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# The Change in Bank Control Act of 1978: Does It Give Rise to a Private Cause of Action?

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## Comments

# The Change in Bank Control Act of 1978: Does It Give Rise to a Private Cause of Action?

### INTRODUCTION

Kentucky may soon witness an increased number of attempted takeovers of banks and bank holding companies. The Kentucky General Assembly recently passed legislation enabling bank holding companies, currently allowed to own only one bank,<sup>1</sup> to become multibank holding companies.<sup>2</sup> Also, in 1982, the Kentucky Supreme Court ruled that the state's Take-Over Bids Disclosure Act<sup>3</sup> was unconstitutional.<sup>4</sup>

When read together, these two factors should have a twofold effect on takeover activity in the banking field: an increased number of takeover attempts and a reduction in the number of constraints on such attempts. One of the important remaining constraints on takeover attempts is the federal Change in Bank Control Act<sup>5</sup> (C.B.C.A.), which will play an ever increasing role in unfriendly takeover attempts. The size of its role, however, will depend upon whether the Act creates a private cause of action and, if so, for whom.

This Comment examines recent case law regarding the availability of a private cause of action under the C.B.C.A. The analysis in these cases will be compared to the United States

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<sup>1</sup> KY. REV. STAT. § 287.030(3) (Bobbs-Merrill 1981) [hereinafter cited as KRS].

<sup>2</sup> H.R. 67, 1984 Reg. Sess. The Bill will enable bank holding companies, having their principal place of business in Kentucky, to acquire control of one or more banks or bank holding companies wherever located. The bill will also allow the formation of a one bank holding company for the purpose of acquiring control of a bank.

<sup>3</sup> KRS §§ 292.560-.630 (1981).

<sup>4</sup> See *Esmark, Inc. v. Strode*, 639 S.W.2d 768 (Ky. 1982) (Kentucky's Take-Over Bids Disclosure Act violated the supremacy and commerce clauses of the United States Constitution because it frustrated the purpose of the Williams Act, which is to regulate tender offers).

<sup>5</sup> 12 U.S.C. § 1817(j) (1982).

Supreme Court's test for implying a cause of action under a federal statute. The Court's test, as set out in *Cort v. Ash*,<sup>6</sup> determines whether a private cause of action can be implied under the C.B.C.A. This Comment concludes that a private cause of action should be implied under the C.B.C.A. for both bank shareholders and banks.

## I. STATUTORY PROVISIONS

The C.B.C.A. applies to all persons<sup>7</sup> who either directly or indirectly acquire control<sup>8</sup> of any insured bank.<sup>9</sup> Persons planning to acquire control of an insured bank must give sixty days prior written notice to the appropriate federal banking agency.<sup>10</sup> The

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<sup>6</sup> 422 U.S. 66 (1975).

<sup>7</sup> 12 U.S.C. § 1817(j)(1). A "person" is defined as "an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein." 12 U.S.C. § 1817(j)(8)(A).

<sup>8</sup> 12 U.S.C. § 1817(j)(1). "[C]ontrol" is defined as "the power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 percentum or more of any class of voting securities of an insured bank." 12 U.S.C. § 1817(j)(8)(B). The regulations adopted pursuant to the Change in Bank Control Act define "control" as:

*Acquisitions of Control.* Under the Change in Bank Control Act of 1978, acquisitions by a person or persons acting in concert of the power to vote 25 percent or more of a class of voting securities of an insured nonmember bank, unless exempted, require prior notice to the Corporation. In addition, a purchase, assignment, transfer, pledge, or other disposition of voting stock through which any person will acquire ownership, control or the power to vote ten percent or more of a class of voting securities will be deemed to be an acquisition by such person of the power to direct that institution's management or policies if: (1) the institution has issued any class of securities subject to the registration requirements of section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781); or (2) Immediately after the transaction no other person will own a greater proportion of that class of voting securities. Other transactions resulting in a person's control of less than 25 percent of a class of voting shares . . . would not result in control for the purpose of the Act.

12 C.F.R. § 303.15(a) (1979). See also 12 C.F.R. § 5.50(e)(1) (1981); 12 C.F.R. § 225.7(a) (1979) (stating similar rules for application by the Comptroller of the Currency and the Federal Reserve Board, respectively).

<sup>9</sup> 12 U.S.C. § 1817(j)(1). The statute specifically states that the term "insured banks" includes bank holding companies. *Id.*

<sup>10</sup> 12 U.S.C. § 1817(j)(1). The office of the Comptroller of the Currency is the responsible federal banking agency for changes in control of national banks. The Federal Reserve Board is responsible for bank holding companies and state member banks, and the Federal

notice must contain, inter alia, the identity of the acquiring person or persons,<sup>11</sup> a statement of assets and liabilities of each acquiring person,<sup>12</sup> the terms of the proposed acquisition,<sup>13</sup> the identity, source, and amount of funds to be used in the acquisition,<sup>14</sup> and the nature of any planned changes in the acquired bank.<sup>15</sup> If the federal banking agency disapproves of the acquisition it must, in writing, within the sixty-day period, inform the person requesting approval.<sup>16</sup> In determining whether to approve or disapprove the acquisition, the banking agency considers certain factors,<sup>17</sup> including: (1) the likelihood that the proposed acquisition would result in a monopoly;<sup>18</sup> (2) the probability that the acquisition would substantially lessen competition;<sup>19</sup> and (3) the chances that the financial condition of the acquiring person would jeopardize the financial stability of the bank.<sup>20</sup> Upon receipt of the disapproval, the acquiring party has ten days to request an agency hearing on the proposed acquisition.<sup>21</sup> If the hearing does not satisfy the acquiring party, the party can obtain a review of the proceeding in the United States court of appeals for the circuit where the home office of the bank to be acquired is located.<sup>22</sup> Finally, the statute sets out specific penalties which can be levied against any person who "willfully" violates the statute or any regulations promulgated pursuant to the C.B.C.A.<sup>23</sup>

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Deposit Insurance Corporation is responsible for insured state nonmember banks. 12 C.F.R. § 5.50(h)(1)(i).

<sup>11</sup> 12 U.S.C. § 1817(j)(6)(A).

<sup>12</sup> 12 U.S.C. § 1817(j)(6)(B).

<sup>13</sup> 12 U.S.C. § 1817(j)(6)(C).

<sup>14</sup> 12 U.S.C. § 1817(j)(6)(D).

<sup>15</sup> 12 U.S.C. § 1817(j)(6)(E). Under the regulations, notice shall not be considered given unless information provided is responsive to every item specified in 12 U.S.C. § 1817(j)(6)(A-E). See 12 C.F.R. § 5.50(f)(2).

<sup>16</sup> 12 U.S.C. § 1817(j)(1). The period for disapproval may be extended for 30 days if the banking agency, in writing, informs the person making the acquisition within the 60-day period. *Id.* The agency must inform the acquiring party in writing within three days of its ultimate decision on the acquisition attempt. 12 U.S.C. § 1817(j)(3).

<sup>17</sup> See 12 U.S.C. § 1817(j)(7)(A-C).

<sup>18</sup> 12 U.S.C. § 1817(j)(7)(A).

<sup>19</sup> 12 U.S.C. § 1817(j)(7)(B).

<sup>20</sup> 12 U.S.C. § 1817(j)(7)(C).

<sup>21</sup> 12 U.S.C. § 1817(j)(3).

<sup>22</sup> 12 U.S.C. § 1817(j)(5).

<sup>23</sup> 12 U.S.C. § 1817(j)(15) ("Any person who willfully violates any provision of this

## II. ANALYSIS OF CASE LAW

A. *Cases Which Imply a Private Cause of Action Under the C.B.C.A.*

The case law is evenly divided on the issue of whether a private cause of action exists under the C.B.C.A. At least two courts have expressly held that a private cause of action does exist under the C.B.C.A. First, in *First Alabama Bancshares, Inc. v. Lowder*,<sup>24</sup> the plaintiff sought to enjoin defendants from acquiring "control" of a bank holding company because of alleged violations of the Bank Holding Company Act<sup>25</sup> (B.H.C.A.) and the C.B.C.A.<sup>26</sup> The significance of this case lies in the court's parallel analysis of the two acts in determining whether a private cause of action exists under either act.<sup>27</sup>

The court dismissed the plaintiff's complaint brought under the B.H.C.A. The language of the B.H.C.A. indicates that Congress delegated to the Federal Reserve Board the authority to determine whether "control" is being exercised over a holding company;<sup>28</sup> consequently, the court held that it had "no jurisdiction over the plaintiffs' claim under the B.H.C.A."<sup>29</sup>

However, the court then held that a private cause of action *did* exist under the C.B.C.A.,<sup>30</sup> and supported its holding by a two-pronged analysis. First, the court in *First Alabama* distinguished the facts before it from those of two other cases, *Whitney National Bank v. Bank of New Orleans & Trust Co.*<sup>31</sup> and *Orbanco, Inc. v. Security Bank.*<sup>32</sup> These cases were cited by the defendant as sup-

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subsection, or any regulation or order issued by the appropriate federal banking agency pursuant thereto, shall forfeit and pay a civil penalty of not more than \$10,000 per day for each day during which such violation continues.").

<sup>24</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,015, at 91,249 (N.D. Ala. May 1, 1981).

<sup>25</sup> 12 U.S.C. § 1842 (1982).

<sup>26</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,255.

<sup>27</sup> See *id.* at 91,255-58.

<sup>28</sup> See 12 U.S.C. § 1842(a)(1) ("It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company").

<sup>29</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,255-56.

<sup>30</sup> *Id.* at 91,258.

<sup>31</sup> 379 U.S. 411 (1965).

<sup>32</sup> 371 F. Supp. 125 (D. Or. 1974).

port for dismissal because they had held that a private cause of action did not exist under the B.H.C.A.<sup>33</sup> The gravamen of the court's argument in *First Alabama* was that the technical and complex issues facing the courts in *Orbanco* and *Whitney National Bank* were not present in a claim under the C.B.C.A. The complexity of the issues forced those latter courts to deny a private cause of action to the plaintiffs because the issues clearly required the expertise of the appropriate federal banking agency.<sup>34</sup> Therefore, the court was not compelled to dismiss plaintiff's cause of action nor to require him to seek only administrative relief.<sup>35</sup>

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<sup>33</sup> The Court in *Whitney National Bank* stated:

We believe that these are the very types of questions that Congress has committed to the [Federal Reserve] Board, and we hold that the Board should make the determination of the plan's propriety in the first instance. The soundness of this conclusion is especially evident when it is remembered that the Board has played a vital role in the development of the national banking laws, a role which makes its views of particular benefit to the courts where ultimately the validity of the arrangement will be tested.

379 U.S. at 421.

<sup>34</sup> See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,257. The court in *First Alabama* said:

Were this court faced with technical and complex problems in applying the C.B.C.A. to this case, I would yield to the [Federal Reserve] Board's expertise. However, unlike plaintiff's claim under the B.H.C.A., the claim under the C.B.C.A. does not demand any such expertise nor does it involve any discretion on the part of this court. If defendants have acquired ten percent or more of Southland shares and if after these acquisitions, no other person owned a greater number of these shares, then the Board's own regulation would presume defendants have acquired control of Southland. 12 C.F.R. § 225.7. If defendants did not file the mandatory sixty days' notice with the Board prior to such acquisitions and did not attain subsequent approval from the Board, then defendants are in violation of the C.B.C.A.

*Id.*

The "technical and complex" issues which arise under the B.H.C.A. and require consideration by the Federal Reserve Board include "the public interest, the anticompetitive effects of the proposed transactions, and the convenience and need of the community to be served." *Orbanco, Inc. v. Security Bank*, 371 F. Supp. at 130.

<sup>35</sup> *Id.* ("It is for the [Federal Reserve] Board, and not this court, to decide whether to approve the acquisitions by defendant. However, this court does have jurisdiction to consider defendant's alleged violations of the C.B.C.A. which do not involve the Board's discretion nor require its expertise.").

Courts have shown a tendency to overlap the concepts of private cause of action, jurisdiction and standing, especially when dealing with an implied cause of action:

We granted certiorari to decide whether such a private cause of action can be maintained. . . . In this Court and in the Court of Appeals the parties have approached the question from several perspectives. The issue has been

Second, the court in *First Alabama* applied the *Cort v. Ash*<sup>36</sup> test<sup>37</sup> to determine whether a private cause of action can be implied under a federal statute. In applying the test the court held that the plaintiff could bring a claim under the C.B.C.A. in the federal courts.<sup>38</sup>

Another case, *Mid Continent Bancshares, Inc. v. O'Brien*,<sup>39</sup> also held that a private cause of action exists under the C.B.C.A.<sup>40</sup> In granting the target bank holding company standing to sue for injunctive relief under the C.B.C.A., the court relied heavily on the holding in *First Alabama*.<sup>41</sup> The court also applied, without specific citation, the *Cort v. Ash* test to imply a private cause of action in favor of the target bank holding company.<sup>42</sup>

variously stated to be whether the Amtrak Act can be read to create a private right of action to enforce compliance with its provisions; whether a federal district court has jurisdiction under the terms of the Act to entertain such a suit; and whether the respondent has standing to bring such a suit. . . . But, however phrased, the threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the district court had jurisdiction to entertain it.

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 455-56 (1974).

<sup>36</sup> 422 U.S. 66 (1975). The issue in *Cort* was whether a shareholder of Bethlehem Steel Corp. could imply a private cause of action under 18 U.S.C. § 610 (prohibiting corporations from making expenditures in connection with federal elections) on behalf of the corporation against the directors for using corporate funds in the 1972 presidential election. The Court held that the shareholder did not have a private cause of action under § 610 to secure derivative relief for the corporation. *Id.* at 77-78.

<sup>37</sup> The Court in *Cort* formulated the following four-part test to determine whether a private cause of action may be implied under a statute:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

*Id.* at 78 (citations omitted).

<sup>38</sup> See [1981 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,258.

<sup>39</sup> [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,734 at 93,702 (E.D. Mo. Dec. 11, 1981).

<sup>40</sup> *Id.* at 93,706.

<sup>41</sup> See *id.* at 93,707.

<sup>42</sup> *Id.* The court in *Mid-Continent* stated:

In addition to the cases which have expressly held that a private cause of action may be implied under the C.B.C.A., at least two courts have simply assumed, without analyzing the propriety of such an assumption, that a plaintiff may bring a private cause of action under the C.B.C.A. In *Riggs National Bank v. Allbritton*,<sup>43</sup> the court granted the plaintiff, a national banking association, preliminary injunctive relief based on the C.B.C.A., even though the court never addressed the issue of whether a private cause of action existed under the C.B.C.A.<sup>44</sup>

Similarly, in *Citizens First Bancorp, Inc. v. Herreld*,<sup>45</sup> the court assumed jurisdiction over a cause of action based on the C.B.C.A. In this case, however, the court denied the motion for injunctive

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In enacting [the C.B.C.A.], Congress was concerned with the continued stability of financial institutions, such as Mid-Continent, by protecting them from acquisitions by undesirables. Indeed, one of its primary purposes was to insure the safety and soundness of the target institution and the banking industry as a whole. Target bank holding companies such as Mid-Continent are thereby among the intended beneficiaries of the Act.

Allowing target bank holding companies to seek injunctive relief under the Act is clearly necessary to make the Act effective. . . . Banking regulation is not an area of concern which "has been so traditionally relegated to state law as to make it inappropriate to infer a federal cause of action."

*Id.* (citations omitted).

<sup>43</sup> 516 F. Supp. 164 (D.D.C. 1981) (plaintiff national bank sought to enjoin an investment group's cash tender offer for the bank's stock).

<sup>44</sup> *See id.* at 181. The court noted that "because of the critical issues raised and questions presented by the Change in Bank Control Act the tender offer must be enjoined pending a trial on the merits." *Id.* at 182. The court further stated that, in the absence of possible violations of the C.B.C.A., injunctive relief would not be necessary; however, the court also said it "[w]as most concerned with the . . . issue of whether the defendant actually complied with the Change in Bank Control Act. . . ." *Id.*

<sup>45</sup> 559 F. Supp. 867 (W.D. Ky. 1982). This case involved a battle between two factions of the board of directors for control of a bank. The plaintiff, Citizens First Bancorp, Inc., was a bank holding company which owned all of the 400,000 shares of Citizens State Bank of Owensboro stock. The individual plaintiffs were directors and stockholders of Bancorp. Defendants were also shareholders and directors of Bancorp. After a series of unsuccessful offers in which defendants tried to purchase plaintiffs' stock in Bancorp, defendants prepared a series of proxy forms and also prepared a notice of a special stockholders meeting for the purpose of removing all directors of Bancorp. Plaintiffs sought a preliminary injunction which would declare all proxies by defendants invalid and would prevent defendants from calling a special stockholders meeting for 45 days from the date of entry. One of the grounds advanced by plaintiffs in pursuit of the injunction was that defendants violated the provision of the C.B.C.A. by failing to give 60 days notice prior to obtaining control of Bancorp. *Id.* at 869-73.

relief because the action showed no likelihood of success on the merits of the case.<sup>46</sup>

The willingness of both courts to decide plaintiffs' allegations on the merits, rather than dismissing the claim because the C.B.C.A. does not give rise to a private cause of action, provides further support for the contention that such a right does exist. In fact, these cases could be understood to mean that a private cause of action is so implicit under the C.B.C.A. that an analysis of statutory intent is unnecessary.

B. *Cases Which Deny a Private Cause of Action Under the C.B.C.A.*

At least two courts have denied the existence of a private cause of action under the C.B.C.A. The case of *Quaker City National Bank v. Hartley*<sup>47</sup> is particularly enlightening because, for the most part, it is the exact opposite of *First Alabama*. As in *First Alabama*, the court in *Hartley* dismissed the plaintiff's cause of action brought under the B.H.C.A. for lack of jurisdiction.<sup>48</sup> However, unlike *First Alabama*, the *Hartley* court also dismissed plaintiff's claim to injunctive relief under the C.B.C.A. The court held that plaintiff's remedy under the Act was purely administrative.<sup>49</sup>

The court gave two reasons for its decision. First, the court stated that the decision in *Whitney National Bank* precluded any private cause of action under the B.H.C.A.,<sup>50</sup> and could be ap-

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<sup>46</sup> See *id.* at 873. The court declared: "We are therefore of the opinion that the plaintiffs have shown no likelihood of success on the merits of this contention [violation of the C.B.C.A.] and injunctive relief under the Change in Bank Control Act will be denied." *Id.* at 874.

In order to succeed on a motion for a preliminary injunction, plaintiff must meet four standards: (1) plaintiff must show "a strong or substantial likelihood or probability of success on the merits"; (2) plaintiffs must show an "irreparable injury"; (3) plaintiff must show whether "the issuance of a preliminary injunction would cause substantial harm to others"; and (4) plaintiff must show "whether the public interest would be served by issuing a preliminary injunction." *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977).

<sup>47</sup> 533 F. Supp. 126 (S.D. Ohio 1981) (plaintiff bank relied upon the C.B.C.A. to sue an investment group for the group's purchase of bank stock).

<sup>48</sup> *Id.* at 127. "In fact the court is aware of no case in which a private cause of action has been entertained under the Holding Act." *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. at 419.

plied with equal force to the C.B.C.A.<sup>51</sup> The court in *Hartley* compared the statutory language of the two acts and determined that because of sufficient "textual similarities, [it saw] no reason why the principles articulated in *Whitney National Bank* . . . should not apply. . . ."<sup>52</sup> The court recognized that *Whitney National Bank* was decided prior to the enactment of the C.B.C.A., but contended that the lawmakers must have known of the decision and its effect on B.H.C.A. litigation.<sup>53</sup> Second, as in *First Alabama*, the court in *Hartley* applied the *Cort v. Ash* test and determined: "Based on . . . the requirements outlined in *Cort v. Ash*, [we decline] to follow the lead of *First Alabama* and [hold] instead that no private cause of action exists under the Change in Bank Control Act of 1978."<sup>54</sup>

*Flagship Banks, Inc. v. Smathers*<sup>55</sup> also denied a plaintiff a cause of action under the C.B.C.A.<sup>56</sup> In *Flagship Banks*, the plaintiff bank brought suit under the C.B.C.A. after the Federal Reserve Board issued an advisory opinion that permitted defendants to acquire the bank.<sup>57</sup> The court held that, under the *Cort v. Ash* test, no private cause of action could be implied under the C.B.C.A. In so holding, the court stated: "It would be inconsistent with the legislative scheme to imply such a right, especially where, as here, the [Federal Reserve] Board is closely monitoring the situation and has preliminarily approved the defendant's actions."<sup>58</sup>

### III. *Cort v. Ash* Analysis

With the current case law so evenly divided and the regulations

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<sup>51</sup> 533 F. Supp. at 128.

<sup>52</sup> *Id.* The Supreme Court in *Whitney Nat'l Bank* stated: "We believe Congress intended for statutory proceedings before the [Federal Reserve] Board to be the sole means by which questions as to organization or operations of a new bank by a bank holding company may be tested." 375 U.S. at 419.

<sup>53</sup> See 533 F. Supp. at 128. "Had they [the lawmakers] desired the district courts to assume original jurisdiction in [C.B.C.A.] disputes, they could have easily circumscribed the effects of the Supreme Court's prior announcements. Instead, they chose to frame the statute in much the same terms as the [B.H.C.A.]" *Id.*

<sup>54</sup> *Id.* at 129.

<sup>55</sup> No. 81-713-Civ-EPS (S.D. Fla. July 22, 1981) (available through the Securities and Exchange Commission).

<sup>56</sup> *Id.*, slip op. at 2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 3.

providing little guidance,<sup>59</sup> the consideration of whether a private cause of action exists under the C.B.C.A. centers on the *Cort v. Ash*<sup>60</sup> analysis.<sup>61</sup> Particular attention must be focused on the four factors set out in *Cort* and how courts have applied these factors when considering whether to imply a private cause of action under the C.B.C.A.<sup>62</sup>

### A. *The First Cort Factor*

The first factor in the *Cort v. Ash* analysis focuses on whether the plaintiff is a member of the class the statute was enacted to protect.<sup>63</sup> In analyzing this first factor, the court in *First Alabama*<sup>64</sup> cited the House of Representatives' committee report<sup>65</sup> issued in conjunction with the Financial Institutions Regulatory and Interest Rate Control Act<sup>66</sup> (of which the C.B.C.A. is a part). The committee report stated: "[S]ince financial institutions provide the lifeblood of communities—money and credit—the public's need for

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<sup>59</sup> The regulations promulgated by the Federal Deposit Insurance Corporation, the Federal Reserve Board and the Comptroller of the Currency are primarily designed to deal with instances in which the C.B.C.A. comes into effect rather than what rights accrue to private parties under the Act. See note 8 *supra* for the pertinent part of the regulations.

<sup>60</sup> 422 U.S. 66 (1975).

<sup>61</sup> See note 37 *supra* for a statement of the *Cort v. Ash* analysis.

<sup>62</sup> Arguably, the four-part *Cort* analysis is falling out of favor with the Supreme Court. For example, in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court centered on only one question—"whether Congress intended to create the private remedy asserted." *Id.* at 15-16. The Court rejected plaintiff's contention that *Cort* required an examination of all four factors before dismissing the cause of action. The Court noted:

It is true that in *Cort v. Ash*, the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. . . . [T]he first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose—are ones traditionally relied upon in determining legislative intent.

*Id.* at 23-24 (citations omitted) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979)). For the purposes of this Comment, however, it is important to examine all four factors because the Supreme Court usually cuts short its analysis only when it determines that Congress never intended to create a private remedy. *Cf.* 444 U.S. at 24.

<sup>63</sup> See *Cort v. Ash*, 422 U.S. at 78.

<sup>64</sup> *First Ala. Bancshares, Inc. v. Lowder*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,015, at 91,249 (N.D. Ala. May 1, 1981).

<sup>65</sup> H.R. REP. No. 1383, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 9273.

<sup>66</sup> Pub. L. No. 95-630, 92 Stat. 3641 (codified in scattered sections of 12 U.S.C.).

laws to assure a safe, sound, and responsive financial system is obvious."<sup>67</sup> The court also focused on the fact that Congress was concerned with the "continued stability of financial institutions . . . by protecting them from acquisitions by undesirables."<sup>68</sup> As a result, the court concluded that target bank holding companies "are intended beneficiaries of the [C.B.C.A.]."<sup>69</sup>

The court in *Hartley* adopted a different approach in analyzing this first factor.<sup>70</sup> The court stated that the C.B.C.A. was enacted as part of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, "whose purpose was, among other things, to provide added protection to the public and to bank shareholders against anticompetitive practices and insider abuses within the banking industry."<sup>71</sup> The court further noted that "nothing in the legislative history even hints that Congress meant to benefit the banks themselves, much less to give their management another weapon with which to defend against takeover attempts."<sup>72</sup>

Implicit in both courts' analysis is the notion that the stockholders of a target financial institution are intended beneficiaries of the statute. This conclusion seems to be supported by the legislative history of the C.B.C.A.: "While these prohibitions would, without a doubt, serve the public interest, they would also benefit stockholders of banking institutions. . . ."<sup>73</sup> The courts, however, differ as to whether the banking institutions themselves can be considered intended beneficiaries of the Act. While it is clear that "insider abuse" was a strong impetus for the passage of the legislation,<sup>74</sup> insider abuse alone could not have been the sole

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<sup>67</sup> H.R. REP. NO. 1383, *supra* note 65, at 9; 1978 U.S. CODE CONG. & AD. NEWS at 9281.

<sup>68</sup> [1981 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,257.

<sup>69</sup> *Id.* at 91,258.

<sup>70</sup> See *Quaker City Nat'l Bank v. Hartley*, 533 F. Supp. 126, 129 (S.D. Ohio 1981).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> H.R. REP. NO. 1383, *supra* note 65, at 7; 1978 U.S. CODE CONG. & AD. NEWS at 9279.

<sup>74</sup> See H.R. REP. NO. 1383, *supra* note 65, at 8-9; 1978 U.S. CODE CONG. & AD. NEWS at 9280-81.

The adequacy of the Nation's banking laws and the vigor of their administration . . . came into sharp question with the failure of the one billion

motivating factor since federal banking agencies had known of such activity long before the legislation was enacted.<sup>75</sup> Rather, the necessity of shoring public confidence in the banking system, which suffered greatly as a result of the adverse publicity surrounding the "Lance affair,"<sup>76</sup> gave Congress the final push it needed to take action.<sup>77</sup> Consequently, the underlying objective of the Act was not

dollar U.S. National Bank of San Diego in 1973. Investigations conducted by the Sub-Committee on Bank Supervision and Insurance of the House Banking and Currency Committee in 1973 and 1974 revealed massive insider abuses at this bank. . . .

The Committee's body of knowledge on banking and savings and loan problems was expanded in late 1976 in field hearings conducted in Texas by the Subcommittee on Financial Institutions Supervision, Regulation and Insurance. This investigation centered on the rapid takeover and sale of banks in the Southwest which became known as the Texas Rent-A-Bank scandal. The insider abuses, spawned in the aftermath of these quickie and unregulated transfers of ownership, brought down two State banks and resulted in conviction of a number of bank officers and directors.

H.R. REP. NO. 1383, *supra* note 65, at 8-9; 1978 U.S. CODE CONG. & AD. NEWS AT 9280-81.

<sup>75</sup> See H.R. REP. NO. 1383, *supra* note 65, at 9; 1978 U.S. CODE CONG. & AD. NEWS at 9281.

The investigation [of U.S. National Bank of San Diego] also revealed that the Comptroller of the Currency's office had been aware of the growing insider abuses since 1962—some eleven years before the bank had closed its doors—but failed to take definitive action.

. . . .

Virtually all of the revelations of what [became] known as the "Lance Affair" [involving massive insider abuses, see note 76 *infra*] covered activities and banking problems that had been discussed, studied and investigated for many years by the Committee and which [filled] volume after volume of printed records.

H.R. REP. NO. 1383, *supra* note 65, at 8-9; 1978 U.S. CODE CONG. & AD. NEWS at 9280-81.

<sup>76</sup> Bert Lance, who later became Director of the Office of Management and Budget, was involved in a series of massive "insider" dealings while serving as a bank officer of the First National Bank of Calhoun and National Bank of Georgia in Atlanta, Georgia. H.R. REP. NO. 1383, *supra* note 65, at 9; 1978 U.S. CODE CONG. & AD. NEWS at 9281. Lance's dealings became a matter of national interest while he was serving as Director of the Office of Management and Budget in the administration of Pres. Jimmy Carter. See 33 CONG. Q. ALMANAC 50-A (1977).

<sup>77</sup> See H.R. REP. NO. 1383, *supra* note 65, at 8-9; 1978 U.S. CODE CONG. & AD. NEWS at 9280, which states:

These revelations [surrounding the "Lance Affair"] were brought into American homes through television and provided a cram course for millions of families on the day-to-day activities of a bank insider. . . . Since financial institutions provide the lifeblood of communities—money and credit—the public's need for laws to assure safe, sound, and responsive financial systems is obvious.

H.R. REP. NO. 1383, *supra* note 65, at 9; 1978 U.S. CODE CONG. & AD. NEWS at 9281.

limited to controlling insider abuse, but included restoring public confidence in the banking system as a whole.<sup>78</sup> With the public interest in mind, limiting the list of intended beneficiaries to the stockholders alone results in an overly narrow reading of the statute. Congress clearly had the survival and strength of the financial institutions in mind when the act was passed.<sup>79</sup> Therefore, any argument which seeks to exclude the financial institutions from the Act's protection misses the mark.

### B. *The Second Cort Factor*

The second factor in the *Cort v. Ash* analysis is whether there exists any indication of legislative intent, explicit or implicit, to create or deny a private cause of action.<sup>80</sup> The determination of congressional intent is really the crux of the *Cort v. Ash* test.<sup>81</sup> If a prospective plaintiff fails to pass this hurdle, the case will probably be dismissed. A court which decides against the plaintiff on this issue would have no need to evaluate the plaintiff's position in relation to the final two *Cort* factors.<sup>82</sup>

The court in *Hartley* noted that neither the express language

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<sup>78</sup> See H.R. REP. NO. 1383, *supra* note 65, at 7-10; 1978 U.S. CODE CONG. & AD. NEWS at 9279-82.

H.R. 1347 [the Financial Institutions Regulatory and Interest Rate Control Act of 1978] addresses the banking problems which have become so evident in recent years and provides the machinery to assure that financial institutions live up to the promises of their charter to serve the public in a safe, sound, and responsive manner.

H.R. REP. NO. 1383, *supra* note 65, at 10; 1978 U.S. CODE CONG. & AD. NEWS at 9282.

<sup>79</sup> See H.R. REP. NO. 1383, *supra* note 65, at 9; 1978 U.S. CODE CONG. & AD. NEWS at 9281.

<sup>80</sup> *Cort v. Ash*, 422 U.S. at 78.

<sup>81</sup> See *California v. Sierra Club*, 451 U.S. 287 (1981). "Cases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to create a private cause of action, but the four factors specified in *Cort* remain the 'criteria through which this intent could be discerned.'" *Id.* at 293 (quoting *Davis v. Passman*, 442 U.S. 228, 241 (1979)). See also *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770 (1981).

<sup>82</sup> *Cf. Touche Ross & Co. v. Redington*, 442 U.S. at 560.

And the parties as well as the Court of Appeals agree that the legislative history . . . simply does not speak to the issue of private remedies. . . . At least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative.

*Id.* at 576. See also *California v. Sierra Club*, 451 U.S. at 287.

in the C.B.C.A. nor the legislative history indicated congressional intent to create a private cause of action under the Act.<sup>83</sup> However, the Supreme Court decisions subsequent to *Cort* have held that Congress' failure to deal expressly with the issue of a private remedy does not destroy an argument that a private cause of action was intended.<sup>84</sup>

To further support its denial of a private cause of action under the C.B.C.A., the court in *Hartley* pointed out that, pursuant to the recognized need for increased power in the hands of the federal supervisory agencies, the Act gives the agencies various enforcement tools.<sup>85</sup> The court further noted: "The focus of the legislation is upon strengthening the role of the administrative agencies, not diluting it by granting courts concurrent jurisdiction."<sup>86</sup> Substantial case law supports the argument that given the elaborate regulatory scheme created by the Act, Congress could not have intended for courts to assume jurisdiction as well.<sup>87</sup>

In contrast, the court in *First Alabama* observed that the only penalty available to regulatory agencies under the C.B.C.A. is a money penalty of \$10,000 per day for willful violation of the provision.<sup>88</sup> The court found this penalty of "little consolation to

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<sup>83</sup> See *Quaker City Nat'l Bank v. Hartley*, 533 F. Supp. at 129. "Nothing in the legislative history even hints that Congress meant to benefit the banks themselves, much less to give their managers another weapon with which to defend against takeover attempts. Nor does it appear that the drafters intended to create any private remedies." *Id.*

<sup>84</sup> See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 18 ("This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available.").

<sup>85</sup> 533 F. Supp. at 129 ("As [previously noted,] . . . the many hearings and investigations into bank failures and banking problems have supported the need for additional and sharper powers for the *Federal supervisory agencies*." (emphasis in original). "H.R. 13471 gives the agencies four major tools: civil money penalties; improved cease-and-desist authority; improved removal and suspension of insider statutes; and control over changes in control of financial institutions." *Id.* (citing H.R. REP. No. 1383, *supra* note 65, at 17; 1978 U.S. CODE CONG. & AD. NEWS at 9289).

<sup>86</sup> *Id.*

<sup>87</sup> See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. at 20 ("In view of these express provisions for enforcing the duties imposed by Section 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'") (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)). See also *Botany Mills v. United States*, 278 U.S. 288, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode").

<sup>88</sup> See *First Ala. Bancshares, Inc. v. Lowder*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,015, at 91,258 (citing 12 U.S.C. § 1817(j)(15)).

the target company whose stock is continually acquired in violation of the C.B.C.A.”<sup>89</sup> The court’s argument implies that the lack of a right to seek injunctive relief renders the statute meaningless if the target financial institution is an intended beneficiary of the C.B.C.A. This argument is given further support by various Supreme Court decisions which deal with this *Cort* factor. The Court has held that the existence of a complex statutory regulatory scheme is not a sufficient reason for denying an otherwise appropriate remedy under another section of the same general statute.<sup>90</sup> Additionally, the Court has recognized that if the legislative history accompanying a statute neither expressly grants nor denies a private cause of action it will be equally void of any language dealing with the existence of such a remedy.<sup>91</sup> Thus, where the statute grants a specific class of persons certain rights, a showing of a specific intention to create a private remedy is unnecessary.<sup>92</sup>

### C. *The Third Cort Factor*

The third factor suggested in *Cort v. Ash* is whether implying a private remedy is consistent with the underlying purpose of the legislative scheme.<sup>93</sup> The court in *First Alabama* agreed with the plaintiffs’ argument that if the “[d]efendants may circumvent the requirement of filing notice before controlling purchases are made, and exercise control by voting those shares, the purpose of the [C.B.C.A.] is completely defeated.”<sup>94</sup> Implicit in this argument is

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<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g., Cannon v. University of Chicago*, 441 U.S. at 711 (“The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.”).

<sup>91</sup> *See id.* at 694 (“We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.”).

<sup>92</sup> *Id.* The Court concluded in *Cannon*:

Therefore, in situations such as the present one “in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.”

*Id.* (quoting *Cort v. Ash*, 422 U.S. at 82) (emphasis in original).

<sup>93</sup> *See Cort v. Ash*, 422 U.S. at 78.

<sup>94</sup> *First Ala. Bancshares, Inc. v. Lowder* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) at 91,258.

the premise that facing a fine of \$10,000 a day may be a cost worth absorbing, temporarily, to gain controlling interest in the financial institution. The court in *Hartley*, however, was not persuaded by this argument.<sup>95</sup> It stated: "[A]dministrative remedies provided by the [C.B.C.A. are] more than 'little consolation' to persons aggrieved under the statute. District court intervention is thus unnecessary to effectuate the underlying purposes of the [C.B.C.A.]"<sup>96</sup>

The Supreme Court, in cases after *Cort*, has interpreted this third *Cort* factor as meaning that a private remedy should not be implied when the remedy would undercut the purpose of the statute.<sup>97</sup> If the underlying purpose of the Act is to protect the public from bank failure brought about by uncontrolled buying and selling of shares in the various financial institutions,<sup>98</sup> then the public interest is not sufficiently served by a monetary penalty which can be assessed by the federal banking agencies. As a result, a private cause of action is necessary to effectuate congressional intent.

#### D. *The Fourth Cort Factor*

The final *Cort* factor is whether the cause of action is one traditionally relegated to state law in an area historically the concern of the states, thus making it inappropriate to infer a cause of action based solely on federal law.<sup>99</sup> The court in *First Alabama* and the court in *Hartley* agreed that the regulation of the banking industry "has not traditionally been relegated to state law."<sup>100</sup> Thus, it appears that this factor will not affect the outcome when implying a federal cause of action under the C.B.C.A.

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<sup>95</sup> See *Quaker City Nat'l Bank v. Hartley*, 533 F. Supp. at 129.

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *Cannon v. University of Chicago*, 441 U.S. at 703 ("[W]hen that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.").

<sup>98</sup> See H.R. REP. NO. 1383, *supra* note 65, at 9; 1978 U.S. CODE CONG. & AD. NEWS at 9281.

<sup>99</sup> See *Cort v. Ash*, 422 U.S. at 78.

<sup>100</sup> See *Quaker City Nat'l Bank v. Hartley*, 533 F. Supp. at 129; *First Ala. Bancshares, Inc. v. Lowder* [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,015, at 91,258 (N.D. Ala. May 1, 1981).

## CONCLUSION

The application of the *Cort v. Ash* analysis to *First Alabama* and *Hartley*, the two cases which deal most thoroughly with the issue of whether a private cause of action exists under the C.B.C.A., leaves the impression that *First Alabama* is the correctly decided case. In order to best carry out the legislative purpose "of assuring that financial institutions live up to the promise of their charter to serve the public in a safe, sound, and responsive manner,"<sup>101</sup> a private cause of action must be implied under the statute. The *Cort v. Ash* analysis appears to grant the shareholders of a target institution standing to sue, and to support such a right in the target institution. If a private remedy is not implied to allow, at the very least, preliminary injunctive relief, the C.B.C.A., which on its face appears to be a bold attempt to regulate bank takeovers, is in reality an ineffective, toothless regulation.

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<sup>101</sup> H.R. REP. NO. 1383, *supra* note 65, at 10; 1978 U.S. CODE CONG. & AD. NEWS at 9282.9-30

