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An Express Private Right of Action for Futures Investors: Does Section 22 of the Commodity Exchange Act Afford Adequate Protection ?

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AN EXPRESS PRIVATE RIGHT OF ACTION FOR FUTURES INVESTORS: DOES SECTION 22 OF THE COMMODITY EXCHANGE ACT AFFORD ADEQUATE PROTECTION?

Section 22 of the Commodity Exchange Act is Congress' attempt to provide futures investors with a clearly-defined private right of action against futures exchanges and other futures professionals. While it answers certain questions that the Supreme Court left open in Merrill Lynch, Pierce, Fenner & Smith v. Curran, *it leaves others to judicial interpretation. Taken together, the language of section 22 and its case law define a cause of action with several important advantages and disadvantages that the futures plaintiff must carefully consider in determining whether section 22 is the appropriate basis for complaint. An aggrieved futures investor may also seek redress under the Commodity Exchange Act's reparations provisions, civil RICO, and state law. In comparing these alternatives, this Note provides a framework in which the potential litigant may determine the appropriate recourse.*

INTRODUCTION

WHEN THE Supreme Court decided *Merrill Lynch, Pierce, Fenner & Smith v. Curran,*[1] it confined its holding to the single proposition that an implied private cause of action is available to aggrieved futures investors under the Commodity Exchange Act (CEA).[2] The Court expressly declined comment on the issues of law and proof regarding elements of liability, causation, and damages.[3] Thus, the private civil action given to futures investors was a mere shell. It became the task of the courts—subject, of course, to congressional intervention—to define and shape the elements of the action.[4]

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1. 456 U.S. 353 (1982). For further discussion of this case, see *infra* notes 55-94 and accompanying text.

2. 7 U.S.C. §§ 1-26 (1982). Congress enacted the first statute regulating futures trading in 1921. This statute, known as the Futures Trading Act, ch. 86, 42 Stat. 187 (1921) (current version at 7 U.S.C. §§ 1-26 (1982)), was held to be an unconstitutional exercise of the taxing power in Hill v. Wallace, 259 U.S. 44 (1922). The same regulatory scheme minus the offending tax provision was promptly reenacted in the Grain Futures Act, ch. 369, 42 Stat. 998 (1922), which, upon amendment in 1936, was renamed the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936) (current version at 7 U.S.C. §§ 1-26 (1982)).

3. 456 U.S. at 395.

4. *Id.*

Unwilling to leave futures investors with an unwieldy and uncertain judicial tool, Congress enacted section 22 of the CEA, which supersedes *Curran* for actions that accrue after January 10, 1983.[5] This provision authorizes an express private right of action and gives substantive content to the elements of the action.[6] This delineation of the elements, however, may impose undesirable limitations on the nature and scope of protection that investors in the futures markets require.

Part I of this Note briefly describes futures trading practices that give rise to investors' claims against brokers and futures exchanges. It also discusses the regulatory remedies that are available to futures investors.[7] Parts II and III examine the *Curran* Court's approval of an implied private right of action and Congress' subsequent creation of a more detailed express private right of action.[8] In Part IV, this Note compares the content of the elements of a private action brought under section 22 to an action brought under *Curran*.[9] Finally, this Note compares the CEA actions to some alternative remedies which may prove more advantageous to certain litigants.[10]

I. COMMODITY FUTURES TRADING

A. *The Mechanics of Futures Trading*[11]

A futures contract is a transaction between a seller, called a short, and a buyer, called a long.[12] The seller agrees to deliver to the buyer a specified quantity and grade of an identified commodity during a particular month in the future, and the buyer agrees to

5. Futures Trading Act of 1982, Pub. L. No. 97-444, § 235, 96 Stat. 2294, 2322 (1983) (codified at 7 U.S.C. § 25 (1982)). The Supreme Court appears to approve of such congressional action. In Cannon v. University of Chicago, 441 U.S. 667 (1979), the Court wrote: "When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." *Id.* at 717.

6. *See* 7 U.S.C. § 25 (1982).

7. *See infra* notes 11-54 and accompanying text.

8. *See infra* notes 55-103 and accompanying text.

9. *See infra* notes 104-93 and accompanying text.

10. *See infra* notes 194-227 and accompanying text.

11. A detailed explanation of futures trading is beyond the scope of this Note. For comprehensive discussions, see generally P. JOHNSON, COMMODITIES REGULATION (1982) and T. RUSSO, THE REGULATION OF THE COMMODITIES FUTURES AND OPTIONS MARKETS (1983).

12. 1 P. JOHNSON, *supra* note 11, at 8 (discussing terminology applicable to futures buyers and sellers). The CEA does not precisely define the term "futures contract." It refers to such contracts as "[t]ransactions . . . involving the sale [of commodities] for future delivery as commonly conducted on boards of trade and known as 'futures.' " 7 U.S.C. § 5 (1982).

accept and pay for the commodity.[13] The parties rarely exercise their respective contractual rights; typically, they offset their contracts by entering the market a second time to acquire the same type of contract for which they bear an obligation opposite to their first transaction.[14]

1. *Boards of Trade and Futures Commission Merchants*

Futures contracts are bought and sold on boards of trade by means of open outcry in a trading pit or ring.[15] Persons known as floor brokers actually buy and sell futures contracts.[16] A board of trade must be designated as a contract market by the Commodity Futures Trading Commission (CFTC) in order to conduct trading in a particular kind of futures contract.[17]

When an investor decides to enter the futures market, he opens an account with a futures commission merchant (FCM).[18] The CEA defines FCM to include individuals or organizations who solicit orders for futures trading.[19] The futures investor places an order to buy or sell futures contracts with one of the FCM's associated persons, who are are sometimes called customer representatives or account executives.[20] An account executive then relays the order to the appropriate exchange where floor brokers execute the transaction.[21]

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13. 1 P. JOHNSON, *supra* note 11, at 8.

14. *Id.* at 9.

15. 7 U.S.C. § 2 (1982); 17 C.F.R. § 1.38(a) (1984). The term "board of trade" applies to any exchange or any association of persons "who [engage] in the business of buying or selling commodity [sic] or receiving the same for sale on consignment." 7 U.S.C. § 2 (1982). A board of trade may thus engage in cash trading, commodities trading, futures trading, or any combination thereof. *See* 1 P. JOHNSON, *supra* note 11, at 70-71.

16. Johnson, *The Changing Face of Commodity Regulation*, PRAC. LAW., Dec. 1974, at 27.

17. 7 U.S.C. § 7 (1982). The expression "contract market" has two meanings: It identifies the board of trade itself and also each of the futures contracts traded on it. 1 P. JOHNSON, *supra* note 11, at 70. Because designation as a contract market is on a contract-by-contract basis, each new futures contract proposed by a board of trade must be separately approved by the CFTC. *Id.*

18. *See* G. GOLD, MODERN COMMODITY FUTURES TRADING 18 (7th ed. 1975).

19. 7 U.S.C. § 2 (1982). FCMs are analogous to brokerage houses in the securities business. 1 P. JOHNSON, *supra* note 11, at 101.

20. 1 T. RUSSO, *supra* note 11, § 4.02.

21. *See* Johnson, *supra* note 16, at 39; *see also* 7 U.S.C. § 2 (1982) (definition of floor broker).

2. *The Nature of Futures Trading: Risk-Shifting and Risk-Taking*

Futures trading is carried on by risk-shifters, called hedgers, and risk-takers, called speculators. Hedgers are individuals (or organizations) who seek to avoid the substantial risk that is associated with adverse price movement in the commodities which they hold.[22] They guard against such risk by selling an amount of futures that is equal to their actual ownership of a commodity.[23] If prices fall, hedgers expect losses on the inventories of the actual commodity to be offset by a profit in the futures market.[24] Conversely, should prices increase, the hedgers expect losses on the futures to be offset by the higher value of the actual commodities owned by them.[25] In either case, a loss on one side of the transaction is ordinarily offset by a profit on the other.[26]

Speculators absorb the risk transferred by the hedgers. Although these futures investors voluntarily risk their capital in expectation of making a profit through changes in market prices, their investments frequently produce losses rather than profits.[27] To encourage speculators to enter the market, a small margin deposit is required as performance security against default in the obligation by either party.[28] Without participation by speculators, markets would lack the liquidity needed for effective risk transfer by hedgers.[29]

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22. *See* G. GOLD, *supra* note 18, at 10-14.

23. *Id.* at 13-14.

24. *Id.* at 14.

25. *Id.*

26. *Id.*

27. *See* H.R. REP. NO. 975, 93d Cong., 2d Sess. 138 (1974). For example, the plaintiff in Hoetger & Co. v. Ascencio, [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,950 (E.D. Mich. Oct. 12, 1983), experienced rapid gains then soaring losses while trading futures. He bought Treasury bill futures contracts and in two weeks reaped a total profit of $21,700. Over the next year, however, the plaintiff lost nearly $250,000 trading the same contracts. *Id.* at 28,090.

28. Johnson, *supra* note 16, at 32. For example, futures customers may invest in the S&P 500, which is a type of futures contract based on fluctuations in Standard and Poor's stock price index rather than on the value of an identifiable commodity. Such investments require a margin deposit of less than $6000 to purchase an interest in a standard contract, worth about $80,000. *Stock Futures: A Hot New World*, BUS. WK., Aug. 22, 1983, at 60. While a small margin allows a speculator to be highly leveraged, downward price movement may force him to pay in additional cash to prevent the FCM from liquidating his position in the market. G. GOLD, *supra* note 18, at 283. In contrast to the small amount of margin necessary to trade futures, the margin deposit required for trading stocks ranges between 50 and 100% of their value. *Id.* at 19-20.

29. H.R. REP. NO. 975, 93d Cong., 2d Sess. 138 (1974). Without speculative buying and selling, trading volume would be restricted since many large orders would go unfilled due

Even though risk is an inherent feature of futures trading, the CFTC still requires that FCMs provide their customers with a risk disclosure statement.[30] Futures investors must sign the statement to certify that they have read and understood it before the FCM may open an account for them.[31] As an additional precaution, FCMs often will voluntarily screen investors by requiring a minimum net worth before placing an order.[32] Of course, the disclosures and other precautionary measures do not always insulate FCMs from lawsuits by customers who incur losses.[33] The aggrieved investor may turn to the CEA for redress against fraudulent trading practices and market manipulation, but not for protection from misfortune caused purely by market forces.[34] Both *Curran* and section 22 of the CEA reflect this underlying purpose. They serve as alternate means of protection for futures investors against deceptive and misleading business practices, not as buffers against unfavorable economic circumstances.

B. *Regulation of Futures Trading*

1. *Limited Coverage Until 1974*

Prior to the creation of the CFTC in 1974, regulation of futures trading was within the purview of the Commodity Exchange Authority, an agency of the U.S. Department of Agriculture.[35] Coexistent with federal regulation were systems of self-regulation that the futures exchanges created and enforced themselves.[36]

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to the floor broker's inability to find an equally large but opposing hedge order at the same price to complete the match. *Id.*

30. 17 C.F.R. § 1.55 (1984).

31. *Id.* One commentator has suggested that in cases where the customer requests further disclosure of risk, the FCM has a duty to supply such additional information in a complete and fair manner. 1 T. RUSSO, *supra* note 11, § 12.33.

32. For example, Dean Witter and other FCMs accept only investors who have a net worth of at least $100,000, not including the value of their residences or insurance policies. *A New Way to Play the Market Catches On*, U.S. NEWS & WORLD REP., Aug. 1, 1983, at 65. The CFTC does not require suitability or "know your customer" rules. *See* Adoption of Customer Protection Rules, 43 Fed. Reg. 31,886, 31,888 (1978).

33. *See* 2 T. RUSSO, *supra* note 11, § 14.01; Hoetger & Co. v. Ascencio, [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,950 (E.D. Mich. Oct. 12, 1983).

34. 2 P. JOHNSON, *supra* note 11, at 231.

35. 1 P. JOHNSON, *supra* note 11, at 175. The Commodity Exchange Authority regulated a limited number of agricultural products. 1 T. RUSSO, *supra* note 11, § 10.02.

36. 1 P. JOHNSON, *supra* note 11, at 346-49. Even though the CFTC has been granted broad rulemaking power, the CEA still requires exchange self-regulation that must meet with CFTC approval. 7 U.S.C. § 7a(8) (1982). Some of these rules are mandated by the CEA or CFTC regulations. For example, exchanges must adopt certain rules as a condition of contract market designation. *See supra* note 17. Likewise, the governing board of each contract market must take whatever steps are necessary to prevent "manipulation of prices and the

2. *Expanded Coverage Through a New Federal Agency*

In 1974, Congress overhauled the regulation of futures by enacting the Commodity Futures Trading Commission Act, also known as the 1974 Amendment.[37] With the 1974 Amendment came a vast expansion in futures regulation, accomplished in part through a simple redefinition of the term "commodity."[38] Prior to 1974, the term included only a limited number of agricultural products.[39] Under the 1974 Amendment, by contrast, the term "commodity" encompasses not only a variety of agricultural products but also "all other goods and articles" (with one exception[40]), together with all "services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."[41]

Congress also created an independent agency, the CFTC, with powers far broader than those held by its predecessor.[42] Congress authorized the new agency to oversee registration of futures professionals—previously, the task of the Commodity Exchange Authority—and gave it the power to enforce the CEA's prohibition against excessive speculation and fraudulent practices.[43] Congress further authorized the establishment of two remedial procedures—arbitration and reparations—for the protection of individual futures investors.[44] The reparations procedure is contained in section 14 of the

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cornering of any commodity by the dealers or operators upon such board." 7 U.S.C. § 7(d) (1982). Other rules are voluntarily adopted by the exchanges themselves. For instance, exchanges have rules that prohibit their employees from engaging in any futures trading: "No employee of the Exchange shall: (1) trade directly or indirectly on any designated contract market for either spot or future delivery in any commodity . . . ." RULES OF THE CHICAGO MERCANTILE EXCH. Rule 254 (Chicago Mercantile Exch. 1984).

37. Pub. L. No. 93-463, 88 Stat. 1389 (current version at 7 U.S.C. §§ 1-26 (1982)).

38. *See id.* § 201, 88 Stat. at 1395 (current version at 7 U.S.C. § 2 (1982)).

39. Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (current version at 7 U.S.C. §§ 1-26 (1982)).

40. The CEA prohibits trading onion futures. 7 U.S.C. § 13-1 (1982).

41. *Id.* § 2.

42. 1974 Amendment § 101, 88 Stat. at 1389 (current version at 7 U.S.C. § 4a (1982)); *see also* 1 P. JOHNSON, *supra* note 11, at 175-77 (discussing underlying rationale for creation of the CFTC).

43. The 1974 Amendment did not materially change the nature of the CEA's prohibitions against such practices. *See* 7 U.S.C. § 6a (1982) (excessive speculation); 7 U.S.C. § 6b (1982) (fraudulent practices).

Congress gave the CFTC some additional responsibilities. Whereas the Commodity Exchange Authority had regulated contract markets, FCMs, and floor brokers, 1 T. RUSSO, *supra* note 11, § 10.01, the CFTC was given responsibility to regulate not only those entities but also introducing brokers, 7 U.S.C. § 6d (1982), persons associated with FCMs or introducing brokers, *id.* § 6k, commodity pool operators, *id.* § 6n, commodity trading advisors, *id.*, and registered futures associations, *id.* § 21. 1 T. RUSSO, *supra* note 11, § 10.01.

44. For a discussion of reparations, see 2 P. JOHNSON, *supra* note 11, at 150-96 and 2 T.

CEA, and allows an aggrieved investor to file a claim for damages against any person who is required to be registered and who allegedly has violated the CEA or any CFTC rule or regulation.[45] The complaining party must seek reparations within two years of the time the cause of action accrues,[46] and may bring his claim before an administrative law judge or any presiding officer designated by the Commission.[47] He may recover actual damages if he proves that the violation proximately caused his loss.[48] The decision by the hearing officer is final unless an appeal before the Commissioners is granted. A final decision is reviewable by a federal court of appeals.[49]

The arbitration provision in section 5a(11) of the CEA requires that each exchange establish a procedure for the settlement of investors' claims and grievances against any of its members or employees.[50] The futures investor participates voluntarily in the procedure and may use it regardless of the amount of the claim.[51] Arbitration procedures must pass CFTC approval.[52]

3. *Private Rights of Action Prior to 1982*

Before 1982, limited redress was available for individual futures investors who brought claims based on alleged violations of the CEA. In the appropriate circumstances, investors could use the Commission's reparations procedure or an exchange's arbitration program.[53] The opportunity to pursue a private action in federal court was limited to those district and circuit courts that had recognized the existence of such an action.[54] This limitation on the pri-

RUSSO, *supra* note 11, §§ 14.02-.09. For a discussion of arbitration, see 1 P. JOHNSON, *supra* note 11, at 283-94 and 1 T. RUSSO, *supra* note 11, § 1.36.

45. 7 U.S.C. § 18(a) (1982).

46. *Id.*

47. 2 P. JOHNSON, *supra* note 11, at 152.

48. 7 U.S.C. § 18(a) (1982).

49. *Id.* § 18(e).

50. *Id.* § 7a(11).

51. *Id.* Until 1982, exchanges were required to have an arbitration procedure for claims up to $15,000. *See* 1974 Amendment § 209, 88 Stat. at 1401 (current version at 7 U.S.C. § 7a(11) (1982)).

52. 1 T. RUSSO, *supra* note 11, § 1.36.

53. *See supra* notes 44-52 and accompanying text.

54. *See, e.g.*, Curran v. Merrill Lynch, Pierce, Fenner & Smith, 622 F.2d 216, 235 (6th Cir. 1980), *aff'd*, 456 U.S. 353 (1982); Leist v. Simplot, 638 F.2d 283, 322 (2d Cir. 1980), *aff'd sub nom.* New York Mercantile Exch. v. Leist, 456 U.S. 353 (1982); Alken v. Lerner, 485 F. Supp. 871, 879 (D.N.J. 1980); Witzel v. Chartered Sys. Corp., 490 F. Supp. 343, 347 (D. Minn. 1980); Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 220 (D. Kan. 1979); Smith v. Groover, 468 F. Supp. 105, 114 (N.D. Ill. 1979); Goodman v. H. Hentz & Co., 265 F.

vate right of action became the focus of the Supreme Court's decision in *Curran* and Congress' amendment of the CEA in 1982.

II. THE *CURRAN* DECISION—JUDICIAL RECOGNITION OF AN IMPLIED PRIVATE ACTION

A. *Factual Background*

In *Curran*, the Supreme Court consolidated several cases in which futures investors brought suit against their FCMs or an exchange.[55] In one case, individual futures investors John and Jacqueline Curran sued Merrill Lynch, Pierce, Fenner & Smith, their FCM, for damages arising from that firm's alleged violation of the antifraud provision of the CEA.[56] In the other cases, several professional futures traders sued to recover losses they had incurred as a result of an elaborate manipulation of the market in potato futures contracts.[57] The fraudulent scheme involved wrongdoing by various groups of potato traders and producers, by several FCMs, and by the New York Mercantile Exchange.[58] The complexity of the scheme requires a brief explanation.

Neil Leist and several other professional futures traders were engaged in the trading of Maine potato futures when, in 1976, they became entangled in the largest default in the history of futures

Supp. 440, 447 (N.D. Ill. 1967). *Contra* Rivers v. Rosenthal & Co., 634 F.2d 774, 792 (5th Cir. 1980), *vacated and remanded*, 456 U.S. 968 (1982); Hensley v. Maduff & Sons, Inc., [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,017, at 23,985 (C.D. Cal. Apr. 1, 1980); Alkan v. Rosenthal & Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,797, at 23,252 (S.D. Ohio Feb. 28, 1979); Comstock Investors, Inc. v. Rosenthal & Co., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,934, at 23,759 (C.D. Cal. Dec. 7, 1979); Fischer v. Rosenthal & Co., 481 F. Supp. 53, 55 (N.D. Tex. 1979); Berman v. Bache, Halsey, Stuart, Shields, Inc., 467 F. Supp. 311, 323 (S.D. Ohio 1979).

55. The circuit court cases included Curran v. Merrill Lynch, Pierce, Fenner & Smith, 622 F.2d 216 (6th Cir. 1980), *aff'd*, 456 U.S. 353 (1982); Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom.* New York Mercantile Exch. v. Leist, 456 U.S. 353 (1982). The various actions by Leist and his co-plaintiffs were consolidated at the circuit court level. 638 F.2d at 285.

56. 7 U.S.C. § 6b (1982); *see* 456 U.S. at 369 n.42. The Currans had authorized an FCM to trade in futures on their behalf. 456 U.S. at 368. Their trading was initially profitable but later resulted in substantial losses, and the account was ultimately closed. *Id.* The appeals court noticed and decided sua sponte that the Currans could maintain a private suit under the CEA. *Id.* at 368-69.

57. Neil Leist was a member of the New York Mercantile Exchange and traded commodities and futures. 638 F.2d at 290. His co-plaintiffs were Incomco, a partnership which was a licensed FCM, and Philip Smith, Incomco's managing partner. They were joined by traders and dealers who represented a class of persons who, like Leist, Incomco, and Smith, had bought futures contracts. *Id.*

58. 638 F.2d at 288-93.

trading in the United States.[59] They were caught in the crossfire of a contest between two powerful groups of traders to control the price of potatoes. The first group was composed of John Richard Simplot and Peter J. Taggares, two large West Coast potato processors.[60] They conspired to depress the price of potatoes by selling a large number of futures contracts in that commodity.[61] The second group was composed of East Coast potato merchants who sought to capitalize on a projected shortage in the potato supply by driving up the price.[62] To this end, they bought as many futures contracts in potatoes as possible.[63] At the same time, they attempted to ensure their control over the price of potatoes by tying up lines of transportation that were essential to the sellers' ability to make deliveries.[64]

Leist and his co-plaintiffs, like the East Coast group, speculated that the price of potatoes would rise.[65] As part of their market strategy, they not only invested in potato futures but also purchased a quantity of actual potatoes.[66] Their plan, however, proved unsuccessful. The West Coast conspirators were successful in their efforts to depress the price of potatoes, thus depriving the plaintiffs of gains they might have realized in an unmanipulated market.[67] For its part, the East Coast group was successful in its attempt to tie up the transportation that otherwise would have been available for deliveries of the commodity.[68] Substantial quantities of actual potatoes

59. 638 F.2d at 285. Sellers of almost 1,000 futures contracts failed to deliver approximately 50,000,000 pounds of Maine potatoes. *Id.* The futures contracts for the potatoes provided for the delivery of a railroad car lot of 50,000 pounds of the commodity at a designated place on the Bangor & Aroostook Railroad during the period May 7 to May 25, 1976. 456 U.S. at 369. Trading in the contracts had begun early in 1975 and ended on May 7, 1976. *Id.*

60. 638 F.2d at 289.

61. *Id.* At the end of trading in the potato futures contract, the West Coast producers were in control of 1,893 open short positions. By comparison, the number of open positions that exist at the end of trading under typical circumstances is approximately 200. *Id.* at 290. Ironically, the USDA's crop forecast had projected a shortfall in the 1976 potato supply; the Department's report indicated that total potato stocks were down 11% and that Maine stocks totaled only 7.4 million hundredweight as compared with 13 million hundredweight the previous year. *Id.* at 289. This report was one of the factors responsible for the increase in the price of the potato contract from $9.75 per hundredweight to a record high of $19.15 per hundredweight by October 3, 1975. *Id.*

62. *Id.* at 290.

63. At the end of trading in the contract, the East Coast producers controlled 911 open long positions. *Id.* at 289; *cf. supra* note 61 (noting that, by comparison, relatively few open positions in a contract usually exist at the end of trading).

64. 638 F.2d at 290.

65. *Id.* at 291.

66. *Id.*

67. *Id.*

68. *Id.*

that the plaintiffs had purchased therefore rotted before delivery.[69] As a result of the conspiracies, then, the plaintiffs not only were precluded from even the possibility of profits that they might have realized, but also incurred substantial losses that they might have avoided in a market untouched by conspiracy.

Leist and his co-plaintiffs sued the two groups of conspirators, the New York Mercantile Exchange, and the FCMs of the West Coast group.[70] They alleged that the conspirators and FCMs had "used and employed manipulative devices and contrivances"[71] in violation of the CEA and had violated rules promulgated by the CFTC. They accused the exchange of, among other things, negligently failing to maintain an orderly market for the trading in Maine potato futures.[72]

B. *The* Curran *Decision*

By a five-to-four vote, the Supreme Court held that an implied private cause of action is available to a futures investor who suffers losses resulting from a violation of the CEA.[73] Such an investor may maintain an action against his own FCM, against the FCMs of other market participants, or against an exchange, depending on which of these parties committed the alleged violation.[74] The Court expressly limited its holding merely to a determination of the existence of an implied private remedy, stating that "unless and until Congress acts," the federal courts would be charged with "fill[ing] in the interstices" of the cause of action.[75] A determination of the content of the liability, causation, and damage components of such a suit would thus have to await judicial or congressional action.[76]

In the majority opinion by Justice Stevens, the Court first examined the criteria governing creation of private causes of action

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69. *Id.*

70. *Id.* at 291-93.

71. *Id.*

72. *Id.* The Supreme Court explained that, although the complaint was not specific, Leist and his co-plaintiffs apparently were seeking recovery against all defendants for violations of 7 U.S.C. § 6b (1982) (antifraud) and 7 U.S.C. § 13(b) (1982) (price manipulation); against the FCMs and the two groups of merchants under 7 U.S.C. § 6a (1982) (excessive speculation); and against the exchange under 7 U.S.C. § 7(d) (1982) (manipulation by exchanges) and 7 U.S.C. § 7a(8) (1982) (failure of exchange to enforce its rules). 456 U.S. at 372 n.49.

73. 456 U.S. at 390-91, 395.

74. *Id.* at 390, 393-94.

75. *Id.* at 395.

76. *Id.*

under other federal statutes.[77] In *Cort v. Ash*,[78] the Court articulated four factors relevant to the determination of whether an implied private remedy is appropriate.[79] The second factor, which has become preeminent since *Cort*,[80] asks whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or or to deny one."[81]

In applying this congressional intent test to the CEA, the Court first examined the "contemporary legal context" in which Congress had enacted its substantial revision of the CEA in 1974.[82] According to the Court, Congress' inaction regarding the statutory provisions under which certain federal courts had recognized an implied private remedy demonstrated an affirmative intent to preserve the remedy.[83]

The majority found further evidence of such intent in the legislative history of the Act.[84] The 1974 Amendment addressed concern that exchanges were not fulfilling their self-regulatory responsibilities.[85] Judicial recognition of the implied private cause of action, in combination with a 1968 amendment to the CEA requiring exchanges to enforce their rules, created an environment in which the exchanges were sued for their failure to enforce such rules.[86] In response, the exchanges promulgated fewer rules, thereby exposing the market to a greater risk of unfair trading.[87] Rather than eliminate the implied cause of action, however, Congress imposed additional rules upon the exchanges.[88]

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77. *Id.* at 374-78.

78. 422 U.S. 66 (1975).

79. *Id.* at 78.

80. *Curran*, 456 U.S. at 377-78 n.60.

81. *Cort*, 422 U.S. at 78. The Court in *Curran* implicitly recognized the difference between intent to *create* a remedy and intent to *preserve* a remedy. The remedy in *Cort* had to be created, but in *Curran*, some federal courts already had allowed a private right of action under the CEA at the time of the 1974 Amendment. Thus, the congressional intent inquiry in *Curran* looked to whether Congress intended to preserve the remedy, rather than whether Congress intended to grant it. *See Curran*, 456 U.S. at 377-82.

82. *Id.* at 381; *see also supra* text accompanying notes 37-54 (discussion of 1974 Amendment).

83. 456 U.S. at 381-82. The Court adopted the presumption that Congress had knowledge of the case law and federal regulation interpreting the 1974 Amendment. *See id.* at 382 & n.66.

84. *Id.* at 382-88.

85. *Id.* at 382-83.

86. *Id.* at 383 & n.71.

87. *Id.*

88. *Id.* at 384. The Court refuted the argument that the arbitration and reparations remedies included in the 1974 Amendment were intended to supplant the implied cause of action. Those remedies, said the Court, were too limited to provide effective means of com-

Moreover, the Court viewed the savings clause in section 2 of the CEA as direct evidence of legislative intent to preserve the implied private remedy.[89] The Court cited the language stating that "[n]othing in this section shall supersede or limit the jurisdiction conferred on the courts of the United States" to support its conclusion that Congress intended to preserve federal court actions in futures regulation.[90]

In a vigorous dissent, Justice Powell launched a three-point attack against the majority's holding.[91] He first asserted that the majority had relied on an erroneously decided lower court opinion, together with a line of cases derived from it, as evidence for the existence of a private cause of action.[92] He then attacked the "contemporary legal context" theory on the grounds that congressional inaction should not signal a "conscious intent to 'preserve' the [judicial] right of action that [had been] mistakenly created."[93] Finally, Justice Powell questioned why Congress would establish arbitration and reparations procedures while concurrently approving the implied private cause of action.[94]

III. The Section 22 Private Right of Action—Congress' Response to *Curran*

While the U.S. Supreme Court was considering *Curran*, members of the House Agriculture Committee were laying the ground-

pensating injured futures customers or to enforce compliance with the statute. *Id.* at 384-85. Furthermore, the legislative history revealed statements by members of both houses of Congress indicating that arbitration and reparations were not intended to interfere with the judicial remedy. *Id.* at 385-86. For example, Senate Agriculture Committee Chairman Talmadge explained that the reparations procedure was "not intended to interfere with the courts in any way." 120 Cong. Rec. 30,459 (1974).

89. 456 U.S. at 386.

90. *Id.* at 386-87; *see also Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13,113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 205 (1974) (statement of Sen. Clark) ("Often the most effective enforcement tool is a private suit. . . .").

91. *Curran*, 456 U.S. at 395-409 (Powell, J., dissenting).

92. Justice Powell contended that Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967) had been decided on a common law principle which did not apply in a federal court of limited jurisdiction. *Id.* at 398-99. For representative cases that follow the principle articulated in *Goodman*, see Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir.), *rev'd on other grounds*, 414 U.S. 113 (1973); Seligson v. New York Produce Exch., 378 F. Supp. 1076 (S.D.N.Y. 1974), *aff'd sub nom.* Miller v. New York Produce Exch., 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977). The majority opinion in *Curran* traced the development of a private cause of action against exchanges from *Goodman* to subsequent cases, most of which were decided at the district court level. 456 U.S. at 391-92.

93. 456 U.S. at 401 (Powell, J., dissenting).

94. *Id.* at 405.

work for reauthorization of the CFTC. The reauthorization hearings gave Congress an ideal opportunity to debate whether futures investors should be given an express private right of action.[95]

House Agriculture Committee members approved the express private right of action in advance of the Supreme Court's decision as a means to protect futures investors and maintain the credibility of the futures market.[96] If, as one Committee member argued, the CFTC were "strangled by budget limitations," futures investors could resort to private lawsuits.[97] Despite the strong justifications for congressional approval of the private remedy, however, the Senate Agriculture Committee chose to wait until *Curran* was

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95. *See CFTC Reauthorization: Hearings on H.R. 5447 Before the Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture*, 97th Cong., 2d Sess. 174-75 (statements of Rep. Glickman) (1982) [hereinafter cited as *Hearings*]. Without congressional reauthorization, the CFTC would have ceased operations on September 30, 1982. Futures Trading Act of 1978, Pub. L. No. 95-405, § 20, 92 Stat. 865, 875 (amended 1982). Current authorization extends until 1986. 7 U.S.C. § 16(d) (1982).

While the *Curran* Court framed the issue as whether a private "cause of action" exists under the CEA, 456 U.S. at 395, Congress called § 22 a private "right of action." 7 U.S.C. § 25 (1982). Whereas some courts have treated the terms "cause of action" and "right of action" as interchangeable, Neon Corp. v. Pennsylvania Distilling Co., 325 Pa. 140, 142, 188 A. 825, 826 (1936), other courts have distinguished them:

> A cause of action consists of two elements: the operative facts and the right or power to seek or obtain redress for the infringement of a legal right which the facts show. Consequently, to engage in a semantic discussion of the distinction between a "cause of action" and a "right of action" is of little help here as the latter is, by definition, an integral part of the former.

Fratelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186, 188 n.6 (1st Cir. 1967) (citations omitted).

If there is a meaningful difference between the terms, "right of action" is more precise. Section 22 merely grants aggrieved futures investors the right to judicial redress against individuals and exchanges. Once a set of facts—that is, a cause of action—in which a futures investor is injured arises, the plaintiff may exercise the § 22 right to recover damages. Strictly speaking, then, the *Curran* Court was also concerned with whether a "right of action," rather than a cause of action, existed. *See* 456 U.S. at 374. It was not ruling on the factual sufficiency of the plaintiff's claim.

96. H.R. REP. NO. 565, pt. I, 97th Cong., 2d Sess. 151-52, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3871, 4000-01. The Committee approved the reauthorization including the private right of action on April 22, 1982. *Id. Curran* was decided May 3, 1982. 456 U.S. at 353. The Chairman of the House Agriculture Subcommittee stated:

> At the time the Committee considered H.R. 5447 [the CFTC reauthorization], the Supreme Court had not yet resolved the issue of whether a private right of action could be implied under the Act. The Committee is of the view that the right of an aggrieved person to sue a violator of the Act is critical to protecting the public and fundamental to maintaining the credibility of the futures markets.

128 CONG. REC. H7486 (daily ed. Sept. 23, 1982) (statement of Rep. Ed Jones).

97. *Hearings, supra* note 95, at 175 (statement of Rep. Glickman). The Committee also might have acted in response to the limitations inherent in the CFTC reparations program. As the following chart indicates, aggrieved futures investors who brought claims during fiscal years 1976-80 experienced substantial delays before their claims were resolved.

decided.[98]

Once the Court announced its decision and it was clear that the opinion contained no details concerning the scope of the private cause of action, House Committee members had a further justification for having provided prospective plaintiffs and defendants with a statutory scheme.[99] The full House approved the Agriculture Committee's inclusion of a carefully articulated private right of action in the CFTC reauthorization.[100] When members of the House and Senate met to resolve differences in their proposals, the Senate conferees agreed to include the private right of action in the final version of the bill.[101] The Chairman of the Senate Agriculture Committee justified his concurrence by stating that "this area of the law is new and uncharted . . . . [The express private right of action] would be helpful in clarifying the limits of liability for violations of the Act."[102]

When the Futures Trading Act of 1982[103] was enacted on January 11, 1983, aggrieved futures investors could, for the first time, raise claims based on an express private right of action.

STATUS OF REPARATIONS CASES

Fiscal Year	Docketed	Closed	Pending as of Year End
1976	25	0	25
1977	319	70	274
1978	303	198	379
1979	535	174	740
1980	741	278	1,203

COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT 1980 at 28 (1980).

98. S. REP. No. 384, 97th Cong., 2d Sess. 74 (1982). The subcommittee assigned to the reauthorization declined to act while *Curran* was pending before the Supreme Court. *Id.*

99. The House Agriculture Committee Chairman said the private action "should be adopted [since] the Court answered [but] one of the several questions that have plagued the courts, plaintiffs and defendants." 128 CONG. REC. H7484 (daily ed. Sept. 23, 1982) (statement of Rep. de la Garza). One Committee member who was particularly critical of the Supreme Court's approach argued that the *Curran* opinion was "so nonspecific and inarticulate" that it would probably take years for the lower courts to define the elements of the private action. *Id.* at H7490 (statement of Rep. Glickman).

100. H.R. 5447, 96th Cong., 2d Sess. § 236 (1982), 128 CONG. REC. H7503 (daily ed. Sept. 23, 1982).

101. H.R. REP. No. 964, 97th Cong., 2d Sess. 51, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4055, 4069.

102. 128 CONG. REC. S14,813 (daily ed. Dec. 15, 1982) (statement of Sen. Helms).

103. Pub. L. No. 97-444, 96 Stat. 2294 (codified at 7 U.S.C. §§ 1-26 (1982)).

IV. SCOPE OF PROTECTION FOR AGGRIEVED FUTURES INVESTORS UNDER SECTION 22, *CURRAN*, AND OTHER CAUSES OF ACTION

The implied private remedy available under *Curran* will be short-lived. It covers only those actions that accrued prior to January 11, 1983.[104] This judicially authorized cause of action serves, however, as a useful benchmark against which to measure the advantages and disadvantages of the express private right of action under section 22.

A. *Comparison of the Causes of Action Under Section 22 and* Curran

1. *Parties Involved in Futures Litigation*

In contrast to *Curran*, which gives plaintiffs little guidance, section 22 comprehensively describes how plaintiffs are to implement their right of action. For instance, only those investors who are actually involved in the futures markets may bring an action under section 22.[105] An owner of an actual commodity who does not trade futures contracts but who experiences a loss in the value of that commodity due to price manipulation in futures markets may not sue market participants.[106] If, however, a futures investor experiences a loss due to price manipulation, he may have an action against several defendants.

Section 22(a) provides that an aggrieved futures investor may sue certain market participants as individuals. First, the investor may bring an action against his FCM[107] or against individuals who provide him with trading advice.[108] The action is available regardless of whether the futures investor is buying or selling futures, options on futures, or options on physical commodities.[109] Second, a futures investor who deals with a broker of non-exchange options, leverage contracts,[110] or interests in commodity pools[111] may main-

104. *See* 7 U.S.C. § 25(d).

105. H.R. REP. No. 565, pt. I, 97th Cong., 2d Sess. 57, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3871, 3906.

106. *Id.*

107. 7 U.S.C. § 25(a)(1)(B) (1982).

108. *Id.* § 25(a)(1)(A).

109. *See id.* § 25(a)(1)(B). An option gives the buyer the right to buy or sell something at a specific price within a specified period of time. COMMODITY FUTURES TRADING COMMISSION, GLOSSARY OF SOME TERMS COMMONLY USED IN THE FUTURES TRADING INDUSTRY 20 (1980) [hereinafter cited as CFTC GLOSSARY].

110. Leverage contracts (also known as margin accounts, margin contracts, and leverage accounts) are futures contracts not traded on any exchange; investor participation is solicited

tain an action against such a broker.[112]

Third, a futures investor may sue individuals with whom he is not in privity. Any investor who buys or sells any type of futures or options and who sustains actual damages caused by a manipulation of the price of the contract or of its underlying commodity may sue the manipulator despite the absence of privity.[113] Futures investors may also sue individuals who willfully aid, abet, counsel, induce, or procure the commission of a violation of the CEA.[114]

In addition to the individual defendants discussed in section 22(a), certain organizations and their employees may be sued if they fit within the requirements of section 22(b).[115] Section 22(b) provides that futures investors whose claims arise from transactions that are subject to the rules governing contract markets may have a cause of action against a contract market,[116] its clearing organization,[117] a licensed board of trade,[118] or a registered futures association.[119] Investors may also sue the controlling persons or employees of these organizations.[120]

2. *Types of Violations Actionable*

On its face, the language of subsections (a) and (b) appears to differentiate between individual defendants and organizational de-

by sellers, typically through mailings. *See* CFTC GLOSSARY, *supra* note 109, at 16; 7 U.S.C. § 23 (1982); 17 C.F.R. § 31.4 (1984).

111. Commodity pools are similar to investment trusts or syndicates in that individuals or firms solicit or accept funds, securities, or property for trading futures contracts. CFTC GLOSSARY, *supra* note 109 at 6; *see also* 7 U.S.C. §§ 6m-6*o* (1982) (governing commodity pools).

112. 7 U.S.C. § 25(a)(1)(C) (1982). The class of defendants subject to suit under the CFTC reparations procedure is smaller than under the private action. A futures investor may seek reparations only against a "person who is registered under the chapter." *Id.* § 18(a). The CEA requires registration of FCMs and their associates, introducing brokers and their associates, floor brokers, associates of CPOs, and associates of CTAs. *See id.* §§ 6e, 6f, 6k.

113. *Id.* § 25(a)(1)(D); Abraham & Frankhauser, *A Review of the Major Revisions of the Commodity Exchange Act*, COMMODITIES L. LETTER, Feb. 1983, at 3.

114. 7 U.S.C. § 25(a)(1) (1982).

115. *Id.* § 25(b).

116. See *supra* note 17 and accompanying text for discussion of contract markets.

117. A clearing organization is an adjunct to a commodity exchange through which transactions executed on the floor of the exchange are settled. CFTC GLOSSARY, *supra* note 109, at 5.

118. See *supra* note 15 for discussion of the functions of a board of trade.

119. A futures association is a self-regulatory organization of the futures industry patterned after the National Association of Securities Dealers. H.R. REP. No. 565, pt. I, 97th Cong., 2d Sess. 41, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3871, 3890.

120. 7 U.S.C. § 25(b)(3) (1982).

fendants with respect to the scope of actionable violations. While subsection (b) states that any violation of the CEA, CFTC rules, or rules of organizations subject to the CEA is a sufficient basis upon which to sue an offending organization, subsection (a) seems to confine the scope of litigation against individual defendants to violations of the CEA itself.[121]

The two theories that attempt to explain this difference reach opposing conclusions about the scope of actionable violations under subsection (a). According to the first theory, the language of section 22(a) totally excludes the possibility of a private right of action based on a violation of a CFTC rule. [122] Had Congress wanted subsection (a) to have the broad coverage provided in subsection (b), proponents of this "total exclusion" theory argue, it would have used language like that in subsection (b). For this reason, Congress must have deliberately confined the scope of subsection (a) to violations of the Act itself.[123]

While the first theory argues that the language of section 22(a) totally excludes suits based on CFTC rule violations, the second theory takes the position that only certain CFTC rules are excluded from the set of actionable violations contemplated by section 22(a).[124] Proponents of this "partial exclusion" approach point out that the CEA, in certain of its provisions, specifically prohibits activities which are "contrary to any rule, regulation, or order of the Commission" that is adopted pursuant to the particular provision.[125] Any violation of one of these rules would therefore constitute a violation of the CEA itself. For example, an option transaction which fails to comply with CFTC rules made pursuant to section 4c(b) of the CEA would, under the language of that section, violate the CEA and thus give rise to an action under section

121. *Compare id.* § 25(a)(1) ("Any person . . . who violates this chapter . . . shall be liable . . . . ") *with id.* § 25(b)(1) ("[An] organization . . . that fails to enforce any bylaw, rule, regulation or resolution that it is required to enforce by the Commission . . . [or in enforcing such rule] violates this chapter or any Commission rule, regulation or order . . . shall be liable . . . .").

122. 2 T. RUSSO, *supra* note 11, § 14.14.

123. *Id.* Section 14 of the CEA, which governs the reparations procedure, is another instance where Congress, in defining the scope of actionable violations, specifically made reference not only to the CEA but also to the rules, regulations, and orders promulgated thereunder. 7 U.S.C. § 18(a) (1982). There is no indication in the legislative history, however, that the private action was to be patterned after the reparations procedure. *See* H.R. REP. No. 565, pt. I, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3781.

124. Abraham & Frankhauser, *supra* note 113, at 4.

125. *E.g.*, 7 U.S.C. § 23(b) (1982) (governing leverage contracts in gold and silver bullion and bulk gold and silver coins).

22(a).[126]

The total exclusion theory provides little protection for aggrieved futures investors under section 22(a). The partial exclusion theory offers better—though still not comprehensive—protection in the area where futures investors most need it, that is, in cases of fraudulent practices. A futures investor might encounter these practices in any type of futures trading: in a futures transaction, in an options transaction,[127] in a leverage transaction,[128] or when dealing with a commodity pool operator (CPO) or a commodity trading advisor (CTA).

Unlike the total exclusion theory, the partial exclusion theory would permit the futures investor to base a cause of action upon violations of options and leverage contract rules. Thus, the partial exclusion theory better protects investors, inasmuch as the rules, rather than the statutes, flesh out the protections against fraud in options trading and leverage transactions.[129]

Current judicial interpretation of section 4b,[130] the general antifraud provision, and section 4*o*,[131] the antifraud provision that applies to CPOs and CTAs, may also provide futures investors relief without recourse to CFTC rules. Aggrieved investors have successfully brought actions under section 4b against their account executives for making false representations,[132] trading of a customer's

126. *See id.* § 6c(b).

127. Fraud in options has prompted both congressional and administrative action. Congress banned option trading in agricultural commodities in 1936. Commodity Exchange Act, Pub. L. No. 74-675, § 4c, 49 Stat. 1491, 1492 (1936) (current version at 7 U.S.C. § 6c (1982)). This prohibition has only recently been relaxed. *See* Futures Trading Act of 1982, Pub. L. No. 97-444, tit. II, §§ 206(1), (2), 96 Stat. 2296, 2301 (codified at 7 U.S.C. § 6c (1982)). In 1978, Congress imposed a general prohibition on nonagricultural commodity options. Futures Trading Act of 1978, Pub. L. No. 95-405, § 3(3), 92 Stat. 865, 867 (current version at 7 U.S.C. § 6c(c) (1982)). Trading in these options may resume if the CFTC proves to Congress that it has the ability successfully to regulate these transactions. *Id.* Limited trading in options on nonagricultural commodities is now authorized through a CFTC pilot program. 17 C.F.R. § 33.4 (1984); *see also* 48 Fed. Reg. 41,575 (1983) (background on pilot program). The Commission has also authorized a pilot program for the trading of agricultural commodities. 45 Fed. Reg. 2752 (1984) (to be codified at 17 C.F.R. § 33).

128. Leverage transactions also have been restricted. *See supra* note 110.

129. *Compare* 7 U.S.C. § 6c (1982) (governing options) *and* 7 U.S.C. § 23 (1982) (governing leverage transactions) *with* 17 C.F.R. § 32.1-.12 (1984) (regulating options) *and* 17 C.F.R. § 32.1-.24 (1984) (regulating leverage transactions).

130. 7 U.S.C. § 6b (1982).

131. *Id.* § 6*o*.

132. Notkin v. Paine, Webber, Jackson & Curtis, Inc., [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,236, at 25,161 (CFTC Aug. 25, 1981) (false creation of reasonable expectations in customer can be fraud under § 4b).

account without prior authorization,[133] churning of a customer's account,[134] and deducting money from a customer's account without repaying the sum.[135] Moreover, in at least one case a pattern of violations of CFTC rules constituted important evidence of a section 4b violation.[136] Even if a "total exclusion" rule were to prohibit suits solely based on violations of CFTC rules, then, injured investors may be able to base claims on section 4b, using CFTC rules violations as powerful evidence of the defendant's fraudulent dealings. Similarly, section 4*o*, which proscribes fraud by CPOs and CTAs, has assisted investors in raising claims without having to rely on CFTC rules. Aggrieved futures investors have successfully sued their CPOs and CTAs under this section for misusing trading advice,[137] making false statements in solicitation,[138] and failing to follow a customer's instructions.[139] Section 4*o* itself, however, may not always be broad enough to afford complete protection.[140] For example, even though CFTC rule 4.22[141] requires a CPO to report

133. Haltmier v. Commodity Futures Trading Comm'n, 554 F.2d 556, 560 (2d Cir. 1977) (§ 4b directly proscribes unauthorized trading by a broker); *accord*, Herman v. T&S Commodities, Inc., 578 F. Supp. 601, 603 (S.D.N.Y. 1983).

134. McGaughey v. Hogan-Orr, Inc., [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,076, at 24,350 (CFTC July 31, 1980) (churning of customer's account, which generates commissions without regard to customer's investment objectives, violates § 4b).

135. Brostrup v. Comvest, Inc., [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,316, at 25,569 (CFTC Dec. 7, 1981) (deducting money from customer's account for the purpose of investment management but never investing it nor returning it to the customer constituted fraudulent conversion in violation of § 4b).

136. In Quigley v. Dean Witter Reynolds, Inc., [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,330, at 25,597 (CFTC Jan. 22, 1982), the administrative law judge found that repeated failure to comply with 17 C.F.R. § 1.35(a-1)(1) (1984) constituted important evidence of a violation of § 4b. That rule requires, in part, that account executives timestamp customer orders.

137. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 285-86 (9th Cir. 1979) (where CTA gave trading advice with knowledge that the advice was incorporated directly into trades on customer's behalf and then bought and sold opposite those customer orders, such transactions operated as a fraud on those customers and violated § 4*o*(1)).

138. Behl v. Stanford Management Corp., [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,935, at 28,036 (CFTC Dec. 7, 1983) (use of false and fraudulent statements in connection with solicitation of funds from a customer was a violation of §§ 4b and 4*o*).

139. Davidson v. Boesch, [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 22,015, at 28,557 (CFTC Feb. 17, 1984) (by ignoring customer's order to transfer his investment out of pooled account and into individual trading account, by performing unauthorized trades of customer's account, and by refusing to liquidate customer's account, CPO violated §§ 4b(A) and 4*o*(1)).

140. *See id.* The *Davidson* decision also cited a violation of 17 C.F.R. § 4.22 (1984) (requiring reports to pool participants). *Davidson*, [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) at 28,557. It is not clear whether the plaintiff's damage award included losses suffered as a result of that violation.

141. 17 C.F.R. § 4.22 (1984).

to his customers, the Act does not contain a similar requirement.[142] Thus, a futures investor may be unable to sue his CPO for a violation of this rule.

A third approach would enable aggrieved futures investors to sue section 22(a) defendants for violations of any CFTC rule whatsoever. The underpinning for this theory is found in section 8a(5) of the CEA, which authorizes the CFTC "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of [the CEA]."[143] The aggrieved investor could assert that the violated rule was, by virtue of section 8a(5), so inextricably linked to the CEA as to bring its violation within the scope of section 22(a).

Judicial rejection of both the partial exclusion theory and the section 8a(5) analysis would effectively remove CFTC rules violations by section 22(a) defendants from the jurisdiction of federal courts. The aggrieved futures investor in such a case would have to resort to the CFTC reparations procedure, where he would be able to frame a complaint for violations of both the CEA and CFTC rules.[144] The disadvantage, however, is that use of the reparations procedure precludes the investor from pursuing the same claim under other laws, including the Racketeer Influenced and Corrupt Organizations Act[145] and state common law.[146]

Like sections 22(a) and 22(b), the *Curran* decision appears to allow claims based on all violations of the CEA. Not only did the Supreme Court phrase the issue in *Curran* broadly enough to provide such comprehensive coverage, but it also deemphasized the sections of the CEA actually at issue and focused instead on Congress' intent with respect to the entire CEA.[147]

142. *See* 7 U.S.C. § 6*o* (1982).

143. *Id.* § 12a(5).

144. CEA § 14(a) allows redress for "any violation of any provision of this chapter, or any rule, regulation or order issued pursuant to the chapter." 7 U.S.C. § 18(a). The D.C. Circuit recently addressed the question of jurisdictional limitations in the CFTC reparations procedure. In Schor v. Commodity Futures Trading Comm'n, Nos. 83-1703 and 83-1704 (D.C. Cir. Aug. 10, 1984) (available Oct. 10, 1984, on LEXIS, Genfed library, Cir file), the court held that the CFTC has no power to adjudicate counterclaims based on common law remedies, implicitly recognizing that the Commission's authority is restricted to resolving claims based upon the CEA and its regulations.

145. 18 U.S.C. §§ 1961-68 (1982).

146. See *infra* notes 194-227 and accompanying text for further discussion of these alternative remedies.

147. 456 U.S. at 369 n.42, 372 n.49; *see* Miller, *Highlights of Recent Federal Court Cases*, COMMODITIES L. LETTER, Apr. 1983, at 7.

Curran may also be compared to section 22(a) regarding whether violations of Commission rules are actionable. Although the *Curran* opinion does not specifically address this point,[148] the Court's silence may evince tacit approval of causes of action based on CFTC rules. If Congress intended to deny section 22(a) actions based on some or all rules violations, as the partial and total exclusion theories argue, the less detailed *Curran* cause of action may afford investors greater protection. The extent of the advantage to *Curran* litigants over section 22(a) litigants, then, depends on how broadly courts interpret section 22(a).

3. *Level of Culpability*

Section 22(a) fails to state the level of culpability that is required to establish a cause of action against an individual who violates the CEA.[149] Courts disagree about the appropriate level of culpability required in actions against individuals.[150] Some courts have applied a "deliberate but without evil intent" standard, holding that one who violates the CEA must have done so intentionally, but need not have schemed to defraud his customers in order to be culpable.[151] Similarly, one court ruled that the commodity professional need "not have had an evil motive or an affirmative intent to injure his customer," nor the subjective desire to cheat or defraud his customer to be culpable, but merely have intended to violate the statute.[152] Moreover, a commodity professional may violate section 4b of the CEA even though his unauthorized activities were well-meant.[153] The defendant in one case had "intentionally and deliberately" undertaken unauthorized transactions in the hope that they would turn out profitably for his customer.[154]

In contrast, some courts have required not only a deliberate act, but also knowledge by the defendant that his action defrauded his

148. 456 U.S. at 395.

149. 7 U.S.C. § 25(a) (1982).

150. *See* 2 P. JOHNSON, *supra* note 11, at 310-23.

151. *See* Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 285 (9th Cir. 1979). The burden of proof required for a number of CEA violations was at issue in *Savage*. The court applied the "deliberate without evil intent" standard to a violation of CEA § 4*o*, 7 U.S.C. § 6*o* (1982). It applied the "deliberate with evil intent" standard, however, to a violation of CEA § 4b, 7 U.S.C. § 6b (1982), based on the different wording of § 4*o* and § 4b.

152. Haltmier v. Commodity Futures Trading Comm'n, 554 F.2d 556, 562 (2d Cir. 1977); *see also* Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 31 (7th Cir. 1977).

153. *Haltmier*, 554 F.2d at 562.

154. *Id.*

customers before finding culpability.[155] One court found such a "deliberate with evil intent" violation where the defendant entered into prearranged trades between himself and his customers.[156] He would be the buyer when filling a sell order for his customers, and be the seller when filling a buy order for them.[157] By controlling both the buying and selling functions, he profited and his customers lost. Thus, the sole purpose of his scheme was fraudulent.

Under section 22(b), plaintiffs must prove bad faith on the part of the organization or controlling person whose action or inaction allegedly caused the harm.[158] The bad faith standard that was used in pre-*Curran* cases and will probably be applied in section 22(b) cases is very much like the "deliberate with evil intent" standard under section 22(a). One court, for example, dismissed a plaintiff's complaint because it contained no allegation of bad faith amounting to fraud.[159] The court defined bad faith as "ulterior motive, for example, personal gain."[160] Consequently, the higher bad faith standard may give defendants in subsection (b) actions an advantage over subsection (a) defendants, depending on which culpability standard a particular jurisdiction applies in subsection (a) cases.

Although section 22(b) specifies a bad faith standard, it says nothing about how the standard is to be applied.[161] While courts agree that bad faith is required to prove culpability for affirmative acts by an exchange,[162] they disagree about whether the same standard should apply to an exchange's failure to act. Traditionally, courts have required a showing of negligence where an exchange's inaction was at issue.[163] But recently, in *Jordon v. New York Mercantile Exchange*,[164] the court applied the bad faith standard to an exchange's inaction as well as its action.[165] The court based its holding on section 22, even though that provision was not enacted

155. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 283 (9th Cir. 1979).

156. *Id.*

157. *Id.* at 275.

158. 7 U.S.C. § 25(b) (1982).

159. P.J. Taggares v. New York Mercantile Exch., 476 F. Supp. 72, 77 (S.D.N.Y. 1979).

160. *Id.* at 77 n.22.

161. *See* 7 U.S.C. § 25(b) (1982).

162. *E.g.*, P.J. Taggares Co. v. New York Mercantile Exch., 476 F. Supp. 72, 76 (S.D.N.Y. 1979) ("[A]bsent allegations of bad faith [, the commodity exchange and its officials] may not be held for discretionary actions taken in the discharge of their duties pursuant to the rules and regulations of the Exchange.").

163. *E.g.*, Strax v. Commodity Exch., Inc., 524 F. Supp. 936, 943 (S.D.N.Y. 1981).

164. [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,856, at 27,587 (S.D.N.Y. Sept. 27, 1983).

165. *Id.* at 27,595.

until after the cause of action arose.[166] Inasmuch as section 22 provided a cause of action for both exchange action and inaction, the court argued, one standard should apply.[167]

In *Curran*, the Court gave no indication as to what should be the standard of culpability.[168] Thus, a court deciding a case based upon a *Curran* private right of action must turn to case law for guidance.

In most cases, an aggrieved futures investor gains no advantage by basing his cause of action on *Curran* instead of section 22 since courts would probably apply the same standard of culpability. In cases where investors have sued individuals, courts will probably require proof in both *Curran* and section 22(a) lawsuits that the individual acted either deliberately but without evil intent or deliberately with evil intent, in accordance with the standard applied to similar cases in the pre-*Curran* era.[169] In cases where the investor has sued an exchange for taking some affirmative action in violation of the CEA, CFTC rules, or its own rules, courts will probably require proof in both *Curran* and section 22(b) lawsuits that the exchange acted in bad faith. Such a result is justified because courts applied the bad faith standard to cases involving affirmative violations by exchanges prior to the *Curran* decision.[170] The one type of case in which a *Curran* claim would likely be more advantageous to an investor than a section 22 claim is where the investor sues an exchange for its failure to take some action required by the CEA, CFTC rules, or its own rules. Courts will apply a negligence standard when the cause of action is based upon *Curran*, rather than applying the bad faith standard of section 22(b).[171] In at least one case, however, the court adopted bad faith as the level of culpability for an exchange's inaction.[172]

Thus, *Curran* and section 22 differ little in the area of standards of culpability. The plaintiff who sues under *Curran* rather than the statute would gain an advantage only in lawsuits based upon an exchange's failure to act.

166. *Id.*

167. *Id.*

168. 456 U.S. at 395.

169. *See supra* note 151.

170. *See supra* note 162.

171. *See supra* note 163.

172. Jordon v. New York Mercantile Exch., [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,856, at 27,587 (S.D.N.Y. Sept. 27, 1983). *But see* Gordon v. Hunt, 558 F. Supp. 122 (S.D.N.Y. 1983) ("*Curran* . . . could well be argued to authorize suit on a less restrictive basis.").

4. *Causation*

Section 22 requires the plaintiff in a futures case to show a causal connection between the violation and his loss.[173] The causation language appears in both subsection (a) and subsection (b), but neither subsection defines causation.[174] Subsection (a) does provide, however, that the losses must have resulted from one of the four types of transactions outlined in that provision.[175] Similarly, subsection (b) states that the losses must have resulted from a transaction "on or subject to the rules of [the] contract market or licensed board of trade," and that they must have been caused either by the organization's failure to enforce its rules or by its having enforced the rules in violation of the CEA or associated rules.[176] The same requirements apply in cases where controlling persons or employees of the organizations are named as subsection (b) defendants.[177] Inasmuch as the *Curran* Court declined to rule on causation,[178] courts must examine other cases to decide causation issues in claims arising under *Curran* as well as under section 22.

Causation problems arise primarily in cases that involve failure to register and misrepresentation. Where account executives have failed to comply with the registration requirement, plaintiffs have often been unable to show that their losses were causally linked to the lack of registration.[179] In one case, for example, the court indicated that a turn in the market, rather than the failure to register, had caused the plaintiff's losses.[180] A court applying section 22 would probably have reached the same conclusion, because section 22 says that direct rather than indirect causation must be shown.[181]

Where causation questions arise with respect to misrepresentation, two slightly different rules emerge.[182] Under the first rule, a

173. *See* 7 U.S.C. §§ 25(a) (1), (b)(1)-(3) (1982).

174. *See id.*

175. *Id.* § 25(a)(1).

176. *Id.* § 25(b)(1)-(2).

177. *Id.* § 25(b)(3).

178. 456 U.S. at 395.

179. *E.g.*, International Cattle Sys. v. Parsons, [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,367, at 25,756 (D. Kan. Mar. 9, 1982).

180. Hoetger & Co. v. Ascencio, [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,950, at 28,094 (E.D. Mich. Oct. 12, 1983).

181. Liability of individuals is predicated upon "damages *resulting* from . . . transactions [under the subsection] and *caused* by such violation." 7 U.S.C. § 25(a) (1982) (emphasis added). Liability of organizations is based on "damages . . . that *resulted* from such transaction and were *caused* by such failure to enforce or enforcement of such bylaws, rules, regulations or resolutions." *Id.* § 25(b)(1) (emphasis added).

182. *See* 2 P. JOHNSON, *supra* note 11, at 359.

plaintiff must show that he attached importance to a misstatement or omission of information by the account executive, and that he was thereby influenced to act differently than he would have acted had he known the true facts.[183] In other words, the plaintiff must have relied on the account executive's misstatement or omission.[184] The second rule presumes that the plaintiff has relied on the misrepresentation, but permits rebuttal of the presumption.[185] Because the burden of proof differs between the two rules, the result that a court would reach in either a *Curran* action or a section 22 action is, in large measure, a function of which rule the court adopts.

5. *Damages*

Subsections (a) and (b) of section 22 both state that successful plaintiffs may recover actual damages for violations of the CEA.[186] Damages awarded in futures cases interpreting the CEA are limited to compensation for out-of-pocket losses or for lost profits.[187] The treatment of damages in section 22 reflects the current state of the law in futures trading. Courts traditionally have not allowed recovery for punitive damages, for damages unrelated to the violation, or for consequential damages.[188]

While *Curran* did not rule on damages,[189] it is likely that the damage award in a case brought under the *Curran* implied private remedy would be the same as the award in a section 22 case. At least with respect to damages, then, a plaintiff who brings a section 22 cause of action acquires no significant advantage over the plaintiff who brings a claim based on *Curran*.

6. *Statute of Limitations*

Section 22 provides that any plaintiff who seeks a private remedy under the Act must bring the action no later than two years

183. Klatt v. International Trading Group, Inc., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,636, at 22,598 (CFTC June 21, 1978) (citing List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir.), *cert. denied sub nom.* List v. Lerner, 382 U.S. 811 (1965)).

184. *Id.*

185. Wong v. First London Commodity Options, Ltd., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,834, at 23,414-15 (CFTC May 29, 1979).

186. 7 U.S.C. § 25(a), (b) (1982).

187. 1 T. RUSSO, *supra* note 11, § 12.43.

188. *See* Barker v. Commodity Management Sys., Inc., [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,432, at 21,756 (CFTC June 2, 1977) (damages in a reparation proceeding are limited to making the complainant whole by restoring the commodity account to what it was when it was opened); Deming v. Peck, [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,157, at 24,735 (CFTC Feb. 27, 1981).

189. 456 U.S. at 395.

from the time the cause of action accrued.[190] However, when a court decides a statute of limitations question under *Curran*, it is faced with little consistent law. In the pre-*Curran* period, courts used various state laws to set the period of limitation. In one instance, state securities law was used;[191] in another, state tort law provided the rule.[192]

Section 22 offers certainty regarding the limitations period, in contrast to the myriad possibilities that exist for a *Curran* claim.[193] Plaintiffs who bring causes of action under *Curran* will benefit if the court applies a limitation period that is longer than the two years prescribed by the CEA.

B. *Alternative Causes of Action*

If aggrieved futures investors cannot bring their claims under the CEA, they may turn to other bodies of law for relief.

1. *State Common Law Claims*

Courts have read section 2 of the CEA as permitting an investor to sue in state court under common law forms of actions such as fraud, breach of fiduciary duty, and conversion.[194] Courts are split, however, on whether actions may be brought under state statutes. Most courts have held that claims under such statutes are not actionable.[195]

State common law claims may allow damage awards that are more liberal than those available under section 22. For example, in a case brought under Arizona law, the court awarded punitive dam-

190. 7 U.S.C. § 25(c) (1982).

191. Smith v. Groover, 468 F. Supp. 105 (N.D. Ill. 1979). The applicable Illinois statute of limitations is three years. *Id.* at 119-20.

192. Jones v. B.C. Christopher & Co., 466 F. Supp. 213 (D. Kan. 1979). The statute of limitations under the Kansas tort law is two years. *Id.* at 228.

193. *See supra* notes 190-92 and accompanying text.

194. E.F. Hutton & Co. v. Lewis, 410 F. Supp. 416, 419 (E.D. Mich. 1976).

195. *E.g.*, Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 420, 248 S.E.2d 567, 570 (1978) (futures claim cannot be brought under state unfair trade practices law); International Trading, Ltd. v. Bell, 262 Ark. 244, 250-53, 556 S.W.2d 420, 423-24, *cert. denied*, 436 U.S. 956 (1977) (futures claim cannot be brought under state securities act); State v. Monex Int'l, Ltd., 527 S.W.2d 804, 806-07 (Tex. App. 1975) (futures claim cannot be brought under state securities act); Haines v. First Commodity Corp., [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,088, at 24,393 (Mass. Sup. Ct. May 21, 1980) (futures claim cannot be brought under state consumer protection laws). *But see, e.g.*, Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc., 465 F. Supp. 585, 592 (M.D. La. 1979), *rev'd on other grounds*, 600 F.2d 1189 (5th Cir. 1980) (futures claims may be brought under state's law of mandate, concerning principal-agent relations).

ages to a defrauded futures investor.[196] As previously noted, section 22 and futures case law generally limit damages to out-of-pocket losses or lost profits.[197]

State law may also provide a longer statute of limitations. For example, the Illinois statute of limitations bars civil actions brought more than three years after accrual of the claim, as compared with the two-year statute of limitations in section 22.[198]

2. *Federal Claims under RICO*

An aggrieved futures investor may bring an action under the Racketeer Influenced and Corrupt Organizations Act (RICO),[199] in conjunction with other remedies.[200] RICO is actually a compilation of federal criminal offenses, or predicate crimes.[201] It permits both criminal and civil suits[202] and empowers victims of the predicate crimes to bring private suits against offenders.[203]

To use civil RICO, the futures investor must prove that the defendant, among other things, engaged in a "pattern of racketeering activity."[204] A "pattern of racketeering activity" arises when the

196. Kotz v. Bache Halsey Stuart, Inc., 685 F.2d 1204, 1207 (9th Cir. 1982); *see also* Harvitt, *Defrauded Commodity Investors: What's In Their Futures*, 71 ILL. B.J. 496 (1983) (recommending addition of a common law fraud complaint under Illinois law to a CEA action, to collect punitive damages).

197. *See supra* notes 186-89 and accompanying text.

198. *See supra* note 191.

199. 18 U.S.C. §§ 1961-68 (1982). RICO is contained in title IX of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C. & 28 U.S.C. (1982)). The purpose of the OCCA is to provide "enhanced sanctions and new remedies to deal with unlawful activities of those engaged in organized crime." *Id.* Statement of Findings and Purpose, 84 Stat. at 923. The goal of RICO is the "elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. No. 617, 91st Cong., 1st Sess. 76 (1970).

200. "Nothing in this title shall supersede any provision of federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title." OCCA § 904, 84 Stat. at 947.

201. 18 U.S.C. § 1961(1) (1982).

202. *Id.* §§ 1963-64.

203. *Id.* § 1964(c). "Any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.*

204. *Id.* § 1962. To prove a violation of § 1962, a plaintiff must specifically prove that: (1) a person; (2) through a pattern; (3) of racketeering activity or collection of an unlawful debt; (4) directly or indirectly, (a) invests in, or (b) maintains an interest in, or (c) participates in; (5) an enterprise; (6) the activities of which affect interstate commerce. *See* Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201, 211-41 (1981) (discussion of elements of proof under § 1962).

defendant or defendants commit at least two violations of a predicate offense within a ten-year period.[205] The plaintiff must also show that there was injury to "business or property"[206] and that the violation caused such injury.[207]

Although futures fraud is not among the predicate RICO offenses,[208] aggrieved futures investors nonetheless have successfully asserted claims under RICO.[209] The usual predicate crime is mail fraud,[210] a claim that is not difficult to prove.[211] To obtain a favorable judgment under civil RICO, the plaintiff has to prove that the defendant engaged in a pattern of activity evidenced by two acts of mail fraud occurring within ten years.[212] At least one plaintiff alleging futures fraud successfully stated such a claim.[213]

In a recent decision, however, the plaintiff was permitted to maintain a cause of action under civil RICO even though there was no mention of a predicate crime.[214] In allowing the cause of action, the court apparently found that civil RICO does not infringe on the CFTC's exclusive regulatory authority and therefore is not preempted by the CEA.[215] But another court dismissed the RICO claim of a futures investor on the grounds that the defendant had

205. 18 U.S.C. § 1961(5) (1982).

206. *Id.* § 1964(c). The courts are split about whether competitive injury must be shown. *See* Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244, 248 (S.D.N.Y. 1981) (no express requirement under RICO to show competitive injury). *But see* North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980) (plaintiff must show competitive injury).

207. 18 U.S.C. § 1964(c) (1982).

208. *See* 18 U.S.C. § 1961(1) (1982). Securities fraud, by contrast, is one of the predicate offenses. *Id.*

209. Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645 (N.D. Ill. 1980) [hereinafter cited as *Parnes* I].

210. *Id.* The creation of the CFTC did not preempt use of the mail fraud statute against fraudulent futures trading. United States v. Brien, 617 F.2d 299, 310 (1st Cir. 1980); United States v. Abrahams, [1980-1982 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,007, at 23,928-29 (S.D.N.Y. Feb. 26, 1980).

211. United States v. Bethea, 672 F.2d 407 (5th Cir. 1982).

212. *See id.* at 419.

213. *Parnes* I, 487 F. Supp. at 646. Even though the plaintiff successfully stated his claim under RICO, he later lost on the merits. Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 24 (N.D. Ill. 1982) [hereinafter cited as *Parnes* II].

214. Vaccariello v. Financial Partnership, Ltd., [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,874 (N.D. Ill. July 29, 1983).

215. *Id.* at 27,717. This rationale has been cited by other courts that have permitted state common law claims for futures fraud. *See supra* note 194 and accompanying text. Although the *Vaccariello* opinion does not mention a predicate crime, the plaintiffs in that case may have based their suit on mail fraud. Similarly, the court in Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311 (N.D. Ill. 1979), held that a counterclaiming defendant could bring an action under civil RICO even though the plaintiff had not been convicted of a predicate crime.

not committed a predicate act.[216] Presumably, the court based its holding on the omission of futures fraud from RICO's list of predicate offenses.[217]

Inasmuch as the use of civil RICO to redress futures fraud is relatively new, there is little judicial authority upon which the aggrieved futures investor may rely in determining whether or not his claim is actionable. Decisions in civil RICO cases involving matters other than futures fraud provide some direction, however. For instance, an investor's suit against FCM managerial and nonmanagerial employees who were acting either individually or on behalf of the FCM would probably be actionable.[218] Further, a plaintiff in a futures fraud suit would probably not be required to prove a nexus between the defendant and organized crime.[219]

An aggrieved investor might encounter difficulty in maintaining a civil RICO action against an organization. One court has held that civil RICO is limited to suits against persons, not enterprises.[220] But another court has ruled that a corporation may be a defendant both as a person and as an enterprise under RICO.[221] By comparison, there is no confusion regarding the opportunity to sue an organization under the CEA: section 22 of the Act expressly allows such suits.[222]

Use of civil RICO by futures investors has two major advantages. First, successful plaintiffs under civil RICO may recover treble damages.[223] Under section 22, the plaintiff's recovery is lim-

216. Applegate v. Dean Witter Reynolds, Inc., [1982-1984 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,881 (S.D. Fla. Jan. 17, 1983). Regrettably, the court's opinion as reported does not give much detail to support its holding. *See id.* at 27,748.

217. *Id.*

218. *Cf.* United States v. Chovanec, 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (civil RICO suit actionable against both subordinates and managers); United States v. LeRoy, 687 F.2d 610, 617 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 823 (1983) (RICO does not require that the predicate acts be in furtherance of the enterprise) (citing United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981)).

219. *Cf.* Engl v. Berg, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981) ("RICO requires neither pleading nor proof of a nexus with organized crime." (citations omitted)). *But cf.* Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747 (E.D. Ill. 1981) (application of RICO is limited to entities involved in organized crime).

220. This principle was unsuccessfully tested in *Parnes* II, 548 F. Supp. at 24.

221. United States v. Hartley, 678 F.2d 961, 989-90 (11th Cir. 1982).

222. 7 U.S.C. § 25(b)(1) (1982).

223. *Id.* § 1964(c). One commentator has suggested that if antitrust law is used by analogy to determine damage awards in cases brought under RICO, then courts should liberally grant damages in such cases. *See* Patton, *Civil RICO: Statutory and Implied Elements of the Treble Damage Remedy*, 14 TEX. TECH L. REV. 377, 418 (1983) (successful plaintiffs should recover any damages directly or derivatively sustained, including loss of past or future profits).

ited to actual damages.[224] Second, the time period for bringing suit under civil RICO is longer than that under section 22. A plaintiff who brings a section 22 action must file his claim within two years after the cause of action accrued,[225] whereas for civil RICO actions, courts have applied a federal criminal statute that specifies a five-year limitation.[226]

Thus, aggrieved futures investors may find civil RICO useful in claims against individuals. By using a mail fraud predicate offense it is not difficult to frame a RICO complaint that may reap large damage awards and offers a liberal limitations period. In light of adverse court rulings, however, investors may be unable to bring a civil RICO claim against organizations.[227]

V. CONCLUSION

With the Supreme Court's decision in *Curran* and Congress' enactment of section 22 of the CEA, the law is now settled that aggrieved futures investors may sue under the CEA.[228] The section 22 right of action, however, has both advantages and disadvantages. Perhaps its principal advantage is the certainty that it provides to the parties to a futures dispute. Whereas *Curran* left open the question of how the elements of the cause of action were to be defined, section 22 provides at least a partial answer. It sets a clear standard for damages and for the statute of limitations, and it carefully delineates which market participants may be named as defendants.[229] It also gives some initial guidance on the matter of causation, although the courts must ultimately determine the precise standard that should apply.[230] The principal disadvantage for plaintiffs is that they must prove a very high level of culpability in order to

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224. 7 U.S.C. § 25(a)(1), (b)(1) (1982).

225. *Id.* § 25(c).

226. *See, e.g.*, United States v. Forsythe, 560 F.2d 1127, 1134 (3d Cir. 1977); United States v. Bethea, 672 F.2d 407, 419 (5th Cir. 1982). The statute reads, "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years . . . after such offense shall have been committed." 18 U.S.C. § 3282 (1982).

227. It may be especially difficult to bring a civil RICO action in the Second Circuit. In a series of recent cases, that court has ruled that such suits must be based on prior criminal convictions. It has expressed the view that Congress expected the criminality of the predicate acts to be proved before permitting a civil racketeering suit. *See* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984); Joel v. Cirrito, No. 84-7113, slip op. (2d Cir. July 27, 1984); Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984).

228. *See supra* notes 55-103 and accompanying text.

229. *See supra* notes 186-93, 105-20 and accompanying text.

230. *See supra* notes 173-85 and accompanying text.

successfully sue organizations and their controlling persons. As for the culpability standard in actions against individuals, section 22 fails to provide any guidance at all.[231] Moreover, the statute is unclear as to whether investors may sue individuals for violations of not only the CEA but also CFTC rules, regulations, and orders.[232]

Aggrieved futures investors now have a wide variety of remedies available to them. The enactment of the section 22 express right of action opens federal courts to futures investors' claims which are based on the CEA. In addition to the reparation procedure that is available under the CEA,[233] futures claims may be brought under laws unconnected to the CEA. In particular, courts have permitted investors to maintain actions under state common law and civil RICO provisions.[234] Moreover, a cause of action under *Curran* may yet be available for a very limited number of plaintiffs.[235]

The comparison of remedies available under *Curran*, the CEA, state common law, and RICO suggests that an aggrieved futures investor should carefully weigh the merits of each remedy before choosing what kind of claim to file. By doing so, he can invoke the remedy or combination of remedies that will best redress his injury.

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231. *See supra* notes 149-57 and accompanying text.
232. *See supra* notes 121-48 and accompanying text.
233. *See supra* notes 45-49 and accompanying text.
234. *See supra* notes 194-227 and accompanying text.
235. *See supra* text accompanying note 104.