude the ordinary defenses of estoppel and waiver. *Id.* at 214.

as less attractive remedies because of the carefully delineated procedural restrictions surrounding the express remedies. Sections 11 and 12 of the '33 Act impose stringent restrictions in the relatively short statutes of limitations and the cost assessment provisions.[56] Additionally, section 11 limits the class of plaintiffs exclusively to purchasers of securities and section 12 allows a right of action only against immediate sellers.[57] Plaintiffs also may decline to proceed under the narrowly defined express remedies in view of the various statutory affirmative defenses such as due diligence and reasonable care prescribed in sections 11 and 12 respectively.[58]

The limitations and procedural restrictions surrounding the express liability provisions of the '34 Act also render section 10(b) a more appealing remedy. Under section 9(e) of the '34 Act, the plaintiff must demonstrate that the defendant's manipulative conduct materially affected the price of the security.[59] Moreover, section 9(e) stipulates that willfulness on the part of the defendant is an element of a cause of action.[60] Section 18(a) of the '34 Act requires the plaintiff to show reliance on a false or misleading statement of material fact included in a document or report filed with a national securities exchange.[61] In contrast to section 10(b),

---

[56] *See supra* notes 38-44 (description of express remedies under §§ 11 and 12).

[57] *See* Lorber v. Beebe, 407 F. Supp. 279, 285-86 (S.D. N.Y. 1975) (recovery under § 11 limited to purchasers of shares issued pursuant to allegedly defective registration statement); Stewart v. Bennett, 359 F. Supp. 878, 884 n.14 (D. Mass. 1973) (only persons purchasing securities that are direct subject of registration statement and prospectus may sue under § 11); *supra* note 41 (describing class of plaintiffs under § 12).

[58] *See supra* notes 40 & 44 and accompanying text (describing defenses of due diligence and reasonable care).

[59] 15 U.S.C. § 78i(e) (1976) (§ 9(e) plaintiff to show defendant's conduct materially affected price of security); *cf. id.* § 78j(b) (§ 10(b) does not require plaintiff to show causal connection between defendant's conduct and price of security).

[60] 15 U.S.C. § 78i(e) (1976). In practical terms, the willfulness requirement under § 9(e) is the virtual equivalent of scienter as required under a § 10(b) cause of action. *See* Ernst & Ernst v. Hochfelder, 425 U.S. at 201. Under § 9(e), the requirement that plaintiff demonstrate willful manipulation appears similar to the requirement of proof under § 10(b), providing for some element of scienter. *Id.*

[61] 15 U.S.C. § 78r(a) (1976). Section 18 of the '34 Act permits an action by a purchaser or seller of a security who relied on a false or misleading statement of material fact included in a document or report filed with a national securities exchange. *Id.* Unlike § 11 of the '33 Act, a plaintiff suing under § 18(a) must prove not only a misrepresentation of material fact, but that the plaintiff either read the filed document or relied on a repetition of the statement. *Id.; see* BLOOMENTHAL, *supra* note 38, § 11.06, at 184 (asserting that plaintiff must read any filed document or rely on copy of that document to prove cause of action under § 18(a)). Courts have determined that plaintiffs must show some reliance on the filed documents to succeed under § 18(a). *See* Jacobson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518, 525 (S.D. N.Y. 1977) (since reliance on actual document needed, constructive reliance is not enough); Gross v. Diversified Mortgage Investors, 438 F. Supp. 190, 195 (S.D. N.Y. 1977) (reliance in some form is necessary). *But cf.* Rudnick v. Franchard Corp., 237 F. Supp. 871, 873 (S.D. N.Y. 1965) (under § 11(a) of '33 Act plaintiffs suing as open market purchasers can establish reliance without actually reading registration statement).

which requires recklessness to incur liability, courts construing sections 9(e) and 18 have refused to attach liability for mere reckless conduct.[62] Finally, the absence of the procedural elements of posting a security bond for costs and restrictive statutes of limitations, both of which adhere under sections 9(e), 16, and 18, make section 10(b) a considerably more desirable remedy for aggrieved shareholders.[63]

Plaintiffs urged courts to imply a right of action under section 10(b) because the open-ended nature and relative lack of restrictions contrast favorably with the many procedural and substantive restrictions surrounding the express remedies of the Acts.[64] In response to plaintiffs' arguments, courts recognized that an implied right of action would effectuate the purposes of the federal securities laws.[65] Even the Supreme Court had suggested that the lower courts imply rights of action to grant the necessary relief for invasions of federally secured rights.[66] Although implied remedies often overlapped express liability provisions, courts reasoned that the securities laws were cumulative, and therefore implication of remedies promoted the congressional policy of providing complete and effective sanctions.[67]

In the last ten years, however, the Supreme Court has evinced a trend away from implying rights of action in all areas of the law by favoring strict statutory interpretation.[68] Accordingly, the ultimate issue for the

---

[62] *See* Higgins, *Section 18 of the Exchange Act: A New Defense Weapon in Securities Litigation*, 1980 DET. C. L. REV. 761, 787 (1980) (§§ 9(e) and 18 of '34 Act appear to preclude liability for recklessness).

[63] *See supra* notes 45-48 and accompanying text (express remedies under '34 Act).

[64] *See* Stewart v. Bennett, 359 F. Supp. 878, 881 n.10 (D. Mass. 1973) (implied right of action recognized under broad and unbridled provisions of § 10(b)); *supra* (text accompanying notes 38-48 examination of express remedies under '33 and '34 Acts).

[65] *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (implied right of action exists under proxy rules containing language similar to that under § 10(b)); Herpich v. Wallace, 430 F.2d 792, 804 (5th Cir. 1970) (implied § 10(b) remedy necessary to effectuate congressional purpose behind § 10(b)); Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 547 (2d Cir. 1967) (broad remedial purposes of '34 Act suggest that judicial relief is available under § 10(b) implied remedy).

[66] J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). The *Borak* decision reaffirmed the remedial powers of the courts established in *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916), which held that courts can create remedies to insure the enforcement of statutory rights. *See* 377 U.S. at 433.

[67] *See* Ellis v. Carter, 291 F.2d 270, 273-74 (9th Cir. 1961). The *Ellis* Court permitted a defrauded purchaser to sue under § 10(b) despite the restrictions imposed by the express remedies of the '33 Act. *Id.* at 273. The *Ellis* court, however, recognized that such a harsh construction poses the danger of nullifying or ignoring the procedural restrictions that Congress carefully provided in the '33 Act. *Id. Compare* Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 787 (2d Cir. 1951) (purchasers afforded remedy under § 10(b) notwithstanding that basis of fraud also constituted § 11 violation) *with* Rosenberg v. Globe Aircraft Corp., 80 F. Supp. 123, 124-25 (E.D. Pa. 1948) (§ 10(b) inapplicable when § 11 or § 12 action available). Courts implied a remedy under § 10(b) by depending on a broad interpretation of the remedial provisions of the securities laws. *See infra* text accompanying notes 106-32 (discussion of *Huddleston* decision).

[68] *See* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981) (no

Court in deciding whether to imply private rights of action is whether Congress actually intended to create a private remedy under a statute.[69] Though the Court presaged a tendency to retrench implied remedies in 1974,[70] the first systematic effort appeared in 1975. In *Cort v. Ash*,[71] the Court announced a four-pronged test to determine whether the judiciary may infer a private cause of action from a regulatory statute.[72] First, a court must establish whether the plaintiff possesses membership in the class of people for whose special benefit Congress enacted the statute.[73] Second, a court should identify whether any indication of legislative in-

---

inferred cause of action under Equal Pay Act of 1963 preventing discrimination by employers); California v. Sierra Club, 451 U.S. 287, 297-98 (1981) (no inferred cause of action under Rivers and Harbors Appropriation Act of 1899 prohibiting obstructions on navigable waters); Universities Research Ass'n. v. Coutu, 450 U.S. 754, 771-72 (1981) (no inferred cause of action under Davis-Bacon Act governing minimum wages under construction contracts).

[69] *See* Universities Research Ass'n. v. Coutu, 450 U.S. 754, 770 (1981) (Court recognized primacy of congressional intent in determining whether to imply right of action).

[70] *See* National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers (*Amtrak*), 414 U.S. 453, 458 (1974). In *Amtrak*, the Supreme Court refused to imply a private right of action under § 404(a) of the Amtrak Act. *Id.* at 455-57; *see* 45 U.S.C. § 564(a) (1976) (applicable provision of Amtrak Act). In concluding that no implied right of action existed, the *Amtrak* Court relied on the ancient maxim of *expressio unius est exclusio alterius*. 414 U.S. at 458. Literally, *expressio unius est exclusio alterius* means that the expression of one thing is the exclusion of the other. BLACK'S LAW DICTIONARY 521 (5th ed. 1978). The specification of certain things or persons in a statute creates the inference of an intention to exclude all others from its operation. *Id.* Under the *expressio* maxim, a court should not infer remedies under a statute when other provisions expressly designate a remedy. 414 U.S. at 458. Without evidence of contrary congressional intent, the *Amtrak* Court determined that the *expressio* maxim mandated that the express remedies were the exclusive liability provisions supplied by the Amtrak Act. *Id.* at 457-58. The Court recognized that courts may expand statutory provisions drafted by Congress only upon a showing of legislative intent indicating the propriety of supplementary remedies to the statutory scheme. *Id.*

[71] 422 U.S. 66 (1975).

[72] *Id.* at 78. In *Cort*, a shareholder suing corporate directors derivatively argued for an implied right of action under a statute prohibiting corporations from making contributions in federal elections. *Id.* at 68-69. In denying the implication of a cause of action, the Court applied four criteria and stated that both the legislative history and the overall legislative purpose provided no basis from which to infer a remedy. *Id.* at 68-70. The Court suggested that permitting a new cause of action was a congressional, not a judicial, responsibility. *Id.* at 69.

[73] *Id.; see* Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1916). In *Rigsby*, the Supreme Court held that a railroad employee injured as a result of his employer's failure to comply with the Federal Safety Appliance Act could sue for damages under that statute, even though the statute explicitly did not provide a remedy. 241 U.S. at 39-40. The *Rigsby* Court analyzed whether the statute created a federal right in favor of the plaintiff, and concluded that Congress enacted the statute to protect a particular class of people and that the plaintiff was a member of that class. *Id.* In *Cort*, the Court stated that no demonstration of legislative intent to create a remedy is necessary when the plaintiffs are the especial beneficiaries of the statute although explicit legislative intent to deny a remedy is controlling. 422 U.S. at 81-82. The statute in *Cort*, however, did not envision the protection of corporate shareholders. *Id.* at 80. The Court thus rejected the *Cort* plaintiff's argument that the statute created a private right of action. *Id.* at 82. *See generally* Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 555 (1981).

tent exists, implicitly or explicitly, either to create or deny a right of action.[74] Third, a court should evaluate whether the implication of a remedy for the plaintiff is consistent with the underlying purpose of the legislative schemes.[75] Finally, a court must question whether the cause of action is one traditionally relegated to state law, rendering a cause of action based solely on federal law inappropriate.[76]

In subsequent decisions, the Supreme Court continued to employ the four-part *Cort* test in restricting the implication of implied remedies.[77] The Court further constricted the approach to implied rights of action in *Touche Ross & Co. v. Redington*.[78] The *Touche Ross* Court substantially modified the *Cort* analytical framework by indicating that the implication of a private right of action depended solely on congressional intent.[79] The Court determined that the four components of the *Cort* test do not possess equal authority.[80] Although the *Touche Ross* Court examined the first three *Cort* factors as nominally relevant indicia to determine whether an implied right of action exists under Section 17(a) of the '34 Act, the *Touche Ross* Court actually relied exclusively on the first two factors.[81] The Court concluded that, absent positive results from an analysis of the first two *Cort* factors, a court could conclude Congress did not intend to imply a right of action

---

[74] 422 U.S. at 78; *see* National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers (*Amtrak*), 414 U.S. 453, 458, 460 (1974) (court will infer private cause of action only if consistent with legislative intent).

[75] 422 U.S. at 78; *see* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423 (1975) (private enforcement necessary to effectuate broad remedial purposes of statute).

[76] 422 U.S. at 78; *see* Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963) (state law governs cause of action for damages due to federal officials' abuse of power); *cf.* J. I. Case Co. v. Borak, 377 U.S. 426, 434 (1964) (federal law appeared applicable after evaluation of both federal and state law).

[77] *See, e.g.*, Chrysler v. Brown, 441 U.S. 281, 316 (1979) (*Cort* analysis resulted in denial of private right of action under Trade Secrets Act); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) (*Cort* analysis determined no implied remedy under Indian Civil Rights Act); Piper v. Chris-Craft Indus., 430 U.S. 1, 24 (1977) (Court denied implied private right of action under § 14(e) of '34 Act after applying *Cort* analysis).

[78] 442 U.S. 560 (1979). In *Touche Ross*, the plaintiff argued for the implication of a private action under § 17(a) of the '34 Act. *Id.* at 568; *see* 15 U.S.C. § 78q(a) (1976) (§ 17(a)). The *Touche Ross* decision illustrated the views propounded by Justice Powell's dissent in Cannon v. University of Chicago, 441 U.S. 677, 740 (1979) (Powell, J., dissenting). 442 U.S. at 561-69. The *Cannon* dissent argued the *Cort* test was contrary to the principles embodied in article III of the United States Constitution. 441 U.S. at 743; *see* U.S. CONST. art. III. Justice Powell suggested that through the judicial implication of remedies, courts of limited jurisdiction unjustly extend their authority without congressonal approval. 441 U.S. at 746.

[79] 442 U.S. at 568. The *Touche Ross* Court modified the *Cort* analysis into a two-tier inquiry. *Id.* at 575; *see supra* notes 71-76 and accompanying text (*Cort* analysis). Initially, a court should discern the appropriate legislative intent surrounding a statute. 442 U.S. at 575. The second tier requires a court to inquire whether federal or state law is applicable. *Id.* In *Touche Ross*, since the Court perceived no requisite congressional intent in a first-level analysis, the Court did not engage in the second level of inquiry. *Id.*

[80] 442 U.S. at 568-75.

[81] *Id.* at 576; *see* Cort v. Ash, 422 U.S. 66, 79-83 (1975) (first and second *Cort* factors involve membership of plaintiff in protected class and legislative history); *supra* notes 71-76 and accompanying text (discussion of *Cort* decision).

under section 17(a),[82] rendering consideration of the third and fourth prongs of the *Cort* analysis unnecessary.[83]

The Supreme Court continued to restrict implied remedies by further narrowing the *Cort* test in *Transamerica Mortgage Advisors, Inc. v. Lewis*.[84] The *Transamerica* Court determined that the central inquiry in whether to imply a right of action is congressional intent.[85] The Court applied the standards established in *Touche Ross* to conclude that an implied right of action existed under section 215, but not under section 206 of the Investment Advisors Act of 1940.[86] In deciding whether to infer a right of action, the *Transamerica* Court emphasized the primacy of legislative intent and began its analysis by focusing on the second factor of the *Cort* test.[87] The Court, however, subdivided the second *Cort* factor into two elements to consider both legislative history and statutory language.[88] Since neither the legislative history nor the statutory language evidenced adequate congressional intent to imply a remedy, the *Transamerica* Court concluded that the plaintiff could not proceed under a section 206 implied remedy.[89] Yet, the Court stated that when a statute does satisfy the modified second factor of the *Cort* test, the inquiry should extend to the third *Cort* factor to examine whether inferring a remedy under the statute would comport with the general legislative scheme.[90] Although the fourth *Cort* factor exists as a part of the analysis, the *Transamerica* Court suggested that courts did not have to consider the fourth factor when an application of prior factors evinces an absence of congressional intent to create an implied remedy.[91] Consequently, the Court in *Transamerica* reorganized the *Cort* framework to produce a more restrictive test for inferring causes of action, relying ultimately on the express intent of Congress.[92]

---

[82] 442 U.S. at 575-76. The *Touche Ross* Court concluded that courts should not imply private rights of action without sufficient congressional intent indicating the propriety of inferring a remedy. *Id.* at 574. The Court recognized that a contrary position would sanction judicial incursions into the realm of the legislature. *Id.* at 577-79.

[83] *Id.* at 575-76; *see* Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33, 49 (1979) (interpretation of *Touche Ross* decision as establishing three-prong modified *Cort* analysis for inferring private right of action).

[84] 444 U.S. 11 (1979).

[85] *Id.* at 15.

[86] *Id.* at 23-24.

[87] *Id.* at 16-22.

[88] *Id.* Although the second *Cort* factor focused exclusively on the legislative history of a statute, the *Transamerica* Court expanded the second factor to consider the language of the statute and the circumstances surrounding its enactment. *Id.* at 18; *see* Cort v. Ash, 422 U.S. at 78.

[89] 444 U.S. at 23-24.

[90] *Id.*

[91] *Id.* In its implication analysis, the *Touche Ross* Court considered the first *Cort* factor as tangential, citing instead the intent of Congress as the dispositive issue in determining whether to create an implied remedy. *Id.* at 24.

[92] *See infra* text accompanying notes 93-96 (status of implication analysis after *Transamerica* decision).

The current status of the implication analysis has evolved from *Touche Ross* and *Transamerica*, which effectively narrowed the *Cort* test into a two-prong standard.[93] Courts should examine whether sufficient evidence of legislative intent exists to support the implication of a remedy.[94] The indicia providing reliable evidence of legislative intent include statutory language, legislative analysis, and the overall legislative scheme.[95] Then, if the legislative intent analysis shows Congress amenable to an implied remedy, the court should employ the fourth *Cort* factor to determine whether state law provides an appropriate remedy, and, if so, the court should defer to the existing remedy.[96]

Although a skeletal framework of the *Cort* implication analysis still exists, more recent cases reflect the Court's increasing emphasis on the intent of the legislature.[97] Moreover, the presence of express remedies poses additional considerations in employing the modified implication analysis.[98] Basing its reasoning on the old apothegm of *expressio unius est exclusio alterius*,[99] the Supreme Court in *Touche Ross* evidenced extreme reluctance to imply a remedy when an express remedy already existed to control the same conduct.[100] In *Touche Ross*, the Court reasoned that Congress well could have provided a private damages remedy under section 17(a) of the '34 Act.[101] Since Congress manifested no intent to supply

---

[93] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1976).

[94] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24 (1979). The *Transamerica* Court stated that the *Cort* factors were relevant in determining whether a private remedy was implicit in a statute, but nonetheless the Court concluded that the central inquiry was whether Congress intended to create such a right of action. *Id.*; *see* Cort v. Ash, 422 U.S. at 78.

[95] 444 U.S. at 24.

[96] 442 U.S. at 575-76.

[97] *See* Middlesex County Sewage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 13 (1981). In *Middlesex*, the plaintiffs alleged that the defendant damaged fishing grounds through discharges and ocean dumping of sewage and other waste. *Id.* at 4-5. The Court noted that the primary consideration in determining whether to infer a right of action is the intent of the legislature. *Id.* As part of the inquiry into legislative intent, the *Middlesex* Court relied on the statutory language, particularly the provision made therein for enforcement and relief. *Id.* at 13-14. Additionally, the Court reviewed the legislative history and other traditional aids of statutory interpretation such as judicial precedent and circumstances surrounding the enactment to determine congressional intent. *Id.*

[98] *See infra* text accompanying notes 99-104 (exploring relationship between express remedies and modified implication analysis).

[99] National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers, 414 U.S. 453, 458 (1974) (explaining *expressio* maxim); *see supra* note 70 (discussion of *expressio* maxim).

[100] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 574 (1979). The *Touche Ross* Court stated that when an express civil remedy exists, courts should show extreme reluctance to imply a cause of action significantly broader than the remedy that Congress chose to provide. *Id.; see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735-36 (1975). The Court in *Blue Chip* described as anomalous the imputation to Congress of an intention to expand the class of plaintiffs for an implied cause of action beyond the bounds Congress delineated for comparable express causes of action. *Id.* at 736.

[101] 442 U.S. at 572.

an implied right of action, the Court concluded that the existence of an express remedy, with its substantive requirements and restrictions, prompted the rejection of an implied remedy.[102] The *Transamerica* Court echoed the reasoning of the *Touche Ross* Court stating that when a statute provides a particular remedy, a court should be cautious in substituting other remedies for an express right of action.[103] The Supreme Court thus appears chary in implying rights of action despite the existence of an express remedy.[104] Considering that the Court's implication analysis focuses primarily on legislative intent, the Court presumably views express liability provisions as a manifestation of Congress' intent to provide an exclusive cause of action.[105] Consequently, when an express remedy is present, courts should exercise extreme caution in enforcing an implied right of action.

In *Huddleston v. Herman & MacLean*,[106] the Supreme Court recently examined a situation involving the overlap of an express remedy with an implied cause of action under section 10(b). The *Huddleston* Court concluded that the availability of an express remedy under Section 11 of the '33 Act did not preclude defrauded purchasers of registered securities from maintaining an implied action under section 10(b).[107] The *Huddleston* plaintiffs, purchasers of registered securities, sued under section 10(b), alleging that the corporate directors of Texas International Speedway, Inc. and its accounting firm engaged in a fraudulent scheme to misrepresent material information in a registration statement and prospectus regarding the financial condition of Texas International.[108] Both the district court and the Fifth Circuit held for the plaintiffs, concluding that an implied remedy under section 10(b) for fraudulent misrepresentation in a registration statement was appropriate notwithstanding the presence of

---

[102] 442 U.S. at 577-78.

[103] *Id.* at 574; Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1978) (courts should exercise caution in reading other implied remedies into statutes expressly providing remedy).

[104] 444 U.S. at 19-20.

[105] *Id.*

[106] 51 U.S.L.W. 4099 (U.S. Jan. 24, 1983).

[107] *Id.* at 4102-03. In *Huddleston*, the Supreme Court clarified the proper standard of proof in private actions under the securities laws. *Id.* at 4103. The Court held that persons seeking recovery under § 10(b) must prove their cause of action by a preponderance of the evidence, and not by clear and convincing evidence. *Id.* The Supreme Court addressed the issue because the Fifth Circuit applied an improper standard of proof. *Id.* The *Huddleston* Court noted that private actions under the securities laws consistently adhere to the preponderance standard. *Id.; cf.* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943) (preponderance of evidence suffices to establish fraud under § 17(a) of '33 Act). *See generally* Loss, *supra* note 14, at 1435.

[108] 51 U.S.L.W. at 4100. In *Huddleston*, the defendant Texas International Speedway, Inc., filed a registration statement and prospectus with the SEC for the sale of securities to the public. *Id.* The defendants earmarked the proceeds of the sale to finance the construction of an automobile speedway. *Id.* Texas International Speedway, Inc., however, did not meet with success and filed a petition for bankruptcy. *Id.*

an express remedy governing the same conduct under section 11 of the '33 Act.[109]

On appeal, the Supreme Court reasoned that Congress did not intend to deny an implied remedy under section 10(b) even though an express remedy was available.[110] The Supreme Court, however, declined to employ the modified implication analysis, relying instead on a "nullification" test to reconcile an express remedy under section 11 with the presence of a section 10(b) implied right of action.[111] Moreover, since the existence of an implied remedy under section 10(b) was simply beyond doubt, the Court neglected to analyze the implication of a right of action under section 10(b).[112] Recognizing that the courts consistently had implied a cause of action under section 10(b), the *Huddleston* Court examined the exclusivity of an express remedy under section 11, considering the presence of an implied remedy under section 10(b).[113]

As part of the nullification analysis, the *Huddleston* Court evaluated whether an implied remedy under section 10(b) would circumvent the carefully drawn procedural restrictions surrounding express remedies such as section 11.[114] The Court feared that preference for an implied remedy despite the availability of an express remedy would nullify the procedural and substantive limitations on the express remedy.[115] Yet, the *Huddleston* Court recognized that the additional burden of proving scienter in a section 10(b) action allowed no substantive advantages to plaintiffs proceeding under section 10(b) rather than under the express remedy of section 11.[116] The Court stated that section 11 attaches absolute liability against the

---

[109] *Id.*

[110] *Id.* at 4101-02.

[111] *See infra* text accompanying notes 114-19 (examination of *Huddleston* Court's nullification analysis).

[112] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) (existence of private cause of action for violations of § 10(b) is well established); *see also* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). In *Superintendent*, the Court confirmed the existence of an implied private right of action under § 10(b) without extended discussion. *Id.*; *see supra* note 6 (evolution of implied rights of action under federal statutes).

[113] 51 U.S.L.W. at 4101-02.

[114] *Id.*; *see supra* text accompanying notes 38-40 (requirements and limitations surrounding § 11 of '33 Act).

[115] *Id.*; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 (1976). In *Hochfelder*, the Court stated that the procedural limitations on the express remedies of the '33 and '34 Act indicate that courts cannot extend an implied § 10(b) remedy to actions premised on negligent wrongdoing. *Id.*

[116] 51 U.S.L.W. at 4102. The *Huddleston* Court determined that the heavier burden of proof required under § 10(b) preserved the integrity of the procedural restrictions surrounding the express remedies. *Id.* The Court feared that plaintiffs would circumvent the procedural limitations of the express remedies by invoking § 10(b), thus flooding the courts with possibly vexatious litigation. *Id.* The *Huddleston* Court reasoned that the § 10(b) requirement of scienter, rather than mere negligence, would prevent plaintiffs from freely nullifying the procedural restrictions of the express remedies by proceeding under the broader, more flexible § 10(b) implied remedy. *Id.*

issuer if the plaintiff proves even innocent material misstatements.[117] In contrast, section 10(b) imposes a significantly heavier burden of proof because the plaintiff must establish that the defendant acted with scienter.[118] The *Huddleston* Court determined that the additional burden in proving a cause of action under section 10(b) justified the application of a section 10(b) implied remedy even when section 11 governed the same actionable conduct.[119]

The *Huddleston* Court also reasoned that the overlap of remedies was neither unusual nor unfortunate.[120] In considering the broad, catchall nature of section 10(b), the Court recognized the inevitability that certain express provisions would govern conduct also actionable under section 10.[121] Specifically, section 11 applies to material misrepresentations or omissions in registration statements[122] and section 10(b) prohibits any manipulative or deceptive device in connection with the purchase or sale of any security.[123] Since each provision redresses different misconduct, the *Huddleston* Court decided not to provide an exception under section 10(b) for fraud occurring in a registration statement simply because section 11 supplied an express remedy addressing the same actionable conduct.[124]

In permitting an implied remedy under section 10(b) notwithstanding an express remedy, the Court employed an analysis of legislative intent in addition to the nullification test, indicating that legislative intent apparently remains an appropriate guideline in cases involving an overlap of remedies.[125] Abandoning the modified *Cort* test, the Court focused

---

[117] *See supra* notes 38-40 and accompanying text (express liability provision under § 11 of '33 Act).

[118] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); *supra* note 27 (scienter requirement).

[119] 51 U.S.L.W. at 4102.

[120] *Id.* at 4101; *see* SEC v. National Sec., Inc., 393 U.S. 453, 468 (1968) (Court recognized that § 10(b) and proxy rules under § 14 of '34 Act may overlap to govern similar types of misconduct); *see also* Fleischer, *Federal Corporation Law: An Assessment*, 78 HARV. L. REV. 1146, 1158 (1965). The author states that the *expressio* maxim, which precludes overlapping remedies, is inapposite under the federal securities laws when discussing the interaction of § 10(b) and § 18(a) of the '34 Act because of the broad remedial purposes of the securities laws, particularly § 10(b). *Id. But see* Comment, *The* National Securities *Case: The Supreme Court and Rule 10b-5*, 69 COLUM. L. REV. 906, 916-18 (1969) (criticizing Supreme Court for not carefully considering ramifications of *National Securities* decision permitting overlap of remedies).

[121] 51 U.S.L.W. at 4101; *see* United States v. Naftalin, 441 U.S. 768, 778 (1979) (applying § 17(a) of '33 Act to conduct also prohibited under § 10(b) in SEC action). The *Naftalin* Court recognized that the Securities Act and the Securities Exchange Act would cover some of the same conduct. *Id.*

[122] *See supra* text accompanying notes 38-40 (discussion of § 11 of '33 Act).

[123] *See supra* note 26 and accompanying text (discussion of element of § 10(b) cause of action concerning manipulative or deceptive devices).

[124] 51 U.S.L.W. at 4101; *cf.* Mills v. Electric Auto-Lite, 396 U.S. 375, 390-91 (1970) (existence of express provisions for recovery of attorney's fees in §§ 9(e) and 18(a) of '34 Act does not preclude award of attorney's fees under § 14(a) of '34 Act).

[125] *See supra* notes 93-96 and accompanying text (current status of implication analysis).

primarily on the general legislative purpose, formerly the third factor in the *Cort* implication analysis, to discern the intent of the legislature.[126] The *Huddleston* Court reasoned that Congress formulated the securities laws to make regulation reasonably complete and effective.[127] In addition, the Court stated that the remedies within the securities laws deserve a cumulative construction in view of the broad remedial purpose behind the Acts.[128] The Court also dismissed the application of the *exclusio* maxim of statutory construction, explaining that a presumption of exclusivity would undermine the remedial purpose of the Acts.[129]

In exploring the legislative intent further, the *Huddleston* Court cited Congress' comprehensive revision of the securities laws in 1975 to illustrate the notion that Congress declined to countermand the implication of a section 10(b) right of action by the courts despite the presence of express remedies.[130] The Court reasoned that since courts consistently allowed implied remedies under section 10(b) even when express remedies were available, Congress' decision to leave section 10(b) unaltered indicated that Congress, while cognizant of such judicial interpretation, affirmed the cumulative construction of section 10(b).[131] Rather than determine whether

---

[126] 51 U.S.L.W. at 4102.

[127] *Id.; see* 15 U.S.C. § 78b (1976) (provisions regulating control of securities); *see also* S. REP. No. 792, 73d Cong., 2d Sess. 1 (1934) (broad remedial purpose behind securities laws).

[128] 51 U.S.L.W. at 4102; *see* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). Congress' decision to leave § 7(b) of the Age Discrimination in Employment Act of 1968 intact after sweeping amendments suggests that Congress ratified the cumulative nature of the provisions contained in the '33 and '34 Acts.

[129] 51 U.S.L.W. at 4102 n.23. In rejecting the application of the *expressio* maxim, the *Huddleston* Court stated that the maxim is inappropriate in a situation in which remedies redress different misconduct and when a presumption of exclusivity would undermine the remedial purposes of the act. *Id.; see* Note, *supra* note 6, at 290-91 (*expressio* maxim is subordinate to overall purpose of Act and unsafe as general rule of construction).

[130] 51 U.S.L.W. at 4102; *see* Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, 98 (1975). In 1975, Congress enacted the most substantial and significant revision of the federal securities laws since the passage of the '34 Act. *See Securities Acts Amendments of 1975: Hearings on S.249 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, S. REP. No. 75, 94th Cong., 1st Sess. 1 (1975), *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 179. As the conference report on the legislation explained, the 1975 amendments represented the most searching re-examination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and public investors since the 1930's. H.R. REP. No. 229, 94th Cong., 1st Sess. 91, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 332. *See generally* Block & Barton, *Implied Private Damage Action Under Section 10(b) of the 1934 Act*, 10 SEC. REG. L.J. 270, 273 (1982) (evaluation of amendments of securities laws).

[131] 51 U.S.L.W. at 4102. Since the 1975 amendments to the securities laws, the lower courts have continued to recognize that an implied cause of action under § 10(b) is available despite the existence of express remedies. *See, e.g.*, Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 650 F.2d 342, 354-59 (D.C. Cir. 1980) (implied § 10(b) remedy available for conduct proscribed by §§ 11 and 12 of '33 Act and § 18 of '34 Act), *cert. denied*, 452 U.S. 954 (1981); Ross v. A.H. Robbins Co., 607 F.2d 545, 551-56 (2d Cir. 1979) (§ 18 of '34 Act does not preclude implication of § 10(b) private right of action), *cert. denied*, 446 U.S. 946 (1980).

Congress intended to create an implied remedy under section 10(b) in view of express remedies, the Court searched for evidence of a legislative intent to deny an implied cause of action, concluding that the exclusivity of express liability provisions was inappropriate.[132]

The Supreme Court's approach in *Huddleston* provides an example of judicial policymaking. The Court summarily acquiesced in the existence of an implied remedy under section 10(b) and failed to apply the modified implication analysis adopted in *Touche Ross* to ascertain the propriety of an implied cause of action.[133] Instead, the Court relied on the historical significance of section 10(b) and the consistent implication of a private cause of action by the lower courts as evidence of the viability of an implied section 10(b) remedy despite an express remedy.[134] In departing from a traditional analysis of legislative intent under the *Cort* test, the *Huddleston* Court relied on a nullification approach, determining that an implied remedy under section 10(b) would not negate the effectiveness of the procedural restrictions surrounding the express remedies.[135] By employing the nullification methodology, the Court failed to evaluate meticulously the legislative history of the statutes involved.[136] In addition, the Supreme Court neglected to ascertain the plaintiff's status as an intended beneficiary of the statute as part of the first factor in the modified *Cort* analysis.[137] Prior Supreme Court decisions suggested that legislative history and the plaintiff's status were vital elements comprising the legislative intent analysis.[138] The *Huddleston* Court, however, emphasized the overall legislative scheme in employing the nullification analysis as an illustration of Congress' intent to permit the application of an implied remedy notwithstanding an express remedy in section 11.[139] Since recent Supreme Court decisions demonstrate an exclusive focus on legislative intent,[140] the Court seems prone to venture beyond the confines of the modified *Cort*

---

[132] 51 U.S.L.W. at 4101-02.

[133] *Id.; see supra* text accompanying notes 93-96 (status of implication analysis after *Touche Ross*).

[134] 51 U.S.L.W. at 4101; *see supra* note 6 (historically, courts consistently implied private right of action under § 10(b).

[135] 51 U.S.L.W. at 4101; *see supra* notes 114-19 and accompanying text (nullification analysis employed by *Huddleston* Court).

[136] 51 U.S.L.W. at 4101.

[137] *Id.; see supra* notes 93 & 94 and accompanying text (modified first factor of *Cort* analysis).

[138] *See* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979). In *Cannon*, the Court suggested that if a plaintiff satisfies the first *Cort* factor, then proof of the second factor, congressional intent to create a remedy, possibly is unnecessary. *Id.; see also* Touche Ross & Co. v. Redington, 442 U.S. 560, 575-77 (1979). The *Touche Ross* Court emphasized the primacy of determining whether Congress intended to create a private right of action. *Id.*

[139] 51 U.S.L.W. at 4101-02.

[140] *E.g.*, California v. Sierra Club, 451 U.S. 287, 296 (1981) (ultimate issue in inferring remedy is congressional intent); Universities Research Ass'n. v. Coutu, 450 U.S. 754, 763 (1981) (same).

analysis, examining aspects of nullification and congressional amendments.

The *Huddleston* Court also relied on the 1975 securities amendments to show that Congress implicitly sanctioned the inference of a section 10(b) remedy by leaving section 10(b) intact.[141] The Court's analysis is questionable considering the misplaced reliance on the intent of Congress in 1975 rather than the intent of Congress during the formulation of the Acts.[142] Depending on the inaction of a subsequent Congress to establish the intent of the enacting Congress seems tenuous,[143] especially since the 1975 amendments to the securities laws dealt with particular areas of legislative concern and not with any re-examination of the private enforcement mechanisms of the Acts.[144] The Supreme Court applied a similar analysis of congressional inaction in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*,[145] determining that a pre-existing implied private action under the Commodity Exchange Act withstood subsequent congressional amendment.[146] The *Curran* Court reasoned that since Congress had previously amended the Act without expressly disapproving of the existing implied remedy, Congress must have intended to perpetuate a private cause of action.[147] The *Curran* Court considered relevant amendments involving only the private remedies under the Commodity Exchange Act.[148] In contrast, the Court in *Huddleston* examined amendments not

---

[141] 51 U.S.L.W. at 4102; *see supra* note 130 (describing amendments to securities laws).

[142] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 574 n.16 (1976). The intent of the present Congress is significant only to the degree that Congress could enact an express right of action upon perceiving a judicial denial of an implied remedy as inappropriate. *Id.* at 578.

[143] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978) (implying private right of action on basis of congressional silence is hazardous undertaking).

[144] *See supra* note 130 (detailing amendments to securities laws).

[145] 456 U.S. 353 (1982); *see infra* text accompanying notes 147 & 148 (explanation of *Curran* decision).

[146] *See infra* text accompanying notes 147 & 148 (explanation of *Curran* decision).

[147] 456 U.S. at 378-82. In *Curran*, the Court relied on the ostensibly uniform and well-understood consensus that a private cause of action exists under the Commodity Exchange Act in justifying an implied remedy. *Id.* at 379-81; *see* 7 U.S.C. §§ 1-7(d) (1976 & Supp. V 1981) (provisions of Commodity Exchange Act). The Supreme Court employed similar reasoning in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975), asserting that an implied action existed under § 10(b) considering the overwhelming consensus among the district and appellate courts that such a cause of action did exist. *Id.*

[148] 456 U.S. at 379-80. Traditionally, the Supreme Court has considered whether Congress had intended to create or deny a remedy under a particular statute in determining whether to imply a cause of action. *See* Cort v. Ash, 422 U.S. at 78-79; *supra* notes 73-76 and accompanying text (discussion of *Cort* analysis for implication of remedies). Notwithstanding the *Curran* decision, the Supreme Court altered the focus on legislative intent, determining that a court must reject an implied cause of action unless Congress affirmatively intended to create one. *See, e.g.*, California v. Sierra Club, 451 U.S. 287, 296 (1981) (ultimate issue is whether Congress intended to create private right of action); Universities Research Ass'n. v. Coutu, 450 U.S. 754, 763 (1981) (question whether statute creates private right of action is ultimately one of congressional intent). The *Curran* Court employed a converse approach in evaluating congressional amendments as part of the legislative history to infer

pertaining specifically to the implication of private rights of action under section 10(b).[149] Considering the underlying disparity in the substantive content of the securities amendments, the *Huddleston* Court fallaciously relied on the inaction of Congress as evidence of permitting an implied remedy under section 10(b) despite the existence of an express remedy.

The *Huddleston* Court's reliance on the heavier burden of proof for section 10(b) as a justification for allowing plaintiffs capable of proving scienter to proceed under section 10(b) rather than under an express remedy is also subject to criticism.[150] The burden of demonstrating that the defendant acted with scienter actually does not limit the potential invocation of section 10(b).[151] Courts generally permit an allegation of some element of scienter to satisfy the burden of proof.[152] Although the Supreme Court has left the question unresolved, courts typically acknowledge that a showing of recklessness comports with the scienter requirement.[153] If recklessness is sufficient to establish scienter, the burden placed on the

---

a cause of action. 456 U.S. at 379-80. The Court reasoned that since no evidence resulted from an analysis of the legislative history that Congress intended to deny a remedy, the existence of an implied remedy under the Commodity Exchange Act remained intact. *Id.; see* Block & Barton, *supra*, note 130, at 273 (examination of effects of *Curran* decision). The Supreme Court's reasoning in *Curran* illustrates a form of judicial policy-making in which the Court views the circumstances and adopts the legislative intent analysis to suit the desired outcome. *Id.; see supra* text accompanying note 147. *But see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978) (implying private right of action on basis of congressional silence is hazardous undertaking).

[149] 51 U.S.L.W. at 4102. In *Curran*, the 1974 amendments to the Commodity Exchange Act dealt extensively with private remedies under the Commodity Exchange Act. 456 U.S. at 365-66. In contrast, the relevant securities amendments to the '33 and '34 Acts dealt with particular areas of legislative concern and did not involve any re-examination of the private enforcement mechanisms of the securities acts. *See supra* note 130 (describing amendments to securities laws). The *Huddleston* Court justified the existence of an implied § 10(b) remedy notwithstanding express remedies by relying on congressional inaction regarding § 10(b) in amending the securities laws. 51 U.S.L.W. at 4102. The Court's reasoning is flawed in that Congress amended legislation not pertaining directly to § 10b. *See* Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975) (1975 amendments did not change § 10(b)). Thus, the Court's reliance on Congress' leaving § 10(b) intact as an indication of congressional approval of an implied action under § 10(b) is misplaced. *See supra* note 147 (discussion of reliance on congressional approval due to congressional silence).

[150] *See supra* text accompanying notes 116 & 118 (discussion of heavier burden of proof under § 10(b) than under express remedies).

[151] *See* Valente v. Pepsico, Inc., 454 F. Supp. 1228, 1251 (D. Del. 1978) (scienter requirement fulfilled by defendant's actual knowledge of undisclosed information). *See generally* Note, *The Exclusivity of the Express Remedy Under Section 18(a) of the Securities Exchange Act of 1934*, 46 GEO. WASH. L. REV. 845, 856-57 (1978).

[152] Ernst & Ernst v. Hochfelder, 425 U.S. at 201 (§ 10(b) regulates practices that involve some element of scienter); *see* Rolf v. Blythe, Eastman Dillon & Co., 570 F.2d 38, 44-47 (2d Cir.) (reckless behavior sufficient to meet scienter requirement), *cert. denied* 439 U.S. 1039 (1978); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1039-40 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) (same).

[153] *See* BLOOMENTHAL, *supra* note 38, § 12.04, at 212-14 (discussion of scienter requirement considering courts' acceptance of recklessness as satisfying scienter rule).

plaintiff is arguably not much greater than requiring the plaintiff to prove negligence.[154] Furthermore, the absence of an express statute of limitations period for section 10(b) as well as the lack of specific provisions under section 10(b) requiring imposition of security for costs and attorney's fees benefit plaintiffs.[155] Since express remedies stipulate detailed procedural restrictions, plaintiffs proceeding under section 10(b) enjoy a comparable dearth of procedural limitations.[156]

Despite the broad applicability of an implied remedy under section 10(b), certain limitations surround the statute to deter unrestrained, vexatious litigation.[157] A particularly effective limitation on a section 10(b) implied cause of action is the purchaser-seller requirement, which courts implement to control the class of plaintiffs suing under section 10(b).[158] Although the Supreme Court has held that a private damage action under section 10(b) is available only to actual purchasers or sellers of securities, the Court has not specified the precise elements involved in a purchase or sale.[159] Consequently, courts can expand or contract the category of purchasers and sellers through liberal or narrow interpretations of the definition of a purchase or sale.[160] For example, the Supreme Court has

---

[154] *See* Note, *Prospectus Liability and Rule 10b-5: A Sequel to* BarChris, 1971 DUKE L.J. 559, 564 n.20 (author speculates that in many situations negligence is established less easily than fraudulent intent). The author hypothesizes that when a defendant exercises due care in preparing a registration statement, but realizes beforehand the statement is misleading, the defendant's intent to defraud is clear. *Id.* Proving the defendant's negligence, however, seems difficult in such a situation. *Id.*

[155] *See supra* notes 33 & 34 and accompanying text (statute of limitations and security requirement under § 10(b)).

[156] *See supra* notes 7-9 and accompanying text (examples of limitations surrounding § 10(b)).

[157] *See supra* text accompanying note 8; *infra* text accompanying notes 158-85 (discussion of purchaser-seller requirement of § 10(b)).

[158] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 754-55 (1975). In *Blue Chip*, the plaintiff claimed that the defendant-corporation distributed an overly pessimistic prospectus attempting to mislead and discourage investors from purchasing the corporation's stock. *Id.* at 726-27. The *Blue Chip* Court ruled that allowing potential investors, disgruntled by the market performance of stocks, to file a § 10(b) claim alleging inadequate disclosure, for example, would circumvent the essential purpose of the antifraud legislation by expanding the class of plaintiffs to include people Congress did not intend to protect. *Id.* at 747. The *Blue Chip* decision established a uniform standard, defining the class of plaintiffs permitted to proceed under § 10(b), which Congress designed to curtail the increasing exceptions to the purchaser-seller rule. *Id.* at 754-55. Several exceptions to the purchaser-seller requirement emerged in federal courts before the decision in *Blue Chip*. *See, e.g.*, Sargent v. Genesco, Inc., 492 F.2d 750, 754 (5th Cir. 1974) (injunctive relief exceptions to purchaser-seller rule); Herpich v. Wallace, 430 F.2d 792, 801 (5th Cir. 1970) (derivative shareholder actions exceptions to purchaser-seller rule).

[159] *See The Circuits Debate, supra* note 11, at 888. (Supreme Court in *Blue Chip* failed to articulate elements of purchase or sale).

[160] *Compare* Rochelle v. Marine Midland Grace Trust Co., 535 F.2d 523, 527-28 (9th Cir. 1976) (issuance of shares of corporation qualifies as sale) *and* Franklin Life Ins. Co. v. Commonwealth Edison Co., 451 F. Supp. 602, 608 (S.D. Ill. 1978) (issuance and later redemption of stocks deemed purchase and sale), *aff'd* 598 F.2d 1109, *cert. denied* 444 U.S. 900 (1979),

concluded that the purchaser-seller requirement precludes retention claims, which involve an assertion that the defendant fraudulently dissuaded the plaintiff from selling a security, thus inducing the plaintiff to retain the devalued security.[161] Similarly, the Fourth Circuit applied the purchaser-seller requirement under section 10(b) in *Gurley v. Documentation, Inc.*,[162] to deny standing to shareholders alleging that the defendants had discouraged the shareholders from selling certain securities through fraudulent inducement.[163] In *Gurley*, the plaintiffs initially bought Documentation, Inc. stock in reliance on the corporate directors' assurance that the plaintiffs as shareholders could sell their shares in conjunction with any future public offering of Documentation, Inc. stock.[164] When Documentation, Inc. planned a public offering of stock, however, the corporate directors decided to support the price of the new issue artificially by temporarily preventing the plaintiffs from putting their shares on the market.[165] The plaintiffs' complaint alleged that Documentation, Inc. fraudulently prevented the plaintiffs from selling their shares until a specified time after the initial public offering of stocks.[166]

In categorizing the plaintiffs' complaint as a deferred sale claim, the *Gurley* Court determined that the plaintiffs lacked standing to sue under section 10(b) because the plaintiffs failed to satisfy the purchaser-seller requirement.[167] The *Gurley* Court recognized that the rationale for imposing a purchaser-seller requirement centers on reducing nuisance suits under section 10(b)[168] and noted that like retention claims, deferred sale

---

with Sacks v. Reynolds Sec., Inc., 593 F.2d 1234, 1234-41 (D.C. Cir. 1978) (custodial transfer of stock from one broker to another while ownership rights remain in same investor is not purchase or sale).

[161] 421 U.S. at 737-38. In *Blue Chip*, the Court explained that retention claims involve shareholders who allege they decided not to sell their shares because of an unduly optimistic representation or a failure to disclose unfavorable material. *Id.*

[162] 674 F.2d 253 (4th Cir. 1982).

[163] *Id.* at 256-57.

[164] Id. at 255.

[165] *Id.* The *Gurley* plaintiffs informed the directors of Documentation, Inc. that the plaintiffs wanted to sell their shares in conjunction with any public offering of stock. *Id.* At a shareholders' meeting, the directors informed the plaintiffs that the company contemplated a public offering of stock sometime in the future. *Id.* The defendants, however, neglected to tell the plaintiffs that plans for a public offering were well underway. *Id.*

[166] *Id.*

[167] *Id.* at 256-57.

[168] *Id.* at 257; *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731-32 (1975). The majority opinion in *Blue Chip* cited the general acceptance by the lower courts of the *Birnbaum* rule as a consideration in maintaining the strict limitations surrounding the purchaser-seller requirement under § 10(b). *Id.; see* Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). In addition, the majority opinion stated that policy considerations such as the fear of strike suits and the danger of successful suits based on spurious oral testimony prompted the Court to uphold a strict purchaser-seller limitation. 421 U.S. at 737-45; *see* Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548-49 (1949). In *Cohen*, the Court characterized strike suits as actions brought not to redress real wrongs, but to cause a nuisance for the defendant. *Id.* In *Blue Chip*, the Court expressed concern

claims expose defendants to potentially vexatious litigation.[169] In a deferred sale claim, the plaintiff usually alleges that the defendant's fraud caused the plaintiff to sell his shares later than he otherwise would have done.[170] To deter such claims and effectively limit the class of plaintiffs invoking an implied section 10(b) remedy, the lower courts have fashioned a test requiring that fraud exist prior to or contemporaneous with the plaintiff's actual sale of securities.[171] Since the crucial evidence in deferred sale claims, like retention claims, is the oral testimony of the plaintiffs, the ease of fabricating a plausible deferred sale claim raises the danger of spurious strike suits.[172] The Fourth Circuit did recognize the inherent unfairness of denying standing to sue on the *Gurley* plaintiff's deferred sale claim, especially since the plaintiffs sold the shares soon after the alleged fraud, but the Court refused to expand the purchaser-seller rule.[173]

---

that vexatious litigation would increase if the Court abandoned the purchaser-seller rule. 421 U.S. at 740. The Court recognized the serious impediment to normal business activity that any lawsuit engenders. *Id.* The Court reasoned that, absent the purchaser-seller limitation, the opportunity would arise for lawsuits to be initiated by persons not actively participating in the marketing of securities, thus exposing companies to the danger of paying large settlements to avoid expensive litigation. *Id.* at 739. The *Blue Chip* Court, in addition, stated that the purchaser-seller rule injected a degree of clarity into the fact-finding process by separating the group of plaintiffs who actually sold or purchased from the group of potential plaintiffs capable of stating a claim, but not proving it. *Id.* at 743. The *Blue Chip* Court also considered the degree of ambiguity involved when oral testimony is practically the entire basis of proof. *Id.* The Court recognized that abolition of the *Birnbaum* doctrine would require the trier of fact to decide many hazy issues based almost exclusively on oral testimony. *Id.* The danger of vexatious litigation, in view of potentially spurious allegations, therefore, posed a serious detriment to the normal functioning of business. *See generally* Dosley, *The Effects of Civil Liability on Investment Banking and the New Issues Market*, 58 VA. L. REV. 776, 822-43 (1972).

[169] 674 F.2d at 257. The *Gurley* Court emphasized that the plaintiff's damages in connection with an alleged fraud were completely speculative. *Id.* The Court explained that the inherent danger of initiating spurious suits based solely on oral testimony outweighed any advantages in allowing deferred sales claims. *Id.; see* O'Brien v. Continental Illinois Nat'l. Bank & Trust, 593 F.2d 54, 58 (7th Cir. 1979) (plaintiff may not bring retention claims by selling securities before filing suit).

[170] 674 F.2d at 257.

[171] *See* JACOBS, *supra* note 3, § 38.01(e)(iii)(A). After *Birnbaum*, the lower courts created several exceptions to the purchaser-seller rule. *Id.* One exception, the deferred sale claim, has the potential to survive despite the holding in *Blue Chip* because the facts of *Blue Chip* do not apply to the deferred sale exception. *Id.* Accordingly, a plaintiff can obtain standing under this exception if he is on the verge of selling or, if, after learning of the fraud, he subsequently sells or buys. *Id.; see also* Ingenito v. Bermec Corp., 376 F. Supp. 1154, 1174-75 (S.D. N.Y. 1974). In a deferred sale claim, the *Ingenito* Court noted that § 10(b) did not require that a sale immediately follow the alleged fraud, and held that since plaintiffs clearly had indicated their intent to sell and subsequently completed their sales, the alleged fraud directly related to the timing and circumstances of the sale, and accordingly stated a § 10(b) claim. *Id.*

[172] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. at 743; *supra* note 168.

[173] *Id.* at 738-39; *see* Lowenfels, *The Demise of the* Birnbaum *Doctrine: A New Era for*

Although the application of the purchaser-seller requirement in *Gurley* established that plaintiffs in deferred sale situations lack standing under section 10(b), application of the purchaser-seller rule often produces less harsh results.[174] In *Pittsburgh Terminal Corp. v. B & O Railroads Co.*,[175] for example, the Third Circuit held that debenture holders satisfied the purchaser-seller requirement.[176] In *Pittsburg Terminal*, the plaintiffs, holders of convertible debentures,[177] alleged that the defendants, directors of the B & O Railroad Co., wrongfully fixed the record date for the distribution of stock dividends, thereby denying the plaintiffs the opportunity to convert the debentures into common stock and participate in the dividend.[178] The Third Circuit held that the option to redeem convertible debentures for common stock was actually a contract to buy or sell securities.[179] The Third Circuit concluded that a contract to buy or sell securities was a purchase or sale as described in section 10(b) and thus bestowed the plaintiff with standing to sue.[180]

As the court in *Pittsburgh Terminal* determined, the existence of a contractual relationship was essential in extending the definition of the purchaser-seller requirement to include convertible debentures.[181] An optional contract to purchase or sell securities, as opposed to the actual purchase or sale of securities as enunciated in the '34 Act, also satisfies the purchaser-seller rule.[182] Though the Supreme Court's definition of a sale

---

Rule 10b-5, 54 VA. L. REV. 268, 275-76 (1968) (barring deferred sale claims under § 10(b) eliminates number of meritorious claims).

[174] *See* Marsh v. Armada Corp., 533 F.2d 978, 981-82 (6th Cir. 1976) (deferred sale actionable under § 10(b) since sale occurred soon after alleged fraud), *cert. denied*, 430 U.S. 954 (1977).

[175] 680 F.2d 933 (3d Cir.), *cert. denied*, 103 S. Ct. 476 (1982).

[176] *Id.*

[177] *Id.* In *Pittsburgh Terminal*, the plaintiffs, Pittsburgh Terminal Corporation and four individual shareholders, held convertible debentures issued by the Baltimore & Ohio Railroad Company. *Id.* at 935-36.

[178] *Id.* In *Pittsburgh Terminal*, the defendants refrained from informing the plaintiffs of the dividends because if the number of Baltimore & Ohio Railroad common stockholders was to increase dramatically, Baltimore & Ohio would have had to file a registration statement with the SEC. *Id.* at 937-38. The directors of Baltimore & Ohio feared that the preparation of a registration statement would entail numerous practical difficulties. *Id.; see* 15 U.S.C. § 77f (1976) (requirements for filing of registration statement).

[179] *See* 509 F. Supp. 1002, 1012 (W.D. Pa. 1981) (district court opinion in *Pittsburgh Terminal*), *aff'd in part and rev'd in part* 680 F.2d 933 (3d Cir.), *cert. denied*, 103 S. Ct. 476 (1981).

[180] 680 F.2d 933, 940 (3d Cir. 1982); *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 751 (1975). In *Blue Chip*, the Supreme Court found that the holders of contractual rights or duties to purchase or sell securities achieved purchaser or seller status for the purposes of § 10(b). *Id.; see supra* note 168 (examination of *Blue Chip* decision).

[181] 680 F.2d 933, 939-40 (3d Cir. 1982).

[182] *See* Wulc v. Gulf & W. Indus., 400 F. Supp. 98, 102 (E.D. Pa. 1975) (optional contract to purchase or sell securities complied with purchaser-seller requirement); Ashton v. Thornley Realty Co., 346 F. Supp. 1294, 1299 n.4 (S.D. N.Y. 1972) (same), *aff'd*, 471 F.2d 746 (2d Cir. 1973); Collins v. Rukin, 342 F. Supp. 1282, 1289 (D. Mass. 1972) (same).

contemplated individual transfers of property, the growing complexity of securities coupled with the waning of face-to-face transactions suggests that a broader, less mechanistic approach to interpreting the purchaser-seller rule is expedient.[183]

The judicial confusion surrounding the purchaser-seller rule has yielded inconsistent holdings. The purchaser-seller requirement remains an effective means of limiting the availability of an implied right of action under section 10(b), even though the rule retains many exceptions.[185] Since Congress failed to identify explicitly an implied remedy under section 10(b), courts must employ judicially developed restraints to prevent vexatious litigation under the statute because section 10(b) is broader and more appealing to litigants than the alternative express remedies.

Despite the availability of express remedies under the '33 and '34 Acts, the *Huddleston* decision conclusively established that courts will continue to exercise pragmatism in allowing a section 10(b) implied remedy with appropriate limitations.[186] Theoretically, the *Huddleston* Court failed to apply the current modified implication analysis; however, the Court emphatically recognized that section 10(b) was too important and well entrenched a remedy in the overall scheme of securities litigation to eliminate.[187] Since courts consistently have acknowledged an implied remedy under section 10(b), the *Huddleston* decision merely approved expressly a practice in which courts have engaged for many years.[188]

The Supreme Court resolved the conflict between express remedies and an implied remedy under section 10(b) through an examination of congressional intent.[189] In drafting the '33 and '34 Acts, the general intent of Congress was to eliminate unfair and fraudulent practices in the securities markets.[190] An implied remedy under section 10(b) is a significant means for aggrieved parties to redress fraud in the market place.[191] If courts abrogated an implied cause of action under section 10(b), leaving plaintiffs with only the narrow express remedies of the Acts, the likelihood

---

[183] *See* Froehlich & Spiegel, *Standing of Federal Securities Plaintiffs—Which Way The Trend*, 24 DEPAUL L. REV. 510, 514 (1975). The authors suggest that a re-evaluation of the purchaser-seller rule is necessary because of inconsistencies in application and results. *Id.* The authors consider a case-by-case examination of the facts essential to the proper operation of the purchaser-seller requirement. *Id.*

[184] *See supra* text accompanying notes 59-64 (describing § 10(b) as attractive remedy compared to express remedies).

[185] *See supra* notes 158 & 160 (examples of exceptions to purchaser-seller requirement).

[186] *See supra* note 107 and accompanying text (discussing holding in *Huddleston*).

[187] *See supra* text accompanying notes 133-134 (*Huddleston* Court's treatment of implication analysis).

[188] *See supra* text accompanying notes 112 & 113 (historical significance of § 10(b) remedy).

[189] *See supra* text accompanying notes 125-32 (discussing Court's legislative intent analysis).

[190] *See supra* notes 16-21 and accompanying text (discussing legislative concerns surrounding securities transactions).

[191] *See supra* text accompanying notes 23-36 (elements of implied remedy under § 10(b)).

of fraudulent practices in the securities markets would increase dramatically. As an antifraud provision, section 10(b) provides fewer procedural limitations than the express remedies in effectuating the broad remedial purposes of the securities legislation.[192] Yet, the higher standard of proof and other limitations such as the purchaser-seller requirement necessary for a section 10(b) cause of action preclude the nullification of the procedural restrictions surrounding the express remedies of the '33 and '34 Acts.[193] Thus, an implied remedy under section 10(b) is widely applicable, ensuring that incidences of fraud will not go unredressed. Notwithstanding the express remedies of the Acts, the congressional goal of deterring fraud in the market place necessitates the continued existence of the catch-all implied right of action under section 10(b).

PAUL J. KENNEDY

[192] *See supra* notes 37-48 and accompanying text (discussing express remedies under securities laws).

[193] *See supra* text accompanying notes 111-19 (discussing *Huddleston* Court's "nullification" analysis).