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Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990): The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement

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***Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990): The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement**

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I. INTRODUCTION

Since the United States Supreme Court first implied a private right of action from a federal regulatory statute in *Texas & Pacific Railway v. Rigsby*,¹ federal courts have been attempting to establish a consistent test for determining when such a private right should be inferred. In *Lamb v. Phillip Morris, Inc.*,² the Sixth Circuit became the first federal appellate court to consider whether a private right of action exists under the Foreign Corrupt Practices Act (FCPA).³ The court in *Lamb* decided that no such action exists.⁴ This note contends that the Sixth Circuit has handed down an erroneous decision, and that the language and history of the FCPA indicates that a private right of action should be recognized.

The FCPA was enacted in 1977 as part of the Securities Exchange Act primarily in response to the increasing use by American firms of bribery to foreign officials in order to secure new business or maintain a competitive advantage with respect to existing business.⁵ Although enacted in 1977, the conceptual beginnings of the FCPA occurred in the aftermath of Watergate.⁶ The Special Prosecutor for the Watergate Investigation had been exploring illegal campaign contributions by American corporations,⁷ and the Securities and Exchange Commission (SEC) became interested in his investigation.⁸ The SEC discovered that many of the illegal contributions were made through slush funds,

1. 241 U.S. 33 (1916), *overruled by* *Cort v. Ash*, 422 U.S. 66 (1975).

2. 915 F.2d 1024 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 961 (1991).

3. Pub. L. No. 95-213, tit. I, 91 Stat. 1494 (1977) (codified at 15 U.S.C. §§ 78dd to -2, 78m (1988)).

4. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028 (1990), *cert. denied*, 111 S. Ct. 961. In *Lamb*, the court recognized that private action under the FCPA had previously been rejected based on the Act of State doctrine in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), but pointed out that decision offered no guidance to the present decision. *Id.* at 1027 n.9.

5. Mary Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085, 1085 (1979); *see id.* at 1085 n.2.

6. Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235, 235 (1982).

7. *Foreign and Corrupt Bribes: Hearings Before the Comm. on Banking, Housing and Urban Affairs on S. 3133*, 94th Cong., 2d Sess. 3 (1976).

8. *See Timmeny, supra* note 6, at 235.

which consisted of money laundered through foreign agents.⁹ The SEC also discovered that much of the money stayed in the hands of the foreign agents.¹⁰ These payments enabled the American companies to obtain new business or continue established business relationships.¹¹ More than 400 companies admitted to making illegal or questionably illegal payments in excess of \$300 million during the 1960s and 1970s.¹² In particular, from 1961 to 1975, Lockheed Aircraft Corporation made payments in excess of \$30 million to foreign officials in connection with sales of Lockheed aircraft and equipment.¹³ Such payments have also been known to topple governments, as several former sovereigns can attest.¹⁴

To combat this bribery and establish an even playing field for American business, Congress enacted the FCPA in 1977. The FCPA provides for both civil and criminal penalties. Because the payments were often made to these officials through fictitious entries in company books,¹⁵ it also includes accounting provisions to make detection possible.¹⁶ The agencies responsible for enforcement of the FCPA are the SEC and the United States Attorney General. While the FCPA does not contain express provision either allowing or prohibiting private rights of action, the

9. *Id.*

10. *Id.*; Frederick B. Wade, *An Examination of the Provisions and Standards of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 255, 255-56 (1982).

11. See Siegel, *supra* note 5, at 1085.

12. See Wade, *supra* note 10, at 255-56 (citing H.R. REP. NO. 831, 95th Cong., 1st Sess. 1977).

13. *Gaines v. Haughton*, 645 F.2d 761, 765 (9th Cir. 1981).

14. See Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1583 n.145 (1990) (citing John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 U. VA. L. REV. 1099, 1103 n.7 (1977)). Corporate bribery by Lockheed Corp., Gulf Oil, and United Brands is reputed to have caused the downfalls of the Tanaka government in Japan, General Rene Barrientos in Bolivia, and President Arellano in Honduras, respectively. *Id.*

15. Siegel, *supra* note 5, at 1085.

16. See 15 U.S.C. §§ 78dd-1 to -2 (setting forth the penalties for violation of the FCPA); see also § 78m (requiring disclosure to the SEC of corporate records).

history and purposes of the Act indicate that whether such a right exists by implication is at least a debatable issue.¹⁷

The implication doctrine allows the judiciary to infer the existence of a private right of action within a federal statute where none expressly exists. The implication doctrine was proposed by the Court in *Rigsby* as a method of ensuring the accomplishment of congressional goals in enacting legislation.¹⁸ Consequently, the implication doctrine will be applied by the courts when there is a danger that the congressional goals behind a specific statute will be frustrated in the absence of a private right of action. Statutory law is only as effective as its enforcement provisions, and the advantage of judicial hindsight¹⁹ makes the courts better situated than the legislature to determine the actual effectiveness of those provisions.²⁰

Part II of this note discusses the legislative history of the Foreign Corrupt Practices Act, and the development of the implication doctrine. Part III is an analysis of the Sixth Circuit's decision as handed down in *Lamb v. Phillip Morris, Inc.* Part IV applies the implication test as it stands today to the facts of *Lamb* to determine whether the Sixth Circuit correctly applied the facts.

II. LEGAL BACKGROUND

A. *The Foreign Corrupt Practices Act*

Although the FCPA was enacted in 1977 by the ninety-fifth Congress, it was preceded by a substantial number of similar bills offered in the preceding congressional session; all directed at prohibiting corporate bribery. The most noteworthy bill to be introduced during the ninety-fourth Congress was Senate Bill 3379,

17. Veronica Ann DeBerardine, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U. L. REV. 203, 226 n.155 (1984).

18. Steven L. Nelson, *Implication of Private Actions From Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 373-74 (1976).

19. Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 U. PA. L. REV. 1392, 1393 (1975).

20. *Id.*

which was introduced by Senator Frank Church.²¹ As originally written, the bill included two provisions for the protection of private plaintiffs injured by bribery.²² According to Senator Church, such private action would "allow the private sector to police itself."²³ During Senate committee hearings on Senate Bill 3379, the SEC submitted a report which posited that private actions should be eliminated from the language of the statute because such a provision under one Securities Exchange Act (SEA) statute (in this case, the FCPA) would create a negative inference with respect to all other SEA statutes.²⁴ The SEC, which was (and continues to be) understaffed,²⁵ depends on private assistance when enforcing certain provisions of the SEA.²⁶ As such, federal courts had implied private rights of action within many SEA statutes.²⁷ Although the Committee "found merit" in the section of the bill giving private redress to competitors harmed by bribery, it was forced into deleting this provision because it would "create ambiguities."²⁸ While Senate Bill 3379 passed the Senate without express provision for private rights of action, the rules of statutory interpretation would probably have permitted one to be implied.²⁹

The following year, in the ninety-fifth Congress, another series of antibribery legislation bills were proposed, and it was a

21. See Siegel, *supra* note 5, at 1105 (citing S. REP. NO. 1031, 94th Cong., 2d Sess. (1976)).

22. See *id.* (citing S. REP. NO. 1031, 94th Cong., 2d Sess. 12-13 (1976)).

23. See Siegel, *supra* note 5, at 1106 (citing 122 CONG. REC. 12,605 (1976)).

24. See [1978 Transfer Binder] FED. SEC. L. REP. ¶ 81,701, reprinting Letter from Frederick B. Wade, Special Counsel to the SEC, to Mr. Raymond Garcia, Emergency Committee for American Trade (May 16, 1978) [hereinafter Wade Letter] (citing Securities and Exchange Commission, 94th Cong., 2d Sess., Report to the Senate Banking, Housing and Urban Affairs Committee on S. 3379 (1976)). The SEC's report stated that a provision creating a private right of action would "create confusion over whether Congress, by expressly recognizing one type of action, intended to preclude the possibility of other implied causes of action." *Id.* at 16.

25. See Nelson, *supra* note 18, at 371 n.6.

26. See *id.* (citing J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)). In *Borak*, the SEC stated that due to staff limitations, the Commission could not adequately examine all of its cases. *Id.*

27. See *infra* note 182 and accompanying text (listing case in which the courts have implied private rights of action under SEA statutes).

28. See Wade Letter, *supra* note 24, (citing S. REP. NO. 1031, 94th Cong., 2d Sess. 3, 13 (1976)).

29. See *infra* notes 165-76 and accompanying text (providing an analysis of the statutory interpretation of the FCPA).

combination of Senate Bill 305³⁰ and House Bill 3815³¹ which eventually became the FCPA. The legislative histories of Senate Bill 305 and House Bill 3815 are replete with discussions of private rights of action.³²

House Bill 3815 included no express private right of action,³³ but the testimony before the House Subcommittee on Consumer Protection and Finance and the remarks made by its members were somewhat telling in this area. A House Report on House Bill 3815, written after the Subcommittee hearings, stated the Subcommittee's intention that private rights of action be recognized under the FCPA for persons who suffer injury as a result of violations of the Act, just as private actions are recognized under other SEA legislation.³⁴ In addition, the City of New York Bar Association submitted a report to the Subcommittee which stated their view that the legislation would be available "to private plaintiffs in implicit actions."³⁵

During the hearings by the same Subcommittee on Senate Bill 305, SEC Chairman Harold M. Williams testified that the legislation would provide "the Commission and *private plaintiffs* . . . with potent new tools to employ against those who [conceal corporate bribery]."³⁶ At this time, the SEC indicated that a private right of action could be inferred from the antibribery provisions of the FCPA.³⁷ In addition, a Senate Report demonstrated the attitude of Senate members that the bribery used by American corporations abroad was an unacceptable substitute

30. 95th Cong., 1st Sess. (1977).

31. 95th Cong., 1st Sess. (1977).

32. Siegel, *supra* note 5, at 1111; *See infra* notes 160-69 and accompanying text.

33. Siegel, *supra* note 5, at 1109.

34. *See* Wade Letter, *supra* note 24 (citing H.R. REP. NO. 640, 95th Cong., 1st Sess. 10 (1977)).

35. *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 88-90 (1977); *cited in* Siegel, *supra* note 5, at 1109.

36. Siegel, *supra* note 5, at 1109 n.171 (emphasis added) (quoting *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 198 (1977)).

37. *See* Siegel, *supra* note 5, at 1088 n.17 (citing Securities Exchange Act Release No. 14,478, 43 Fed. Reg. 7752 (1978)).

for straightforward, healthy competition in attracting foreign business and had a negative impact on the domestic competitive climate.³⁸

B. The Implication Doctrine

1. Early History

Although the implication doctrine has been recognized in England for almost 140 years,³⁹ the U.S. Supreme Court did not utilize the doctrine until 1916, when it decided *Texas & Pacific Railway v. Rigsby*.⁴⁰ Rigsby was a railroad employee injured on the job as a result of his employer's failure to comply with the Federal Safety Appliance Act (FSAA).⁴¹ Although the FSAA was considered a penal statute, and therefore primarily enforceable by the state, the Court implied a private right of action in favor of Rigsby against his employer.⁴² The Court held that when a defendant disregards a statute to the detriment of one of a class of especial beneficiaries⁴³ thereof, the right to private remedies is to be implied.⁴⁴ At the time of *Rigsby*, as now, there were inherent congressional limitations in enacting legislation.⁴⁵ The purpose of the implication doctrine is to prevent these limitations from resulting in legislation which falls short of congressional goals.⁴⁶ Perhaps the most significant limitation is a lack of congressional

38. See Wade Letter, *supra* note 24 (citing S. REP. NO. 114, 95th Cong., 1st Sess. 4 (1977)).

39. Couch v. Steel, 118 Eng. Rep. 1193, 1196-97 (Q.B. 1854).

40. 241 U.S. 33 (1916).

41. *Id.* at 36 (citing Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (1893) (amended 1910)).

42. *Id.* at 39-40.

43. *Id.* According to *Rigsby*, an especial beneficiary is a person for whom the statute was enacted to benefit, or was enacted to create an advantage. *Id.* at 39.

44. *Id.* at 39-40.

45. See Nelson, *supra* note 18, at 373 (citing *Fagot v. Flintkote Co.*, 305 F. Supp. 407, 410 (E.D. La. 1969)); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957); Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963); Comment, *supra* note 20, at 1393.

46. See *McDaniel v. Univ. of Chicago*, 548 F.2d 689, 694 (7th Cir. 1977) (stating that the Davis-Bacon Act, 40 U.S.C. §§ 276 to a-5, was a good example of how legislative remedies can be ineffective in achieving the congressional purpose).

foresight in recognizing the remedies necessary for effective implementation.⁴⁷ Legislators certainly know how to include a private right of action within a statute, but they may not realize that one is necessary, or they may simply neglect to include such a provision. The courts, on the other hand, have the opportunity to observe the actual effectiveness of the enforcement scheme, and determine if private enforcement will be necessary to give effect to congressional goals.⁴⁸

2. The Implication Doctrine in the 1960s and 1970s

In the 1960s and early 1970s, federal courts frequently utilized the implication doctrine to create remedies for private plaintiffs under regulatory statutes.⁴⁹ In *J.I. Case Co. v. Borak*,⁵⁰ the Supreme Court stated that it was the duty of the courts to provide any necessary remedies to effectuate the congressional purpose.⁵¹

The Court then held that implying private rights of action, when necessary, was one of these remedies.⁵² During the 1960s and 1970s, the courts applied a fairly simple implication analysis; if a statute was enacted for the benefit of a special class, the judiciary would recognize a personal remedy for members of that class.⁵³

3. Cort v. Ash and the Cort Factors

In the 1975 landmark case of *Cort v. Ash*,⁵⁴ the Supreme Court created a new test for determining whether a private right of action should be implied under a statute containing no express

47. See Nelson, *supra* note 18, at 374 (citing Mishkin, *supra* note 44, at 800); see also *supra* notes 19-20 and accompanying text.

48. See Nelson, *supra* note 18, at 374.

49. See, e.g., *Allen v. State Board of Elections*, 393 U.S. 544 (1969), *overruled by* *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Fagot v. Flintkot Co.*, 305 F. Supp. 407 (E.D. La. 1969).

50. 377 U.S. 426 (1964).

51. *Id.* at 433.

52. *Id.*

53. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374 (1982).

54. 422 U.S. 66 (1975).

private remedies. The new test was more specific than the test previously applied, but it still allowed for a flexible approach.⁵⁵ The four factors laid out in *Cort* to consider whether to imply a private right of action are: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted, (2) whether there is any explicit or implicit legislative intent which shows an intent to either grant or deny a remedy, (3) whether implication is consistent with the underlying legislative scheme, and (4) whether the right of action is one traditionally left to the states.⁵⁶

In *Cort*, the Supreme Court applied these factors and determined that no private right of action existed under section 610 of the Federal Election Campaign Act of 1971 (FECA).⁵⁷ In *Cort*, a shareholder of Bethlehem Steel was attempting to recoup the corporation's campaign contributions during the 1972 presidential election.⁵⁸ Applying the first factor, the Court focused on the fact that the FECA was exclusively a criminal statute, and had no provision for civil enforcement, either by private individuals or government entities.⁵⁹ The unanimous Court held that provision for a criminal penalty did not preclude implication of a private right of action, but concluded that there must be an indication that some civil action was available.⁶⁰ In discussing the second factor, the Court determined that protection of shareholders was only a secondary purpose of Congress in enacting the FECA.⁶¹ The Court cited *Bivens v. Six Unknown Federal Narcotics Agents*⁶² as precedent for the general rule that implied actions would be found only where Congress had clearly articulated a right in favor of the plaintiff.⁶³ In addition, the Court did not find in the legislative

55. *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1056 (D. Del. 1982).

56. *Cort*, 422 U.S. at 78.

57. *Id.* at 84.

58. *Id.* at 70-71.

59. *Id.* at 74.

60. *Id.* at 79; *see id.* at 80 (The Court was unwilling to hold that even a bare criminal statute would in every circumstance bar implication of a private right of action).

61. *Id.* at 81.

62. 403 U.S. 388 (1971).

63. *Cort*, 422 U.S. at 82.

history of the FECA any indication of congressional intent to create a private remedy.⁶⁴ For the third factor, while the Court did not explicitly find that a private action was inconsistent with the provisions of the FECA, they stated that private enforcement was not necessary to effectuate the congressional purposes.⁶⁵ With respect to the final factor, the Court pointed out that actions such as this were generally brought as ultra vires or a breach of fiduciary duty, both of which are generally subject to state regulation.⁶⁶ As such, the fourth factor was also not met under the FECA.⁶⁷

4. *The Implication Doctrine After Cort v. Ash*

In the years following *Cort v. Ash*, the Supreme Court refined the test it had created in *Cort*. In 1979, the Supreme Court began to establish a narrower standard for implying private actions from federal statutes, holding in *Cannon v. University of Chicago*⁶⁸ that legislative intent essentially subsumed the other *Cort* factors.⁶⁹ Although the Court was willing to imply a private action under Title IX of the Civil Rights Act, it did not believe that merely violating a federal statute—harming some person in the process—entitles the injured person to a private remedy.⁷⁰

A second case, decided in 1979, continued to restrict the focus of the *Cort* test to discerning legislative intent. In *Touche Ross & Co. v. Redington* [hereinafter *Touche Ross*],⁷¹ the Court decided that although all four of the *Cort* factors were to be considered, the courts were not to accord equal weight to each factor.⁷² In *Touche Ross*, the Court was debating whether to imply a private remedy

64. *Id.*

65. *Id.* at 84.

66. *Id.* at 84-85.

67. *Id.*

68. 441 U.S. 677 (1979).

69. *Id.* at 688-709. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979); *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1056 (D. Del. 1982).

70. *Cannon*, 441 U.S. at 688.

71. 442 U.S. 560 (1979).

72. *Id.* at 575.

under section 17(a) of the 1934 Securities Exchange Act.⁷³ The central inquiry was whether Congress intended, by express language or by implication, to create a private right of action.⁷⁴ *Touche Ross* viewed the other three *Cort* factors as simply sub-factors which were traditionally used to determine legislative intent.⁷⁵ Because the Act's legislative history was completely devoid of consideration as to the existence of a private right of action, the Court refused to recognize one.⁷⁶

Cannon not only narrowed the scope of the implication analysis to a determination of legislative intent, it analyzed the legislative intent for the first time within the contemporary legal context.⁷⁷ Through this concept, the Court held that when conducting an analysis of legislative intent, Congress is assumed to be cognizant of "relevant judicial opinions when it enacts legislation."⁷⁸ In *Cannon*, the Court held that Congress, in enacting Title IX of the Civil Rights Act, was presumed to have been aware of then recent decisions providing implied private rights of action under similarly constructed Civil Rights legislation.⁷⁹

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*,⁸⁰ the Court continued to adhere to *Cannon*'s concept of contemporary legal context, stating that the focus of the legislative intent determination must be on the state of the law at the time the legislation was enacted.⁸¹ To make this determination, *Curran* stated that the judiciary must scrutinize congressional perception of the statute which it was enacting or amending.⁸² The Court was willing to imply a private right of action under the Commodity

73. *Id.* at 571-74.

74. *Id.* at 575.

75. *Id.* at 575-76.

76. *Id.* at 571-74.

77. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979).

78. *Id.*

79. *See id.* at 698 n.22 (citing *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1967), as cases in which similarly constructed Civil Rights legislation was construed by the Supreme Court to include private rights of action).

80. 456 U.S. 353 (1982).

81. *Id.* at 378-79.

82. *Id.*

Futures Trading Act (CFTA) of 1974,⁸³ based on the conclusion that prior to the 1974 amendments to the Act, federal courts had already implied private rights of action.⁸⁴ In the opinion of the Court, the previously implied actions were a part of the contemporary legal context at the time the Congress debated the CFTA. Therefore, the Court held that it was the intent of Congress to preserve the private remedy.⁸⁵

III. THE CASE

A. *The Facts*

Plaintiffs were all Kentucky growers of burley tobacco, which is used in cigarettes and other tobacco products.⁸⁶ Defendants, Phillip Morris and B.A.T. Industries, were tobacco purchasers which regularly bought their tobacco in Kentucky, as well as in foreign markets.⁸⁷ Because of the dual markets from which the defendants were able to draw, Kentucky tobacco growers are in direct competition with tobacco growers from abroad.⁸⁸ In 1982, a Phillip Morris subsidiary (called C.A. Tabacalera National) and a B.A.T. subsidiary (called C.A. Cigarerra Bigott) entered into a contract with La Fundacion Del Nino (Children's Foundation) of Caracas, Venezuela.⁸⁹ The Children's Foundation was represented in the contract by the wife of the-then president of Venezuela.⁹⁰ The agreement called for periodic donations to the Children's Foundation by the tobacco companies which would total approximately \$12.5 million.⁹¹ In return, the Venezuelan government would maintain price controls on Venezuelan tobacco, eliminate controls on retail cigarette prices in Venezuela, grant tax

83. 7 U.S.C. §§ 821-822 (1988).

84. *Curran*, 456 U.S. at 381-82.

85. *Id.*

86. *Lamb*, 915 F.2d at 1025.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Lamb*, 915 F.2d at 1025.

deductions for the donations, and assure that existing tax rates applicable to tobacco companies would not be increased.⁹² Plaintiffs also alleged that the subsidiaries of defendants had made similar arrangements in Argentina, Brazil, Costa Rica, Mexico, and Nicaragua.⁹³

B. Procedural History

Plaintiffs brought this action in the United States District Court for the Eastern District of Kentucky.⁹⁴ The complaint originally claimed only an antitrust violation, but the plaintiffs were allowed to amend their complaint to include a claim under the FCPA.⁹⁵

According to plaintiffs, the donations paid by defendants' subsidiary companies constituted unlawful inducements amounting to bribery, and had the effect of restraining trade.⁹⁶ Plaintiffs charged that the inducements artificially depressed tobacco prices, especially in the United States.⁹⁷ In the meantime, according to plaintiffs, producers of tobacco products were assured lucrative prices in South American markets.⁹⁸ Plaintiffs requested treble damages and injunctive relief based on the asserted reduction in domestic tobacco prices.⁹⁹

The district court dismissed both of the plaintiffs' claims in response to defendants' Federal Rules of Civil Procedure 12(b)(6) motion.¹⁰⁰ The court held that the antitrust claim was barred by the Act of State Doctrine,¹⁰¹ and that the FCPA claim was an impermissible private action.¹⁰² Plaintiffs appealed to the Sixth

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Lamb*, 915 F.2d at 1025.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. As described in *Lamb*, the Act of State doctrine "in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." 915 F.2d at 1026.

102. *Id.* at 1025.

Circuit, contending that the district court erroneously dismissed their claims.¹⁰³

C. The Opinion

In *Lamb*, the Sixth Circuit was faced with a case of first impression. No other federal appellate court had considered whether there was an implied private right of action within the FCPA.¹⁰⁴ Judge Guy, writing for the court, began his analysis by setting out the four factors enumerated in *Cort v. Ash*.¹⁰⁵ The court pointed out that the implication analysis should focus on the intent of Congress in enacting the legislation,¹⁰⁶ citing the Supreme Court decision in *Thompson v. Thompson*¹⁰⁷ as support for this position.¹⁰⁸ Although *Lamb* realized that congressional intent was the main issue, it utilized all four *Cort* factors in its analysis, and actually gave the most attention to the especial beneficiary consideration.¹⁰⁹

The court felt that the plaintiffs were not one of the especial beneficiaries which Congress intended to protect in enacting the FCPA.¹¹⁰ According to Judge Guy, the goal of the FCPA was to promote confidence in international and domestic markets.¹¹¹ In the opinion of the court, the Attorney General's role in encouraging and supervising compliance with the Act indicated that the FCPA was enacted to maintain the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs.¹¹² From this finding, the

103. *Id.*

104. *Id.* at 1027.

105. See *supra* text accompanying note 56 (listing the *Cort* factors).

106. *Lamb*, 915 F.2d at 1028.

107. 484 U.S. 174 (1988).

108. *Lamb*, 915 F.2d at 1028; see *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (The intent of Congress is the ultimate issue for decision in an implication analysis, unless the statute has express provision).

109. *Lamb*, 915 F.2d at 1028-30.

110. *Id.* at 1028-29.

111. *Id.*

112. *Id.* at 1029.

court concluded that the plaintiffs, as competitors of the foreign growers and suppliers of defendant purchasers, could not claim intended beneficiary status under the FCPA.¹¹³

Lamb next discussed whether the intent of Congress in enacting the FCPA included recognition of private rights of action.¹¹⁴ The court focused on the ninety-fourth Senate's original inclusion of express private rights of action under the FCPA, and subsequent removal of this provision.¹¹⁵ While the court recognized an earlier House Committee Report which demonstrated a congressional expectation that courts should infer a private right, the court felt that the later conference report, which made no mention of private actions, indicated the true intent of Congress that no such right should exist.¹¹⁶ Judge Guy indicated that, in his personal opinion, the courts should never infer a private right of action.¹¹⁷

The court only briefly discussed the third and fourth *Cort* factors. As to whether implication was consistent with the underlying legislative scheme, the court found that private enforcement would be inconsistent with the goals of the FCPA since enforcement, according to the court, was to be carried out by the Attorney General alone.¹¹⁸ With respect to the fourth factor, while the court did not find that this overseas bribery was an area relegated to state control, it did conclude that the plaintiffs were amply protected by federal antitrust laws.¹¹⁹ Therefore, the court was unwilling to use the fourth *Cort* factor to infer a private right.¹²⁰

113. *Lamb*, 915 F.2d at 1028-29.

114. *Id.* at 1029.

115. *Id.*

116. *Id.*

117. *Id.* at 1029 n.13. "Speaking only for myself, if writing on a clean slate, I would never infer a private right of action where the legislation itself is silent in that regard." *Id.*

118. *Lamb*, 915 F.2d at 1029-30.

119. *Id.* at 1030.

120. *Id.*

IV. ANALYSIS

In recent years, federal courts have been less likely to permit a private recovery under a regulatory statute where such recovery was not expressly provided.¹²¹ The most commonly accepted reason behind this policy has been that if the legislature intends for a private right of action to exist, they know very well how to include such a provision.¹²² But is this a good argument? After all, the same reasons for implication that existed when the Supreme Court decided *Texas & Pacific Railway v. Rigsby* are still in existence today.¹²³ The main purpose behind the implication doctrine is to give full effect to the intent of the legislature.¹²⁴ As mentioned earlier, there are inherent limitations in the legislative process,¹²⁵ most importantly congressional foresight.¹²⁶ In today's complicated economic and legal spheres, the hindsight gained by implication makes more sense than ever.¹²⁷

When undertaking an implication analysis, a court must focus not only on the black letter law as set forth in the *Cort v. Ash* line of cases, but also on the purposes of the implication doctrine itself. As stated earlier in this text, the *Cort* factors are still applied, but the main focus of the test is legislative intent,¹²⁸ which must be

121. This modern trend is apparent from the progression of Supreme Court cases beginning with *Texas & Pacific Railway Co. v. Rigsby* and *J.I. Case v. Borak*, in which the Court implied rights of action whenever the statute in question appeared to fall short of attaining congressional goals. The next major case was *Cort v. Ash*, in which the Court narrowed the test to the four step analysis. Then in *Cannon v. University of Chicago* and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, the Court narrowed the test further essentially to determining whether there is discernible legislative intent that a private right of action exists in the complaining plaintiff. See *Jacobs*, 549 F. Supp. at 1058.

122. *Lamb*, 915 F.2d at 1029 n.13. The position of Judge Guy is indicative of the current judicial attitude when he states that if the judiciary stopped filling in legislative gaps, Congress would soon stop leaving such gaps. *Id.*

123. See *supra* text accompanying notes 40-48 (providing the early history of the implication doctrine and its foundations).

124. Nelson, *supra* note 18, at 374.

125. See *supra* text accompanying notes 45-48 (discussing congressional limitations, including foresight).

126. *Id.*

127. Comment, *supra* note 20, at 1393.

128. See *supra* text accompanying notes 68-76 (outlining cases in which the Court narrowed the implication analysis to legislative intent).

carried out given the contemporaneous legal context to the statute when it was enacted.¹²⁹ Thus, the central focus of the test is on congressional intent “with an eye toward” the four *Cort* factors.¹³⁰

A. *The Other Cort Factors*

In addition to legislative intent, the factors determining implication of a private right of action are: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any explicit or implicit legislative intent which shows an intent to either grant or deny a remedy; and (3) whether implication is consistent with the underlying legislative scheme.¹³¹ In *Lamb v. Phillip Morris, Inc.*, the Sixth Circuit found that none of these three factors were present,¹³² but further analysis of the factors indicates that the court was mistaken.

1. *Especial Beneficiaries*

In the opinion of the Sixth Circuit, the FCPA was created to allow the SEC to assist federal enforcement agencies, specifically the Attorney General, in curbing bribes of foreign officials.¹³³ Assuming that the SEC and Attorney General were intended to have primary enforcement responsibilities over the FCPA does not necessarily indicate who is the primary beneficiary of the Act. Congress stated during committee hearings on the FCPA that foreign bribery can effect America’s domestic competitive climate,¹³⁴ and that such bribery “rewards corruption instead of

129. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979). The analysis is based on the premise that Congress is assumed to be aware of relevant judicial opinions when it enacts legislation. *Id.*; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982). *Lewis v. Sporeck*, 612 F. Supp. 1316, 1327 (N.D. Cal. 1985); *see supra* text accompanying notes 73-80.

130. *Cannon*, 441 U.S. at 698-99; *see Karahalios v. Nat’l Fed’n of Fed. Employees, Local 1263*, 489 U.S. 527 (1989); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

131. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

132. *Lamb*, 915 F.2d at 1028-30.

133. *Id.* at 1028.

134. S. REP. NO. 114, 95th Cong., 1st Sess. 4 (1977).

efficiency'' at the cost of the violator's competitors.¹³⁵ The Sixth Circuit assumed from this language that Congress designed the FCPA to secure the integrity of American foreign policy and domestic markets.¹³⁶ This may arguably be so, but if that is the primary goal of the Act, competitors of the violating party are at least secondary beneficiaries of the thereby protected domestic markets.

In addition, the Seventh Circuit Court of Appeals has recognized that a statute may have more than one class of beneficiaries. In *McDaniel v. University of Chicago*,¹³⁷ the Seventh Circuit held that especial beneficiaries does not always mean exclusive beneficiaries.¹³⁸ Acts of Congress may be passed for a variety of purposes, and there may be one or several beneficiaries of any statutory enactment.¹³⁹ It is logical that competitors of FCPA violators should be considered beneficiaries of the Act. It also follows that as direct beneficiaries of the FCPA's ability to protect the integrity of markets, private plaintiffs have a strong interest in enforcement of the FCPA, a factor which would make them excellent enforcement tools to assist the SEC.

2. Consistency with the Legislative Scheme

In *Lamb*, the Sixth Circuit also found that private enforcement of the FCPA was inconsistent with the provisions of the Act itself.¹⁴⁰ In the opinion of the court, the terms of the FCPA indicated a preference for compliance over prosecution.¹⁴¹ Based on this alleged preference, the court opined that congressional goals would be hindered by private plaintiffs whose goal was post-violation enforcement, rather than pre-violation compliance.¹⁴² For foreign policy reasons, Congress may have genuinely preferred

135. H.R. REP. NO. 640, 95th Cong., 1st Sess. 4-5 (1977).

136. *Lamb*, 915 F.2d at 1028-29.

137. 548 F.2d 689 (1977).

138. *Id.* at 693.

139. *See generally id.*

140. *Lamb*, 915 F.2d at 1029-30.

141. *Id.* at 1029.

142. *Id.*

corporate reporting which would ensure compliance. However, if Congress did not intend post-violation prosecution to play an integral role in enforcement of the FCPA, it would not have included provisions in the Act for severe fines and possible imprisonment.¹⁴³ Prosecution must have been *at least* a consideration of Congress in enacting the FCPA. Furthermore, for the Act to have any real effectiveness in curtailing bribery, there must be the possibility of prosecution for those who do not comply.

While the FCPA gives the SEC and the Attorney General discretion to bring civil or criminal actions,¹⁴⁴ the existence of discretionary state enforcement does not create an inference of exclusive enforcement by state agencies.¹⁴⁵ In *Abrahamson v. Fleschner*,¹⁴⁶ the Second Circuit Court of Appeals considered the possibility of implied private rights of action under the Advisers Act of 1940 (another SEA statute), which contained the same discretionary prosecution language as the FCPA.¹⁴⁷ The court in *Abrahamson* found no legislative intent to restrict enforcement to the Commission.¹⁴⁸ Instead, it found that the enforcement powers given to the SEC under the Adviser's Act were identical to those given in other securities acts under which the courts have recognized private rights of action.¹⁴⁹ The Second Circuit felt it would be extraordinary for Congress to expect federal agencies to prosecute in every instance, and cited *Securities Investor Protection Corp. v. Barbour*¹⁵⁰ for the proposition that private suits under

143. See 15 U.S.C. § 78dd-2 (g)(1)(A) (1988) (providing for fines not to exceed \$2 million for domestic corporations which violate the Act); § 78dd-2 (g)(2)(B) (calling for fines not to exceed \$100,000 and prison terms not to exceed five years for directors or officers who willfully violate the Act).

144. § 78dd-2(d)(1).

145. See *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1976), *cert. denied*, 436 U.S. 913 (1978).

146. *Id.*

147. *Id.* at 874 n.19. The language in the Adviser's Act provides that the SEC "may in its discretion bring an action" for injunctive relief. *Id.*; cf. 15 U.S.C. § 78dd-2(d)(1) (1988). The language in the relevant section of the FCPA provides that the Attorney General may, in his discretion, bring an action for injunctive relief. *Id.*

148. *Abrahamson*, 568 F.2d at 874 n.19.

149. *Id.*

150. 421 U.S. 412 (1975).

the SEA should only be barred when they were a hindrance to Commission action.¹⁵¹ In the case of the FCPA, private enforcement would not hinder or interfere with the SEC's or Attorney General's enforcement responsibilities.

A similar view was expressed by the Supreme Court in *Cannon v. University of Chicago*.¹⁵² In *Cannon*, the Court held that if the administering agency takes the position that private remedies would provide effective assistance in enforcing the statutory goals,¹⁵³ then a private right of action should be recognized.¹⁵⁴ Such intent was demonstrated by the Chairman of the SEC, who indicated at the time of the FCPA's enactment that the Commission would value private assistance in its enforcement.¹⁵⁵

3. State Control Over the Area of Litigation

The Sixth Circuit next considered whether antibribery legislation is an area traditionally delegated to state control. The court's analysis of this element was faulty in that it sidestepped the real inquiry, which is whether the right of action is one generally within state control. The court found that the FCPA did not meet this element due to the existence of other federal laws under which the plaintiff could seek a remedy.¹⁵⁶ According to the court, because federal antitrust legislation was applied on a global scale,¹⁵⁷ the plaintiffs, even without a FCPA claim, would not be left without any possibility of recovery.¹⁵⁸ The problem with this

151. See *Abrahamson*, 568 F.2d at 874 n.19 (citing *Securities Investor Protection Group v. Barbour*, 421 U.S. 412, 423 (1975)).

152. 441 U.S. 677 (1979).

153. *Id.* at 707. A private remedy is considered effective if "the government itself perceives no . . . interference" with its enforcement responsibilities by private plaintiffs. *Id.*

154. *Id.*

155. Siegel, *supra* note 5, at 1109 (citing *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 198 (1977)).

156. *Id.*

157. See *Lamb*, 915 F.2d at 1030 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962), and *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6, for the proposition that the "Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce").

158. *Id.*

analysis is that the Sixth Circuit has altered the Supreme Court test by considering availability of other remedies. In the Supreme Court's description of the fourth factor in *Cort v. Ash*, there was no mention of alternative avenues of redress. The fourth *Cort* factor is merely a determination whether the right of action is within an area traditionally controlled by the states, which would make it inappropriate to infer a right of action based solely on federal law.¹⁵⁹ Because the Sixth Circuit gave no support or precedent for its departure from the Supreme Court rule, its analysis was faulty, and the court should have ended its analysis after its determination that implication would not intrude upon matters of state concern. Had the Sixth Circuit stopped there, it would have found that this element of implication was met.¹⁶⁰

B. Legislative Intent

Even if a court is satisfied that the first three *Cort* factors are met, it cannot infer a private right of action absent supporting legislative intent.¹⁶¹ The judiciary may infer congressional intent from the language of the statute, the statutory structure, the legislative history, or merely from the goals which the statute was designed to effectuate.¹⁶² In its legislative intent analysis, the Sixth Circuit failed to consider the state of the law at the time the FCPA was enacted¹⁶³ as required by the doctrine of contemporary

159. For support in developing this particular factor of the implication test, see *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963), *J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964), and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 394-95 (1971)).

160. See *Lamb*, 925 F.2d at 1030 (The regulation of bribery to foreign officials could not be characterized as a matter traditionally relegated to state control).

161. See *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (holding that legislative intent subsumed the other *Cort* factors); see also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (holding that all four *Cort* factors were to be considered, but that more weight must be accorded to legislative intent); *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1056 (D. De. 1982) (holding that the central inquiry was on the intent of Congress to create a private right of action).

162. See *Thompson v. Thompson*, 484 U.S. 174, 179 (1988); Comment, *supra* note 20, at 1412.

163. See *Jacobs*, 549 F.Supp. at 1056 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982)).

legal context.¹⁶⁴ Because this idea is so integral to an intent analysis, and the FCPA in particular, the bulk of this analysis will discuss the existence of contemporaneous congressional intent to provide a private remedy under the FCPA.

1. Rules of Statutory Construction

Since the original draft of the FCPA had express provisions for private actions, which were later deleted,¹⁶⁵ a strong argument can be made against an implied right of action. In divining legislative intent, it is a well established rule that the removal of a provision indicates congressional intent to exclude the specific provision from the statute. However, given the circumstances surrounding the enactment of the FCPA, this rule is not applicable. The ninety-fourth Congress deleted the express private right of action provision because the Senate Committee on Banking, Housing and Urban Affairs believed that the language "would have duplicated and possibly confused existing remedies available to shareholders."¹⁶⁶ The SEC's testimony before that Subcommittee was the basis for this conclusion.¹⁶⁷ By deleting the express provision for private remedies, Congress did not intend to eliminate such a right of action. On the contrary, the deletion by Congress was done to ensure that such a right was available under all applicable SEA statutes.

Probably the most important recognized rule of statutory construction in analyzing the FCPA is that in the absence of express statutory provision, committee reports are the most

164. See *supra* text accompanying notes 77-85 (describing the creation and development of the contemporary legal context doctrine).

165. See *supra* notes 22-28 and accompanying text (describing reasons given by Congress for deleting the express provision for private rights of action under the FCPA).

166. S. REP. NO. 1031, 94th Cong., 2d Sess. 12, 12-13 (1976). See Wade Letter, *supra* note 24 ("[T]he use of the word 'duplicated' is a strong indication that the Committee believed it was unnecessary expressly to provide for a private right of action on behalf of shareholders . . .").

167. See Wade Letter, *supra* note 24 (citing Securities and Exchange Commission, 94th Cong., 2d Sess., Report to the Senate Banking, Housing and Urban Affairs Committee on S. 3379 (1976)); see *supra* notes 24-26, and accompanying text (providing the substance of the SEC report).

persuasive source of legislative intent.¹⁶⁸ During the ninety-fifth Congress (which enacted the FCPA), the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce stated in its report that its members intended for the courts to recognize a private right of action in favor of persons experiencing injury caused by prohibited corporate bribery.¹⁶⁹

Further support for the implication of a private right of action is gained from statements made by the SEC. According to the Supreme Court, the views of an administrative agency are entitled to particular weight where the administrators took part in drafting the legislation and expressly indicated their views to Congress in Committee hearings.¹⁷⁰ SEC Chairman Harold M. Williams testified before the above mentioned Committee during the FCPA hearings that “this legislation would furnish the Commission and private plaintiffs . . . with potent new tools to employ against those who [commit corporate bribery].”¹⁷¹

While courts may consider comments made by congressional committee members in a legislative intent analysis, some of these comments are to be discounted completely or given little weight. Before enactment of the FCPA, a Conference Committee was created to reconcile the differences between the House and Senate versions of the legislation. After the Committee’s deliberations,

168. *Thornburg v. Gingles*, 478 U.S. 30, 40 (1986); *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *Mills v. United States*, 713 F.2d 1249, 1252 (7th Cir. 1983), *cert denied*, 464 U.S. 1069 (1984).

169. H.R. REP. NO. 640, 95th Cong., 1st Sess. 10 (1977); *see also* Wade Letter, *supra* note 24 (“[T]he word ‘persons’ is broad enough to encompass an implied cause of action on behalf of both shareholders and competitors of the corporation that may suffer injury as a result of prohibited corporate bribery . . .”).

170. *Miller v. Youakim*, 440 U.S. 125, 144 (1979); *Zuber*, 396 U.S. at 192; *Adams v. United States*, 319 U.S. 312, 314-15 (1943); *United States v. Am. Trucking Ass’n, Inc.*, 310 U.S. 534, 549 (1940); *cf. Piper v. Chris Craft Indus., Inc.*, 430 U.S. 1 (1977). The Court in *Piper* held that the expertise of an administrative agency is of limited value when determining if a court should imply a private right of action. *Id.* at 41 n.27. The Court, however, was focusing on the views of an administrative agency at the time of litigation, and not on views given during the drafting of the legislation. *Id.*

171. Siegel, *supra* note 5, at 1109 n.171 (emphasis added) (quoting *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 198 (1977)).

Senator John Tower and Congressman Samuel Devine, both members of the Committee, stated expressly that the Conference Committee did not intend for the courts to imply a remedy for private plaintiffs.¹⁷² While on the surface these comments would seem damning to an argument for implication, their persuasiveness in an implication analysis is severely limited by the rules of statutory construction. Remarks made by persons not involved with the drafting of the bill, as well as comments by opponents of the bill, are entitled to little weight in determining legislative intent.¹⁷³ Actually, courts look to the sponsors of legislation when the meaning of a statute is in doubt.¹⁷⁴ Neither Tower nor Devine were involved in the drafting of the FCPA. Actually, Devine joined in a minority report expressly opposing the adopted enforcement provisions. In addition, neither of the Conferees could persuade their brethren to include their statements in the Committee report.¹⁷⁵

The testimony and release presented by the SEC, along with the express intent of the Subcommittee on Consumer Protection and Finance as indicated in their report,¹⁷⁶ should have sufficed to show legislative intent and overcome the negative inference the Subcommittee members knew would otherwise be created by deleting the express provision for private actions. Therefore, application of the rules of statutory construction indicates that Congress intended for the FCPA to include implicit private actions.

172. See Wade Letter, *supra* note 24 (citing H.R. REP. NO. 831, 95th Cong., 1st Sess. (1977)).

173. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976) (holding that remarks made by nondrafters of legislation during congressional debate is entitled to little weight); see also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956) (Legislators with minority views should not be allowed to effectively amend a bill by putting words in the mouths of the majority).

174. *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964).

175. Wade Letter, *supra* note 24. Actually, Tower later stated that the question of implication was never considered by the Conference Committee. *Id.*

176. See *supra* notes 34, 36-37 and accompanying text (providing the substance of the Committee Report, the SEC Chairman's testimony, and the SEC release).

2. Contemporaneous Legal Context

It is no secret that the federal courts today are much less likely than in previous years to infer a private right of action from a statute.¹⁷⁷ The Supreme Court has held, however, that an analysis of legislative intent must be carried out in the legal context contemporary with the enactment of the statute.¹⁷⁸ This doctrine is founded on the assumption that Congress is aware of relevant judicial opinions when it enacts legislation.¹⁷⁹ Given this legal doctrine, the Sixth Circuit should have looked beyond the current attitude toward implication to the stance the courts took toward the doctrine at the time of the ninety-fifth Congress.¹⁸⁰

To determine the law governing the implication doctrine in 1977, one would certainly have to look to the contemporaneous case law, but the amount of case law pertaining to implication and contemporaneous with the enactment of the FCPA would probably require another comment to effectively analyze. An illustration of the contemporaneous judicial attitude toward implication is given in a statement made by one commentator in 1975: "[T]he existence of the [implication] doctrine is so widely accepted that its underlying justification is rarely discussed."¹⁸¹ From a statement like this, one can infer that in 1977 the judicial attitude toward implication was at the very least more liberal than it is today, and at most equally favorable as in 1975.

While a broad overview of all applicable case law is beyond the scope of this comment, an examination of case law pertaining

177. *Jacobs*, 549 F. Supp. at 1058; see *supra* note 121 and accompanying text (outlining the trend away from implication as seen in Supreme Court cases).

178. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979); *Lewis v. Sporck*, 612 F. Supp. 1316, 1327 (N.D. Cal. 1985).

179. *Cannon*, 441 U.S. at 696-97; see *Lewis*, 612 F. Supp. at 1327.

180. Cf. *Jacobs*, 549 F. Supp. 1050. The court in *Jacobs* cites *Piper v. Chris Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977), for the proposition that the contemporary legal context analysis does not include a determination of whether the courts were more likely to imply a right of action, and that the 'legal context' can be considered only if there is some judicial interpretation of the specific statutory question at issue. *Id.* The Court in *Piper* did not, however, make any such assertion, but rather held that a finding of implication with respect to one plaintiff does not lead to implication for a second plaintiff not similarly situated. See generally *Piper*, 430 U.S. 1 (1977).

181. Comment, *supra* note 20, at 1393; *Jacobs*, 549 F. Supp. at 1058.

to the contemporary judicial attitude towards implication under SEA statutes is possible. Considerable case law indicates a positive judicial attitude toward implication under the provisions of the Securities Exchange Act (of which the FCPA is a part) at the time the FCPA was enacted.¹⁸² This was due to the inability of the SEC to effectively enforce all of the provisions which came under its regulatory jurisdiction.¹⁸³ Actually, two years before the enactment of the FCPA, the Supreme Court held that it would be unrealistic for Congress to expect federal agencies to prosecute every violation within their jurisdiction.¹⁸⁴ The Court also stated that any such expectation for the SEC in particular would be even less realistic, and that private suits under the SEA should be barred only when they are a hindrance to Commission action. Because of the SEC's ineffectiveness in enforcement of SEA provisions, federal courts by 1977 had inferred private rights of action under several SEA provisions.¹⁸⁵ This fact was conveyed to Congress by then SEC Chairman Harold Williams through the SEC report circulated to the various congressional committees.¹⁸⁶ Therefore,

182. See *Moses v. Burgin*, 445 F.2d 369 (1st Cir. 1971), *cert. denied*, 404 U.S. 994 (1971); *Herpich v. Wallace*, 430 F.2d 792, 815 (5th Cir. 1970); *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) (recognizing an implied private right of action under the Investment Companies Act); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9; *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2d Cir. 1951); *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (finding implied private rights of action under Section 10(b) of the 1934 Act and Rule 10b-5); see also *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (finding an implied private right of action under Section 14(a) of the 1934 Act); *Goldstein v. Groesbeck*, 142 F.2d 422 (2d Cir. 1944), *cert. denied*, 323 U.S. 737 (1944) (finding an implied right of action under the Public Utility Holding Company Act); *Daniel v. Int'l Bhd. of Teamsters*, 561 F.2d 1223 (7th Cir. 1977); *Local 734 Trust v. Continental Ill. Nat'l Bank & Trust Co.*, Fed. Sec. L. Rep. (CCH) ¶ 94565, 95963 (N.D. Ill. 1974) (finding an implied private right of action under section 17(a) of the 1933 Act).

183. *Abrahamson v. Fleschner*, 568 F.2d 862, 874 (2d Cir. 1976); see *Nelson*, *supra* note 18, at 371 (citing *J.I. Case Co. v. Borak* in which the SEC admitted that it was unable to adequately examine all complaints due to staff limitations).

184. *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975).

185. See *supra* note 182.

186. See *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 196-211 (1977). After the report given by Mr. Williams, the House Report on House Bill 3815 included the following: "The recognition of such a private cause [of action] would . . . provide a necessary supplement to the enforcement efforts of the [Securities Exchange] Commission and the Department of Justice." Siegel, *supra* note 5, at 1110 (emphasis added) (quoting H.R. REP.

in enacting and amending the FCPA, Congress knew of the difficulties the SEC would face in single-handedly enforcing the FCPA provisions,¹⁸⁷ and the possible negative effect an express right of recovery could have had on previously implied private rights of action under the SEA. Had these considerations not been part of the contemporary legal context in 1977, it is likely that Congress would have left an express provision for private rights of action in the FCPA.

V. CONCLUSION

There can be no doubt that if Congress wants to include a private right of action within the provisions of a statute they certainly know how to do so. However, this ability does not preclude the possibility that Congress intended a private right, even in the absence of an express provision. "Beyond the political realities which will at times compel congressional by-passing of any issue—thus leaving it open until pending litigation forces court resolution—lie such simpler pressures as shortness of time and, perhaps most important, the severe limits of human foresight."¹⁸⁸ The limitations alluded to in this quote will often result in ineffective legislation.¹⁸⁹ The implication doctrine was created to prevent these limitations from frustrating congressional goals.¹⁹⁰ Although these limitations still exist, the courts today are less likely to imply a private right of action. Determining whether or not this trend is a positive one has not been the goal of this comment, but rather to determine whether such implication was warranted under the Foreign Corrupt Practices Act.

No. 640, 95th Cong., 1st Sess. 10 (1977)).

187. See *Abrahamson*, 568 F.2d at 874 (stating that in 1977 "courts consistently have recognized that the [SEC's] resources are inadequate to the task of policing alone the federal securities laws"); see also *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204 (1967) (holding that inadequacy of enforcement is a particularly important reason to imply a private right of action lest the wrongdoer be able to shift the burden of his violation onto the innocent plaintiff).

188. *Mishkin*, *supra* note 44, at 800.

189. See *Nelson*, *supra* note 18, at 374.

190. *Id.*

The case law on implication indicates that there is a four element test, which was set forth in *Cort v. Ash*. However, cases subsequent to *Cort* have held that the focus of any implication analysis must be on legislative intent. Prior case law has also held that the legislative intent must be measured at the time the statute was enacted. When the FCPA was enacted, federal courts were still liberally applying the implication doctrine. As late as 1977, courts were still citing as precedent the implication language of *J.I. Case Co. v. Borak*, which held that “[i]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.”¹⁹¹ It was under this more liberal implication standard which Congress enacted the Foreign Corrupt Practices Act, and it is under this standard that today’s courts should determine if a private right of action should be implied. Finally, the Sixth Circuit’s decision not to imply a private right of action creates a strong sense of irony when one considers that the express provision for private remedy was taken out of the enacted version of the FCPA to protect the private remedies under other SEA statutes, and out of a feeling that such provision was not necessary for the right to exist. Given these considerations, it appears that the Sixth Circuit handed down an incorrect decision in *Lamb v. Phillip Morris, Inc.* when they chose not to infer such a private right.

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191. *Abrahamson*, 568 F.2d at 872.