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THE PROPRIETY AND SCOPE OF CUMULATIVE REMEDIES UNDER THE FEDERAL SECURITIES LAWS

Marc I. Steinberg*

INTRODUCTION

In a number of cases during the past decade, the Supreme Court has construed strictly various provisions of the federal securities laws and has applied restrictively the implied rights of action doctrine. Nonetheless, the Court has recognized an implied private right of action for damages under section 10(b) of the Securities Exchange Act of 1934.

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I thank especially Michael Saffer, Member of the New Jersey Bar, for his thorough research and helpful comments. I also extend my appreciation to Jonathan Eisenberg, Associate, Kirkpatrick, Lockhart, Hill, Christopher & Phillips, Washington, D.C., and to Larry Lavoie, Special Counsel, Office of the General Counsel, Securities and Exchange Commission, for their helpful suggestions. The views expressed herein are solely those of the author. This Article is dated September 1982.


3 Section 10(b), 15 U.S.C. § 78j(b) (1976), provides:
and rule 10b-5 promulgated thereunder, and at times has construed the securities laws in a remedial manner. These developments influence a question of increasing importance under the federal securities laws: whether an implied private right of action for damages exists under section 10(b) and Rule 10b-5 on the basis of activities that would be subject to certain provisions that afford express remedies. Although the Court has identified this problem in dicta, it has never squarely addressed the issue of whether the remedies afforded by the securities laws are exclusive or cumulative.

A cumulative construction of the securities laws permits a party "to invoke [a] . . . remedy in the face of a statute which may, in certain circumstances, provide another remedy for the same conduct." The
policy rationale for overlapping remedies is to ensure that the failure of an injured investor to meet the technical requirements for recovering under an express cause of action does not undermine investor protection and the integrity of the marketplace. Proponents of exclusivity, however, assert that the statutory language and legislative history of the express causes of action indicate that to recognize an implied remedy in this context would frustrate the statutory scheme intended by Congress. They conclude that where the plaintiff cannot proceed under an express provision, Congress intended that he not proceed at all.

Courts may differ on whether a statute providing an express remedy should also include implied remedies. For example, some courts have construed implied actions for damages under section 10(b) and the express provisions of section 18(a) of the Securities Exchange Act of 1934 as cumulative, while others have construed them as exclusive. Section 18(a) provides an express cause of action for damages when an investor purchases or sells a security in reliance upon a materially false or misleading statement that is contained in a document filed with the SEC, where such statement affects the price of the security. If the


9 See notes 111-35 and accompanying text infra.


11 See notes 106-10 and accompanying text infra.

12 15 U.S.C. § 78r(a) (1976). Section 18(a) provides:

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.


Supreme Court ultimately holds section 18(a) to be exclusive, defrauded investors who fail to meet the onerous reliance requirement\(^\text{15}\) may be denied any meaningful relief under the federal securities laws.\(^\text{16}\) In contrast, if the Court deems section 18(a) to be cumulative in scope, then investors will have a remedy, as they do now in most courts, under section 10(b).\(^\text{17}\)

This Article examines the legislative intent and policies underlying an exclusive or a cumulative construction of the federal securities laws. Section 18(a) of the Securities Exchange Act provides the focal point for this analysis because of the recent case law concerning it\(^\text{18}\) and the probable draconian effect of an exclusive construction on defrauded investors who cannot meet its technical requirements. The Article also examines the desirability of a cumulative construction in the context of other provisions, including sections 11 and 12(2) of the Securities Act of 1933 and sections 9 and 13(d) of the Securities Exchange Act of 1934. Finally, the Article concludes that the securities laws in general, and section 18(a) in particular, should permit overlap between remedies in cases of fraudulent conduct, but not when the violation falls under the reporting provisions of the Securities Exchange Act.

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THE SUPREME COURT—HAS THE PENDULUM SLOWED?

The Supreme Court's restrictive decisions in the securities law area arguably may imply that the Court would adopt an exclusive construc-

\(^\text{15}\) A number of courts have held that § 18(a) is limited by its express language to documents actually "filed" with the Commission pursuant to the Securities Exchange Act of 1934. See, e.g., In re Falstaff Brewing Corp. Antitrust Litig., 441 F. Supp. 62, 67 (E.D. Mo. 1977); Rich v. Touche Ross & Co., 415 F. Supp. 95, 102 (S.D.N.Y. 1976). But see SEC v. Keller Indus., 342 F. Supp. 654, 658-59 (S.D.N.Y. 1972) (interim quarterly report publicly circulated provides basis for cause of action if materially misleading). As for the culpability requirement, the section expressly states that "good faith" is a defense to liability and that the burden of proof is upon the defendant. As the Supreme Court has observed:

Under § 18 liability extends to persons who, in reliance on such statements, purchased or sold a security whose price was affected by the statements. Liability is limited, however, in the important respect that the defendant is accorded the defense that he acted in "good faith and had no knowledge that such statement was false or misleading." Consistent with this language the legislative history of the section suggests something more than negligence on the part of the defendant is required for recovery.


\(^\text{16}\) See Ross v. A.H. Robins Co., 607 F.2d 545 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980). See also Greene, Determining the Responsibilities of Underwriters Distributing Securities Within an Integrated Disclosure System, 56 Notre Dame Law. 755, 758 (1981) ("In the forty-seven years since the enactment of section 18, there has been no reported case sustaining liability under the section . . . ."'); notes 273-79 and accompanying text infra.

\(^\text{17}\) See notes 111-32, 143-70 and accompanying text infra.

\(^\text{18}\) See, e.g., cases cited in notes 13-14 supra.
tion when an express remedy is available. In particular, some of the Court's recent holdings in the section 10(b) and implied rights areas support this view.\(^1\) Although it is true that the present Court does not embrace the proposition that the securities laws are designed to prevent all fraudulent conduct, it is premature to conclude that the Court would adhere to an exclusive construction.\(^2\)

Unquestionably, a number of recent decisions have narrowed the scope of the federal securities laws. With respect to section 10(b), the Court has limited standing to actual purchasers or sellers of securities,\(^2\) required scienter\(^22\) in both private damage\(^2\) and SEC injunctive actions,\(^24\) required that "manipulation" or "deception," and not a "mere"

\(^1\) See, e.g., Note, supra note 10; cases cited in notes 1-2 supra. But see cases cited in note 5 supra.


\(^22\) Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 736 (1975) ("It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.").

\(^23\) On this point, the Court stated:

In this opinion the term "scienter" refers to a mental state embracing intent to deceive, manipulate, or defraud. In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5.


\(^24\) Aaron v. SEC, 446 U.S. 680 (1980). The Supreme Court held that the SEC must prove scienter as an element of a civil enforcement action to enjoin violations of § 10(b) and rule 10b-5 prescribed thereunder, and of § 17(a)(1), but need not prove scienter under §§ 17(a)(2) or 17(a)(3). As Justice Blackmun had presaged in Hochfelder, see 425 U.S. at 215 (Blackmun, J., dissenting), the Court found that the language of § 10(b) and rule 10b-5 controlled regardless of the plaintiff's identity. In reaching this conclusion, the Court primarily relied on Hochfelder's rationale. 446 U.S. at 689-95. With respect to § 17(a)(1), the Court found that "[t]he language of § 17(a)(1), which makes it unlawful 'to employ any device, scheme, or artifice to defraud,' plainly evinces an intent on the part of Congress to proscribe only knowing or intentional misconduct." Id. at 696. By contrast, the Court found that § 17(a)(2)'s language, "which prohibits any person from obtaining money or property 'by means of any untrue statement of a material fact' or any omission to state a material fact, is
breach of fiduciary duty be shown, and has declined to impose liability based on silence where there is no duty to disclose. Similarly, in the implied rights area, the Court has abandoned a policy rationale and has insisted on a showing of congressional intent before implying a private remedy.

On the other hand, the Court’s recent decisions also reflect a concern with investor protection and the integrity of the marketplace. For example, in United States v. Naftalin, the Court construed section 17(a) of the Securities Act in the context of a criminal prosecution. In upholding Naftalin’s conviction, the Court concluded that the protection of section 17(a)(1) extends beyond actual purchasers and investors, that the “in” language of section 17(a) may be as encompassing as the “in connection with” language of section 10(b), and that section 17(a) ap-

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25 Santa Fe Indus. v. Green, 430 U.S. 462 (1977). In Santa Fe, minority shareholders objected to the terms of a short-form merger entered into pursuant to a Delaware statute. In lieu of pursuing their appraisal remedies, the minority shareholders commenced an action seeking to set aside the merger or to recover what they claimed to be fair value of their shares. The Supreme Court refused to recognize an actionable claim under § 10(b) and rule 10b-5 thereunder for alleged breaches of fiduciary duty where there was no deception, misrepresentation, nondisclosure, or manipulation. Id. at 473-74. For a discussion of Santa Fe and its progeny, see Ferrara & Steinberg, A Reappraisal of Santa Fe: Rule 10b-5 and the New Federalism, 129 U. Pa. L. Rev. 263 (1980).

26 Chiarella v. United States, 445 U.S. 222 (1980). The Court held that silence, absent a duty to disclose, will not give rise to § 10(b) or rule 10b-5 liability. The Court stated:

Thus, administrative and judicial interpretations have established that silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b) despite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure. But such liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction. Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder’s welfare before their own, will not benefit personally through fraudulent use of material nonpublic information.

Id. at 230 (footnote omitted).

27 See notes 43-62 and accompanying text infra.


29 Section 17(a), 15 U.S.C. § 77q(a), provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

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

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
plies to aftermarket trading frauds. Furthermore, in Aaron v. SEC, the Court held that the SEC need not prove scienter for violations of section 17(a)(2) and 17(a)(3), and subsequently held in Rubin v. United States that a pledge of stock as collateral for a loan is an "offer or sale" of a security within the meaning of section 17(a). In construing section 10(b), the Court in Chiarella v. United States appeared to reinforce the principle that, insofar as insiders and their tippees are concerned, a duty to disclose or abstain from trading does arise when such persons are in possession of material nonpublic information. Moreover, in Transamerica Mortgage Advisors, Inc. v. Lewis, the Court implied a right to specific relief under section 215 of the Investment Advisers Act, which is similar to section 29(b) of the Exchange Act. Additionally, in Steadman v.

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30 441 U.S. at 772-73 & n.4. For a discussion of Naftalin and its implications, see Steinberg, Section 17(a) of the Securities Act of 1933 After Naftalin and Redington, 68 GEO. L.J. 163 (1979).


32 Id. at 696-97; see note 24 supra. With respect to the issuance of an injunction "upon a proper showing" for violation of § 17(a)(2) or § 17(a)(3), the Court pointed out that "nothing on the face of § 20(b) [of the 1933 Act] or § 21(d) [of the 1934 Act] purports to impose an independent requirement of scienter." 446 U.S. at 700-01. In so holding, however, the Court stated that, in an SEC action under §§ 17(a)(2) and 17(a)(3), "the degree of intentional wrongdoing evident in a defendant's past conduct" is "[a]n important factor" in determining whether the Commission has "establish[ed] a sufficient evidentiary predicate to show that such future violation may occur." Id. at 701. The Court concluded that the presence or absence of scienter is "one of the aggravating or mitigating factors to be taken into account" in a court's exercise of its equitable jurisdiction. Id. In a concurring opinion, Chief Justice Burger deviated from the majority's rationale in this respect, asserting that the SEC "will almost always" be required to show that the defendant's past conduct was more culpable than negligence. The Chief Justice concluded that "[a]n injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith." Id. at 703 (Burger, C.J., concurring). For discussion on this issue, see Steinberg, SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification, and Dissolution, 66 CORNELL L. REV. 27, 34-41 (1980).


34 Id. at 428-31. The Court reasoned that the procurement of a loan secured by a pledge of stock involves, according to the definition of the terms "offer" and "sale" contained in § 2(3) of the Securities Act, a "disposition of...[an] interest in a security, for value." Id. at 429 (emphasis in original). Thus, "[a]lthough pledges transfer less than absolute title, the interest thus transferred nonetheless is an 'interest in a security.'" Id.


38 Id. at 19. In this regard, the Lewis Court did not construe § 29(b) of the Securities Exchange Act of 1934, which may be distinguished from § 215. Although rarely invoked since its enactment, the possible implications of § 29(b) are massive. See Regional Properties, Inc. v. Financial & Real Estate Consulting Co., 678 F.2d 552 (5th Cir. 1982); Eastside Church of Christ v. National Plan, Inc., 391 F.2d 357 (5th Cir.), cert. denied, 393 U.S. 913 (1968). See generally Gruenbaum & Steinberg, Section 29(b) of the Securities Exchange Act of 1934: A Viable Remedy Awakened, 48 GEO. WASH. L. REV. 1 (1979). For further discussion on § 29(b), see notes 276-79 and accompanying text infra.


40 For the text of § 29(b), see note 267 infra.
SEC,\textsuperscript{41} the Court held that the preponderance of the evidence, rather than the clear and convincing standard, is appropriate in SEC administrative proceedings based on fraud.\textsuperscript{42}

Most importantly, the Supreme Court's recent decision in \textit{Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran}\textsuperscript{43} arguably signifies that a cumulative construction of remedies under the federal securities laws is consistent with and supported by congressional intent. Imposing private rights of action under the Commodity Exchange Act (CEA),\textsuperscript{44} the Curran Court recognized that, in the years prior to 1975, "[i]f a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class."\textsuperscript{45} "Under this approach, federal courts . . . regarded the denial of a[n implied] remedy as the exception rather than the rule."\textsuperscript{46} In \textit{Cort v. Ash},\textsuperscript{47} decided in 1975, the Court altered its approach by focusing on congressional intent.\textsuperscript{48}

In discerning congressional intent, the Curran Court stated that it must examine the "contemporary legal context" at the time that the legislation was enacted.\textsuperscript{49} Elaborating, the Court reasoned:

[W]e must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the preexisting remedy.\textsuperscript{50}

\textsuperscript{41} 450 U.S. 91 (1981).

\textsuperscript{42} Id. at 96. In this regard, the Court premised its holding on a construction of § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 7(c) (1976). \textit{See} Steinberg, Steadman v. SEC—\textit{Its Implications and Significance}, 6 DEL. J. CORP. LAW 1 (1981). The Court recently granted certiorari on the proper standard of proof in an action for damages pursuant to § 10(b) in Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), \textit{cert. granted}, 102 S. Ct. 1766 (1982). The Fifth Circuit had held in \textit{Huddleston} that "clear and convincing evidence" is the appropriate standard.

\textsuperscript{43} 102 S. Ct. 1825 (1982).


\textsuperscript{45} 102 S. Ct. at 1837 (relying on Texas & Pacific R.R. v. Rigsby, 241 U.S. 33, 39-40 (1916)). One such example of this approach is \textit{J.I. Case Co. v. Borak}, 377 U.S. 426 (1964) (recognition of implied right of action for violations of § 14(a) of Securities Exchange Act of 1934 based on need to effectuate investor protection policies of Exchange Act and need to supplement SEC action).

\textsuperscript{46} Id. at 1837; \textit{see} cases cited in note 45 supra.

\textsuperscript{47} 422 U.S. 66 (1975).

\textsuperscript{48} Id. at 78. For a statement of these criteria and subsequent application, \textit{see} notes 69-91 and accompanying text infra.

\textsuperscript{49} 102 S. Ct. at 1839 (quoting \textit{Cannon v. University of Chicago}, 441 U.S. 677, 698-99 (1979)).

\textsuperscript{50} 102 S. Ct. at 1839 (citations omitted).
In deciding *Curran*, the Court focused on ascertaining Congress' intent in 1974 when it "comprehensively reexamined and strengthened" the CEA. Upon examining the case law, the Court concluded that the federal courts had "routinely and consistently" implied private rights under the CEA prior to the 1974 amendments. Accordingly, the existence of these remedies was part of the "contemporary legal context" in which Congress enacted the 1974 amendments. The Court, therefore, concluded that Congress' decision not to alter the statutory provisions that had been construed to provide implied private rights of action was evidence that Congress affirmatively intended to preserve these preexisting implied remedies.

The *Curran* Court recognized that the *Cori v. Ash* criteria for implying a private remedy had not been met with respect to certain of the plaintiffs' claims. The Court asserted, however, that it was not faced with such an inquiry. Rather than discerning Congress' intent when it enacts "new" legislation, the *Curran* situation required an inquiry concerning such intent when Congress legislates in a statutory setting in which implied rights had already been consistently and routinely recognized by the courts. Hence, the focus is on whether Congress intended to preserve the preexisting implied remedy.

Such an analysis may be employed in the context of the propriety of cumulative remedies under the federal securities laws. Congress has significantly amended the Securities Acts in 1964, 1968, 1970, and 1975. As the *Curran* Court recognized by analogy, the existence of an

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51 Id.
52 Id.
53 Id. at 1841. In dissent, Justice Powell, joined by the Chief Justice and Justices Rehnquist and O'Connor, strongly disagreed with the Court's analysis. Justice Powell stated: The [Court's] decision rests on two theories. First, the Court relies on fewer than a dozen cases in which the lower federal courts erroneously upheld private rights of action in the years prior to the 1974 Amendments to the CEA. Reasoning that these mistaken decisions constituted "the law" in 1974, the Court holds that Congress must be assumed to have endorsed this path of error when it failed to amend certain sections of the CEA in that year. This theory is incompatible with our constitutional separation of powers, and in my view it is without support in logic or in law. Additionally—whether alternatively or cumulatively is unclear—the Court finds that Congress in 1974 "affirmatively" manifested its intent to "preserve" private rights of action by adopting particular amendments to the CEA. This finding is reached without even token deference to established tests for discerning congressional intent. Id. at 1848 (Powell, J., dissenting) (emphasis in original).
54 Id. at 1845 ("[P]etitioners in the three manipulation cases correctly point out that the other sections of the CEA that they are accused of violating are framed in general terms and do not purport to confer special rights on any identifiable class of persons.").
55 Id. at 1839. But see id. at 1848 (Powell, J., dissenting); note 53 supra. The Court apparently declined to address the situation where Congress has not significantly amended a statute subsequent to federal court decisions implying private rights of action. See also note 61 infra.
implied private right of action under section 10(b) was uniformly recognized by the lower federal courts. Moreover, although not addressed in Curran, these courts had consistently and routinely permitted a plaintiff to proceed under section 10(b) even where express remedies were available. Faced with these decisions recognizing cumulative remedies, Congress never sought to modify this approach. Hence, the conclusion may be reached that Congress intended to preserve these cumulative remedies when it amended the securities laws.

This proposition may be rebutted, however, by a footnote in Curran which asserts that, unlike the CEA, "no comparable legislative approval or acquiescence exists for the rule 10b-5 remedy." This statement appears to be misplaced. The 1975 amendments, enacted prior to Cort v. Ash, constituted the "most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934." In these amendments, Congress had ample opportunity to restrict, modify, or reject the cumulative remedy.

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60 102 S. Ct. at 1845 n.88. This statement appears inconsistent with another proposition advanced by the Court. Quoting from his dissent in Piper v. Chris-Craft Indus., 430 U.S. 1 (1977), Justice Stevens, writing for the Curran Court, stated:

The statutes originally enacted in 1933 and 1934 have been amended so often with full congressional awareness of the judicial interpretation of Rule 10b-5 as implicitly creating a private remedy that we must now assume that Congress intended to create rights for the specific beneficiaries of the legislation as well as duties to be policed by the SEC....

102 S. Ct. at 1846 n.92 (quoting 430 U.S. at 55 n.4 (Stevens, J., dissenting)).

61 The 1975 amendments were enacted on June 4, 1975. Securities Act Amendments of 1975, Pub. L. No. 94-79, § 30, 89 Stat. 97. The Court decided Cort v. Ash on June 17, 1975. Although not entirely clear from the Curran Court's analysis, it may be that a more explicit showing of congressional intent is required for statutes amended after Cort was decided. On the other hand, a plausible argument can be made that the crucial criterion is whether the courts were "routinely and consistently" implying a private right of action for the statute under judicial review, independent of when such decisions were handed down. Under this rationale, the date on which Cort was decided goes only to the more stringent standard that courts after Cort use to determine the implication of remedy question where there is "new" legislation; the date has no relevance in ascertaining whether Congress intended to preserve a preexisting remedy.

62 Securities Act Amendments of 1975: Hearings on S. 249 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 1 (1975); see Pitt, supra note 59, at 22.
construction adopted by the courts, but declined to do so. According to the language of Curran, therefore, "the fact that a comprehensive reexamination and significant amendment of the [federal securities laws] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."63

As further support for a cumulative approach, the Curran Court implied private rights of action under the CEA even though the 1974 amendments created reparation and arbitration procedures through which future traders might seek relief for violations of the Act.64 It may be argued that permitting cumulative remedies where there are "informal" administrative procedures, such as arbitration and reparation,65 is far different than where there are express judicial remedies, such as those provided in the 1933 and 1934 Securities Acts.66 This assertion is undoubtedly valid, but is irrelevant when considered in the legislative framework of these Acts. In the case of the CEA, there were few court decisions construing the effect of these informal procedures on the implication of private remedies and no subsequent congressional legislation of a substantial nature.67 Cumulative remedies under the federal securities laws, on the other hand, have an established tradition and were subject to revision, if Congress so chose, on four different occasions when it significantly amended these laws.68

Thus, it may be argued persuasively that if courts were to apply the Curran rationale in determining whether to adopt a cumulative or exclusive construction of the securities laws, they should permit overlap between the express and implied remedies. If courts decline to employ the Curran analysis in this context, however, then a crucial issue concerns the continued vitality of the Cort v. Ash test for determining the existence of an implied private cause of action under a federal statute. The Cort formulation provides a four-prong standard:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area

63 102 S. Ct. at 1841; see note 60 supra.
64 Id. at 1842.
65 The Court concluded that "the legislative evidence indicates that these informal [reparation and arbitration] procedures were intended to supplement rather than supplant the implied judicial remedy." Id.
66 See Pitt, supra note 59, at 22.
67 See 102 S. Ct. at 1842-43.
68 See notes 56-63 and accompanying text supra.
basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?  

In subsequent decisions, the Court has embraced the Cort test with varying levels of enthusiasm. In Cannon v. University of Chicago, the Court first voiced its dissatisfaction with the Cort standard while implying a private remedy under Title IX of the Education Amendments of 1972. The Court concluded that the far better course is for Congress to create an express cause of action when it desires to afford private litigants with the right to seek redress. However, "under certain limited circumstances," such a failure by Congress is not inconsistent with its intent to have the Court imply an appropriate private remedy. Because the issue before the Court presented "the atypical situation in which all of the [Cort] circumstances that the Court [had] previously identified as supportive of an implied remedy [were] present," the majority concluded that an implied cause of action could properly be inferred. Justice Rehnquist emphasized in a concurring opinion that the question of determining whether to imply a private cause of action is one of statutory construction. He noted that recent cases, such as Cort, had approached the implication of the private remedy issue more stringently than the Court did previously and cautioned "that the ball, so to speak, may now be in [Congress'] court." Under Justice Rehnquist's view, the Court should be extremely reluctant to imply private remedies without sufficient specificity by Congress. Justice Powell went further in his dissent, asserting that the four-prong Cort standard must be abandoned not only on policy grounds, but because the Cort analysis does not comport with the doctrine of the separation of powers: "The 'four factor' analysis of that case is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected." This assertion was explicitly rejected by the Curran Court.

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69 422 U.S. at 78 (citations omitted). See discussion in notes 47-48, 54-55 and accompanying text supra.
73 441 U.S. at 717.
74 Id. at 718 (Rehnquist, J., concurring).
75 Id.
76 Id. at 731 (Powell, J., dissenting); see Steinberg, Implied Private Rights of Action Under Federal Law, 55 NOTRE DAME LAW. 33, 40 (1979) ("Justice Powell's assertion that the courts are pursuing an unconstitutional course is premised on unduly strict notions of judicial restraint.").
77 102 S. Ct. at 1838 (Court expressly finds "no merit to the argument . . . that the judicial recognition of an implied private remedy violates the separation of powers doctrine.") (relying on Montana-Dakota Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261-62 (1951) (Frankfurter, J., dissenting)).
The Court further modified the four-prong Cort test in Touche Ross & Co. v. Redington, in which it refused to imply a private cause of action for damages under section 17(a) of the Securities Exchange Act of 1934. Writing for the Court, Justice Rehnquist emphasized that the decision to imply a private right of action is limited “solely” to a determination of congressional intent. The Court in its holding refused to accord equal weight to the four Cort principles. Rather, when a statute does not provide private rights to any identifiable class, does not prohibit any conduct as unlawful, and has a legislative history that is silent or ambiguous on the existence of private remedies, the Court will find that no congressional intent to create a private remedy exists. A court is obligated in such cases not to consider the third and fourth prongs of the Cort test, namely, whether the implication of a private remedy is necessary to effectuate the statute’s purpose and whether the action is one traditionally relegated to state law.

The Court reaffirmed the apparent demise of the Cort test in Transamerica Mortgage Advisors, Inc. v. Lewis. The Court, relying on Redington, held that the central inquiry in determining whether to imply a private right of action is an examination of congressional intent. The Court embraced a restrictive approach to the implied remedy question.

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79 15 U.S.C. § 78q(a)(1) (1976). Section 17(a) requires broker-dealers and others to maintain and file such books and records as the Commission “may prescribe as necessary or appropriate in the public interest or for the protection of investors.”
80 442 U.S. at 568.
81 Id. at 575-76. The Redington Court enunciated other principles to aid in ascertaining Congress’ intent in the implication of a private remedy when the legislative history is silent or ambiguous. First, when a statute’s primary focus is to prevent or forestall future harm rather than to provide recompense after a violation has occurred, this militates against implication. Id. at 570-71. Second, when a statute provides other private remedies, the inference arises that “when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.” Id. at 572. This principle is inconsistent with the Court’s holding in Cannon that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.” Cannon v. University of Chicago, 441 U.S. 677, 711 (1979). Finally, if the principal express civil remedy is directed at essentially the same type of misconduct as the statute at issue and if Congress passed the two provisions contemporaneously, the Court will be “extremely reluctant to imply a cause of action in [the statute in question] that is significantly broader than the remedy that Congress chose to provide.” 442 U.S. at 574.
83 Id. at 15-16.
84 The Court stated:

The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us.

Id. at 15-16 (citations omitted).
in holding that no implied private right of action for damages existed under section 206 of the Investment Advisers Act,\textsuperscript{85} even though the provision was "intended to benefit the clients of investment advisers."\textsuperscript{86}

The Supreme Court, however, revived the \textit{Cort} standard in more recent cases involving implied rights of action in non-securities areas.\textsuperscript{87} \textit{California v. Sierra Club}\textsuperscript{88} highlights the split on the Court with regard to the continued viability of the \textit{Cort} four-prong test. The majority applied the \textit{Cort} standard and refused to recognize an implied right of action under the Rivers and Harbors Appropriation Act,\textsuperscript{89} stating:

\begin{quote}
Combined, these four factors present the relevant inquiries to pursue in answering the recurring question of implied causes of action. Cases subsequent to \textit{Cort} have explained that the ultimate issue is whether Congress intended to create a private right of action, but the four factors specified in \textit{Cort} remain the "criteria through which this intent could be discerned."\textsuperscript{90}
\end{quote}

Justice Rehnquist in a separate concurring opinion asserted that "the Court's opinion places somewhat more emphasis on \textit{Cort v. Ash} than is warranted in light of several more recent 'implied right of action' decisions which limit it."\textsuperscript{91}

Although not generally embracing the expansionist holdings of yesteryear,\textsuperscript{92} these recent decisions indicate that the Court has eschewed a

\begin{footnotes}
\textsuperscript{85} 15 U.S.C. § 80b-6 (1976). Section 206 broadly proscribes fraudulent or other deceptive acts and practices by investment advisers.
\textsuperscript{86} 444 U.S. at 17.
\textsuperscript{88} 451 U.S. 287 (1981).
\textsuperscript{89} 33 U.S.C. § 403 (1976).
\textsuperscript{92} It may be argued, however, that \textit{Curran} is such an expansionist holding. \textit{See} \textit{generally} notes 43-68 and accompanying text \textit{supra}. The same can be said for \textit{Nafalin}. \textit{See} notes 28-30 and accompanying text \textit{supra}. For expansionist holdings of yesteryear, \textit{see}, e.g., \textit{Affiliated Ute Citizens v. United States,} 406 U.S. 128 (1972) (relaxing common-law reliance requirement in cases of nondisclosure under § 10(b)); \textit{Superintendent of Ins. v. Bankers Life & Casualty Co.,} 404 U.S. 6 (1971) (recognizing implied right of action for damages under § 10(b); applying that provision where there was an arguably tenuous connection between the securities transaction and the fraudulent activity); \textit{SEC v. National Sec., Inc.,} 393 U.S. 453 (1969) (recognizing SEC's authority to regulate activities of insurance companies); \textit{J.I. Case Co. v. Borak,} 377
\end{footnotes}
limiting rationale for the federal securities laws. The Court has recognized a private right of action for damages under section 10(b), and even in its restrictive implication cases, has refused to deny implied remedies to all private claimants. Recent implication cases, particularly Curran and California v. Sierra Club, arguably support the continued viability of cumulative remedies.

Several conclusions follow from this analysis. First, if an exclusive construction of section 18(a) is adopted, aggrieved parties would be denied meaningful redress under the federal securities laws. This result is contrary to the thrust of decisions such as Piper and Lewis, and ignores section 10(b)'s unique status within the fabric of the federal securities laws. Second, under the Cori and Curran standards, implied rights may be found in the absence of explicit congressional intent. As Curran suggests, in ascertaining this intent, it is highly significant, if not determinative, that Congress has amended the securities acts on a number of occasions and was presumably aware that the courts were "routinely and consistently" applying section 10(b) in a cumulative manner. From this perspective, it is quite plausible that the Supreme Court would adopt a cumulative construction when presented with the issue. In any event, the adherence to an exclusive rationale by some lower courts, premised primarily on perceived restrictive Supreme Court decisions, is misplaced.
II
LOWER COURT DECISIONS

Prior to recent Supreme Court decisions restricting the scope of section 10(b),\(^\text{99}\) the lower federal courts generally held that a section 10(b) action based on fraud\(^\text{100}\) could be instituted for conduct covered by the express liability provisions of the 1933 and 1934 Acts.\(^\text{101}\) For example, in \textit{Fischman v. Raytheon Manufacturing Co.},\(^\text{102}\) the district court held that allowing a section 10(b) claim would circumvent the restrictions contained in section 11.\(^\text{103}\) The Second Circuit reversed, reasoning that "when, to conduct actionable under § 11 of the 1933 Act, there is added the ingredient of fraud, then that conduct becomes actionable under

\(^{99}\) \textit{See} notes 21-27 and accompanying text \textit{supra}.

\(^{100}\) Prior to Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), a number of courts permitted a § 10(b) action for damages to be premised on negligence. \textit{See}, e.g., \textit{White v. Abrams}, 495 F.2d 724, 730-35 (9th Cir. 1974) (negligence may suffice under flexible duty standard); \textit{Myzel v. Fields}, 386 F.2d 718, 735 (8th Cir. 1967), \textit{cert. denied}, 390 U.S. 951 (1968) (negligence suffices).


\(^{103}\) \textit{9 F.R.D.} at 710-11. Section 11(a), 15 U.S.C. § 77k(a)(1)-(5) (1976), provides:

(a) Persons possessing cause of action; persons liable. In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him; and

(5) every underwriter with respect to such security.
§ 10(b) of the 1934 Act and the Rule. ..." Courts have also permitted cumulative remedies between sections 10(b) and 18(a) under a similar rationale.

Some lower courts, pointing to recent Supreme Court decisions, have adopted an exclusive construction holding that an overlap of remedies would frustrate the statutory scheme. For example, in *McFarland v. Memorex Corp.*, the district court was reluctant, in the absence of explicit congressional intent, to permit the plaintiff to pursue an alternative remedy under section 10(b) where the alleged misdeeds were within the Securities Act's express remedial provisions. Similarly, in a case dealing with the exclusivity of remedies between sections 10(b) and 18(a), the district court in *McKee v. Federals, Inc.*, held that "[s]ince the § 18 remedy (an express statutory provision) is not unavailable to plaintiff the invocation of an implied rule 10b-5 remedy may not be countenanced."

Courts adhering to the exclusivity rationale also rely on the procedural requirements of the express provisions that are absent from the implied remedies. Accordingly, a cumulative construction would allow a plaintiff to maintain an implied right of action under circumstances where an express remedy would be unavailable. Courts strictly constru-

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104 188 F.2d at 787. In *Fischman*, the plaintiffs did not have a cause of action under § 11 because they did not purchase the registered securities. *Id.* at 786-87.


106 Although the Supreme Court has apparently rejected the statutory-tort theory, *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), previous lower court decisions relied upon the concept as a justification for cumulative remedies. The statutory-tort theory is a common-law doctrine that holds that persons injured by a violation of a statute enacted for their benefit are entitled to recover damages for their injury. *See* 1 A. Bromberg & L. Lowenfels, * supra* note 101, § 2.4(1)(a), at 29-31. These courts reasoned that because Congress enacted the securities statutes to protect investors, such person should be compensated for their injury even if they invoked an implied rather than an applicable express remedy. *See, e.g.*, Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 213 (9th Cir. 1962); Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 786-87 (2d Cir. 1951); Osborne v. Mallory, 86 F. Supp. 869, 879 (S.D.N.Y. 1949); Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946).

108 Courts also have relied upon the statutory avoidability theory embodied in § 29(b) of the 1934 Act to support cumulative remedies. *See*, e.g., Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 213 (9th Cir. 1962); *see* note 40 and accompanying text *supra*; notes 276-79 and accompanying text *infra*.


ing the statutory scheme find that this consequence is incompatible with congressional intent.\textsuperscript{110}

The majority of courts, however, have adopted a cumulative construction both with respect to overlap between section 10(b) and sections 11 and 12(2) of the Securities Act, and between section 10(b) and sections 9 and 18(a) of the Securities Exchange Act.\textsuperscript{111} The Second Circuit addressed the question of cumulative remedies between sections 10(b) and 18(a) in \textit{Ross v. A.H. Robins Co.}\textsuperscript{112} In \textit{Ross}, the plaintiffs alleged that the defendants had manipulated and artificially inflated the market price of Robins' common stock by disseminating false and misleading information concerning the effectiveness and safety of the Dalkon Shield, an intrauterine birth control device that it manufactured, and by failing to reveal information which suggested that the shield was less effective and more dangerous than the company's earlier public statements had indicated.\textsuperscript{113} The plaintiffs alleged that the company had made misleading statements in both SEC filings\textsuperscript{114} and public an-

\textsuperscript{110} See \textit{McFarland v. Memorex Corp.}, 493 F. Supp. 631, 653-55 (N.D. Cal. 1980). For example, §§ 11 and 12 of the Securities Act are subject to § 13, which contains a general one-year statute of limitations upon the discovery of the untrue statement or omission. Section 13 also provides that “[i]n no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale.” In contrast, no statute of limitations accompanies implied actions under § 10(b), and, accordingly, the appropriate state statute of limitations must be applied. See, e.g., \textit{IDS Progressive Fund, Inc. v. First of Mich. Corp.}, 533 F.2d 340, 344 (6th Cir. 1976) (Michigan's six-year limitations period applies to § 10(b) claim); cases cited in note 215 infra.

Another rationale supporting exclusivity is that strike suits may become more prevalent if plaintiffs are permitted to pursue cumulative remedies. A strike suit involves litigation which, by objective standards, has little chance of success at trial but has a settlement value to the plaintiff disproportionate to its prospect for success. See \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723, 741 (1975). Since exclusivity would bar a significant amount of litigation that would be permitted by courts recognizing cumulative remedies, concern for strike suits may be advanced as a justification for exclusivity. But see note 235 infra.


\textsuperscript{112} 607 F.2d 545 (2d Cir. 1979), \textit{cert. denied}, 446 U.S. 946 (1980).

\textsuperscript{113} \textit{Id.} at 549.

\textsuperscript{114} The allegedly misleading statements were contained in annual reports filed with the Commission pursuant to Form 10-K. \textit{Id.}
nouncements. The plaintiffs, who purchased Robins stock when the allegedly misleading statements were made, brought an action under section 10(b) and rule 10b-5 after the stock plummeted upon public disclosure of the product’s problems.

The district court, relying on the procedural restrictions embodied in section 18(a), rejected the section 10(b) claim and held that section 18(a) was the exclusive remedy for the fraudulent conduct alleged. The Second Circuit reversed, holding that the section 10(b) remedy does not nullify the limitations and requirements of section 18(a). In addition, the court found that policy considerations militate against an exclusive construction of section 18(a).

The Second Circuit had previously held that whenever the conduct alleged contains an ingredient of fraud, and other conditions are met, section 10(b) is applicable regardless of the availability of an express cause of action. After recognizing this proposition, the court addressed the argument that permitting the section 10(b) claim circumvents the stringent requirements of section 18(a). Rejecting this argument, the court reasoned that the plaintiffs sought to invoke section 10(b) "to state a claim that is beyond the scope of § 18—the latter section furthering the narrow and particularized objective of encouraging use of and reliance upon records filed with the SEC, by expressly authorizing damage suits against those who make them depositaries of materially false or misleading statements."

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115 The allegedly misleading statements were contained in four press releases during a 12-month period. Id.
116 The named plaintiffs and members of the class alleged that they purchased Robins stock based upon the misleading public information that Robins released. The value of the common stock dropped from $19 to $13 on the New York Stock Exchange following investigations by the Food and Drug Administration and the Department of Health, Education and Welfare, and the institution of over 500 product-liability suits against Robins. Id. at 550.
117 See notes 12-16 and accompanying text supra.
118 465 F. Supp. 904 (S.D.N.Y. 1979). The court initially found that the reach of the two provisions was significantly different. The court noted that while a plaintiff may assert a claim under § 10(b) and rule 10b-5 for statements made in a press release, such a claim could not be asserted under § 18. Second, the court pointed to the stricter reliance standard required for a § 18 action. Third, the court recognized the three-year statute of limitations for § 18 actions and the absence of any explicit statute of limitations for § 10(b) actions. Finally, the court noted that § 18 permits courts to assess payment of costs of the action, while § 10(b) does not provide for a comparable undertaking. Id. at 910-13.
119 607 F.2d 545, 553-56 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980).
120 Id. at 556.
121 For example, the plaintiff must be a purchaser or seller of securities. Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).
122 607 F.2d at 555.
123 Id. at 556. In this regard, the court stated: To now hold, at this late date, that conduct is not proscribed by § 10(b) merely because it is also subject to § 18 would effectively deprive open market investors... of any remedy simply because the misinformation happened to be lodged in a form filed with the S.E.C. Such a result would be remarkably
that a plaintiff seeking to recover under section 10(b) must plead and prove scienter, whereas section 18(a) does not saddle a complainant with this significant burden. The court employed this distinction as an additional justification for allowing a section 10(b) action in spite of section 18(a)'s rigorous reliance requirement.

The court also relied on policy considerations in its endorsement of cumulative remedies. The court found it incongruous to deprive open market investors of a section 10(b) remedy for fraudulent conduct simply because a document filed with the SEC happened to contain misinformation. Moreover, the court concluded that forcing plaintiffs to proceed under section 18 because the statements were filed with the SEC would encourage corporate malfeasants to include their misrepresentations in materials filed with the Commission, "for the sole purpose of insulating themselves from liability under § 10(b) and restricting the class of potential plaintiffs to the unlikely few who actually viewed and relied on the misleading information."

The District of Columbia Circuit followed and expanded Robins in Wachovia Bank & Trust Co. v. National Student Marketing Corp. In Wachovia Bank, the defendants contended that section 18(a) provided the exclusive remedy for alleged misstatements contained in documents filed with the SEC pursuant to the Securities Exchange Act, and that section 12(2) of the Securities Act afforded the exclusive remedy for state-

incongruous in view of the fact that it is the open market investor who over the years has become one of the prime beneficiaries of the protections afforded by § 10(b) and Rule 10b-5.

Id. at 555-56.  
124 Id; see notes 12-16 and accompanying text supra.  
125 607 F.2d at 556. Accordingly, the court concluded:
In view of the alternatives that face us, we choose the one which we believe gives controlling weight to the fundamental policies underlying the securities acts and which recognizes that § 10(b) and Rule 10b-5 have become, by careful judicial construction, the primary mechanisms by which open market investors can seek redress against those who manipulate the market by fraudulent activity.

Id.  
126 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981). The Wachovia plaintiffs purchased nearly five million dollars of National Student Marketing stock (NSMC) in a private placement in 1969. Following the merger of NSMC and Interstate National Corporation, the stock fell from 69 1/2 on December 17, 1969 to 16 on February 17, 1970. Numerous suits were filed against NSMC, NSMC's counsel, and NSMC's accountants. The Wachovia litigation concerned alleged misrepresentations about NSMC's financial condition in press releases, oral statements, reports filed with the SEC, and other published reports not filed with the Commission. Id. at 345. See generally Ferrara & Steinberg, The Role of Inside Counsel in the Corporate Accountability Process, 4 CORP. L. REV. 3 (1981); Gruenbaum, Corporate/Securities Lawyers: Disclosure, Responsibility, Liability to Investors and National Student Marketing Corp., 54 NOTRE DAME LAW. 795 (1979).  
127 Section 12(2), 15 U.S.C. 771(2) (1976), provides:
Any person who—

(2) offers or sells a security (whether or not exempted by the provisions of
ments that were not contained in such filed documents.\textsuperscript{129} The District of Columbia Circuit rejected these contentions. Regarding the impact of the express remedies on section 10(b), the court pointed out that “the nature of the legislative process militates against each enactment’s being self-contained and mutually exclusive of every other enactment.”\textsuperscript{130} The court further reasoned that the express remedies are designed to treat different problems and be applicable in different situations, and therefore are “totally different” from the implied remedy of section 10(b). For example, although various restrictions that apply in suits seeking relief under the express remedies are absent in section 10(b) actions, these restrictions are counterbalanced by that provision’s scienter requirement.\textsuperscript{131} Accordingly, the court concluded that a cause of action may be implied under section 10(b), “irrespective of the possibility of overlap between that implied cause of action and express remedies provided by other sections of the securities laws.”\textsuperscript{132}


\textsuperscript{130} 650 F.2d at 355.

\textsuperscript{131} \textit{Id.} at 355-57. For example, the court stated that “[t]he higher burden of proof under Section 10(b) is clearly a trade-off for the limitations on section 11 claims . . . .” \textit{Id.} at 356. At another point, the court likewise reasoned that “the more stringent fraud requirement of Section 10(b) serves as a trade-off for Section 12(2)'s short statute of limitations and apparent restriction of defendants to sellers of securities.” \textit{Id.}

\textsuperscript{132} \textit{Id.} at 359. In so holding, the court adopted the SEC’s position. Appearing as amicus curiae, the Commission stated:

The Commission is concerned by the defendants’ argument in this case that investors may be excluded from this well-established implied private remedy for deceptive conduct by the possible existence of narrowly drawn express remedies, and particularly by Section 18 of the Securities Exchange Act, 15 U.S.C. 78r, the remedy designed only for persons who actually read and rely upon corporate filings with the Commission, which does not and cannot re-
Subsequently, in \textit{Huddleston v. Herman & MacLean},\textsuperscript{133} the Fifth Circuit adhered to a cumulative construction in permitting a section 10(b) claim to proceed even though sections 11 and 12(2) of the Securities Act covered the alleged conduct. The court premised its holding upon the more stringent section 10(b) scienter requirement and upon policy considerations,\textsuperscript{134} concluding that "[w]hile Sections 11 and 12(2) of the 1933 Act, like Section 18 of the 1934 Act, contain limitations and requirements not exacted of Section 10(b) litigants, allowing invocation of the Section 10(b) remedy does not impermissibly nullify those constraints."\textsuperscript{135}

In one respect, however, the Fifth Circuit's reasoning is misplaced. In adopting a cumulative construction, the court asserted that limiting the plaintiffs to the remedies provided by sections 11 and 12(2) would induce corporate malfeasants to limit their liability by including misleading statements in prospectuses filed with the SEC.\textsuperscript{136} Although such reasoning may be persuasive when section 18(a) is the express provision at issue,\textsuperscript{137} it is not valid when sections 11 and 12(2) are applicable. Ordinarily, plaintiffs seeking to recover under these provisions are not required to establish reliance as they are under section 18(a).\textsuperscript{138} Moreover, section 11, and section 12(2) if strict privity between the purchaser and seller is relaxed,\textsuperscript{139} provide aggrieved litigants with viable reme-

\textsuperscript{133} 640 F.2d 534 (5th Cir. 1981), \textit{cert. granted}, 102 S. Ct. 1766 (1982).
\textsuperscript{134} \textit{Id.} at 540-43.
\textsuperscript{135} \textit{Id.} at 542.
\textsuperscript{136} \textit{Id.} at 542-43.
\textsuperscript{137} \textit{See} notes 12-16 and accompanying text \textit{supra}.
\textsuperscript{138} As stated by Jennings and Marsh:
\begin{quote}
Proof of reliance by the plaintiff on the false or misleading statement is not necessary in an action under Section 12(2), as it normally is not in an action under Section 11; but . . . a plaintiff who acquired the security after the issuer made an earnings statement covering a 12-month period after the effective date "generally available" must prove reliance in an action under Section 11.
\end{quote}
\textit{R. Jennings & H. Marsh, Securities Regulation} 778 (5th ed. 1982).
Thus, far from being a dead letter, these provisions should be viewed with trepidation by potential violators.\textsuperscript{141}

### III

#### A Suggested Approach

The central inquiry is not only whether courts should adhere to a cumulative construction, but also under what provisions, if any, they should adopt this approach. The following discussion addresses the propriety and scope of cumulative remedies when fraud is an ingredient of the complainant's claim, and the party alleges violations of: (1) section 10(b) and section 18(a); (2) comparable provisions to section 18(a); (3) section 10(b) and section 12(2); (4) section 10(b) and section 11, and (5) section 10(b) and section 9. The discussion then focuses on the propriety of cumulative remedies when the complainant alleges violations of a reporting provision of the Exchange Act and section 18(a). Finally, assuming that an exclusive construction of section 18(a) ultimately is adopted, the discussion addresses how the provision should be construed, and explores whether alternative remedies are available.\textsuperscript{142}

#### A. Section 10(b) and Section 18(a)

Primarily because of the provision's rigid criteria, a suit based solely upon section 18(a) has never succeeded.\textsuperscript{143} Section 18(a) contains strict standards of reliance and causation and also requires the plaintiff to be a purchaser or seller.\textsuperscript{144} In addition, section 18(c) sets forth fairly stringent time limitations for bringing a cause of action.\textsuperscript{145} The difficulty of satisfying these standards has prompted plaintiffs in every reported case to couple their section 18(a) claim with an additional cause of action. By permitting plaintiffs to proceed under multiple causes of action, courts have provided them with a realistic opportunity for redress. In contrast, courts holding section 18(a) to be exclusive have effectively precluded such plaintiffs from any hope of recovery under the federal

\textsuperscript{140} See R. Jennings & H. Marsh, supra note 138, at 833-35, 841.


\textsuperscript{142} Section 10(b) potentially overlaps with a number of other express liability provisions, including § 15 of the Securities Act, 15 U.S.C. § 77o (1976), and §§ 16(b) and 20 of the Securities Exchange Act, 15 U.S.C. §§ 78p(b), 78t (1976).

\textsuperscript{143} See Greene, supra note 16, at 758.

\textsuperscript{144} For the complete text of § 18(a), see note 12 supra.

\textsuperscript{145} Section 18(c), 15 U.S.C. § 78r(c) (1976), provides that "[n]o action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within the three years after such cause of action accrued."
securities laws.¹⁴⁶

Satisfying the reliance standard under section 18(a) is a particularly onerous task. Courts have held that a plaintiff must establish "eyeball reliance"¹⁴⁷ upon the allegedly false or misleading statement contained in a document filed with the SEC.¹⁴⁸ Thus, an investor must prove that he actually read the filed document or a copy thereof containing the statement.¹⁴⁹ Given the average investor's propensity to scrutinize such corporate documents,¹⁵⁰ it is apparent that this requirement presents a major obstacle to plaintiffs seeking to maintain a section 18(a) cause of action.

Similarly, the provision's causation requirement poses potential difficulties for the plaintiff who seeks to invoke section 18(a). The plaintiff bears the "double-barreled"¹⁵¹ burden of demonstrating that the false or misleading statement both affected the price of the security and damaged him.¹⁵² The harshness of the foregoing criteria has impelled several courts to permit plaintiffs to couple their section 18(a) right of action with an additional cause of action under the federal securities laws.¹⁵³

¹⁴⁶ Plaintiffs, depending on the circumstances, may have a remedy under state law, based either on common-law fraud or on a violation of the pertinent Blue Sky provision. A number of states, in their Blue Sky statutes, have incorporated provisions similar to rule 10b-5. See, e.g., CONN. GEN. STAT. ANN. § 36-472 (West 1981); MASS. ANN. LAWS ch. 110A, § 101 (Michie/Law. Co-op. 1979); N.J. STAT. ANN. § 49:3-52 (West 1970); PA. STAT. ANN. tit. 70, § 1-401 (Purdon Supp. 1981); WASH. REV. CODE ANN. § 21.20.010 (1979); WIS. STAT. ANN. § 555.41 (West Special Pamphlet 1981).


¹⁴⁹ As noted by the district court in Wachovia, it is unclear whether the plaintiff's reliance must be on the actual document that was filed with the Commission, or whether reliance on a copy thereof is sufficient. In this regard, the district court stated that the latter "seems to be the more reasonable position since it is the knowledge that it has been filed with the Commission that justifies reliance on the document." Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 461 F. Supp. 999, 1006 n.13 (D.D.C. 1978), rev'd on other grounds, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981).


¹⁵¹ See 3 L. Loss, SECURITIES REGULATION 1752 (2d ed. 1961).

¹⁵² See, e.g., Jacobson v. Peat, Marwick, Mitchell & Co., 445 F. Supp. 518 (S.D.N.Y. 1977); Hoover v. Allen, 241 F. Supp. 213 (S.D.N.Y. 1965). Section 16(a), unlike § 10(b), also provides that a "court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant."

¹⁵³ See notes 111-35 and accompanying text supra. These courts have also relied, in part, on the rigorous scienter standard required in § 10(b) actions.
It is critical to consider the likely consequences that would ensue if courts hold that section 18(a) is the exclusive remedy for false or misleading statements contained in documents filed with the SEC pursuant to the Exchange Act: With respect to such misconduct, the open market purchaser or seller would effectively be denied all meaningful redress under federal law. Such a construction could also provide corporate malfeasants with the opportunity to insulate their conduct from monetary recompense by including all of their material misrepresentations and nondisclosures in documents filed with the Commission.\textsuperscript{154} In sum, the ultimate effect of such an exclusive interpretation would be severely to impair the integrity of the marketplace and investor protection.

Although the Supreme Court has recently taken a more restrictive view of section 10(b) and perhaps of implied rights of action,\textsuperscript{155} the Court has also shown a concern not to deny a viable remedy to all aggrieved plaintiffs\textsuperscript{156} and to protect ethical business.\textsuperscript{157} Viewed from this perspective, the interests of investors and the financial community are inextricably intertwined. Exclusivity of the section 18(a) remedy may induce parties to file fraudulent documents with the SEC that would not only injure investors, but would also wreak havoc upon the financial community and perhaps upon the economy as a whole. Taking these considerations into account, exclusivity of the section 18(a) cause of action “would create a loophole in the statute that Congress simply did not intend to create.”\textsuperscript{158}

\textsuperscript{154} See Ross v. A.H. Robins Co., 607 F.2d 545, 555-56 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980). In such a situation, the Commission may bring an action for injunctive relief based on violation of § 10(b). Even under an exclusive construction, which extends to only private litigants, the SEC would be able to invoke the antifraud prohibition of § 10(b), irrespective of whether the false or misleading statement was contained in a filed document. Also, the Commission could employ § 17(a) of the Securities Act of 1933 in this context. \textit{See also} cases cited in note 255 infra. Further, under certain circumstances, aggrieved parties may obtain monetary recompense indirectly by means of ancillary or other equitable relief procured by the SEC against a subject party. \textit{See}, e.g., SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102-03 (2d Cir. 1978); Chris-Craft Indus., v. Piper Aircraft Corp., 480 F.2d 341, 390-91 (2d Cir. 1972), \textit{cert. denied}, 414 U.S. 910 (1973); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1007, 1104-05 (2d Cir. 1972). \textit{See generally} Farrand, \textit{Ancillary Remedies in SEC Civil Enforcement Suits}, 89 HARV. L. REV. 1779 (1976); Hazen, \textit{Administrative Enforcement: An Evaluation of the Securities and Exchange Commission's Use of Injunctions and Other Enforcement Methods}, 31 HASTINGS L.J. 427, 444-51 (1979); Mathews, \textit{Liability of Lawyers Under the Federal Securities Laws}, 30 BUS. LAW. 105 (1975); Steinberg, supra note 32. at 32-33. In addition, if the requisite mental state is shown, such misconduct gives rise to criminal liability. \textit{See} Securities Act of 1933, § 24, 15 U.S.C. § 77x (1976); Securities Exchange Act of 1934, § 32(a), 15 U.S.C. § 78ff(a) (1976). Also, state remedies may be available. \textit{See} note 146 supra.

\textsuperscript{155} \textit{See} notes 21-27, 78-86 and accompanying text supra.

\textsuperscript{156} \textit{See} notes 94-95 and accompanying text supra.


\textsuperscript{158} 441 U.S. at 777. An analogy can be drawn to the Court's holding in \textit{Naftalin} that the protection of § 17(a) of the Securities Act extends to financial intermediaries. There, the
B. Comparable Provisions to Section 18(a)

An examination of other provisions where a material misrepresentation or nondisclosure is contained in a document filed with the SEC that constitutes the basis for the action further demonstrates the illogic of an exclusive construction of the section 18(a) right of action.\(^\text{159}\) Rule 14a-9,\(^\text{160}\) promulgated pursuant to section 14(a) of the Exchange Act,\(^\text{161}\) for example, prohibits material misrepresentations and omissions in proxy statements. Because proxy statements are filed with the SEC, the rationale supporting an exclusive construction of section 18(a) arguably would bar private damage actions under section 14(a) and rule 14a-9. It is well established, however, that an implied right of action under these provisions does exist.\(^\text{162}\) As another example, section 14(d),\(^\text{163}\) and Com-

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Court recognized that a predominant purpose of the Securities Acts was to protect ethical business. It reasoned that the interests of investors and those of financial intermediaries are interrelated because frauds perpetrated against either group may ultimately injure the other and the economy as a whole. \(\text{id. at 776.}\) Contending that the Naftalin Court's approach was "sound and firmly rooted in the reality of the operations of the securities markets," this author has concluded previously that "[a]lthough some authorities may fragmentize the operational components of the securities markets and theorize about the applicability of the various regulatory restrictions to each part, the markets actually operate as a unified whole where those desiring to buy or sell may do so with confidence." Steinberg, supra note 30, at 170.

Also, a plausible argument can be made that because § 18(a) apparently affords only a damages remedy, even under an exclusive construction, courts can award the equitable remedy of rescission pursuant to § 10(b). This subject is addressed later in this Article. \(\text{See notes 240, 273-75 and accompanying text infra.}\)

\(^{159}\) As noted previously, § 18(a) applies only when the document is filed pursuant to the Exchange Act. \(\text{See notes 12 & 15 supra.}\) For a discussion of § 17(a) of the Securities Act of 1933, see notes 266-75 and accompanying text infra.

\(^{160}\) Rule 14a-9, 17 C.F.R. § 240.14a-9(a) (1982), provides:

be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

\(^{161}\) Securities Exchange Act of 1934, § 14(a), 15 U.S.C. § 78n(a) (1976). Section 14(a) provides generally that proxies cannot be solicited "in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors. . . ." Section 14(a) applies to all nonexempt securities registered pursuant to § 12 of the Exchange Act.


mission rules prescribed thereunder, generally require that the offeror and the target company file documents with the SEC when a tender offer is made. Subject to certain limitations, material misrepresentations and omissions contained in these documents are actionable under section 14(e), the antifraud provision that applies to tender offers. This implied remedy, premised on misleading filings with the SEC, appears contrary to the spirit of an exclusive construction of section 18(a).

Section 18(a), however, does not extend to the above examples because the section only provides relief to purchasers and sellers. None-
theless, these examples illustrate the incongruity of an exclusive construction of section 18(a). There is no justifiable reason in this context why courts should single out section 10(b) from the other implied causes of action that have been recognized under comparable provisions, particularly in view of section 10(b)'s special status within the fabric of the federal securities laws.\(^{170}\) That a misrepresentation contained in a filed document related to a purchase or sale, rather than a proxy solicitation or a tender offer, does not justify denying relief to aggrieved investors. Indeed, if courts were to extend exclusivity under section 18(a) to such provisions as sections 14(a) and 14(e), they would also deprive shareholders of a meaningful remedy. Because Congress clearly did not intend this result, a coherent construction of the Exchange Act demands that open-market purchasers and sellers receive a cumulative construction of section 10(b).

C. Section 10(b) and Section 12(2)

Section 12(2) of the Securities Act of 1933\(^ {171}\) generally imposes liability on any person who offers or sells a security by means of a prospectus or oral communication that includes a material misrepresentation or nondisclosure. The defendant may avoid liability if he proves that he did not know and that by exercising reasonable care could not have known of the misrepresentation or omission.\(^ {172}\) The question that arises is whether a plaintiff may sue under section 10(b) even though section 12(2) is available.

Unlike section 10(b), section 12(2) under a remedial construction may be properly viewed as a "legislative oak" rather than a "judicial acorn."\(^ {173}\) If construed accordingly, section 12(2) extends liability to

\(^{170}\) See Gould v. American-Hawaiian S.S. Co., 553 F.2d 761, 778 (3d Cir. 1976) ("[U]nlike sections 10(b) and 18 of the [Exchange] Act, which encompass activity in numerous and diverse areas of securities markets and corporate management, section 14(a) is specially limited to materials used in soliciting proxies.").


\(^{172}\) See Sanders v. John Nuveen & Co., 619 F.2d 1222, 1228 (7th Cir. 1980), cert. denied, 450 U.S. 1005 (1981); Wigand v. Flo-Tek, Inc., 609 F.2d 1028, 1034 (2d Cir. 1980). In Sanders, the Seventh Circuit discussed the underwriter's duty of care under § 12(2) in connection with an unregistered offering. The court held the underwriting firm liable for failing to make a reasonable investigation. The court stated, however, that "since what constitutes reasonable care under § 12(2) depends upon the circumstances, we, of course, do not intimate that the duty of a seller under § 12(2) is always the same as that of an underwriter in a registration offering under § 11." 619 F.2d at 1228. Justice Powell, joined by Justice Rehnquist, dissented from the denial of certiorari and expressed concern that the Seventh Circuit decision would "be read as recognizing no distinction between the standards of care applicable under §§ 11 and 12(2), and particularly as casting doubt upon the reasonableness of relying upon the expertise of certified public accountants." 450 U.S. at 1011 (Powell, J., dissenting); see Greene, supra note 16, at 778-81; Comment, "Reasonable Care" in Section 12(2) of the Securities Act of 1933, 48 U. Chi. L. Rev. 372 (1981).

\(^{173}\) Cf. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) ("When we
those persons integrally connected with, or substantially involved in, the offer or sale, permits aider and abettor liability principles to be applied, and encompasses oral communications made in the aftermarket. Because the defendant must demonstrate that he was not negligent and because rescission or damages are available alternative remedies, section 12(2) may be a potent weapon in the plaintiff’s arsenal.

A number of courts, however, have strictly construed section 12(2), requiring privity between the purchaser and the seller. Under this restrictive interpretation, section 12(2) frequently provides little solace to aggrieved claimants. Therefore, if courts give section 12(2) an exclusive construction, that construction should extend only to those purchasers who could invoke section 12(2), and only to those situations where the provision would apply. For example, courts adopting exclusivity should recognize the section 10(b) claim if they require privity for a section 12(2) action and privity does not exist. Similarly, if section 12(2) applies only to the initial distribution process, then section 10(b) should provide a remedy for misleading oral communications made in the aftermarket.

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176 See, e.g., Wilko v. Swan, 127 F. Supp. 55, 58-60 (S.D.N.Y. 1955). See also Hazen, A Look Beyond the Pruning of Rule 10b-5: Implied Remedies and Section 17(a) of the Securities Act of 1933, 64 VA. L. REV. 641, 644 n.15 (1978) (contending that § 12(2) provides broad antifraud remedy, unrelated to registration requirements, that will become useful weapon for litigants in light of Supreme Court’s decision in Hochfelder limiting private cause of action based on § 10(b) and rule 10b-5); Steinberg, supra note 30, at 180 (“Nothing in [Section 12(2)] specifically limits the prohibition of such ‘oral communications’ to those occurring only during the initial distribution.”).


178 See note 191 infra.

179 In United States v. Naftalin, 441 U.S. 768 (1979), the Supreme Court held that § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(l) (1976), applied to aftermarket trading frauds. In so holding, however, the Court characterized § 17(a) as a “major departure"
The section 10(b) remedy should be available to aggrieved litigants in any event. Section 10(b), unlike section 12(2), is a broad antifraud provision that requires the plaintiff to show reliance and scienter to prevail. These requirements thereby offset section 12(2)'s shorter statute of limitations. As stated by one court, "[i]t appears doubtful that Congress intended victims of intentional fraud to be limited to the negligence remedy provided by § 12(2)." Moreover, the plaintiff's burden of proving scienter under section 10(b) is significantly more difficult than requiring that the defendant prove his lack of negligence under section 12(2); as a result, the cumulative approach would not enable a court to find an implied cause of action that is significantly broader than the one Congress expressly provided.

D. Section 10(b) and Section 11

Whether a section 10(b) remedy should be available to a plaintiff who acquires a security, issued pursuant to a registration statement that contains a material misrepresentation or omission, presents a far more troublesome question. Unlike section 12(2), section 11 specifies the persons who can be sued and expressly restricts liability to those material misstatements or omissions contained in the registration statement.

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from the Securities Act's framework of regulating initial offerings. 441 U.S. at 778. Based on the Nafialin Court's language and § 12(2)'s position in the Securities Act, it is arguable that the provision applies only to the initial distribution process. Such a construction, however, would be contrary to the plain language of the statute and the weight of judicial and scholarly authority. See, e.g., Wilko v. Swan, 127 F. Supp. 55, 58-60 (S.D.N.Y. 1955); Hazen, supra note 176, at 644 n.15; Steinberg, supra note 30, at 180; note 176 infra. See also Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 650 F.2d 342, 357 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981) ("Even if we were inclined to hold that the express remedies were intended to be exclusive, they should only preclude implied causes of action in those cases in which they truly constitute 'remedies.'"); note 191 infra.

See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208-10 (1976); Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972). Reliance need not be proved under § 12(2). See R. JENNINGS & H. MARSH, supra note 138, at 778. Under § 10(b), although the plaintiff ordinarily must show reliance, in some circumstances this requirement is relaxed. See 406 U.S. at 153; Panzirer v. Wolf, 663 F.2d 356 (2d Cir. 1981), cert. granted sub nom., 102 S. Ct. 3481 (1982). See also note 23 supra; notes 246-48 infra. Cf. Steinberg, supra note 30, at 178 ("Unlike section 12(2), in which negligent misconduct not constituting fraud or deception is sufficient to impose liability for negligent, material misstatements or omissions in the offer or sale of securities, section 17(a) is primarily directed against fraudulent schemes and practices . . . .").

See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208-09 (1976). In holding that scienter must be proved in a § 10(b) private damage action, the Court emphasized that "each of the express civil remedies in the 1933 Act allowing recovery for negligent conduct . . . is subject to significant procedural restrictions not applicable under § 10(b)." See also note 110 supra.


See notes 69-81 and accompanying text supra.

For the complete text of § 11, see note 103 supra. See also R. JENNINGS & H. MARSH, supra note 138, at 862-63.
Accordingly, to imply a section 10(b) remedy in this context arguably would contravene congressional intent.

In marked contrast to section 10(b), on the other hand, plaintiffs proceeding under section 11 are not burdened with proving scienter, causation, damages, and, ordinarily, reliance.\textsuperscript{185} Hence, section 11’s procedural limitations remain fully effective in those situations in which the claimant seeks redress under that provision either because he cannot satisfy, or elects not to attempt to meet, section 10(b)’s more onerous requirements.\textsuperscript{186} Moreover, section 11, somewhat like section 12(2), provides for a “due diligence” defense.\textsuperscript{187} Accordingly, it is not directed primarily at deceptive conduct.\textsuperscript{188} Arguably, courts should therefore invoke the antifraud remedy of section 10(b), which requires proof of scienter,\textsuperscript{189} to fill this apparent void. Indeed, congressional concern with providing an effective deterrent against deceptive schemes and practices militates against precluding a section 10(b) remedy. If courts adopted an exclusive construction, section 11’s shorter statute of limitations\textsuperscript{190} would leave some victims of intentional misconduct without redress. It is unlikely that Congress intended such a result which, in effect, would signify that investors purchasing securities pursuant to a registered offering would be accorded less protection against intentional misconduct than purchasers in an unregistered offering or in the aftermarket.\textsuperscript{191}

Even if section 11 is deemed to be exclusive, such exclusivity should

\textsuperscript{185} See Securities Act of 1933, § 11 (a), (b)(3), (e), 15 U.S.C. § 77k(a), (b)(3), (e); R. Jenning\textsuperscript{s} & H. Marsh, supra note 138, at 757-59, 778; notes 138 & 180 supra.

\textsuperscript{186} See Brief for the Securities and Exchange Commission as Amicus Curiae at 22, Hud\textsuperscript{d}leston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), cert. granted, 102 S. Ct. 1766 (1982).


\textsuperscript{188} See Greene, supra note 16, at 768 (“The defense of reasonable investigation and belief was included in section 11 to protect persons, other than the issuer, from liability for material misstatements or omissions which might occur despite their careful investigation of the issue.”).

\textsuperscript{189} See note 181 supra.

\textsuperscript{190} See note 110 supra.

\textsuperscript{191} Under an exclusive construction, it may be argued that, because § 12(2) applies to unregistered offerings, this statement is erroneous. Section 12(2), however, applies only to the making of material misrepresentations and nondisclosures pursuant to a prospectus or oral communication. Fraud or deception may be perpetrated by other means. In these situations, § 10(b) would apply. See notes 178-79 and accompanying text supra. See also Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 461 F. Supp. 999, 1006 (D.D.C. 1978), rev’d on other grounds, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981).

A somewhat related liability issue is raised by the integrated disclosure system in which for certain issuers 1934 Act reports can be incorporated by reference into the registration statement. See Securities Act Release Nos. 6393-85 (Mar. 3, 1982). Such incorporation of Exchange Act reports may make it more onerous for parties subject to the Act to satisfy § 11’s “due diligence” obligations, thus resulting in greater exposure to liability for, among others, directors, underwriters, and accountants. See Hovdesven & Wolfram, Underwriter Liability in
only extend to those persons who are within the provision's scope. For example, purchasers who acquire securities that are not part of an ongoing public offering should be entitled to invoke section 10(b). Simil-
arily, courts should permit aggrieved purchasers to bring section 10(b) claims against persons who allegedly rendered substantial assistance in the making of material misrepresentations or omissions contained in the registration statement, but who are neither controlling persons nor specifically listed in section 11 as subject to suit. This construction of section 11 is wholly consistent with the legislative scheme. It merely ensures that purchasers who would otherwise be unable to bring a section 11 action, or could not bring such an action against certain defendants, have a viable remedy.

E. Section 10(b) and Section 9

The question whether an implied right of action for damages exists under section 10(b) when the alleged conduct comes within the coverage of section 9 of the Exchange Act\(^\text{194}\) merits a different analytical frame-

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\(^{192}\) See also Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 650 F.2d 342 (D.C. Cir. 1980); cert. denied, 452 U.S. 954 (1981); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951); notes 104 & 178 infra.

\(^{193}\) Section 15 of the Securities Act, 15 U.S.C. § 77o (1976), renders one liable who controls any person jointly and severally liable under § 11 or § 12 of the Securities Act. 17 C.F.R. § 230.405(f) (1982), defines “control” as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person . . .”

Another example of a situation that is not within § 11’s scope is when an expert, such as an accountant, is sued for fraudulent misconduct for those portions of the registration statement which he did not “expertise.” In this situation, as well as in the textual example, liability is premised on an aider and abettor rationale. As a general proposition, the elements necessary to establish aider and abettor liability are: (1) that the primary party committed a securities law violation, (2) that the accused aider and abettor was generally aware that his role was part of an improper activity, and (3) that the accused aider and abettor knowingly and substantially assisted the principal violation. See ITT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47-48 (2d Cir.), cert. denied, 439 U.S. 1039 (1978); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94-97 (5th Cir. 1975); Seiffer v. Topsy’s Int’l, Inc., 487 F. Supp. 653, 667-69 (D. Kan. 1980). See also Decker v. SEC, 631 F.2d 1380 (10th Cir. 1980); Investors Research Corp. v. SEC, 628 F.2d 168 (D.C. Cir. 1980).

\(^{194}\) 15 U.S.C. § 78i (1976). The two most relevant subsections for purposes here are §§ 9(a) and 9(e). They provide:

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of sub-
work. Unlike sections 11 and 12(2) of the Securities Act and section 18(a) of the Securities Exchange Act, section 9 requires that the plain-

stantially the same size, at substantially the same time and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(e) Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (e) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys’ fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the violation and within three years after such violation.

See notes 138, 180, 185 and accompanying text supra.
tiff prove that the defendant acted with scienter in order to recover.196 Section 9, moreover, imposes additional burdens upon the plaintiff.197 Due to the scope of the section 9 requirements, there are apparently no additional elements that a plaintiff must prove to recover under section 10(b).198

Despite section 10(b)'s lack of a "trade-off" that would impose a more stringent burden of proof on the plaintiff, the few courts that have confronted this issue generally have adopted a cumulative approach.199 This rationale, however, was recently rejected by the Fifth Circuit in Chemetron Corp. v. Business Funds, Inc.200 In holding that section 9 was the exclusive remedy, the court reasoned that the scienter, causation, and reliance requirements were all more stringent under section 9 than under section 10(b).201 More specifically, the court held that while "recklessness"202 has been held to satisfy section 10(b)'s scienter requirement,203 such proof of recklessness does not suffice for section 9.204 Further, section 9(a) imposes a distinct and more specific standard, an

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196 For the text of subsections (a) and (c) of § 9, see note 194 supra.
197 For example, unlike § 11, § 9 requires the plaintiff to prove scienter, causation, reliance, and damages. Unlike § 12(2), a plaintiff proceeding under § 9 must prove scienter and reliance. See notes 138, 180, 185 and accompanying text supra. Moreover, plaintiffs seeking to invoke § 9 are subject to substantial procedural limitations:

Section 9(e) contains a relatively short statute of limitations, permits the court to require security for costs, limits damages to losses sustained by reason of the unlawful price manipulation, provides for contribution by persons not joined as defendants in the original action, and permits the court to assess attorneys' fees against either party.


198 See notes 138, 180, 185, 197 and accompanying text supra.

200 682 F.2d 1149, 1158-63 (5th Cir. 1982).
201 Id. at 93,959.
202 Courts have applied at least four different definitions of recklessness. See Steinberg & Gruenbaum, supra note 22, at 191-208.
204 682 F.2d at 1162. But see note 211 infra.
"intent to induce" a purchase or sale of the subject security.\textsuperscript{205} Moreover, whereas section 10(b) requires only that the material misrepresentation or nondisclosure "touch" upon the reasons for the security's change in value,\textsuperscript{206} section 9(a), construed in conjunction with section 9(e), requires that such conduct "affect" the price at which the plaintiff purchased or sold the subject security.\textsuperscript{207} Last, the court asserted that, unlike section 10(b) where reliance can sometimes be presumed,\textsuperscript{208} section 9 requires actual reliance in all instances.\textsuperscript{209} Taking these considerations into account, the court found that "permitting a Rule 10b-5 remedy here would impermissibly nullify the section 9 remedy . . . ."\textsuperscript{210}

While the court's assertion that section 9's scienter and reliance requirements are stricter than their counterparts under section 10(b) is subject to debate,\textsuperscript{211} it is correct in concluding that the implied right of action under section 10(b) does not require the plaintiff to undertake any burdens additional to those he would face under section 9's express remedy. On the surface, therefore, the court's analysis appears sound. Upon further reflection, however, the conclusion is inescapably reached that this approach not only leads to absurd results\textsuperscript{212} but, even more importantly, is a dangerous assault upon the integrity of the marketplace.

For example, under the court's analysis, one who engages in stock manipulation that fails to "affect" the price at which the plaintiff purchased or sold the subject security may entirely avoid private liability even though such misconduct "touched" upon the reasons for the

\textsuperscript{205} Id. For the language of § 9(a), see note 194 supra.
\textsuperscript{207} 682 F.2d at 1162 & n.21. For the language at subsections (a) and (e) of § 9, see note 194 supra.
\textsuperscript{209} 682 F.2d at 1162 n.20.
\textsuperscript{210} Id. at 1169. For further support, the court also referred to the procedural limitations that are present under § 9 but not under § 10(b). Id. at 1163 n.24; see note 198 supra. See note 198 supra. In addition, the court relied on its interpretation of the Exchange Act's legislative history. 682 F.2d at 1194.
\textsuperscript{211} For example, § 9(a)(4) proscribes materially false or misleading statements which the defendant knew or "had reasonable ground to believe was so false or misleading." Section 9(e) imposes liability upon any person who, \textit{inter alia}, "willfully" engages in the proscribed acts or transactions enumerated in subsections (a), (b), and (c) of § 9. The above language arguably encompasses reckless as well as intentional misconduct. See Steinberg & Gruenbaum, supra note 22, at 191-210. Further, courts may conclude that in appropriate circumstances reliance may be presumed under § 9(a). See generally cases cited in note 208 supra.
\textsuperscript{212} See 682 F.2d at 1194 (Williams, J., dissenting in part) ("The difficulty I have with [the majority's opinion] is that it leads to a result which borders on the absurd.").
security's change in value. Moreover, because section 9(a)(2) requires a series of transactions to take place in order to constitute a violation, while section 10(b) requires only one such transaction, the court's rationale implies that a defendant would be liable under section 10(b) for a single transaction but would avoid monetary liability for a series of transactions unless the plaintiff satisfies section 9(a)(2)'s more stringent requirements. Such a rationale clearly makes little sense. To reconcile the court's seemingly expansive language with the realities of the marketplace and congressional intent, its holding should be limited to those situations where relief would have been clearly available under section 9 but the plaintiff proceeded under section 10(b). This would occur, for instance, where the plaintiff, seeking to preserve the vitality of his cause of action, attempts to invoke section 10(b) after section 9(e)'s shorter statute of limitations had run.

Moreover, the clearest and most persuasive reason why the panel's decision in Chemetron is misplaced is that it affords less protection to investors who trade on a national securities exchange than to those who trade in the over-the-counter market. It is beyond dispute that section 9 applies by its terms only to transactions on a national securities exchange. To fill this vacuum, courts have uniformly held that such

213 In this regard, one who engages in such stock manipulation will arguably be subject to § 10(b) liability in both SEC and criminal actions. Unlike private actions for damages, government proceedings should not be subject to the exclusivity rationale. See SEC v. Falstaff Brewing Corp., 629 F.2d 62 (D.C. Cir.), cert. denied sub nom. Kalmanovitz v. SEC, 449 U.S. 1012 (1980).

214 See 682 F.2d at 1195 (Williams, J., dissenting in part). In his dissenting opinion, Judge Williams asserted that "[t]he compelling irony in this case is that the majority view results in freeing the more serious offender but holding the lesser offender liable for engaging in exactly the same activities, manipulative and fraudulent devices in securities transactions." Id. at 1197. Although there is considerable logic to such an assertion, it arguably extends only to private suits for monetary damages. Such offenders still should be subject to SEC and criminal actions under § 10(b). See notes 154 & 213 supra and note 255 infra. Moreover, it is well settled that in appropriate circumstances the Commission may obtain other equitable relief, including the disgorgement of profits illegally procured. See, e.g., SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102-03 (2d Cir. 1978); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104-05 (2d Cir. 1972); authorities cited in note 154 supra.

215 Under § 9(e), suits must be "brought within one year after the discovery of the facts constituting the violation and within three years after such violation." On the other hand, no express limitations period exists in the Exchange Act for actions brought under § 10(b). The courts thus have applied the state statute of limitations applicable to comparable state actions. See, e.g., Loveridge v. Dregoux, 678 F.2d 870, 874-75 (10th Cir. 1982) (Utah three-year statute of limitations for fraud applied); White v. Sanders, 650 F.2d 627, 629 (5th Cir. 1981) (two-year statute of limitations period of Alabama Blue Sky law applied); Carothers v. Rice, 633 F.2d 7, 12 (6th Cir. 1980) (three-year statute of limitations period of Kentucky Blue Sky law applied).

CUMULATIVE REMEDIES

manipulative practices that occur in the over-the-counter market may be redressed by private claimants under section 10(b). Because these claimants are not saddled with the limitations of section 9, they may successfully seek redress in situations in which injured investors who trade on a national securities exchange under the Chemetron rationale would be denied recovery.

Such a result is not only misplaced but is contrary to congressional intent. The Securities Acts Amendments of 1964 were the ultimate result of a congressionally-mandated special study conducted by the Securities and Exchange Commission. The study recommended, inter alia, that Congress strengthen over-the-counter regulation. Congress followed this recommendation in order to provide, as much as practicable, equality of regulation between the national securities exchange and over-the-counter markets. At no time, however, did Congress intend to create greater rights on behalf of over-the-counter investors as compared to those given to investors who trade in listed securities.

Congress' approach is sound and firmly rooted in the reality of the operations of the securities markets. In contrast, the Chemetron panel's holding fragmentizes the operational components of the securities markets and ignores that the markets operate as a unified whole where those desiring to buy or sell may do so with confidence. Denying private parties the use of section 10(b) with respect to manipulative schemes in listed securities would insulate from monetary liability practices repugnant to the notions of honesty and fairness. Such a construction goes far toward undermining the very interests the securities laws were designed to protect.

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217 See, e.g., Wachovia Bank & Trust Co. v. National Student Mktg. Co., 650 F.2d 342 (D.C. Cir. 1980) (by implication), cert. denied, 452 U.S. 954 (1981); Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981) (by implication), cert. granted, 102 S. Ct. 1766 (1982); Wolgin v. Magic Marker Corp., 82 F.R.D. 168, 179 (E.D. Pa. 1979). See also R. JENNINGS & H. MARSH, supra note 138, at 775 (Section 9 is "limited to listed securities and does not prohibit similar actions in the over-the-counter market, although it would seem that Rule 10b-5, even after its recent paring back by the Supreme Court, would clearly cover similar activity in the over-the-counter market to that described in Section 9.").


220 Id. pt. 3, at 62-64.

221 Thus, prior to the 1964 amendments, the registration (§ 12), periodic reporting (§ 13), proxy (§ 14), and recapture of short-swing profits (§ 16) provisions of the Exchange Act applied only to corporations that had securities listed on a national securities exchange. The 1964 amendments "extended their application to certain publicly-held corporations [meeting defined asset and shareholder requirements] whose securities are traded over-the-counter." R. JENNINGS & H. MARSH, supra note 138, at 441.

222 See id. at 441-44, (quoting Securities Exchange Act Release No. 7425 (Sept. 15, 1964)); Cohen, supra note 150, at 1341 ("[T]hrough the Securities Acts Amendments of 1964, the 1934 Act's pattern of continuous disclosure was made applicable to a much larger category of issuers—all those presumed to be the subject of active investor interest in the over-the-counter market. . . .").
F. Reporting Provisions of the Exchange Act and Section 18(a)

Certain provisions of the Securities Exchange Act subject issuers and other persons to affirmative reporting or disclosure obligations. Section 13(a), for example, requires applicable issuers to file periodic reports with the Commission. Section 13(d) generally requires any person or group of persons, who acquires more than five percent of a class of equity securities registered under section 12 of the Act, to disclose certain specific information within ten days by filing a Schedule 13D with the SEC and by sending copies to the issuer and to each

223 Generally, two other arguments have been advanced for a cumulative construction of the federal securities laws. One is based on § 16 of the Securities Act, 15 U.S.C. § 77p (1976), and § 26(a) of the Securities Exchange Act, 15 U.S.C. § 78bb(a) (1976), which both state that the rights and remedies provided in the respective acts “shall be in addition to any and all other rights and remedies that may exist at law or in equity.” See Brief for the Securities and Exchange Commission as Amicus Curiae, at 15, Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), cert. granted, 102 S. Ct. 1766 (1982). The second is based on the proposition that a “no-overlap” rule would be particularly difficult to administer. As stated by one court:

Such a rule would require the court in every section 10(b) or Rule 10b-5 case to determine, on a pretrial motion, whether the wrongs alleged in the complaint could arguably give rise to liability under one of the express civil remedies of the 1933 Act or the 1934 Act. This determination would often turn on the precise facts of a given case, so that the court might be unable to act until discovery was completed. Too, this pretrial determination might raise difficult legal issues regarding the applicability of a particular express remedy.


226 Id. § 78m(d). Generally, § 12, and Commission rules thereunder, subject companies whose stock is traded on a national stock exchange (§ 12(b)), or that have total assets in excess of $3 million and more than 500 shareholders of record of a class of equity security (§ 12(g) as modified by SEC Rule 12g-1, 17 C.F.R. § 240.12g-1 (1982)) to the periodic reporting requirements of § 13. See Securities Exchange Act Release No. 18647 (Apr. 15, 1982), reprinted in 14 SEC. REG. & L. REP. (BNA) 701 (Apr. 23, 1982).


Schedule 13D requires disclosure of the identity of the issuer and the security, the identity, background, and citizenship of the reporting persons, the source and amount of funds used to acquire the securities, the purpose of the transaction, the reporting person’s interest in the securities including trading history for the last 60 days and any contracts, arrangements, understandings or relationships with respect to the securities to which the reporting person or group is a party.

Bialkin, Attura & D’Alimonte, Why, When and How to Conduct a Proxy Battle for Corporate Control,
exchange on which the security is traded.\(^{228}\)

The question arises whether the courts should recognize an implied right of action for damages under these provisions in view of the express remedy provided by section 18(a). Most courts have correctly adopted an exclusive construction of section 18(a) in this context.\(^{229}\) Under the modified Cort standards that Redington applied,\(^{230}\) the relevant provisions, namely section 13(a) and section 13(d), neither create identifiable rights in any party nor proscribe any conduct as being unlawful, and their legislative history is silent or ambiguous on the existence of an implied action for damages.\(^{231}\) According to Redington, therefore, the

\(\text{in Proxy Contests and Battles for Corporate Control 87, 117 (Practicing Law Institute 1981).}\)

\(^{228}\) 15 U.S.C. § 78m(d) (1976). The Second Circuit stated that “[t]he goal of § 13(d) ‘is to alert the marketplace to every large, rapid aggregation or accumulation of securities . . . which might represent a potential shift in corporate control.’” Treadway Cos. v. Care Corp., 638 F.2d 357, 380 (2d Cir. 1980) (quoting GAF Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972)). In this regard, it is clear that § 13(d) is a disclosure statute. The District of Columbia Circuit has observed: “[I]t is plain that Section 13(d) requires the making of a completely truthful statement.” SEC v. Savoy Indus., 587 F.2d 1149, 1165 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979). See also Chromalloy Am. Corp. v. Sun Chem. Corp., 611 F.2d 240, 246-47 (8th Cir. 1979) (§ 13(d) requires disclosure of “purpose” to acquire control even if no fixed plan exists). However, in Judge Gesell’s view, such disclosure does not extend to indefinite or tentative plans. Hence, “[i]n judging the adequacy of a Schedule 13D statement, fair accuracy, not perfection, is the appropriate standard.” Purolator, Inc. v. Tiger Int’l, Inc., 510 F. Supp. 554, 556 (D.D.C. 1981). Moreover, as the Fifth Circuit stated:

The person or corporation filing a Schedule 13D statement need not necessarily walk a tortuous path. He must, of course, be precise and forthright in making full and fair disclosure as to all material facts called for by the various items of the schedule. At the same time he must be careful not to delineate extravagantly or to enlarge beyond reasonable bounds . . . Though the offeror has an obligation fairly to disclose its plans in the event of a takeover, it is not required to make predictions of future behavior, however tentatively phrased, which may cause the offeree or the public investor to rely on them unjustifiably.


\(^{230}\) See note 69 and accompanying text supra.

\(^{231}\) This analysis, however, does not apply to certain other reporting or disclosure provisions. For example, § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1976), by its terms, makes failure to adhere to its disclosure requirements unlawful. Accordingly, courts should apply the Cort four-prong test in its entirety when determining whether an implied right of action for damages exists under § 14(d). It is arguable, however, that the Supreme Court’s analysis in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825 (1982), dictates that an
courts should conclude that Congress did not intend to create a private damages remedy under these provisions. Further, Congress designed section 13(a) and section 13(d) to require persons or entities subject to those provisions to provide information to the marketplace so that investors and other relevant parties can react intelligently. Thus, the primary objective of these provisions is to mandate the filing of certain pertinent information, rather than to provide an antifraud prohibition. Finally, to authorize an implied remedy for damages under section 13(a) or 13(d) would indirectly circumvent the purchaser-seller requirement under section 10(b), thereby permitting allegedly aggrieved parties to bring suit on the theory that they would have purchased, sold, or retained their stock if the filed information had been accurate. Such a result would raise the possibility of vexatious litigation, the very consequence that the Supreme Court sought to alleviate. In this regard, if the plaintiff is a purchaser or seller, he has an adequate remedy under section 10(b), provided that the courts adopt the cumulative construction recommended herein.

The denial of a private right of action for damages under section 13(d) and comparable provisions, however, should not preclude the implication of a private right of action for injunctive relief. Applying the implied right for damages under the provision should be recognized. Such an argument is misplaced. Prior to 1975, the courts did not "routinely and consistently" recognize such a remedy under §14(d). See generally 102 S. Ct. at 1841; notes 43-98 and accompanying text supra.

See notes 80-81 and accompanying text supra. The Supreme Court's decision in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S. Ct. 1825 (1982), also supports this conclusion. Prior to 1975, the reporting provisions, unlike § 10(b), were not generally construed to provide implied private rights of action for damages. See GAF Corp. v. Milstein, 453 F.2d 709 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972). See also notes 43-98 and accompanying text supra.

See note 228 supra. Section 10(b) and other antifraud provisions may under certain circumstances require a subject party to affirmatively disclose, even in the absence of prior inaccurate disclosures. See note 224 supra.

See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). See also note 21 and accompanying text supra.

With respect to strike suits, the Supreme Court stated in Blue Chip:

[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

421 U.S. at 740 (citations omitted). Arguably, however, the courts may combat the potential of vexatious litigation by measures such as requiring plaintiffs to post security for expenses, requiring judicial review of derivative settlements, and granting summary judgment motions. A number of states require the posting of security for expenses. See, e.g., CAL. CORP. CODE § 800(d) (West 1977); N.J. STAT. ANN. § 14A:3-6(3) (West Supp. 1981); N.Y. BUS. CORP. LAW § 627 (McKinney Supp. 1982); MODEL BUS. CORP. ACT § 49 (1974). See also Haberman v. Tobin, 626 F.2d 1101 (2d Cir. 1980).

See notes 143-93 and accompanying text supra.
Supreme Court’s analysis in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* prior to 1975 courts uniformly recognized such implied rights of action for injunctive relief. Moreover, section 13(d) was enacted thirty-four years after section 18(a) in a “contemporary legal context” in which courts “regarded the denial of a remedy as the exception rather than the rule.” Hence, the granting of injunctive relief in this context would be consistent with the statutory scheme, even when viewed from an exclusive construction of section 18(a). Indeed, if the courts deny an issuer corporation or any other interested party such a remedy

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237 102 S. Ct. 1825, 1839 (1982). For further discussion, see notes 43-68 and accompanying text supra.

238 See, e.g., GAF Corp. v. Milstein, 453 F.2d 709, 719-21 (2d Cir. 1971), cert. denied, 406 U.S. 910 (1972); Bath Indus. v. Blot, 427 F.2d 97, 113 (7th Cir. 1970). As discussed earlier, the Securities Exchange Act has been amended in significant respects. See notes 56-58 and accompanying text supra. Accordingly, in the words of Curran, “the fact that a comprehensive reexamination and significant amendment of the [Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.” 102 S. Ct. at 1841.

239 102 S. Ct. at 1837 (relying on Texas & Pac. R.R. v. Rigsby, 241 U.S. 33, 39-40 (1916)). Moreover, the 1975 amendments, which left the provisions of § 13(d) unchanged, constituted Congress’ most extensive review of the federal securities laws. See Hearings, supra note 62, at 1; Pitt, supra note 59, at 22; notes 43-68 and accompanying text supra.

240 See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 102 S. Ct. at 1839-40; notes 237-39 and accompanying text supra. Moreover, in contests for corporate control, the stage of preliminary injunctive relief, rather than post-contest proceedings, “is the time when relief can best be given.” *Piper v. Chris-Craft Indus.,* 430 U.S. 1, 42 (1977) (quoting *Electronic Specialty Co. v. International Controls Corp.,* 409 F.2d 937, 947 (2d Cir. 1969), cited with approval in *Mobil Corp. v. Marathon Oil Co.,* 669 F.2d 366 (6th Cir. 1981). See also *Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49, 57-65 (1975). Accordingly, the courts must recognize an action for injunctive relief under § 13(d) if that provision is to fulfill its essential function—to ensure that accurate material information is available to shareholders and investors before they make a determination to buy or sell stock in the issuing corporation. See *Bath Indus. v. Blot,* 427 F.2d 97, 113 (7th Cir. 1970).

It is possible that an action for injunctive relief is available under § 18(a) since that provision allows an aggrieved person to sue at law or in equity. For example, in *Deckert v. Independence Shares Corp.,* 311 U.S. 282 (1940), the Court, in an action brought under the Securities Act of 1933, stated:

[The] courts are given jurisdiction “of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.” The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.

*Id.* at 288 (emphasis in original) (quoting Securities Act of 1933, § 22(a), 15 U.S.C. § 77v (1976)). Similarly, § 27 of the Exchange Act, 15 U.S.C. § 78aa (1976), grants the federal district courts jurisdiction “to enforce any liability or duty” created by the Act. In this regard, however, even if such a right to injunctive relief may be procured under § 18(a), that provision expressly requires that the aggrieved party be a purchaser or seller. This requirement fails to address the function that § 13(d) is designed to serve. See discussion in this note supra.

241 The target company is in the best position to detect violations and to bring suit to force compliance with § 13(d). See *Weeks Dredging & Contracting, Inc. v. American Dredging Co.,* 451 F. Supp. 468 (E.D. Pa. 1978); *Burack, Implied Rights in Tender Offers,* 14 REV. SEC. REG. 885 (1981); Note, *An Implied Right of Action for Issuers Under Section 13(d) of the Securities*
under section 13(d), a shift in corporate control may occur without the knowledge of the marketplace. This result would be antithetical to the rationale underlying section 13(d).\textsuperscript{242} Accordingly, the integrity of the marketplace and investor protection demand that the courts recognize an implied remedy for injunctive relief in this setting.\textsuperscript{243}

G. Suggested Construction of Section 18(a)

If the courts ultimately give section 18(a) an exclusive construction, the interpretation and scope of that provision will become crucial to aggrieved litigants. Although several courts have construed section 18(a) as imposing strict standards of causation and reliance,\textsuperscript{244} the courts could read the provision more flexibly without contravening congressional intent. With respect to the causation and reliance requirements, the language of the statute provides that a culpable defendant "shall be liable to any person . . . who, in reliance upon such [materially false or misleading] statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance. . . ."\textsuperscript{245} Construed flexibly, the language that creates the reliance requirement does not demand that the plaintiff actually read the filed document or a copy thereof.\textsuperscript{246} Indeed, one can argue that investors generally rely on the assumption that the marketprice of the security has

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\textsuperscript{242} See notes 240-41 and accompanying text supra.


\textsuperscript{244} See notes 143-52 and accompanying text supra.

\textsuperscript{245} 15 U.S.C. § 78r(a) (1976). For the complete text of § 18(a), see note 12 supra.

been validly established, and that no unsuspected fraudulent activity, including materially false or misleading statements, has affected the price. Even if the courts do not apply this "fraud on the market" approach in the section 18(a) setting, arguably the provision requires only that the plaintiff rely on the misleading statement in engaging in the transaction. A plaintiff may show such reliance without proving that he read the filed document or a copy thereof. The plaintiff, for example, may have purchased or sold the security on his broker's recommendation, which was based in turn on an actual reading of the repre-

(CCH) ¶ 98,369 (S.D.N.Y. 1981). In Blackie, a leading "fraud on the market" case with respect to § 10(b) and rule 10b-5, the Ninth Circuit stated:

Here, we eliminate the requirement that plaintiffs prove reliance directly in this context because the requirement imposes an unreasonable and irrelevant evidentiary burden. A purchaser on the stock exchanges may be either unaware of a specific false representation, or may not directly rely on it; he may purchase because of a favorable price trend, price earnings ratio, or some other factor. Nevertheless, he relies generally on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price, and thus indirectly on the truth of the representations underlying the stock price—whether he is aware of it or not, the price he pays reflects material misrepresentations. Requiring direct proof from each purchaser that he relied on a particular representation when purchasing would defeat recovery by those whose reliance was indirect, despite the fact that the causational chain is broken only if the purchaser would have purchased the stock even had he known of the misrepresentation. We decline to leave such open market purchasers unprotected. The statute and rule are designed to foster an expectation that securities markets are free from fraud—an expectation on which purchasers should be able to rely.


See cases cited in note 246 supra. Particularly relevant in this regard is Judge Higginbotham's observation in In re LTV Sec. Litig., 88 F.R.D. 134 (N.D. Tex. 1980), that "reliance on the market price is conceptually indistinguishable from reliance upon representations made in face-to-face transactions." Id. at 142. Judge Higginbotham stated:

In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price. . . .

. . . Recent economic studies tend to buttress empirically the central assumption of the fraud on the market theory—that the market price reflects all representations concerning the stock. . . .

The fraud on the market theory does not eliminate the element of reliance but places it where in open market transactions it realistically belongs—connecting the purchaser to the market, not the specific misstatement.

Id. at 143-44.
sentation contained in the filed document. Likewise, the plaintiff may have engaged in the transaction after reading a financial column that reported on the statements made in the filed document. In both situations, although the plaintiff relied in the first instance on other sources, his ultimate source of reliance was the statements contained in the document.248

Under an alternative approach, even if exclusivity were adopted, the above examples arguably fall within the fabric of section 10(b) and not within section 18(a). In other words, the plaintiff in his purchase or sale actually relied on his broker or the financial article, and not on the misrepresentations contained in the filed document.249 Section 18(a), therefore, does not apply in this context. Liability would be imposed upon the culpable issuer or other person on either a fraud on the market rationale250 or on the premise that the defendant, by filing documents with the Commission, had sufficiently entangled itself with the broker's or financial columnist's representations so as to induce the misstatements, thereby rendering those representations attributable to it. Because it was reasonably foreseeable that the filed documents would be reported on and communicated by financial sources,251 courts may con-

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248 Courts have recognized such "indirect" or "third party" reliance under § 10(b). See, e.g., Panzirer v. Wolf, 663 F.2d 365, 367 (2d Cir. 1981), cert. granted sub nom. Price Waterhouse v. Panzirer, 102 S. Ct. 3481 (1982) ("We find no support in the law for the district court's distinction between primary and secondary reliance."); Walsh v. Butcher & Sherrerd, 452 F. Supp. 80, 84 (E.D. Pa. 1978) ("While we can find no authority directly discussing the issue of 'third-party reliance,' our understanding of the reliance element reveals that reliance of this kind cannot be deemed insufficient as a matter of law."); Sullivan v. Chase Inv. Serv. of Boston, Inc., 79 F.R.D. 246, 271 n.13 (N.D. Cal. 1978) ("If, as allegedly happened with plaintiff Sullivan, a broker defendant distributed the chart not to the client but to a member of the client's family, the broker would be liable if he knew the chart to be false and expected the family member to give the chart to the client or to tell the client about the information contained in the chart."); Entin v. Barg, 60 F.R.D. 108, 112 (E.D. Pa. 1973) ("[I]n a case of either misrepresentation or nondisclosure, the only direct conscious reliance may be by one in the business of investment counseling, and the actual buyer or seller may only be relying on his adviser's expertise or the 'glowing reports' of a successful business engendered by the fraud leading to an inflated market"; in such situations, § 10(b) does not "require actual reliance on particular misrepresentations or nondisclosures."). Cf. Douglas & Bates, The Federal Securities Act of 1933, 43 Yale L.J. 171, 172 (1933) (One effect of the Securities Act is to "place[e] in the market during the early stages of the life of a security a body of facts which, operating indirectly through investment services and expert investors, will tend to produce more accurate appraisal of the worth of the security if it commands a broad enough market.").

249 See authorities cited in note 248 supra.

250 See notes 246-47 and accompanying text supra.

251 As stated by SEC Chairman John S.R. Shad:

Managements often devote a great deal of time to their annual reports; and, too often, they abdicate their 10-Ks, prospectuses and proxies to counsel. They may not appreciate that these documents are carefully studied by institutional investors (who account for 70 percent of the listed and 50 percent of the over-the-counter market), as well as by the bond rating agencies and others. They have a much greater impact on the market prices of corporate securities than the letters to the shareholders in annual reports to which top managements often devote much greater attention.
clude that the allegedly culpable party had placed its imprimatur on the statements made by such financial sources.\textsuperscript{252} According to this analysis, the plaintiff's reliance on misrepresentations or nondisclosures made in connection with the purchase or sale of securities gives rise to a valid claim under section 10(b), even under an exclusive construction of section 18(a).\textsuperscript{253}

Even if the courts reject the above rationales,\textsuperscript{254} they should at least hold that defendants cannot insulate themselves from section 10(b) liability by making identical misrepresentations or nondisclosures in both SEC filed documents and in reports and releases that are not so filed. As to the latter, the section 10(b) cause of action should be available. Otherwise, malfeansants could publicize false or misleading statements

\textsuperscript{252} Panzirer v. Wolf, 663 F.2d 365, 367 (2d Cir. 1981), \textit{cert. granted sub nom. Price Waterhouse v. Panzirer}, 102 S. Ct. 3481 (1982) ("Where the plaintiff acts upon information from those working in or reporting on the securities markets, and where that information is circulated after a material misrepresentation or omission plaintiff has stated a sufficient claim of reliance on the misrepresentation or nondisclosure."); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), \textit{cert. denied}, 102 S. Ct. 658 (1981) ("While it is true that there is no duty upon management or directors to disclose financial projections, . . . it is also axiomatic that once a company undertakes partial disclosure of such information there is a duty to make the full disclosure of known facts necessary to avoid making such statements misleading."); Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980) (In determining whether Liggett had a duty to correct the investment community's high expectations regarding the company's earnings once it learned that its own internal forecasts were less optimistic, the court phrased the pertinent issue as "whether Liggett sufficiently entangled itself with the analysts' forecasts to render those predictions 'attributable to it' "); after reviewing the relevant facts, the court absolved Liggett of liability on this basis, concluding that "Liggett did not place its imprimatur, expressly or impliedly, on the analysts' projections." \textit{Id} at 163); Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1221 (9th Cir. 1980) ("There is no evidence . . . that the [financial] estimates were made with such reasonable certainty even to allow them to be disclosed to the public.") (emphasis in original); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 949 (2d Cir. 1969) (defendant, who was preparing to make tender offer, was under no duty to correct erroneous factual statements of press not attributable to it).


\textsuperscript{254} The above rationales are exclusive and are based on different lines of analysis. Accordingly, the acceptance of one precludes adoption of the other.
through press releases, correspondence with shareholders, and communications with the financial press, and yet avoid section 10(b) liability in private actions for damages by including these statements in documents filed with the SEC. Even under an exclusive construction, such an interpretation cannot be countenanced. Misrepresentations and nondisclosures contained in documents that are not filed, even if identical to those contained in documents that are filed, constitute separate wrongs that courts should redress without the encumbrances of the section 18(a) requirements. This analysis, even under exclusivity, is consistent with the statutory framework, and is necessary if the remedial scheme for aftermarket trading abuses is to have any efficacious purpose.

The causation standard under section 18(a) requires that the materially false or misleading statement affect the price of the security. The plaintiff should be able to satisfy this requirement by showing a purchase or sale, that the statement contained in the filed document was materially false or misleading, and that, if applicable, when such statement became known in the financial community as being false or misleading, the price of the security reflected this event within a reasonably short time thereafter. Although one may claim that this standard is inappropriate on the premise that the nexus between the false or misleading statement and the damage caused is too tenuous, imposing a more stringent causation requirement would make recovery under section 18(a) all but impossible. An alternative approach would allow the defendant, after the plaintiff satisfies the causation standard stated above, to show affirmatively that the misleading statement did not affect the price of the security or that unrelated factors contributed to the plaintiff's loss.

Another important issue in regard to the scope of section 18(a) is the effect, if any, that incorporation by reference will have on the reme-

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255 It is clear, however, that the SEC can sue for injunctive relief for violations of § 10(b). Unlike private parties, the Commission is not required to prove reliance and causation. See, e.g., SEC v. Falstaff Brewing Corp., 629 F.2d 62, 75-77 (D.C. Cir.), cert. denied, 449 U.S. 1012 (1980); SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 277-78 (S.D.N.Y. 1966), aff'd in relevant part, 401 F.2d 833 (2d Cir. 1968), cert. denied, 404 U.S. 1005 (1971). Moreover, under appropriate circumstances, the Commission can obtain, as ancillary or other equitable relief, disgorgement or rescission on behalf of aggrieved investors. See note 154 supra.

256 For the text of § 18(a), see note 12 supra.

257 See Blackie v. Barrack, 524 F.2d 891, 906 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976) ("We think causation is adequately established in the impersonal stock exchange context by proof of purchase and of the materiality of the misrepresentations, without direct proof of reliance."). See also cases cited in note 246 supra.

258 Cf. Rifkin v. Crow, 574 F.2d 256, 262 (5th Cir. 1978) (recovery precluded under § 10(b) if defendant can prove plaintiff's nonreliance); Securities Act of 1933, § 11(e), 15 U.S.C. § 77k(e) (1976) ("If the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such [materially false or misleading] part of the registration statement, with respect to which his liability is asserted, . . . such portion of or all such damages shall not be recoverable.").
dial scheme. Generally, annual reports to shareholders are not "filed" documents for section 18(a) purposes. In 1980, the Commission adopted amendments designed to facilitate integration of the Securities Act of 1933 and the Securities Exchange Act of 1934 disclosure systems. Under the amendments, the annual report to shareholders may become the cornerstone disclosure document. In this respect, a principal feature is the establishment of uniform disclosure requirements for both the Form 10-K and the annual report to shareholders. The restructured Form 10-K requires that certain basic financial information be set forth, and that this same information, in turn, may be incorporated by reference from the shareholder report into the Form 10-K. Under an exclusive construction, such incorporation by reference may be detrimental to registrant liability concerns. Because the shareholder report is widely disseminated, plaintiffs should find it significantly easier to prove reliance and causation than in current actions seeking redress under section 18(a). Such incorporation by reference also raises the question whether courts should relegate plaintiffs, who could otherwise bring a section 10(b) claim for material misstatements or omissions contained in


261 The amendments call for a more meaningful analysis of the registrant's business and financial condition, including the market price of the registrant's securities and its statement of dividend policy, selected financial data, management's discussion and analysis of the registrant's financial condition, and supplementary financial information. The amendments also require discussion of the financial statements and changes in financial condition in their entirety, thereby prompting registrants to focus on liquidity and capital resources in addition to income. Apparently due in part to commentator concern that incorporation might affect the readability of the stockholder report, the SEC elected to make such incorporation from the annual report to shareholders into the Form 10-K optional, rather than mandatory, for reporting companies. See SEC Approves Integration of Form 10-K, Annual Report; Proposes New Registration System Based on Issuer Size, SEC. REG. & L. REP. (BNA) No. 568, at D-1 (Aug. 27, 1980); note 260 supra. See also the most recent SEC integration releases adopting components of the integrated disclosure system; Securities Act Release Nos. 6383-85 (Mar. 3, 1982); note 191 supra.

shareholder reports, to solely a section 18(a) cause of action, provided
that an exclusive construction were adopted. The courts should answer
this question in the negative. These reports, delivered to shareholders,
are not "filed" documents under section 18(a), and the subsequent
incorporation by reference of information contained in these reports
should not alter this situation.

H. Alternative Remedies

If the courts ultimately adopt an exclusive construction of section
18(a), aggrieved litigants may have no recourse but to seek alternative
remedies. Section 17(a) of the Securities Act and section 29(b) of the
Securities Exchange Act are relevant in this context. Because both of
these provisions have been the subject of extensive commentary, the
following discussion addresses only the limited subject matter at issue.

Section 17(a) is a broad antifraud provision. Its statutory language
has been incorporated almost verbatim into a number of statutory and
regulatory provisions, including rule 10b-5. The lower federal

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263 See note 259 supra.
264 The Commission apparently has the authority to require that such shareholder re-
ports be "filed." See Heit v. Weitzen, 402 F.2d 909, 915 (2d Cir. 1968), cert. denied, 395 U.S.
sion, it has exercised this authority. See Rule 12b-23(d), 17 C.F.R. § 240.12-23(d) (1982).
265 Once documents filed with the SEC contain or incorporate false or misleading state-
ments, providing only a § 18(a) cause of action in this context would enable malfeasants to
avoid § 10(b) liability in private actions for damages. This result is contrary to both the
legislative framework and public policy. But see note 264 supra.
266 For complete text of § 17(a), see note 29 supra.
267 Section 29(b), 15 U.S.C. § 78cc(b) (1976), provides:

Every contract made in violation of any provision of this chapter or of
any rule or regulation thereunder, and every contract [including any contract
for listing a security on an exchange] . . . the performance of which involves
the violation of, or the continuance of any relationship or practice in violation
of, any provision of this chapter or any rule or regulation thereunder, shall be
void (1) as regards the rights of any person who, in violation of any such
provision, rule, or regulation, shall have made or engaged in the performance
of any such contract, and (2) as regards the rights of any person who, not
being a party to such contract, shall have acquired any right thereunder with
actual knowledge of the facts by reason of which the making or performance
of such contract was in violation of any such provision, rule, or
regulation. . . .

268 For commentary on § 17(a), see, e.g., Hazen, supra note 154; Horton, Section 17(a) of
the 1933 Securities Act—The Wrong Place for a Private Right, 68 NW. U.L. REV. 44 (1973); Stein-
berg, supra note 30. For a discussion of § 29(b), see Gruenbaum & Steinberg, supra note 38.
269 See, e.g., 15 U.S.C. § 78n(e) (1976) (proscribing deceptive, fraudulent, and manipula-
tive acts or practices, and the making of false or misleading material statements in connec-
tion with a tender offer); id. § 80b-6 (forbidding fraudulent, deceptive, or manipulative
actions by investment advisers); 17 C.F.R. § 240.12b-20 (1982) (requiring statements and re-
ports to include material information necessary to ensure that the statements are not misleading);
id. § 240.14a-9 (forbidding solicitation by means of materially false or misleading proxy
statements).
270 For the text of rule 10b-5, see note 3 supra.
cumulative remedies between § 17(a) and § 17(a)(1) and (3); § 17(a)(2) action subject to § 12(2) (private right of action under § 17(a)); Valles Salgado v. Piedmont Capital Corp., 452 F. Supp. 853, 857-58 (D.P.R. 1978) (§ 17(a) provides implied private damages remedy for fraudulent purchase of mutual fund shares); cf. Schaefer v. First Nat'l Bank, 509 F.2d 1287, 1293 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976) (allowing private damages claimed under § 17(a) of the Exchange Act; court need not decide existence of private remedy for violation of § 17(a) of Securities Act). But see Shull v. Dain, Kalman & Quail, Inc., 561 F.2d 152, 159 (8th Cir. 1977), cert. denied, 434 U.S. 1086 (1978) (rejecting implied right of action under § 17(a)); In re New York Municipal Sec. Litig., 507 F. Supp. 169, 186-87 (S.D.N.Y. 1980) (no implied private right of action against municipal issuers under § 17(a) based on legislative history and construction of §§ 11 & 12(2)); McFarland v. Memorex Corp., 493 F. Supp. 631, 649-53 (N.D. Cal. 1980) (no implied right of action under § 17(a) based on application of Redington and Lewis); Woods v. Homes & Structures, Inc., 489 F. Supp. 1270, 1284-88 (D. Kan. 1980) (“Plaintiffs will not be permitted to circumvent the restrictions of the 1934 Act and the express remedy of Section 12(2) of the 1933 Act via an implied Section 17(a) action.”); Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890, 903-05 (D. Me. 1971) (review of legislative history and statutory construction indicates § 17(a) not intended to provide private damage remedy). See also Johns Hopkins Univ. v. Hutton, 488 F.2d 912, 914 (4th Cir. 1973), cert. denied, 416 U.S. 916 (1974) (in actions for rescission of oil and gas production payments, court implied sub silentio private cause of action under § 17(a)); Dorfman v. First Boston Corp., 336 F. Supp. 1089, 1095 (E.D. Pa. 1972) (upholding implied private right of action under §§ 17(a)(1) and (3); § 17(a)(2) action subject to § 12(2) limitations).

These issues include whether offerors have standing to bring an implied right of action for damages, and whether they are required to show scienter in such actions. For discussion of these issues, see Steinberg, supra note 30, at 175-85. Moreover, the propriety of cumulative remedies between § 17(a) and §§ 11 and 12(2) remains an open question. If courts imply a private right of action for damages under § 17(a), they should resolve the issue of cumulative remedies as proposed in the discussion of §§ 11 and 12(2) and their overlap with § 10(b). Although it appears unlikely, the Supreme Court may address the propriety of cumulative remedies between § 17(a) and § 11 in Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), cert. granted, 102 S. Ct. 1766 (1982). See notes 171-93 and accompanying text supra.
An exception to this principle apparently exists when the plaintiff seeks an equitable remedy.\(^{273}\) Rescission is one equitable remedy that a court may grant under provisions such as section 10(b) and perhaps section 17(a).\(^{274}\) Once the parties have consummated a transaction, however, courts are extremely reluctant to grant the aggrieved litigant the remedy of rescission except in the most egregious situations.\(^{275}\) In this respect, section 29(b) may serve as a potent weapon for such parties. Although some courts have recognized the vitality of this provision,\(^{276}\) others have declined to apply it, reasoning in part that the language of the statute is “draconian.”\(^{277}\) With a limited number of exceptions, section 29(b) provides that a violating party to a contract, or his successor who takes with knowledge, shall have no rights under the contract, even when performance of the contract has been rendered.\(^{278}\) Conceivably, therefore, section 29(b) may provide an aggrieved purchaser or seller of securities with an absolute right of rescission, irrespective of the potential exclusivity limitation for damages contained in section 18(a).\(^{279}\)

\(^{273}\) An action for equitable relief may be available under § 18(a). See note 240 supra.


\(^{275}\) See cases cited in note 274 supra.


\(^{278}\) It appears that the § 29(b) remedy is available only when there has been a violation of another section of the Exchange Act or any of the rules or regulations promulgated thereunder. See, e.g., cases cited in notes 276-77 supra.

\(^{279}\) See Gruenbaum & Steinberg, supra note 38, at 53: With the recent Supreme Court decisions restricting the reach, scope, and effect of the federal securities laws, injured parties frequently may find themselves without adequate redress. The express provision contained in Section 29(b) may provide a viable remedy for aggrieved litigants. The section arguably provides a complainant who has rights under a contract formed or performed in violation of the Exchange Act and who has standing to sue for the substantive violation with the right to rescind the contract.

Some courts have recognized the “devastating” and “Draconian” effect of the section, but have refused to implement its express provisions. Such an interpretation ignores the section’s clear language and the Act’s overriding congressional objective of investor protection. Given section 29(b)’s apparent meaning, it conceivably extends to void any transaction, from a simple purchase or sale of securities, to a complex proxy fight, merger, tender offer, reorganization, or other transaction, when there has been a violation of the Exchange Act or any of the rules or regulations prescribed thereunder.
CONCLUSION

This Article's analysis of the propriety and scope of cumulative remedies under the federal securities laws indicates that the choice between a cumulative and an exclusive construction is not merely a matter of semantics or solely of theoretical relevance. Rather, it has a crucial substantive impact on the ability of injured victims of fraudulent misconduct to obtain meaningful redress. Because an exclusive construction of section 18(a), and to a somewhat lesser extent section 9, may well deny aggrieved parties any relief and will impair the integrity of the marketplace, the courts should reject such an interpretation. In addition, an exclusive construction is objectionable because it represents an unduly narrow view of congressional intent. Although a cumulative approach is recommended with respect to overlap between section 10(b) and sections 11 and 12(2), such a result is not as vital as in the section 9 and section 18(a) contexts. If courts ultimately adopt exclusivity for either section 11 or 12(2), however, it is important that such exclusivity extend only to those persons who are within the scope of the subject provision and only to those situations in which the provision would apply. The adoption of this suggested approach would ensure that victims of fraudulent misconduct can obtain meaningful federal redress. At the same time, such a construction comports with the legislative framework and does not place undue burdens upon potential defendants.

See also Regional Properties, Inc. v. Financial & Real Estate Consulting Co., 678 F.2d 552, 559 (5th Cir. 1982) ("[A] person can avoid a contract under section 29(b) if he can show that (1) the contract involved a 'prohibited transaction,' (2) he is in contractual privity with the defendant, and (3) he is 'in the class of persons the Act was designed to protect.' ")