ORIGINAL

In the

Supreme Court of the United States

TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA), ET AL.,

Petitioners,

v.

HARRY LEWIS,

Respondent.

No. 77-1645

Washington, D. C.
March 20, 1979

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Respondent. :

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Washington, D. C.

Tuesday, March 20, 1979

The above-entitled matter came on for argument at 10:59 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN M. ANDERSON, ESQ., 450 Pacific Avenue, San Francisco, California 94133; on behalf of the Petitioners

ERIC L. KEISMAN, ESQ., Wolf, Popper, Ross, Wolf & Jones, 845 Third Avenue, New York, New York 10022; on behalf of the Respondent

RALPH C. FERRARA, ESQ., General Counsel, Securities and Exchange Commission, Washington, D. C.; as amicus curiae

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C O N T E N T S

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Transamerica Mortgage Advisors v. Lewis.

I think you may proceed whenever you are ready, Mr. Anderson.

ORAL ARGUMENT OF JOHN M. ANDERSON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ANDERSON: Thank you. Mr. Chief Justice and may it please the Court:

The case now before the Court, Transamerica Mortgage Advisors v. Lewis, presents a narrow technical question of law and a broad important question of judicial policy. The question of law presented is whether section 206 of the Investment Advisers Act of 1940 affords a private right of action. The question of judicial policy presented is whether this Court should imply a private right of action under the Advisers Act and then leave to further litigation resolution of such questions as who may bring the action, who may be the defendant, who may be sued for what breaches of what duties, as well as questions of reliance, causation and intent.

This Court is being asked to interpret a statute, but I submit that it is being asked in a larger sense to assess its role in the application of the federal securities laws. This Court is not being asked to deny relief to those clients of investment advisers who have been victims of the advisers' deceit or negligence. Ample federal and state remedies already exist for the redress of grievances by clients of investment advisers.

This Court is not being asked to read the Investment Act narrowly or restrictively, in violation of the principle announced in the Brouk case. We do simply urge that this Act be read as it was written by the Congress and it has been amended.

The facts of this case briefly are as follows: The case came to court in April 1973 with a suit by the plaintiff and respondent Harry Lewis asking legal and equitable relief for alleged violations of the Investment Advisers Act. The lawsuit was case as both a derivative action on behalf of Mortgage Trust of America, a real estate investment trust, and as a class action on behalf of the shareholders of Mortgage Trust of America.

The petitioners moved to dismiss the complaint for failure to state a claim and argued that since Mortgage Trust of America was and is a mortgage lender which does not deal in securities within the meaning of the federal securities law, it was not subject to the Investment Advisers Act of 1940, that further, since Transamerica Mortgage Advisors is not a public investment adviser in any sense of those words, it is not subject to the Act. We further argued that the respondent had failed to make proper demand on the trustees of Mortgage

Trust of America. And finally we argued that the Advisers Act does not afford a private right of action in any event.

The District Court noted that the petitioners' arguments all had what were called substantial merit, but ruled that since the Advisers Act does not afford a private right of action, there was no need to decide the other arguments advanced.

On appeal, petitioners again argued that the Investment Advisers Act does not apply to the petitioners or the facts in this case, and that there is no private right of action in any event.

QUESTION: Is there a question of whether or not there is a private right of action or whether or not there is a private right of action for money damages?

MR. ANDERSON: The question is whether or not there is a private right of action. The question as originally posed in the petition for cert, Mr. Justice Stewart, was whether or not there was a private right of action.

QUESTION: Yes.

MR. ANDERSON: In preparing the brief, we narrowed the question to whether it was a private right of action for money damages.

QUESTION: And thereby incurred the attack from your adversary.

MR. ANDERSON: That is correct. The reason for the narrowing of the question, which I believe to be proper within the meaning of the Court's rules, was that the Court of Appeals decision which is in question here, in the Ninth Circuit, was based on and simply incorporated the decision of the Second Circuit in a case called Abrahamson v. Fleschner. That case was devoted exclusively to the consideration of whether or not there was a private right of action for damages. Equitable issues were not present in that case, or equitable claims were not present, and for that reason we narrowed it. We narrowed it also because much of the claims for equitable relief in this case seemed to be moote and for that reason we deemed that to be the issue; nonetheless we, as Mr. Justice Stewart suggested, incurred the wrath of our opponents in their brief and for that reason in our reply brief we address the problem across the board broadly, both equitable and legal relief.

QUESTION: And that is the question as described in your petition for certiorari?

MR. ANDERSON: That's correct.

QUESTION: And you agree now that that is the question before the Court?

MR. ANDERSON: Yes, Mr. Justice Stewart, that is the question that is before the Court.

Returning to the chronology of events that bring us here, on appeal to the Court of Appeals for the Ninth Circuit--

dichotomy there?

MR. ANDERSON: It may suggest that, but I think a reading of the Act as a whole suggests that, and particularly the language which follows the expression "suits in equity," Mr. Justice Rehnquist, suggest that that is because the Act as a whole is geared to enforcement by the Securities and Exchange Commission and that Commission being given broad powers to seek injunctive relief, and I think that is the reason for that particular provision in the Act, a point which I will stress later in this argument.

QUESTION: Wouldn't it be more likely that the public authority would seek the equitable relief than private in the general rule of cases?

MR. ANDERSON: Yes, I think that is probably the case. However, I do not believe that the limitation of the language to suits in equity suggests that the Congress meant to imply a right to equitable relief. I think quite the opposite. I think that, as suggested by some of the legislative history --

QUESTION: Congress intended to create a private right of action for equitable relief.

MR. ANDERSON: That's correct. That's correct, Mr. Justice Stewart.

QUESTION: It clearly is a provision for suita for equitable relief brought by the enforcing agency.

MR. ANDERSON: That is correct.

QUESTION: In any event, you feel we have to decide the equitable feature here?

MR. ANDERSON: Yes. The equitable issue is before the Court. It is a prayer or an aspect of the prayer in the complaint which was filed in this case, and as counsel for the respondent correctly point out, it is an aspect of the prayer or of the relief which they sought, and so I think it is properly before the Court.

QUESTION: That isn't my question. My question is do we have to decide it.

MR. ANDERSON: Since the issue before the Court is whether there is an implied right of action encompassing both legal and equitable relief, the answer would be yes. I think the answer is that it has to be decided by the Court.

QUESTION: And yet your question presented in your own brief is this, may a private right of action at law for damages be implied under the Investment Advisers Act.

MR. ANDERSON: Yes, Mr. Justice Blackmun. The reason for that again was because in the decision which was subject to appeal here, namely the Ninth Circuit decision in this case, simply incorporated a Second Circuit decision in the case called Abrahamson v. Fleschner, and in that particular --

QUESTION: I am familiar with that case, and I am asking again whether we have to decide the equity aspect of this.

MR. ANDERSON: I don't want to --

QUESTION: Why should we decide this in the first place? Why shouldn't we send it back?

MR. ANDERSON: I don't want to be presumptuous to suggest what the Court has to do. It i my view that the question of both legal and equitable relief is before the Court.

QUESTION: Well, there isn't any compulsion on the Court to treat them on an all or nothing basis, is there?

MR. ANDERSON: No, Mr. Chief Justice, I think there is not such compulsion. However, it would seem to me that to the extent that we are here seeking to solve problems that it might be helpful to litigants at large if there were some indication of the Court's views on the subject of --

QUESTION: And in your submission, no valid distinction can be made?

MR. ANDERSON: I believe that to be the case. I think, for example, here that the problem that might be pointed out by that kind of distinction is illustrated by this very case in which the respondent seeks rescissionary rights and incidental damages, and it seems to me that that sort of runs together the issue to such an extent that it would be very difficult if we tried to separate them out.

QUESTION: Is not the equitable moot?

MR. ANDERSON: The equitable relief entails in the first instance a prayer that an advisory contract be enjoined from renewal or enforcement. It has in fact been renewed since the beginning of this litigation and there has been no effort to seek preliminary or interim relief by the respondents, so I take it that it is moot to that extent.

QUESTION: Mr. Anderson, isn't it also true that both equitable and legal claims were asserted and the District Judge dismissed the entire complaint?

MR. ANDERSON: That is correct. That is correct. And it is also true that in the Ninth Circuit decision, the court talks of both legal and equitable relief, notwithstanding the fact that it was simply incorporating the decision or ruling of the Second Circuit in the Abrahamson case.

In the appeal to the Ninth Circuit, we argued again that the facts of this case do not lend themselves to application of the Advisers Act in any event and that there was no private right of action. The Court of Appeals declined to decide the other issues advanced and with one judge dissenting ruled that the implication of a private right of action for injunctive relief and damages under the Advisers Act in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation.

The Court of Appeals opinion, as I indicated, simply adopts wholesale the opinion of the Second Circuit, both the majority opinion and the dissenting opinion in the case of Abrahamson v. Fleschner.

Now, it seems to me that the resolution of this case entailed, first, consideration of the special wording of the Advisers Act. And I want to stress that the Advisers Act is unique among all the federal securities acts in the grant of jurisdiction, not simply in limiting to the question of actions -- the elimination of the expression "actions at law," but in the phrase which follows that, and I wish to emphasize this because it has not been the matter of extended treatments in the brief, but in the Advisers Act the jurisdiction is conferred "of all suits in equity to enjoin any violation of the Act." It does not confer jurisdiction over actions at law or actions other than suits in equity to enjoin. All of the other federal securities laws, the '33 Act, the '34 Act, and the other securities acts in question, all refer to jurisdiction of all suits in equity and actions at law brought to enforce any liability or duty created. There is a significant and I believe to be important distinction in the nature of the jurisdiction which is conferred between the 1940 Act and the 1933 and the 1934 Acts in particular.

The second matter which I believe must be resolved here is the consideration of the factors pointed out in the Court's 1975 opinion in the case of Cort v. Ash, in which the

Court specified or suggested factors to be considered in determining whether or not an Act not expressly providing private right of action would nonetheless afford implication.

In doing that kind of analysis, which I do not intend today to belabor, it seems to me that the most important aspect of that is attention to the legislative history. The legislative history of the Investment Advisers Act belies any suggestion that Congress thought initially or has thought since that it ought to be the basis for private right of action.

And finally I would submit that the Court ought to consider the results that would follow if this Court were to imply a private right of action under the Advisers Act.

The original legislation in 1940 began with an SEC bill which contains standard jurisdictional language which included reference to jurisdiction over suits in equity and actions at law, the same language that was in the 1933 and the 1934 Acts. Following negotiation and hearing, a compromise was reached and arranged on various aspects of the bill, and one of the changes made was that the language "actions at law" with respect to duties and violations of the Act was eliminated, and we now have the statute which is before us which refers only to suits in equity, to enjoin any violation of the Act.

Secondly -- and there is another important distinction -- from its inception in 1940, the Investment Advisers Act has never had any provisions for express civil liability. Unlike the 1933 Act and unlike the 1934 Act, the Investment Advisers Act does not provide any express liability in any of its provisions. In 1960, the Advisers Act was amended and the Securities and Exchange Commission was given additional enforcement powers, but the grant of jurisdiction or the limitation of jurisdiction, if you will, was not changed. It remained the same.

And in 1970 there was I believe to be the most important and direct announcement by the Congress as to the meaning or intention with respect to the Advisers Act, when the Congress added a private right of action to the companion statute -- that is the Investment Company Act of 1940 -- and they added an expressed private right of action to that legislation and further specified in adding that expressed right of action who may be the plaintiff, who may be the defendant, the nature of the duty that would be violated giving rise to the action, they allocated the burden of proof, they established evidentiary standards, and finally they prescribed the damages which may be recovered. This was all done in 1970, at a time when amendments were being made to both the Investment Company Act and the Investment Advisers Act.

No creation of express civil liability, no creation of an express private right of action was had under the

Advisers Act even though it was done very specifically and deliberately under the Investment Company Act.

QUESTION: Well, was it proposed?

MR. ANDERSON: It was proposed by the SEC at various times, including in 1970, but there was no action taken on it and, as my colleague, the attorney for the respondents, reminds us, we are not to make much of silence, I gather. But the fact is that it has been proposed and was most recently proposed as a matter of act in 1976 by the Securities and Exchange Commission and there has been no action taken on it.

I would like to turn now, if I may, to the results that would follow if this Court were to imply private right of action. Because of the special wording of the Investment Advisers Act, it would create at a minimum a hornets nest of litigation because it cannot help but create a series of unanswered questions.

The Investment Advisers Act, section 206, the basis for the claim of an implied right of action in this case, refers to wrongdoing against clients of investment advisers or prospective clients. The key words, of course, are "prospective clients." And the first question that must come to mind is what is meant by prospective clients. I submit that the use of that phrase is consistent with conferral of authority and jurisdiction on the Securities and Exchange Commission to seek relief against investment advisers who are soliciting business, going after business. It is I think equally inconsistent with the notion that from that could be implied a right, a private right of action, the first question being, of course, who are prospective clients of investment advisers.

QUESTION: Well, that would be equitable relief only, wouldn't it?

MR. ANDERSON: It might -- yes, Mr. Chief Justice, it may suggest equitable relief only, but I think it raises the problem which this Court addressed in the Blue Chip Stamps case, namely who are this class of people who might be clients of the investment advisers. And it seems to me that the use of prospective clients belies any suggestion that it was intended that this Act confers jurisdiction on people who could claim that they might have been a client of the investment adviser if they had but known what good advice or what bad advice he was going to give. I mean, it seems to me that it simply creates an open-ended class of plaintiffs without limits, as Judge Gurfein suggested in his dissent in the Abrahamson case.

QUESTION: Mr. Anderson, on that point, as I recall the beginning of your argument, you said there were state and federal remedies available to clients of investment advisers who had been defrauded.

MR. ANDERSON: Yes, sir.

QUESTION: What are the federal remedies that are available to clients?

MR. ANDERSON: Mr. Justice Stevens, the most obvious one that would come to mind would be that in the event a client of an investment adviser purchased stock and in connection with that purchase the investment adviser had acted intentionally deceitful with respect to representations about the stock, it would seem to me that the client would have a claim under rule 10(b) or rule 10(b)(5) under the 1934 Act.

QUESTION: I see. They don't have a remedy for violation of section 206 though or whatever the number of this is?

MR. ANDERSON: The question, of course, before the Court is whether or not they would have if you imply private right of action.

QUESTION: Yes.

MR. ANDERSON: I am suggesting that there is a remedy, there is a remedy available --

QUESTION: For violations other than the ones that are alleged in this complaint?

MR. ANDERSON: That's correct.

QUESTION: For violations of other provisions of the Act.

MR. ANDERSON: That's right.

QUESTION: I see.

MR. ANDERSON: And it is significant, Mr. Justice Stevens, that in this case there is no allegation of a purchase or sale.

QUESTION: Right.

MR. ANDERSON: We are dealing instead with a fact situation which has been characterized at the conclusion of the complaint as being by its nature fraudulent, deceitful or in violation of the Act.

The second result of implying a private right of action here is to leave open the question of prospective defendants. Section 206 speaks of those who aid or abet in the familiar language, and therefore I submit that the question not only is open as to who may sue but who may be a defendant. It leaves open also the question of reliance and causation, and it leaves open the question of intent which this Court dealt with in the Hochfelder case.

Now, the potential reach of a private action under the Advisers Act is illustrated by this very case. It is alleged here that the adviser to a real estate invesment trust has violated the Advisers Act. There is no allegation that the wrongdoing occurred in connection with the purchase or sale of any securities, there is no allegation that the acts of the trustee-petitioners constituted willful deception, there is no allegation here of intentional concealment of any material facts. The complaint simply constitutes a description of facts, facts which were revealed and in fact reported to the SEC in registration statements and then characterized as being in violation of the Act under section 206.

I would submit that in the considerations of whether or not the language lends itself to implication of a private right of action, the Court be mindful of the fact that if a private right of action were to be implied in this case, it would open the door to the avoidance of the limitations on private security actions which have been recognized by this Court, limitations with respect to whether or not there was a purchase or sale, a limitation recognized in the Blue Chip Stamps case. It would permit disregard of the requirement that the plaintiff allege and prove intent to defraud and deceive, a limitation recognized in the Hochfelder case. It would permit disregard of the requirement that there be willful deception, not just breach of fiduciary duty, a limitation recognized in the Santa Fe Industries v. Green case.

I reserve the remaining time. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Keisman.

ORAL ARGUMENT OF ERIC L. KEISMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KEISMAN: Mr. Chief Justice and may it please the Court:

In sharing our time with the Securities and Exchange Commission, we will concentrate on all aspects of the case except the third of the Cort v. Ash criteria, the necessity or the importance of supplementation of government activity, which area will be covered primarily by the government in the time it has to argue.

We would like to start first by reidentifying this case. The complaint in this action is primarily and always was a classic bill inequity, seeking a declaration of voidness of a contract between an investment adviser and the advisee, to wit the Mortgage Trust of America, which we have called in our brief MTA. It also seeks restition of the consideration paid under that contract on the grounds that the contract was at all times in violation of the Investment Advisers Act of 1940, including section 206, and of course that relief arises under 215(b) of the Act, providing that contracts in violation of the Act or practices under contracts in violation of the Act are void.

This is the primary relief sought in this action and always was. Now, the respondent has said some of this is moot because we never sought preliminary relief, even though the contract has been renewed. It is rather difficult to move for preliminary injunction on the basis of the complaint that has been dismissed for want of subject matter jurisdiction. The equitable relief sought is in no sense moot, it is the gravamen of the action.

The Court of Appeals for the Ninth Circuit ruled very narrowly and quite properly. It reached only the issue that was before it. The District Court had dismissed the complaint for want of subject matter of jurisdiction, finding that there was no private right of action under the Advisers Act, no matter how cast, and the Court of Appeals disagreed and therefore it reversed and said that in the proper case there could be a private right of action for injunctive relief, equitable relief or damages, and it got no farther.

It adopted the rationale of Abrahamson but, of course, Abrahamson is the very, very different case. Abrahamson was a suit that could only be characterized as a suit for damages arising out of participation in a hedge fund, and this Court denied certiorari in that case, in Abrahamson. And as we have said in our brief, we respectfully contend that this would be a peculiar case and a most peculiar record in which to attempt to relitigate Abrahamson.

QUESTION: Well, what intimation do you draw from our denial of certiorari in Abrahamson?

MR. KEISMAN: I draw, I believe, Mr. Justice Rehnquist, no improper intimation. It holds nothing. It holds I believe only that the Court did not consider that case of sufficient importance to warrant at the time its review.

QUESTION: As Justice Frankfurter used to say, four justices didn't vote to grant.

MR. KEISMAN: Quite so, Mr. Justice Rehnquist. What I am saying here, however, is that this is not Abrahamson and the petitioners to a certain degree seem to stress that they would like to relitigate all the questions in Abrahamson, but those questions aren't here. This is not a suit primarily for money damages. This suit does not raise the question of whether in order for there to be subject matter jurisdiction this Court must allow an action cast in law. This is not to say that we don't think it is proper to imply such an action. And I will get within the next couple of minutes to the question of whether anything at all, much less anything important, is to be drawn from whatever happened to section 214 of the Advisers Act in the few weeks that it was not considered by a committee but presented willy-nilly to the floor, after some other rapid redrafting.in the summer of 1940.

But at the very least, the very least we say that a bill in equity, which is what this case is, lies. Now, we agree that the Cort v. Ash criteria, that is at least the Commission and I agreed to cast our argument along those lines.

Now, we think the first of the criteria expressed by this Court, whether the statute in question was passed for the special benefit of a particular class of persons, and whether as this Court itself explained that, that means whether it creates a federal fight. And we think that in this instance that the Advisers Act creates a federal right on behalf of the clients of investment advisers within the context of the advisory relationship. This is obvious and manifest and we are not going to belabor what is in our brief.

This Court itself in the Capital Research Bureau case analyzed the meaning based on that, with the passage of the Advisers Act, nothing has happened in the interim to change that analysis. Congress a s concerned about the relationship inter se se between the adviser and the client advisee. It was not concerned in passing the Advisers Act, with all due respect to the petitioners, with the purchase and sale of securities by the adviser on behalf of the advisee. It was concerned and it was seriously concerned with the re-relationship inter se se.

One of the things in the legislative history, perhaps very significant in this case, was that one of the things Congress expressed its concern about in both the Senate report and the House report was the kind of compensation arrangements that advisers dealt for themselves with their advisees. Were they, as the SEC had warned in its 1939 study, dealing themselves compensation arrangements which encouraged them to go out and take untoward risks. The most common in those days were contingent ones which are, of course, prohibited as to registered advisers. More common today or yesterday in the rather brief era of the ascendency of the real estate investment trust was the compensation contract based at least in part upon undispersed commitments which encouraged the practice of heavy forward committing, borrowing short to lend long, and incurring reverse leverage so that in order to expand your fee base you borrowed money for more than you could get for it if you had committed it sufficiently. Of course, much of that is no longer important in the investment community, but the inter se se relationship, the way a compensation arrangement is designed was definitely a concern in both houses of Congress, or at least the cognizant committees in 1939 and 1940.

Now, the special benefit, well there was no other beneficiary of this Act except, of course, for the sovereign interest in the integrity of securities markets and the health of the capital markets. The class of persons, whether individual or corporate, or some other kind of entity to be protected, and Congress said it again and again in each of the reports, in the hearings, in Senator Wagner's statements was to protect the investors. This is obvious. What form of remedy they might seek is no part of the question, much less the answer.

Once a federal right is created, it is nothing uncommon for the legislature to leave the method of its protection to the courts. We contend that it has long been accepted by legislatures that the special genius for designing remedy is judicial. Vey often the legislative attempt to foresee what kinds of violations of the general terms of the statute will occur.

QUESTION: You say once that the federal right has been created, do you mean once the federal private right has been created or just once a federal prohibition has been enacted?

MR. KEISMAN: I begin with once a federal prohibition. I am not trying to imply my conclusion in my premise, Mr. Justice Rehnquist. I am saying that a federal positive law enacted by the Congress says that practices that operate as a fraud or deceit by advisors upon advisees. At the very least if they are in the contractual relationship, they result in void contracts and a void contract not only under this Court's comment in Deckert v. Independence Shares, the Second Circuit's holding in Goldstein v. Groesbeck, and I believe this Court commented upon it again in the Blue Chip case. Void means voidable at the instance of the party aggrieved. No other meaning is current or has been within the century in the Anglo-American legal system. It does not mean that the contract is void at the option of the government. I believe this Court has made that clear. Nor does it mean that the contract is void if no one tries to do anything about it.

It has frequently been read that void means voidable, and in a way this reduces the strictures, the party aggrieved, if it so wishes, can seek not to take its remedy. It must assert its remedy.

QUESTION: Or it can defend --

MR. KEISMAN: It can defend --

QUESTION: -- on the ground that he has no obligation because the contract is void.

MR. KEISMAN: Mr. Justice Stewart, that isn't a reading for which even the petitioner has been able to cite any authority. It is a conceivable --

QUESTION: When I went to law school it was considered that there was some difference between voidable and void. Now perhaps that difference has been blurred in the ensuing years.

MR. KEISMAN: I respectfully submit that this Court's interpretation, its proper interpretation of sections like 215, that is section 29(b) of the Exchange Act and the Second Circuit's interpretation of 26 of the Public Utility Holding Company Act require a vast change in the law if we are now to say, oh, no, all 215(b) means is it can be used defensively. It would also make the statute meaningless.

QUESTION: Are you talking about this Court's interpretation of the last few years or over a period of a generation?

MR. KEISMAN: Well, the first statement of which I am well aware, Mr. Justice Rehnquist, is in Deckert which in turn cites authority as to the meaning of these provisions in the securities laws, and it says that they are voidable at the instance of the party aggrieved. And it is also the teaching of Groesbeck.

QUESTION: And a good deal of the reasoning of the very first -- I think it is the first case that implied a private right of action in the other provisions of the securities laws was the Kardon case and that did rely greatly on this void idea, didn't it, to imply --

MR. KEISMAN: I think it was an alternate holding in Kardon. I believe the holding in Kardon relied most strictly on the then doctrine of the restatement of torts, simply what we contended in our brief, is the proposition that a court properly starts with.

QUESTION: Going back to the Safety Appliance Act and so on.

MR. KEISMAN: The Safety Appliance Act, Rigsby and, of course, way back to Couch v. Steel and Dean Thayer's commentaries that when federal positive law is created or any positive law is created, saying such act or omission is criminal or otherwise wrongful, as against such persons, then it is the most natural thing in the world for the civil process as well as the sovereign penal process to imply a remedy with respect thereto to the party aggrieved.

Now, the petitioners here we think recognize this because they mount a massive exegesis upon a three-word omission from section 214, the special federal question jurisdiction subsection. As we believe we have developed, perhaps too exhaustively in our brief, section 214 has no legislative history worthy of the name. Section 214 as known to the floors of the House and the Senate, as described to it in the committee reports that came to the floor, is described as being comparable to the provisions contained in the Investment Company Act. As a matter of fact, every section in Title II of the Advisers Act after section 207 is so described as comparable.

If a member of the Senate or a member of the House were more than ordinarily curious he might have turned to the legislative history of the Investment Company Act in the Senate and House report on that which happened to be on his desk in the same package, and then he would have been told that section 44 of the Companies Act contained the usual provision about jurisdiction.

Now, if the intent of Congress is the intent of tierh house and not the intent of some draftsmen working for someone on some subcommittee, then the reasonable interpretation of the intent of the sovereign body of Congress with respect to 214 is what it intended to do, what it had done before. No one suggested to it, even if a member read the committee reports and read the committee hearings, there was nothing in any of those that carried the remotest suggestion that anyone had ever made a conscious change or that they meant to do anything other than what they had done before.

There is no factual historical explanation that says why at some point on some day 214 was drawn precisely the way it was. Historically the most rational is that for a long time, as we went through the rapid spring and summer of 1940 drafting these laws, large pieces of Title I and Title II, the formal pieces, jurisdiction, venue, offenses, procedure, had been picked up from the 1935 Act and put in bodily perhaps as a way of saving time. There was apparently some desire to get this work done. At some point --

QUESTION: Which was the 1935 Act?

MR. KEISMAN: I'm sorry, the Trust Indenture Act.

QUESTION: I see.

MR. KEISMAN: At some point, the industry protested that this bill was sloppy in effect. This was what actually happened, Title I and Title II should be separated, that section should be written. Rather quickly sections were written and we have the committee print that pops up now with sections all neatly done for Title I and Title II, with no comment on any of them, not the slightest off the floor nor on.

Now, to create a monumental doctrine to say that the Advisers Act shall be different from all other acts because of this bit of draftsman's trivia and against what the floors of each house enacted in this bill without substantially being told is an excuse, it is not a valid reason for an exegesis, for a different result, for change of the consequences of the broad anti-fraud provision of the Advisers Act as opposed to the consequences of section 10(b) or, more to the point, rule 10b-5.

QUESTION: Mr. Keisman, going back to your broader point that where there is a wrong there has got to be a remedy what do you do with Piper v. Chris-Craft?

MR. KEISMAN: In Piper, this Court came to the conclusion that a defeated tender-offeror in that capacity was not a member of the class protected by the Williams Act. Mr. Justice Stevens, I am aware that you did not concur in that position. But I think that the cases are nonetheless distinguishable as they did come down or as we contend this one should come down, in that there was an argument, and the argument was recognized, that to put another weapon in the hands of a company seeking to take over another, as it were the predator, was to tilt the balance in a way different than Congress had in mind. The Williams Act was enacted because the Congress expressed great concern at the rush of companies, conglomerates, aggressive corporations to take over others, and the Williams Act was passed to make that a little more difficult.

Now, if the predator as it were could sue not only his competitor but as the logic appeared to be could sue the target company if it fought back hard and slipped into some omission in the race in the perhaps seven to ten days it takes to mount what the financial press used to call the Saturday night special, why, the target company's resistance might be weakened beyond all reason the fear that a well-mounted and powerful attack seeking to take you over -- well, the management might not fight back anyway, if they do fight back there is some reason for saying, no, we are not going to give the predator a chance to use the Williams Act in any way, the predator is on his own.

That is not this case. Here we have --

QUESTION: The difference you are saying then is that that dealt with for whom the cause of action may have applied, whereas this deals with whether any may be --

MR. KEISMAN: Yes, Mr. Justice Stevens. The result expressed in terms of Cort criterion four, whether this should be remitted to the state court, we submit and we have argued in our brief, are actually words of conclusion riding on the conclusion as to criterion number one, that the offeror was not within the class protected and that really could perhaps have been the end of it.

Now, in the time remaining I would simply like to stress that the problems, the tremendous policy problems thought to arrive out of allowing federal protection of an advisee by his advisor for breach of what Congress recognized was a fiduciary relationship and a fiduciary relationship of federal concern. This Court pointed that out in Green v. Santa Fe. Congress has superimposed what it knew as a fiduciary relationship, positive law with respect to what is a breach of this kind of fiduciary duty.

We respectfully submit that this is the job of the federal judiciary as to limiations, as to scienter -- again, the Second Circuit knows all about scienter, it decided Abrahamson, it also decided Drexell. Scienter has always been a part of a fraud claim. As to other things --

QUESTION: The Second Circuit knew all about Piper and Chris-Craft, too, didn't it?

MR. KEISMAN: Well, it may have erred, Mr. Justice Rehnquist, in that case, but we respectfully suggest that as to the proper elements of a 206 offense, there is no reason to think that the Second Circuit would be any more open-ended than it was under 10b-5, the Williams Act or something rather new at the time, sir.

We respectfully suggest that these problems are the problems that are properly those of the District Courts, to delineate the elements that are not before this Court and that are not in the record -- we have very little of a record here, a pleading dismissed for want of jurisdiction. If this is not the job of the federal judiciary, we respectfully suggest that it leaves one in some doubt as to what that job is. The pretended horrors of the flood of litigation? No, the petitioners found perhaps fifteen cases in seven years. The Judicial Conference reports that 130,000 private federal civil actions were filed last year. The number of times that the federal judiciary would have to concern itself about fraudulent conduct by an interstate advisor, by an advisor advising investors on a national scale is very small, probably less frequently than it has to consider the terrible burden of doing a litigation under section 1 of the Sherman Act. The burden isn't there. The Hochfelder problem isn't there. The Blue Chip problem isn't there.

The universe of plants are people in a contractual relationship. A prospective client who doesn't enter into a relationship isn't going to be defrauded. That is a shiboleth. We are not going to have suits for damages arising out of a false advertisement for a tempt sheet that someone didn't buy. A prospective client could be defrauded if he becomes a client, and perhaps it is the ad that made him become a client. But the problem isn't really there.

The problem is as fictional as the asserted datum with which this Court was presented with regard to suits against real estate trusts. As we pointed out, the only verifiable datum, the only reported case cited is miscited. One cast was presented as involving an unjust settlement. As it happens, we were able to inspect the file because my friend was counsel for the plaintiff there and the case was settled after the trustees of the trust wanted it settled. There is no problem of burden and there is a duty in the courts which we respectfully submit should be met.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ferrara.

ORAL ARGUMENT OF RALPH C. FERRARA, ESQ.,

AS AMICUS CURIAE

MR. FERRARA: Mr. Chief Justice and may it please the Court:

The Securities and Exchange Commission believes that an implied remedy for damages caused by violations of the anti-fraud provisions of the Investment Advisers Act is consistent with the Act's legislative scheme and necessary to achieve effectively its goals.

As you have already heard, a primary congressional purpose underlying the enactment of the Investment Advisers Act, particularly its anti-fraud provisions, was to eliminate fraud and overreaching by investment advisers, abuses which had compromised the interests of advisory clients and deregation of the delicate fiduciary nature of an advisory relationship.

Judicial recognition of an implied right of action here would effectuate that congressional goal. Far from interfering with the Act's regulatory scheme or its enforcement by the Commission in the manner explicitly provided for in the statute, section 206 -- I'm sorry, implying a right of action under section 206 of the Advisors Act would serve as a necessary supplement to governmental action. Without a private remedy, statutory objectives would be frustrated and congressionally provided protections for advisory clients would be significantly diminished.

Like section 10(b) of the Securities and Exchange Act, section 206 of the Advisers Act is a general anti-fraud provision, an across the board prohibition of the countless varieties of deceptions and cunning devices to which clients of investment advisers might be subjected, and all who meet the statutory definition of adviser, including those who are exempt from registration by the Commission, are covered.

Section 206 is therefore a provision intended and structured by the legislators to provide broad protections to the clients of investment advisers, to the clients of investment advisers. Congress clearly articulated a federal right and that a special class.

Becuase of this specific congressional purpose, section 206 in some respects is more limited to the anti-fraud provisions of section 10(b) of the Exchange Act. For example, section 206 is limited in its applicability to an adviser's relationship with his client. On the other hand, the limitations contained in section 10(b) that the fraud be in connection with the purchase and sale of a security is not a prerequisite since Congress recognized that fraud by an adviser may take forms which do not always directly relate to the purchase and sale of securities, thus the legislative history of the Act repeatedly emphasizes the need to protect the special class of clients from unscrupulous and fraudulent practices.

By 1940, of course, Congress had enacted a full panoply of securities laws which were in part designed to prevent fraudulent practices, yet Congress perceived a deficiency in the legislative scheme in that it was not as effective as it could be in preventing the types of abuses that had grown up in the investment advisory field. Congress intended to remedy this deficiency and this Court has directed lower courts that it is their duty to provide such remedies as are necessary to effectuate the congressional purpose.

It is therefore significant to the Commission that each of the three appellate courts that has considered the issue presented here and the overwhelming number of district courts that have done so have concluded that a private remedy is both appropriate and necessary to achieve the goals underlying the Investment Advisers Act. And as the Firth Circuit has stated in the Wilson case, there are no less drastic and more closely tailored means by which to do so.

We submit that the many courts that have considered this issue have been faithful to the Court's direction. There are, as this Court has pointed out, of course, circumstances in which a private remedy would not only fail to contribute to furthering the legislative scheme but would also actually interfere with Congress' intent. But we do not have in these circumstances, we do not have in this case an assertion of a private remedy by one that the statute was meant to regulate as we had in the Piper case. Here the clients of the advisers were intended to benefit from the statute, and that is who is bringing the action. Nor do we have a situation in which private enforcement would not be harmonious with the exercize of the enforcement powers entrusted to governmental agencies, as was the case in Amtrak and Barbour.

It has been the Commission's consistent experience that even where allegations in a separate private damage action parallel the Commission action in an enforcement proceeding, private remedies do not interfere with their own enforcement activities and, of course, many private actions are brought where the Commission does not or because of limited resources could not institute its own proceeding.

We recognize, of course, that administrative or institutional limitations alone do not justify the implication of private remedies, but an appreciation of the dimensions of the enforcement problems faced by the Commission and how that problem has changed through the years is useful to an understanding of the depths of the problems that are faced today.

As in Brouk, one measure of the necessity for a private action is to provide -- I should say is provided by the scope of the practical problems that the agency faces in attempting to administer the Act. In 1940, the investment adviser industry was indeed a fledgling profession. That emerged in response to a depression and the public's perceived need for investment expertise to supervisors' investments. But that fledgling profession has experienced dramatic growth since 1940, and recent statistics indicate that that is a continuing trend.

In 1941, barely 750 advisers registered with the Commission under the Investment Advisers Act, as compared to approximately 6,000 broker-dealers that were registered with the Commission back in 1941. Currently the Commission's records put the number of registered investment advisers -- and that is not the entire universe of advisers, but the number of registered investment advisers at 5,500, almost equalling the number of registered broker-dealers.

Perhaps even more indicative of the importance of the advisery industry to the nation's affairs, of our national economy is the growth of the assets under advisement. While the number of advisers increased seven-fold since 1941, the amount of assets under advisement has increased fifty times. Today there are $200 billion under advisement. And it must be taken into account that, unlike overseeing and disciplining the broker-dealer community where the Exchange Act provided for a Commission and self-regulatory partnership in enforcing the Act, the Commission must bear the primary responsibility for regulating and enforcing the provisions of the Investment Advisers Act.

Moreover, the enforcement role, as I said a moment ago, extends to all those who meet the definition of an adviser, including the many advisers who are exempt from the Act's registration provisions.

For various reasons not limited to the scarcity of available resources, the Commission must carefully choose the cases it brings. Even in those cases it does bring, moverover, it is normally impossible for the Commission to obtain redress for injured investors. As Mr. Justice Stevens pointed out, it is fundamental to our adversary system that selfish interests of litigants provide the best guarantee that a claim will be effectiveless asserted. Certainly, it is true that there is no policeman so effective as the one whose pocketbook is affected by the degree to which he enforces the law.

As we have pointed out, many of the reasons which compel a conclusion that a private right of action should be available under the Exchange Act also militate for the conclusion that a private action should be provided under the

Advisers Act.

QUESTION: Do you draw any distinction between legal and equitable claims?

MR. FERRARA: Well, indeed, I suppose the Commission would prefer to see the case decided on the narrowest grounds, principally because we have been told and we understand that implied actions are not favored. However, I think that in this case, although the relief prayed for is basically equitable relief, damages are also prayed for, and we think probably this would be a good time to resolve the question of whether there is an implied remedy under the Investment Advisers Act.

QUESTION: That doesn't quite answer my Brother White's question, as I understood his question. That is, in your submission, do you think there is a valid distinction or a valid distinction can be made between the two claims, in light of the statute?

MR. FERRARA: Yes, a distinction --

QUESTION: Judge Gurfein did, in dissenting in the Second Circuit.

MR. FERRARA: That's right.

QUESTION: And your brief seems to indicate that.

MR. FERRARA: No. Indeed, a distinction could be drawn. Judge Gurfein, in dissenting in the Abrahamson case in a footnote, seemed to suggest that had the Abrahamson case been an equitable action or an action for equitable relief, that action might have gone forward and be implied under section 206.

QUESTION: Also in the text of his dissenting opinion I think there is --

MR. FERRARA: And in this action, since the principal relief prayed for is an injunction, rescission, restitution on accounting, as well as damages --

QUESTION: Tell me why you think in terms of whether there is an implied private cause of action there could be some distinction drawn? I am not talking about the jurisdiction, whether there might be some difference as to whether you needed the jurisdictional amount, but I am talking about the private cause of action.

MR. FERRARA: Yes. As Mr. Justice Stewart pointed out in assisting me in clarifying my response to you, the Commission believes that this case could be decided solely by treating the equitable question, but it doesn't have to be. Now, if the Court --

QUESTION: You haven't answered my question yet.

MR. FERRARA: I understand that. If the Court chose to decide the action just on the basis of the equitable -- chose to decide the case on simply the --

QUESTION: To put it differently, why should you get a different and how could you get a different answer on the legal side and on the equitable side in terms of the private cause of action, just briefly?

MR. FERRARA: Briefly, we would follow the direction of Mr. Chief Justice Burger in the Piper case, where he asked as one of the criteria that were utilized in that case if there was a less drastic means by which to provide the remedies that were needed to fulfill the congressional purpose. And Mr. Justice Burger might say in analogy to the Piper case that this is --

QUESTION: How about the Commission?

MR. FERRARA: We would agree that if the Court chose a less drastic --

QUESTION: What do you urge the Court to do?

MR. FERRARA: We urge the Court to find that implied right of action under section 206 of the Advisers Act, but should the Court choose to find --

QUESTION: For what, both legal and equitable?

MR. FERRARA: For legal and equitable relief. However --

QUESTION: You think the Act should be construed that way?

MR. FERRARA: We do indeed. However, we recognize that should the Court wish to find only that an equitable remedy should be implied under section 206, it could do so.

QUESTION: Remedies sometimes don't put any money in anyone's pocket, isn't that so?

MR. FERRARA: Indeed they do not.

QUESTION: The Commission isn't so much concerned about putting money in people's pockets as stopping wrong-doing that is on-going, isn't that right?

MR. FERRARA: That's correct. We generally seek prospective relief.

QUESTION: But you told us that your argument is based upon the economic motivation of private parties.

MR. FERRARA: I'm sorry?

QUESTION: A great deal of your argument is based upon the fuel that is provided by the economic motivation of private parties.

MR. FERRARA: That's correct.

QUESTION: And economic motivation has to do with putting money in people's pockets generally.

MR. FERRARA: The protection of the economic interests of clients is the very point of prohibitions against adviser fraud. Mr. Chief Justice, the Commission normally seeks prospective equitable relief in getting an injunction. A private litigant seeking equitable relief oftentimes, as in this case, would seek rescission, restituion and accounting and to some extent restitution as the equitable analogue, I believe, of damages.

QUESTION: Mr. Ferrara, which if any of the four factors identified in Cort v. Ash would suggest that one could draw distinction between legal and equitable remedies?

MR. FERRARA: It would be the third, sir, that is whether or not the action was consistent with the underlying legislative scheme. That is the way that --

QUESTION: Are you suggesting then that perhaps an equitable action is consistent but a damage action might be inconsistent?

MR. FERRARA: No. What I am suggesting is that in providing a gloss over the four-part Cort test in the Piper case, I believe this Court suggested in focusing on Cort factor three, that is where the action is consistent, this Court asked an additional question and that is whether or not the action, a private action could go forward in a less drastic fashion than to seek full legal damages. And since there was no response in that case, they found in part that the third factor of the Cort test had not been met.

I think in this case, should the Court wish to take that approach, should the Court wish to provide that gloss of Piper on Cort v. Ash, it could decide that at a minimum the third degree or the third criteria of the Cort test could be met by providing equitable relief. However, we believe that the Court should decide the broader question and that is whether there is an implied right of action generally under the Investment Advisers Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Do you have anything more, Mr. Anderson?

ORAL ARGUMENT OF JOHN M. ANDERSON, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. ANDERSON: May it please the Court --

MR. CHIEF JUSTICE BURGER: You have eight minutes and if you need it we will run through your rebuttal entirely before breaking.

MR. ANDERSON: Thank you, Mr. Chief Justice.

Let me be as brief as I can. The omission of the phrase "action at law" in and of itself is not as significant as the omission of the phrase "action at law brought to enforce any liability or duty created." Those words do not appear in the Investment Advisers Act of 1940. They do appear in the 1933 Act and in the 1934 Act. I think that is the omission which is significant.

There are a limited number of --

QUESTION: Mr. Anderson, don't they appear in the '33 and '34 Act as those Acts have express actions at law available for remedy?

MR. ANDERSON: Yes, that's correct. However --

QUESTION: There is no such express action at law available under this statute.

MR. ANDERSON: Yes, that is correct. However, in the '33 and '34 Acts where there are creations of expressed rights of action, those provisions providing those expressed rights of action create and have in them those very sections conferral of jurisdiction, and so it seems to me that the significance is not the omission or the inclusion for that purpose but to suggest a broader range of remedies available.

There are a few number of suits against real estate investment trusts because of the uncertainty as to whether or not a private right of action exists under this Act. That I think is the answer to the fact that there are only some 15 suits that we have been able to find in recent years. As the Court may know, the District Courts have been divided on this issue and all of the Courts of Appeals which have considered this, there has been a strong dissent.

With respect to Judge Gurfein's comment that there might be equitable relief available, it should be pointed out that equitable relief as an issue was not in that case, but more importantly I think it would be anomalous for this Court to conclude that there might be equitable relief because the existence of equitable relief presupposes under standard equitable principles the existence or the absence of adequate legal relief. And I think it would be on that technical legal ground, it would be inconsistent to do so. But more importantly, as we point out in this case, since there is a prayer here for rescission, the line between equitable relief and money damages relief is bound to be blurred.

The Securities and Exchange Commission refers to the only other case in which this Court has considered the Investment Advisers Act, namely the Capital Gains case. In the Capital Gains case, this Court held that the Commission need not show intentional willful misconduct, old fashioned fraud in order to obtain an injunction. Are we to understand from that that a private litigant seeking injunctive relief also would not have to show old fashioned fraud, intentional conduct. And if that is the case, does it not undermine this Court's ruling in the Hochfelder case where the limitation on the kind of conduct that could be prescribed.

The argument is made in this case that the Advisers Act at least provides for equitable relief that is based on section 215(b) of the Advisers Act, and as we submit and discuss at length in the red reply brief, that argument is based on misreadings of that section and does not account for the fact that that section was undoubtedly based on state law in which the voidability provision was available as a defense for someone seeking to enforce an adviser contract, did not confer necessarily or by experience a right to affirmative action.

The Advisers Act, unlike the 1933 and 1934 Acts, does not purport to regulate the marketing of securities generally. It is aimed at a small specific segment of the securities industry. It is aimed instead at a special relationship rather than a range of transactions, and we submit that to use 1933 and 1934 Act principles in wholesale interpretation of the Advisers Act simply because they are both or all three are federal securities law is misleading and inappropriate, given their different aims and different purposes.

Accepting the premise that the Advisers Act was intended to protect clients of investment advisers, it is ironic I think that if this Court were to imply a private right of action under that Act, it would plunge those litigants, those claimants, those clients of investment advisers into years of unknown litigation -- and I say unknown, as to who may bring the suit, who may be a defendant, who may be sued, what are the standards for causation, and what are the questions for intent.

How much more it would benefit the investors, how much more it would benefit the clients of investment advisers if the federal courts were to leave to Congress the task of weighing and considering those very questions, as the Congress itself did in 1970 in its evaluation of the Investment Company Act. It seems to me that the beneficiaries of the Act, namely the clients of investment advisers, would benefit more from refusing to imply a private right of action here and allowing the Congress to weigh and to evaluate the remedies before opening the door to witless protracted private litigation in the federal courts.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 12:02 o'clock p.m., the case in the above-entitled matter was submitted.)

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