ORIGINAL

In the

Supreme Court of the United States

TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA), ET AL.,

PETITIONERS,

V.

HARRY LEWIS

RESPONDENT.

No. 77-1645

Washington, D. C.
October 2, 1979

Pages 1 thru 51

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v. : No. 77-1645

HARRY LEWIS,

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Washington, D. C.

Tuesday, October 2, 1979

The above-entitled matter came on for argument at 1:51 o'clock p.m.

BEFORE

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN M. ANDERSON, ESQ., 450 Pacific Avenue, San Francisco, California 94133; on behalf of the Petitioners

ERIC L. KEISMAN, ESQ., Wolf, Popper, Ross, Wolf & Jones, 845 Third Avenue, New York, New York 10022; on behalf of the Respondent

RALPH C. FERRARA, ESQ., General Counsel, Securities and Exchange Commission, Washington, D. C.; as amicus curiae

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CONTENTS

P R O C E E D I N G S.

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Transamerica Mortgage Advisors against Lewis.

Mr. Anderson, you may proceed when you are ready.

ORAL ARGUMENT OF JOHN M. ANDERSON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ANDERSON: Thank you. Mr. Chief Justice and may it please the Court:

It has been six months since this Court first heard oral argument in this case. And for that reason, with the Court's permission, I will take a minute or two to offer a brief summary of the facts relevant to the issue before this Court; namely, whether a private right of action may be implied under the Investment Advisers Act of 1940.

This Court learned last March this case came to Court in April, 1973 with a suit by the Plaintiff and Respondent Harry Lewis asking legal and equitable relief for alleged violation of the Investment Advisers Act.

The Petitioners moved to dismiss the complaint for failure to state a claim and argued that Mortgage Trust of America was and is a mortgage lender which does not deal in securities within the meaning of the Federal securities laws; that Transamerica Mortgage Advisers, its adviser, is not a public investment adviser in any sense of that word; that the Investment Advisers Act of 1940 does not apply to the

Petitioners or to the facts of this case; that the Respondent Lewis had failed to make proper demand on the Trustees of Mortgage Trust of America and that the Investment Advisers Act of 1940 does not afford a private right of action in any event.

The District Court noted that the Petitioners' arguments had what were called "substantial merit", but ruled that since the Advisers Act does not afford a private right of action that the other questions would not be decided.

On appeal, Petitioners again argued that the Investment Advisers Act does not apply to the Petitioners or to the facts of this case, and that there is no private right of action.

The Court of Appeals also declined to consider the other arguments just mentioned and ruled, with one Judge dissenting, "Implication of a private right of action for injunctive relief and damages under the Advisers Act in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting legislation."

The decision and the dissent of the Court of Appeals is based on and, indeed, simply incorporates the decision of the Second Circuit and the dissent in the Second Circuit in a case known as Abrahamson v. Fleschner.

As I had occasion to state last March, this case presents a narrow technical question of law and a broad

important question of judicial policy. The narrow question of law presented is whether a private right of action may be implied under Section 206 of the Investment Advisers Act of 1940. The question of judicial policy presented is whether this Court should imply a right of action under the Advisers Act and then leave to further litigation resolution of such questions as who may bring the action, who may be named a defendant, allocations od burdens of proof, the evidentiary standards to be applied and the damages that may be recovered.

QUESTION: Are you suggesting that if Congress had not either expressly or impliedly created a cause of action that this Court could do so?

MR. ANDERSON: It's my belief, Mr. Justice Rehnquist, that Congress has had an opportunity on numerous occasions both when the Act was originally passed and since that time to consider and act on whether or not a private right of action is appropriate here. As we point out in our brief, on each occasion it has not created -- expressly not created and implied a cause of action and, for that reason, we take the position that this Court is not in a position to make that judgment, if you will, that there ought to be a private right of action.

I might further answer that question and refer back to the language of the Court of Appeals in this case, where the Court of Appeals said that it made the judgment that it

was necessary to have this implied right of action in order to carry out the purposes of the Act. And I question it, with all due respect, whether this Court is in a position to substitute its judgment, or the Court of Appeals was in a position to substitute its judgment for what seems to be the judgment of the Congress on six different occasions since 1940 that there should not be an express or a right of private action under the Investment Advisers Act.

QUESTION: Didn't Professor Loss in his testimony, suggest that Congress should do just that, just leave the matter open and let the Courts decide it?

MR. ANDERSON: Yes, Professor Loss suggested in his testimony to the Committee hearing on legislation that was proposed, I believe, in 1966 that it might facilitate -- I believe those are his words -- implication of a private right of action if Congress at that time would add the words "action at law" to the jurisdiction and venue provision of the statute. But I think the suggestion that facilitation would take place is a telling admission that it does not exist otherwise.

Now, for this Court to imply private right of action under the Investment Advisers Act, it would necessarily engender uncertainty as well as cause delay and undoubtedly add to the expense of the parties involved and in general frustrate the very right which is suggested here should be implied.

And I say that because to imply a private right of action must necessarily in the context of this case leave open all of those questions which Congress very well could spell out, could delineate, could define as it did when it created a private right of action under the Investment Company Act of 1970.

This engendering of uncertainty comes against a background of statutory language which is unique to the Investment Advisers Act and which confers jurisdiction on the Federal courts for only one legal purpose -- the jurisdictional provision of the Investment Advisers Act limits the jurisdiction to a suit in equity to enjoin violations of the Act. That language is unique to the Investment Advisers Act and it is distinguishable from each of the other Federal securities laws.

The other laws, the other Acts all provide that the jurisdiction shall extend to all suits in equity and actions at law brought to enforce any liability or duty created under each of those Acts.

The addition or the omission of the language action at law brought to enforce any duty or liability, we are told in the case of Touche Ross v. Redington ought not to be read as the creation of a private right of action, but we contend that it remains an important indication of Congressional intent.

Now the Respondent's only explanation for the difference in the language between the Investment Advisers Act of 1940 and the other Federal securities laws, to which I have just referred, is that it was either an unintentional oversight by an unidentified draftsman and that the section itself really has no legislative history worthy of the name. Now, the importance of the Advisers Act's special language is reenforced by an examination of that Act's legislative history.

Now, a typical anthropologist, the counsel in this case has sifted through the legislative history, through the sands and the pebbles, if you will, of the legislative history, and they have found artifacts to support their position in each direction. But the important part of that search, or to take the metaphor one step further, that dig is that the proponents of an affirmative private right of actions for damages in this case or for equitable relief have been unable to point to any one solid evidence or one solid piece of testimony or anything that would approach solid indication that the Congress intended that the Act serve as a springboard of private actions by disgruntled investors.

But there is one other artifact on the other side that we believe to be particularly important, and that is the amendment to the Investment Company Act in 1970 in which the Congress expressly created a private right of action under the Investment Company Act, the companion statute to the Investment

Advisers Act.

The 1970 amendment to the Investment Company Act added a private right of action to the Investment Company Act, but no private right of action to the Advisers Act. This addition of a private right of action to the Investment Company Act included Congressional attention to each of those unknown factors to which I referred earlier.

When Congress acted in 1970, it defined the duty or the standard of conduct, it defined the class of plaintiffs, parties who could sue; it defined the class of defendants who could be sued;it allocated the burden of proof; it established the evidentiary standards that must be met by the plaintiff; and it prescribed the damages which could be recoverable.

QUESTION: Haven't some of the decisions of this Court said that what Congress did or didn't do 25 or 30 years after the Act on which the parties are relying isn't of great significance?

MR. ANDERSON: That's correct, Mr. Justice Rehnquist; however, as recently of June, I believe it was, in the case of Touche Ross v. Redington, the Court ruled that, and instructed, if you will, counsel to look to the context in which a statute was enacted or to look at the context in which it appears. The exact words are to call attention to the statutory scheme of which the statute was a part.

QUESTION: But that would be the 1940 Act here,

wouldn't it?

MR. ANDERSON: Yes, And in 1940, of course, there was no private right of action created under the Investment Company Act either. But I think it significant that in 1970, in the course of amending both the Investment Advisers Act and the Investment Company Act that the Congress expressly created a private right of action against certain investment advisers under the Investment Company Act. And it seems to me that if Congress had intended that there be, or wanted there to be, if you will, a private right of action under the Investment Advisers Act, that would have been the time to do it.

QUESTION: Couldn't Congress have assumed that?

MR. ANDERSON: It is possible, yes, Mr. Justice Marshall, it is possible that Congress could have assumed that, however, for Congress to have assumed that, one would have supposed that we could find in the record some indication or existence of that assumption, and there is none. There is nothing in the record to suggest, nothing in the Congressional hearing to suggest that Congress assumed that that right existed.

And I would further add that if Congress assumed that the right existed, why did it deem it necessary to create the Act, the private right of action in the Investment Company Act, which is a companion statute in which it could just as easily have deemed that it existed and, therefore, it was

unnecessary in that instance.

To take it one step further, the actions of Congress in 1970 really alleviate the major policy objections that we see to the implication of a private right in this instance because, as I pointed out, it does really address all of these difficult questions having to do with damages, burdens of proof, and so forth.

QUESTION: Mr. Anderson, if memory serves, in the original argument in this case, there was some discussion about what the question actually was before us. Is the question whether or not there is a private right of action under the Investment Advisers Act, or is the question whether or not there is a private right of action for money damages under that Act?

MR. ANDERSON: The question before the Court is whether or not there is a private right of action under the Investment Advisers Act. You are quite correct, in the first argument there was some question as to whether a distinction should be made. We urged then, and we urge now that no such distinction should be made.

QUESTION: Judge Gurfein did make such a distinction, didn't he?

MR. ANDERSON: Yes. In a footnote, in a dicta footnote--

QUESTION: Right.

MR. ANDERSON: --Judge Gurfein suggested that it

might be easier to--

QUESTION: It was a dissenting opinion anyway.

MR. ANDERSON: That's correct.

QUESTION: It was all dicta.

MR. ANDERSON: However, we give it due homage because--

QUESTION: It was on your side.

MR. ANDERSON: --it was in support of our position.

QUESTION: Right.

MR. ANDERSON: Justice Gurfein's dissent suggests that it might be easier given the language of the Advisers Act to imply a private right of action for an equitable action to enjoin.

QUESTION: Right.

MR. ANDERSON: But we take the position that the rationale which would dictate a decision with respect to money damages applies with equal force in this instance to the right to equitable relief.

QUESTION: And in the present case, Judge Wallace did no more than say he agreed with Judge Gurfein?

MR. ANDERSON: That's correct, Mr. Justice Stewart. That's correct. He simply adopted the opinion.

QUESTION: And in this case, of course, there is an action for money damages.

MR. ANDERSON: Yes, it is an action for money damages and for equitable relief. And, if I may add to that,

the difficulty which we pointed out to the Court last March and, which, of course, persists today is that the Respondents in this case have asked for a rescision and incidental damages so if, for example, this Court were to make a distinction between legal and equitable relief and to limit relief to equitable relief, I think the distinction would soon become meaningless for the reason that courts of equity have traditionally been empowered to grant complete relief, including incidental damages, as necessary.

Now, there is additional legislative history which clearly points away, in our judgment, from the implication of a private remedy here. But rather than repeat and summarize that history all of which appears in the brief, I respectfully refer simply to the fact again that neither the Respondent nor the SEC have been able to offer any direct evidence that Congress intended to give clients of investment advisers ready access to the Federal courts.

At best the Respondents and SEC simply urge an analogy to the Securities Exchange Act of 1934, a different Act for a different purpose.

Let me turn now, if it please the Court, to two principal policy objections to the implication of a private right of action under the Advisers Act.

First, if this Court were to imply a private right of action under the Advisers Act, it would undermine, if not

destroy, this Court's recognition in 1975 that an investor cannot maintain an action under the Securities Exchange Act of 1934 unless the investor can allege the purchase or the sale of a security.

Now, according to the Respondents and the SEC, merely being a client of an investment advisor, the existence of the relationship endows that client or prospective client with the right to sue for damages or to seek equitable relief, even though the client or prospective client neither purchased nor sold a security.

Let me pose an example: Let us suppose that an investment adviser recommended against the purchase of a certai common stock; let us further suppose that the client follows the advice of the advisor and does not purchase the stock; let us suppose that the stock next rises in value, according to the SEC and the Respondents, the existence of the relationship between the advisor and the client would give that client the right to file a suit against the advisor and allege that but for the advice he would have purchased the common stock.

Now, the SEC clearly said at pages 40 to 45 -- excuse me, pages 41 through 45 of its initial brief that since the Investment Advisers Act does not have purchase or sale language you don't need to worry about that because it is not a requirement. The Respondent seems to say the same thing at pages 60 to 62 of the Respondent's brief, although it is

less direct.

The conclusion is that a client who does not purchase stock would be entitled to maintain an action under Section 206 of the Advisers Act, whereas someone who did not have an investment advisor, and was not dealing with an investment advisor, would be barred from bringing a claim. The result is, in effect, a discrimination between those who are fortunate enough to afford the services of an investment advisor and those who do not use an investment advisor.

QUESTION: It only applies to investment advisors who defraud their clients.

MR. ANDERSON: Absolutely, that's correct. But the point is, I think, Mr. Justice Stevens is that if the allegation were that they were the victim of fraud with respect to not purchasing, they would have standing under the rationale of the interpretation given by the Respondent SEC -- by the REspondent and the SEC in this case.

I think the example well illustrates the extent to which implying a right of action in this case would undermine the limitation, if you will, that this Court recognized in the Manor-Blue Chip Stamp Case--

QUESTION: Do you think the Court has decided any cases since the last argument that have any relevance to the issue you are arguing?

MR. ANDERSON: Very certainly, Mr. Justice.

QUESTION: Are you going to discuss any of those?

MR. ANDERSON: Yes. We have counted upon the two cases that seem the most directly relevant here in Cannon v. The University of Chicago, and Touche Ross v. Redington, which seem to bear on the question that is currently before the Court. And we have commented on those two cases.

I would be pleased to comment here on the impact of either of those cases, if you wish.

QUESTION: No, apparently, you don't think they help you very much. I would assume you would call our attention--

MR. ANDERSON: I do, indeed, think that both of those cases help.

QUESTION: I may have missed your later brief, that's part of my problem.

MR. ANDERSON: There is a yellow covered brief, I believe, and it includes discussion of both the Redington Case and the Touche Ross Case.

QUESTION: Thank you. I just didn't get it.

We have one from the SEC, filed on September 25th.

MR. ANDERSON: Yes, and I believe the Court has a yellow covered brief also which includes a supplemental brief which we filed, which is devoted, in large part, to both the Cannon and Touche Ross Case.

I must say that I think with one possible exception that Touche Ross and Redington seem to be conceptually identical to the case which is before the Court, and that the

rationale for that case would suggest a decision in the Petitioner's favor here.

The case of Cannon is not inconsistent with a ruling here for the rather, I think, abundant reasons given in that case, such as the existence or provision of attorneys fees to the prevailing party other than the Government; the existence of Congressional action following implication of a private right of action and for all of the reasons given in the majority opinion in that case, the Cannon case is absolutely consistent with a ruling in the Petitioner's favor here.

Let me now return, if it please the Court, to the second policy consideration which bears on a decision here, and that centers on the special wording of Section 206, the provision of the Investment Advisers Act on which the claim for private right -- private relief is based.

Section 206 makes it unlawful for an investment adviser to defraud a client or prospective client. The key words, of course, are "a prospective client."

And this raises an interesting example. Let's suppose an investment adviser were to send a business solicitation, letter or material, to a prospective client; let us suppose next that that material were later deemed or alleged by the SEC to be misleading, fradulent, deceptive, and so forth, the SEC clearly says at pages 41 through 45 of its brief that this prospective client would have a claim

under the Investment Advisers Act and the Respondent is simply silent on the issue.

Those who are prospective clients of investment advisers are hardly a discreet class of plaintiffs. But, more importantly, the notion that a private right of action could exist in favor of prospective clients, at a minimum it raises more questions than it could possibly answer.

Nonetheless, Section 206 speaks of prospective client as well as clients.

Prospective clients, however, is consistent with enforcement by the SEC, going into court and seeking to prevent an investment adviser from sending misleading or deceptive material with respect to investments.

QUESTION: You don't question the authority of the SEC to bring an injunctive action?

MR. ANDERSON: Absolutely not. No, indeed. I think the duty and responsibility of the SEC is the enforcement mechanism under this Act. But I simply refer to the SEC enforcement here because that use of the phrase "prospective client" is consistent with that kind of enforcement, and I submit it is not consistent with the notion of private enforcement.

QUESTION: What kind of relief could the Commission, the SEC secure?

MR. ANDERSON: In the example just given, under the

express wording of this Act, they could go into court and seek an injunction to enjoin a violation of the Act.

QUESTION: Only equitable relief.

MR. ANDERSON: Only equitable relief; that's correct.

The potential reach of a private action under the Advisers Act is illustrated by this very case. I would respectfully remind the Court just what is alleged here. It is alleged here that the adviser to a real estate investment trust has violated the Advisers Act. There is no allegation that the wrongdoing occurred in connection with the purchase or sale of any security. There is no allegation that the acts of the Trustee Petitioners constituted wilful deception. There is no allegation of intentional concealment of material fact.

The complaint is simply a complaint about a relationship -- a relationship between a real estate investment trust and its adviser.

And if we take all of those things about which the complaint is not about, I think it's clear to see the fashion or the manner in which it is able to circumvent the limitations that this Court in recent years has imposed on securities actions. It circumvents, for example, the requirement in Ernst & Ernst v. Hochfelder that there be an allegation and proof of intent to deceive. It permits certain avoidance of the requirement that there be wilful

deception, as pointed out in the case of Santa Fe Industries v. Green.

Now, in response to the policy considerations, the Petitioners offer a series of what amounts to reassurances that the Courts of Appeal will be guided by recent decisions of the Court and will not go astray.

For example, in response to the contention that implying a right of private action here would undermine the purchase or sale requirement, the Respondent states, at page 58 of its brief,"it is fair to presume that the federal courts in giving proper scope to Section 206 will be appropriately guided" by the requirement that intent be an element of the claim.

QUESTION: Mr. Anderson, in the SEC's Supplemental Brief, on pages 2 and 3, in its summary of argument, it says, "This Court's recent decisions emphasize that implication of a private right of action presents a question of 'statutory construction.' Citing Touche Ross and Cannon. "In resolving that question, the Court has held, it is necessary to determine 'whether Congress intended to create the private right of action asserted.'"

Is it really up to us to consider all of these policy considerations if Congress has not by implication or expressly created a private cause of action?

MR. ANDERSON: No, Mr. Justice Rehnquist, I point

out these policy difficulties here to, if you will, explain or to elaborate the resulting difficulties that would follow an implication in this instance. And we are instructed that this Court is the Court to consider policy and, for that reason, I bring it to the attention of the Court. But I want to repeat in direct answer to your question--

QUESTION: Who instructed you that this Court was the Court to consider policy?

MR. ANDERSON: The Supreme Court of the United States we learn first in law school and later in review is to consider all of the reasons which bear on a decision.

It seems to me that the decisions, for example, the Touche -- excuse me, the Blue Chip Stamps Case, those policy considerations were discussed by Judge Gurfein in his consent in the Abrahamson Case, and it is simply here I repeat them to point out the practical difficulties that follow from that implication. But I do not for a moment wish to suggest that there is any reason here why this Court would want to do anything other than what would be evident from the intent of Congress.

And, to repeat the basic point here, there is no direct evidence here of which we are aware that Congress intended to create a private right of action.

I will reserve the balance of my time. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Keisman.

ORAL ARGUMENT OF ERIC L. KEISMAN, ESQ.

ON BEHALF OF THE RESPONDENT

MR. KEISMAN: Mr. Chief Justice, may it please this Honorable Court:

We, too, think it is appropriate to begin this re-argument by calling attention to what this case, and what, therefore, is actually and necessarily before this Court for decision.

This is an action brought derivatively by a shareholder of a real estate investment trust against its investment adviser, certain of the trustees of the trust, the parent of the advisers and a sister corporation alleged to have been parties to the transactions alleged to be fraudulent.

Now, in discussing the issues before the Court, we are again dividing time with the Government, the SEC, and, subject to the Court's desires and questions, we intend to focus on the case, what the statute does, by necessity, by implication, and the legislative background against which the statute was enacted.

The Commission will emphasize, again subject to the Court's questions, the appropriateness within the enforcement picture of a private remedy; the question of the relationship between the administrative machinery and the appropriateness of implications of private remedy and the inapplicability of doctrines such as those arising from AMTRAK and SIPC against

Barber. And, with the Court's permission, I would like to point out, as I argued last Spring, in its principal cause of action, classically equitable in the substantive form.

Now, there is no quibble that merger happened. And that merger started out as a procedural doctrine and continued to be a procedural doctrine. I think there is also no quibble that the substantive law recognizes in the nature of relief available and the nature of defenses available, there is still such a thing as a claim equitable in its character, in its substantive character. Although one is not demurrable, if one pleads the inequity in a thing called a complaint. You can't plead laches in a complaint for goods sold and delivered and you can plead laches in a bill for restitution and rescision.

And its primary cause of action, this is a bill for rescision of a contract alleged to be the product of a fraudulent scheme and plan for restitution of the compensation or at least the excess compensation paid thereunder. It even contains the partial seeds of partial equitable defense; that is that the full restitution of all compensation would be something for a court of equity to consider if all of the services rendered could not be tendered back for what they were worth.

What is actually before this Court, and what can't be not decided, given that certiorari has been granted, is whether an equitable action arises by necessary implication

or proper implication through Section 206 of the Investment Advisers Act of 1940.

Now, Cannon against the University of Chicago, I think, teaches us that the Cort against Ash analysis wholly appropriate to use. But, as we were so bold as to suggest in our first brief, the four criteria are not independent. They are not four points to count on a score board. The second through fourth eliminate the first.

And, while there has been a difference in the expression of analysis, this really doesn't differ from what th Court did 100 years ago, at least as I understand it, through our distinguished Dean Thayer, who said the reason we look to imply claims from wrongs arising under statutes is because in an appropriate kind of case, and we are talking about the kind of case where a standard of safety or a standard of decency had been established by a legislature, not to do so would be to fail to offer appropriate respect to the other branch of the Government.

There is no discontinuity between the cases at common law, the cases under early Federal statutes, and the case at bar. There is a difference in approach and analysis, perhaps a tighter and more careful view of greater recognition when it arises of the problems of federalism.

QUESTION: Do you think possible changes in legislative practices over the period since Dean Thayer was

talking might have something to do with this?

MR. KEISMAN: To a certain degree, Mr. Chief Justice. It may be that this has become a little bit more of a code nation than it was; that is, in some cases, and perhaps increasingly the Congress is willing to take the risk of spelling out all of the elements of the special kind of cause of action that it wants to create.

But, at least in 1940, and I think I only have to speak principally to 1940 and not to 1979, this was not a code country. There were experiments with codes. But, as we have argued before, we think it perfectly clear that Congress created under some of the Securities Acts specific hybrid forms of action for specific wrongs, its study of which had given rise to the 1933 and 1934 and 1935 Act. It likewise created certain open-ended provisions saying again and again in its legislative history we don't know, for example, what kind of fraud is going to happen.

Professor Loss, in one of the treatise sections we cited in our original brief, picks up I think the appropriate metaphor for an Oregon State Court that if we codified the law of fraud, the Federal Oregon Court said there is a certain kind of gentleman finding ways to commit three but not the fourth element of such fraud.

A certain amount of open-endedness and non-codification of the law of fraud was recognized by the legislation

to be necessary to avoid codifying the avoidance of any penalty for fraud.

QUESTION: I wasn't really thinking of the Code problem. I am thinking about the practical day by day, hour by hour practices of the Congress today as compared to the Congress of 100 or even 50 or 30 years ago.

MR. KEISMAN: That may be so, Mr. Chief Justice, but with respect to Section 206, we are talking about 1940 and, respectfully, I don't think there has been any change -- certainly no change that invalidates anything this Court said Cort against Ash or in Cannon. We start with what kind of a statute it is.

QUESTION: Well, for example, when Congress in one of these cases that we have provided for attorney's fees to be allowed to the private litigant, that was thought to be enough to suggest that it was mere inadvertence that they hadn't provided for an express and explicit private right of action. But, otherwise, doesn't Professor Loss' approach leave an enormous amount of discretion to the Courts on what are essentially policy questions?

MR. KEISMAN: Well, Mr. Chief Justice, enormous is a question of characterization. I don't think it's a problem here. I don't think it's a problem here because there is a much stronger indication of Congressional intention that some private litigation arise from the Advisers Act, directly in

the Advisers Act. There is a section, Section 215(b) which says that any contract and practice, the continuation of any relationship that is in violation of a substantive provision of this Title is void. The courts -- this Court has recognized in Deckert, in citing Deckert and Blue Chip Cases softened the blow of the word "void" so that it doesn't mean no title may pass in a remote error of the grantor can't take the land back.

It is perfectly clear in the decisions of this Court that the least it means is avoidable at the suit of the party deceived or aggrieved. That's right in the Advisers Act. And if one is looking to decide, as this Court has so often traditionally done, only the case before it, we respectfully submit this Court would have to nullify Section 215(b), to say that no private litigation arises out of the anti fraud provisions of the Advisers Act.

This is a much clearer case, we respectfully submit, without other considerations we haven't dealt with yet, than Cannon.

In Cannon, there is a prohibition against any person being discriminated against on several different bases.

This Court was wise enough to realize that a class of persons discriminated against, even though large, was a discreet class, and it was right creating language. Here it is said in 206 no investment adviser shall defraud his client. That is a very narrow discreet class. The legislative history

from 1934 to 1940 is replete with indications that the Congress considered, those who provide capital for the capital market to be a discreet class in need of special and new protection.

By the Court in Cannon standards, 206 is far narrower than 901, directed not only to a single kind of plaintiff but to a single kind of defendant. In 1940 it was only registered advisers. In 1960 it became any advisers.

As to the prospective client question, I think the answer is simple. Fraud doesn't ripen into a cause of action until at least money passes, until the property is fraudulently taken. A prospective client can easily cover the case where the fraud was in the inducement. As one of the things, Congress was worried about touts and tipsters.The invester sends in his money and gets nothing back. The Court might say, "Well, this isn't an advisor-client relationship, it's a fraud in the inducement or false pretenses."

Otherewise, while Petitioners raise the horror of suits by people who get tip sheets and don't do anything, again this is a fraud statute. We are talking about an economic fraud statute. As a matter of fact, if we are sending bad things through the mail. The problem doesn't exist.

QUESTION: Are you saying then that the language of Section 80(b)-50 about the validity of every contract made in violation of any provisions, et cetera, doesn't limit the

extent of the private right of action? Does someone who has just got a tout sheet and did not actually enter into a contract, but where a claimed fraud as a result of it could sue?

MR. KEISMAN: No, Mr. Justice, he couldn't have been defrauded in any sense I know in the Anglo-American Law, if he parted with nothing in consideration of an inducement that had a fraudulent character to make him become a client of an adviser, what economic tort could possibly have occurred? 215 we say is a deminimus. Professor Loss finally went so far in the 1969 supplement to remark that 29(b) under the '34 Act statute was more, perhaps, explicit than implied.

What I am arguing, sir, there is no question Congress expected some claims to be made.

QUESTION: What if the sheet had said, "Don't go to anybody but us", and the private cause of action alleged that he relied on that and went to the people who sent out the sheet and if he had gone to somebody else he would have gotten good advice and made good investments?

MR. KEISMAN: Mr. Justice Rehnquist, I think this Court and most federal courts would deal with it the same way this Court dealt with the problem presented in Blue Chip, the claim that nothing happened because somebody read something again is not traditional fraud or deceipt and I think this Court would deal with it as it said in that case

that there is a level which the Court must consider policy. And, again, you can always say, "We will do nothing that a rational legislator would not have done." There is that mode of analysis too. We can say it cannot be that Congress meant for this to occur. And within the rubric and within the proprieties, the Courts would dispose of the fellow who said, "Well, I did nothing. I sat in my room until my money went away. This fellow told me not to invest."

Again, I think 215 can be read as solving this case and this case only. This Court need not decide any other case at this time. This is not to say that we do not agree with the Government and with this Court in Touche Ross to make this perhaps somewhat agonising distinction once you look at what 206 does on the basis of 214 and the omission of the phrase "actions of law". It probably isn't in keeping with the way jurisprudence has proceeded since merger, that once equitable jurisdiction attaches to make the argument that the question of which of a series of open-ended remedies have been recognized as alternates at least for a generation rises to statutory or higher significance is a little bit like trying to write the Declaration of Independence on the head of a pin without a very small needle.

We showed in our brief that 214 had no history. We showed that it wasn't looked at, it wasn't written up and it wasn't marked up. We showed one thing more. We showed

that if how it got passed means anything, it means exactly the opposite to what the Petitioner argued. Why? Because the Reports that came to the Floor on which the majority voted said these contain the usual provisions about jurisdiction and venue actions.

If that meant anything to the 266 votes that was necessary to carry the House, it had to mean we are doing again what we did in 1933, what we did in 1934, what we did in 1935 in the Holding Company Act and what we did in 1939 in the Trust Indenture Act. Nobody suggested to the Senate or the House there was any difference in the procedural sections of the Acts they enacted in 1940.

This Court has said more than I think it fit for me to comment on on what we do with things that didn't get through Congress, but weren't rejected by it. So I am not going to spend a lot of time on why Congress didn't amend. Again, we cover that with considerable thoroughness in our brief.

The amendment of the Investment Company Act was a response to a particular scandal and a particular lengthy investigation by the Wharton School at the University of Pennsylvania on mutual fund fees. And that is all Congress focused on. And one of the things they were worried about was a split of decision in the courts, and I think a difficult decision in the Second Circuit for the court to do what it thought had to be done and what Congress would have wanted it to do. It had to go back and say we'll raise the claim for

economic mishandling under the larceny statute, which is probably as far as Judge Friendly has ever gone and perhaps Congress felt we had better nail this down. We are having trouble in the First Circuit, but the defendants even conceded it; we're having trouble in the Second, let's lay it out, and so they did.

There was no discussion in teh Wharton Report of general problems with other kinds of investment advisers. Things that don't come to Congress' attention this Court has said for 100 years aren't part of the history that we can interpret.

The question has been raised and we don't think it's a proper kind of statutory interpretation, will something horrible happen if you read Section 206 and Section 215 to create a private claim.

Again, the Respondent notes that the Petitioner has found 15 cases in a dozen years, and the judicial report tells us that 130,000 federal civil actions were filed last year deminimus non cure at lex. There is no break.
That's the elements of the cause of action. This Court has now spoken as to what the proper elements of an action for fraud are and what they aren't.

I can't warrant that all lower Courts will understand, but I would be terribly, terribly surprised if I could bring a negligence case against Investment Advisers, I really would, or against an investment adviser who had never entered into a contract and never had a client. I really think that

this is more or less asking this Court to not be a Court but to be a clearinghouse because they well know that this is the kind of statute we have always done this with before. Congress had to mean that a fellow could sue to set aside this contract and get his money back but there might be so many suits even though it never happened before we had better stop it now.

I respectfully submit that is not what this Court has been doing in judicial administration. It has not said we are not going to enforce federal statutes because it's a problem to enforce federal statutes. As I said last Spring, once Congress creates positive laws, which I was taught in school means the command creating rights and duties, the designing of remedies, the authority of the Courts in this country and in England, the Federal courts as much as the State courts.

One recognizes that the Courts should not encroach on province of Congress. Congress, we submit, expected the Courts, certainly in 1940, and right on perhaps until early this Summer, with a common anti-fraud statute to do what it had done with other anti-fraud statutes directed toward classes that the Congress had indicated needed special protection.

QUESTION: But if Congress understands that private actions must be created explicitly, doesn't this problem, the

long range problem work itself out?

MR. KEISMAN: But it won't as to conditions of people as against -- well, who have claims that accrued before this under 1979.

QUESTION: That's why I said long range.

MR. KEISMAN: Well, in the long range, but I respectfully submit, Mr. Chief Justice, that that shouldn't deprive Plaintiffs who were hurt in 1973. As the Commission correctly states, this Court is serving notice on Congress from now on, except for certain excepted areas, and the Court is in Cannon serving that kind of notice, we will never imply a remedy. You have got to codify the civil law.

When that is explicitly done, those subsequent statutes could, I suppose, give rise to any right of implication. But I respectfully submit that this Court should consider very carefully in terms of its institutional needs whether it really means except in one or two special areas that this must be a code country if it wishes to create the situation where the gentleman from Oregon, I averted to before, can have his support, whether it wishes to try, for example, if must take on codifying the Sherman Act.

That's another statute that many commentators have point out has become quasi-constitutional.

QUESTION: In the Sherman Act there is a common cause of action. Here we are talking about the existence of

a private remedy, not about the element of it.

MR. KEISMAN: A remedy with regard to codifying all of the substantive law, which if codified, each private action, each private remedy, none may any longer arise by implication then I wonder whether that is really what the Court means as the proper division of duties between Congress and the Courts. I don't think that's what Cannon says. I don't think that is what Touche Ross says. Touche Ross distinguishes itself, as pointed out in the notes, and this is a classic and ordinary record-keeping and document-filing statute, and informational statute. It doesn't purport to create any right of A vis-a-vis B. It purports to create and be read as creating and was read by the majority as creating nothing more than a right of the government to require A to do something.

Now whether one would like to see that swept up in a broader implication or not, I think it has nothing to do with Section 206.

I am merely suggesting, Justice Rehnquist, the response to the question is the world changing, will we hereafter require a precise codification by the Congress of every substantive right and duty that it thinks ought to exist within the system of jurisprudence, that this may raise more dangers than it cures. I don't deny that at some levels and at some limits that is a difficult question.

I suggest, respectfully, that with regard to a simple

section like 206, it isn't.

I thank the Court.

CHIEF JUSTICE BURGER: Very well. Mr. Ferrara.

ORAL ARGUMENT BY RALPH C. FERRARA, ESQ.

AS AMICUS CURIAE

MR. FERRARA: Mr. Chief Justice, may it please the Court:

The Securities and Exchange Commission would like to talk about the five cases that this Court decided last term that bear on this case: Cannon, Touche, Kidwell, Burks against Lasker, Davis, but before I do that, I have listened to Mr. Anderson on two occasions twist this case, and I would like to respond to a few of the things he said before launching into my argument in chief.

First, somehow Mr. Anderson seems to think the Touche Ross opinion decided last term clothes Section 214 with some kind of special significance for his case. If Touche Ross stands for anything, it stands for the fact that jurisdictional provisions like Section 214 create new duties, create new liabilities and if there are duties or liabilities to be created, to be recognized, you have got to go to the substantive provisions of the statute.

That's the anti-fraud provision, Section 206 here. I think it's inexplicable that he thinks Touche Ross helps his case.

Secondly, he on three occasions in the course of his principal argument says that there is no indication in the legislative history that Congress affirmatively intended to create a private cause of action. That's not the test. Cannon and Touche affirm that that's not the test.

Mr. Justice Stevens in the course of writing the majority opinion in Cannon said that that case was atypical -- that's the word he used, "atypical", and that there seemed to be a rather significant indication of legislative intent to create a private cause of action and Mr. Justice White, in his dissenting opinion, disagreed with that.

QUESTION: The language on page 3 of your Supplemental Brief where you say in resolving that question the Court has held that it is necessary to determine "whether Congress intended to create the private right of action asserted."

MR. FERRARA: I am sorry, I understand the quote, I didn't understand the question.

QUESTION: Well, I believe what you were just arguing is somewhat at odds with the language I just quoted.

MR. FERRARA: Not at all. We embrace, as we do in our brief, both the Cannon and Touche standards. We understand that this Court wants to treat questions of recognizing private rights of action under Federal statutes that don't expressly provide for one as an issue of statutory construction. And

we think that this Court in Cannon and Touche gave us the guidelines to go about the business of engaging in statutory construction. The guidelines that the Court gave us in determining that threshold question of Congressional intent are clearly articulated in Touche. Mr. Justice Stevens in Cannon said it's that right duty -- let me slow down.

Mr. Justice Stevens said in Cannon said it is that right or duty creating language in the statute that is the best indication of whether a private right of action should be implied. That's the Cannon of statutory construction that this Court, I think, in both Cannon and Touche have chosen to determine whether or not a right of action should be implied.

QUESTION: Are you saying as long as you've got the right duty substantive language in the statute, you must find in the statute some affirmative evidence that Congress did not intend to?

MR. FERRARA: I think that's too short a standard, Mr. Justice White. I think that the threshold inquiry is determining whether or not the plaintiff was in the special class. I think this Court said in Cannon--

QUESTION: If that's all you find in the legislative history or the rest of the statute, and you find no other evidence of any kind except that there's that substantive right or duty, you would say the right is implied.

MR. FERRARA: If this Court would like to say the right is implied, I would agree with it.

QUESTION: I thought that's what you said a moment ago.

MR. FERRARA: No, I say that that's the starting point in determining whether or not a right should be im--

QUESTION: What else do you need?

MR. FERRARA: Well, this Court has said in Cannon and Touche that once you've answered that threshold question from the language of the statute itself, then this Court is going to be decidedly receptive to implying a cause of action when it is necessary or at least helpful to effectuating the underlying Congressional purposes. That, I think, this Court said in both of those cases as the next step. And we think that this case needs that next step also.

Beyond that, the Court has said that if you want to regard it as a sub-step of 2, the Court has said that it's going to be decidedly receptive to implying a right of action if failing to do so would undermine the statutory purpose. We think we meet that test too.

Beyond that, the Court said as a third test, if you will, that we're going to be decidedly receptive to implying a private right of action when an explicit right is created on behalf of a benefitted class, but there is not an opportunity for that benefitted class to access to intervene, to

activate, to participate in the administrative machinery created under the statute. We meet that test too.

That, I think, is the refocusing, the refurbishing of Cort against Ash that Cannon and Touche provide and I introduce the subject of the Davis Case also in my opening remarks. We think that that bears on this too. Because, as Mr. Justice Brennan pointed out in that case, writing for the majority, the question of whether or not there is a cause of action under a statute is analytically distinct from the question of relief.

So all of that Cannon and Touche language, all of the new mode of analysis to determine whether or not Congress intended a right of action should be implied all focuses on the question of cause of action, as properly it should.

Well, continuing, Mr. Anderson also seems to think or take some comfort in the 1970 amendment to the Investment Company Act, creating an express right of action under Section 36(b), but he omits to tell the Court that Congress said in both the Senate and House Reports, as I recall, to those 1970 amendments to the Investment Company Act that it had absolutely no intention to adversely affect implied remedies under other provisions of the Federal securities laws, particularly the Investment Company Act or I think the Investment Advisers Act.

He raises the 1976 amendments, or proposed

amendments to the Investment Advisers Act, but he doesn't tell you there that the Congress considered those 1976 amendments merely to confirm what it understood to be the fact that actions had been implied, and properly so, under Section 206 of the Investment Advisers Act.

Mr. Anderson says that the Securities and Exchange Commission and the Respondents in this case seek to imply a private right of action merely by some analogy to the Securities and Exchange Act, an obvious reference to Borak. That's just not the case at all. We submitted a 22-page supplemental brief indicating that we are quite comfortable living under Cannon and quite comfortable living under Touche, quite comfortable living under Davis and, quite frankly, relieved that Burks even helped this case.

Mr. Anderson seems to think that the SEC doesn't place great credence in what he calls the policy argument; that there is no purchase and sale here involved. Well, we think -- I'm sorry, he says that not only we don't place great credence in that but that our entire argument rests on the language of the statute. He says the SEC seems to sit on its hands saying the language of the statute doesn't require a purchase and sale accordingly. All of those marvelous policy considerations that the Court articulated in Blue Chip -- marvelous from his perspective -- that the SEC completely disregards. Well, it's just not true.

In Blue Chip -- as I say, this case is substantially different than Blue Chip. Here there is a clear transactional nexus between the Plaintiff and Defendant. I mean they have a privity of contract between them. They have an investment adviser and a client to that investment adviser, much different than Blue Chip.

Here you have a very definite limited class of potential plaintiffs, expressly identified in the statute. The statute talks in terms of clients of investment advisers. It's not a statute that talks in terms of the general public, the kind of person that would be sitting by the wayside and a purchase and sale securities transaction that Blue Chip was worried about.

Also, there is no remote expectation of contingent liabilities in a case like that.

As a matter of fact, Mr. Anderson in the course of his opening remarks suggested that in the Commission's brief, pages 41 through 45, we embrace the notion that a prospective client should also have an implied right of action. I don't recall that our brief does that.

As a matter of fact, the Commission's position is that allegations of fraud presuppose that there has to be the existence of a client-adviser relationship. Now, certainly fraud can induce a party into becoming a client of an adviser, but the Commission's position and the Commission's view is

that before an action can be maintained, a person is going to have to demonstrate that at the time of the action, or at the time of the discovery of the fraud, that he was a client.

QUESTION: But you don't require that there had been a contract?

MR. FERRARA: I'm sorry?

QUESTION: You don't require that there had been a contract?

MR. FERRARA: If you mean a written contract--

QUESTION: No, I don't mean a written -- I mean a contract as defined in 215.

MR. FERRARA: We think there has to have been an advisory relationship, a formal advisory relationship so that you have a client status and an advisory status in existence. The prospective client language, we think, was added by Congress merely to be able to cover the situation where the plaintiff before he becomes a client is induced to become a client on the basis of fraudulent misrepresentation and that prospective client language is important for the SEC that has as part of its enforcement machinery the obligation to go in and bring injunctive action to prevent frauds that are about to occur so the prospective client language is very important for the SEC language but not, we think, particularly relevant or particularly complicating for this Court in determining whether clients should have an implied right of action under

Section 206.

Finally, having discussed briefly Mr. Anderson's position, I would now like to turn to our argument. As I said briefly, in part responding to some of the points that Mr. Anderson raised, this Court has characterized last term and defined what it calls the threshold question in determining whether a private right of action should be implied or recognized under a Federal statute or recognized under a Federal statute not explicitly providing for one. And that threshold question was identified by the Court to be whether or not the plaintiff or the respondent in this case was within the special class meant to be protected by the statute.

We think that Section 206 in the language, the language of the statute, the thing that Mr. Justice Stevens writing for the Court said we had to look to, the language of the statute creates Federal rights in favor of a particularized class. I am sorry.

QUESTION: Do you concede in these kinds of cases that the bottom line has to be that we conclude that Congress intended to create a private cause of action?

MR. FERRARA: I not only concede that, I agree with it. I think that's exactly what this Court has said that the question of Congressional intent--

QUESTION: Why is that essential too? Why is that

bottom line essential that Congress must intend to create it?

MR. FERRARA: Because this Court has decided that it no longer wants to engage in a policy-based reasoning that got us to Borak, a case that has been characterized by this Court last term as being apparent and incomprehensible as a matter of policy; policy-based reasoning as supporting the implication implied rights of action is apparently out. The statutory construction in defining the intent of Congress is apparently in.

QUESTION: Assume you find a statute that everybody would agree creates or purports to protect a class of people and create some rights in them that somebody is going to attempt to protect under the statute and they are perfectly identifiable and the right is clear, now why do you need a Congressional intent to create a private cause of action?

MR. FERRARA: Quite frankly, Mr. Justice White, the Commission will be just as happy to have--

QUESTION: I just want your view. I wonder what your view of it is.

MR. FERRARA: My view is that this Court was far better suited when it based its implication decisions on policy-based reasoning of Borak. However, we are perfectly comfortable with having the statutory construction rule that has been articulated in Cannon and Touche. And I am not the one who said that determining what the ultimate Congressional

intent is is the proper test. That's the test this Court--

QUESTION: It isn't a question of jurisdiction, is it?

MR. FERRARA: It is not a question of jurisdiction because the jurisdiction under 28 USC 1331 and 214--

QUESTION: And the right is stated under the Federal statute. Why do you need some further license from Congress to get into the Federal court?

MR. FERRARA: I think if you are asking me to explain the rationale of the Court's decisions in Cannon and Touche, I would respond by saying, Mr. Justice White, that there is concern on the part of the Court that it not engage in breaches of what has been characterized as a separation of powers provision of the Constitution. The Court does not want to be

QUESTION: It assumes the answer that you can't get into courts unless Congress tells you --lets you in.

MR. FERRARA: I am sorry; I don't understand your question.

QUESTION: Well, Courts have recognized rights of action, causes of action without waiting for Congress to say yea or nay on the subject; have they not?

MR. FERRARA: Absolutely. That's correct, Mr. Chief Justice.

QUESTION: The question is whether in the framework of a particular statute we are forced to rely on statutory

construction and not draw on broader powers.

MR. FERRARA: Mr. Chief Justice, if I could stand up here for another one hour and try to persuade you that the rationale of Borak was correct and this Court should be drawing on broader policy-based considerations, I would love to do so. But I just don't think for some reason it's going to do me a lot of good.

QUESTION: No, the red light doesn't permit you to do so anyway.

Do you have anything further, Mr. Anderson?

REBUTTAL ARGUMENT OF JOHN M. ANDERSON, ESQ.

ON BEHALF OF PETITIONERS

MR. ANDERSON: Mr. Chief Justice, may it please the Court:

Section 215 of the Advisers Act, the so-called void provision or voidable provision is discussed at pages 5 through 9 of the red reply brief. I will not take any time here, but, in essence, the argument that Section 215 of the Advisers Act authorizes private action is based on an analogy to a comparable provision under the 1934 Act, an Act which has a statute of limitations provision in it. This section has no such provision in it, and it is the very existence of that statutory statute of limitation which has been used by the Courts to justify a private right of action under Section 215.

This Act is not the 1934 Act. It had a different purpose. It was aimed at a different aspect or segment of the securities industry. The right or duty language which appeared in both Touche Ross and the Cannon Case, I submit, can only be one test. It ought not become another mechanistic tool whereby you look and you find the existence of a right or duty and then automatically turn and decide that there is a private right of action.

I hope that this case will clarify for litigants in the future that the existence of a right or duty per se is not the test. The basic test remains the intent of Congress.

The Advisers Act, unlike the 1933 and the 1934 Act does not purport to regulate the marketing--

QUESTION: Why is Congress, if it is clear enough in an Act that Congress created some protection for a class of people and created some duties on behalf of one group in favor of another, why -- and then you have the jurisdictional provisions in Federal court, why do you need some other evidence from Congress that people protected have to have a right to go into court?

MR. ANDERSON: Mr. Justice White, I don't think you do under the example that you gave. The example that you gave was if it is clear enough in the Act itself that Congress intended to create--

QUESTION: I didn't say that. I didn't say that. I said that it is clear in the Act that there are some duties created by Congress, some duties placed on one group in favor of another. That's perfectly clear.

MR. ANDERSON: Yes.

QUESTION: And they say nothing at all about getting into court about it.

MR. ANDERSON: There are any number of Federal Acts which create rights and duty language in favor of special classes and this Court has not ruled that either the party--

QUESTION: I am just asking you, why do you need some other evidence from Congress that the people protected have to have a separate license from Congress to get into court?

MR. ANDERSON: Because I think the creation of rights and duties under Federal statute could encompass a broad range of statutes and, therefore, imply causes of action under them. There has to be something more than the simple creation of a right or duty. There has to be something more in the statute to indicate that that right or duty could be asserted by the special class to be benefitted.

QUESTION: Why?

MR. ANDERSON: Because otherwise it seems to me that you could not explain such cases as--

QUESTION: I know, but that is just bootstrapping

based on our cases. I want to know about what you--

MR. ANDERSON: Well, it seems again there are any number of statutes which create rights or duties or have rights or duty language in them and to simply use that as the talisman or the basis upon which you are then going to say that because rights or duties are created in favor of this class automatically that class has standing to sue--

QUESTION: Find some evidence in the statute or its structure or unless Congress affirmatively didn't intend -- that they intended to keep them out of court.

MR. ANDERSON: I do not understand in the case of implying causes of action that it is the task of those who are resisting implication to come before the Court and offer proof that Congress did not intend to imply a private right of action. Because, Mr. Justice White, it seems to me that there are any number of statutes, as I said earlier, which have rights or duty language in favor of certain specified or identifiable class but that in and of itself it seems cannot be used as an automatic or a checklist thing and, furthermore, to shift another way, the burden to the parties opposing implication to prove that Congress did not intend.

Now the Advisers Act is aimed at a small specific segment of the investment industry and that fact alone I think is very important because it makes difficult, at least, all of these analogies to the '34 Act, which are the

basis of the Respondent's and the SEC's argument. I respectfully call the Court's attention to all of the arguments that are made under Section 206, all of the arguments that are made under Sectinn 215 are arguments by analogy to the 1934 Act and the 1933 Act. And even the use of Borak, a 1934 Act case is an indication that what has happened is that they are arguments by analogy. Attention -- Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:17 o'clock p.m. the case was submitted.)

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