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Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER, & SMITH, INC.	)	
Peititoner,	)	
v.	)	NO. 80-203
J. J. CURRAN AND JACQUELYN L. CURRAN	)	

Washington, D. C.

November 2, 1981

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ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

MERRILL LYNCH, PIERCE, FENNER, & SMITH, INC., Petitioner, v. J. J. CURRAN AND JACQUELYN L. CURRAN : No. 80-203

Washington, D. C.

Monday, November 2, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:53 o'clock a.m.

APPEARANCES:

RICHARD P. SASLOW, ESQ., Detroit, Michigan; on behalf of the Petitioner.

ROBERT A. HUDSON, ESQ., Detroit, Michigan; on behalf of the Respondents.

BARRY SULLIVAN, ESQ., Office of The Solicitor General, Department of Washington, Washington, D. C., amicus curaie.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear argument next in Merrill Lynch against Curran.

Mr. Saslow, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD P. SASLOW, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SASLOW: Mr. Chief Justice, and may it please the Court, the issue presented is whether the Commodity Exchange Act provides persons such as the Currans an implied right to maintain a civil action for damages under Section 4, the antifraud provisions of the Act in federal court.

In a broader sense, the issue is where is the line to be drawn that distinguishes between the proper scope of judicial function in the interpretation and application of statutory language, and what the Constitution defines to be the legislative prerogative, the enactment of substantive rights and federal statutes.

Very briefly, the facts are that the Currans opened a commodity trading account with Merrill Lynch in 1973. The account was closed about a year later, having sustained substantial losses. The Currans started suit in the United States District Court for the Eastern District of Michigan, claiming civil damages alleged to have been suffered as a result of the fraud of Merrill Lynch.

In the Court of Appeals, the Court addressed sua

sponte and decided the issue of whether the statute creates this implied remedy. Over the dissent of Judge Philips, the court concluded that there is such a remedy.

The Currans' claim is based on Section 4b of the Commodity Exchange Act, a 1936 statute. The 1936 Act was broadly proscriptive, provided for criminal sanctions, and granted some regulatory powers to the Secretary of Agriculture. There was no provision in that Act for any private remedy in federal courts. There was no language in the statute creating such a right, and there was no indication anywhere in the legislative history that Congress ever considered, contemplated, or intended the existence of such a right.

The 1936 Act contained Section 4c, savings clause, which preserved to persons any rights or remedies they might have under applicable state law.

The Commodity Exchange Act was amended in 1968, very substantially in 1974, and again thereafter in 1978. The 1974 amendment significantly broadened and strengthened the regulatory control of the government over this sector of the economy. The 1974 amendments created the Commodity Futures Trading Commission, which was designed to be an expert agency with broad administrative, regulatory, and enforcement and remedial powers.

The Commission was vested with the oversight of

contract markets, of the rules and regulations of the contract markets, was given power to enforce with cease and desist orders the terms of the Act. It engages in the registration and licensing of persons active in this industry. It has the power to revoke and suspend licenses and registration for violations of the Act.

The Commission has the power to impose civil penalties of up to $100,000, and to pursue criminal prosecutions, with penalties ranging up to $500,000 for, among other things, wilfull violation of the section at issue here, the antifraud provisions, Section 4b.

The 1974 amendments also repealed the state law savings clause, provided for exclusive jurisdiction over futures trading and related activities in the Commission, and also set up an administrative reparation procedure by which aggrieved persons such as the Currans could pursue a civil damage remedy before the Commission.

The Act did not in 1936 nor in 1974 nor at any other time contain any language granting a person a right to sue for civil damages in the United States District Court alleging a violation of the Act.

The Currans are asking in effect that the Court correct this Congressional oversight. They ask that the Court --

QUESTION: Do you use that term with precision?

That is, that it was an oversight?

MR. SASLOW: No, Your Honor, absolutely not. We take the position that Congress acted purposefully, that it is being characterized by the Respondents as an oversight.

QUESTION: Then you are using it in quotation marks.

MR. SASLOW: Yes, sir.

QUESTION: Their claim of oversight.

MR. SASLOW: Yes, Mr. Chief Justice.

QUESTION: Is it correct that they contend it was an oversight? They thought Congress was aware of the existing private cause of action and found no need to enact it. Isn't that their argument?

MR. SASLOW: They argue that there was an existing private right of action. We dispute that there ever was.

QUESTION: But if they are right, then it wouldn't be an oversight that they didn't put it in.

MR. SASLOW: Yes, it would still be an omission from the statute that is purposeful.

QUESTION: But not an oversight. If they thought they knew -- may they were wrong -- that there was an existing private cause of action and they didn't change the law deliberately, because they thought, we've already got a remedy, it would not be fair to call that an oversight, would it?

MR. SASLOW: If that were the situation, no, but the --

QUESTION: And that is what your opponent argues is the situation. I know you disagree with it.

MR. SASLOW: But the legislative history simply doesn't bear that out. Congress was in fact presented with testimony saying, if you provide these reparation proceedings, you must also include express language creating a civil damages remedy in federal court or else --

QUESTION: I understand. I just merely was questioning whether it is correct to say they are relying on an oversight. That isn't as I understand it their argument. Maybe they are wrong.

MR. SASLOW: What the Respondents are asking in effect, though, is that the Court ignore the years of debate, hearings, testimony, drafting, enactment, amendment that underlie the formation of this Act since 1936 and which represents a reasoned policy decision on the part of Congress as to what rights and remedies should be contained within the Act.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock..

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

(Whereupon, at 12:00 p.m., the Court was recessed, to reconvene at 1:00 p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Saslow, you may resume whenever you are ready.

ORAL ARGUMENT OF RICHARD P. SASLOW, ESQ.,

ON BEHALF OF THE PETITIONER -- RESUMED

MR. SASLOW: Mr. Chief Justice, and may it please the Court, the Congress of the United States has since 1936 devoted considerable attention, time, effort, and draftsmanship to the creation of the Commodity Exchange Act. Yet the Respondents would ask this Court to disregard that Congressional effort in this very key provision and substitute the wisdom of this Court for that of the Congress as to whether this substantive right, this private right of action, should exist under this statute.

What Respondents ask in effect is for the Court to exceed its judicial function and venture into the realm of the legislative function..

This Court recently in Texas Industries versus Radcliffe Materials had occasion, speaking through the Chief Justice, to discuss the fact that the creation of substantive rights is a legislative function. The Court noted that it is the Congress that is equipped to make these kinds of policy decisions.

For example, in the consideration that preceded the enactment of the Commodity Exchange Act, the Congress

heard testimony from witnesses representing many diverse segments within the futures trading industry. This testimony, the hearings amounted to hundreds and hundreds of pages of legislative history, and represented the accumulation by the Congress of information, of the interests, the opinions, the desires of all of these many groups.

The decision of the Congress as to how those many and often diverse interests could best be balanced and mutually served, and how the futures industry and the national economy could best be served through this Act is set forth in the language, the provisions that the Congress put into the Commodity Exchange Act.

The framers of our Constitution determined that such policy decisions are to be made by elected representatives, those who are politically accountable to their constituents.

The judicial forum is unsuited to the making of such policy decisions. Courts are limited to the facts presented to them by individual litigants in an adversary posture. The Court does not have free ranging source of information to make such decisions.

QUESTION: Mr. Saslow, does Section 4b refer to the obligation of the FCMs toward third parties in the market generally, or only to their own customers?

MR. SASLOW: It does not direct their obligation to anyone in particular. It simply prohibits their committing fraud or deceit. I believe the focus of Section 4b is expressed in the 1936 enactment, and notwithstanding that the Respondents seek to look for Congressional intent in the 1974 amendments, it must be remembered that Section 4b was enaceted in 1936, and has been on the books since that time, notwithstanding the amendment of other provisions of the Act.

And in 1936, the Congress was focusing on the protection of farmers, producers, people who handle the commodities, to protect those people from the abuses of, among others, speculators. The idea was the protection of the marketplace and of the agricultural segment of the economy from manipulation, excessive speculation, and other abuses in the futures market.

QUESTION: Were the plaintiffs in this case speculators themselves?

MR. SASLOW: Yes, they were. Speculators as opposed to hedgers, who are people who have an interest in the cash commodity itself and are trying to abate the risk.

QUESTION: By playing both sides, so to speak?

MR. SASLOW: That's right.

The role of statutory construction traditionally involves the resolution of ambiguities in the statute, the

efforts of the judicial branch to harmonize apparent conflicts between different provisions within a statute, or the task of harmonizing apparent conflicts between different statutes, and the application of the law to the facts of an individual case.

Where, as in this case, the statute itself is clear, the Court need only consider the language and the structure of the Act to answer the question, and the answer to the question here is that there is no private right of action contained within the statute. Therefore, none exists.

This Court's recent decisions have emphasized these limitations on the judicial role in the implication of private rights --

QUESTION: Mr. Saslow, may I ask, I gather your basic position is that at least under the 1974 amendments, any redress has to be obtained from the Commission. There is no state law question here, I gather, is there? If there is pre-emption, it is pre-emption of any judicial remedy in the federal courts, and redress only before the Commission?

MR. SASLOW: I do not believe that the federal state pre-emption issue is before the Court in this case, but I do believe --

QUESTION: There are, I gather, I think your brief suggests that there may be some ruling for state law in the cases of contractual commercial rights and contracts for

future delivery, but as to what we are talking about in this case, is it your position that the Congress has specified that if you have any redress you have to go to the Commission to get it?

MR. SASLOW: Yes.

QUESTION: That is basically your position.

MR. SASLOW: That states my understanding --

QUESTION: Yes.

MR. SASLOW: -- of the effect of the Act.

QUESTION: Yes.

QUESTION: But didn't you say in your reply brief that the Currans would have a cause of action for fraud under Michigan law? Or am I mistaken about that?

MR. SASLOW: No, Justice Powell, I don't believe --

QUESTION: You don't think so?

MR. SASLOW: -- we expressed that position in our reply brief.

QUESTION: I guess I am looking at the wrong brief. Well, on Page 2 of your reply brief, you say Respondents could sue for fraud in state court under the common law of Michigan. Is it the yellow brief? Am I looking at the right one?

(Pause.)

MR. SASLOW: Justice Powell, I was addressing an argument made by the Respondents that their cause of action

accrued prior to the date after which reparations would be available to them.

QUESTION: Yes, but --

MR. SASLOW: The pre-emptive effect of the Commodity Futures Trading Commission Act arises in the 1974 amendments. Prior to that time there was a savings clause in the statute that reserved state remedies to litigants. That savings clause was deleted in 1974, and the reparation proceedings were made available at the same time.

So, in addressing this, the argument of the Petitioners, we say regardless of when their claim accrued, and that has never been determined in this case, if it was before the effective date of the 1974 amendments, they would have available a state court remedy; if it were afterward, they would have direct reparation remedy before the Commission.

QUESTION: Doesn't that modify your answer to Mr. Justice Brennan? Aren't you saying, if I understand you correctly, that these Respondents would have, unless barred by the statute of limitations, a fraud action in the Michigan state courts?

MR. SASLOW: Only if their claim as they now say accrued prior to the availability of reparation.

QUESTION: Well, that is their claim, isn't it?

MR. SASLOW: Well, it was not their claim in the

court below.

QUESTION: All right.

MR. SASLOW: We were addressing an argument that they made that if this Court does not grant a private right of action in the federal courts, they would be without any remedy whatever, and in addressing that point we just say that they have one or the other depending on when their claim accrued.

This Court's recent decisions have stressed the limitations on the judicial role in the implication of private rights under statutes that don't expressly provide those rights. What this Court has said is that it cannot infer a private remedy under such a statute in the absence of clear, persuasive evidence that such was the intent of the Congress, yet the evidence that the Respondents rely on in this case is evidence of the sort that this Court has rejected as being probative of the existence of a private remedy.

The Respondents argue that this is a comprehensive regulatory statute providing various means of enforcement and redress. They argue further that it is the apparent will of the Congress to provide strong enforcement, and therefore it would advance that same Congressional purpose for the Court to imply an additional form of remedy. This Court has, however, held otherwise, acknowledging that when

there is a comprehensive, broad statute providing for varied remedies, it creates a presumption that the Congress knew what it was doing and enacted those remedies that it intended, and remained silent as to those remedies that it did not intend.

The Commodity Exchange Act at various provisions expressly provides for the jurisdiction of the United States Court to contribute to the enforcement of the statute. The Courts are given jurisdiction over the cease and desist actions of the Commission. They are given enforcement of Commission orders. The enforcement and appellate review of reparation awards is expressly placed in the federal courts.

Obviously, as this Court has noted, when Congress wishes to provide a remedy, it knows how to do so and does so expressly.

QUESTION: Mr. Saslow, is there a review -- I can't remember -- of the denial of reparations?

MR. SASLOW: From an award of no damages?

QUESTION: If the Commission says, you are not entitled to anything, does the complaining party have right of review of that?

MR. SASLOW: There are two situations in which that can happen, Justice Stevens. There is an initial determination made upon the filing of the complaint whether the complaint has sufficient merit to go any further. I

understand that that decision is not reviewable. If the proceeding does continue, and there is a hearing, and the award is that there are no damages, no cause of action, then that determination, in my understanding, is reviewable.

QUESTION: If reparations are granted, how are they administered?

MR. SASLOW: They are heard by an administrative law judge who has broad adjudicative powers, not too dissimilar to the federal courts. There are provisions for discovery, representation by counsel, and so forth.

QUESTION: Would the function be somewhat like the distributions in a class action?

MR. SASLOW: I am not familiar enough with those mechanics to --

QUESTION: Well, where a fund is recovered for a class, it is impounded by the courts and then administratively it is parcelled out or available to the people, the members of the class who have elected to come in.

MR. SASLOW: I do not know if the reparation proceedings provide in fact for class action, but if it were an individual proceeding, it would proceed not unlike a normal individual piece of litigation in the federal courts. In other words, if there is an award, it is enforceable individually againts the respondent, and it is enforceable in the federal courts with the normal execution

remedies.

In addition, the trading privileges of a respondent who doesn't pay an award ordered by the Commission are automatically suspended.

It is argued by the Respondents that Section 4b was enacted for the especial benefit of customers such as themselves, and that therefore a private right of action should be implied. This argument is unavailing for two reasons. The first of those reasons is that it is factually incorrect. As I discussed a few minutes ago, the protection was directed to the marketplace in general, and to the extent there was any particular favored class, it was basically the farmers.

The argument is also legally insufficient. Even if people such as the Respondents were a favored class at whom the statute's benefits were aimed, that still is insufficient to create a substantive right to proceed in the federal courts.

The Respondents also seek to invoke the holdings of approximately four United States District Courts that recognize an implied right of action, using the tort pro se analysis of Rigsby and Borak, an analysis that this Court has since categorically rejected in Touche Ross and Transamerica. It is argued that the Congress was aware of, approved of, and in effect adopted these decisions, and now

this Court is debarred from taking that away since it is not said to represent a Congressional enactment.

This argument is factually incorrect and constitutionally unsound. It is factually incorrect because it is simply not supportable that the Congress as a whole was aware of, spent any time considering, or acted in reliance on the existence of a right found by these four courts in Illinois, Minnesota, Louisiana, and Pennsylvania.

The decisions were constitutionally unsound and Congress was simply not well aware of them. There are hundreds of pages of legislative history underlying the 1974 amendments, and there are a very few, very scattered, some ambiguous, some clearly perjorative references to these cases, but there is nothing that focuses on them and represents any Congressional intent recognizing this to be the law or establishing an intent that this shall be the law upon the adoption of these amendments.

The District Courts cannot create substantive rights. Again, it is a Congressional function. They can recognize, they can infer that which Congress has sufficiently implied to them, but they can't create it out of whole cloth, as these courts did honoring Bigsby and Borak.

To follow this argument of the Respondents --

QUESTION: You contend, of course, that both

Rigsby and Borak were incorrectly decided, don't you?

MR. SASLOW: I think Borak was incorrectly decided under the principles this Court has established since that time. I think Rigsby relied on an incorrect premise, but I think Rigsby might have nonetheless been correctly decided even under the Court's current principles.

QUESTION: Under your more or less constitutional argument that the Court has no power to do this, it seems to me Rigsby is clearly wrong.

MR. SASLOW: Well, my argument is that the Court cannot say that this statute creates a duty, that duty has been breached, this plaintiff has been injured, therefore he has a right to proceed in federal court for a damage remedy. I think this Court has in recent terms held that that can't be done. What can constitutionally be done is for the Court to resolve ambiguities and infer in some cases a right of action even where none is expressly provided.

In Rigsby, for example, one of the provisions of the Safety and Appliance Act at issue in that case said that employees shall not be deemed to have assumed the risk. A provision that takes away a legal defense would seem to create a reasonable inference that that defense must be able to be asserted in some forum, and I think there might be an inference to be drawn there that a private right of action was intended.

QUESTION: What about Cort against Ash? Do you think that is acceptable to you?

MR. SASLOW: I think that --

QUESTION: Is that consistent with your theory?

MR. SASLOW: I think that Cort v. Ash has been leading the lower courts astray, the consideration --

QUESTION: That isn't what I asked you. Do you think Cort v. Ash is consistent with your approach?

MR. SASLOW: The result is; the reasoning is probably unnecessary in many cases.

QUESTION: Well, and inconsistent with your approach.

MR. SASLOW: Yes, Justice White, it is.

QUESTION: So if we were going to take your approach, we would have to tear up Cort against Ash and all the cases that have followed that.

MR. SASLOW: No, not at all. I don't believe that is true.

QUESTION: Well, don't you argue in your brief that Cort and Ash was satisfied?

MR. SASLOW: I think under the test that Cort v. Ash establishes, there is no private right of action. I think the degree of inquiry that is required by Cort v. Ash is unnecessary in a case where there is not some indication within the statute that there might have been a private

right intended.

QUESTION: So if we were going to take your approach, we would have to considerably modify the Cort v. Ash approach.

MR. SASLOW: I believe --

QUESTION: We might get the same results in various cases that you would, and some not, but we would have to do a little rewriting.

MR. SASLOW: I don't believe that to decide the case in my favor the Court needs to rewrite Cort v. Ash. I do think that --

QUESTION: Well, why do you criticize Cort v. Ash?

MR. SASLOW: Because I think that the --

QUESTION: We have not overruled Cort v. Ash, and we have decided four or five cases since then applying it.

MR. SASLOW: I recognize that.

QUESTION: Why do you question it?

MR. SASLOW: Because, Justice Powell, when the Courts are invited, as Cort v. Ash invites them, to consider whether an additional private right of action would advance the Congressional purpose, the Courts are then invited to try to form a subjective intent or a subjective idea of what the Congressional purpose is and whether this additional remedy might advance it, and I believe they are led into making legislative policy decisions of the kind that should

be made by elected representatives.

QUESTION: Couldn't you just say, this would be a very easy case under Cort v. Ash?

MR. SASLOW: I could say that. Yes, sir.

QUESTION: I would have thought you might have.

QUESTION: Because the factors are not satisfied for implication, you think.

MR. SASLOW: I believe that is correct.

QUESTION: In other words, you depend on the fact that these huge potential penalties against a broker and criminal sanctions are going to keep them in line. Is that it?

MR. SASLOW: No, Mr. Chief Justice. What I am in effect relying on is that that is the determination that the Congress made, and that that is properly a Congressional decision to make.

QUESTION: And that that is all they intended. And that that is all they intended. That is your argument, isn't it?

MR. SASLOW: And that is all that they intended.

QUESTION: And if there are any reparations, they are incidental.

MR. SASLOW: Well, they are part of the enactment that Congress chose. The Congress was presented --

QUESTION: No, but basically, Mr. Saslow, aren't

you arguing as you answered me earlier, that what they did in 1974 was to say reparation shall be a remedy and you will get it before the Commission, and you don't have any cause of action in the courts, in the federal courts? Isn't that what you are arguing?

MR. SASLOW: No, I am arguing that there was never a cause of action in the federal courts, and after 1974 there was also a remedy in reparation and no remedy in state court. But there was never a right of action in the federal court.

QUESTION: Well, suppose that however much you argue to the contrary, this Court or some court said, well, at the time the 1974 statute was amended, prior to those amendments there was a well recognized cause of action in the federal courts. At least the federal courts had been adjudicating private causes of action under 4b. Let's just assume that is true.

MR. SASLOW: All right.

QUESTION: Now, what would you say then? And let's assume the legislative history were clear that Congress recognized that those causes of action had been implied by the courts, and did nothing, were absolutely quiet about it, except to recognize it.

MR. SASLOW: I would argue that there is still no private right of action.

QUESTION: Because the 1974 reparations remedy displaced the old cause of action. Isn't that your argument?

MR. SASLOW: No, I am arguing that there was never a right of action in the federal courts. There was a right in the state courts.

QUESTION: Accepting Justice White's premise, that there was, then what would you say, was his question to you.

MR. SASLOW: I would say that a right of action still has to be affirmatively created by the Congress. If there --

QUESTION: The reparations action was.

MR. SASLOW: Yes, that's right. It was. And the right of action in the courts was not. That was a Congressional decision, a choice. And it is not the function of the judges to --

QUESTION: So you say you think it poses the wrong question, to say like the Sixth Circuit did or the Second Circuit that the real question here is whether Congress intended to eliminate an existing cause of action.

MR. SASLOW: I think that stands --

QUESTION: The question should be whether they intended to create one.

MR. SASLOW: I think the question posed by the Sixth Circuit turns Articles I and III on their ear.

QUESTION: And by the Second Circuit, too?

MR. SASLOW: And by the Second Circuit as well.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Hudson?

ORAL ARGUMENT OF ROBERT A. HUDSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. HUDSON: Mr. Chief Justice, and may it please the Court, in making the determination of whether a private right of action exists under the Commodity Exchange Act, the opinions of this Court instruct that the touchstone is Congressional intent. In this case, we submit that the relevant inquiry is whether Congress in enacting the substantive and extensive amendments to the Commodity Exchange Act in 1974 intended to deny a private right of action under Section 4b.

We believe this approach to be the correct one in view of the circumstances surrounding the enactment of the 1974 legislation, circumstances which show that based on the unanimous interpretation of Section 4b by the federal courts and based upon the testimony provided to Congress, and statements made by our legislators, Congress perceived that the Act afforded a private right of action.

Thus stated, we believe that the opinion below did not, as this Court cautioned in Northwest Airlines versus United States, fashion a new rule or provide a new remedy

which Congress decided not to adopt, but instead merely interpreted a statute as continuing an existing remedy. We believe the attempt to couch this case in constitutional terms is in fact to beg the very question that we have before the Court, and exalt the proper exercise of this Court's duty in interpreting a statute far beyond its plain import.

This Court has stated on numerous occasions that in construing a statute we look first to the statutory language, and particularly to the provisions made therein for enforcement and relief. While as in nearly every case involving an implied right of action, there is no explicit statutory language which would answer this question for us, we believe the explicit terms of the statute are particularly telling of Congressional intent in this case.

Section 4b is a customer-oriented antifraud statute, very much like Section 10b of the Securities and Exchange Act, interpreted by this Court in Superintendent of Insurance, and Sections 206 and 215 of the Investment Advisors Act, considered in Transamerica Mortgage Advisors. The very language of Section 4b makes it clear that a commodity broker's customers are the especial class intended to be benefitted by that statute.

In Leist against Simplot, Judge Mansfield in his dissenting opinion correctly observed that it is only a

customer who may bring a suit under Section 4b. The express terms of the statute find significant support in the legislative history, which shows that customer protection was one of the, if not the overriding purpose of the legislation.

However, as this Court has cautioned in California versus Sierra Club, the question is not simply whether -- who would benefit, but whether Congress intended to confer federal rights upon those beneficiaries. As to this issue, the Petitioner and the Respondent are not in disagreement, because as Petitioner states in his brief, there is no reason for a court to speculate whether Congress intended that persons aggrieved by violations of the Act be entitled to recover damages.

Plainly, Congress did so intend. And that intention is specified in the express terminology of the statute. Sections 5a(11) and Section 14 of the Act create respectively a private, voluntary arbitration mechanism and an administrative reparations procedure to commodity customers injured for a broker's violation of Section 4b.

Thus, we believe the express terms of the statute, without regard to any other factors, conclusively demonstrate that Congress enacted a federal statute conferring federal duties upon commodity brokers toward their customers, and that Congress intended that customers

would have recourse, civil recourse for violations of that statute.

Yet based upon the record as submitted to this Court, and we want to make that clear, the record supports, and we contend, that the claim of the Currans arose before the effective date of the reparations procedure. Under those facts, no remedy is provided to the Currans. Accordingly, the remaining inquiry of whether Congress intended that those rights to which I have referred would be supported through private litigation must be determined by reference to the language of the -- not to the language of the statute, but through Congressional intent and the factors reflecting that intent, as this Court has outlined in Cort against Ash.

QUESTION: Is there any dispute about that with your opposition, as to whether there is a remedy for the Currans under this section?

MR. HUDSON: Justice Blackmun, I believe there is no dispute. The comment has been made that possibly their claim arose during a time when they could use reparations. We contest that vigorously. I believe that it was correctly observed earlier that the Petitioners are suggesting that the Currans be sent to state court. They simply, in our view, cannot use reparations and they cannot use arbitration.

We believe, therefore, that it would be useful to

take a look very quickly to what precisely Congress did in 1974 with the Commodity Exchange Act. In 1974, 19 new sections were enacted; 27 sections were amended; and excluding the severability clause, only five sections were left undisturbed. Section 4b was one of the sections that was amended, yet the operative language upon which the Respondents rely was left completely intact.

The changes to the 1974 Act -- in the 1974 legislation constituted a vast change in the scheme of legislation, and expansion of federal regulation, and in the means of providing redress for the violations. So, we believe, based on that very extensive modification, that the intent to be discerned is the intent of the 1974 Congress. This is a point which every court which has considered this issue thus far has made.

In considering what the 1974 Congress intended with regard to claims like the Currans', we must recognize that when Congress sat down to amend the statute, it was the unanimous interpretation of the lower federal courts that a private right of action was allowed under Section 4b. Petitioner is unable to point to one single decision that even suggests that that would not be an appropriate result.

QUESTION: Well, Mr. Hudson, in the case of Georgia against United States, decided about seven or eight years ago, where the Voting Rights Act was renewed, the

Court's opinion states at Page 411, US at Page 526, "After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the Allen case, which had been a matter of some controversy in this Court, was repeatedly discussed. The Act was extended for five years without any substantive modification. We can only conclude, then, that Allen correctly interpreted the Congressional design when it held that the Act gives broad interpretation of the right to vote," et cetera.

Now, was there that kind of discussion in the 1974 Congress?

MR. HUDSON: No, there was not, Justice Rehnquist. In fact, the discussions in the 1974 Congress did not get into the specifics in terms of the cases that were decided, however, we believe that even without that, we believe that the conclusion which the Court reached in Cannon versus University of Chicago, which was that -- the statement was made that our legislators are presumed to know the law, in addition to that general presumption, there was a significant amount of testimony which was presented and which we have outlined in our brief which shows that Congress was told that there was a right of action in the courts.

For example, a statement by Mr. Alvin Donohue, of the Minneapolis Grain Exchange, to the effect that the facts

in large claims can best be established through the procedure --

QUESTION: These were lower courts, not the U. S. Supreme Court, like the Allen case.

MR. HUDSON: This is correct, Justice Rehnquist. However, we believe that the emphasis which the Petitioner is trying to place on that very fact is -- overlooks what we believe to be a very significant concept of statutory construction to which this Court referred to in Cannon, which is that it is not really the state of the law which is governing, it is Congress's perception of the state of the law. Whether or not that perception is correct or not is of no moment. If Congress perceived that that private right of action existed, that in fact is the most significant indication of legislative intent.

QUESTION: Well, by 1974, when this Congress acted, AMTRAK had been decided, had it not?

MR. HUDSON: It had.

QUESTION: Or within a month or so, and there we had said that it was no longer open season on private rights of action.

MR. HUDSON: This is correct, Justice Rehnquist. I think that the AMTRAK decision and the very, I believe, cogent questions that you are pointing out must be considered, but I think they must be considered in the

context of the entire circumstances. We believe that we must weigh the factor that you have just mentioned with the fact that Congress was told on repeated occasions that customers could go to Court in most instances by those very individuals who were going to be governed by this Act.

As a matter of fact, one of the representatives of the Petitioner made that very statement to Congress himself in testimony.

It is -- Therefore, the way that we believe that factor is relevant is that this Court has outlined a number of tools, accepted tools of statutory construction which must be looked at. I think the point that we are making, there was this line of authority, Congress was told that there was recourse to the courts --

QUESTION: Well, was there any contrary authority?

MR. HUDSON: There was not. Not under Section 4b, Justice White. It was unanimous, and in fact the belief, we believe, was so universal that it is even underscored by the proceedings below in this case.

QUESTION: Well, Mr. Hudson, is it your position then that Congress anticipated these parallel remedies with respect to those people who could use reparations? With respect to them, did they have a choice? Or could they go both ways at once?

MR. HUDSON: I perceive, Justice White, that

Congress intended that they would have a choice.

QUESTION: A choice, but if they chose one way, that was the end of it?

MR. HUDSON: Correct. That is correct.

QUESTION: If you filed an action in court, you couldn't go for reparation?

MR. HUDSON: That's correct. As a matter of fact --

QUESTION: So there was no primary jurisdiction or no exclusive jurisdiction.

MR. HUDSON: That's correct. That is correct. That is our contention, Justice White. As a matter of fact, the Commodity Futures Trading Commission agrees with that, because at the very --

QUESTION: I know they do. I know they do, and where were the commodities decisions reviewable? In the courts of appeal?

MR. HUDSON: Yes, in the courts of appeal. That is correct. You mean from the lower federal courts or --

QUESTION: No, no.

MR. HUDSON: -- in reparations?

QUESTION: From reparations.

MR. HUDSON: Yes, they go directly from reparations to the -- well, they go directly from reparations to the Commodity Exchange Commission itself.

QUESTION: And then to the courts.

MR. HUDSON: Correct. That's correct. Then to the courts of appeal.

QUESTION: Mr. Hudson, on that point, do you agree that they would have been reviewable -- a denial of a claim for reparations would have been reviewable?

MR. HUDSON: No, I do not, Justice Stevens.

QUESTION: You don't.

MR. HUDSON: As a matter of fact, that is one of the points that we make in support of our contention that it could not have been intended to be an exclusive remedy. There are certain facets to the way that the reparations remedy works that we believe show that it is inconsistent with an intention to make it an exclusive remedy.

QUESTION: But your position is that you have a choice, but once you have made it, you are stuck with it.

MR. HUDSON: That's correct.

QUESTION: So if you file for reparations and they refuse to entertain it --

MR. HUDSON: No, I don't think I would go that far, Justice White, because after all, if --

QUESTION: I gather you wouldn't.

MR. HUDSON: Well, if there has been no decision, if there has been no appeal --

QUESTION: Well, there has been a decision not to

entertain

MR. HUDSON: Correct, but I don't believe that would be any kind of decision on the merits, and I don't believe it would bar --

QUESTION: It certainly would have been a choice of yours, though.

MR. HUDSON: Excuse me, sir?

QUESTION: It would have been a choice of yours to seek reparations rather than court reivew.

MR. HUDSON: It would. It would, because reparations, we believe, was intended to provide an expeditious and inexpensive alternative to court proceedings.

QUESTION: So you think that Congress anticipated independent judgments by courts on commodities exchanges and with no obligation -- if you filed in the court rather than go for reparations, the court you filed in would have no duty whatsoever to consider how the Commodities Exchange Commission had construed its own statute.

MR. HUDSON: This is correct. In fact, this was the way that the courts were interpreting the law prior to the 1974 amendments. This is exactly what the courts were doing. Admittedly, the Commodity Futures Trading Commission had not been created at that time.

QUESTION: Well, yes. That's what I --

MR. HUDSON: We believe, however, that if we

accept the premise, and we believe it is adequately supported in the record, that Congress perceived that alternative to be available, then Congress should have spoken to that fact. Congress would have said something about it. Congress did not.

And in fact, as I have indicated, we believe the intent of Congress to perpetuate the remedy is shown by a study of the mechanism itself of enforcement under the Act.

QUESTION: Suppose there had never been a decision on a private cause of action under 4b prior to 1974. Let's assume there had never been any judgments. Would you still be making the argument that Congress -- that courts could imply cause of action under 4b?

MR. HUDSON: Yes, I would, Justice White. The reason would be that --

QUESTION: In spite of their provision of the reparations?

MR. HUDSON: I definitely would. The reason is that we are looking at a number of factors. That is one factor. I believe that because of the existence of that line of authority, because Congress was informed of it, we have to consider that. If that was not the case, then I think we would have to pass that, we would have to look at the other circumstances, for example, the way the reparations remedy itself works.

Arbitration, which is one of the remedies provided, is only allowable for claims below $15,000, and must in any event be voluntary, certainly not the case if you have no alternative. And the Currans have no alternative in this case, because while the Commodity Futures Trading Commission Act, including Section 4b, became effective on October 23rd, 1974, the reparations remedy did not become effective for three months later, in January of 1975, and claims under reparations could not be filed for one year thereafter, January, 1976.

So, while this type of a phase-in may certainly be explainable in terms of allowing the CFTC to adopt its regulations and prepare itself for its duties, it is completely, we believe, had Congress intended to make that an exclusive remedy, it would have logically made that available to everyone who might come before the Commission.

At the same time, it strains credulity to believe that Congress intended to immunize conduct violative of Section 4b during that period prior to the time that reparations would take effect. This, we believe, is governed by the very standard tool of statutory construction that an unreasonable construction of a statute should yield to the reasonable one.

So, unless this Court upholds the existence of a private right of action, the Currans will be without any

remedy, and we believe that the duty which Congress imposed upon the Petitioner will become entirely precatory, certainly not a wise decision, we believe.

Now, consideration of the reparations procedure itself shows, even if it was available, shows that it would not be adequate because of the point made in response to Justice Stevens' question, that there is no review of a denial by the CFTC, and in fact in 1978 Congress analogized reparations as similar to the operation of a small claims court, certainly not the kind of desciption that would contemplate an exclusive remedy.

QUESTION: Well, your point is basically that the CFTC and the federal courts simply are proceeding on two parallel, never meeting plains, because neither of them has to pay any attention to the other. Is that right?

MR. HUDSON: Well, I would not say that, Justice Rehnquist, because certainly I believe that decisions by the Commodity Futures Trading Commission could be viewed as precedent and applied just as decisions in the other courts. However, I would point out that with regard to securities legislation, while the SEC does not have a customer remedy procedure of this nature, there are various different courts interpreting the law, and certainly with regard to enforcement matters the SEC is interpreting the law as well. That has not posed a problem. I don't believe

it would pose a problem in this case.

QUESTION: Well, but the SEC has been rebuffed a number of times in this Court, has it not?

MR. HUDSON: Indeed it has, and based certainly on some of the decisions, including those that were cited here, I believe, properly, but the fact of the matter is that Congress has in fact permitted the SEC to perform a certain function in that regard. It has also permitted the courts to perform a certain function, and I believe that there has not been an inconsistency in that.

Finally, we would like to point out very briefly that the underlying purpose of the 1974 legislation, which was customer protection, would clearly be frustrated by denying the Currans the right to pursue their claims, but in addition to that there are other ramifications.

For example, the volume of cases with the Commission has become so great that the backlog there is now two to three years. This hardly comports with Congress's intent to make the reparations remedy an expeditious one. And --

QUESTION: Would you say the same line of reasoning would enable someone to bypass the EEOC and go directly into court?

MR. HUDSON: By itself, absolutely not, Justice Rehnquist, but once again, we believe this case presents a

situation where we have a confluence of factors which we believe is entirely consistent with the prior decisions of this Court that when considered all together show that Congress intended that remedy to continue. Any one of them by themselves, I will readily concede, would not clearly show that intent, but we believe that when you have them all together, you must go forward and find that there is a right of action.

In Johnson versus United States, which is a case not cited in our brief, Justice Holmes, then Judge Holmes of the First Circuit Court of Appeals, stated that it is not an adequate discharge of a court's duty to say, we see what you are driving at, but you have not said it, and therefore we will go on as before.

QUESTION: I thought he came from the Supreme Judicial Court of Massachusetts.

MR. HUDSON: That case, Your Honor, was in the First Circuit Court of Appeals.

QUESTION: Well, Justice Holmes never sat there.

MR. HUDSON: Well, I am mistaken then. I apologize. I think, however, the point is certainly adequate for this case as well.

QUESTION: Wherever he sat, he said what you said he said. Is that it?

(General laughter.)

CHIEF JUSTICE BURGER: Very well, Mr. Hudson.

Mr. Sullivan.

QUESTION: Mr. Sullivan, before you start, it may help me if you answer a question or two that I have in mind. I think everyone agrees that we are endeavoring to ascertain the intention of Congress, and the primary question was Congressional intent in 1974 when this Act was extensively amended.

It seems to me also that the intention of Congress in 1936 is relevant. Let's assume, for example, that before the 1974 Act, that we had decided Cort v. Ash, and you had to apply Cort v. Ash to the 1936 record, a record in which there is not a word suggesting an implied cause of action, and the statute then didn't even have a jurisdictional savings clause comparable to the savings clause in the Acts of 1933 and 1934 dealing with securities law.

Applying Cort v. Ash to the 1936 Act, how would the Solicitor General have argued?

ORAL ARGUMENT OF BARRY SULLIVAN, ESQ.,

AMICUS CURIAE

MR. SULLIVAN: I can't say that that is a question that I have particularly given my consideration to before now.

QUESTION: Well, let me ask you this. Let's assume you agree with the implication of my question that

after Cort v. Ash and before the 1974 Act, it would be very difficult indeed to infer a cause of action under the 1936 Act.

MR. SULLIVAN: I think it would certainly be more difficult than under Rigsby.

QUESTION: Let's assume we agree on that. How do you justify putting the burden of proof on proponents of the view that there is on implied cause of action, understanding Cort to have said, in effect, that the lower courts that interpreted the 1936 Act as providing a cause of action were wrong? In other words, if they were wrong, and in effect you have conceded it would be a very close question, where does the burden lie here today?

MR. SULLIVAN: Well, I think it is difficult to say that those courts were necessarily wrong, because they are applying a different test, but as someone said in response to a question earlier, they might have gotten to the same place by a different test.

QUESTION: By what test? Assuming Cort v. Ash came down prior to the 1974 Act, what test in light of Cort would have sustained a private cause of action being inferred on the basis of the language, the legislative history of the 1936 Act?

MR. SULLIVAN: Well, I think that first of all, under Cort, I would have to start by saying that Section 4b

was enacted for the especial benefit of futures traders.

QUESTION: But 4b has not been changed.

MR. SULLIVAN: That is correct, and I would say that in 1936, that was the case. That is how I would start the process.

QUESTION: That would meet one of the four factors in Cort, but only one.

MR. SULLIVAN: That's correct. And the second factor is the one that might give us some trouble, as far as Congress's --

QUESTION: It will give you a whole lot of trouble, in view of the emphasis in your brief on intention.

MR. SULLIVAN: Well, it would, and I concede that, but the problem is that in 1936, when Congress enacted the language that it did in 4b, it wasn't aware of the Cort test, obviously, and it was operating under Rigsby. Presumably, the Congress then thought that if it were appropriate to have an implied right of action under Section 4b, the courts would imply that.

I don't think that there is any -- I think it is very difficult to go back and to see what Congress did in 1936 and to analyze it in terms of today's law, and that is basically the emphasis of our brief, and I think justifiably so.

QUESTION: You mean, I gather, Mr. Sullivan, that

Rigsby stood for the proposition that the mere fact that the statute was enacted for the benefit of a particular class without more, required the implication of a cause of action in his favor?

MR. SULLIVAN: I don't think that it required the implication of class action --

QUESTION: Or supported it, at least?

MR. SULLIVAN: Pardon me?

QUESTION: Supported one, at least?

MR. SULLIVAN: I think that's right. I think that as has been stated in either Sierra Club or Middlesex County by Justice Stevens, these were really analogous to the freewheeling days before Erie. These were the freewheeling days before Cort. It was well established in the 1890s and in 1936 when Congress enacted 4b that the courts were under a statutory tort theory going to go ahead and finish the job that presumably Congress could have done if it wanted to.

QUESTION: Well, Mr. Sullivan, you say it didn't require it but it would have supported it. One court could have come out against it and another court could have come out in favor, and both would have been right under your theory.

MR. SULLIVAN: Well, I think that is probably accurate. I think depending on the circumstances of a particular case, although I have to say that this is a

matter of legal history, to say how somebody would apply Rigsby. I am really not an expert in that. However, I think that there was a good deal of discretion left to the courts under Rigsby to determine whether the implication of a particular remedy, one among many, presumably, would be felicitous in terms of the administration of the statute and the goals that the statute was directed at furthering.

This is a very different world that we are talking about in terms of what the law was when Congress enacted this section in 1936 and what the law is today, let alone what the law was in 1974 when Congress amended the statute.

QUESTION: You do agree, then, that -- or your observation is that Cort against Ash did cut back substantially on Rigsby?

MR. SULLIVAN: I don't think there is any question about that, Mr. Justice White.

What I think should also be said about the cases that were decided on which we relied prior to 1974 is that not only were they unanimous, not only were they before Congress, Congress was clearly aware that this was what the state of the law was --

QUESTION: How many are there, Mr. Sullivan?

MR. SULLIVAN: I think it depends on who is doing the counting, as to how many. There, I think, are about ten or eleven that either hold it or say it indicta with respect

to one of the provisions of the Act. Some are 4b cases and some are manipulation cases.

QUESTION: How many are Supreme Court cases?

MR. SULLIVAN: Well, there is one Supreme Court case, the Deaktor case, in which the Court held that in the first instance a manipulation claim should be presented to the agency, and while the Court didn't squarely hold in that case, and we certainly concede that it didn't, that there was a private remedy under the manipulation section. Certainly the implication of the Court's decision that you go in the first instance to the agency or to the old commission certainly implies that in the second instance you can go to court, and indeed, the exchanges did not contest that in that case. They simply argued the case, and it was argued here as a prime jurisdiction question, which again shows how well settled in our view the law was at that time.

And along that line, in fact, in 1974, when the exchanges, in an attempt to cut back on their liability, went to Congress and in effect conceded that as the law stood then they could be liable under the manipulation provisions, and that they needed relief, and Congress -- there is no evidence that Congress gave them any relief.

In years later, in testimony before the Commission, as we point out, the commodity professionals, the industry also treated this as a question that had been

decided against them, both by the courts and by Congress in 1974 by testifying before the Commission that a private right of action was still available, and this was cramping their style, in effect, and it is only now, at this stage of the game, when this Court's decisions since Cannon have given the commodities industry a handle, a legal handle that they now say that there was never any cause of action.

CHIEF JUSTICE BURGER: Your time has expired, Mr. Sullivan.

QUESTION: Do you have a question?

QUESTION: After you.

QUESTION: Mr. Sullivan, I wanted to follow up, if I might, on Justice Powell's question about, assume we forget about everything since -- or assume Cort v. Ash were the law in 1936, and you said the analysis would be more difficult under 4b then. Would the analysis of the private cause of action issue under 4b be any different in your view than the analysis under the Securities Act for a 10b cause of action?

MR. SULLIVAN: No, I don't think so.

QUESTION: So the reasoning which would destroy the 4b cause of action would also presumably destroy the 10b cause of action?

MR. SULLIVAN: I think that is right.

QUESTION: But there was a jurisdictional

provision in the Securities Act, both 1933 and 1934, and none in the Act of 1936, with respect to commodities.

MR. SULLIVAN: That is correct, but I think that -- I think the placement of the jurisdictional provision in the particular statute isn't particularly important. The question is whether there is some basis for federal jurisdiction, and presumably if you agree that there was a cause of action you would find that there was general -- question jurisdiction.

QUESTION: Mr. Sullivan, may I ask you a question or two that I would ask the Solicitor General if he were here? It may not be fair to ask you, but it is a bit curious, at least for me, that the executive branch of government, the Solicitor General's office in particular, should be here today when there is no question of the constitutionality of a statute, arguing in favor of an implied cause of action, in view of the fact that there are scores of cases that have fallen into the federal judicial system trying to decide just what we are trying to decide here today, whether Congress intended to create a cause of action when it didn't utter a single word in the statute that supports that, and it seems to me to be a curious thing for the government of the United States, the executive branch to be arguing that the courts rather than the legislative branch should decide this issue.

Now, how many words would it have taken Congress to have said in a sentence, 15, 20, 25 words, and it said nothing. There is not a word in the Senate committee report, and a couple of ambiguous comments in the House report. So we have very little guidance, it seems to me. You just tell the Solicitor General what I said.

QUESTION: Are you here representing a commodities exchange?

MR. SULLIVAN: Yes. I am representing the Commission.

QUESTION: Do you think that is part of the executive branch?

MR. SULLIVAN: I perhaps should have the Solicitor General here to answer that question, too. But it is an independent --

QUESTION: It is the position of the independent agency that private enforcement would aid the enforcement of this federal statute, is it not?

MR. SULLIVAN: That's right, and I think that -- I was preparing a response to Justice Powell's question, not realizing that I wouldn't have an opportunity to answer it, and I would just say that if we did not believe that the legislative history and the historical context in which this issue arises led us to the view that Congress intended a private right of action to be sustained in 1974, we would

not be here. But we believe that there is a fine line between this Court's using judicial restraint quite properly as a shield to protect itself from having to legislate unconstitutionally, perhaps, as opposed to using it as a sword to not give effect to what Congress's intent clearly was, and we believe that Congress's intent is manifest, despite the fact that the people who were drafting this legislation might have gotten a B rather than an A on a law school exam because they didn't use the case names --

QUESTION: It would have been preferable for Congress to make itself explicit, wouldn't it?

MR. SULLIVAN: I think it would have been preferable, but I think that in the historical context the question really is, why should Congress have thought that it was necessary, and I think everyone knows that when Congress goes back and puts in a few words in a statute, that is also fertile ground for further litigation as to whether the words that have been put in the statute mean exactly what the case law said previously.

Therefore, that may be just as problematic as being silent.

QUESTION: You are not suggesting that it would be difficult on the part of Congress to make its intention absolute and unequivocal, are you?

MR. SULLIVAN: My basic response, Mr. Chief

Justice, is that in 1974 there was no need for Congress to do that, and that is why --

QUESTION: That doesn't quite answer my question. I said, is there any doubt that in a very few words, whether 25, as my Brother Powell suggested, or 30, that Congress could make it crystal clear what they intended?

MR. SULLIVAN: I think that that is certainly --

QUESTION: You wouldn't have any trouble drafing that language, would you?

MR. SULLIVAN: Well, I can't say that I have had any experience as a statutory draftsman in the past, but I think that that is probably true, but again the question is, why would Congress have thought in 1974 that it was necessary.

QUESTION: Whether it is necessary. That is a separate question.

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

(Whereupon, at 2:01 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

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BY Shawn Connelly