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ARTICLES

IMPLIED PRIVATE ACTIONS UNDER SEC RULES 14a-9 AND 10b-5: THE IMPACT OF VIRGINIA BANKSHARES, INC. v. SANDBERG

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I. INTRODUCTION

Congress has provided expressly for private causes of action for certain violations of the Securities Act of 19331 (the "‘33 Act") and the Securities and Exchange Act of 19342 (the "‘34 Act"). For example, Section 11 of the ‘33 Act3 deals with civil liabilities for false registration statements, and Section 18 of the ‘34 Act4 deals with liability for misleading statements in certain items filed with the Securities and Exchange Commission (SEC). In addition, courts have recognized implied private causes of action with respect to certain securities law violations even though express statutory language authorizing private actions was lacking. For example, both Section 14(a) of the ‘34 Act,5 as implemented by SEC Rule 14a-9,6 and Section 10(b) of the ‘34 Act,7 as implemented by SEC Rule 10b-5,8 have been the bases of implied private actions.9 Whether to imply a private cause of ac-

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tion under a particular statutory provision has been a subject of considerable controversy among the courts.\textsuperscript{10}

Even after the basic decision to imply a private cause of action under a particular statutory section is made, difficult questions as to the elements of the implied cause of action remain. In *Virginia Bankshares, Inc. v. Sandberg*\textsuperscript{11} ("Sandberg") the Supreme Court dealt specifically with the elements of an implied private cause of action for misleading proxy statements under Section 14(a) of the '34 Act as implemented by SEC Rule 14a-9. In particular, *Sandberg* addressed questions regarding the actionability of certain proxy statements involving indefinite, unverifiable, and conclusory terms, and whether misleading proxy statements can legally be considered the cause of damages to frozen-out and underpaid minority shareholders who lack the votes to defeat a merger proposal. This Article analyzes and evaluates the views of the Court in *Sandberg*, but it goes beyond Section 14(a) to consider the impact of *Sandberg* on implied private causes of action under Section 10(b) of the '34 Act as implemented by SEC Rule 10b-5. In addition, it considers the impact of recent legislation and legislative history on the interpretive perspective of courts with regard to implied private actions under Sections 10(b) and 14(a).

II. *Sandberg*: Facts and Proceedings

In *Sandberg*, Virginia Bankshares, Inc. (VBI), a wholly owned subsidiary of First American Bankshares, Inc. (FABI), owned eighty-five percent of the First American Bank of Virginia (the "Bank") with the remaining fifteen percent in the hands of about 2000 minority shareholders. FABI initiated a merger of the Bank into VBI. An investment banking firm was hired by FABI to give an opinion on the appropriate price for Bank shares of minority shareholders who would lose their interests because of the merger. The investment banking firm opined that $42 a share would be a fair price. The executive committee of the Bank approved the merger at that price, and full board approval followed.\textsuperscript{12} In soliciting proxy votes in favor of the merger proposal, the Bank's directors stated that "they had approved the plan because of its opportunity for the minority shareholders to achieve a 'high' value, which they elsewhere described as a 'fair' price, for their stock."\textsuperscript{13}

\textsuperscript{10} There are also cases that do not recognize implied private actions. See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (rejecting an implied action under Section 17(a) of the '34 Act, 15 U.S.C. § 78q(a)).
\textsuperscript{11} 111 S. Ct. 2749 (1991).
\textsuperscript{12} *Id.* at 2755-56.
\textsuperscript{13} *Id.* at 2756.
After approval of the merger, Sandberg, a minority shareholder who had not given the requested proxy, sought damages in federal court from FABI and the Bank’s directors. Sandberg charged that proxies had been solicited in violation of Section 14(a) of the ’34 Act and SEC Rule 14a-9. She alleged, “among other things, that the directors had not believed that the price offered was high or that the terms of the merger were fair, but had recommended the merger only because they believed they had no alternative if they wished to remain on the board.” Section 14(a) makes unlawful certain proxy solicitations that contravene SEC rules and regulations. SEC Rule 14a-9(a) provides:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

The jury was instructed that it could find in favor of Sandberg “without a showing of her own reliance on the alleged misstatements, so long as they were material and the proxy solicitation was an ‘essential link’ in the merger process.” The jury found for Sandberg based on the violation of Rule 14a-9 by all defendants and awarded $18 a share, having found that Sandberg would have received $60 a share rather than $42 per share if there had been an adequate stock evaluation. The court of appeals reversed the district court’s refusal to certify a class of all minority shareholders in

14. Id. Sandberg also charged breach of fiduciary duties owed to minority shareholders under state law. Id.
15. Section 14(a) provides:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in 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, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

17. Sandberg, 111 S. Ct. at 2756.
18. Id.
19. Id.
Sandberg’s action and ruled that there was liability to all of the Bank’s former minority shareholders $18 a share. The court of appeals affirmed the holding that certain statements in the proxy solicitation were materially misleading for purposes of Rule 14a-9, “and that respondents could maintain their action even though their votes had not been needed to effectuate the merger.” The Supreme Court reversed the court of appeals. In doing so, the Court addressed “whether causation of damages compensable under § 14(a) can be shown by a member of a class of minority shareholders whose votes are not required by law or corporate bylaw to authorize the corporate action subject to the proxy solicitation.” The Court held that the plaintiffs had failed “to demonstrate the equitable basis required to extend the § 14(a) private action to such shareholders when any indication of congressional intent to do so is lacking.” As will be discussed, Sandberg did not indicate that such shareholders cannot in any circumstances show a basis for relief under Section 14(a). Indeed, the decision clearly leaves open certain possibilities for relief. With respect to another question, “whether a statement couched in conclusory or qualitative terms purporting to explain directors’ reasons for recommending certain corporate action can be materially misleading within the meaning of Rule 14a-9,” the Court held “that knowingly false statements of reasons may be actionable even though conclusory in form.”

III. ACTIONABILITY OF MISREPRESENTATIONS OF OPINION OR BELIEF UNDER RULE 14A-9: THE SUPREME COURT’S VIEW

A key statement found by the court of appeals to have been materially misleading in violation of Section 14(a) “was that ‘The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank’s public shareholders to achieve a high value for their shares.’” The defendants argued “that statements of opinion or belief incorporating indefinite and unverifiable expressions cannot be actionable as misstatements of material fact within the meaning of Rule 14a-9.”

A number of points should be considered with respect to the Supreme Court’s analysis of that argument. The first point to consider is the mean-

20. Id. at 2756 n.4.
21. Id. at 2756.
22. Id. at 2755.
23. Id.
24. Id.
25. Id.
26. Id. at 2756-57.
27. Id. at 2757.
ing of the jury verdict. The Court interpreted the “jury verdict as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed.”

This interpretation enabled the Court to avoid deciding whether scienter was necessary for liability under Section 14(a).

The second issue to consider is the materiality of the directors' statements. The Court cited *TSC Industries, Inc. v. Northway, Inc.*, which held that a fact is material “if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” The Court opined that a statement of belief by corporate directors about a recommended course of action or an explanation of their reasons for recommending it can be of such importance. The Court reasoned that shareholders know that directors usually have more knowledge and expertise than the normal investor and that under state law directors are customarily obliged to exercise their judgment in the shareholders' interest.

The third consideration is public policy. Notwithstanding the Court's assumption that the statements were material, a question remained as to whether such statements fall within the strictures of Rule 14a-9. The Court rejected the argument, based on *Blue Chip Stamps v. Manor Drug Stores*, that sound policy grounds should place the statements outside of Rule 14a-9. In *Blue Chip*, the Supreme Court held that persons suing on an implied private cause of action for violation of SEC Rule 10b-5 must be buyers or sellers of securities as opposed to those who rely on deception and take no action either to sell or to buy. The Court explained that allowing nonsellers or nonbuyers to recover would increase the risk of nuisance litigation resting on a plaintiff's subjective hypothesis about the number of shares he would have sold or purchased. In *Sandberg*, the Court indicated that the *Blue Chip* decision “deflected the threat of vexatious litigation over 'many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony.'”

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28. *Id.*
29. *Id.* at 2757 n.5.
32. *Id.*
33. *Id.*
34. *Id.*
36. *Id.* at 734.
37. *Id.* at 734-35.
The Court did not see the same dangers in *Sandberg* from attacks on the truth of directors' statements of reasons or beliefs. It is important to understand that the Court saw such statements as factual in two senses: "as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed."\(^{39}\) The Court did not believe that proof or disproof of such statements in either sense implicated the concerns expressed in *Blue Chip*.\(^{40}\) The Court explained that the root of concern in *Blue Chip* "was a plaintiff's capacity to manufacture claims of hypothetical action, unconstrained by independent evidence,"\(^{41}\) whereas the Court felt that "[r]easons for directors' recommendations or statements of belief are, in contrast, characteristically matters of corporate record subject to documentation, to be supported or attacked by evidence of historical fact outside a plaintiff's control."\(^{42}\) As examples of such evidence, the Court pointed to corporate minutes, other statements of the directors, and circumstantial evidence bearing on the facts underlying the reasons claimed and the honesty of the statement that such reasons are the basis for a recommendation or other action, especially where reasons or beliefs involve money valuations.\(^{43}\)

The fourth point to consider is the use of conclusory, indefinite, and unverifiable terms. Although the term "high value," as used in the quoted statement, is indefinite and in a sense unverifiable, as is the term "fair," the use of such terms is not immune from liability: "[S]uch conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading."\(^{44}\) The Court's position is significant in the protection it provides to shareholders against the kinds of statements at issue in *Sandberg*.

The fifth consideration is provable facts about conclusory terms. The Court pointed to provable facts about assets and levels of operation regarding the issue of whether $42 was "high" and the proposal "fair" when assessed under recognized valuation methods.\(^{45}\) According to the Court, there was evidence from the plaintiffs bearing upon the $42 price described in the proxy statement as offering a premium over book value and market price: (1) a calculation of the book figure based on the appreciation of real

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39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 2759.
estate holdings (which eliminated the premium);46 (2) evidence that the market was closed, thin, and dominated by FABI information omitted from the proxy statement;47 and (3) evidence of another fact not disclosed, that the going concern value of the Bank exceeded $60 per share.48 Thus, the Court held:

However conclusory the directors' statement may have been, then, it was open to attack by garden-variety evidence, subject neither to a plaintiff's control nor ready manufacture, and there was no undue risk of open-ended liability or uncontrollable litigation in allowing respondents the opportunity for recovery on the allegation that it was misleading to call $42 "high."49

Finally, one must consider the dual aspects of misleading statements. In allowing a cause of action under Section 14(a), the Court identified two misleading aspects of the statement under consideration: First, the statement misstated the speaker's reasons.50 Second, it misled "about the stated subject matter (e.g., the value of the shares)."51 The Court clearly was against recognizing "liability on mere disbelief or undisclosed motive without any demonstration that the proxy statement was false or misleading about its subject"52 because such recognition would confine Section 14(a) litigation solely to "the 'impurities' of a director's 'unclean heart.'"53 The Court believed that if liability rested on such a psychological fact, the temptation to base a Section 14(a) action on psychological inquiry would invite the strike suits and attrition by discovery that Blue Chip sought to discourage.54 Thus, the Court held that "disbelief or undisclosed motivation, standing alone, [is] insufficient to satisfy the element of fact that must be established under § 14(a)."55

Several other points involving the directors' controversial statements warrant attention. The first is neutralization. In Sandberg, the defendants argued that publishing accurate facts in a proxy statement can render a misleading proposition too unimportant to serve as a ground for liability.56 The Court agreed, but stated that "not every mixture with the true will

46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id. at 2760.
53. Id. (quoting Stedman v. Storer, 308 F. Supp. 881, 887 (S.D.N.Y. 1969)).
54. Id.
55. Id.
56. Id.
neutralize the deceptive.”

In the instant case, the Court found the jury was not compelled to find such a neutralization.

The second point is federalism. The Court rejected the argument that recovery for a misleading statement regarding fairness is tantamount to assuming federal authority to bar corporate transactions thought to be unfair to a group of shareholders. The Court noted its statement in Santa Fe Industries, Inc. v. Green that “except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.” The Court pointed out that “[a]lthough a corporate transaction’s ‘fairness’ is not, as such, a federal concern, a proxy statement’s claim of fairness presupposes a factual integrity that federal law is expressly concerned to preserve.”

The third point involving the director’s controversial statements is “self accusation.” Petitioners complained that the Court was effectively requiring them to accuse themselves of a breach of fiduciary duty. The Court responded that “liability for misleading others does not raise a duty of self-accusation; it enforces a duty to refrain from misleading.”

The Court was careful to point out that it did not decide whether directors were obligated to state the reasons for supporting the merger.

IV. THE CAUSATION ISSUE—THE SUPREME COURT’S VIEW

Another issue in Sandberg was whether causation of damages may be shown in an implied private cause of action for misleading proxy statements under Section 14(a) by a member of a class of minority shareholders whose votes “are not required by law or corporate bylaw to authorize the transaction giving rise to the claim.” The Court reviewed the law by referring to J.I. Case Co. v. Borak, which held that an implied private cause of action was available under Section 14(a), and by referring to Mills v. Electric Auto-Lite Co., which addressed whether plaintiffs needed to prove that the defect in proxy solicitation had a “decisive effect on the voting.”

57. Id.
58. Id. at 2761.
59. Id. at 2758 n.6.
60. 430 U.S. 462 (1977).
61. Sandberg, 111 S. Ct. at 2758 n.6 (quoting Santa Fe, 430 U.S. at 479).
62. Id.
63. Id. at 2761 n.7.
64. Id.
65. Id. at 2761 (footnote omitted).
68. Sandberg, 111 S. Ct. at 2762 (quoting Mills, 396 U.S. at 385).
pointed out that in *Mills* the merger proposal required a two-thirds vote, and that the majority stockholders controlled just over half of the shares. The Court stated:

The *Mills* Court avoided the evidentiary morass that would have followed from requiring individualized proof that enough minority shareholders had relied upon the misstatements to swing the vote. Instead, it held that causation of damages by a material proxy misstatement could be established by showing that minority proxies necessary and sufficient to authorize the corporate acts had been given in accordance with the tenor of the solicitation, and the Court described such a causal relationship by calling the proxy solicitation an "essential link in the accomplishment of the transaction."\(^{69}\)

The Court recalled that *Mills* left open the question of whether shareholders whose votes are not required by law or bylaw to authorize the proposed action could demonstrate causation,\(^{70}\) a question confronted in *Sandberg*.

In *Sandberg*, the minority shareholders offered two theories to deal with the "essential link" question under the *Mills* causation test. First, the essential link existed "because VBI and FABI would have been unwilling to proceed with the merger without the approval manifested by the minority shareholders' proxies, which would not have been obtained without the solicitation's express misstatements and misleading omissions."\(^{71}\) The Court further explained:

On this reasoning, the causal connection would depend on a desire to avoid bad shareholder or public relations, and the essential character of the causal link would stem not from the enforceable terms of the parties' corporate relationship, but from one party's apprehension of the ill will of the other.\(^{72}\)

Second, the proxy statement was an essential link because it was the means to satisfy a state statute requiring minority shareholder approval, which would save the merger from voidability stemming from a conflict of interest on the part of a Bank director who had voted for the merger while serving as one of FABI's directors.\(^{73}\) The Court explained that the statute provided that "minority approval after disclosure of the material facts about the transaction and the director's interest was one of three avenues to insulate the merger from later attack for conflict."\(^{74}\) The causation argu-

\(^{69}\) *Id.*

\(^{70}\) *Id.* (quoting *Mills*, 396 U.S. at 385 n.7).

\(^{71}\) *Id.*

\(^{72}\) *Id.*

\(^{73}\) *Id.*

\(^{74}\) *Id.* at 2762-63.
ment would be based on using the proxy statement to obtain votes to bar a minority shareholder from proceedings to void the merger.\textsuperscript{75}

In analyzing the Court’s decisions regarding the theories advanced by plaintiffs, it is important to consider the perspective of the Court. First, neither theory presents the solicitation as essential in the \textit{Mills} causal sense, where solicitation links the directors’ proposal with the votes required to authorize the transaction. Thus, the Court took the position that either theory would extend the scope of \textit{Borak} actions beyond \textit{Mills} and expand the class of plaintiffs who could bring suit under Section 14(a). Second, and of great significance, the Court pointed to the rule that emerged subsequent to \textit{Borak} and \textit{Mills}, “that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy,”\textsuperscript{76} and that “[f]rom this the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended.”\textsuperscript{77} The Court cited \textit{Touche Ross & Co. v. Redington},\textsuperscript{78} in which this intent was given primary consideration in deciding whether to recognize a private remedy in a case involving Section 17(a)\textsuperscript{79} of the ’34 Act. In that case, the Court rejected the implication of such a remedy.\textsuperscript{80} Third, the Court could “find no manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as respondents’ theory of causation would entail.”\textsuperscript{81} The Court could find little in the text or legislative history to help in understanding the intended scope of the private right of action, and indicated it would have trouble inferring congressional dependence on implied private actions with respect to Section 14(a) in light of express actions provided by Congress in other sections of the statute.\textsuperscript{82} Fourth, notwithstanding the Court’s difficulty with respect to implying a private cause of action, it expressly refrained from questioning the \textit{Borak} and \textit{Mills} holdings.\textsuperscript{83} The Court instead dealt

\begin{itemize}
  \item \textsuperscript{75} \textit{Id.} at 2763.
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{Id.}
  \item \textsuperscript{78} 442 U.S. 560, 575 (1979).
  \item \textsuperscript{79} 15 U.S.C. § 78q(a) (1988).
  \item \textsuperscript{80} \textit{Sandberg}, 111 S. Ct. at 2764.
  \item \textsuperscript{81} \textit{Id.} at 2763.
  \item \textsuperscript{82} \textit{Id.} at 2764.
  \item \textsuperscript{83} \textit{Id.} at 2764 n.11. The Court said:
    The object of our enquiry does not extend further to question the holding of either \textit{[Borak]} or \textit{[Mills]} at this date, any more than we have done so in the past. Our point is simply to recognize the hurdle facing any litigant who urges us to enlarge the scope of the action beyond the point reached in \textit{Mills}.
  \item \textsuperscript{84} \textit{Id.} (citation omitted). It has been argued that the Court’s position does leave open the ultimate possibility of the future elimination by the Court of the implied cause of action under Rule 14a-9.
\end{itemize}
with whether the action should be expanded by acceptance of causation theories as set forth by plaintiffs. In considering that question, the Court recognized that while congressional silence is a serious obstacle to expanding Borak causation, it is not "a necessarily insurmountable barrier." The Court looked to Blue Chip regarding the expansion issue because that case also involved an effort to expand the scope of an action implied without conclusive congressional guidance. The Court pointed to the Blue Chip case, stating:

"There, we accepted the proposition that where a legal structure of private statutory rights has developed without clear indications of congressional intent, the contours of that structure need not be frozen absolutely when the result would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized." Evidently, the Court viewed the Sandberg plaintiffs' quest for a private remedy, which would place them on the same footing as shareholders with votes necessary for initial corporate action, as requiring an examination of policy reasons discussed in Blue Chip. In Blue Chip, plaintiffs who were neither buyers nor sellers of securities sought the right to sue in an implied private cause of action under Rule 10b-5, as buyers or sellers of securities could do. This view may sound to some extent like an effort to equate Sandberg and Blue Chip as standing cases. Although analogizing Sandberg to Blue Chip may be useful and appropriate for some purposes, doctrinal differences should be borne in mind to avoid confusion. In Sandberg, a restrictive theory of causation was used to promote policy objectives by limiting the implied action under Rule 14a-9. However, in Blue Chip, a restrictive theory of plaintiffs' standing to sue under Rule 10b-5 was employed by the Court to promote policy objectives. Testimony before a Senate Subcommittee with reference to a proposed statute of limitations for implied Rule 10b-5 actions by SEC Chairman Richard Breeden points to a variety of restrictive doctrines:

"Courts apply many legal doctrines that are more effective than statutes of limitation in screening out nonmeritorious claims, and which ensure that investors recover only reasonable damages under the federal securities laws. For example, courts have long read a pur-
chaser/seller requirement into Rule 10b-5. In addition, in the past decade, notions of causation have been used to ensure a nexus between alleged misrepresentations and damages sought. Many courts have held that a plaintiff is not entitled to recovery unless he can show both that (1) but for the fraud he would not have entered into the transaction, and (2) the losses sustained by the plaintiff resulted from the defendant's conduct. Further, a plaintiff in a 10(b) suit must prove scienter, or degree of knowledge greater than mere negligence. In addition, Chairman Breeden referred to Sandberg as a Supreme Court holding "that attenuated causation would not support recovery by a plaintiff for violation of the proxy provisions." In dealing with the first theory that a desire to avoid minority shareholders' ill will should justify recognizing the requisite causality of a proxy statement needed to obtain minority support, the Court referred to the policy analysis of Blue Chip. Recalling Blue Chip's concern about liability turning "on 'hazy' issues inviting self-serving testimony, strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process," the Court found "[t]he same threats of speculative claims and procedural intractability are inherent in respondents' theory of causation linked through the directors' desire for a cosmetic vote." The Court was concerned about dissatisfied minority shareholders alleging that managerial timidity would have doomed corporate action but for the approval induced by a misleading statement, opposing claims of hypothetical diffidence and boldness of directors, and resulting depositions precluding judicial resolution short of trial. The Court said: Reliable evidence would seldom exist. Directors would understand the prudence of making a few statements about plans to proceed even without minority endorsement, and discovery would be a quest for recollections of oral conversations at odds with the official pronouncements, in hopes of finding support for ex post facto guesses about how much heat the directors would have stood in the absence

89. Id. at 17 n.6.
91. Id. at 2765.
92. Id.
93. Id.
of minority approval. The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory of causation that raised such prospects, and we reject this one.94

Finally, the Court addressed whether the causation requirement was satisfied because of the function of the proxy solicitation to obtain minority approval that would preclude a minority suit attacking the merger.95 The Court saw this theory as based on the policy ground that a federal remedy should be provided under Section 14(a) when a false or misleading proxy statement results in a loss under state law of a shareholder plaintiff's state remedy for enforcing a state right.96 Evidently, counsel for the SEC and Federal Deposit Insurance Corporation had suggested that causation be recognized . . . when a minority shareholder has been induced by a misleading proxy statement to forfeit a state-law right to an appraisal remedy by voting to approve a transaction . . ., or when such a shareholder has been deterred from obtaining an order enjoining a damaging transaction by a proxy solicitation that misrepresents the facts on which an injunction could properly have been issued.97

The Court avoided deciding whether Section 14(a) provides a cause of action for lost state remedies by finding no indication in the law or facts that such a loss resulted from the proxy solicitation in this case.98 One of the main reasons for the Court's position was that the Virginia statute bars a shareholder from seeking to avoid a conflict of interest transaction if minority shareholders ratified the transaction after disclosure of the material facts of the transaction and the conflict.99 Thus, according to the Court, if there was inaccurate disclosure of material facts, there was no loss of state remedy.100 Furthermore, the Court noted that it was not claimed that the statement misled respondents into "a false belief that they had no chance to upset the merger, until the time for bringing suit had run out."101 Moreover, the Court pointed out that no state appraisal remedy was affected because there was no such remedy under Virginia law.102

94. Id.
95. Id.
96. Id.
97. Id. at 2765-66 (citation omitted).
98. Id. at 2766.
99. Id.
100. Id.
101. Id.
102. Id. at 2766 n.14.
V. ANALYSIS OF THE SUPREME COURT'S POSITION ON THE ACTIONABILITY OF MISREPRESENTATIONS OF OPINION OR BELIEF UNDER RULE 14A-9

In considering the Court's position in Sandberg with respect to the actionability under Rule 14a-9 of the directors' statements of opinion or belief, it may be helpful to differentiate between two separate elements involved in pursuing a cause of action under that rule: materiality and actionability. As indicated above, in Sandberg, the Court's test for materiality of a fact, as drawn from TSC, is "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." How could a statement of the kind made by the directors in Sandberg be of importance to a reasonable shareholder? As a practical matter, such a statement may be important in other ways than deciding how to vote. For example, such a statement may be important in deciding whether to file suit or publicize the unfairness of the merger in hopes of preventing the merger. Furthermore, such a statement may be important in deciding whether to accept the price offered for shares or to seek an appraisal. Indeed, such a statement may be important in deciding whether to investigate the merits of a merger proposal further, as distinguished from being lulled into the belief that the merger is advantageous and that further investigation is undesirable or unnecessary.

Of course, the Sandberg Court's discussion of materiality spoke in terms of importance in deciding how to vote; the issue of materiality in the context of other decisions was not explicated. The Court's reasons for believing that the controversial statement could be material have already been discussed, as have the Court's reasons for holding the statements actionable under Rule 14a-9, despite policy arguments like those in Blue Chip.

To better understand the Court's ruling with regard to the "actionability" of the controversial statement by the directors and not just its "materiality," assume that the same statement was made about high value and fair price except that the figure offered was $60 per share (which was not only a fair price, but even a high value). The Court took the position that the misrepresentation as to directors' reasons for supporting the merger would not by itself be actionable. The Court did not say that such a misrepresentation would not be material and therefore not actionable. Would such a

105. Sandberg, 111 S. Ct. at 2757 (quoting TSC Indus., Inc., 426 U.S. at 449); see also supra notes 30-31 and accompanying text.
106. See supra text accompanying notes 32-43.
statement have been material on the facts of the Sandberg case? When directors tell voters false reasons for their support of a merger, would that be important to the shareholders who are voting? It may be. The Court explained why directors' views may be important to shareholders by virtue of the directors' knowledge, expertise, and obligation to exercise their judgment in the shareholders' interest. Furthermore, in Mills, a proxy statement was alleged to be misleading because it told shareholders that their board of directors recommended approval of a merger without telling them that all of the directors were nominees of and under the control and domination of the other party to the merger. The omission in Mills is not so different in kind from the misrepresentation as to directors' reasons or beliefs that the Court held in Sandberg would not be actionable without further misinformation. Indeed, in Mills, the Court made clear that it should not be presumed that shareholders would accept any and every fair merger offer put before them; thus, the mere fact that the $60 price would be fair should not put the matter to rest under the Mills approach. The Court pointed out in Mills that "in view of the many other factors that might lead shareholders to prefer their current position to that of owners of a larger, combined enterprise, it is pure conjecture to assume that the fairness of the proposal will always be determinative of their vote." Moreover, when directors lie about their reasons for approving a merger, such a lie could be material not only in arriving at a voting decision but in arriving at various other decisions discussed above.

Since the Court does not say that lack of materiality is the basis of its position, what is the basis? Perhaps the best way to explain the Court's position in Sandberg is that it represents a strict construction of the scope of

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107. In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 n.6 (1970), the Supreme Court discussed the materiality issue as follows:

In this case, where the misleading aspect of the solicitation involved failure to reveal a serious conflict of interest on the part of the directors, the Court of Appeals concluded that the crucial question in determining materiality was "whether the minority shareholders were sufficiently alerted to the board's relationship to their adversary to be on their guard." 403 F. 2d, at 434. An adequate disclosure of this relationship would have warned the stockholders to give more careful scrutiny to the terms of the merger than they might to one recommended by an entirely disinterested board. Thus, the failure to make such a disclosure was found to be a material defect "as a matter of law," thwarting the informed decision at which the statute aims, regardless of whether the terms of the merger were such that a reasonable stockholder would have approved the transaction after more careful analysis.

Id.

108. Mills, 396 U.S. at 382 n.5.

109. Id. Similarly in the Sandberg merger context, it is arguable that there may be a factor or factors that would lead shareholders to prefer the status quo.
the cause of action under Rule 14a-9 and the use of policy considerations to determine that scope. The Court's use of policy reasons leads it to *Blue Chip* for guidance, and it takes the position that liability based on a psychological fact threatens the strike suits and attrition by discovery which *Blue Chip* was trying to prevent. But there is a big difference between the kind of evidence that concerned the Court in *Blue Chip* and the kind of evidence that would be needed to show liability based on the lies of directors about their motivations. In *Blue Chip*, the evidence in question involved the plaintiff's state of mind, a matter about which the plaintiff would be uniquely able to testify and a matter posing special dangers of manufactured claims and special difficulties of rebuttal. The plaintiffs here, however, would be trying to prove the state of the defendant directors' minds when they made a representation—a totally different kind of evidentiary problem. Furthermore, the Court's own words argue against making too much of the *Blue Chip* analogy. The Court stated that “[r]easons for directors' recommendations or statements of belief are . . . characteristically matters of corporate record subject to documentation to be supported or attacked by evidence of historical fact outside a plaintiff's control.”

Justice Scalia's concurring opinion offered still another possible argument against the position of the Court when he stated that the “disallowance . . . of an action for misrepresentation of belief is entirely contrary to the modern law of torts.” He nevertheless stated that he had no problem departing from modern tort law because of his belief that the cause of action under Rule 14a-9 was never enacted by Congress "and hence the more narrow we make it (within the bounds of rationality) the more faithful we are to our task." While such a negative position about the cause of action under Rule 14(a)-9 at this stage in its life seems extreme, it is most revealing about the underlying judicial thought process.

The Court's bottom line is troubling. Directors who owe a fiduciary duty to shareholders and nevertheless lie in a material way about their reasons for approving a merger would not be accountable for such a lie in an implied action under Rule 14a-9 because the implied action under that rule has lost favor with the Court. The importance of the directors' misrepresentations and the weakness of the policy reasons offered for restriction of the implied action, are powerful factors cutting against the Court's narrow interpretation. It seems inappropriate to take an absolute position that directors may brazenly lie in a proxy statement in a material way about their

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111. *Id. at 2767* (Scalia, J., concurring in part and concurring in the judgment).
112. *Id.* (Scalia, J., concurring in part and concurring in the judgment).
reasons for supporting a merger because policy reasons concerning a somewhat questionable or exaggerated fear of charges about director motives outweigh the need to pursue the directors in an implied cause of action under a rule designed to protect against proxy statement lies. Still, as indicated above, the Court’s position regarding the actionability of the statement in *Sandberg* contains some good news for plaintiffs in its rejection of complete immunity for conclusory, indefinite, and unverifiable terms.

In any event, where the Court drew the line of policy was not essential to the outcome of the *Sandberg* because the Court’s conditions as to the actionability of the directors’ statements were met and the materiality criteria satisfied. Thus, causation became the crucial issue. It should also be noted that none of the Justices voted against the positions taken by Justice Souter regarding the actionability or materiality of the directors’ statements.

Furthermore, the Court’s strict construction position relative to the implied private action under Rule 14a-9 may be inappropriate in cases affected by expressions of congressional intent evidenced in 1988 legislation and certain history accompanying it favorable to implied private actions under securities laws. This topic is discussed in Part VII.

VI. ANALYSIS OF THE SUPREME COURT’S POSITION ON THE CAUSATION ISSUE

In analyzing the causation position taken by the Court, it is important to recall *Mills v. Electric Auto-Lite Co.* 113 In that case, the Court held that the shareholder makes a sufficient showing of a causal relationship between the violation and the injury if “he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction.” 114

In addition, as indicated above, the Court in *Mills* specifically left open the question of “whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority.” 115 The Court said, “Even in that situation, if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders, at least one court has held that the proxy solicitation might be sufficiently related to the merger to satisfy the causation requirement.” 116

114. Id. at 385.
115. Id. at 385 n.7.
116. Id.
Neither Mills nor Sandberg indicates that the essential link test is the exclusive test to be applied in proxy cases. Since a proxy statement may be material to shareholders, not only for voting decisions but also for other decisions, trying to fit all causation problems under an essential link test may prove inappropriate in the event nonvoting decisions are allowed to be the basis of implied actions. In Sandberg, the Court found it unnecessary to decide whether causation could be predicated on misrepresentations material to shareholder decisions to bring suits against mergers or to seek appraisals.

Before discussing various causation possibilities in Rule 14a-9 implied action cases, it is convenient to note two general points of criticism of the Court's position in Sandberg. First, the Court's opinion appears to require that as a matter of law or corporate bylaw, the solicitation be an essential link in accomplishing the transaction in order to fit under the essential link test. However, drawing the line so that the solicitation is required by law or bylaw is unclear and may be underinclusive. Did the Court intend to set up two separate categories of governmentally prescribed law (such as a statute) and bylaws? Suppose for example, that the solicitation is required by corporate charter. Would such a solicitation be less of an essential link than one required by a bylaw? It is doubtful that the Court would take that position. Indeed it is arguable that a solicitation required by a duly adopted Board resolution is as essential as one required by a bylaw. Moreover, in Mills it appears that the essential link came from a merger agreement requirement of a two-thirds vote.

Second, the position of the Court in Sandberg in discussing the intent of Congress with regard to the expansion of the cause of action under Rule 14a-9 is unrealistic, if, as the Court seems to say, there really is no indication of congressional intent to even create an implied cause of action under Section 14(a). It is unrealistic to speak of its growth or limitation in terms of congressional intent when the Court finds congressional intent so lacking. Since the Court chooses not to overrule precedents establishing a cause of action under Section 14(a), the issue is more a question of the definition of the cause of action under that section rather than its expansion or restriction in light of some fictional or imagined congressional intent. When Con-

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117. It should be noted that several Justices believe that the essential link test for causation may still be satisfied where the minority lacks sufficient votes to defeat a proposal by management. Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2768, (1991) (Stevens, J., concurring in part and dissenting in part); id. at 2773 (Kennedy, J., concurring in part and dissenting in part)." Justices Marshall, Blackmun, and Stevens joined in Justice Kennedy's opinion. Justice Marshall also joined in Justice Stevens's opinion.

118. Mills, 396 U.S. at 379.
gress has given the courts nothing in the way of intent to go by in terms of elements of judicially implied causes of action, it is for courts to reasonably define the causes of action rather than to lament their creation by using nonexistent congressional intent as a basis for narrowing their scope.

Moreover, as indicated above, the strict construction approach relative to implied private actions that guided the Court in *Sandberg* may be inappropriate with regard to cases affected by 1988 legislation and certain accompanying legislative history evidencing congressional intent favorable to such actions which are discussed in Part VII.

In any event, it is possible that in future cases the Supreme Court will squarely face issues regarding the materiality and causation of a misrepresentation in a proxy statement impacting on nonvoting decisions that a shareholder may make, such as a suit decision or an appraisal decision. If so, as indicated above, the "essential link" language from *Mills* may be inappropriate in making the causation decision under Rule 14a-9. It is significant that the *Sandberg* Court did not foreclose the possibility of suits under Rule 14a-9 based on nonvoting decisions, a matter that will be discussed hereafter at greater length.

The possible materiality of the directors' statement in *Sandberg* has already been considered. A differential of $18 per share (as determined by the jury) may well be important enough to be material in the deliberations of shareholders with respect to a variety of things that they could do—whether in voting or by suit or other forms of action.

The issue then is what may constitute causation in *Sandberg*-type cases, based on material proxy misrepresentations involving implied actions under Rule 14a-9. The question of causation is considered here in two senses: legally acceptable causation and factually sufficient causation. As to the former, the question is what would be within the scope of legally acceptable causation under Rule 14a-9 when courts make that determination as the *Sandberg* Court did? Although a restrictive causation approach based on an analytical approach like that in *Sandberg* may be used to limit the opportunities for plaintiffs to use that rule successfully, such an approach may be inappropriate if the congressional intent evidenced in 1988 legislation and certain accompanying history favorable to implied actions (discussed in Part VII of this Article) is deemed to apply to Rule 14a-9 cases. However, even when courts consider wrongdoing by defendants to furnish legally acceptable causation in a Rule 14a-9 case, issues may arise in determining whether the wrongdoing is satisfactorily shown to be the factually sufficient cause (or cause in fact) of the loss suffered by plaintiffs.
A. Legally Acceptable Causation

1. Voting Down the Merger.

Because the public shareholders, a minority, could not vote down the merger in Sandberg, the Court refused to use the essential link theory of Mills to establish causation. However, in truth, even if the public shareholders were in a majority, they might not succeed in winning a proxy vote against the merger. The question arises as to the reality of establishing causation or presuming it merely from the fact that public shareholders constitute a majority. Both Mills and Sandberg would allow proof of causation to flow from the mere fact that public shareholders own a majority of shares, a position that may often be unrealistic. Still, as a matter of policy, this lack of realism may be downplayed if lies by directors to shareholders are dealt with firmly—on the basis that those who have been lied to in a material way should benefit from a favorable but rebuttable presumption as to causation.

2. Public Relations.

Suppose that properly informed shareholders could have caused public relations problems by way of embarrassing or causing ill-will for proponents of the merger to such a large extent that the merger may have been aborted or defeated even by the majority that proposed it. Of course, Sandberg rejected the idea that causation could be based on such a theory. If, however, the Court is willing to give the complaining shareholders the benefit of a fiction that a theoretical majority would rise to veto a transaction, it seems less daring and perhaps more realistic to allow causation to be shown by public relations considerations.

In a dissenting opinion joined by three other Justices, Justice Kennedy was critical of the Court's distinction between cases where minority shareholders could vote down a transaction and cases where causation must be shown by nonvoting theories. A key point that he makes is that a proxy disclosure, which suggests that the transaction is unfair to minority shareholders or that the board or majority are in breach of fiduciary duties to the minority, may lead the majority to vote against management's proposal. He took the position that "[i]f the majority shareholder votes against the transaction in order to comply with its state law duties, or out of fear of liability, or upon concluding that the transaction will injure the reputation of the business, this ought not to be characterized as nonvoting caus-
tion." He even raised the possibility that the majority shareholder may prefer to avoid the embarrassment of voting against its own proposal and may cancel the shareholders meeting at which the vote was to be taken. To him, "[t]he real question ought to be whether an injury was shown by the effect the nondisclosure had on the entire merger process, including the period before votes are cast." He also challenged the Court's view "that a nonvoting causation theory would "turn on "hazy" issues inviting self-serving testimony, strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process." It was his view that the "likelihood that causation exists supports elimination of any requirement that the plaintiff prove the material misstatement or omission caused the transaction to go forward when it otherwise would have been halted or voted down." Recognizing the difficulties of proving or disproving causation as possibly greater when the minority lacks the votes to defeat a proposal, he stated that "[a] presumption will assist courts in managing a circumstance in which direct proof is rendered difficult."

3. Fear of Suit.

If there is proper disclosure, a favorable vote by a minority of shareholders may immunize a transaction against certain kinds of legal attack at least under the law of some states such as the Virginia law discussed in *Sandberg*. Absent minority shareholder approval, could the causation requirement be met by showing that directors would not go ahead with a deal because the transaction would not be immunized and because of fear of suit? Although this precise causation argument was not specifically addressed in *Sandberg*, the Court's ruling would probably be read as cutting against or even precluding its success.

4. Loss of Ability to Sue Because of Immunity Statute.

It appears that the argument was made in *Sandberg* that because shareholders would lose the ability to sue under the Virginia statute granting immunity, recognizing a Rule 14a-9 suit is sufficiently justified. The Court dealt with that argument by indicating that immunity would not be granted if disclosure was improper.

121. *Id.* (Kennedy, J., concurring in part and dissenting in part).
122. *Id.* (Kennedy, J., concurring in part and dissenting in part).
123. *Id.* (Kennedy, J., concurring in part and dissenting in part).
124. *Id.* at 2771 (Kenndy, J., concurring in part and dissenting in part).
125. *Id.* (Kennedy, J., concurring in part and dissenting in part).
126. *Id.* (Kennedy, J., concurring in part and dissenting in part).
5. Misrepresentations as to Suit Facts.

The Court did not decide whether misrepresentations material to shareholders in arriving at a decision to bring a suit against a merger could be the basis of causation for purposes of a suit under Rule 14a-9.\textsuperscript{127}

6. Misrepresentations as to Appraisal Facts.

The Court did not decide whether misrepresentations material to a decision on whether to seek an appraisal could be the basis of causation in a suit under Rule 14a-9 because appraisal was not allowed under Virginia law.\textsuperscript{128}

B. Factually Sufficient Causation

Another question discussed here is when would a misrepresentation that the Court would recognize, at least in theory, as furnishing a legally acceptable basis for satisfying the causation requirement under Rule 14a-9 also be a factually sufficient cause (or the cause in fact) of the loss under that rule. In some situations, dealing with this question may not be simple. Suppose, for example, the Court took the position that the misrepresentation of facts material to a suit decision, facts that may be called “sue facts,”\textsuperscript{129} unlike the misrepresentation of facts involving “ill will,” is a legally acceptable basis for satisfying the causation requirement. That would still leave the possibly complex question of whether the misrepresentation of sue facts was the factually sufficient cause (or cause in fact) of the loss in a particular case.

One possible position is that the misrepresentation of a sue fact is the cause in fact of loss only if it is determined that the shareholders would in fact have sued and that the suit action shareholders would have taken would have prevented the loss they suffered. By analogy to some Rule 10b-5 cases, various standards of causation concerning the possible impact of suit action may be envisioned. In a previous article, this author discussed possible causation theories in the context of Rule 10b-5 cases when a shareholder has a means of self-protection in the form of a suit attacking a transaction as follows:

In addition, there is the question of whether it is necessary to show if the loss would have been avoided by the taking of the self-protective

\textsuperscript{127} Id. at 2773 (Kennedy, J., concurring in part and dissenting in part).

\textsuperscript{128} Id. at 2766.

\textsuperscript{129} “A ‘sue fact’ is, in general, a fact which is material to a sue decision. A ‘sue decision’ is a decision by a shareholder whether or not to institute a representative or derivative suit alleging a state-law cause of action.” Sandberg, 111 S. Ct. at 2762 n.9 (quoting Harvey Gelb, Rule 10b-5 and Santa Fe—Herein of Sue Facts, Shame Facts, and Other Matters, 87 W. VA. L. REV. 189, 190 & n.52 (1985) (citation omitted)). “Shame facts” are said to be facts that, had they been disclosed, would have “shamed” management into abandoning a proposed transaction. Id.
action. In dealing with this problem a variety of positions have been taken (in situations where the self-protective method is a suit) as to what must be shown: 1) the suit would have succeeded; 2) there was a reasonable probability of success; 3) there was a prima facie case for relief; 4) a cause of action for relief would have been stated. In Madison Consultants the Second Circuit Court of Appeals held that the plaintiff must show by a fair preponderance of the evidence that he “would have succeeded in preventing the loss he in fact suffered.” The court dismissed the “cause of action” and “prima facie” case tests as too weak by pointing out that the former would lead to a finding of causation even in cases where the plaintiff would almost certainly lose, and that the latter was ambiguous and “would require a finding of causation even when the defendant could devastatingly rebut the plaintiff’s case.”

In Madison Consultants, the Court recognized that although its test may lead to a “trial within a trial,” the nature of the claim “depends upon an appraisal of [the plaintiff’s] chances of success in a state court suit.” Having a trial within a trial may involve some difficulties. In Kidwell ex rel. Penfold v. Meikle, the court held “that no relief is available . . . under Rule 10b-5 unless a minority member would have succeeded in getting permanent injunctive relief, or damages in excess of an appraisal remedy, in the state-law action.” The court explained that “[t]he question is essentially one of fact, but the federal trial judge should decide any legal issues that would have arisen in the hypothetical state suit as a matter of law in the Rule 10b-5 suit.”

In the previous article, this author also raised questions, however, as to the propriety of using findings predictive of suit success.

This approach, which insists on findings predictive of suit success, really ignores a more basic argument that a correct finding in such cases should involve whether the defendant would have desisted or retreated from misconduct by virtue of even the threat of a credible suit or other self-protective action including public exposure which could be triggered by a disclosure. If so, then the lack of disclosure would really be the cause of the loss, and a finding as to who would win the suit would be unnecessary. If the self-protective action is not a suit by the investor or does not involve any state or federal

130. Gelb, supra note 129, at 209 (footnotes omitted).
132. Id. at 65.
133. 597 F.2d 1273 (9th Cir. 1979).
134. Id. at 1294.
135. Id.
136. Gelb, supra note 129.
remedy, but only public exposure, it would seem that the question of cause would have to be presented along such lines. If a court is really prepared to decide if nonsuit protective actions would succeed, logically, the court should be willing to determine if suit protective actions, and not the suits themselves, would be successful. The Madison Consultants case could have proceeded on that basis.\textsuperscript{137}

Of course, if it is determined that the suit protective action would not have led the defendant to desist or retreat, then a finding as to the potential success of the suit may be required.

The attitude of the Court in Sandberg, however, demonstrates a somewhat restrictive causation approach in a Rule 14a-9 case. Such an attitude is not wholly unreasonable since certain broad approaches pose their risks for defendants and for courts involving determinations of a rather nebulous nature, as the following discussion involving comparable problems in Rule 10b-5 actions indicates:

Acceptance of a shame fact or broad self-protective approach as bases for liability in rule 10b-5 actions would thus have the effect of not only widening the kinds of disclosures which would need to be made, but also of liberalizing the basis on which the cause of the loss could be determined in the sue-fact situation. But determinations regarding the potential success of self-protective actions, it must be recognized, can lead into a rather nebulous area. Presumably too, an even thinner basis of causation would be formulated in circuits which accept standards less demanding than one which would require, as in Madison Consultants, that a plaintiff show by a fair preponderance of the evidence that he would have succeeded in preventing the loss.\textsuperscript{138}

Whether the Court would be more liberal in defining the cause of action in a Rule 10b-5 case than it was in Sandberg in a Rule 14a-9 case is considered in the next section.

It should be emphasized that in reaching its decision about causation in the Sandberg case, the Court was not holding that causation could not as a matter of logic or reality be shown based on the public relations issue. Rather, the Court was deciding as a matter of policy not to allow causation to be shown based upon such a theory because of its fears concerning expansion of liability under Rule 14a-9 based upon considerations like those of Blue Chip. Indeed, the Sandberg Court recognized the force of the evidence favorable to the plaintiff regarding causation, but stated:

\textsuperscript{137} Id. at 210.
\textsuperscript{138} Id.
The issue before us, however, is whether to recognize a theory of causation generally, and our decision against doing so rests on our apprehension that the ensuing litigation would be exemplified by cases far less tractable than this. Respondents' burden to justify recognition of causation beyond the scope of *Mills* must be addressed not by emphasizing the instant case but by confronting the risk inherent in the cases that could be expected to be characteristic if the causal theory were adopted.\footnote{139}

One more issue may be discussed at this point. If the Court allows a sue fact misrepresentation to be within the range of legally acceptable causation under Rule 14a-9, how would it allocate the burden of proof with respect to causation in the proceeding? *Mills* reflects an accommodating position with regard to proof to be furnished by the plaintiff in a Rule 14a-9 case where the essential link is established. In part at least, this accommodation is justified by the difficulties of proof in voting cases. In view of the potential complexities in sue fact cases and of the policy favoring honest and accurate proxy solicitation, would such an accommodation be justified in sue fact cases? Would it be justified in other kinds of cases under Rule 14a-9? One might ask the same question with respect to sue fact and other kinds of cases brought under Rule 10b-5. In *Sandberg*, Justice Kennedy, in dissent, was ready to create a presumption with regard to causation in favor of the plaintiffs. Furthermore, as will be seen in the next section, accommodating plaintiffs with respect to causation issues has marked the Court's position in certain cases involving implied actions under Rule 10b-5. The strict view of *Sandberg* regarding legally acceptable causation in the implied action under Rule 14a-9 runs somewhat counter to the accommodating spirit of positions previously taken.

**VII. The Impact of Sandberg on Implied Causes of Action Under Rule 10b-5**

*Sandberg* has had an impact on implied private actions under SEC rules other than Rule 14a-9. Subsequent to *Sandberg*, the Supreme Court vacated a judgment involving an implied private cause of action under Rule 13e-3 of the '34 Act\footnote{140} and remanded the case to the court of appeals for further consideration in light of *Sandberg*.\footnote{141}

A natural question arising from *Sandberg* is whether the causation theories expressed in that case apply to implied private actions under Rule 10b-

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  \item \footnote{139} Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2765 n.12 (1991). *But see id.* at 2768 (Kennedy, J., concurring in part and dissenting in part).
  \item \footnote{140} 17 C.F.R. § 240.13e-3 (1992). Rule 13e-3 involves going private transactions.
\end{itemize}
5. In *Scattergood v. Perelman*, the Third Circuit dealt with that question. In that case, MacAndrews and Forbes Holdings Inc. (M&F) wholly owned AGI Acquisition Corporation (AGI), which it merged with Andrews Group Inc. ("Andrews"). M&F owned fifty-seven percent of Andrews. Shareholders of Andrews were given debentures in exchange for their stock. The claim was made by certain Andrews shareholders that their shares were priced too low because of premerger and proxy misrepresentations. Claims were made under both Rule 14a-9 and Rule 10b-5. The complaint named as defendants, Andrews and certain of its directors and officers, M&F and certain of its directors and officers, and the individual who was sole shareholder and chairman of the board of M&F. Claims were made that the defendants "conducted a fraudulent campaign of misrepresentations designed to depress the stock's price so as to facilitate a freeze-out merger at a woefully inadequate price" and issued a "proxy statement containing misrepresentations in connection with the vote on their freeze-out merger." The court viewed *Sandberg* in sweeping terms, stating that the Supreme Court had held "that, when a majority shareholder of a company pursues a freeze-out merger, the chain of causation between a pre-merger misrepresentation and the price received under the merger is broken." It was the court's position that while *Sandberg* addressed Section 14(a) claims only, its reasoning as indicated by its references to *Blue Chip* (a Section 10(b) case) applies as well to other misrepresentations preceding a freeze-out merger and to Section 10(b) claims in connection therewith. It was the court's view that *Sandberg* ruled out nonvoting causation theories as a class. The court went on to say:

The Plaintiffs in this case are in a position very similar to that of the minority shareholder in *Virginia Bankshares*. Their argument, as we understand it, is that despite the fact that M & F had the legal power to effectuate a freeze-out merger, it would not have been willing to exercise that power had it not been able to depress the price of An-

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142. 945 F.2d 618 (3d Cir. 1991).
143. *Id.* at 620-21.
144. *Id.* at 621.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 620.
149. *Id.*
150. *Id.*
151. *Id.* at 625.
152. *Id.*
drews stock by its campaign of misrepresentation and its misleading proxy statement. This argument seems to us indistinguishable from the argument rejected in *Virginia Bankshares*, where the plaintiffs argued that, but for the misrepresentations, the majority shareholder would not have been willing to effectuate the merger.\footnote{153}{Id. at 625-26.}

The court recognized a possible exception to the rule about freeze-out mergers that "relates to situations in which the majority's misstatement or omission has caused the minority shareholders to forego an opportunity under state law to enjoin a merger,"\footnote{154}{Id. at 626 n.4.} but the "exception, if it exists, is inapplicable here because the plaintiffs did attempt to enjoin the merger under state law."\footnote{155}{Id.}

Is the court correct that the argument in *Scattergood* is indistinguishable from *Sandberg*? Not really. There is an important factual difference between *Scattergood* and *Sandberg*. The claim in *Scattergood* involved an alleged depression in the price of stock brought about by a campaign of misrepresentation and the misleading proxy statement. This kind of price manipulation presents a different kind of case than *Sandberg*, which involved questions of whether public relations considerations or ill will would have aborted a merger effort by those in control. To say that *Scattergood* is obviously controlled by *Sandberg* is quite a stretch.

Furthermore, one cannot read *Sandberg* and agree with the Third Circuit opinion in *Scattergood* that the only possible exception to *Sandberg*'s narrow rule involves shareholders foregoing an opportunity under state law to enjoin a merger. For example, the loss of an opportunity to seek an appraisal with respect to shares was not ruled out by *Sandberg* as a possible basis for causation, and the Court's opinion did not address all other possibilities.

Moreover, recent legislation and legislative history may render inappropriate a *Sandberg*-type strict interpretation based on a narrow view of the scope of a Rule 14a-9 action or a Rule 10b-5 action, which results from the principle that implied causes of action should be looked upon with disfavor. The recent additions of Sections 20A\footnote{156}{15 U.S.C. § 78t-1 (1988).} and 27A\footnote{157}{15 U.S.C.A. § 78aa-1 (West Supp. 1992).} to the '34 Act make it difficult to accept the proposition that a Rule 10b-5 private action should be looked upon with disfavor simply because Congress may not have initially intended or expressly provided for such an action. The adoption of both of these new sections represents express congressional approval of Rule 10b-5
private actions. Insider trading cases under Section 20A even depend to an extent on law developed in implied cause of action cases under Rule 10b-5. For example, the meaning of the word "contemporaneous," which is important to the application of Section 20A, is not set forth in that section but is dependent on case law. Section 20A(a) codifies the right of action for certain insider trading cases as follows:

Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.\(^{158}\)

Legislative history regarding Section 20A states that "[t]he bill does not define the term 'contemporaneous' which has developed through case law"\(^ {159}\) and cites several cases that involve Rule 10b-5 as examples.\(^ {160}\) In addition, the history quotes approvingly language from former SEC Chairman David Ruder regarding the importance of private rights of action and points out that codification of an express right of action was intended to overturn court cases precluding recovery when the defendant's violation is based upon the misappropriation theory. House Committee Report No. 100-910 states:

Although the courts have recognized an implied private right of action in insider trading cases, this section would codify an express right of action against insider traders and tippers for those who traded the same class of securities "contemporaneously" with and on the opposite side of the market from the insider trader. The value of this provision is evident in the testimony of SEC Chairman Ruder, who stated on July 11, 1988, before the Subcommittee on Telecommunications and Finance, that "private rights of action have traditionally served as an important supplement to the Commission's enforcement of the federal securities laws."

In particular, the codification of a right of action for contemporaneous traders is specifically intended to overturn court cases which have precluded recovery for plaintiffs where the defendant's violation is premised upon the misappropriation theory. See e.g., *Moss v. Morgan Stanley*, 719 F.2d 5 (2d Cir. 1983). The Committee believes

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that this result is inconsistent with the remedial purposes of the Exchange Act, and that the misappropriation theory fulfills appropriate regulatory objectives in determining when communicating or trading while in possession of material nonpublic information is unlawful.\textsuperscript{161}

The Committee Report furnishes support not only for implied private actions but also for their expansive rather than restrictive development as follows:

At the full Committee markup, the Committee also accepted an amendment to delete the paragraph containing an express private right of action for parties other than contemporaneous traders. The Committee's intention in this amendment was to avoid creating an express private cause of action which might have the unintended effect of freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area. Rather, the Committee wanted to given [sic] the courts leeway to develop such private rights of action in an expansive fashion in the future.\textsuperscript{162}

In particular the Committee Report referred to the flexibility of Section 10(b), Rule 10b-5, and other Exchange Act provisions in dealing with insider trading violations:

Despite the absence of explicit statutory language for private rights of action outside of the contemporaneous trader plaintiff situation, the Committee recognized that there clearly are injuries caused by insider trading to others beyond contemporaneous traders. In the view of the Committee, Section 10(b), Rule 10b-5, and other relevant provisions of the Exchange Act have sufficient flexibility to recognize and protect any person defrauded, or harmed by a violation of any provision of this title or the rules or regulations thereunder by another person's purchasing or selling a security while in the possession of material, nonpublic information, or communicating such information to others.\textsuperscript{163}

Further support for the vitality of implied causes of action under Rule 10b-5 is found in the notion recognized by the Committee that when a

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\textsuperscript{161} \textit{Id.} at 6063-64. \\
\textsuperscript{162} \textit{Id.} at 6064. The deleted section reads as follows: \\
\textsuperscript{(2) OTHER ACTIONS. Any person (other than a person entitled to recovery solely under paragraph (1) of this subsection) injured by a violation described in such paragraph in connection with such person's purchase or sale of securities may bring an action in any court of competent jurisdiction to seek recovery of any damages caused by such violation, or for appropriate equitable relief, or both. \\
H.R. 5133, 100th Cong., 2d Sess. (1988). The language of paragraph (1) referred to in the deleted section is quite similar to that of Section 20A(a) referred to in the text accompanying note 158. \\
\textsuperscript{163} 1988 U.S.C.C.A.N., \textit{supra} note 159, at 6064-65.}
\end{flushright}
plaintiff is defrauded by the insider trading of a defendant and suffers actual damages proximately caused by the defendant's behavior, a damages cap of profit gained or loss avoided by the defendant, which is applicable under the contemporaneous trading statute, would not be appropriate. "[R]ather, in such an implied private cause of action, the plaintiff should be able to recover the full extent of those actual damages."164

Although the focus of Section 20A is on insider trading, its text and the legislative history referred to above do not pertain solely to implied private actions involving insider trading. The text of Section 20A(d) expressly encompasses other implied actions: "Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter."165

In its discussion, the Committee offers further evidence of its support for implied actions at the same time it refers specifically to a case involving Anheuser-Busch:

The section on private rights of action explicitly states that nothing in this section may be construed in any fashion to limit or condition the right of any person to bring an action to enforce a requirement of the Exchange Act, or the availability of any cause of action implied under the Exchange Act. The Committee in fact expressly recognizes the implied right of action under the securities laws for cases including but not limited to the situations such as that noted above in the Anheuser-Busch case.166

Arguably, Section 20A(d) and the legislative history just quoted constitute congressional recognition of implied private actions not only under Section 10(b) but also under other sections, including Section 14(a). The Committee reference to Anheuser-Busch, which involved insider trading, is explained as follows:

The most prominent example of the non-contemporaneous trader suit which came to the attention of the Committee involved a suit filed by Anheuser-Busch Companies, Inc. against Paul Thayer, a former director of the corporation. See Anheuser-Busch Companies, Inc., v. Thayer, et. al., CA3-85-0794-R (N.D. Texas 1986). In that case, the plaintiff alleged that it was defrauded not as a result of trading with the defendant, but by having information secretly stolen and by having the subsequent trading on the information concealed. According to the complaint in this case, prior to public

164. Id. at 6065.
dissemination, the tipper disclosed to several parties the plans of Anheuser-Busch to acquire Campbell Taggart, Inc. The alleged misappropriation of Anheuser-Busch's confidential information proximately caused a significant increase in the market price of Campbell Taggart stock before Anheuser-Busch announced its offer. This forced Anheuser-Busch to raise its tender offer price, and the company eventually paid approximately $80 million more as a result of the illegal insider trading. Clearly, in such a case, the plaintiff corporation was a victim of the defendant's misappropriation. In the view of the Committee, where the plaintiff can prove that it suffered injury as a result of the defendant's insider trading, the plaintiff has standing to sue in this circumstance, and the remedial purposes of the securities laws require recognition of such an action.

In the view of the Committee, it was also important to note that in situations such as the Anheuser-Busch case and others, the potential harm to the plaintiff from the defendant's insider trading or tipping may be far greater than the profit gained or loss avoided by that defendant.167

Arguably, the broad support for implied private actions evidenced by some of the congressional materials quoted above would eliminate the strict construction approach taken by the Court not only in Section 10(b) cases, but also in cases under other sections, including Section 14(a). Moreover, Congress gave express recognition to implied private actions under Section 10(b) in 1991 when it passed Section 27A of the '34 Act,168 which relates to the statute of limitations for certain of such actions. Section 27A did away with the retroactive impact on certain pending cases of a Supreme Court decision,169 which adopted a short limitations period for implied private actions under Section 10(b) of the '34 Act. In assessing the impact of Section 27A, it should be noted that its validity has been challenged with mixed results.170

Significantly, the recent Supreme Court decision in Musick, Peeler & Garrett v. Employers Ins. of Wausau171 specifically recognized that congressional acknowledgement of the Rule 10b-5 action flows from Sections 20A and 27A. In Musick, the Court held that defendants in an implied private action under Section 10(b) and Rule 10b-5 have a right under federal law to

167. Id.
seek contribution from joint tortfeasors. The Court took the position that both federal courts and Congress have recognized "judicial authority to shape, within limits, the 10b-5 cause of action." The Court pointed to acceptance by federal courts of "the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes." In support of that proposition the Court cited Blue Chip and Sandberg.

The Court explained the congressional support in Sections 20A and 27A relative to the 10b-5 action as follows:

The existence of that action, and our cumulative work in its design, have been obvious legislative considerations in the enactment of two recent federal statutes. The first is the Insider Trading and Securities Fraud Enforcement Act of 1988 . . . , which added the insider trading prohibition of § 20A to the 1934 Act. . . . Section 20A(d) states that "[n]othing in this section shall be construed to limit or condition . . . the availability of any cause of action implied from a provision of this chapter." The second statute is the recent congressional enactment respecting limitations periods for 10b-5 actions. Following our resolution two terms ago of a difficult statute of limitations issue for 10b-5 suits . . . , Congress intervened by limiting the retroactive effect of our decision, and the caution in its intervention is instructive. In an approach parallel to the one it adopted for the insider trading statute, Congress did no more than direct the applicable "limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 . . . ."

We infer from these references an acknowledgment of the 10b-5 action without any further expression of legislative intent to define it. . . . Indeed, the latter statute . . . not only treats the 10b-5 action as an accepted feature of our securities laws, but avoids entangling Congress in its formulation. That task, it would appear, Congress has left to us.

Whether Congress intended implied actions under Section 10(b) or whether courts were wrong to imply them many years ago should lose considerable, if not all, importance in the interpretation game now that Congress has given express recognition and approval to the judicial development of private implied actions under Section 10(b). It would seem that the judicial discussion regarding such actions should therefore move to a different level. This would be so simply by virtue of Section 20A and its

172. Id. at 2089.
173. Id.
174. Id.
legislative history, even if Section 27A were considered invalid. In addition, it is arguable that Section 20A and certain accompanying history furnish significant support for implied private actions under other securities law sections. Must Congress do even more to satisfy the Court that it approves of the Section 10(b) private implied action or private implied actions under other sections such as Section 14(a)? Is the Court ready to abandon its narrow perspective regarding the scope of any or all of such actions based on its questioning of original congressional purpose or earlier judicial precedents? Should the Court be as comfortable in using policy reasons as in the past to restrict the scope of private implied actions under the securities laws? Significantly, perhaps, the majority opinion in *Musick* did not refer to a narrow perspective growing out of the origins of the Section 10(b) action.

The recent congressional enactments and legislative history and the decision in *Musick* do not necessarily mean that the Court must or will discard existing narrow interpretations, such as the Rule 10b-5 interpretation in *Blue Chip*, without further congressional action. Other considerations may support the *Blue Chip* result, and it may be argued that existing Supreme Court precedents that give narrow interpretations to implied actions under Section 10(b) should not be overturned because if Congress had intended such a result, it would have expressly so provided. Indeed, the Court’s position in *Musick* that Congress intended to leave the development under Rule 10b-5 to courts may cut in the other direction. But, at a minimum, it should be hard to maintain the narrow interpretation perspective based on lack of congressional intent after the enactment of Sections 20A and 27A and the *Musick* assessment of those sections. The use of strict causation rules and strict rules regarding the actionability of misrepresentations of opinion or belief as in *Sandberg* would seem inappropriate in Rule 10b-5 actions to the extent that it is based on such a perspective.

Clearly, the policy approach used in *Blue Chip* to narrowly interpret the scope of Rule 10b-5 actions was based, to some extent, on the lack of legislative support underlying the development of Rule 10b-5 implied private causes of action. The Court stated:

[W]e would by no means be understood as suggesting that we are able to divine from the language of § 10 (b) the express “intent of Congress” as to the contours of a private cause of action under Rule 10b-5. When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it, . . . but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission
in 1942 foreordained the present state of the law with respect to Rule 10b-5. It is therefore proper that we consider, in addition to the factors already discussed, what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance.\textsuperscript{175}

Sections 20A and 27A and the legislative history referred to above afford at least some express legislative approval for the judicial oak and, to a degree, foster its health and growth, and \textit{Musick} recognizes this. The adoption of these sections after many years of the utilization and development of implied private actions under Rule 10b-5 arguably should reduce, if not eliminate, the emphasis on the fact that there was only a legislative acorn from which Rule 10b-5 implied private causes of action grew. Thus, the use of \textit{Blue Chip} policy reasons to preclude findings of causation in Rule 10b-5 cases may be inappropriate or hard to justify. On the other hand, there may be bases other than the acorn-oak metaphor to support the use of such policy reasons or other ones in construing congressional intent so as to reduce the effectiveness of private actions under Rule 10b-5.

In addition, application of the \textit{Sandberg} causation approach to Rule 10b-5 implied private actions seems questionable in light of the significant accommodation shown by the Court with respect to plaintiffs' responsibilities regarding causation issues in earlier Rule 10b-5 cases. In \textit{Affiliated Ute Citizens v. United States,}\textsuperscript{176} the Supreme Court decided that when there was a failure to disclose material information by persons with a duty to make a disclosure, positive proof of reliance was not a prerequisite to recovery. The Court held that "[t]his obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact."\textsuperscript{177} Furthermore, in \textit{Basic Inc. v. Levinson,}\textsuperscript{178} the Court held a presumption of reliance in favor of the plaintiff in a Rule 10b-5 case based on a fraud-on-the-market theory to be appropriate, explaining as follows:

Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations. It has been noted that "it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?"... Indeed, nearly every court that has considered the prop-

\textsuperscript{175} 175. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).
\textsuperscript{176} 176. 406 U.S. 128 (1972).
\textsuperscript{177} 177. Id. at 154 (citation omitted).
\textsuperscript{178} 178. 485 U.S. 224 (1988).
osition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed. Commentators generally have applauded the adoption of one variation or another of the fraud-on-the-market theory. An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.\textsuperscript{179}

This accommodation by the Court to favor the plaintiff with regard to the causation issue was also discussed in \textit{Basic} as follows:

We agree that reliance is an element of a Rule 10b-5 cause of action. \ldots Reliance provides the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury \ldots. There is, however, more than one way to demonstrate the causal connection. Indeed, we previously have dispensed with a requirement of positive proof of reliance, where a duty to disclose material information had been breached, concluding that the necessary nexus between the plaintiffs’ injury and the defendant’s wrongful conduct had been established. \textit{See Affiliated Ute Citizens v. United States.} \ldots Similarly, we did not require proof that material omissions or misstatements in a proxy statement decisively affected voting, because the proxy solicitation itself, rather than the defect in the solicitation materials, served as an essential link in the transaction. \textit{See Mills v. Electric Auto-Lite Co} \ldots \textsuperscript{180}

While it is true that in a sense \textit{Sandberg} deviates from the accommodating trend regarding causation, of which \textit{Mills} (a Rule 14a-9 case) is a part, it seems to take a bigger leap to move away from that trend in a Rule 10b-5 case—particularly since \textit{Basic} is a fairly recent case decided after the Supreme Court purportedly saw the errors of past courts in too readily implying causes of action under federal securities law. Furthermore, when a plaintiff has shown under Rule 10b-5 or even Rule 14a-9 that a defendant has lied as to a material fact, the easing of the causation burden does not seem too troubling.

\textsuperscript{179} \textit{Id.} at 246-47 (citation omitted) (footnotes omitted).

\textsuperscript{180} \textit{Id.} at 243 (citations omitted).
VIII. Conclusion

On the question of causation, there was considerable division among the Justices in Sandberg. Four of the Justices dissented. Furthermore, there were real differences in the approaches of the Justices concerning whether an implied cause of action under Rule 14a-9 should be narrowly restricted. Justice Souter, in the opinion of the Court that was joined by three other Justices, found congressional silence to be a serious obstacle to the expansion of cognizable Borak causation, though not a necessarily insurmountable barrier. In a concurring opinion, Justice Scalia, while addressing an issue other than causation, revealed perhaps an even more restrictive approach when he stated that since the federal cause of action at issue was never enacted by Congress “the more narrow we make it (within the bounds of rationality) the more faithful we are to our task.”

On the other hand, the dissenting opinion of Justice Kennedy, joined by the other three Justices, while recognizing that caution should be exercised in creating implied private rights of action, said:

Where an implied cause of action is well accepted by our own cases and has become an established part of the securities laws, however, we should enforce it as a meaningful remedy unless we are to eliminate it all together. As the Court phrases it, we must consider the causation question in light of the underlying “policy reasons for deciding where the outer limits of the right should lie.”

Justice Kennedy was critical of the Court’s analysis with regard to the purposes underlying Section 14(a), saying that consideration of the purposes was done “with the avowed aim to limit the cause of action and with undue emphasis upon fears of ‘speculative claims and procedural intractability.’” He characterized the result as “a sort of guerrilla warfare to restrict a well-established implied right of action.” He warned that if the Court’s analysis “is any guide, Congress and those charged with enforcement of the securities laws stand forewarned that unresolved questions concerning the scope of those causes of action are likely to be answered by the Court in favor of defendants.”

Since its decision in Sandberg, the Court’s membership has changed. It is hard to say if the present Court will revise its narrow perspective with

182. Id. at 2769 (Kennedy, J., concurring in part and dissenting in part) (citations omitted).
183. Id. at 2770 (Kennedy, J., concurring in part and dissenting in part).
184. Id. (Kennedy, J., concurring in part and dissenting in part).
185. Id. (Kennedy, J., concurring in part and dissenting in part).
regard to implied private actions under Rule 14a-9. However, there have been developments that may preclude a narrow Sandberg-type construction of implied private rights of action under Rule 10b-5, Rule 14a-9, and other securities laws. Although it may still be possible to quibble about the impact of, or significance of, congressional support for these implied private actions, as the Court has recognized in Musick, there is no legislative vacuum with regard to such actions. While the legislative record with regard to implied causes of action can no longer be called "silent," it is conceivable that the Court would give little weight to the congressional noises that have been heard to date. On the other hand, Musick does indicate some judicial recognition of the significance of the congressional actions. One could envision a judicial position requiring further congressional action with respect to implied private actions before such cases can shed their unfavored status. Yet, it is difficult to say that existing congressional approval for implied private actions should be without relevance to the perspective with which the Court views the elements of the actions. In light of the views expressed by the dissenters, three of whom remain on the Court, with regard to the implied cause of action under Rule 14a-9 in Sandberg, and the majority of six in Musick (five of whom remain on the Court), one can conceive of a more generous interpretation of implied causes of action under Rule 10b-5 and other SEC rules, including Rule 14a-9. On the other hand, it is possible that the Court could change its strict approach toward private actions under Rule 10b-5 as a result of Sections 20A and 27A and some of the legislative history discussed above, but be unwilling to go that far with respect to private actions under Rule 14a-9 or other SEC rules without further expressions of congressional intent.

The Supreme Court became dissatisfied with the approaches taken by past courts in readily implying private causes of action under the federal securities laws. The result of the Court's dissatisfaction in recent years has been not only a reluctance to imply new causes of action, but also what has appeared to be a desire to minimize the harm caused by the recognition of implied private causes of action—not by overruling them, but by narrowly construing them. Musick, with its recognition of the impact of Sections 20A and 27A, reflects new possibilities regarding 10b-5 actions, but it is not yet clear how far the Court will go. If private actions under such Sections as 10(b) and 14(a) really are important in the enforcement of federal securities laws, then Congress should consider the following steps in order to give courts clearer directions:

1. Identify sections of the Securities Act of 1933 and the Securities Exchange Act of 1934, such as sections 10(b) and 14(a), that can be
enforced with private causes of action beyond those already expressly identified.
2. Set forth the elements of recognized private causes of action to the extent that is legislatively feasible.
3. State whether private causes of action may still be implied or whether no more implications should be made.

In developing legislation relative to private actions, Congress should determine which securities violations should be redressable by such actions and should address the elimination of inappropriate strict judicial construction based on the lack of sufficiently expressed congressional intent. In addition, in deciding how much specific legislative guidance relative to the elements of private causes of action should be enacted, Congress should be mindful that legislative treatment of securities violations, such as fraud, should be flexible enough to be effective and allow for appropriate judicial interpretation and development.