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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank my friends and family for their support.

COMMENT

EQUITY UP IN SMOKE: CIVIL RICO, DISGORGEMENT, AND *UNITED STATES V. PHILIP MORRIS*

*Christopher L. McCall**

INTRODUCTION

On September 22, 1999, the United States Government filed an unprecedented lawsuit against the world's largest tobacco companies[1] in the District Court for the District of Columbia.[2] "The tobacco companies," then-President Bill Clinton said at a press conference announcing the suit, "should answer to the taxpayers for their actions."[3] At the same press conference, then-Attorney General Janet Reno said that the tobacco companies "have waged an intentional, coordinated campaign of fraud and deceit . . . designed to preserve their enormous profits whatever the cost in human lives, human suffering and medical resources. The consequences have been staggering."[4]

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1. The Government's complaint named as defendants tobacco manufacturers Philip Morris, Inc., Philip Morris Companies, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, American Tobacco Company, Lorillard Tobacco Company, British-American Tobacco Co., Ltd., British American Tobacco (Investments), Ltd., and the Liggett Group, Inc. Two industry trade groups, the Council for Tobacco Research-U.S.A., Inc., and the Tobacco Institute, were also named.

2. *See* Complaint for Damages and Injunctive and Declaratory Relief, United States v. Philip Morris, Inc., No. 99-CV-02496 (D.D.C. Sept. 22, 1999). The Complaint was subsequently amended. *See* First Amended Complaint for Damages and Injunctive and Declaratory Relief, United States v. Philip Morris, Inc., No. 99-CV-02496 (D.D.C. Feb. 28, 2001) [hereinafter First Amended Complaint].

3. Marc Lacey, *Tobacco Industry Accused of Fraud in Lawsuit by U.S.*, N.Y. Times, Sept. 23, 1999, at A1.

4. *Id.* Interestingly, then-Texas Governor and Republican presidential candidate George W. Bush criticized the lawsuit, saying through a spokesperson that he "hoped the era of big government will not be replaced by the era of big lawsuits." *Id.* When Governor Bush became President in January 2001 and decided to proceed with the case, anti-smoking groups—which pointed out that the tobacco industry had donated some $8 million in the 2000 election, more than eighty percent of it to Republican candidates—were concerned that the new administration would fail to vigorously support the case, as President Bill Clinton had. *See* David Johnston, *In Shift, U.S. Opens Effort to Settle Tobacco Lawsuit*, N.Y. Times, June 20, 2001, at A1. Some of these concerns appear well-founded. In April 2001, the Justice Department's Tobacco Litigation Team sent a memorandum to then-Attorney

The Government's suit, *United States v. Philip Morris*, contained four counts. The first two counts sought to recover billions of dollars in costs incurred by the Government in providing health care for Medicare patients, military veterans, and federal employees suffering from smoking-related illnesses.[5] The remaining—and far more controversial—counts were brought under § 1964 of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[6] RICO's civil provision.[7] The Government alleged that the tobacco companies constituted a "racketeering enterprise" under RICO and sought to disgorge approximately $280 billion from the tobacco companies for various RICO violations since 1970, the year the statute was enacted.[8]

On December 27, 1999, the tobacco companies moved to dismiss the complaint,[9] arguing, *inter alia*, that disgorgement is not, as a matter of law, a remedy available under § 1964(a) of RICO, which grants district courts jurisdiction to "prevent and restrain violations of [RICO] by issuing appropriate orders, including, but not limited to" orders of divestment, injunction, and dissolution.[10] The tobacco companies argued that disgorgement, an "inherently backward-looking" remedy, could not be imposed under § 1964(a), which only permits forward-looking remedies, "in keeping with the statute's stated purpose—'to prevent and restrain' future violations."[11]

The district court granted the tobacco companies' motion to dismiss on two of the Government's counts but permitted the two RICO counts to proceed, holding that disgorgement was indeed an available remedy under RICO.[12] In holding that disgorgement was, as a matter of law, available under § 1964(a), the district court relied on a decision of the U.S. Court of Appeals for the Second Circuit, which at the time was the only appellate court to have addressed the issue. In *United States v. Carson*,[13] the Second

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General John Ashcroft to inform him that, of the $57 million the division estimated it would need to proceed with the case that year, the Bush Administration had only budgeted $1.8 million for it. *See* Christopher Marquis, *Warning on U.S. Tobacco Suit*, N.Y. Times, Apr. 25, 2001, at A16.

5. *See infra* notes 216-19 and accompanying text.

6. 18 U.S.C. §§ 1961-1968 (2000).

7. *See infra* notes 220-25 and accompanying text. The Racketeer Influenced and Corrupt Organizations Act ("RICO") counts were considered highly controversial because the Government's suit marked the first time that RICO had been used against an entire American industry. *See* Barry Meier, *Two Strategies at Work and Stiff Challenges Ahead in Federal Lawsuit*, N.Y. Times, Sept. 23, 1999, at A22. The fact that two of the defendants in the Government's case—Philip Morris and R.J. Reynolds—appeared on the Fortune 500 list at eight and eighty-nine, respectively, *see Fortune 500 Largest U.S. Corporations*, Fortune, Apr. 26, 1999, at F-1, at the time the lawsuit was filed only fueled the controversy.

8. *See infra* notes 226-30 and accompanying text.

9. *See* Certain Defendants' Memorandum of Law in Support of Motion to Dismiss, United States v. Philip Morris, Inc., 116 F. Supp. 2d 131 (D.D.C. 2000) (No. 99-CV-02496) [hereinafter Motion to Dismiss].

10. *See* 18 U.S.C. § 1964(a).

11. Motion to Dismiss, *supra* note 9, at 50 (quoting 18 U.S.C. § 1964(a)).

12. *See Philip Morris, Inc.*, 116 F. Supp. 2d 131; *infra* Part II.C.2.

13. *See* United States v. Carson, 52 F.3d 1173 (2d Cir. 1995); *infra* Part II.A.

Circuit held that disgorgement was an available remedy under § 1964(a), but only under very limited circumstances. Specifically, *Carson* held that disgorgement would only be an appropriate means of preventing and restraining future RICO violations where the money to be disgorged was presently being used or was capable of being used to fund such violations. Because the district court in *Philip Morris* read *Carson* to require a factual finding before disgorgement could be imposed—namely, that the tobacco companies were presently committing or were capable of committing future RICO violations—it rejected the tobacco companies' motion to dismiss as premature.[14]

On August 1, 2003, the tobacco companies filed a motion for summary judgment to dismiss the Government's disgorgement claim, recapitulating many of the arguments from their motion to dismiss.[15] The district court denied the motion, holding that disgorgement could be imposed, consistent with a district court's inherent equitable powers, upon a factual finding of a likelihood of future violations.[16] Because the likelihood of future violations was a disputed question of fact, the district court denied the tobacco companies' motion for summary judgment. In its opinion, the district court also addressed the Second Circuit's holding in *Carson* and the holding of the Court of Appeals for the Fifth Circuit in *Richard v. Hoechst Celanese Chemical Group*,[17] in which the Fifth Circuit adopted *Carson*. The district court rejected the restriction *Carson* and *Richard* sought to place on a district court's ability to impose whatever equitable remedies it deemed appropriate under § 1964(a), holding that the restriction was inconsistent with the text of § 1964(a) as well as RICO's legislative purpose.

The tobacco companies appealed to the Court of Appeals for the District of Columbia. On February 4, 2005, the D.C. Circuit reversed, holding that, contrary to the district court's conclusion that § 1964(a) granted district courts full equitable jurisdiction, § 1964(a) only granted district courts authority to impose forward-looking remedies, and disgorgement was not such a remedy.[18] The D.C. Circuit also addressed, and explicitly rejected, both *Carson* and *Richard*, holding that disgorgement was categorically unavailable under § 1964(a).[19] The Government filed a petition for certiorari with the United States Supreme Court, which was denied on October 17, 2005.[20]

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14. *See infra* Part II.C.2.

15. *See* Defendants' Brief in Support of Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72 (D.D.C. 2004) (No. 99-CV-02496) [hereinafter Motion for Partial Summary Judgment].

16. *See Philip Morris USA, Inc.*, 321 F. Supp. 2d 72; *infra* Part II.C.3.

17. *See* Richard v. Hoechst Celanese Chem. Group, 355 F.3d 345 (5th Cir. 2003); *infra* Part II.B.

18. *See* United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir.), *cert. denied*, 126 S. Ct. 478 (2005); *infra* Part II.D.1.

19. *See infra* Part II.D.2.

20. *See Philip Morris USA, Inc.*, 126 S. Ct. 478. At the time of the U.S. Court of Appeals for the District of Columbia's decision, the case was being tried by District Court

This Comment addresses the availability of disgorgement as a remedy under § 1964(a) of the RICO statute. More specifically, this Comment addresses whether § 1964(a) grants district courts the full range of equitable jurisdiction to impose whatever remedies they deem appropriate—including, but not limited to, the equitable remedy of disgorgement—or whether the language in § 1964(a) authorizing district courts to issue appropriate orders to "prevent and restrain" future RICO violations circumscribes their jurisdiction.

In Part I, this Comment examines the RICO statute itself, focusing on its civil provision and the grant of equitable jurisdiction in § 1964(a). Next this Comment discusses the nature of equitable jurisdiction generally and the significance of its roots in British common law. Then this Comment discusses three specific cases in which the United States Supreme Court has analyzed grants of equitable jurisdiction similar to the one at issue in § 1964(a).

In Part II, this Comment describes and analyzes the three positions that have been staked out vis-à-vis the availability of disgorgement as a remedy under § 1964(a). First, this Comment analyzes the decisions of the Second and Fifth Circuits in *Carson* and *Richard*, respectively, in which the courts held that, although § 1964(a) does not provide a general grant of equitable jurisdiction, disgorgement could, under limited circumstances, be considered a means of preventing and restraining future RICO violations and therefore permissible under § 1964(a). Second, this Comment analyzes the decision of the District Court for the District of Columbia in *Philip Morris*, in which the district court held that § 1964(a) does provide a general grant of equitable jurisdiction and that disgorgement could be imposed consistent with a district court's equitable authority. Third, this Comment analyzes the decision of the D.C. Circuit in *Philip Morris*, in which the D.C. Circuit held that § 1964(a) circumscribes a district court's equitable jurisdiction and further held that disgorgement is categorically unavailable under § 1964(a), thereby reversing the district court and explicitly rejecting *Carson* and *Richard*.

In Part III, this Comment argues in favor of the position taken by the district court in *Philip Morris* and the dissenting opinion in the D.C. Circuit's *Philip Morris* decision. Specifically, this Comment argues that § 1964(a) does indeed represent a general grant of equitable jurisdiction. Consistent with that jurisdiction, a district court has the authority to impose whatever equitable remedies it deems appropriate, including disgorgement, upon a finding of a reasonable likelihood of future RICO violations. Because the availability of disgorgement is dependent on a factual finding—namely, the likelihood of future violations—this Comment argues

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Judge Gladys Kessler without a jury. The trial lasted nine months, ending in June 2005. *See* Linda Greenhouse, *Supreme Court Roundup: Justices Reject Appeal in Tobacco Case*, N.Y. Times, Oct. 18, 2005, at A18; Michael Janofsky & David Johnson, *Limit for Award in Tobacco Case Sets Off Protest*, N.Y. Times, June 9, 2005, at A1. As of this writing, Judge Kessler has yet to issue a decision.

that its availability is ultimately a question of fact to be determined by a jury.

While this issue may seem rather esoteric, it is far from an academic question. As this Comment discusses, the extent of the authority vested in a district court by the statutory grant of jurisdiction in § 1964(a) proved to be a critical issue in the Government's $280 billion suit against the tobacco companies. This Comment, moreover, should be read in the context of the broader debate between those who advocate an approach to statutory interpretation that, in the words of one commentator, "tend[s] to prefer mechanical, rules-based methods of interpretation that, at least ostensibly, minimize the role of judicial choice" and those who advocate a standards-based approach to statutory interpretation that "calls upon courts to make intelligent choices and, on appropriate occasions, to deviate from the most straightforward reading of statutory text."[21]

I. SECTION 1964(A) AND EQUITABLE GRANTS OF JURISDICTION

This part begins with a brief examination of the RICO statute and its legislative history,[22] with a special emphasis on the statute's civil provision. Next, this part discusses the distinction between law and equity at common law in order to understand the broad range of powers available to a court exercising equitable jurisdiction. Finally, this part looks at three Supreme

21. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 Tex. L. Rev. 339, 339 (2005).

22. This Comment proceeds from the assumption that consideration of legislative history and purpose is an appropriate method of statutory interpretation. This assumption is, admittedly, highly debatable, but addressing it adequately is far beyond the scope of this Comment. For arguments against consideration of legislative history and purpose, see Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 Int'l Rev. L. & Econ. 284, 284 (1992) (arguing that "the concept of 'an' intent for a person is fictive and for an institution hilarious. A hunt for this snipe liberates the interpreter, who can attribute to the drafters whatever 'intent' serves purposes derived by other means"); John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 450 (2005) (arguing against consideration of legislative intent because "[t]he legislative process is untidy and opaque; it gives those with intense and even outlying preferences numerous opportunities to slow or stop legislation and to insist upon compromise as the price of assent," thereby making it impossible to discern the true intent of any given piece of legislation); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (arguing that "the quest for the 'genuine' legislative intent is probably a wild-goose chase"). For arguments taking the opposing point of view, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 847 (1992) (then-First Circuit Court of Appeals Judge and current Supreme Court Justice defending the consideration of legislative purpose and arguing that "any significant change in the extent to which courts look to legislative history would likely prove harmful"); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457, 1510-28 (2000) (arguing that courts should consider certain legislative materials in attempting to discern legislative purpose); Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 Geo. L.J. 427, 429 (2005) (arguing that "even when there is no dispute about meaning, intent lurks in the background as a crucial element of our understanding").

Court cases interpreting grants of jurisdiction similar to the one in § 1964(a).

A. *RICO*

RICO was enacted as Title IX of the Organized Crime Control Act of 1970,[23] a broad-based congressional effort to combat organized crime, the effects of which, according to Congress, "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."[24] Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes,"[25] a mandate the Supreme Court has at least acknowledged,[26] if not always applied.[27] In order to provide "new weapons of unprecedented scope for an assault upon organized crime and its economic roots,"[28] RICO contains

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23. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of 18 U.S.C.).

24. *Id.* (Statement of Findings and Purpose). After an extensive review of RICO's legislative history, Professor G. Robert Blakey, one of RICO's principal drafters, concluded that the following points were established "beyond serious question":

> (1) Congress fully intended, after specific debate, to have RICO apply *beyond* any limiting concept like "organized crime" or "racketeering";
>
> (2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would *not* be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;
>
> (3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;
>
> (4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and
>
> (5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.

G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 Notre Dame L. Rev. 237, 280 (1982). For additional discussion of RICO's evolution in Congress and in the courts, see Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 664-713 (1987).

25. 84 Stat. at 947. *But see* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990) (including the liberal construction rule as a "canard" of legal analysis and observing that "the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right").

26. "RICO is to be read broadly. This is the lesson not only of Congress'[s] self-consciously expansive language and overall approach . . . but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985) (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (codified as amended at 18 U.S.C. § 1961 (2000))).

27. *See, e.g.*, Reves v. Ernst & Young, 507 U.S. 170, 183 (1993) (holding that the liberal construction mandate "seeks to ensure that Congress'[s] intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended").

28. Russello v. United States, 464 U.S. 16, 26 (1983).

both criminal[29] and civil[30] provisions to impose a range of penalties when a defendant violates the statute.

1. A RICO Violation

RICO prohibits any person[31] from: (1) investing income derived from a pattern of racketeering activity[32] in an enterprise engaged in interstate or foreign commerce;[33] (2) acquiring an interest in any enterprise engaged in interstate commerce through a pattern of racketeering activity;[34] (3) participating in the affairs of an enterprise that affects interstate commerce through a pattern of racketeering activity;[35] or (4) conspiring to participate in any of the foregoing.[36] The Supreme Court has held that RICO applies not only to organized crime syndicates but also to legitimate businesses[37] and to organizations operating without a profit motive.[38] Indeed, courts have liberally construed the type of organization that can constitute an

29. *See* 18 U.S.C. § 1963.

30. *See id.* § 1964.

31. RICO defines a person as "any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3). Courts have consistently interpreted "person" broadly under the RICO statute. *See, e.g.*, Jund v. Town of Hempstead, 941 F.2d 1271, 1282 (2d Cir. 1991) (holding that an unincorporated political association constitutes a "person" under RICO); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1305 (2d Cir. 1990) (holding that a public utility constitutes a "person" under RICO). *But see* Donahue v. FBI, 204 F. Supp. 2d 169, 173-74 (D. Mass. 2002) (holding that the Federal Bureau of Investigation does not constitute a "person" under RICO).

32. A pattern of racketeering activity "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The list of offenses constituting "racketeering activity" can be found at *id.* § 1961(1).

33. *Id.* § 1962(a).

34. *Id.* § 1962(b).

35. *Id.* § 1962(c).

36. *Id.* § 1962(d).

37. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (holding that legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences").

38. *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 261 (1994) (permitting a RICO action to proceed against an anti-abortion group even though the group did not operate for profit); United States v. Muyet, 994 F. Supp. 501, 511-12 (S.D.N.Y. 1998) (holding that RICO does not require the Government to prove a drug ring operated for profit). After the Supreme Court remanded *Scheidler* to the Seventh Circuit and that court's decision was appealed, the Supreme Court heard the case again in 2003 to resolve a circuit split over the availability of injunctive relief under RICO. *See* Daniel Z. Herbst, Comment, *Injunctive Relief and Civil RICO: After* Scheidler v. National Organization for Women, Inc., *RICO's Scope and Remedies Require Reevaluation*, 53 Cath. U. L. Rev. 1125, 1146-47 (2004) (discussing the case, referred to as "*Scheidler II*"). On November 30, 2005, the Supreme Court, for the third time, heard arguments in the case. *See* Linda Greenhouse, *For New Court, Abortion Case Takes Old Path*, N.Y. Times, Dec. 1, 2005, at A1 (discussing the *Scheidler* case and predicting, based on her impression from the oral argument, that the Court would again reverse the Seventh Circuit).

"enterprise" under RICO—from a corporation[39] to a labor union[40] to other types of organizations.[41]

To violate RICO, a defendant must have engaged in at least two predicate acts constituting a "pattern of racketeering activity."[42] The Supreme Court has held, however, that the two acts cannot constitute a "pattern" under RICO if they are isolated and unrelated to one another.[43] Instead, the acts must pass the so-called "continuity plus relationship" test—that is, the "related predicates [must] themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit."[44]

2. The Criminal Provisions of RICO

RICO's criminal provision, § 1963,[45] provides that, in addition to any punishment for the crimes constituting the predicate RICO acts, a defendant convicted under RICO faces up to twenty years imprisonment, fines, and possible forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity."[46] More controversial under RICO have been a provision which allows the Government to seek a restraining order to prevent a defendant from transferring assets to a third party[47] and RICO's

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39. *See* Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263 (2d Cir. 1995) (holding that two corporations constituted a RICO "enterprise").

40. *See* United States v. Cervone, 907 F.2d 332, 336 (2d Cir. 1990) (holding that a union and its trust fund constituted a RICO "enterprise"); Landry v. Air Line Pilots Ass'n Int'l, 901 F.2d 404, 434 (5th Cir. 1990) (holding that a pilot's union constituted a RICO "enterprise").

41. *See, e.g.*, United States v. Kehoe, 310 F.3d 579, 586-87 (8th Cir. 2002) (holding that a white supremacist organization constituted a RICO "enterprise" because its members operated with a common purpose and acted in concert to advance that purpose); United States v. Chance, 306 F.3d 356, 373 (6th Cir. 2002) (holding that a county sheriff, head of police vice department, and members of an organized crime syndicate constituted a RICO "enterprise" because of common purpose); United States v. Phillips, 239 F.3d 829, 844 (7th Cir. 2001) (holding that a street gang constituted a RICO "enterprise" because it was a well-established and hierarchical organization). *But see* Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (holding that health plans and insurance companies alleged to have engaged in a scheme to defraud health plan beneficiaries did not constitute a RICO "enterprise" because there was no common purpose and structure).

42. *See* 18 U.S.C. § 1961(5) (2000). A conviction for each of the predicate acts is not required to initiate a RICO prosecution; in fact at least one court has held that a RICO prosecution could proceed where one of the predicate acts was a murder for which the defendant had been acquitted. *See* United States v. Farmer, 924 F.2d 647, 649 (7th Cir. 1991).

43. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 243 (1989).

44. *Id.* at 242.

45. 18 U.S.C. § 1963. This Comment focuses primarily on RICO's civil provision; accordingly, the discussion of RICO's criminal provision will be brief. For an extended analysis of RICO's criminal provision, see Michele Sacks et al., *Racketeer Influenced and Corrupt Organizations*, 42 Am. Crim. L. Rev. 825, 828-63 (2005).

46. 18 U.S.C. § 1963(a).

47. *See id.* § 1963(d)(1). The section provides in full,

> (d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or

forfeiture provisions.[48] Courts have broadly construed the forfeiture provision to permit the Government to obtain all revenue tainted by a RICO violation.[49]

3. The Civil Provision of RICO

Section 1964 is RICO's civil provision. Section 1964(a) grants district courts equitable jurisdiction[50] over civil RICO actions to

> prevent and restrain violations of [RICO] 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 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

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take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

Id.

48. Section 1963(a) provides that a defendant's property will be forfeited to the United States Government upon a conviction under RICO. *Id.* § 1963(a). Section 1963(c) provides that any property transferred by the defendant to a third party shall also be forfeited to the United States Government unless the third party can prove he was a bona fide purchaser with no knowledge of the forfeiture action. *Id.* § 1963(c).

49. *See* United States v. Simmons, 154 F.3d 765, 770-71 (8th Cir. 1998) (holding that, under § 1963, the Government is entitled to all "proceeds" of defendant's racketeering, which refers to gross receipts, not net profits); United States v. McHan, 101 F.3d 1027, 1042 (4th Cir. 1996) (same); United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995) (same). *But see* United States v. Masters, 924 F.2d 1362, 1370 (7th Cir. 1991) (holding that "proceeds" under § 1963 refers to net profits, not gross receipts).

50. It is undisputed that § 1964(a) is a grant of equitable jurisdiction; the question this Comment addresses is the extent of this equitable jurisdiction. *See* United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1197-98 (D.C. Cir.), *cert. denied*, 126 S. Ct. 478 (2005); United States v. Carson, 52 F.3d 1173, 1181 (2d Cir. 1995).

> reorganization of any enterprise, making due provision for the rights of innocent persons.[51]

The language of § 1964(a) has been interpreted to "grant[] courts broad discretion and latitude in enjoining violators from activities that might lead to future violations."[52] Perhaps more significantly, the Supreme Court has also held that "if Congress'[s] liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident."[53] While the statute explicitly enumerates three remedies, "'the list is not exhaustive.'"[54]

Section 1964(b) permits the Attorney General to institute a civil proceeding.[55] Section 1964(c) provides a private cause of action to "[a]ny person injured in his business or property by reason of a violation of section 1962" and allows him to recover treble damages and attorney's fees.[56] In order to bring a suit under § 1964(c), a private plaintiff must show: (1) a violation of § 1962;[57] (2) injury to her business or property; and (3) causation of the injury by the violation.[58] Significant to the expansion of civil RICO was the Supreme Court's 1985 holding that a criminal conviction under RICO is not a prerequisite to a civil action under the statute. "As defined in the statute," the Supreme Court held in *Sedima, S.P.R.L. v. Imrex Co.*, "racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be."[59] The Supreme Court's holding in *Sedima* has been interpreted as part of an effort by the Supreme Court to reiterate to lower courts that civil RICO, like its sister criminal provision, should be construed broadly.[60]

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51. 18 U.S.C. § 1964(a).

52. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 995 F.2d 375, 377 (2d Cir. 1993); *accord* United States v. Sasso, 215 F.3d 283, 289-93 (2d Cir. 2000) (discussing § 1964(a)'s "expansive language, its legislative history, and the traditional power of the district courts to fashion equitable remedies"); Blakey, *supra* note 24, at 331 ("It is difficult to see how a court could conclude that [§ 1964(a)] does not provide equitable relief for private parties. . . . It is not limited on its face or in its legislative history.").

53. Sedima, S.P.L.R. v. Imrex Co., Inc., 473 U.S. 479, 491 n.10 (1985).

54. *Philip Morris USA, Inc.*, 396 F.3d at 1218 (Tatel, J., dissenting) (quoting S. Rep. No. 91-617, at 160 (1969)).

55. 18 U.S.C. § 1964(b).

56. *Id.* § 1964(c).

57. The Supreme Court has held that an alleged conspiracy to violate RICO, prohibited by § 1962(d), cannot provide the basis for the requisite violation in a civil RICO suit. *See* Beck v. Prupis, 529 U.S. 494, 507 (2000).

58. *See* Sacks et al., *supra* note 45, at 865. The third requirement—causation—has proven to be the major obstacle to plaintiffs in civil RICO actions. *See, e.g.*, Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 271-72 (1992) (holding causation too attenuated to permit a private plaintiff to recover under § 1964); De Falco v. Bernas, 244 F.3d 286, 329 (2d Cir. 2001) (same).

59. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 488 (1985).

60. Sacks et al., *supra* note 45, at 864; *see also* Donald R. Lee, Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 Notre Dame L. Rev. 945, 966-77 (1984) (reviewing a number of lower court cases in which courts expressed a reluctance to liberally construe civil RICO actions).

B. *Equity*

The Supreme Court has interpreted equitable grants of jurisdiction similar to the one in § 1964(a)—which authorizes district courts to "prevent and restrain violations of [RICO] by issuing appropriate orders"[61]—on a number of occasions. Three of the Supreme Court's seminal decisions on this issue are discussed below. But first it will be worthwhile to review the historical distinction drawn by the common law between cases at law and cases in equity in order to understand the latitude and discretion vested in a district court exercising its equitable jurisdiction.

1. The Common Law Distinction Between Law and Equity

The American legal system has its origins in England, where litigation took place in a bifurcated system of common law, or "law," courts and Chancery, or "equity," courts.[62] The law courts—which consisted of the King's Bench, the Common Pleas, and the Exchequer[63]—had three identifying characteristics: the writ system, the jury, and single-issue pleading.[64] Each "represented a means of confining and focusing disputes, rationalizing and organizing law, and of applying rules in an orderly, consistent, and predictable manner."[65] It was the writ system, however, that would provide the sole basis for determining whether a case would be heard before a law or equity court.[66]

Historically, one of the means by which British kings exercised their authority to uphold justice was by issuing a writ—"royal order(s) which authori[z]ed a court to hear a case and instructed a sheriff to secure the attendance of the defendant"[67]—which would bring the case directly to the king's council.[68] Subjects could petition the king's Chancellor, who served as his secretary, for the issuance of a writ.[69] The writ system initially developed as a means of organizing complaints into categories of standardized claims—that is, if a complainant presented a set of facts similar to those alleged by other complainants, the Chancery clerks

61. 18 U.S.C. § 1964(a).

62. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 914 (1987).

63. Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 Va. L. Rev. 753, 756 (1944).

64. Subrin, *supra* note 62, at 914.

65. *Id.*

66. *Id.* at 915. The writ system and its influences on American law is the only aspect of the law courts that will be discussed in this Comment. For a more thorough discussion of law and equity courts than is practical here, see generally Wesley Newcomb Hohfeld, *The Relations Between Equity and Law*, 11 Mich. L. Rev. 537 (1913), and Henry H. Ingersoll, *Confusion of Law and Equity*, 21 Yale L.J. 58 (1911).

67. S.F.C. Milsom, Historical Foundations of the Common Law 22 (1969).

68. Subrin, *supra* note 62, at 915.

69. *See id.* Interestingly, writs were initially sold by the Chancellor. *Id.*

accepting the complaint would group it with the similar ones.[70] At first, writs were construed liberally to permit an action that did not appear to fit into one of the existing categories.[71] Over time, however, the writ system became "a hard and fast system with certain clearly defined things which it could do and with equally clearly defined things which it could not do."[72] For example, the only remedy that a law court could impose in private actions was monetary damages,[73] even if it was clear that such a remedy would not provide complete relief.[74] The writ system was so inflexibly administered that a complainant whose allegations did not fit into an existing category was simply barred from pursuing a claim.[75]

Because many meritorious claims were barred from proceeding by the rigidity of the law courts, complainants informally appealed directly to the king for relief.[76] These appeals were referred to the head of the Chancery, the Lord Chancellor.[77] In those instances where a "plain, adequate and complete" remedy was not otherwise available because of a procedural or substantive deficiency, the Lord Chancellor—the "keeper of the king's conscience"[78]—would have the power to afford relief.[79] By the sixteenth century, the Court of Chancery had developed into a distinct court, administered by the Chancellor.[80] The types of cases heard in these equity courts ran the gamut from libel and fraud to ordinary commercial disputes that simply did not fit into one of the strict categories of writs.[81] "The bill in equity became the procedural vehicle for the exceptional case" and

70. *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 438-39 (2003). The system also developed for efficiency reasons. As the number of complaints filed grew, the task of reading through each became too onerous for the clerks, thus they began to require the complainant to identify the category in which his complaint belonged. *See* Roger L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 Chi.-Kent L. Rev. 81, 92 (1934).

71. Main, *supra* note 70, at 439.

72. George Burton Adams, *The Origin of English Equity*, 16 Colum. L. Rev. 87, 96 (1916); *accord* Subrin, *supra* note 62, at 917 (describing the law courts as "rigid and rarefied" and noting that parties could—and often did—lose cases on highly technical grounds); William Q. de Funiak, *Origin and Nature of Equity*, 23 Tul. L. Rev. 54, 57 (1948) ("A growing worship of formalism and technicality also began to obsess the courts of law."); George Palmer Garrett, *The Heel of Achilles*, 11 Va. L. Rev. 30, 30 (1924) ("The Common Law made a feti[s]h of procedure.").

73. Main, *supra* note 70, at 440.

74. This was often the case in property disputes. *See* Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. Va. L.Q. 21, 28 (1919) (describing the lone remedy available to law courts as "wholly inadequate" and "as bad as no remedy at all").

75. *See* de Funiak, *supra* note 72, at 56.

76. Main, *supra* note 70, at 441-42.

77. The Lord Chancellor was usually a bishop familiar with ecclesiastical, civil, and Roman law. Subrin, *supra* note 62, at 919.

78. Main, *supra* note 70, at 441 (internal quotation omitted).

79. Severns, *supra* note 70, at 84.

80. Subrin, *supra* note 62, at 918.

81. *See* Glenn & Redden, *supra* note 63, at 764.

permitted the consideration of "the subtleties forbidden by the formalized writ, such as fraud, mistake, and fiduciary relationships."[82]

Although equity eventually "lost its youthful exuberance" as equity courts developed their own internal system of procedure and became more confined by precedent,[83] equity courts still exercised an enormous amount of power vis-à-vis the law courts.[84] Unlike their counterparts in the law courts, equity judges were "released from confinement to a single writ, a single form of action, and a single issue" and were not as bound by precedent.[85] Describing the flexibility of equity as opposed to law, future Supreme Court Justice Benjamin Cardozo wrote that "when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends."[86] The development of equity courts was based on the recognition of an inherent conflict between the necessity of a uniform and impartial set of laws[87] and the necessity to take individual factors into account—to recognize that "every case presents a moral problem, and almost all moral problems are unique."[88] Because equity attempts to resolve what may well be an irresolvable conflict, it has always been controversial.[89]

It is important to note, however, that a bill in equity could only be filed where there was not a "plain, adequate and complete" remedy available in the law courts—the standard that became the test for determining in which court a case would proceed.[90] The rationale for this policy was to preserve the defendant's right to a jury trial—exclusively available in law courts—whenever possible.[91] Thus a complainant seeking monetary damages—

82. Subrin, *supra* note 62, at 918.

83. Main, *supra* note 70, at 448. According to one commentator, by the middle of the eighteenth century, "equitable jurisdiction had become so fixed, so certain, that lawyers could say, 'There is nothing new in equity.'" Severns, *supra* note 70, at 106.

84. *See, e.g.*, Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 Harv. L. Rev. 834, 835 (1918) (arguing that "equity is outside the common law, even antagonistic to it").

85. Subrin, *supra* note 62, at 920.

86. Benjamin N. Cardozo, The Nature of the Judicial Process 65 (1921).

87. Second Circuit Judge Henry Friendly called the uniform and impartial application of law "the most basic principle of jurisprudence." Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982).

88. Main, *supra* note 70, at 444-45; *accord* Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951) (Hand, J.) ("Nor is it possible to make use of general principles, for almost every moral situation is unique; and no one could be sure how far the distinguishing features of each case would be morally relevant to one person and not to another.").

89. *See* Severns, *supra* note 70, at 82-83.

90. Kittle, *supra* note 74, at 29 (describing the manner in which "equity courts adopted the rule that they would not take jurisdiction where there is a complete, adequate and plain remedy at law"); *accord* Elias Merwin, The Principles of Equity and Equity Pleading 29 (1895) ("[E]quity will not take jurisdiction whenever there is a plain, adequate, and complete remedy at common law.").

91. Main, *supra* note 70, at 451. Before the courts of law and equity were merged in the United States, the Supreme Court recognized the need to give the defendant the right to a jury trial as the paramount reason for proceeding at law wherever possible. *See* Killian v.

even in conjunction with equitable relief—would first be required to seek redress in a law court, but one seeking an injunction, disgorgement,[92] or other equitable relief would be permitted to file a bill of equity.[93]

The English common law system is the antecedent to the American legal system, thus it should come as no surprise that, historically, "[t]he distinction between law and equity is recognized everywhere in the jurisprudence of the United States."[94] Beginning in the nineteenth century, however, a movement of lawyers frustrated with the parallel systems of law and equity began to advocate for reform.[95] In 1934, Congress enacted the Rules Enabling Act, which authorized the Supreme Court to "prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[96] In 1938, the advisory committee appointed by the Supreme Court to create the rules promulgated the final version of the Federal Rules of Civil Procedure.[97] Rule 2—entitled, significantly, "One Form of Action"—merged the courts of law and equity: "There shall be one form of action to be known as 'civil action.'"[98]

Although the American system no longer formally recognizes the distinction between cases at law and in equity,[99] "equity enjoys a potent . . .

Ebbinghaus, 110 U.S. 568, 573 (1884) (holding that "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by a jury" (internal quotation omitted)).

92. Disgorgement is an equitable remedy. *See* Tull v. United States, 481 U.S. 412, 424 (1987) (describing the suit at issue in the case as "similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy").

93. Subrin, *supra* note 62, at 919-20.

94. United States v. King, 48 U.S. (7 How.) 833, 846 (1849).

95. *See* Main, *supra* note 70, at 464-65.

96. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (2000)).

97. *See* Main, *supra* note 70, at 471.

98. Fed. R. Civ. P. 2.

99. In certain areas, however, the distinction continues to play a prominent—even dispositive—role. One such area is trusts, particularly cases concerning the Employee Retirement Income Security Act ("ERISA"). In *Mertens v. Hewitt Associates*, the Supreme Court, in an opinion by Justice Antonin Scalia, held that the phrase "equitable relief" in an ERISA provision had to be interpreted by looking to the common law of trusts and determining which remedies were available at law and which were available in equity. 508 U.S. 248, 255-59 (1993). Justice Scalia noted, however, the difficulty of this task "[a]s memories of the divided bench, and familiarity with its technical refinements, recede further into the past." *Id.* at 256. For an extensive analysis of ERISA's roots in the common law, as well as trenchant criticism of the Supreme Court's holding in *Mertens* and two similar cases, see John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1320, 1365 (2003) (describing "the toll of injustice worked under these rulings" and arguing that "[t]he Supreme Court needs to confess its error in ERISA remedy law").

legacy in our unified procedural system."[100] Courts will often invoke their broad equitable jurisdiction to award equitable remedies such as disgorgement[101] and restitution[102] in addition to money damages—the traditional form of legal relief—as the particular situation demands.[103] In certain instances, just as the English equity courts once did, American courts will exercise their equitable jurisdiction in extraordinary ways[104] to avoid any "injustice that would result from rigorous application of the common law."[105]

This Comment next discusses three cases in which the Supreme Court was called upon to delineate the boundaries of the authority a district court may exercise pursuant to a statutory grant of equitable jurisdiction. These cases are particularly important because, as this Comment discusses in Part II, they played a critical role in the interpretation of the equitable grant of jurisdiction in § 1964(a).

2. *Porter v. Warner Holding Co.*

Porter v. Warner Holding Co.[106] concerned a suit brought by the Administrator of the Office of Price Administration against a landlord for a violation of the Emergency Price Control Act of 1942 ("EPCA"), a statute enacted by Congress during World War II to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents."[107] Section 205(a) of the EPCA provides as follows:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts

100. Main, *supra* note 70, at 476; *accord* Subrin, *supra* note 62, at 922 (arguing that "[t]he underlying philosophy of, and procedural choices embodied in, the Federal Rules [of Civil Procedure] were almost universally drawn from equity rather than common law").

101. *See, e.g.*, FTC v. Gem Merch. Corp., 87 F.3d 466, 468 (11th Cir. 1996) (holding that, although the Federal Trade Commission Act does not expressly authorize district courts to order disgorgement of ill-gained profits "the unqualified grant of statutory authority to issue an injunction under [the statute] carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits").

102. *See, e.g.*, United States v. Lane Labs-USA, Inc., 427 F.3d 219, 223 (3d Cir. 2005) (permitting a district court to order restitution under the Food, Drug and Cosmetic Act although the statute did not specifically authorize restitution because "such specificity is not required where the government properly invokes a court's equitable jurisdiction under this statute").

103. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

104. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17 (1971) (invoking the judiciary's "historic equitable remedial powers" to order busing as part of the Supreme Court's unprecedented—and highly controversial—desegregation effort).

105. Subrin, *supra* note 62, at 918.

106. 328 U.S. 395 (1946).

107. Emergency Price Control Act of 1942, Pub. L. No. 26-421, 56 Stat. 23, 23-24, *repealed by* Act of Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641.

> or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.[108]

The Administrator brought suit under § 205(a) against the Warner Holding Company ("Warner") for charging rent in excess of the law's maximum in Warner's eight apartment complexes in Minneapolis, Minnesota.[109] The complaint sought an injunction to enjoin Warner from continuing to charge rent higher than the maximum permitted by law.[110]

Additionally, the Administrator sought to disgorge from Warner the difference between the rent its tenants paid and the maximum Warner was permitted to charge for the period from November 1, 1942 through June 29, 1943.[111] The Administrator did not bring this suit under § 205(e) of the EPCA, however, which authorizes a private party who purchases a "commodity" priced in excess of the maximum permitted by law to sue to recover the money,[112] because § 205(e) requires private citizens to bring such suits within one year of the occurrence, which the tenants in this case presumably failed to do.[113]

The district court enjoined Warner from continuing to collect rent in excess of the maximum permitted under the EPCA but declined to order Warner to reimburse its tenants for excess rent paid during the relevant time period, holding that it lacked jurisdiction to order such restitution under § 205(a) of the EPCA.[114] The Court of Appeals for the Eighth Circuit affirmed.[115]

In a sweeping opinion, the Supreme Court reversed. First it addressed the type of equitable jurisdiction granted by the EPCA: "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[116] Moreover, the Court held that where the suit concerned the public interest as opposed to private parties, a district court's "equitable powers assume an

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108. *See Porter*, 328 U.S. at 397 (quoting § 205(a) of the Emergency Price Control Act of 1942 ("EPCA")).

109. *See id.* at 396.

110. *See id.* at 396-97.

111. *See id.*

112. Section 205(e) provides, in pertinent part, as follows:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge.

Id. at 406 n.9 (Rutledge, J., dissenting) (quoting § 205(e) in its entirety).

113. *See id.* at 401.

114. *See id.* at 397.

115. *Id.*

116. *Id.* at 398.

even broader and more flexible character."[117] Such powers permit a district court to "go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice."[118]

Because the EPCA granted district courts the full range of equitable jurisdiction, the Court held that an order to disgorge rent acquired in violation of the EPCA could therefore be sustained as an "other order" under the statute, even though disgorgement was not a remedy explicitly enumerated in the statute.[119] The Court based its decision on one of two theories. First, such an order could be considered "an equitable adjunct to an injunction decree."[120] The Court reasoned that the invocation of a district court's equitable jurisdiction grants it the power "to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law."[121]

Alternatively, the Court held that a disgorgement order could be considered "an order appropriate and necessary to enforce compliance" with the EPCA.[122] After examining the EPCA's legislative history, the Court concluded that Congress, in enacting the EPCA, made no attempt to "catalogue" every type of relief; rather it granted the judiciary the broad authority to "adapt[] appropriate equitable remedies to specific situations."[123] An order requiring Warner to reimburse tenants for rent charged in excess of the maximum set by law was, according to the Court, such an appropriate equitable remedy.[124]

Because the EPCA did not "in so many words, or by a necessary and inescapable inference" restrict the district court's inherent equitable powers, "the full scope of that jurisdiction is to be recognized and applied."[125] Accordingly, the Supreme Court reversed and remanded to the district court "so that it may exercise the discretion that belongs to it."[126]

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117. *Id.*; *accord* Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937) (holding that, in the case of a labor dispute, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved").

118. *See Porter*, 328 U.S. at 398; *cf.* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (holding that "[a]n appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity" (internal citation and quotation omitted)).

119. *See Porter*, 328 U.S. at 398-99.

120. *See id.* at 399.

121. *Id. Contra id.* at 406 (Rutledge, J., dissenting) (arguing that the Administrator's right to seek equitable relief under § 205(a) and a private citizen's right to seek legal relief under § 205(e) are "mutually exclusive, not alternative, rights of recovery").

122. *See id.* at 400.

123. *See id.* The Court quoted a Senate Report stating that district courts "are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." *Id.* at 401 (quoting S. Rep. 77-931, at 10 (1942)).

124. *See id.* at 400.

125. *See id.* at 398.

126. *See id.* at 403.

The Supreme Court's broad conception of equitable jurisdiction in *Porter* remains the touchstone for interpreting statutory grants of equitable jurisdiction,[127] and *Porter* plays a critical—even dispositive—role in those cases determining the availability of disgorgement under § 1964(a), as this Comment discusses in Part II.

3. *Mitchell v. Robert DeMario Jewelry, Inc.*

Mitchell v. Robert DeMario Jewelry, Inc.[128] concerned a suit brought by the United States Secretary of Labor under § 215(a)(3) of the Fair Labor Standards Act of 1938 ("FLSA").[129] The section prohibited, *inter alia*, an employer from "discharg[ing] or in any other manner discriminat[ing] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter."[130] At the time the suit was brought, § 217 of the FLSA granted district courts jurisdiction

> for cause shown, to restrain violations of § 215: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.[131]

Several of the defendant's employees sought the assistance of the Secretary to recover unpaid wages.[132] The Secretary instituted an action under the FLSA on the employees' behalf.[133] According to the district court's findings of fact, after receiving notice of the action, the defendant "commenced a course of discriminatory conduct against three of the complaining employees, culminating in their discharge."[134]

The district court, finding the evidence of retaliatory discrimination "clear and convincing," granted an injunction against further discrimination and ordered the reinstatement of the discharged employees.[135] But it declined to order reimbursement of the employees' lost wages.[136] On

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127. *See e.g.*, United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001) (citing *Porter* for the proposition that district courts exercise broad discretion that can be "displaced only by a 'clear and valid legislative command'"); Miller v. French, 530 U.S. 327, 340 (2000) (citing *Porter* for the proposition that "we should not construe a statute to displace courts' traditional equitable authority absent . . . an 'inescapable inference' to the contrary").

128. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960).

129. 29 U.S.C. § 215(a)(3) (2000). For an extensive analysis of the Fair Labor Standards Act of 1938 ("FLSA") and its theoretical underpinnings, see Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 Hofstra Lab. & Emp. L.J. 19, 39-70 (2000).

130. 29 U.S.C. § 215(a)(3).

131. *See Mitchell*, 361 U.S. at 289 (quoting 29 U.S.C. § 217 as it then existed). Congress amended the statute in 1961. *See* Pub. L. No. 87-30, 75 Stat. 65 (1961).

132. *See Mitchell*, 361 U.S. at 289-90.

133. *See id.*

134. *Id.*

135. *Id.*

136. *Id.*

appeal, the Court of Appeals for the Fifth Circuit affirmed, holding that, under the FLSA, district courts lacked jurisdiction to order reimbursement of lost wages resulting from an unlawful discharge.[137] The Fifth Circuit held that jurisdiction "'must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment.'"[138]

"In this," the Supreme Court held in reversing, "the [Fifth Circuit] was mistaken."[139] The Court instead held that "'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'"[140] The central purpose of the FLSA was to establish minimum labor standards which would be enforced by employee complaints to the Secretary of Labor.[141] If employees feared economic retaliation from their employers for seeking to enforce their rights under the FLSA, the central purpose of the law would be frustrated.[142] The Court held that employees should not, consistent with the FLSA, be forced to choose between enforcing their rights but not receiving reimbursement for lost wages if their employer unlawfully discharges them, or simply not enforcing their rights at all.[143] "We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice."[144]

The Court also rejected the argument advanced by the defendant that, if the Court permitted reimbursement of the employees' unpaid wages, it would be violating the FLSA's express prohibition that no court shall have jurisdiction to order an employer to pay "unpaid *minimum* wages."[145] The Court examined the legislative history of the FLSA and determined that Congress intended to preclude courts from ordering recalcitrant employers to reimburse employees covered by statutes imposing minimum salary requirements, and not to preclude courts from ordering employers to reimburse employees whom it wrongfully discharged.[146] The Court then

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137. *Id.*

138. *Id.* (quoting the Fifth Circuit opinion).

139. *Id.*

140. *Id.* at 292 (quoting Clark v. Smith, 38 U.S. 195, 200 (1839)).

141. *See id.*

142. *See id.* ("For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.").

143. *See id.* at 292-93.

144. *Id.* at 293.

145. *See id.* at 294-95.

146. *Id.* In dissent, Justice Charles Whittaker, joined by Justices Hugo Black and Tom Clark, argued that the majority's opinion embraced a "fallacy." *Id.* at 299 (Whittaker, J., dissenting).

> The only possible basis or theory under which a wrongfully discharged employee might recover his lost wages is that the attempted discharge, being unlawful, never became effective, and since he was unlawfully excluded from his job his wages continued to accrue. It would seem necessarily to follow that an award for those lost "wages" would be as much one for "unpaid minimum wages or unpaid overtime compensation" as would an award for "wages" for services actually performed. . . . Hence, it seems inescapable that however viewed an award for wages lost because of an unlawful discharge is one for, or that at least embraces, unpaid minimum wages or unpaid overtime compensation or both.

Id. at 299-300.

remanded the case to the Fifth Circuit to determine if the district court abused its discretion in declining to order reimbursement of the employees' lost wages.[147]

In *Mitchell*, the Supreme Court not only continued its tradition, begun in *Porter*, of broadly interpreting the authority exercised by a district court under a statutory grant of equitable authority, but arguably expanded that interpretation as well, making *Mitchell* something of a companion case to *Porter* for courts interpreting grants of equitable authority.[148]

4. *Meghrig v. KFC Western, Inc.*

In *Meghrig v. KFC Western, Inc.*,[149] the Supreme Court unanimously rejected an attempt by a private plaintiff to recover the prior costs of cleaning up toxic waste under § 6972 of the Resource Conservation and Recovery Act of 1976 ("RCRA").[150] Section 6972(a), the citizen suit provision of the RCRA, provides a private right of action

> against any person . . . and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.[151]

Section 6972(a) grants district courts jurisdiction to "restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . to order such person to take such other action as may be necessary, or both."[152]

The plaintiff in *Meghrig* was KFC Western ("KFC"), which owned and operated a Kentucky Fried Chicken franchise in Los Angeles.[153] In 1988, KFC discovered that its property was contaminated with petroleum and was ordered by the Los Angeles County Department of Health Services to clean it up.[154] KFC spent approximately $211,000 removing and disposing of

147. *See id.* at 296.

148. *See* United States v. Lane Labs-USA, Inc., 427 F.3d 219, 224-25 (3d Cir. 2005) (noting that, "[i]n *Mitchell*, the Supreme Court not only reinforced its ruling in *Porter*, but expanded its scope as well").

149. 516 U.S. 479 (1996).

150. 42 U.S.C. § 6972 (2000). The Resource Conservation and Recovery Act of 1976 ("RCRA") is a comprehensive environmental statute that grants the Environmental Protection Agency ("EPA") broad authority to "regulate hazardous wastes from cradle to grave." Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331 (1994). Under the statute, the EPA has the authority to enforce compliance with a number of handling, record-keeping, storage, and monitoring requirements. *Id.* at 332.

151. 42 U.S.C. § 6972(a)(1)(B).

152. *Id.* § 6972(a).

153. *See Meghrig*, 516 U.S. at 481.

154. *See id.*

soil tainted by the petroleum.[155] Three years later, KFC filed a complaint against the former owners of the property, the Meghrigs, under the citizen suit provisions of the RCRA, seeking to recover its cleanup costs.[156] KFC claimed the solid waste had previously posed an "imminent and substantial endangerment to health or the environment" and that the Meghrigs had contributed to the "'past or present handling, storage, treatment, transportation, or disposal.'"[157]

The district court dismissed the complaint, holding that the RCRA does not permit a private citizen to recover past cleanup costs because the statute only permits such recovery where waste presents an "imminent and substantial endangerment" at the time the suit is filed.[158] The Court of Appeals for the Ninth Circuit reversed, holding that the RCRA permits recovery for past cleanup costs if the waste presented an "imminent and substantial endangerment" at the time it was cleaned up.[159]

Justice Sandra Day O'Connor, writing for a unanimous Court, reversed the Ninth Circuit for two reasons, both based on the Court's interpretation of the RCRA.[160] First, the Court held that the language in § 6972(a)(1)(B), authorizing private parties to bring suit for hazardous waste which "may present an imminent and substantial endangerment to health or the environment," implied that a suit could only be brought when the waste constituted such an imminent danger at the time the suit is brought—and not, as the Ninth Circuit held, at the time the waste is cleaned up.[161] The Court held that "the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger."[162]

Second, § 6972(a) authorizes district courts to "restrain" any person from violating the RCRA, "to order such person to take such other action as may be necessary," or to do both.[163] The Court interpreted this language to mean that a private citizen could sue to obtain a mandatory injunction ordering a party to clean up a presently existing hazard, or obtain a prohibitory injunction to "restrain" a party from violating the RCRA.[164] "Neither remedy, however, is susceptible of the interpretation adopted by the Ninth Circuit, as neither contemplates the award of past cleanup costs . . . ."[165] Moreover, the Court pointed out that a similar statute, the Comprehensive Environmental Response, Compensation, and Liability Act

155. *Id.*
156. *Id.* at 481-82.
157. *Id.* (quoting 42 U.S.C. § 6972(a)).
158. *Id.*
159. *See* KFC W., Inc. v. Meghrig, 49 F.3d 518, 520-21 (9th Cir. 1995), *rev'd*, 516 U.S. 479 (1996). The Supreme Court referred to the Ninth Circuit's opinion as a "novel application of federal statutory law." *Meghrig*, 516 U.S. at 483.
160. *See Meghrig*, 516 U.S. at 484.
161. *See id.* at 486.
162. *Id.* at 485-86.
163. 42 U.S.C. § 6972(a).
164. *See Meghrig*, 516 U.S. at 484.
165. *Id.*

of 1980 ("CERCLA")[166] "expressly permits the Government to recover 'all costs of removal or remedial action,'" which the Court interpreted to mean that "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy."[167]

The Court also rejected an argument advanced by KFC and the Government, in an amicus curiae brief, that, under *Porter* and *Mitchell*, district courts possess "inherent authority" to award any equitable remedy unless such a remedy is explicitly taken away by Congress.[168] The Court held that where Congress has established "'elaborate enforcement provisions'" for remedying violations of a statute, as it had with the RCRA, additional remedies cannot be inferred by courts.[169] In language that seemed to cast doubt on the Court's prior decisions in *Porter* and *Mitchell*—although without explicitly overruling either[170]—the Court also held that "'[i]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'"[171]

Because the Court concluded that the RCRA could only provide a remedy that "ameliorates present or obviates the risk of future 'imminent' harms, not a remedy that compensates for past cleanup efforts," it reversed the Ninth Circuit and dismissed KFC's complaint.[172]

While it may seem that *Meghrig* signaled an end to the Supreme Court's broad interpretation of the authority vested in district courts pursuant to statutory grants of equitable jurisdiction, at least one Court of Appeals has described *Meghrig* as a "bump[] in the road" and not a "roadblock[]" to the analysis set forth by *Porter* and *Mitchell*.[173] As this Comment discusses in Part II below, whether a court interpreting a statutory grant of equitable

166. 42 U.S.C. §§ 9601-9675 (2000).

167. *Meghrig*, 516 U.S. at 485 (citation omitted). The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") established a standard of strict liability, with joint and several liability, for four different classes of persons: (1) the current owners or operators of a facility where hazardous materials were improperly disposed; (2) the previous owners of such a facility; (3) the transporters of hazardous materials to or from a facility at which the materials were improperly disposed; and (4) the individuals who generated the hazardous materials that were ultimately improperly disposed. *See* Martina E. Cartwright, *Superfund: It's No Longer Super and It Isn't Much of a Fund*, 18 Tul. Envtl. L.J. 299, 305-06 (2005). For a general discussion of the history of CERCLA, see *id.* at 301-08.

168. *See Meghrig*, 516 U.S. at 487.

169. *See id.* at 487-88 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981)).

170. Indeed, *Porter* has been cited by the Supreme Court as recently as 2001. *See supra* note 127 and accompanying text.

171. *Meghrig*, 516 U.S. at 488 (quoting *Middlesex County*, 453 U.S. at 14).

172. *See id.* at 486, 488.

173. United States v. Lane-Labs, Inc., 427 F.3d 219, 230 (11th Cir. 2005). The Eleventh Circuit argued that the nature of the suit at issue in *Meghrig*—a citizen suit seeking reimbursement of the cleanup of toxic waste—was *sui generis* and therefore it would be inappropriate to read *Meghrig* as abandoning the course charted in *Porter* and followed by *Mitchell*. *Id.* at 231, 232 & n.4.

jurisdiction chooses to treat *Meghrig* as controlling or as a mere "bump in the road" will often determine the outcome of the case.

II. THE CIRCUITS SPLIT AS TO THE AVAILABILITY OF DISGORGEMENT AS A REMEDY UNDER § 1964(A)

As discussed in the preceding part, a district court exercising the full range of its equitable jurisdiction has significant authority to impose whatever remedies it deems appropriate. This part describes and analyzes the three different positions that have emerged as to the extent of the equitable jurisdiction granted to district courts by § 1964(a) and the implications of these positions for the availability of disgorgement as a remedy.

First, this part discusses the Second Circuit's decision in *Carson*, holding that § 1964(a) circumscribes a district court's equitable jurisdiction to those remedies that could "prevent and restrain" future RICO violations. *Carson* held, however, that disgorgement could be appropriate where there was a finding that the money to be disgorged was being used or was capable of being used to fund further RICO violations. In conjunction with *Carson*, this part discusses the Fifth Circuit's decision in *Richard*, in which the Fifth Circuit adopted *Carson*. Second, this part discusses the decision of the district court in *Philip Morris*, in which the district court rejected *Carson*, holding that § 1964(a) grants district courts the full range of equitable authority, including the authority to impose disgorgement. Finally, this part discusses the decision of the D.C. Circuit in *Philip Morris*, holding, over a vigorous dissent, that disgorgement is categorically unavailable under § 1964(a).

A. *The Second Circuit Holds that § 1964(a) Is Not a General Grant of Equitable Authority but that Disgorgement Could Nonetheless Be Permissible Under Certain Circumstances*

In *United States v. Carson*,[174] the Second Circuit was confronted with an issue of first impression—namely, whether disgorgement of ill-gotten gains was a permissible exercise of a district court's authority under § 1964(a).[175] *Carson* concerned a 1990 civil RICO action brought by the Government in the Southern District of New York against a former union official.[176]

174. 52 F.3d 1173 (2d Cir. 1995).

175. *Id.* at 1181.

176. Donald J. Carson was the Secretary-Treasurer of Local 1588 of the International Longshoreman's Association. *See id.* at 1176. The civil action followed the defendant's 1988 criminal conviction for conspiracy to conduct the affairs of a racketeering enterprise in the District Court for the District of New Jersey. This conviction was subsequently overturned by the United States Court of Appeals for the Third Circuit on a ground unrelated to the topic of this Comment. *See* United States v. Carson, 969 F.2d 1480 (3d Cir. 1992). The U.S. Attorney's office in New Jersey declined the opportunity to re-try Carson on the criminal charges. *See Carson*, 52 F.3d at 1179. As discussed *supra* in note 59 and accompanying text, a criminal conviction is not a prerequisite for commencing a civil RICO action.

Following a bench trial, the district court in *Carson* entered a judgment in favor of the Government and ordered the defendant to disgorge $76,100 in ill-gotten gains.[177]

The defendant appealed, presenting six different issues for review.[178] On the issue of disgorgement, the defendant argued that the district court lacked the authority to issue an order disgorging the defendant of $76,100 in ill-gotten gains.[179] Specifically, the defendant argued that because he was being ordered to disgorge money gained as a result of his racketeering activities in the 1980's, he could not be ordered to disgorge that money through a complaint first filed in 1990.[180] A remedy such as disgorgement, the defendant argued, is "available only to prevent *ongoing and future* misconduct, and not to remedy past misconduct."[181] The defendant based his argument on the language of § 1964(a), which grants district courts jurisdiction to issue orders to "prevent and restrain" RICO violations.[182]

In effect, the defendant argued that disgorgement was unavailable as a remedy under § 1964(a) because he was no longer engaged in the racketeering enterprise at the time the suit was brought and, therefore, any disgorgement order could not serve to "prevent and restrain" future RICO violations. This the district court found disconcerting.

> If [the defendant] is correct that his separation from the union in and of itself removes this Court's power to grant equitable relief like disgorgement—because he will no longer be in a position to engage in labor racketeering—that would mean that a union racketeer, after raiding the union coffers, need only quit his position in order to retain the ill-gotten gains of his tenure. We believe that Congress intended to bestow on the district courts broad equitable powers, including disgorgement, to prevent such a result.[183]

Accordingly, the district court held that disgorgement would be appropriate in the defendant's case.[184]

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177. *See Carson*, 52 F.3d at 1179. The district court also issued a broad injunction preventing the defendant from having any commercial contact with any labor organization or organized crime figure. For the text of the injunction, see *id.* at 1184 n.10.

178. *See id.* at 1176. This Comment will only address disgorgement.

179. *See id.* at 1180.

180. The district court ordered the defendant to disgorge $16,100 he received in kickbacks between 1981 and 1982 and $60,000 the defendant embezzled from 1982 through 1988. *Id.* at 1180-81.

181. *Id.* at 1181 (quoting defendant's brief).

182. *See* 18 U.S.C. § 1964(a) (2000).

183. United States v. Local 1804-1, Int'l Longshoremen's Ass'n, Nos. 90 Civ. 0963, 5618, 1993 WL 77319, at *4 (S.D.N.Y. Mar. 15, 1993); *accord* United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1448 (E.D.N.Y. 1988) (holding that the imposition of equitable relief such as disgorgement under the securities laws "lies within the sound discretion of the court. A court exercising the broad equitable powers of RICO's § 1964 has similar, if not wider, latitude in designing appropriate relief." (internal citations and quotation omitted)).

184. *See Local 1804-1*, 1993 WL 77319, at *4-*5.

The Second Circuit reversed, holding that "[a] plain reading of the statute does not support the broad interpretation adopted by the district court."[185] The jurisdictional authority conferred on district courts in § 1964(a), the Second Circuit held, "serve[s] the goal of foreclosing future violations, and do[es] not afford broader redress."[186] Because the defendant received the gains sought to be disgorged before the civil action was brought, disgorgement could not be considered part of an effort to "prevent and restrain" future RICO violations.[187] Moreover, the Second Circuit noted that the three remedies[188] enumerated in § 1964(a) were, unlike disgorgement, forward-looking, and therefore consistent with RICO's purpose to "prevent and restrain" future violations.[189]

In reversing the district court, the Second Circuit rejected a deterrence argument implicit in the district court's opinion—namely, that any remedy that inflicts pain on a defendant can be understood as an effort to "prevent and restrain" future RICO violations. "Categorical disgorgement of all ill-gotten gains," the Second Circuit held, "may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future RICO violations."[190] If disgorgement could be so justified, § 1964(a) would read "prevent, restrain and discourage."[191]

The Second Circuit did not foreclose entirely the possibility of disgorgement being used as a remedy for ill-gotten gains, however. Indeed, it held—unfortunately with minimal elaboration—that the remedy would be appropriate where "there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose."[192] Within this exception, disgorgement would be "more easily justifiable" in the case of "gains ill-gotten relatively recently."[193]

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185. *Carson*, 52 F.3d at 1181.

186. *Id.* at 1182.

187. *Id.* Although the Second Circuit—rather inexplicably—did not even discuss *Porter*, one can infer that it found in the words "prevent and restrain" of § 1964(a) a "necessary and inescapable inference" restricting the district court's equitable jurisdiction. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

188. The three remedies were divestment, injunction, and dissolution. *See* 18 U.S.C. § 1964(a) (2000).

189. *See Carson*, 52 F.3d at 1181. *But see* United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1218 (D.C. Cir. 2005) (Tatel, J., dissenting) (quoting S. Rep. No. 91-617, at 160 (1969), which states that the list of remedies enumerated in § 1964(a) "'is not exhaustive'").

190. *Carson*, 52 F.3d at 1182.

191. *Id.* (internal quotation omitted).

192. *Id.*

193. *Id.* Because it was unclear to the Second Circuit whether the district court had ordered disgorgement in an effort to "prevent and restrain" future RICO violations—which, under the Second Circuit's interpretation of the statute, would be permissible—or whether the district court had ordered disgorgement in an effort to inflict pain on the defendant—which would be impermissible—the Second Circuit remanded to the district court "for a determination as to which disgorgement amounts, if any, were intended solely to 'prevent and restrain' future RICO violations." *Id.* On remand, the district court held that there was nothing in the record to "indicate[] that the Court gave any consideration to the need to deter future conduct when it set the amount of the forfeiture." United States v. Local 1804-1, Int'l Longshoremen's Ass'n, Nos. 90 Civ. 0963, 5618, 1996 WL 22377, at *1 (S.D.N.Y. Jan. 22,

While *Carson* stands for the proposition that disgorgement could, under certain circumstances, be available under § 1964(a), it is not entirely clear if the Second Circuit intended to limit the availability of disgorgement to instances where specific assets are being used to violate RICO or are capable of being used for that purpose, or if the remedy could be imposed upon a finding that a defendant's assets in general are available. "Money is fungible."[194] It would therefore seem somewhat absurd to only permit disgorgement in instances where the defendant retained the specific assets allegedly ill-gained—that is, where he possessed, at the time the suit is filed, the same $100 bills he received during the course of his unlawful activity.[195] This, however, is precisely what the tobacco companies would argue to the D.C. Circuit in *Philip Morris*[196] and appears to be the argument adopted by the concurring opinion on the D.C. Circuit in that case.[197] Thus, while *Carson* clearly holds that § 1964(a) is not a full grant of equitable jurisdiction but that disgorgement could be permissible under certain circumstances, there appears to be a great deal of confusion as to what those circumstances would be.

B. *The Fifth Circuit Adopts* Carson

In *Richard v. Hoechst Celanese Chemical Group*, the Fifth Circuit Court of Appeals explicitly adopted the reasoning of the Second Circuit in *Carson* regarding disgorgement and civil RICO.[198] *Richard* concerned a class action brought by a homeowner against various manufacturers of allegedly defective polybutylene[199] plumbing components.[200] The plaintiff brought a RICO action against the manufacturers, asking the district court to disgorge them of the ill-gotten proceeds of their alleged campaign to misrepresent

1996). Accordingly, the district court held that its prior order disgorging the defendant of ill-gotten gains could not be affirmed consistent with the Second Circuit's interpretation of § 1964(a). *Id.*

194. Sabri v. United States, 541 U.S. 600, 606 (2004).

195. *Cf.* SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000) (characterizing such an argument as "monstrous" and noting that "it would perpetuate rather than correct an inequity").

196. *See* Appellants' Brief at 48, United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005) (No. 04-CV-5252) (arguing that equitable remedies such as disgorgement are "available only to restore particular property taken from the plaintiff").

197. *See infra* notes 305-11 and accompanying text.

198. Richard v. Hoechst Celanese Chem. Group, 355 F.3d 345, 355 (5th Cir. 2003) ("We agree with the Second Circuit's reasoning in *Carson*.").

199. Polybutylene is a type of plastic produced as a by-product of the oil refining process. *See* Richard v. Hoechst Celanese Chem. Group, Inc., 208 F.R.D. 575, 577 (E.D. Tex. 2002).

200. *Richard*, 355 F.3d at 347. The plaintiff alleged that the manufacturers engaged in a fraudulent scheme to mislead buyers into purchasing polybutylene plumbing even though the manufacturers knew, based on internal scientists' reports, that polybutylene plumbing would degrade when exposed to the low concentrations of chlorine typical of municipal water systems. *Id.* at 348. As a result, the plumbing would leak and cause property damage, for which the plaintiff claimed the manufacturers were liable. *Id.*

the durability of polybutylene plumbing and thereby defraud consumers.[201] The district court granted the defendants' motion to dismiss, holding that equitable remedies such as disgorgement were categorically unavailable to plaintiffs in civil RICO actions.[202]

The Fifth Circuit affirmed the district court's judgment, though not its reasoning.[203] The Fifth Circuit discussed the Second Circuit's decision in *Carson*—specifically its holding that disgorgement is, in general, an available remedy under § 1964 with the qualification that "when disgorgement is sought for the purpose of compensating a party for past injuries . . . the plain language of § 1964 bars relief."[204] "We agree with the Second Circuit's reasoning in *Carson*," the Fifth Circuit held.[205] Like the Second Circuit in *Carson*, however, the Fifth Circuit held that disgorgement, while available as a remedy under certain circumstances, was not appropriate in the case before it.[206] Specifically, the Fifth Circuit held that, because the defendants no longer manufactured polybutylene plumbing, disgorgement could not "prevent and restrain" future RICO violations.[207]

Richard also intimated—in a single sentence—a deterrence rationale for permitting disgorgement as a remedy under civil RICO. The Fifth Circuit held that the plaintiff "fails to argue that such disgorgement would prevent manufacturers of similar products from committing similar injuries,"[208] thus implying that such an argument may have proven persuasive.[209] Implicit here is the notion that disgorgement could be justified not only to "prevent and restrain" the particular defendants in that case from continued misconduct—which would not be possible, as they were no longer in the business—but to "prevent and restrain" other members of society from engaging in similar misconduct—the classic general deterrence argument.[210] Although such a deterrence rationale seemingly contradicted

201. *See Richard*, 208 F.R.D. at 580-81. As in the Government's case against the tobacco companies, the predicate acts alleged under the RICO statute were violations of 18 U.S.C. §§ 1341, 1343 (2000) (mail and wire fraud, respectively). *Richard*, 208 F.R.D. at 580-81.

202. *See id.* at 588 ("To the extent that courts in the Fifth Circuit have considered equitable remedies under RICO, the idea has been dismissed.").

203. *Richard*, 355 F.3d at 354 (holding that disgorgement is an inappropriate remedy "given the circumstances present in this case").

204. *Id.* at 354-55.

205. *Id.* at 355.

206. *Id.* at 354.

207. *Id.* at 355.

208. *Id.*

209. In a dissenting opinion, Judge Jacques Wiener advanced this argument further. Judge Wiener analogized disgorgement in this case to another equitable remedy, exemplary damages, "the principal purpose [of which] is not simply to punish the offending parties for having conspired to make the illicit profits but to convey a strong message, to the conspirators and to third parties alike, that there is yet another disincentive to engaging in such proscribed conduct." *Id.* (Wiener, J., dissenting).

210. Black's Law Dictionary defines general deterrence as follows: "A goal of criminal law generally, or of a specific conviction and sentence, to discourage people from committing crimes." Black's Law Dictionary 460 (7th ed. 1999); *see also* Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 71 (2005) ("General deterrence seeks to

the Second Circuit's rejection of such a rationale in *Carson*,[211] the Fifth Circuit nonetheless adopted *Carson*.

Like *Carson*, *Richard* rejected the argument that § 1964(a) represents a full grant of equitable jurisdiction, but held that disgorgement could be permissible under § 1964(a) under limited circumstances. For the reasons discussed above regarding *Carson*, it is not entirely clear what those circumstances would be.[212] *Richard* rejected the use of disgorgement in the case before it because the defendants were no longer in business,[213] but, because it adopted *Carson*, the Fifth Circuit presumably agreed that disgorgement would be appropriate in the case of "gains ill-gotten relatively recently."[214] Because money is fungible, however, it is simply not clear why *Carson* and *Richard* placed so much weight on the temporal aspect of the defendant's gains,[215] a point that would prove to be critical in later courts' analyses of *Carson* and *Richard*.

C. *The D.C. District Court Holds, Contrary to* Carson *and* Richard, *that § 1964(a) Is a General Grant of Equitable Jurisdiction Vesting in District Courts the Authority to Issue Any Relief They Deem Appropriate, Including Disgorgement*

1. The Government's Lawsuit

The Government's complaint against the tobacco companies contained four counts. The first count was brought under the Medical Care Recovery Act, which authorizes the Government to recover costs of providing medical care when such medical care is required because of the tortious conduct of a third party.[216] In its suit, the Government sought to recover medical costs incurred as a result of treating veterans and federal employees for smoking-related illnesses.[217] The second count was brought under the Medicare Secondary Payer provisions of the Social Security Act, which gives the Government a subrogation right against third parties who are responsible for providing coverage to Medicare recipients but fail to do so.[218] In its suit, the Government sought to recover medical costs incurred as a result of providing health care to Medicare recipients suffering from smoking-related illnesses.[219]

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discourage would-be offenders from committing further crimes by instilling a fear of receiving the penalty given to this offender.").

211. *See supra* notes 190-91 and accompanying text.
212. *See supra* notes 194-97 and accompanying text.
213. *Richard*, 355 F.3d at 355.
214. United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995).
215. *See supra* notes 194-95 and accompanying text.
216. *See* 42 U.S.C. § 2651 (2000).
217. *See* First Amended Complaint, *supra* note 2, ¶¶ 126-66.
218. *See* 42 U.S.C. § 1395y (2000).
219. *See* First Amended Complaint, *supra* note 2, ¶¶ 167-70.

The third and fourth counts were brought under RICO[220] and alleged that the tobacco companies constituted an "enterprise" under RICO, formed not later than a December 15, 1953, meeting at the Plaza Hotel in New York.[221] This enterprise, the Government alleged, "did unlawfully, knowingly, and intentionally conduct . . . a pattern of racketeering activity."[222] More specifically, the Government alleged that the enterprise existed to "coordinate strategy, manipulate scientific data, suppress the truth about the consequences of smoking, and otherwise further defendants' fraudulent scheme."[223] The predicate acts alleged were mail and wire fraud,[224] violations of which occurred when the tobacco companies, over the course of several decades, "utilized advertisements and promotions, and . . . made numerous other public statements through the mails and in broadcasts and other media, [c]ongressional hearings, and other public appearances as part of a concerted and coordinated campaign" to mislead the public about the deleterious effects of smoking, which were alleged to have been known to the tobacco companies at all times.[225]

As to relief, the Government sought monetary damages for costs it had incurred and would incur in the future treating smoking-related illnesses,[226] disgorgement of all proceeds obtained as a result of RICO violations[227]—an amount the Government would ultimately calculate to be $280 billion[228]—and a sweeping injunction to, *inter alia*, "[p]rohibit each defendant and its agents from engaging in any public relations endeavor that misrepresents, or suppresses information concerning, the health risks associated with cigarette smoking or the addictive nature of nicotine."[229] The Government

220. Count three was for substantive RICO violations while count four was for conspiracy to violate RICO. *See id.* § VI.A, C.

221. *See id.* ¶¶ 174-75.

222. *Id.* ¶ 172.

223. *See id.* ¶ 182.

224. 18 U.S.C. §§ 1341, 1343 (2000) (mail and wire fraud, respectively).

225. *See* First Amended Complaint, *supra* note 2, ¶ 177.

226. *See id.* § VII.A.1-3.

227. *See id.* § VII.B.1.

228. The $280 billion figure was the calculation of a Government expert that appeared in the Government's Preliminary Proposed Findings of Law. *See* United States v. Philip Morris, USA, Inc., 321 F. Supp. 2d 72, 74 n.4 (D.D.C. 2004).

229. First Amended Complaint, *supra* note 2, § VII.B.2.d. The Government also asked the district court to require the tobacco companies to fund a smoking cessation campaign. *See id.* § VII.B.2.i. At the close of the nine-month trial in June 2005, the Government requested $10 billion to fund this campaign, despite testimony from the Government's own expert witness that such a campaign would cost $130 billion, leading Judge Kessler to remark in open court that the Government's revised request "suggests that additional influences have been brought to bear on what the government's case is." Janofsky & Johnston, *supra* note 20. Other commentary was much less subtle. *See* Editorial, *Torpedoing a Tobacco Suit*, N.Y. Times, June 10, 2005, at A20 (editorializing that the Government's shift represented "an egregious example of favoritism toward a big politically connected industry"); *see also supra* note 4 (discussing the impact of the 2000 presidential election on the case).

further requested any relief the district court deemed "necessary and appropriate to prevent and restrain" further RICO violations.[230]

2. The District Court Rejects the Tobacco Companies' Motion to Dismiss the Case

The tobacco companies moved to dismiss the case.[231] The district court granted the tobacco companies' motion on the first and second counts but denied it on the RICO counts.[232] The tobacco companies did not address the specific elements of the Government's RICO claims in their motion to dismiss, but rather argued that the Government had failed to prove that the tobacco companies' putative RICO violations would continue in the future, so as to warrant the broad equitable relief sought by the Government.[233] The district court rejected the tobacco companies' arguments.

To obtain injunctive relief, the district court held, "a plaintiff must show that the defendant's past unlawful conduct indicates a reasonable likelihood of further violation(s) in the future,"[234] which is evaluated by applying a three-part test set forth by the Court of Appeals for the D.C. Circuit in *SEC v. First City Financial Corp.*[235] The *First City* test involves the following three factors: "[W]hether a defendant's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future."[236] While courts consider each factor, no single one is determinative and "the district court should determine the propensity for future violations based on the totality of circumstances."[237]

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230. *See* First Amended Complaint, *supra* note 2, § VII.B.3.

231. *See* Motion to Dismiss, *supra* note 9.

232. *See* United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 134 (D.D.C. 2000). For the district court's decision on the first two counts, which will not be discussed in this Comment, see *id.* at 138-46.

233. *See* Motion to Dismiss, *supra* note 9, at 38-50.

234. *Philip Morris*, 116 F. Supp. 2d at 148 (citation and internal quotation omitted); *accord* United States v. Local 30, United Slate, Tile & Composition Roofers, 871 F.2d 401, 408-09 (3d Cir. 1989) (holding that, under § 1964(a), "the district court is authorized to fashion appropriate equitable relief to prevent future violations of [RICO]. Whether such relief is appropriate under § 1964(a) depends on whether there exists a likelihood that wrongful acts will be committed in the future"); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) (holding that "[w]hether equitable relief is appropriate [under § 1964(a)] depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future"); *see also* SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1477 (2d Cir. 1996) (upholding a district court's order of equitable relief where there was a likelihood of future violations of the Securities Exchange Act of 1934); Bangerter v. Orem City Corp., 46 F.3d 1491, 1498 & n.14 (10th Cir. 1995) (observing that injunctive relief is only appropriate where there is a finding that the defendant will be likely to violate the law in the future); SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994) (same); SEC v. Gruenberg, 989 F.2d 977, 978 (8th Cir. 1993) (same).

235. SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1228 (D.C. Cir. 1989).

236. *Id.*

237. *Id.*

The district court, presuming the veracity of the Government's allegations, as it must on a motion to dismiss,[238] held that the Government had "clearly and overwhelmingly satisfied each of the three *First City* factors."[239] First, the Government's complaint alleged more than one hundred acts of wire and mail fraud,[240] occurring over several decades.[241] Second, the Government's complaint did not allege "technical" violations, but rather a "concerted and coordinated campaign"[242] of fraudulent and misleading statements about the effects of cigarette smoking.[243] As to the final factor, the district court merely pointed out that the tobacco companies remained in the business of manufacturing and selling cigarettes, and therefore would have "countless" opportunities to violate the law in the future.[244]

The district court also rejected the tobacco companies' argument that disgorgement is not, as a matter of law, an available remedy under civil RICO. Significantly, because of the way the district court disposed of the issue—as requiring a factual finding—it was never required to address the argument's merits. The district court noted that the Second Circuit was the only federal appellate court to address the availability of disgorgement in a civil RICO suit[245] and that the Second Circuit held it was indeed available, albeit under limited circumstances[246] But the district court interpreted the Second Circuit's decision in *Carson* in such a way as to require it to reject the tobacco companies' argument as premature.

> The Court of Appeals in *Carson* observed that whether disgorgement is appropriate in a particular case depends on whether there is a "*finding* that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at 1182 (emphasis added). This Court has not made such a finding, nor could it at this stage. So long as disgorgement is permitted in civil RICO suits as a matter of law, as the Court so concludes, it would not be appropriate to ask, at the present stage, whether the Government has proved that it has an adequate basis for seeking such a remedy.[247]

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238. For a court considering a motion to dismiss, "the only relevant factual allegations are the plaintiffs', and they must be presumed to be true." *Philip Morris*, 116 F. Supp. 2d at 135 (citation and internal quotation omitted). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

239. *Philip Morris*, 116 F. Supp. 2d at 149.

240. *See* First Amended Complaint, *supra* note 2, ¶ 206.

241. *Philip Morris*, 116 F. Supp. 2d at 149.

242. *See* First Amended Complaint, *supra* note 2, ¶ 177.

243. *Philip Morris*, 116 F. Supp. 2d at 149.

244. *Id.*

245. The Fifth Circuit did not consider the issue until 2003 in a case called *Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345 (5th Cir. 2003); *see supra* Part II.B.

246. *Philip Morris*, 116 F. Supp. 2d at 151.

247. *Id.*

Because the district court interpreted *Carson* to first require a factual finding that ill-gotten gains are being used or "constitute capital available" for use in committing future RICO violations, it denied the tobacco companies' motion as to the RICO claim.[248]

3. The District Court Rejects the Tobacco Companies' Motion for Partial Summary Judgment

The tobacco companies did not appeal the decision permitting the RICO claims to move forward. Instead, three years later, they moved for partial summary judgment,[249] asking the district court to rule that the text of § 1964(a) and the Second Circuit's decision in *Carson* precluded the imposition of disgorgement as a remedy.[250] Additionally, the tobacco companies argued that the Government's economic model, used to calculate the $280 billion which the Government sought to disgorge, was flawed as a matter of law.[251] The district court rejected both arguments.

As a threshold matter, the district court again held[252] that in order to "prevent and restrain" future RICO violations, there must be "a reasonable likelihood of future RICO violations prior to entering any order of injunctive relief or disgorgement."[253] The likelihood of future violations is "'frequently established by inferences drawn from past conduct'" such as "the nature, seriousness, and extent of past violations."[254] Because the "nature, seriousness, and extent" of the tobacco companies' past RICO violations, if any, were disputed, the district court held summary judgment was premature, just as it had held years earlier in response to the tobacco companies' motion to dismiss.[255]

The district court then addressed the tobacco companies' argument that the limitation placed upon disgorgement by *Carson* and *Richard*[256]

248. *Id.* at 151-52.

249. On a motion for summary judgment, a court must construe all evidence in the light most favorable to the nonmoving party—in this case, the Government. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

250. *See* Motion for Partial Summary Judgment, *supra* note 15, at 18-26.

251. This Comment will not address this issue. For the tobacco companies' argument, see *id.* at 8-18. For the district court's discussion—and rejection—of the tobacco companies' argument regarding the Government's economic model, see United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72, 81-82 (D.D.C. 2004).

252. See *supra* notes 234-37 and accompanying text, discussing the district court's opinion, in response to the tobacco companies' motion to dismiss, holding that the imposition of injunctive relief requires proof of a likelihood of future RICO violations.

253. *Philip Morris*, 321 F. Supp. 2d at 76; *accord* United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974).

254. *Philip Morris*, 321 F. Supp. 2d at 75 n.5 (quoting United States v. Local 30, Tile & Composition Roofers, 871 F.2d 401, 409 (3d Cir. 1989)); *see also* cases cited *supra* note 234.

255. *See supra* notes 247-48 and accompanying text.

256. Perhaps because *Carson* preceded *Richard*, the district court in *Philip Morris* references both cases by citing only *Carson*, a convention this Comment will follow.

precluded disgorgement as a remedy in the current case.[257] In *Carson*, the Second Circuit held that disgorgement of gains ill-gotten long in the past would not be permissible unless such gains were "being used to fund or promote the illegal conduct, or constitute capital available for that purpose."[258] The district court rejected this limitation, offering five interrelated reasons.[259]

First, the district court held that *Carson* was inconsistent with the text of § 1964(a) itself. Conceiving disgorgement as a form of deterrence,[260] the district court pointed out that it is not at all clear that deterrence is incompatible with the statutory charge to "prevent and restrain," and cited several definitions of the word "deter" that include the words "prevent," and "restrain."[261] While acknowledging that there are "minor differences of nuance" among the words "deter," "discourage," "prevent," and "restrain," the district court held that such "slight" differences are "surely not sufficient to justify the differing treatment accorded them by the Second Circuit."[262]

Second, the district court held that *Carson*'s limitation was inconsistent with RICO's legislative history and purpose. In *Carson*, the Second Circuit concluded that "prevent and restrain" could not justify a remedy such as disgorgement merely because the remedy inflicts pain; if it could, § 1964(a) would read "prevent, restrain and discourage."[263] The district court rejected *Carson*'s conclusion, holding that such a "narrow interpretation of Section 1964(a) cannot be squared with Congress'[s] intention that this provision be read broadly," citing a Senate Report granting federal courts the authority under RICO to "craft equitable relief broad enough to do all that is

257. The district court also noted that, contrary to the tobacco companies' argument, it had never adopted the limitation *Carson* placed on disgorgement in its decision on the tobacco companies' motion to dismiss. Rather, it had discussed *Carson* in response to the tobacco companies' argument that disgorgement was never a remedy available under RICO. *See Philip Morris*, 321 F. Supp. 2d at 76 n.7.

258. United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995).

259. In rejecting the limitation *Carson* placed upon disgorgement as a remedy under RICO, the district court necessarily rejected the tobacco companies' argument that disgorgement was inconsistent with the "prevent and restrain" language of § 1964(a), though it did not explicitly do so.

260. Disgorgement is generally considered to have a deterrent effect. *See* SEC v. Sargent, 329 F.3d 34, 41 & n.2 (1st Cir. 2003); Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 695 & n.6 (6th Cir. 2000); *In re* Bilzerian, 153 F.3d 1278, 1283 (11th Cir. 1998).

261. *Philip Morris*, 321 F. Supp. 2d at 77 (citing Black's Law Dictionary, Oxford English Dictionary, and Merriam Webster's Collegiate Dictionary).

262. *Id.* at 77-78. Moreover, specific language in § 1964(a) would appear to preclude any limitation on the equitable authority a district court may exercise thereunder. For example, the words "appropriate remedies"—analogous to the words "appropriate orders" in § 1964(a)—"connote[] the remedial discretion which is the hallmark of equity." West v. Gibson, 527 U.S. 212, 225-26 (1999) (Kennedy, J., dissenting) (interpreting the words "appropriate remedies" under Title VII of the Civil Rights Act of 1964). The word "including" in § 1964(a) "makes clear that [the appropriate orders] are not limited to the examples that follow that word." *Id.* at 218 (majority opinion).

263. *Carson*, 52 F.3d at 1182 (internal quotation omitted).

necessary."[264] Moreover, *Carson's* limitation on disgorgement was also contrary to one of the purposes of RICO, namely to "divest [an enterprise] of the fruits of its ill-gotten gains."[265]

Third, the district court held that *Carson's* interpretation of § 1964(a) was inconsistent with the Supreme Court's 1946 holding in *Porter v. Warner Holding Co.*[266] In *Porter*,[267] the Supreme Court interpreted the extent of the equitable jurisdiction available to a district court by a statute that granted authority to issue "a temporary injunction, restraining order, or other order."[268] The Supreme Court held that

> the comprehensiveness of [a court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.[269]

Because § 1964(a) contains neither a "clear and valid legislative command" nor a "necessary and inescapable inference" limiting disgorgement to funds available to continue to violate RICO, the district court in *Philip Morris* concluded that *Carson*'s restriction on § 1964(a)'s scope was inconsistent with *Porter*.[270] Moreover, the district court noted that *Carson*'s divergence from *Porter* was particularly improper in the case of § 1964(a), of which the Supreme Court has held, "'if Congress'[s] liberal-construction mandate is to be applied anywhere, it is in Section 1964, where RICO's remedial purposes are most evident.'"[271]

Fourth, the district court held that *Carson*'s interpretation of § 1964(a) was inconsistent with the interpretations of other federal courts interpreting similarly worded provisions.[272] The Securities Exchange Act of 1934, for

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264. *Philip Morris*, 321 F. Supp. 2d at 77 (citing S. Rep. No. 91-617, at 160 (1969)) (internal quotation omitted).

265. United States v. Turkette, 452 U.S. 576, 585 (1981).

266. *Philip Morris*, 321 F. Supp. 2d at 78.

267. 328 U.S. 395 (1946). This case is discussed at length *supra* Part I.B.2.

268. *Id.* at 397.

269. *Id.* at 398.

270. *See Philip Morris*, 321 F. Supp. 2d at 78.

271. *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 n.10 (1985)); *see also* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (holding that "'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature'" (quoting Clark v. Smith, 38 U.S. 195, 200 (1839))).

272. *Philip Morris*, 321 F. Supp. 2d at 78. For a case permitting a district court to exercise the full range of equitable jurisdiction without an explicit statutory authorization, see Commodity Futures Trading Comm'n v. Hunt, 591 F.2d 1211, 1223 (7th Cir. 1979) (holding that, although the Commodity Exchange Act did not contain a provision expressly authorizing the equitable relief sought by the Government, "neither does [the Act] have any provision restricting the equitable power of the district court. *Porter* and *Mitchell* indicate that the latter fact is a sufficient basis for concluding that a district court possesses the authority to order restitution pursuant to the Commodity Exchange Act."). For cases following the Seventh Circuit's decision in *Hunt*, see Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 583-84 (9th Cir. 1982) (following the Seventh Circuit's holding in *Hunt*); Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp., 788 F.2d 92, 94 (2d Cir. 1986) (same); Commodity Futures Trading Comm'n

example, grants district courts authority to "'enjoin [violations of the Act], and upon a proper showing a permanent or temporary injunction or restraining order shall be granted.'"[273] Although the Securities Exchange Act, like RICO, does not explicitly provide for disgorgement, the D.C. Circuit has held that disgorgement is an appropriate remedy under the Act.[274] Moreover, the district court noted that no court has limited the ill-gotten gains eligible for disgorgement under the Securities Exchange Act to those that "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose," as *Carson* required for disgorgement under civil RICO.[275]

Finally, the district court reasoned that following *Carson*'s approach would lead to absurd results inconsistent with prior decisions of the D.C. Circuit. In *SEC v. Banner Fund International*,[276] a defendant convicted of securities violations argued that he could not comply with the disgorgement order imposed because he no longer had access to the assets at issue (approximately $9 million). The D.C. Circuit upheld the district court's disgorgement order, holding that "disgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset."[277] The D.C. Circuit in *Banner Fund* concluded that it would be "absurd" to allow a defendant to spend his ill-gotten gains before an action can be brought against him in order to immunize himself from a disgorgement order.[278] The district court in *Philip Morris* found that it would be similarly "absurd" to immunize the tobacco companies from an order of disgorgement simply because they had disposed of the proceeds of their RICO violations and therefore, under *Carson*, could not use such proceeds to continue to violate RICO.[279]

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v. Am. Metals Exch. Corp., 991 F.2d 71, 76 (3d Cir. 1993) (same). *See also* FTC v. Gem Merch. Corp., 87 F.3d 466, 468 (11th Cir. 1996) (construing the language "to enjoin" in the Federal Trade Commission Act to "carr[y] with it the full range of equitable remedies").

273. *Philip Morris*, 321 F. Supp. 2d at 78 (quoting 15 U.S.C. § 78u(d) (2000)).

274. *See, e.g.*, SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1229-31 (D.C. Cir. 1989); SEC v. Materia, 745 F.2d 197, 201 (2d Cir. 1984) (holding that, in light of the broad equitable jurisdiction conferred on district courts by the Securities Exchange Act, disgorgement "is by no means a new addition to this catalogue of permissible equitable remedies"); *accord* SEC v. Manor Nursing Ctr., Inc., 458 F.2d 1082, 1103 (2d Cir. 1972) (holding that disgorgement is an appropriate remedy under the Securities Exchange Act "[o]nce the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation").

275. *Philip Morris*, 321 F. Supp. 2d at 78.

276. SEC v. Banner Fund Int'l, 211 F.3d 602 (D.C. Cir. 2000).

277. *Id.* at 617.

278. *Id.* ("Under [the defendant's] approach, for example, a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of disgorgement. [This] would be a monstrous doctrine for it would perpetuate rather than correct an inequity.").

279. *Philip Morris*, 321 F. Supp. 2d at 80. The district court also addressed the tobacco companies' argument that *Banner Fund* and other cases relied upon by the court concerned violations of the Securities Exchange Act of 1934, among others, and were therefore inapposite in the RICO proceeding: "[N]either the Second Circuit nor Defendants offer any

Because the district court had previously held that disgorgement is generally a remedy available under civil RICO[280] and because it rejected the "narrow limitation" that *Carson* attempted to engraft onto RICO, it denied the tobacco companies' motion for partial summary judgment.

The district court in *Philip Morris* advanced a broad and sweeping interpretation of the equitable authority exercised by a district court under § 1964(a). In so doing, the district court adhered very much to the spirit of *Porter* and *Mitchell* in its dogged insistence on a "clear and valid legislative command" or a "necessary and inescapable inference" before interpreting a statute to circumscribe a district court's inherent equitable authority.[281] Because the district court found no such command or inference in § 1964(a)'s text or legislative purpose, it found no reason to preclude disgorgement—or any other equitable remedy—as a matter of law.

D. *The D.C. Circuit Holds that § 1964(a) Is Not a General Grant of Equitable Jurisdiction and Categorically Rejects the Availability of Disgorgement Under § 1964(a)*

The tobacco companies appealed the district court's decision to the Court of Appeals for the District of Columbia. In *United States v. Philip Morris USA, Inc.*,[282] a three-judge panel of the D.C. Circuit, after granting the tobacco companies' interlocutory appeal under 28 U.S.C. § 1292(b),[283] reversed the ruling of the district court, over a vigorous dissent. The D.C. Circuit held that the language in § 1964(a) "indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations."[284] Disgorgement, the D.C. Circuit held, "is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore

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reason to conclude that disgorgement in RICO cases does not serve the very same purposes (deterrence and deprivation of unjust enrichment) as it does in securities cases." *Id.* at 79-80.

280. *See supra* Part II.C.2.

281. See *supra* Part I.B.2-3 for discussions of *Porter* and *Mitchell*, respectively, and their broad interpretations of a district court's equitable authority.

282. 396 F.3d 1190 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 478 (2005). For a discussion of the Supreme Court's denial of certiorari, see Greenhouse, *supra* note 20.

283. The statute provides, in pertinent part, as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

28 U.S.C. § 1292(b) (2000). The majority and dissent hotly disputed whether, under 28 U.S.C. § 1292(b), it was even appropriate for the Court to consider whether disgorgement was generally available under RICO. *Compare Philip Morris*, 396 F.3d at 1193-97 (majority opinion arguing that the court could consider disgorgement generally), *with id.*at 1209-14 (Tatel, J., dissenting) (arguing that "[b]ecause the tobacco companies ask us to address an issue not fairly included in the certified order and not presented at that time to the district court, I would dismiss this interlocutory appeal").

284. *Philip Morris*, 396 F.3d at 1198.

the status quo."[285] The D.C. Circuit rejected not only the broad claim advanced by the Government—that all equitable remedies, including disgorgement, are available under § 1964(a)—but also the narrower one—that disgorgement is available as a remedy within the narrow exception carved out by *Carson*.[286]

1. The D.C. Circuit Interprets § 1964(a) to Circumscribe a District Court's Equitable Authority

The Government argued that "[w]hen Congress provided the district courts with 'jurisdiction to prevent and restrain violations' of RICO by 'issuing appropriate orders,' it clearly would have understood that its grant of authority did not divest a court of inherent equitable powers," among them the power to order disgorgement of ill-gotten gains.[287] The D.C. Circuit disagreed, characterizing the Government's argument as advocating a "plenary grant of equitable jurisdiction" wholly incompatible with the limited jurisdiction conferred on federal courts by Congress and the Constitution.[288] The D.C. Circuit held that the language of the statute precluded such a broad reading.[289] The "prevent and restrain" language in § 1964 limited a district court's equitable jurisdiction to forward-looking remedies aimed at preventing and restraining future RICO violations.[290] Disgorgement is not a forward-looking remedy, but rather a "quintessentially backward-looking" one that is "measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct."[291]

The D.C. Circuit also addressed the argument that disgorgement could be understood as a forward-looking remedy because of its ability to deter

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285. *Id.*

286. The Government argued that, absent an express statutory provision, a district court retained all inherent equitable authority, including the power to order disgorgement. *See* Brief for the United States of America as Appellee at 14-17, *Philip Morris*, 396 F.3d 1190 (No. 04-CV-5252) [hereinafter Government Brief]. In the alternative, the Government argued that disgorgement would be appropriate in this case within the narrow exception carved out by *Carson*, as a means of preventing ongoing and future RICO violations. *See id.* at 30-39.

287. *Id.* at 18 (quoting 18 U.S.C. § 1964(a) (2000)).

288. *Philip Morris*, 396 F.3d at 1197-98; *accord* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (holding that district courts "are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree" (citations omitted)). *But see* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (holding that Congress has the authority to regulate a district courts' equitable jurisdiction, "but we do not lightly assume that Congress has intended to depart from established principles" absent a clear indication of such intent).

289. *Philip Morris*, 396 F.3d at 1197 ("We will not expand upon our equitable jurisdiction if, as here, we are restricted by the statutory language . . . .").

290. *Id.* at 1198.

291. *Id.* *But see supra* notes 234-44, 252-55 and accompanying text (discussing the district court's holding that disgorgement would only be an appropriate remedy where there is first a finding of a likelihood of future RICO violations).

future violations.[292] While the D.C. Circuit agreed with the argument generally—that disgorgement could "prevent and restrain" future violations "insofar as it makes RICO violations unprofitable"—it believed the argument "goes too far."[293] The D.C. Circuit quoted *Carson*: "If [deterrence] were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage,' and would allow any remedy that inflicts pain."[294] A concurring opinion by Judge Williams further addressed the deterrence issue, arguing it was unlikely Congress intended § 1964(a) to authorize disgorgement because it would have "only a trivial incremental effect" on deterrence in light of the far harsher punishments—e.g., criminal forfeiture, treble damages—explicitly authorized by the RICO statute.[295]

The D.C. Circuit also addressed the Government's argument that the text of § 1964(a)—which authorizes district courts to "prevent and restrain" violations of RICO "by issuing appropriate orders, including, but not limited to"—provides for a broad grant of equitable jurisdiction.[296] The D.C. Circuit held that the words "including, but not limited to" in § 1964(a) "introduce a non-exhaustive list that sets out specific examples of a general principle"—namely, those remedies that "prevent and restrain."[297] Applying the statutory interpretation canons of *noscitur a sociis*[298] and *ejusdem generis*,[299] the D.C. Circuit held that the three remedies enumerated in the statute—divestment, injunction, and dissolution—raise a "'necessary and inescapable inference' . . . that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out

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292. *See Philip Morris*, 396 F.3d at 1200.

293. *Id.*

294. United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995). *But see* George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 Ariz. L. Rev. 611, 638-40 (1994) (referring to courts' expectations that Congress will explicitly set forth every remedy it intends to provide as the "specificity myth").

295. *See Philip Morris*, 396 F.3d at 1203-04 (Williams, J., concurring). Judge Stephen Williams illustrated his point with the following scenario:

> I find it hard to imagine a waffling villain—already in court for RICO violations—saying to himself: "Well, my chances of escaping § 1963(a) forfeiture and imprisonment because of the statute of limitations and the burden of proof, and of escaping treble damages under § 1964(c), and contempt penalties for violating the court's orders, still leave RICO violations attractive on a net basis; but that implied disgorgement under § 1964(a)—wow! Too much. It tilts me over the line."

Id. at 1204.

296. *See* Government Brief, *supra* note 286, at 17-19.

297. *Philip Morris*, 396 F.3d at 1200.

298. This term means, literally, "it is known by its associates." Black's Law Dictionary, *supra* note 210, at 1084 ("A canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.").

299. This term means, literally, "of the same kind or class." *Id.* at 535 ("A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other barnyard animal*, the general language *or any other barnyard animal*—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals (and thus would exclude chickens).").

disgorgement."[300] Because disgorgement is not a forward-looking remedy, the D.C. Circuit categorically rejected its use in civil RICO actions.

2. The D.C. Circuit Rejects *Carson* and *Richard*

Although the D.C. Circuit categorically rejected the use of disgorgement, it nonetheless addressed the Government's narrower argument that disgorgement could be justified in the case within the exception carved out by *Carson*[301] and *Richard* because the tobacco companies were alleged to have obtained billions of dollars through racketeering activities and could use these proceeds to continue to violate the law.[302] The D.C. Circuit rejected this argument because it disagreed with *Carson* and *Richard*'s qualified acceptance of the availability of disgorgement under § 1964(a).[303]

> While we avoid creating circuit splits when possible, in this case we can find no justification for considering any order of disgorgement to be forward-looking as required by § 1964(a). The language of the statute explicitly provides three alternative ways to deprive RICO defendants of control over the enterprise and protect against future violations: divestment, injunction, and dissolution. We need not twist the language to create a new remedy not contemplated by the statute.[304]

Judge Stephen Williams's concurrence further elucidated what he regarded as the Second Circuit's "superficially appealing interpretation" of § 1964(a) in *Carson*.[305]

Carson held that disgorgement could "prevent and restrain" future RICO violations if the disgorgement were limited to those ill-gotten gains "being used to fund or promote the illegal conduct, or constitut[ing] capital available for that purpose."[306] Judge Williams—who appeared to read

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300. *Philip Morris*, 396 F.3d at 1200 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)); *accord* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (expressing the Court's reluctance to "extend[] remedies not specifically authorized by [a statute's] text"); Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (holding that a "detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly" (internal quotation omitted)); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (instructing that when "construing a statute we are obliged to give effect, if possible, to every word Congress used"); Halverson v. Slater, 129 F.3d 180, 185 (D.C. Cir. 1997) (noting that, when interpreting a statute all language must be given effect because "Congress cannot be presumed to do a futile thing"—namely, include superfluous language in a statute).

301. "Ordinarily, the disgorgement of gains ill-gotten long in the past will not serve the goal of 'prevent[ing] and restrain[ing]' future violations unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) (quoting 18 U.S.C. § 1964(a) (2000)) (alterations in original).

302. *See* Government Brief, *supra* note 286, at 30-32.

303. *See supra* notes 192-93, 204-12 and accompanying text (discussing the circumstances under which *Carson* and *Richard*, respectively, held that disgorgement would be permissible under § 1964(a)).

304. *Philip Morris*, 396 F.3d at 1201.

305. *Id.* at 1202 (Williams, J., concurring).

306. *Carson*, 52 F.3d at 1182.

Carson to mean that only those specific assets illegally obtained could be disgorged[307]—pointed out that making this determination would be a nearly impossible task in the case of the tobacco companies.[308] Would a court simply conclude that all the tobacco companies' assets could be used to commit future RICO violations and order the companies into bankruptcy?[309] Or would a court attempt to determine, for example, which assets Altria Group, Inc.—the parent company of Philip Morris as well as multiple nontobacco companies[310]—was using for the marketing and sale of cigarettes and which it was using for the marketing and sale of Oreo cookies? The concurrence rejected this "virtually metaphysical quest to draw lines based on the likelihood that particular resources will be devoted to crime."[311]

If the district court's opinion in *Philip Morris* represents an exceptionally broad interpretation of § 1964(a),[312] then the D.C. Circuit's reversal represents an exceptionally narrow one. Under the D.C. Circuit's interpretation, § 1964(a) severely circumscribes a district court's equitable jurisdiction through a *Porter*-style "clear and valid legislative command."[313] This statutory command permits few remedies beyond those specifically enumerated, and particularly not a "backward-looking" remedy such as disgorgement, even if the disgorgement were tailored, as *Carson* and *Richard* advocated, at "gains ill-gotten relatively recently."[314]

3. The Dissent

In a vigorous dissent, Judge David Tatel argued forcefully that the majority erred in rejecting both the broad and narrow arguments advanced by the Government,[315] and in so doing "ignore[d] controlling Supreme Court precedent, disregard[ed] Congress's plain language, and create[ed] a circuit split."[316]

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307. *See supra* notes 194-97 and accompanying text (discussing the problematic nature of this reading of *Carson*).

308. *Philip Morris*, 396 F.3d at 1203 (Williams, J., concurring).

309. The concurrence points out that the tobacco companies sued by the Government almost certainly have a combined net worth below the $280 billion sought. *See id.* at 1202. It is far from clear, however, that some sort of settlement, whereby the tobacco companies would have been compelled to set up a trust to make payments over an extended period of time, would have been beyond the companies' financial means. For a discussion of a massive, multi-billion dollar trust established by the Johns-Manville Corporation, one of the world's largest asbestos manufacturers, to compensate future victims of asbestosis, see Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 Cardozo L. Rev. 583, 591-602 (1996).

310. *See* Altria at a Glance, http://www.altria.com/about_altria/1_1_altriaataglance.asp (last visited Jan. 29, 2006).

311. *Philip Morris*, 396 F.3d at 1203 (Williams, J., concurring).

312. *See supra* note 281 and accompanying text.

313. See *supra* Part I.B.2 for a discussion of *Porter*.

314. United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995).

315. *See supra* note 286 and accompanying text.

316. *Philip Morris*, 396 F.3d at 1208 (Tatel, J., dissenting).

Judge Tatel first addressed the majority's rejection of the argument that § 1964(a) confers broad equitable authority on the district courts. Whereas the majority relied exclusively on the Supreme Court's decision in *Meghrig*,[317] Judge Tatel argued that *Porter*[318] and *Mitchell*[319] were controlling for three reasons.[320] First, the statute at issue in *Mitchell*, the FLSA, more closely resembled RICO than the statute at issue in *Meghrig*, the RCRA, because "[b]oth RICO and the EPCA stand alone in grappling with a broad social issue, whereas the RCRA had a closely related statute [CERCLA] on which the Court in *Meghrig* relied heavily."[321] Second, in *Porter* and *Mitchell* the Government brought the suit, and *Porter* held that a district court's "equitable powers assume an even broader and more flexible character"[322] in a case implicating the public interest.[323] Finally, *Meghrig's* suggestion that the language "to restrain" in the RCRA only referred to prohibitory injunctions cannot be reconciled with § 1964(a), which explicitly authorizes other remedies.[324]

Judge Tatel believed *Porter* and *Mitchell*, and not *Meghrig*, should control, and argued that there was no basis in either decision to deny district courts full equitable jurisdiction under the grant of 1964(a). *Porter* held that "the comprehensiveness of [a district court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."[325] The dissent could find no such "clear and valid legislative command" in § 1964(a).[326] Because *Porter* and *Mitchell* both contained statutory language similar to that of § 1964(a) which the Supreme Court interpreted as a grant of full equitable jurisdiction, the dissent argued that the district court "may order whatever equitable relief it deems appropriate," including disgorgement.[327]

Judge Tatel also argued that the majority erred in rejecting the argument that disgorgement could be understood as a remedy to "prevent and restrain" future RICO violations.[328] Because the district court held—correctly, in Judge Tatel's view—that disgorgement would only be a permissible remedy upon a finding that the defendants are likely to violate RICO in the future,[329] it was a question of fact.[330] Because the Government

317. See *supra* Part I.B.4 for a detailed discussion of this case.
318. See *supra* Part I.B.2 for a detailed discussion of this case.
319. See *supra* Part I.B.3 for a detailed discussion of this case.
320. *Philip Morris*, 396 F.3d at 1220 (Tatel, J., dissenting).
321. *Id.* at 1220-21.
322. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).
323. *Philip Morris*, 396 F.3d at 1221 (Tatel, J., dissenting); *accord* United States v. Alisal Water Corp. 427 F.3d 597, 608 (9th Cir. 2005) (citing *Porter* for the proposition that a district court's equitable powers are even broader in a case involving the public as opposed to private interests).
324. *Philip Morris*, 396 F.3d at 1221 (Tatel, J., dissenting).
325. *Porter*, 328 U.S. at 398.
326. *Philip Morris*, 396 F.3d at 1216 (Tatel, J., dissenting).
327. *Id.* at 1222.
328. *Id.*
329. *See supra* notes 234-44, 252-55 and accompanying text.

presented evidence in the form of expert testimony to the effect that a disgorgement order would indeed prevent RICO violations in the future—evidence which a court, on a motion for summary judgment, must accept as true[331]—Judge Tatel argued that summary judgment was inappropriate.

Judge Tatel also disagreed with the majority's arguments as to why disgorgement could not "prevent and restrain" future RICO violations. First, he rejected the majority's characterization of disgorgement as a "quintessentially backward-looking remedy,"[332] relying on *Porter* for the proposition that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains."[333] Second, he rejected the majority's application of the canons of statutory construction *noscitur a sociis* and *ejusdem generis* to exclude disgorgement from the remedies enumerated in § 1964(a).[334] In light of the "expansive" language used in § 1964(a)—"by issuing appropriate orders, including, but not limited to"—Judge Tatel saw no reason to use these two canons of statutory construction "to limit the types of equitable relief available to district courts given Congress's instruction that RICO 'shall be liberally construed to effectuate its remedial purposes.'"[335] Finally, the dissent disagreed with the majority's argument that permitting disgorgement under § 1964(a) would permit duplicative recovery, in conjunction with the criminal forfeiture provisions of RICO: "[T]he Supreme Court has observed that 'Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions.' . . . The converse should hold as well."[336]

Although Judge Tatel believed disgorgement could be a permissible remedy under RICO, he believed its use should be rare[337] and he flatly rejected the suggestion of the Fifth Circuit in *Richard*[338] that disgorgement could be imposed purely as a general deterrent.[339] Disgorgement would only be permissible in a case where a court first finds that a defendant is likely to commit RICO violations in the future.[340] But Judge Tatel believed that, "[i]n equity, as nowhere else, courts [should] eschew rigid absolutes"

330. *Philip Morris*, 396 F.3d at 1222 (Tatel, J., dissenting).

331. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

332. *Philip Morris*, 396 F.3d at 1198.

333. Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946); *see also* United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952) (holding that the sole purpose of injunctive relief is to "forestall future violations").

334. *Philip Morris*, 396 F.3d at 1200.

335. *Id.* at 1224 (Tatel, J., dissenting) (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (codified as amended at 18 U.S.C. § 1961 (2000))).

336. *Id.* (quoting United States v. Turkette, 452 U.S. 576, 585 (1981)).

337. *Id.* at 1226.

338. *See supra* notes 208-11 and accompanying text.

339. *See Philip Morris*, 396 F.3d at 1225 (Tatel, J., dissenting) (arguing that, "[b]ecause any remedy imposed for a solely exemplary purpose (i.e., to dissuade others from committing RICO violations) would amount to punishment, it goes beyond what Congress intended as well as pushes the boundaries of what equity permits" (citation omitted)).

340. *Id.* at 1224-25.

recognizing that "precisely what remedy or combination of remedies . . . will serve to prevent and restrain defendants from committing RICO violations is an issue of fact, not statutory interpretation."[341]

As discussed in this part, the various positions taken on the availability of disgorgement under RICO—the Second and Fifth Circuits' qualified acceptance in *Carson* and *Richard*, respectively, the D.C. District Court's categorical acceptance in *Philip Morris*, and the D.C. Circuit's categorical rejection in *Philip Morris*—stem from disagreement as to the extent of the equitable jurisdiction granted to district courts by § 1964(a). *Carson* and *Richard* held that § 1964(a) circumscribes a district court's equitable jurisdiction to those remedies that could "prevent and restrain" future RICO violations. But *Carson* and *Richard* also held that disgorgement could, under certain circumstances, "prevent and restrain" future RICO violations, and therefore be consistent with the statutory grant of authority. The D.C. District Court in *Philip Morris* disagreed that § 1964(a) imposes any such restriction, arguing that the statute grants district courts the full range of equitable authority, including the authority to impose disgorgement. The D.C. Circuit in *Philip Morris* reversed, holding, like *Carson* and *Richard*, that § 1964(a) does indeed circumscribe a district court's equitable authority, but the D.C. Circuit interpreted the statute much more narrowly than *Carson* and *Richard*, holding that disgorgement could never be permissible under § 1964(a).

III. DISGORGEMENT IS A PERMISSIBLE REMEDY UNDER § 1964(A)

This Comment argues that § 1964(a) does indeed grant district courts the full range of their equitable authority—authority which includes the power to disgorge RICO defendants of ill-gotten gains. In so arguing, this Comment disagrees with the D.C. Circuit's opinion in *Philip Morris* and also with the qualified acceptance of disgorgement under § 1964(a) advocated by the Second Circuit in *Carson* and adopted by the Fifth Circuit in *Richard*. This Comment argues that disgorgement is one of the equitable remedies available to a district court exercising its inherent equitable authority, as evidenced by § 1964(a)'s text as well as RICO's legislative purpose. Alternatively, even if § 1964(a) does not represent a full grant of equitable authority, disgorgement, properly understood as a deterrent to future RICO violations, is wholly consistent with the statutory charge to "prevent and restrain" future RICO violations.

A. *Section 1964(a) Provides District Courts a General Grant of Equitable Jurisdiction*

As the Supreme Court held in *Porter*—a case never overruled and cited by the Supreme Court as recently as 2001[342]—absent a "clear and valid

341. *Id.* at 1226 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 n. 39 (1976)) (first and second alternations in original).

342. *See supra* note 127.

legislative command" or a "necessary and inescapable inference," "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[343] Section 1964(a) grants district courts jurisdiction to "prevent and restrain violations of [RICO] by issuing appropriate orders, including, but not limited to" orders of divestment, injunction or dissolution.[344] Contrary to the D.C. Circuit's opinion in *Philip Morris*, the Second Circuit's in *Carson*, and the Fifth Circuit's in *Richard*—all of which construed the "prevent and restrain" language to circumscribe district courts' equitable authority—§ 1964(a) contains neither a "clear and valid legislative command" nor a "necessary and inescapable inference" restricting a district court's "inherent equitable powers."

At the outset, it is critical to understand Congress's broad aims and purpose in enacting RICO.[345] When Congress enacted RICO in 1970, it directed in no uncertain terms that RICO "shall be liberally construed to effectuate its remedial purposes"[346] and that district courts should have the authority under RICO to "craft equitable relief broad enough to do all that is necessary."[347] While three remedies were enumerated in the statute, "'the list is not exhaustive.'"[348] In light of these congressional admonitions, the Supreme Court has held that "RICO is to be read broadly. This is the lesson . . . of Congress'[s] self-consciously expansive language and overall approach . . . ."[349] A broad reading is particularly appropriate in § 1964, "where RICO's remedial purposes are most evident."[350] But the Supreme Court has also held that Congress's express admonition to construe RICO liberally "is not an invitation to apply RICO to new purposes that Congress never intended."[351]

There simply is no evidence, however, that Congress intended to withhold or limit a district court's equitable jurisdiction in § 1964(a). On the contrary, the evidence suggests a "clear and valid legislative command" that Congress intended to grant district courts full equitable jurisdiction, not restrict it.[352] The D.C. Circuit in *Philip Morris* relied on the general comprehensiveness of the RICO statute to support its conclusion that Congress intended to circumscribe a district court's equitable jurisdiction under § 1964(a)—that is, because Congress did not explicitly grant district courts full equitable jurisdiction, Congress must have intended to withhold

343. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

344. 18 U.S.C. § 1964(a) (2000).

345. *See supra* notes 23-30, 52-54 and accompanying text.

346. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 947 (codified as amended in scattered sections of 18 U.S.C.).

347. *See* United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72, 77 (D.D.C. 2004) (citing S. Rep. No. 91-617, at 160 (1969)).

348. United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1218 (D.C. Cir. 2005) (Tatel, J., dissenting) (quoting S. Rep. No. 91-617, at 160).

349. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985).

350. *Id.* at 491 n.10.

351. Reves v. Ernst & Young, 507 U.S. 170, 183 (1993).

352. *See supra* notes 345-50 and accompanying text.

it.[353] This conclusion seeks a level of specificity from Congress that is unrealistic, impractical, and unworkable.[354] More importantly, however, the D.C. Circuit's interpretation of § 1964(a) simply reads language out of the statute, in contravention of the familiar proposition that "[c]ourts should disfavor interpretations of statutes that render language superfluous."[355]

Section 1964(a) grants district courts jurisdiction to issue "appropriate orders, including but not limited to" those enumerated therein. The words "appropriate orders," properly analogized to the words "appropriate remedies," have been interpreted to "connote[] the remedial discretion which is the hallmark of equity."[356] The word "including" in the statute "makes clear that [appropriate orders] are not limited to the examples that follow that word."[357] Unless the words "including but not limited to" are superfluous, then additional remedies beyond those enumerated must be permissible under § 1964(a). Because these additional remedies were not enumerated, it certainly seems reasonable to conclude that Congress intended district courts to retain their inherent[358] equitable authority. Indeed, coupled with Congress's admonition that RICO "shall be liberally construed," this conclusion seems the most probable. At the very least, however, the presence of this language rebuts the notion that § 1964(a) contains a "clear and valid legislative command" or a "necessary and inescapable inference" that Congress intended to circumscribe district courts' inherent equitable jurisdiction.

The D.C. Circuit in *Philip Morris*, the Second Circuit in *Carson*, and the Fifth Circuit in *Richard* all held, however, that the "prevent and restrain" language in § 1964(a) represented an express limitation on district courts' equitable jurisdiction. There is reason to doubt this argument. In *Mitchell*, the Supreme Court interpreted a statute authorizing district courts "to restrain violations" of the FLSA as having conferred inherent equitable jurisdiction on the district courts.[359] While the Supreme Court in *Meghrig* construed almost identical language in the RCRA as imposing a limit on district courts' equitable jurisdiction, a number of lower courts have construed similar language as conferring full equitable jurisdiction.[360] Moreover, bearing in mind the Supreme Court's admonition in *Porter* that, where the public interest is implicated—as it undoubtedly is in the

353. *See supra* note 300 and accompanying text.

354. *See* Flint, *supra* note 294, at 638-40.

355. United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 233 (2003) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).

356. West v. Gibson, 527 U.S. 212, 225-26 (1999) (Kennedy, J., dissenting) (interpreting the words "appropriate remedies" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000)).

357. *Id.* at 218 (interpreting the word "including" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e).

358. *See* Webster's Third New International Dictionary 1163 (3d ed. 1986) (defining "inherent" as "structural or involved in the constitution or essential character of something").

359. *See supra* Part I.B.3.

360. *See supra* note 272 and accompanying text.

Government's case against the tobacco companies[361]—district courts' "equitable powers assume an even broader and more flexible character,"[362] this argument circumscribing jurisdiction based on the "prevent and restrain" language simply cannot carry the day.[363]

B. *Disgorgement Is Consistent with the Text of § 1964(a)*

Even if § 1964(a) is not a general grant of equitable authority, disgorgement would be a permissible remedy thereunder. By the plain language of § 1964(a), the only "appropriate orders" a district court is authorized to issue are those that "prevent and restrain" future RICO violations. Divestment, injunction, and dissolution are but three examples of such "appropriate orders." Disgorgement, properly understood as a deterrent to committing future RICO violations,[364] can indeed "prevent and restrain" consistent with § 1964(a).

As the D.C. Circuit conceded in *Philip Morris*, disgorging a RICO defendant of ill-gotten gains would be a means of preventing and restraining future RICO violations, insofar as it would "make[] RICO violations unprofitable."[365] However, the D.C. Circuit agreed with the Second Circuit in *Carson*—and, therefore, the Fifth Circuit in *Richard*—that if "prevent and restrain" were intended to include disgorgement, then § 1964(a) would read "prevent, restrain and discourage."[366] The D.C. Circuit reached this conclusion because it held that only remedies similarly forward-looking as those enumerated in the statute could be inferred by the language "including, but not limited to."[367] The D.C. Circuit excluded disgorgement because it was a "quintessentially backward-looking remedy."[368]

This erroneous conclusion stems from a misunderstanding of the nature of the disgorgement at issue. While it is true that disgorgement is "measured by the amount of prior unlawful gains"[369] it is not true that

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361. *See supra* Part II.C.1 (describing the nature of the Government's lawsuit).

362. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); *accord* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960) (holding that "'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature'" (quoting Clark v. Smith, 38 U.S. (13 Pet.) 195, 200 (1839))); United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1220 (D.C. Cir. 2005) (Tatel, J., dissenting); United States v. Alisal Water Corp. 427 F.3d 597, 608 (9th Cir. 2005) (citing *Porter* for the proposition that a district court's equitable powers are even broader in a case involving the public as opposed to private interests).

363. *Cf.* Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.").

364. *See supra* notes 260-62 and accompanying text.

365. *See Philip Morris*, 396 F.3d at 1200.

366. United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995) (internal quotation omitted).

367. *See supra* notes 297-300 and accompanying text.

368. *See Philip Morris*, 396 F.3d at 1198.

369. *Id.*

disgorgement, under § 1964(a), "is awarded without respect to whether the defendant will act unlawfully in the future."[370] Disgorgement is an equitable remedy.[371] "Whether equitable relief is appropriate [under § 1964(a)] depends . . . on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future, a likelihood which is frequently established by inferences drawn from past conduct."[372] The district court in *Philip Morris* made it abundantly clear that the threshold inquiry in determining the availability of disgorgement under § 1964(a) would be the likelihood of the defendant committing RICO violations in the future.[373] The dissenting opinion on the D.C. Circuit agreed.[374] The Supreme Court, moreover, has held that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains."[375]

Relying on *Meghrig*, in which the Supreme Court unanimously held that a statute granting district courts jurisdiction to "restrain" improper disposal of hazardous waste could not be construed to permit compensation for past cleanup costs, the D.C. Circuit held that "[i]f 'restrain' is only aimed at future actions, 'prevent' is even more so."[376] Again, this argument misunderstands the nature of the remedy contemplated under the RICO statute. In *Meghrig*—a case which one court of appeals has characterized as an outlier[377]—there was no question that the hazardous waste at issue no longer presented "an imminent and substantial endangerment to health or the environment" precisely because the waste had already been cleaned up.[378] The form of disgorgement sought by the Government, however, is only available upon a finding of a "reasonable likelihood of future RICO violations."[379]

The fact that disgorgement would only be available under § 1964(a) upon a finding that the defendant is likely to commit future RICO violations addresses a number of the concerns raised regarding the use of disgorgement under RICO. First, in his concurring opinion in *Philip Morris*, Judge Williams argued against disgorgement by pointing out that any deterrent effect of disgorgement would be "incremental."[380] It is not clear how this is at all relevant, as § 1964(a) does not limit a district court's authority to impose only those remedies that substantially prevent and restrain future violations.

370. *Id.*
371. *See supra* note 92.
372. United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974).
373. *See supra* notes 234-44, 252-55 and accompanying text.
374. *See supra* notes 329-31 and accompanying text.
375. Porter v. Warning Holding Co., 328 U.S. 395, 400 (1946).
376. United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1199 (D.C. Cir. 2005).
377. *See supra* note 173 and accompanying text.
378. *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 485-86 (1996).
379. *See* United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72, 75 (D.D.C. 2004).
380. *See supra* note 295 and accompanying text.

Second, in *Richard*, the Fifth Circuit implied that disgorgement could be imposed on the basis of a general deterrence theory[381]—that is, that disgorgement would be an appropriate remedy for a given RICO defendant because it would deter similar persons from committing RICO violations.[382] Such an approach would amount to punitive damages, a remedy outside the scope of the equitable relief authorized by § 1964(a).[383] Concerns over this approach appear to underlie the Second Circuit's decision limiting disgorgement in *Carson*.[384] What is advocated here is disgorgement as a specific deterrent,[385] meant to disgorge ill-gotten gains from a specific RICO defendant to prevent and restrain that defendant from committing any further RICO violations.

Finally, the limitation *Carson* placed upon disgorgement—holding it permissible only in instances where "there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose"[386]—is, if read literally, patently absurd.[387] Money, of course, is fungible. Permitting a RICO defendant to avoid having to disgorge his ill-gotten gains merely because he had already spent those specific gains would be a highly disconcerting elevation of form over substance. More broadly, however, the *Carson* limitation on disgorgement is unnecessary because it rests on the assumption that disgorgement is not a forward-looking remedy and therefore cannot be considered to "prevent and restrain" future RICO violations. As argued above, disgorgement, properly understood as a specific deterrent, and imposed upon a finding that the defendant is likely to commit future RICO violations, can indeed "prevent and restrain" future RICO violations. In any event, the disgorgement advocated here would be a requirement to "return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset."[388]

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381. General deterrence is "designed to prevent future crimes by members of the public at large." Frase, *supra* note 210, at 71.

382. *See supra* notes 208-11 and accompanying text.

383. *See supra* notes 337-39 and accompanying text.

384. United States v. Carson, 52 F.3d 1173, 1182 (2d Cir. 1995).

385. Black's Law Dictionary defines special (specific) deterrence as follows: "A goal of a specific conviction and sentence to dissuade the offender from committing crimes in the future." Black's Law Dictionary, *supra* note 210, at 460; *see also* Frase, *supra* note 210, at 70 ("Specific deterrence (also known as special or individual deterrence) seeks to discourage the defendant from committing further crimes by instilling fear of receiving the same or a more severe penalty in the future.").

386. *Carson*, 52 F.3d at 1182.

387. Judge Williams, in his concurring opinion in *Philip Morris*, seems to read this literally in asking how a court would determine which ill-gotten gains are being used to violate RICO and which are being used for lawful purposes. *See supra* notes 305-11 and accompanying text.

388. SEC v. Banner Fund Int'l, 211 F.3d 602, 617 (D.C. Cir. 2000).

CONCLUSION

In *Philip Morris*, the D.C. Circuit erred in limiting, as a matter of law, the relief sought by the Government in its innovative and groundbreaking case[389] against the tobacco industry. It erred first by reading—in accord with the Second Circuit in *Carson* and the Fifth Circuit in *Richard*—a limitation into § 1964(a) that simply is not there, and second by construing disgorgement as an inherently backward-looking remedy inconsistent with § 1964(a)'s command to "prevent and restrain" future RICO violations. In fact, as the district court in *Philip Morris* and the dissent in the D.C. Circuit correctly found, § 1964(a) contains neither a "clear and valid legislative command" nor a "necessary and inescapable inference" that would circumscribe a district court's equitable jurisdiction. Moreover, even if § 1964(a) does circumscribe a district court's equitable authority, disgorgement, imposed upon a finding of a likelihood of future RICO violations, would be consistent with the statutory command to "prevent and restrain." In holding otherwise, the Second Circuit in *Carson*, the Fifth Circuit in *Richard*, and the D.C. Circuit in *Philip Morris* have ignored the plain language of § 1964(a), Congress's express intent in enacting RICO and the Supreme Court's command to "do complete rather than truncated justice."[390]

389. *See supra* note 7.
390. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).