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THE IMPLIED PRIVATE CAUSE OF ACTION AND THE FEDERAL AVIATION ACT: A PRACTICAL APPLICATION OF CORT v. ASH

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I. INTRODUCTION

As is so often the case when an opinion of the United States Supreme Court appears to provide comprehensive guidelines in an area of the law that has been the subject of conflict or confusion, the decision in Cort v. Ash¹ did not eliminate the questions faced by the various federal courts of appeals concerning implied federal causes of action, but merely shifted their focus. As a result, in the field of aviation law alone, the courts of appeals, particularly the United States Court of Appeals for the Third Circuit, have faced an unprecedented number of cases questioning whether such causes of action exist under various circumstances.²

It was clear almost sixty years before the Cort decision that, under some circumstances, a person who had suffered damages as a result of the violation of a federal statute might have a right to sue the violator even though the statute did not expressly create a private cause of action. This doctrine of "implied" remedies received the stamp of Supreme Court approval in the landmark case of Texas & Pacific Ry. v. Rigsby,³ which arose under the Federal Safety Appliance Acts.⁴ The Rigsby Court stated that “[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . .”⁵

5. 241 U.S. at 39.

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The authors represented the appellants in Rauch v. United Instruments, Inc., 548 F.2d 452 (3d Cir. 1976), which is among the cases discussed in their article.

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tests to resolve the often difficult issue of whether under the facts of a given case a particular federal statute created a private right of action by implication.

Finally, in *Cort v. Ash*, a unanimous Supreme Court, speaking through Mr. Justice Brennan, undertook to harmonize the past six decades of its decisional law. In declining to accept the plaintiff shareholder's assertion that a private cause of action should be inferred under a criminal provision prohibiting corporate campaign contributions, the Court held:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," — that is, does the statute create a federal right in favor of the plaintiffs? 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 purposes of the legislative scheme to imply such a remedy for the plaintiffs? 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?

The Supreme Court's delineation of the factors to be considered in determining the existence of an implied federal cause of action has brought about not the elimination of litigation, but the creation

6. For a discussion of some of these tests, see *Cort v. Ash*, 422 U.S. at 78–79, 82–83 n.14.

7. The importance of this question in many cases cannot be minimized. If the asserted cause of action has no state analogue, or if relief is unavailable under the analogous state cause, the answer will determine whether a plaintiff may have a hearing at all on the facts relating to his complaint that he has suffered damages from the violation of his federally protected rights. See, e.g., *id.* at 78. On many other occasions, although some sort of relief may be available in state courts, the answer will determine whether a plaintiff may have access to a federal forum for the determination of federal rights or whether the outlines of those rights will be measured by federal common law or by the common law of one or another of the states. See, e.g., *D'Arcy v. Delta Airlines, Inc.*, 12 Av. Cas. (CCH) 18,282 (S.D.N.Y. 1974); *Moody v. McDaniel*, 190 F. Supp. 24, 28 (N.D. Miss. 1960).

8. Act of June 25, 1948, ch. 645, 62 Stat. 723, as amended (repealed 1976). Although the Court found no implied federal cause of action under this criminal statute, it rejected the view, expressed in dissent in the court of appeals, "that where a statute provides a penal remedy alone, it cannot be regarded as creating a right in any particular class of people." 422 U.S. at 78–79. Nevertheless, the Court gave some indication that a "bare" criminal statute, providing no other remedies, is unlikely to give rise to a private cause of action. See *id.* at 79–80.

— at least for a time — of additional exploration by the lower federal courts. The difficult question of how the Cort factors are to be applied remains, and the Supreme Court has yet to supply the lower federal courts with much direction on the general approach to be used in applying the factors or with many examples of their application in the context of specific federal statutes.

On its face, the Cort formulation presents a number of fruitful areas for analysis and discussion. Thus, for example, a careful reader might raise a serious question as to whether the third Cort factor is not merely a subcategory of the second. Similarly, in this day of multipart omnibus acts, it is important to know whether the Supreme Court meant to create a test to be applied on a statute-wide basis or merely to each individual provision of a statute, so that some sections of the same statute might create an implied cause of action while others would not. Rather than deal with questions such as these in the abstract, it may be helpful to focus on the application of the Cort factors to a single statute, though not a single section of that statute, in the hope that such a limited analysis will develop analytical techniques equally applicable to other cases and other statutes. Accordingly, this article will examine the factors against the backdrop of the Federal Aviation Act (Act), and will analyze the various federal decisions which have discussed the appropriateness of implying a private right of action for violations of various provisions in that Act. Finally, this article will attempt to draw from these decisions under this statute a more useful approach to the application of the Cort criteria in this and other fields.

II. THE Cort CRITERIA AS APPLIED TO THE FEDERAL AVIATION ACT: THE EXISTING CASES

There are several basic types of cases in which the question of the appropriateness of a private action under the Federal Aviation Act has been raised: actions alleging discrimination in ticketing or

10. It might be appropriate to argue that the inconsistency of a private cause of action with the legislative scheme is strong evidence of at least an implied legislative intent not to create such a remedy. See note 83 and accompanying text infra.

11. The lower federal courts have consistently considered the sections of the Federal Aviation Act on an individual basis when determining whether to imply a federal cause of action. See, e.g., the cases listed in note 14 infra.

12. 49 U.S.C. §§ 1301-1542 (1970 & Supp. V 1975). This legislation is also known as the Federal Aviation Program which, inter alia, authorized the continuation and enumerates the duties of the Civil Aeronautics Board. E.g., id. §§ 1321-1325. The Act also established the Federal Aviation Administration (FAA), id. § 1341, and delineates powers and duties of the FAA Administrator. E.g., id. §§ 1342-1357, 1421-1432.
overbooking and subsequent "bumping";\(^{13}\) actions alleging overcharges by airlines or claims that services for which the plaintiffs have paid have not been provided;\(^{14}\) and actions claiming violations of safety provisions of the Act or of regulations promulgated under the safety provisions.\(^{15}\) For the most part, the varying results in these cases can be rationalized by an examination of the various Cort factors in the context of the differing provisions of the Act.

A. The First Factor — Whether the Act Creates a Federal Right in Favor of the Plaintiffs

Looking to the actual statutory scheme involved in Cort, Mr. Justice Brennan noted:

[In those situations in which we have inferred a private cause of action not expressly provided, there has generally been]


14. See, e.g., Wolf v. Trans World Airlines, Inc., 544 F.2d 134 (3d Cir. 1976), cert. denied, 450 U.S. 915 (1977) (airline passengers forced to forfeit free guest accommodations may not bring private federal action under § 403(b) of the Act, which prohibits regulated airlines from charging fares inconsistent with those established by tariff, or under § 411 of the Act, which prohibits deceptive practices); Polansky v. Trans World Airlines, Inc., 523 F.2d 332 (3d Cir. 1975) (airline passengers furnished inferior ground accommodations may not bring private federal action under § 411 of the Act); Bratton v. Shiffrin, 440 F. Supp. 1257 (N.D. Ill. 1977) (charter tour participants and travel agencies seeking to recover deposits from bank in which deposits were escrowed and bankrupt tour operator and organizers may not bring private federal action under § 401(n)(2) of the Act and regulations promulgated thereunder to insure financial responsibility of tour operators); Vandrey v. Lufthansa German Airlines, 14 Av. Cas. (CCH) 17,788 (E.D. Pa. 1977) (airline passengers denied reduced ticket charges may not bring private federal action under §§ 403(b), 404(a) or 411 of the Act).

15. See, e.g., Rauch v. United Instruments, Inc., 548 F.2d 452 (3d Cir. 1976) (no private cause of action exists for damages on behalf of aircraft owners required to repair defective altimeter to conform with FAA directive); Snuggs v. Eastern Airlines, Inc., 13 Av. Cas. (CCH) 17,631 (S.D. Fla. 1975) (state wrongful death action is not removable to federal court under theory of implied federal cause of action); D'Arcy v. Delta Airlines, Inc., 12 Av. Cas. (CCH) 18,282 (S.D.N.Y. 1974) (allegations in complaint of violations of regulations promulgated under the Act in aviation disaster are not sufficient to remove case to federal court); Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972) (private cause of action exists in favor of person injured or damaged as a result of a violation of duty of care imposed by the Act and regulations); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681 (D. Colo. 1969) (no private federal cause of action for tort liability exists under § 101(26) of the Act); Yelenik v. Worley, 284 F. Supp. 679 (E.D. Va. 1968) (no private federal cause of action for damages due to
a clearly articulated federal right in the plaintiff, e.g., *Bivens v. Six Unknown Federal Narcotics Agents*, . . ., or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, e.g., *J.I. Case Co. v. Borak*, . . ..16

In a sense, the standard suggested by the decision in *Borak* may be viewed as an example of that suggested by the *Bivens* decision; the legislative scheme governing the relationship between the parties will be considered pervasive in a particular regard if it is so comprehensive in scope that it clearly indicates that the plaintiff has a right capable of being vindicated or, in other words, if the plaintiff has a “clearly articulated federal right.” Both formulations require careful scrutiny of the statute in question to determine whether the plaintiff is suing in his capacity as an individual intended to be protected by the statute against the type of harm he alleges has occurred. As the following review of the Federal Aviation Act cases reveals, the test is thus very similar to that used to determine whether a violation of a particular statute constitutes negligence per se.17

1. **Discrimination and Bumping Cases**

Where discrimination in ticketing or overbooking and consequent discriminatory bumping have been alleged, plaintiffs have generally been allowed to maintain their actions in the federal courts18 since the Act explicitly creates a “public right of freedom of transit through navigable airspace of the United States”19 and states that no carrier shall “subject any particular person . . . in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”20

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17. See Restatement (Second) of Torts, § 874A, Comment f at 75-76 (tent. Draft No. 22, 1976); see also Rauch v. United Instruments, Inc., 548 F.2d 452, 459 (3d Cir. 1976).
20. Id. § 1374(b).
However, the cases under the Act also make clear that not all injuries caused by airline discrimination will give rise to a private right of action on the part of the injured individual. In *Nader v. Allegheny Airlines, Inc.*,\(^{21}\) the nonprofit organization for which Ralph Nader was raising funds when he was bumped was not allowed to press any claim, state or federal, for damages incurred due to Nader's failure to arrive in time to appear at a rally because the organization was deemed too "remote from the transaction" to fall "within the class of persons who may recover."\(^{22}\)

Similarly, in *Mason v. Belieu*,\(^{23}\) the plaintiff was not allowed to recover for the mental distress she suffered when her husband, who had purchased a flight ticket, was refused passage and failed to arrive on his scheduled flight.\(^{24}\) The United States Court of Appeals for the District of Columbia Circuit noted:

> This attempt to protect all persons from unjust practices, however, does not mean that all injuries traceable by some direct line of causation to airline discrimination, no matter how distant or minute, are compensable under section 404. *Not only must nonpassengers be included within the class of persons covered by the Act, but the injury for which they seek recovery must be an interest protected by the statute ....*

> The unjustified refusal of the airline to allow Mr. Mason to use his ticket for Flight 585 affected Mrs. Mason only indirectly since she was not personally denied access to Pan American services or facilities. *Although the trial court held that her mental distress was "directly and foreseeably" caused by this action, this tort concept of causation does not bring Mrs. Mason's injury — distress because someone else was denied transportation — within the class of interests sought to be protected by the statute ....* We hold that such derivative claims are not actionable under the antidiscrimination clause.\(^{25}\)

### 2. Breach of Contract Cases

In contrast, the courts have been hesitant to imply a private right of action in breach of contract and overcharging cases probably in large part because of the first *Cort* factor. It is difficult to perceive any clear federal right of passengers to receive what they

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22. 512 F.2d at 549.
24. 543 F.2d at 222.
25. *Id.* at 219-20 (emphasis added) (citation omitted).
contract to receive from the airline or what they are entitled to under the tariff — the airline’s rate schedule filed with the Civil Aeronautics Board (CAB). Thus in Polansky v. Trans World Airlines, Inc., the United States Court of Appeals for the Third Circuit refused to imply a private right of action under section 404(b) of the Federal Aviation Act, the same statutory section generally invoked in the discrimination and bumping cases, for what was termed “misconduct which amounts (at the most) to nothing more than a breach of contract, ‘misrepresentation’ or breach of warranty.” While the plaintiffs were passengers who had allegedly been misled about the accommodations they were to receive on the tour being run by the airline, and were thus “members of the proper class,” the court held that they “did not suffer the harm the statute was designed to prevent.”

As might have been expected after its decision in Polansky, the Third Circuit in Wolf v. Trans World Airlines, Inc., held that section 403(b) of the Act, forbidding charges differing from those specified in the tariff, did not authorize private suits by allegedly aggrieved passengers. The Wolf court reasoned that the statute was not intended to protect those passengers, but was rather “designed to empower the CAB to control the supposedly pernicious competitive activities that were the target of the Federal Aviation Act.” Similarly, in Vandrey v. Lufthansa German Airlines, the United States District Court for the Eastern District of Pennsylvania refused to imply a private right of action under section 403(a), which prohibits fares that “unduly prefer or prejudice” other air carriers.

27. 523 F.2d 332 (3d Cir. 1975).
28. Section 404(b) provides in pertinent part: “No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person... in any respect whatsoever or subject any particular person... to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” 49 U.S.C. § 1374(b) (1970).
29. See cases cited in note 13 supra.
30. 523 F.2d at 338.
31. Id. at 335.
33. Section 403(b) provides in pertinent part:
No air carrier or foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such air carrier or foreign air carrier. . . .
34. 544 F.2d at 137-38.
35. Id. at 137.
in favor of plaintiff passengers claiming a right to be refunded the difference between the fare applicable when they purchased their tickets and a later, lower fare which became effective prior to their departure date.\(^{38}\) The reason given by the court was that the “clear implication” of the statute was that “a fare that is too low would be unreasonable to other participating air carriers, yet would not be challenged by the passengers who paid the lower fare” and thus the statute was designed to benefit other airlines and not passengers.\(^{39}\)

3. Safety Cases

The cases involving the safety provisions of the Act\(^ {40}\) are not as easy to harmonize. At present there is a disagreement as to whether those injured as a result of violations of these provisions may have a federal cause of action, with the majority view apparently against the implication of such a right.\(^ {41}\)

As the United States Court of Appeals for the Third Circuit noted in Rauch v. United Instruments, Inc.,\(^ {42}\) in a broad sense the safety provisions seek to assure “the personal safety of all persons who are potential passengers or crew members of civil and military aircraft as well as those others on the ground whose lives or property might be endangered by accidents resulting from unsafe aircraft or other unsafe flying conditions.”\(^ {43}\) The Rauch determination that

\(^{38}\) 14 Av. Cas. (CCH) at 17,789.

\(^{39}\) Id. The court may also have been influenced by the fact that the type of ticket purchased by the plaintiffs was required to be purchased two calendar months in advance of travel, while the new fare went into effect only four days before their actual departure date. See id. at 17,789 n.1. Similarly, in Bratton v. Shiffrin, 440 F. Supp. 1257, 1262 (N.D. Ill. 1977), the court distinguished between plaintiff travel agencies and individual tour participants, holding that the former clearly were not within the class of “travelers” for whose benefit § 401(n)(2) of the Act was enacted. The court then went on to conclude that the other Cort factors all indicated that no private right of action was warranted even on behalf of the tour participants. See notes 70, 77 infra.


\(^{42}\) 548 F.2d 452 (3d Cir. 1976). See notes 51-57, 92 & 108-12 and accompanying text infra.

\(^{43}\) 548 F.2d at 457.
potential air crash victims come within the class of beneficiaries of the safety provisions of the Federal Aviation Act seems eminently sound. It is hard to imagine any court refusing to hold that the passengers and crew of a plane that crashed because of failure to comply with safety regulations under the Act were not members "of the class for whose especial benefit the statute was enacted" or denying that, in abstract terms, the first Cort factor, at least, would support the implication of a federal right in their favor.\(^{44}\)

By contrast, the reasoning of other courts that have sought to deny federal relief to the actual victims of air crashes alleged to have resulted from failure to comply with the safety provisions of the Act is somewhat strained. Nevertheless, there are a few cases which explicitly hold that the safety provisions, and the regulations promulgated under them, do not in and of themselves create a federal right in potential or actual passengers to be free of accidents in the air but rather serve merely as a discretionary guide to defining the proper standard of care applicable in the traditional common law causes of action arising out of such accidents.\(^{45}\) A number of other cases denying federal rights of action can be seen as resting on this ground.\(^{46}\)

There is even a slight suggestion that the Supreme Court is leaning in the latter direction. In its decision last term in *Miree v. DeKalb County*,\(^{47}\) the Court refused to create federal common law to govern the question whether private parties could sue a municipality as third party beneficiaries of its contract with the Federal Aviation Administration (FAA), when breach of the contract was alleged to have caused the accident in question.\(^{48}\) *Miree* was a diversity case in which the court of appeals had turned to federal common law not to find the basis for a claim but to avoid the plaintiffs' state law right to sue as third party beneficiaries under a contract between the

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44. On the other hand, the availability of an exceptionally adequate state law remedy may provide the justification for the denial of an implied federal cause of action even to the actual accident victim. See also note 99 and accompanying text infra.

45. See, e.g., *D'Arcy v. Delta Air Lines, Inc.*, 12 Av. Cas. (CCH) 18,282 (S.D.N.Y. 1974) (regulations promulgated under the Act help to define standard of care but do not provide ground on which to base claim resulting from aviation disaster); *Moody v. McDaniel*, 190 F. Supp. 24, 28 (N.D. Miss. 1960) (Act and regulations did not create federal cause of action in wrongful death case arising out of airplane accident).


48. Id. at 26, 32.
county and the FAA. The Supreme Court reversed, reasoning that "any federal interest in the outcome of the question [was] 'far too speculative ... to justify the application of federal law to transactions essentially of local concern.'"49 It is conceivable that under this reasoning the Court might hold that the federal interest in air safety in general is insufficient to federalize tort and warranty liability of aircraft manufacturers, owners, and operators even when accident victims are involved.50

However the law may develop with respect to the existence of a federal remedy in favor of accident victims, it is clear that a private remedy is not likely to be implied when the injury did not arise from an actual accident caused by violation of the safety provisions of the Act. For example, in Rauch v. United Instruments, Inc.,51 the Third Circuit held that the Act does not permit aircraft owners to recover from the manufacturer and distributor of an allegedly defective altimeter the cost of permitting a repair to the instrument in compliance with an FAA directive.52 The plaintiffs had alleged that the FAA had ordered the altimeter to be repaired because it was inherently unsafe.53 Although the Third Circuit in Rauch clearly recognized airline passengers and crew members as special beneficiaries of the Act,54 the court also noted:

It does not follow, of course, that upon a violation of the Act or the regulations with respect to aircraft safety every potential passenger or crew member of the affected aircraft has an implied cause of action for damages under the Act. For an essential element of such a cause of action, expressed or implied, is injury resulting from such a statutory violation which has been inflicted upon the plaintiff in his capacity as a member of the protected class and which has caused him measurable damage.55

50. The petitioners in Miree sought to make affirmative use of the issue of an implied federal right only when the case reached the Supreme Court. 433 U.S. at 33–34. For this reason, the Court did not consider this argument as a basis of upholding plaintiffs' right to sue. Id. However, Mr. Justice Rehnquist, writing for the Court, did state in passing that "[t]he fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit ...." Id. at 33–34. See Snuggs v. Eastern Airlines, Inc., 13 Av. Cas. (CCH) 17,631 (S.D. Fla. 1975).
51. See notes 42–43 and accompanying text supra; notes 92 & 108–12 and accompanying text infra.
52. 548 F.2d at 454.
53. Id.
54. Id. at 457.
55. Id.
Without resolving the question of the right of accident victims to recover under federal law, the Rauch court distinguished between actual victims of aircraft accidents that occurred as a result of violations of safety regulations and potential aircrash victims who are also owners of aircraft and who seek recovery for economic losses suffered in performing their statutory duties of complying with the Act's safety provisions. The court had little difficulty in finding a lack of congressional concern for the economic expense incurred by the owners, noting that prevention of injury before it occurred was the principal purpose of the Act and that this had been accomplished when the allegedly unsafe altimeters were corrected in accordance with the FAA directive.

Thus, in almost every case, the first Cort factor gives clear and significant aid in determining whether a private federal cause of action should be implied under the Federal Aviation Act.

B. The Second Factor — Whether Congress Intended To Create a Federal Right of Action as a Means of Enforcing the Act

The legislative history of a particular statute rarely contains a definitive indication as to congressional intent, either explicit or implicit, to create or deny a federal remedy. Typically courts have determined legislative intent only from consideration of the other Cort factors. For example, where a clear federal right is granted the plaintiff in the statute, an intent to imply a remedy to enforce that right generally is implied. On the other hand, where the statute expressly provides a particular remedy, a presumption against intent to provide other remedies is created. Similarly, an intent to provide a remedy is not implied where it is not necessary to

56. Id. at 457-58.
57. Id. at 458-59.
58. See Texas v. Pac. Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916). This reasoning is consistent with the maxim of statutory construction, *ubi jus, ibi remedium*, which suggests that if the legislation created a right, it must have created a remedy to enforce it.
59. See T.I.M.E. Inc. v. United States, 359 U.S. 464, 471 (1969) (significant omissions in Motor Carrier Act, 49 U.S.C. §§ 301–327 (1970) negate implication of shippers' right of reparation with respect to allegedly unreasonable tariff rates formerly effective). This reasoning is consistent with the maxim of statutory construction, *expressio unius, exclusio alterius est*, suggesting that if one remedy is provided, the legislature intended to exclude other remedies, and, in addition, that if one section of a statute calls for civil liability and the other does not, the legislature must have intended no civil liability under the second section.
These general principles can be applied to the Federal Aviation Act with only limited success. They work best in the discrimination and bumping cases, where there is a clear federal right involved. Regarding the breach of contract and overcharging cases, there is little evidence in the legislative history whether a private remedy was intended to be created. The more honest approach would appear to be to give little weight to legislative history in these cases and to concentrate on the other Cort factors more capable of reasoned analysis.

The majority of the cases under the safety provisions of the Act have held that a private action was neither intended nor envisioned by Congress as a means of enforcement of these provisions. In 1969, Congress considered — but did not pass — a bill to provide for a federal cause of action for injuries arising out of aircraft disasters. The fact that the bill was not passed could be read to indicate a congressional decision not to imply a private action for at least this class of cases. However, many of the courts ruling on the

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62. See text accompanying notes 18-20 supra.


question of congressional intent vis-à-vis a private right of action under the Federal Aviation Act for air accident victims appear to have reached their conclusions less from their view of legislative history than from the application of the other Cort factors.68 Thus, it might be preferable simply to give the other Cort factors increased weight in cases arising under the safety provisions of the Act as well as in breach of contract cases.

C. The Third Factor — Whether a Federal Right of Action Would Be Consistent With the Underlying Purposes of the Legislative Scheme

According to Cort, no indication in the legislative history of congressional intent to grant or withhold a private remedy for violations of a statute is necessary to determine whether the implication of such a remedy would be consistent with the legislative scheme.69 Rather, the force of the third factor delineated by the Supreme Court depends on such considerations as whether the remedy would further the purpose of the statute in question,70 whether existing remedies are adequate to enforce the federal interest involved,71 and whether the remedy to be implied would conflict with the statutory scheme.72 The application of these considerations to the various types of cases arising under the

69. 422 U.S. at 82.
70. See Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 337 (3d Cir. 1975). It could in fact be argued that two recent Supreme Court cases have modified the third Cort factor to mean that a private right of action, “should not be implied where it is ‘unnecessary to ensure the fulfillment of Congress’ purposes’ in adopting the Act.” See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477 (1977) quoting Piper v. Christie-Craft Industries, Inc., 430 U.S. 1, 41 (1977). For a specific application of these cases to a provision of the federal Aviation Act, see Bratton v. Shiffrin, 440 F. Supp. 1257, 1264 (N.D. Ill. 1977), in which the court stated:

Where a government agency can provide private parties with the relief necessary to effectuate the congressional purposes, where there is no express provision for a private remedy and the legislative history is bereft of any indication that such a remedy should be implied, courts should be hesitant to add to the burden of the judicial system. Particularly in a case such as this where the C.A.B. has filed an action against the defendants to enjoin further violations of the Act and recover the deposits made by the private plaintiffs, it is unnecessary to imply a private remedy to protect the interests of the plaintiff class.
Federal Aviation Act provides a fair prediction as to whether a private remedy will be implied.\textsuperscript{73}

For example, in the discrimination and bumping cases, the federal cause of action is necessary to afford the plaintiff the opportunity to redress the harm he has suffered, which may not be directly cognizable under the common law.\textsuperscript{74} On the other hand, claims for damages ancillary to the denial of access to the airspace, being somewhat removed from the major aims of the Act, do not require vindication as a matter of federal law.\textsuperscript{75}

Similarly, in the breach of contract and overcharging cases, the courts have noted that while the Act does not encourage airlines not to perform services as contracted, “protecting passengers from inadequate services would in no way foster the statutory goal” of insuring free access to airspace.\textsuperscript{76} This conclusion seems particularly correct because the CAB has the duty to administer the Act and can monitor compliance with tariffs.\textsuperscript{77}

As for the cases arising under the safety provisions of the Act, several courts have recognized that the federal government’s air safety program would not be improved by the implication of the federal tort remedy.\textsuperscript{78} As noted in \textit{Moungey v. Brandt}:\textsuperscript{79}

The national interest in safety in civil aeronautics is adequately protected by the network of statutory and administrative procedures and sanctions expressly created by the Federal Aviation Program, as outlined above. No persuasive reason suggests itself why the efficacy of the Program need be

\textsuperscript{73} Of course, some of these same considerations may help to indicate explicit legislative intent, which is often dispositive of the ultimate question whether or not to imply the federal remedy. \textit{See, e.g.}, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 421 (1975); National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers, 414 U.S. 453, 464, \textit{rehearing denied}, 415 U.S. 952 (1974).

\textsuperscript{74} \textit{See} Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 338 (3d Cir. 1975).


\textsuperscript{76} \textit{See, e.g.}, Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 337 (3d Cir. 1975).

\textsuperscript{77} \textit{See note 26 supra}; Wolf v. Trans World Airlines, Inc., 544 F.2d 134, 138 (3d Cir. 1976), \textit{cert. denied}, 430 U.S. 915 (1977). Even where the statutory goal is to protect passengers from financially irresponsible tour operators, as is the case with §401(n)(2) of the Act, the fact that “[t]he C.A.B. has explicit authority to enforce the statute and regulations at issue, and to seek an injunction against any further violations . . . [and to] obtain an order for refunds of the plaintiffs’ tour deposits” was sufficient reason to refuse to imply a private federal remedy in the plaintiffs’ favor. \textit{Bratton v. Shiffrin}, 440 F. Supp. 1257, 1264 (N.D. Ill. 1977). \textit{See note 83 infra}.


\textsuperscript{79} 250 F. Supp. 445 (W.D. Wis. 1966).
fortified by the creation, by implication, of a civil remedy in the federal court.80

It is clear that the Administrator of the Federal Aviation Program has great authority to regulate the use of all navigable airspace in the United States,81 and administrative remedies should suffice.82 In fact, it could be argued that a private remedy would interfere with the legislative intent to centralize in a single agency the authority to promulgate and enforce rules relating to the safe use of airspace83 and thus is inconsistent with the legislative scheme.

D. The Fourth Factor — Whether the Cause of Action Is One Traditionally Relegated to State Law

In the eyes of many courts, the fourth Cort factor is especially significant because of the philosophical underpinnings of our system of federalism, which presupposes that those matters that are local in nature should be dealt with by local authorities. The United States Court of Appeals for the Third Circuit has stated: “Only where there is some countervailing national interest should the federal courts imply a federal private remedy when an adequate state remedy already exists.”84 The difficulty of satisfying this test and the degree to which this factor overlaps with the other Cort factors are evident.

Consider, for example, the discrimination and bumping cases brought under the Federal Aviation Act, which arise out of a

80. Id. at 451.
81. See United States v. Christensen, 419 F.2d 1401, 1404 (9th Cir. 1969); Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960); Lee v. United States, 261 F. Supp. 252, 257 (C.D. Cal. 1966); 49 U.S.C. §§ 1471, 1487(a) (1970 & Supp. V 1975); note 12 supra. The Committee on Interstate and Foreign Commerce recommended that the Administrator be given plenary power to:
(a) Allocate airspace and control its use by both civil and military aircraft;
(b) Make and enforce air traffic rules for both civil and military aircraft;
(c) Develop and operate a common system of air navigation facilities for both civil and military aircraft;
(d) Make and enforce safety regulations governing the design and operation of civil aircraft.
82. See Luedtke v. County of Milwaukee, 521 F.2d 387, 391 (7th Cir. 1975); Eisman v. Pan Am. World Airlines, Inc., 336 F. Supp. 543, 554 (E.D. Pa. 1971). For example, the Act provides that an individual may file a complaint with the FAA. See 49 U.S.C. § 1482(a) (1970). Nor do practical limitations such as an agency’s lack of resources to take action on every complaint filed outweigh the fact that the agency has the power to act to enforce the law when it deems this to be necessary. See Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 (1977); Bratton v. Shiffrin, 440 F. Supp. 1257, 1264 (N.D. Ill. 1977).
federally created right often lacking a directly comparable state cause of action.85 State remedies appear to be inadequate, especially in the discrimination field, and a private right of action has been implied under the federal statute.86 However, the federal remedy exists only where it is necessary to vindicate federal rights;87 thus, claims like Mrs. Mason's in Mason v. Belieu, "which lie outside the major aim of the Act,"88 are relegated to other remedies, whether expressly provided for in the statute or arising under traditional common law principles.89

In contrast, the existence of obvious remedies for breach of contract and overcharging claims has been a major factor in the court decisions refusing to imply a federal remedy.90 The same argument applies to cases alleging violation of the safety provisions of the Act and a number of courts have reacted accordingly.91 The words of the Third Circuit in Rauch are particularly telling:

[Plaintiffs'] claim . . . to recover . . . the cost of repairing their altimeter . . . is the type of situation with which the common and statutory law of the states deals every day. Whether their claim is based on liability for breach of a warranty of merchantability and fitness or on negligence or strict liability in tort, all of which they allege, the state law has been traditionally available to an injured party to obtain a remedy. In such a controversy as this the fact that it was the Administrator's regulations which, in the interest of air safety, prohibited the use of the altimeter unless properly repaired is peripheral and not a basic element of the claim. Accordingly this fact does not transform what is an ordinary claim to recover the cost of repairs made necessary by the defendants' derelictions, whether contractual or tortious, into some species of suit to enforce air safety regulations. It is clear to us that application of the fourth Cort v. Ash factor furnishes no support for the plaintiffs' position.92

86. See id. See also Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 338 (3d Cir. 1975).
88. 543 F.2d at 221. See notes 23-25 and accompanying text supra.
89. 543 F.2d at 221.
92. 548 F.2d at 459-60 (footnotes omitted).
In short, the question is simply the degree of federal interest in the matter, which depends on the extent to which the matter is "essentially of local concern." The federal courts are courts of limited jurisdiction and are already overloaded; certainly there appears to be no good reason to add whole areas to their jurisdiction without carefully considering the need to do so. Under the circumstances, the importance of the fourth Cort factor should not be underestimated.

III. APPLYING THE CORT CRITERIA IN THE FUTURE:
THERE IS A BETTER WAY

This short summary of the existing Federal Aviation Act cases suggests that no problem arises in applying the Cort criteria when all or most of the factors point, to the degree that they point at all, in the same direction. Thus, under an act whose legislative history is almost devoid of any indication of congressional intent, the focus has been largely on the first and fourth of the factors. In the discrimination and bumping cases, these factors combine to call for a federal remedy; in the nonaccident safety area they combine to call for its denial. Even in the area of incidental discomfort from the violation of tariff regulations, where state remedies may or may not be adequate, the statutory provisions relied upon by the plaintiffs do not seem to have been enacted for their special benefit, and, moreover, a private federal remedy may well be inconsistent with the statute's regulatory scheme.

However, in the area of the rights of actual accident victims, there is a direct conflict between the clear availability of adequate

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99. See Wolf v. Trans World Airlines, Inc., 544 F.2d 134 (3d Cir. 1976), cert. denied, 430 U.S. 915 (1977); Polansky v. Trans World Airlines, Inc., 523 F.2d 332 (3d Cir. 1975). In both Wolf and Polansky, the Third Circuit concluded that the implication of a private remedy would not be consistent with the Act's policy of promoting efficient air service at reasonable charges without unjust discrimination, undue preferences, or unfair competition. 544 F.2d at 138; 523 F.2d at 336-37.
state remedies and the equally clear — at least to most courts — intent of Congress to benefit especially the passengers and crew who would be endangered by the violation of air safety regulations. The result, not unpredictably, has been an enduring conflict in the case holdings.

The application of the four Cort factors has resulted in confusion in the difficult cases partially because the implication of a cause of action from a silent or ambiguous federal statute is not a question of “discovering” congressional intent any more than the development of the common law was a matter of “discovering” the true meaning of existing precedent. Moreover, whereas the second and third Cort factors are addressed solely to the question of whether Congress intended to create a private cause of action, the first and fourth factors help to answer not only that question but the related questions of whether a court should, as a matter of policy, imply a private cause of action and for whom. Unfortunately, since all of these questions must be answered by the application of one or more of the Cort factors, the federal courts have failed to recognize the existence of separate questions and have tended simply to apply the Cort factors without further analysis.

Accordingly, it is suggested that in order to avoid confusion in applying the Cort factors, a court should address itself separately to each of three questions. The first is the traditional question of whether Congress intended to create a federal cause of action. The second question — which courts are loathe to admit asking — is whether, assuming apparent congressional neutrality on the first question, the court itself should imply a federal cause of action. Finally, if either of the first two questions is answered in the affirmative, the court must determine whether the particular plaintiff involved falls within the class of persons entitled to benefit from the implied cause of action.

A. Did Congress Intend to Create a Federal Cause of Action?

This is the question, explicitly faced in Cort, for which the Supreme Court formulated its four-factor test. It is most akin to the second Cort factor, although the other three factors may be

100. See note 87 and accompanying text supra.
101. See notes 39-40 and accompanying text supra.
102. See note 41 and accompanying text supra.
103. See text accompanying note 9 supra.
helpful in answering it, particularly when the legislative history is ambiguous.

To a court seeking to determine the existence of a private cause of action, an actual expression of congressional intent is crucial. Plainly, if Congress stated in explicit terms that a federal remedy was created or denied, the federal court would need to go no further in its investigation. Similarly, if the legislative history makes it clear that Congress intended to create or deny a federal remedy, this should come close to answering the question; it is only because legislative history seldom speaks with the clarity of statutory language that the court should look to the other three Cort factors to corroborate its judgment.

On the other hand, it is difficult for any court to hold that Congress specifically intended to create a private cause of action on the basis of a statute whose legislative history does not indicate that the issue was ever considered by that body and whose statutory language makes no reference to a private remedy. Accordingly, it is suggested that, to the degree that a court attributes to congressional intention the creation of an implied federal right of action, there should be at least enough legislative history to indicate that Congress was aware of the possibility that it was creating a cause of action and did not act to negate that possibility. Thereafter, the considerations involved in the first, third and fourth Cort factors are likely to be helpful in determining whether or not it is fair to impute to the Congress the intention of creating an implied federal cause of action.

B. If It Is Impossible to Determine Whether Congress Intended to Create an Implied Federal Cause of Action, Should the Federal Court Nevertheless Hold That Such a Cause of Action Exists?

This question will normally be asked when there is little or no evidence that Congress actually considered whether it was creating an implied federal cause of action. The question tends to relate most closely to the fourth Cort factor, although each of the other factors is likely to have some bearing on its answer.

It could be argued that a sufficient answer to this question is implicit from the facts that the federal courts are overburdened with litigation and that their jurisdiction is limited to that created by statute, and that there should be a universal rule against the

creation of implied causes of action absent evidence of congressional intent.\textsuperscript{105}

We suggest, however, that there are occasions on which it is appropriate for the federal courts to create a federal common law right of action even when it is hard to say that Congress intended this result. But these occasions are rare and limited in number, and we submit that they arise only when there is a clear federal right to be vindicated and an absence of any adequate state cause of action to vindicate that right.\textsuperscript{106} In other words, the court should create a federal common law right of action only when the second and third \textit{Cort} factors are neutral and the first and fourth factors plainly point to the creation of such a right.

\textbf{C. Assuming the Existence of an Implied Federal Cause of Action, Does the Plaintiff Fall Within the Class of Persons Entitled to Benefit From It?}

This consideration is largely independent of those involved in the first and second questions. Nevertheless, an affirmative answer to it is vital to the existence of an implied federal cause of action. In answering this question, the analysis of the court should normally center on a reevaluation of the considerations involved in the first \textit{Cort} factor to the exclusion of the other three.\textsuperscript{107}

\textbf{IV. Conclusion}

We believe that the method of analysis described above was foreshadowed by the Third Circuit's decision in \textit{Rauch}. The \textit{Rauch} court discussed only the first and fourth \textit{Cort} factors in satisfying itself that there was no implied federal cause of action for the particular plaintiffs involved in that case,\textsuperscript{108} and it did so in terms more applicable to the second and third questions posed above than

\textsuperscript{105} But see \textit{Restatement (Second) of Torts}, §874A, Comment h at 79–80 (Tent. Draft No. 22, 1976).

\textsuperscript{106} Indeed, under these circumstances, the federal court may well conclude that whether or not Congress considered the existence of a private remedy, that remedy is needed to carry out the statutory purpose. This approach is similar to the position adopted in the \textit{Restatement of Torts (Second)}, which recognized that in implying a tort remedy under a statute, a court often is exercising its discretion and cautioned against hiding behind the "smoke screen" of legislative intent. \textit{Restatement (Second) of Torts}, §874A, Comment e at 74–75 (Tent. Draft No. 22, 1976).


\textsuperscript{108} 548 F.2d at 456–60.
Thus, the analysis of the first *Cort* factor plainly centered not on the question of whether Congress had created a federal right to safe air passage in favor of some plaintiff, but of whether, assuming such a right, the plaintiff aircraft owners and operators were the persons for whose benefit that right had been created. At the same time, the analysis of the fourth *Cort* factor stressed the availability of simple, commonly used state law alternatives to a federal cause of action in terms which indicated that the court found it unnecessary to opt for the creation of a new cause of action.

We hope that the analytical framework suggested in this article may help to clarify the application of the *Cort* criteria, resulting in better reasoned and more consistent determinations regarding the availability of an implied federal cause of action through a recognition of the separate questions which may be involved in the application of the *Cort* factors to any particular case.

109. *Id.* Indeed, the discussion of the first *Cort* factor concluded with a determination not that there is no class subject to the special protection of the Act, but that the special class is "the occupants of aircraft in flight" rather than the plaintiff "aircraft owners." See *Rauch* at 459. Similarly, if less explicitly, the discussion of the fourth *Cort* factor addressed only the need for a private federal cause of action rather than the intention of Congress to create such a cause of action. See *Rauch* at 459-60.

110. *Id.* at 457-58 n.10.

111. *Id.* at 457-58.

112. *Id.* at 459-60. As a practical matter, having determined that the first and fourth *Cort* factors so plainly pointed to the absence of a federal cause of action, the *Rauch* court found it unnecessary to consider the other two factors concerning legislative intent and consistency with the legislative scheme. *Id.* at 460. As the textual analysis above suggests, the determination that the plaintiffs in *Rauch* were barred by the first factor should have been dispositive. Had the court made a contrary determination that the plaintiffs before it were within the protected class, the analysis of whether an implied federal cause of action had been created should have begun with the question of legislative intent rather than that of the availability of adequate state remedies. *But see* text accompanying notes 63-65 & 81, *infra,* indicating that there is little if any basis for determining that Congress intended to create a private cause of action to enforce the safety provisions of the Act.