



1-1-1984

Availability of Equitable Relief in Civil Causes of Action in RICO

Donald R. Lee

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Donald R. Lee, *Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 Notre Dame L. Rev. 945 (1984).

Available at: <http://scholarship.law.nd.edu/ndlr/vol59/iss4/5>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

The Availability of Equitable Relief in Civil Causes of Action in RICO

Since the enactment of the Racketeer Influenced and Corrupt Organizations Act ("RICO")¹ in 1970, its opponents have made significant attempts to restrict the statute's scope.² Accordingly, the opponents of RICO have proposed a number of judicial limitations as methods to narrow the impact of the statute.³ As a result of these efforts, some courts have taken steps to preclude a private plaintiff suing under RICO from receiving equitable relief under the statute.⁴

This Note examines the methods employed by courts to narrow the remedial provisions of RICO to preclude equitable relief for private plaintiffs. Part I discusses the impropriety of this judicial restriction in light of the express language of RICO and its liberal construction directive. Part II argues that even if RICO is read as not expressly providing equitable relief for private plaintiffs, this form of relief should nevertheless be implied by the courts under the Supreme Court's principles of statutory construction. Part III analyzes those decisions in which federal courts have expressed a willing-

1 18 U.S.C. §§ 1961-1968 (1982).

2 See, e.g., ABA: REPORT TO THE HOUSE OF DELEGATES, SECTION ON CRIMINAL JUSTICE (1982), in which the American Bar Association adopted twelve proposed amendments to RICO. One of these proposals includes the repeal of RICO's Liberal Construction Clause, a proposal which, if enacted by the legislature, would cripple the statute's effectiveness. See notes 23-26 *infra*. It is interesting to note that the ABA wholeheartedly supported the Organized Crime Control Act in 1970, and proposed only two amendments to Title IX, both of which were adopted: RICO's treble damages provision, and an amendment giving courts discretion to close certain proceedings. *Organized Crime Control, Hearings on S.30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 538, 543-44 (1970) (testimony of ABA President Edward L. Wright). See generally Blakey, *RICO Civil Fraud Action in Context: Reflections on Bennet v. Berg*, 58 NOTRE DAME L. REV. 246 n.25 (1982).

3 For example, some courts have attempted to restrict the class of potential RICO defendants to members of a so-called "organized crime" family. See *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 747 (N.D. Ill. 1981) (dismissal of RICO claim against land developers because they were not "involved with 'organized crime' or activities within the penumbra of that phrase"); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (denial of a motion to amend a complaint against a telephone answering service to include a RICO claim because the defendant was not a member of "a society of criminals operating outside the law"). These courts ignore the absence of any such requirement in the express language of RICO. Moreover, analysis of RICO's legislative history clearly reveals that the statute should not be restricted in this manner. See note 69 *infra*. See generally Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 RUTGERS L. REV. 327-34 (1983).

4 See text accompanying notes 112-75 *infra*.

ness to restrict the availability of equitable relief under RICO and illustrates the flaws in reasoning which enabled these courts to reach this result.

I. Does RICO Expressly Provide Equitable Remedies for Private Plaintiffs Suing Under the Statute?

A. *The Text of RICO: Section 1964 Civil Remedies*

In determining the scope of the remedies available to a private plaintiff suing under a statute, the traditional approach⁵ is to first examine the text of the statute. Section 1962⁶ provides that RICO is violated by "any person . . . associated with any enterprise . . . the activities of which affect . . . commerce, conduct[ing] . . . the enterprise's affairs through a pattern of racketeering activity."⁷ Section 1964(a)⁸ confers jurisdiction on the federal district courts to prevent

5 In the Supreme Court's own words, it "has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis v. United States*, 445 U.S. 55, 60 (1980) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *South-eastern Community College v. Davis*, 442 U.S. 397, 405 (1979). RICO, of course, is subject to this basic rule. *United States v. Turkette*, 452 U.S. 576, 580 (1980) ("[w]e look first to . . . [RICO's] language").

6 18 U.S.C. § 1962 (1982) provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

7 *Id.*

8 18 U.S.C. § 1964(a) (1982) provides:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of Section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to prohibiting any

and restrain violations of Section 1962 through broad equitable remedial powers, including, but not limited to, the power to order divestitures, reorganizations and dissolutions.⁹ Section 1964(a) does not limit the use of these broad equitable remedial powers to government or other types of suits.¹⁰ Rather, the section simply provides the broad discretionary power of the federal district courts to fashion equitable relief in cases where violations of RICO are found.¹¹

Section 1964(b)¹² grants power to the Attorney General to institute proceedings under section 1964(a).¹³ This express grant of power to the government to sue was necessary to assure its right to bring civil suits and seek equitable relief against RICO violators.¹⁴ Absent section 1964(b), the government's ability to seek this type of relief for violations of RICO would have been subject to challenge.¹⁵ Accordingly, this provision should be read as putting beyond question the Attorney General's power to utilize RICO's civil equitable remedies.¹⁶

person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

9 *Id.*

10 *Id.*

11 *Id.*

12 18 U.S.C. § 1964(b) (1982) provides:

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

13 *Id.*

14 See notes 15-16 *infra*.

15 By expressly providing that the government may seek equity relief under RICO, § 1964(b) sets aside the old rule that only a victim, and not the government, may enjoin a crime. See *In re Debs*, 158 U.S. 564, 582-84 (1895).

16 The purpose of § 1964(b) was to put beyond question the right of the government to bring a civil suit beyond the traditional limitations of equity jurisprudence. *United States v. Cappetto*, 502 F.2d 1351, 1358-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). The defendants in *Cappetto* challenged a district court's grant of a preliminary injunction to the United States under civil RICO because the government had not shown the traditional equity requirements of irreparable injury or inadequacy of remedy at law. The Court of Appeals for the Seventh Circuit responded:

"We need not decide the academic question of whether, in the absence of Section 1964, such a showing would be necessary. It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than the injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require

Section 1964(c)¹⁷ authorizes suits by private parties; it then provides for the recovery by a successful plaintiff of treble damages, costs, and attorney's fees.¹⁸ The language of this provision does not expressly preclude the private plaintiff from receiving equitable relief. Section 1964(c) states that the injured party shall "sue and," not "sue to."¹⁹ No warrant exists, therefore, to read Congress' decision to grant treble damages to private plaintiffs as an incentive to enforce RICO as a decision to deny them other forms of relief.²⁰

If treble damages, costs, and attorney's fees had not been added for private plaintiffs, victims suing under RICO would have been restricted to receiving the usual range and types of relief, including injunctions and actual damages. Under these circumstances, a victim contemplating the possibility of bringing a RICO civil action would, in many cases, have found the litigation involved to be prohibitively expensive, despite the ultimate value of the various forms of relief to which he would have been entitled.²¹ Section 1964(c) was

a showing of inadequacy of remedy at law. If, as defendants contend, the existence of a criminal remedy at law under Section 1963 would defeat an action in equity under Section 1964, the latter section would be a nullity."

Id. at 1358-59.

The necessary inclusion of § 1964(b) in RICO should not be interpreted to deny private plaintiffs the right to seek equitable relief.

17 18 U.S.C. § 1964(c) (1982) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

18 *Id.*

19 *Id.* The difference in wording is crucial. "Sue to" expresses an intent to restrict the remedies "to" those listed. "Sue and," however, expresses an intent to add to the remedies already available. See note 162 *infra*. See *Aetna Casualty and Surety Co. v. Liebowitz*, No. 83-7728, slip op. at 2510 ("[o]nce the Supreme Court handed down *Bell v. Hood*, 327 U.S. 678 (1946) . . . a specific statutory provision [in RICO] authorizing . . . injunctive relief . . . was no longer necessary").

20 Unless a statute specifically defines a word used within it, a court should "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 104 S.Ct. 296, 299 (1983) (citing *Richards v. United States*, 369 U.S. 1, 9 (1962)). The ordinary meaning of the word "and" is certainly not restrictive. Rather, Webster's Dictionary defines the word "and" to mean: "along with or together with;" "added to or linked to;" "in addition to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 80 (3rd ed. 1971). It is difficult to see how a court applying the ordinary meaning of the word "and" could view Congress' decision to add the right to secure treble damage relief to the general right to sue as manifesting an intention to subtract the right to obtain other forms of relief.

21 There is sound economic reasoning underlying Congress' decision to provide a treble damages remedy for private RICO plaintiffs. Professor (now Judge) Richard A. Posner makes a strong argument for encouraging private enforcement of more than actual damage awards against deliberate anti-social conduct, particularly where the factor of concealment is present. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 462 (private enforcement), 143, 272

designed to eliminate this obstacle to the private enforcement of RICO by providing the possibility of adequate compensation to those victims who choose to undertake this difficult task.²²

B. *Liberal Construction*

RICO is a remedial statute containing both criminal and civil provisions for its enforcement.²³ The traditional canon of statutory construction is that remedial statutes are to be construed liberally to effect their purposes.²⁴ Congress clearly intended RICO to be so construed, since the statute itself contains a Liberal Construction Clause.²⁵ The drafters of RICO also provided a Congressional Statement of Findings and Purpose to aid in the statute's construction.²⁶

(more than actual damages for deliberate conduct), 235 (concealment) (2d ed. 1977). Posner recognized the importance of private enforcement of public law and its historical precedent in the criminal and regulatory law of England. *Id.* at 462. The need for a careful blending of public and private enforcement, therefore, is manifest.

22 Congress has described the purpose of the treble damages provision as providing the possibility of adequate compensation for private plaintiffs suing under the statute. In reporting on S.1630, the criminal code bill, the Senate Judiciary Committee described RICO in these terms:

"[I]t is hoped the knowledge that a person will be subject to substantial civil damages will serve as an effective deterrent to the commission of . . . [a RICO] offense. [However,] [t]he purpose of the [treble damage civil recovery] . . . is remedial, not penal; adequate relief or compensation is the main goal."

S. REP. NO. 307, 97th Cong., 1st Sess. 1273 (1981). Here, the Committee cited *United States v. Bornstein*, 423 U.S. 303, 313-16 (1976), which articulated a theory of multiple compensation recovery under the False Claims Act, 31 U.S.C. §§ 231-233, 235 (1976).

23 It was the clear intent of Congress that RICO be a remedial statute. Title IX, "it [was] . . . emphasized, [is] remedial rather than penal." S. REP. NO. 617, 91st Cong., 1st Sess. 82 (1969). When Congress clearly classifies a remedy as not penal, courts will give this classification great deference. *United States v. Ward*, 448 U.S. 242, 248-51 (1980) (civil penalty classified as such for all purposes, including federal common law that may have pointed in the other direction); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 204, 312-15 (1981) (statute controls over federal common law). Accordingly, RICO has been appropriately classified by the courts as remedial, not penal. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681, 683-85 (N.D. Ind. 1982) (RICO remedial for survivorship and statute of limitations in private treble damage action).

24 *Peyton v. Rowe*, 391 U.S. 54, 65 (1968). See generally K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules and Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950); K. LLEWELLYN, *THE COMMON LAW TRADITION* app. c (1960). See also note 69 *infra*.

25 The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961 (1982)) ("The provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes."). For a comprehensive analysis of the background and rationale of the liberal construction clause, see Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

26 The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-23 (codified at 18 U.S.C. § 1961 (1982)) states:

A substantial majority of federal courts has been willing to construe liberally the provisions of RICO in the application of its criminal remedies.²⁷ A minority has questioned the constitutionality of such interpretation, based on the belief that due process requires strict construction of penal statutes.²⁸ This minority is mistaken in its

Congressional Statement of Findings and Purpose

"The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other [sic] forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

"It is the purpose of this Act . . . to seek the eradication of organized crime in the United States by strengthening [sic] the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

RICO's Liberal Construction Clause is unique in federal law, except for the Criminal Appeals Act, 18 U.S.C. § 3731 (1982). It is not unique in state law. A majority of states today has abolished the common law rule of strict construction either by expressly abrogating it or adopting some variation of "fair import" or "liberal construction." The statutes are collected in Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 245 n.25 (1982). On the relation between the liberal construction clause and the rule of lenity, see *id.* at 288-90 n.150. The abolition was part of a legislative response to judicial hostility to reform movements in the 19th century. Indeed, judicial hostility to change through legislation was so common at that time "that it became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 174 (1974).

27 See, e.g., *United States v. Thompson*, 685 F.2d 993, 997-98 (7th Cir. 1981) (the office of Governor of the State of Tennessee held to be an "enterprise" within the meaning of RICO; the court found the language of RICO to be "both clear and broad, particularly because Congress provided the Liberal Construction Clause"); *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978) (definition of "enterprise" extended to include diversified wholly illicit association in fact), *cert. denied*, 434 U.S. 1072 (1978).

28 See, e.g., *United States v. Anderson*, 626 F.2d 1358, 1369-70 (8th Cir. 1980) (court doubted the propriety of the Liberal Construction Clause, and chose instead to apply the rule of lenity, giving a narrow interpretation to "enterprise"); *United States v. Grzwacz*, 603 F.2d 682, 692 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (Swygert, J., dissenting) ("unclear

belief: due process does not require the strict construction of penal statutes.²⁹ Thus, even if RICO were to be classified as penal rather than remedial in nature, liberal construction would still be proper.³⁰

Section 1964, however, is part of the civil, and not the criminal, provisions of RICO.³¹ Not even a colorable claim exists that liberal construction of the civil provisions of RICO in accordance with the Liberal Construction Clause would be unconstitutional.³² It might be argued that a liberal construction of a particular provision is not an appropriate way to handle the problem that RICO was designed to address. That, however, is not a proper decision for a court to make.³³ Congress carefully considered both the form and substance of RICO.³⁴ Amendments of the statute, if any, should come only

whether Congress intended its directive to apply to those sections which establish criminal liability or merely to the 'remedial' provisions of Title IX").

29 See *Albernaz v. United States*, 450 U.S. 333, 342-43 (1981) (inappropriate to strictly construe a penal statute under the rule of lenity where statutory ambiguity does not exist: "Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one"); *Gore v. United States*, 357 U.S. 386, 390-91 (1957) (Narcotic Drugs Import and Export Act should not be strictly construed because Congress clearly did not intend it to be); *United States v. Brown* 333 U.S. 18, 25 (1947) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose.").

30 See note 29 *supra*.

31 18 U.S.C. § 1964 (1982).

32 See text accompanying notes 24-26 *supra*.

33 See notes 34-35 *infra* and accompanying text.

34 On December 18, 1969, Senator McClellan, for the Judiciary Committee, reported out S. 30, the Organized Crime Control Act, amended to incorporate S. 1861 as Title IX. S. REP. NO. 617, 91st Cong., 1st Sess. 83 (1969). On reporting the bill, Senator McClellan observed: "[This debate on the Organized Crime Control Act] is the culmination of a year of detailed study, hearings, and consultations, and a result of one of the most thoroughly gratifying bipartisan efforts in which I have participated since coming to the Senate." 116 CONG. REC. 585 (1970). The Senator then listed the groups whose opinions had been consulted and whose ideas and suggestions had been embodied in the bill, including:

[T]he President's Crime Commission, The National Commission on Reform of Federal Criminal Laws, The American Bar Association Project on Minimum Standards of Criminal Justice, The Model Penal Code of the American Law Institute, The Model Sentencing Act [of the] . . . National Council on Crime and Delinquency, The Association of Federal Investigators, The New York County Lawyers Association, The American Civil Liberties Union, . . . The National Association of Counties and The New York State Bar Association The National Chamber of Commerce and the International Association of Chiefs of Police.

116 CONG. REC. 585. The Supreme Court termed the Act, in *Iannelli v. United States*, 420 U.S. 770, 789 (1975), a "carefully crafted piece of legislation."

Congressman Poff, another sponsor of the Act, responded to the critics of the bill, who suggested it was ill-drafted or not well thought-out, when he observed:

[In his] experience, no single measure [had] received more thorough consideration by a legislative committee than this bill. On numerous occasions, it required lengthy discussions in order to arrive at a consensus or compromise Precedents as contained in numerous court decisions were reviewed and weighed — and

through the legislative process. Even ignoring the separation of powers questions involved,³⁵ the lower courts should realize the propriety of construing liberally the provisions of RICO because of the Supreme Court's recent acknowledgements of the importance of the Liberal Construction Clause. In *United States v. Turkette*³⁶ and *Russello v. United States*,³⁷ the only RICO cases which have been decided by the Supreme Court to date, the Court has acknowledged the exist-

every effort was made to produce a strong and effective tool with which to combat organized crime — and at the same time deal fairly with *all* who might be affected by this legislation — whether part of the crime syndicate or not.

116 CONG. REC. 35,204 (emphasis added). Accordingly, no court ought now re-weigh the "balance" between "opposing policy arguments," *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978), strike a new "compromise," *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), or make an effort to rewrite this carefully crafted piece of legislation, *Iannelli v. United States*, 420 U.S. 770, 789 (1975). Congress has "announc[e]d its . . . considered judgment." *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (quoting *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). That ought to end the matter, absent constitutional considerations, which are not implicated. *United States v. Turkette*, 452 U.S. 576, 587 (1981) ("[t]here is no argument that Congress acted beyond its power That being the case, the courts are without authority to restrict the application of the statute.").

35 Justice Harlan's classic statement concerning the separation of powers is a clear articulation of the deference which a court should grant the intent of Congress:

[T]he question relates to matters of public policy . . . and Congress alone can deal with the subject; . . . [a] court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy[.] . . . [T]he [opponents of a statute] must go to Congress and obtain an amendment of the . . . [statute] if they think . . . [it wrong.] . . . [The Supreme Court] cannot and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law.

Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 102 (1910) (Harlan, J., concurring in part and dissenting in part) (emphasis in original).

36 452 U.S. 576, 587-89 (1981). *Turkette* was the first case involving RICO decided by the Supreme Court. The essence of the defendant's argument was that, because his association performed only illegal acts, and did not involve legitimate business, it was not an "enterprise" for the purposes of RICO. The Court held that "enterprise" as used in RICO encompasses both legitimate and illegitimate associations. The Supreme Court acknowledged RICO's Liberal Construction Clause and Statement of Findings and Purpose in its decision, stating that "[i]n view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime." *Id.* at 579.

37 104 S. Ct. 296 (1983). The defendant in *Russello* was convicted under RICO for his involvement in an arson ring that resulted in his fraudulently receiving insurance proceeds in payment for the fire loss of a building he owned. The defendant appealed the judgment of forfeiture which was entered against him for the amount of the insurance proceeds, arguing that the proceeds did not constitute a forfeitable "interest" within the meaning of § 1963(a)(1). The Supreme Court rejected the argument that the provisions of RICO should be narrowly interpreted, once again emphasizing that the Liberal Construction Clause and Statement of Findings and Purpose, far from revealing a limited congressional intent, instead "clearly [demonstrate] that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Id.* at 302.

ence of the Liberal Construction Clause and Congressional Statement of Findings and Purpose. The Court expressed no disinclination to follow the manifest intent of Congress.³⁸

A fair construction of section 1964(c) leads to the conclusion that a successful private plaintiff suing under RICO should receive not only treble damages, costs, and attorney's fees, but also any equitable relief that he might be entitled to under section 1964(a). Given the Liberal Construction Clause, the question of how this interpretation follows from the text is largely a matter of indifference. If the text is plain, the remedy is there; if the text is ambiguous, the ambiguity should be resolved in favor of enhancing the remedial purpose of RICO.

Regarding the availability of equitable remedies for private plaintiffs, then, two interpretations of the text are possible: they are available or they are not. In choosing between these two alternatives, the Liberal Construction Clause mandates that a court follow the interpretation that effects the remedial purposes of the statute.³⁹ Granting full equitable remedies to private plaintiffs suing under RICO effects the remedial purposes of the statute. In *Russello*, the Supreme Court noted that "the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."⁴⁰ The Court also pointed out that "Congress emphasized the need to fashion new remedies in order to achieve its far-reaching objectives."⁴¹ Indeed, in some situations, the possibility of receiving equitable relief might be the sole or primary factor motivating a victim in bringing a RICO civil action.⁴² If victims of RICO violations are not given this form of relief, the public will have to rely upon the government to seek equitable enforcement of RICO, thus frustrating Congress' intent that RICO also be enforced through the private action.⁴³ In light of the Con-

38 In *Russello*, the Court stated: "This Court has recognized the significance of this statement of findings and purpose. *United States v. Turkette*, 452 U.S. at 588-589 . . . Further, Congress directed . . . 'The provisions of this title shall be liberally construed to effectuate its remedial purpose.'" 104 S. Ct. at 302.

39 See note 25 *supra*.

40 104 S.Ct. 296, 302 (1983).

41 *Id.* at 302.

42 See note 21 *supra*.

43 An analogy to the jurisprudence of private civil suits under § 4 of the Clayton Act is particularly helpful to demonstrate the inconsistency of discouraging private civil suits under RICO. This analogy is persuasive authority since § 1964 was modeled on antitrust law. S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969); H. R. REP. NO. 1549, 91st Cong., 2d Sess. 56-60 (1970). To the degree that RICO was drafted outside the antitrust provisions, it was to avoid restrictive antitrust precedent. *State Farm Fire & Casualty Co. v. Estate of Caton*, 540

gressional mandate in the Liberal Construction Clause, a federal court should not feel that it does not have the authority to grant full equitable relief to private plaintiffs in appropriate circumstances.⁴⁴

II. The Supreme Court Jurisprudence as Applied to RICO: Principles of Statutory Construction

Despite the Liberal Construction Clause and the Congressional Statement of Findings and Purpose, lower federal courts have attempted to restrict the remedies available to private plaintiffs suing under RICO.⁴⁵ These courts give scant attention to the question of whether section 1964, read by itself or in conjunction with the Liberal Construction Clause, expressly provides equitable remedies for private plaintiffs. Instead, they have argued that it is necessary to employ the Supreme Court's principles of statutory construction to determine if these equitable remedies may nevertheless be implied in the statute.⁴⁶ The express language of the statute should render such an analysis unnecessary. Nevertheless, an examination of RICO, following the teachings of the Supreme Court on the implication of claims for relief in federal statutes, shows that it would be proper to imply equitable remedies for private plaintiffs.

A. *The Legal Environment in Which RICO Was Enacted*

Proper analysis of RICO under the Supreme Court's rules of statutory construction requires application of the law as it existed at the time of RICO's passage in 1970.⁴⁷ The lower court decisions have wrongly suggested, however, that RICO should be analyzed under the stricter rules of statutory construction established by the

F. Supp. 673, 680 (N.D. Ind. 1982) ("section 1964(c) was . . . cast as a separate statute intentionally to avoid the *restricted* precedent of antitrust jurisprudence") (emphasis added). Therefore, what the Supreme Court has said of private civil suits under § 4 may be legitimately observed of RICO. Congress "created the treble-damage remedy . . . precisely for the purpose of encouraging *private* challenges to violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 334 (1979) (emphasis in original). Private suits in fact "provide a significant supplement to the limited resources available to the Department of Justice." *Id.* In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, 84% were instituted by private plaintiffs. U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). It would be inconsistent with Congress' use of an antitrust model in drafting RICO to not encourage private plaintiffs to bring civil actions under the statute.

44 See notes 112-15 *infra*.

45 *Id.*

46 *Id.*

47 See notes 49-56 *infra* and accompanying text.

Supreme Court's 1975 decision in *Cort v. Ash*.⁴⁸ *Merrill Lynch, Pierce, Fenner & Smith v. Curran*⁴⁹ demonstrates the impropriety of this approach.

In *Curran*, the Supreme Court stated that "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on the issue, the initial focus must be on the state of the law at the time the legislation was enacted."⁵⁰ Congress is assumed to have been familiar with the current status of the law when it passed the legislation in question.⁵¹ Accordingly, judicial perception of the law must bear heavily on the intent of the Congress in passing the statute in the form in which it did. "[O]ur focus must be on the intent of Congress when it enacted the statute in question."⁵² The law as it exists today would be relevant only if one is willing to assume that Congress can predict the future. If RICO is read as being silent on the issue of private equitable remedies, the statute should, therefore, be interpreted using the rules of statutory construction that existed when it was passed in 1970, and not the stricter rules established in 1975 in *Cort v. Ash*.⁵³

The Court in *Curran* provided a clear statement of the law as it existed in 1970:

If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916). Under this approach, federal courts, following a common law tradition, regarded the denial of a remedy as the exception rather than the rule.⁵⁴

Under the approach which prevailed until *Cort*, "congressional silence or ambiguity was an insufficient reason for the denial of a remedy for a member of the class a statute was enacted to protect."⁵⁵ It was considered the duty of the courts to provide any remedies necessary to effect the congressional purpose.⁵⁶

Congress obviated the necessity of inferring the precise purposes of RICO by including a Congressional Statement of Findings and

48 422 U.S. 66 (1974).

49 456 U.S. 353 (1982).

50 *Id.* at 378.

51 *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

52 *Daily Income Fund Inc. v. Fox*, 104 S. Ct. 831, 839 (1984).

53 *Id.*

54 456 U.S. at 374-75.

55 *Id.* at 377.

56 *J.I. Case v. Borak*, 377 U.S. 426, 433 (1964).

Purpose in the statute itself.⁵⁷ The last paragraph of the Statement declares that: "It is the purpose of the Act . . . [to provide] enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."⁵⁸ The Supreme Court has explicitly recognized the significance of this Statement.⁵⁹ In *United States v. Turkette*,⁶⁰ the Court noted that "the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions."⁶¹ Similarly, the Court stressed, in *Russello v. United States*,⁶² that "Congress emphasized the need to fashion new remedies in order to achieve its far reaching objectives."⁶³ Analyzing RICO under the rules of statutory construction that existed in 1970, the question then becomes whether the implication of equitable remedies for private plaintiffs would make effective these express purposes of Congress.

The private suits authorized by section 1964(c) of RICO are part of a statute that expressly states as its purpose the provision of new remedies to combat organized crime.⁶⁴ Such private suits should certainly be encouraged, and it cannot seriously be argued that equitable remedies would not play an integral role in the private enforcement of the Act.⁶⁵ As a practical matter, federal and state governments simply do not have adequate resources to investigate, much less prosecute, every RICO violation.⁶⁶ The availability of eq-

57 The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-23 (codified at 18 U.S.C. § 1961 (1982)); see note 26 *supra*.

58 *Id.*

59 See text accompanying notes 60-63 *infra*.

60 See discussion at note 36 *supra*.

61 *Turkette*, 452 U.S. at 586.

62 104 S. Ct. 296 (1983).

63 *Id.* at 302.

64 The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-23 (codified at 18 U.S.C. § 1961 (1982)); see text accompanying notes 57-58 *supra*.

65 See note 43 *supra*.

66 The inadequacy of these resources was demonstrated by a study conducted by the Section on Criminal Justice of the American Bar Association into the resources devoted to investigation and prosecution of fraud. This study was conducted under a federal grant, and the final report is reprinted in *White Collar Crime 1978: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 260-82 (1978). The Section studied the Securities and Exchange Commission, the Federal Bureau of Investigation, the United States Postal Inspection Service, the Department of Health, Education and Welfare, the Internal Revenue Service, the Antitrust Division of the Department of Justice, various banking agencies, and selected state and local efforts. Its findings were deeply disturbing. The Section found that the "[t]otal federal effort against economic crime [was] . . . in need of the develop-

uitable relief to RICO private plaintiffs, then, would provide greater incentive for victims to bring these suits. Innovative use of equitable remedies by the courts in private RICO actions could provide a means of dealing with RICO offenders that simply cannot be accomplished by the imposition of treble damages, costs, and attorney's fees upon a guilty defendant.⁶⁷ The congressional sponsors of RICO expressed the desirability of such innovative use of the statute.⁶⁸

RICO is a broad remedial statute. Although its primary purpose is to provide effective remedies to be used against organized crime, its prohibitions necessarily encompass other conduct not normally considered within the realm of organized crime per se.⁶⁹ An underlying concern of the courts that have expressed a willingness to

ment of priorities." *Id.* at 264. In addition, "available resources [were] . . . unequal to the task of combatting organized crime." *Id.* The "lack of resources at the federal and local level [was] . . . a function of insufficient manpower and inadequately trained personnel." *Id.* at 265. The implications of this study for federal government enforcement of RICO are obvious. The resources which would be necessary for adequate government investigation and prosecution of RICO violations simply do not exist.

67 RICO grants broad equitable powers. *See* 18 U.S.C. § 1964(a) (1982) ("prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders"). In light of its liberal construction clause and its legislative history, § 1964 ought to be held to authorize temporary restraining orders, preliminary injunctions, receiverships, and the full range of ultimate equity relief on the request of the government or private parties. *See, e.g.*, 115 CONG. REC. 9567 (1969) (statement of Sen. McClellan, one of the sponsors of RICO) (RICO is not "limit[ed] to the remedies . . . already . . . established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice.").

68 115 CONG. REC. 6993 (1969) (statement of Sen. Hruska) ("The bill is innovative Hopefully experts on organized crime will be able to conceive of additional applications of the law. The potential is great.")

69 It is necessary that RICO's scope extend beyond "organized crime" to allow the statute to accomplish this primary purpose. During the House hearings on RICO, Senator McClellan, one of RICO's sponsors, observed in response to objections that RICO was unnecessarily broad:

[T]he objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.

116 CONG. REC. 18,913-14 (1970). Senator McClellan later observed:

Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

Id. at 18,940. *See also* *Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("This view is beset by many difficulties. It assumes that Congress could and should specify in ad-

deny equitable relief to RICO private plaintiffs seems to have been that these plaintiffs often are not seeking relief from "organized crime" activity.⁷⁰ Accordingly, the equitable remedies were not necessary to effect the statute's primary purpose to provide remedies for organized crime activity.⁷¹ This analysis, however, fails to consider that if RICO private plaintiffs are statutorily denied the right to seek equitable relief in cases which do not involve organized crime, they will also be denied this right in the cases which do involve organized crime. Not only would the implication of the right of RICO private plaintiffs to seek equitable relief effect the clear congressional purposes of RICO, but the denial of that right would seriously impede those same purposes.

Treble damages, costs, and attorney's fees simply may not provide the necessary incentive to the victim who has a meritorious complaint. This may be especially true in cases actually involving organized crime, cases which would have the greatest social value and which should be encouraged.⁷² A victim, for example, may have

vance all the possible circumstances to which a remedial statute might apply and state which cases are within the scope of a statute.").

70 See, e.g., *Dan River v. Icahn*, 701 F.2d 278 (4th Cir. 1983).

71 *Id.*

72 It is unnecessary to go any further than the legislative history of RICO for an example of this precise type of situation. In the House of Representatives, S. 30, the Organized Crime Control Act, was referred to the Committee on the Judiciary on January 26, 1970. 116 CONG. REC. 1103 (1970). On March 10, 1970, Congressman Poff took the floor to comment on it, and in particular on Title IX (RICO). Congressman Poff was "a manager of the bill." *United States v. Turkette*, 452 U.S. 576, 593 (1981). As such, his comments are entitled to weight. *Lewis v. United States*, 445 U.S. 55, 63 (1980). Congressman Poff brought to the attention of the floor a "thoughtful and accurate" analysis of S. 30 prepared by the United States Chamber of Commerce, which included "several specific hypothetical examples, which aid[ed] the reader in understanding concretely the provisions of S. 30." 116 CONG. REC. 6708 (1970). The Chamber of Commerce report included a detailed analysis of how the Senate bill would operate to attack a Mafia boss' takeover of a jukebox corporation. The report commented:

A Mafia boss accepts all the shares in a juke box corporation in payment for an illegal gambling debt. Then he expands the number of cafes in which his machines are placed by having the cafe owners threatened and beaten. Soon, he dominates the music machine business in his city, has ruined his competitors, and raises the share of the machine income which he demands that the cafes pay him. Under present law, the government may be able to obtain a criminal conviction, imprisonment and fine.

The trouble is that while the Mafia boss serves his prison term, other members of the syndicate run the business for him, and upon his release he resumes his brutal and monopolistic methods. . . . Thus, in the illustration used above, a criminal prosecution (under Title IX as passed in the Senate) of the Mafia boss could also result in forfeiture to the government of his interest in the business, or a civil proceeding that could result in an order that he divest himself of the business and refrain from re-entering that line directly or indirectly. In either case, the court

suffered considerable loss at the hands of a member of the Mafia during the course of the member's infiltration of the victim's legitimate business. While the plaintiff may have suffered great economic loss, the possibility of recovering treble damages, costs, and attorney's fees may in fact not be enough to encourage the victim to bring suit. A RICO violation is difficult to establish,⁷³ and the victim certainly has no guarantee of prevailing on the merits. Moreover, the defendant may have rendered himself judgment-proof by the time that judgment actually is obtained.⁷⁴ In addition, if equitable remedies are not available to private plaintiffs, the perpetrator may be free to carry on his illicit activities and continue to injure the plaintiff and others, despite the treble damages award.⁷⁵ If he cannot seek equitable relief, a victim faced with these possibilities, as well as the real possibility of physical or economic retaliation by a vengeful defendant, may well foresee that he could end up worse off than he was before instituting the law suit.

Section 1964(c) cannot fulfill its statutory purpose of providing an effective remedy for the proscribed conduct of RICO without the implication of equitable relief for private plaintiffs in all types of RICO cases. The rules of statutory construction under which RICO should be analyzed, therefore, dictate that these equitable remedies should be implied.

could supervise the sale of the business to see that it wound up in clean hands. A legitimate industry could be returned to lawful operation in a free enterprise system. 116 CONG. REC. 6709-10 (1970).

73 See notes 97-100 *infra* and accompanying text.

74 In 1963, for example, the McClellan Committee investigated the organized crime operations of Santo Trafficante, the Tampa, Florida Mafia boss. Neil G. Brown, the Tampa Chief of Police, testified: "We know of no legitimate businesses that are owned or controlled by Santo Trafficante. He owns no real estate, nor any other property, real or personal. His house, automobile and all his other possessions are held in the name of others." *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess. 527-28 (1963) (statement of Neil G. Brown). See also *Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice, Comm. on the Judiciary*, 96th Cong., 2d Sess. 96-97, 114 (1980) (statement of Irvin B. Nathan) (three problems: 1) ascertaining what the assets are, 2) reaching them if they are in the hands of third parties, and 3) preventing their dissipation before trial; problems compounded since "sophisticated criminals . . . have access to the best lawyers and accountants money can buy"); STRONGER FEDERAL EFFORT NEEDED IN FIGHT AGAINST ORGANIZED CRIME: REPORT BY COMPTROLLER GENERAL OF THE UNITED STATES 31-34 (1981) (problems in criminal forfeiture: 1) uncertain status of assets, 2) third party holdings, and 3) dissipation prior to seizure); ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING, REPORT OF COMPTROLLER GENERAL OF THE UNITED STATES 30-42 (1981) (same).

75 "[I]f the offender is judgment proof, as is so often the case with criminal offenders, the [civil] remedy is ineffectual." POSNER, *supra* note 21, at 467.

B. *The Consequences of Denying Equitable Relief to Private Plaintiffs Suing Under RICO*

If RICO private plaintiffs are denied the right to seek equitable relief in addition to treble damages, costs, and attorney's fees, similar relief may be available to them under other federal and state laws.⁷⁶ Equitable relief obtained under laws other than RICO, however, would be subject to limitations that would not apply to the same type of relief obtained under RICO.⁷⁷

Careful examination of the consequences of limiting the equitable relief available to RICO private plaintiffs in this manner is necessary to complete a proper analysis of RICO under the rules of statutory construction that existed in 1970. Such examination clearly shows that equitable remedies for private plaintiffs must be implied in RICO to prevent a result that would be contrary to the intent of Congress in passing the statute.

If RICO is interpreted as providing equitable relief to private plaintiffs, a person suing under the statute would receive preliminary and final equitable relief pursuant to section 1964. Section 1964 authorizes the district courts to issue any appropriate orders necessary to prevent and restrain violations of RICO.⁷⁸ The result of allowing private plaintiffs to seek preliminary and final relief under RICO, rather than under other federal and state law, is significant. The general rule for obtaining equitable relief under federal statutes that authorize equitable remedies is that the traditional required factors of inadequacy at law or irreparable injury need not be shown to receive the requested relief.⁷⁹ This would provide the RICO private plaintiff with a valuable tool, because he would need only show a reasonable likelihood of success on the merits to receive equitable relief.⁸⁰ Furthermore, it would be immaterial that a private party, and not the government, was seeking the relief.⁸¹ This result would effect

76 See text accompanying notes 83-85 *infra*.

77 See text accompanying notes 86-111 *infra*.

78 18 U.S.C. § 1964(a) (1982).

79 Neither FED. R. CIV. P. 64 nor traditional equity jurisprudence controls in the face of a specific federal statute. The text of Rule 64 is explicitly subject to any existing statute of the United States. FED. R. CIV. P. 64; *United States v. Capetto*, 502 F.2d 1351, 1358-59 (7th Cir. 1974) ("It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief without any showing of irreparable injury . . . or inadequacy of remedy at law."), *cert. denied*, 420 U.S. 925 (1975).

80 502 F.2d at 1359.

81 See, e.g., *Atchison, T & S. F. Ry. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981) (railroads able to obtain injunctive relief without showing of irreparable harm or inadequacy of remedy at law because relief was sought pursuant to a federal statute).

one of the primary purposes of RICO by providing "enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."⁸²

If, however, RICO is interpreted as neither expressly nor implicitly providing equitable relief to private plaintiffs, a person suing under the statute would be entitled to seek preliminary equitable relief under Rule 65 of the Federal Rules of Civil Procedure.⁸³ Any preliminary relief sought by a plaintiff which appeared to be more legal than equitable in nature (attachment, for example) would have to be obtained under Rule 64 of the Federal Rules of Civil Procedure.⁸⁴ RICO private plaintiffs seeking final equitable relief would be relegated to any remedies which they might obtain through state

82 *United States v. Turkette*, 452 U.S. 576, 589 (1981).

83 FED. R. CIV. P. 65(b) provides:

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

An additional argument can be made that the All Writs Act, 28 U.S.C. § 1651(a) (1982), may be invoked to preserve the status quo in appropriate circumstances. *See* *FTC v. Dean Foods*, 384 U.S. 597, 603-05 (1966) (preliminary injunction to prevent merger); *ITT Community Dev. Corp. v. Barton*, 457 F. Supp. 224 (N.D. Fla. 1978) (injunction issued to protect damage claim).

84 FED. R. CIV. P. 64 provides:

SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

causes of action under a theory of pendent jurisdiction.⁸⁵

1. Preliminary Relief Under Rules 64 and 65

A RICO private plaintiff would find it much more difficult to obtain preliminary equitable relief under Rule 65 than he would if the relief could be obtained under RICO. A plaintiff seeking such relief under Rule 65 to prevent further damages pendente lite would be required to satisfy the four traditional factors: irreparable harm, balance of inconvenience, probability of success, and the public interest.⁸⁶ If the preliminary relief sought by the plaintiff was considered by the court to be legal in nature, rather than equitable, the plaintiff would be entitled to the relief "available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought."⁸⁷

The problems that would arise if private plaintiffs are denied the right to this preliminary relief under RICO are well illustrated by *Ashland Oil, Inc. v. Gleave*.⁸⁸ The plaintiffs in *Ashland* attempted to secure a preliminary injunction to restrain the defendants from disposing of or transferring their tangible assets without prior court approval.⁸⁹ The court rejected the plaintiff's argument that the preliminary equitable relief requested was available under section 1964(a).⁹⁰ Indeed, the court rejected the argument that the relief requested was equitable at all.⁹¹ The court decided that the plaintiff had actually requested attachment, a legal remedy which, pursuant to Rule 64, was governed by New York state law.⁹² Since the court

85 See text accompanying notes 99-111 *infra*.

86 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (1973). See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Withrow v. Larkin*, 421 U.S. 35, 45 (1975); *Sampson v. Murray*, 415 U.S. 61, 84 n.53 (1974); *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929). The traditional factors have been reformulated as probability of success and irreparable injury or serious question and balance of hardships. See, e.g., *John B. Hull, Inc. v. Waterbury Petroleum Prod., Inc.*, 588 F.2d 24, 27 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979). Generally, the factors are formulated and applied in the traditional fashion. See, e.g., *Hannis Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1353-58 (11th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181, 187 (3d Cir. 1980).

87 FED. R. CIV. P. 64; see note 84 *supra*.

88 540 F. Supp. 81 (W.D.N.Y. 1982).

89 *Id.* at 82.

90 *Id.* at 85.

91 *Id.* at 86. The court believed that the plaintiff's request for a provisional remedy had to be strictly construed because it was in derogation of the common law. *Id.* at 83. *But see* Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387-88, 406-07 (1908) ("proposition . . . has no justification . . . [T]he public cannot be relied upon . . . to tolerate judicial obstruction . . . of social policies.").

92 540 F. Supp. at 83; see note 84 *supra*.

believed that it was required to apply state law, it did so. The court concluded that the plaintiff could not satisfy the requirements of New York state law necessary to grant such an attachment, even though the court found that the plaintiffs had demonstrated a probability of success on the merits.⁹³ The *Ashland* court doubted whether the frustration of a money judgment could ever constitute the irreparable harm necessary to receive preliminary relief.⁹⁴

The *Ashland* decision reveals a serious problem that will arise if RICO private plaintiffs are denied the right to seek preliminary equitable relief under the statute. If private plaintiffs are forced to satisfy either state law requirements or the traditional factors of Rule 65 to obtain preliminary relief, they may find themselves unable to prevent their potential treble damages awards from being disposed of by defendants prior to issuance of a judgment.⁹⁵ This would be particularly true in jurisdictions such as that of the *Ashland* court, where doubt exists as to whether a preliminary injunction should ever be issued to secure a money judgment.⁹⁶ This result would severely hamper the effectiveness of RICO's private treble damages remedy.

2. Final Equitable Relief Through State Claims Under Pendent Jurisdiction

Section 1962 makes unlawful certain activity in violation of RICO.⁹⁷ To violate any one of the four provisions of section 1962, a person must engage in a pattern of racketeering activity.⁹⁸ Section 1961(1) defines racketeering activity through a long list of federal and state crimes.⁹⁹ Section 1961(5) defines a pattern of racketeering

93 540 F. Supp. at 82.

94 *Id.* at 86.

95 See notes 74-75 *supra*.

96 See *Ashland*, 540 F. Supp. at 86. ("It is questionable whether . . . frustration of enforcement of a money judgment . . . can ever constitute irreparable harm.")

97 18 U.S.C. § 1962 (1982). See note 6 *supra*.

98 18 U.S.C. § 1962 (1982). See note 6 *supra*.

99 18 U.S.C. § 1961(1) (1982). Some of the crimes which constitute racketeering activity include: murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which crimes are chargeable under state law and punishable by imprisonment for more than one year; sports bribery, counterfeiting, theft from interstate shipment, embezzlement from pension and welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, obstruction of justice, obstruction of criminal investigations, obstruction of State or local law enforcement, racketeering, interstate transportation of wagering paraphernalia, unlawful welfare fund payments, illegal gambling businesses, interstate transportation of stolen property, trafficking in contraband cigarettes, and white slave traffic, which crimes are chargeable under federal law.

activity to require at least two acts of racketeering activity.¹⁰⁰

Because of the nature of the predicate offenses that must be proven to satisfy RICO's pattern of racketeering requirement, most RICO actions naturally give rise to parallel state claims.¹⁰¹ A federal court may assume pendent jurisdiction of these state claims. The state claims should easily satisfy the requirement of *United Mine Workers v. Gibbs*¹⁰² that, in relation to the federal claim, they are "deriv[ed] from a common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."¹⁰³ A federal court maintaining pendent jurisdiction over the parallel state claims could conceivably provide complete equitable relief to a RICO private plaintiff. Although this may appear to accomplish the same objectives as would equitable remedies under RICO, it would not. Many problems will arise if private plaintiffs suing under RICO have to rely on pendent jurisdiction of their state claims to receive equitable relief.

Pendent jurisdiction is a doctrine of discretion, and not a plaintiff's right.¹⁰⁴ A district court may consider many factors in deciding whether to maintain pendent jurisdiction over a state claim, including judicial economy, convenience, fairness to the litigants, and jury confusion.¹⁰⁵ Nothing exists to prevent a court that has denied equitable relief to a private plaintiff under RICO from invoking its discretionary powers to also deny pendent jurisdiction of the plaintiff's state claims.¹⁰⁶

Moreover, a federal court that is willing to exercise its discretionary powers of pendent jurisdiction and to grant equitable remedies to a private RICO plaintiff will still find itself limited in many instances. The court will have to apply state law to the pendent state claims, and the types of equitable relief available vary from state to state.¹⁰⁷ A federal court might well find that it does not have the

100 18 U.S.C. § 1961(5) (1982).

101 See note 99 *supra*. In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court stated "the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes in their respective jurisdictions . . . [even though] some of those crimes may also constitute predicate acts of racketeering under RICO." *Id.* at 586 n.9.

102 383 U.S. 715 (1966).

103 *Id.* at 725.

104 *Id.* at 726.

105 *Id.* at 726-29.

106 *Id.*

107 The problems which could be caused by the differences in the laws of the various states regarding equitable relief are best illustrated by the facts of *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980). In *Marubeni*, Marubeni America Corporation

authority to grant the most appropriate relief a situation may call for, simply because the state law that it must apply does not make that particular equitable remedy available.¹⁰⁸ A federal court granting private equitable relief under RICO, on the other hand, would have at its disposal a full range of equitable remedies with which to

and Hitachi Cable Ltd., as well as a corporate officer of each company, were charged under § 1962(c) for operating the affairs of an enterprise "through" a pattern of racketeering activity, which consisted of mail fraud, wire fraud, and interstate bribery. The indictment alleged that Marubeni's local representative paid bribes to Richard McBride, an employee of Anchorage Telephone Utility, an instrumentality of the Municipality of Anchorage, Alaska, to obtain confidential bidding information that was used to secure \$8.8 million in telephone cable contracts. *See United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982) (conviction of representative upheld). In addition, the government sought forfeiture under § 1963(a)(1) of "any and all sums or amounts paid or payable" to either corporation as a result of contracts procured through the § 1962(c) violation. In *Marubeni*, although the court of appeals held that the proceeds of a contract tainted by bribery were not subject to forfeiture under § 1963(a)(1), the court noted that civil remedies, namely treble damages and equitable relief, were available. 611 F.2d at 770 n.13. How general federal jurisprudence of a legal or equitable character would apply, moreover, is not in serious doubt. Breaches of the principal-agent relationship give rise to a legal claim for relief. *See Jankowitz v. United States*, 533 F.2d 538 (Ct. Cl. 1976) (counterclaim to recover bribes); *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964) (recovery of monies paid to poultry inspector); *United States v. Bowen*, 290 F.2d 40, 44 (5th Cir. 1961) ("The master as the party whose trust has been betrayed . . . is entitled to all of the fruits of the servant's dereliction."). Here, those damages — the amount of the bribes — would be trebled, to a total of \$990,000. In addition, the relief would not be limited to damages. A constructive trust could be imposed and the proceeds duly traced and restitution ordered. *United States v. Carter*, 217 U.S. 286 (1910) (constructive trust imposed on illegal profits garnered by an army captain from contracts let). Contracts vitiated by fraud may also be rescinded without a *quantum meruit* accounting. *K & R Eng'g Co. v. United States*, 616 F.2d 469, 476-77 (Ct. Cl. 1980). Here, that would mean \$8.8 million returned to the company without an accounting for the cable received. The no *quantum meruit* accounting rule in government contracts tainted by fraud stems from principles well-established since the time of the Tea Pot Dome scandals. *See Mammoth Oil Co. v. United States*, 275 U.S. 13 (1922) (cancellation of oil lease); *Pan American Petroleum and Transp. Co. v. United States*, 273 U.S. 456 (1927). Accordingly, RICO should be read to authorize the Anchorage Telephone Utility, an instrumentality of the Municipality of Anchorage, to seek such a full range of legal and equitable relief.

If RICO were read to authorize only legal relief, recovery could be had for the bribes, duly trebled, but substantial issues might rise concerning the scope of equitable relief under pendent jurisdiction. For example, some states follow the no *quantum meruit* accounting rule. *See, e.g., St. Grand Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973). But no Alaska precedent exists squarely on the question. A federal court should, therefore, be reluctant under general principles of comity to decide how the Alaska Supreme Court might decide the question. Imposing constructive trusts is also common in state jurisprudence. *See, e.g., Boston v. Santosuosso*, 298 Mass. 175, 10 N.E.2d 271 (1937) (constructive trust imposed on Mayor Curley); *Jersey City v. Hague*, 18 N.J. 584, 115 N.E.2d (1955) (constructive trust imposed on Mayor Hague). But what if Alaska law had not had an occasion to deal with the political corruption so characteristic of the northeast? One cannot predict how a federal court would or ought to resolve such important questions involving state law jurisprudence.

108 *See* note 107 *supra*.

grant the most appropriate relief in any given situation.¹⁰⁹

A plaintiff in need of individualized equitable relief will naturally seek to bring the action in a state where the equitable remedies are available. Thus, forcing RICO private plaintiffs to rely on possible pendent jurisdiction of their state claims to receive equitable relief for RICO offenses will also promote forum shopping.¹¹⁰ RICO is particularly susceptible to forum shopping since, under its expansive provisions for jurisdiction, venue, and process, most plaintiffs will have the choice of bringing their action in one of several jurisdictions.¹¹¹ In the interest of maintaining the integrity of the federal court system, forum shopping is not a practice that should be encouraged.

Examination of the consequences of denying RICO private plaintiffs the right to seek equitable relief reveals a scenario replete with pitfalls that Congress could not have intended when it passed the statute. It is only possible to achieve the purposes for which Congress enacted RICO by providing these equitable remedies under RICO itself, and not forcing RICO private plaintiffs to rely on other federal or state laws.

III. The Statement of the Lower Courts

RICO should be read as expressly providing, on the face of the statute, equitable relief for private plaintiffs. If a court is not satisfied with this construction, proper application of the Supreme Court's rules of statutory construction clearly shows that the equitable remedies should nevertheless be implied for private plaintiffs. Certain lower courts, however, have attempted to restrict the remedies available to private plaintiffs suing under RICO, excluding equitable relief.

In *Dan River, Inc. v. Icahn*,¹¹² *Bennet v. Berg*,¹¹³ *Trane Co. v. O'Connor*

109 18 U.S.C. § 1964(a) (1982). See note 8 *supra*.

110 See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1039-40 (1980).

111 18 U.S.C. § 1965 (1982) provides:

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

112 701 F.2d 278 (4th Cir. 1983). *Dan River* involved the attempted takeover of Dan River,

Securities,¹¹⁴ and *Kaushal v. State Bank of India*,¹¹⁵ the private plaintiffs

Inc., a major textile manufacturer, by Carl C. Icahn and several companies under his control ("Icahn").

Dan River's RICO claim was based on allegations that some of the funds used by Icahn in the attempted takeover were acquired through extortionate acts committed through Baywater Realty & Capital Corporation, a company controlled by Icahn. Dan River alleged several predicate offenses on which to base Icahn's violation of RICO. According to the Fourth Circuit's opinion, the facts alleged by Dan River failed to demonstrate a strong likelihood of success on the merits. Although this finding was sufficient reason to reject the RICO claim as grounds for the injunction, the court nevertheless felt it necessary to express its "substantial doubt whether RICO grants private parties such as Dan River a cause of action for equitable relief." *Id.* at 290. The court did not analyze this issue, but merely cited *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), as supportive of its proposition that "[i]n light of the most recent indications from the Supreme Court, Dan River's action for equitable relief under RICO might well fail to state a claim." *Id.* See text accompanying notes 49-111 *supra*.

113 710 F.2d 1361 (8th Cir. 1983). The plaintiffs in *Bennet* were present and former residents of the John Knox Village retirement community in Lee's Summit, Missouri. The list of defendants included the not-for-profit corporation John Knox Village, Kenneth Berg, the founder of the Village, and various not-for-profit corporations allegedly controlled by Berg.

The plaintiffs alleged that the "defendants had conspired to, and did in fact, defraud them with the result that plaintiffs face[d] the loss of the 'life care' which they expected to receive in return for an initial endowment fee plus a monthly service fee." *Id.* at 1363. Count I charged defendants with participating, and conspiring to participate, in a pattern of racketeering through mail fraud, in violation of RICO, 18 U.S.C. § 1962 (1982). Count II was a prayer for equitable relief in the form of reorganization of the village. 685 F.2d at 1065. The district court had dismissed the plaintiff's complaint because "it failed to allege the existence of an identifiable enterprise within the meaning of RICO, and because the equitable relief sought by [plaintiffs was] not available to a private [party under RICO]." *Id.* at 1056. Because the court of appeals affirmed the dismissal of Count II on other grounds, it declined to "reach the difficult question whether . . . this equitable relief [was] available to private plaintiffs pursuant to 18 U.S.C. § 1964 and, if not, whether such relief may be granted under the court's general equitable powers." *Id.* at 1064. The court added, without "endorsing or rejecting the opinions there expressed," that such scholarship as the court had discovered had concluded that "equitable relief [was] available to the private plaintiff." *Id.* at 1064. The court of appeals cited *Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L. Q. 1014, 1038 nn. 132-33. See also *id.* at 1047 n.197.

On rehearing en banc, the court of appeals affirmed the dismissal of Count II, without reaching the issue of equitable relief for private plaintiffs under RICO. *Bennet v. Berg*, 710 F.2d 1361 (1983). Judge McMillian, however, concurring in part and dissenting in part, did not agree that Count II should be dismissed, and therefore "would also [have] reach[ed] the question whether equitable relief is available to private parties under RICO . . . and [have] answer[ed] that question affirmatively." 710 F.2d 1361 (1983) (McMillian, C.J., concurring in part and dissenting in part).

114 561 F. Supp. 301 (S.D.N.Y. 1983) Plaintiff Trane sought a preliminary injunction prohibiting the defendants from making any further purchases of Trane stock, from voting their stock, and from disposing of it except under court order.

O'Connor was engaged in "risk arbitrage," a business which involves the purchase and sale of the securities of companies involved in extraordinary transactions, such as reorganizations, liquidations, mergers, and tender offers. O'Connor had targeted Trane as a likely candidate for takeover and subsequently began purchasing large amounts of Trane stock, hoping

requested equitable relief under the civil provisions of RICO. The *Dan River*, *Bennet*, and *Trane* courts found it unnecessary even to reach the issue.¹¹⁶ These courts did, however, raise questions as to the availability of such relief but did not attempt to engage in any analysis of the issue.¹¹⁷ The *Kaushal* court found that the defendant had violated RICO,¹¹⁸ but denied the equitable relief requested by the victims, stating that RICO does not make equitable remedies available to private plaintiffs.¹¹⁹ To justify this result, the *Kaushal*

to profit either if Trane became involved in a merger or tender offer by a third party, or by selling the shares back to Trane. Trane alleged that through these purchases O'Connor manipulated the securities market in violation of sections 9(a)(2) and 10(b) of the Securities Exchange Act. 15 U.S.C. §§ 78i(a)(2), 78j(b) (1982). Trane also alleged that this same behavior also violated RICO.

The court first addressed the market manipulation claim, and found the proof to be insufficient to support a finding that O'Connor had violated the Securities Exchange Act. Next, the court addressed the RICO claim, stating that "[t]he threshold question for consideration is whether a private party may maintain an action for injunctive relief under RICO." 561 F. Supp. 306. The court relied primarily on *Dan River* as casting serious doubt on "the propriety of granting injunctive relief to private plaintiffs alleging violations under RICO." *Id.* at 307. The court then expressed its own "serious doubt that Trane may properly invoke RICO to secure injunctive relief against O'Connor. However, [this court] need not reach that issue. Since the activities of O'Connor have been held not to violate Section 9(a) or 10(b) of the Exchange Act, these activities surely do not come within the ambit of RICO's proscriptions. Accordingly, the claims under RICO must be dismissed." *Id.*

Trane recently appealed the district court's denial of a preliminary injunction against the defendants. Although the appellate court found it unnecessary to decide whether equity relief is available to private plaintiffs suing under RICO, it did agree with the district court that, at the very least, a showing of a likelihood of irreparable harm must be made before a preliminary injunction will be granted to a private party suing under RICO. *Trane Co. v. O'Connor Secur.*, 718 F.2d 26 (2d Cir. 1983).

115 556 F. Supp. 576 (N.D. Ill. 1983). *Kaushal* involved a scheme devised by officers of the State Bank of India ("SBI") to fraudulently induce the plaintiffs into purchasing the assets and assuming the liabilities of a group of affiliated corporations which owed more than two million dollars to SBI. This was accomplished by presenting the plaintiffs with false financial statements, intentionally overstating the assets and understating the liabilities of these companies by more than \$700,000. Once plaintiffs had purchased the companies and discovered the fraud, the defendants planned to complete the scheme by foreclosing on the one solvent business in the group, the Khyber India Restaurant, and selling it to one of SBI's important New York customers. The plaintiffs sought treble damages in the first count of their complaint, under § 1964(c). Count II of the plaintiff's complaint was a prayer for equitable relief in which they sought to block SBI's sale of the Khyber India Restaurant and to divest SBI of any interest which it had acquired in the restaurant. The district court ruled that although the plaintiff's complaint was sufficient to establish a private cause of action for damages under RICO, they were not entitled to the equitable relief requested because RICO does not authorize, expressly or implicitly, equitable relief for private plaintiffs. *See* text accompanying notes 121-125 *infra*.

116 *See* notes 112-14 *supra*.

117 *Id.*

118 556 F. Supp. at 579-81.

119 *Id.* at 581-84.

court engaged in a cursory analysis of the issue.¹²⁰ Taken together, the opinions of these courts have left in doubt the question of whether courts will provide equitable relief to private plaintiffs under RICO.

A. *Kaushal v. State Bank of India*

Since the court in *Kaushal v. State Bank of India*¹²¹ was the only lower court to actually find it necessary to decide whether RICO private plaintiffs can receive equitable relief, it was the only court that actually engaged in any substantial legal analysis of the question beyond the bald statement that RICO does or may not provide such relief. The *Kaushal* court, however, gave scant attention to the question of whether section 1964, read by itself or in conjunction with the Liberal Construction Clause, expressly provided equitable remedies for private plaintiffs.¹²² Instead, it passed over this basic question and stated that because equitable remedies were not expressly provided for plaintiffs under RICO, it was necessary to employ the applicable Supreme Court guidelines of statutory construction to determine if these equitable remedies would nevertheless be implied.¹²³ The *Kaushal* court then relied on the stricter rules of statutory construction established by the *Cort v. Ash*¹²⁴ line of cases to support its decision not to imply equitable remedies for private RICO plaintiffs. The court did not analyze RICO in light of the more liberal rules existing in 1970, the year RICO was enacted.¹²⁵ Nevertheless, a careful analysis of RICO under the rules established by *Cort v. Ash* demonstrates that the *Kaushal* court was not justified in denying equitable remedies to RICO private plaintiffs.

B. *Cort v. Ash and Its Progeny*

In *Cort v. Ash*, the Supreme Court formulated four factors that must be considered in determining whether a private cause of action or remedy is implicit in a statute not expressly providing for it.¹²⁶ These factors are:

¹²⁰ *Id.* See text accompanying notes 121-75 *infra*.

¹²¹ 556 F. Supp. 576 (N.D. Ill. 1983).

¹²² The *Kaushal* court found it appropriate to "analyze" this important question in three short paragraphs. 556 F. Supp. at 582.

¹²³ *Id.* at 583.

¹²⁴ 442 U.S. 66 (1974).

¹²⁵ 556 F. Supp. at 584.

¹²⁶ 422 U.S. at 78.

1. Is the plaintiff one of the class for whose special benefit the statute was enacted?
2. Is there any indication of legislative intent, explicit or implicit, to create or deny such a remedy?
3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
4. Is the cause of action one traditionally relegated to state law in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?¹²⁷

To determine whether equitable remedies should be implied for RICO private plaintiffs under the test of *Cort v. Ash*, it is appropriate to analyze the Supreme Court's application of each of the *Cort* factors to the subsequent cases that have required their application. The *Kaushal* court, however, undertook an incomplete analysis of the *Cort* line of cases to support its decision. Of the several cases that have followed and explained the *Cort* rules of statutory construction, the *Kaushal* court chose to rely only on *Touche Ross & Co. v. Redington*¹²⁸ and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.¹²⁹ The court felt that those cases stated the rule that a court may read additional judicial remedies into a statute only where "strong indicia of a contrary legislative intent" negate the implication that "Congress provided precisely the remedies it considered appropriate."¹³⁰ The court neglected to consider relevant legislative history and those Supreme Court decisions that strongly indicate that if RICO does not expressly provide equitable remedies for private plaintiffs, the availability of the remedies nevertheless should be implied.¹³¹ The *Kaushal* court also neglected to discuss or acknowledge other cases in the *Cort* line which support the proposition.¹³² Further analysis of *Touche Ross* and *Sea Clammers*, as well as the other cases, reveals that the *Kaushal* court was not justified in refusing to grant equitable relief to private plaintiffs suing under RICO.

1. *Touche Ross & Co. v. Redington*

In *Touche Ross*,¹³³ the customers of Weis Securities, a brokerage

¹²⁷ *Id.*

¹²⁸ 442 U.S. 560 (1979).

¹²⁹ 453 U.S. 1 (1981).

¹³⁰ 556 F. Supp. at 584.

¹³¹ See text accompanying notes 133-75 *infra*.

¹³² These cases are discussed in the text accompanying notes 142-60 *infra*. See also note 141 *infra*.

¹³³ 442 U.S. 560 (1979).

firm, sued Touche Ross and Co. Touche Ross was the accounting firm responsible for auditing the financial reports that Weis filed with federal regulatory authorities pursuant to section 17(a) of the Securities Exchange Act of 1934.¹³⁴ The customer's cause of action was based on misstatements contained in the reports.¹³⁵ Although section 17(a) imposed reporting requirements, it did not provide an express cause of action for persons injured by violation of the statute.¹³⁶ The Supreme Court held that a private cause of action should not be implied in section 17(a). The Court's decision not to imply a cause of action turned on its application of the *Cort* factors to section 17(a).¹³⁷

The Supreme Court first found that section 17(a) merely imposed record keeping and reporting duties on broker-dealers, without prohibiting certain conduct or creating federal rights in favor of private parties; the plaintiff customers, then, were not members of a class for whose special benefit the statute was enacted.¹³⁸ Thus, section 17(a) failed to satisfy the first factor of the *Cort* test.

There is no question that private plaintiffs suing under RICO satisfy the first factor of the *Cort* test, since RICO victims are members of the class for whom RICO was enacted. Unlike section 17(a), section 1964 does not require a court to imply jurisdiction, a cause of action, and a remedy.¹³⁹ Section 1964(c) expressly grants jurisdiction and provides for a cause of action for "any person injured."¹⁴⁰ Only the particular type of remedy needs to be implied.¹⁴¹

134 *Id.* at 563.

135 *Id.* at 565-66.

136 *Id.* at 569 (section 17(a) simply requires broker-dealers and others to keep records and file reports as the commission may describe, but does not create a private cause of action in favor of anyone).

137 *Id.* at 571 (no basis in the language of § 17(a) for inferring that a civil cause of action for damages exists for anyone).

138 *Id.* at 579.

139 18 U.S.C. § 1964(c) (1982). *See* note 17 *supra*.

140 18 U.S.C. § 1964(c) (1982). *See* note 17 *supra*.

141 This distinction is important in questions of statutory construction. In section 1964(c), Congress has expressly mandated that private plaintiffs have a cause of action under RICO. 18 U.S.C. § 1964(1) (1982). A court must be more cautious in implying a cause of action in a statute which does not expressly provide for it, because the possibility that its decision may over-extend the intent of the legislature is great. This danger is not nearly as great with RICO and similarly constructed statutes, however, where the Congress has expressly stated who may sue and the only remaining question is the scope of the remedies available under the statute.

The *Kaushal* court suggested that the circumstances in *Herman & Maclean v. Huddleston*, 103 S. Ct. 683 (1983), indicated that the Supreme Court would not be willing to imply private equitable remedies in RICO. 556 F. Supp. at 584. The *Kaushal* court relied upon the

A court's primary focus, however, should be on the second factor of the *Cort* test: whether there is any indication of legislative intent, explicit or implicit, to create or deny such a remedy. In *Merrill Lynch, Pierce, Fenner & Smith v. Curran*,¹⁴² the Supreme Court stated that their cases subsequent to *Cort v. Ash* have plainly stated that the focus must be on the intent of Congress.¹⁴³

The Supreme Court in *Touche Ross* did focus on the legislative history of section 17(a), noting that it was entirely silent on the question whether a private right of action should be available under the statute.¹⁴⁴ This congressional silence reinforced the Court's decision not to imply a cause of action, because to imply a private cause of action based on congressional silence would be a "hazardous enterprise, at best."¹⁴⁵

The legislative history of RICO, unlike that of section 17(a), is not silent on the issue of equity relief for private plaintiffs.¹⁴⁶ When RICO came before Congress as Title IX of S.30, the Organized Crime Control Act, Congressman Sam Steiger of Arizona proposed a detailed amendment to the statute that would have provided express equitable remedies for private plaintiffs suing under RICO.¹⁴⁷ The amendment proposed several other additions to the statute, including the right of the Attorney General to sue for damages, the right of the Attorney General to intervene in any civil suit which he deemed to be of general public importance, and a five year statute of limita-

Supreme Court's finding of a specific congressional intent to cumulate remedies under federal securities laws in making this statement. 556 F. Supp. at 584. The *Kaushal* court's suggestion echoed a statement made earlier in the *Kaushal* opinion that "the inclusion of a single statutory reference to private plaintiffs, and the identification of a single remedy for such plaintiffs in that very section, logically carries the negative implication no other remedy was intended to be conferred." 556 F. Supp. at 582 n.20. The Supreme Court in *Huddleston*, however, actually stated that a court should be receptive to the implication of remedies in a statute where failure to provide them would undermine the remedial purpose of the statute.

We also reject application of the maxim of statutory construction, *expressio unius est exclusio alterius* [the expression of one thing is to the exclusion of all others.] . . . As we stated in *SEC v. Joiner Corp.*, 320 U.S. 344, 350-51, 64 S. Ct. 120, 123, 88 L. Ed. 88 (1943), such canons "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose." . . . We believe the maxim cannot properly be applied where the remedies redress different misconduct and where the remedial purposes of the Acts would be undermined by a presumption of exclusivity.

103 S. Ct. at 690 n.23.

142 456 U.S. 353 (1982).

143 *Id.* at 377.

144 442 U.S. at 571.

145 *Id.*

146 See text accompanying notes 147-51 *infra*.

147 116 CONG. REC. 35,227-28 (1970).

tions.¹⁴⁸ A day later, Congressman Richard H. Poff, a manager of the bill, requested Congressman Steiger to withdraw his amendment.¹⁴⁹ Poff expressed the need for the Judiciary Committee to explore the potential consequences of this amendment at a later date.¹⁵⁰ Congressman Steiger withdrew his amendment from consideration, but, in doing so, expressed his belief that, without his amendment, private plaintiffs still may have this option to seek equitable relief.¹⁵¹

The legislative history of RICO is, moreover, strikingly similar to the legislative history of Title IX of the Education Amendments of 1972 ("Title IX").¹⁵² In *Cannon v. University of Chicago*,¹⁵³ a major Supreme Court case of the *Cort* line that was decided in the same term as *Touche Ross*, the Court was asked to decide whether Title IX provided an implied private cause of action.¹⁵⁴ In *Cannon*, the Court focused on the intent of Congress as evidenced by the statute's legislative history and found it proper to imply the private cause of action.¹⁵⁵ The Court stated:

The only excerpt relied upon by respondents that deals precisely with the question whether the victim of discrimination has a private remedy under Title VI was a comment by Senator Keating. In it, he expressed disappointment at the administration's failure to include his suggestion for an express remedy in its final proposed bill. Our analysis of the legislative history convinces us, however, that neither the administration's decision not to incorporate that suggestion expressly in its bill, nor Senator Keating's response to that decision, is indicative of a rejection of a private right of action against recipients of federal funds. Instead the former seems to have been a compromise aimed at protecting the individual rights without subjecting the Government to suits, while the latter is merely one Senator's isolated expression of a preference for an express private remedy. In short, neither is inconsistent with the implication of such a remedy. Nor is there any other indication in the legislative history that any Member of Congress voted in favor of the statute in reliance on an understanding that Title VI did not include a private remedy.¹⁵⁶

148 *Id.*

149 *Id.* at 35,346; *United States v. Turkette*, 452 U.S. 576, 593 (1980).

150 116 CONG. REC. at 35,347.

151 *Id.* at 35,346-47.

152 20 U.S.C. § 1681 (1972).

153 441 U.S. 677 (1979).

154 *Id.* at 688-89.

155 *Id.* at 717.

156 *Id.* at 713-16. Although the Court in *Cannon* was concerned with the legislative history

The Court also found it important to note that Senator Keating expressed his belief that, despite Congress' decision not to provide for an express private remedy in Title IX, the private remedy was nevertheless implicit in the statute.¹⁵⁷

Despite the obvious similarity of the legislative histories of Title IX and RICO, the *Kaushal* court failed to use *Cannon* in its analysis. Based on the Supreme Court's decision in *Cannon*, the *Kaushal* court was not justified in relying upon *Touche Ross* to deny equitable remedies to private RICO plaintiffs. RICO itself clearly expresses that it was enacted for the special benefit of these private plaintiffs.¹⁵⁸ The legislative history, if not supportive of an intent to imply equitable remedies for private plaintiffs, certainly does not indicate a congressional intent to deny these remedies. In *Touche Ross*, the Supreme Court found it unnecessary to decide whether section 17(a) satisfied the third and fourth factors of the *Cort* test, since the statute did not satisfy the first two factors.¹⁵⁹ The analysis followed by the Supreme Court in its interpretation of section 17(a) in the *Touche Ross* case was, therefore, in fact inconsistent with the analysis demanded by RICO.

2. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*

The *Kaushal* court also relied upon another decision in the *Cort* line, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*.¹⁶⁰ The reliance on *Sea Clammers* is even less justified than the reliance on *Touche Ross*.

The plaintiffs in *Sea Clammers* alleged that the various defendants had been dumping sewage and waste materials into the Atlantic Ocean in violation of the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act ("MPRSA").¹⁶¹ Both the FWPCA and the MPRSA have provisions which expressly grant private parties the right to seek injunctive relief under these statutes.¹⁶² The plaintiffs in *Sea Clammers*, however,

of Title IX, its analysis of the legislative history required an analysis of Title VI of the Civil Rights Act of 1964 instead. Title IX had been patterned after Title VI, with the substitution of the word "sex" in Title IX for the words "race, color, or national origin" in Title VI; the drafters of Title IX explicitly assumed that Title IX would be interpreted in the same way that Title VI had been. 441 U.S. at 694-96.

157 *Id.* at 716 n.52.

158 18 U.S.C. § 1964(c) (1976). *See* note 17 *supra*.

159 442 U.S. at 575.

160 453 U.S. 1 (1980).

161 33 U.S.C. § 1251 (1976 & Supp. III 1979); 33 U.S.C. § 1401 (1976 & Supp. III 1979).

162 33 U.S.C. § 1365(a) (1976 & Supp. III 1979); 33 U.S.C. § 1415(g) (1976 & Supp. III

also sought damages under the two acts, despite the fact that damages were not expressly provided for private parties under either statute.¹⁶³ The Third Circuit determined that the FWPCA and MPRSA implicitly authorized suits for damages in addition to the express private injunctive remedy, and the defendants appealed.¹⁶⁴

The Supreme Court, in deciding whether an implied damages remedy existed within the FWPCA and the MPRSA, turned once again to the legislative history of the statutes. Although the FWPCA and the MPRSA are broad statutes with unusually elaborate enforcement provisions,¹⁶⁵ their legislative histories indicated that Congress strongly intended to limit private actions to injunctive relief.¹⁶⁶ The Court quoted a statement made by Senator Hart as being representative of this intent:

It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of S. 4358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary person, I suspect, who, with no prospect of financial gain and the very real prospect of financial loss, will initiate court action under this bill.¹⁶⁷

At no place in the legislative history of RICO is there any similar indication that Congress intended to deny equitable remedies to private plaintiffs suing under the statute, much less the type of concrete expression of legislative intent provided by Senator Hart's statement. The Supreme Court's analysis of the legislative history of the FWPCA and the MPRSA is helpful in analyzing the different legislative history of RICO only to the extent that it points out the differ-

1979). It is interesting to note that sections 1365(a) and 1415(g) both authorize any person to sue "to enjoin." Section 1964(c) of RICO, on the other hand, states that any person injured may sue "and shall recover threefold the damages . . ." 18 U.S.C. § 1964(c) (1982). The difference in the wording of these statutory schemes supports the argument that Congress intends by the use of the word "and" to add to the remedies already available to a plaintiff, while use of the word "to" shows intent to restrict the remedies available. *See* notes 19-20 *supra*.

163 453 U.S. at 12.

164 *National Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222, 1229 (3rd Cir. 1980).

165 453 U.S. at 13-14.

166 *Id.* at 17-18.

167 *Id.* at 18 n.27.

ences in the histories. The *Sea Clammers* analysis in fact demonstrates that courts should imply private equitable relief under RICO. The *Kaushal* court's reliance on *Sea Clammers* to deny equitable relief was, therefore, unfounded.

3. RICO and the Last Two Factors of the *Cort v. Ash* Test

In both *Touche Ross* and *Sea Clammers*, the Supreme Court found it unnecessary to decide whether any of the statutes satisfied the third and fourth factors of the *Cort* test, because "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."¹⁶⁸ In both cases, once the Court decided that the legislative history could not support a finding that Congress intended to provide the private remedy, there was no need for further analysis.¹⁶⁹ The Supreme Court's discussion of the legislative history of Title IX in *Cannon* shows, however, that an analysis of RICO does not justify ending the inquiry at the second factor.¹⁷⁰ Since the *Kaushal* court, by choosing to rely on *Touche Ross* and *Sea Clammers*, mistakenly neglected to apply the third and fourth factors of the *Cort* test to RICO, it is necessary to do so here.

The third factor of the *Cort* test is whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.¹⁷¹ As the Supreme Court stated in *Cannon*, when a "remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."¹⁷² Providing such an equitable remedy in a private RICO cause of action would certainly further the purpose of RICO.

With regard to the fourth factor of the *Cort* test, it must be determined whether it would be inappropriate to infer private equitable remedies based solely on federal law because this relief is traditionally relegated to state law in an area basically the concern of the states.¹⁷³ The Supreme Court has answered this question. The Court, in *Turkette*, stated that the purpose of the Organized Crime Control Act of 1970 was to enable the Federal government to address a large and neglected problem. Existing law, state and federal, was

168 *Touche Ross*, 442 U.S. at 575.

169 *Touche Ross*, 442 U.S. at 576; *Sea Clammers*, 453 U.S. at 17-18.

170 See text accompanying notes 152-59 *supra*.

171 *Cort*, 422 U.S. at 78.

172 441 U.S. at 703.

173 422 U.S. at 78.

inadequate to address the national problem of organized crime.¹⁷⁴ RICO was enacted in response to the inadequacy of state law, and thus it cannot reasonably be argued that the implication of private equitable remedies in the statute fails to satisfy the fourth factor of the *Cort* test.¹⁷⁵

Under a strict application of the *Cort* rules of statutory construction, RICO should provide equitable relief to private plaintiffs. The Supreme Court's test in *Cort v. Ash* and the Court's interpretation of the test in subsequent cases mandates this result.

IV. Conclusion

When Congress enacted RICO in 1970, it did so in response to a situation that it perceived to be seriously harming our nation. RICO is a well-crafted statute and reflects the careful consideration that Congress deemed necessary. Both the text of RICO and the legislative history of the statute indicate that RICO makes available equitable relief for private plaintiffs suing under its civil provisions. Critics argue that this grant of equitable relief is not an appropriate means of combatting the problems that RICO was enacted to address. These critics are, of course, entitled to attempt to change RICO through the legislative process. They should not be entitled, however, to make this attempt through the judicial forum, given the text and legislative history of RICO. If RICO is to be emasculated of one of its most potentially useful aspects, private equitable relief, it should only be as a result of careful deliberation within the legislative process. As other courts face this issue, it is hoped that they will recognize and protect the right of private plaintiffs to receive equitable relief under RICO.

Donald R. Lee

174 *United States v. Turkette*, 452 U.S. 576, 586 (1981).

175 *Id.* Congress anticipated and rejected arguments that RICO improperly usurps state power by providing in the statute that "[n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title." The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961 (1982)).