UIC Law Review

Volume 39 | Issue 4 Article 10

Summer 2006

Shareholders' Rights to a Cause of Action Under the Investment Company Act of 1940 Following Exxon Mobil v. Allapattah, 39 J. Marshall L. Rev. 1521 (2006)

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SHAREHOLDERS' RIGHTS TO A CAUSE OF ACTION UNDER THE INVESTMENT COMPANY ACT OF 1940 FOLLOWING *EXXON MOBIL V. ALLAPATTAH*

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I. INTRODUCTION

The devastating decline in the investment of individual stocks following the Enron, Tyco, and WorldCom scandals has pushed more investors into the mutual fund industry, an area that has been relatively free from scandal.[1] This is due in large part to the core fiduciary principles set forth in the Investment Company Act of 1940 (ICA).[2] However, these fiduciary principles have come under recent attack with court decisions overturning decades of precedent providing for shareholder rights of action, including those for breach of fiduciary duty under § 36(a) of the ICA.[3]

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* Juris Doctor Candidate May 2007, The John Marshall Law School. The author would like to thank Professor Molly Lien for her inspiration in writing this comment. The author would also like to thank her family and friends for their support throughout the past three years.

1. *See* MATTHEW P. FINK, INVESTMENT COMPANY INSTITUTE, ICI PRESIDENT'S REPORT AT THE ICI GENERAL MEMBERSHIP MEETING, (2003) http://www.ici.org/statements/remarks/03_gmm_fink_spch.html (stating that in 2002 an investor's chance of choosing a stock that would lose at least sixty percent of its value was one out of five, while the chance of choosing a mutual fund that would lose the same value was one out of 807); *see also* Editorial, *Wall Street's Chaperone*, WALL ST. J., Apr. 29, 2003 at A16 ("[I]t no longer makes sense for most clients to dabble in individual stocks. The war is over. The mutual fund industry won.").

2. *See* Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -64 (2005) (setting out various provisions for breach of fiduciary duty between shareholders and investment companies).

3. DH2 Inc. v. Athanassiades, 359 F. Supp. 2d 708, 714-15 (N.D. Ill. 2005); Dull v. Arch, No. 05-140, 2005 U.S. Dist. LEXIS 14988, at *7 (N.D. Ill. July 27, 2005); Jacobs v. Bremner, 378 F. Supp. 2d 861, 866 (N.D. Ill. 2005); *see also* Dorchester Investors v. Peak Int'l Ltd., 134 F. Supp 2d 569, 581 (S.D.N.Y. 2001) (finding no private right of action under ICA § 34(b)); Olmsted v. Pruco Life Ins. Co. of New Jersey, 283 F.3d 429, 432-34 (2d Cir. 2002) (holding that no private cause of action exists under either § 26 or § 27 of the ICA). *See generally* Arthur Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 134 (2004) (discussing fiduciary duties as they relate to financial firms, including the duty of loyalty and the duty to disclose material

Part II of this paper will discuss the legislative history of the ICA, precedent involving private rights of action, and a recent court decision that stands in direct contradiction to both. Part III of this paper will explore the importance of legislative history in the statutory interpretation of the ICA and the impact of precluding shareholders' private rights of action. Lastly, Part IV of this paper will propose that courts consider extrinsic evidence, such as longstanding precedent and unambiguous legislative intent, even when statutory language appears clear on its face.

II. BACKGROUND

A. The Development of the ICA

The ICA was enacted to counter widespread abuses that had become apparent in the investment company industry, to preserve the role of investment companies in capital formation, and to assure investor protection.[4] Evidence of abuse in the industry was evident after a Securities and Exchange Commission (SEC) report found that between 1929 and 1936, shareholders lost approximately forty percent of their investments.[5] To address this issue, Congress commissioned the Investment Trust Study,[6] which found that investment companies often benefited their affiliates' and sponsors' interests rather than the interests of their clients.[7] These benefits were the result of improper transactions, such as

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information bearing on a client's decision in assessing securities options).

4. Paul Roye, S.E.C., Remarks before the American Bar Association: The Exciting World of Investment Company Regulation (June 14, 2001), *available at* http://www.sec.gov/news.speech/spch500.htm; *see also* S. REP. NO. 1775 (1940) (stating that new legislation was proposed because the previous legislation enacted by the SEC in 1933 and 1934 was insufficient "to eliminate abuses and deficiencies which exist in investment companies" and also because many investment companies did not fall within the scope of the previous legislation); H.R. REP. NO. 2639, (1940) (finding that legislation is needed to stop the malpractices that exist in the investment company industry).

5. Roye, *supra* note 4 (asserting that the loss of investments was due to the investment companies' ability to attract "small unsophisticated investors," allowing them to mislead investors on the true nature of their investment).

6. *See* 15 U.S.C. § 79z-4 (2005) (directing the SEC to make a study of the activities and functions of investment companies, their corporate structures, the investment policies of the companies, and the influence exerted by those affiliated with the managements of the companies on their own investment policies).

7. Roye, *supra* note 4 (finding that because investment companies were structured in a way that kept them under the control of their sponsors, who owned enough shares to have senior voting rights, the funds were controlled to their benefit, and because fund assets were highly liquid in nature, they were often easily embezzled by affiliated financial firms who used the assets for their own private capital).

embezzlement, occurring in large part because of the fund sponsors' abandonment of fiduciary obligations to investors.[8]

B. Significance of the ICA Today

The ICA is an important piece of legislation that regulates one of the most popular ways individuals invest their money: through the purchase of mutual funds.[9] Today, approximately 53.9 million U.S. households own mutual funds, amounting to forty-eight percent of all U.S. households and almost ninety two million individuals.[10] By the end of 2004, shareholders had invested in more than 8000 mutual funds, totaling more than $8.1 trillion invested.[11] This far exceeds the amount of money that is deposited at, and the total financial assets of, all U.S. commercial banks.[12]

C. Interpretation of § 36(a) of the ICA

1. The Statutory Language and Legislative History of § 36(a) of the ICA

The plain language of § 36(a) of the ICA authorizes the SEC to bring a civil action against officers or directors for breach of fiduciary duty to shareholders when personal misconduct is involved.[13] On its face, this section does not provide shareholders

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8. *Id. See generally* Thomas Frongillo, Christine Chung & Najwa Nabti, *Late Trading of Mutual Funds: Chinks in the Armor of the Regulators' Claim that it is Illegal Per Se*, ANDREWS WHITE-COLLAR CRIME REPORTER, July 29, 2004, at 5 (discussing abuses that presently occur in the investment company industry).

9. J. Kevin McCall, Avidan J. Stern & James L. Thompson, *Private Litigation Under the Investment Company Act of 1940, in* ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION: SECURITIES 2003 4-5 (2003); *see also* FINK, *supra* note 1 (stating that mutual funds are the primary way in which middle-Americans choose to make long-term investments in today's economy); INVESTMENT COMPANY INSTITUTE, INVESTMENT COMPANY FACT BOOK (2005) [hereinafter ICI FACTBOOK] (finding that mutual funds represent ninety-five percent of total investment company assets).

10. ICI FACTBOOK, *supra* note 9, at 29-30 (comparing households today to the six percent of U.S. households that owned mutual funds just twenty-five years ago).

11. *Id.* at 59.

12. Roye, *supra* note 4 (stating that in 2001 mutual funds had over seven-trillion dollars in assets compared to three-trillion dollars deposited in banks and the six-trillion dollars constituting the total assets of the commercial banks).

13. 15 U.S.C. § 80a-35(a) (2005) states:

> The Commission is authorized to bring an action in the proper district court of the United States . . . alleging that a person serving or acting in one or more of the following capacities has engaged . . . in any act of practice constituting a breach of fiduciary duty involving personal misconduct in respect to any registered investment company for which

with a private right of action.[14] A study of the entire ICA reveals that only one section of the Act, § 36(b), provides for a private right of action.[15] That section was amended in 1970 to allow a private cause of action by a security holder .[16]

However, courts have often implied private rights of action under many sections of the ICA, most notably under §36(a), "which plaintiff's have used as a catch-all provision covering any alleged breach of fiduciary duty."[17] For example, in *In re Nuveen Fund Litigation*,[18] the United States District Court for the Northern

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such person so serves or acts- (1) as officer, director, member of any advisory board, investment advisor, or depositor; or (2) as principal underwriter . . . .

14. *Id.*

15. 15 U.S.C. §§ 80a-1 to -64. *See also* McCall, *supra* note 9, at 4-32 (stating that only § 36(b) of the ICA "expressly provides for a private right of action for damages"). *See generally id.* at 4-18 (finding that the basis of the 1970 Amendments to the ICA was the Wharton Study, which found that existing remedies for improper compensation of advisors did not properly protect mutual fund investors).

16. 15 U.S.C. § 80a-35(b) reads:

> [T]he investment advisor . . . shall be deemed to have a fiduciary duty with respect to receipt of compensation for services or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment advisor . . . . An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser . . . for breach of fiduciary duty in respect of such compensation or payment made by such registered investment company or by security holders.

See also S. REP. NO. 91-184, at 6 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4897, 4902 (stating that the need exists to amend the ICA to curb abuses of investment advisers in compensations that are received from fund investors).

17. Young v. Nationwide Life Ins. Co., 2 F. Supp. 2d 914, 926 (S.D. Tex 1998); *In re* Nuveen Fund Litigation, No. 94 C 360, 1996 U.S. Dist. LEXIS 8071, at *37 (N.D. Ill 1996); Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1114 (D.R.I. 1990); *Brown*, 194 F. Supp. 2d at 222; General Time Corp. v. American Investors Fund, Inc., 282 F. Supp. 400, 401-02 (D.N.Y 1968); Entel v. Guilden, 223 F. Supp. 129, 133 (S.D.N.Y 1963); Cogan v. Johnston, 162 F. Supp. 907, 909 (S.D.N.Y. 1958); McCall, *supra* note 9, at 4-32 to -38 (citing Tannenbaum v. Zeller, 552 F.2d 402, 417 (2d Cir. 1977)); *see also* A.E. Korpela & L.I. Reiser, Annotation, *Shareholders' Suits Against Investment Companies*, 30 A.L.R.3D 1088 (stating that a preponderance of case law supports the proposition that shareholders have a private right of action against investment companies for violations of the Investment Company Act). *See generally* Jean F. Rydstrom, Annotation, *Duty of Investment Adviser and Interested Directors of Mutual Fund, Under § 36 of the Investment Company Act of 1940, with Respect to Recapture of Portfolio Brokerage Commissions*, 47 A.L.R. FED. 607 (discussing fiduciary duties imposed on advisers and directors of investment companies).

18. *In re* Nuveen Fund Litigation, No. 94 C 360, 1996 U.S. Dist. LEXIS 8071, at *25 (N.D. Ill 1996) (denying defendant's motion claiming that the shareholders did not have a private right of action under § 34(b) based on false

District of Illinois found that while the defendant in this particular case had not breached a fiduciary duty, a private right of action did indeed exist under § 36(a).[19] The court stated that the "decisive question is whether Congress intended to provide such a private right of action in enacting the statute."[20] The court went on to state that congressional intent is to be inferred from the language and structure of the statute, the statute's legislative history, and through an examination of whether the private right of action is consistent with the statute's underlying scheme.[21]

As noted above, § 36(a) does not explicitly provide for a private right of action.[22] However, most courts have looked to the statutory structure of the ICA as justification for interpreting this section as implying a private right of action.[23] For example, the industry abuse that was found to exist in the SEC study noted above and that Congress sought to prevent in enacting the ICA was enumerated in § 1(b) of the Act.[24] This section, entitled "policy," states that the "interests of investors" are adversely affected when investors purchase securities without accurate information concerning the policies and financial responsibility of the companies.[25] More importantly, the last paragraph of this section provides that the Act should be interpreted to mitigate or

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and misleading statements).

19. *See id.* at *17 (upholding the lower court's decision, not because a private right of action did not exist under § 36(a), but because the directors did not "aid and abet" conduct prohibited by that section of the Act).

20. *Id.* at *12 (citing West Allis Mem'l Hosp. Inc. v. Bowen, 852 F.2d 251, 255 (7th Cir. 1988)); *see id.* at *11 (finding that the failure of Congress to expressly provide for a private remedy does not mean that implying one is inconsistent with an intent to make that remedy available).

21. *See id.* at *12 (stating that the language of the Act directs courts to interpret provisions, and the legislative history arising from the amendments indicates that the courts should imply a private right of action (citing Spicer v. Chicago Bd. Of Options Exchange, Inc., 977 F.2d 255, 258 (7th Cir. 1992))).

22. 15 U.S.C. § 80a-35(a).

23. *See* Lessler v. Little, 857 F.2d 866, 872 (1st Cir. 1988) (finding that when statutory construct is silent and a private remedy is recognized by the courts, the question is whether Congress intended to preserve the right of action); *see also* Bancroft Convertible Fund, Inc. v. Zico Inv. Holdings, Inc., 825 F.2d 731, 734 (3d Cir. 1987) ("[I]n determining whether a private cause of action may be implied from a federal regulatory statute, the starting point is congressional intent[]").

24. 15 U.S.C. § 80a-1; *see also* McCall, *supra* note 9, at 4-15 (stating that courts have interpreted the ICA as intended to "remedy certain abusive practices in the management of investment companies" and that the practices Congress sought to specifically target were those discussed in the SEC study and listed expressly as congressional policy in § 1(b) of the Act (citing Option Advisory Service, Inc. v. SEC, 668 F.2d 120, 121 (2d Cir. 1981))).

25. 15 U.S.C. § 80a-1(b). Section 1(b) identifies various ways in which the public interest and the interest of investors are adversely affected, based on facts disclosed from the reports the SEC made pursuant to the Public Utility Holding Company Act of 1935. *Id.*

eliminate conditions in the Act that adversely affect investors' interests.[26]

Courts have also looked to the legislative history of subsequent amendments to the ICA as justification for interpreting the section as implying a private right of action.[27] In 1970, Congress amended the ICA to add § 36(b), which seeks to reduce the risk of the adviser self-dealing that was predominant in the investment industry at the time.[28] The amendment provided a private right of action for security holders under § 36(b), the only section of the ICA to do so.[29] While some courts have held that by enacting § 36(b), Congress showed that "when [it] wished to provide a private damage remedy, it knew how to do so and did so expressly,"[30] others have implied a private right of action in § 36(a) based on the corresponding Senate Report, which explained that the language of § 36(b) "should not be read by implication to affect" the implying of a private right of action under § 36(a).[31]

In 1980, Congress amended the ICA to provide that the Act's provisions would apply to business development companies in addition to investment companies.[32] In doing so, the House Committee stated that it "wishe[d] to make plain that it expect[ed] the court to imply private rights of action under this legislation."[33]

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26. *Id.* Specifically, Section 1(b) provides:

> It is hereby declared that the policy and purposes of this title, in accordance with which the provision of this title shall be interpreted, are to mitigate, and, so far as feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

Id.

27. *In re Nuveen Fund Litigation*, 1996 U.S. Dist. LEXIS 8071, at *14; *Jacobs*, 378 F. Supp. 2d at 863.

28. 15 U.S.C. § 80a-35(b); *see* Green v. Nuveen Advisory Corp., 295 F.3d 738, 743 (7th Cir. 2002) (stating that Congress amended the ICA with § 36(b), a section that created "a narrow federal remedy" for breach of fiduciary duty that stretches beyond common law breach of fiduciary duties).

29. 15 U.S.C. §80a-35(b).

30. Olmstead v. Pruco Life Ins. Co. of New Jersey, 283 F.3d 429, 433 (2d Cir. 2002) (citing Touche Ross & Co. v. Redington Trustee, 442 U.S. 560, 573 (U.S. 1979)); Dull v. Arch, No. 05-140, 2005 U.S. Dist. LEXIS 14988, at *7 (N.D. Ill. July 27, 2005).

31. S. REP. NO. 91-894 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4897, 4960; *see also* Fogel v. Chestnutt, 668 F.2d 100, 111-12 (2d Cir. 1981) ("Surely the last thing the SEC intended [by proposing § 36(b)] was the abolition of implied causes of action which the courts had recognized under other sections of the ICA, as the SEC had consistently . . . ."); *Jacobs*, 378 F. Supp. 2d at 863 (stating that the Senate went out of its way to "head off any potential expressio unius argument" by explaining that the enactment of § 36(b) should have no effect on the courts' current practice of implying a private right of action under § 36(a)).

32. *Jacobs*, 378 F. Supp. 2d at 863.

33. H.R. REP. NO. 96-1341 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4800, 4811. The House Committee further commented: "[W]ith respect to business

The United States Supreme Court has never addressed the issue of whether there is a private right of action under the ICA.[34] However, in *Central Bank of Denver v. First Interstate Bank of Denver,* the Court did find that no private cause of action existed under § 10(b) of the Securities & Exchange Act of 1934, even though decades of precedent found otherwise.[35] In spite of *Central Bank*, many courts have continued to imply private rights of action under the ICA.[36]

On two occasions, the Supreme Court has assumed that private rights of action exist under the ICA.[37] In *Kamen v. Kemper Financial Services, Inc.*, the Court found that an individual shareholder could bring an action under § 20 of the ICA.[38] Although the Court did not mention the fact that this section does not expressly provide a private right of action, it held that the purpose of a derivative action was to give shareholders a means to protect themselves from the malfeasance of the "faithless directors and managers."[39] In *Burks v. Lasker*,[40] the Court again noted that,

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development companies, the Committee contemplates suits by shareholders as well as by the Commission, since these are the persons the provision is designed to protect, and such private rights of action will assist in carrying out the remedial purposes of Section 36." *Id.*; *see also Jacobs*, 378 F. Supp. 2d at 863 (citing H.R. REP. NO. 96-1341 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4800, 4811); *In re Nuveen Fund Litigation*, 1996 U.S. Dist. LEXIS 8071 at *15 (same).

34. McCall, *supra* note 9, at 4-32.

35. Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 190 (1994); *see* McCall, *supra* note 9, at 4-35-37 (stating that, following the decision in *Central Bank*, some courts decided to no longer imply private rights of action under the ICA, while other courts distinguished the case). *See generally* Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors*, 53 CATH. U. L. REV. 667, 667 (2004) (discussing the impact of *Central Bank* on aiding-and-abetting liability under § 10(b)).

36. *Young*, 2 F. Supp. 2d at 925, 930; Seidel v. Lee, 954 F. Supp. 810, 818 (D. Del 1996); Strougo *ex rel.* Brazil Fund Inc. v. Scudder, Stevens & Clark, Inc., 964 F. Supp. 783, 792-96 (S.D.N.Y. 1997); *In re Nuveen Fund Litigation*, U.S. Dist. LEXIS 8071 at *9-16; Blatt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 916 F. Supp. 1343, 1349 (D.N.J. 1996); Langer v. Brown, 913 F. Supp. 260, 267-70 (S.D.N.Y. 1996)); McCall, *supra* note 9, at 4-37 (citing McLachlan v. Simon, 31 F. Supp. 2d 731 (N.D. Cal. 1998)).

37. McCall, *supra* note 9, at 4-32.

38. Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 96 (1991) (providing that, while the SEC has urged the Supreme Court to provide for a private right of action, the Court has never addressed the question and refused to address the issue in this case, as neither party litigated that particular question before the Court of Appeals (citing Ross v. Bernhard, 396 U.S. 531, 534 (1970)).

39. *Kamen*, 500 U.S. at 96. *See generally* 15 U.S.C. § 80a-20(a):

> It shall be unlawful for any person, by use of the mails or any means or instrumentality of interstate commerce . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security of which a registered investment company is the issuer in

although no private cause of action existed expressly, one would be assumed under § 13(a) because the lower courts had so assumed based on precedent.[41]

2. The Reinterpretation of Private Rights of Action Under the ICA

With no express decision from the highest court and division amongst the lower courts as to whether a private right of action exists under the ICA, the Supreme Court decided a case that subsequently changed the way the United States District Court for the Northern District of Illinois, Eastern Division interprets the ICA.[42] In *Exxon Mobil Corp. v. Allapattah Services, Inc.*,[43] the Court interpreted 28 U.S.C.S. § 1367, the statute that governs supplemental jurisdiction. There, the Court held that the statutory language was clear on its face and, therefore, the Court could not use extrinsic authority to aid in interpretation.[44] In *Exxon Mobil*, the Court concluded that legislative history is itself often ambiguous. Moreover, legislative materials, such as committee reports, often give unelected staffers and lobbyists the incentive to manipulate legislative history when they are unable to achieve a result through the statutory text.[45]

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contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

40. *See* Burks v. Lasker, 441 U.S. 471, 474 (1979) (discussing § 13(a)(3) of the ICA).

41. *Id.* at 475 (citing *Brown*, 194 F. Supp. 2d at 222-28, Abrahamson v. Fleschner, 568 F.2d 862 (Cal. 1977), and Bolger v. Laventhol, 381 F. Supp. 260 (S.D.N.Y. 1974)).

42. *Jacobs*, 378 F. Supp. 2d at 863; *see also Individually-Brought Investment Company Act Claims Against Mutual Fund Managers Dismissed*, SECURITIES CLASS ACTION REPORTER, Aug. 15, 2005, at 12 [hereinafter *Individual Claims Dismissed*] (stating that the U.S. District Court for the Northern District of Illinois dismissed state and federal claims that had been brought by individual shareholders against directors and advisors because the ICA provided no private right of action).

43. Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S. Ct. 2611 (2005). In *Exxon Mobil* the Court addressed the question of whether § 1367, a statute the Court ruled is unambiguous on face but has legislative history that may speak to a different interpretation, authorizes supplemental jurisdiction over other plaintiffs who have been joined in the same case or controversy when only one plaintiff has satisfied the amount in controversy requirement. *Id.* at 2625.

44. *Id.* at 2626 (holding that the "authoritative statement is the statutory text, not the legislative history or any other extrinsic material" and that extrinsic materials aid in interpretation to "shed a reliable light" on Congress's understanding of ambiguous terms).

45. *Id.* (stating that judicial investigation of legislative history often becomes "an exercise in 'looking over a crowd and picking out your friends'" and that judicial reliance on legislative materials is not subject to the requirements of Article I and is often the subject of strategic manipulations when staffers and lobbyists are unable to achieve their goal through the

Starting in 2004, many class action suits were filed on behalf of shareholders alleging improper use of fund assets to pay excessive commissions to brokers who would then favor a particular fund in their sales efforts.[46] In one such case, *Jacobs v. Bremner*, the plaintiff-shareholders alleged that the defendants did not ensure their funds participated in the class action settlements they were eligible for, thereby providing an opportunity for the Northern District of Illinois to examine private rights of action under § 36(a).[47]

The court in *Jacobs* held that dismissal of the plaintiffs' action under § 36(a) was required following the Supreme Court's decision in *Exxon Mobil*.[48] The *Jacobs* court held that *Exxon Mobil* made clear that affirmative statements of Congress's specific intent are "impotent in the face of unambiguous statutory language."[49] Since the plain statutory language of § 36(a) provides a right of action for the SEC alone, no room was left for the court

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statutory text (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983))); *see also* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 362 (2005) (stating that textualists often worry that "'clues provided by the legislative history are bound to be false'" and that legislative history allows staffers and legislators to "salt" the record with misleading statements (quoting Antonin Scalia, *Commentaries Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (Amy Gutmann ed., 1997))).

46. *See FDIC Proposes Revisions to Annual Independent Audit and Reporting Requirements; Federal District Court Dismisses Mutual Fund Shareholder Suit Alleging Improper Revenue Sharing*, MONDAQ, Aug. 10, 2005, at 2 (stating that the lawsuits all alleged breach of fiduciary obligations under § 36(a)); *see also* Kim Koopersmith, et. al., *Recent Lawsuits Against Mutual Funds, Investment Advisors and Related Parties*, METROPOLITAN CORPORATE COUNSEL, March 2005, at 16 (highlighting recent class action lawsuits filed against mutual funds).

47. *Jacobs*, 378 F. Supp. 2d at 862 (discussing breach of fiduciary duty as it relates to both § 36(a) and § 36(b) and finding that plaintiff's "garden variety" claims are not encompassed by either provision, regardless of the issue of standing under § 36(a)).

48. *See id.* at 864-65 (finding the defendants' reliance on *Central Bank* and *Alexander* was misplaced, as those two cases stood for the proposition that clear statutory language must be followed in the face of silence, while § 36(a) contained specific language calling for such action); *see also Individual Claims Dismissed*, *supra* note 42, at 12 (asserting that the Act expressly gives the SEC a right of action and "leaves no room for implication of a private right of action").

49. *Jacobs*, 378 F. Supp. 2d at 865 (stating that *Exxon* addressed the same issue at play here, namely, the conflict between unambiguous statutory language and an unambiguous statement of congressional intent in determining whether § 1367(a) confers jurisdiction to the courts in class action suits where some, but not all, of the members of the class meet the amount in controversy requirement).

to imply that such an action exists.[50] The *Jacobs* court held that, following *Exxon Mobil*, it could no longer use legislative history and statutory structure to justify interpreting § 36(a) as implying a private right of action, as other courts had done.[51] The court concluded that restraint had to be exercised "even though creating a private right of action might create a good fit with the policy goals of the statute."[52]

The reinterpretation by the *Jacobs* court highlights the conflict that has persisted in statutory interpretation: the struggle between textualists, who seek to enforce the objective meaning of the text, and intentionalists, who seek to enforce the subjective meaning of those who wrote the text.[53] Without an express ruling from the Supreme Court on whether the ICA provides for a private right of action, and with the seventh circuit's refusal to decide this issue,[54] the long-term effect of *Exxon Mobil* and *Jacobs* remains unclear.

III. ANALYSIS

The first portion of this section will compare the strength of the legislative history and the interpretation of statutory ambiguity in *Exxon Mobil* and *Jacobs*. The second portion will discuss the effect of *Jacobs* on investors and the SEC, along with examining the role of the SEC in private rights litigation. The last portion of this section will consider the strength of investor claims under state fiduciary principles.

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50. *Id.* at 866.

51. *See id.* at 863-65 (stating that courts typically relied on the congressional hearing reports from the 1970 and 1980 amendments in order to justify a private right of action).

52. *Id.* at 864; *see also* 15 U.S.C. § 80a-1(b) (listing the policy goals of Congress in enacting the ICA based on a congressional study of abuses that were prevalent in the investment company industry).

53. Nelson, *supra* note 45, at 347. The author asserts that all statutory interpreters seek the meaning the legislature intends and that the conflict between textualism and intentionalism boils down to differences between methodology and normative tendencies, meaning that legislative intent is important to textualists, though it uses a more rule-based approach in applying it to statutory construction). *Id.* at 415-17. *See generally* Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?: A Theoretical Approach*, 69 BROOKLYN L. REV. 163, 183-90 (discussing the various differences between judges that approach statutory construction from both intentionalist and textualist perspectives).

54. Boland v. Engle, 113 F.3d 706, 715 (7th Cir. 1997); *see also* McCall, *supra* note 9, at 4-34 (noting that *Boland* was the Seventh Circuit's first attempt at questioning private rights of action under the ICA, though the Court did not rule on the issue).

A. A Comparison of Jacobs to Exxon Mobil

The *Jacobs* case, in relying on *Exxon Mobil*, seems to be consistent with recent Supreme Court decisions that "appear increasingly sympathetic to a strong presumption against private remedies."[55] Even so, the judgment in *Exxon Mobil* was reached by a slim five-to-four majority.[56] Since the court in *Jacobs* relied so heavily on *Exxon Mobil* to arrive at its holding, it is necessary to analyze the court's dependence on that case.[57]

1. The Strength of Legislative History

Exxon Mobil and *Jacobs* differ in the strength of the legislative history that supports the respective statutes in question. In *Exxon Mobil*, the Court stated that even if it were to agree that the text of 28 U.S.C. § 1367 is ambiguous,[58] the legislative history would not alter its view as to the best understanding of that statute.[59] This was because the corresponding House Report could be read to adopt one interpretation of § 1367 and a Subcommittee Working Paper, on which the statute was based, could reflect an opposite understanding.[60] On the other hand, the legislative history supporting § 36(a) of the ICA, as discussed in the previous section,

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55. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 148 (citing Alexander v. Sandoval, 532 U.S. 275, 291 (2001)); *see also* Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994) (holding that express statutory authority prevails and rejecting the idea that the Court could look to congressional intent to protect investors); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001) (refusing to imply a right of action and stating that the Court has retreated from its willingness to imply a cause of action where Congress has not provided for one expressly).

56. *Exxon Mobil*, 125 S. Ct. 2611. Justices Kennedy, Rehnquist, Scalia, Souter, and Thomas joined in the opinion of the Court in *Exxon Mobil*, while Justices Breyer, Ginsburg, O'Connor, and Stevens dissented in this case. *Id.*

57. *See Jacobs*, 378 F. Supp. 2d at 864 (holding that dismissal of the private claim was warranted following the decision in *Exxon Mobil*).

58. *Exxon Mobil*, 125 S. Ct. at 2619-20. § 1367 reads:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

59. *Exxon Mobil*, 125 S. Ct. at 2625. The Court found that the better interpretation of § 1367 is that when a complaint contains at least one claim that satisfies the amount-in-controversy requirement, the Court has supplemental jurisdiction over all other claims within the same case or controversy. *Id.* at 2620. The Court did not adopt the interpretation of the statute that would require each claim to satisfy the amount in controversy requirement. *Id.*

60. *Id.* at 2627 (observing that attempts to figure out which authority is more reflective of the legislators' understanding is a "hopeless task").

contains "specific and affirmative statements of intent" calling for private rights of action under the Act.[61]

In deciding both *Exxon Mobil* and *Jacobs*, the courts took a textualist approach in deemphasizing legislative history.[62] Although textualists place a great deal of emphasis on the express language of the statute, they seem to have the same goal as intentionalists: to understand legislative intent.[63] Even textualists admit that there certainly could be individual instances where judges who consulted legislative history would be better suited to capture the meaning intended by the legislature than those who disregarded it.[64] The question, therefore, seems to be whether judges should categorically presume legislative history is useful or whether judges should consult extrinsic materials on a case-by-case basis to try and reach more accurate assessments of a statute's intended meaning.[65] However, under recent Supreme Court decisions, the issue of legislative history does not even come into play unless a court first finds that the statute in question is ambiguous.[66]

2. *The Threshold Question of Ambiguity*

One apparent effect of the court's decision in *Jacobs* is to ignore Congress's specific intent as shown through legislative history. In *Jacobs*, the court stated that legislative history has no place in statutory interpretation where the statute is not "ambiguous."[67] The word "ambiguous," however, is subject to

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61. *Jacobs*, 378 F. Supp. 2d at 864; *see supra* note 31.

62. Nelson, *supra* note 45, at 362-63 (finding that textualists are famous for ignoring legislative history when others would invoke it for a variety of reasons, including the fear of activist judges, time constraint, and the idea that people outside of the legislature are not sophisticated enough to advance legislative intent).

63. *Id.* at 347-48 (arguing that textualists are given a bad wrap for their downplay of legislative history, even though they too are seeking to interpret the statute as it was intended by legislators).

64. *Id.* at 363; *see also* Stephenson, *supra* note 55, at 102-03 (asserting that some of the most important private rights of action that are judicially implied based on congressional intent are those that have been recognized under securities regulation and investor protection laws).

65. Nelson, *supra* note 45, at 362-63 (noting the textualist belief that, in the aggregate, the judiciary's efforts to uncover a statute's intended meaning will be no less accurate than if they simply presume members of Congress were using words in a conventional sense, while the intentionalists believe that, in certain instances, looking at legislative history provides a common sense approach to statutory interpretation).

66. *See Exxon Mobil*, 125 S. Ct. at 2626 ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting legislatures understanding of otherwise ambiguous terms.").

67. *Jacobs*, 378 F. Supp. 2d at 865; *see also* Stephenson, *supra* note 55, at 166 (finding a recent shift in judicial preferences in that deference is now accorded to extrinsic material only when there is a statutory ambiguity).

various interpretations among different judges.[68] In *Exxon Mobil*, Justice Stevens dissented, stating that, "[b]ecause ambiguity is in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted."[69] He went on to reason that judges should make "themselves accountable to all reliable evidence of legislative intent."[70]

However, courts generally do not differ in their understanding of § 36(a) of the ICA: it explicitly grants authority only to the SEC to bring a cause of action.[71] That said, courts have split in deciding whether the statute is ambiguous for two reasons: (1) because § 1 states that conditions in the Act that adversely affect investors' interests should be mitigated or eliminated, and (2) because § 36(b) is the only one of the Act's sixty-four sections to expressly provide for a private right of action, an oddity at best.[72]

Determining whether a statute is ambiguous becomes difficult when a statute "provides a clear private remedy under one provision, but the structure of the statute makes it unclear whether that remedy also applies to a separate but related substantive provision in the same statute."[73] Some courts have implied a private right of action under § 36(a), finding it ambiguous in light of § 36(b), which provides a private remedy.[74] It is important to note that the Supreme Court has looked beyond the precise language of a statute and has instead looked at the "broader context of the statute as a whole" in order to determine whether the language is ambiguous.[75] Therefore, whether the courts' use of the word "ambiguous" is relative to the statute as a

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68. *Exxon Mobil*, 125 S. Ct. at 2628 (Stevens, J., dissenting) (arguing that the Court erred in finding that the language of 28 U.S.C. § 1367 was not ambiguous).

69. *Id.*

70. *Id.* (citing Koons Buick Pontiac GMC v. Nigh, 543 U.S. 50, 65-66 (2004) (Stevens, J., concurring)). Indeed while in recent years the Court has suggested looking into legislative history only to resolve textual ambiguities, "common sense is often more reliable than rote repetition of canons of statutory construction." *Koon*, 543 U.S. at 65-66.

71. 15 U.S.C. § 80a-35(b). *See generally* McCall, *supra* note 9, at 4-32 (stating that while courts differ in permitting private actions under § 36, they are in agreement on the express grant of power to the SEC).

72. 15 U.S.C. § 80a-1, § 80a-35(b); *see* McCall, *supra* note 9, at 4-35 (confirming that the First, Second, Third, Fourth, and Tenth Circuit Courts of Appeal have recognized implied private rights of action under the ICA (citing Lessler v. Little, 857 F.2d 866, 871-74 (1st Cir. 1988); Fogel v. Chestnutt, 533 F.2d 731, 745 (2d Cir. 1975); Esplin v. Hirschi, 402 F.2d 94, 103 (10th Cir. 1968); Brown v. Eastern States Corp., 181 F.2d 26, 28 (4th Cir. 1950)).

73. Stephenson, *supra* note 55, at 167 (citing *Sandoval*, 532 U.S. at 288-89).

74. McCall, *supra* note 9, at 4-36.

75. Matthew J. Cleveland, *Title VII and Negative Job References: Employees Find Safe Harbor in Robinson v. Shell Oil Company*, 31 J. MARSHALL L. REV. 521, 535 (1998).

whole or to a specific section of the Act is determinative as to whether they should delve into its legislative history.[76]

B. The Impact of Jacobs *on Investors and the SEC*

1. Civil Claimants Must Settle For Criminal Prosecution

Yet another impact of the ruling in *Jacobs*, one that investors will clearly feel, is the inability to bring a civil claim for damages or injunctive relief.[77] Every year, private investors file a large number of cases seeking to hold investment companies liable for money damages resulting from breaches of duties in their handling of securities.[78] Now, since the SEC is authorized to bring only criminal actions, investors will have almost no private recourse under the ICA. The number of actions private investors file far outweighs the number of cases the SEC brings before the court, often because private parties are in a better position than a public agency to uncover violations of law.[79]

2. The SEC's Support For Implied Private Rights of Action

The ICA places the SEC in the position of having to enforce an incredibly complicated statute, and its general answer to most actions by investment companies is "no, you can't do that."[80] The SEC has also been granted exemptive authority, which requires that the SEC issue new rules and orders and find new approaches in response to changed circumstances in the investment company industry.[81] However, this has been a burdensome task for the SEC. Former Chairman Harvey Pitt stated, "I will not regale you with the statistics on the length of time requests for exemptive

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76. Stephenson, *supra* note 55, at 166-67 ("[T]he meta-question as to whether a statutory provision is 'ambiguous' is as much a matter of subjective interpretation as the underlying question of what the provision means.").

77. *Individual Claims Dismissed*, *supra* note 42, at 12.

78. Koopersmith et al, *supra* note 46, at 16 (noting that, in the course of a few weeks, thirty-nine private class action lawsuits were filed against investment companies alleging breaches of duty).

79. *See* David S. Ruder, *The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1174-75 (finding that in 1961, the year the SEC actively began promoting private rights of action under the ICA, the SEC filed less than one hundred cases and by 1988 this number had increased to only two hundred; in contrast, the number of actions filed by investors in the same period increased almost fifteen fold); Stephenson, *supra* note 55, at 108 (asserting that affected private citizens are better able to not only monitor compliance, but weigh the costs and benefits associated with bringing an enforcement action).

80. Harvey L. Pitt, S.E.C., Chairman, Remarks before the Investment Company Institute, 2002 General Membership Meeting (May 24, 2002), *available at* http://www.sec.gov/news/speech/spch562.htm.

81. *See id.* (stating that the SEC's use of its exemptive power has always been to protect the needs of investors).

relief wait in the queue before being addressed. But, the number is incredibly high."[82]

As a result, the SEC has long supported private rights of action in federal securities litigation, including the ICA, finding that it supplements its own enforcement program and further deters misconduct.[83] The SEC argues that to the extent that private rights are curtailed, "further demands will be [placed] on the Commission's already stretched resources."[84] During fiscal year 2004, the SEC received over 70,000 complaints, solely from investors.[85]

The Supreme Court has also remarked on the importance of implying private rights of action to supplement SEC action, finding that civil damages and injunctive relief provide effective weapons in enforcement of federal regulations.[86] This is especially true, the Court noted, in light of the number of cases the SEC must review and the time limitations that accompany review of each case.[87]

3. *The SEC's Role in Private Securities Litigation*

The SEC supports private rights of action through its participation as amicus.[88] However, as a result of the SEC's

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82. *Id.*

83. *See* Giovanni P. Prezioso, S.E.C., General Counsel, Remarks Before the American Bar Association Section of Business Law, General Counsel Forum (June 3, 2004), *available at* http://www.sec.gov/news/speech/spch060304gpp.htm (stating that the SEC argued for implied rights of action under the ICA in *Brown v. Bullock* and *Brouk v. Managed Funds, Inc.*). *See generally* Brown v. Bullock 294 F.2d 415, 421 (2d Cir. 1961) (holding that a private right of action exists under the Act for a director's breach of fiduciary duties); Brouk v. Managed Funds, Inc., 286 F.2d 901, 918 (8th Cir. 1961) (finding that no private right of action existed under the ICA for plaintiffs seeking money damages against officers).

84. Arthur Levitt, S.E.C., Chairman, Final Thoughts on Litigation Reform (Jan. 23, 1996), *available at* http://www.sec.gov/news/speech/speecharchive/1996/spch070.txt. *See generally* Stephenson, *supra* note 55, at 107 (stating that because the budget and manpower of federal regulatory agencies is limited, they simply lack the power to enforce laws properly, but when individual citizens are able to act as attorneys and bring private claims government enforcement efforts are complemented).

85. U.S. SECURITIES AND EXCHANGE COMMISSION, 2004 PERFORMANCE AND ACCOUNTABILITY REPORT 66 (2005) *available at* http://www.sec.gov/new/data/htm.

86. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964) (holding that a private right of action exists under § 14 of the Securities Exchange Act of 1934 because it is the federal courts' duty to "adjust their remedies so as to grant the necessary relief" when there is no specific grant of private right, and when it is necessary to achieve the statute's chief purpose of to protecting investors).

87. *Id.* at 432.

88. *See id.* (stating that because the stakes in litigation under private rights of action are often in the millions and billions of dollars, courts tend to read the SEC's briefs very carefully and afford them a great deal of weight).

limited resources, it has focused its efforts on participating exclusively in cases dealing with federal securities laws at the Supreme Court level.[89] This means that cases such as *Jacobs* will not appear on the SEC's radar until they reach the appellate level, at the very earliest.

While implying private rights of action under the ICA allows for enforcement of the Act that the SEC might not otherwise address, the SEC's role in private securities litigation must also be questioned. Through the filing of amicus briefs, the SEC has had a significant impact in shaping the development of securities laws, as its "brilliant win/loss record demonstrates."[90] It has often been met with deference from the courts, which are aware of the SEC's practical expertise and the need for flexibility in dealing with changed circumstances.[91]

However, in *International Brotherhood of Teamsters v. Daniel* the Court observed that, "there are limits, grounded in the language, purpose, and history of a particular statute, on how far an agency may properly go in its interpretive role."[92] Although the SEC may have better information than the legislature and the courts, scholars have stated that this does not necessarily mean they should be given broad authority over the scope of potential private rights of action.[93] Thus, while it is clear that the SEC supports private rights of action under the ICA, since it can not alone prosecute every violation under the Act, it is also clear that issues arise as to the level of deference an agency should be afforded when it argues that private rights of action be implied.

C. Common Law Fiduciary Claims Provide Little Relief to Investors

Yet another effect of the *Jacobs* court ruling is that in states such as Illinois, where dealers in securities owe common law fiduciary duties to their customers,[94] some investors may look to

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See generally Ruder, *supra* note 79, at 1170-80 (discussing the SEC's historical role as amicus and the effect of its current amicus program on the courts).

89. Ruder, *supra* note 79, at 1170-80.

90. Prezioso, *supra* note 83. The SEC has filed amicus briefs in "every substantive area of the securities law that can be enforced through private litigation" and, on balance, the courts have often formally acknowledged that they are adopting the SEC's position. *Id.*

91. Ruder, *supra* note 79, at 1181 (citing Basic Inc. v. Levison, 485 U.S. 224, 239 n.16 (1988)).

92. *Id.* at 1182 (citing Int'l Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 & n.20 (1979)).

93. Stephenson, *supra* note 55, at 129 (arguing that because agencies are often closely involved in not only statutory enforcement but also in politics, they may not always be aligned with the social interests of investors).

94. Brady v. Allstate Life Ins. Co., No. 04-2518, 2004 U.S. Dist. LEXIS 19853, at *9 (N.D. Ill. Oct. 5, 2004) (citing T-Bill Option Club v. Brown & Co. Securities Corp., No. 92-2737, 1994 U.S. App. LEXIS 11976 (7th Cir. 1994)).

this cause of action for relief. For example, in *Brady v. Allstate Life Insurance Co.*, the plaintiffs argued breach of fiduciary duty under both § 36 of the ICA and common law, when Allstate failed to move funds between accounts according to investors' wishes.[95] The court ruled that, while the plaintiffs did not plead facts sufficient to state a claim under the § 36 personal misconduct standard,[96] they did have a claim for breach of fiduciary duty under common law theory.[97] The court warned, however, that the scope of the duty owed by Allstate was "exceedingly narrow, 'consisting at most of a duty to properly carry out transactions ordered by the customer.'"[98]

The scope of the fiduciary duty, then, under state common law principles and under the ICA, differs.[99] The majority of state corporation codes allow a corporation to limit or even eliminate the liability of its directors and officers for breach of state law fiduciary duties.[100] While under common law principles, the fiduciary duty is a narrow one, § 36(a) of the ICA is used by plaintiffs as a "catch-all provision covering any alleged breach of fiduciary duty."[101] In enacting the ICA, and in subsequently amending the Act, Congress made clear that breaches of fiduciary duty existed for which no other mechanism was in place to counter.[102]

The impact of *Jacobs* is far reaching and includes: a disregard of the ICA's clear legislative history; the inability of investors to bring civil actions under the ICA; the inability to find relief under

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95. *Brady*, 2004 U.S. Dist. LEXIS 19853 at *9.

96. *Id.* at *7-8 (finding that Allstate's actions, instituting company transfer restrictions, did not rise to the level of personal misconduct under § 36, since that section pertains to gross neglect of responsibilities and actions that involve self-dealing).

97. *Id.* at *8.

98. *Id.* at *8-9.

99. *See* 15 U.S.C. § 80a-35(a) (providing that a breach of fiduciary duty action involving personal misconduct may be filed against "any registered investment company for which such person so serves or acts — (1) as officer, director, member of any advisory board, investment adviser, or depositor; or (2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company"); Index Futures Group, Inc. v. Ross, 199 Ill. App. 3d 468, 475-76 (stating that customers are owed merely a narrow duty of care in connection with the performance of the functions ordered by the customer, such as taking orders, executing trades, and dealing with customer funds).

100. Koopersmith et al., *supra* note 46, at 3. The author states that many corporations invoke the protection state corporation codes provide by including exculpatory charter provisions in their articles of incorporation. *Id.* Moreover, state breach of fiduciary claims are not always viable claims, as there are often no uniform standards of care in the mutual fund industry. *Id.*

101. McCall, *supra* note 9, at 4-32.

102. H.R. REP. NO. 96-1341 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4800, 4811.

state actions for breach; and the placement of the burdensome task of holding investment companies liable on the shoulders of the already over-burdened SEC.

IV. PROPOSAL

While the use of legislative history in Exxon Mobil would not have changed th*at* Court's ruling,[103] the opposite result would have been posited in *Jacobs* with the use of the ICA's legislative history.[104] Since the legislative history of § 1367 is ambiguous,[105] it could not aid the Court in its interpretation of that statute. However, in *Jacobs*, the court agreed that the statute's legislative history was unambiguous and explicitly called for a private right of action.[106] Both of these courts refused to consider legislative history because they reasoned that the statute in question was clear on its face.[107] The *Jacobs* court, therefore, overlooked a key tool in understanding the legislature's intent, which is, after all, the goal of statutory interpretation according to both textualists and intentionalists.[108]

The approach the Supreme Court has adopted leaves a pitfall: a complete disregard of clear legislative history that calls for a court to rule one way, yet ruling another way because the statute in question appears unambiguous — a determination that is often

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103. *Exxon Mobil*, 125 S. Ct. at 2625 (holding that § 1367 by its plain text "authorize[s] supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy").

104. *See Jacobs*, 378 F. Supp. 2d at 864 ("[R]estraint must be exercised even though creating a private right of action might create a good fit with the policy goals of the statute.").

105. *Exxon Mobil*, 125 S. Ct. at 2625.

106. *Jacobs*, 378 F. Supp. 2d at 863. The court recognized that the legislative history of the ICA contained affirmative statements of specific intent, acknowledging a 1980 House Committee report that stated:

> The Committee wishes to make plain that it expects the courts to imply private rights of action under this legislation, where the plaintiff falls within the class of persons protected by the statutory provision in question. Such a right would be consistent with and further Congress' intent in enacting this provision, and where such actions would not improperly occupy an area traditionally the concern of state law.

Id. (citing H.R. Rep. No. 96-1341, at 28-29 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4800, 4811.

107. *Exxon Mobil*, 125 S. Ct. at 2625; *Jacobs*, 378 F. Supp. 2d at 866.

108. *See* Nelson, *supra* note 45, at 347 (stating that although textualists and intentionalists have the same goals, their methodology is different: textualists seek the objective meaning of the text, while intentionalists try to enforce the subjective intent of the legislature); *see also* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (discussing the Supreme Court's "unflinching[] proclam[ation] that 'legislative intent' is the touchstone of federal statutory interpretation").

itself subjective.[109] In order to deal with the problems of applying a categorical rule against the use of legislative history when a statute appears clear on its face, courts should instead adopt a common-sense approach.

When overruling decades of precedent that have implied a private right of action, courts should rely not only on the statutory text, but also on the legislative history when that history is clear, as it is here. Looking to legislative history not only when it contains explicit language, but also when there is longstanding precedent[110] recognizing such legislative history provides a balance that should ease the worries of textualists.

Textualists often argue that a straightforward reading of the statute is required to hold the legislature accountable for the statute it has passed.[111] This certainly seems to be the case in *Exxon Mobil*.[112] However, accountability is difficult to attain.[113] The public's one-time involvement in pushing the legislature to pass the ICA makes it less likely that the legislature will be aware of, and respond effectively to, the defect in the law.[114] This, therefore, undermines the textualists' claim that a formal approach to statutory interpretation will "promote more artful drafting."[115] It is important to remember that the ICA was adopted following a period when investors had lost over forty percent of their investments.[116] Without a modern day catalyst, the ICA will likely remain unchanged and investors will suffer the consequences while the industry remains unchecked.

Justice Scalia has proposed the rule that courts should not read federal statutes to establish private rights of action by

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109. *Exxon Mobil*, 125 S. Ct. at 2628-31 (Stevens, J., dissenting), *see also* Stephenson, *supra* note 55, at 166 ("[W]hether a statutory provision is 'ambiguous' is just as much a matter of subjective interpretation as the underlying question of what the provision means.").

110. *See Tannenbaum*, 552 F.2d at 417; Young v. Nationwide Life Ins. Co., 2 F. Supp. 2d 914, 926 (S.D. Tex 1998); *In re Nuveen Fund Litigation*, 1996 U.S. Dist. LEXIS 8071, at *37; Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1114 (D.R.I. 1990); *Brown*, 194 F. Supp. at 222; Entel v. Guilden, 223 F. Supp. 129, 133 (S.D.N.Y 1963); Cogan v. Johnston, 162 F. Supp. 907, 909 (S.D.N.Y. 1958); General Time Corp. v. American Investors Fund, Inc., 283 F. Supp. 400, 401-02 (S.D.N.Y 1968). These cases establish over forty years of precedent for implying a private right of action under the ICA.

111. Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2753 (2005).

112. *Exxon Mobil*, 125 S. Ct. at 2624. The Court noted that while a statutory omission may seem odd, it is not always absurd, and therefore the Court held that in the case of unintended drafting errors it is the duty of the legislators, through congressional vote, to fix it. *Id.*

113. *Judicial Approaches to Direct Democracy*, *supra* note 111, at 2753.

114. *See id.* (discussing the relevance of direct democracy as it relates to both statutory interpretation and judicial review).

115. *Id.*

116. Roye, *supra* note 4.

implication.[117] He believes that members of Congress make express provisions for these causes of action when they want to create them.[118] Textualist judges often interpret laws on the assumption that legislators are aware of their contemporary legal context and are aware of the effects the laws will have.[119] However, in the case of the ICA, that assumption is misplaced. The ICA was adopted during a time when Congress could have reasonably expected that private rights of action be implied freely.[120] At the time Congress passed the ICA, courts had a record of implying private rights of action even when the statute did not explicitly call for one.[121]

Textualists are skeptical of judges' abilities to distinguish between which floor statements and committee reports should be given credence.[122] They argue that judges are not in a position to "separate the wheat from the chaff" and that a categorical exclusion of legislative history may yield more accurate results in statutory interpretation.[123] However, the Supreme Court does not seem to be arguing for a categorical exclusion of legislative history.[124] The Court stated that extrinsic materials can "shed reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."[125] This means that there are times when the Court is perfectly comfortable with its capability of interpreting legislative history.

Moreover, textualists argue that, through their interpretation of legislative history, a statutory meaning may be superimposed that Congress did not intend.[126] However, a study of case law shows that conservative members of the Rehnquist Court have used strict canons of interpretation in contested cases to undermine legislative preference.[127] This means that canons have

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117. Nelson, *supra* note 45, at 391.

118. *Id.*

119. *See Judicial Approaches to Direct Democracy*, *supra* note 111, at 2752 (arguing that such practices are dependent on both the expertise of the lawmakers and their familiarity with the consequences of legislation).

120. *Jacobs*, 378 F. Supp. 2d at 864 (citing Alexander v. Sandoval, 532 U.S. 275, 287-88 (2001)).

121. *Id.*

122. Nelson, *supra* note 45, at 377.

123. *See id.* (arguing for a strict rule-based approach to statutory interpretation).

124. *Exxon Mobil*, 125 S. Ct. at 2626.

125. *Id.*

126. *See id.* (arguing that legislative history is often "murky" and subject to varying interpretations among the members of the judiciary).

127. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAN. L. REV. 1, 30 (2005) (reporting that, as compared with the Burger Court, reliance on legislative history has gone down twenty-percent during the Rehnquist Court, while the use of statutory text has increased fifteen-percent). Brudney and Ditslear further

been "regularly used in an instrumental if not ideologically conscious manner."[128]

It seems, therefore, that many of the reasons textualists offer for refusing to consult legislative history lose their credence, especially as applied to the ICA. Consulting unambiguous legislative history, even when a statute appears clear on its face, recognizes that legislatures have coherent and identifiable, but sometimes unexpressed, policy intentions.[129]

When interpreting § 36 of the ICA, courts have a variety of tools at their disposal. The text of § 36, the text of the entire statute,[130] the legislature's policy preferences,[131] the legislative history,[132] and the administrative findings[133] are all mechanisms

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argue that in close cases there has been a substantive reliance on canons by more conservative members of the court, which more liberal members of the Court have countered by invoking the importance of legislative history in statutory interpretation. *Id.* at 7.

128. *Id.* at 6. Some scholars argue that use of strict canons of statutory interpretation serve the judiciary's more strategic interest. *Id.* at 9. As such, the canons are used as a façade, merely to support the courts' judicial policy preferences. *Id.* at 10.

129. Manning, *supra* note 108, at 423-24. Intentionalists believe that legislation should be treated just as the speech of an individual human actor is treated: "unexpressed background intentions" can be used to clarify the meaning that a reasonable person would attach to the chosen words. *Id.* Textualists, however, believe that the only legislative intentions are those that are expressed in the final text of the statute and, therefore, they do not believe that Congress has a "collective will apart from the outcomes of the complex legislative process" *Id.* at 424.

130. While § 36(a) may not appear ambiguous on its face, when it is interpreted in light of the entire Act, including the policy provisions and the amended § 36(b) which provides for a private right of action, it is more difficult to argue that § 36, on its own, encompasses the legislative intent of the enacting Congress. *See supra* notes 22-26 and accompanying text.

131. 15 U.S.C. § 80a-1(b). That section states:

> It is hereby declared that the policy and purposes of this title, in accordance with which the provision of this title shall be interpreted, are to mitigate, and, so far as feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

132. S. REP. NO. 91-184 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4897, 4902; H.R. REP. NO. 96-1341 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4800, 4811.

133. *See* Ruder, *supra* note 79, at 1174-75 (stating that the SEC has been actively promoting private rights of action under the ICA through the filing of amicus briefs in cases that are at the appellate and Supreme Court level). *See generally* Stephenson, *supra* note 55, at 107 (stating that because the SEC's budget and manpower is over-stretched, it supports a regulating mechanism that provides for the ability of individual citizens to act as attorneys and bring private claims); Prezioso, *supra* note 83 (stating that the SEC has filed amicus briefs in all areas of securities law that can be enforced through private litigation and that the courts have often formally acknowledged adoption of the SEC's position).

available to the court.[134] In light of the lengthy judicial precedent and the clear legislative history, courts should move past the text in interpreting whether a private right of action exists under the ICA. In doing so, the courts will enforce, rather than frustrate, congressional intent.[135]

Nothing can be more clear than Congress explicitly stating that it intends for there to be a private right of action under the Act.[136] Overturning decades of precedent would frustrate this congressional intent. Had Congress not intended there to be a private right of action, it certainly would have amended the statute to so state or would have argued such during one of the Act's many floor discussions.

V. CONCLUSION

Although the federal judiciary has been moving away from relying on legislative history, a categorical rule against its usefulness in statutory interpretation leaves much to be desired. The ICA, with its explicit legislative history calling for a private right of action and decades of precedent implying such a right, has certainly fallen victim to the rigid rules applied my many courts.. Many of the textualists' reasons for these rigid rules are speculative at best.

Therefore, courts should look past the text of the statute and welcome the use of legislative history to aid in statutory interpretation, especially when the court is exercising its right to overturn longstanding precedent. In the case of the ICA, this is the common-sense approach. Rather than ignoring a mechanism that aids the courts in giving the statute the effect that was intended, courts should embrace the aid, even if it means strict rules of interpretation must succumb to a case-by-case analysis.

134. Brudney & Ditslear, *supra* note 127, at 8.

135. *Id.*

136. S. REP. NO. 91-184 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4897, 4902; H.R. REP. NO. 96-1341 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4800, 4811.