In the

ORIGINAL

Supreme Court of the United States

NEW YORK MERCANTILE EXCHANGE, ET AL., Peititioners,	)	
v.	)	NO. 80-757
NEIL LEIST, PHILIP SMITH AND INCOMCO; CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,, Petitioner,	)	
v.	)	NO. 80-895
NEIL LEIST, PHILIP SMITH AND INCOMCO: AND HEINOLD COMMODITIES, INC., ET AL., Petitioners,	)	
v.	)	NO. 80-936
NEIL LEIST ET AL.	)	

Washington, D. C.

November 2, 1981

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NEW YORK MERCANTILE EXCHANGE, ET AL., Petitioners, v. NEIL LEIST, PHILIP SMITH AND INCOMCO; CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., Petitioner, v. NEIL LEIST, PHILIP SMITH AND INCOMCO; and HEINOLD COMMODITIES, INC., ET AL., Petitioners, v. NEIL LEIST ET AL.

No. 80-757

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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 2:02 o'clock p.m.

APPEARANCES:

WILLIAM E. HEGARTY, ESQ., New York, New York;
on behalf of the Petitioners.

GERARD K. SANDWEG, JR., ESQ., St. Louis,
Missouri; on behalf of the Petitioners.

LEONARD TOBOROFF, ESQ., New York, New York;
on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in New York Mercantile Exchange against Leist and others on the consolidated case.

Mr. Hegarty, I think you may proceed when you are ready.

ORAL ARGUMENT OF WILLIAM E. HEGARTY, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HEGARTY: Mr. Chief Justice, and may it please the Court, let me begin by going back to 1936, to the era that Justice Powell referred to. In the Congressional debates, the Senate debate concerning the 1936 amendments to the Commodity Exchange Act, a decision of this Court was read into the record. That decision had held that the pre-existing Act could not provide a remedy against someone who was accused of having manipulated the market because the statute was framed in terms of is manipulating, present tense.

This Court said that the proceeding could not go forward. It affirmed the lower court, which it so held. It said, and this, as I say, was read into the record, the entire decision by Justice Brandeis, a unanimous decision of this Court, to supply omissions transcends the judicial function.

I don't believe that the perception of the role of

the Congress and of the judiciary in 1936 and earlier, and even since has been -- has gone through the sea changes that are suggested by the Respondents and by the CFTC. Indeed, much mention has been made of Rigsby. In that decision, it seems to me, as I read it, that Justice Pitney was very, very careful to have two bases for his decision. One indeed was for the use of the remedium, but immediately thereafter he said the inference is made irresistible by the language of the statute, and I don't think that is very different from Cort v. Ash, if one thinks about it.

Now, the argument in the earlier case is different in two respects from the questions presented presently. That case involves a section of the Commodity Exchange Act, Section 4b, which is for the benefit by claim of a customer and it provides that his broker may not defraud him. That language might suffice for the first factor in Cort. Representing a contract market, I am addressing different sections, Sections 5d, 5a(8), and perhaps 9b, which is the general criminal statute against manipulation.

5d is the licensing statute. It says that boards of trade will be designated as contract markets if they satisfy certain criteria, one of which is to have a system to prevent manipulation -- not to prevent manipulation, but to have a system to prevent it. 5a(8) is prescriptive. It says that one of the things the contract market must do is

enforce its rules.

These are quite patently for the general benefit of the -- well, it certainly goes far beyond the futures market. It goes to the cash market, as it is called, the production, the handling, the use of commodities.

The other very significant distinction between the 4b question and the question posed as against a contract market is a practical distinction. It is a question of practical consequences, and implicit, if I can use the word in this general context, holding of the Second Circuit or the court below was that a cash trader, that is, a person not trading in the futures market at all, but holding cash potatoes, had a claim against the contract market because of an alleged failure on its part to act in an emergency.

That opens up, it seems to me, the picture of not only which we would have in the Securities Acts functioning on the trading in a particular security or something of that sort. It goes beyond that. It is trading in a futures contract, but then the impact of that trading, that alleged manipulation might have on the cash product. In other words, manipulation in wheat in the Chicago Board of Trade, the price fixed in the Chicago Board of Trade is used, as they call it, for price discovery by those who are actually delivering wheat to mills.

This is, as Judge Mansfield said in dissent below,

what is involved is literally hundreds of millions of dollars. Now, I don't cite that in a kind of interorum way. I cite it for this purpose. It seems to me that when the consequences are such, when the possible result is such, it bears very directly on whether one can assume that Congress intended such a result or chose not to say so, which after all is the fundamental question.

I regret that the Solicitor General's office did not choose to argue in this case, to deal with questions of that sort, although they briefed them, I suppose.

Now, the three sections that interest the contract markets are Section 5d, as I said. That was enacted in 1921. At that time, a companion statute enacted the same month was the Packers and Stockyards Act, which provided both for reparations and private damages against the stockyard and others, and I think it is suggested that te two statutes go in tandem, and no such remedy is provided in the Commodity -- as it was then called, the Grain Futures Act, I think.

9b was enacted in 1936, and as I say, in Wallace against Cutten, a case which I quoted from, it was before Congress, very much before Congress at that point.

5a(8), as I say, Subdivision a(8) was added to 5a in 1968, at a time when Congress did not enact a bill which would have provided an action against contract markets.

Now we come to 1974, and a unanimous panel of the Fifth Circuit said that the legislative history was emphatically equivocal in that that was not a sufficient basis to predicate a private right of action.

QUESTION: That is an interesting expression, isn't it?

MR. HEGARTY: It is. I think it was very well chosen.

QUESTION: Interesting expression, "empatically" --

MR. HEGARTY: "Equivocal."

(General laughter.)

MR. HEGARTY: They said also, to substantiate their point, Justice White, that the evidence as to whether or not Congress was aware of the one appellate court decision --

QUESTION: It is like saying the Congressional silence was very loud indeed.

MR. HEGARTY: That is what the court below said, Your Honor, but the Fifth Circuit thought that the evidence was dubious, if you will, that Congress as a whole had any awareness of the one decision, one appellate decision that upheld a cause of action against a contract market. They said there was no evidence that Congress had approved it.

In the opinion from the majority below, it was described as implicit approval by Congress, and I think to

premise an implied right of action upon an implicit approval by Congress in emphatically equivocal legislative history piles too much on too shaky a foundation.

In 1974, if you look at objective evidence again as to contract markets, they did not enact a private action against contract markets. They did enact the reparations remedy from which contract markets are excluded. They did specifically authorize the CFTC to bring injunction for suits in district courts against contract markets, and they added to the penalty provision the direction to the CFTC to consider whether the amount of the penalty would materially impair the contract market's ability to carry on its operations and duties, and I don't think a possible exposure to hundreds of millions of dollars could be said to be consistent with that.

If there was a dramatic overhaul of the statute in 1974, it is similar to that which occurred and was the subject of this Court's decision in City of Milwaukee. There had been a federal common law cause of action for nuisance. The Seventh Circuit had held here that there was a common law cause of action against contract markets, the one appellate decision. I think it would follow that such a contract -- common law cause of action had been supplanted by the legislation.

Finally, let me say this. The question posed is,

is there a private right of action, is there an implied private right of action, but that is a very, very narrow question. The question really should be, is there a private right of action having certain dimensions?

For example, there is no guidance whatsoever in this statute for a determination, as was present in the case of Ocville, as to what standard of liability should exist, what measure of culpability is required for this action. If we go back to the District Court in this case, where negligence is alleged, I would move to dismiss on the grounds that bad faith had not been alledged. But I have no guidance. The District Court will have none. It is too simplistic a question to ask whether a private right of action is implied, I submit.

I will say one final point, if I may, in answer to the question posed by Mr. Justice White earlier on. I think there must be affirmative evidence to create the action. We cannot invert the burden of inquiry, as occurred here.

I don't wish to intrude upon the time of counsel to argue for the brokers, unless there be any questions. Perhaps I should say further intrude.

CHIEF JUSTICE BURGER: Mr. Sandweg?

ORAL ARGUMENT OF GERARD K. SANDWEG, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SANDWEG: Mr. Chief Justice, and may it please

the Court, the question to be decided by the Court is in what forum under the Commodity Exchange Act as enacted by Congress can a private party obtain redress for alleged violations of the Commodity Exchange Act?

QUESTION: Against whom?

MR. SANDWEG: Against, in this case, a futures commission merchant, and in the consolidated cases that we have here also an exchange.

QUESTION: Right.

MR. SANDWEG: Otherwise stated, the issue is whether Congress created a private right of action for violation of the particular sections of the Commodity Exchange Act.

I think first we have to focus on the statute as it now exists, and see its application to the facts here at issue.

QUESTION: Could I just make sure --

MR. SANDWEG: Yes, sir.

QUESTION: -- with these parties involved, was there a reparations remedy?

MR. SANDWEG: No party filed for reparations.

QUESTION: But is there one under the statute or not?

MR. SANDWEG: Your Honor, we believe that there is one.

QUESTION: Your colleagues on the other side are to the contrary, I take it.

MR. SANDWEG: My colleagues are to the contrary.

QUESTION: All right. Thank you.

MR. SANDWEG: The statute here expresses Congress's decision as to how to regulate the nation's commodities and markets. To put its decision into effect, we have the Commodity Exchange Act. It is a multi-faceted regulatory system. The exchanges regulate their members, including the broker petitioners, through their bylaws, rules, and disciplinary proceedings.

Over everything, however, is the Commodity Futures Trading Commission. It can compel the adoption, modification, or repeal of an exchange's rules and regulations. It exercises oversight and appellate jurisdiction over the self-regulatory entities. It is empowered to participate directly in regulatory and enforcement matters, and indeed, it routinely does so.

QUESTION: Mr. Sandweg, excuse me for interrupting, but on the reparations point -- you say there is a reparations remedy -- am I right in believing that the Commission takes the position there is none?

MR. SANDWEG: The Commission takes the position that there is none.

QUESTION: Well, if they take the position there

is none, and they deny all claims of this kind, and there is no review of it, how can it be an effective remedy?

MR. SANDWEG: Your Honor, I think that it is not fair to say that there is no review. The provisions of the administrative --

QUESTION: Well, if they say there is no remedy, that is a reviewable decision if somebody filed there?

MR. SANDWEG: Your Honor, we believe it is. We think that a decision that there is no reparations right is appealable to the courts under both the Administrative Procedure Act and under fundamental notions of due process, if the Commission were to take that view, which it apparently does.

The Commission here has been highly visible in what it has done. The exchange, acting in its self-regulatory role, held price and penalty hearings to compensate those persons who had defaulted, and penalized the defaulting parties. The Business Conduct Committee of the exchange held hearings regarding violations of the exchange rules. The CFTC conducted an extensive investigation and instituted disciplinary proceedings against the exchange and the short sellers, but not against the brokers.

Our position is that the Respondents, had they been so inclined, could have instituted reparations

proceedings, and upon proof of the claimed violations, obtained an award for their damages.

In short, the regulatory scheme enacted by Congress and in place provides a comprehensive system for discipline of wrongdoers and compensation of victims.

Now, let us turn to the Respondents who participated in the market and here claim damages. They claim they are entitled to damages in a federal lawsuit not only on the basis of the antitrust violations which they claim, but also on the basis of an implied private right of action which they contend are implicit in the Commodity Exchange Act.

We submit the implied right of action does not exist on two bases. The first and the controlling basis is that it simply was not created by Congress. We believe, however, in case one questions does this make sense, that the fact of the reparations remedy explains but does not control over our position.

The burden here is on the Respondents to demonstrate affirmative Congressional intent to create the remedy. None of the Respondents have done this, because they can't.

QUESTION: Mr. Sandweg, let me ask you a question somewhat akin to what Justice Powell asked previous counsel. There is much talk in the record and in the

statute itself about "manipulative devices". What is a manipulative device? How do you prove it? Is it negligence? Is it bad faith?

MR. SANDWEG: The court decisions on the question of the existence of manipulation are numerous and generally they refer to it as anything that the mind of man can imagine. Therefore, the question of what is manipulative is not at all well defined. It is not a scorecard where you can go to to check off the indicia and say that you have or do not have manipulation.

QUESTION: Well, how does a judge charge a jury, then, as to whether or not they should find on the evidence that this was or was not a manipulative device?

MR. SANDWEG: I have not seen the jury instructions in the cases that have come out.

QUESTION: Well, but in a typical case.

MR. SANDWEG: I am not sure. I think it is most difficult to actually prove a manipulation of a commodities market, because of the fact you have so many forces of supply and demand meeting. There can be simple questions of manipulation. For example, the corner, where someone controls the entire supply, and controls that supply other than through a legal way.

QUESTION: To a certain extent, everybody is trying to manipulate, aren't they?

MR. SANDWEG: That's true, Your Honor. Everyone is attempting to participate in the price discovery process by buying or selling for a price they determine to be appropriate.

QUESTION: Mr. Sandweg, the description Judge Friendly gave us of the transaction here, would that fall within your definition of a manipulative device? On the potatoes?

MR. SANDWEG: Your Honor, I think the question of manipulation of the potatoes market is a very difficult factual question which isn't here. Certainly the --

QUESTION: I know it is not, but I am just asking whether the description Judge Friendly gave us in page after page after page --

MR. SANDWEG: From Judge Friendly's description, there were two major forces moving in the marketplace. Our client fortunately was not one of them. It would appear that they could be characterized as manipulation, but whether or not that is a proper legal conclusion, I don't speak to today. I think it is a very difficult fact question, and one of the reasons we think the CFTC exists is to resolve that very difficult fact question, where they have the advantage of the particular knowledge of what can and cannot be manipulative in commodities markets.

In 1936, Congress passed a comprehensive law to

regulate a marketplace which has, had, and continues to have a major effect on interstate commerce. Its concern was protecting the nation's economy. The language of the Commodity Exchange Act in 1936, when the operative sections at issue were passed, has not one word suggestive of an intent to create a right of action. The legislative history likewise has not one word.

Because of Congressional concern that federal pre-emption might occur with respect to individual conduct, it preserved under Section 4c the right to bring actions under state law in state courts. In 1974, the Commodity Exchange Act was amended, but it was not re-enacted. None of the amendments created a private right of action.

The legislative history of the 1974 amendments tells us nothing about any 1974 amendment which would create a private right of action. The twig on which the CFTC has asked this Court to hang its hat is a jurisdictional savings clause which, as the Touche case teaches us, cannot create a right of action.

The remaining legislative history, ambiguous at best, tells us nothing except for perhaps a limited knowledge of what courts had done between 1936 and 1974, but courts cannot create private rights of action. At best, they can examine statutory language and legislative history and find that Congress implicitly created the right. No

court had done that prior to 1974.

This Court has asked whether or not Cort v. Ash compels a different analysis. I think the Court --

QUESTION: You suggest, then, that Rigsby was just way out of bounds?

MR. SANDWEG: I think Mr. Hegarty's presentation of Rigsby is correct, but I think that Rigsby no longer speaks to the current situation.

QUESTION: So your answer is, yes, Rigsby was just wrong?

MR. SANDWEG: I think it was wrong. The 4b here, the Court also asked whether or not 4b was limited, and I think that is very important to this case. 4b speaks to broker-customer relations. It does not speak to the kind of relationship between the broker members here and the claimants. They are not customers of any brokers. And as Judge Friendly pointed out, the crabbed language of 4b is difficult to interpret, but I think the only proper interpretation is, it reaches a broker-customer claim.

We have mentioned that we think that reparations are important not because they upheld the decision, but rather because they respond to the argument that is here that there should be a remedy, but our system is one which Congress gives the remedy. Equally important, the factual predicate for that argument is not here. We think the

remedy of reparations is available to these people.

Reparations reaches persons registered and required to register, and affords a comprehensive remedy system for violations. Section 13a of the Act, which already existed, reaches deeply into those associated with wrongdoing and allows them to be proceeded against as principals.

As our brief discusses, we believe full relief is available to those injured by a violation of the Commodity Exchange Act.

If the Court has no questions, I will reserve the remaining time and use it if necessary. Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Toboroff.

ORAL ARGUMENT OF LEONARD TOBOROFF, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. TOBOROFF: Mr. Justice, Mr. Chief Justice, and may it please the Court, so far in the presentations so far, facts have been withheld by the defendants, understandably so because they are crucial to the application of this Court's standards to this statute determining legislative intent. The facts are these.

In a limited and perishable commodity, potatoes, manipulators named Simplot and Taggares oversold the entire crop threefold. They never intended to liquidate it. Their

contracts -- to take delivery of their short sales, and as a result they artificially depressed the price, irrespective of the normal supply and demand factors, which are what the commodity futures markets have the right to expect.

In short, they and their brokers fixed the market and ultimately destroyed it, in full view of the exchange, which kwowingly permitted it.

The plaintiffs are entitled to deal with a free and fair futures market pursuant to the Congressional purpose and in accordance with the legislative scheme. Instead, they were thrown into a fixed market manipulated by Simplot, Taggares, and others who are not before this Court in this process, and not subject at all to reparations, incidentally, and who have carefully and tactically absented themselves from this Court here, but their conduct is not absent.

No one challenges that the conduct violated the statute. No one challenges that the market was polluted in violation of the Congressional purpose. Those facts delineating that conduct by those people are set forth in exhaustive detail by Judge Friendly below in the record, at Pages 95 through 105 of the Joint Appendix, and I will refrain from repeating any of them, but will rely on that exposition, and note that if Judge Friendly is reversed, those major manipulators will go scot free, leaving their

victims behind them, and if the purpose of the Congress, the purpose that Congress expressed when it amended or re-enacted the statute will also be frustrated, and the legislative scheme will be robbed of one of its crucial pieces that make up its symmetry, which is the private right of action.

I think at this point I should first briefly address the question that Mr. Justice Powell asked with respect to the 1936 statute. In 1974, sir, Congress switched its theory. They changed from allowing the exchanges to regulate themselves through self-regulation to compulsory regulation at the behest of the newly created CFTC. One Congressman described the self-regulation as "fox in the chicken coop" regulation, and switching the theory brings us right up to speed with 1974. We have to look at the legislative intent in 1974.

When that happened, when they switched their theory, the exchanges promptly went to Congress and said, well, give us immunity. We want immunity from the private right of action. Congress didn't grant them that immunity. That is the theory that came into being in 1974, so we have a turnover from 1936 into 1974, compelling us to examine 1974, and we would concede that that is the legislative history that needs to be examined.

QUESTION: Would you say that if there had never

been any court cases on private causes of action prior to 1974, and the question arose first after 1974 as to whether the exchanges were subject to suit in a private cause of action, would you say that you win or lose?

MR. TOBOROFF: Are you asking, sir, if this case arose, the statute came down in 1974 --

QUESTION: Suppose this very case that we have arose, and the only thing that is different is that there never had been any judicial judgments about private causes of action prior to 1974.

MR. TOBOROFF: We would still have the private right of action, because we had something else in addition to the unbroken chain of eleven to fourteen decisions. We have 50 years of Congressional experience, starting in 1921, as to major market manipulations. This is not like the Curran situation, the customer-broker. We have a situation where from 1921 on Congress focused concern on the major market manipulators. They named some of them in some of the Congressional testimony. I can't remember their names. I remember one, Arthur Cutten, I think. But they named a bunch of them, and they focused their concern on that person, or that group of persons, who through large concentrations of money could throw an entire market out of whack.

Congress was not writing on a blank slate. It had

all kinds of experience. I submit that that is what the recent cases hold. The defendants would have us believe that you have to look at the statutory language and stop. If there is not any explicit statutory language, that is it. Transamerica teaches differently. Transamerica says you can go to the structure of the statute and to the circumstances of its enactment, which is the legislative history.

Judge Friendly had the Transamerica, Touche Ross, and Cannon in front of him when he went through this, and he used those cases, that 1979 triad of cases, to support, very painstakingly, support his inevitable conclusion that there was a private right of action in accordance with the standards set forth by this Court.

Now, there have been about six, I think -- I will take a guess and say six -- decisions since the 1979 triad. They don't change the standards.

QUESTION: But your theory is, as I understand it, that because of the unbroken line of judicial precedent you refer to, and because of the legislative history of the 1974 amendments, that Congress thereby expressed its intent with respect to a private cause of action. Isn't that your theory?

MR. TOBOROFF: Well --

QUESTION: And that there should be a private

cause of action against the exchanges.

MR. TOBOROFF: There should be --

QUESTION: Isn't that what you say Congress said in 1974?

MR. TOBOROFF: That there should be a private right of action?

QUESTION: So that it is completely irrelevant since that time how you would come out under Cort v. Ash or Transamerica or anything else. The question was settled in 1974. Congress said the courts have said this was our intention, they were quite right, we refuse to disturb it, that is the end of it.

MR. TOBOROFF: A bit more. Congress justifiably could and justifiably did assume that the private right of action was in place --

QUESTION: And did not disturb it.

MR. TOBOROFF: -- and did not disturb it, but more than that. I say a bit more because I am returning, I think, to Mr. Justice Rehnquist's question. He asked, was there a Supreme Court decision, and there was, and it was Deaktor, and it was explained, the Deaktor case. Now, everybody has made light of the Deaktor case. I think Deaktor deserves a bit more attention. Not whether or not Deaktor was wrong. Deaktor implicitly recognized the private right of action. Not whether or not it was wrong,

but it was a United States Supreme Court decision decided on December 3rd, 1973, just ten days before Representative Poge opened the Congressional hearings with the statement that --

QUESTION: Deaktor was not a Supreme Court of the United States case. It was cert denied, wasn't it?

MR. TOBOROFF: No, Deaktor -- there was a memorandum opinion in Deaktor on December 3, 1974, I believe. I am sure.

When that case came down, ten days later, Chairman Poge opened the hearings and emphasized to the entire House, and I am quoting, "Courts have implied a private remedy for individual litigants under the Commodity Exchange Act."

Now, even if Deaktor was wrong, and I don't think it was -- I think it was right -- but even if it was wrong, Congress understood that the courts, including the United States Supreme Court, had the question before it, and everyone had recognized, without a hint of a dissent, that there was a private right of action, and that is when Congress set down --

QUESTION: But you must take the next step from that and say that Congress also must be understood in 1974 to have said, and the courts have been quite right as to what our intention was, that there is a private cause of action.

MR. TOBOROFF: Congress had -- pardon me --

QUESTION: In 1974, Congress in effect said, I think you submit, that the courts have correctly understood what our intention was in 1936, that there is a private cause of action available.

MR. TOBOROFF: I didn't put it that way. I will agree with you, but I didn't put it that way.

QUESTION: Well, it might be even better for you if you did.

(General laughter.)

MR. TOBOROFF: In that case, I will take the next question.

QUESTION: Because aren't you saying that Congress not only didn't disturb what the courts have said, but recognized the validity of the courts' approach?

MR. TOBOROFF: Right. As Judge --

QUESTION: You submit the question is over with.

MR. TOBOROFF: All the remedies were in place then, in 1936.

QUESTION: Mr. Toboroff?

MR. TOBOROFF: Yes, sir.

QUESTION: Let's get back to the hypothetical that Justice White asked, which was, let's assume that there had been no federal court decisions prior to the Act of 1974. On that assumption, where would the burden of proof have lain in this litigation? On you or on your friends over

here?

MR. TOBOROFF: On my friends over here on my left.

QUESTION: What have our cases said about that? I have understood up until today that certainly absent the sort of line of judicial decisions you rely on, if one claimed there was an implied cause of action, that he had the burden of establishing Congressional intent. Didn't Justice Friendly say that in his opinion?

MR. TOBOROFF: Yes, sir. My fire and fall back position on that question is this. It depends -- When Congress sits down, it depends what they are writing on, the slate that they are writing on. Even without that line, that chain, that unbroken chain of decisions, even without that, they had the experience. There was a reason that they sat down, 50 years of experience, to protect -- and the purpose was to protect the American consumer through the operation of a fair and free market for the benefit of the investors, the traders that come into that market. There is no market without traders like that. The market simply doesn't exist without speculators.

Now, to have -- I think it is quite a fire and fall back position. There were 50 years of experience, more than 50 years. These markets had been polluted many, many times. The proof of the pudding of what I am stating is as follows. After July 8, 1980, after Judge Friendly's

decision on July 8, 1980, there has not been another major market manipulation. Up until then, they were legion. Even between -- even after the District Court dismissed the complaints in 1979, bang, along came the silver manipulation.

QUESTION: May I try another hypothetical?

MR. TOBOROFF: Surely, sir.

QUESTION: Let's suppose there were no prior experience whatever, that this was a de novo attempt to regulate the commodities market, and no prior judicial decisions. Where would the burden of proof lie if you filed this complaint?

MR. TOBOROFF: I will finally retreat to the recent decisions, but I say that our case is sui generis and miles distant from those decisions, because of those two experiences.

QUESTION: Mr. Toboroff, the Deaktor case was an antitrust case, was it not?

MR. TOBOROFF: The Deaktor case was -- there were two cases. In the Seventh Circuit, it was recognized that there was a violation of the Commodity Exchange Act, and I can quote you to the section, or the analysis of it which appears in Judge Friendly's decision in the record below, which seems the easiest place to get it.

May I come bact to that, sir? I have it somewhere, but I --

QUESTION: Well, I am looking at the bottom paragraph on Page 14 in 414 US, where it says that, Richey versus Chicago Mercantile Exchange, which was the primary case, "held that an antitrust action against the exchange should have been stayed to afford the Commodity Exchange Commission an opportunity to determine if the challenged conduct of the exchange was in compliance with the statute and with exchange rules. Because administrative adjudication of alleged violations of the CEA and the rules lay at the heart of the task assigned the commission by Congress, we recognize that the court, although retaining final authority to interpret the CEA and the relationship of the antitrust laws should avail itself of the abilities of the commission to unravel the intricate technical facts of the commodity industry and arrive at some judgment as to whether the exchange had conducted itself in compliance with the law."

MR. TOBOROFF: That is my point, sir. The very words -- I tried to jot them down fast as read, were "alleged violations of the CEA", which was in the record below, was in the Seventh Circuit, and the repetition of that language by the Supreme Court on December 13 -- December 3 -- pardon me -- 1973, is crucial to the consideration of that case by the House ten days later.

That is why I say that it is an important

consideration, and that this Court implicitly recognized that, but even if this Court didn't implicitly recognize it, Congress must have understood that it was implicitly recognized by this Court. Therefore, when Congress sat down ten days later, with Deaktor in front of it, they recognized the prior right of action.

QUESTION: But the Deaktor case doesn't talk about a private right of action.

MR. TOBOROFF: I understand that. My point is a little bit short of that. My point is that Congress understood from a whole line of decisions that there was a private right of action, and then you have Deaktor, which doesn't refute that, where in the Seventh Circuit the allegation is violations of the Commodity Exchange Act against an exchange.

QUESTION: Well, but then you say Deaktor is a Supreme Court case.

MR. TOBOROFF: The memorandum decision --

QUESTION: Which says nothing about an implied right of action.

MR. TOBOROFF: I tried to preface that, sir, by saying I wanted to make a bit more of that case than what it is, because of the time frame in which it came down. If I didn't articulate that properly, I would like to do it now. My reason for bearing in on that a little heavy was the time

frame that it came down and what Congress could have reasonably been given to understand as to whether or not there is a private right of action.

QUESTION: Well, they presumably could read it for themselves, couldn't they?

MR. TOBOROFF: Yes, sir, and the Seventh Circuit decision as well.

QUESTION: And which would they have taken to be the law?

MR. TOBOROFF: They would have taken to be the law, I respectfully submit, that there was a private right of action --

QUESTION: Well, they would have taken to be the law the Supreme Court decision, not the Seventh Circuit decision.

MR. TOBOROFF: The Supreme Court decision did not overrule the allegations of violations against the -- under the Commodity Exchange Act against the exchange that were in the Seventh Circuit.

QUESTION: Well, it does more than that. It implicitly sustained them, because it remanded and said abstain rather than dismiss, and if there was no private cause of action, they would have dismiss. Isn't that right?

MR. TOBOROFF: Yes, sir.

I would also like to meet head-on, as Judge

Friendly did in the question raised by Mr. Justice Powell where the statute doesn't utter a single word in its language. As I say, you must go through that language. You must look at everything, and concluding from that language that there is a private right of action.

The exchange in its reply brief wants to stop at the front door of the language in the statute, and they wind it up by sort of a little bit of a scare tactic, saying that if we don't stop here, we are going to have a lot of clogged dockets. There are going to be a lot of lawsuits. They are asking for, it seems to me, a little bit of judicial legislation today, something they couldn't get in 1974 when Congress switched the theory from self-regulation to compulsory regulation, and I rather think that isn't entirely true.

I rather think that the way to empty the dockets is just to affirm Judge Friendly's decision. There are no more major market manipulations, and there won't be a lot of cases because there won't be any manipulations. I think that is the best way to do it, and I think that is what Congress intended, and I think that in the Congressional scheme, the legislative scheme and the Congressional purpose, the private right of action was one of the principal spokes in the wheel that Congress always understood to be there.

QUESTION: Do you think that 10b(5) Cardon decision in 1946 emptied the dockets?

MR. TOBOROFF: I would say, first of all, the commodity markets are a great deal different than the security markets. The security laws are the closest analogue, and I agree to that, but I would say or I would ask Lord knows how many manipulations in the securities markets we would have if manipulators of those markets were not responsible in United States courts.

I can't see any kind of a -- if they had a reparations provision under the securities laws, I would presume that the same thing would happen there that is happening here. It is a limited, small claims type of remedy that doesn't reach the people like Simplot and Taggares. They go away scot free to do other manipulations in other markets. They are not liable to any redress from the victims that they plucked, and if you affirm Judge Friendly today, Simplot and Taggares, for instance, will not manipulate another potato market. Other manipulators of soybeans, silver, porkbellies, orange juice, they won't manipulate those markets, because they will be subject to the only true economic incentive redress that can be brought to bear against him, and that is by the private litigant.

QUESTION: Why then don't these private litigant suits stop manipulations? Cardon was decided in 1946, and

the suits have been legion since then.

MR. TOBOROFF: I think in 10b(5), as I say, the securities markets are a little different from the commodities markets. I am not arguing in the customer account here. Most of the legion of cases under 10b(5) are these customer account cases. They are not broad market manipulations where, for instance, the price of coffee goes up from 80 cents to $5.40 a pound inside of two months, or where the price of silver goes from $4 an ounce to $52 an ounce inside of five or six months.

QUESTION: And then back.

MR. TOBOROFF: Right, and almost taking down the securities markets and brokerage firms with it. That -- What is at stake here in Leist against Simplot, in this case, these three consolidated cases, is the manipulation of a vast national market, affecting the national economy, if you will, not the squabble between the customer and his broker. I submit that most of the legion of cases that you will find in the securities laws are the squabbling type, where somebody has lost $50,000 or $100,000 and goes and gets a lawyer, and there is a private right of action.

Here, that is basically the Sixth Circuit case, that is basically the Fifth Circuit case, but it isn't this case. This case deals with what is really at stake in this statute. These are the very evils that Congress tried to

prevent in 1974 and had a 50-year history of. I am practically giving you 1974 facts in 1976. It is practically in materia, in para materia, and it is not sleight of hand. It actually happened. Congress didn't know that these people would go out and manipulate the potato market in 1976, but they knew from 50 years of experience that other markets had been manipulated all along the line.

QUESTION: They saw all that going on and they didn't express one word about creating a private right of action.

MR. TOBOROFF: Because in 1974, when they sat down to write the law, they had every reason to expect, justifiably expect, and did justifiably expect that the private right of action was in place. Exchanges, brokers, futures commission merchants asked them about it, and it stayed in there. All kinds of testimony -- in the closing statement, I think, on September 9, 1974, Chairman Talmadge, the head of the Senate Committee, said that -- he was talking about the various remedies that were provided by the new Act. He said, they will not interfere with the courts in any way. That alone, if you followed the recent decisions of this Court, that alone seems to me to be fatal to the proposition that there is not enough legislative intent to find a private right of action here.

If you get into the legislative intent, the defendants are swamped, and they lose. It is full of legislative intent, and talking about the standards that have to be applied, I believe --

QUESTION: Mr. Toboroff, can you tell me why you don't puruse your reparations remedy?

MR. TOBOROFF: Reparations remedies, sir, are meaningless as to us, probably as to Mr. Curran as well, but certainly as to us. Simplot and Taggares are non-registered persons. They are not amenable to the reparations procedure.

QUESTION: And the exchange isn't?

MR. TOBOROFF: The exchange isn't, either, but the exchange stood there and watched this happen. The facts are in Judge Friendly's record. They could have stopped it nine days earlier, and so could the CFTC, but they let it go on, and --

QUESTION: Well, Friendly thought there was no reparation available against the exchange then.

MR. TOBOROFF: There is not. There is not. Mr. Leist could not go and sue the exchange for the half a million dollars or so that he lost. He could not go to reparations and sue Simplot and Taggares. That is a laugh, as far as they are concerned. They are sitting around, waiting to see how this decision comes down. They haven't manipulated any potato markets since Judge Friendly's

decision, but they did manipulate one back in 1971, on the Chicago Mercantile Exchange, in the same fashion.

The fact of the matter is that given all of the -- there was no lawsuit brought for that one, but given all of these circumstances, the slate that Congress was writing on, and the reparations question is a heavy question because it has been decided up and down. It is a remedy that supplants private right of action. Actually, it was an addition to it, and that is clear from the testimony in the House and the Senate, the hearings in the Senate.

The fact of the matter is that if the only thing that the plaintiffs had were access to reparations, they would have nothing. Simplot and Taggares, any major market manipulator could manipulate a market and just go away scot free, and nothing could be done. There would be no right -- if there were no right of action against them in the United States court under the Commodity Exchange Act, there would be nothing left.

QUESTION: That is because they are not registered. Is that the reason?

MR. TOBOROFF: That is because they are not registered, and that is because Congress didn't choose to register them, because there was a private right of action against them. Congress chose to register people and supplier registration -- reparations remedy much in what the

Solicitor General's brief for the CFTC calls a small claims procedure, quick, to the point, expeditious. That hasn't happened, either, but that is not the point.

QUESTION: Mr. Toboroff --

MR. TOBOROFF: Yes, sir.

QUESTION: -- in your brief, one of the main points -- Page 22 is where it commences -- you state that Congress did not by today's standards know how to imply a private remedy even if it wished to. If it wished to provide a remedy, would it not have done so exclusively?

MR. TOBOROFF: My point is, they applied a private remedy in 1974 the way the private remedies were applied. They couldn't know in 1974 that there would be the 1979 triad, and that the Court would now be wrestling at the end of the 1981 term -- 1980 term, pardon me, and the beginning of the 1981 term with the question. Fortunately or unfortunately, this is the first commodity case. This is a sui generis case. This does not go to the -- has no close analogue to the six or seven recent decisions since the 1979 triad.

They have some analogue in that they are securities cases, although there was no -- there was a blank slate on those and they were considering Acts in 1934 or 1940 that were well prior to the expansion era of undertaking the judicial implication which started, as I

think Justice Rehnquist pointed out, in 1946 with the Cardon case, and reached full flower with Borak, but if you take Borak as the starting point, 1964, and go from Borak to Cort against Ash in 1975, those eleven years, you have those eleven years, and you have a situation like the modern statute, where you have a 50-year history, and where you have an unbroken chain of decisions -- whether they are right or wrong, Congress is aware of those decisions, and you have those two items when Congress sits down in those eleven years. It is a sui generis case. It is just, as I said, miles apart from the recent decisions. This is the only chance that the Court has to apply its standards to this particular Act, naturally, because this is the only case, these two cases, but -- these consolidated cases for which I am arguing here have broader questions than simply 4b.

QUESTION: In other words, you are saying Cort v. Ash and its progeny changed the law.

MR. TOBOROFF: I -- changed the law? They narrowed the standards, is what they did. Yes, if Congress sat down -- not Cort v. Ash specifically, because after Cort v. Ash, Your Honor noted in Cannon in your dissent that there were, I think 20 was the number, circuit courts of appeals that had implied private rights of action. It really wasn't until 1979. Certainly in 1975 after the Cort

against Ash decision, some smart Congressional staffers could have perked up their ears and written a little better, but I think if I were standing here and talking about a 1976 statute, I would be trying to stretch it to 1979, is what I am saying, but I don't have to do that. I got -- I am in before Cort against Ash.

In conclusion, I would just like to emphasize that the exchanges are here today really asking for a little bit of judicial exculpation -- exculpation by way of judicial legislation from something that Congress wouldn't give them in 1974 when it switched its theory from self-regulation, from fox in the chicken coop self-regulation to compulsory regulation, and I think that based on all of the cases, based on the standards as they exist today, enunciated here, the Court has to conclude that Judge Friendly should be affirmed.

Thank you.

CHIEF JUSTICE BURGER: Mr. Sandweg, you have eight minutes left.

ORAL ARGUMENT OF GERARD K. SANDWEG, JR,. ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. SANDWEG: Thank you, Your Honor.

Justice Stevens, you asked about the Deaktor case. I think it is important to this Court to understand first, as has been ably pointed out, this Court's decision

had nothing to do with the private right of action. That wa the Seventh Circuit's decision.

QUESTION: It is true that the remand by this Court wouldn't have made any sense unless this Court assumed there was a private cause of action.

MR. SANDWEG: It remanded it first to the agency to determine whether or not it was an action, presumably that would have followed from that remand.

QUESTION: But it didn't order dismissal.

MR. SANDWEG: It did not order dismissal. That is correct. But the use of Deaktor here is to illuminate what Congress knew when it enacted the 1974 Act, and our point is that the 1974 Act and Congress's knowledge of Deaktor in 1974 is not relevant to this Court's inquiry about this. The question here is what the Congress did in 1936 when it enacted the operative language alleged to give rise to the right of action.

When Deaktor was cited to the Court -- to the Congress in 1974, it was not cited to Congress to show the existence of a private right of action. The purpose of it being cited was to show the application of the antitrust laws. Thus, whatever the Seventh Circuit may have held, or whatever the implications of this Court's decision may have been, they do not give rise to Congressional knowledge in 1974 even if that knowledge were relevant, which we claim

that it is not.

Secondly, the question of reparations availability. We believe Section 13a of the Act must be considered with care in analyzing whether or not reparations are available to persons in this case. My own client has had a reparations claim filed with the Commodity Futures Trading Commission which the commission has forwarded to us, which is the way the commssion initiates the proceeding, having determined that the claim, so to speak, states a claim. That is by a non-customer, just as Mr. Toboroff's clients are non-customers.

The reparations availability as to Messrs Simplot and Taggares have to be read under 13a, which talks about anyone who commands, induces, et cetera, a violation of the Act is liable in an administrative proceeding as a principal. We submit that reparations are an administrative proceeding under the Act quite clearly, and therefore a person in the character of Messrs. Simplot and Taggares, who were alleged to have violated the Act, would be liable on reparations.

In addition, much has been made as if Mr. Simplot and Mr. Taggares had not been punished by this Act. Quite the contrary is true. The exchange imposed massive penalties against them, in addition to CFTC imposed long-term suspensions from trading on these individuals.

Moreover, Mr. Toboroff continues under Judge Mansfield's decision to have available his antitrust claims against them, which remain pending in the District Court. Thus, they were severely penalized under a statute designed by Congress to accomplish exactly what it accomplished.

If there are no further questions, we thank the Court for its indulgence.

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

(Whereupon, at 2:59 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 Sharon Connelly