

THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995: RETROACTIVE APPLICATION OF THE RICO AMENDMENT

I. INTRODUCTION

Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.¹

Leges et consuetudines futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit.²

The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.³

In 1995, the Congress ended a ten year struggle to curtail "frivolous" securities litigation by enacting the Private Securities Litigation Reform Act of 1995 ("The Reform Act").⁴ The Reform Act includes many sweeping changes in both procedural and substantive law governing the activities of private parties under federal securities law.⁵ It also contains an amendment to 18 U.S.C. §1964(c) eliminating securities fraud as a predicate offense for civil RICO.⁶ In essence, defrauded investors are no longer able

1. *United States v. Heth*, 3 U.S. 399, 413 (1806).

2. Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 n.4 (1936) (citing the *Corpus Juris Civilis* at Codes 1, 14, 7. Smead translates this passage: "[L]aws and customs should be given an operation on future transactions [. . .] and that they cannot be recalled to past facts unless it is stated expressly that they apply either to past time or to pending transactions."

3. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1989) (Scalia, J., concurring).

4. Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995).

5. John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW 335 (1996). Some of the changes include safe harbors for forward looking statements, heightened pleading standards, fee shifting and proportionate liability; see *id.* at 351-368 for a more detailed explanation of these provisions.

6. Racketeering Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§1961-68 (1988 & Supp. I 1989)). "RICO," as it is commonly known, was enacted in 1970 as Title IX of the Organized Crime Controls Act of 1970. RICO was intended to deal with the problem of "enterprise criminality" that is "patterns" of violence, corruption, fraud in government, labor or criminal operations. RICO is a particularly powerful tool for law enforcement agencies and private individuals because it broadens the scope of criminal and civil remedies to include fines, imprisonment, forfeiture, injunctions and treble damages for injured parties. See G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability*, 33 CRIM. L. REV. 1345 (1996) for a detailed analysis of the RICO statute.

to use RICO, absent a criminal conviction, to bring securities fraud suits. While the amendment to RICO is controversial, the purpose of this note is not to judge its merits; it will instead focus on whether it should apply retroactively to conduct that occurred prior to its effective date.

*District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Securities*⁷ was the first case to address this issue. In *District 65*, the United States District Court for the Northern District of Georgia refused to dismiss plaintiffs' RICO claims against a brokerage firm and one of its employees. The Court concluded no clear expression of congressional intent existed to warrant retroactive application of §107. Moreover, eliminating the predicate acts on which the plaintiffs had based their RICO complaint would impair the ability of the plaintiffs to recover for acts violating federal law.⁸

The issue turned on the Court's reading of sections 107 and 108 of the Reform Act. Section 107 of Title I of the Reform Act states, "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 [of Title 18]."⁹ Accordingly, the amendment severely limits a RICO based securities fraud action.¹⁰ Nevertheless, the general temporal applicability of the amendment is not stated. Section 108 of Title I, which deals with general applicability of the statute, does not mention how the RICO amendment is to be applied. Rather, it states that the other amendments of Title I that modify the Securities Exchange Act of 1934 and the Securities Act of 1933 do not apply to cases pending.¹¹ In other words, the amendments to the securities acts are given prospective application. The defendants in *District 65* argued §107 applies retroactively because all other sections of Title I of the Reform Act were explicitly given prospective application. The *District 65* Court, relying on the framework set out in *Landgraf v. USI Film Products*,¹² rejected this argument: "[A]lthough Congress deliberately chose not to apply the expansive securities law changes retroactively, it did not similarly express its intent with respect to RICO actions standing alone. Congress' intent is not clearly stated."¹³ The RICO claims were not dismissed but the issue was certified for immediate appeal to the Eleventh Circuit.¹⁴

Following *District 65*, this issue appeared elsewhere. Most courts follow the logic of *District 65*.¹⁵ Nevertheless, three district courts held that §107 would be ap-

7. *District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Securities*, 925 F. Supp. 1551 (N.D. Ga. 1996).

8. *Id.* at 1570.

9. § 107, 109 Stat. at 758.

10. The prohibition in §107 does not apply to if a defendant if he has been criminally convicted for securities fraud. For an analysis of this exception see G. Robert Blakey & Kevin P. Roddy, *Securities Reform and RICO: A Lawyer's Dream*, 23 RICO L. RPTR. 802, 808-812 (1996) [hereinafter Blakey & Roddy].

11. Section 108 of the Reform Act provides: "The amendments made by this title shall not affect or apply to any private action arising under title I of the Securities and Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this act." § 108, 109 Stat. at 758.

12. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

13. *District 65*, 925 F. Supp. at 1570.

14. *Prudential Securities, Inc. v. District 65 Retirement Trust*, 925 F. Supp. 1551 (N.D. Ga. 1996), appeal docketed, No. 96-8481 (11th Cir. Apr. 24, 1996).

15. See *Klein v. Boyd*, No. 95-5410, 1996 WL 675554 (E.D. Pa. Nov. 19, 1996); *Baker v. Pfeifer*, 940 F. Supp. 1168 (S.D. Ohio 1996); *Mathews v. Kidder, Peabody & Co.*, 947 F.Supp. 180

plied retroactively.¹⁶ Litigation over retroactivity will become more prevalent, since many RICO cases are pending that are based on conduct that occurred before the Reform Act became effective. Barring congressional action to rectify the problem, the courts will be left to resolve the issue.

A strong presumption against retroactive legislation is a characteristic of Anglo-American jurisprudence. Retroactive application of new law potentially works harsh results. For this reason, it is considered unfair and violative of fundamental principles of jurisprudence.¹⁷ Individuals must know the law in order to follow it. When they are aware of how their conduct will be judged, individuals form expectations and model their behavior in light of the law. Retroactive legislation, however, disrupts this process.¹⁸ When a law that alters legal relations for past conduct is enacted, expectations are frustrated, behavior that was lawful becomes unlawful, and in many cases, individuals are stripped of rights and remedies they once possessed. The Constitution itself protects individuals from retroactive criminal law; the courts similarly do not apply legislation retroactively unless Congress manifests a clear intent to the contrary.

This note argues that §107 of the Reform Act should not apply retroactively. While Congress possesses the power to enact retroactive legislation, an intent is not manifested in either the text of the amendment or the legislative history that justifies retroactive application. Moreover, retroactive application will work a significant injustice on plaintiffs who were injured by conduct that occurred prior to the Reform Act's effective date. At the time of their injury, the law afforded them a RICO claim for relief, and, in many cases, this will be the only remedy. That plaintiffs should be stripped of a remedy that they possess is repugnant to basic notions of fairness.

Part II of this note examines the roots of the common law presumption against retroactivity and how it evolved in American jurisprudence. Part III analyzes the legislative history of the Private Litigation Securities Reform Act of 1995 to discern whether Congress manifested a clear intent for retroactive application of §107. Part IV of this note will analyze the text of the amendment and recent court decisions regarding the retroactivity issue. Part V suggests some possible solutions to prevent similar problems in the future.

II. THE JURISPRUDENCE OF RETROACTIVITY

A. Background: The Historical Presumption Against Retroactivity

The policy against retroactive application of law is reflected in the legal foundations of Western civilization. The Greeks recognized that retroactive legislation is repugnant to the idea of fairness.¹⁹ Roman Law also included a provision that new

(W.D.Pa. 1996); *In Re Prudential Securities*, 930 F. Supp. 69 (S.D.N.Y. 1996); *Bromm v. Premier Capital Investments*, CV95-3327 (D. Neb. Aug. 7, 1996).

16. See *Rowe v. Marietta Corp.*, No. 92-2963-D, 1997 WL 37055 (W.D. Tenn. Jan. 29, 1997) (plaintiffs' RICO claims dismissed; court held RICO amendment does not violate the presumption against retroactivity in *Landgraf*); *Reading Wireless Cable v. Steingold*, No. CV-S-95-785-DWH (LRL), 1996 WL 7289045 (D. Nev. July 23, 1996) (§ 107 of the Reform Act applies retroactively to claims filed before the statute's enactment); *ABF Capital Management v. Askin Capital Management*, No. 96 CIV. 2578(RWS), 1997 WL 27062 (S.D.N.Y. Jan. 24, 1997) (§ 107 of the Reform Act applies retroactively to claims filed after the date the provision became effective, but filed after the provision became effective).

17. NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 41.02 at 341 (5th ed. 1993).

18. C. SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 41.05 at 261 (4th ed. 1972).

19. Smead, *supra* note 2, at 775 n.2 (citing SIR PAUL VINOGRANDOFF, *OUTLINES OF HISTORICAL*

laws only govern future transactions unless it was made clear they were intended to address past acts.²⁰ The principle found its way into English common law through the writings of Bracton.²¹ Coke, a student of Bracton, firmly embedded the principle into common law jurisprudence by formulating it into a legal maxim that the English courts quickly adopted.²² Coke's maxim was originally viewed as a rule of statutory construction, but over time it was united with the concept of justice.²³ English courts only applied the principle where retroactive application of a law disadvantaged an individual.²⁴ While English courts and commentators recognized the principle as one of its fundamental rules, the doctrine of legislative sovereignty that dominated the period hampered its complete recognition.²⁵

The policy against retroactive legislation reflects numerous concerns. First, stability in our past transactions is necessary for closure and certainty.²⁶ Individuals want to know they can put past events behind them and focus on the future. Second, to plan future conduct, knowledge of the law and how the law will view that conduct is required. Moreover, retroactive laws cannot deter unlawful conduct because the acts they affect are already complete. Prospective legislation is the best way to encourage behavior in the future.²⁷ Last, corruption and partiality is avoided when legislation is passed without "an exact knowledge of who will benefit."²⁸

B. Retroactive Laws and American Jurisprudence

The Framers' antipathy to retroactive laws is illustrated in the Constitution. The Constitution prohibits both the states and Congress from passing *ex post facto* laws and bills of attainder. Additionally, states are prohibited from passing laws impairing contractual obligations. While the *ex post facto* clause was held to apply only to criminal laws, that this was the intention of the Framers is doubtful.²⁹ In *Calder v. Bull*,³⁰ the Supreme Court held that civil legislation did not fall within the scope of the *ex post facto* clause. Justice Chase wrote the principal opinion basing his argument on the proceedings of the Constitutional Convention and the clause's common law usage. Despite Chase's confidence in his reasoning, his reliance on the convention proceedings is discredited.³¹ Moreover, Chase ignored the fact that two of his brethren were

JURISPRUDENCE 139, 140. Vinogradoff cites the example of Timokrates and the Athenian Ambassadors to support this proposition. The Ambassadors withheld money owed to the city-state and then were condemned to repay twice the amount. Timokrates attempted to absolve the ambassadors by passing a law to eliminate the penalty. Demosthenes ruled that the law was invalid because it was retroactive.)

20. *Id.*

21. *Id.* at 776. Bracton is credited for carrying over many principles of the Roman civil law into the common law through his work *De Legibus et Consuetudinibus Angliae*. HENRICI DE BRACON, *LEGIBUS ET CONSUEUDINIBUS ANGLIAE* 531 (Sir Travers Twiss tran., ed. 1990).

22. Smead, *supra* note 2, at 776 n.5 ("Likewise time is to be taken into account, since every new constitution ought to impose a form upon future matters, and not upon things past.").

23. *Id.* at 778-80.

24. *Id.* at 776.

25. *Id.* at 780.

26. Scott M. Pearson, Note, *Canons, Presumptions and Manifest Injustice: Retroactivity of the Civil Rights Act of 1991*, 3 S. CAL. INTERDISCIPLINARY L.J. 461, 476 (1993) [*hereinafter* Pearson].

27. *Id.* at 476-77.

28. *Id.* at 477 n.83.

29. See William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947); Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315 (1922).

30. *Calder v. Bull*, 3 U.S. 386 (1798).

31. See *Satterlee v. Matthewson*, 27 U.S. 380, 413 (1829) (Constitution does not prohibit

already on the record against the proposition.³² Justice Paterson³³ acquiesced and joined Chase's opinion but did express his uneasiness with the result:

I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws; and therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact.³⁴

In addition to Paterson, many other Framers shared similar beliefs about the scope of the *ex post facto* clause.

James Madison, the principal author of the Constitution, firmly denounced retroactive legislation in *The Federalist* as being "contrary to the first principles of the social compact, and to every principle of sound legislation."³⁵ Madison added:

The sober people of America are weary of fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the proceeding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.³⁶

At the Constitutional Convention, delegates Oliver Ellsworth and Gouverneur Morris thought the clause unnecessary because they felt that it commonly understood that "*ex post facto* laws were void of themselves."³⁷ Madison recorded the vote on the *ex post facto* clause to be a ban on "retrospective laws."³⁸ Nevertheless, John Dickinson noted the term "*ex post facto*" applied only to criminal laws and suggested that a provision against retroactive civil laws also be added.³⁹ Despite the adoption of the clause, the records of the convention suggest many delegates believed they had banned retroactive civil legislation as well.⁴⁰ Moreover, a few states incorporated a general prohibition against all retroactive laws into their constitutions.⁴¹

retrospective laws unless they violate the *ex post facto* or contracts clause). In *Satterlee*, Justice Johnson's opinion is a point by point refutation of Chase's opinion in *Calder*. Johnson had the benefit of having the transcripts of the convention that were not available in print when Chase wrote his opinion. For a brief discussion of Johnson's opinion see Field, *supra* note 29, at 330-31.

32. See Crosskey, *supra* note 29, at 560-61. Paterson expressed a contrary view in *Van Horne's Lessee v. Dorrance*, 2 U.S. 304 (1795).

33. Justice Paterson represented New Jersey at the Constitutional Convention.

34. *Calder*, 3 U.S. at 397.

35. *The Federalist* No. 44, at 282-83 (J. Madison) (C. Rossiter ed. 1961).

36. *Id.*

37. 2 MAX FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 376 (1966).

38. Pearson, *supra* note 26, at 503.

39. *Id.* at 503. Dickinson relied on Blackstone as his authority for the proposition that *ex post facto* applied to criminal laws only. Yet, William Crosskey suggests that Dickinson read Blackstone out of context: "Blackstone was merely exemplifying the 'making of laws *ex post facto*,' and not defining such laws," he adds that Blackstone's proposition that "*all laws should be therefore made to commence in futuro*" should apply to civil as well as criminal legislation. See Crosskey, *supra* note 29, at 546.

40. See Field, *supra* note 29, at 317-27.

41. New Hampshire, Colorado, Georgia, Idaho, Missouri, Ohio, Tennessee and Texas explicitly

From a policy perspective, no rational reason exists to prohibit criminal but not civil retroactive laws. All the concerns regarding notice, stability and deterrence are equally applicable to both types of law. In *Calder*, Justice Chase defined four types of criminal laws that violate the *ex post facto* clause:

1st. Every law that makes an action done before passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.⁴²

Retroactive application of civil law is only different because it usually involves a monetary remedy. New burdens on past transactions are still unjust whether they be in the form of criminal or civil sanctions. Civil defendants are in no better position than criminal defendants to change their behavior when they have no notice of the law. Finally, a change of law does not undo the injury a plaintiff received regardless of whether it was the result of a criminal or tortious act.

Statutes such as RICO, that contain both criminal and civil causes of action, illustrate the problems of only prohibiting retroactive criminal laws. The prohibition against *ex post facto* laws protects a RICO defendant charged with predicate acts of fraud, extortion and gambling when the suit is brought by the government. Nevertheless, when that same suit is brought by a private party, only a presumption against retroactivity exists. Moreover, the only difference may be the plaintiff since the government can seek injunctive as well as monetary relief against RICO defendants. The focus in both situations should be the conduct in question. Regardless of whether the conduct results in criminal or civil charges, conduct that is unlawful when committed should be punished or sanctioned. Moreover, the plaintiffs injured by the unlawful conduct should have a cause of action regardless of how the law changes after the injury. If it violates the Constitution to make past conduct criminal, then for the same reason we should not allow laws to add or subtract civil liability for past conduct.

C. Pre-Landgraf: Conflicting Precedents

Prior to *Landgraf*, no definitive rule governed the retroactivity issue. Rather, lower courts struggled with two conflicting Supreme Court precedents: *Bowen v. Georgetown University Hospital*⁴³ and *Bradley v. Richmond School Board*.⁴⁴ *Bowen* follows the traditional presumption against retroactive application of legislation. The case concerned the validity of a 1981 Department of Health and Human Services (HHS) rule that set limits on reimbursement levels allowable for Medicare costs. After a challenge by participating hospitals, the District Court struck down the regulation and HHS reimbursed the hospital under the pre-1981 pricing index. In 1984, HHS attempted to reissue the 1981 pricing index rule by retroactively applying it to 1981. HHS hoped to recoup its losses by using the old schedule. Again, the hospitals sued and the

prohibit retroactive civil legislation in their state constitutions. See SINGER, *supra* note 17, at §41.03.

42. *Calder*, 3 U.S. at 390.

43. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

44. *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974).

Federal District Court granted summary judgment in their favor. The Supreme Court affirmed the ruling and stated that "[r]etroactivity is not favored in the law" and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."⁴⁵ Moreover, although the Court recognized that Congress possessed the power to make retroactive legislation, it added: it "ought not to be extended as to permit unreasonably harsh action without very plain words."⁴⁶ The Court offered no analysis on how it arrived at this conclusion; the presumably unanimous decision is based on the strength of common law principles against retroactivity.⁴⁷

In *Bowen*, the plaintiffs were parents who sought attorney's fees and expenses after winning a protracted school desegregation suit. Although no statute authorized the award, the Federal District Court awarded attorney's fees and expenses to the parents based on equitable principles.⁴⁸ The Court of Appeals reversed this decision and stated, "if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts."⁴⁹ Moreover, the Court of Appeals refused to apply the new legislation passed authorizing payment of attorney's fees in desegregation cases while the case was on appeal.

The Supreme Court affirmed the Court of Appeals, thereby reversing the trial court and granted the award to the parents. The Supreme Court concluded that a court should "apply the law in effect at the time it renders its decision, unless such an application would result in manifest injustice or there is a statutory direction or legislative history to the contrary."⁵⁰ The defendant school district faced no additional burden since similar awards were made before passage of the legislation. Moreover, application of the statute did not alter the school district's constitutional obligation to provide a nondiscriminatory education.⁵¹

In 1990, the Supreme Court acknowledged the "tensions" between the *Bowen* and *Bradley* lines of cases in *Kaiser Aluminum and Chemical Corp. v. Bonjorno*,⁵² but did not resolve the issue.⁵³ Nevertheless, the issue would soon need to be addressed by the court. Justice Scalia, in a concurring opinion, criticized *Bradley* for misreading prior cases dealing with retroactivity.⁵⁴ Noting that *Bradley* relied on many

45. *Id.* at 206.

46. *Id.* at 208 (quoting *Brimstone R.Co. v. United States*, 276 U.S. 104, 122 (1928)).

47. See *Gersman v. Group Health Ass'n Inc.*, 975 F.2d 886, 894 (D. D.C. 1992), *cert. denied*, 114 S.Ct. 1642 (1994).

48. *Bowen*, 416 U.S. at 696. The trial court predicated its ruling on two points: 1) the School Board's actions had resulted in unreasonable delay in desegregating the schools, causing the parents of the children to incur substantial expenditures to assert their constitutional rights; and 2) plaintiffs' suit served an important public purpose in that it forced the School Board into compliance with the law.

49. *Id.*

50. *Id.* at 711.

51. *Id.* at 720-21.

52. *Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990) (calculation of postjudgment interest in antitrust suit properly runs from the date of the entry of judgment and not the date of the verdict).

53. *Id.* at 834-37. The Court did not resolve the issue because under both *Bowen* and *Bradley*, where congressional intent is clear it governs. The plain language of the statute at issue was clear in its original and amended form that interest rate for any particular judgment runs from date of judgment and single interest rate is to be used throughout the period of accrual.

54. *Id.* at 844-51. *Bradley* primarily relies on *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268 (1969) (holding appellate court must apply the law in effect at the time it renders its

cases involving judicial decisions rather than statutes and cases where the law was changed after the issue was adjudicated, Scalia suggested that *Bradley* only applies in a number of limited circumstances. He further added that *Bradley*'s "manifest injustice" test permits judges to exercise their own policy preferences and gives them the power to "expand or contract the effect of legislative action."⁵⁵

[T]here is nothing to be said for a presumption of retroactivity It is contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent. The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks, Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law.⁵⁶

Justice's Scalia's sentiments proved influential when the Court next addressed the retroactivity issue.

D. *Landgraf*: Retroactivity Issue Resolved

The Supreme Court definitively addressed the issue of retroactivity in *Landgraf v. USI Film Products*.⁵⁷ In *Landgraf*, a female employee brought a sexual harassment suit against USI under Title VII of the Civil Rights Act of 1964.⁵⁸ The District Court found that although she had been harassed, it was not so severe as to justify equitable relief. At the time of the suit, Title VII did not provide for any other remedy and as a result, *Landgraf*'s claim was dismissed. While her appeal was pending, Congress passed the Civil Rights Act of 1991 ("1991 Act") that included a provision for compensatory and punitive damages in cases of intentional sexual harassment under Title VII.⁵⁹ The Court of Appeals refused to remand *Landgraf*'s case for a jury trial to determine damages pursuant to the 1991 Act. The Supreme Court granted certiorari to determine whether §102 of the 1991 Act should be applied retroactively to cases pending at the time the Act became law.

The Supreme Court was unpersuaded by arguments that Congress intended to apply the 1991 Act retroactively. In resolving the issue, the Court looked at the history of the legislation, the text of the Act, and the tension existing between the *Bowen* and *Bradley* cases. Examining the legislative history of the 1991 Act, the Supreme Court found no clear intent to provide for retroactive application. Two pieces of evidence support this conclusion. First, the House version of the 1991 Act contained an explicit retroactivity provision when it was introduced, but the Senate substitute later agreed upon omitted that provision.⁶⁰ Debate over the effective date offered many "partisan statements" attempting to discern the meaning of the Act's "effective date" provision,

decision) and *United States v. Schooner Peggy*, 1 U.S. 103 (1801) (holding that if subsequent to judgment of trial court and prior to decision of appellate court, a law intervenes and changes the rule of law that governs, the new law must be obeyed).

55. *Kaiser Aluminum*, 494 U.S. at 857.

56. *Id.*

57. *Landgraf*, 511 U.S. 244.

58. 42 U.S.C. § 2000e (1994).

59. 42 U.S.C. § 1981a (1994). Section 102 of the 1991 Civil Rights Act provided for a jury trial when damages for sexual harassment are claimed. It also provided a monetary remedy that did not previously exist. *Landgraf*, 511 U.S. at 254.

60. *Id.* at 262-63.

but none were conclusive.⁶¹ Second, the President a year earlier had vetoed the 1990 Civil Rights Act citing "unfair retroactivity rules" as one reason for his disapproval.⁶² The Court speculated that this omission was not accidental: "it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kinds of explicit retroactivity commands found in the 1990 bill."⁶³ From this evidence, the Court found that the legislative history alone was not dispositive on the issue of retroactive intent.

The Court next turned to an examination of the text of the statute. Landgraf argued that because the Act expressly provides for prospectivity in only two sections, it should be inferred that the opposite was intended for the rest of the Act.⁶⁴ Skeptical of Landgraf's *expressio unius exclusio alterius*⁶⁵ argument, the Court stated:

[g]iven the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences from two provisions of quite limited effect.⁶⁶

They further added that Landgraf's argument would "require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message."⁶⁷ The Court was unwilling to read beyond the plain meaning of the text. The legislative history showing that the House bill contained retroactivity language that was omitted in the final Senate version further weakened Landgraf's position. Justice Stevens noted that the debate over the bill's effective date offers "no evidence that Members believed an agreement had been tacitly struck on the retroactivity issue, and little to suggest that Congress understood or intended the interplay of §§402(a), 402(b), and 109(c) to have the decisive effect petitioner assigns them."⁶⁸ The intent of one House cannot be used as binding authority for the intent of the law.⁶⁹

61. *Id.* at 262 n.15.

62. *Id.* at 256.

63. *Id.*

64. Landgraf relied on the text of three provisions of the Act to support her proposition: §§402(a), 402(b) and 109(c). Section 402(a) states: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Section 402(b), which both parties stipulated was intended to exempt a particular disparate impact claim against Wards Cove Packing Company provides:

(b) CERTAIN DISPARATE IMPACT CASES.

Notwithstanding any other provisions of this Act, nothing in this Act shall apply to any disparate impact cases for which a complaint was filed before March 1, 1975, and for which the initial decision was rendered after October 30, 1983.

Section 109(c), applying Title VII to overseas employers states:

(c) APPLICATION OF AMENDMENTS.

The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."

Landgraf contended that subsections 402(b) and 109(c) were the "other provisions" that to which §402(a) referred. When these sections are read together they create a "strong negative inference that all sections of the Act not specifically declared prospective apply to cases that arose before November 21, 1991." *Id.* at 257-58.

65. A principle of law that holds when one or more things of a class are expressly mentioned others of the same class are excluded.

66. *Landgraf*, 511 U.S. at 259.

67. *Id.* at 262.

68. *Id.* at 263.

69. *See I.N.S. v. Chadha*, 462 U.S. 919 (1983).

Last, the Court set out to resolve the "apparent tension" between *Bradley* and *Bowen* it acknowledged in *Kaiser Aluminum*. The *Bradley* line of cases stands for the proposition that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction of legislative history to the contrary."⁷⁰ The Court noted that it will generally apply *Bradley* where: 1) no vested right of a party has been substantially affected; 2) the statute granted or removed jurisdiction from a particular judicial body; and 3) procedural rules are involved.⁷¹ According to the Court, *Bradley* "did not alter the presumption against application . . . of new statutes that would have genuinely 'retroactive effect.'"⁷² Rather, *Bradley* can be distinguished on the grounds that determinations of attorney's fees are "collateral to the main cause of action" and are an issue separate from the cause of action to be proved at trial.⁷³ Given that existing legal theories warranted the award of attorney's fees, the new legislation "did not impose an additional or unforeseeable obligation on the school board."⁷⁴ Additionally, the Court found *Bradley* a compelling equitable case because it gave relief to parents who were attempting to desegregate the public schools. *Bradley* does not undermine the presumption against retroactivity, rather it elucidates the few and well defined exceptions that exist in the doctrine.

The *Bowen* line of cases reflects the traditional disfavor for applying legislation retroactively: "Retroactivity is not favored in the law . . . even where some substantial justification for retroactive rule-making is presented, courts should be reluctant to find such authority absent a statutory grant."⁷⁵ According to *Landgraf*, courts have not applied new legislation retroactively where it would: 1) affect a contractual or property right; 2) affect rights that are "vested" in particular party; 3) add burdens to private parties that were not in place prior to the enactment of the new law; or 4) impose new monetary obligations on the government.⁷⁶ If Congress clearly prescribes the reach of the new legislation, then the language of the statute controls. In absence of any "express command," the court should follow the traditional presumption against retroactivity where "it would impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."⁷⁷

The Court concluded that §102 of the Civil Rights Act of 1991 should not be applied retroactively in *Landgraf*. Section 102(b) authorized punitive damages, a new form of relief that did not exist prior to the filing of *Landgraf*'s lawsuit. To allow

70. *Bradley*, 416 U.S. at 711.

71. *Landgraf*, 511 U.S. at 273-75.

72. *Id.* at 277.

73. *Id.*

74. *Id.*

75. *Bowen*, 488 U.S. at 208-09.

76. *Landgraf*, 511 U.S. at 270-73.

77. *Id.* at 280. These criteria appear illustrative and not exhaustive. Much of the Court's discussion is focused on the increasing liability since *Landgraf* was seeking a new remedy that imposed new liability on USI. Nothing in the opinion suggests that the same analysis should not be used when determining whether liability is being reduced for past conduct. In fact, the Court states, "[t]he extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Id.* at 283-84. To support this point the Court mentions that state courts "have consistently held that statutes changing or abolishing limits on the amount if damages available in wrongful death actions should not, in the absence of clear legislative intent, apply to actions arising before their enactment." *Id.* at 284 n.36.

Landgraf to benefit from the new statutory remedy would provide her with "a new right" that she did not have when she filed her original suit.⁷⁸ The Court rejected Landgraf's contention that a procedural right was involved. The right to a jury trial was not procedural in her case because its purpose was to award monetary damages. Moreover, subjecting LSI to a jury trial for damages would increase their liability for past conduct. The Court found that giving Landgraf a new remedy was fundamentally unfair and violated the traditional presumption against retroactivity. To date, *Landgraf* is the most definitive Supreme Court pronouncement on the issue of retroactivity.

III. THE SECURITIES REFORM ACT OF 1995

The Private Securities Litigation Reform Act of 1995 was the culmination of numerous attempts to reform securities law. The Reform Act made sweeping changes in substantive securities law. It significantly alters the conduct of private actions under federal securities laws, the consequences of liability for those actions, and the standards for liability.⁷⁹ While the original intent of the bill was to curb supposedly frivolous lawsuits, particularly those filed for their settlement value, the bill that emerged significantly effected even meritorious suits.⁸⁰ One of the most controversial provisions is the removal of securities fraud as a predicate act for civil RICO.

A. History of RICO

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) as Title IX of the Organized Crime Control Act.⁸¹ RICO was created to deal with the problem of "enterprise criminality."⁸² RICO is effective because it provides for "enhanced criminal and civil sanctions" such as "fines, imprisonment, forfeiture, injunctions, and treble damage[s]."⁸³ Many believe that RICO was only intended to combat organized crime; courts and commentators alike, however, recognize that RICO was drafted "broadly enough to encompass a wide range of criminal activity."⁸⁴ Today, RICO is "the prosecutor's tool of choice against sophisticated forms of crime."⁸⁵ Moreover, the treble damage provision of RICO is similar to antitrust law, since it creates "a private enforcement mechanism that . . . deter[s] violators and provide[s] . . . ample compensation to the victims."⁸⁶ Despite numerous attacks in the courts, civil RICO survived and remains a viable means of combating fraud and cor-

78. *Landgraf*, 511 U.S. at 283.

79. *Avery*, *supra* note 5, at 335.

80. *Id.*

81. Blakey & Roddy, *supra* note 10, at 802.

82. RICO shifts the focus from single acts and individuals to "patterns" of crimes and multiple perpetrators. RICO is utilized to combat "'patterns' of violence, the provision of illegal goods and services, corruption in labor or management relations, corruption in government, and criminal fraud—expressly including fraud in the sale of securities by, through, or against various types of licit or illicit 'enterprises'". *Id.* See G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982) for a more detailed analysis of predicate RICO acts.

83. Blakey & Roddy, *supra* note 10, at 802.

84. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989).

85. Blakey & Roddy, *supra* note 10, at 803. Criminal RICO was not used with regularity until about 1975. Since that time, criminal RICO actions number about 125 per year. Of those suits, approximately 39% have been in the area of organized crime, 48% in white collar crime, and 13% fall in other areas (terrorism, anti-Semitic groups, etc.). *Id.*

86. *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982).

ruption.⁸⁷

In the wake of *Sedima, S.P.R.L. v. Imrex Co.*,⁸⁸ Congress attempted to limit RICO to criminal use. The accounting and securities industries primarily fueled these efforts.⁸⁹ After considerable Congressional hearings on the matter, legislation passed the House but fell two votes shy in the Senate in 1986.⁹⁰ In 1990, Congress proposed a purchaser-seller limitation on RICO; this legislation failed to pass, but laid the foundation for another reform effort in 1995.⁹¹

B. Private Securities Litigation Reform Act of 1995

One of the first legislative initiatives of the newly elected Republican majority in 1994 was securities litigation reform. On February 27, 1995, Representative Thomas J. Bliley (R-VA) introduced The Private Securities Litigation Reform Act of 1995 in the House of Representatives.⁹² The measure originally appeared as Title II of H.R.10, the Common Sense Legal Reforms Act of 1995. After being referred to the House Commerce and Judiciary Committee, the committee held hearings on the measure. The Commerce Committee reported on Title II on February 24, 1995.⁹³ No RICO provision existed in the bill as reported.

Title II was renamed H.R. 1058 and introduced in the House on February 27, 1995.⁹⁴ H.R. 1058 contained provisions regarding professional and lead plaintiffs, class counsel, safe harbors for forward-looking statements, heightened pleading standards, fee shifting and other measures affecting private securities suits.⁹⁵ The House Commerce and Judiciary Committee held hearings on H.R. 1058 and made reports on their findings. RICO reform was never mentioned in these hearings, and a RICO provision was not included in H.R. 1058 when it reached the House floor on March 6, 1995.⁹⁶ The first mention of RICO came when Rep. Chris Cox (R-CA) introduced an amendment proposing to "exempt from civil RICO any liability under 18 U.S.C. § 1964(c) any conduct actionable as securities fraud."⁹⁷ Cox urged that this amendment was necessary to curb "frivolous securities litigation" and that this provision was originally included in the bill but was omitted "inadvertently" when the Commerce and Judiciary versions were combined.⁹⁸ Cox's position was criticized by Representative John Conyers (D-MI) who said:

The problem that we have is that the gentleman's amendment is asking the Con-

87. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (fact that offending conduct is described by reference to criminal statutes does not mean private civil action will be judged by criminal standards of liability; no requirement that a defendant must be criminally convicted of a predicate act or RICO violation before a treble damage suit can be brought under RICO).

88. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

89. Blakey & Roddy, *supra* note 10, at 803.

90. *Id.* at 804.

91. *Id.*

92. 141 CONG. REC. H124 (daily ed. Jan 4, 1995).

93. H.R. Rep. 104-50, pt.1 (1995).

94. 141 CONG. REC. H2306 (daily ed. Feb. 27, 1995).

95. H.R. 1058, 104th Cong., (1995).

96. 141 CONG. REC. H2760, H2716 (daily ed. Mar. 7, 1995).

97. 141 CONG. REC. H2770 (daily ed. Feb. 27, 1995). The text of the amendment stated: "Section 1964(c) of title 18, United States Code, is amended by inserting, except that no person may bring under this provision if the racketeering activity, as defined in section 1961(1)(D), involves conduct actionable as fraud in the purchase or sale of securities before the period." *Id.*

98. *Id.*

gress in broad daylight to believe that the biggest amendment for fighting civil fraud that has ever been put on the books was accidentally left out. I guess we accidentally did not have any hearings. I guess there accidentally were not any witnesses. . . . If it was an accident, let us go back and do it correctly. The provision of this amendment is broader than any attempt at a modification of RICO, and the gentleman knows it.⁹⁹

Cox further argued securities reform that did not address a change in RICO was meaningless because RICO provided an "end run" around existing securities law.¹⁰⁰ He contended that RICO is often used to "extort settlements from innocent defendants" by plaintiffs who possess no chance of recovery.¹⁰¹

Representative Jack Fields (R-TX) explained how the amendment would change the litigation of securities fraud: "H.R. 1058 . . . has a losers pay provision. RICO does not. H.R. 1058 preserves a one year statute of limitation. The RICO statute of limitations is longer. H.R. 1058 limits joint and several liability to knowing securities fraud; RICO does not."¹⁰²

Representative John Bryant (D-TX) contested Cox's claim that RICO was a "loophole." Bryant read Cox the RICO statute which specifically states that "racketeering" includes "any offense involving fraud and the sale of securities." Cox responded by arguing RICO was "never intended to apply to securities cases."¹⁰³

Representative John Dingell (D-MI) offered another sharp criticism of Cox's amendment; he pointed out that securities fraud was a part of RICO since its enactment and "there is not one scintilla of evidence in the record of the Committee on Commerce whether we should or we should not" change that.¹⁰⁴ Dingell argued that this change would run counter to the confidence Americans have in our securities market because it would weaken "an extraordinarily good system of private enforcement."¹⁰⁵ Representative Edward Markey (D-MA), along with Dingell, noted that the amendment would eliminate any civil RICO liability for Mafia involvement in the securities industry.¹⁰⁶ Moreover, Dingell added that the amendment allowed a racketeer to avoid RICO liability so long as one of their predicate acts was securities fraud.¹⁰⁷ For example, a RICO defendant whose predicate acts include murder, nar-

99. *Id.* at H2765.

100. *Id.* at H2771.

101. *Id.*

102. *Id.* at H2775.

103. *Id.* at H2771.

104. *Id.* at H2774.

105. *Id.*

106. *Id.* Markey's concerns were based on subcommittee hearings in which "we had to have our witnesses testify with bags over their heads because of the fear of retaliation by organized crime in the penny stock market of this county." *Id.* at H2777.

107. *Id.* at H2778. Rep. Dingell's suggestion that the 1995 amendment to RICO covers all conduct in a pattern, in which one of the predicate acts is fraud, is not supported by the text of the statute. Conduct that can be characterized as "fraud in the purchase or sale of securities" should fall within the amendment despite attempts to recharacterize the conduct through "artful pleading." Nevertheless, the text of the 1995 amendment applies to "conduct that would have been actionable as fraud"; therefore, conduct that is not actionable as fraud is not covered by the amendment. While the legislative history supports the view that any effort to use RICO in a securities fraud action should be eliminated, the plain text of the amendment does not reflect this intent. Given the Supreme Court's current approach to statutory interpretation, it is unlikely that the intent manifested in the legislative history will be enough to warrant deviating from the plain meaning of the statute. Congress may need to amend the RICO amendment to give it the effect they intended. See Blakey & Roddy, *supra* note 10,

otics, conspiracy and gambling in addition to securities fraud would not be subject to RICO liability.¹⁰⁸ Dingell criticized the amendment as "sloppy work" and "an embarrassment to the House"; he urged the amendment be rejected.¹⁰⁹ Nevertheless, Cox's amendment passed by a vote of 292 to 124.¹¹⁰

Senators Chris Dodd (D-CT) and Pete Domenici (R-NM) introduced S. 240, a companion to H.R. 1058, on January 18, 1995.¹¹¹ Contrary to the later version of the House bill, S. 240 did include a RICO provision that was similar to Cox's amendment.¹¹² After being referred to the Senate Committee on Banking, Housing and Urban Affairs, the Subcommittee on Securities held hearings on S. 240. Arthur Levitt, Chairman of the Securities and Exchange Commission, testified in support of a provision that would "[e]liminat[e] the overlap between private remedies under RICO and the federal securities laws."¹¹³ In a written statement to the subcommittee, Levitt stated "[b]ecause the securities laws generally provide adequate remedies for those injured by securities fraud, it is both unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO."¹¹⁴ Despite strong opposition by the Bar of New York City which characterized the proposal as "ambiguous" and "unworkable,"¹¹⁵ the bill was passed in committee by a vote of 11 to 4 and was presented to the full Senate on June 22, 1995.¹¹⁶

Contrary to the fierce debate in the House, the RICO provision was hardly mentioned in the Senate.¹¹⁷ Only after extensive consideration of other amendments did Senator Joseph Biden (D-DE) offer an amendment that allowed the use of civil RICO where the defendant was previously convicted for fraud.¹¹⁸ Additionally, the amendment provided that the statute of limitations for the RICO action would accrue from the final date of the conviction. Sen. Biden's amendment was accepted.¹¹⁹ Soon after, the Senate substituted the text of S. 240 after the enacting clause of H.R. 1058 and passed the bill by a vote of 70 to 29.¹²⁰

The final version of the bill that emerged from conference committee contained the RICO provision and reflected the amendment offered by Sen. Biden.¹²¹ No new

at 809-10.

108. Blakey & Roddy, *supra* note 10, at 806.

109. 141 CONG. REC. at H2778.

110. *Id.* at H2778-79.

111. 141 CONG. REC. S1075 (daily ed. Jan. 18, 1995).

112. S. 240, 104th Cong. §105 (1995), 141 CONG. REC. S1078 (daily ed. Jan. 18, 1995).

113. *Securities Litigation Reform Proposals S. 240, S. 667 and H.R. 1058: Hearings Before the Subcomm. on Sec. of the Senate Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 232 (1995).

114. *Id.* at 251.

115. 141 CONG. REC. S8885 (daily ed. June 22, 1995).

116. *Id.*

117. Blakey & Roddy, *supra* note 10, at 807-08.

118. 141 CONG. REC. S9163 (daily ed. June 27, 1995). Ironically, Biden suggested that he thought "carving out securities fraud from the application of the civil RICO statutes . . . [was] a bad idea." However, he chose not to debate the point. *Id.* For an excellent analysis of 1995 RICO exception, see Blakey & Roddy, *supra* note 10, at 808-12.

119. 141 CONG. REC. S9219 (daily ed. June 28, 1995).

120. *Id.*

121. *Id.* The amendment provides:

AMENDMENT TO RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.

debate over the RICO provision occurred in conference and the committee report only contained a short passage indicating the measure was supported by SEC Chairman Levitt.¹²² The bill as reported passed easily in both the House and the Senate.¹²³ President Clinton vetoed the bill on December 19, 1995, citing his objections to the pleading standards, safe harbor provisions, and Rule 11 sanctions.¹²⁴ President Clinton's objections did not mention the amendment to RICO. The bill returned to the Congress and both the House and Senate voted to override the President's veto; no new debate over the RICO provisions took place in the override debates.¹²⁵

The purpose of analyzing the legislative history of the Reform Act is to determine the Congressional intent regarding the general temporal applicability of the RICO amendment. Despite considerable debate in the House over the amendment, and hearings in the Senate, discussion of the applicability of the amendment never occurred.¹²⁶ If Congress did intend to apply the RICO amendment retroactively, that intent is not manifested in any of the proceedings or debate that occurred prior to the Act's passage. Further, if Congress did intend retroactive application it possesses the power to amend the Reform Act to make its intent clear. Barring any legislative action, the courts should not give effect to any suggestion that the RICO amendment applies retroactively. Redrafting the statute is Congress' job, the courts should apply the statute as written.¹²⁷

IV. RECENT LITIGATION INVOLVING SECTION 107

A. District 65

*District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Securities, Inc.*¹²⁸ was the first case to raise the question of whether sections 107 and 108 of the Reform Act apply retroactively. The plaintiffs in the case were members of a voluntary pension trust established to provide retirement, death and disability benefits to members of various industrial unions. They alleged that the defendants, Prudential Securities, and its employee, William L. Kicklighter, Jr.,

Section 1964(c) of title 18, United States Code is amended by inserting before the period " , except that no person may rely upon conduct that would have been actionable as fraud in the purchase of [sic] sale of securities to establish a violation of section 1962", provided however that this exception shall not apply if any participant in the fraud is criminally convicted in connection therewith, in which case the statute of limitations shall start to run on the date that the conviction becomes final.

122. H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. 42-43 (1995).

123. The House passed the bill by a vote of 320 to 102. 141 CONG. REC. 14055 (daily ed. Dec. 6, 1995). The Senate vote was 65 to 30. 141 CONG. REC. S17991, S17997 (daily ed. Dec. 5, 1995).

124. H.R. Doc. No. 104-150 (1995).

125. The House overrode the President's veto by a vote of 319 to 100. 141 CONG. REC. H15224 (daily ed. Dec. 20, 1995). Senator Arlen Specter (R-Pa) mentioned that the bill included a provision eliminating securities fraud from RICO but no substantive discussion took place. *Id.* at S19047 (daily ed. Dec. 21, 1995). The Senate vote was 68 to 30. 141 CONG. REC. at S19047 (daily ed. Dec. 22, 1995).

126. *Id.*

127. See *Sedima*, 473 U.S. at 479. As early as 1985, the Supreme Court recognized that RICO was being used for purposes not expressly intended by Congress: "We . . . recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Id.* at 500. The Court also added that it was not their job to rectify the problem; rather that where there is a "defect" inherent in the statute, "correction must lie with Congress." *Id.* at 499.

128. 925 F. Supp. 1551 (N.D. Ga. 1996).

invested funds in securities inconsistent with the trust's investment objectives, engaged in unauthorized trading, violated the Employee Retirement Income Security Act's ("ERISA") trading regulations, violated the rules of securities associations, and misrepresented and omitted material facts in dealing with the trust.¹²⁹ A RICO cause of action based on fraud in the purchase or sale of securities was also included in the pleading.¹³⁰

In late December of 1995, just after the Reform Act became law, the defendants moved to dismiss the RICO claims, asserting the new RICO amendment precluded the use of securities fraud as a predicate act for a RICO violation. The plaintiffs countered by arguing "(1) the predicate acts set forth in their complaint [were] not based solely upon conduct which would have been actionable as securities fraud, and (2) that even if they were . . . the amendment to the statute does not apply retroactively."¹³¹ The *District 65* court concluded that the allegations of mail and wire fraud were "so remote as to not be in connection with the purchase or sale of securities."¹³² In other words, the mail and wire fraud charges were not affected by the RICO amendment, and therefore were not dismissed. Nevertheless, the court found it necessary to take up the retroactivity question because the "allegations concerning defendants' representations as to risk of investments, failure to disclose commission restrictions, and churning of accounts would have been actionable as securities fraud claims."¹³³

The *District 65* court used the framework set by the Supreme Court in *Landgraf* to analyze the applicability of §107. Looking first at the statutory text of §§107 and 108, the court sought to determine whether it "manifests an intent that [section 107] should be applied to cases that arose . . . before its enactment."¹³⁴ The defendants argued the RICO amendment applies retroactively by implication. Section 108 states that changes instituted by the Reform Act "shall not affect or apply to any private action arising under Title I of the Securities Exchange Act of 1934 or Title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act."¹³⁵ Since Congress did not include the RICO amendment within the prospective application of §108, the defendants inferred that §107 was meant to apply retroactively. A similar argument was made and rejected in *Landgraf*, where the Supreme Court noted, "[g]iven the high stakes of the retroactivity question . . . it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect."¹³⁶ According to *Landgraf*, courts should not depart from the general rule of prospective application where Congress has only made its intent known by implication. Therefore, the court rejected the defendants' textual argument that §107 applies retroactively.

The next part of the *Landgraf* framework requires the court to determine whether

129. *Id.* at 1558.

130. *Id.* at 1566. The plaintiffs alleged the following as RICO predicate acts: fraud under 18 U.S.C. § 1343 (1994), mail fraud under 18 U.S.C. § 1341 (1994) and fraud in the sale of securities under 15 U.S.C. § 77a (1994 & Supp. 1995). *Id.*

131. *Id.*

132. *Id.* at 1568.

133. *Id.*

134. *Id.* (quoting *Landgraf*, 511 U.S. at 257).

135. *Id.* (quoting Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, §108, 109 Stat. 737, 758).

136. *Landgraf*, 511 U.S. at 259.

the case would fall into one of the exceptions carved out by the *Bradley* line of cases. In order to do so, *Landgraf* instructs the court to ask whether the new legislation would impair rights the party possessed when they acted, increase liability for past conduct, or create new duties with respect to transactions already completed.¹³⁷ The *District 65* court found the sole issue was whether §107 impaired the rights the plaintiffs had when they filed the suit.¹³⁸

The plaintiffs in *District 65* had a RICO cause of action based on mail and wire fraud when they filed their suit in 1994. Nevertheless, they were unable to file a non-RICO securities fraud suit because the statute of limitations expired before their complaint was filed. If the plaintiffs were not allowed to use mail and wire fraud as the basis for a RICO suit, they would be denied relief. The court concluded that retroactive application of §107 "impairs the plaintiffs' ability to recover for actions which may have violated federal law."¹³⁹ Absent a clear intent for retroactive application and the fact a "vested right" was at stake, the court held retroactive application of §107 would be a "manifest injustice" and it would not read the statute to apply retroactively.¹⁴⁰

B. *Reading* and *Rowe*: The Case for Retroactivity

A number of recent district court decisions follow *District 65*.¹⁴¹ Nevertheless, support for *District 65* is not unanimous. Three cases, *Reading Wireless Cable Television Partnership v. Steingold*,¹⁴² *Rowe v. Marietta Corp.*,¹⁴³ and *ABF Capital Management v. Asking Capital Management*,¹⁴⁴ apply §107 retroactively. The defendants in these cases made essentially the same argument as the defendants in *District 65*: that silence in §108 on the general applicability of the RICO amendment (§107), in conjunction with a clear congressional intent to apply §108 prospectively, shows congressional intent to apply the RICO amendment retroactively.¹⁴⁵

All three cases use different evidence in the legislative history to support retroactive application. For example, the *Reading* court found that the Conference Committee's adoption of the House version of the applicability provision provided compelling evidence of retroactive intent.¹⁴⁶ The Senate version of the applicability provision stated, "[t]he provisions included in Title I of this Act apply to any private action commenced after the date of enactment."¹⁴⁷ The court conceded that had this version been enacted, §107 would not apply retroactively. However, the Conference Committee adopted the House's applicability version, and later this version was enacted into

137. *Id.* at 280.

138. *District 65*, 925 F. Supp. at 1569. The court concluded that the RICO amendment did not increase a party's liability for past conduct nor did it impose new duties with respect to transactions already completed in the case. *Id.* Therefore, the court was left to examine whether the amendment impaired the plaintiffs' rights when they acted. *Id.*

139. *Id.* at 1570.

140. *Id.*

141. See *supra* note 15 for decisions following *District 65*.

142. No. CV-S-95-785-DWH(LRL), 1996 WL 728045 (D. Nev. July 23, 1996).

143. No. 92-2963-D, 1997 WL 37055 (W.D. Tenn. Jan. 29, 1997).

144. No. 96 CIV. 2578(RWS), 1997 WL 27062 (S.D.N.Y. Jan. 24, 1997).

145. *Reading*, 1996 WL 728045 at *1; *Rowe*, 1997 WL 37055, at *9; *ABF*, 1997 WL 27062 at *7.*8.

146. *Reading*, 1996 WL 728045, at *2.

147. S.240, 104th Cong., § 110 (1995).

law.¹⁴⁸ Neither the Senate Report nor the House Conference Report offers an explanation for this substitution. Yet, the court found this to be persuasive evidence that Congress did not intend to limit application of §107 to cases commenced after enactment.¹⁴⁹

Reading and *Rowe* probed into the nature of the RICO amendment to support the conclusion that §107 should have retroactive effect. The *Reading* court observed that §107 is unique because it was not intended to "identify and prohibit abusive litigation conduct."¹⁵⁰ Rather, its purpose was to eliminate the "unnecessary and unfair piling on of liability" in securities fraud cases where adequate remedies already existed to combat fraudulent conduct.¹⁵¹ Further, the *Rowe* court noted that "Congress intended RICO as a weapon against organized crime, not as a weapon against ordinary investors and the business community."¹⁵²

While *Reading* and *Rowe* offer plausible arguments from the Reform Act's legislative history, their evidence hardly manifests a "clear" intent for retroactivity. First, both courts misread *Landgraf*. The Supreme Court in *Landgraf* rejected a similar claim where plaintiffs argued by way of negative inference that a provision applied retroactively. Second, the procedural history of the inclusion of the RICO amendment also weakens the argument for retroactivity. The RICO amendment was an eleventh hour addition to the Reform Act. Several House members severely criticized the inclusion of the RICO amendment because it did not go through the normal legislative hearing process.¹⁵³ Moreover, had Congress intended retroactive application of §107, it most likely would appear somewhere in the record. Despite extensive House debate on the merits of eliminating a RICO cause of action for securities fraud, the record is void of any discussion of retroactive application of the amendment.¹⁵⁴ Given the late inclusion of the amendment into the bill, it is likely that §108's express statement of prospectivity was simply overlooked or the result of poor drafting.¹⁵⁵ The evidence cited by *Reading* and *Rowe* does little to overcome the strong presumption against retroactivity laid down by *Landgraf*.

The defendants in *Rowe* also argued that §107 is a purely jurisdictional provision and therefore qualifies as an exception to *Landgraf's* general rule.¹⁵⁶ The *Rowe* court reasoned that jurisdictional rules are exempt because they "take[] away no substantive

148. H.R. 1058, 104th Cong., §108 (1995), provides that "[t]he amendments made by this title shall not affect or apply to any private action under Title I of the Securities and Exchange Act of 1934 and Title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this act."

149. *Reading*, 1996 WL 728045, at *2.

150. *Id.*

151. *Id.* The court cites the testimony of SEC Chairman Arthur Levitt as authority on this point.

152. *Rowe*, 1997 WL 37055, at *13 (citing Rep. Cox).

153. See 141 CONG. REC. H2777 (daily ed. March 7, 1995) (statement of Rep. Markey). Representative Markey stated:

Is it proper for this Congress to take up an issue of such a magnitude with no hearings. To then come out here with a historic amendment to a separate piece of legislation with the Committee on Rules having a special hearing last night to put in order a nongermane amendment to a piece of legislation that has nothing to do with the business, and then asking our Members to rush out here at 6:30 and cast a vote on that, it is unfair. It is wrong. . . .

154. See *supra* notes 98-117 and accompanying text.

155. *Baker v. Pfeifer*, 940 F. Supp. 1168, 1178-79 (S.D. Ohio 1996).

156. *Rowe*, 1997 WL 37055, at *11.

right, but simply change[] the tribunal that is to hear the case."¹⁵⁷ Additionally, the court noted "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'"¹⁵⁸ While *Landgraf* does provide for a jurisdictional rule exception, §107 is not a jurisdictional provision. It does not repeal RICO nor does it withdraw the jurisdiction of the federal courts to hear RICO claims. Rather, §107 only restricts RICO's definition of "racketeering activity."¹⁵⁹ Section 1964(c) of RICO is a "multi-faceted statutory provision."¹⁶⁰ It provides a private right of action to sue for treble damages and that such suits may be brought "in any appropriate United States district court."¹⁶¹ Section 107 limits the predicate acts on which RICO actions are based, but it does not change the jurisdiction of the district courts to hear those claims. Given Justice Stevens' assertion in *Landgraf* that the "jurisdictional exception" applies where the statute speaks to the power of the court and not to the rights and obligations of parties, the *Rowe* court's characterization of §107 as a jurisdictional statute is erroneous.¹⁶²

The *Rowe* court illustrates a common theme among the cases finding against retroactive application of §107. In every case, the plaintiffs were barred from bringing §10(b) actions for securities fraud because the limitations had run on those claims. Where §10(b) claims had not run, *Rowe* claimed the plaintiffs' legitimate expectations and rights to recovery were not impaired.¹⁶³ While in the ordinary case this will probably be true, conceivably some claims that are not actionable under securities law may be actionable under RICO.¹⁶⁴ Claims for relief under securities fraud must commence within one year after discovery and within three years of the violation.¹⁶⁵ Nevertheless, the RICO statute of limitation is four years.¹⁶⁶ Moreover, a consistent rule for the point of accrual has not been determined.¹⁶⁷ Given that RICO focuses on "discovery" and "injury" while securities law emphasizes "violations" and different periods of limitations, a RICO claim may still be actionable after the statute of limitations has run on the securities claim. Last, §107 does not preclude the possibility that securities fraud may be plead as a predicate act for aiding and abetting or conspiracy to violate RICO.¹⁶⁸

157. *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

158. *Id.* (quoting *Landgraf*, 511 U.S. at 2740 (citation omitted)).

159. Blakey & Roddy, *supra* note 10, at 814. See 18 U.S.C. §1961(1)(D) (1994) (defining "racketeering activity" to include "fraud in the sale of securities").

160. Blakey & Roddy, *see supra* note 10, at 814.

161. 18 U.S.C. § 1964(c) (1994).

162. See also *United States v. Hughes Aircraft Co.*, 63 F.3d 1512, 1517 (*Landgraf* exception applies only to a statutory amendment "explicitly effect[ing] a jurisdictional bar").

163. *Rowe*, 1997 WL 37055 at *14.

164. Blakey & Roddy, *supra* note 10, at 810 for a more extended discussion of "actionable conduct."

165. 15 U.S.C. § 78i(e) (1994).

166. See *Agency Holding Corp. v. Malley Duff & Assoc.*, 483 U.S. 143, 156 (1987).

167. While there is no consensus among the circuits most are following "some variation of a 'discovery' rule ('knew or should have known') that focuses on the sufficiency of the acts in the alleged 'pattern' for liability and 'injury' caused by . . . those acts constituting the 'pattern.'" Blakey & Roddy, *supra* note 9, at 810. See also *Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996), *cert. granted*, 117 S.Ct. 725 (1997).

168. For the purposes of the RICO amendment, any conduct which is "actionable" under the securities fraud cannot be used as a predicate act for a RICO claim. Nevertheless, the Supreme Court imposed a purchaser-seller limitation on a 10b-5 implied private cause of action thereby precluding any

C. ABF Capital Management

Only one case has addressed whether the RICO amendment applies to all cases brought after the Reform Act's passage, or only to cases relying on conduct that occurred after its passage. In *ABF Capital Management*, the District Court for the Southern District of New York dismissed plaintiffs' RICO claims based on conduct that occurred before the Act's effective date, but were not filed until after the Act became law. The plaintiffs argued that application of the Reform Act to their claim violated the "vested rights" prong of the *Landgraf* test. The Court rejected this argument, however, stating that, "A cause of action that has not been reduced to a final judgment is not a 'vested right'."¹⁶⁹ Since the plaintiffs were still able to bring a common law fraud claim against the defendants, the court held that elimination of a treble damages remedy under RICO was not unjust.

The *ABF Capital Management* Court contends that "[n]othing in *Landgraf* implies that a vested right occurs immediately upon a party's conduct."¹⁷⁰ This statement is misleading. First, the Supreme Court does not define what rights are "vested" for retroactivity purposes in *Landgraf*. Generally, however, vested rights are defined as those rights that "have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of any other private person."¹⁷¹ Second, such accrual, a question of federal law, usually occurs when three elements are present: a violator, violation and injury.¹⁷² A rule that would not protect causes of action as property rights until they are reduced to a final judgment, on the other hand, would work harsh results. Under that rule, no difference would exist between the plaintiff who has just been injured and one who was, after the expenditure of great time and expense, a day from receiving a judgment. Manifestly, the two parties are not similarly situated.

Moreover, a marked distinction exists between the right to a remedy and a right to a cause of action.¹⁷³ If a remedy is changed, a plaintiff may not get what he expected but he will still receive some form of relief. When an accrued cause of action is extinguished before judgment, the plaintiff is denied the opportunity to have his case heard and ultimately is barred from any relief for his injury.¹⁷⁴

action for aiding and abetting or conspiracy to violate 10b-5. If aiding and abetting and conspiracy are not "actionable" under the securities laws, then they are still viable for a RICO cause of action. For example, a plaintiff is not precluded from filing a conspiracy to violate RICO claim based on mail or wire fraud against a defendant who has defrauded them. See *Blakey & Roddy, supra* note 10, at 810.

169. *ABF Capital Management*, 1997 WL 27062 at *9 (quoting *Hyundai Merchant Marine Co. v. United States*, 888 F. Supp. 543, 551 (S.D.N.Y. 1995)).

170. *Id.* at *9 (quoting *In re Industrial Freight Sys., Inc.* 191 B.R. 825, 829 n.7 (Bankr. C.D. Cal. 1996)).

171. BLACK'S LAW DICTIONARY 1564 (6th ed. 1990).

172. *Cope v. Anderson*, 331 U.S. 461, 464 (1947) (accrual is a question of federal law); *United States v. Kubrich*, 444 U.S. 111, 122 (1979) (accrual for statute of limitations) ("that he had been hurt and who has inflicted the injury").

173. *Rhodes v. Jones*, 351 F.2d 884, 886 (8th Cir. 1965) ("A cause of action is a situation or state of facts which entitles a party to sustain an action and gives him the right to seek judicial interference in his behalf . . . [T]he cause of action is something different from the remedy or relief sought").

174. See Elizabeth Louise Loeb, Note, *Constitutional Fallout From the Warner Amendment: Annihilating the Rights of Atomic Weapons Testing Victims*, 62 N.Y.U. L. REV. 1331, 1355 (1987) ("Victims of atomic weapons testing have not yet acquired vested property interests in recovery but have ac-

While jurisprudence on the issue is hardly settled, the Supreme Court recognizes that claims for compensation may constitute property for due process.¹⁷⁵ Lower courts properly extend due process protection to various tort claims.¹⁷⁶ While these cases do not directly address the issue involved in *ABF Capital Management*, taken in the context of the issue of protecting accrued claims as "property" for due process, they support the proposition that extinguishing an accrued cause of action impairs property rights protected by the Constitution.¹⁷⁷

Defendants who committed securities fraud were on notice that their conduct violated RICO. Moreover, allowing plaintiffs to rely on this cause of action does not increase their liability for past conduct. As discussed above, statutes of limitations and accrual problems may prevent many plaintiffs from receiving relief from causes of action other than a RICO suit. Plaintiffs and defendants are now on notice that securities fraud is no longer actionable as a RICO predicate offense. Applying this provision to conduct that occurred before this amendment was passed, however is unjust and will deprive plaintiffs of a legitimate tool of recovery that existed at the time they were injured.

V. CONCLUSION

The Private Securities Litigation Reform Act is the culmination of years of work by the securities and accounting industries to curb "abusive" securities litigation. While ambitious in its scope, the legislation "suffer[s] from a lack of agreement on the nature

quired vested property interests in the right to sue defense contractors for their injuries").

175. *Id.* at 1347. See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-32 (1982) (injured worker's right to use EPA's adjudicatory procedures is a "species of property protected by the Due Process Clause"; state can determine preconditions to bringing action, but once granted, it cannot remove them without "appropriate procedural safeguards"); *Mullane v. Central Hanover*, 339 U.S. 306, 313 (1950) (judicial proceeding to settle fiduciary accounts deprive beneficiaries the right to have trustee answer for negligent management, such rights are property and cannot be cut off without due process; "[m]any controversies have raged about the cryptic and abstract words of the Due Process clause but there can be no doubt that at a minimum they require that deprivations of life, liberty or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case"); *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933) (depositor of insolvent bank was not deprived due process when legislative action provided a different means through which he receive liquidated assets; "although a vested cause of action is property and is protected from arbitrary interference . . . the appellant has no property, in the constitutional sense, in a particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure") (citation omitted); *Coombes v. Getz*, 285 U.S. 434, 435, 442 (1932) (state could not extinguish contractual liability of corporate officers to shareholders by repealing corporation law; "the right of the petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision"); *Ettor v. City of Tacoma*, 228 U.S. 148, 156, 158 (1913) (statutory cause of action against city became vested at the time damage occurred; repealing statutory remedy did not extinguish plaintiffs' right to compensation).

176. *Id.*

177. *Id.* See, e.g., *Ryland v. Shapiro*, 708 F.2d 967, 973 (5th Cir. 1983) (right to bring wrongful death action under 42 U.S.C. § 1983 is a property right and may not be denied without due process); *In re Aircrash* on Apr. 22, 1974, 684 F.2d 1301, 1312 (9th Cir. 1982) (plaintiffs' rights to recover for wrongful death are "property" within the meaning of the Fifth Amendment: "there is no question that claims for compensation are property interests that cannot be taken for public use without compensation"); *Hartford Fire Insurance Co., v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1368 (6th Cir. 1984) (property right arises for due process purposes arises once injury actually occurs); *Greyhound Food Management, Inc. v. City of Dayton*, 653 F. Supp. 1207, 1219 (W.D. Ohio 1986) (statute that retroactively barred claims against municipalities under subrogation provisions of insurance violated due process).

and extent of the problems it was seeking to redress."¹⁷⁸ Moreover, it provides no "uniform policy" or "theoretical framework," and as a result, courts will spend years unravelling the scope of its many provisions.¹⁷⁹ The RICO amendment reflects this problem. Added to the Act late in its history, without proper legislation hearings and debate, the amendment creates more confusion than clarity. Ironically, it will be the courts and not the legislature that has the last word on the amendment's applicability.

Where Congress did not provide a clear intent for a statute's applicability, courts resort to the judicial default rule that new law applies prospectively. Proponents of retroactive application offer no compelling textual evidence to overcome this presumption. The text of the amendment is silent on applicability and, when faced with a similar situation, the Supreme Court held that it would not find retroactive application through negative inference.

Proponents of retroactive application can produce no clear evidence of retroactive intent in the debates and hearings that proceeded the amendment's enactment. In fact, the evidence is to the contrary. The fact that the amendment passed and was supported by the SEC can not be imported to support retroactive application. Rather, the RICO amendment was a eleventh-hour addition to a bill that was fueled by powerful special interests. No substantive discussions on applicability took place when the amendment was offered; further, the amendment did not go through the formal hearing process. To suggest that the amendment was "inadvertently" omitted only serves to add further insult to plaintiffs whose meritorious causes of action are in jeopardy.

The number of suits affected by the RICO amendment is difficult to estimate. Nevertheless, Mark Griffin, the chairman of the Securities Litigation Reform Task Force of the North American Securities Administrators Association, projects the impact might be severe. Griffin's projections show that the Reform Act will impact 1.79 million investors and deprive them the right to recover approximately \$2.87 billion over the next five years.¹⁸⁰ Regardless of how the financial stakes are calculated, the reality is that many plaintiffs that were injured by conduct that was unlawful when committed will be deprived relief if the RICO amendment is given retroactive effect.

Congress can avoid the problems in the Reform Act and the Civil Rights Act of 1991 by carefully drafting statutes, and particularly amendments that significantly change the structure of a bill. Most legislation is drafted by congressional staff and committee counsel. It is their responsibility to make sure amendments fit into the overall structure of a bill and to also inform the members of Congress of potential side effects of amendments. For example, when §107 was offered as an amendment to the Reform Act, §108 should have been amended to clarify the applicability of the RICO provision. At a minimum, every statute should clearly state its limitations period and its general temporal applicability. These are not unreasonable demands. Considering the wealth of resources available to congressional committees, these provisions should be standard in all new legislation. The dockets of the federal courts are already beyond capacity. Congress could alleviate some of this burden by saving the courts the job of interpreting poorly drafted legislation.

Another possible solution to the problem is an amendment to Title I of the

178. Avery, *supra* note 5, at 337.

179. *Id.*

180. Blakey & Roddy, *supra* note 10, at 816.

United States Code to include guidelines for retroactive application of legislation. Currently, the courts are left the task of determining the applicability of ambiguous legislation. The current default rule was laid out in *Landgraf*, where the Supreme Court said it will not apply a statute retroactively where the statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct or impose new duties with respect to transactions already completed."¹⁸¹ Such an amendment would serve two purposes: it would reduce litigation over questions of retroactivity and it would allow Congress, rather than the courts, to define the parameters of when a statute applies retroactively.

The statute of limitations will eventually run on all conduct that still is actionable as a RICO cause of action for securities fraud, making this issue moot. Nevertheless, in the interim, many plaintiffs with real injuries and meritorious suits risk losing their recovery if courts continue to apply §107 retroactively. A strong presumption against retroactivity is present in American jurisprudence. It is contrary to basic principles of justice to extinguish a cause of action from a plaintiff injured by a defendant who was aware the conduct was unlawful when committed. The courts should therefore follow the *District 65* holding and refuse to apply §107 retroactively.

Michael S. Rafford*

181. *Landgraf*, 511 U.S. at 280.

* B.A., Economics, University of Notre Dame, 1993; Juris Doctorate Candidate, Notre Dame Law School, 1998. I would like to thank my wife, Kelly, for her support and patience during the writing of this note. I would also like to thank Professor G. Robert Blakey for his comments and recommendations.

