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James L. Miller

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*Private Cause of Action Under Section 17(a) of Securities  
Exchange Act of 1934 • Doctrine of Implication*

*Touche Ross v. Redington*, 99 S. Ct. 2479 (1979)

**T**HE SECURITIES EXCHANGE ACT of 1934 is principally designed to protect investors through regulation of securities transactions on the organized exchanges and in the over-the-counter markets.<sup>1</sup> In addition to the creation of the Securities and Exchange Commission as its leading enforcement mechanism,<sup>2</sup> the 1934 Act provides for criminal penalties<sup>3</sup> and, in certain instances, private causes of action for individuals who incur damage by others' violations of the Act.<sup>4</sup> However, courts will often imply a civil cause of action for an injured party despite the absence of express statutory authorization.<sup>5</sup> Subsequent judicial attempts to determine when supplemental civil relief can or should be implied has traditionally resulted in the courts' inability to formulate consistent and workable analytical standards of implication. Recently, however, the Supreme Court has indicated an attempt to reappraise its position and adhere to an arguably stricter standard for the judicial implication of private causes of action. *Touche Ross v. Redington*<sup>6</sup> represents the most current example of the willingness of the Court to maintain this standard.

**I. BACKGROUND OF THE CASE**

Touche Ross & Co. (Touche Ross) is a firm of certified public accountants. Weis Securities, Inc. (Weis) was a broker-dealer registered with the Securities and Exchange Commission (SEC) as well as a member of the New York Stock Exchange. Weis retained Touche Ross to audit its books and records and prepare for filing with the SEC the annual reports of financial condition required by Section 17(a) of the Securities Exchange Act of 1934.<sup>7</sup>

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<sup>1</sup> Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a - 78kk (1976)).

<sup>2</sup> *Id.* at §§ 4, 9, 21; 15 U.S.C. §§ 78d, 78i, 78s, 78u (1976).

<sup>3</sup> *Id.* at § 32(a); 15 U.S.C. §§ 78ff(a) (1976).

<sup>4</sup> *Id.* at §§ 9(e), 16(b), 18(a), 20(a); 15 U.S.C. §§ 78i(e), 78p(b), 78r(a), 78t(a) (1976).

<sup>5</sup> See Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

<sup>6</sup> 99 S. Ct. 2479 (1979).

<sup>7</sup> 15 U.S.C. § 78q (1976). In 1972, the date relevant to this case, Section 17(a) read as follows:

(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78o of this title, shall make, keep, and preserve for such periods, such accounts, correspondance, memoranda, papers, books, and other records, and make such

Subsequently, Weis' financial condition began to deteriorate and, pursuant to the Securities Investor Protection Act (SIPA)<sup>8</sup> Weis' liquidation was ordered and Redington was appointed trustee. During this period, the Securities Investor Protection Corporation (SIPC)<sup>9</sup> advanced \$14 million to Trustee Redington to satisfy the claims of approximately 34,000 Weis customers who had left assets with Weis. Suit was subsequently filed on April 30, 1976 in district court by Trustee Redington and SIPC against Touche Ross.<sup>10</sup> The complaint alleged that in 1972 certain of Weis' officers misstated the financial condition of Weis in reports prepared at the end of the fiscal year. These actions resulted in the preparation and certification of allegedly false and misleading financial statements by Touche Ross in violation of Section 17(a) of the 1934 Act.<sup>11</sup> Consequently, plaintiffs alleged that Touche Ross breached duties it had assumed toward them by violating, and aiding and abetting the Weis officers in violating, state common law, Section 17(a) of the 1934 Act and certain regulations promulgated thereunder by the SEC.

The district court dismissed the complaint, holding that no claim for relief was stated because no private cause of action could be implied from Section 17(a). Acknowledging the fact that in the 45 years during which the statute has been in effect there has been no decision by the Supreme Court as to whether a private right of action could be asserted for a violation of Section 17(a),<sup>12</sup> the district court viewed this section as essentially a book-keeping provision:

From the wording of this provision and in the context of the other provisions of the 1934 Act, it would appear that Section 17 was designed

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reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at anytime or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Section 17 was amended in 1975. Compare 15 U.S.C. § 78q(a) (1970) with 15 U.S.C. § 78q(a)(1) (1976).

<sup>8</sup> Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636 (codified at 15 U.S.C. §§ 78aaa - 78111 (1976)). Generally, SIPA was enacted to provide to customers of securities broker-dealers protection against losses which might occur as a result of the financial failure of broker dealers.

<sup>9</sup> Securities Investor Protection Corporation is a non-profit organization of securities dealers established by Congress in 1970 in the Securities Investor Protection Act. 15 U.S.C. § 78ccc (1976). SIPC is required to maintain a fund, supported by private assessments of its members, to be used to compensate those customers of brokerage houses who incur damages due to broker insolvencies. *Id.* § 78ddd, § 78fff(f).

<sup>10</sup> Redington v. Touche Ross & Co., 428 F. Supp. 483 (S.D.N.Y. 1977).

<sup>11</sup> In four opinion letters, all written in 1972, Touche Ross represented that it had examined certain financial statements of Weis and concluded that they fairly and accurately presented the financial status of Weis, in conformity with generally accepted accounting standards.

<sup>12</sup> The Supreme Court, in the case of Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n. 13 (1976), had expressly left this question open.

to supply administrative guidance in the bookkeeping area and not to create any rights in anybody.<sup>13</sup>

The district court went on to state that Section 18(a) should be considered the only civil liability provision for a violation of the "reporting provisions"<sup>14</sup> of the 1934 Act.<sup>15</sup> As a result, the Court did not accept the argument set forth by Trustee Redington and SIPC that there was an implied private claim under Section 17 *broader* than the claim *expressly* created in Section 18.<sup>16</sup> Hence, the district court concluded that the subject matter of the two sections (Section 17 and Section 18), their titles, and their juxtaposition "strongly suggest a legislative intent that the *only* private claim for a violation of Section 17 was the claim created in Section 18"<sup>17</sup> (emphasis added).

On appeal, the Second Circuit reversed and held that SIPC and Trustee Redington could assert an implied cause of action on behalf of Weis' customers.<sup>18</sup> In reaching this conclusion, the appellate court rejected the stance taken by the district court that Section 17 was a mere reporting provision:

We believe that, even if no right of action were implied, to see nothing but 'administrative guidance' in a provision as crucial to the regulation of brokers as section 17 is to take far too narrow a view of the statute. Certified public accountants play a significant role in the scheme

<sup>13</sup> 428 F. Supp. at 489.

<sup>14</sup> Specifically, reporting provisions are those sections of the 1934 Act that require the filing of applications, documents, and reports. In addition to Section 17, other reporting sections include §§ 12(b), 12(g), 13(a), 13(d), 13(f), 15(b)(1), 15(d), and 16(a); 15 U.S.C. §§ 781(b), 781(g), 78m(a), 78m(d), 78m(f), 78o(b)(1), 78o(d), 78p(a) (1976). The majority of courts dealing with reporting provisions have held that Section 18(a) is the "catch-all" civil liability provision. *See e.g., DeWitt v. American Stock Transfer Co.*, 433 F. Supp. 994, 1005 (S.D.N.Y. 1977); *In re Penn Central Securities Litigation*, 347 F. Supp. 1327, 1340 (E.D. Pa. 1972), *aff'd* 494 F.2d 528 (3d Cir. 1974).

<sup>15</sup> 15 U.S.C. § 78r(a) (1976). Section 18(a) provides:

**Liability for misleading statements**

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) *who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement*, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant (emphasis added).

<sup>16</sup> Trustee Redington and SIPC could not bring suit under Section 18 since neither they nor Weis' customers had bought or sold a security in reliance on the reports submitted by Touche Ross.

<sup>17</sup> 428 F. Supp. at 489.

<sup>18</sup> *Redington v. Touche Ross & Co.*, 592 F.2d 617 (2nd Cir. 1978).

created by the '34 Act for the regulations promulgated by the SEC . . . we hold that section 17 of the '34 Act likewise imposes a duty on accountants.<sup>19</sup>

Thus, the appellate court rejected the conclusion of the district court that Section 18(a) was to be the exclusive civil liability provision for a violation of Section 17. Rather, the appellate court held that the customers of brokers were the "favored wards" of Section 17(a) and, therefore, it could not agree that "Congress simultaneously sought to protect a class and deprived the class of the means of protection" (by limiting Section 18(a) to purchasers and sellers and not expressly providing a remedy for the customers of brokers in Section 17(a)).<sup>20</sup>

The Supreme Court granted certiorari in order to decide whether customers of securities brokerage firms that are required to file certain financial reports as mandated by Section 17 have an implied cause of action for damages under Section 17(a) against accountants who audit such reports based on misstatements contained in the reports.

The Court reversed, holding that a private remedy is not implicit in Section 17(a).

## II. DEVELOPMENT OF THE DOCTRINE OF IMPLICATION

The doctrine of implication was first accepted and applied by American Courts in 1916.<sup>21</sup> Generally speaking, except for a brief period,<sup>22</sup> the doctrine has witnessed prevailing acceptance. This was especially true during the 1960's and early 1970's as courts began to formulate more extensive, but

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<sup>19</sup> *Id.* at 621.

<sup>20</sup> *Id.* at 623.

<sup>21</sup> The first case to enunciate the implication doctrine was *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916). In *Rigsby*, a railroad employee was injured by defective railroad equipment in violation of the Federal Safety Appliance Act. 45 U.S.C. §§ 1-43 (1975). The Court ultimately held that, despite the fact that the relevant statutory provision did not provide a private cause of action, the plaintiff was undoubtedly a member of the class the statute was designed to protect:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied.

*Id.* at 39.

The principal announced in the *Rigsby* decision was, in effect, too broad. It did not provide an analytical set of standards which a court could apply to a statute in an attempt to find a civil remedy. Rather, it has been argued by some commentators that the rule might well be applicable to anyone who is injured by a violation of a federal statutory provision since most federal regulatory statutes are written with the intent to protect and benefit some group of individuals. See e.g., Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1394 (1975); Note, *Emerging Standard for Implied Action Under Federal Statutes*, 9 U. MICH. J.L. REFORM 294, 297 (1976); Note, *Implication of Private Actions from Federal Statutes: From Borak To Ash*, 1 J. CORP. L. 371, 376 (1976).

<sup>22</sup> See *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 471 (1959); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

not necessarily consistent, rationales for the implication of civil remedies. However, *Touche Ross & Co. v. Redington* reflects the culmination of a series of decisions promulgated by the present Court which, in attempting to provide a more analytical framework in deciding whether to imply a private cause of action, has resulted in a stricter standard.

*National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*<sup>23</sup> was the first decision which signalled a change in the attitude of the Court toward implication. In *Amtrak*, the plaintiff brought suit to enjoin the discontinuance of certain passenger rail routes, claiming that such action would violate the Rail Passenger Act of 1970.<sup>24</sup> Because the legislative history of the Act expressly created a public cause of action by the Attorney General and a private cause of action in cases involving a labor agreement, the Court denied relief by applying the maxim *expressio unius est exclusio alterius*.<sup>25</sup> The Court interpreted this tenet to mean that when the express language and history of a statute provide exclusive remedies for its violation, no additional private rights may be implied absent "clear contrary evidence of legislative intent."<sup>26</sup>

*Amtrak* formed a basis of analysis that was adopted and applied in the *Redington* decision: that the initial determination by a court should be whether Congress expressly provided a remedy for violations of a statutory provision and if so, absent clear contrary evidence of legislative intent, the express remedy will be deemed exclusive and no other form of relief may be implied.

Initially, the *Redington* Court followed the principles set out in *Amtrak*.<sup>27</sup> Its central inquiry was focused on whether Congress intended to

<sup>23</sup> 414 U.S. 453 (1974) (*Amtrak*).

<sup>24</sup> 45 U.S.C. §§ 501-644 (1970 & Supp. V 1975).

<sup>25</sup> "Expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 692 (rev. 4th ed. 1968). This doctrine has been met with much criticism. The most common argument made against application of this maxim is that it arguably does not reveal actual legislative intent since it falsely assumes that Congress has examined each statutory provision and has consciously determined to withhold a private action. See *SEC v. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). See also Gamm & Eisberg, *The Implied Rights Doctrine*, 41 U. Mo. K.C.L. REV. 292, 300-01 (1972); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, *supra* note 5, at 290-91; Note, *Implications of Private Actions from Federal Statutes: From Borak To Ash*, *supra* note 21, at 377-78; Comment, *Implying Private Causes of Action From Federal Statutes: Amtrak and Cort Apply the Brakes*, 17 B.C. INDUS. & COM. L. REV. 53, 68 (1975).

<sup>26</sup> 414 U.S. at 457. In further explanation, the Court stated that:

(I)t goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.

*Id.* at 457-58.

<sup>27</sup> These principles were reaffirmed in *Securities Investor Protection Corp. v. Barbour (SIPC)*, 421 U.S. 412 (1975). In *SIPC*, customers of a failing brokerage-dealer sought a court order to compel the SIPC to initiate liquidation proceedings against the dealer. The Court, in refusing to imply a private remedy for the plaintiffs, held that Congress had manifestly

create a private cause of action in Section 17(a). To this extent, the *Redington* Court closely scrutinized both the language and the legislative history of the statute.<sup>28</sup> In terms of the language of Section 17(a) the majority concluded, as did the district court, that this section was merely a "reporting provision" and did not purport to create a private cause of action.<sup>29</sup> Regarding legislative history, the Court was unable to find any evidence of Congressional intent to either create or deny a private cause of action in Section 17(a).<sup>30</sup> However, against the arguments of SIPC and Trustee Redington, the Court refused to imply a remedy on the basis of Congressional silence<sup>31</sup> stating that:

(W)here, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that Section 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section.<sup>32</sup>

Apparently content that Congress did not intend, either expressly or impliedly, to provide a remedy in Section 17(a), the Court emphasized the existence of other remedial provisions as evidence of legislative intent not

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intended that only the SEC have statutory authority to compel the SIPC to discharge its obligations. The Court stated that:

Congress' primary purpose in enacting the SIPA and creating the SIPC was, of course, the protection of investors. It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose.

*Id.* at 421.

Note, however, that the statutory provisions in both *Amtrak* and *SIPC* involve explicitly conferred remedies for a specific wrongdoing and that the plaintiffs in each case are seeking additional remedies. In *Redington* there was no express remedy in Section 17(a), but Trustee Redington and SIPC argued that relief should be implied in this section. On the other hand, Touche Ross maintained that Section 18(a) should provide the exclusive remedy.

<sup>28</sup> A series of recent decisions also reflect this approach. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473 (1977) (The language of Section 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception. Nor have we been cited to any evidence in the legislative history that would support a departure from the language of the statute); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (When a statute speaks so specifically in terms of manipulation and deception . . . and when its history reflects no more expansive intent, (the Court is) quite unwilling to extend the scope of the statute).

<sup>29</sup> By its terms, 317(a) is forward-looking, not retrospective; it seeks to forestall insolvency, not to provide recompense after it has occurred. 99 S. Ct. at 2486.

<sup>30</sup> *Id.* at 2486-87.

<sup>31</sup> Two divergent views have normally been presented as to whether a silent legislative record should be used to either grant or deny implication: that silence conclusively indicates private actions were not intended or, at the other extreme, that silence should not preclude implication given that a legislature has merely failed to consider the issue at hand. Commentators appear to accept the latter view. A common argument generally given in support of this position is that the legislature could not have been expected to contemplate the various enforcement mechanisms at the time of passage which would ensure the vigor of the act. See Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, *supra* note 21, at 1413-14. Note, *Implication of Private Actions from Federal Statutes: From Borak To Ash*, *supra* note 21, at 378-79.

<sup>32</sup> 99 S. Ct. at 2479, 2486-87 (1979).

to provide a remedy. First, it concluded that since Congress expressly granted private causes of action in numerous provisions of the 1934 Act it could have, if it chose, expressly provided for a private damage remedy in Section 17(a).<sup>33</sup> Second, the Court maintained that there was evidence to support the view that Congress meant Section 18(a) to be the exclusive remedy for misstatements contained in the "reporting provisions."<sup>34</sup>

The *Redington* Court did not expressly adopt the *expressio unius* doctrine set out in *Amtrak*. However, it deemed Congressional enactment of Section 18(a) to be concrete evidence of a legislative intent to preclude the acceptance of a broader implied remedy under Section 17(a) to include brokerage customers.

A similar position was taken by the Court in *Blue Chip Stamps v. Manor Drug Stores*<sup>35</sup> where the plaintiffs alleged that, due to a scheme devised by the defendants which presented an overly pessimistic appraisal of a new business, they refrained from purchasing securities. Relief was sought under Section 10(b) which makes it unlawful to use deceptive devices or make misleading statements "in connection with the purchase or sale of any security."<sup>36</sup> The Court ruled that a private action for damages under rule 10(b) was restricted to actual purchasers or sellers of securities not those, such as the plaintiffs, who merely refrained from purchasing securities. The Court noted that when Congress has chosen to provide a remedy for those other than purchasers or sellers it has done so expressly.<sup>37</sup>

However, reliance by the *Redington* Court on examination of mere statutory language and legislative history was incompatible with prior cases where the Court was willing to examine other factors of analysis to determine whether an implied private right of action was proper.<sup>38</sup>

Mr. Justice Marshall, the sole dissenter in *Redington*, argued that the majority approach was contrary to the test established in *Cort v. Ash*.<sup>39</sup>

<sup>33</sup> See *supra* note 4.

<sup>34</sup> 99 S. Ct. at 2488, n. 15.

<sup>35</sup> 421 U.S. 723 (1975).

<sup>36</sup> See Rule 10b-5; 17 C.F.R. § 240.10b-5; 15 U.S.C. § 78j(b) (1975).

<sup>37</sup> 421 U.S. at 734 (citing 16(b) of the 1934 Act, 15 U.S.C. § 78p(b) (1975) which expressly allows issuers of a security to recover profits). See also Note, *Redington v. Touche Ross & Co.: An Unwarranted Implication of a Private Right of Action Against Accountants Under Section 17(a) of the Securities Exchange Act of 1934*, 73 NORTHWESTERN UNIV. L. REV. 1136 (1979).

<sup>38</sup> See e.g., *Cannon v. Univ. of Chicago*, 99 S. Ct. 1946, 1953 (1979); *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 38-42 (1977); *Allen v. State Board of Elections*, 393 U.S. 544, 577 (1969); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202-04 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426, 431-32 (1964). Note, however, that the *Redington* Court, *in dicta*, maintained that other factors may well be relevant in a case presenting a factual situation which demands that attention be drawn to additional considerations. 99 S. Ct. at 2489.

<sup>39</sup> 422 U.S. 66 (1975). In *Cort*, the Supreme Court held that a corporation stockholder did not have an implied cause of action against corporate directors under 18 U.S.C. § 610 (1970), a criminal statute prohibiting a corporation from making certain campaign contributions.

In *Cort*, the Supreme Court developed a four factor analysis for determining whether a remedy is implicit in a statute which does not expressly grant one:

First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted' - that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>40</sup>

The *Redington* majority maintained, however, that it was needless to adhere to a mechanical application of all four factors. Instead, once the statutory language and legislative history - traditional criteria used in ascertaining legislative intent - have been clearly determined, it will be unnecessary to consider the latter two factors set out in *Cort*, whether an implied private remedy is necessary to effectuate the purpose of the section or whether the cause of action is one traditionally relegated to state law.

This direction appears to be clearly inconsistent with the approach followed in *Piper v. Chris-Craft Industries, Inc.*<sup>41</sup> Plaintiff, a defeated takeover bidder, was denied an implied cause of action against its successful competitor and the target company under Section 14(e) of the 1934 Act.<sup>42</sup> Finding that this section made no express provision for a private cause of action, the Court turned to the legislative history to divine the intent of Congress. While maintaining that Congress intended to protect only the shareholders of a target corporation, not tender offerors such as the plaintiff, the Court did not stop its analysis there. Rather, it went on and applied all four *Cort* factors,<sup>43</sup> finding that its conclusion was nonetheless confirmed.<sup>44</sup>

This approach, from what appears to be a mechanical application of the four *Cort* factors in *Piper* to reliance on only evidence of legislative intent in *Redington*, questions how meaningful the *Cort* criteria have become in providing a useful analytical framework for implication.<sup>45</sup> Granted,

<sup>40</sup> *Id.* at 78 (citations omitted).

<sup>41</sup> 430 U.S. 1 (1977).

<sup>42</sup> 15 U.S.C. § 78n(e) (1976). Section 14(e) makes unlawful "any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . or any solicitation of security holders in opposition to or in favor of any such offer."

<sup>43</sup> In addition to the application of the *Cort* criteria, the *Piper* Court also based its decision on a fifth requirement: "Whether it is necessary to imply a remedy to effectuate the congressional goals embodied in the statute." 430 U.S. at 26.

<sup>44</sup> See Recent Developments, *Implied Private Right of Action Under Section 17 of the Securities Exchange Act of 1934*, 31 VANDERBILT L. REV. 1513, 1517 (1978).

<sup>45</sup> *Id.* at 1517.

each of the factors provide the courts with a number of useful criteria to consider in determining whether a cause of action should be implied.<sup>46</sup> However, the recording of four separate factors may create the assumption that all of the factors should be given equal weight and importance when, in fact, this may not be the case especially where, as in *Redington*, the finding that the legislature did not intend the plaintiff to benefit from the statute was clearly dispositive of the case.<sup>47</sup> It may be argued that the *Redington* decision reflects an attempt by the Court to develop a more refined attitude toward the *Cort* criteria which would, in turn, result in a more accurate reflection of congressional intent.

However, by disregarding the examination of the latter two *Cort* factors as well as other criteria, the Court seems to be limiting what it had previously determined to be relevant considerations in ascertaining whether a private remedy should be implied in statutory actions.

For example, the 1964 landmark decision of *J.I. Case Co. v. Borak*,<sup>48</sup> while arguably representing the most extreme example of the willingness of the Supreme Court to imply a private right of action,<sup>49</sup> nevertheless presented considerations which, if accepted, might have affected the analysis in the *Redington* decision.

The plaintiff in *Borak*, a stockholder of J.I. Case Co., brought suit under Section 14(a) of the 1934 Act alleging that an attempted merger by Case was effected through the circulation of a false and misleading proxy statement.<sup>50</sup> Like Section 17(a) in *Redington*, Section 14(a) did not ex-

<sup>46</sup> See *Cannon v. Univ. of Chicago*, 99 S. Ct. 1946 (1979). The Supreme Court held that plaintiff, who was denied admission to medical schools at two private universities, was entitled to a private cause of action under Title IX. The Court maintained that "before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort v. Ash* identifies as indicative of such intent" (citations omitted). *Id.* at 1947. *But see* Mr. Justice White, dissenting. He maintains that "Because in my view the legislative history and statutory scheme show that Congress intended not to provide a new private cause of action, and because under our previous decisions such intent is controlling, I dissent (citing *Cort*, *SIPC*, and *Amtrak*)." *Id.* at 1968. See also Mr. Justice Powell, dissenting. He states that "(A)s the opinion of the Court today demonstrates, the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement." *Id.* at 1980.

<sup>47</sup> 99 S. Ct. at 2486 (1979).

<sup>48</sup> 377 U.S. 426 (1964).

<sup>49</sup> See e.g., *Cannon v. Univ. of Chicago*, 99 S. Ct. at 1946 (Powell, J. dissenting).

<sup>50</sup> 15 U.S.C. § 78n(a) (1976). Section 14(a) provides:

(a) It shall be unlawful for any person, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the (Securities and Exchange) Commission may prescribe is necessary or appropriate in the public interest or for the protection of investors" (emphasis added).

The *Redington* Court, however, did attempt to distinguish *Borak* on the ground that the statute in *Borak* at least prohibited certain conduct of private parties while Section 17(a) does not refer to the conduct of any individuals. 99 S. Ct. at 2485-86 (1979).

pressly provide a remedy. Nevertheless, the Supreme Court held that an implied right of action existed under this section.<sup>51</sup> It premised its decision on consideration of Section 27 of the 1934 Act<sup>52</sup> which gives the federal courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" under the Act.<sup>53</sup> In addition, the Court looked at the "broad remedial purposes" of the 1934 Act and concluded that while the language of Section 14(a) made no specific reference to a private right of action, "among its chief purposes is the 'protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."<sup>54</sup> In further justification, the Court held that because the SEC was not able to adequately enforce Section 14(a) violations, an implied private action would be "a necessary supplement to Commission action."<sup>55</sup>

The *Redington* Court, however, held that these considerations were not only inapplicable but, rather, irrelevant to the case at bar. It claimed that a cause of action could not be inferred from Section 27:

Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiff's rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision . . . The Court in *Borak* found a private cause of action implicit in Section 14(a) . . . We do not now question the actual holding of that case, but we decline to read the opinion so broadly that virtually every provision of the securities acts gives rise to an implied private cause of action.<sup>56</sup>

In addition, the *Redington* Court found that, due to recent opinions which do not permit reading a provision "more broadly than its language and statutory scheme reasonably permit," no reliance could be placed on the "broad remedial purposes" of the Act.<sup>57</sup> This stance is inapposite from that taken in *Borak* where the Court determined that since the purpose of the statute was for the protection of investors, judicial relief would be necessary

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<sup>51</sup> The "Borak" test, though not explicitly set out in the *Borak* decision, was enunciated in *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967). A private action may be implied when:

1. The plaintiff is within the zone of interest intended to be protected by the statute.
2. The harm is of the type that the statute was intended to forestall and
3. The remedies provided are inadequate to effectuate Congress' purpose in passing the statute. See Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, *supra* note 21, at 1396.

<sup>52</sup> 15 U.S.C. § 78aa (1976).

<sup>53</sup> 377 U.S. at 431.

<sup>54</sup> *Id.* at 432. Identical language appears in Section 17(a).

<sup>55</sup> *Id.*

<sup>56</sup> 99 S. Ct. at 2479, 2490.

<sup>57</sup> *Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 116 (1978); *Ernst & Ernst*

to achieve Congressional intent to provide a private remedy. In essence, the *Borak* Court deemed implication necessary to achieve the purpose of the statute.<sup>58</sup> However, the *Redington* Court failed to consider whether implying a private right of action in Section 17(a) was necessary to protect a customer of a broker. Simply stated, the Court was not willing to encompass in its analysis such considerations as those found in *Borak*:

To the extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today.<sup>59</sup>

### III. CONCLUSION

A host of reasons have traditionally been given for implying a private remedy in a statute not expressly providing one. For example, the court is arguably in a better position to assess the need for additional civil relief than was the legislature. Also, the character of regulatory statutes may make uniform remedies more practicable.<sup>60</sup> As a result, there is undoubtedly a need for federal courts to provide remedies for the violation of federal statutory provisions. Yet, the decision whether to imply a private cause of action involves the resolution of a number of difficult and overlapping issues. For example, the type of conduct the statute was designed to protect, whether it is possible to correctly discern legislative intent, what possible policies the legislature had in mind when passing the statute, and whether the lack of effective enforcement mechanisms of a regulatory statute should be a crucial consideration. It is in this process whereby, as a result of ineffective limits initially being placed on the implied right of action doctrine, some courts have been accused of judicial legislation and violating the separation of powers doctrine in their effort to find an implied remedy.<sup>61</sup>

It was undoubtedly in response to this situation that the present Court has attempted to articulate a more analytical approach toward private remedies under the securities statutes. As shown by *Amtrak*, an initial determination must be made whether Congress, absent clear contrary evidence of legislative intent, expressly provided a remedy. This is resolved by an examination of considerations which most clearly evidence legislative intent: statutory language and legislative history. The *Redington* Court, however, ended its examination at this point. There was no need to analyze the latter

<sup>58</sup> Subsequent Supreme Court decisions have echoed this approach. See e.g., *Sante Fe Indus., Inc. v. Green*, 430 U.S. 462, 467 (1977); *Piper v. Chris-Craft Indus. Inc.*, 432 U.S. 1, 26 (1977).

<sup>59</sup> 99 S. Ct. at 2490.

<sup>60</sup> See Note, *Implying Civil Remedies From Federal Regulatory Statutes*, *supra* note 5, at 291-93.

<sup>61</sup> See Comment, *Implying Private Causes of Action from Federal Statutes: Amtrak and Correctly Applying the Brakes*, *supra* note 25, at 65.

two factors set out in the *Cort* test as well as other considerations such as references to the remedial purposes of the 1934 Act enunciated in *Borak*.

It can be argued that this approach is more reflective of actual Congressional intent. That is, another direction could have been taken where an implied remedy might have been found on nothing more than a judicially promulgated concept of what one court may have considered the purpose of the Act to be, the inadequacy of the mode of enforcement, the policies that the legislature sought to effectuate, and so on.

However, the *Redington* Court took a traditional stance concerning the separation of powers and refused to engage in supererogatory conduct.

JAMES L. MILLER

## CONSTITUTIONAL LAW

### *First Amendment • Freedom of The Press • Erosion of New York Times Co. v. Sullivan*

*Herbert v. Lando*, 441 U.S. 153 (1979)

**I**N *Herbert v. Lando*<sup>1</sup> the Supreme Court announced that the first amendment does not require a constitutional privilege foreclosing direct inquiry into the editorial process. While the decision may seem correct in its overturning of the absolute privilege afforded to the editorial process by the Second Circuit,<sup>2</sup> nevertheless, by refusing to grant even a qualified privilege to the editorial process the Court may have upset the delicate balance between an individual's interest in his reputation and society's interest in a free flow of information recognized in *New York Times Co. v. Sullivan*.<sup>3</sup>

Anthony Herbert, a retired United States Army Colonel, attracted the attention of the news media in March 1971 when he filed charges with the United States Army Criminal Investigation Division accusing his superior officers of covering up war crimes in Vietnam.<sup>4</sup> Herbert alleged that he had witnessed numerous atrocities while serving in Vietnam and that he had duly reported these atrocities to his superiors. According to

<sup>1</sup> 441 U.S. 153 (1979).

<sup>2</sup> *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977), cert. granted, 98 S. Ct. 1483 (1978).

<sup>3</sup> 376 U.S. 254 (1964).

<sup>4</sup> In July 1971 Herbert was interviewed by LIFE MAGAZINE. In September the New York Times carried an article entitled *How a Supersoldier was Fired from his Command*. Herbert also appeared on the Dick Cavett Television Show. 568 F.2d at 981.