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First Pacific Bancorp, Inc. v. Helfer: A Case for an Implied Private Cause of Action

I. INTRODUCTION

In 1933, Congress created the Federal Deposit Insurance Corporation (FDIC) to “ensure maintenance of the going concern value of failed banks and to avoid significant disruption in banking services.” In order to accomplish this goal, Congress vested the FDIC with broad powers. For example, the FDIC has the authority to prescribe rules regarding the conduct of receiverships, as well as the ability to succeed to title of assets and all rights of any shareholders, officers, and directors of the insured institution. Once these powers are assumed, the FDIC as receiver can liquidate an institution and use the proceeds of that liquidation to pay valid claims. Balanced against the powers of the FDIC are duties of accounting and reporting. The Ninth Circuit Court of Appeals in First Pacific Bancorp, Inc. v. Helfer held that a shareholder of a bank has a private cause of action under 12 U.S.C. § 1821(d)(15); therefore, a shareholder is able to sue the FDIC for a statutorily required accounting report.

1. First Pacific Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1120 (9th Cir. 2000) (citing Jones v. FDIC, 748 F.2d 1400, 1402 (10th Cir. 1984)).
2. Id.
5. 12 U.S.C. § 1821(d)(1)(E) (1994). The statute allows the FDIC to “place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.” Id.
ers of First Pacific Bancorp, expecting a receivership surplus in the neighborhood of $2.8 million, received only six pages of unaudited reports from the FDIC indicating a net loss for the receivership. The Ninth Circuit's decision was contrary to the Third Circuit Court's ruling in *Hindes v. FDIC* decided in 1998. Consequently, the issue is on uncertain ground in other jurisdictions and may, in a future case, be appealed to the Supreme Court.

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), an amendment to the original Federal Deposit Insurance Act, imposes accounting and record-keeping requirements on the FDIC. Under FIRREA, the FDIC must maintain a full accounting of each receivership consistent with FDIC's own accounting and reporting practices. Additionally, the FDIC must provide an annual accounting or report to the Secretary of the Treasury, to the Comptroller of the Currency, to the authority that appointed the FDIC as receiver, and, upon request, to any shareholder of the depository institution or to any other member of the public. Although these reports are required

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9. Hindes *v. FDIC*, 137 F.3d 148, 172 (3rd Cir. 1998). *Hindes* is factually similar to *First Pacific Bancorp, Inc.* in that the plaintiffs in *Hindes* felt the accounting reports created by the FDIC were insufficient. *Id.* at 171-72. The plaintiffs in *Hindes* brought suit against the FDIC, inter alia, to enforce the accounting and reporting provisions in 12 U.S.C. § 1821(d)(15). *Id.* at 171. The case was appealed to the Third Circuit where it was dismissed because the court found no private cause of action existed in favor of the plaintiffs. *Id.* at 172.

10. *First Pacific Bancorp, Inc.*, 224 F.3d at 1120.

11. *Id.* at 1126-27.

12. 12 U.S.C. § 1821(d)(15)(A) (1994). The statute specifically requires "the [FDIC] as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the [FDIC], maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default." *Id.*

13. *Id.* § 1821(d)(15)(B). For each receivership to which the FDIC was appointed, the statute requires that "the [FDIC] shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver." *Id.*

14. *Id.* § 1821(d)(15)(C). The central issue of the *First Pacific Bancorp, Inc.* case is the language italicized below. The section states that "[a]ny report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public." *Id.* (emphasis added).
under FIRREA, it is unclear if a shareholder has the power to compel the FDIC to adhere to the requirements. The court addressed this question in *First Pacific Bancorp, Inc. v. Helfer.*

This Note examines the facts of *First Pacific Bancorp, Inc. v. Helfer,* its history in the district court, and the Ninth Circuit Court of Appeal's resolution of the issues presented by the case. The Note then reviews the relevant case law, as well as the evolution of, and the controversy surrounding the test for an implied cause of action. Next, the Note analyzes *First Pacific Bancorp, Inc.,* comparing its holding with the those in the background cases. Finally, the Note discusses the impact of the decision in *First Pacific Bancorp, Inc.* on the banking industry. It concludes that the Ninth Circuit Court was correct in its holding and recommends that other jurisdictions and the Supreme Court follow the Ninth Circuit's precedent.

II. STATEMENT OF THE CASE

The plaintiff in *First Pacific Bancorp, Inc.,* First Pacific Bancorp (First Pacific), is a one-bank holding company and the exclusive shareholder of First Pacific Bank. On August 7, 1990, the FDIC was appointed as receiver for First Pacific by the Cali-

15. *First Pacific Bancorp, Inc.,* 224 F.3d 1117, 1119-20 (9th Cir. 2000).
16. See infra notes 22-36 and accompanying text.
17. See infra notes 37-67 and accompanying text.
18. See infra notes 68-134 and accompanying text.
19. See infra notes 135-81 and accompanying text.
20. See infra notes 182-89 and accompanying text.
21. See infra notes 190-91 and accompanying text.
22. There are three shareholders of First Pacific Bancorp: Ada P. Sands, Leonard S. Sands, and Michael Zugsmith. Each is also listed as a plaintiff in this case. (*First Pacific Bancorp, Inc.,* 224 F.3d 1117, 1119 n.2 (9th Cir. 2000)). However, the court found that, although all the plaintiffs are parties to the appeal, only [First Pacific] Bancorp can be treated as a "shareholder" within the meaning of the statute. Only [First Pacific] Bancorp is a "shareholder of the depository institution for which the Corporation was appointed . . . receiver," 12 U.S.C. § 1821(d)(15)(C). The individual plaintiffs are shareholders of [First Pacific] Bancorp, not First Pacific Bank.

*Id.*

23. *Id.* at 1119.
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The following day the FDIC exercised its statutory power and began to liquidate First Pacific Bank.

On May 7, 1996, the FDIC gave notice to the plaintiff that it was terminating its six-year receivership. In addition to the notice, the FDIC sent the plaintiff two pages of unaudited financial statements covering five years of the receivership from August 10, 1990, through December 31, 1995. First Pacific felt that the data provided in the FDIC reports was insufficient and subsequently requested additional financial data. In response, the FDIC provided four pages of financial data and claimed that it had met its statutory obligations of reporting and accounting. First Pacific

24. Id.

25. Holding Company, supra note 8, at 5. "According to appellants' brief, the FDIC initially reported that the bank had assets of approximately $104,515,000, liabilities of about $100,241,000, and a receivership surplus of $4,274,000. However, these figures do not include information on the FDIC's sale of the bank's deposits, assets and business to Commercial Central Bank on Aug. 8...." Id.

26. Id.

27. First Pacific Bancorp, Inc., 224 F.3d at 1119. "One report was entitled 'Statement of Financial Condition,' and reported the assets, liabilities, and equity of the bank as August 10, 1990 and as of December 31, 1995. The other statement, 'Financial Condition and Liquidation Activity,' reported aggregated amounts of receipts and disbursements of [First Pacific Bank]." Id. The statements were bare bone and no details were provided for the interim periods. Id.

The statement broke down the total amount of money received by the FDIC during the five-plus year period into only two categories: "Principal Collection and Interest Income on Assets, Net of Participant," reported at nearly $83 million, and "Receipts from FDIC and Others," reported at over $20 million. The disbursements received similar treatment, reported in only two aggregate amounts: "Liquidation and Other Disbursements" at nearly $84 million, and "Payments to FDIC" totaling over $18 million.

Id. at 1119 n.1.

28. First Pacific Bancorp, Inc., 224 F.3d 1117,1119 (9th Cir. 2000). "Appellants argue this report does not comply with generally accepted accounting principals (GAAP) and is inaccurate because it still does not include the sale of accounts to Commercial Central, or information on several large settlement which were negotiated during the FDIC's tenure." Holding Company, supra note 8, at 5.

29. Holding Company, supra note 8, at 5. The information the FDIC provided included an unaudited, one-page 'Statement of Income and Expenses,' detailing total liquidation income and expense, loss on assets, and net loss from liquidation; an unaudited, one-page 'Statement of Cash Receipts and Disbursements,' detailing liquidation receipts and
was still not satisfied.\(^{30}\)

After exhausting informal means of obtaining additional information, First Pacific filed suit in the U.S. District Court for the Central District of California.\(^{31}\) In its complaint, First Pacific requested an accounting of First Pacific Bank’s financial condition during the period the FDIC was acting as receiver.\(^{32}\) More specifically, First Pacific filed to compel the FDIC to provide a financial accounting, which conformed with FDIC’s own accounting and reporting standards.\(^{33}\) On December 1, 1997, the court sustained a summary judgment motion in favor of the FDIC.\(^{34}\) The court found "no authority that would allow plaintiffs to pursue a private cause of action under 12 U.S.C. § 1821(d)(15) by questioning the adequacy of the FDIC's financial reports."\(^{35}\) First Pacific appealed the district court’s decision to the Ninth Circuit Court of Appeals.\(^{36}\)

When reviewing First Pacific Bancorp, Inc., the Ninth Circuit analyzed the issue under the Supreme Court's decision in Cort v. Ash.\(^{37}\) Cort promulgated a four-prong test to determine whether

\(^{30}\) First Pacific Bancorp, Inc., 224 F.3d at 1119. The FDIC also reported that the receivership had suffered a net loss rather than the initial $4,274,000 reported. Holding Company, supra note 8, at 5.

\(^{31}\) Id. The court uses the term "informal" to describe the correspondence between First Pacific and the FDIC. Id. However, it seems that drafting letters objecting to the termination of the receivership and requesting additional financial information may require a description a bit stronger than informal.

\(^{32}\) Id.

\(^{33}\) Id.

\(^{34}\) First Pacific Bancorp, Inc., 224 F.3d 1117,1119 (9th Cir. 2000).

\(^{35}\) Id.

\(^{36}\) Id. at 119. While the Federal appeal was pending, "[First Pacific] filed a complaint against the FDIC in state court alleging breach of fiduciary duty, unjust enrichment, and intentional misrepresentation and demanding as accounting pursuant to state law." Id. at 1120. Subsequently, the FDIC removed the case to federal court and filed for a motion to dismiss for failure to state a claim. Id. The district court sustained this motion in favor of the FDIC. Id. Plaintiffs also appealed this decision, and it was consolidated with the original suit. Id. The Ninth Circuit affirmed the district court on this matter holding that the plaintiffs were barred from bringing the second suit by res judicata because the state law mirrored the federal law in the area. Id. at 1128-29.

a private cause of action exists in a given statute. The Supreme Court asked:

First, is the plaintiff one of the class for whose special benefit the statute was enacted — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purpose 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?

Using this test, the Ninth Circuit reversed the ruling of the district court and found an implied private cause of action in the language of 12 U.S.C. § 1821(d)(15). Although the circuit court found an implied private cause of action in favor of First Pacific, the victory may be bittersweet. The circuit court remanded the case to the district court for a determination of whether the reports provided by the FDIC were in conformity with the requirements of section 1821(d)(15).

Under the first Cort factor, the circuit court held that § 1821(d)(15) singled out the shareholders of a bank as members of the class the statute sought to protect. The circuit court reasoned that, "while the overarching goal of the [FDIC Act] is to protect faith and confidence in the banking system and to ensure adequate protection of the depositors through the insurance fund, share-

38. First Pacific Bancorp, Inc., 224 F.3d at 1121. There is some dispute as to whether the Cort factors are to be given the same weight or even if the test has been overruled all together. Id. See also infra notes 136-41 and accompanying text (analyzing the Ninth Circuit’s decision).
39. First Pacific Bancorp, Inc., 224 F.3d at 1121 (quoting Cort, 422 U.S. at 78).
40. First Pacific Bancorp, Inc., 224 F.3d 1117,1121-28 (9th Cir. 2000).
41. Id. at 1128.
42. Id. at 1122. See also, supra note 13 and accompanying text (discussing 12 U.S.C. § 1821(d)(15)).
holders are the specifically named beneficiaries in the subsection at issue here."^{43} The circuit court pointed to the language of § 1821(d)(15)(C) and its requirement that the FDIC provide the same accounting report to shareholders as to the government authorities listed in subparagraph (B).^{44} The circuit court also found that § 1821(d)(11)(C),^{45} "requires the same report to accompany distributions to shareholders made pursuant to section 1821(d)(11)(A)(v)."^{46} Finally, the court bolstered its conclusions with comparison to other Supreme Court decisions and prior Ninth Circuit cases.^{47}

The Ninth Circuit also found the second Cort factor present by concluding that Congress intended to permit or create a private remedy.^{48} Although the record was silent on whether Congress intended to create a private cause of action,^{49} the circuit court held that in order to enforce the duties owed to the shareholder by the

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43. *First Pacific Bancorp, Inc.*, 224 F.3d at 1122.
44. *Id.*
46. *First Pacific Bancorp, Inc.*, 224 F.3d 1117,1122 (9th Cir. 2000). Paragraph (11)(A) lists the order of priority in which amounts realized from the liquidation of the receivership are distributed. Subparagraph (v) includes, "shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company)." 12 U.S.C. § 1821(d)(11)(A)(v) (1994).
47. *First Pacific Bancorp, Inc.*, 224 F.3d at 1122-23. The court compared *First Pacific Bancorp, Inc.* with the Supreme Court decisions of *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *California v. Sierra Club*, 451 U.S. 287 (1981). *Id.* at 1122-23. See infra notes 81-119 and accompanying text. In addition, the court referenced the previous Ninth Circuit decisions of *Oliver v. Sealaska Corp.*, 192 F.3d 1220 (9th Cir. 1999) (holding that a private right of action exists under the Alaska Native Claims Settlement Act because the statute specifically required distribution of revenues to shareholders of the defendant corporation.), *Crow Tribe of Indians v. Campbell Farming Corp.*, 31 F.3d 768 (9th Cir. 1994) (holding that a statute referring to "any Crow Indian" was enacted for the benefit of an individual Crow Indian not for the tribe as a whole, and therefore, no private cause of action existed in favor of the tribe.) and *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661 (9th Cir. 2000) (holding that reference to Native Hawaiians in a statute conferred a specific benefit on Native Hawaiians). *Id.* at 1123.
49. *Id.* The court reasoned: "The absence of a statement of intent to create a remedy does not necessarily mean that no remedy is available. Indeed, if that were the case, the Supreme Court would not have developed a test for an implied private right of action." *Id.* at 1124.
FDIC, there must be a private cause of action available to the shareholders.⁵⁰ The court also observed that the Supreme Court historically reserves remedies in equity for the courts unless a statute strongly indicates otherwise.⁵¹ Because the remedy (an accounting) sought by First Pacific is an equitable one, the circuit court perceived Congress' silence as a presumption that a shareholder may pursue such an equitable claim.⁵²

Addressing the third Cort factor, the circuit court questioned whether a private cause of action is consistent with the purpose of FIRREA.⁵³ As previously stated, one of the purposes of enacting FIRREA was "to improve the supervision of savings associations by strengthening capital, accounting, and other supervisory standards."⁵⁴ The court reasoned that "strengthened accounting standards elevate sunlight over secrecy."⁵⁵ In light of the stated purposes of FIRREA, the court also found it unlikely that Congress would enact unenforceable accounting requirements.⁵⁶ Therefore, because the statute does not specify which entities may compel an accounting,⁵⁷ the circuit court held that those which the statute enumerates to receive the accounting reports may enforce the statutory provisions.⁵⁸ The Ninth Circuit concluded the statute places shareholders on the same ground as the government agencies entitled to the accounting;⁵⁹ therefore, a private right of action is consistent with the purposes of FIRREA.⁶⁰

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⁵⁰ Id. at 1126.
⁵¹ Id. at 1125.

In fact the Supreme Court has observed: "unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Id. (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1981))

⁵² First Pacific Bancorp, Inc., 224 F.3d 1117,1125 (9th Cir. 2000).
⁵³ Id. at 1126-27.
⁵⁴ Id. at 1126(qoting H.R Conf. Rep. No. 101-222, at 393 (1989)).
⁵⁵ Id. at 1126.
⁵⁶ Id. at 1126-27.
⁵⁸ First Pacific Bancorp, Inc., 224 F.3d 1117,1127 (9th Cir. 2000).
⁵⁹ See supra notes 13-14 and accompanying text.
⁶⁰ First Pacific Bancorp, Inc., 224 F.3d at 1127.
Finally, the circuit court concluded the fourth Cort factor was satisfied. It found that the FDIC's accounting and reporting duty arose under federal law. Consequently, the court held that the cause of action could not be relegated to state law.

As a result of the circuit court's finding that § 1821(d)(15) satisfied each of the four Cort factors, it held that the statute creates a private right of action to compel an accounting in favor of First Pacific. The court recognized that its decision conflicted with a divided Third Circuit Court decision in Hindes v. FDIC. As discussed in the next section, the Ninth Circuit Court held that the Hindes decision incorrectly found shareholders were not a special class which § 1821(d)(15) sought to protect. However, the Ninth Circuit Court limited its decision to suits for accountings when the FDIC has provided essentially meaningless or insufficient reports to the shareholders of a bank in receivership.

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61. Id. The court again acknowledges that the fourth Cort factor may no longer be part of the implied cause of action inquiry, but nevertheless applies it to First Pacific Bancorp, Inc. Id.

62. Id. The court's entire analysis of the fourth prong is as follows:

While the utility of the fourth Cort factor is in doubt, we note that the claim here is not traditionally relegated to state law. By contrast, in Oliver, the plaintiff was a shareholder with the opportunity to bring a derivative suit on behalf of the corporation, a cause of action traditionally relegated to state law. However, in the instant case, the FDIC's duty to make an accounting arises under federal law. Thus, the fourth and final factor of the Cort test, whatever its weight, must be answered in favor of the Plaintiffs.

Id.

63. Id.

64. First Pacific Bancorp, Inc., 224 F.3d 1117,1128 (9th Cir. 2000). The court left for another day the question of whether a member of the general public or a watchdog organization has the same private right of action under the statute. Id. However, the court seemed to indicate they would find a private right of action in favor of a member of the general public when it stated that "[b]oth shareholders and the general public are given a right of access to the information that the FDIC is required to compile." Id. at 1123.

65. Id. at 1127; Hindes v. FDIC, 137 F.3d 148 (1998).

66. Id. at 1127-28.

67. Id. at 1128.
III. BACKGROUND LAW

While it may seem that when Congress intends for a class to have the benefit of a private cause of action in order to enforce their rights under a statute, "the far better course is to specify as much when it creates those rights." However, the Supreme Court has "long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation." When finding an implied cause of action, the courts must also be careful, not to usurp the powers granted to Congress by Article III of the United States Constitution by "[assuming] the legislative role of creating... a remedy and thereby enlarge their jurisdiction." The Supreme Court, after recognizing the danger of judicially created remedies, narrowed the test for implied causes of action by setting forth the four-pronged inquiry found in *Cort v. Ash*.

In *Cort*, the Court considered "whether a private cause of action [should] be implied under... 18 U.S.C. § 610, a criminal statute prohibiting corporations from making a 'contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors... are to be voted for'". The Court systematically applied its four-pronged test to the statute, and held that the statute did not give rise to an implied cause of ac-

69. Id. at 717. The Supreme Court first examined the question of an implied cause of action in *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916). Id. As in *Cort*, the Court in *Texas & Pacific Railway Co.* looked to the language of the statute. *Cannon*, 441 U.S. at 689. "Thus, the statutory reference to 'any employee of any such common carrier' in the 1893 legislation requiring railroads to equip their cars with secure 'grab irons or handholds,' made 'irresistible' the Court's earliest 'inference of a private right of action' - in that case in favor of a railway employee who was injured when a grab iron gave way." Id. (quoting *Texas & Pacific Railway Co.*, 241 U.S. at 40) (internal citations omitted).
70. U.S. CONST. art. III, § 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Id.
73. *Cort*, 422 U.S. at 68.
74. Id. at 77. See supra text accompanying note 39.
tion. First, the Court found that the criminal statute could not be construed to create a right in any particular class of people without a statutory basis for the inference of the right. Second, the Court found nothing in the Legislative history to indicate congressional intent to create a right for shareholders to sue for damages under 18 U.S.C. § 610. The Court construed congressional silence against an implied cause of action, stating that it indicates Congress' desire "that the relationship between corporations and their stockholders would continue to be entrusted entirely to state law." Third, the Court held that a private remedy would not further the legislative purpose of the statute because the recovery of damages would come only after the corporate influence had its affect on the election. Finally, for the same reasons it articulated in the second prong—that the shareholder-corporation relationship is better left to the states—the Court held that the issue should be relegated to state law.

Four years after Cort, the Supreme Court, in Cannon v. University of Chicago, used the four-prong test to find a private cause of action implied in Title IX of the Education Amendments of 1972. In Cannon, the plaintiff brought suit against the University of Chicago and Northwestern University alleging that she was denied admission because of her sex. Unlike the decision in Cort, the Supreme Court found Title IX to benefit a special class. In the words of the majority:

75. See id. at 78-85.
76. Id. at 79.
77. Id. at 82-83. The Court stated "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to prove an intention to create a private cause of action." Id. at 82 (emphasis added). However, the Court went on to say that an explicit purpose to deny one would be controlling. Id.
79. Id. at 84.
80. Id.
82. Id. at 680-82 nn.1-2.
83. Compare id. at 693-94, with Cort, 422 U.S. at 79-80 (holding that the statute in question "was nothing more that a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone").
[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.\textsuperscript{84}

Additionally, the Court reasoned, Title IX was framed after Title VI of the Civil Rights Act of 1964 and the courts had already found a cause of action implicit in Title VI.\textsuperscript{85} As a result, the Court held that Congress must have known that Title IX, with nearly identical language as Title VI, would be treated likewise.\textsuperscript{86} The Court also found that a private cause of action would enable an isolated violation to be remedied without terminating federal financial support and impacting numerous innocent students.\textsuperscript{87} Finally, the Court held that due to the federal nature of Title IX, the issue could not be relegated to state law.\textsuperscript{88}

The next two decisions further narrowed the test for an implied cause of action.\textsuperscript{89} Decided shortly after Cannon, both

\begin{itemize}
  \item \textsuperscript{84} Cannon, 411 U.S. at 690-93.
  \item \textsuperscript{85} Id. at 696-98.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Cannon v. Univ. of Chicago, 411 U.S. 677, 704-05 (1979).
  \item \textsuperscript{88} Id. at 708-09.
  \item \textsuperscript{89} There is some argument that the new test in Touche Ross & Co. and Transamerica Mortgage Advisors, Inc. overruled the four-prong Cort test. See First Pacific Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1121-22 (9th Cir. 2000) (citing Touche Ross & Co v. Redington, 442 U.S. 560, 575-76 (1979); Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring)). In California v. Sierra Club, Justice Rehnquist (joined by Chief Justice Burger, Justice Stewart, and Justice Powell) wrote a concurring opinion questioning the emphasis the Court puts on the Cort test. 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring). He argued that “in deciding an implied-right-of-action case courts need not mechanically trudge through all four of the factors when the dispositive question of legislative intent has been resolved.” Sierra Club, 451 U.S. at 302 (citations omitted). In addition, Justice Scalia wrote in a concurring opinion of Thompson v. Thompson:

  \begin{quote}
    I also find misleading the Court’s statement that, in determining the existence of a private right of action, “we have relied on the four factors set out in Cort v. Ash, . . . along with other tools of statutory construction.” That is not an accurate description of
  \end{quote}
\end{itemize}
Touche Ross & Co. v. Redington, and Transamerica Mortgage Advisors, Inc. v. Lewis, emphasize the question of "whether Congress intended to create, either expressly or by implication, a private cause of action." The Court found that in both cases the four prongs of the Cort test were relevant in determining whether a private remedy exists, but each prong was not entitled to equal weight.

Using the narrowed test, the Touche Ross & Co Court did not find a private cause of action implied in § 17(a) of the Securities Exchange Act of 1934. The Court stated "[s]ection 17(a) is like provisions in countless other statutes that simply require certain regulated businesses to keep records and file periodic reports to enable the relevant governmental authorities to perform their

what we have done. It could not be plainer that we effectively overruled the Cort v. Ash analysis in Touche Ross & Co. v. Redington... and Transamerica Mortgage Advisors, Inc. v. Lewis, converting one of its four factors (congressional intent) into the determinative factor, with the other thee merely indicative of its presence or absence.

484 U.S. 174, 189 (1988) (Scalia, J., concurring) (emphasis in original and internal citations omitted). However, the language of Touche Ross & Co. does not seem that strong. While it is true that the Court in Touche Ross & Co. described the central inquiry as whether Congress intended to create a private remedy, the Court later states that "the 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." Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979) (citations omitted). Rather than expressly overruling the Cort test as Justice Scalia indicates, the author suggests that the Court in Touche Ross & Co. is merely shifting the weight given to each prong. See id.

90. 442 U.S. 560 (1979).
93. Id.
94. See Touche Ross & Co., 442 U.S. at 577. The relevant part of section 17(a) reads:

Every national securities exchange, every member thereof, ... and every broker or dealer registered pursuant to ... this title, shall make, keep, and preserve for such periods, such accounts, correspondence, ... and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78q(a)(1970 ed.).

Id. at 568.
regulatory functions." As such, the Court held that section 17(a) neither confers rights on a special class, nor prohibits unlawful conduct; therefore there was no basis for "inferring that a civil cause of action for damages lay in favor of anyone." The Court then turned to the legislative history of section 17(a) as indicia of intent. Upon finding that no history of intent existed, the Court concluded, that in cases where a statute was found not to provide a benefit to a special class and was devoid of legislative intention to do so, the inquiry ends. At this point the Court deviated from the Cort decision and found it unnecessary to examine the last two prongs of the inquiry.

In Transamerica Mortgage Advisors, Inc., the Court applied the new test to two statutes: sections 215 and 206 of the Investment Advisors Act of 1940. Although the Congressional Record is silent in respect to section 215, the Court held that a private cause of action was implicit in the languages of the statute. The Court stated, "[b]y declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its crite-

96. Id. at 571 (citing Cort v. Ash, 422 U.S. 66, 79 (1975)).
97. See id. at 571-74.
98. Id. at 576.
99. See id. at 575-76.

Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

ria may be litigated somewhere." Conversely, the Court held that section 206 "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." Furthermore, the Court’s analysis of the legislative history revealed that Congress has expressly provided private remedies in other securities laws and yet enacted no analogous provisions in the act. Again, having found that Congress intended no private remedy for section 206, the Court ended its inquiry without considering the third and fourth prongs of the *Cort.*

Only two years after *Transamerica Mortgage Advisors, Inc.*, the Supreme Court in *California v. Sierra Club* apparently revived and clarified the four-pronged test originally set forth in *Cort.* The Court stated, "these four factors present the relevant inquiries to pursue in answering the recurring question of implied causes of action." Accordingly, the Court applied *Cort* to section 10 of the Rivers and Harbors Appropriation Act of 1899. First, the Court held that while it is possible for someone to benefit from section 10, the analysis under *Cort* is whether “Congress intended to confer federal rights upon those beneficiaries.” Here, the Court answered in the negative. More specifically, the Court found that the statute does no more than state a general proscription of conduct; therefore it implies no private remedy. Furthermore, the Court construed congressional silence concerning remedies as indicative that “Congress was concerned not with private rights but the Federal Government’s ability to respond to obstructions on navigable waterways.” Clarifying the *Cort* test, the Court con-

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102. *Id.*
103. *Id.* at 19.
104. *Id.* at 20-21.
105. *Id.* at 23-24.
107. *Id.* at 293. The four factors are the means through which the ultimate issue, congressional intent, can be discerned. *Id.*
109. *Id.* at 294 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 693 n.13 (1979)).
110. *Id.*
111. *Id.*
112. *Id.* at 296.
cluded that "only ... if the first two factors give indication of congressional intent to create the remedy," was it necessary to explore whether a private remedy would advance the purpose of the statute or if the issue is appropriate for federal litigation.  

The Supreme Court in *Thompson v. Thompson* upheld the use of the clarified four-prong inquiry found in *California v. Sierra Club.* The Court stated that their focus on congressional intent does not mean that they must find evidence of an express intent to create a private cause of action in the Congressional Record. If that were so, the Court believed, "[t]he implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action." Rather, the Court fell back on the *Cort* test to determine whether Congress intended a private remedy. In this case, the Court analyzed the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738(A), holding that the Act did not meet the *Cort* test; consequently, a private remedy was not to be found.

None of the cases discussed have been expressly overruled. Consequently, the doctrine of implied causes of action is somewhat unclear. It is apparent that the four prongs of *Cort* are still viable in some form, and the Supreme Court's focus on congressional intent is also clear. What is not clear, however, is whether a court must, or should, apply each of the four *Cort* factors to the statute, and what weight, if any, should be given to each factor in the analysis. Accordingly, which version of the test a court

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117. *Id.*  
118. *Id.* at 179-80.  
119. *Id.* at 175-76, 187. The statute, in relevant part reads: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State." 28 U.S.C § 1738A(a) (1980).  
120. *See supra* note 89 and accompanying text.  
121. *See First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121-22 (9th Cir. 2000).  
122. *See id.* at 1121 (citing *California v. Sierra Club*, 451 U.S. 287, 293 (1981)).
adopts plays a significant role in the outcome of a decision.\(^{123}\)

In *Hindes v. FDIC*, the Third Circuit Court chose not to analyze 12 U.S.C. § 1821(d)(15), the same statute at issue in *First Pacific Bancorp, Inc.*, under the last two prongs of *Cort*. As a result, the *Hindes* Court found that no private remedy existed.\(^{124}\) The relevant facts of this case are substantially similar to those in *First Pacific Bancorp, Inc.*\(^{125}\) The appellants are shareholders of a bank of which the FDIC was appointed receiver.\(^{126}\) After the bank went into receivership, the appellants contend that the FDIC failed to produce a statutorily required accounting report in accordance with the accounting and reporting standards of the FDIC to the shareholders.\(^{127}\) The shareholders brought suit against the FDIC to enforce the statute and compel a full accounting.\(^{128}\)

The *Hindes* court, relying on the language in *California v. Sierra Club*, focused its analysis on the first two prongs of *Cort*.\(^{129}\) The circuit court held that the shareholders of the bank are not members of a special class to which Congress granted special rights under 12 U.S.C. § 1821(d)(15).\(^{130}\) As evidence, the circuit court pointed to the language of the statute: “the plain language of the statute puts shareholders on par with members of the general public. The statute gives shareholders and members of the public identical rights—the FDIC must make the annual report available to either upon request—and the statute establishes these rights in the same subsection.”\(^{131}\) Consequently, the court did not feel

\(^{123}\) *See id.* at 1121-22.

\(^{124}\) *Hindes v. FDIC*, 137 F.3d 148, 172 (1998). The decision of *Hindes* in respect to its analysis of 12 U.S.C. § 1821(d)(15) is very short, taking up less than one page. *Id.* In comparison, the court in *First Pacific Bancorp, Inc.* wrote over six pages in its analysis of the issue. 224 F.3d at 1122-28. While the length of a decision is hardly indicative of its competence, it is interesting that the *Hindes* court was so cursory in its analysis.

\(^{125}\) *See Hindes*, 137 F.3d at 153-55. In 1992 the Secretary of Banking for the state of Pennsylvania closed Meritor Savings Bank and appointed the FDIC as receiver. *Id.* at 153. The plaintiff’s sought a full accounting of the receivership activities from the FDIC pursuant to 12 U.S.C. § 1821(d)(15). *Id.* at 171.

\(^{126}\) *Id.* at 153.

\(^{127}\) *Id.* at 171.

\(^{128}\) *Id.*

\(^{129}\) *Id.* at 172 (stating “[b]ecause the first two *Cort* factors are not satisfied, our inquiry ends here.”) (citing *California v. Sierra Club*, 451 U.S. 287, 298 (1981)).


\(^{131}\) *Id.*
compelled to distinguish the shareholders as a special class apart from the general public.\textsuperscript{132} The circuit court concluded with a cursory analysis of legislative intent.\textsuperscript{133} Finding the Congressional Record silent, the court simply held that there was no indication of intent by Congress to imply a private remedy.\textsuperscript{134}

IV. ANALYSIS

Taking the background law into consideration, the first decision the Ninth Circuit Court had to make in First Pacific Bancorp, Inc. was which test for an implied right of action the court was to adopt.\textsuperscript{135} The court recognized that the Supreme Court had seemingly used several variations of the Cort test, and also the possibility that Cort was no longer good law.\textsuperscript{136} Nevertheless, the Ninth Circuit stated that they found the four-prong test in Cort helpful in analyzing whether 12 U.S.C. § 1821(d)(15) implies a private cause of action.\textsuperscript{137}

The court's adoption of all four prongs of Cort is not inconsistent with the relevant case law.\textsuperscript{138} The Supreme Court has never expressly overruled Cort, nor ever indicated that any of its four

\textsuperscript{132} \textit{Id}. But see First Pacific Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1123 (9th Cir. 2000). The Court stated:

We note that the district court, agreeing with the FDIC, reasoned that subsection (15)(C) places the shareholders on the same footing as the public in general. According to the district court, this eliminates the possibility that the statute was enacted for the benefit of the shareholders. This view is not correct. Both shareholders and the general public are given a right of access to the information that the FDIC is required to compile.

\textit{Id}.

\textsuperscript{133} Hindes, 137 F.3d at 172.

\textsuperscript{134} \textit{Id}.

\textsuperscript{135} First Pacific Bancorp, Inc., 224 F.3d at 1121-1122.

\textsuperscript{136} \textit{Id}. at 1121-22. "Indeed, there has even been some suggestion that Cort has been overruled." \textit{Id}.

\textsuperscript{137} \textit{Id}.

\textsuperscript{138} See California v. Sierra Club, 451 U.S. 287, 293 (1981). The Court stated, "Combined, these four factors present the relevant inquiries to pursue in answering the recurring question of implied causes of action. Cases subsequent to Cort have explained that the ultimate issue is whether Congress intended to create a private right of action; but the four factors specified in Cort remain the ‘criteria through which this intent could be discerned.’" \textit{Id} (internal citations omitted).
factors were excluded from the analysis.\textsuperscript{139} The Court has, in \textit{Transamerica Mortgage Advisors, Inc.} and \textit{Touche Ross & Co.}, indicated that the factors do not necessarily carry equal weight.\textsuperscript{140} However, weighing the factors never became necessary for the Ninth Circuit Court because all four factors pointed toward an implied cause of action.\textsuperscript{141}

After adopting the \textit{Cort} test, the court decided that First Pacific was a member of a special class for which 12 U.S.C. § 1821(d)(15) was enacted.\textsuperscript{142} The language of the statute specifically states that the shareholder of a bank in receivership is entitled to a copy of the report the FDIC prepares, in accordance with its own accounting standards, for the government agencies.\textsuperscript{143} Thus, as the court reasoned, the provision puts the shareholders on the same footing as the government agencies, and thereby singles them out as members of a special class.\textsuperscript{144}

The Supreme Court’s decisions in this area support the Ninth Circuit’s conclusion.\textsuperscript{145} In \textit{Cannon}, the Court drew the distinction between laws that are enacted for the protection of the general public and those focusing on a special class.\textsuperscript{146} For example, the language of Title IX of the Education Amendments of 1972 provides in part that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educa-

\textsuperscript{139} \textit{See}, First Pacific Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1121-22 (9th Cir. 2000).


\textsuperscript{141} \textit{First Pacific Bancorp, Inc.}, 224 F.3d at 1129 ("Applying each factor of the \textit{Cort} test leads us to conclude that Congress intended to create a private right of action in favor of the shareholder of failed financial institutions to enforce § 1821(d)(15)(B) and (C) and § 1821(d)(11)(C).")\textsuperscript{;} \textit{Cannon v. Univ. of Chicago}, 441 U.S. 677, 709 (1979) ("In sum, there is no need in this case to weigh the four \textit{Cort} factors; all of them support the same result.")

\textsuperscript{142} \textit{First Pacific Bancorp, Inc.}, 224 F.3d at 1123.


\textsuperscript{144} \textit{First Pacific Bancorp, Inc.}, 224 F.3d at 1122. The distinction between the government agencies and the shareholders is that the FDIC has a burden of production with respect to the government agencies, while the shareholder has the burden of request. \textit{Id.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Cannon}, 441 U.S. at 690-93.
tion program or activity receiving Federal financial assistance.\textsuperscript{147} Rather than merely prohibiting discriminatory conduct, the statute clearly focuses on the individual who is being discriminated against and identifies that person as a member of a special class for whom the statute was enacted.\textsuperscript{148} Likewise, Congress wrote 12 U.S.C. § 1821(d)(15) specifically listing those who are entitled to receive the FDIC's report rather than simply requiring the FDIC to obey its own accounting standards.\textsuperscript{149}

The Supreme Court's decision in \textit{Transamerica Mortgage Advisors, Inc.} also supports the Ninth Circuit Court's finding that the plaintiffs in \textit{First Pacific Bancorp, Inc.} were a special class.\textsuperscript{150} As discussed above, section 215 of the Investment Advisors Act of 1940 declares contracts made in violation of the section void.\textsuperscript{151} The Court recognized that Congress anticipated the possibility of litigation arising out of that language even though no private cause of action is expressly provided in the statute.\textsuperscript{152} Thus, the statute was created for the benefit of a special class, those who were harmed by a violation of section 215.\textsuperscript{153} Similarly, in \textit{First Pacific Bancorp, Inc.}, the court determined that 12 U.S.C. § 1281(d)(15) gives the plaintiff a statutory right to the FDIC's report, and, therefore, the "customary legal incidents," in this case an accounting, of the plaintiff's right should follow.\textsuperscript{154}

\begin{enumerate}
\item[147.] 20 U.S.C. § 1681(a) (1994).
\item[148.] Cannon \textit{v. Univ. of Chicago}, 441 U.S. 677, 690-93 (1979).
\item[149.] The statute states that the FDIC shall make available any report produced under the statute to any shareholder of the receivership. 12 U.S.C § 1821(d)(15)(C) (1994).
\item[150.] First Pacific Bancorp, Inc. \textit{v. Helfer}, 224 F.3d 1117, 1123 (9th Cir. 2000) (citing \textit{Transamerica Mortgage Advisors, Inc.}, \textit{v. Lewis} 444 U.S. 11, 19 (1979)).
\item[151.] \textit{See supra} note 100 and accompanying text.
\item[153.] \textit{Id.} The Court stated that,
\begin{quote}
\[a:] \text{t}he very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid.
\end{quote}
\textit{Id.}
\item[154.] First Pacific Bancorp, Inc. 224 F.3d at 1123 (quoting \textit{Transamerica Mortgage Advisors, Inc.}, 444 U.S. at 19).
\end{enumerate}
Although 12 U.S.C § 1281(d)(15)(C) places shareholders on the same footing as the government agencies, the subsection also lists the general public as being entitled to receive the FDIC's report. The Third Circuit Court in Hindes focused on this language and held that shareholders were not members of any special class which Congress intended to benefit under the statute. However, the Ninth Circuit in First Pacific Bancorp, Inc., as well as Judge Roth's dissenting opinion in Hindes, stated the Hindes decision ignored the possibility that the general public and the shareholders were listed in the statute to grant both the same benefit of a private cause of action. In addition, the Ninth Circuit in First Pacific Bancorp, Inc. considered another plausible reading of the statute's mention of both shareholders and the general public. The fact that shareholders were specifically listed and not merely consolidated with the reference to the general public distinguishes shareholders as a special class apart from the general public. The court concluded that this reading of the statute allows both shareholders and the general public to request the FDIC's report, but a private right of action to enforce the statutory requirement lies only with the shareholders.

155. Id. at 1122; Hindes v. FDIC, 137 F.3d 148, 172 (1998). The statute states: "Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public." 12 U.S.C. § 1821(d)(15)(C) (1994) (emphasis added). Subparagraph B requires "the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver." 12 U.S.C. § 1821(d)(15)(B) (1994) (emphasis added).

156. Hindes, 137 F.3d at 172.

157. First Pacific Bancorp, Inc. v. Helfer 224 F.3d 1117,1123 (9th Cir. 2000); Hindes, 137 F.3d at 172 (Roth, J., concurring and dissenting). Circuit Judge Roth's dissent reads in part,

I conclude from the above statutory language that shareholders, as well as the general public, have the right to an annual report which has been prepared in a manner which is consistent with the accounting and reporting practices established by the FDIC. It has not been documented on the record here that the annual reports supplied to appellants by the FDIC do conform to such practices.

Hindes, 137 F.3d at 172 (Roth, J., concurring and dissenting).

158. First Pacific Bancorp, Inc., 224 F.3d at 1127.

159. Id.

160. Id.
The Ninth Circuit also disagreed with the decision in *Hindes* that there was no indication of congressional intent to create a remedy. While the court in *Hindes* interpreted legislative silence as signaling no congressional intent, the court in *First Pacific Bancorp, Inc.* reasoned if that were necessarily true, the Supreme Court would not have developed a test for an implied private right of action. The court further relied on the Supreme Court's observation that unless a statute expressly states, or at least strongly indicates, the courts are restricted from exercising their jurisdiction in equity, the court's full power in that jurisdiction is to be applied. In *First Pacific Bancorp, Inc.*, the remedy sought, an accounting, is an equitable one and 12 U.S.C. § 1281(d)(15) does not strip away the power of the courts to render remedies in equity by either specific language or strong implication. As a result, the presumption found in *First Pacific Bancorp, Inc.* despite Congress' silence an individual may pursue a claim appears to be valid.

The background law in this area further supports the Ninth Circuit’s finding. In *Cort*, the Supreme Court stated as long as it can be shown that a statute was designed to benefit a specific class, it is not necessary to show an explicit intention by Congress to create a private cause of action. In *First Pacific Bancorp, Inc.*, the court found 12 U.S.C. § 1821(d)(15) benefited the shareholders; therefore, it is a logical assumption that the benefit was not created without a means of enforcing it.

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161. *Id.* The entire analysis of legislative intent performed by the *Hindes* court reads: “Further, the legislative history is silent as to whether Congress intended to create a private remedy.” *Hindes v. FDIC*, 137 F.3d 148, 172 (1998). In *First Pacific Bancorp, Inc.*, the Ninth Circuit responded to this cursory analysis: “As we have already pointed out, silence does not necessarily mean that no remedy is intended.” 224 F.3d at 1127.

162. *First Pacific Bancorp, Inc.*, 224 F.3d at 1124.


164. *Id.* at 1125.

165. *Id.*


167. *First Pacific Bancorp, Inc.*, 224 F.3d at 1125-26. The court applied the “logic of *Transamerica Mortgage Advisors, Inc.*,,” stating, “we can say that Congress would not create a right in the shareholders to access the financial reports without a concomitant expectation that the information itself would be available to examine.” *Id.* See *Transamerica Mortgage Advisors, Inc.* v. Lewis, 444 U.S. 11, 19 (1979) (“For
In its discussion of the third Cort factor, the Ninth Circuit Court determined the means of enforcing the FDIC's duty, an accounting, is consistent with the underlying purpose of 12 U.S.C. § 1821(d)(15). The court found one purpose of the statute was to improve the supervision of banks by strengthening accounting standards. By allowing private enforcement of the statute's provisions, the court helped to ensure the FDIC used the appropriate accounting standards. Furthermore, the statute provides no other enforcement provision or indication as to who may compel an accounting. The statute does, however, specifically list shareholders, along with the Secretary of the Treasury, the Comptroller General of the United States and the authority that appointed the FDIC receiver, as a class entitled to receive the FDIC's report.

As discussed above, the court could find no reason to distinguish the rights of the governmental agencies from those of the shareholders to enforce the benefits provided in the statute. Therefore, in order to avoid an outcome that renders a requirement created by Congress unenforceable, the court recognized an implied remedy in the shareholders.

In recognizing the private cause of action, the court rejected the FDIC's argument that the requirement of providing the annual accounting would be overly burdensome. The court found providing additional copies of a report the FDIC was already statutorily required to make was not imposing any further responsibilities.

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168. First Pacific Bancorp, Inc., 224 F.3d at 1127. The Hindes court found it unnecessary to explore the last two prongs of Cort after deciding the first two were not met. Hindes v. FDIC, 137 F.3d 148, 172 (1998) (citing California v. Sierra Club, 451 U.S. 287, 298 (1981)). Consequently, the court never made it to this prong of the Cort analysis. Id.


170. First Pacific Bancorp, Inc., 224 F.3d at 1127.

171. Id. at 1126.


173. First Pacific Bancorp, Inc., 224 F.3d at 1122. See supra 144 and accompanying text.

174. See id. at 1122-1128.

175. First Pacific Bancorp, Inc., 224 F.3d 1117, 1127 (9th Cir. 2000).
duties, but rather was ensuring the FDIC fulfill the obligations mandated by Congress.\textsuperscript{176} Therefore, the court's holding imposed no additional burdens on the FDIC.\textsuperscript{177}

The analysis of the fourth \textit{Cort} factor in the \textit{First Pacific Bancorp, Inc.} case is very simple.\textsuperscript{178} The FDIC's duty to make an accounting of the receivership arises under federal law.\textsuperscript{179} Consequently, the cause of action cannot be relegated to state law.\textsuperscript{180} This outcome is substantiated by the Supreme Court's finding in \textit{Cannon}. In \textit{Cannon}, the Court held that because the case dealt with the expenditure of federal funds, there could be no question but that the fourth factor supports an implied cause of action in the federal courts.\textsuperscript{181}

\textbf{V. CONCLUSION}

Using the \textit{Cort} test, it is clear the implication of a private right of action under 12 U.S.C. §1821(d)(15) is not outside the authority of the courts.\textsuperscript{182} However, beyond the \textit{Cort} test there may be an even greater reason to imply a private remedy. No other group listed in 12 U.S.C. § 1821(d)(15) as entitled to receive a copy of the FDIC's report has more at stake than the shareholders of the bank in receivership. This case arose when the shareholders of First Pacific, expecting a receivership surplus in the neighborhood of $2.8 million, received six pages of unaudited reports from the FDIC indicating a net loss for the receivership.\textsuperscript{183} The reports contained bare-bone financial data and did not report the sale of accounts to other banks, or financial information on several large settlements the FDIC negotiated during the receivership.\textsuperscript{184} The \textit{Hindes} decision, and the district court's decision in \textit{First Pacific Bancorp, Inc.} court used only four sentences of its 10-page decision to analyze this prong of \textit{Cort}. See id. at 1127.

\begin{thebibliography}{99}
\bibitem{176} Id.
\bibitem{177} Id.
\bibitem{178} The \textit{First Pacific Bancorp, Inc.} court used only four sentences of its 10-page decision to analyze this prong of \textit{Cort}. See \textit{id.} at 1127.
\bibitem{179} Id. at 1127; see 12 U.S.C. § 1821(d)(15) (1994).
\bibitem{180} \textit{First Pacific Bancorp, Inc.}, 224 F.3d at 1127.
\bibitem{181} \textit{Cannon v. Univ. of Chicago}, 441 U.S. 677, 708-09 (1979).
\bibitem{182} \textit{See First Pacific Bancorp, Inc. v. Helfer}, 224 F.3d 1117, 1127-28 (9th Cir. 2000).
\bibitem{183} \textit{Hindes} decision, and the district court's decision in \textit{First Pacific Bancorp, Inc.} court used only four sentences of its 10-page decision to analyze this prong of \textit{Cort}. See \textit{id.} at 1127.
\bibitem{184} \textit{Id.}
Bancorp, Inc., suggest the shareholders of the banks must simply accept this conduct, even when millions of dollars are at stake.\textsuperscript{185} In essence, those decisions allow the FDIC to act without accountability to the shareholders, a position which is seemingly unsustainable in light of the Congressionally created accounting and reporting requirements found in 12 U.S.C. § 1821(d)(15).\textsuperscript{186}

The law after the \textit{First Pacific Bancorp, Inc.} case, at least in the Ninth Circuit, forces the FDIC to exercise greater care in its accounting of receiverships as required by the statute. For the shareholders of banks, this strengthening of accounting and reporting standards allows them to see exactly how the assets of the defaulted bank are treated by the FDIC in its receiver capacity.\textsuperscript{187} In the instance of the \textit{First Pacific Bancorp, Inc.}, the Ninth Circuit’s decision requires the FDIC to disclose to the shareholders how the $4,274,000 receivership surplus became a net loss.\textsuperscript{188} In addition, the shareholders are entitled to a report covering the sale of First Pacific’s accounts to Commercial Central Bank.\textsuperscript{189} The \textit{First Pacific Bancorp, Inc.} decision ensures the appropriate financial records are maintained and disclosed by the FDIC in accordance with 12 U.S.C. § 1821(d)(15).\textsuperscript{190} In order to further the purpose of the statute, the \textit{First Pacific Bancorp, Inc.} court’s finding of an implied private cause of action for an accounting should be upheld.

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\textsuperscript{185} See \textit{id.} at 1119.
\textsuperscript{186} \textit{id.} at 1126.
\textsuperscript{187} \textit{Holding Company, supra} note 8 at 5.
\textsuperscript{188} \textit{id.}
\textsuperscript{189} \textit{id.}
\textsuperscript{190} \textit{First Pacific Bancorp, Inc. v. Helfer}, 224 F.3d 1117, 1129 (9th Cir. 2000).