RECENT DEVELOPMENTS

EXPORT CONTROLS—A PRIVATE CAUSE OF ACTION UNDER THE EXPORT ADMINISTRATION ACT OF 1979

The federal courts have only twice examined the issue of whether a private cause of action exists under the antiboycott provision of the Export Administration Act of 1979 (EAA). Although the Act explicitly grants a cause of action to the government, it is silent concerning the grant of a cause of action to a private citizen. The two courts which recently examined this issue drew opposite conclusions despite their reliance on the same history of the EAA and on almost the same case law.

In *Bulk Oil (ZUG) A.G. v. Sun Company*,[1] defendant Sun Company contracted with plaintiff Bulk Oil to deliver British North Sea crude oil to any destination designated by plaintiff, provided that the performance of the contract adhered to government policy of the United Kingdom.[2] In 1981, plaintiff named Haifa, Israel, as the port of destination.[3] The defendant, however, refused to ship the oil, contending that the policy of the United Kingdom precluded the sale of oil to Israel.[4]

Plaintiff attempted to bring suit under the antiboycott provision[5] of the EAA.[6] On August 25, 1983, a New York district court,

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[1] Bulk Oil (ZUG) A.G. v. Sun Company, 583 F. Supp. 1134 (1983 S.D.N.Y.), *aff'd*, Nos. 83-7779, 83-7781, 83-7785 (2d Cir. Feb. 17, 1984) (the second opinion contains a proviso which states that its holding does not constitute a formal opinion of the court and should not be cited in unrelated cases).

[2] The contract contained a destination clause which stated, "Destination Free but always in line with exporting country's Government policy. United Kingdom Government policy, at present, does not allow delivery to South Africa." *Bulk Oil*, 583 F. Supp. at 1135. The controversy in this case was submitted to arbitration in London, where the arbitrator found that Britain's policy prevented export of North Sea crude oil to Israel. *Id.* at 1135.

[3] *Id.* at 1136.

[4] The arbitrator found that Bulk Zug's (a subsidiary of Bulk Oil) nomination of Israel was a breach of contract which relieved defendant of its obligations. *Bulk Oil*, 583 F. Supp. at 1136.

[5] [T]he President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not

noting that no express private right of action existed under the antiboycott provision of the EAA,[7] declined to find an implied private right of action under the same provision.[8] The court conceded, however, that a literal reading of the statute could be construed to grant a private remedy.[9] On February 17, 1984, the United States Court of Appeals for the Second Circuit affirmed.[10]

The issue of an implied private cause of action under the antiboycott provision of the EAA was next addressed by a Texas district court in *Abrams v. Baylor College of Medicine*.[11] In *Abrams*, the defendant medical school denied the plaintiff doctors, who were Jewish, the right to participate in a medical school program which sent cardiovascular surgical teams to Saudi Arabia. Plaintiffs filed suit alleging that the action of the defendant violated the antiboycott provisions of the EAA by excluding Jews from Saudi Arabia, thereby furthering Saudi Arabia's boycott of Israel.[12] On March 5, 1984, in contrast to the New York district court in *Bulk Oil*, the Texas district court found that the history of the EAA indicated that Congress intended that an implied private cause of action exist under the antiboycott provision of the EAA.[13] Ironically, this holding, which is directly contrary to *Bulk Oil*, is based on virtually the same precedent as that used by the court in *Bulk Oil*.[14]

Thus, two federal district courts have relied on the same legislative history to determine whether an implied private cause of action should be granted under the antiboycott provision of the EAA. Although the Texas and New York courts reached opposite

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itself the object of any form of boycott pursuant to United States law or regulation[.]

50 U.S.C. app. § 2407(a)(1) (Supp. 1980).

[6] Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1982).

[7] *Bulk Oil*, 583 F. Supp. at 1139.

[8] *Id.* at 1143.

[9] *Id.* at 1141.

[10] *Bulk Oil*, Nos. 83-7779, 83-7781, 83-7785 (2d Cir. Feb. 17, 1984).

[11] Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984).

[12] *Id.* at 1580.

[13] *Id.* at 1581.

[14] The court in *Bulk Oil* relied on Leist v. Simplot, 638 F.2d 283 (1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982); Cort v. Ash, 422 U.S. 66 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak), 441 U.S. 453 (1974), and on the legislative history surrounding the attempted passage of an amendment concerning a private cause of action with treble damages. *See infra* notes 62-64, 89, 90 and accompanying text. The court in *Abrams* relied on the same precedent, excluding *Amtrak* and adding *Bulk Oil*.

conclusions, both courts recognized that the existence of an implied private cause of action under the antiboycott provision depends upon the legislative history of that provision and the inferences drawn from it.[15]

In 1967,[16] Congress added the antiboycott provision of the EAA to the Export Control Act of 1949[17] as a direct result of the Arab boycott of Israel.[18] The specific purpose of the provision was to protect "American businesses from competitive pressures to become involved in foreign trade conspiracies against countries friendly to the United States,"[19] especially Israel. While the antiboycott provision pertains to restrictive trade measures, the general purpose of all the export control acts[20] has been to allow the United States government, especially the executive branch,[21] to in-

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[15] *See infra* notes 65-67, 71-76 and accompanying text.

[16] The 1965 version did not empower the President to issue regulations but rather provided that:

> The Congress further declares that it is the policy of the United States (A) to oppose restrictive trade practice or boycott fostered or imposed by foreign countries against other countries friendly to the United States and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States.

Act of July 30, 1965, Pub. L. No. 89-63, § 3(a), 79 Stat. 209.

[17] Export Control Act of 1949, Pub. L. 81-11, 63 Stat. 7 (codified at 50 U.S.C. app. §§ 2021-2032 (1949).

[18] "The third amendment apparently was due to the efforts of the Arab countries to boycott or blacklist firms which deal with Israel . . . ." 111 CONG. REC. H12831 (daily ed. June 8, 1965) (statement of Rep. Smith); "What happens is that an American concern seeking to do business in one of the Arab States receives a questionnaire insisting upon certain information as to the origin of the materials going into the product which the American firm seeks to sell and information as to whether or not the American firm also does business with Israel. If the American firm refuses to answer, it runs the risk of being boycotted by the Arab States in question." 111 CONG. REC. H12833 (daily ed. June 8, 1965) (statement of Rep. Ashley); "[I]n furthering the Arab league boycott against Israel, the League requires, for example, U.S. business firms to state among other things that they do not do business with Israel, that they do not employ Jews, that the majority ownership of their firms is held by others than Jews, and so forth." 111 CONG. REC. H12832 (daily ed. June 8, 1965) (statement of Rep. Patman).

[19] 111 CONG. REC. H12831 (daily ed. June 8, 1965) (statement of Rep. Pepper); STAFF OF SENATE COMM. ON BANKING AND CURRENCY, EXPORT REGULATIONS, S. REP. No. 363, 89th Cong., 1st Sess. (1965).

[20] Export Control Act of 1949, 50 U.S.C. app. §§ 2021-2032 (1949). Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (1982).

[21] When discussing export controls, Congress continually uses words such as the President, the Department of State, and the executive branch. For use of this terminology when discussing the antiboycott provision, see 111 CONG. REC. H12831-42 (daily ed. June 18,

fluence private exporters in their choice of products exported and which countries receive these products.[22]

As a result of the government's desire to influence exporters' choice of trading partners, Congress has gradually increased the penalties for violating the various export control acts. Today, the United States has a full array of civil and criminal sanctions, contained in a system of export licensing, to protect its interests. These sanctions are exclusively for the use of the government.[23] In contrast, the parties potentially harmed by violation of the antiboycott provision of the EAA include many parties in the private sector.[24] The EAA is, nevertheless, silent concerning whether a private cause of action exists.[25]

Despite the lack of an express private cause of action in a given legislative act, courts can recognize an implied cause of action by looking at the language, structure, or history of an act.[26] Although courts usually do not create private causes of action without some evidence that an act implies such an action, the courts' willingness to find evidence of an implied cause of action has varied over time.

The first method of anlaysis the federal courts employed to find an implied private action was the tort theory. In the 1916 decision of *Texas and Pacific Railway v. Rigsby*,[27] the United States Su-

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1965); 111 CONG. REC. S15387-91 (daily ed. June 30, 1965).

[22] *See generally* Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right to Export" Versus National Security and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 235 (1981) (history of export controls and rationale behind export control acts); Evrard, *The Export Administration Act of 1979; Analysis of its Major Provisions and Potential Impact on United States Exporters*, 12 CAL. W. INT'L L.J. 1 (1982) (discusses the export acts and the methods of enforcement; states that all three acts concern the balancing of the need for exporting goods and technology with the desire to control that trade in view of foreign policy, national security, trade considerations, and congressional oversight).

[23] The statute provides for a fine of $50,000 or five times the value of the exports involved, whichever is greater, and/or imprisonment up to five years in the case of knowing violations.

Willful violations of the statute carry up to $250,000 fines and/or 10 years' imprisonment for individuals and $1,000,000 or five times the value of the exports, whichever is greater, for other entities.

In addition to criminal sanctions, the law also provides for civil penalties of up to $10,000 per violation; $100,000 if the violation concerned national security or defense products or services. Violations also may lead to revocation of the violator's export license. 50 U.S.C. § 2410(a)-(c) (1982).

[24] For example, the party involved in *Bulk Oil* was an oil company, and the parties in *Abrams* were doctors.

[25] *See infra* notes 80-82 and accompanying text.

[26] Cannon v. University of Chicago, 441 U.S. 677, 717 (1979); *see infra* note 46.

[27] Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

preme Court held that the violation of a statute was a wrongful act which gave the injured party a private right to recover damages.[28] Not until 1964, in *J.I. Case Co. v. Borak*, was a second major theory created to justify an implied private cause of action.[29] In *Borak*, the Supreme Court held that federal courts must provide remedies necessary to effectuate the congressional purpose of an act.[30] This second theory evolved during a period when courts were willing to find an implied private cause of action under almost any statute.[31]

As compared with the judicial willingness during the 1960's to find an implied cause of action, the 1975 decision of *Cort v. Ash* marked a definite decrease in judicial sanctioning of implied causes of action.[32] In *Cort*, the Supreme Court restricted judicial discretion by outlining four factors which were to be used in ascertaining whether an implied cause of action exists under a statute. These factors, now known as the *Cort* factors, were: (1) whether the statute created a federal right in favor of a certain class; (2) whether any indication of congressional intent to create or deny a private cause of action existed; (3) whether the granting of a private cause of action would be consistent with the underlying purpose of the legislative scheme; and (4) whether the cause of action was one that was traditionally relegated to the states.[33]

In *Cort*, the Supreme Court did not indicate how much weight was to be given to each factor,[34] but a trilogy of Supreme Court decisions delineated the factors according to their respective

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[28] "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." *Id.* at 39.

[29] J.I. Case Co. v. Borak, 377 U.S. 426 (1964). For an overview of implied causes of actions, see Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Note, *Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?*, 51 U. COLO. L. REV. 355 (1980).

[30] *Borak*, 377 U.S. at 433.

[31] *See* Cannon v. University of Chicago, 441 U.S. 676 n.23 (1979) (in the decade preceding 1972 the Supreme Court decided six implied cause of action cases and found a cause of action in each); *see infra* notes 103, 106 and accompanying text.

[32] Cort v. Ash, 422 U.S. 66 (1975).

[33] *Id.* at 78.

[34] In *Cort*, the Supreme Court refused to create a private cause of action in favor of a shareholder suing derivatively from a criminal statute making it lawful for a corporation to contribute to certain political campaigns. The decision was based on the fact that the protection of shareholders was a secondary concern (question of a protected class) and that the other *Cort* factors were either neutral or went against an implied cause of action. *Id.* at 79-80.

weight. In *Cannon v. University of Chicago*,[35] the Supreme Court noted that it was no longer true that when someone is harmed and a statute is violated, a private cause of action necessarily follows.[36] In *Touche Ross & Co. v. Redington*,[37] the Supreme Court stated that the primary issue to be addressed when ascertaining whether a private cause of action exists is the existence of a congressional intent to create a private cause of action.[38] Among the three remaining factors, the *Touche Ross* court focused on whether the plaintiff was a member of a class that the statute was originally designed to protect.[39] In *Transamerica Mortgage Advisors, Inc. v. Lewis*,[40] the Court placed further emphasis on congressional intent and noted that unless congressional intent was found, the other *Cort* factors would be immaterial.[41] Although the effect upon lower courts of the Supreme Court's reliance on congressional intent for finding an implied private cause of action is debatable,[42] it is more difficult for courts to grant an implied private cause of action using an analysis based on congressional intent rather than an analysis based on one of the prior theories used by the Supreme Court.[43]

Once the Supreme Court centered its test for an implied cause of

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[35] *Cannon*, 441 U.S. 676 (1979) (violation of Title IX of the Education Amendments of 1972 gives rise to an implied private cause of action).

[36] *Id.* at 688; *see also* Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (tort theory rejected).

[37] 442 U.S. 560 (1978).

[38] "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 575.

[39] The Court relegated the third and fourth *Cort* factors to a position of "little relevance" when congressional intent is not found. *Id.* at 575.

[40] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979).

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

[42] In 1979, Justice Powell stated that *Cort v. Ash* did not indicate a new trend toward disallowing a private cause of action. He noted that during the four years since *Cort* at least 20 decisions by the courts of appeal have found implied private actions under federal statutes. *Cannon*, 441 U.S. at 741 (Powell, J., dissenting).

[43] Before 1975, courts sometimes denied a private cause of action either because the statute was a general regulatory prohibition enacted for the public at large or because evidence existed that Congress intended the remedy granted to be exclusive. *Merrill Lynch*, 456 U.S. 353, 376. The *Cort* case created more grounds to deny granting an implied private cause of action. *See* California v. Sierra Club, 451 U.S. 287, 292-93 (1981). For cases during the mid-1970's which questioned the right to an implied cause of action see National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 441 U.S. 453 (1974) (no cause of action for enforcement of the Rail Passenger Service Act); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) (no cause of action to force a corporation to act in plaintiff's best interest); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (no cause of action under § 14 of the Securities Exchange Act of 1934).

action on the intent of Congress[44] it delineated the factors leading to a determination of congressional intent. The Supreme Court cases after 1979 actually used the three remaining *Cort* factors as evidence of the most crucial *Cort* factor, congressional intent.[45] The Court indicated that by looking at the "language and structure of the statute in light of the circumstances surrounding" an act's passage,[46] it could determine congressional intent. Through this process all four *Cort* principles must be reviewed.

The first two tests of congressional intent which the Supreme Court derived from the *Cort* factors require analysis of factors which are more likely to deny a private cause of action if the act in question fails to pass the standard set than to grant an implied cause of action if the act passes the test. One threshold indication of intent to grant a private remedy is whether Congress granted a benefit to a special class.[47] If the class is very large or its membership vague, then a court will probably deny a cause of action;[48] if the class to be protected by the act is small and identifiable,[49] the search for intent moves to the next level of analysis.

The second threshold test concerns the types of remedies available under the statute. If no remedies are granted to the government or to the private sector, the courts are likely to deny an im-

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[44] Texas Indus. Inc. v. Radcliff Materials, Inc. 451 U.S. 630 (1981); Le Vick v. Skaggs Companies, Inc., 701 F.2d 777 (9th Cir. 1983); *supra* notes 32-41 and accompanying text. Implying private causes of action to aid the purpose of a statute was dropped in favor of determining congressional intent. *See Transamerica Mortgage Advisors*, 444 U.S. at 15; the tort theory was rejected in *Touche Ross*, 442 U.S. at 568.

[45] *See infra* notes 47-49, 57, 58 and accompanying text; *Sierra Club*, 451 U.S. at 287; Northwest Airlines, Inc. v. Transport Worker's Union of America, 451 U.S. 77 (1981); Universities Research Ass'n v. Couter, 450 U.S. 754 (1981).

[46] Liest v. Simplot, 638 F.2d 283, 325 (1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982); *see* Rivers v. Rosenthal & Co., 634 F.2d 774, 783 (5th Cir. 1980); *see supra* note 26.

[47] *Supra* notes 32, 33 and accompanying text; *infra* notes 48, 49.

[48] *Sierra Club*, 451 U.S. at 287 (statute only prohibits obstruction of navigable stream and does not confer rights on a particular class; therefore, no implied cause of action is granted); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1976) (benefit to public at large); Cort v. Ash, 422 U.S. 66 (1975) (benefit was to public at large; protection of shareholders was a secondary concern of the act).

[49] The Supreme Court noted that it has found implied causes of action in many cases, but in all of these, the statute either prohibited certain conduct or created rights for certain parties. *Redington*, 442 U.S. at 569. "[W]e must carefully search the language of the statutory provisions under consideration for any expression of intent to benefit a specific group, as distinguished from an intent to benefit an entire industry, line of commerce or the public at large. Absent such expression, the possibility that Congress intended to provide a private remedy is so slim as to be virtually non-existent." Leist v. Simplot, 638 F.2d 283, 326 (1980) (Mansfield, J., dissenting).

plied cause of action on the theory that doing so on the basis of legislative silence is at best hazardous.[50] If private causes of action are expressly granted to certain classes, courts usually assume that Congress also would have granted a right of action to a plaintiff outside the designated class if it had so intended.[51] Finally, if other remedies are available to the plaintiff, either under the statute in question or any other statute or case law, the courts will usually deny an implied cause of action.[52] If the government is given a remedy or series of remedies, however, and no private remedies, are mentioned, then the search for congressional intent will continue.[53]

Beyond the special class and remedies tests of congressional intent, the third test focuses on the search for a clear indication of congressional intent in the legislative history of the act.[54] Absent an express statement concerning a cause of action in the legislative history, the court then looks to certain surrounding circumstances for that intent, including more subtle indications within the legislative history.[55] The primary evidence of congressional intent in the legislative history is the consideration of a private cause of action.[56]

If the legislative history of the act also gives no conclusive evidence of intent, the court must continue to the fourth test or level of analysis. This level involves two *Cort* factors: legislative purpose and the traditional relegation of causes of action to the states. If the remedy sought is one which traditionally has been relegated to

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[50] *Leist*, 638 F. 2d at 326 (Mansfield, J., dissenting) (quoting *Redington*, 442 U.S. at 571).

[51] *See generally Redington*, 442 U.S. at 571-74. The Court said sections of the act explicitly granted causes of action, but the section of the Securities Exchange Act at issue did not; therefore, no implied cause of action existed. *See also Transamerica*, 444 U.S. at 19.

[52] See *Transamerica*, 444 U.S. at 19; *Barbour*, 421 U.S. at 419.

[53] The maxim of statutory construction *expression unius est exlusio alterius* is no longer considered reliable because it stands on the faulty premise that all possible alternatives or supplemental provisions were necessarily considered and rejected by the legislative draftsman. *See Transamerica*, 444 U.S. at 18 (failure of Congress to consider a private cause of action under the Investment Advisors Act of 1940 is not necessarily inconsistent with an intent to create a private cause of action); American Trucking Assns., Inc. v. United States, 344 U.S. 298, 309-310 (1953).

[54] Leist v. Simplot, 638 F.2d at 327 (Mansfield, J., dissenting); *Transamerica*, 444 U.S. at 18.

[55] *See supra* note 46 and accompanying text; *Leist*, 638 F.2d at 327 (Mansfield, J., dissenting). Those circumstances include among other things, congressional consideration of an express private remedy, statements as to the understanding of the need for such a remedy, and whether an implied remedy is consistent with the statute's underlying purposes. *Id.*

[56] *See infra* notes 65-67, 71-76, 91-94 and accompanying text.

other tribunals,[57] or if the implied remedy is not consistent with the purpose of the act and its enforcement measures,[58] then the court will deny a private cause of action.

If the preceding four-step method of anlaysis has been applied to an act and still no evidence of an intent to deny or grant a cause of action has been found, the courts will ultimately examine relevant case authority existing when the legislation in question was enacted.[59] When looking at past judicial decisions, the courts presume that Congress incorporated these judicial rulings into the most recent statutory framework.[60] If the legislation is recent, however, and therefore has not been interpreted by the courts the modern theories of the Supreme Court will be applied by the Courts to determine if an implied private cause of action exists.[61] If the legislation is not recent, the courts will retreat to the case law contemporary with the act's enactment or re-enactment. Thus, if courts in the past routinely granted a private cause of action under an act, and Congress passes that act again, the courts assume that Congress tacitly approved the past judicial decisions.[62]

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[57] *See, e.g.*, Rohnert Park v. Harris, 601 F.2d 1040 (9th Cir.), *cert. denied*, 445 U.S. 961 (1979) (a claim under state law could be brought, therefore, no claim can be brought under Housing Act of 1979).

[58] "[U]nder *Cort*, a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, where that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the court is decidedly receptive to its implication under the statute." *Cannon*, 441 U.S. at 703; *see* Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969); Machinists v. Central Airlines, 372 U.S. 682, 690 (1963).

[59] *Curran*, 456 U.S. 353 (1982); *Cannon* 441 U.S. at 698-99.

[60] "[A]bsent express indications to the contrary, the reenactment of statutes in substantially the same form or their wholesale adoption into other statutory schemes is presumed to perpetuate and incorporate the judicial baggage that has accumulated in relation to those provisions." Rivers v. Rosenthal & Co., 634 F.2d 774, 783 (4th Cir. 1980); Van Vranker v. Helvering, 115 F.2d 709 (2d Cir. 1940); *see* Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[61] *Curran*, 456 U.S. 353; *accord Cannon*, 441 U.S. 677 (1972 amendment considered not very old, yet not new, so the court used the *Cort* factors and an old analysis).

[62] Scientex Corp. v. Kay, 689 F.2d 879 (9th Cir. 1982); *supra* note 57. The Commodity Exchange Act (CEA), 7 U.S.C. §§ 1-26 (1982), has been cited for the opposite proposition because, before 1974, the courts routinely granted an implied private cause of action under the Act. The courts split in their decision after 1974, but the reason was that courts will not consider an act which has been completely rewritten to incorporate past judicial decisions. In essence, the Act becomes a new act and not a reenactment of the old act. Once a new act has been passed, the courts interpret the legislation by using the modes of statutory interpretation current at its enactment. *See* Comment, *The Status of the Implied Private Cause of Action Under the Commodity Exchange Act*, 30 EMORY L.J. 631 (1981); *see generally*, Rivers v. Rosenthal & Co., 634 F.2d 774 (5th Cir. 1980). One glimpse at the extent of the overhaul of the CEA can be obtained by noting that the 1974 Act "for the first time expressly provided the means for persons injured by violation of the Act to seek redress from

But if the legislation is not new, and the courts have not construed the issue of a right to a private cause of action in a particular act, the courts have no judicial decisions on which to base their holdings. The courts will then use the degree of judicial activism of that period as an indication of congressional intent.[63]

Using the described methodology of searching for implied private causes of action, the *Bulk Oil* and *Abrams* courts reached opposite conclusions concerning the existence of an implied private cause of action under the antiboycott provision of the EAA.[64] In *Bulk Oil*, the Southern District Court of New York found no implied private cause of action under the antiboycott provision. The court relied on a failed attempt by the House of Representatives in 1976 to amend the EAA to include a private cause of action with treble damages for violation of the antiboycott provision.[65] The argument that Congress rejected such a private right of action was reinforced in 1977 when Congress passed a bill concerning the EAA, which contained no right to a private cause of action;[66] therefore, the New York district court reasoned, the failure of the House to pass the amendment evidenced an intent that no private cause of action be granted. The amendment's failure, combined with the fact that no plaintiff had ever attempted to bring a private cause of action under the antiboycott provision, was sufficient evidence of the lack of an intent to grant an implied private cause of action to convince the court that no such action existed.[67] The district court decided that even though by a literal reading of the EAA's judicial savings clause[68] the act could be construed as pro-

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those responsible." *Rivers*, 634 F.2d at 780. This is another reason to deny a private cause of action. *See supra* note 51.

[63] *See infra* note 103 and accompanying text. In contrast, when referring to the Rivers and Harbors Appropriation Act, Justice Stevens noted that at the time the act was passed, Congress would have assumed that the courts would imply a private cause of action because the implication of a private cause of action was then (1890) a normal process. He concluded that this fact was overcome by the modern analysis of congressional intent. *Sierra Club*, 451 U.S. at, 298-300 (1981) (Stevens J., concurring). This holding illustrates that the Supreme Court will only use the past analysis of the courts if other indications of intent are silent. In *Sierra Club*, the act only protected the public at large and did not protect a special class. The Court relied on this fact along with some evidence of congressional intent to deny a private cause of action. *Id.* at 294-98.

[64] *See supra* notes 1-14 and accompanying text.

[65] *Bulk Oil*, 583 F.Supp. at 1140, 1141; H.R. 15377, 94th Cong., 2d Sess., § 6(g) (1976).

[66] Act of June 22, 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977).

[67] *Bulk Oil*, 583 F.Supp. at 1140.

[68] The act states that: "[n]othing in subsection (c), (d), or (f) limits (1) the availability of other administrative or judicial remedies with respect to violations of this Act . . . or any regulation, order, or license issued under this Act[.]" 50 U.S.C.A. app. § 2410(g) (1982) [sub-

viding a private cause of action, such a result was not intended.[69]

The issue of an implied private cause of action under the antiboycott provision of the EAA was next addressed by a Texas court in the *Abrams* decision. Like the *Bulk Oil* court, the Texas court sought an indication of congressional intent in the history of the attempt to amend the EAA to grant a private cause of action with a treble damage provision.[70] The court decided that the failed attempt to amend was not dispositive of the second *Cort* factor,[71] emphasizing that the attempt to provide a private cause of action was in the context of treble damages rather than actual damages.[72] Also, Congress adjourned before considering the House bill and, therefore, never expressly rejected the grant of a private cause of action.[73] Finally, the court noted, none of the bills leading to the passage of the 1977 Act expressly granted or denied a private cause of action.[74] The Court thus found that the Act's legislative history did not foreclose an implied private cause of action.[75]

The Court then stated that the background of the Act, considered together with a close reading of its provisions and the regulations promulgated pursuant to the Act, led to the conclusion that United States Jews were within the class of persons protected by the EAA:[76] "Moreover, . . . the legislative history, viewed as a totality, militates in favor of implying a private cause of action."[77]

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sections (c), (d), and (f) pertain to civil penalties, the payment of them, and actions for the recovery of the penalties.]

[69] The court said it believed the intent of the judicial savings clause was to increase the regulatory flexibility of the government. *Bulk Oil*, 583 F.Supp. at 1141-42.

[70] *Abrams*, 581 F.Supp. at 1580.

[71] *Id.* at 1580-81.

[72] *Id.* at 1580.

[73] *Id.*

[74] *Id.* at 1580-81.

[75] *Id.* at 1581.

[76] *Id.*

The background of the anti-boycott provisions of the EAA is significant. In the mid-1970's, Congress became very concerned regarding efforts by Arab countries to pressure American companies into furthering their boycotts of Israeli interests. *See e.g.*, S. Rep. No. 95-104, 95th Cong., 1st Sess. (1978), esp. at 16-19. As a result of this concern, Congress enacted anti-boycott legislation as an amendment to the EAA [Pub. L. 95-52, 91 Stat. 235 (1977)]. The anti-boycott rules were reenacted as part of the 1979 version of the EAA (Pub. L. 96-72, 93 Stat. 503, codified as 50 U.S.C. app. § 2401 *et seq.*). This background, together with a thorough reading of the EAA, as amended, and the regulations promulgated pursuant thereto, leads us to the conclusion that the "especial class" of persons to be protected by the EAA is comprised not only of Israelis but of American Jews as well.

Id.

[77] *Id.*

Thus, the first two *Cort* factors were positive. An implied cause of action for United States Jews is consistent with the legislative scheme's underlying purpose, and no such remedy is available under state law, the Court said.[78] The Court thus concluded that all four *Cort* factors weighed heavily in favor of an implied private cause of action for Jews injured by acts made illegal by the EAA.[79]

Both the New York and Texas decisions should be scrutinized for the extent to which the courts analyzed the EAA's antiboycott provisions in light of judicially developed factors for determining the existence of implied private causes of action. When considering the existence of a private cause of action, a court must first look at the language and structure of the EAA.[80] In the EAA, the only express provision indicating such an intent on the part of Congress is found within the judicial savings clause.[81] This clause states that nothing in the Act shall limit the jurisdiction conferred on courts of the United States. The *Abrams* court found a private cause of action but chose to ignore the savings clause. The *Bulk Oil* court discounted the importance of the judicial savings clause by deciding that, although a literal reading of the clause would indicate the existence of a private cause of action, its context indicated that congressional intent was to increase the government's regulatory flexibility by not limiting the government's choice of enforcement.[82]

Both courts may have been correct in ignoring or discounting the judicial savings clause, because the effect of the provisions is unclear.[83] Congress added the judicial savings clause in 1965 along with the antiboycott provision, but no mention of the clause was made during the congressional debates.[84] The language of the section is also of little help because a reading of the clause out of context clearly indicates a private cause of action. A reading of the clause in context, however, leaves the intent of Congress unclear. A probable answer is that the provision refers to government enforce-

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[78] *Id.*

[79] *Id.*

[80] The first step always is to look at the express provisions of an act for an indication of intent. *Transamerica*, 444 U.S. at 16; *Touche Ross*, 442 U.S. at 568; *Cannon*, 441 U.S. at 689.

[81] *See supra* note 68.

[82] *See supra* note 69.

[83] *See generally Rivers*, 634 F.2d at 786-88 (5th Cir. 1980) (denial of an implied private cause of action under a judicial savings clause).

[84] *See* 111 CONG. REC. H12831-42 (daily ed. June 8, 1965); 111 CONG. REC. S1538[7]-39 (daily ed. June 30, 1965).

ment of the Act. The existence of an intent of Congress to grant a private cause of action through this provision appears highly unlikely. Congress probably would not have created an entire act to describe government regulations and enforcements only to add one sentence granting an entire array of private causes of action without mentioning that provision in debate.

With the great likelihood that Congress never explicitly considered a private cause of action, the question remains whether Congress impliedly created one. This inquiry involves application of the *Cort* factors, primarily the second factor, congressional intent. The search for intent also encompasses the other three *Cort* factors since they are, essentially, indicators of intent. Once one *Cort* factor proves the intent of Congress, the inquiry may end without considering the other factors.[85]

The first level of analysis of intent inquires into the class protected by the antiboycott provision.[86] If this provision is designed to protect a small identifiable class, then the possibility of an implied private cause of action remains. The antiboycott provision does protect a certain small class because it protects United States persons or companies who are harmed by a violation of the act.[87]

The second threshold test the antiboycott provision must pass concerns remedies under the provision.[88] The Act provides an array of civil and criminal penalties for the government but is silent concerning an analogous private cause of action.[89] Since no other remedies for the plaintiffs in *Bulk Oil* or *Abrams* exist, the search for congressional intent must move to the next level of analysis.

The third step, involving the EAA's legislative history,[90] is unimportant because it contains no express statement of intent. The *Bulk Oil* and *Abrams* courts were correct in ignoring this step. Thus, evidence of intent may be found only in certain surrounding

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[85] Intent is now the key to statutory interpretation. The other *Cort* factors are useful to the extent they aid the court's knowledge of congressional intent, but once intent is found the search ends at that point without further application of the *Cort* factors. *Rivers*, 634 F.2d at 782; *Transamerica*, 444 U.S. at 23-24; *Redington*, 442 U.S. at 575-76.

[86] *See supra* notes 47-49 and accompanying text.

[87] *See supra* notes 16-17. The Senate stated that one purpose of the 1965 amendment was to protect United States business firms from competitive pressures to become involved in foreign trade conspiracies against countries friendly to the United States. S. Rep. No. 363, 89th Cong., 1st Sess. (1965).

[88] *See supra* notes 50-53 and accompanying text.

[89] *See supra* note 23.

[90] *See supra* note 54.

circumstances enumerated by the courts.[91] The first two of the four relevant surrounding circumstances of the antiboycott provision are the third and fourth *Cort* factors, the Act's underlying purpose and the availability of a state-law remedy.[92] As already noted, neither of these inquiries negates an implied private cause of action.[93]

The third relevant surrounding circumstance concerns the consideration and rejection of a private cause of action by Congress.[94] Here, the *Bulk Oil* and *Abrams* courts diverged over the 1976 effort in the House to amend the EAA to add a private right of action for treble damages.[95] The effort to amend the EAA gives no clue as to congressional intent.[96] Courts often reject the argument that the failure of Congress to pass a provision for treble damages evidences an intent to deny a private cause of action for actual damages.[97] The district court's attempt in *Bulk Oil* to do otherwise

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[91] *See supra* note 46.

[92] *See supra* notes 57-58 and accompanying text.

[93] *See supra* notes 57-58 and accompanying text.

[94] *See supra* note 56 and accompanying text.

[95] *See supra* notes 65-67, 71-76 and accompanying text. The *Abrams* court cited *Leist* for the proposition that it is unwise to infer congressional intent from congressional inaction. *Abrams*, 581 F.Supp. at 1581. The *Bulk Oil* court discounted the importance of *Leist* because the *Leist* court noted that judicial decisions prior to 1974 upheld a private cause of action under the Rail Passenger Service Act. This gave the *Leist* court a basis on which to conclude that the denial of a private cause of action with treble damages did not deny a private cause of action for actual damages. *Bulk Oil*, 583 F.Supp. at 1141. The *Bulk Oil* court contended that its case was closer to *Amtrak*, 414 U.S. 453 (1974), because Congress had no judicial precedent when it amended the EAA. *Bulk Oil*, 583 F.Supp. at 1141. The *Bulk Oil* court was correct in its analysis of *Leist* but incorrect in its analysis of *Amtrak*, because the Rail Passenger Service Act (45 U.S.C. §§ 501-658 (1982)) manifested an intent to allow a private cause of action not only to the government but also to certain affected employees. *Amtrak*, 414 U.S. at 458, 460; *see also* Securities Investment Protection Corp. v. Barbour, 421 U.S. 412, 418, 421 (1975) (*Amtrak* viewed as a case in which an implied private cause of action is inconsistent with legislative intent). Congress is assumed to have denied a private cause of action to those not mentioned by the Act. *See supra* note 51.

[96] *See supra* notes 65-67, 71-73 and accompanying text; *infra* note 101.

[97] "Congress[']' refusal to adopt [bills providing for treble damges] might just as reasonably be presumed to have derived from an opposition to treble damages as from an opposition to the damage remedy itself." *Rivers*, 634 F.2d at 788 (quoting Alken v. Lerner, 485 F.Supp. 871, 877 (D.N.J. 1980); the *Rivers* court believed that the consideration by Congress of three separate bills calling for a private cause of action with treble damages was not an indication of congressional intent. *Rivers*, 634 F.2d at 788; *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 n.11 (1969) (discounting value of unsuccessful attempts at legislation, including a pocket veto by the President, as guides to intent); *Leist*, 638 F.2d 283 (rejection of argument that a denial of a private action with treble damages by Congress could be used as evidence of a denial of a private cause of action); *but cf.* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 460-61, (1974) (denial by Congress of a private cause of action for actual damages given substantial weight).

is unconvincing.

Bulk Oil's rationale for denying a private cause of action fails because the consideration of a private cause of action for treble damage is inherently different from the consideration of a private cause of action for actual damages. A court can always grant actual damages once a cause of action exists, but the grant of treble damages by a court is only permissible pursuant to a legislative act.[98] Likewise unconvincing is the New York court's attempt to bolster its analysis of the amendment effort by pointing out the failure of any plaintiff ever to attempt a private suit under the antiboycott provisions.[99] The Supreme Court's prescibed analysis for congressional intent does include consideration of the number of attempted private actions; the test is the Court's interpretation of an act, not a plaintiff's interpretation.

The fourth surrounding circumstance, contemporary judicial activism, is the only factor which can decide the existence or nonexistence of an implied private cause of action under the antiboycott provision of the EAA. This last inquiry involves the judicial theories used by the courts at the time of the passage of the antiboycott provision to grant an implied private cause of action.[100]

The judicial activism of the courts in 1965,[101] when the antiboycott provision was added to the EAA, is the factor a court must use in determining the existence of an implied private cause of action for plaintiffs in the class protected by the antiboycott provision. Although it is true that the reenactment of a statute incorporates preceding judicial interpretation,[102] the antiboycott provision has only been interpreted in 1983 and 1984. But, as the Supreme Court in *Cannon* stated concerning a 1972 act:

> Indeed, during the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this court has consistently found implied remedies often in cases much less clear

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[98] A court may always grant actual damages but punitive damages are not always available in common law actions. As a substitute for punitive damages a legislature may provide for treble damages. *See* Edwards v. Travelers Inc. of Hartford, Conn., 563 F.2d 105 (6th Cir. 1977). The cause of action must fall under a statute granting treble damages in order that a court may award treble damages. *See* Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982); Continential Motel Brokers, Inc. v. Blankenship, 739 F.2d 226, 232, 234 (6th Cir. 1984); Bache Halsey Stuart Shields Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1048 (10th Cir. 1983).

[99] *See supra* notes 65-67 and accompanying text.

[100] *See supra* notes 59-63 and accompanying text.

[101] *See supra* note 31.

[102] *See supra* note 60.

> than this. It was *after* 1972 that this court decided *Cort v. Ash* and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute. We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into account its contemporary legal context. In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.[103]

As in *Cannon*, this article has followed the strict approach of recent cases, but all the factors, including the *Cort* factors, are either neutral or slightly in favor of the existence of an implied private cause of action in the antiboycott provision. That no private cause of action is expressly granted by the statute suggests that the legislative history will be equally silent, as it is.[104] Yet the courts do not consider this lack of consideration to be dispositive of the issue and instead continue the search for congressional intent.

The search for congressional intent must center on the judicial activism of the 1960's,[105] especially considering the fact that the most important case was decided in 1964,[106] the year before the enactment of the antiboycott provision. Under *J.I. Case Co.*, the chief concern of the courts was to aid the purpose of a statute, and granting an implied private cause of action under the antiboycott provision of the EAA would accomplish that.[107]

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[103] *Cannon*, 441 U.S. at 698-99.

[104] *Transamerica*, 444 U.S. at 18; *see infra* note 105.

[105] One might argue that when a statute and its history are silent concerning a private cause of action, the one seeking to prove that an implied private cause of action exists must affirmatively show an intent of Congress to create a private cause of action. The argument, however, is not convincing:

> We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such causes of action would be controlling."

Cannon, 441 U.S. at 694 (quoting Cort v. Ash, 422 U.S. at 82).

[106] *See supra* notes 29-30 and accompanying text.

[107] Even if the Congress which enacted the antiboycott provisions had left the question of an implied private cause of action to the courts and had not even considered the judicial holdings of the times, the judicial activism might still control. [Commodity Futures Trading Act, Pub. L. No. 93-463, 88 Stat. 1389 (1974)]. This quotation from *Rivers* illustrates the proposition:

Thus, the *Bulk Oil* court was incorrect when it denied that an implied cause of action exists under the antiboycott provision of the EAA, but it may have been correct in denying a private cause of action to the plaintiff oil company. The denial of a private cause of action depends on the oil company being in the class the antiboycott provision was designed to protect. The court never delved into the actual ownership of the company, but the court did note that the plaintiff was an United States subsidiary of a foreign corporation.[108] Thus, courts will have to decide if the protected class is this large. In this vein, inquiry into the true ownership of the parent corporation would be helpful.

The *Abrams* court reached a correct conclusion when it held that a private cause of action existed for the plaintiff doctors, but the court's rationale was almost nonexistent. The Texas court relied on the history of the EAA as a totality without a systematic analysis of the case in light of judicially developed factors for determining the existence of implied private causes of action. A better approach would have been to carry the question of an implied private cause of action through the exhaustive analyses developed in the aftermath of *Cort v. Ash.*

Wilbur Owens

> We agree that the liberal judicial climate in which the CFTCA was born requires us to be more solicitous and sensitive to indications of Congress' desire to create a cause of action. Indeed, any indication that Congress actually intended merely to leave the question to the judiciary to be resolved according to its contemporary rules of construction, while clearly inadequate under current standards, would likely be sufficient to carry the day here.

Rivers, 634 F.2d at 789.

[108] *Bulk Oil*, 583 F.Supp. at 1136.