TO REMEDY OR NOT TO REMEDY: THE AVAILABILITY OF DISGORGEMENT UNDER CIVIL RICO

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO) is one of the broadest and most complex statutes in American history. RICO has been the object of much controversy because of its broad reach and its imposition of both criminal and civil penalties. The statute was enacted as a response to the problem of organized crime, which was particularly prominent at the time of its passage.[1] However, over time RICO was increasingly used as a method of obtaining alternative relief in securities and business fraud cases.[2] Although Congress enacted it primarily as a criminal statute, RICO provides for a variety of civil remedies including treble damages and costs and attorney's fees.[3] RICO was viewed almost exclusively as a criminal statute during the first ten years of its existence. Although enacted in 1970, the explosion of civil RICO claims did not begin until the 1980s.[4] The attractiveness of civil RICO to plaintiffs lies predominantly in the prospect of treble damages.[5] However, the availability of a federal forum and the award of mandatory costs and

1. Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970) ("It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.").

2. *See, e.g.*, Barbara Black, *Racketeer Influenced and Corrupt Organizations (RICO)—Securities and Commercial Fraud as Racketeering Crime after* Sedima*: What is a "Pattern of Racketeering Activity?"*, 6 PACE L. REV. 365, 366 (1986) ("Attorneys representing the victims of securities and commercial fraud now routinely add a claim alleging a RICO violation. It is the attractiveness of the remedy—the successful plaintiff's recovery of treble damages and attorney's fees—that has led to this ever increasing use of RICO.").

3. *See infra* note 12 and accompanying text.

4. For example, of civil RICO cases decided prior to 1985, only three percent were decided between 1970–1980. After that time, two percent were decided in 1980, seven percent in 1981, thirteen percent in 1982, thirty-three percent in 1983, and forty-three percent in 1986. *See* ARTHUR F. MATHEWS ET AL., REPORT OF THE AD HOC CIVIL RICO TASK FORCE 55 (1985).

5. *See* Plount v. Am. Home Assur. Co., 668 F. Supp. 204, 205 (S.D.N.Y. 1987) ("[T]he civil RICO has resulted in a flood of what are and should be state court cases that are being reframed and brought in federal court as RICO actions because of the carrot of treble recovery and the availability of a federal forum."); Meadow Ltd. P'ship v. Heritage Savings & Loan Ass'n, 639 F. Supp. 643, 650 (E.D. Va. 1986) ("Not surprisingly, given the attractiveness of RICO's treble damages and attorneys fees, plaintiffs often include RICO counts in run-of-the-mill commercial cases, such as this one.").

attorney's fees are additional reasons why plaintiffs find civil RICO attractive.[6]

The continuing use of the civil RICO statute in cases not related to organized crime has led some commentators to argue that civil RICO is not just being overused but abused by plaintiffs.[7] Many business leaders have criticized civil RICO's broad reach.[8] Still others have argued that the extensive use of RICO has contributed greatly to the expansion of federal criminal law.[9]

RICO provides for a variety of remedies under both the criminal and civil sections. For instance, under criminal RICO, the government may seek imprisonment, fines, injunctions, and even forfeiture of any of the

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6. *See, e.g.*, Phillip Stuller, *How the RIAA Can Stop Worrying and Learn to Love the RICO Act: Exploiting Civil RICO to Battle Peer-to-Peer Copyright Infringement*, 24 LOY. L.A. ENT. L. REV. 521, 526 (2004) ("There are many attractive benefits for successful civil RICO plaintiffs including treble damage awards, mandatory cost and attorney fee awards, nationwide service of process, [and] worldwide personal jurisdiction . . . .").

7. *See generally* Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735 (1990) (discussing abuses of civil RICO); Arthur Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME L. REV. 896, 929 (1990) (commenting that "the use of civil RICO [provisions has] been pushed far beyond what Congress originally envisioned."). For a discussion on ways to reform RICO to eliminate abuses of the statute, see generally Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827 (1987). *But see* Michael Goldsmith & Penrod W. Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 BYU L. REV. 55 (1986) (arguing that RICO's critics have overstated the abuse of the statute, current legal procedures are adequate for handling abuses, and RICO is an effective tool for combating fraud in the commercial context).

8. For example, Edward O'Brien, president of the Securities Industry Association, argued:

> [B]ecause of the enticement of the possibility of treble damages and the recovery of attorney fees, [RICO] is now a boilerplate allegation used in every imaginable type of civil action, particularly common ordinary commercial disputes . . . .
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> The Department of Justice, in its use of RICO in criminal prosecutions, has published very careful guidelines for its use . . . . Unfortunately, plaintiffs' counsel in civil RICO suits have no such guidelines. The use of the statute is indiscriminate . . . .

Oversight on Civil RICO Suits: Hearing Before the S. Comm. on the Judiciary, 99th Cong. 3–4 (1985) (statement of Edward O'Brien, President, Sec. Indus. Ass'n) (footnotes omitted). One Securities and Exchange Commission Member testified that:

> RICO charges have been made in a wide variety of . . . cases against legitimate businesses having nothing whatsoever to do with organized crime . . . .
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> RICO's civil liability provision has turned virtually every securities fraud claim into a potential RICO claim, with all the benefits that RICO confers on plaintiffs, including potential treble damages and attorneys' fees and access to federal courts even for state law claims.

Oversight on Civil RICO Suits: Hearing Before the S. Comm. on the Judiciary, 99th Cong. 7 (1985) (statement of Charles Marinaccio, Member of the Sec. & Exch. Comm'n).

9. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 501–22 (1985) (Marshall, J., dissenting) (noting the dramatic shift of federal power under RICO).

defendant's proceeds derived from a violation of RICO.[10] In addition to costs and attorney's fees and treble damages, equitable relief may be available to civil RICO plaintiffs, but courts disagree about the availability of equitable relief to private plaintiffs under civil RICO.[11] The breadth and scope of the RICO statute make the question of what remedies should be obtainable by civil RICO plaintiffs especially difficult.

This Note considers whether disgorgement should be available as a remedy under civil RICO. Part II examines the leading cases on disgorgement under civil RICO and reviews the legislative history of RICO as it relates to the issue of available remedies. Part III discusses the rationale of the two leading cases in this area in light of the legislative history of the statute and prior Supreme Court precedent. Part IV proposes that disgorgement is a remedy properly within the courts' equitable jurisdiction as conveyed in § 1964(a), and, therefore, should be available under civil RICO.

II. OVERVIEW

Civil RICO provides a remedy of treble damages, the cost of the suit, and reasonable attorney's fees to "any person injured in his business or property by reason of a violation . . . ."[12] Section 1964(c) expressly creates

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10. *See* 18 U.S.C. § 1963 (2000). Few if any other criminal statutes provide for forfeiture. Criminal forfeiture was largely unknown in American law at the time. The use of the forfeiture provision was intended to provide an innovative approach to the contemporary problem of organized crime. *See* S. REP. NO. 91-617, at 79 (1969).

11. *Compare* Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 695 (7th Cir. 2001), *rev'd on other grounds*, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) ("We are persuaded . . . that the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief."), *with* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1088 (9th Cir. 1986) ("Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO."). Other courts have discussed the issue without deciding it. *See, e.g.*, Johnson v. Collins Entm't. Co., 199 F.3d 710, 726 (4th Cir. 1999); *In re* Fredeman Litig., 843 F.2d 821, 828–30 (5th Cir. 1988); Trane Co. v. O'Connor Sec., 718 F.2d 26, 28–29 (2d Cir. 1983) (expressing doubt about availability of injunctive relief for private plaintiffs); Bennett v. Berg, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief is available).

12. 18 U.S.C. § 1964(c) (2000). This section reads:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction become final.

a private cause of action for individuals who suffer injury to their business or property. Congress intended the private cause of action to act as a supplement to the criminal provisions of RICO to aid in combating organized crime.[13] The statute also grants courts the power to "prevent and restrain violations" by "issuing appropriate orders."[14] This provision is sometimes interpreted as providing equitable relief to private plaintiffs.[15] Civil RICO also provides for divestiture, restrictions on future activities, and dissolution or reorganization of an enterprise.[16] Interestingly, RICO contains a liberal construction clause mandating that "the provisions of this title shall be liberally construed to effectuate its remedial purposes."[17] Although most courts have followed the directive, some have applied a narrow construction to the statute, criticizing RICO's ambiguous and overly broad nature.[18] The Supreme Court has shown a willingness to apply RICO's liberal construction clause to civil actions under § 1964.[19]

To satisfy the elements of a civil RICO action, the plaintiff must show an injury to business or property caused by the defendant's violation of

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13. *See Sedima*, 473 U.S. at 498 (describing the intent of those supporting § 1964(c) to improve the effectiveness of RICO through private action).

14. 18 U.S.C. § 1964(a) (2000). The whole section reads:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

15. *See supra* note 11.

16. *See* 18 U.S.C. § 1964(a) (2000).

17. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922 (1970). Few, if any, other federal criminal statutes contain such a clause.

18. *See* Michael P. Kenny, *Escaping the RICO Dragnet in Civil Litigation: Why Won't the Lower Courts Listen to the Supreme Court*, 30 DUQ. L. REV. 257, 260 (1992) ("Although the Supreme Court has consistently refused to limit the RICO dragnet, numerous lower federal courts have pinched and pruned the statute consistently. Paradoxically, many of the restrictive interpretations are based on the language of Section 1964(c), which creates a private right of action."); David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 72 (1996) (citation omitted) ("Despite the Sedima Court's endorsement of civil RICO's broad scope and its liberal interpretation of Section 1964(c), 'judicial efforts to narrow (its) scope continue largely unabated.'"); Craig W. Palm, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 168–69 (1980) ("Most courts have followed the directive and interpreted RICO broadly. Some commentators and courts, however, have advocated a narrow construction, asserting that the statute is ambiguous and spreads the criminal net too wide.").

19. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 n.10 (1985) ("Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.").

one of the four racketeering acts described in § 1962.[20] The four prohibited acts under RICO are: investment of racketeering income, acquiring or maintaining an interest in or control of an enterprise, conducting or participating in the conduct of the affairs of the enterprise, and conspiring to violate any of these three prohibited activities.[21]

RICO also requires the presence of an "enterprise" and a "pattern of racketeering activity"[22] before any violation can be found.[23] The term "pattern of racketeering activity" is defined as "at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."[24] The term "enterprise" is defined broadly as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[25] There is no

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20. *See* 18 U.S.C. § 1962(c). In an effort to limit the broad application of RICO, many courts began to create (somewhat artificial) requirements that are not expressly contained in the language of the statute. Many of these limitations involved special injury requirements. These courts

> attempted to limit civil RICO in six main ways: (1) by including an organized crime requirement, (2) by requiring proof of a competitive injury, (3) by requiring proof of a racketeering injury, (4) by requiring a prior criminal conviction, (5) by requiring that the enterprise be a legitimate business, or (6) by requiring that the enterprise be accompanied by an economic motive.

See Audra K. Hamilton, *RICO, the Unexpected Protector Unveiled in* National Organization For Women, Inc. v. Scheidler, 48 ARK. L. REV. 851, 865 (1995). The Supreme Court has rejected all of these limitations in turn.

21. *See* 18 U.S.C. § 1962(a) (2000).

22. The issues raised by RICO's requirement of a "pattern of racketeering activity" are quite numerous. For a discussion of some of these issues and a glimpse at the circuit courts' lack of uniformity, see H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989).

23. For an excellent overview of the entire RICO statutory scheme see 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 7 (2d ed. 1992).

24. 18 U.S.C. § 1961(5). One key element in the "pattern of racketeering activity" of RICO is continuity. The alleged pattern of activity must pose a continuing threat in order to violate RICO. Courts generally recognize two ways to satisfy the continuity requirement: open-ended continuity and closed-ended continuity. Criminal activity that is ongoing or likely to occur in the future constitutes "open-ended continuity." Criminal activity that occurred over a substantial period of time—usually longer than one year—but has ceased may constitute "closed-ended" continuity and can also satisfy the pattern requirement. *See* BRICKEY, *supra* note 23, at 330–37. Another key element in the pattern requirement is the existence of a relationship between the separate racketeering acts. The relationship element requires the racketeering acts to have the same or similar purposes or results. The acts cannot merely be isolated events. *Id.* at 334.

25. 18 U.S.C. § 1961(4). RICO encompasses two general types of enterprises—formal organizations and "associated in fact" enterprises. Both legal entities and associations with strictly illegal motives are included in the definition. *See* BRICKEY, *supra* note 23, at 297–303. The enterprise element of RICO, similar to the pattern of racketeering activity and the injury requirements, has been used by courts to limit the reach of the statute. *See, e.g.*, Paul Edgar Harold, Quo Vadis, *Association in Fact? The Growing Disparity Between how Federal Courts Interpret RICO's Enterprise Provision in Criminal and Civil Cases*, 80 NOTRE DAME L. REV. 781, 781–82 (2005) ("Since the inception of RICO, [courts] have especially attempted to curtail the reach of the 'association-in-fact enterprise,' the

requirement under the statute that there be a connection to organized crime. Therefore, legitimate businesses and individuals are subject to liability if they violate any of RICO's provisions.[26] The remedies available under RICO's civil provisions are broad. Furthermore, the court possesses inherent equitable powers it may exercise to ensure justice.

The Supreme Court has characterized disgorgement as an equitable remedy that is restitutionary in nature.[27] In general, disgorgement is used to restore the status quo by forcing the defendant to return what rightfully belongs to the plaintiff or to return the fruits of his ill-gotten gains.[28] The measure of an equitable remedy like disgorgement is the loss to the victim or the gain to the violator.[29] Disgorgement can be seen as serving three general functions.[30] First, it serves to end the violation.[31] Second, disgorgement deprives the violator of the benefits of his violation.[32] Third, it restricts or removes the power of the violator to carry on illegal activities in the future.[33] Disgorgement is often used as a remedy in the context of securities law violations and other federal statutes.[34]

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element of the enterprise concept that gives RICO such variety in application. Currently, federal courts evidence the judicial hostility to civil RICO in particular through tightening their interpretation of what constitutes an association-in-fact enterprise in the civil context . . . .").

26. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) ("Yet Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.") (internal citation omitted).

27. *See* Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570 (1990) ("First, we have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'") (internal citation omitted).

28. *See* Tull v. United States, 481 U.S. 412, 424 (1987) (stating that restitution is limited to restoring the status quo and forcing the return of that which rightfully belongs to the plaintiff).

29. *See* DAN B. DOBBS, LAW OF REMEDIES §§ 1.1, 4.1 (2d ed. 1993).

30. *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 365 (1961) ("Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act . . . .") (quoting Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128–29 (1948), *overruled on other grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984)). *See also* United States v. Minn. Mining & Mfg. Co., 96 F. Supp. 356, 357 (1951) ("In general the object of the remedies under the anti-trust laws is to prevent the continuance of wrongful conduct, and to deprive the wrongdoers of the fruits of their unlawful conduct, and to prevent the creation anew of restraint forbidden by law.").

31. *E.I. du Pont*, 366 U.S. at 365.

32. *Id.*

33. *Id.*

34. *See* United States v. Lane Labs-USA Inc., 427 F.3d 219 (3d. Cir. 2005) (listing several cases that have permitted or awarded disgorgement under several different federal statutes such as Federal Trade Commission Act, Securities Exchange Act of 1934, and Commodity Exchange Act).

A. Leading Cases

The concept of disgorgement does not appear anywhere in the RICO statute. Interestingly, there have been relatively few cases addressing the issue of disgorgement as a remedy under civil RICO.[35] The first case to consider the issue was *United States v. Bonanno Organized Crime Family of La Cosa Nostra*.[36] In *Bonanno*, the district court reasoned that under securities laws, "[t]he authority to order disgorgement derives from the broad equitable powers given courts . . . ."[37] In the context of civil RICO, the court explained that disgorgement should be available because the equitable powers granted to courts are broader than those available under securities laws.[38] The court described the essence of equity jurisdiction as "the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."[39] The ability of courts to be flexible in crafting a solution is what distinguishes equitable remedies from legal remedies.[40] Ultimately, the court dismissed the government's complaint and disgorgement was not ordered.[41]

It was not long before the Eastern District of New York had another opportunity to consider the issue of disgorgement under civil RICO. In *United States v. Private Sanitation Industry Association*,[42] the district court followed the *Bonanno* logic and allowed the government to pursue disgorgement as an appropriate equitable remedy under civil RICO.[43] The court noted that divestiture was not the only remedy available under

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35. *See infra* note 45.
36. 683 F. Supp. 1411 (E.D.N.Y. 1988)
37. *Id.* at 1448.
38. *Id.*
39. *Id.* (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944)).
40. *Id. See also* Freeman v. Pitts, 503 U.S. 467, 487 (1992) ("The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision."); United States v. Paradise, 480 U.S. 149, 183–84 (1987) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.") (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 358 n.8 (1961) ("Equitable remedies . . . are distinguished by their flexibility**,** their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.") (quoting POMEROY, EQUITY JURISPRUDENCE § 109 (5th ed. 1941)).
41. *Bonanno*, 683 F. Supp. at 1460.
42. 793 F. Supp. 1114 (E.D.N.Y. 1992).
43. *Id.* at 1152.

§ 1964(a) and that disgorgement was among the equitable remedies available to courts.[44]

1. United States v. Carson

The Second Circuit, one of the few circuits to have actually decided the issue,[45] ultimately agreed with the district court. In *United States v. Carson*,[46] the Second Circuit held that disgorgement is an available remedy under RICO because of the broad equitable powers granted to courts under § 1964(a).[47] Defendant Donald Carson was the Secretary-Treasurer of the International Longshoremen's Association from 1972 to 1988.[48] During his tenure, Carson was involved with the Gambino organized crime family.[49] The district court found that Carson had accepted kickbacks in exchange for certain labor deals,[50] embezzled funds from the Longshoremen's Association,[51] and had used intimidation and fear to suppress the democratic rights of union members by calling attention to his connection with organized crime.[52] The district court ordered Carson to disgorge $60,000 in connection with his embezzlement of the Association's funds.[53]

According to the Second Circuit, "[a]s a general rule, disgorgement is among the equitable powers available to the district court . . . ."[54] Even though the court accepted disgorgement as an available remedy under civil RICO, it limited use of disgorgement as a remedy to those situations in which disgorgement could be used to prevent "ongoing and future misconduct."[55] The court focused on the "to prevent and restrain" language of § 1964(a). "The three examples contained in the text of section 1964(a) are forward looking, and calculated to prevent RICO

44. *Id.* at 1151.

45. At the present time, only the Second and D.C. Circuits have actually decided the issue. However, the Fifth Circuit has discussed the issue in dicta. *See* United States v. Carson, 52 F.3d 1173 (2d Cir. 1995); United States v. Philip Morris USA, Inc., 396 F.3d 1190 (D.C. Cir. 2005); Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345 (5th Cir. 2003).

46. 52 F.3d 1173 (2d Cir. 1995).

47. *Id.* at 1181.

48. *Id.* at 1176.

49. *Id.*

50. *Id.* at 1177.

51. *Id.*

52. *Id.* at 1178.

53. *Id.* at 1179.

54. *Id.* at 1181.

55. *Id.*

violations in the future."[56] The court rejected the notion that whatever hurts a RICO violator will necessarily prevent and restrain future violations of RICO.[57] Thus, under *Carson*, a court should order disgorgement if future violations would be impacted but should not order disgorgement merely as a means of punishing the RICO violator. Any punitive use of disgorgement is not authorized by § 1964 and therefore would fall outside the jurisdiction of the courts.[58]

2. United States v. Philip Morris USA, Inc.

The D.C. Circuit is the only other circuit to have decided the issue of whether disgorgement is a proper remedy under civil RICO.[59] The D.C. Circuit recently considered the issue of disgorgement in the context of the tobacco industry litigation.[60] In *United States v. Philip Morris USA, Inc.*,[61] the government alleged that several cigarette manufacturers fraudulently concealed the fact that tobacco use poses certain health-related dangers to users, including cancer and other negative effects.[62] The government also alleged that the cigarette manufacturers engaged in illegal marketing of their products to minors.[63] The manufacturers engaged in a criminal enterprise to carry out their fraudulent activities and therefore violated RICO.[64] The government sought several remedies including damages, injunctive relief, and disgorgement of $280 billion in proceeds from cigarette sales to the "youth addicted population" between 1971 and 2001.[65] The defendants challenged the availability of disgorgement as a remedy under civil RICO.

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56. *Id.*
57. *Id.* at 1182.
58. *Id.*
59. *See supra* note 45.
60. See Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 863–69 (2004), for a brief discussion of the government's suit against the tobacco industry. For a more extensive discussion see also Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143 (2001); Robert L. Rabin, *The Tobacco Litigation: A Tenative Assessment*, 51 DEPAUL L. REV. 331 (2001).
61. 396 F.3d 1190 (D.C. Cir. 2005), *cert. denied* 126 S. Ct. 478 (2005).
62. *Id.* at 1192.
63. *Id.*
64. *Id.*
65. *Id.* at 1193.

Reversing the decision of the district court,[66] the appellate court held "that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a possible remedy . . . ."[67] The appellate court viewed the language of § 1964(a), "to prevent and restrain" RICO violations, coupled with the examples of remedies given in the text,[68] as limiting relief available under civil RICO exclusively to those remedies that are aimed at future actions.[69] "Disgorgement, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo."[70] The court asserted a number of arguments to justify its holding. The court found the comprehensive structure of RICO's remedial scheme to be strong evidence that Congress did not intend to authorize any remedies not expressly included in the statute.[71] Because of RICO's "'comprehensive and reticulated' remedial scheme," there exists "a necessary and inescapable inference" that Congress intended to limit relief under § 1964(a) to exclude disgorgement.[72] Additionally, the court noted the similarity between disgorgement under § 1964 and the criminal forfeiture provision of § 1963.[73] However, because § 1963 is a criminal provision, it contains additional procedural safeguards such as a five-year statute of limitations, proof beyond a reasonable doubt, and certain notice requirements.[74] If disgorgement was available as a remedy, plaintiffs could simply bypass the more rigorous procedures required by § 1963. Furthermore, recovery under disgorgement could be duplicative of the damages available under § 1964(c).[75]

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66. *See* United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72 (D.D.C. 2004). The district court went so far as to say that *Carson*'s limitation on disgorgement to those ill-gotten gains being used to fund illegal activities was not consistent with the plain language of § 1964(a) or the legislative history of RICO. *Id.* at 77.

67. *Philip Morris*, 396 F.3d at 1197.

68. Section 1964(a) gives several examples of "appropriate orders":

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

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

70. *Id.*

71. *Id.* at 1200.

72. *Id.* (citation omitted).

73. *Id.*

74. *Id.* at 1200–01.

75. *Id.* at 1201. *See supra* note 11 for damages available under § 1964(c).

In its opinion, the *Philip Morris* court relied on the Supreme Court's ruling in *Meghrig v. KFC Western, Inc*.[76] In *Meghrig*, the Court found that compensation for past environmental cleanup was not contemplated by the statute at issue.[77] *Meghrig* arose in the context of a private citizen suit under the Resource Conservation and Recovery Act (RCRA)[78] for recovery of cleanup costs incurred by the plaintiffs. The RCRA had a companion act in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[79] which provided for recovery of cleanup costs.[80] Like § 1964(a), the RCRA also contains the language "to restrain" in its provision for remedies.[81] The Court explained that "where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute . . . 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute."[82]

The *Philip Morris* court rejected the government's argument that *Porter v. Warner Holding Co.*[83] and *Mitchell v. Robert DeMario Jewelry, Inc.*[84] require grants of equitable jurisdiction to be read broadly.[85] In *Porter*, the Supreme Court concluded that the Emergency Price Control Act of 1942[86] authorized the courts to order recovery and restitution of illegal rents obtained in violation of the Act.[87] The Court instructed, "Unless a statute in so many words, or by a necessary and inescapable

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76. 516 U.S. 479 (1996).

77. *Id.* at 483.

78. 42 U.S.C. § 6972(a) (2000). The relevant portion provides:

> The district court shall have 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 referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both . . . .

79. 42 U.S.C. §§ 9601 9675 (2000).

80. Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990), *abrogated on other grounds by* Key Tronic Corp. v. United States, 511 U.S. 809 (1994) (The "two . . . main purposes of CERCLA [are] prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.").

81. United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1199 (D.C. Cir. 2005).

82. *Meghrig*, 516 U.S. at 487–88 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981)).

83. 328 U.S. 395 (1946).

84. 361 U.S. 288 (1960).

85. *Philip Morris*, 396 F.3d at 1197–99.

86. 50 U.S.C. App. § 925(a) (repealed 1947). The Emergency Price Control Act was enacted in response to substantial inflationary pressures in the United States and its imminent entrance into the Second World War. Congress was very concerned about rising prices, the cost of the war, and supply shortages owing to the country's reduced labor force brought on by the large number of employed men and women who left their jobs and families to fight in the war. *See* S. REP. NO. 77-931 (1942).

87. *Porter*, 328 U.S. at 399.

inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[88] Furthermore, "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command."[89] The Court clearly stated that equity jurisdiction should not be limited once it is granted to the courts unless the language of the particular statute expressly places limits on the courts' equitable powers.[90]

In *Mitchell*, the Supreme Court followed the general principles laid out in *Porter*. *Mitchell* involved the equitable jurisdiction of courts under the Fair Labor Standards Act (FLSA).[91] The FLSA, similar to RICO, contained language that authorized courts "to restrain violations" of the Act.[92] After quoting *Porter*'s general recognition of courts' broad equitable powers, the Court went on to say:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.''[93]

The Court found that the district courts' equitable powers under the FLSA included the power to order reimbursement of lost wages because of an unlawful discharge.[94]

The *Philip Morris* court distinguished the grant of equitable jurisdiction found in civil RICO from that found in the Emergency Price Control Act of 1942 and the Fair Labor Standards Act of 1938.[95] The goal

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88. *Id.* at 398.
89. *Id.*
90. *Id.*
91. 29 U.S.C. § 500 201-219 (2000).
92. 29 U.S.C. § 217 provides:

> The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

93. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 298, 291–92 (1960) (quoting Clark v. Smith, 38 U.S. 195, 203 (1839)).
94. *Id.* at 296.
95. United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1198 (D.C. Cir. 2005). The court emphasized the fact that the statute at issue in *Porter* was designed to combat inflation. *See supra* note

of § 1964(a) is to prevent or restrain future violations.[96] The court believed the plain language of the civil RICO provision limited the courts' equitable jurisdiction to those remedies aimed solely at future conduct.[97] Thus, in the D.C. Circuit's view, disgorgement is not an appropriate remedy under civil RICO.[98]

3. Richard v. Hoechst Celanese Chemical Group, Inc.

In contrast to the D.C. Circuit, the Fifth Circuit has spoken favorably about the *Carson* decision, but only in dicta. In *Richard v. Hoechst Celanese Chemical Group, Inc.*,[99] the plaintiff brought a class action suit alleging that the defendants had misrepresented the quality of their polybutylene plumbing systems.[100] The plaintiff claimed that the defendants had described their plumbing systems as lightweight, inexpensive, able to withstand harsh temperatures, and having a lifetime of fifty years.[101] In reality, the defendants' plumbing system did not live up to these promises.[102] Among other claims, the plaintiff sought equitable relief under civil RICO.[103] The Fifth Circuit declined to reach the question of whether disgorgement is available as an equitable remedy under civil RICO.[104] Nonetheless, the court, in dicta, agreed with the reasoning of the Second Circuit in *Carson*.[105] Disgorgement is available as a remedy under § 1964(a) but "only to prevent ongoing and future conduct."[106] The

86. The court reasoned that disgorgement of past overcharges would further the purpose of that particular statute. The purpose of § 1964(a), however, is to "prevent and restrain" violations in the future. According to the court, disgorgement would not further that purpose because its aim is to remedy past violations. *Phillip Morris*, 396 F.3d at 1198.

96. *Phillip Morris*, 396 F.3d at 1198.

97. *Id.*

98. Judge Tatel dissented. He disagreed with the majority's application of *Meghrig*, arguing that *Porter* and *Mitchell* controlled the case. He did not interpret RICO's provisions as imposing a "necessary and inescapable inference" limiting the district court's equity jurisdiction, which prevents the complete administration of justice. Judge Tatel also disagreed with the majority's view that disgorgement "is a quintessentially backward-looking remedy." On the contrary, the decisions in *Porter* and *Mitchell* found that disgorgement can impact future conduct. *Id.* at 1220–24 (Tatel, J., dissenting). "Although I agree that a court sitting in equity cannot order disgorgement that exceeds a defendant's past ill-gotten profits . . . this does not mean disgorgement is always backward-looking and can never have a forward-looking effect on the defendants. The Supreme Court made this clear in *Porter* . . . ." *Id.* at 1223.

99. 355 F.3d 345 (5th Cir. 2003).

100. *Id.* at 347.

101. *Id.* at 348.

102. *Id.*

103. *Id.* at 349.

104. *Id.* at 354.

105. *Id.* at 355.

106. *Id.*

plaintiff in this case did not seek disgorgement to prevent and restrain the production of the plumbing systems. Indeed, the defendant manufacturers no longer produced the plumbing systems at all.[107] In this instance, the disgorgement claim was sought as compensation for the injury to the plaintiff and not to prevent future conduct.[108]

B. Legislative History

A review of RICO's legislative history reveals that Congress never specifically considered the issue of disgorgement as a remedy under § 1964(a). Even so, the legislative history is valuable as a means for understanding what Congress intended to remedy by enacting RICO.[109]

Prior to RICO's enactment, Congress had documented extensively the pervasiveness, structure, and magnitude of organized crime, not only in illegitimate businesses, but also in legitimate businesses.[110] In response to

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107. *Id.*

108. *Id.* Circuit Judge Wiener disagreed with the majority opinion on only one point—the availability of disgorgement to the plaintiff in *Richard*. He argued that the proper focus or target of the "prevent and restrain" language of § 1964(a) is not the specific defendant in the case, but is all potential defendants similar to the actual defendant. From this point of view, disgorgement would satisfy the "prevent and restrain" requirement by deterring potential violators from engaging in conduct prohibited by RICO. *Id.* at 355–56 (Wiener, J., dissenting) ("Thus, it seems clear to me that the primary thrust of disgorgement *is* to 'prevent and restrain' the offending parties—as well as all potential malefactors who receive the message—from engaging in such activities with *any* product, not just the single discontinued product that happened to have been the object of the proscribed behavior alleged in the particular case.").

109. For a detailed overview of the legislative history of RICO, see G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980). *See also* Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 38–51 (1996).

110. *See, e.g.*, S. REP. NO. 89-72 (1965); S. REP. NO. 87-1784 (1962); S. REP. NO. 86-621 (1959); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADM. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 190 (1967). In the Senate's report accompanying the bill that would eventually be enacted as RICO, the Judiciary Committee listed its findings as follows:

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

the growing problem of organized crime in America, Senators McClellan and Hruska each introduced a bill in the Senate aimed at combating organized crime.[111] These two bills eventually were combined, and the new bill, named Senate Bill 30, was passed by the Senate almost unanimously.[112] The House made several changes to Senate Bill 30. Most of the changes limited the scope of the bill.[113] However, § 1964(c), providing for the additional remedies of treble damages and attorney's fees, was added.[114] The altered version of Senate Bill 30 passed in the House was approved by the Senate and signed into law by President Nixon on October 15, 1970.[115]

Probably most illustrative of congressional intent in including § 1964 is the Senate's report on the bill that eventually became RICO.[116] In describing the civil remedies the bill provided, the Senate Judiciary Committee explained that, even though the use of remedies such as injunctions, divestment, and dissolution were explicitly authorized by the plain language of the statute, those remedies were not exclusive.[117] The

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> bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

S. REP. NO. 91-617, at 1–2 (1969).

111. Senator McClellan's bill was titled the Organized Crime Control Act. S. 30, 91st Cong. (1969). Senator Hruska's bill was titled the Criminal Activities Profits Act. S. 1623, 91st Cong. (1969). *See* Blakey & Gettings, *supra* note 109, at 1017.

112. The bill emerging from the Judiciary Committee and passed by the Senate was broader than either of the bills initially introduced by Senators McClellan or Hruska. *See* Blakey & Gettings, *supra* note 109, at 1019. Interestingly, the vote in the Senate to pass the bill was 73 to 1. 116 CONG. REC. 972 (1970).

113. *See* Blakey & Gettings, *supra* note 109, at 1020.

114. There was little discussion regarding the private treble damages provision. It seemed to be generally accepted as a positive addition to the bill. *See* Kristi Rae Culver, *Civil RICO: Should Private Plaintiffs be Granted Equitable Relief?*, 18 PAC. L.J. 1199, 1211 (1986). The addition of subsection C to § 1964 was proposed by the American Bar Association. "In the portion seeking to add a proposed section 1964 'civil remedies' we would recommend an amendment to include the additional civil remedy of authorizing private damage suits based on the concept of § 4 of the Clayton Act." 116 CONG. REC. 25, 190–91 (1970).

115. 116 CONG. REC. 37264 (1970).

116. *See* S. REP. NO. 91-617 (1969).

117. *Id.* at 81. Specifically, the Senate report reads:

> Title IX thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of civil remedies, including a civil investigative demand, now available in the antitrust area. The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that Title IX seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil. Punishment as such is limited to the criminal remedies, noted above.

Id. at 81.

purpose of § 1964 was to provide civil remedies *in addition to* the criminal penalties of § 1963 in order to give RICO more flexibility in addressing criminal organizations.[118] Along with greater flexibility, civil remedies increase the deterrent effect of the statute and, in some cases, provide a more efficient method of attacking illegal activity (e.g. the standard of proof in civil cases is lower than in criminal cases). It is clear from the Senate's report that the civil remedies provided for by RICO are meant to be strictly remedial in nature and are not intended to punish the violator. Punishment, as such, is limited to the criminal penalties laid out in § 1963.[119]

III. ANALYSIS

Any discussion of the interpretation of civil RICO must be undertaken with the realization that the Supreme Court requires courts to read civil RICO broadly to effectuate its purpose.[120] RICO's liberal construction clause has been recognized and used by courts to broadly interpret RICO's provisions.[121] The legislative history of RICO confirms Congress's intent to construe the statute broadly, not narrowly.[122] Despite the fact that RICO's broad application is commonly used against legitimate businesses rather than organized crime, the Supreme Court has upheld a broad construction of the statute, stating that this particular defect "is inherent in the statute as written, and its correction must lie with Congress."[123]

A. RICO's Liberal Construction Mandate

The court's opinion in *Philip Morris* largely ignores RICO's liberal construction clause. Instead, the court focuses on the words "to prevent and restrain" in § 1964(a).[124] The court held, "The language of the statute explicitly provides three alternative ways to deprive RICO defendants of

118. *Id*. The civil remedies provided for in § 1964(a) include equitable remedies, which are inherently more flexible than legal remedies. *See supra* note 40.

119. S. REP. NO. 91-617, at 81 (1969).

120. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497–98 (1985) ("RICO is to be read broadly. This is the lesson not only of Congress' 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 . . . .'") (internal citations omitted).

121. *See* Palm, *supra* note 18, at 168.

122. *See supra* note 117 and accompanying text.

123. *Sedima*, 473 U.S. at 499. *See also* United States v. Turkette, 452 U.S. 576, 589–91 (1981) (holding that RICO applies to both legitimate and illegitimate businesses and noting the broad purpose of Congress to seek the eradication of organized crime in the United States).

124. *See* United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1198 (2005).

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."[125] But the D.C. Circuit's analysis completely ignores the plain language of § 1964(a), which reads, "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, *including, but not limited to* the listed remedies."[126] The court's analysis essentially ignores the "including, but not limited to" language; instead, the court argues that because the examples of appropriate remedies given in § 1964(a) are all forward looking, all possible remedies under § 1964(a) must be forward looking.[127] This analysis also ignores the legislative history of the provision,[128] which clearly shows that Congress envisioned use of any remedy which advances the goals of the statute.[129] Nowhere in the legislative history is there any indication that disgorgement is precluded as a remedy under civil RICO because it is not strictly "forward looking."[130]

B. Interpreting Porter *and* Mitchell

The D.C. Circuit also improperly interpreted both *Porter* and *Mitchell*. In *Porter*, the Supreme Court held that the Emergency Price Control Act granted courts equitable jurisdiction to order restitution of illegal rents obtained in violation of the Act.[131] The relevant language in *Porter* granted courts the authority to enter a "permanent or temporary injunction, restraining order, or other order . . . ."[132] The statute said nothing about

125. *Id.* at 1201.

126. 18 U.S.C. § 1964(a) (2000) (emphasis added).

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

128. *See* S. REP. NO. 91-617, at 160 (1969) ("Subsection (a) contains broad remedial provisions for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.").

129. *Id.*

130. *See supra* note 117 and accompanying text. The argument that disgorgement is an inherently backward-looking remedy also ignores its deterrent effect on future violations. Several judges have argued that the deterrent effect of disgorgement is sufficiently forward-looking to satisfy the "to prevent and restrain" language of § 1964(a). *See, e.g.*, *supra* notes 98 and 108.

131. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398–99 (1946) ("It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under § 205(a).").

132. *Id.* at 397. According to the *Porter* court, § 205(a) of the Emergency Price Control Act read:

> 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

disgorgement, but the Court allowed the use of restitution as a remedy under the statute despite the lack of any language specifically authorizing it.[133]

In *Mitchell*, the Court held that the Fair Labor Standards Act granted courts the power to order restitution for lost wages resulting from a violation of the Act.[134] The language at issue in *Mitchell* gave courts jurisdiction "to restrain the violations."[135] *Mitchell* thus expanded the scope of *Porter* to give courts as much equitable jurisdiction as is necessary to further the policies and purposes of the empowering statute. The language of the statute at issue in *Mitchell* is similar to the language used in § 1964(a).[136] Both statutes use the phrase "to restrain," which implies, at the very least, that equitable powers similar to those found available in *Mitchell* must also be available under civil RICO.

Porter and *Mitchell* together stand for the proposition that "a district court sitting in equity may order restitution unless there is a clear statutory limitation on the district court's equitable jurisdiction and powers; and . . . restitution is permitted only where it furthers the purposes of the statute."[137] With respect to § 1964(a), disgorgement furthers the purpose of the provision by depriving the violator of his ill-gotten gains and deterring the defendant from engaging in similar conduct in the future. This is consistent with Congress's intent that all remedies that further the broad aims of RICO should be available under § 1964(a).[138]

C. Misplaced Reliance on Meghrig

Moreover, the *Philip Morris* court's reliance on *Meghrig* is misplaced. *Meghrig* arose in the context of a private citizen suit under RCRA for recovery of cleanup costs incurred by the plaintiffs.[139] Unlike RICO, this statute has a companion act in the CERCLA, which provides for recovery

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> section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts 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.

Porter, 328 U.S. at 397.

133. *See Porter*, 328 U.S. at 399.
134. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 296 (1960).
135. 29 U.S.C. § 217 (2000).
136. *Compare* 29 U.S.C. § 217 (2000) *with* 18 U.S.C. § 1964(a) (2000).
137. United States v. Lane Labs-USA Inc., 427 F.3d 219, 225 (3d Cir. 2005).
138. *See supra* note 128.
139. *See* Meghrig v. KFC Western, Inc., 516 U.S. 479, 481 (1996).

of cleanup costs.[140] RICO's own provisions set out comprehensive remedies to effectuate its purposes. In addition, RICO's statutory scheme, with its broad remedial purpose and liberal construction clause, is easily distinguishable from RCRA.[141] The general principles clearly expressed in *Porter* and *Mitchell* control the availability of disgorgement as an equitable remedy under civil RICO, not *Meghrig*.[142]

D. Characteristics of Disgorgement

The *Phillip Morris* court's refusal to recognize disgorgement as an available remedy under the logic of *Porter* and *Mitchell* is inconsistent with a number of other appellate courts, which have recognized disgorgement as an equitable remedy under other statutory schemes. For example, the Eleventh Circuit held that the Federal Trade Commission Act (FTCA) gives courts the equitable power to order disgorgement.[143] In an FTC case against a telemarketing company, the court relied on *Porter* to infer broad equitable jurisdiction from the statute at issue.[144] The FTCA granted courts the power to issue injunctions and "to enjoin" violations.[145] The court noted that the statute played an important role in the enforcement of consumer protection laws.[146] "Accordingly, disgorgement, the purpose of which 'is not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain,' is appropriate."[147]

Similarly, the Sixth Circuit held that the Federal Food, Drug and Cosmetic Act (FDCA) authorizes courts to compel disgorgement and restitution.[148] In *United States v. Universal Management Services*, a case against a company engaged in the sale of certain products in violation of

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140. *Id.* at 483.

141. *See* United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1220 (2005) (Tatel, J., dissenting) ("In my view, *Porter* and *Mitchell*, not *Meghrig*, 'directly control' this case. Several reasons support this conclusion, and nothing points the other way.").

142. *Id.*

143. *See* FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996).

144. *Id.* at 469 ("As *Porter* makes plain, absent a clear command to the contrary, the district court's equitable powers are extensive. Among the equitable powers of a court is the power to grant restitution and disgorgement.").

145. *See* 15 U.S.C. § 53(b), which provides in relevant part: "[T]he Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. . . . [I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

146. *FTC*, 87 F.3d at 470.

147. *Id.* (quoting SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978)).

148. *See* United States v. Universal Mgmt. Services, Inc., 191 F.3d 750, 762 (6th Cir. 1999) ("[N]othing in the FDCA precludes a court sitting in equity from ordering restitution in appropriate cases.").

the FDCA, the court also relied on *Porter*.[149] The language of the FDCA grants courts jurisdiction "to restrain violations."[150] Therefore, the court held that because nothing in the FDCA explicitly restricted courts' equitable jurisdiction, restitution and disgorgement were remedies available under the statute.[151]

Even the D.C. Circuit has allowed disgorgement in the context of the Securities Exchange Act. In *SEC v. First City Financial Corp.*,[152] the SEC charged the defendants with violating § 13(d) of the Securities Exchange Act.[153] The court held that §§ 21(d) and (e)[154] of the Act, which grant courts the power "to enjoin" future violations, permitted disgorgement as a remedy.[155] Furthermore, the court described disgorgement as "an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to *deter* others from violating the securities laws."[156] The *Philip Morris* court's characterization of disgorgement as an "inherently backward-looking remedy" is in direct conflict with its previous holdings allowing disgorgement in other contexts because of the remedy's tendency to deter future violations.[157]

The critical difference between the Second Circuit's view of disgorgement and the D.C. Circuit's view lies in the courts' views of how disgorgement functions as a remedy. Under the Second Circuit's view, disgorgement can be an effective tool used to "prevent and restrain" future violations when the ill-gotten gains have been obtained relatively recently.[158] On the other hand, the D.C. Circuit's view of disgorgement is

149. *Id.* at 761 ("Absent a clear command by Congress that a statute providing for equitable relief excludes certain forms of such relief, this court will presume the full scope of equitable powers may be exercised by the courts.").

150. 21 U.S.C. § 332(a) provides: "The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown to restrain violations of section 331 of this title . . . ."

151. *Universal Mgmt.*, 191 F.3d at 762.

152. 890 F.2d 1215 (D.C. Cir. 1989).

153. *Id.* at 1217.

154. 15 U.S.C. § 78u(d), (e).

155. *First City Fin. Corp.*, 890 F.2d at 1230 ("Disgorgement, then, is available simply because the relevant provisions of the Securities Exchange Act of 1934, sections 21(d) and (e), 15 U.S.C. §§ 78u(d) and (e), vest jurisdiction in the federal courts.").

156. *Id.* (emphasis added).

157. *Compare* United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1198 (2005) ("Disgorgement, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo."), *with First City Fin. Corp.*, 890 F.2d at 1230 ("Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws.").

158. *See supra* text accompanying notes 54–57.

that the remedy is inherently backward looking and cannot be used to prevent future violations.[159]

The D.C. Circuit's characterization of disgorgement is erroneous. Not only does the court's depiction of disgorgement as inherently backward looking ignore the Supreme Court's discussion of restitution in *Porter*, it also ignores the economic and deterrent effects of the remedy. In *Porter*, the Court characterized orders for restitution as having a material impact on the likelihood of future violations.[160] The Court explained that "it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains . . . ."[161] Moreover, the government presented expert testimony in the *Philip Morris* case showing that a disgorgement order will have a substantial deterrent effect on future violations.[162] For example, one of the government's expert witnesses testified that "requiring defendants to pay proceeds will affect their expectations (and those of others contemplating malfeasance) about the returns from future misconduct. As a matter of economic principle, the higher the proceeds amount, the lower the expected returns from future misconduct and the greater the desired effect of deterrence."[163]

The *Philip Morris* court's view of disgorgement as a remedy is limited and incomplete. The court focuses on the fact that past ill-gotten gains are taken from the violator while ignoring all other benefits of the remedy such as deterrence and prevention of the funds being used in future violations. Disgorgement is not merely a "backward-looking" remedy. On the contrary, disgorgement has real value in preventing and deterring future violations.[164]

IV. PROPOSAL

The Supreme Court should resolve the circuit split by allowing disgorgement as a remedy under § 1964(a). The court in *Philip Morris*

159. *See supra* notes 66–75 and accompanying text.

160. Porter v. Warner Holdings Co., 328 U.S. 395, 400 (1946).

161. *Id.*

162. *See Philip Morris*, 396 F.3d at 1223 (Tatel, J., dissenting) ("The government offers expert testimony to the effect that a disgorgement order will deter the tobacco companies from violating RICO in the future—in the dictionary's language, it will deprive them of the hope of succeeding in benefiting from future RICO violations and hold them back from committing such violations.").

163. *Id.* at 1206 (citation omitted).

164. *See supra* notes 160–62 and accompanying text.

incorrectly applied the general principles set out in *Porter* and *Mitchell* that "[u]nless 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."[165] Furthermore, the *Carson* court's admonition that "we do not see how it serves any civil RICO purpose to order disgorgement of gains ill-gotten long ago."[166] also misses the mark. Both courts failed to recognize, or even consider, the possibility that disgorgement can act as a deterrent function that serves to "prevent and restrain" future violations.[167] The Supreme Court explicitly recognized the restraining effect of restitution in *Porter*.[168] Both *Carson* and *Philip Morris* ignore the import of *Porter*'s general principles.

Disgorgement also serves to "prevent and restrain" future violations by depriving the violator of capital used "to fund or promote the illegal conduct."[169] In this respect, the effect of disgorgement is similar to the effects of divestment or dissolution, which are expressly listed in § 1964(a).[170] In fact, in circumstances where the defendants are legitimate businesses, such as large publicly held corporations like the one in *Philip Morris*, disgorgement is a much more attractive equitable remedy than either divestment or dissolution because the defendant company can continue to do business after disgorging its ill-gotten gains. One of the principle characteristics of equitable jurisdiction is the power of the court to craft flexible remedies that best address the problems in a given case.[171]

The argument that disgorgement overlaps with the criminal remedy of forfeiture, which is available under § 1963(a), is without merit. Congress never intended for RICO's civil and criminal remedies to be mutually exclusive.[172] Rather, Congress intended to provide new remedies, both criminal and civil, in order to supply the option to the government of using whatever tool would be most effective.[173] The legislative history is quite clear on this point.[174]

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165. *Porter*, 328 U.S. at 398.

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

167. *See Philip Morris*, 396 F.3d at 1223 (Tatel, J., dissenting) ("This court does not conclude that disgorgement can never have a restraining effect on future conduct of the defendants—the only conclusion that could justify a holding that district courts can never order disgorgement under section 1964(a). Instead, the court offers several unpersuasive reasons for its conclusion that as a matter of statutory interpretation disgorgement is not a permissible remedy under section 1964(a).").

168. *Porter*, 328 U.S. at 400. *See also supra* note 160 and accompanying text.

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

170. *See supra* note 14.

171. *See supra* note 40 and accompanying text.

172. *See* S. REP. NO. 91-617, at 79 (1969) (observing that an individual violator could be legally separated from the organization either by the criminal law approach *or* through a civil law approach).

173. *Id.* at 78 (noting that traditional criminal approaches were relatively ineffective tools for

Finally, the legislative history of RICO demonstrates that Congress intended to grant courts broad equitable powers.[175] Section 1964(a) brings to bear on RICO violators "the full panoply of civil remedies."[176] Although certain specific remedies are laid out in § 1964(a), the legislative history of the section shows that "the list is not exhaustive, and the *only* limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons."[177] Disgorgement properly advances the aims of civil RICO by preventing and restraining future violations.

V. CONCLUSION

Disgorgement is a restitutionary remedy that should be available to courts hearing RICO claims under the equitable jurisdiction granted by § 1964(a). The two appellate courts that have decided this issue have split. In *Carson*, the Second Circuit held that disgorgement is an available remedy under § 1964 because of the broad equitable powers granted to courts by that provision. However, the *Carson* court limited the use of disgorgement as a remedy to those situations in which it could be used to prevent ongoing and future conduct. In *Philip Morris*, the D.C. Circuit held that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a proper remedy.

The *Philip Morris* court largely ignored the legislative history of RICO, which demonstrates that the equitable remedies expressly listed in § 1964(a) are not exhaustive. The remedies listed within the statute are examples of the remedies available under § 1964(a), but are by no means meant to be a limitation on other equitable remedies which are not expressly listed in the provision.

Furthermore, the *Philip Morris* decision incorrectly interpreted Supreme Court precedent. Both *Porter* and *Mitchell* clearly stand for the proposition that a court's equitable jurisdiction, including restitution, may not be limited absent clear statutory intent to do so. The language "to

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implementing RICO's economic policy). Congress sought new remedies to deal not only with individual criminals but also with the economic base those individuals used to carry out their crimes. *Id.* at 79 ("What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.").

174. *See supra* notes 117–19 and accompanying text.

175. *See supra* notes 116–19 and accompanying text.

176. S. REP. NO. 91-617, at 81 (1969).

177. *Id.* at 160 (emphasis added).

prevent and restrain" in § 1964(a) certainly does not constitute a clear statutory intent to limit the equitable jurisdiction of courts. This is especially true given the clear intent of Congress that the only limit on RICO's civil remedies be that "they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons."[178] Thus, the equitable remedies available under § 1964(a) should be interpreted broadly in order to accomplish the goals of RICO.[179]

Finally, excluding disgorgement as an available remedy under civil RICO is inconsistent with many other appellate court decisions that have recognized disgorgement as a proper equitable remedy under other similar statutory schemes. Many other courts have interpreted statutory language similar to the "prevent and restrain" language used in § 1964(a). These other courts reasoned that disgorgement often furthers the purpose of a particular statute by depriving the wrongdoer of his ill-gotten gains and deterring others from committing similar violations in the future.

For the reasons discussed above, *Philip Morris* unnecessarily restricts the equitable jurisdiction conveyed by § 1964(a) and should not be followed by other courts. Disgorgement should be a remedy available to courts under § 1964(a) to further the goals Congress sought to achieve when it enacted RICO.

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178. *Id.*

179. *See supra* note 1 listing the major goals sought by RICO.

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