

THE CONTINUED AVAILABILITY OF PRIVATE ACTIONS FOR FRAUD UNDER THE SECURITIES STATUTES IN COMMODITY-SECURITY TRANSACTIONS

A commodity futures contract is a standardized contract for the purchase and sale of a fixed quantity of a commodity for delivery on a specified future date at a determined price.¹ In the late 1960's, this simple contractual form was transformed into and used for increasingly complicated arrangements.² The resulting changes in the nature of futures trading significantly reduced the effectiveness of the Commodity Exchange Act (CEA),³ in regulating the commodities industry. First, the CEA covered only a narrow listing of agricultural items.⁴ Therefore, although futures trading was expanding rapidly into many non-agricultural products,⁵ trading in these items could not be regulated by the CEA. Second, the small staff and limited trade and commercial experience⁶ of

¹ A. BROMBERG & L. LOWENFELS, *SECURITIES FRAUD & COMMODITIES FRAUD* § 4.6 (421), at 82.181 [hereinafter cited as BROMBERG & LOWENFELS]. Commodity forward contracts are similar to commodity futures contracts; however, they are not traded on exchanges nor are they standardized but rather are individually negotiated. *Id.* § 4.6 (423), at 82.188.

² See *id.* § 4.6 (400-446), at 82.101-82.269. Examples of these more complicated transactions are discretionary trading accounts in commodity futures contracts and commodity options. The discretionary accounts are agreements created by dealers whereby a customer gives a broker authority to buy and to sell commodity futures, commodity forwards, and bare commodities at the broker's discretion without consulting the customer. *Id.* § 4.6 (430-31), at 82.201. These accounts can be formed as either commodity pools in which the customers share in profits and losses or individual arrangements. *Id.*

Commodity options are contracts in which the option holder or purchaser is given the right to purchase certain commodities from the option seller at a determined price for a specified period of time. Long, *Commodity Options — Revisited*, 25 *DRAKE L. REV.* 75 (1975) [hereinafter cited as Long]. Options can be either naked or covered. A naked option is one party's simple unsupported promise to buy or sell a futures contract at a specified time and price. Long, *supra*, at 82-102; BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (441), at 82.242. A covered option is different in that the party promising to buy or sell takes steps to insure that he will be able to perform the contract. BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (441), at 82.242.

³ Ch. 545, 49 Stat. 1491 (1936) (current version at 7 U.S.C. §§ 1-22 (1976) and 7 U.S.C. §§ 1-22 (Supp. III 1979)). The CEA had governed futures trading since 1936. See Hewitt, *The Line Between Commodities and Securities — Part I*, 1 *AGRIC. L.J.* 291, 292 (1979) [hereinafter cited as Hewitt].

⁴ 7 U.S.C. § 2 (1970) provided:

The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, onions, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cotton-seed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice.

Id.

⁵ By 1974, futures trading was occurring in at least 14 non-food products, including foreign currency, copper, and silver. Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 *VAND. L. REV.* 1, 2-4 (1976) [hereinafter cited as Johnson].

⁶ See *Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 125-26 (1974) (statement of Arthur N. Economou, President, American Board of Trade, and President, American Association of Commodity Traders) [hereinafter cited as *Hearings on 11955*].

the Commodity Exchange Authority,⁷ the agency charged with administering CEA provisions,⁸ prevented it from effectively regulating the increased amount⁹ and complexity of commodities transactions. These two deficiencies in the regulatory machinery of the CEA created a tremendous potential for fraud in the commodities industry.¹⁰

Dissatisfaction with the CEA's regulatory reach led investors and other individuals to seek alternative forms of relief. The Securities and Exchange Commission (SEC) brought injunctive suits to prevent violations of the antifraud provisions and registration requirements of the securities laws by futures dealers and other participants in the commodities industry.¹¹ In addition, injured investors instituted private actions under the securities laws to remedy losses caused by fraudulent schemes.¹² The approach of the SEC and private parties in such suits was to seek a liberal definition of security and to use the broad antifraud provisions of the securities acts to redress scandalous activity in the commodities field. Their success depended upon the courts' willingness to accept an expansion of the term security to include various commodity transactions.¹³

⁷ The Commodity Exchange Authority was a division of the United States Department of Agriculture. Johnson, *supra* note 5, at 6 n.15.

⁸ *Id.*

⁹ In 1973, the twelve organized commodity exchanges in the United States registered a trading volume having an estimated dollar volume of \$520 billion. See Hewitt, *supra* note 3, at 295; Johnson, *supra* note 5, at 2. This figure portrayed a 400% increase in trading volume since 1964. See Johnson, *supra* note 5, at 2.

¹⁰ Two forms of fraudulent activity, in particular, appeared to pose potent dangers to the stability of the futures markets. First, unscrupulous traders with interests in the underlying cash markets for particular commodities used futures trading to manipulate markets for their product. See, e.g., *Leist v. Simplot*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,160-64 and 24,170-71 (2d Cir. 1980), *cert. granted sub nom. Heinold Commodities, Inc. v. Leist*, 49 U.S.L.W. 3595 (Feb. 24, 1981); *Deaktor v. L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973). For example, these traders would artificially raise or depress the prices for their products and force other investors to liquidate at the abnormal prices. See *id.* Second, devious brokers increasingly used schemes, such as discretionary accounts and options, to defraud speculative investors — those who had no underlying interest in the cash market. See *Leist*, 2 COMM. FUT. L. REP. at 24,170; Long, *supra* note 2, at 87. For example, brokers had established Ponzi schemes whereby they would pay their customers profits by using money received from subsequent purchasers of options — thereby causing monumental losses to these later purchasers. See, e.g., Russo & Lyon, *The Exclusive Jurisdiction of the Commodity Futures Trading Commission*, 6 HOFSTRA L. REV. 47, 60-61 (1977) [hereinafter cited as Russo & Lyon]; Guttman, *The Futures Trading Act of 1978: The Reaffirmation of CFTC-SEC Coordinated Jurisdiction Over Security/Commodities*, 28 AM. U.L. REV. 1, 10 n.55 (1978).

¹¹ See, e.g., *SEC v. Commodity Options Int'l, Inc.*, 553 F.2d 628 (9th Cir. 1977); *SEC v. American Commodity Exchange, Inc.*, 546 F.2d 1361 (10th Cir. 1976); *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974); *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027 (2d Cir. 1974).

¹² See, e.g., *Berman v. Orimex Trading, Inc.*, 291 F. Supp. 701 (S.D.N.Y. 1968); *Maheu v. Reynolds & Co.*, 282 F. Supp. 423 (S.D.N.Y. 1967); *Sinva, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359 (S.D.N.Y. 1966).

¹³ Courts varied in their willingness to allow an expanded definition of security, or investment contract, to include commodities transactions. These courts applied the test for determining the presence of an investment contract as enunciated by the Supreme Court in *SEC v.*

In 1974, Congress also responded to the regulatory deficiencies in the commodities industry and enacted the Commodity Futures Trading Commission Act of 1974 (CFTCA).¹⁴ In the CFTCA, Congress replaced the ineffective Commodity Exchange Authority with an independent agency, the Commodity Futures Trading Commission (CFTC), and vested this agency with exclusive jurisdiction over futures trading.¹⁵ The provision granting exclusive jurisdiction to the CFTC has jeopardized the ability of the SEC and private parties to bring suits under the securities statutes. Indeed, this provision has explicitly and permanently prevented the SEC from exercising any jurisdiction over commodities transactions that fall within the purview of the CFTC's exclusive jurisdiction.¹⁶ Thus, even though certain commodity arrangements may also

W.J. Howey Co., 328 U.S. 293 (1946). Thus, they inquired whether the transaction involved an investment of money in a common enterprise from which one expects profits solely from the efforts of others. *Id.* at 298-99. See FitzGibbon, *What is a Security — A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 MINN. L. REV. 893 (1980). In general, futures and forwards contracts as well as bare commodities have been held not to be securities under the *Howey* test. See, e.g., *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 350 (N.D. Ohio 1976) (futures contracts); *Schwartz v. Bache & Co., Inc.*, 340 F. Supp. 995, 998 (S.D. Iowa 1972) (forward contracts); *Continental Marketing Corp. v. SEC*, 387 F.2d 466, 468 (10th Cir. 1967) (bare commodities). In contrast, a more controversial topic has been whether discretionary trading accounts in commodity futures are securities. BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (430-40), at 82.201. Those courts ignoring the common enterprise component of the *Howey* test and focusing upon the dependence element have found unpooled accounts to be securities. See, e.g., *Johnson v. Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764, 765-66 (S.D.N.Y. 1972). Similarly, courts reasoning that vertical commonality, or a contract between a single investor and promoter, is sufficient to satisfy the common enterprise prong of the *Howey* test have concluded that non-pooled discretionary accounts are securities. See, e.g., *SEC v. Continental Commodities Corp.*, 497 F.2d 516, 521-23 (5th Cir. 1974). In contrast, those courts finding horizontal commonality, or a pooling of resources of pro-rata distribution of profits among investors to be a requisite element of the *Howey* test have held that discretionary accounts are not securities unless they are authorized to be pooled by the investors. See, e.g., *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972), *cert. denied*, 409 U.S. 887 (1972). Pooled discretionary accounts, however, have been deemed to satisfy the common enterprise requirement under either interpretation. See, e.g., *SEC v. Comstock Coin Co.*, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,414 (D. Nev. 1964).

The case law for options is less clear although a trend is discernible. Most courts have held that a naked option is a security. See BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (442), at 82.244; Long, *The Naked Commodity Option Contract As a Security*, WM. & MARY L. REV. 211 (1973). In contrast, the issue of whether covered options are securities has been less directly discussed by the courts. See BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (444-46), at 82.261. Nevertheless, such options are probably not investment contracts since "[c]over — if shown to be adequate — negates dependence . . . , negates horizontal common enterprise among customers, and may negate vertical common enterprise between customers and sellers." *Id.* § 4.6 (445), at 82.262; accord, Note, *Federal Legislation for Commodity Option Trading: A Proposal*, 47 S. CAL. L. REV. 1418, 1432-37 (1974).

¹⁴ Pub. L. No. 93-463, 88 Stat. 1389 (1974), as amended by Pub. L. No. 95-405, 92 Stat. 865 (1978) (codified at 7 U.S.C. §§ 1-22 (1976 & Supp. III 1979)).

¹⁵ 7 U.S.C. § 2 (1976). See text at note 27 *infra*.

¹⁶ See Bromberg, *Securities Law — Relationship to Commodities Law*, 35 BUS. LAW. 787, 791 (1980); Johnson, *supra* note 5, at 31. See also Bromberg, *Commodities Law and Securities Law — Overlaps and Preemptions*, 1 J. CORP. L. 217, 309 (1976) ("[T]he SEC and state agencies are ousted from suing for fraud, failure to register, or other violations of the securities laws. They are thus

be securities¹⁷ and would otherwise be subject to the securities laws, Congress chose to remove these transactions from SEC jurisdiction. In contrast to the express removal of SEC authority in the CFTCA, however, Congress did not expressly preclude individual investors from continuing to bring private actions under the antifraud provisions of the securities laws.¹⁸ Nevertheless, the fate of such private remedies has been questioned.¹⁹

This note will submit that private remedies for fraud under the securities statutes should still be allowed in transactions where, in addition to a commodity, a security is found to exist,²⁰ notwithstanding the CFTCA's exclusive jurisdiction clause. First, the scope of this issue will be delimited through an analysis of the CFTCA's provisions and examination of cases which have encountered the issue. Since the CFTCA is ambiguous regarding the continued applicability of the securities statutes to commodity-security transactions, the courts have not evolved a uniform approach to the problem. Next, analysis of the legislative history of the CFTCA, policy considerations, and analogous instances where a statutory framework has affected the applicability of rights under other statutes will be presented. Examination of these topics reveals that private actions for fraud under the securities statutes should be allowed to continue notwithstanding the CFTC's exclusive regulatory jurisdiction over the commodities industry.

I. THE PROBLEM DELIMITED

A. CFTCA Exclusive Jurisdiction

In the CFTCA, Congress enacted a complete overhaul of the CEA.²¹ First, Congress expanded the definition of commodity to include not only the types of commodities originally listed in the CEA²² but also "all other goods and articles, . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in"²³ This expansive

deprived of a power they have exercised against those discretionary accounts which have been regarded as securities.").

¹⁷ See note 13 *supra*.

¹⁸ See Bromberg, *Securities Law — Relationship to Commodities Law*, 35 BUS. LAW. 787, 795 (1980); Mullis v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 492 F. Supp. 1345, 1349-51 (D. Nev. 1980); see also Hewitt, *supra* note 3, at 319; Johnson, *supra* note 5, at 32; Schroeder & Pollack, *Commodities Regulation*, 8 REV. OF SEC. REG. 937, 938 (1975) ("[E]ven where the Commission's exclusive jurisdiction ousts another agency, a court might apply substantive rules of law embodied in the statute applicable to the ousted agency, at least to the extent that the application of particular provisions does not require the exercise of the agency's jurisdiction.").

¹⁹ See text and notes at notes 34-61 *infra*.

²⁰ This article does not examine which commodity transactions ought to be investment contracts. For a thorough discussion of this issue, see BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (440-46), at 82.101-869. See note 13 *supra*. Rather, in discussing whether private actions under the securities statutes should be retained for private commodities investors, it will be assumed that the plaintiff can surmount the threshold obstacle of determining that the transaction in question includes a security. Consequently, reference will hereinafter be made to "commodity-security transactions."

²¹ *Leist v. Simplot*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,166 (2d Cir. 1980), *cert. granted sub nom. Heindold Commodities, Inc. v. Leist*, 49 U.S.L.W. 3595 (Feb. 24, 1981).

²² See note 4 *supra*.

²³ 7 U.S.C. § 2 (1976).

wording extended coverage to any commodity traded as a futures contract.²⁴ In addition to expanding such coverage, the CFTCA abolished the Commodity Exchange Authority and replaced it with the CFTC, an independent regulatory agency. This agency was equipped with broad rule-making authority to conduct investigations, to issue cease and desist orders, and to impose civil and criminal sanctions.²⁵ Further, the CFTCA authorized an elaborate system of reparations proceedings before the CFTC.²⁶ Finally, Congress vested the CFTC with exclusive jurisdiction in regulating futures trading. The Act states:

Provided, That the Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market . . . : *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.²⁷

This section terminates SEC authority to regulate commodities transactions falling within the CFTC's exclusive jurisdiction, regardless of whether a security also exists.²⁸ In contrast, private actions under the securities laws are nowhere similarly ousted.²⁹ Instead, the court jurisdictional saving clause³⁰ may be interpreted as an express retention of these causes of action.³¹ Since a cause of action, however, is not a jurisdictional power,³² the court jurisdictional saving clause, applied narrowly, does not clearly preserve the right of individuals to bring suit under the fraud provisions of the securities laws in commodity-security transactions. The CFTCA, therefore, is ambiguous because it does not expressly retain or terminate the availability of these private remedies. The existence of the court jurisdictional saving clause as well as the absence of any language extinguishing private fraud actions under the securities statutes militates against a sweeping extinction of the applicability of securities concepts to

²⁴ *Id.*; see Hewitt, *supra* note 3, at 301-02.

²⁵ See 7 U.S.C. § 13 (1976); *United States v. Abrahams*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,927 (S.D.N.Y. 1980). See also *Leist*, 2 COMM. FUT. L. REP. at 24,194-95 (Mansfield, J., dissenting).

²⁶ 7 U.S.C. § 18 (1976); see *Leist*, 2 COMM. FUT. L. REP. at 24,180-81; *Johnson*, *supra* note 5, at 40; Hewitt, *supra* note 3, at 322.

²⁷ 7 U.S.C. § 2 (1976).

²⁸ See note 16 *supra*.

²⁹ See note 18 *supra*.

³⁰ 7 U.S.C. § 2 (1976).

³¹ See *Johnson*, *supra* note 5, at 32.

³² See *Yates v. Island Creek Coal Co.*, 485 F. Supp. 995, 996 n.1 (W.D. Va. 1980) ("Whether plaintiffs have an implied cause of action under the statute is not a question of jurisdiction . . ."). See also *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979).

the commodities industry. Had Congress desired to eliminate the availability of the private fraud remedies under the securities laws, a clause to that effect — much like that terminating SEC power — could easily have been inserted.³³ Courts considering the issue, however, have rarely recognized this assertion.

B. Judicial Consideration

Since the enactment of the CFTCA, there has been only minimal judicial consideration of the availability of private fraud remedies under the securities statutes in cases involving commodity-security transactions. Although courts addressing the issue have not presented elaborate analyses, four general responses have emerged. Some courts have overlooked the potential abolition of the applicability of the securities laws to commodities transactions and have simply decided whether a security exists. Other courts have combined their analyses of the existence of a security with an examination of the potential ousting of the securities laws by the CFTCA and have concluded that a security was not present in the commodity transaction before them. A third group has held that the exclusive regulatory jurisdiction of the CFTC has rendered the securities statutes wholly inapplicable. Finally, some courts have concluded that with respect to private actions under the securities statutes, the CFTC's regulatory jurisdiction is non-exclusive.

Courts in the first group have continued to canvass the pre-CFTCA dispute³⁴ about whether certain commodity-security transactions are securities without acknowledging the potential preemption of the securities statutes by the exclusive jurisdiction clause.³⁵ For example, in *Curran v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*,³⁶ the Sixth Circuit was faced with actions for fraud

³³ In recent years, the Supreme Court has demonstrated a restrictive attitude towards the implication of private rights of action. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Judge Mansfield in his dissent in *Leist*, 2 COMM. FUT. L. REP. at 24,190 (Mansfield, J., dissenting), applied this limiting trend and concluded that private actions under the CEA are no longer available since Congress, in amending the CEA by the CFTCA in 1974, failed to mention the existence of such implied actions. *Id.* at 24,194. Regardless of the correctness of Judge Mansfield's analysis of the availability of private actions under the CEA, his reasoning is inapplicable to the issue of the continued availability of private actions under the securities statutes in commodity-security transactions. Since Congress was amending the CEA, and not the securities statutes, it had no occasion or need to reiterate its approval of implying private actions under the securities laws. Indeed, it would distort greatly the legislative process and the doctrine of implied rights to require Congress to preserve expressly implied remedies under statutes other than the one it was amending. Thus, the availability of private remedies under the securities statutes in commodity-security transactions should not be jeopardized because Congress failed to demand unequivocally their retention during its consideration of the CFTCA.

³⁴ See note 13 *supra*.

³⁵ See, e.g., *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 219-22 (6th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3053 (Aug. 9, 1980); *Moody v. Bache & Co., Inc.*, 570 F.2d 523, 525-27 (5th Cir. 1978); *Meredith v. Conti Commodity Services, Inc.*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,107, at 24,460-63 (D.D.C. 1980); *Poplar Grove Pltg. & Ref. Co. v. Bache, Halsey, Stuart, Inc.*, 465 F. Supp. 585, 588-91 (M.D. La. 1979); *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447, 448-54 (N.D. Ohio 1976); *E.F. Hutton & Co. v. Lewis*, 410 F. Supp. 416, 417-20 (E.D. Mich. 1976).

³⁶ 622 F.2d 216 (6th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3053 (Aug. 9, 1980).

under the securities statutes by investors in discretionary trading accounts.³⁷ The court upheld the district court's dismissal of the investors' claims on the grounds that the transactions in question did not involve securities.³⁸ Nowhere did the Sixth Circuit address the potential termination of the applicability of the securities laws to commodity-security transactions.

The willingness of the court in *Curran* as well as other courts in this group to discuss whether certain transactions in commodity futures are securities indicates that they do not view the securities statutes as being ousted where an investment contract can be demonstrated. Since these courts have proceeded directly to the merits, they evidently recognize the continued availability of private actions under the securities statutes. In contrast, those courts concluding that the CFTCA terminated the applicability of the securities statutes have recognized that it is irrelevant whether a challenged futures transaction is also an investment contract.³⁹

A second group of courts has addressed the issue of what effect the enactment of the CFTCA had upon private actions under the securities statutes.⁴⁰ Their analysis, however, has succeeded only in further confusing the issue. For example, in *E.F. Hutton & Co., Inc. v. Schank*,⁴¹ the court examined whether a discretionary trading account in commodity futures was a security within the meaning of the federal securities laws.⁴² The court discussed the test for an investment contract, or security,⁴³ as well as the jurisdictional conflict,⁴⁴ and concluded that a security was not involved.⁴⁵ In justifying its conclusion, this court, as well as others in this group,⁴⁶ emphasized both the ongoing jurisdictional dispute and the existence of a comprehensive regulatory scheme under the commodities statutes. Thus, without explicitly stating that the CFTCA requires narrowing the definition of security they limited its meaning on just that impetus.

Courts in the third group which have grappled with the impact of the CFTCA upon private actions under the securities statutes have provided only

³⁷ *Id.* at 218-19.

³⁸ *Id.* at 220-24.

³⁹ *See, e.g., Bartels v. International Commodities Corp.*, 435 F. Supp. 865, 868-79 (D. Conn. 1977).

⁴⁰ *See Fischer v. Rosenthal & Co.*, 481 F. Supp. 53, 54-55 (N.D. Tex. 1979); *E.F. Hutton & Co., Inc. v. Schank*, 456 F. Supp. 507, 512-14 (D. Utah 1976).

⁴¹ 456 F. Supp. 507 (D. Utah 1976).

⁴² *Id.* at 512.

⁴³ *Id.* at 512-13.

⁴⁴ *Id.* at 513.

⁴⁵ *Id.* at 514.

⁴⁶ *See, e.g., Berman v. Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311, 319-20 (S.D. Ohio 1979); *E.F. Hutton & Co., Inc. v. Schank*, 456 F. Supp. 507, 514 (D. Utah 1976) ("Congress did not intend that a commodities account be a security . . ."). *Cf. R.J. Hereley & Son Co. v. Stotler & Co.*, 466 F. Supp. 345 (N.D. Ill. 1979), where the court, in considering whether a private action exists for violations of the CEA, held that the exclusive jurisdiction of the CFTC did not preclude such private actions. The court concluded that "[T]he reference to the Commission's exclusive jurisdiction was merely intended to remedy the confusion about whether certain types of commodities transactions came within the definition of a security . . ." *Id.* at 347. In adopting the CFTCA, Congress expressly refused to narrow the definition of security in this manner. *See text and note at note 99 infra.*

marginal insight into the problem, concluding quickly that the securities laws were wholly inapplicable. In *Bartels v. International Commodities Corp.*,⁴⁷ for example, the court summarily dismissed fraud claims brought under the securities statutes in an alleged commodity-security transaction.⁴⁸ The court examined portions of the legislative history of the CFTCA which discussed the intention to eliminate direct control by the SEC over the commodities industry⁴⁹ and concluded that "... Congress has made it clear that it does not intend the securities laws to apply to commodity transactions."⁵⁰ The *Bartels* court, like others in this group,⁵¹ viewed the CFTC jurisdictional proviso as prohibiting any relief from fraud under the securities laws in commodity-security transactions. The court made no distinction between the explicit removal of SEC jurisdiction and the court's implied extinguishing of private investors' claims.⁵²

These courts in the third group apparently assumed that private actions serve no purpose separate from regulation and are no different in nature than regulatory actions.⁵³ A fourth group of courts, however, has recognized a distinction between private actions and regulatory provisions.⁵⁴ For example,

⁴⁷ 435 F. Supp. 865 (D. Conn. 1977).

⁴⁸ *Id.* at 866 & n.1.

⁴⁹ *Id.* at 868-70, referring to H.R. REP. NO. 93-975, 93d Cong., 2d Sess. 7 (1974); H.R. REP. NO. 94-122, 94th Cong., 1st Sess. 8 (1975).

⁵⁰ *Id.* at 869.

⁵¹ See, e.g., *Fairchild Arabatziz & Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd.*, 470 F. Supp. 610 (S.D.N.Y. 1979), where the court followed exactly the reasoning in *Bartels* but offered no analysis. *Fairchild* involved a suit under the securities statutes for alleged fraud regarding certain commodity options. *Id.* at 612. No insight beyond the recitation of the *Bartels* decision was proffered in the court's dismissal of the securities claims. *Id.* at 614.

⁵² In *Gonzales v. Paine, Webber, Jackson & Curtis*, [Current] FED. SEC. L. REP. (CCH) ¶ 97,561 (S.D.N.Y. 1980), the court endorsed the conclusion in *Bartels* and held that exclusive CFTC regulatory authority necessarily dictates that both securities and commodities statutory remedies were extinguished. The court then dismissed all of the plaintiff's claims for fraud under both the CEA and the securities laws, *id.* at 97,944, concluding that the existence of a "plethora of private actions," *id.* at 97,944 (quoting *Berman v. Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311, 323 (S.D. Ohio 1979)), would deprive the CFTC of the opportunity to build a strong regulatory policy. Finally, in *Hofmayer v. Dean Witter & Co., Inc.*, 459 F. Supp. 733 (N.D. Cal. 1978), the court similarly offered cursory reasoning in dismissing a plaintiff's fraud claims under both the securities statutes and the CEA. *Id.* at 735. The court reasoned that such actions should not remain available due to "Congress' plainly stated intent to have the Commodity Exchange Act, as amended, preempt the field of regulation of commodity futures trading . . ." *Id.* at 737.

⁵³ But see *Witzel v. Chartered Systems Corp. of New York, Ltd.*, 490 F. Supp. 343 (D. Minn. 1980), wherein the court remarked that "[i]t logically follows that the Act preempts private actions based on federal or state statutory schemes which contemplate agency regulation which would interfere with the CFTC's jurisdiction over commodity options." *Id.* at 347. Therefore, since these actions do not trigger agency involvement, they should remain available. See text and notes at 113-14 *infra*.

⁵⁴ See, e.g., *Navigator Group Funds v. Shearson Hayden Stone, Inc.*, 487 F. Supp. 416, 425-26 (S.D.N.Y. 1980) (the court suggested that a private action for violation of the securities statutes may still exist in a commodities situation); *Searsy v. Commercial Trading Corp.*, 437 SEC. REG. & L. REP. (BNA) A-10, A-11 (1-25-78) (Tex. 1977) (the court concluded that private suits under state securities laws may be available).

in *Mullis v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*,⁵⁵ the court concluded that although "there can be no private liability actions based on SEC rules or regulations," suits under the securities statutes still would be allowed.⁵⁶ The court resolved, though curtly, that the legislative history clearly separated the issues of agency and court jurisdiction and that allowing private actions under the securities statutes was necessary to implement congressional intent.⁵⁷ The court in *Mullis* reasoned that just as Congress intended to provide the CFTC with exclusive jurisdiction to achieve regulatory supremacy, it also intended that private investors maintain and obtain maximum protection under both federal statutes. Consequently, the jurisdiction of the courts to entertain private actions under the securities statutes was preserved.⁵⁸

In *SEC v. G. Weeks Securities, Inc.*,⁵⁹ the court adopted a novel approach — different from any of the judicial responses discussed in the four preceeding groups — to the CFTCA jurisdictional issue. In order to avoid the jurisdictional barrier, the court ruled that the commodity-security transaction in question⁶⁰ simply was not a commodity.⁶¹ Regardless of the correctness of the court's decision, its refusal to follow the trend of deciding that any transaction involving both a commodity and a security will be labelled a commodity due to the exclusive jurisdiction provisions of the CFTC is important. The court's seeming disregard for congressional intent to incorporate a broad definition of commodity might be better understood if viewed as evidence of frustration with the excessively broad scope given the CFTC's exclusive control over any kind of transaction even slightly resembling a commodity.

Court decisions on the availability of private commodities fraud actions under the securities statutes have not resolved the issue. Instead, they have ignored the potential jurisdictional obstacle or used congressional intent to terminate SEC jurisdiction to extinguish private actions under the securities laws. Although several courts have recognized the possibility of a distinction between private actions and SEC power, their numbers and reasoning are insufficient to surmount the growing controversy.

II. LEGISLATIVE HISTORY OF THE EXCLUSIVE JURISDICTION CLAUSE

The language of the CFTCA regarding the fate of private actions for fraud under the securities statutes is ambiguous. Thus, the legislative history must be examined to discern congressional intent with respect to the retention of such actions in commodity-security transactions.⁶² The legislative history of the CFTCA, much like the statute's provisions, nowhere reveals an express intent

⁵⁵ 492 F. Supp. 1345 (D. Nev. 1980).

⁵⁶ *Id.* at 1350. See also text and notes at notes 113-14 *infra*.

⁵⁷ *Id.* at 1350-51, referring to S. REP. NO. 93-1131, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843, 5848; H. CONF. REP. NO. 93-1383, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5894, 5897.

⁵⁸ 492 F. Supp. at 1351.

⁵⁹ 483 F. Supp. 1239 (W.D. Tenn. 1980).

⁶⁰ *Id.* at 1241.

⁶¹ *Id.* at 1244-45.

⁶² *Leist v. Simplot*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051, at 24,180 (2d Cir. 1980), cert. granted sub. nom. *Heinold Commodities, Inc. v. Leist*, 49 U.S.L.W. 3595 (Feb. 24, 1981).

to terminate the continued availability of the securities statutes to private commodities investors.⁶³ Therefore, since Congress failed to address this issue, an understanding of legislative intent regarding these private actions must be gleaned from a discussion of both the future role of the SEC in regulating futures trading and the meaning of the court jurisdictional saving clause⁶⁴ in section two of the CFTCA. It will be submitted that Congress, rather than expressing a desire to oust the availability of private remedies for fraud under the securities statutes, intended that they were to remain available to investors in commodity-security transactions.

The overreaching goal of the CFTCA was "to amend the Commodity Exchange Act to strengthen the regulation of futures trading."⁶⁵ One form of commodities regulation, however, was clearly terminated — the power of the SEC to regulate any security transaction which also included a commodity within the purview of the CFTC's exclusive jurisdiction.⁶⁶ This ejection of the SEC from the field of commodities regulation occurred only after much discussion. The House Committee on Agriculture, which initiated the 1974 amendments, prepared a draft bill,⁶⁷ which not only expanded the definition of commodity and created a new and independent CFTC, but also contained an express protection of the jurisdiction of the SEC. Specifically, the bill stated:

Provided, That nothing contained in this Act shall preclude the Securities and Exchange Commission from carrying out its duties and responsibilities in accordance with the laws of the United States under which it was established and currently functions.⁶⁸

No other agency was explicitly mentioned in the House committee bill nor is there any evidence of the reasons behind this provision's inclusion. The SEC itself neither testified at, nor submitted materials for, any of the hearings on the CFTCA.⁶⁹ Witnesses opposed to SEC jurisdiction, including the Chicago Board of Trade and several exchanges, however, quickly vocalized their disfavor with any SEC involvement in commodities trading.⁷⁰ Subsequently, the House committee revised the bill, presumably to clarify its jurisdictional provisions.⁷¹ This alteration, however, not only vested the CFTC with exclusive jurisdiction but also expanded the jurisdictional saving clause to encom-

⁶³ See, e.g., S. REP. NO. 93-1131, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843; H. CONF. REP. NO. 93-1383, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5897.

⁶⁴ See text at note 27 *supra*.

⁶⁵ *Hearings on S. 2485, S. 2578, S. 2837 & H.R. 13113, Before the Senate Comm. on Agriculture & Forestry*, 93d Cong., 2d Sess. 125 (1974) [hereinafter cited as *Hearings on 13113*].

⁶⁶ See note 16 *supra*.

⁶⁷ H.R. 11955, 93d Cong., 2d Sess. (1974).

⁶⁸ *Hearings on 11955*, *supra* note 6, at 348.

⁶⁹ Johnson, *supra* note 5, at 10 & n.28.

⁷⁰ *Hearings on 11955*, *supra* note 6, at 168 (statement of Chicago Board of Trade); *id.* at 105, 113-14 (statement of Chicago Mercantile Exchange); *id.* at 249, 253 (statement of New York Coffee & Sugar Exchange, Inc.; Commodity Exchange, Inc.; New York Cocoa Exchange, Inc.); *id.* at 322 (statement of Continental Grain Co.).

⁷¹ Johnson, *supra* note 5, at 11.

pass other agencies.⁷² The committee report on the bill explained that under this provision, the SEC and other agencies were divested of jurisdiction with respect to any interests or transactions involving commodities, regardless of whether the transactions otherwise came within the agency's jurisdiction.⁷³ The House report made no mention, however, about the continued applicability of the statutory provisions under which these agencies operate.

At the Senate committee level, although similar attention was devoted to limiting the power of the SEC, the fate of private actions under the securities statutes was not discussed. In particular, the Senate version of the exclusive jurisdiction clause, prepared by the Senate Agriculture & Forestry Committee, inserted the phrase "except as hereinabove provided"⁷⁴ in an effort to incorporate the House committee report's limitations on the SEC's and other agencies' powers. In addition, the Senate committee also inserted the court jurisdictional saving clause providing that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State."⁷⁵ Thus, the Senate committee appeared to extinguish SEC and agency jurisdiction while introducing a new twist to the jurisdictional melee, namely, the court jurisdictional saving clause.⁷⁶ The exact scope of the court jurisdic-

⁷² *Hearings on 13113*, *supra* note 65, at 140-41. The House Committee's revision stated: *Provided*, That the Commission [CFTC] shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market: *And provided further*, That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States.

Id.

⁷³ See Johnson, *supra* note 5, at 12.

⁷⁴ S. REP. NO. 93-1131, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5870.

⁷⁵ *Id.*

⁷⁶ The origin of this express retention of court jurisdiction appears to be testimony of Representative Peter W. Rodino, Chairman of the House Committee on the Judiciary, before the Senate Agriculture & Forestry Committee. *Hearings on 13113*, *supra* note 65, at 257-62. He emphasized the advisability of ensuring that court jurisdiction to hear contract and commercial law claims and to review CFTC decisions be preserved. *Id.* at 260. Chairman Rodino also stressed the importance of defining the extent to which other statutory provisions, such as the antitrust laws, were to apply. *Id.* Chairman Rodino commented:

In addition, this double proviso could possibly be read as an attempt to oust even the federal courts of jurisdiction. The first proviso confers "exclusive jurisdiction. The first proviso confers "exclusive jurisdiction" on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts.

.....
If it appears advisable to retain rather than to delete the double proviso of Section 201(B) . . . it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions.

Id. Chairman Rodino's suggestions obviously were acted upon by the Senate committee.

tional saving clause, however, was defined neither by the Senate report nor by committee members' testimony.⁷⁷ The report clarified that agencies no longer would exercise jurisdiction over any transaction falling within the scope of the CFTC's exclusive jurisdiction.⁷⁸ Nevertheless, the language of the report and the Senate's revised text of section 201(B) did not eliminate the applicability of the statutes under which these agencies operate nor the vitality of private actions pursuant to these statutes.⁷⁹ Instead, the court jurisdictional saving clause implicitly suggests that courts may continue to exercise jurisdiction over claims which they previously had jurisdiction to hear.

In debate on the bill before the full Senate, Chairman Talmadge shed light on the purposes behind the court jurisdictional saving clause. He commented:

In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities — exchanges, traders, customers, et cetera — will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws. . . .⁸⁰

Chairman Talmadge thus assured the Senate that existing laws were to remain applicable. Although he recites only the antitrust laws by name, his use of the words "such as" strongly suggests that other provisions, including the securities statutes, were also to retain force. Another comment made by Chairman Talmadge on the Senate floor suggests that the court jurisdictional saving clause had a more limited purpose than preserving private rights of action. He remarked:

⁷⁷ Cf. *Leist v. Simplot*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 at 24,183 (2d Cir. 1980), cert. granted sub nom. *Heinold Commodities, Inc. v. Leist*, 49 U.S.L.W. 3595 (Feb. 24, 1981) ("While Chairman Rodino's remarks were focussed on antitrust jurisdiction, they were not limited to that. He argued generally that federal courts retained jurisdiction, and cited antitrust jurisdiction as an example supporting this view. Other objections to the exclusive jurisdiction provisions of the House bill were explicitly addressed to the preservation of private rights of action.").

⁷⁸ H. CONF. REP. NO. 93-1383, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5894, 5897. The Report stated:

The House bill provides for exclusive jurisdiction of the Commission [CFTC] over all futures transactions. However, it is provided that such exclusive jurisdiction would not supersede or limit the jurisdiction of the Securities and Exchange Commission or other regulatory authorities.

The Senate Committee amendment retains the provision of the House bill but adds three clarifying amendments. The clarifying amendments make clear that (a) the Commission's jurisdiction over futures contract markets or other exchanges is exclusive and includes the regulation of commodity accounts, commodity trading agreements, and commodity options; (b) the Commission's jurisdiction, where applicable, supersedes State as well as Federal agencies; and (c) Federal and State courts retain their respective jurisdictions.

Id.

⁷⁹ See text and note at note 18 *supra*.

⁸⁰ 120 CONG. REC. 30459 (1974) (remarks of Sen. Talmadge).

The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved.⁸¹

While it is possible that this statement indicates that the jurisdictional saving clause was intended to preserve judicial review of agency action and that the reparations proceedings before the CFTC were intended to be the exclusive remedies for defrauded investors,⁸² such an interpretation ignores Senator Talmadge's choice of words. Indeed, in *Leist v. Simplot*⁸³ Judge Friendly recognized the significance of Chairman Talmadge's language. He noted that if the reparations procedure were intended to be the only remedy then "it *certainly* would lighten the burden on the courts of appeals" but emphasized that "the Senator spoke in terms of 'hope' and lightening the burden 'somewhat' — as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts."⁸⁴ Hence, Chairman Talmadge's comments support the continued applicability of private rights under the securities statutes.

The Conference committee's discussion of the court jurisdictional saving clause sheds further light upon the ramifications of its inclusion. The Senate version, with a minor exception, prevailed at Conference.⁸⁵ The Conference report⁸⁶ explained the Conference committee's adoption of the Senate version of the measure, specifically addressing a clause in the Senate bill eliminating the last sentence of section 4c of the Commodity Exchange Act,⁸⁷ which had expressly reserved the applicability of state law. To explain the Conference committee's elimination of continued state authority the report emphasized the importance of federal supremacy in commodities regulation. It stated:

Under the exclusive grant of jurisdiction to the Commission, the authority in the Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned. Therefore, if any substantive State law regulating futures trading was contrary to or inconsistent with

⁸¹ *Id.*

⁸² *See, e.g., Leist*, 2 COMM. FUT. L. REP. at 24,212 n.19 (Mansfield, J., dissenting); Johnson, *supra* note 5, at 32-33.

⁸³ 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 (2d Cir. 1980), *cert. granted sub nom.* Heinold Commodities, Inc. v. Leist, 49 U.S.L.W. 3595 (Feb. 24, 1981).

⁸⁴ *Id.* at 24,182 (emphasis in original).

⁸⁵ The only deviation was that the Conference committee accepted the House committee's extension of CFTC exclusive jurisdiction to include all domestic and foreign commodity markets rather than the Senate's narrower limitation to "contract markets." Johnson, *supra* note 5, at 17.

⁸⁶ H. CONF. REP. NO. 1383, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5894.

⁸⁷ *Id.* at 5897.

Federal law, the Federal law would govern. In view of the broad grant of authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States.⁸⁸

Notably, the report did not advocate a similar fate for federal statutory provisions which might affect commodities transactions. Rather, the report emphasized that "federal," and not state, law will govern. This interpretation is in accord with Chairman Talmadge's desire to insure that other substantive federal laws would remain applicable.⁸⁹

The Conference committee's version of H.R. 13113 was presented to the House floor in October of 1974. At that time, Representative Poage, Chairman of the Conference committee, offered comments focusing upon the future role of the SEC in regulating commodities futures.⁹⁰ Chairman Poage, however, did not discuss the implications of the court jurisdictional saving clause. Although he indicated the pending SEC investigations against abuses not previously covered by the CEA would be allowed to continue, he did not rely upon the court jurisdictional saving clause to buttress his remarks. Instead, he explained that a separate provision, section 412,⁹¹ had been included to insure that all pending proceedings and investigations would continue.⁹² Since, according to Chairman Poage, section 412 was introduced to preserve pending agency actions, the purpose of the court jurisdictional saving clause cannot be narrowed to this concern. Furthermore, although Chairman Poage indicated that future actions by state and federal agencies including the SEC would be precluded under the CFTCA, he did not extend this analysis to suits brought by private individuals. Hence, Chairman Poage's construction eliminating agency proceedings, other than pending suits, should not be extended to terminate the availability of private actions under the securities statutes.

⁸⁸ *Id.*

⁸⁹ See text at note 80 *supra*.

⁹⁰ 120 CONG. REC. 34737 (1974) (remarks of Rep. Poage).

⁹¹ *Id.* The section 4a note, codifying section 412 of Pub. L. 93-463, 7 U.S.C. § 4a (1976), provides: "Pending proceedings under existing law shall not be abated by reason of any provision of this Act . . . but shall be disposed of pursuant to the applicable provisions of the Commodity Exchange Act, as amended . . . , in effect prior to the effective date of this Act" *Id.*

⁹² 120 CONG. REC. 34737 (1974) (remarks of Rep. Poage). Chairman Poage commented:

In addition, the conferees wished to make clear that nothing in the act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC. Congress was aware that there have been ongoing efforts by various State and Federal regulators to prevent some of these abuses. Accordingly, section 412 was included in the bill to make clear that all pending proceedings, including ongoing investigations, as well as court proceedings, should continue unabated by any provision of the act . . . We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this act.

Id.

A final allusion to the meaning of the court jurisdictional saving clause can be found in the report of the Senate Agriculture & Forestry Committee⁹³ on H.R.J. Res. 335.⁹⁴ This joint resolution was prepared by the House and the Senate, after the CFTCA was signed into law,⁹⁵ to extend the CFTC's deadlines to accomplish certain statutory mandates.⁹⁶ The Senate report stated specifically that state criminal antifraud laws were to remain applicable to commodities transactions:

The Committee realizes that many fraudulent schemes are devised to prey on the unsuspecting and unsophisticated investor. In many case, [sic] these schemes purport to deal in commodities trading. The States are encouraged to continue to utilize their criminal antifraud statutes to discourage such schemes.⁹⁷

Although these state criminal antifraud provisions are mentioned expressly in the legislative history while the federal securities statutes are not, this omission is not dispositive of the fate of private actions under the securities statutes for two reasons. First, since the Conference committee's report expressly provided that state law was preempted,⁹⁸ Congress may have felt compelled to refer specifically to the retention of the state antifraud statutes to ensure their continued applicability. In contrast, there was no express termination of the applicability of the federal statutory actions. Therefore, Congress probably perceived no need to mention explicitly their preservation. Second, since these state criminal antifraud statutes require the utilization of state agency enforcement mechanisms, their preemption, in light of the grant of exclusive regulatory authority to the CFTC, was probably certain to occur absent a clear statement to the contrary. In contrast, the private remedies for fraud under the securities statutes do not activate any agency proceedings. Thus, their termination is not required.

Other considerations supporting the continued availability of private actions under the securities laws appear in the legislative history of the CFTCA as well. For example, Congress refused to adopt several proposals that would have expressly denied the applicability of securities concepts to the commodities industry.⁹⁹ These proposals provided that what is a commodity cannot also be a security. Their adoption would have extinguished both the SEC's and

⁹³ S. REP. NO. 94-73, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 143, 147.

⁹⁴ H.R.J. Res. 335, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 77.

⁹⁵ On October 24, 1974, the text of H.R. 13113, as prepared by the Conference committee, was signed into law by the President. Pub. L. No. 93-463 (1974). *See Johnson, supra* note 5, at 19. Although the Act was to be operational on April 21, 1975, there was a delay in naming candidates to serve as commissioners of the CFTC. 121 CONG. REC. 9243 (1975).

⁹⁶ S. REP. NO. 94-73, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 143, 147 (1975).

⁹⁷ *Id.*

⁹⁸ *See text at note 88 supra.*

⁹⁹ *See Hearings on 13113, supra* note 65, at 715 (statement of Harold J. Heinold, President, Heinold Commodities, Inc., on futures and managed or discretionary accounts), 751

private parties abilities to sue under the securities statutes. By not pursuing this course, Congress indicated that securities concepts were to retain relevance and that private remedies under the securities laws were to continue. Another example in the legislative history supporting the survival of private actions under the securities statutes emerges from the prevalence of these private actions prior to the adoption of the CFTCA. As Judge Friendly commented in *Leist v. Simplot*: "Congress was not only aware of the implied right of action under the CEA in 1974, . . . but surely was also aware of the private right of action recognized in the analogous field of securities regulation."¹⁰⁰ The specific language of the CFTCA provides another example supporting the continued applicability of the securities laws. The CFTCA now grants exclusive jurisdiction to the CFTC over accounts, agreements, and transactions, but not over individuals.¹⁰¹ The statutory language thus supports the conclusion that persons were not to be exempted from existing statutory provisions.¹⁰² Finally, since the private rights of action under the securities statutes in commodity-security transactions existed prior to the enactment of the CFTCA, a strong argument exists that their extinction occurred only if Congress manifested an explicit intention to eliminate them.¹⁰³

Thus, the legislative history of the CFTCA does not militate against allowing private actions for fraud under the securities laws to continue to be available to investors in commodity-security transactions. Instead, comments calling for preservation of the applicability of federal statutes and state general antifraud provisions support the conclusion that the securities actions for fraud ought also to survive the enactment of the CFTCA. Although SEC power was terminated, the Congress which devised the CFTCA did not project a similar destiny for private remedies under the securities laws. Therefore, these actions should be upheld by the courts.¹⁰⁴

IV. PRIVATE SECURITIES REMEDIES AND CFTC JURISDICTION: COMPATIBLE GOALS

While the legislative history of the CFTCA supports the proposition that private investors should retain the ability to initiate damage actions for fraud

(statement of M. Martin Rom, Chairman of the Board, International Precious Metals Corp., on futures, forwards, commodity margin accounts, and other commodity investments), 796 (statement of Dr. Henry G. Jarecki, Chairman of the Board, Mocatta Metals Corp., on futures and options). See also BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (471) at 82.384.

¹⁰⁰ *Leist*, 2 COMM. FUT. L. REP. (CCH) at 24,169 n.14.

¹⁰¹ 7 U.S.C. § 2 (1976).

¹⁰² See Schroeder & Pollack, *Commodities Regulation*, 8 REV. OF SEC. REG. 937, 938 (1975).

¹⁰³ See Hewitt, *supra* note 3, at 319 & n.161, 324 (citing H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING & APPLICATION OF LAW* 1412-13 (10th ed. 1958)); BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (470-86), at 82.381-431. See also *United States v. Abrahams*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,926-27 (S.D.N.Y. 1980) (concluding that repeal by implication was not favored); *accord*, *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 24 (1976).

¹⁰⁴ *Cf. Leist*, 2 COMM. FUT. L. REP. at 24,181 ("It is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind.").

under the securities laws, policy arguments also support this conclusion. The lack of a threat to CFTC power, the usefulness of the securities laws in this context, and the similarity between the statutory schemes reveals that retaining private securities suits is a goal compatible with the CFTCA grant of exclusive jurisdiction. The CFTCA appears to have four dominant purposes: expanding the definition of commodity to encompass nonagricultural interests;¹⁰⁵ replacing the ineffective Commodity Exchange Authority with a strong, independent federal agency, the CFTC;¹⁰⁶ strengthening and modernizing regulatory controls of the industry;¹⁰⁷ and, eliminating the mounting potential for defrauding investors in the futures markets.¹⁰⁸ None of these goals standing alone appears to have been the *sine qua non* of the CFTCA to the Congress which passed it. Nevertheless, the intention to centralize the regulation of commodity futures in the CFTC and the desire to increase available remedies for defrauded investors appear to have been the principal concerns to Congress.¹⁰⁹ Private actions for fraud under the securities statutes, however, do not necessarily conflict with such goals of exclusive regulatory jurisdiction and more extensive remedies. Indeed, they clearly further the purpose of eliminating fraud in the commodities industry. To the extent that private damage actions may be found to transgress the boundaries of the CFTC's jurisdiction, the desirability of strengthening investor remedies in the commodities industry outweighs the interest in giving the CFTC absolute authority to dictate all futures trading policies.¹¹⁰

¹⁰⁵ See Hewitt, *supra* note 3, at 296; S. REP. NO. 93-1131, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843, 5870.

¹⁰⁶ See generally Johnson, *supra* note 5. See also Hewitt, *supra* note 3, at 296-98.

¹⁰⁷ See generally Johnson, *supra* note 5. See also Leist, 2 COMM. FUT. L. REP. at 24,167 and 24,180.

¹⁰⁸ See Leist, 2 COMM. FUT. L. REP. at 24,186 ("In the case of the [Commodity Exchange Act] we have found abundant evidence in the legislative history that the intent to protect traders in the commodity futures was the dominant purpose (of the CFTCA) . . ."); Note, *The Commodities Game Has A New Referee*, 52 CHI.-KENT L. REV. 438, 459 (1975). The Note suggested:

the argument . . . that Congress did not intend to deprive private persons of a remedy is clearly a stronger one now The legislative history of the CFTCA indicates that the purpose of Congress was to further protect the exchange customer, not to deprive him of protection. The proviso in the Act that the jurisdiction of state and federal courts is not superseded supports the presumption that the customer was intended to be further protected by the Act.

Id. at 459 (footnotes omitted). See also *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977) ("the Act [the original CEA and the CFTCA] itself . . . was [enacted] for the protection of investors"); Note, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. REV. 804, 826 (1975) ("the statute's clear purpose — to increase existing protection of commodities futures investors").

¹⁰⁹ See notes 106 & 108 *supra*.

¹¹⁰ See BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (482), at 82.424:

Application of securities fraud standards to commodity investments imposes a compliance burden on the commodity industry — to the undetermined extent that securities fraud standards are higher than or different from commodity fraud standards. . . . But we think this is outweighed by the desirability of affording commodity investors the benefit of the more fully developed securities law standards when their commodity investment are securities by traditional tests.

A. *Private Actions vs. Exclusive Regulatory Jurisdiction*

The Senate Report for the 1978 amendments to the CEA stated that the CFTC "was created in order to assure that a single expert agency would have the responsibility for developing a coherent regulatory program encompassing futures trading and related activities."¹¹¹ Maintaining private actions under the securities statutes does not conflict with this specific purpose of exclusive regulatory jurisdiction.¹¹² The first reason for the lack of conflict is that only actions for fraud under the securities statutes and not those for failure to register would remain available.¹¹³ Since the registration actions originate from a requirement that entails the activation of SEC machinery, they were necessarily extinguished with the grant of exclusive regulatory jurisdiction to the CFTC. Just as the SEC has no authority either to regulate traders if they do register, or to compel registration, a private party likewise cannot bring suit for failure to comply with the registration provisions. The regulatory machinery of the SEC is not implicated, however, in private actions for fraud. Accordingly, no SEC conflict with the CFTC will result from such actions.¹¹⁴

The distinctive nature of fraud issues as compared with regulatory concerns supports the continued availability of private actions under the securities statutes. The basis of a defrauded investor's challenge is not that he desires additional or different regulatory practices. It is that he be compensated for injury caused by illegal conduct. Such a concern is adjudicatory in nature, not regulatory, and is consequently in less need of exclusive control by a single agency or a single statutory framework.¹¹⁵ The fraud provisions are thus

¹¹¹ S. REP. NO. 95-850, 95th Cong., 2d Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2087, 2101.

¹¹² This note does not discuss in detail the extent to which commodity transactions are or ought to be securities. See text and note at note 13 *supra*. Instead, the analysis will focus upon to what extent the securities laws should apply, where a security exists, to commodity-security transactions.

¹¹³ BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (482), at 82.424 ("... Senate witnesses urging exclusive jurisdiction ... almost uniformly expressed concern about liability for failure to register under the securities laws, but none expressed concern about being subjected to securities fraud standards"); Bromberg, *Securities Law — Relationship to Commodities Law*, 35 BUS. LAW. 787, 795 n.26 (1980).

¹¹⁴ It has been suggested that the exclusive jurisdiction clause of the CFTCA requires that only the securities statutes and not SEC rules or regulations remain applicable in private actions under the securities laws. See *Mullis v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 492 F. Supp. 1345, 1350 (D. Nev. 1980); Bromberg, *Securities Law — Relationship to Commodities Law*, 35 BUS. LAW. 787, 795 n.28 (1980). A valid distinction may be drawn, however, between rules interpreting statutory provisions that are of general applicability, such as 17 C.F.R. § 240.10b-5, and rules or regulations more specific in nature adopted pursuant to 15 U.S.C. § 78w(a) (1976). Courts may consider broad interpretative SEC rules in adjudicating liability under the antifraud provisions of the securities acts; however, they would not be bound by the rules' standards due to Congress' decision to prevent the SEC from exercising control over futures trading. Furthermore, courts are probably obligated, in light of the CFTCA's exclusive jurisdiction provision, to disregard any pronouncements by the SEC that attempt to create special classes of rules for the conduct of commodity-security transactions. This requirement evolves from Congress' determination that the SEC may not regulate futures trading; therefore, it may not do indirectly — through rulemaking authority — what it cannot do directly.

¹¹⁵ See text and notes at notes 120-21 *infra*.

distinguishable from the registration and other managerial provisions of the securities statutes. Similarly, the adjudicatory nature of antifraud actions suggest that reliance upon an exclusive statutory framework was not intended by Congress. While it is evident that Congress sought to promote administrative efficiency through one agency in enacting the CFTCA,¹¹⁶ Congress did not simultaneously intend to limit the reach of antifraud provisions of other legislation. Indeed, it expressly reserved the applicability of state criminal fraud statutes while preempting many other state statutory provisions.¹¹⁷ Since Congress retained the applicability of *all* federal statutes to the commodities industry,¹¹⁸ the availability of the antifraud provisions of the securities laws should not be abolished. To do so would allow defendants to escape liability under the securities accounts. Such action would clearly thwart the goal of the CFTCA and the purposes of the federal securities laws.

The need for judicial resolution of fraud issues, as distinguished from other regulatory concerns, has been recognized both by Congress and the CFTC in other situations. The Securities Act of 1933 allows certain securities to be exempted from the registration requirements thereunder,¹¹⁹ but such securities remain subject to the antifraud provisions of the securities acts. Likewise the CFTC has acknowledged the necessity for and validity of judicial resolution of fraud issues — notwithstanding its exclusive regulatory jurisdiction.¹²⁰ In furtherance of this policy, the CFTC has declared that it would not intervene in fraud actions instituted in federal court.¹²¹ Thus, within both the securities and commodities fields, private actions for fraud have retained importance independent of surrounding regulatory procedures. Accordingly, maintaining private actions for fraud under the securities statutes in commodity-security transactions can allow fraud issues, appropriate for

¹¹⁶ See generally S. REP. NO. 93-1131, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5843; H. CONF. REP. NO. 93-1383, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5894.

¹¹⁷ See text and notes at 88 & 97 *supra*.

¹¹⁸ See text and note at note 80 *supra*.

¹¹⁹ 15 U.S.C. § 77c(b) (1976).

¹²⁰ 41 Fed. Reg. 18,471, 18,472 (1976).

¹²¹ 17 C.F.R. § 12.21(a)(7) (1980). See *Leist v. Simplot*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,051 (2d Cir. 1980), cert. granted sub nom. *Heinold Commodities, Inc. v. Leist*, 49 U.S.L.W. 3595 (Feb. 24, 1981), for a comprehensive discussion of the issues relating to the existence or nonexistence of private remedies under the CEA. See also *Rivers v. Rosenthal & Co.*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,128 (5th Cir. 1980). If the Supreme Court were to find that private remedies under the CEA survived the enactment of the CFTCA then the argument that private remedies do not derogate from the CFTC's exclusive regulatory jurisdiction is strengthened. The private actions for fraud under the CEA serve essentially the same purpose in commodities transactions as do the securities private actions in commodity-security transactions. Thus, if the Supreme Court were to conclude that the CEA actions did not significantly interfere with the exclusive regulatory jurisdiction of the CFTC then a similar conclusion regarding the securities statutes would become more palatable. Valid arguments exist, however, that the CEA actions infringe less extensively upon the CFTC's authority than do actions under the securities statutes since the CEA's standards and the CFTC's interpretation thereof govern in the private actions for fraud under the CEA. Nevertheless, both types of private remedies open the gates for judicial resolution of issues in manners different than the CFTC might have chosen. Thus, the private remedies under the CEA are not substantially less intrusive than those under the securities laws.

judicial resolution, to be litigated without undermining the CFTC's position as the only regulatory agency.

Thus, private remedies for fraud under the securities statutes in commodity-security transactions would not detract significantly from the CFTC's power to exercise exclusive regulatory jurisdiction. Issues appropriate for agency determination, such as the nature and extent of registration requirements, would remain in the CFTC's sole control. In contrast, the determination of particular investors' fraud remedies would be subject to the authority of the courts as well as the CFTC.

B. *Securities Statutes' Unique Value*

The availability of private actions under the securities laws, whether or not such rights are available under the CEA,¹²² will help effectuate the congressional goals of eliminating fraud and strengthening remedies for defrauded investors. Suits by individuals under the securities statutes increase the number of enforcement actions and help decrease the agencies' caseload. Although the reparations proceedings before the CFTC are vast improvements over previous remedies under the CEA, one agency simply cannot effectively remedy all of the fraudulent undertakings in the famously scandalous commodities industry. Furthermore, there may be some dissatisfaction with the limited reach of the CFTC's reparations procedures. For instance, in *Leist v. Simplot*, Judge Friendly seized on this problem as an indication of the desirability of allowing other remedies.¹²³ These deficiencies in agency remedies are compounded by the CFTC's less than aggressive enforcement practices.¹²⁴ Consequently, extinguishing private remedies would augment the potential for unremedied fraudulent activity, thereby disserving one of the major purposes of the CFTCA.

If a private action were recognized under the CEA, the arguments for retaining the private remedies under the securities statutes would then focus upon subtle but important variations between the securities and commodities laws. The securities statutes and the CEA are replete with similarities.¹²⁵ Nevertheless, in some circumstances the securities laws provide more extensive remedies for the defrauded investor.¹²⁶ Therefore, investors in commodity-

¹²² See note 121 *supra*.

¹²³ *Leist*, 2 COMM. FUT. L. REP. at 24,181.

¹²⁴ See Bromberg, *Securities Law — Relationship to Commodities Law*, 35 BUS. LAW. 787, 788 (1980); Johnson, *supra* note 5, at 42 (commenting upon criticism before 1976).

¹²⁵ See BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (460-69), at 82.361-73; Bromberg, *Securities Law — Relationship to Commodities*, 35 BUS. LAW. 787, 788-90 (1980).

¹²⁶ One noteworthy variation between the two statutory frameworks is that the securities laws provide general service of process and venue sections, while the CEA provides none. BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (462), at 82.373. Such provisions interfere in no way the CFTC's power to define commodity trading policy since they do not address substantive concerns.

The securities statutes' disclosure standards present potential differences as well. *Id.* § 4.6 (462), at 82.367-71 (contrasting the securities statutes' elaborate policies with the CEA's silence regarding disclosure requirements). Although the CFTC has indicated that nondisclosure may serve as a basis for fraud or deceit, 40 Fed. Reg. 26504-06 (1975), it has intimated that due

security transactions which are found to be securities ought to be accorded the most effective remedy. While an argument can be marshalled that discrepancies existing between the CEA and the securities statutes are the product of distinctions between the commodities and securities industries and, therefore, ought to remain,¹²⁷ this argument is inapplicable to commodity-security transactions meeting the traditional test for a security.¹²⁸ As one commentator points out with respect to commodity option schemes:

[T]he people who are investing in this type of contract [options] are not the normal commodity trader who has a reasonable knowledge of the commodity market and its operation. Instead the people drawn to the commodity option schemes are the totally unsophisticated investor who is merely seeking an investment for his money and has no knowledge of the commodity market. Likewise most of the commodity option dealers are not normally commodity traders. Most of the firms . . . came from other branches of the securities business because of the easy pickings in a new and virtually unregulated area of investment. The regulatory scheme of the Commodity Exchange Act while it does have an anti-fraud section similar to that found in the securities act, which has been construed to give rise to a private cause of action, is not designed to provide this class of unskilled investors with the information that they need to make an intelligent investment decision in this area.¹²⁹

Thus, it would appear that investors in these commodity-security transactions are comparable in their level of sophistication and knowledge to those who invest in securities. Furthermore, the dealer firms are well-versed in securities policies. Since the investors, the dealers and the transactions themselves are attuned to securities concepts, allowing the securities statutes to remain appli-

to differences between the commodities and securities markets, the role of nondisclosure in commodities may not approximate the degree of stringency required in the securities statutes. 40 Fed. Reg. 26505 (1975). Since the securities statutes' disclosure standards would apply only where a security exists, their invocation would be appropriate in these instances. Otherwise, shrewd traders could attach nominal commodity interests to securities accounts in order to shield themselves from the more extensive disclosure requirements of the securities acts.

Another relevant difference between the securities and commodities laws is that investors invoking the securities statutes have a guaranteed right of court access notwithstanding the existence of an arbitration agreement. *E.F. Hutton & Co., Inc. v. Schank*, 456 F. Supp. 507, 513 (D. Utah 1976); Hewitt, *supra* note 3, at 323. In contrast, predispute arbitration agreements can be binding under the CEA. Hewitt, *supra* note 3, at 323. Although these agreements can serve as "quick and inexpensive resolution of disputes," *id.* at 323, even the CFTC has acknowledged the danger that submission to arbitration may be involuntary and that rights may be waived unknowingly. 41 Fed. Reg. 27526 (1976). Since many investors in hybrid commodity-security accounts are unsophisticated and unknowledgeable in investment practices, maintaining the availability of the securities actions would help to safeguard these investors' rights. Other relevant differences between the securities and commodities standards are discussed in BROMBERG & LOWENFELS, *supra* note 1, § 4.6 (460-69), at 82.361-73.

¹²⁷ Hewitt, *supra* note 3, at 321-23.

¹²⁸ See note 13 *supra*.

¹²⁹ Long, *supra* note 2, at 130 (footnotes omitted).

cable would not result in an imposition of foreign and ill-fitted inventions.¹³⁰ Consequently, in those instances where an investor has been defrauded in a commodity-security transaction which comports with the requirements for a security, the more extensive remedies under the securities statutes¹³¹ ought to remain available.

C. Analogous Statutory Frameworks

In addition to legislative history and policy considerations, another argument supporting the availability of the securities statutes can be found through analogy to other statutes. Although such comparisons reveal no final answer to the problem of retaining private actions under the securities statutes in commodity-security transactions, the ambiguity of the CEA in this respect is highlighted. An analysis of one court's interpretation of the effect of the CFTCA upon federal statutes, other than the securities laws, will be offered first. Subsequently other statutory frameworks wherein Congress has retained or terminated recognized rights and remedies will be examined. All of these examples lend support to the conclusion that the private remedies under the securities laws should continue to apply to commodity-security transactions.

A salient example of the effect of one federal statutory framework upon another is that of the impact of the CFTCA upon the mail and wire fraud statutes.¹³² A federal district court recently considered that issue in *United States v. Abrahams*.¹³³ The defendant in *Abrahams* was charged with violating the mail and wire fraud statutes. The government alleged that the defendant, having devised multiple schemes to defraud the public,¹³⁴ then used the mails and wires to place orders for commodity options and to send confirmations of those orders.¹³⁵ The defendant argued that the granting of exclusive jurisdiction to the CFTC precluded prosecution under other federal statutes.¹³⁶

The court approached the issue with a presumption that the applicability of federal statutes should not be terminated absent an express declaration by Congress to that effect.¹³⁷ The court then applied three tests to determine the impact of the CFTCA upon the challenged statutes.¹³⁸ First, the court stated that " 'the implication [of termination] must be clear, necessary and irresisti-

¹³⁰ See *id.* at 80-81 ("The distinction between commodities trading and securities law appears to be more the result of historical happenstance than conceptual distinction.")

¹³¹ See note 126 *supra*.

¹³² 18 U.S.C. § 1341 (1976) (the mail fraud statute); 18 U.S.C. § 1343 (1976) (the wire fraud statute).

¹³³ 2 COMM. FUT. L. REP. (CCH) ¶ 21,007 (S.D.N.Y. 1980).

¹³⁴ The government alleged that the defendant had represented that it would purchase options for customers but never actually purchased them, disseminated false and misleading investment recommendations, and employed unskilled sales persons to use high pressure selling techniques. *Id.* at 23,925.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 23,926.

¹³⁸ *Id.* at 23,926-27 and 23,929-30. The wire fraud statute is modeled after the mail fraud statute; thus, the court's discussion focused upon the mail fraud statute. *Id.* at 23,925 n.4.

ble.'"¹³⁹ Second, the court emphasized that "the legislative intent to repeal must be manifest in the positive repugnancy between the provisions."¹⁴⁰ Third, the court explained that if the proof required to establish a violation under the two statutes varies then the later-enacted statute does not repeal the older one.¹⁴¹

In applying these tests, the court first reasoned that although Congress equipped the CTFC with extensive power to prosecute violations of the CEA and to impose civil and criminal sanctions,¹⁴² there was no legislative intent that the CFTC's ability to prosecute was to be exclusive.¹⁴³ The court noted that the power to prosecute under criminal provisions other than those under the CEA did not receive the same treatment by Congress as the power of federal and state agencies to bring suit to enjoin the allegedly fraudulent sale of commodity futures.¹⁴⁴ The court emphasized that although Congress intended to divest agencies of their jurisdiction "[to free] the exchanges from having to conform their practices to conflicting *agency* standards,"¹⁴⁵ other statutory provisions were not similarly terminated. To support its conclusion, the court relied upon Chairman Talmadge's assurance that persons in the trading industry would not be exempted from existing laws.¹⁴⁶ Although the court in *Abrahams* mentioned the controversy surrounding the continued availability of private actions under the CEA,¹⁴⁷ it did not purport to resolve the issue nor did it discuss the similar controversy surrounding the applicability of private remedies under the securities laws. Nevertheless, the legislative history indicates that private actions under the securities laws were not to be extinguished.

The second inquiry in the court's preemption analysis, whether the mail fraud statute provisions were repugnant to those of the CEA, was also decided in favor of maintaining the mail fraud actions.¹⁴⁸ Noting that the mail fraud statute is broad and has remained applicable in other circumstances where comprehensive legislation has been passed, the court concluded that it and the

¹³⁹ *Id.* at 23,927 (quoting *Blumenthal v. United States*, 88 F.2d 522, 526 (8th Cir. 1937)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 23,929-30. Although the court refers to a later-enacted "more specific" statute preempting an older, "more general" one, the same test applies regardless of differences in specificity. See *United States v. Shareef*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,108, at 24,464 (2d Cir. 1980); *United States v. Green*, 494 F.2d 820, 827 (5th Cir.), *cert. denied*, 419 U.S. 1004 (1974).

¹⁴² *United States v. Abrahams*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,927 (S.D.N.Y. 1980); see also text and note at note 25 *supra*.

¹⁴³ *Id.* at 23,928.

¹⁴⁴ *Id.* at 23,928 n.10. *Accord*, *United States v. Shareef*, 2 COMM. FUT. L. REP. (CCH) ¶ 21,108 (2d Cir. 1980).

¹⁴⁵ *United States v. Abrahams*, 2 COMM. FUT. L. REP. at 23,928 n.10 (emphasis supplied).

¹⁴⁶ *Id.* at 23,928.

¹⁴⁷ *Id.* at 23,928 n.10.

¹⁴⁸ *Id.* at 23,928-29.

CEA complemented, rather than conflicted with, each other.¹⁴⁹ Much as the provisions of the mail fraud and commodities statutes work towards the same goal of controlling and remedying fraudulent situations, portions of the securities acts also seek to achieve this purpose. Indeed, the only difference in purpose between the statutes is that each is concerned with particular circumstances where fraud can arise — one where the mails are used, one where a security is involved and one where a commodity is identified. Just as the mail fraud statute and the CEA may overlap without threatening interference in the independent functioning of each statutory framework, so can the securities and commodities laws. Therefore, the private actions under the securities laws, like the enforcement actions under the mail fraud statute, should continue to apply.

The third test for determining whether the CFTCA precluded suits under the mail fraud statute focused upon the proof required to establish a violation of the two statutes. If the requisite proof varies, then the later-enacted statute does not preempt the earlier one. The court concluded that the mail fraud statute does contain different proof requirements.¹⁵⁰ Similarly, the securities statutes and the CEA contain important differences regarding liability which bolster the argument that the securities actions, like the mail and wire fraud statutes, were intended to remain applicable. The *Abrahams* court's refusal to expand the scope of the CFTC's exclusive jurisdiction to eliminate another federal antifraud provision is relevant to and supportive of an interpretation of the CFTCA which allows private remedies for fraud under the securities statutes to remain available to defrauded investors in commodity-security transactions.

No other instances exist where the granting of exclusive regulatory jurisdiction to one federal agency potentially compromised implied private rights under another federal statutory framework.¹⁵¹ Nevertheless, other

¹⁴⁹ *Id.* at 23,929.

¹⁵⁰ *Id.* at 23,930.

¹⁵¹ See Hewitt, *supra* note 3, at 320. Litigation involving the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (1976) (ERISA), evinces a related concern regarding the effect of a comprehensive federal statute upon remedies under other federal legislation. ERISA was enacted to place the power to regulate employee benefit plans under the federal government. See *Delta Air Lines, Inc. v. Kramarsky*, 485 F. Supp. 300, 304 (S.D.N.Y. 1980). This statute explicitly provides that state laws relating to certain employee benefit plans are preempted, 29 U.S.C. § 1144(a) (1976), and that no federal law is ousted, 29 U.S.C. § 1144(d) (1976). Consequently, implied rights under federal law should continue to apply to employee benefit plans. In *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), however, the Supreme Court appears to have reached an opposite conclusion. Close analysis reveals, however, that the Court did not actually decide this issue. In *Teamsters*, the Court held that implied rights under the securities statutes were not applicable to compulsory, noncontributory pension plans. *Id.* at 570. The Court emphasized both that the SEC had never expressed the view before this litigation that such plans were securities, *id.* at 569, and that such plans do not in fact resemble securities. *Id.* at 558-62. The Court suggested that since an extensive legislative scheme existed under ERISA for remedying any fraud, there was no need to torture the securities laws to render them applicable. *Id.* at 569-70.

The reasoning in this case is distinguishable from the role of the securities statutes in the commodities industry for two reasons. First, the Court did not actually rule that the securities laws were ousted; it merely weighed the existence of a comprehensive alternative legislative scheme as one factor in deciding whether to perform definitional gymnastics with the securities

statutory schemes that have ousted federal or state regulation and laws have expressly addressed which remedies are extinguished upon their enactment. Their straightforward provisions contrast sharply with the absence of any clause in the CFTCA terminating private actions under the securities laws. For example, the Copyright Act,¹⁵² effective in 1978, openly avers that:

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by [portions of this title] . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.¹⁵³

Similarly, the Federal Employment Compensation Act (FECA)¹⁵⁴ which ousted the applicability of the Federal Torts Claims Act¹⁵⁵ to claims covered by FECA explicitly provides for such an exclusive remedy.¹⁵⁶ Thus, where specific rights or remedies have been nullified, Congress has been careful to state clearly its intent to create exclusive liabilities and remedies.

A final analogy supporting the argument that private actions under the securities statutes are to continue to be available to defrauded investors in commodity-security transactions is found in the court's analysis in *Credit Data of Arizona, Inc. v. Arizona*.¹⁵⁷ There, the Court of Appeals for the Ninth Circuit illustrated the policies behind the preemption doctrine and the Federal Fair Credit Reporting Act (FCRA).¹⁵⁸ The FCRA provides that:

This subchapter does not annul, alter, affect, or exempt any person

laws. Second, in contrast to the previous noninvolvement of the SEC in pension plans, the SEC and several courts had concluded prior to the enactment of the CFTCA that certain trading accounts in commodities futures were securities. Therefore, the extension of the securities concepts to commodity-security transactions after the enactment of the CFTCA has not been a novel experiment. Furthermore, such extension did not require any torturing of the securities laws as a similar extension would have required in the pension plan field. Noncontributory pension plans do not resemble closely a security while they are undoubtedly pension plans; whereas, commodity-security transactions are arguably as much like investment contracts as they are like traditional commodities. Thus, the Court's reasoning in *Teamsters* should not be extended to the issue of retaining the availability of private fraud remedies under the securities statutes in commodity-security transactions.

¹⁵² Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976 & Supp. III 1979).

¹⁵³ *Id.* at § 301(a) (1976).

¹⁵⁴ 5 U.S.C. §§ 8101-8193 (1976).

¹⁵⁵ 28 U.S.C. §§ 2671-2680 (1976).

¹⁵⁶ 5 U.S.C. § 8116(c) provides:

The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover . . . because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workman's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

Id. See *Reep v. United States*, 557 F.2d 204, 206 (9th Cir. 1977).

¹⁵⁷ 602 F.2d 195 (9th Cir. 1979).

¹⁵⁸ 15 U.S.C. §§ 1681-1681t (1976).

subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.¹⁵⁹

The court, in interpreting "inconsistent" as it was used in the statute, concluded that the state law gave the consumer slightly more protection than the federal law in the pending situation and that this more extensive protection did not amount to an inconsistency.¹⁶⁰ The CFTCA and the securities statutes, like the federal and state laws in *Credit Data*, have the same goals — protecting investors and preventing fraud. Although the securities statutes, like the state law in *Credit Data*, might provide the investor with more protection than the CFTCA in certain circumstances, this discrepancy is insufficient to qualify as an "inconsistency." Therefore, the securities statutes, like the state law in *Credit Data*, should remain available to defrauded investors in commodity-security transactions. Analysis of other statutory provisions raising similar issues of preemption and ousting of previously existing remedies thus reveals that the language of the CFTCA supports the continued availability of private remedies under the securities statutes.

CONCLUSION

Policy considerations behind the enactment of the CFTCA support the continued availability of private actions for fraud under the securities statutes in commodity-security transactions. If fraudulent and scandalous schemes are to be effectively detected, eliminated, and remedied, judicial involvement is necessary. Furthermore, the adjudicatory nature of fraud issues — as evidenced by SEC, CFTC, and congressional support of judicial resolution of antifraud actions — reveals that the CFTC's exclusive regulatory jurisdiction over the commodities industry would not be undermined by allowing the securities private fraud remedies to continue. In addition, Congress evidenced no intent or desire to terminate the applicability of the antifraud provisions of the securities statutes. Rather, emphasis was placed upon preserving both the viability of federal laws and court jurisdiction. Finally, the language of the CFTCA militates in favor of the continued applicability of these remedies. Therefore, courts should not undertake a superficial analysis of the statutory language as well as legislative history and use the express intention to terminate SEC power to extinguish private remedies under the securities laws. Rather, Congress' goal of protecting the investor in commodity transactions should be upheld and private fraud remedies under the securities statutes should remain available to defrauded investors in commodity-security transactions.

MARJORY D. ROBERTSON

¹⁵⁹ *Id.* § 1681c.

¹⁶⁰ *Credit Data*, 602 F.2d at 198.