

Federal Courts—Implied Rights of Action: *Transamerica Advisers, Inc. v. Lewis*¹—In *J.I. Case Co. v. Borak*,² decided in 1964, the Supreme Court of the United States recognized an implied right of action under section 14(a)³ of the Securities Exchange Act of 1934.⁴ The *Borak* Court, in explaining its holding, emphasized that an implied right of action was necessary to effectuate the congressional purpose behind the statute's enactment.⁵ In *Transamerica v. Lewis*,⁶ however, decided in 1979, it was irrelevant to the Supreme Court whether a private remedy was needed to effectuate the congressional purpose of a statute.⁷ Instead, the *Lewis* Court denied an implied right of action under section 206 of the Investment Advisers Act of 1940,⁸ solely because it could find no legislative intent in the wording or legislative history of the statute to create such a remedy.⁹ Thus, the *Borak* and *Lewis* decisions together indicate that, in a fifteen year span, the Supreme Court underwent a dramatic shift in its attitude towards implied rights of action. This casenote will analyze the Court's drastic change in its position—a change which culminated in the decision of *Transamerica v. Lewis*.

In *Lewis*, Mortgage Trust of America (the Trust) was qualified under the Internal Revenue Code as a real estate investment trust,¹⁰ investing chiefly in construction and development first mortgage loans.¹¹ The employees and officers of the Trust had been associated previously with Transamerica Land Capital, Inc. (Land Capital), from whom the Trust purchased its original portfolio of mortgages.¹² The investment adviser retained by the Trust was Transamerica Mortgage Advisers, Inc. (Mortgage Advisers), whose sole client was and always had been the Trust.¹³ It advised the Trust on various real estate investments and administered the Trust's daily operations.¹⁴ Both Land Capital and Mortgage Advisers were subsidiaries of and controlled by Transamerica Corporation (Transamerica), the sponsor of the Trust.¹⁵

In 1974, Harry Lewis, a shareholder of the Trust, instituted a derivative action on behalf of the Trust and a class action on behalf of the Trust's shareholders in federal district court.¹⁶ Named as defendants were the Trust, several of its trustees, Mortgage Advisers, Land Capital, and Transamerica.¹⁷

¹ 444 U.S. 11 (1979).

² 377 U.S. 426 (1964).

³ 15 U.S.C. § 78n(a) (1976).

⁴ 377 U.S. at 430-31.

⁵ *Id.* at 433.

⁶ 444 U.S. at 11.

⁷ *Id.* at 24.

⁸ 15 U.S.C. § 80b-6 (1976). The Investment Advisers Act is codified at 15 U.S.C. §§ 80b-1 to 80b-21 (1976).

⁹ 444 U.S. at 24.

¹⁰ Mortgage Trust of America was a real estate investment trust within the meaning of §§ 856-858 of the Internal Revenue Code.

¹¹ *Lewis v. Transamerica Corp.*, 575 F.2d 237 (9th Cir. 1978), *rev'd*, 444 U.S. 11 (1979).

¹² *Id.* at 237-38.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 237.

¹⁷ 444 U.S. at 13.

Lewis alleged that under the Investment Advisers Act of 1940 the defendants had been guilty of various frauds and breaches of fiduciary duty in the course of advising or managing the Trust.¹⁸ In the derivative action Lewis sought an injunction against further performance of the advisory contract, rescission of the advisory contract, restitution of the consideration paid by the Trust to Mortgage Advisers, and an accounting of illegal profits.¹⁹ In the class action he sought an award for damages.²⁰ The district court held that section 206 of the Investment Advisers Act, which makes it unlawful for an investment adviser to employ a scheme or device to defraud a client, or to engage in any business which serves as a fraud upon a client,²¹ provides no private right of action.²² The complaint, therefore, was dismissed. The Ninth Circuit Court of Appeals, however, reversed the decision of the district court. It held that the implication of a private right of action for injunctive relief and damages under the Investment Advisers Act in favor of appropriate plaintiffs is neces-

¹⁸ *Id.* at 13-14. Lewis brought three causes of action, each of which was said to arise under the Investment Advisers Act of 1940. The first alleged that the advisory contract between Mortgage Advisers and the Trust was unlawful because both parties to the contract had failed to register in accordance with the Investment Advisers Act, and because the contract had provided for excessive fees to be paid by the Trust. *Id.* at 13. The second alleged that the defendants had breached their fiduciary duty to the Trust by having it purchase securities of inferior quality from Land Capital, which, like Mortgage Advisers, was a subsidiary of Transamerica. *Id.* The third alleged that the defendants had misappropriated profitable investment opportunities for the benefit of other companies affiliated with Transamerica, while such opportunities should have inured to the Trust. *Id.* at 13-14.

¹⁹ *Id.* at 14.

²⁰ *Id.*

²¹ Section 206 of the Investment Advisers Act, 15 U.S.C. § 80b-6 (1976), reads as follows:

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

Id.

²² *Lewis v. Transamerica Corp.*, No. C73-2180 RHS (N.D. Cal., filed Oct. 7, 1974), *rev'd*, 575 F.2d 237 (9th Cir. 1978), *aff'd*, 444 U.S. 11 (1979).

sary to achieve the aim of Congress in enacting the legislation.²³ Finding the plaintiffs here to be "appropriate," the court of appeals vacated the lower court's order of dismissal and remanded the case to the district court for further proceedings.²⁴

The Supreme Court granted certiorari on defendant's appeal.²⁵ In a 5-4 decision, the Supreme Court HELD: A limited private remedy exists under the Investment Advisers Act to void an investment advisers contract, but the Act confers no other private causes of action, legal or equitable.²⁶ Specifically, the Court found that while the private remedy of contract rescission is implied under section 215 of the Act,²⁷ no private right of action for damages is implied under section 206, the Act's general anti-fraud provision.²⁸

In an opinion by Justice Stewart, the Court noted initially that the Investment Advisers Act nowhere provides expressly for a private cause of action.²⁹ Thus the issue before the Court was whether it should imply a private cause of action under the Act in favor of the clients of investment advisers.³⁰

²³ *Lewis v. Transamerica Corp.*, 575 F.2d at 239. Rather than elaborating upon the reasoning for its holding, the court of appeals stated that it adopted the rationale of two previous circuit court decisions, *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978), *vacated and remanded*, 444 U.S. 959 (1979), and *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), both of which had found an implied right of action under the Investment Advisers Act. 575 F.2d at 238. The *Wilson* court had noted that Congress' goal in enacting the Investment Advisers Act was to protect investors from the possibility of overreaching and fraudulent conduct on the part of investment advisers. 566 F.2d at 1243. To satisfy this goal, the *Wilson* court implied a private remedy in favor of investors under section 206 of the Act. *Id.* The *Abrahamson* court reached the same result, reasoning that the implication of a private remedy was necessary because the SEC—the agency charged with enforcement of federal securities laws, such as the Investment Advisers Act—does not have sufficient resources alone to enforce the many provisions of these statutes. 568 F.2d at 874.

²⁴ *Lewis v. Transamerica Corp.*, 575 F.2d at 239.

²⁵ 439 U.S. 952 (1978).

²⁶ 444 U.S. at 24-25.

²⁷ *Id.* at 19. Section 215 of the Investment Advisers Act, 15 U.S.C. § 80b-15 (1976), reads in pertinent part:

Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

Id.

²⁸ 444 U.S. at 19-20.

²⁹ *Id.* at 14. The Court observed that the only provision of the Act authorizing any suits to enforce the obligations or duties created by it is section 209, 15 U.S.C. § 80b-9 (1976), which permits the SEC to bring suit to enjoin violations of the Act. 444 U.S. at 14.

³⁰ 444 U.S. at 13.

The Court indicated that the key to deciding if a private remedy should be implied was whether Congress had intended to create such a remedy.³¹ According to the Court, this determination of congressional intent essentially was a matter of statutory construction.³²

Having stated its approach to implied rights of action in general terms, the *Lewis* Court turned its attention specifically to sections 215 and 206 of the Investment Advisers Act. In considering section 215, the Court discussed its two reasons for determining that this provision showed a congressional intent to create a private cause of action for rescission, for restitution, and for an injunction against continued operation of the contract. First, the Court maintained that section 215, by declaring certain contracts void, necessarily contemplated that the issue of voidness may be litigated somewhere.³³ Second, the Court noted that it had previously implied a private right to rescind a void contract in section 29(b)³⁴ of the Securities Exchange Act of 1934, a provision comparable to section 215.³⁵ The Court thus concluded that this same principle should govern with respect to section 215.³⁶ For these reasons the Court granted an implied remedy under section 215.

In contrast to its holding with respect to section 215, the *Lewis* Court refused to grant an implied remedy under section 206 of the Investment Advisers Act because it found that Congress had not intended to authorize a private right of action under that provision.³⁷ The Court explained this finding first by referring to a canon of statutory construction—that where a statute expressly provides a specific remedy or remedies, a court must be wary of reading others into it.³⁸ This canon is commonly known as the *expressio unius est exclusio alterius* principle.³⁹ Applying this principle to the Investment Ad-

³¹ *Id.* at 15-16.

³² *Id.* at 15.

³³ *Id.* at 18. The Court noted that an implied statutory permission to litigate somewhere the issue of voidness under section 215 could mean merely that section 215 would be raised defensively to prevent enforcement of an investment adviser's contract. *Id.* The *Lewis* Court went on to say, however, that traditional notions of equity jurisprudence, presumably known to Congress, indicated that one who has the power to void a contract may also resort to a court for rescission of the contract and for restitution of any consideration paid. *Id.*

³⁴ 15 U.S.C. § 78cc(b) (1976). Section 29(b) of the 1934 Act provides in pertinent part:

Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder . . . shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract . . .

Id.

³⁵ 444 U.S. at 18-19. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970).

³⁶ 444 U.S. at 19.

³⁷ *Id.* at 19, 20.

³⁸ *Id.* at 19.

³⁹ According to BLACK'S LAW DICTIONARY 521 (5th ed. 1979), this Latin expression has been interpreted as the "expression of one thing is the exclusion of another." After being utilized earlier in *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 470-71 (1959), and *Botany Worsted Mills v. United States*, 278 U.S. 282, 288-89 (1929), the *expressio* maxim was revived in *National Passenger Corp. v. National Ass'n*

visers Act, the Court noted that because Congress had explicitly provided certain criminal and administrative methods for enforcing compliance with section 206 elsewhere in the Act,⁴⁰ it was unlikely that Congress had merely forgotten to add an express private civil remedy within section 206 itself.⁴¹ The Court did observe that the *expressio* maxim could yield to persuasive evidence of a contrary legislative intent. It stated, however, that any additional evidence in this case indicated, if anything, an intent *not* to have the implied remedy.⁴² To illustrate this point, the Court turned its attention to the structure of enforcement provisions in legislative schemes enacted in other securities laws. In each of the securities laws enacted prior to the Investment Advisers Act, and in the Act's companion legislation, the Investment Company Act,⁴³ Congress had expressly authorized private suits for damages in prescribed circumstances.⁴⁴ The Court assumed, therefore, that Congress knew how to create a private damage remedy when it wanted one.⁴⁵ Consequently, according to the Court, the absence of such an express remedy in section 206 strongly suggested that Congress did not intend for one to be implied.⁴⁶

After applying the *expressio* maxim to section 206, the Court further explained its refusal to imply a private remedy under that section by referring to the legislative history of section 214,⁴⁷ the jurisdictional section of the Act,

of R.R. Passengers, 414 U.S. 453, 458 (1974), *rehearing denied*, 415 U.S. 952 (1974) [hereinafter cited as *Amtrak*]. See text and notes at notes 259-61 *infra* for a discussion of this maxim.

⁴⁰ Under § 203, 15 U.S.C. § 80b-3, the Securities Exchange Commission can impose various administrative sanctions on persons who violate provisions of the Act, including § 206. 444 U.S. at 20. Under § 209, 15 U.S.C. § 80b-9 (1976), the Securities Exchange Commission is authorized to bring civil actions in federal courts to enjoin compliance with the Act, including § 206. *Id.* Under § 217, 15 U.S.C. § 80b-17 (1976), willful violations of the Act are criminal offenses punishable by fine, imprisonment, or both. *Id.*

⁴¹ 444 U.S. at 20.

⁴² *Id.*

⁴³ 15 U.S.C. §§ 80a-1 to 80a-52 (1976).

⁴⁴ 444 U.S. at 20. See Securities Act of 1933, §§ 11-12 (codified at 15 U.S.C. §§ 77k-77l (1976)); Securities Exchange Act of 1934, §§ 9(e), 16(b), 18 (codified at 15 U.S.C. §§ 78i(e), 78p(b), 78r (1976)); Public Utility Holding Company Act of 1935, §§ 16(a), 17(b) (codified at 15 U.S.C. §§ 79p(a), 79q(b) (1976)); Trust Indenture Act of 1939, § 323(a) (codified at 15 U.S.C. § 77www(a) (1976)); Investment Company Act of 1940, § 30(f) (codified at 15 U.S.C. § 80a-29(f) (1976)).

⁴⁵ 444 U.S. at 21.

⁴⁶ *Id.*

⁴⁷ Section 214 of the Investment Advisers Act, 15 U.S.C. § 80b-14 (1976), provides in pertinent part:

The district court of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this subchapter or the rules, regulations, or orders thereunder, and, concurrently with State and territorial courts, of all suits in equity to enjoin any violation of this subchapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enjoin any violation of this subchapter or rules, regulations, or orders thereunder, may be brought in any such

which granted jurisdiction only to actions in equity.⁴⁸ The Court noted that early drafts of section 214 had incorporated by reference a provision of the Public Utility Holding Company Act of 1935,⁴⁹ giving federal courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by" the statute (emphasis added).⁵⁰ The Court pointed out, however, that the words "actions at law" were omitted from later versions of the bill.⁵¹ The Court viewed section 214's present lack of reference to "actions at law" as additional evidence that Congress did not intend the Investment Advisers Act to be construed as granting a private right of action for anything beyond the limited equitable relief the Court had recognized under section 215.⁵² Thus the *Lewis* Court's brief consideration of legislative history and its thorough application of the *expressio* maxim caused its refusal to imply a private remedy under section 206.

In determining that a private right of action could not be found under section 206, the majority did not utilize the entire four factor approach for implied rights of action laid down by the Court four years before in *Cort v. Ash*.⁵³ While basing its decision regarding an implied right of action under section 206 solely on a consideration of one of the *Cort* factors—whether there was evidence of a legislative intent to create a private cause of action⁵⁴—the *Lewis* Court rejected the plaintiff's argument that it consider

district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

Id.

⁴⁸ 444 U.S. at 21.

⁴⁹ The Public Utility Holding Company Act is codified at 15 U.S.C. §§ 79 to 79z-6 (1976).

⁵⁰ 444 U.S. at 22 (quoting 15 U.S.C. § 79y (1976)).

⁵¹ *Id.* at 22 n.12. See note 47 *supra*. The plaintiff argued that the omission of any reference in § 214 to "actions at law" was irrelevant because jurisdiction over a case such as this would often exist, both in law as well as in equity, under the general federal question jurisdiction statute, 28 U.S.C. § 1331 (1976). 444 U.S. at 22 n.12. This statute reads in pertinent part: "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States . . ." 28 U.S.C. § 1331(a) (1976). In addition, the plaintiff contended that nowhere was it expressly stated that the omission was intended to preclude private remedies for damages. 444 U.S. at 22 n.12. The plaintiff did concede, however, that the language of § 214 was probably narrowed in view of the absence from the Act of any express provision for a private cause of action for damages. *Id.*

⁵² 444 U.S. at 24.

⁵³ 422 U.S. 66, 78 (1975). The Court in *Cort* had stated the following factors as relevant in determining whether a private remedy is implicit in a statute not expressly providing one: (1) is the plaintiff within the class for whose especial benefit the statute was enacted; (2) is there any indication of explicit or implicit legislative intent to create or deny such a remedy; (3) would such a remedy for the plaintiff be consistent with the underlying purposes of the legislative scheme; (4) is the cause of action one traditionally relegated to state law in an area basically a State concern, so that to infer a cause of action based solely on federal law would be inappropriate. *Id.* For a discussion of *Cort* and the four *Cort* factors, see text and notes at notes 132-66 *infra*.

⁵⁴ 422 U.S. at 78.

two additional *Cort* factors.⁵⁵ One of the *Cort* factors proposed by the plaintiff was whether the implication of a private remedy would be useful in furthering the legislative scheme,⁵⁶ while the other factor was whether the remedy for such a violation was one traditionally relegated to state law.⁵⁷ In addition to ignoring these factors, the Court indicated that another *Cort* factor—whether the plaintiff was in a class especially benefited by the statute⁵⁸—could be answered affirmatively in *Lewis*, but that satisfaction of this factor did not require the implication of a private remedy for the *Lewis* plaintiff.⁵⁹ Rather, the *Lewis* Court viewed its inquiry into section 206 as ended because it had already determined, through the use of the *expressio* maxim and a consideration of legislative history, that Congress had not intended to create a private cause of action under section 206 of the Investment Advisers Act.⁶⁰ Therefore, it was irrelevant to the *Lewis* Court whether the four factor *Cort* analysis was satisfied.⁶¹

Justice White, joined by Justices Brennan, Marshall, and Stevens, dissented from the majority opinion in *Lewis*.⁶² In the dissenters' view, the majority had departed from established principles by holding that private rights of action under the Act are limited to rescissions of investment advisers contracts.⁶³ To the dissent, this departure was clearly demonstrated by the fact that prior decisions had recognized implied private actions for damages under provisions of the securities laws with substantially the same language as that of section 206 of the Investment Advisers Act.⁶⁴

⁵⁵ 444 U.S. at 23. The Court noted that it had rejected the same contentions in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979) [hereinafter cited as *Touche Ross*], where it had been argued unsuccessfully that these two factors alone justified the implication of a private cause of action under § 17a of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a) (1976). 444 U.S. at 23-24 (citing 442 U.S. at 575-76). For a discussion of *Touche Ross*, see text and notes at notes 201-25 *infra*.

⁵⁶ 422 U.S. at 78.

⁵⁷ 444 U.S. at 23. See 422 U.S. at 78.

⁵⁸ 422 U.S. at 78.

⁵⁹ 444 U.S. at 23-24.

⁶⁰ *Id.* at 24.

⁶¹ In a one-sentence concurring opinion, Justice Powell joined the Court's opinion, which he considered compatible with his dissent in *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979). 444 U.S. at 25 (Powell, J., concurring). In his *Cannon* dissent, Justice Powell had criticized the majority's implication of a private remedy under § 901a of Title IX of the Education Amendment Acts of 1972, 20 U.S.C. § 1681(a) (1976), because it was contrary to the separation of powers doctrine. 441 U.S. at 730 (Powell, J., dissenting).

⁶² 444 U.S. at 25 (White, J., dissenting).

⁶³ *Id.* The dissent noted that the majority's holding rejected the conclusion of every circuit court of appeals that had considered the question. *Id.* See *Lewis v. Transamerica Corp.*, 575 F.2d 237 (9th Cir. 1978); *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1977); *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977).

⁶⁴ 444 U.S. at 25 (White, J., dissenting). The dissent observed that the provisions of section 206 are substantially similar to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and rule 10b-5, 17 C.F.R. § 240.10b-5 (1979), both of which have been held to create private causes of action for which damages may be

In addition to criticizing the majority's decision for its lack of adherence to precedent, the dissent analyzed section 206 under the four factor approach of *Cort v. Ash*.⁶⁵ Although it agreed with the majority that the implication of a private right of action is limited solely to whether Congress intended to create the private remedy, the dissent impliedly rejected the majority's view that the issue would be decided by only one *Cort* factor—whether there was evidence of such a legislative intent in either the statutory wording or the legislative history. The dissent also rejected the majority's use of the *expressio* maxim in determining legislative intent.⁶⁶ To the dissent, all four *Cort* factors were to be the criteria through which the congressional intent to create a private remedy could be discerned.⁶⁷ In applying the *Cort* analysis, the *Lewis* dissent found that a private remedy should have been implied under section 206 because that statutory provision satisfied each *Cort* factor. In applying the three *Cort* factors that the *Lewis* majority had viewed as unnecessary in making its determination, the dissent found that (1) the *Lewis* plaintiff was within the class especially benefited by the statute;⁶⁸ (2) an implied private cause of action would be compatible with effectuating the statutory purpose of the Investment Advisers Act;⁶⁹ and (3) the regulation of investment advisers' activities was not a traditional state concern.⁷⁰ In considering the *Cort* factor applied by the majority, the dissent, unlike the majority, maintained that it was satisfied because there existed evidence of a legislative intent to create a

recovered. 444 U.S. at 25-26 n.1 (White, J., dissenting). See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *Superintendent of Ins. of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971).

⁶⁵ 444 U.S. at 27 (White, J., dissenting). See 422 U.S. at 78.

⁶⁶ 444 U.S. at 29-30 n.6 (White, J., dissenting).

⁶⁷ *Id.* at 27 (White, J., dissenting). For a listing of the four *Cort* factors, see note 53 *supra*.

⁶⁸ 444 U.S. at 27 (White, J., dissenting). The dissent stated that § 206 was enacted for the especial benefit of clients of investment advisers, since they would be the victims of the fraudulent practices prohibited by that provision. *Id.* Applying this to the situation at hand, the dissent observed that the plaintiff was representing the client corporation, Mortgage Trust of America, and the client corporation's shareholders. *Id.* Both the client corporation and ultimately its shareholders allegedly had been injured by violations of § 206, committed by the investment adviser, Transamerica Mortgage Advisers, Inc. *Id.* Consequently, the dissent, like the majority, found the plaintiff to be within the class especially benefited by § 206, and thus answered the first *Cort* question in the affirmative. *Id.* at 27-28.

⁶⁹ *Id.* at 34 (White, J., dissenting). The dissent noted that the purpose of the Act was the prevention of fraudulent practices by investment advisers. *Id.* It then reasoned that implication of a private right of action was needed to effectuate this purpose because under the Act the SEC could seek only prospective equitable relief to prevent future violations, and because the SEC, with the growth of the investment advisory industry, could no longer handle the entire scope of the enforcement program. *Id.* at 34-35 (White, J., dissenting). Thus, the dissent found that the *Cort* factor pertaining to statutory purpose, when applied to the situation at hand, could be answered in the affirmative. *Id.* at 35.

⁷⁰ *Id.* at 36. The dissent's rationale for so concluding was that only six states had legislation regulating the investment advisers industry, and state statutes subsequently passed had been patterned after the federal legislation. *Id.* at 35-36. See Note, *Private Causes of Action Under Section 206 of the Investment Advisers Act*, 74 MICH. L. REV. 308, 324 (1975).

private remedy under section 206.⁷¹ According to the dissent, the fact that section 215 implied a private remedy was evidence of such a legislative intent.⁷² The dissent saw section 215 not as a substantive provision but merely as one non-exclusive consequence of a violation of section 206.⁷³ Therefore, the dissent stated that the existence of one type of private action to enforce a consequence of section 206 demonstrated that Congress contemplated the use of implied private actions to redress other violations of section 206 as well.⁷⁴ In addition, the dissent reasoned that the majority had confused the question of whether a cause of action exists with the question of the nature of available relief, because it had limited private litigants injured under section 206 to actions for contract rescission under section 215.⁷⁵ The dissent pointed out that according to the Court's prior decisions, once it has been recognized that a statute creates an implied cause of action, courts have had wide discretion in fashioning both legal and equitable relief.⁷⁶

Having determined that section 215 provided evidence of a legislative intent to create a private cause of action under section 206, the dissent next treated the majority's contention that the exclusion of "actions at law" from the jurisdictional provision of section 214 indicates a congressional intent not to have a private right of action under section 206.⁷⁷ Acknowledging that other federal securities laws do have provisions expressly granting jurisdiction over "actions at law," the dissent maintained that the omission of such a provision in section 214 provided no persuasive evidence of a legislative intent to deny a private right of action, because section 214 is a jurisdictional rather than a substantive provision.⁷⁸ The Court itself previously had determined that the source of implied rights of action must be found, not in the jurisdictional provisions, but in the substantive provisions which they seek to enforce.⁷⁹ Thus, based upon its consideration of sections 214 and 215, the dissent found that the *Cort* factor pertaining to evidence of legislative intent was satisfied with respect to section 206.⁸⁰ Because it also determined that the three remaining *Cort* factors were satisfied when applied to section 206, the *Lewis* dissent expressed its view that an implied private cause of action for damages under section 206 should be recognized.⁸¹

⁷¹ 444 U.S. at 28 & n.5 (White, J., dissenting).

⁷² *Id.* at 29 (White, J., dissenting).

⁷³ *Id.*

⁷⁴ *Id.* According to the dissent, it also indicated that Congress did not intend the powers given to the SEC to be the exclusive means for enforcement of the Act. *Id.*

⁷⁵ *Id.* at 30. As the dissent mentioned, the Court in *Davis v. Passman*, 442 U.S. 228, 239 (1978), had recognized that the question whether a litigant has a right of action is distinct from and prior to the question of what relief, if any, he may be able to receive. *Id.* 444 U.S. at 30.

⁷⁶ *Id.* See, e.g., *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies.").

⁷⁷ 444 U.S. at 31 (White, J., dissenting).

⁷⁸ *Id.* at 32-33 (White, J., dissenting).

⁷⁹ *Id.* at 32 (White, J., dissenting) (citing *Touche Ross*, 442 U.S. at 577).

⁸⁰ 444 U.S. at 28 & n.5 (White, J., dissenting).

⁸¹ *Id.* at 36 (White, J., dissenting).

The significance of *Transamerica v. Lewis* is twofold. First, the *Lewis* decision moves closer to a complete rejection of the four factor *Cort* test than any prior Supreme Court decision. According to the *Lewis* Court, the determination of whether to imply a private cause of action should be based solely on a restrictive application of the second *Cort* factor, which demands evidence of a legislative intent to create or deny such an action.⁸² If this aspect of the *Cort* test is *not* met, it is irrelevant that the plaintiff satisfies the three remaining portions of the *Cort* standard. This results in a test for implied causes of action which is more stringent than any applied by the Court thus far. The *Lewis* decision is also significant for its heavy reliance on the *expressio* maxim in determining legislative intent. This maxim, the use of which increases the strictness of the *Lewis* test, has been applied sparingly in the past.⁸³ The emphasis, however, placed upon it in *Lewis* as well as in two other recent decisions⁸⁴ appears to indicate a judicial trend towards greater utilization of this principle when deciding implied rights of action cases. Use of this maxim in future decisions will greatly limit, if not end, the implication of private rights of action.

This casenote will first trace the history of implied rights of action from the liberal test of *J.I. Case Co. v. Borak*⁸⁵ to the more demanding standards set by *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*⁸⁶ and *Cort v. Ash*.⁸⁷ It will then consider the Court's dual approach towards implied rights of action in the 1978 term—a liberal application of the *Cort* test in the civil rights context and the use of an increasingly restrictive test in the regulatory area. Subsequently, an analysis of the 1979 decision of *Transamerica v. Lewis* will indicate that, at least in the realm of securities regulation, the Court intends to maintain its strict attitude towards implied remedies. This article will demonstrate that *Lewis* offers the most rigorous test of any because it focuses solely on evidence of legislative intent and because it utilizes the *expressio unius est exclusio alterius* principle in its search for this evidence. It will be submitted that the *Lewis* test, which will deny the implication of most private causes of action, should not be utilized, since there is substantial justification for implying private rights of action notwithstanding the absence of facial legislative intent. In place of the *Lewis* test, a more liberal two part test will be proposed.

I. THE HISTORY OF IMPLIED RIGHTS OF ACTION

Although the implication doctrine originated in England in 1854,⁸⁸ it was not applied in the United States until 1916 in the Supreme Court decision of

⁸² 444 U.S. at 24.

⁸³ See note 39 *supra* for a listing of certain prior cases using the *expressio* maxim.

⁸⁴ *Amtrak*, 414 U.S. at 458; *Touche Ross*, 442 U.S. at 571-74.

⁸⁵ 377 U.S. 426 (1964).

⁸⁶ 414 U.S. 453 (1974).

⁸⁷ 422 U.S. 66 (1975).

⁸⁸ *Couch v. Steel*, 118 Eng. Rep. 1193 (Q.B. 1854). In *Couch*, the plaintiff, who had become ill while serving on one of the defendant's ships, alleged that he was unable to recover from his sickness while at sea because of an insufficient supply of

Texas & Pacific Railway v. Rigsby.⁸⁹ There, the Court implied a private cause of action for an injured railroad employee under the Federal Safety Appliance Act.⁹⁰ In so doing, the *Rigsby* Court observed that "[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"⁹¹ In the years following *Rigsby*, however, the creation of an implied private cause of action was relatively unusual.⁹² Then in 1964, when *J.I. Case Co. v. Borak*⁹³ was decided, the restrictive approach of the Supreme Court towards implied rights of action was liberalized.⁹⁴ It is therefore instructive to look at the *Borak* test and the policy reason behind its formulation.

A. *J.I. Case v. Borak* and the *Borak* Test

In *J.I. Case Co. v. Borak*,⁹⁵ a shareholder of Case Company brought an action for rescission of a consummated merger between Case Company and the American Tractor Corporation, and for damages for himself and other shareholders.⁹⁶ The stockholder alleged a violation of section 14(a) of the Securities Exchange Act of 1934,⁹⁷ because, according to the stockholder, the

medicines on board the vessel. *Id.* at 1194. The statute under which the suit was brought indicated that an adequate supply of medicines must be provided on each ship, *id.*, and that a violation of this law would incur a penalty. *Id.* at 1196. Although the statute offered no express private remedy for damages, the court implied a private remedy in favor of the plaintiff. *Id.* at 1198.

⁸⁹ 241 U.S. 33 (1916).

⁹⁰ In *Rigsby*, the railroad employee was injured because of his employer's failure to comply with the regulatory provisions of the Federal Safety Appliance Act, 45 U.S.C. §§ 1-16 (1976). This Act expressly provided only penal sanctions. See 45 U.S.C. § 6 (1976). While *Rigsby* is still cited in support of the implication of private remedies, later cases have rejected the result of *Rigsby* under the Federal Safety Appliance Act. See, e.g., *Crane v. Cedar Rapids & I.C. Ry.*, 395 U.S. 164 (1969); *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205 (1934).

⁹¹ 241 U.S. at 39.

⁹² Comment, *Implying Private Causes of Action from Federal Statutes: Amtrak and Cort Apply the Brakes*, 17 B.C. IND. & COM. L. REV. 53, 54 (1975) [hereinafter cited as *Implying Private Causes of Action*].

⁹³ 377 U.S. 426 (1964).

⁹⁴ See *Implying Private Causes of Action*, *supra* note 92, at 55.

⁹⁵ 377 U.S. 426 (1964).

⁹⁶ *Id.* at 427.

⁹⁷ Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1964) provided:

It shall be unlawful for any person, by the 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 as necessary or appropriate in the public interest or for the protection of investors.

Id. The stockholder also alleged a violation of Rule 14(a)-9, Fed. Reg. 11434 (1952), which read:

No solicitation subject to §§ 240.14a-1, to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting, or other com-

merger was effectuated through circulation of a false and misleading proxy statement by those proposing the merger.⁹⁸ Section 14(a), however, made no specific reference to a private right of action; instead, it expressly provided only prospective enforcement by the SEC.⁹⁹

The *Borak* Court held that a private party has an implied right of action for a violation of section 14(a).¹⁰⁰ The Court's principal reason for so ruling was that granting such an implied right was essential to effectuate the purpose of the statute.¹⁰¹ The Court noted that under section 14(a) it was unlawful for any person to solicit proxies in contravention of regulations prescribed by the SEC as necessary in the public interest or for the protection of investors.¹⁰² Consequently, the *Borak* Court saw investors as the prime intended beneficiaries of the Act and their protection as one of its main purposes.¹⁰³ The Court observed that because the SEC had to inspect over 2,000 proxy statements annually, it admittedly had to accept most representations contained in proxy material at their face value.¹⁰⁴ This meant that violations of section 14(a) often would not be apparent to the Commission in its cursory examination of the proxies and therefore would not be corrected. Consequently, the Court saw implied private actions as a needed supplement to action by the Commission if the purpose of section 14(a) was to be carried out.¹⁰⁵ To a much lesser extent, the *Borak* Court also relied on the fact that state law might not provide the remedial relief necessary. The Court noted that even if the law of the state did attach responsibility to the use of misleading proxy statements, the victim might still face insurmountable hurdles in a state court, such as security for expenses statutes.¹⁰⁶

Following this opinion, federal court decisions¹⁰⁷ extracted from *J.I. Case Co. v. Borak* a three part test which was never stated explicitly in the *Borak* opinion.¹⁰⁸ According to this *Borak*-derived test, a private right of action may

munication written or oral containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Id.

⁹⁸ 377 U.S. at 427.

⁹⁹ *Id.* at 431.

¹⁰⁰ *Id.* at 433. The complete *Borak* holding was that a private party has an implied right of action for a violation of section 14(a) of the Securities Exchange Act of 1934 and rule 14(a)-9.

¹⁰¹ *Id.*

¹⁰² *Id.* at 431.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 432.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 434-35.

¹⁰⁷ See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970); *Fagot v. Flintkote Co.*, 305 F. Supp. 407 (E.D. La. 1969).

¹⁰⁸ Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1396 (1975) [hereinafter cited as *Some Implications for Implication*].

be implied when (1) the plaintiff falls 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 prevent; and (3) the express penalty or remedy is insufficient to effectuate the congressional purpose in passing the statute.¹⁰⁹ Applying this test, federal courts for a number of years liberally construed private rights of action in many federal statutes.¹¹⁰ In 1974, however, the era of the *Borak* approach abruptly ended when the Supreme Court changed its attitude on implied rights of action, and adopted a more stringent approach in *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*¹¹¹ and *Cort v. Ash*.¹¹²

B. Amtrak and Cort

Amtrak represents the Court's first modern usage of the *expressio* maxim in denying an implied right of action. In that case, the National Association of Railroad Passengers filed suit under the Rail Passengers Service Act of 1970 (Amtrak Act)¹¹³ to enjoin the announced discontinuance of certain passenger trains operated by Central of Georgia Railway Company.¹¹⁴ Section 307(a) of this Act,¹¹⁵ however, confers jurisdiction on federal district courts to grant equitable relief *only* on petition of the Attorney General or, if the case involves a labor agreement, on petition of an affected railroad employee.¹¹⁶ The question, therefore, was whether an implied right of action lay in favor of railway passengers to prevent actions by Amtrak that were allegedly violative of its enabling statute.¹¹⁷

The Court held that section 307(a) provides the exclusive remedies for violations of the Amtrak Act, and that no additional private cause of action

¹⁰⁹ *Id.*

¹¹⁰ *Id.* See note 107 *supra*.

¹¹¹ 414 U.S. 453 (1974).

¹¹² 422 U.S. 66 (1975).

¹¹³ 45 U.S.C. §§ 501-645 (1976).

¹¹⁴ 414 U.S. at 454. The gravamen of the plaintiff's complaint was that such discontinuances were prohibited by the Amtrak Act. *Id.* at 454-55. Named as defendants were Central; its parent, Southern Railway Company; and the National Railroad Passenger Corporation (Amtrak). *Id.* at 454.

¹¹⁵ Section 307(a), 45 U.S.C. § 547(a) (1976), provides:

If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

Id.

¹¹⁶ 414 U.S. at 456-57.

¹¹⁷ *Id.* at 456.

can be inferred from the Act.¹¹⁸ In reaching its decision, the *Amtrak* Court reasoned that the implication of a private right of action would have been permissible only if such a finding were consistent with the legislative intent and would effectuate the purposes of the Amtrak Act.¹¹⁹ In considering legislative intent the Court utilized the principle that when legislation expressly provides a certain remedy or remedies, a court should not expand the coverage of the statute to subsume other remedies.¹²⁰ This rule of statutory construction, which later was to play a significant role in *Transamerica v. Lewis*,¹²¹ is an application of the *expressio* principle.¹²² In keeping with this principle, the *Amtrak* Court noted that since section 307(a) expressly creates a private cause of action limited to a case involving a labor agreement, the implication of an additional private right of action would not be permissible.¹²³ The Court did concede that this rule of construction would yield to clear contrary evidence of legislative intent, but the Court found no such evidence in *Amtrak*.¹²⁴

After considering the legislative intent, the *Amtrak* Court focused on the purpose of the Amtrak Act. The Court found that the Act was intended to provide an efficient means by which Amtrak could eliminate unprofitable routes without submitting to the time-consuming proceedings of state regulatory bodies or the Interstate Commerce Commission, as had been required before the Act's passage.¹²⁵ If, however, a private right of action were implied here, the Act's goal of efficiency would be destroyed, because it would indicate that the future withdrawal of uneconomic train routes would be slowed by suits in the federal courts.¹²⁶

The two factor analysis of the *Amtrak* Court, which included a determination of both statutory purpose and legislative intent, appears to be more restrictive than the test utilized in *Borak*. The *Amtrak* Court, like the Court in *Borak*, considered whether such an implied right was needed to effectuate the purpose of the statute.¹²⁷ Unlike the *Borak* Court, however, the *Amtrak* Court also sought to determine whether the implication of a private action was consistent with legislative intent, and in so doing, utilized the *expressio* principle. It is unlikely that a court will grant an implied remedy after application of the *expressio* principle because according to this maxim, a court can deny a litigant any implied remedies if even one express remedy is stated within the statute at issue. Consequently, although the *Amtrak* Court did not indicate whether satisfying only the "statutory purpose" factor would be sufficient for implying

¹¹⁸ *Id.* at 464-65.

¹¹⁹ *Id.* at 457-58.

¹²⁰ *Id.* at 458.

¹²¹ See text and notes at notes 38-46 *supra*.

¹²² 414 U.S. at 458.

¹²³ *Id.* at 460.

¹²⁴ *Id.* at 458.

¹²⁵ *Id.* at 463.

¹²⁶ *Id.* at 463-64. Thus, unlike in *Borak*, the *Amtrak* Court found that the implication of a private right of action would hinder rather than further the legislative scheme. *Id.*

¹²⁷ *Id.* at 463.

a private cause of action, this omission should not obscure the fact that by resurrecting the *expressio* maxim, the *Amtrak* Court rejected the liberal *Borak* approach.¹²⁸ The use of the *expressio* principle indicated that the *Amtrak* Court had moved a lengthy distance from *Borak*, where the focus had been on the broad policy considerations underlying the statute,¹²⁹ and where the Court had been very willing to find an implied right of action in a federal statute.¹³⁰ As a circuit court judge writing after *Amtrak* stated, the *Amtrak* decision was a definite signal to the lower courts to limit their use of the implication doctrine.¹³¹

One year after the *Amtrak* decision, the Court delivered its landmark decision of *Cort v. Ash*,¹³² where the Court reemphasized its more restrictive approach towards implied rights of action by eliciting and narrowly applying a four factor test. In *Cort*, a shareholder of Bethlehem Steel Corporation sought damages from that corporation because of an alleged violation of 18 U.S.C. § 610.¹³³ This criminal statute, which expressly provided only for a criminal penalty, prohibited corporations from making an expenditure or contribution in connection with any election in which votes were to be cast for presidential and vice-presidential electors.¹³⁴ The shareholder plaintiff contended that

¹²⁸ Note, *Implication of Private Actions From Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 381 (1976) [hereinafter cited as *From Borak to Ash*].

¹²⁹ See text and notes at notes 100-05 *supra*. See also Note, *The Implication of a Private Cause of Action Under Title III of the Consumer Credit Protection Act*, 47 S. CAL. L. REV. 383, 410 (1974) [hereinafter cited as *Consumer Credit Protection Act*].

¹³⁰ *From Borak to Ash*, *supra* note 128, at 380.

¹³¹ *Ash v. Cort*, 496 F.2d 416, 426-27 (3d Cir. 1974) (Aldisert, J., dissenting). This court of appeals decision was later reversed in *Cort v. Ash*, 422 U.S. 66 (1975), where the Court adopted the view of Judge Aldisert.

¹³² 422 U.S. 66 (1975).

¹³³ *Id.* at 71. When this suit was filed, 18 U.S.C. § 610 (1970) provided in part as follows:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

Id.

¹³⁴ *Id.*

during the 1972 presidential election, the corporate directors of Bethlehem had violated section 610 by authorizing political advertisements to be paid from Bethlehem's general corporate funds for the presidential election campaign.¹³⁵

In *Cort*, the Court held that a private cause of action by a shareholder to secure derivative damages would not be implied under section 610.¹³⁶ Rather, it ruled that relief was available, if at all, under state law.¹³⁷ In deciding not to imply a federal cause of action under section 610, the Court considered a four factor approach, which was the approach later utilized by the *Lewis* dissent,¹³⁸ and which had been drawn from the tests of previous implied rights cases.¹³⁹ The first factor of the *Cort* analysis, where it had to be determined if the plaintiff was one of the class for whose especial benefit the statute had been enacted, was essentially the standard used in *Texas & Pacific Railway v. Rigsby*.¹⁴⁰ In applying this first factor in *Cort*, the Court indicated that one must be a *primary* beneficiary in order to fall within the class of intended plaintiffs.¹⁴¹ The Court then noted that the protection of ordinary shareholders was at best a secondary concern of the statute, since its primary goal was to eliminate the apparent hold on political parties which business interests sometimes obtained because of generous campaign contributions.¹⁴² Consequently, the Court held that the shareholder, not being a primary beneficiary of the legislation at issue, had not satisfied this initial section of the *Cort* analysis.¹⁴³

The Court then moved to the second factor, which was drawn from one of the two factors considered in *Amtrak*, and which was concerned with whether there was any indication of explicit or implied legislative intent either to create such a remedy or to deny one.¹⁴⁴ The application of this second factor by the Court in the *Cort* case differed from the manner in which the *Amtrak* Court had applied it. In *Amtrak* the Court had relied almost solely on the *expressio* maxim, which negates all remedies not expressly stated in the

¹³⁵ 422 U.S. at 70-71.

¹³⁶ *Id.* at 85.

¹³⁷ *Id.* The state law to which the Court referred was that of Delaware. *Id.* at 71.

¹³⁸ See text and notes at notes 65-81 *supra*.

¹³⁹ 422 U.S. at 78.

¹⁴⁰ 241 U.S. 33, 41-42 (1916). See text and notes at notes 89-91 *supra* for a brief discussion of *Rigsby*.

¹⁴¹ 422 U.S. at 78.

¹⁴² *Id.* at 82. The Court viewed § 610 as being primarily concerned with corporations as a source of aggregated wealth and thus of possibly corrupting influence, and not directly concerned with the internal relations between the corporations and their shareholders. *Id.* In contrast, the Court noted that in those situations where it had inferred a federal private cause of action, there had generally been a clearly articulated federal right in the plaintiff, *see, e.g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or a pervasive legislative scheme ruling the relationship between the plaintiff class and the defendant class in a particular respect, *see, e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). 422 U.S. at 82.

¹⁴³ *Id.* at 81-82.

¹⁴⁴ *Id.* at 78.

statute, in order to decide if an implied right of action was consistent with the legislative intent.¹⁴⁵ In *Cort*, by contrast, the Court did not apply this rule of statutory construction.¹⁴⁶ In its discussion of the second factor, the Court noted that if a plaintiff was a primary beneficiary of the statute—that is, if he clearly fell within the class to whom the federal law had granted certain rights—he need not show a legislative intent to create a cause of action, although an explicit legislative intent to deny such a cause of action would be controlling.¹⁴⁷ In *Cort*, however, the plaintiff had not been found to be a primary beneficiary under the statute.¹⁴⁸ Therefore, in such a situation, the lack of any suggestion in the legislative history that section 610 may give rise to a suit for damages, or to any civil cause of action, reinforced the Court's conclusion that the legislative expectation, if any, was that such an offense would be entrusted to state rather than federal law.¹⁴⁹

Turning to the third factor of the test, the Court in *Cort* asked whether an implied right of action in favor of the plaintiff would be consistent with the underlying purposes of the legislative scheme.¹⁵⁰ This aspect of the test bears a great similarity to the *Borak* standard, permitting "such remedies as are necessary to make effective the congressional purpose."¹⁵¹ Unlike *Borak*, however, the Court in *Cort* required that the implied action be consistent with the *primary* purpose, rather than any purpose, of the statute.¹⁵² The Court viewed the primary purpose of the statute as the destruction of the influence over elections which corporations exercised through financial contributions.¹⁵³ The Court decided that the recovery of the derivative damages sought here would not cure the corporate influence over elections.¹⁵⁴ Instead, such a remedy would permit corporate directors to "borrow" corporate funds for a time, and the compelled "repayment" at a later date might well not deter the violation.¹⁵⁵ Consequently, the implied right of action sought by the shareholder in *Cort* would not aid the primary statutory purpose and thus did not meet the third part of the test.¹⁵⁶

The fourth and final prong of the *Cort* test considered whether the cause of action was one traditionally relegated to state law in an area which was fundamentally the concern of the states.¹⁵⁷ In applying this portion of the test, which had also been utilized in *Borak*,¹⁵⁸ the Court in *Cort* found that it was entirely appropriate to relegate the shareholder plaintiff here to whatever

¹⁴⁵ 414 U.S. at 458.

¹⁴⁶ 422 U.S. at 82 n.14.

¹⁴⁷ 422 U.S. at 82.

¹⁴⁸ *Id.* at 81.

¹⁴⁹ *Id.* at 82-84.

¹⁵⁰ *Id.* at 78.

¹⁵¹ See *Borak*, 377 U.S. at 433.

¹⁵² 422 U.S. at 84.

¹⁵³ *Id.* at 80.

¹⁵⁴ *Id.* at 84.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 78.

¹⁵⁸ 377 U.S. at 434-35.

remedy state law had created.¹⁵⁹ Viewing his claim as a violation of the director's fiduciary duty to the corporation, the Court reasoned that corporations are creatures of state law and that shareholders invest in the corporation with the understanding that state law will govern the internal affairs of the corporation.¹⁶⁰ After its analysis of the fourth factor, the Court in *Cort* ruled that since the plaintiff had not satisfied any of the four parts of the test, a private right of action for damages against corporate directors would not be implied under section 610.¹⁶¹

The *Cort* test was capable of either a liberal or a strict interpretation, because of the general terms in which it was phrased and because of the Court's failure to assign relative weights to each factor of the test. Yet throughout the opinion, the Court demonstrated that it favored a very strict construction of each portion of this test for implied rights of action. For example, it interpreted "beneficiary" in the first part of the test to refer only to a primary beneficiary.¹⁶² In addition, it construed "purpose" in the third part as indicating only a primary purpose and not a secondary concern, in contrast to the *Borak* approach.¹⁶³ The strict interpretation of the Supreme Court in *Cort* is also evidenced by the fact that the court of appeals, applying much the same test, found that the plaintiff was a member of the class for whose especial benefit the statute was enacted, and that it would be appropriate, in light of the statute's purposes, to afford the plaintiff the remedy sought.¹⁶⁴ The Court's strict interpretation of a demanding four part test indicates that the intent of *Cort* was like that of *Amtrak*, even though the former did not create a presumption against implication by use of the *expressio* principle. The aim of both cases was to slow the rapid proliferation of implied rights of action.¹⁶⁵ This goal of *Cort* and *Amtrak*, however, remained unfulfilled when in the four years following *Cort*, at least twenty court of appeals decisions implied private rights of action from federal statutes.¹⁶⁶

¹⁵⁹ 422 U.S. at 84.

¹⁶⁰ *Id.* The Court distinguished the *Cort* situation from that of *Borak*. *Id.* at 85. The Court noted that in *Borak*, the whole purpose of the statute at issue would have been defeated if no federal right of action had been implied and if state law had provided no remedy. *Id.* In contrast, in enacting § 610, Congress was not concerned with regulating corporations but with lessening their impact on federal presidential elections. *Id.* The absence of a derivative cause of action for damages thus would not hinder the primary statutory goal. *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 80.

¹⁶³ *Id.* at 84.

¹⁶⁴ See *Ash v. Cort*, 496 F.2d 416, 422-24 (3d Cir. 1974), *rev'd*, 422 U.S. 66 (1975); *Implying Private Causes of Action*, *supra* note 92, at 64.

¹⁶⁵ *Implying Private Causes of Action*, *supra* note 92, at 64.

¹⁶⁶ Some of these lower court decisions are: *Local Div. No. 714, Amalgamated Transit Union v. Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir. 1978) (§ 13c of Urban Mass Transportation Act of 1964); *Bratton v. Shiffrin*, 585 F.2d 223 (7th Cir. 1978), *vacated and remanded*, 443 U.S. 903 (1979) (§ 1007a of Federal Aviation Act of 1958); *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978), *vacated and remanded*, 444 U.S. 959 (1979) (§ 206 of Investment Advisers Act of 1940); *Association of Data Processing Service Organizations v. Federal Home Loan Bank Bd.*, 568 F.2d 478 (6th Cir. 1977) (§ 11e of Federal Home Loan Bank Act); *Abrahamson v.*

C. *The 1978 Term: Cannon and Touche Ross*

In its 1978 Term, the United States Supreme Court handed down two implied rights decisions in which it reached opposite results—*Cannon v. University of Chicago*¹⁶⁷ and *Touche Ross & Co. v. Redington*.¹⁶⁸ Through these cases, the Court seemed to demonstrate that instead of using a universal *Amtrak*—or *Cort*—based approach to implied rights of action, it was setting rules for implied remedies in the area of civil rights legislation different from those in the field of securities regulation. Thus, while the Court followed a liberal interpretation of the *Cort* analysis in creating an implied remedy in *Cannon*, it decreased its emphasis of the *Cort* analysis and relied heavily on the *expressio* maxim of *Amtrak* in denying an implied right of action in *Touche Ross*. This section will concentrate on the *Cannon* and *Touche Ross* decisions before this article further considers the *Lewis* case, where it became obvious that the approach of *Cort* and *Cannon* would not be utilized in the securities area.

In *Cannon*, the plaintiff was a female who had been denied admission to the medical schools of two private universities.¹⁶⁹ In a civil rights suit brought under section 901(a)¹⁷⁰ of Title IX of the Education Amendment Acts of 1972,¹⁷¹ she charged the schools with discriminating against her on the basis of sex.¹⁷² Title IX, however, which prohibits sex discrimination by universities receiving federal financial assistance, does not expressly authorize any private right of action.¹⁷³ Yet the *Cannon* Court held that the plaintiff had the right

Fleschner, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (§ 206 of Investment Advisers Act of 1940).

¹⁶⁷ 441 U.S. 677 (1979).

¹⁶⁸ 442 U.S. 560 (1979).

¹⁶⁹ 441 U.S. at 680. The two private universities were the University of Chicago and Northwestern University. *Id.* at 680 n.1.

¹⁷⁰ 20 U.S.C. § 1681(a) (1976). Section 901(a), in relevant part, provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." *Id.*

¹⁷¹ 20 U.S.C. §§ 1681-1686 (1976).

¹⁷² 441 U.S. at 680. Plaintiff's complaints allege that the plaintiff was qualified to attend both of the defendant medical schools based on objective (i.e., test scores and grade point average) and subjective criteria. *Id.* at 680-81 n.2. Both schools admitted some persons to the classes to which she had applied despite the fact that such persons' objective qualifications were less impressive than those of the plaintiff. *Id.* It was also noted that both schools have policies against accepting applicants more than 30 years old, at least if they do not have advanced degrees, and petitioner was 39 years old when she applied. *Id.* The plaintiff alleged that these policies prevented her from being asked to interview at the medical schools, so that she did not have the opportunity to convince the schools that her personal qualifications warranted her admission instead of the admission of persons whose objective qualifications were better than hers. *Id.* Because the incidence of interrupted higher education is greater among women than men, the plaintiff further claimed that the age and advanced degree criteria operate to exclude women from being considered, even though such criteria are not valid predictors of success in medical schools or medical practice. *Id.* Thus, according to the plaintiff, the existence of the criteria evidenced a violation of the medical school's duty under Title IX to avoid discrimination on the basis of sex. *Id.*

¹⁷³ 441 U.S. at 683. Rather, Title IX establishes a procedure for the termination of federal financial support by the federal government for educational institutions which violate section 901. *Id.* Because the defendant universities were receiving federal

to pursue, under Title IX, a private cause of action against the universities.¹⁷⁴

In reaching its decision, the Court applied each part of the *Cort* test to the facts in *Cannon*.¹⁷⁵ It found, in considering the first part of the *Cort* test, that Title IX explicitly conferred a benefit on persons discriminated against by educational institutions on the basis of sex, and that the female plaintiff was clearly a member of that especially benefited class.¹⁷⁶ Analyzing the second factor without any reference to the *expressio* maxim, the *Cannon* Court noted that since it was clear that federal law had granted a class of persons, including the plaintiff, certain rights, it need not find evidence of a congressional intent to create a private cause of action, although evidence of an explicit intent to deny such a cause of action would be controlling.¹⁷⁷ Nevertheless, the Court spent much time in demonstrating, through legislative history, that Title IX did show a legislative intent to create such a remedy.¹⁷⁸ It mentioned that Title IX had been patterned after Title VI of the Civil Rights Act of 1964,¹⁷⁹ which prohibits racial discrimination in federally funded programs.¹⁸⁰ When Title IX was enacted, Title VI had already been interpreted as creating a private remedy,¹⁸¹ and the *Cannon* Court found through legislative history that the drafters of Title IX had assumed that it would be interpreted and applied just as Title VI had been.¹⁸² Hence, the *Cannon* Court had no doubt that Congress intended to create a private remedy in Title IX comparable to that in Title VI.¹⁸³

After finding that an implied right of action here would satisfy the second *Cort* factor, the *Cannon* Court focused on the third factor, which was concerned with whether an implied private remedy would frustrate the underlying purpose of the legislative scheme.¹⁸⁴ Here the Court stated that one

funds, they were subject to the strictures of Title IX. 441 U.S. at 680. See note 170 *supra* for the relevant portion of Title IX, 20 U.S.C. § 1681 (1976).

¹⁷⁴ 441 U.S. at 688-89.

¹⁷⁵ *Id.* at 689.

¹⁷⁶ *Id.* at 693-94.

¹⁷⁷ *Id.* at 694.

¹⁷⁸ *Id.* at 702-03.

¹⁷⁹ 42 U.S.C. §§ 2000d-2000d-6 (1976).

¹⁸⁰ 441 U.S. at 696. Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

¹⁸¹ 441 U.S. at 696. Among the decisions which construed Title VI as creating a private remedy are: *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967); *Blackshear Residents Organization v. Housing Auth.*, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972); *Hawthorne v. Kenbridge Recreation Ass'n*, 341 F. Supp. 1382, 1383-84 (E.D. Va. 1972).

¹⁸² 441 U.S. at 696-98. According to Senator Bayh, "the same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]." *Id.* at 696 n.19 (quoting 117 CONG. REC. 30408 (1971)).

¹⁸³ 441 U.S. at 703.

¹⁸⁴ *Id.*

of the goals of Title IX was to provide individual citizens with effective protection against the discriminatory practices of universities receiving federal funding.¹⁸⁵ The Court reasoned that this goal was best met through the award of relief to the private litigant who has been injured by the discrimination.¹⁸⁶ The Court then turned to the fourth *Cort* inquiry, which questioned whether implying a federal remedy was inappropriate because the subject matter involved an area of concern to the states. It determined that like the other three factors, the fourth *Cort* factor was satisfied by the *Cannon* fact situation.¹⁸⁷ In justifying this finding the Court noted that since the Civil War, the federal government and the federal courts had been the primary means of protecting citizens against invidious discrimination.¹⁸⁸ Moreover, the Court observed that it was the expenditure of federal funds that justified this particular statutory prohibition.¹⁸⁹ Consequently, the Court held that without doubt, this aspect of the *Cort* analysis supported the implication of a private federal remedy.¹⁹⁰ In summary, the Court concluded that there was no need to weigh the four *Cort* factors because each supported the same result, namely, that a private cause of action should be granted victims of discrimination under Title IX.¹⁹¹

The *Cannon* result would not have been reached if the Court had used the *expressio* maxim it had applied in *Amtrak* and was later to apply in *Touche Ross & Co. v. Redington*¹⁹² and *Transamerica v. Lewis*.¹⁹³ According to the *expressio* principle, the legislature is considered not to have intended a remedy in the provision at issue if other parts of the statute expressly provide other remedies. In *Cannon*, it was noted that Title IX does expressly offer a remedy in section 902,¹⁹⁴ which establishes a procedure for termination of federal financial support by the relevant federal department or agency to institutions violating the statute.¹⁹⁵ Yet, in contrast to the mandate of the *expressio* principle, the *Cannon* Court still implied a private cause of action under Title IX.¹⁹⁶ The Court's failure to use the *expressio* maxim and the lenient approach which resulted can first be explained by a consideration of the great similarity existing between Title IX and Title VI.¹⁹⁷ The two statutes use identical language to describe the benefited class, except for the use of the word "sex" in Title

¹⁸⁵ *Id.* at 704. The *Cannon* Court observed that the other goal of Title IX was to avoid the use of federal resources to support discriminatory practices. *Id.* According to the Court, this goal generally was served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices. *Id.* See 20 U.S.C. § 1682 (1976).

¹⁸⁶ 441 U.S. at 705-06.

¹⁸⁷ *Id.* at 708-09.

¹⁸⁸ *Id.* at 708.

¹⁸⁹ *Id.* at 708-09.

¹⁹⁰ *Id.* at 709.

¹⁹¹ *Id.*

¹⁹² 442 U.S. 560 (1979).

¹⁹³ 444 U.S. 11 (1979).

¹⁹⁴ 20 U.S.C. § 1682 (1976).

¹⁹⁵ 441 U.S. at 683-84.

¹⁹⁶ *Id.* at 717.

¹⁹⁷ See note 180 *supra* for the text of § 601 of Title VI.

IX in place of the words "race, color, or national origin" in Title VI,¹⁹⁸ and the legislative history indicates that both were intended to be interpreted and applied in the same way.¹⁹⁹ Therefore, the *Cannon* Court assumed that since Title VI had already been construed as creating a private right of action, so too should Title IX.²⁰⁰

Although not explicitly stated, another explanation for the *Cannon* Court's more liberal attitude and failure to apply the *expressio* maxim is that in suits involving civil rights legislation, the Court prefers not to engage in the more stringent tests which it later used in *Touche Ross* and *Lewis* because of the importance of the right involved. Therefore, in retrospect it appears that because of both the unique legislative history and the nature of the claim, *Cannon* is an exception to the general trend towards an extremely restrictive approach to implied rights of action.

The *Cannon* decision was soon followed by *Touche Ross & Co. v. Redington*,²⁰¹ in which the Court, retreating from the less stringent *Cannon* approach and its application of the four factor *Cort* analysis, revealed a highly restrictive attitude towards implied rights of action. In *Touche Ross*, the Securities Investor Protection Corporation (SIPC) and the trustee of Weis, a securities brokerage firm, filed suit under section 17(a)²⁰² of the Securities Exchange Act of 1934 against *Touche Ross*, an accounting firm.²⁰³ The plaintiffs sought to impose liability on *Touche Ross* because of its allegedly improper audit and certification of the 1972 Weis financial statements filed

¹⁹⁸ 441 U.S. at 694-95.

¹⁹⁹ *Id.* at 703. See note 182 *supra*.

²⁰⁰ 441 U.S. at 703. The *Cannon* Court stated:

It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Id. at 696-98.

²⁰¹ 442 U.S. 560 (1979).

²⁰² Section 17(a) of the 1934 Act (codified at 15 U.S.C. 78q(a) (1970)), read as follows:

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, correspondence, memoranda, papers, books, and other records, and make such 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 any time 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.

Id.

²⁰³ 442 U.S. at 565.

with the SEC.²⁰⁴ Section 17(a), which did not explicitly provide for any private right of action, required broker-dealers and others to keep such records and file such reports as the SEC prescribed.²⁰⁵

The *Touche Ross* Court held that section 17(a) of the Securities Exchange Act of 1934 did not create an implied cause of action in favor of the customers of Weis, here represented by plaintiffs SIPC and the trustee.²⁰⁶ In explaining its decision, the *Touche Ross* Court emphasized, as would the *Lewis* Court, that its task was limited *solely* to determining whether Congress intended to create the private right of action here asserted.²⁰⁷ In attempting to make this determination, the *Touche Ross* Court first noted that section 17(a)

²⁰⁴ *Id.* at 565-66. In *Touche Ross*, the defendant accounting firm, Touche Ross, had been retained by a securities brokerage firm, Weis Securities Inc., a broker-dealer registered with the SEC. *Id.* at 563. From 1969 to 1973, Touche Ross conducted audits of Weis' financial condition required by section 17(a) of the Securities Exchange Act and rules promulgated thereunder. *Id.* at 563-64. See 17 C.F.R. § 240.17a-5 (1979). In 1973, because of Weis' precarious financial condition and because of possible violations of the 1934 Act by Weis and its officers, the SEC was granted an injunction barring Weis and five of its officers from continuing to conduct business in violation of the 1934 Act. *Id.* at 564. Simultaneously, the U.S. District Court for the Southern District of New York granted the Securities Investor Protection Corporation (SIPC) a decree adjudging that Weis' customers were in need of the protection afforded by the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa-78lll (1976). *Id.* The general protection offered by the Act included SIPC's compensating, up to certain limits, customers of brokerage firms who incurred losses from broker insolvencies. *Id.* at 564-65 n.5. In *Touche Ross*, because Weis' cash and securities during the liquidation appeared insufficient to make whole its customers, SIPC advanced the plaintiff Redington, the court-appointed trustee, \$14 million to satisfy Weis' customer and credit claims. *Id.* at 565. Yet there still remained several million dollars of unsatisfied customer claims. *Id.* Therefore SIPC and the trustee Redington filed a suit against Touche Ross under section 17(a) of the 1934 Act. *Id.* The trustee sought \$51 million on behalf of Weis and the customers of Weis, while SIPC claimed \$14 million either as subrogee of Weis' customers or in its own right. *Id.* at 566.

²⁰⁵ *Id.* at 569. At the time Touche Ross performed the auditing services for Weis, rule 17a-5, 17C.F.R. §§ 240.17a-5(a), (h) (1972), required Weis to file an annual report of its financial condition, which included a certificate by an independent public accountant stating "clearly the opinion of the accountant with respect to the financial statement covered by the certificate and the accounting principles and practices reflected therein." 442 U.S. at 563-64 n.3 (quoting 17 C.F.R. § 240.17a-5(a), (h) (1972)). In addition, the rule required the accountant's certificate to contain a

reasonably comprehensive statement as to the scope of the audit made, including a statement as to whether the accountant received the procedures followed for safeguarding the securities of customers, . . . whether the audit was made in accordance with generally accepted auditing standards applicable in the circumstances [and] . . . whether the audit made omitted any procedure deemed necessary by the accountant under the circumstances of the particular case.

442 U.S. at 563-64 n.3 (quoting 17 C.F.R. § 240.17a-5(g)(2) (1972)). Weis also was required to attach an affirmation or oath to the report that the financial statements were true and correct. 442 U.S. at 563-64 n.3 (citing 17 C.F.R. § 240.17a-5(b)(2) (1972)). Since 1972, the Securities Exchange Commission has amended rule 17a-5. 442 U.S. at 563-64 n.3. See 17 C.F.R. § 240-17a-5 (1979).

²⁰⁶ 442 U.S. at 576.

²⁰⁷ *Id.* at 568.

by its terms neither conferred rights on private parties nor proscribed any conduct as unlawful.²⁰⁸ This indicated that section 17(a) did not have private parties, such as the plaintiffs here, as its primary beneficiaries. As the Court observed, section 17(a) was enacted to provide regulatory authorities with the necessary information to enforce various statutes.²⁰⁹ Subsequently, the *Touche Ross* Court pointed out that the legislative history of the 1934 Act was totally silent on whether a private right should be available under section 17(a) in the circumstances of this case.²¹⁰ Then, in what appeared to be a revival of the *expressio* maxim utilized in *Amtrak*, the Court focused most of its attention on the fact that provisions of the 1934 Act other than section 17(a) explicitly authorized certain private causes of action not available to the *Touche Ross* plaintiffs.²¹¹ The Court made particular reference to section 18(a), which created an express right against persons such as accountants who caused materially misleading statements to be made in reports filed with the Commission.²¹² As noted by the Court, the cause of action stated in section 18(a) was

²⁰⁸ *Id.* at 569.

²⁰⁹ *Id.* The Court noted that reports filed in accordance with § 17a, along with inspections and other information, enable the Commission and the Exchange to ensure compliance with the "net capital rule," which is the chief regulatory tool by which the Exchange and the Commission monitor the financial wellbeing of brokerage firms and protect customers from the risks involved in leaving their securities and cash with broker-dealers. *Id.* at 570 & n.10. According to the Court, the information within the § 17(a) reports is intended to provide the Commission, the Exchange, and other authorities with enough warning to allow them to take appropriate action to protect investors before the financial collapse of the broker-dealer involved. *Id.* But the *Touche* Court maintained that § 17(a) does not purport to confer private damage rights or any remedy in the event that the regulatory authorities are not successful in achieving their objectives and the broker becomes insolvent before corrective measures can be taken. *Id.* at 570.

²¹⁰ *Id.* at 571.

²¹¹ *Id.* at 571-74. Provisions of the 1934 Act providing private remedies include: § 16b, 15 U.S.C. § 78p(b) (1976); § 18a, 15 U.S.C. § 78r(a) (1976); and § 9c, 15 U.S.C. § 78i(e) (1976).

²¹² 442 U.S. at 572-74. Section 18(a), as set forth in 15 U.S.C. § 78r(a) (1976), provides:

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.

Id.

limited to persons who, in reliance on an accountant's statements, bought or sold a security whose price was affected by the statements.²¹³ Since SIPC and the Trustee Redington did not contend that Weis' customers bought or sold securities in reliance on the section 17(a) reports at issue, they could not sue Touche Ross under section 18(a).²¹⁴ The Court stated that because sections 17(a) and 18(a) were created contemporaneously, it was extremely reluctant to imply a cause of action under section 17(a) which would be much broader than the one expressly provided by Congress in section 18(a).²¹⁵ Apparently, to the *Touche Ross* Court, such an implied remedy under section 17(a) in favor of the plaintiffs would have been contrary to legislative intent.

After discussing the relationship between sections 17(a) and 18(a), the Court turned its attention to the plaintiffs' contention that the third and fourth *Cort* factors, pertaining to the effectuation of the statutory purpose and the relegation of the matter to state law, be considered.²¹⁶ The *Touche Ross* Court concluded that once the question whether Congress intended to create a private right of action had been answered in the negative, as here, such factors had no relevance to the implication inquiry.²¹⁷

The *Touche Ross* opinion seemed to indicate that, in general, a private right of action will *not* be implied in a securities case (1) where the plaintiff is not the primary beneficiary under the statute, and (2) where an application of the *expressio* principle indicates that Congress did not intend to create the private right of action asserted. The *Touche Ross* approach was a repudiation of the *Borak* analysis because it failed to consider whether an implied right of action would further the statutory purpose. In addition, the *Touche Ross* test was an indication of a movement of the Court away from the four factor *Cort* test. In *Cort*, each prong of the four part test for implied rights of action was applied to the facts.²¹⁸ In *Touche Ross*, the focus was only on the first two factors, which considered the benefited class and evidence of legislative intent, and the Court found the second factor to be the determinative one in deciding whether to imply a private right of action.²¹⁹

In departing from the *Borak* approach and the four factor *Cort* test, the *Touche Ross* Court significantly adopted a much more restrictive attitude towards implied rights of action than *Cannon* or other prior cases. This attitude is indicated first by the *Touche Ross* Court's great dependence on the *expressio* maxim, which creates a presumption against implication by requiring that the remedies expressly provided in a statute be the exclusive ones.²²⁰ This principle had been utilized previously in *Amtrak* but was not applied in *Borak* or *Cort*. Although the *Touche Ross* Court never expressly referred to this maxim, the Court's reliance on it was obvious from its refusal to imply a private

²¹³ 442 U.S. at 574.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 575.

²¹⁷ *Id.* at 576.

²¹⁸ 422 U.S. at 78-85.

²¹⁹ 442 U.S. at 576.

²²⁰ See *From Borak to Ash*, *supra* note 128, at 381; *Implying Private Causes of Action*, *supra* note 92, at 68.

remedy under section 17(a) because one had been explicitly provided under section 18(a) of the Act.²²¹

The restrictive nature of the *Touche Ross* test, in contrast to that of *Cort*, is also indicated by the Court's refusal to apply two *Cort* factors which were much easier to satisfy than the factor relating to evidence of legislative intent, which the *Touche Ross* Court had seen as key to its decision. These two omitted factors include the third part of the *Cort* test, which focused on statutory purpose and which was the basis of the *Borak* test, and the fourth part, which considered the appropriateness of relegating the matter to state law. In *Touche Ross*, these two factors would have been satisfied if applied, even though the factor considering evidence of legislative intent was not satisfied. As the *Touche Ross* dissent noted in discussing the third *Cort* factor, a cause of action would have been consistent with the underlying purposes of the 1934 Act because the SEC, lacking sufficient resources to audit all broker's documents, had to rely on certification by accountants.²²² Thus, implying a private cause of action would have both facilitated the SEC's enforcement efforts and provided an incentive for accountants to perform their certification functions correctly.²²³ The fourth *Cort* factor, regarding the appropriateness of relegating the matter to state law, would also have been satisfied in *Touche Ross* because, as the *Touche Ross* dissent stated, the enforcement of the 1934 Act's reporting provisions was not a matter of traditional state concern, but instead related solely to the effectiveness of federal statutory requirements.²²⁴ Furthermore, "since the problems caused by broker insolvency are national in scope, so too must be the standards governing financial disclosure."²²⁵ Yet the *Touche Ross* Court still chose to disregard the third and fourth *Cort* factors. Therefore, the *Touche Ross* Court moved a great distance from the *Borak* approach and the *Cort* analysis and much closer to an overly stringent standard for implied rights of action, under which the *expressio* maxim was relied upon heavily and the third and fourth factors of the *Cort* test were not even considered.

After the conflicting decisions of *Cannon* and *Touche Ross*, the future attitude of the Supreme Court in implying rights of action could not be predicted with certainty. *Cannon*, in a liberal application of the *Cort* test, had implied a private cause of action in the civil rights area, while *Touche Ross*, through an analysis more restrictive than that of *Cort*, refused to create an implied remedy in the securities field. Although it seemed likely after *Touche Ross* that the *Cannon* approach would not be extended to the securities area, confirmation of this opinion came only with the *Lewis* decision. The overly strict approach of *Lewis* left no doubt that the Court intended to proceed along the lines of *Touche Ross* rather than *Cannon* in determining whether to imply a private right of action in the field of securities regulation.

²²¹ 442 U.S. at 574.

²²² *Id.* at 582 (Marshall, J., dissenting). See also *J.I. Case Co. v. Borak*, 377 U.S. at 432; *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969).

²²³ 442 U.S. at 582 (Marshall, J., dissenting).

²²⁴ *Id.* at 582-83 (Marshall, J., dissenting).

²²⁵ *Id.* at 583 (Marshall, J., dissenting) (citing *Touche Ross & Co. v. Redington*, 592 F.2d 617, 623 (2d Cir. 1978)).

II. THE LEWIS TEST AND THE FUTURE OF IMPLIED RIGHTS OF ACTION

A. What Lewis Adds to Prior Law

When the Court in *Transamerica v. Lewis*²²⁶ intensified the narrow approach of *Touche Ross* by holding that a private right of action could not be implied under section 206 of the Investment Advisers Act,²²⁷ it based its decision solely on a restrictive interpretation of the second *Cort* factor, namely, that the language, structure, and legislative history of the statute served as evidence of a legislative intent not to create the private right of action asserted.²²⁸ The Court indicated that once such evidence was established, it did not matter if the plaintiff fulfilled the first *Cort* factor by being a member of the class especially benefited by the statute.²²⁹ In addition, the *Lewis* Court viewed the third *Cort* factor, which had been emphasized in *Borak*, as insignificant in arriving at its holding, and failed even to mention the fourth factor of the *Cort* analysis.²³⁰ Thus, *Lewis* represents the first time the Supreme Court has reached an implied right of action decision by using only one of the *Cort* factors.

Touche Ross is similar to *Lewis* in that it focused chiefly on the second *Cort* factor and omitted any consideration of the third and fourth factors. In *Touche Ross*, however, unlike in *Lewis*, the first *Cort* inquiry could not be answered in the affirmative. The *Touche Ross* Court specifically noted that section 17(a) of the 1934 Act,²³¹ the statutory provision at issue, granted no private rights to any identifiable class and proscribed no conduct as unlawful.²³² Consequently, the initial section of the *Cort* analysis, asking whether the plaintiff was a member of the class benefited by the statute, had to be answered in the negative, since section 17(a) created no class of which the plaintiff could be a member.²³³ Thus the decision in *Touche Ross* not to imply a private remedy actually was founded on a consideration not only of the second *Cort* factor but also of the first. In contrast, the *Lewis* Court conceded that section 206 was intended to benefit the clients of investment advisers.²³⁴ Therefore, the initial factor of *Cort* was passed because the plaintiff in *Lewis*, since he represented such a client, Mortgage Trust of America, did fall within the primary class to be benefited by the statute. Yet the *Lewis* Court still refused to imply a private right of action, even though the first *Cort* factor was satisfied, because it found no evidence of positive legislative intent to create a private cause of action. Thus the *Lewis* Court went even further than *Touche Ross* in its disregard of the *Cort* test and *Borak* principles, and made it even more difficult for a court to utilize the implication doctrine.

²²⁶ 444 U.S. 11 (1979).

²²⁷ 15 U.S.C. § 80b-6 (1976).

²²⁸ 444 U.S. at 20-22.

²²⁹ *Id.* at 23.

²³⁰ *Id.* at 24.

²³¹ 15 U.S.C. § 78q(a) (1970).

²³² 442 U.S. at 569.

²³³ *Id.* at 570-71.

²³⁴ 444 U.S. at 24.

In addition to setting forth an approach to implied rights of action which deemphasized *Cort* and *Borak* by focusing only on legislative intent, the *Lewis* decision is also significant for its use of the *expressio* principle to an even greater degree than the *Touche Ross* Court. Paraphrasing the *expressio* maxim, the *Lewis* Court noted that where a statute explicitly provides a particular remedy or remedies, the court must be chary of reading others into it.²³⁵ The Court then proceeded to apply this principle in such a manner as to reduce substantially the likelihood of finding a legislative intent to create a private cause of action. The *Touche Ross* Court had looked only to other sections of the 1934 Act, such as sections 9(e), 16(b), and 18(a), to find express remedies.²³⁶ The *Lewis* Court initially did the same by considering sections 203, 209, and 217 of the Investment Advisers Act, which together provided both judicial and administrative means for enforcing compliance with section 206.²³⁷ The *Lewis* Court noted that in view of these express provisions for enforcing section 206, it was unlikely that Congress had forgotten to mention an intended private action.²³⁸ In contrast to the *Touche Ross* approach, however, the *Lewis* Court continued this aspect of its analysis by looking beyond the Investment Advisers Act. It considered provisions of the securities laws preceding the Act as well as a provision of the Investment Company Act, enacted as companion legislation to the Investment Advisers Act.²³⁹ Finding that each of these statutes expressly authorized certain limited private suits for damages, the Court concluded that the absence of such provisions for damages in section 206 further suggested that Congress was unwilling to impose any potential monetary liability on a private suitor.²⁴⁰ Such a conclusion suggests that even if there are no express remedies in the statute in question, the Court will find them in related statutes and then apply the *expressio* principle.

Consequently, the contribution of the *Lewis* decision to the law is that it provides an even more restrictive approach than *Touche Ross* by focusing solely on evidence of legislative intent in implying private remedies. In addition, it increases the Court's reliance on the *expressio* maxim, already seen in *Touche Ross*. Thus *Lewis* confirms that the more liberal *Cort*-based analysis of *Canon* will not be extended to the securities field. In the area of securities regulation, *Lewis* appears to complete what *Touche Ross* did not quite finish—a total reversal of the Court's attitude since the era of the less stringent standards of *Borak* and *Cort*.

²³⁵ *Id.* at 19.

²³⁶ 442 U.S. at 571-74.

²³⁷ 444 U.S. at 20.

²³⁸ *Id.*

²³⁹ *Id.* at 20-21. Among the statutory provisions in which Congress expressly authorized private suits for damages under prescribed circumstances are § 11 of the Securities Exchange Act of 1933, 15 U.S.C. § 77k (1976); § 18 of the Securities Exchange Act of 1934, 15 U.S.C. § 78r (1976); § 30(f) of the Investment Company Act, 15 U.S.C. § 180a-29f (1976).

²⁴⁰ 444 U.S. at 21.

B. A Justification of Implied Rights of Action

The overly restrictive approach of the *Lewis* Court towards implied rights of action is unpersuasive when one considers that the implication of remedies from federal statutes is not only a permissible, but also a necessary, function of the judiciary.²⁴¹ Implication can be justified as a permissible judicial task first because in implying causes of action the courts are not usurping legislative power by *creating* new laws; rather, they are merely providing assistance in *enforcing* the standards of conduct previously defined in the statute by Congress.²⁴² For example, the standard set by Congress in section 14(a) of the Securities Exchange Act was that proxies could be sent only if they were in accordance with the rules of the Securities Exchange Commission.²⁴³ By holding that a private party could bring suit for a violation of section 14(a) the Court in *Borak* was not providing a new or altered standard, for after *Borak*, adherence to the SEC rules with respect to proxies still was required. Instead, the *Borak* Court was aiding Congress by ensuring the effectiveness of the standard which Congress itself had already enacted—Section 14(a). Thus, contrary to the arguments of implication opponents,²⁴⁴ implied rights of action do not appear to constitute legislation by the courts.

Two factors lend support to the view that judicial implication does not usurp legislative powers. The first of these factors is that the Court, especially in *Cort* and the cases following *Cort*, actually demonstrated great deference to legislative intent²⁴⁵ in deciding whether to imply private remedies. For example, in *Cort*, one of the four parts of the Court's proposed test was devoted solely to determining whether there was any evidence of legislative intent either to deny or to create the cause of action there sought. Moreover, in the years after *Cort*, this factor pertaining to evidence of legislative intent assumed increasing importance until in *Lewis* it was the sole consideration in the

²⁴¹ In keeping with this idea, one commentator noted that "effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress." Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957).

²⁴² From *Borak* to *Ash*, *supra* note 128, at 374; see generally Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291-92 (1963).

²⁴³ See 15 U.S.C. § 78n(a) (1976), the text of which can be found at note 97 *supra*.

²⁴⁴ Among the anti-implication arguments is that of Chief Justice Burger, who in his dissenting opinion in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411-12 (1971), stated:

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.

Id.

²⁴⁵ See *Implying Private Causes of Action*, *supra* note 92, at 67.

Court's decision not to imply a private remedy. Because the Court could find no evidence in the language or legislative history of section 206 that the legislature had intended to create a private cause of action for the clients of investment advisers, it refused to imply one.²⁴⁶ A second factor supporting the belief that the judiciary is not infringing upon legislative ground by implying private remedies is that, as stated by the Ninth Circuit, Congress initially has the opportunity to prevent judicial implication in an enforcement scheme which it wants to be exclusive by denying any private actions in the language of the original statute.²⁴⁷ Where Congress offers such a pronouncement regarding remedies, then it seems obvious a court would not consider implication. Where Congress, however, does not offer such clear statements of its intent, it would seem that Congress expects the judiciary to assume the function of implying the remedies necessary to enforce the statute.²⁴⁸

Implication can be justified as a permissible judicial function not only because it does not intrude on the legislative sphere but also because the courts have jurisdiction to entertain such suits under 28 U.S.C. § 1331(a), which allows the district courts to have original jurisdiction over a matter which "arises under the Constitution, laws, or treaties of the United States."²⁴⁹ As the Supreme Court in *Bell v. Hood*²⁵⁰ noted:

²⁴⁶ 444 U.S. at 24.

²⁴⁷ *Stewart v. Travelers Corp.*, 503 F.2d 108, 112 (9th Cir. 1974). In keeping with this view, it can be argued that under the system of checks and balances Congress should feel free to revise what the judiciary has done if the former decides the latter has acted erroneously. *Consumer Credit Protection Act*, *supra* note 129, at 414. An illustration of this process can be found by analyzing the history of sections 216 (c) and 217 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217 (1952):

Before Congress added subdivision (c) to § 16 and the proviso to § 17 in 1949, the Second Circuit had held . . . that a District Court, acting under its unrestricted general equity powers, had jurisdiction, in a suit brought by the Secretary under § 17 of the Act as it then stood, to order not only an injunction against violation of the provisions . . . of the Act, and reinstatement of employees wrongfully discharged, but also an award of reparations for wages lost by employees because of their wrongful discharge. Thereafter . . . the Second Circuit held in *McComb v. Frank Scerbo & Sons* [77 F.2d 137, 140 (2d Cir. 1949)] . . . that a District Court, proceeding under its unrestricted general equity powers, had jurisdiction, in an injunctive action brought by the Secretary under § 17 as it then stood, to award reparations to employees for unpaid minimum wages and overtime compensation to which their past services entitled them.

Evidently dissatisfied with those decisions, Congress . . . added subsection (c) to § 16 and the proviso to § 17 of the Act. . . . The Conference Report . . . said, respecting the proviso, that: "The provision . . . will have the effect of reversing such decisions as *McComb v. Scerbo* . . ."

Consumer Credit Protection Act, *supra* note 129, at 415 (quoting *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 300-01 (1970) (Whittaker, J., dissenting)).

²⁴⁸ Justice Rehnquist, in the concurring opinion of *Cannon v. University of Chicago*, 441 U.S. at 718, stated that, although it is better for Congress to specify when it intends a private cause of action, cases such as *Borak* and numerous cases from other federal courts had given Congress "good reason to think that the federal judiciary would undertake this task," at least during the time when several titles of the Civil Rights Act were enacted.

²⁴⁹ 444 U.S. at 32-33 (White, J., dissenting).

²⁵⁰ 327 U.S. 678 (1946).

[W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions [where the claim is either immaterial or insubstantial and frivolous] . . . must entertain the suit. . . . The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.²⁵¹

Thus, jurisdiction is no impediment to viewing implication as a permissible judicial function.

While the implication of private rights of action can be justified as a permissible judicial function, there also exists strong support for viewing implication as a necessary judicial function. For example, a consideration of the restriction under which Congress operates in providing statutory remedies highlights the need for judicial implication. In passing legislation, Congress must often decide upon remedial and penal schemes without any previous opportunity to measure their practical effectiveness.²⁵² What may appear to be a complete and efficient system of enforcement at the time of enactment may in fact do little to curtail the practices that the statute was designed to prevent.²⁵³ Therefore, it should not be presumed that Congress desires exclusivity of remedy unless it expressly says so. Rather, the statutory remedies enacted by the legislature should be viewed as nonexclusive because specific violations for which Congress did not expressly provide may occur. To effectuate the statutory goals, these statutory remedies should be supplemented, when needed, by the judiciary. The judicial branch is well suited to such a task because, unlike the legislature, it is able to observe a statute in operation and to decide the actual effectiveness of its enforcement mechanism.²⁵⁴

The need for viewing implication as a judicial task is apparent even where a statute permits an administrative agency to bring suit. Administrative agencies are admittedly understaffed, and therefore the statutory goals may not be met unless the courts offer assistance by implying private rights of action. For example, the *Borak* Court observed that the SEC's lack of personnel made an independent examination of the facts set out in all proxy material received by them an impossibility.²⁵⁵ Consequently, violations due to the presence of misleading statements in the material may never have been punished without judicial implication. The lack of administrative personnel was also noted in the dissenting opinion in *Touche Ross*. There, Justice Marshall observed that implying a private right of action under section 17(a) of the 1934 Act would facilitate the SEC's enforcement efforts, because the SEC lacked the resources to audit all the documents that brokers had filed.²⁵⁶

²⁵¹ Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 288 (1963) (quoting *Bell v. Hood*, 327 U.S. at 681-82).

²⁵² *Some Implications for Implication*, *supra* note 108, at 1393.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 377 U.S. at 432.

²⁵⁶ 442 U.S. at 582 (Marshall, J., dissenting).

Similarly, the *Lewis* dissent noted that although 5,385 investment advisers were registered with the SEC in 1977, the SEC was able to conduct only 459 inspections of investment advisers that year.²⁵⁷ Thus the Commission rightly maintained that private litigation was a necessary supplement to SEC enforcement activity.²⁵⁸ Finally, the implication of private rights of action should be considered among the duties of the courts even where a statute provides for exclusive administrative enforcement. Frequently administrative agencies—such as the SEC—can offer only prospective, not retrospective, relief. Such a remedy standing alone is contrary to the notion of redress for wrongs done, which underlies our common law system of justice.

In summary, the implication of private rights of action, since it involves enforcement rather than creation of norms, should be viewed as an appropriate function of the judiciary. The need for such a view becomes apparent after noting the restrictions imposed upon Congress as it attempts to formulate statutory remedies. Because implication is a function of the judiciary, a favorable judicial attitude towards the implication doctrine is justified, and consequently the rigid *Lewis* test, which restricts the implication of private rights to the point where virtually none will be implied, should be replaced.

C. A Proposed Test for Implied Rights of Action

In place of the test utilized by the *Lewis* Court, it is proposed that a two part test be employed by the courts to determine whether a cause of action should be inferred under a particular statute. This two pronged analysis will balance the need for more frequent judicial implication with the necessity of preventing a sudden flood of litigation. Thus, while allowing the courts to imply private remedies where appropriate, the proposed test will not burden the judiciary with an overflow of litigants whose injuries bear, at best, only a tangential relation to the statute under which they seek an implied right of action.

The first part of the proposed test asks whether the implication of such a remedy for the plaintiff is consistent with the goals of the legislative scheme. In responding to this inquiry, it should be determined (a) if the plaintiff is within the class which the statute is intended to benefit, and (b) if the plaintiff has suffered the kind of injury against which the statute was designed to protect. If both of these are answered affirmatively, the first part of the proposed test has been satisfied. It should be noted that this initial prong is similar to both the first and third *Cort* factors, which concern benefited class and statutory purpose, respectively. Because these two *Cort* factors are overlapping, it is more practical and concise to consider the benefited class and statutory aim together. The initial portion of this suggested analysis is, however, less difficult to satisfy than either the first or third *Cort* factors because, unlike *Cort*, it does not require the plaintiff either to be a *primary* beneficiary of the statute or to have suffered the type of injury against which the statute was *primarily* intended to protect. Rather, the plaintiff will meet this section of the pro-

²⁵⁷ 444 U.S. at 35 n.12.

²⁵⁸ *Id.* at 35.

posed test if a reasonable interpretation of the statute indicates that he is an intended beneficiary of the legislation and that his injury was one against which the legislative scheme was designed to protect.

The second and final portion of the suggested test seeks to determine whether, within the legislative history and statutory scheme, there is any indication of a legislative intent to deny such an action. If any such indication is found, an implied remedy is not to be granted. In applying this prong of the test it is *not* necessary to find an intent to create a private right of action. Consequently, unless there is strong evidence of congressional intent to deny a private remedy, the second prong of this test will be satisfied. Furthermore, under this section of the test, the *expressio* maxim, so prominent in *Amtrak*, *Touche Ross*, and *Lewis*, should not be applied in attempting to demonstrate a congressional intent to deny a private right of action. The rationale for proscribing the use of the *expressio* maxim is that this principle is founded on an unreliable premise. The maxim presumes that all remedies not expressly provided in the statute were considered and rejected by the legislative draftsmen before enacting the legislation.²⁵⁹ Although this premise represents one possible interpretation of the inclusion of certain remedies and the exclusion of others, there are at least two additional plausible explanations. For instance, the inclusion of remedies in one section of a statute can be construed as a restriction on the implication of other remedies but *only* within that specific section of the statute. Under this construction, the full array of remedies available under common law can still be implied under other sections of the statute.²⁶⁰ In addition, a more likely interpretation of the legislature's intent in providing only certain statutory remedies is that Congress, without benefit of hindsight, did not anticipate that other remedies would be necessary to ensure complete protection for those injured by violations of the statute.²⁶¹ Under this interpretation, the legislature would have included other remedies within the statute, had it foreseen the need. Thus, because the *expressio* maxim is founded on an interpretation which is most likely inaccurate, it is unfair to apply the principle in an implication decision. This is especially true because

²⁵⁹ This was the view expressed by the court in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973) *cert. denied*, 415 U.S. 951 (1974), with respect to the *expressio* principle: "[t]his maxim is increasingly considered unreliable . . . for it stands on the faculty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen." *Id.* at 676 (citations omitted). This view echoed that of *Durnin v. Allentown Fed. Sav. & Loan Ass'n*, 218 F. Supp. 716 (E.D. Pa. 1963), where the court stated:

The doctrine *expressio unius est exclusio alterius* is at best an unreliable basis for ascertaining intention. Its premise is that the draftsman has made a comprehensive review of all possible related provisions, from which the inference is to be drawn that his silence indicates a discriminating judgment of rejection. Such a conclusion usually is unrealistic, for it assumes too much foresight in the draftsman.

Id. at 719.

²⁶⁰ See *Consumer Credit Protection Act*, *supra* note 129, at 407. This reasoning was applied in *Baird v. Franklin*, 141 F.2d 238, 245 (2d Cir. 1944) (implied private right of action granted under 15 U.S.C. § 78aa (1970)).

²⁶¹ See *Some Implications for Implication*, *supra* note 108, at 1417.

an application of this principle, with its exclusion of all remedies not expressly provided, practically ensures the denial of the implied cause of action sought. Since use of the *expressio* maxim is proscribed, this part of the proposed test is more favorable towards implication than the second *Cort* factor, which, although it did not utilize the *expressio* principle, did not proscribe its use.

In summary, the two pronged analysis suggested herein, with its emphasis on intended rather than primary statutory goals and its elimination of the *expressio* maxim, encourages implication of private remedies more than recent Supreme Court decisions. Nevertheless, its guidelines still prevent an indiscriminate use of implication, for a court can imply a private right of action under the proposed test only if it finds that both factors have been satisfied.

If this test had been applied in *Transamerica v. Lewis* the Court would have held that a private cause of action could be implied from section 206 of the Investment Advisers Act, since both prongs of the test would have been met. Under the initial prong of the test, the first query, seeking to determine the plaintiff's membership in the benefited class, would be satisfied because both the language and legislative history of section 206 of the Investment Advisers Act, according to the *Lewis* Court, was intended to benefit the clients of investment advisers, and the *Lewis* plaintiff represented a member of that class of clients.²⁶² The second query under the initial portion of the test, searching to discover whether the plaintiff's injury was one against which the statute was designed to protect, also would be answered affirmatively in *Lewis*. The majority opinion conceded that the purpose of section 206 was to protect those injured by the fraudulent practices of investment advisers,²⁶³ and the plaintiff alleged that the injury was caused by the various frauds and breaches of fiduciary duties of its investment adviser.²⁶⁴ Consequently, the implication of a private right for the plaintiff, representing the victims of such practices, is consistent with the statutory purpose, and the first portion of the suggested test is satisfied.

The latter portion of the proposed test, searching for an indication of legislative intent to deny such an action, also would be satisfied when applied to the facts in *Lewis*. The reason for this is first that the proposed test prohibits use of the *expressio* maxim so widely utilized by the *Lewis* Court. In addition, the Court found neither clear legislative history nor an express statement in the statute indicating that SEC remedies are exclusive. Thus, application of the two pronged analysis suggested herein to the facts of *Lewis* would have resulted in an implied cause of action for plaintiff *Lewis*. Furthermore, the adoption of this proposed test, rather than the *Lewis* test, by future courts would mean a vast reduction in the number of abandoned plaintiffs and frustrated statutory goals.

CONCLUSION

The refusal of the Court in *Transamerica v. Lewis* to imply a private cause of action under section 206²⁶⁵ of the Investment Advisers Act of 1940 clearly

²⁶² 444 U.S. at 17.

²⁶³ *Id.* at 24.

²⁶⁴ *Id.* at 13.

²⁶⁵ 15 U.S.C. § 80b-6 (1976).

indicates the Court's adoption of an even more restrictive approach than previously utilized in the implication inquiry. The judicial disenchantment with the implied rights doctrine began in the mid-1970's, after the liberal *Borak* decision led to an overflow of implied rights of action. The Court, however, apparently viewed as insufficient, at least for the securities area, the restraints placed upon the implication doctrine through the use of the *expressio* maxim in *Amtrak* and the narrow application of a four factor test in *Cort*. Consequently, it eliminated the two more easily satisfied *Cort* factors in *Touche Ross*, and in *Lewis* reduced its implication analysis to only one factor. This one factor test of *Lewis*, with its dependency on the *expressio* principle, will preclude the implication of innumerable private rights of action. Therefore, in its place a two pronged analysis, more easily satisfied than the *Lewis* test, is suggested. If adopted, it would reverse the current anti-implication trend of the Court, a trend which has already denied to many injured victims the remedy justice demands.

LINDA J. HOARD