Washington and Lee Law Review

Volume 39 | Issue 3 Article 11

Summer 6-1-1982

Implied Private Rights Of Action Under Section 6(B) Of The Securities Exchange Act Of 1934

IMPLIED PRIVATE RIGHTS OF ACTION UNDER SECTION 6(b) OF THE SECURITIES EXCHANGE ACT OF 1934

Current application of legal standards to the activities of participants in the securities industry reflects a blend of two distinct regulatory techniques.[1] Through the Securities Exchange Act of 1934,[2] ('34 Act) the federal government imposes direct requirements and prohibitions upon the behavior of securities market participants.[3] These requirements and prohibitions define the parameters of lawful conduct within the securities industry[4] and, in some instances, provide that violations will result in the imposition of civil and criminal liabilities.[5] In addition to imposing direct regulation, however, the '34 Act regulates the activities of securities market participants by supervising the self-regulation of market institutions.[6] Through this indirect means of regula-

---

[1] *See* H.R. DOC. No. 95, 88th Cong., 1st Sess., Pt. 1 at 3 (1963) [hereinafter cited as H.R. DOC. No. 95]; 2 LOSS, SECURITIES REGULATION 1168-83 (2d ed. 1961) [hereinafter cited as LOSS].

[2] 15 U.S.C. §§ 78a-78kk (1976 & Supp. IV 1980).

[3] *See, e.g.*, 15 U.S.C. § 78h(a) (1976) (§ 8 of '34 Act imposes limitations upon borrowing of funds by brokers, dealers, or exchange members acting as such); 15 U.S.C. § 78j(b) (1976) (§ 10(b) of '34 Act prohibits use of any manipulative or deceptive device or contrivance in connection with purchase or sale of security where device or contrivance is prohibited by regulation); 15 U.S.C. § 78m (1976 & Supp. I 1977) (§ 13 of '34 Act requires issuers of registered securities to file periodic reports with Securities and Exchange Commission); 15 U.S.C. § 78n(e) (1976) (§ 14(e) of '34 Act prohibits fraudulent or manipulative acts or practices in connection with any tender offer). *See also* H.R. DOC. No. 95, *supra* note 1, at 3.

[4] *See* ROBBINS, THE SECURITIES MARKETS 83-120 (1966) [hereinafter cited as ROBBINS]. The primary objectives of the '34 Act are disclosure of information by registered issuers, regulation of credit, and prevention of fraud and abuse in the securities industry. *See id.*; note 3 *supra.*

[5] *See, e.g.*, 15 U.S.C. § 78i(e) (1976) (§ 9(e) of '34 Act creates civil liability for any person who manipulates security prices); 15 U.S.C. § 78p(b) (1976) (§ 16(b) of '34 Act imposes civil liability upon insiders for profits derived from short-swing transactions in issuer's securities); 15 U.S.C. § 78ff(b) (1976 & Supp. I 1977) (§ 32 of '34 Act imposes criminal liabilities upon persons who willfully violate provisions of '34 Act or rules or regulations promulgated thereunder). *See also* Schwartz, *Express and Implied Remedies Under the Federal Securities Laws*, 9 INST. SEC. REG. 341 (1978); Matthews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases*, 39 GEO. WASH. L. REV. 901 (1971).

[6] *See* H.R. DOC. No. 95, *supra* note 1, at 3-5; Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 L. & CONTEMP. PROB. 663, 663-67 (1964) [hereinafter cited as Jennings]. Major institutions of the securities market are the National Association of Securities Dealers, Inc. (NASD), the New York Stock Exchange (NYSE), and the American Stock Exchange (AMEX). *See* LOSS, *supra* note 1, at 1170. In 1944 twenty-five exchanges had registered with the Securities and Exchange Commission (SEC), but through attrition and mergers, the number of registered exchanges has steadily decreased. *See id.*

tion, the federal government both permits and requires national securities exchanges to adopt rules governing the business conduct of their members.[7]

The federal government influences the character of stock exchange rules through provisions of the '34 Act relating to the registration of stock exchanges as national securities exchanges.[8] Section 6(a) of the '34 Act provides that an exchange may be registered as a national securities exchange by filing an application with the Securities Exchange Commission (SEC).[9] Section 5 of the '34 Act[10] provides impetus for registration by prohibiting use of the facilities of an exchange for the purpose of effecting a transaction in a security unless the exchange is registered under section 6.[11] Section 6(b) describes the circumstances under which

---

[7] *See* 15 U.S.C. § 78f (1976) ('34 Act, § 6). Section 6(a) of the '34 Act permits a stock exchange to be registered as a national stock exchange by filing with the SEC an application conforming to SEC rules. *Id.* § 78f(a). Section 6(b) of the '34 Act provides that the SEC will not register an exchange unless the exchange promulgates and enforces certain types of exchange rules. *Id.* § 78f(b)(3-8). For example, an exchange must promulgate rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster competition among persons engaged in effecting transactions in securities, and to protect investors. *See id.* § 78f(b)(5). In addition, the SEC will not register an exchange unless its rules provide for disciplinary sanctions, and the exchange has the capacity to enforce member compliance with both exchange rules and the '34 Act. *See id.* § 78f(b)(1 & 6).

The '34 Act defines "exchange" as any organization, association, or group of persons that constitutes, maintains or provides a market place or facilities for bringing together purchasers and sellers of securities. *Id.* § 78c(a)(1). "Member", when used with respect to an exchange, refers to any person who is permitted either to effect transactions on an exchange without the services of another person, or to make use of exchange facilities for effecting transactions thereon without payment of a commission or fee or with the payment of a commission or fee that is less than the commission or fee charged the general public. *See id.* § 78c(a)(3) ('34 Act, § 3(a)(3)).

[8] *See id.* § 78f; note 7 *supra.*

[9] 15 U.S.C. § 78f(a) (1976). Section 6(a) of the '34 Act confers authority upon the SEC to prescribe by rule the information required to be included in the application of an exchange for registration. *Id.* Section 6(a) requires that the application contain the rules of the exchange requesting registration. *Id.*; *see* note 7 *supra.*

[10] 15 U.S.C. § 78e (1976).

[11] *Id.* The '34 Act defines exchange "facility" as the premises of an exchange, its property, any right to use exchange premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange, including any system of communication to or from an exchange that is maintained by or with the consent of the exchange. *Id.* § 78c(a)(2). "Facility" also embraces any right of an exchange to the use of any property or service. *See id. See also* 15 U.S.C. § 78s (1976) ('34 Act, § 19). Section 19 of the '34 Act outlines responsibilities and oversight of national stock exchanges. *See id.* § 78s(b)-(i). Section 19 requires exchanges to comply and enforce compliance with the provisions of the '34 Act, rules and regulations thereunder, and exchange rules. *Id.* § 78s(g). Section 19 also requires exchanges to file with the SEC preliminary notice of proposed rule changes and confers upon the SEC power to amend or delete exchange rules upon publication of notice and opportunity for hearing. *Id.* § 78s(b)&(c). Section 19 does not, however, confer authority upon the SEC to enforce member compliance with exchange rules. *See id.* § 78s; Loss, *supra* note 1, at 1178.

the SEC will deny registration of an exchange.[12] Specifically, section 6(b) provides that an exchange shall not be registered unless the rules of the exchange are designed to prevent fraudulent and manipulative acts and practices,[13] to promote just and equitable principles of trade,[14] and to protect investors.[15] While section 6 does not incorporate exchange rules or give exchange rules the force of federal law,[16] section 6 requires that exchanges promulgate certain types of rules as a precondition to participation in the securities industry.[17]

Recent years have witnessed a substantial increase in case law addressing the question whether there is an implied private right of action under section 6 of the '34 Act.[18] Plaintiffs have brought actions in federal courts against issuers, exchange members, and exchanges themselves on the theory that conduct in violation of exchange rules is conduct in viola-

---

[12] *See id.* § 78f(b) (3-8) (1976); note 7 *supra.*

[13] 15 U.S.C. § 78f(b)(5) (1976).

[14] *Id.*

[15] *Id.*

[16] *See id.* § 78f; note 7 *supra.*

[17] *See* 15 U.S.C. § 78f (3-8) (1976); text accompanying notes 13-15 *supra*; Note, *The Suitability Rule: Should a Private Right of Action Exist?* 55 ST. JOHN'S L. REV. 493, 513 (1981) [hereinafter cited as *The Suitability Rule*]. In addition to providing for the registration of stock exchanges, the '34 Act also provides for the registration of organizations of broker-dealers trading in the over-the-counter market (OTC market). *See* 15 U.S.C. § 78 0-3 (1976) ('34 Act, § 15A). The '34 Act, as amended in 1936, regulated the activities of participants in the OTC market by requiring broker-dealers to independently register under the '34 Act. *See id.* § 78o (1976). Partly in response to the desires of OTC market representatives for some form of industry self-regulation, and partly in response to a perceived need to cope with methods of doing business which, while technically legal, are nonetheless unfair and damaging to the mechanism of the free and open market, Congress added § 15A to the '34 Act. *See id.* § 78 o-3 (1976); H.R. DOC. No. 95, *supra* note 1, at 604-07; S. REP. No. 1455 at 3 and H.R. REP. No. 2307 at 4, 75th Cong., 3d Sess. (1938). Section 15A provides that an association of brokers and dealers may register as a national securities association by filing an application with the SEC. 15 U.S.C. § 78 0-3(a) (1976). Like § 6 of the '34 Act, § 15A(b) describes circumstances under which the SEC shall not register an association of brokers and dealers, many of which relate to the character of association rules. *See id.* § 78 0-3(b)(2-11) (1976); Jennings, *supra* note 6, at 675-76. The NASD is the only association that has applied for registration under § 15A. *See* LOSS, *supra* note 1, at 1365.

[18] *See, e.g.*, State Teacher's Retirement Bd. v. Flour Corp., 654 F.2d 843, 851-53 (2d Cir. 1981) (no implied private right of action for alleged violation of § A2 of NYSE Listing Agreement and Company Manual requiring issuer to promptly notify public of large contract); Jablon v. Dean Witter & Co., 614 F.2d 677, 678-81 (9th Cir. 1980) (no implied private action for alleged violation of NYSE Rule 405 and Art. III, § 2 of NASD Rules of Fair Practice requiring broker to make inquiry into customer's financial condition before opening account); Smith v. Smith, Barney, Harris, Upham & Co., Inc., 505 F. Supp. 1380, 1384-86 (W.D. Mo. 1981) (implying private action for alleged egregious violation of NYSE Rule 405); Coleman v. D.H. Blair & Co., Inc., [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,252, 91,643-49 (S.D.N.J. 1981) (no implied private right of action for alleged violations of NYSE Rule 405 or NASD Rules of Fair Practice, art. III, § 2 requiring broker inquiry into financial condition of customer). *See generally* Thayer, *Public Wrong and Private Action*, 24 HARV L. REV. 317 (1923) [hereinafter cited as Thayer].

tion of federal law.[19] Early decisions in actions brought under section 6 uniformly recognize that under appropriate circumstances, conduct in violation of exchange rules gives rise to an implied right of action.[20] Recent Supreme Court decisions, however, have altered and refined the process by which a court determines whether an implied right of action exists under a federal statute.[21] Consequently, a determination of whether an implied right of action exists under section 6 involves a reappraisal of early section 6 precedent in light of redefined standards.[22]

Colonial Realty Corp. v. Bache & Co.[23] and *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[24] are early Circuit Court decisions that have heavily influenced litigation regarding the existence of an implied private right of action under section 6.[25] In *Colonial Realty*, the United States Court of Appeals for the Second Circuit considered whether a court could imply a private right of action for alleged violations of New York Stock Exchange (NYSE) and National Association of Securities Dealers, Inc. (NASD) rules requiring member firms to conduct their dealings in a manner consistent with just and equitable principles of trade.[26]

---

[19] *See* Comment, *Securities Regulation—Expanding the Scope of the 1934 Act—The Issuer's Liability for Failure to Comply with the NYSE Company Manual*, 29 RUTGERS L. REV. 1251 [hereinafter cited as *Issuer's Liability*]; Wolfson & Russo, *The Stock Exchange Member: Liability for Violation of Stock Exchange Rules*, 58 CAL. L. REV. 1120 (1970) [hereinafter cited as *Member Liability*]; Note, *Exchange Liability Under Section 6 of the Securities Exchange Act: The Eligible Plaintiff Problem*, 78 COLUM. L. REV. 112 (1978) [hereinafter cited as *Exchange Liability*]. *See generally* Thayer, *supra* note 18.

[20] *See* text accompanying notes 24-51 *infra*.

[21] *See* Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Canon v. University of Chicago, 441 U.S. 677 (1978); Cort v. Ash, 422 U.S. 66 (1975); text accompanying notes 61-97 *infra*.

[22] *See* text accompanying notes 109-83 *infra*.

[23] 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

[24] 410 F.2d 135 (7th Cir.), *cert. denied*, 396 U.S. 838 (1969).

[25] *See* Smith v. Smith, Barney, Harris, Upham & Co., Inc., 505 F. Supp. 1380, 1384-86 (W.D. Mo. 1981) (applying *Buttrey* to question whether implied private right of action under § 6 exists); Coleman v. D.H. Blair & Co., Inc., [1981-82 Transfer Binder] FED. SEC. L. REP. CCH ¶ 98,252, 91,643 (S.D.N.Y. 1981) (*Colonial Realty* is starting point in § 6 implication analysis). *See generally The Suitability Rule*, *supra* note 17.

[26] *See* 358 F.2d at 179-80. The plaintiff in *Colonial Realty* alleged violations of Article XIV of the NYSE Constitution, Article I, § 2(a) of the NASD Bylaws, and Article III, § 1 of the NASD Rules of Fair Practice. *See id.* At the time plaintiff brought suit, Article XIV of the NYSE Constitution provided that the NYSE could expel a member for conduct inconsistent with just and equitable principles of trade. *See* 358 F.2d at 180. Article XIV currently provides that the NYSE Board of Directors shall have power to adopt disciplinary rules to address violations of exchange rules or of the '34 Act. *See* NYSE CONST., Art. XIV, § 1, *reprinted in* 2 N.Y. STOCK EXCH. GUIDE (CCH) ¶ 1653, at 1091-92 (1980). Article XIV enumerates a range of disciplinary sanctions for exchange rule violations, including expulsion. *See id.* at 1029. Article I, § 2(a) of the NASD By-Laws prohibits the membership of any broker or dealer who has been or is barred or suspended from any market organization for conduct inconsistent with just and equitable principles of trade. *See* NASD BY-LAWS, art. 1, § 2(a), *reprinted in* (1976) NASD SEC. DEALER'S MANUAL (CCH) ¶ 1102, 1045. Article III, § 1

Plaintiff Colonial Realty Corp. (Colonial Realty) contended that Bache & Company (Bache) violated NYSE and NASD rules when Bache sold securities from Colonial Realty's margin account in response to a decline in stock market prices.[27] Arguing that Bache had acted in violation of an alleged oral agreement with respect to the minimum required margin, Colonial Realty brought action under section 6 in conjunction with actions for breach of contract and common law negligence.[28]

Observing that the question of whether courts should imply a private right of action under section 6 is not susceptible to a simple, absolute answer,[29] the Second Circuit held that when a plaintiff seeks to predicate civil liability upon violation of an exchange rule, a court must look to the nature of the particular rule and its place in the regulation of the securities market.[30] The court noted that some exchange rules might properly be regarded as a substitute for direct SEC regulation,[31] and that the imposition of civil liability under such rules might be necessary and appropriate to fulfilling the goals of the '34 Act.[32] Because the plaintiff in *Colonial Realty* alleged violation of only those exchange rules that require adherence to "just and equitable principles of trade,"[33] however,

---

of the NASD Rules of Fair Practice requires members to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their affairs. *See id.* at 2014; note 17 *supra.*

[27] *See* 358 F.2d at 179. A margin account is an arrangement whereby a customer purchases stock from a brokerage firm by advancing only a portion of the purchase price with the firm advancing credit for the balance due. *See* Stephens v. Reynolds Securities, Inc., 413 F. Supp. 50, 50 (N.D. Ala. 1976). The brokerage firm maintains the purchased stock as collateral for the loan. *See id.* The defendant in *Colonial Realty* sold securities from plaintiff's margin account in lieu of making a margin call. *See* 358 F.2d at 179. A margin call is a demand by a broker to increase the money or securities held as collateral in the event the price of the stock has fallen since the date of purchase. *See* BLACK'S LAW DICTIONARY 871 (5th ed. 1979).

[28] *See* 358 F.2d at 179-80. The plaintiff in *Colonial Realty* alleged that Bache had orally agreed that Bache would not require a margin in excess of the minimum requirements of the NYSE. *See id.*; note 28 *supra*; text accompanying notes 175-83 *infra.*

[29] *See* 358 F.2d at 182.

[30] 358 F.2d at 182. The *Colonial Realty* court reasoned that because the exchanges enjoy wide discretion in promulgating rules as to matters not addressed by statute or regulation, Congress may not have intended that violation of any exchange rule would result in civil liability. *See id.* at 181. Although acknowledging a duty to make effective the congressional purpose and policy of federal statutes, the court noted that exchange rules promulgated under § 6 vary greatly in their relationship to the '34 Act. *See id.*

[31] Under the *Colonial Realty* analysis, to the extent that an exchange rule is a substitute for direct SEC regulation, the case for the implication of a private right of action is stronger. The court reasoned that because the implication of a private right of action under § 6 should not interfere with state law principles of fiduciary duty, a court should imply a right of action only when an exchange rule clearly reflects the influence of federal reglation. *See* 358 F.2d at 182-83; note 31 *supra.*

[32] *See id.* The *Colonial Realty* court noted that the case for implying a private right of action would be strongest when an exchange rule imposed a duty unknown at common law. *See* note 32 *supra*; text accompanying notes 175-83 *infra.*

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

the Second Circuit refused to imply a private right of action under section 6 under the circumstances presented.[34] Fearing that the standard's vagueness would require fashioning a new body of federal broker-customer law in place of principles of state law,[35] the court held that exchange rules requiring adherence to just and equitable principles of trade were not so directly related to SEC regulation as to permit the implication of a private right of action.[36]

In *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[37] the Seventh Circuit followed an approach to determining whether an implied private right of action exists under section 6 that focuses upon the conduct of the defendant rather than the nature of the rule alleged.[38] *Buttrey* involved alleged violations of NYSE Rule 405.[39] Rule 405 requires all members of the NYSE to use due diligence to learn the essential facts relative to each customer, order, and account accepted or carried by a member.[40] The plaintiff in *Buttrey*, a trustee in bankruptcy for a dealer in securities,[41] alleged that Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) violated Rule 405 by permitting the dealer to open and actively trade in an account without making inquiries into the financial condition of the dealer.[42] As a result of failing to make such inquiries, the plaintiff contended that Merrill Lynch was liable under section 6 for losses the dealer sustained in speculations made with fraudulently converted property of the bankrupt dealer's customers.[43]

On defendant's motion for summary judgment, the Seventh Circuit relied on *Colonial Realty* for the proposition that stock exchange rules can play an integral role in the regulation of the securities industry.[44] Observing that the NYSE promulgated Rule 405 in accordance with sec-

---

[34] 358 F.2d at 182-83.

[35] *See id.* at 183. In 1961, Professor Loss remarked that implying a private right of action under § 6 of the '34 Act would result in a substantial infringement of state court jurisdiction. *See* LOSS, *supra* note 1, at 996-99. If a federal question arose upon every allegation of an exchange rule violation, federal courts effectively would have exclusive jurisdiction over customer-broker suits. *See id.*; text accompanying notes 68, 173-85 *infra*.

[36] 358 F.2d at 183.

[37] 410 F.2d 135 (7th Cir. 1969).

[38] *See id.* at 141-43; text accompanying notes 39-50 *infra*.

[39] *See* 410 F.2d at 141.

[40] NYSE RULE 405, *reprinted in* 2 N.Y. STOCK EXCH. GUIDE (CCH) ¶ 2,405 (1980); *see The Suitability Rule*, *supra* note 17, at 493-96.

[41] *See* 410 F.2d at 136.

[42] *See id.* at 141. The plaintiff in *Buttrey* alleged that the defendant-broker authorized the opening of plaintiff's account without receiving any financial statements, bank references, or credit reports of plaintiff. *See id.* In addition, plaintiff alleged that the defendant-broker did not ascertain whether plaintiff had filed certain required reports with the SEC, or whether plaintiff traded as principal or agent. *See id.*

[43] *See id.* at 137.

[44] *See id.* at 142. The *Buttrey* court found that the defendant-broker's failure to make any inquiries into the financial condition of the plaintiff constituted breach of a duty that plays an integral role in SEC regulation. *See id.* In finding that an implied right of action ex-

tions 6 and 19 of the '34 Act,[45] the court determined that implying a private right of action under section 6 would be consistent with the jurisdiction of the federal courts to enforce rights and liabilities arising under the '34 Act.[46] While declining to hold that a private plaintiff may bring action for a merely negligent violation of Rule 405,[47] the court held that because Merrill Lynch's alleged Rule 405 violation involved conduct tantamount to fraud, plaintiff had stated a cause of action under section 6.[48] Reasoning that the touchstone for determining whether a court should imply a private right of action for violation of an exchange rule is

---

ists under § 6 of the '34 Act, however, the *Buttrey* court also focused upon the degree to which the alleged conduct approached fraud. *See id.* at 143; note 42 *supra.*

[45] *See* 410 F.2d at 141; 15 U.S.C. § 78f, 78s (1976); notes 7, 11 *supra.*

[46] *See* 410 F.2d at 142; 15 U.S.C. § 78aa (1976) ('34 Act, § 27). Section 27 of the '34 Act gives United States District Courts exclusive jurisdiction over violations of the '34 Act, and over all suits in law and equity to enforce any liability or duty under the '34 Act or regulations thereunder. *Id.* The *Buttrey* court held that because exchange rules are promulgated under sections 6 and 19 of the '34 Act, violations of exchange rules may be actionable as violations of duties created by the '34 Act. *See* 410 F.2d at 142. Since § 27 grants jurisdiction as to duties as well as rules, the court observed that violation of an exchange rule may be actionable even if the exchange rule is not considered a rule under the '34 Act. *See id.*; Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules*, 66 COLUM. L. REV. 12, 18-19 (1966) [hereinafter cited as Lowenfels]. The Supreme Court, however, has heavily criticized reliance upon § 27 as evidence of congressional intent to create a private cause of action. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979). In *Redington*, the Supreme Court held that § 27 creates no cause of action of its own force because it neither creates rights nor imposes liabilities. *Id.* The Court held that a plaintiff seeking to bring an implied cause of action must find his rights in the substantive provisions of the '34 Act before invoking the jurisdictional provision. *Id.*

[47] *See* 410 F.2d at 142. The *Buttrey* court held that errors of judgment by a defendant resulting in violation of an exchange rule might not support a federal cause of action. *See id.* at 143; text accompanying notes 48-50 *infra.*

[48] *See* 410 F.2d at 142. The *Buttrey* court did not specifically address the question of why violations of exchange rules amounting to less than fraud might not support the implication of a federal cause of action. *See id.* at 141-43. The *Buttrey* court possibly might have articulated the "tantamount to fraud" standard to reconcile the implied cause of action under § 6 with the antifraud provisions of the '34 Act. *See* note 5 *supra.* Several courts have followed the *Buttrey* court's holding that violation of an exchange rule becomes actionable when the conduct alleged is tantamount to fraud. *See, e.g.*, Smith v. Smith, Barney, Harris, Upham & Co., Inc., 505 F. Supp. 1380, 1384-86 (W.D. Mo. 1981); Rolf v. Blyth Eastman Dillon & Co., 424 F. Supp. 1021, 1036-37 (S.D.N.J. 1977), *aff'd*, 570 F.2d 38 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); Shorrock v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,251, 92,678 (D. Or. 1977). Two courts, however, have leveled serious criticisms at conditioning the availability of a private right of action under § 6 upon the degree to which the challenged conduct approaches the level of fraud. *See* Nelson v. Hench, 428 F. Supp. 411, 418-19 (D. Minn. 1977); Zagari v. Dean Witter & Co., [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,777, 90,809 (N.D. Cal. 1976). According to the *Nelson* court, conditioning the availability of a private right of action upon the type of conduct alleged leads to the legally illogical result that violations of the same rule do not consistently give rise to the same right of action. *See* 428 F. Supp. at 418-19. The *Zagari* court similarly reasoned that the existence of a private right of action under § 6 is a question wholly independent of the degree to which the alleged conduct approaches fraud. *See*

the extent to which the purpose of the rule is to protect investors,[49] the Seventh Circuit held that implying a private right of action to redress an egregious violation of Rule 405 would be consistent with the purposes of the '34 Act.[50]

While *Colonial Realty* and *Buttrey* continue to influence litigation involving implied private rights of action under section 6,[51] both decisions expressly relied on the heavily criticised ruling in *J. I. Case & Co. v. Borak*.[52] In *Borak*, a shareholder of a recently merged corporation brought action in federal court charging that proxy solicitation material issued in connection with the merger was materially false and misleading in violation of SEC rule 14a-9.[53] In overturning the trial

---

[1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) at 90,809; Hoblin, *A Stock Broker's Implied Liability to its Customer for Violations of a Rule of a Registered Stock Exchange*, 39 FORDHAM L. REV. 253, 267 (1970); *The Suitability Rule*, *supra* note 17, at 505-07.

[49] *See* 410 F.2d at 142; text accompanying notes 65, 109-34 *infra*.

[50] *See* 410 F.2d at 142; text accompanying notes 67, 154-68 *infra*.

[51] *See* note 25 *supra*.

[52] *See* 358 F.2d at 181; 410 F.2d at 142; J.I. Case & Co. v. Borak, 377 U.S. 426 (1964). In *Borak*, the Supreme Court adopted an extremely liberal approach to implying private rights of action under federal statutes. *See* 377 U.S. at 432; Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 WASH. & LEE L. REV. 783, 793-96 (1980) [hereinafter cited as Maher]; Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 553-59 (1981) [hereinafter cited as Frankel]; Comment, *Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme*, 1980 DUKE L.J. 928, 929-932 [hereinafter cited as *Statutory Scheme*]; text accompanying notes 53-60 *infra*.

The Supreme Court first implied a private right of action under a federal statute in Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 36-42 (1961). *See* Leist v. Simplot, 638 F.2d 283, 298 (2d Cir. 1981), *petition for writ of certiorari granted*, 2-23-82, 50 U.S.L.W. 3078 (No. 80-757); Note, *Implying Civil Remedies Under Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 285 (1963) [hereinafter cited as *Implying Civil Remedies*]. In *Rigsby*, the plaintiff railway switchman was injured as a result of a defective handhold on a railcar. *See id.* at 36. Plaintiff sought to predicate liability upon an alleged violation of § 4 of the Federal Safety Appliance Act requiring secure handholds on the ends and sides of railcars moving in interstate commerce. *See id.* at 36-37; Federal Safety Appliance Act, ch. 196, § 4, 27 Stat. 531 (1893). Finding that § 4 was intended for the especial protection of railway employees such as the plaintiff, the Supreme Court ruled on the basis of common law authorities that an implied cause of action for damages exists for disregard of the statutory command. *See* 241 U.S. at 39. *See also* Couch v. Steele, 3 El. & Bl. 402, 118 Eng. Rep. 1193, 1195 (Q.B. 1854) (private action by plaintiff seaman for violation of statute requiring shipowners to store certain medicines aboard vessel); *Anon.*, 6 Mod. 26, 26-27, 87 Eng. Rep. 791, 791 (Q.B. 1794) (action by landlord for violation by tenant of statute prohibiting waste); 3 BLACK COM. 51,123 (Lewis ed. 1898); 1 COYMES DIGEST, *Action Upon Statute*, 445-53 (5th ed. 1824).

Several commentators trace the history of implied private rights of action to the tort law principle that conduct in violation of statute is unreasonable and therefore negligent. *See* Mowe, *Federal Statutes and Implied Private Actions*, 55 ORE. L. REV. 3, 4-8 (1976) [hereinafter cited as Mowe]; Thayer, *supra* note 18, at 317-29; Maher, *supra* at 786. Under a tort per se theory, a court accepts statutory duty as evidencing a duty owed the plaintiff. *See id. See also* RESTATEMENT OF TORTS § 286 (1934).

[53] *See* 377 U.S. at 427-28; 17 C.F.R. § 240.14a-9 (1981). The SEC promulgated SEC rule 14a-9 under the authority of § 14(a) of the '34 Act, 15 U.S.C. § 78n(a) (1976). Section 14(a) prohibits the solicitation of any proxy in contravention of such rules and regulations as the SEC

court's determination that the jurisdictional provision of the '34 Act restricts the types of relief a federal court may grant for violation of the securities laws,[54] the Supreme Court imposed a duty upon federal courts to be alert in recognizing the rights of private plaintiffs in order to make effective the congressional purpose and policy in federal statutes.[55] The Court observed that Congress's intent in enacting section 14(a) was to ensure fair corporate suffrage for the stockholders of companies registered under the '34 Act,[56] and that the latitude Congress conferred upon the SEC in implementing section 14(a) was evidence of the broad remedial purpose of the statute.[57] Relying on these considerations as well as the jurisdiction of the federal courts to enforce rights and liabilities arising under the '34 Act,[58] the Supreme Court ruled that private enforcement of proxy rules provides a necessary supplement to SEC enforcement.[59] The Court upheld the plaintiff's right to attack the consummated merger by way of action under SEC Rule 14a-9 even though neither section 14(a) nor rule 14a-9 expressly contemplates such an action.[60]

Indications that *Borak* would no longer continue to control the implication of private rights of action under federal statutes first became

---

may prescribe as necessary or appropriate or for the protection of investors. *See id.* SEC Rule 14a-9 prohibits materially false or misleading statements or omissions in proxy solicitation materials. *See* 17 C.F.R. § 240.14a-9 (1981). *See generally* FLEISHER, TENDER OFFERS: DEFENSES, RESPONSES AND PLANNING (1978).

[54] *See* 377 U.S. at 427-28; 317 F.2d 838, 846-47 (7th Cir. 1963). The trial court in *Borak* ruled that § 27 of the '34 Act limited the court's capacity to grant declaratory relief. *See id.* Because the merger of plaintiff's corporation was complete as of the time of suit, the trial court concluded that it lacked power to redress the alleged violation of SEC Rule 14a-9. *See id.*; note 53 *supra.*

[55] *See* 377 U.S. at 432; Maher, *supra* note 52, at 793-96.

[56] *See* 377 U.S. at 431; H.R. REP. No. 1383, 73d Cong., 2d Sess. 13 (1934) [hereinafter cited as H.R. REP. No. 1383]; SEN. REP. No. 792, 73d Cong., 2d Sess. 12 (1934) [hereinafter cited as SEN. REP. No. 792].

[57] *See* 377 U.S. at 431-32; 15 U.S.C. § 78n(a) (1976); note 53 *supra.*

[58] *See* 377 U.S. at 432-32; 15 U.S.C. § 78aa (1976) ('34 Act, § 27); note 46 *supra.*

[59] *See* 377 U.S. at 431. In finding an implied private right of action under SEC Rule 14a-9, the *Borak* court pointed to the expressly conferred treble damage action under the antitrust laws. *See id.*; 15 U.S.C. § 15 (1976) (Clayton Act, § 4). Section 4 of the Clayton Act provides that anyone who is injured in his business or property by reason of actions forbidden by the antitrust laws may sue in federal district court and recover three-fold the damages he sustained plus the cost of suit. *Id.*; *see* Frankel, *supra* note 52, at 555-57.

[60] *See* 377 U.S. at 432; 15 U.S.C. § 78n(a) (1976); 17 C.F.R. § 240.14a-9 (1981); note 53 *supra. See also* Affiliated Ute Citizens v. United States, 406 U.S. 128, 156-57 (1972) (private right of action implied under SEC Rule 10b-5 for injury caused by misrepresentation of material fact); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13-14 (1971) (right of action implied under SEC Rule 10b-5 for plan to purchase securities with ultimately worthless assets); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 193-200 (1967) (implied right of action to recover costs of removing vessels negligently sunk in violation of § 15 of Rivers and Harbors Act of 1899); *Statutory Scheme*, *supra* note 52, at 929-32.

apparent in *Cort v. Ash*.[61] In *Cort*, a stockholder brought suit in federal court seeking to compel corporate directors to account for political contributions to federal candidates made in violation of a criminal statute.[62] In denying the existence of an implied private right of action to recover the money illegally contributed,[63] the Supreme Court established four factors relevant in determining whether a court should imply a private right of action under a federal statute.[64] First, a court must inquire whether the plaintiff is a member of a class for whose especial benefit the statute was enacted.[65] Second, a court must determine whether any explicit or implicit legislative intent exists either to create or deny a private remedy.[66] Third, the implication of a private right of action must be consistent with the underlying purposes of the relevant legislation.[67] Finally, implying a private right of action should not unnecessarily in-

---

[61] 422 U.S. 66 (1975).

[62] *See id.* at 68-72; 18 U.S.C. § 610 (1948) (repealed in Pub. L. 94-283, title II, § 201(a) (1976) (Federal Elections Campaign Act). Section 610 of the Federal Elections Campaign Act forbade national banks, corporations, and labor organizations from making political campaign contributions or expenditures. *See id.*

[63] *See* 422 U.S. at 77-82.

[64] *See id.* at 78; notes 65-72 *infra*.

[65] *See* 422 U.S. at 78. Inquiry into whether the plaintiff is a member of a class for whose especial benefit the statute was enacted primarily involves a determination regarding whether the plaintiff has standing to bring action under the relevant statute. *See* 422 U.S. at 80-84; Maher, *supra* note 52, at 797-98. The Supreme Court recently has handed down two decisions that focus upon the standing of a plaintiff to bring action under the federal securities laws. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 34-36 (1977) (defeated tender offeror cannot bring implied cause of action for violation of statute prohibiting fraudulent statements in tender offer documents since statutory purpose is to protect investors); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731-49 (1975) (to bring action under SEC rule 10b-5, plaintiff must be either purchaser or seller of security with respect to which alleged fraud was committed); text accompanying notes 109-34 *infra*.

[66] *See* 422 U.S. at 78. Indications of congressional intent to imply a cause of action under a particular federal statute have become the central inquiry in post-*Cort* Supreme Court decisions on implying private rights of action under federal statutes. *See* text accompanying notes 136-53 *infra*. Overriding concern for discerning congressional intent in questions of implication may be the product of the Supreme Court's growing recognition of the separation of powers doctrine. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 568-78 (1979) (ultimate question in implication analysis is whether Congress intended to create private right of action and not whether court can improve statutory scheme); Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting); (*Cort* approach to questions of implication invites constitutionally forbidden judicial legislation). In a strict separation of powers context, federal courts lack power to imply a private right of action unless traditional principles of statutory construction clearly indicate that Congress intended to confer a private right of action under the relevant federal statute. *See* Frankel, *supra* note 52, at 557-59.

[67] *See* 422 U.S. at 78. Consistency with statutory purposes is the predominant rationale of the now disaffirmed *Borak* decision. *See* 377 U.S. 426, 432 (1964); text accompanying notes 52-66 *supra* and 68-97 *infra*. In recent decisions, the Supreme Court has criticized reliance upon statutory purpose as a basis for implying a private right of action under federal statutes. *See* Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 29 (1979)

terfere with areas traditionally within state court jurisdiction.[68] Since the first three factors originated in earlier federal court decisions on implying private rights of action under federal statutes,[69] the *Cort* opinion did not represent a radically new or different approach to the implication issue.[70] Insofar as it decreases the significance of whether implying a cause of action would help make effective the purpose and policy of federal statutes,[71] however, *Cort* represented a retreat from the more liberal judicial philosophy of *Borak*.[72]

Further complicating the issue of whether an implied private right of action is available under section 6 are a series of cases decided after *Cort* that cast doubt not only on the continued validity of the *Cort* analysis,[73] but also on the issue whether federal courts even have the power to imply private rights of action under federal statutes.[74] In *Touche Ross & Co. v. Redington*,[75] the Supreme Court considered whether an implied right of action exists under section 17(a) of the '34 Act.[76] Instead of independently examining the *Cort* factors in an attempt

---

(statutory purpose inquiry subordinate to congressional intent inquiry); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (disavowing *Borak* as controlling precedent in questions whether to imply private right of action under federal statute); notes 154-68 *infra*.

[68] *See* 422 U.S. at 78; notes 175-83 *infra*.

[69] *See, e.g.*, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 421 (1975) (consideration of relationship between private action and statutory purpose); National R. Passenger Corp. v. National Ass'n of R. Passengers, 414 U.S. 453, 461 (1974) (consideration of legislative history in question whether to imply private right of action); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202-03 (1967) (consideration whether statute designed to protect certain plaintiffs or interests); Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 37 (1916) (consideration whether plaintiff is member of statutorily protected class).

[70] *See* Frankel, *supra* note 52, at 559; note 69 *supra*.

[71] *See Statutory Scheme*, *supra* note 52, at 932-35; text accompanying notes 65-68 *supra*.

[72] *See* Maher, *supra* note 52, at 783-85; text accompanying notes 51-60 *supra*.

[73] *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers Union, _____ U.S. _____, 101 S. Ct. 1571-84 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11-36 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560-83 (1979); text accompanying notes 75-97 *infra*.

[74] *See* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting) (implication of private right of action in absence of clear congressional intent to create private right is beyond power of federal courts); Frankel, *supra* note 52, at 563-70 (recent Supreme Court decisions rest on principle that federal courts lack power to grant judicially implied relief for statutory violations).

[75] 442 U.S. 560 (1979).

[76] *See id.* at 568-79; 15 U.S.C. § 78g(a) (1976). Section 17(a) of the '34 Act requires securities brokerage firms to furnish copies of such reports as the SEC may prescribe as necessary or appropriate in the public interest. *Id.* The plaintiff in *Redington* alleged that the defendant auditing firm breached duties owing under § 17(a) through defendant's failure to discover the true financial condition of Weis Securities Inc. (Weis), an insolvent securities brokerage firm. *See* 442 U.S. at 563-66. The plaintiff sought to predicate liability of Touche Ross & Co. on the theory that had financial audits been properly prepared, the precarious financial condition of Weis would have been discovered in time to take remedial action to prevent liquidation and loss to Weis' customers. *See id.* at 565-66.

to determine whether the Court should imply a private right of action under section 17(a),[77] the Supreme Court characterized the matter as one of determining congressional intent through statutory construction.[78] While the Court discussed three of the four *Cort* factors in analyzing whether Congress intended to create a private right of action under section 17(a),[79] the *Redington* Court expressly limited the significance of those factors to the congressional intent determination.[80] Relying on the language of section 17(a),[81] its legislative history,[82] and the presence of express private rights of action in other provisions of the '34 Act,[83] the Court found that there was no evidence of congressional intent to imply a private right of action under section 17(a).[84] Specifically disavowing *Borak* as controlling precedent,[85] the Supreme Court held that a court must construe the statute under which a private right of action is asserted rather than attempt to improve upon it.[86]

In *Transamerica Mortgage Advisors, Inc. v. Lewis*,[87] the Supreme Court further elaborated on the congressional intent approach to implying private rights of action and its relationship to the *Cort* analysis.[88] In

---

[77] *See* notes 78-86 *infra*.

[78] *See* 442 U.S. at 568. A statutory construction approach to implying private rights of action under federal statutes is consistent with the principle that federal courts lack power to judicially recognize private actions under federal statutes in the absence of clear legislative intent. *See* Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1978) (Powell, J., dissenting); Maher, *supra* note 52, at 787-93. There is disagreement, however, as to whether federal courts in fact lack power to recognize implied private rights of action. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 n.4 (1971) (Harlan, J., concurring) (implying remedy refers to process by which court exercises choice among judicial remedies according to reasons of policy embodied in particular statute); Frankel, *supra* note 52, at 563-85.

[79] *See* 442 U.S. at 575-76. In determining whether Congress intended to create a private right of action under § 17(a) of the '34 Act, the *Redington* Court discussed the language and focus of § 17(a), its legislative history, and its statutory purpose. *See id.*

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

[81] *See id.* at 568-71; note 76 *supra*.

[82] *See* 442 U.S. at 571; note 67 *supra*.

[83] *See* 442 U.S. at 571-74. While in *Borak* the Supreme Court rejected the argument that because the '34 Act provides for express private remedies, implied relief was not available, the Supreme Court in *Redington* took the opposite position. *See* 377 U.S. at 431-33; 442 U.S. at 571-74. Reasoning that when Congress wished to provide a remedy, Congress provided remedies expressly, the Court in *Redington* concluded that the implication of a private right of action under § 17(a) might unacceptably broaden the remedies that Congress chose to provide for '34 Act violations. *See* 442 U.S. at 574. *But see* Leist v. Simplot, 638 F.2d 283, 298 (2d Cir. 1980), *petition for writ of cert. granted*, 101 S. Ct. 1346 (1981) (No. 80-757) (observing that in view of history of implied rights of action, congressional silence on remedies may reflect assumption that courts will provide remedies).

[84] *See* 442 U.S. at 576.

[85] *See id.* at 576-77.

[86] *See id.* at 578.

[87] 444 U.S. 11 (1979).

[88] *See* 444 U.S. at 15-25; Underwood, *Transamerica Mortgage Advisors, Inc. v. Lewis: An Analysis of the Supreme Court's Definition of an Implied Right of Action*, 7 PEPPERDINE L. REV. 533, 544-48 (1980) [hereinafter cited as Underwood].

finding that no implied private right of action exists under section 206 of the Investment Advisors Act of 1940,[89] the *Transamerica* Court expressly minimized the importance of whether the statute's design is to protect a particular class of persons and whether implying a cause of action would be consistent with the statute's purpose.[90] The Court relied on *Redington* for the principle that in determining the existence of an implied right of action, the ultimate issue is whether Congress intended to create a remedy for private plaintiffs injured by conduct in violation of the relevant statute.[91] On examination of the language and legislative history of section 206,[92] the *Transamerica* Court found that Congress did not intend to create a private right of action.[93] Accordingly, the Court denied the existence of a private right without inquiry into considerations of statutory purpose or whether the claim was one traditionally brought under state law.[94] Observing that each of the securities laws preceding the Investment Advisors Act of 1940 contain express private remedies,[95] the Supreme Court remarked that Congress obviously knew how to provide for private remedies, and that when Congress wished to do so, it provided for private remedies expressly.[96]

Supreme Court decisions after *Transamerica* have uniformly acknowledged that congressional intent is the ultimate consideration in determining whether to imply a private right of action under a federal statute.[97] While the most recent opinions indicate clearly that *Cort* con-

---

[89] *See* 444 U.S. at 15-25; 15 U.S.C. § 80b-6 (1976) (Investment Advisors Act of 1940, § 206). Section 206 of the Investment Advisor Act of 1940 ('40 Act) proscribes fraudulent practices by investment advisors. *See id.* The plaintiff in *Transamerica* alleged that the defendants violated the '40 Act by failing to register under the Act, by misappropriating profitable investment opportunities, and by causing plaintiff to purchase poor quality securities. *See* 444 U.S. at 13.

[90] *See id.* at 15, 24; text accompanying notes 65 & 67 *supra.*

[91] *See* 444 U.S. at 15-17; notes 75-85 *supra.*

[92] *See* 444 U.S. at 16-22.

[93] *See id.* at 24.

[94] *See id.* The *Transamerica* Court held that because congressional intent is the ultimate consideration in deciding whether to imply a private right of action under a specific statute, when neither the language of the statute nor its legislative history indicate any intent to create an implied action, a court need not examine the remaining *Cort* factors. *See id.* The dissent in *Transamerica* argued that upon application of all four *Cort* factors, a court could only conclude that a private right of action does exist under the relevant statute despite the absence of express statutory authorization. *See id.* at 25-26 (White, J., dissenting). The majority's refusal to consider whether implying a private right of action would be consistent with statutory purposes is consistent with a strict statutory construction approach to implying private rights of action. *See* Underwood, *supra* note 88, at 545-46; text accompanying note 72 *supra.*

[95] *See* 444 U.S. at 20-21.

[96] *See id.*; note 83 *supra.*

[97] *See* California v. Sierra Club, _____ U.S. _____, 101 S. Ct. 1775, 1779 (1981) (ultimate issue in questions of implication is whether Congress intended to create a private right of action); Northwest Airlines, Inc. v. Transport Workers Union, _____ U.S. _____, 101 S. Ct. 1571, 1580 (1981) (implication of private right of action is matter of statutory con-

tinues to be relevant at least insofar as aiding in the task of determining congressional intent,[98] recent opinions also indicate persistent disagreement regarding the proper weight of the four-factor analysis in determining the existence of implied private rights of action.[99] Whether recent Supreme Court decisions emphasizing congressional intent operate only to increase the weight of congressional intent in the four-factor analysis[100] or whether those decisions indicate that *Cort* is now completely subsumed into the congressional intent analysis,[101] pre-*Cort* section 6 precedent clearly requires reevaluation.[102] Because the *Cort*, *Redington*, and *Transamerica* decisions have substantially altered and redefined the process by which a court may imply a private right of action under a federal statute,[103] determining the existence of an implied right of action under section 6 involves application of the *Cort* analysis as refined by subsequent cases.[104]

Outside the confines of a particular case, one cannot determine whether a plaintiff is a member of a class for whose especial benefit section 6 was enacted. As a result, inquiry into the first *Cort* factor is confined to determining whether Congress enacted section 6 for the especial benefit of a particular class of persons.[105] As *Cort* suggested,[106]

---

struction in which congressional intent is ultimate issue); Universities Research Ass'n v. Coutou, _____ U.S. _____, 101 S. Ct. 1451, 1461 (1981) (question whether statute creates private right of action is one of congressional intent and not whether court can improve on statute).

[98] *See* California v. Sierra Club, _____ U.S. _____, 101 S. Ct. 1775, 1778 (1981) (*Cort* outlines proper approach to determining whether to imply private right); Northwest Airlines, Inc. v. Transport Workers Union, _____ U.S. _____, 101 S. Ct. 1571, 1580 (1981) (all *Cort* factors relevant to question whether Congress intended implied private right); Universities Research Ass'n v. Coutou, _____ U.S. _____, 101 S. Ct. 1451, 1461 (1981) (first three *Cort* factors relevant to inquiry into congressional intent).

[99] *See* California v. Sierra Club, _____ U.S. _____, 101 S. Ct. 1775 (1981). In *Sierra Club*, the Supreme Court described *Cort* as the "preferred approach for determining whether a cause of action should be implied from a federal statute." *See id.* at 1778. While the Court recognized that recent cases indicate congressional intent to be the ultimate inquiry, the Court followed the four-factor *Cort* approach in examining congressional intent. *See id.* at 1779-81.

Chief Justice Burger, Justice Rehnquist, Justice Powell and Justice Stewart joined in a concurring opinion that criticized the majority's emphasis on *Cort*. *See id.* at 1783 (Rehnquist, J., concurring). Remarking that the *Cort* factors are merely guides in the central task of determining legislative intent, the concurring opinion stated that in deciding an implied right of action case, a court need not trudge through all four *Cort* factors. *See id.* 1783-84.

[100] *See* California v. Sierra Club, _____ U.S. _____, 101 S. Ct. 1775, 1778 (1981); note 99 *supra*.

[101] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979); note 94 *supra*.

[102] *See* text accompanying notes 109-83 *infra*.

[103] *See* text accompanying notes 61-99 *supra*.

[104] *See* text accompanying notes 109-83 *infra*.

[105] *See* 422 U.S. at 78; text accompanying note 65 *supra*.

[106] *See* 422 U.S. at 78. The *Cort* opinion characterized the first factor in the implication

and as *Redington* and *Transamerica* have made clear,[107] a court determines whether Congress intended a statute to confer especial benefits upon a particular class of persons by examining statutory purpose as well as the creation of specific rights or privileges in specific persons.[108]

In terms of statutory purpose to protect or benefit a particular class of persons, section 6 appears to be amenable to the implication of a private right of action.[109] In the Senate and House reports accompanying the '34 Act,[110] Congress made clear its concern for the investing public.[111] With the stock market crash of 1929 fresh in its memory,[112] Congress enacted section 6 as part of an attempt to change the practices of stock exchanges so that the investing public might justifiably place its confidence in those exchanges.[113] Finding that the liquidity of securities made possible by exchange trading is potentially dangerous to the stability of the national economy by facilitating the rapid sale of securities in a panic market,[114] Congress concluded that the extension of

---

analysis as whether the relevant statute was enacted for the especial benefit of any particular class of persons. *See id. Cort* goes on, however, to restate this inquiry in terms of whether the relevant statute confers any specific rights upon the plaintiff. *See id.*

[107] *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979) (first *Cort* factor concerned with language and focus of statute); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979) (same).

[108] *See* notes 106, 107 *supra.*

[109] *See* text accompanying notes 110-20 *infra.*

[110] *See generally* SEN. REP. No. 792, *supra* note 56; H.R. REP. No. 1383, *supra* note 56; text accompanying notes 111-16 *infra.*

[111] *See* SEN. REP. No. 792, *supra* note 56 at 4; H.R. REP. No. 1383, *supra* note 56, at 5. In the Senate report accompanying the '34 Act, the Committee on Banking and Currency remarked that the attitude of exchange authorities toward public regulation was sharply at variance with the extent to which the public welfare must be guarded in exchange matters. *See* SEN. REP. No. 792, *supra* note 56, at 4. The Committee pointed to exchange support of price manipulation as an example of the need to impose regulation for the protection of investors. *See id.* The House Report accompanying the '34 Act referred to the need to extend a fiduciary duty from professional securities market participants to the ordinary citizen. *See* H.R. REP. No. 1383, *supra* note 56, at 5. Noting that the growth of public security ownership had precipitated no changes in the management of stock exchange machinery, the Committee on Interstate and Foreign Commerce reasoned that the imposition of new legal and ethical standards upon stock exchanges was necessary to protect the nonprofessional investor. *See id.* at 4-5.

[112] *See* SEN. REP. No. 792, *supra* note 56, at 4; H.R. REP. No. 1383, *supra* note 56, at 3. The House report accompanying the '34 Act was careful to disavow any intent to wreak vengeance upon stock exchanges for the economic catastrophe following the 1929 crash. *See* H.R. REP. No. 1383, *supra* note 53, at 3. Attributing the violent economic events of the depression era to natural fluctuations in the economic system, the Report preceded from the assumption that inadequate exchange regulation simply accentuated moderate fluctuations into speculative booms and depressions. *See id.* The Senate Report accompanying the '34 Act, however, more directly attributed the economic dislocations of the depression to inadequate stock exchange regulation. *See* SEN. REP. No. 792, *supra* note 5, at 3-4.

[113] *See* H.R. REP. No. 1383, *supra* note 56, at 4-5.

[114] *See id.* The liquidity of securities made possible by exchange trading is potentially dangerous to the stability of the national economy because of the ease with which securities

a fiduciary relationship between exchanges and the public was necessary to the stability of the securities industry.[115] As the Committee on Interstate and Foreign Commerce indicated, when everything can be sold at once, the public must have confidence not to sell.[116]

Courts that have considered the section 6 implication issue in terms of whether section 6 is intended for the protection of any specific persons also have concluded that Congress enacted section 6 for the protection of investors.[117] In two 1977 decisions involving section 6,[118] the Second Circuit held that an implied cause of action does not exist in favor of member firms of exchanges or their controlling persons because public investors are the intended beneficiaries of the statute.[119] District courts similarly have concluded that exchange rules promulgated under section 6 relate directly to the protection of investors.[120]

---

may be sold in a panic situation. *See id.* The House Report accompanying the '34 Act reasoned that as an economic system grows more complicated and liquid, it must also become more moderate, honest, and justifiably self-trusting. *See id.*

[115] *See id.*; H.R. DOC. No. 95, *supra* note 1, at 237-40; note 11 *supra.*

[116] *See* H.R. REP. No. 1383, *supra* note 56, at 5.

[117] *See* text accompanying notes 118-20 *infra.*

[118] *See* Hirsch v. DuPont, 553 F.2d 750 (2d Cir. 1977); Lank v. New York Stock Exch., 548 F.2d 61 (2d Cir. 1977); note 119 *infra.*

[119] *See* 553 F.2d at 760-61; 548 F.2d at 65-66. In *Hirsch*, former partners of a NYSE brokerage firm brought action under § 6 against the NYSE for alleged failure to disclose certain information relating to the financial condition of a second brokerage firm with which Hirsch proposed to merge. *See* 553 F.2d at 753. While seeking to predicate liability upon SEC rule 10b-5, the plaintiff in *Hirsch* attempted to rely on NYSE rules to establish a duty to disclose. *See id.* at 760; 17 C.F.R. § 240.10b-5 (1981). Reasoning that the duty of a stock exchange to enforce exchange rules is a duty owed to public investors who are unable to fend for themselves, the Second Circuit held that the NYSE was under no duty to notify the partners of one of its members of the financial difficulties of another member. *See* 553 F.2d at 760-62.

In *Lank*, a receiver in bankruptcy of a defunct brokerage firm brought action against the NYSE under § 6 for alleged failures to enforce compliance with exchange rules. *See* 548 F.2d at 62-63. Plaintiff contended that had the NYSE enforced the bankrupt's compliance with exchange rules through the sanction of suspension of membership, the losses suffered by the bankrupt's customers, creditors, and stockholders might have been avoided. *See id.* at 63. Finding that Congress intended to draw a clear distinction between public investors and exchange members with respect to rights and liabilities arising under § 6, the *Lank* court held that Congress did not intend to afford protection to exchange members in undertaking to regulate their conduct. *See id.* at 66. Accordingly, the court held that the NYSE was not liable to a member organization for failure to enforce member compliance with exchange rules. *See id.*; *But see* New York Stock Exch., Inc. v. Sloan, 394 F. Supp. 1303, 1316 (S.D.N.Y. 1976) (general and limited partners of member firm are within § 6 protected class); Verace v. New York Stock Exch., Inc., [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,735, 90,575-80 (S.D.N.Y. 1976) (subordinated lenders of member firm have standing to bring § 6 claim); Weinberger v. New York Stock Exch., 403 F. Supp. 1020, 1027 (S.D.N.Y. 1976) (same).

[120] *See* Smith v. Smith, Barney, Harris, Upham & Co., Inc., 505 F. Supp. 1380, 1384-85 (W.D. Mo. 1981); Carr v. New York Stock Exch., Inc., [1975-76 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,563, 99,808-09 (N.D. Cal. 1976); Steinberg v. Merrill Lynch, Pierce, Fenner

Analysis of the first *Cort* factor in terms of whether section 6 prohibits conduct or creates federal rights, however, leads to the opposite conclusion.[121] Section 6 does not prohibit any particular type of conduct.[122] Section 5 prohibits use of the facilities of interstate commerce to effect a transaction on an exchange that is not registered under section 6.[123] Section 6, however, describes only the process of registration.[124] Section 6 preconditions registration of an exchange upon the promulgation and enforcement of exchange rules,[125] but does not undertake to define those rules beyond requiring that they meet certain general standards.[126] Instead of prohibiting conduct in violation of exchange rules, section 6 indirectly regulates that conduct by requiring exchanges to promulgate and enforce exchange rules as a precondition to participation in the securities market.[127]

In *Jablon v. Dean Witter & Co.*,[128] the Ninth Circuit recently considered whether section 6 protects investors in terms of whether section 6 prohibits conduct or creates federal rights in favor of certain persons.[129] The plaintiff in *Jablon* alleged not only that the defendant violated exchange rules by failing to make investment recommendations suitable to plaintiff's investment goals,[130] but also that the defendant acted fraudulently in managing plaintiff's account.[131] Despite the alleged fraud, the court held that no implied private right of action exists under section 6.[132] Because the statute creates neither rights nor liabilities on

---

& Smith, Inc. [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,599, 96,121 (S.D.N.Y. 1974). *See generally Exchange Liability*, *supra* note 19.

[121] *See* text accompanying notes 122-34 *infra*.

[122] *See* 15 U.S.C. § 78f (1976); note 7 *supra*.

[123] 15 U.S.C. § 78e (1976).

[124] *See* U.S.C. § 78f (1976); note 7 *supra*.

[125] *See* 15 U.S.C. § 78f(b)(1-8) (1976). Section 6(b) of the '34 Act provides that the SEC shall not register an exchange as a national securities exchange unless the SEC determines that both the exchange and the exchange's rules meet certain criteria. *See id.* The criteria specified in § 6(b) relate to organization and capacity of the exchange, membership standards, representation of members in administration of the exchange, equitable allocation of fees and dues, character of exchange rules, discipline for violation of exchange rules, and effect of exchange rules on competition. *See id.*; Jennings, *supra* note 6, at 670; note 7 *supra*.

[126] *See* 15 U.S.C. § 78f(b) (3-8); note 7 *supra*.

[127] *See* 15 U.S.C. § 78f(b); H.R. DOC. NO. 95, *supra* note 1, at 3-5; *The Suitability Rule*, *supra* note 17, at 513; note 7 *supra*.

[128] 614 F.2d 677 (9th Cir. 1980).

[129] *See id.* at 679-81.

[130] *See id.* at 678-79.

[131] *See id.*; text accompanying note 48 *supra*.

[132] 614 F.2d at 680. The *Jablon* court based its denial of an implied private right of action under § 6 on the interrelated grounds that § 6(b) creates no federal rights in favor of certain persons, and that Congress did not intend to create an implied private right of action under § 6. *See id.* at 680-81; Comment, *Securities Regulation—Private Right of Action Under Stock Exchange Rules*—Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980), 1981 ARIZ. STATE L.J. 337, 337-52 [hereinafter cited as *Private Right*].

the part of private persons, the *Jablon* court rejected the argument that section 6's concern for the protection of investors warranted the implication of a private right of action.[133] In terms of the creation of specific rights or privileges, Congress did not enact section 6 for the especial benefit of a particular class of persons.[134]

Analysis of the second factor in the *Cort* approach also indicates that a court may not properly imply a private right of action under section 6.[135] Evidence of explicit or implicit congressional intent, the ultimate consideration in determining whether to imply a private right of action under a federal statute,[136] is completely absent from the legislative history of section 6.[137] The role of stock exchanges in the administration of the '34 Act reflects a compromise between direct government regulation of the securities industry and unfettered self-regulation of the industry by stock exchanges themselves.[138] Recognizing that rigid statutory control would involve regulatory inflexibility as well as an enormous expenditure of public funds,[139] Congress enacted the '34 Act to reform exchange practices so that exchanges could carry the burden of regulating the conduct of their members.[140] While the government retains control over the character of exchange rules,[141] the legislative history of section 6 anticipates only exchange enforcement of exchange rules.[142] Nowhere did Congress suggest that private parties might enforce exchange rules through federal law actions for damages.[143]

---

[133] *See id.* at 680; *Private Right*, *supra* note 132, at 337-52.

[134] *See* 614 F.2d at 680; text accompanying notes 121-33 *supra*.

[135] *See* 422 U.S. at 78; text accompanying notes 75-97 *supra*.

[136] *See* Northwest Airlines, Inc. v. Transport Workers Union, _____ U.S. _____, 101 S. Ct. 1571, 1580 (1981); text accompanying note 97 *supra*.

[137] *See* Jablon v. Dean Witter & Co., 614 F.2d 677, 680-81 (1980); Coleman v. D.H. Blair & Co., Inc., [1981-82 Transfer Binder] FED. SEC. L. REP. ¶ 98,252, 91,647 (S.D.N.Y. 1981); SEN. REP. NO. 792, *supra* note 56, at 1-6; H.R. REP. NO. 1383, *supra* note 56, at 1-16; text accompanying notes 138-43 *infra*.

[138] *See* H.R. REP. NO. 1383, *supra* note 56, at 14-16. In the Report accompanying the Securities Exchange Bill of 1934, the Committee on Interstate and Foreign Commerce pointed out that the bill left a wide measure of responsibility and control in the exchanges themselves. *See id.* at 15. The Committee noted that the Securities Exchange Bill left the exchanges with the power to alter or amend exchange rules to meet unforeseen problems, or to meet old problems more effectively. *See id.* In describing the purpose of leaving such latitude to the exchanges, the committee expressed its hope that the effect of the bill would be to give well-managed exchanges the power necessary to effect needed reforms themselves without direct government intervention. *See id.*; Jennings, *supra* note 6, at 663-74; *The Suitability Rule*, *supra* note 17, at 496-99; text accompanying notes 6-17 *supra*.

[139] *See* SEN. REP. NO. 1455, *supra* note 17, at 3-4; H.R. REP. NO. 2307, *supra* note 17, at 4-5.

[140] *See* DOUGLAS, DEMOCRACY AND FINANCE 82 (Allen ed. 1940).

[141] *See* 15 U.S.C. § 78s (1976) ('34 Act, § 19); note 11 *supra*.

[142] *See* SEN. REP. NO. 792, *supra* note 56, at 1-6; H.R. REP. NO. 1383, *supra* note 56, at 1-16; H.R. DOC. NO. 95, *supra* note 1, at 3.

[143] *See* SEN. REP. NO. 792, *supra* note 56, at 1-6; H.R. REP. NO. 1383, *supra* note 56, at 1-16; H.R. DOC. NO. 95, *supra* note 1, at 3. Under the provisions of the '34 Act, the SEC is

In *Coleman v. D.H. Blair & Co.*,[144] the United States District Court for the Southern District of New York recently examined the question of whether Congress intended to create a private cause of action under section 6.[145] The plaintiff-customer in *Coleman* charged the defendant-broker with fraud, willful misrepresentations, and failure to exercise adequate supervision and control over plaintiff's account.[146] In holding that the plaintiff could not predicate liability for these actions upon alleged violations of NYSE and NASD rules,[147] the court found several indications that Congress did not intend to create a private right of action under section 6.[148] The statutory bases for NYSE and NASD rules do not confer rights or proscribe conduct by exchange or association members.[149] Additionally, the court found that there is no mention of an implied private right of action in the legislative history of section 6[150] and

---

powerless to compel a member to comply with exchange rules. *See* Jennings, *supra* note 6, at 671-72; Loss, *supra* note 1, at 1176-78. The SEC may, however, suspend or revoke the registration of the exchange itself, or take administrative action against an exchange officer. *See* 15 U.S.C. § 78s (a)(1)&(3) (1976) ('34 Act, § 19); Loss, *supra* note 1, at 1178; note 11 *supra*.

[144] [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,252 (S.D.N.Y. 1981).

[145] *See id.* at 91,642-49.

[146] *See id.* at 91,642.

[147] *See* [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 91,642. The plaintiff in *Coleman* alleged violations of NYSE Rules 405, 342(b) and 408 as well as violations of Article III of the NASD Rules of Fair Practice, sections 1, 2, 18, and 27. *See id.* NYSE Rule 405 and § 2, Article III of the NASD Rules impose an obligation upon member-firms to recommend investment transactions that are suitable to the investment needs of a customer. *See* NASD Rules of Fair Practice, art. III, § 2, *reprinted in* 1976 NASD Sec. Dealers Manual (CCH) ¶ 2152; text accompanying note 42 *supra*. Section 1 of the NASD Rules obligates a member to observe high standards of commercial honor and just and equitable principles of trade in the conduct of business. *See* (1976) NASD Sec. Dealers Manual (CCH) ¶ 2151. Section 18 of the NASD Rules prohibits fraudulent, manipulative, and deceptive conduct in securities transactions. *See id.* at ¶ 2168. Section 27 of the NASD Rules imposes upon members a broad range of responsibilities and duties with respect to handling and review of accounts. *See id.* at ¶ 2177. NYSE Rule 408 establishes minimum standards of conduct with respect to the authorization and handling of discretionary trading accounts. *See* NYSE Rule 408, *reprinted in* 2 N.Y. Stock Exch. Guide (CCH) ¶ 2,405 (1980). NYSE Rule 342(d) requires the general partners or directors of each member organization to establish and maintain a system of supervision and control over departments, officers, and employees. *See id.* at ¶ 2342.

The holding in *Colonial Realty* may have influenced the *Coleman* plaintiff's decision to allege violation of such a wide variety of NYSE and NASD Rules. Because *Colonial Realty* conditions the availability of an implied private right of action upon the extent to which the relevant exchange rule is a substitute for direct SEC regulation, pleading violation of several rules increases one's chances of recovery. *See* 358 F.2d at 181; notes 31, 32 *supra*; *see generally* Lowenfels, *supra* note 46.

[148] *See* [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 91,647; text accompanying notes 149-52 *infra*.

[149] *See* [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 91,647; text accompanying notes 121-34 *supra*.

[150] *See* [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 91,647; text accompanying notes 135-43 *supra*.

that the existence of express private remedies in the '34 Act suggests that the failure to provide an implied remedy in connection with exchange rules was not an oversight.[151] Finally, the court noted that the '34 Act's concept of supervised self-regulation suggests that Congress elected self-regulation as the exclusive means of enforcement.[152] Relying on these four indications, the *Coleman* court found that Congress did not intend to create a private right of action under section 6, and accordingly, the court dismissed plaintiff's claim under section 6.[153]

The third *Cort* factor, whether the implication of a private right of action would be consistent with the purposes of the '34 Act,[154] lends only ambiguous support to implying a private right of action under section 6.[155] In two pre-*Cort* decisions,[156] the Second and Seventh Circuits expressly supported the implication of a private right of action under section 6 on the theory that potential civil liability for violation of exchange rules would aid in realizing the '34 Act's purpose of protecting investors by guaranteeing fairness in stock exchange transactions.[157] In addition, because the '34 Act as a whole is directed primarily at eliminating fraud in securities transactions,[158] several courts have held that implying a cause of action only when a defendant's conduct is tantamount to fraud is a technique by which to prevent conflict between the implied remedy under section 6 and the express remedies in other sections of the '34 Act.[159]

---

[151] *See* [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,647; text accompanying note 83 *supra*.

[152] *See* [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,647; H.R. DOC. No. 95, *supra* note 1, at 3-5.

[153] *See* [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,648.

[154] *See* 422 U.S. at 78; text accompanying note 67 *supra*.

[155] *See* text accompanying notes 156-68 *infra*.

[156] *See* Van Gemert v. Boeing Co., 520 F.2d 1373, 1380-82 (2d Cir. 1975); Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, 410 F.2d 135, 141-43 (7th Cir. 1969); text accompanying notes 61-72 *supra*.

[157] *See* 520 F.2d at 1381-82; 410 F.2d at 142; text accompanying note 55 *supra*. In *Boeing*, plaintiff brought suit claiming that the defendant issuer had failed to give adequate notice of the impending redemption of convertible debentures. *See* 520 F.2d at 1374. Plaintiff predicated its suit on NYSE Listing Agreement provisions that required publication of notice of intent to redeem debentures in certain approved publications. *See id.* at 1376-77. The Second Circuit in *Boeing*, following its decision in *Colonial Realty*, held that considering the specific notice requirements of the Listing Agreement and their important role in the statutory scheme, allegations of violations of the Listing Agreement gave rise to a colorable claim under federal law. *See id.* at 1380-86; text accompanying notes 26-36 *supra*.

[158] *See* note 4 *supra*.

[159] *See* Smith v. Smith Barney, Harris, Upham & Co., Inc., 505 F. Supp. 1380, 1385 (W.D. Mo. 1981); Rolf v. Blyth Eastman Dillon & Co., Inc., 424 F. Supp. 1021, 1041 (S.D.N.Y. 1977); Jenny v. Shearson, Hammill & Co., Inc., [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,021, 97,582 (S.D.N.Y. 1975).

[160] 549 F.2d 164 (10th Cir. 1977).

[161] *See id.* at 168. In *Utah State University*, a state university opened several accounts with numerous brokerage firms and purchased several millions of dollars of securities. *See*

In *Utah State University of Agriculture and Applied Science v. Bear, Stearnes & Co.*,[160] however, the Tenth Circuit Court of Appeals indicated that implying a private cause of action under section 6 might frustrate the purposes of the '34 Act.[161] In *Utah State University*, a state university brought action against its investment program broker for violations of stock exchange and dealer association rules requiring the broker to observe just and equitable principles of trade and to make investment recommendations suitable to the customer's investment objectives.[162] The *Utah State University* court, following the rule articulated in *Buttrey*,[163] held that the complaint did not state a cause of action under section 6 because the plaintiff did not allege overreaching, misrepresentation, manipulation or deception.[164] Reasoning that Congress had chosen a system of self-regulation to avoid the disadvantages of rigid direct regulation,[165] the court voiced concern that potential civil liability for violations of exchange rules might undercut flexibility in the management of the NYSE and NASD.[166] Because exchanges might hesitate to promulgate new rules if negligent violation of those rules would create liability for exchange members,[167] the court refused to imply a cause of action under section 6 to redress the conduct alleged.[168]

Even if, notwithstanding the concerns of the *Utah State University* court, one concludes that implying a cause of action does support the purposes of section 6,[169] recent Supreme Court decisions expressly minimizing the weight of the third *Cort* factor indicate that consistency with legislative purpose alone will not support the implication of a private right of action.[170] The statutory construction approach to implying private rights of action focuses not on policy considerations,[171] but on the narrow issue of whether Congress actually intended to create an implied right of action under a given federal statute.[172] As other considera-

---

id. at 166. Following an audit of the university's investment program, the assistant attorney general of Utah expressed his opinion that the university's investment program was illegal. *See id.* The Supreme Court of Utah subsequently ruled that the university did not have power with which to purchase securities with public funds, whereupon the university brought suit against its brokers. *See id.*; First Equity Corporation of Florida v. Utah State University, 544 P.2d 887 (S. Ct. Utah 1975).

[163] *See* 410 F.2d at 143; text accompanying notes 37-50 *supra.*

[164] *See* 549 F.2d at 169.

[165] *See id.* at 168; SEN. REP. No. 1455, *supra* note 17, at 3-4; H.R. REP. No. 2307, *supra* note 17, at 4-5.

[166] *See* 549 F.2d at 168.

[167] *See id.*

[168] *See id.* at 168-69.

[169] *See* text accompanying notes 154-59 *supra.*

[170] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); text accompanying notes 75-97 *supra.*

[171] *See* Frankel, *supra* note 52, at 559-70.

[172] *See id.*; text accompanying notes 75-97 *supra.*

tions have been subsumed into the congressional intent inquiry,[173] consistency with statutory purpose has become a less significant factor in questions of implication.[174]

Analysis of the fourth *Cort* factor, whether implying a cause of action would unnecessarily interfere with areas traditionally within state court jurisdiction,[175] also indicates that a court may not properly imply a private right of action under section 6.[176] The legal parameters of broker-customer relationships traditionally have focused upon common law principles of contract and fiduciary duty.[177] The *Colonial Realty* court, eleven years before the Supreme Court's decision in *Cort*,[178] expressed concern that implying a private right of action under section 6 would require fashioning a new body of federal broker-customer law to replace traditional state regulation.[179] Observing that a decision to imply a private right of action under section 6 would require the conclusion that Congress intended to impose upon brokers legal standards different from those long recognized in state law,[180] the *Colonial Realty* court noted that implication would saddle the federal courts with ordinary customer-broker suits even between litigants of the same state.[181] A leading commentator on securities regulation similarly expressed concern that litigation of broker-customer suits in federal courts under the '34 Act would result in a substantial encroachment upon matters traditionally within state court jurisdiction.[182] Consequently, analysis of the

---

[173] *See* Frankel, *supra* note 52, at 559-70.

[174] *See* 444 U.S. at 24.

[175] *See* 422 U.S. at 78; text accompanying note 68 *supra*.

[176] *See* text accompanying notes 177-83 *infra*.

[177] *See* 358 F.2d at 183; *The Suitability Rule*, *supra* note 17, at 503. Stock exchanges in the United States originated as informal associations of persons buying and selling public and private obligations. *See* Loss, *supra* note 1, at 996. The NYSE originated in a 1792 agreement between New York brokers trading in the $80 million bond issue with which the federal government consolidated the Revolutionary War debt. *See* Brookman, *The New York Stock Exchange*, in THE STOCK MARKET HANDBOOK 72 (1970). Between 1792 and 1939, the NYSE operated as a wholly private organization. *See* 1 SEC, IN THE MATTER OF RICHARD WHITNEY 177 (1938); ROBBINS, THE SECURITIES MARKETS, OPERATIONS AND ISSUES 107 (1966). Recognizing that the private status of securities exchanges is inconsistent with their importance in the national economy, Congress enacted the '34 Act in an attempt to improve previously inadequate exchange self-regulation. *See* SEN. REP. NO. 792, *supra* note 56, at 4-5. While the '34 Act represents the first exercise of public authority over the operation of exchanges per se, state law traditionally has governed the legal parameters of broker-client relationships. *See* Loss, *supra* note 1, at 996-99; note 182 *infra*.

[178] *See* 422 U.S. 66 (1975); 358 F.2d 178 (1966).

[179] *See* 358 F.2d at 183; text accompanying notes 180-81 *infra*.

[180] *See* 358 F.2d at 183.

[181] *See id.*; 15 U.S.C. § 78aa (1976) ('34 Act, § 27); note 46 *supra*.

[182] *See* Loss, *supra* note 1, at 996-99, 2005-06. In his treatise on the regulation of the securities industry, Professor Loss indicated that if § 27 of the '34 Act were read so as to embrace exchange rules, allegations of violations of exchange rules would suffice to eliminate state court jurisdiction over matters traditionally within state court jurisdiction. *See id.*

fourth *Cort* factor provides no support for the implication of a private right of action under section 6.[183]

Application of the four-part *Cort* analysis to the question whether an implied cause of action exists under section 6 of the '34 Act indicates plainly that the *Colonial Realty* and *Buttrey* decisions should no longer dominate the development of the law in this area.[184] While *Colonial Realty* and *Buttrey* continue to influence lower court decisions with respect to private rights of action under section 6,[185] their precedential weight has been severely diminished by the articulation of new standards for implying private rights of action under federal statutes.[186] Under those new standards, *Colonial Realty* and *Buttrey* are important primarily for their analytic, not authoritative value.[187]

Of the four factors to be considered in deciding whether to imply a private right of action under a federal statute,[188] only two lend qualified support to the implication of a private right under section 6.[189] Although section 6 does not prohibit certain conduct or create federal rights in favor of any particular group of persons,[190] Congress enacted section 6 to achieve the ultimate goal of protecting investors.[191] Thus, in terms of broad statutory policy, Congress appears to have enacted section 6 for the especial benefit of a particular class of persons.[192] Similarly, implying a private right of action under section 6 for violations of exchange rules would be consistent with section 6's purpose of mandating honesty and fairness in exchange transactions.[193] While the threat of potential liability might discourage exchanges from promulgating new rules,[194] the threat

---

[183] *See* text accompanying notes 175-82 *supra.*

[184] *See* text accompanying notes 109-83 *supra.*

[185] *See* note 25 *supra.*

[186] *See* text accompanying notes 61-97 *supra.*

[187] *See* text accompanying notes 23-50 *supra.* The *Colonial Realty* approach, which conditions the availability of an implied right upon the extent to which an exchange rule is a substitute for direct SEC regulation, fails to take into consideration the principles of *Cort* and its progeny. *See* text accompanying notes 61-97 *supra.* Such an approach, however, is relevant insofar as a court must inquire into the nature of a specific exchange rule after having concluded that § 6 does support an implied right of action. *See* 358 F.2d at 182. The *Buttrey* approach, which conditions the availability of an implied right upon the extent to which the defendant's conduct approaches fraud, has proper application only in determining the extent to which the implication of a private right of action under § 6 conflicts with the express liability provisions of the '34 Act or intrudes upon an area of the law traditionally relegated to state court jurisdiction. *See* 410 F. Supp. at 143; text accompanying notes 37-50 *supra.*

[188] *See* 422 U.S. at 78; text accompanying notes 65-68 *supra.*

[189] *See* text accompanying notes 109-134, 154-68 *supra* .

[190] *See* 15 U.S.C. § 78f (1976); text accompanying notes 122-34 *supra.*

[191] *See* text accompanying notes 109-120 *supra.*

[192] *See* note 65 *supra.*

[193] *See* text accompanying notes 156-61 *supra.*

[194] *See* Utah State Univ. of Agriculture and Applied Science v. Bear, Stearnes & Co., 549 F.2d 164, 168 (10th Cir. 1977); text accompanying notes 162-70 *supra.*

of liability would surely encourage diligent enforcement of and compliance with rules already in effect.[195]

In addressing the four-factor *Cort* analysis, however, the Supreme Court has leveled its most serious criticisms at precisely those *Cort* factors under which section 6 appears to qualify.[196] Even assuming that all four factors remain relevant to the question of implication,[197] considering the Supreme Court's new emphasis on the language and focus of federal statutes,[198] great doubt exists whether a court could properly rely on the protected class and statutory purpose factors to imply a private right of action under section 6.[199] Moreover, if the question whether a court may imply a private right of action under a federal statute is to be resolved solely by reference to indications of congressional intent to create civil liability,[200] section 6 even more clearly does not support the implication of a private right of action.[201] Because the language and legislative history of the '34 Act are bereft of any indication that Congress intended to enforce stock exchange rules through the imposition of civil liability,[202] there is no statutory basis from which to imply a private right of action under section 6.[203] Without such a basis, the Supreme Court has held that a court may not properly imply a private right of action from a federal statute.[204]

Colonial Realty and *Buttrey*, like many decisions involving implied private rights of action under the Federal securities laws, have been overshadowed by the Supreme Court's reinterpretation of the law relating to implied private rights of action under federal statutes.[205] While commentators have severely criticized the Supreme Court's more restrictive approach toward implying private rights of action under federal statutes,[206] in the case of section 6, a more restricted approach is

---

[195] *See* text accompanying notes 154-59 *supra*.

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

[197] *See* California v. Sierra Club, _____ U.S. _____, _____, 101 S. Ct. 1775, 1778; note 99 *supra*.

[198] *See* text accompanying notes 75-97 *supra*.

[199] *See id.*

[200] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); text accompanying notes 75-97 *supra*.

[201] *See* text accompanying notes 135-53 *supra*.

[202] *See* text accompanying notes 135-43 *supra*.

[203] *See* Jablon v. Dean Witter & Co., 614 F.2d 677, 679-81 (9th Cir. 1980); Coleman v. D.H. Blair & Co., Inc. [1981-82 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,252, 91,647 (S.D.N.Y. 1981); text accompanying notes 128-34, 144-53 *supra*.

[204] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 568-79 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-25 (1979); text accompanying notes 75-97 *supra*.

[205] *See generally* Frankel, *supra* note 5; text accompanying notes 61-97 *supra*.

[206] *See* Ratner, *The Demise of the Implied Private Right of Action in the Supreme Court*, 11 INST. SEC. REG. 289-301 (1980); Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841-62 (1977). Frankel, *supra* note 52, at 584-85.

consistent with the role of exchange rules in the securities laws.[207] As Congress deemed it wise not to undertake direct regulation of stock exchange transactions and broker-client relationships,[208] courts should be hesitant to undertake direct regulation themselves.[209] Within the parameters of section 6 of the '34 Act,[210] exchanges should be free to establish standards of member conduct without fear of creating enormous and unexpected liabilities.[211]

JOHN M. BLOXOM, IV

[207] *See* Jennings, *supra* note 6, at 667-74; text accompanying notes 121-27 *supra.*
[208] *See* 15 U.S.C. § 78f (1976); note 7 *supra.*
[209] *See* text accompanying notes 135-53 *supra.*
[210] *See* 15 U.S.C. § 78f (1976); note 7 *supra.*
[211] *See* text accompanying notes 161-68 *supra.*