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A Modest Proposal on Supreme Court Unanimity to Constitutionally Invalidate Laws

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THE AVAILABILITY OF EQUITABLE REMEDIES FOR PRIVATE LITIGANTS UNDER UTAH'S RACKETEERING INFLUENCES AND CRIMINAL ENTERPRISE ACT

I. [§ 1] INTRODUCTION

In 1970, the United States Congress included Title IX—Racketeer Influenced and Corrupt Organizations (RICO)—as part of the Organized Crime Control Act.[1] The purpose of RICO is, *inter alia*, "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies."[2] In order to achieve this purpose, RICO allows for unique remedies (treble damages), unique sanctions (attorney fees), and unique penalties (forfeiture) on both a civil and criminal level. During the first few years following the enactment of RICO, only limited civil action occurred. However, recent years have witnessed a barrage of civil RICO cases. This sudden influx in the number of RICO suits has burdened the courts, and influenced several legislative bodies to act. In the federal legislature, amendments have been proposed and adopted as part of federal RICO, while in state legislatures, statutes patterned after the 1970 federal RICO have been adopted.[3]

In 1981, Utah lawmakers passed the Utah Racketeering Influences and Criminal Enterprise Act (RICE).[4] Though differing in some aspects from the federal statute, Utah's RICE is, to a large degree, patterned after federal RICO. Unfortunately, Utah's RICE gives rise to many of the same problems that federal RICO does. This article explores one such issue, namely, whether under Utah's RICE private litigants may obtain equitable relief. The analysis will begin with a review of the statute itself, followed by a probe into federal cases dealing with the issue as it arises under RICO. Finally, this article will examine Utah laws and rules of construction that the courts should and will most likely rely on in allowing equitable relief for private litigants.

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[1]18 U.S.C. §§ 1961-1968 (1970).

[2]County of Cook v. Lynch, 560 F. Supp. 136, 139 (1982), quoting Pub. L. No. 91-452, 84 Stat. 923. *See also* United States v. Turkette, 452 U.S. 576, 591 (1981) (stating that the purpose of RICO is "to address the infiltration of legitimate business by organized crime.")

[3]Currently, 23 states have passed RICO-type statutes, and seven other states are considering RICO-type statutes.

[4]UTAH CODE ANN. §§ 76-10-1601 to 1608 (Supp. 1985).

II. [§ 2] A CLOSE LOOK AT THE STATUTE

A. [§ 2.1] FEDERAL RICO

As suggested, the portions of both statutes pertinent to this article are similar. 18 U.S.C § 1964 outlines the civil remedies available under the federal statute. Subsection (a) states that "[t]he district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders. . . ." Subsection (b) grants the Attorney General the right to institute proceedings under the federal statute. Subsection (b) also provides that, in proceedings instituted by the Attorney General, "pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper."

Subsection (c) of the federal statute 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." Finally, subsection (d) provides for collateral estoppel in cases brought by the United States.

Even a first reading of the federal statute gives rise to the question of whether a private citizen can obtain equitable relief. The statute explicitly provides *legal* remedies for *any* person injured by racketeering, and it likewise provides for equitable remedies in cases brought by the Attorney General; but the statute neither explicitly provides nor deprives private litigants the right to equitable remedies.

B. [§ 2.2] UTAH'S RICE

Utah's RICE contains the same type of language which creates the same issue. The pertinent portions of the Utah statute read:

> A person who sustains injury to his person, business, or property by a pattern of racketeering activity, in which he is not a participant, may file an action in the district court for the recovery of treble damages, the costs of the suit, including reasonable attorney's fees, and any punitive damages the court may deem reasonable. The state or any county may file an action on behalf of these persons injured or to prevent, restrain or remedy racketeering as defined by this part.[5]
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> A final judment or decree rendered in favor of the state or a county in any criminal proceeding brought by this state or a county shall preclude the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding.[6]

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[5]UTAH CODE ANN. § 76-10-1605(1) (Supp. 1985).

[6]UTAH CODE ANN. § 76-10-1607 (Supp. 1985).

Much like the federal statute, Utah's RICE is explicit in providing for legal remedies for private litigants, and equitable remedies for government-instituted cases. However, the statute is silent concerning a private litigant's right to equitable relief. Perhaps, as suggested by the wording of the statute, a private litigant *may* obtain equitable remedies through a suit instituted by the government; but the question still remains: without the government go-between, can a private litigant obtain equitable remedies under Utah's RICE? Because the wording of the statute itself does not answer this question, one must turn to the courts and case law for the answer.

III. [§ 3] AN ANALYSIS OF FEDERAL CASES

The relative newness of Utah's RICE makes it difficult to analyze its effectiveness based solely on Utah cases. However, because Utah's RICE bears such a similarity to federal RICO, Utah's law can be examined by first analyzing its federal counterpart. Indeed, it is probably safe to assume that if equitable remedies are indisputably available to private litigants under federal RICO, then they are also available under Utah's RICE. The problem is, of course, that the availability of such remedies on a federal level is anything but indisputable. The courts are split on the issue. Those jurisdictions favoring equitable remedies for private RICO litigants argue that RICO should be liberally construed. Conversely, courts holding the opposite assert that, because such remedies are not explicitly provided, they are not available. This article begins with an examination of the authorities that advocate equitable relief for private RICO parties.

A. [§ 3.1] AUTHORITIES FAVORING EQUITABLE RELIEF FOR PRIVATE RICO LITIGANTS

In the 1982 case of *County of Cook v. Lynch*,[7] a federal district court was called upon to decide whether, under 18 U.S.C. § 1964(d) a party other than the United States could invoke the doctrine of collateral estoppel. Subsection (d) provides that once a judgment or decree has been rendered againt a defendant in a case brought by the United States, that defendant is estopped from denying the "essential allegations of the criminal offense in any subsequent civil proceeding *brought by the United States*." (emphasis added) In *Lynch*, Cook County was claiming a collateral estoppel right under § 1964(d). Lynch (and the other defendants in the action) argued that the statute's explicit "affirmation of the United States' right to an estoppel [negates] the right of any other party to rely on a RICO conviction."[8] The court, rejecting defendants' argument, reiter-

[7]560 F Supp. 136 (N.D. Ill. 1982).

[8]*Id.* at 139.

ated that the purpose of RICO is to eradicate organized crime, and reasoned that allowing collateral estoppel for parties other than the United States would serve to meet this purpose. The court's strongest rationale, however, was derived from Section 904(a) of RICO (uncodified) which states that the provisions of RICO *"shall be liberally construed to effectuate its remedial purposes."*[9] Using this reasoning, it was not difficult for the court to conclude that Cook County, as a "person," had a right to collateral estoppel under 18 U.S.C. § 1964(d) even though the United States is the only party expressly mentioned as having such a right.[10]

The *Lynch* court set forth the most persvasive argument for allowing equitable relief for private litigants under § 1964(d) of RICO. But the reasoning can be applied to the rest of the civil remedies portion of the statute as well. The purpose of RICO is to curb organized crime, and liberally construing the statute to allow private parties equitable relief will aid in achieving that purpose. At least one scholar strongly agrees with the *Lynch* rationale. In a NOTRE DAME LAW REVIEW article, Professor G. Robert Blakey argues:

> It is difficult see how a court could conclude that RICO does not provide equitable relief for private parties . . . Section 1964 ought to be read as authorizing both governmental and private suits to obtain equitable relief. To the degree that ambiguity might be thought to exist in the choice of language, the liberal construction clause and the remedial purpose of the staute come down on the side of finding private suits to be authorized and that full relief can be granted. No satisfactory rationale can be offered, in short, to explain why a court ought to feel itself circumscribed in doing full justice for a victim under RICO .[11]

Surprisingly, the rationale adopted by *Lynch* and Blakey are set forth in very few cases which allow equitable relief for private parties. Rather, the majority of such cases merely assumes that the remedies are available, and, having so assumed, limit the analysis to whether or not specific criteria have been met.[12] It may seem odd that a court should assume something controversial without offering any explanation as to why it so assumed; but, perhaps this method of assumption presents the strongest argument of all: there is nothing to debate—the availability of equitable relief for private parties is not even an issue.

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[9]*Id.* at 139 (quoting 84 Stat. 947) (emphasis added).

[10]Utah's RICE specifically allows counties equitable relief, but says nothing about private litigants. *See* discussion in § 4.2, *infra.*

[11]Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58* NOTRE DAME L. REV. 237, 329 (1983).

[12]*See* Aetna Casualty and Surety Co. v. Liebowitz, 730 F.2d 905 (2d Cir. 1984) (denying attorney fees in the case of injunction or settlement, but assuming that

B. [§ 3.2] AUTHORITIES AGAINST EQUITABLE RELIEF FOR PRIVATE RICO LITIGANTS

Federal cases denying equitable relief to private RICO litigants argue 1) that RICO should be strictly construed, and 2) that strict construction of the statute reveals a legislative intent to deny equitable remedies to private parties. *Ashland Oil, Inc. v. Gleave*[13] presented a federal district court with the challenge of deciding whether a private RICO litigant (Ashland Oil) could obtain the equitable remedy of attachment. Plaintiffs in *Ashland Oil* argued that "because under the broader language of paragraph (b) of section 1964, the government would be able to secure the relief plaintiff seeks if the Attorney General had brought this action, plaintiff ought also to have access to such relief."[14] In forcefully rejecting plaintiff's argument, the court stated:

> [T]he mere fact that the statutory language appears to provide for a broader range of provisional remedies in actions brought by the government than in those brought by private litigants affords no reason for (and, in fact, argues against) reading such greater breadth into the provision relating to private actions.
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> . . . .
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> Thus it is obvious that Congress intended the government to have greater leeway than private litigants in securing provisional remedies in section 1964 actions.[15]

In *Ashland Oil,* then, the court rejected the "liberal construction" argument, and adopted a strict interpretation of the statute. According to *Ashland Oil,* congressional intent, evidenced by the wording of the statute, mandates such an interpretation.

Similarly, in *Kaushal v. State Bank of India*,[16] a federal district court was faced with the issue of whether to grant injunctive relief to a private RICO litigant. The *Kaushal* court quoted Blakey,[17] but ruled contrary to Blakey's rationale. Instead, the court adopted a "strict constructionism"

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injunction is allowable for private parties); Marshall Field and Co. v. Icahn, 537 F. Supp. 413 (S.D.N.Y. 1982) (assuming injunctions are proper for private litigants, but denying injunction on other grounds); Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981) (assuming injunctive relief is proper for private RICO litigants, but denying it on other grounds).

[13]540 F. Supp. 81 (W.D.N.Y. 1982).

[14]*Id.* at 84-85.

[15]*Id.* at 85.

[16]556 F. Supp. 576 (N.D.Ill. 1983).

[17]*Id.* at 584.

approach. "Such an approach ('strict constructionism,' if you will) both accepts the breadth of Congress' language and honors the limits of Congress' provision of a federal cause of action,"[18] With this attitude in mind, the court reasoned:

> Section 1964(c) certainly in terms grants only a private treble-damages remedy. True, it does not expressly say "only" the damages remedy is granted, and Section 1964(a) does not say "only" the government may seek its illustrative equitable remedies. . . . *But the fair reading of the statute is its literal one*—that Section 1964(b) defines who "may institute proceedings under this section [1964]"; the Attorney General.[19]

As in *Ashland Oil,* the *Kaushal* court determined that the wording of the statute evinced that Congress did not intend to allow equitable remedies to private RICO plaintiffs. In so holding, the court concluded that "Section 1964(a)'s provisions spell out the governmental equitable remedies available under Section 1964(b), not the private remedy available under section 1964(c)."[20]

Finally, to add judicial support to its "legislative intent" rationale, *Kaushal* held that "current Supreme Court doctrine sharply limits the implication of rights of action or remedies where Congress has not provided them."[21] Accordingly, the court denied plaintiff's motion for injunctive relief.

In addition to *Ashland Oil* and *Kaushal,* other cases express "serious doubt" as to the availability of equitable remedies for private parties, though they do not directly rule on the issue.[22]

IV. [§ 4] UTAH'S RACKETEERING INFLUENCES AND CRIMINAL ENTERPRISE ACT

The issue is far from decided (at least in a uniform fashion) on the federal level. Whether and how the federal RICO cases will affect Utah's

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[18]*Id.* at 579.

[19]*Id.* at 582-583 (emphasis added) (citations omitted).

[20]*Id.* at 583.

[21]*Id.* at 584. Additionally, the court quoted Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) which stated 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." This argument embraces the doctrine of *expressio unius est exclusio alterius* which shall be discussed, *infra,* § 4.2.

[22]*See,* Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350 (S.D.N.Y. 1984); Dan River, Inc. v. Icahn, 701 F.2d 278 (4th Cir. 1983); Trane Co. v. O'Connor Securities, 718 F.2d 26 (2d Cir. 1983); *See also* Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), a recent Ninth Circuit opinion expressly rejecting equitable relief for private RICO plaintiffs.

RICE cases concerning equitable relief for private parties has yet to be seen. Because UTAH CODE ANN. § 7-10-1605(1)-(2) and § 76-10-1607 incorporate virtually every aspect of the civil remedies found in 18 U.S.C. § 1964(a)-(d), Utah courts have adequate federal precedent to rule either way on the issue. The courts could follow federal precedent which liberally construes the racketeering statute so as to achieve the remedial purpose thereof, and allow private RICE parties to obtain equitable relief; yet there is also strong federal precedent which, if followed, would mandate that Utah courts adopt a strict construction of the statute and hold that only the state and county are entitled to equitable relief under the express terms of RICE because they are the only parties mentioned in the statute, and "rights of action or remedies [are not available] where congress has not provided for them."[23]

The unavailability of Utah precedent on this issue allows speculation as to whether Utah courts will permit equitable relief for private RICE litigants. However, the issue is not left totally without indicators as to what the trend might be. A study of the manner in which Utah courts generally apply the rules of construction reveals that Utah courts are more apt to adopt a liberal construction of the statute, thereby allowing private RICE parties equitable relief. In doing so, however, the courts will need to first, establish that the statute is ambiguous; second, determine that the doctrine of *expressio unius est exclusio alterius*[24] is inapplicable to the issue at hand; and third, justify the liberal construction of a penal statute.

A. [§ 4.1] AMBIGUITY IN UTAH'S RICE

The first obstacle Utah courts will encounter in justifying equitable relief to private RICE litigants is the fact that, absent a showing of ambiguity in the language of the statute, any sort of judicial construction is inappropriate. "The function of liberal construction is called into use where there is ambiguity in the language of the statute. . . ."[25] Arguably, the wording of RICE is *not* ambiguous—it simply states that "[t]he state or any county may file an action . . . to prevent, restrain or remedy racketeering."[26] Thus, any ambiguity must be read into the statute by what the statute does not say.

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[23]*Kaushal,* 556 F. Supp. at 584.

[24]The doctrine means essentially that the mention or inclusion of one thing in a statute implies the exclusion of others.

[25]State *ex rel.* Stephan v. Martin, 230 Kan. 747, 752, 641 P.2d 1011, 1016 (1982), quoting Russell v. Cogswell, 151 Kan. 793, 795, 101 P.2d 361, 363 (1940). Note, these cases, and others cited, *infra,* are in jurisdictions outside of Utah, and, admittedly, are less than controlling within Utah; however, the cases cited will either be in a state within the Tenth Circuit (jurisdictions which Utah is more apt to follow), or in a state with policies similar to Utah's.

[26]UTAH CODE ANN. § 76-10-1605(1) (Supp. 1985).

But is this alleged omission of language enough to make the statute ambiguous, thus calling for construction by the court? There are strong arguments to the contrary. As early as 1967, the Utah Supreme Court held:

> [A] statute should not be . . . applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional right. If it meets these tests it is not the court's prerogative to consider its wisdom, or its effectiveness, nor even the reasonableness or orderliness of the procedure set forth, but it has a duty to let it operate as the legislature has provided.[27]

A rigid application of the *Gord* rationale to Utah's RICE would make it inappropriate for Utah courts to read into RICE something that is not expressly there (namely, the eligibility of private parties for equitable relief), even if the addition would make better law. Utah's RICE is not "so unclear or confused as to be wholly beyond reason," nor is it inoperable; and, arguably, it does not "contravene some basic constitutional right." Thus, *Gord* seems to totally negate any possibility of allowing courts to read into RICE the availability of equitable relief for private parties. However, there are other considerations Utah courts can entertain to find that RICE is ambiguous, thus meriting judicial construction, even to the extent of reading into the statute equitable relief for private litigants.

As to the ambiguity issue, it has already been noted that nothing in the language of RICE appears ambiguous. However, the mere fact that the availability of equitable relief for private parties has been litigated on the federal level, and has been decided both ways, gives rise to an assumption of ambiguity. "Construction of a statute is required when statutes are ambiguous . . . [and a] statute is ambiguous when there are two or more interpretations which can fairly be made."[28] Hence, regardless of the apparent plainness of the language contained in RICE, the statute is ambiguous because there are "two or more interpretations which can fairly be made." Accordingly, Utah courts will probably conclude that some sort of judicial construction is appropriate.

B. [§ 4.2] THE DOCTRINE OF *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS*

The issue remains, however, whether it is proper for Utah courts to consider omissions when construing a statute. This brings into the discus-

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[27]Gord v. Salt Lake City, 20 Utah 2d 138, 141, 434 P.2d 449, 451 (1967).

[28]Sterling Drilling Co. v. Kansas Department of Revenue, 9 Kan. App. 2d 108, 110, 673 P.2d 456, 458 (1983); *see also*, State *ex rel.* Stephan v. Martin, *supra*, note 25.

sion a consideration of the doctrine of *expressio unius est exclusio alterius.*[29] The doctrine is widely accepted and is certainly relevant to this discussion of Utah's RICE. Application of the doctrine would mandate that because the state and "any county" are included in the statute as parties who may seek equitable relief, private litigants, by not being mentioned, are excluded from eligibility for such remedies. This doctrine has been accepted by Utah courts. Though not specifically mentioning the doctrine by name, *Gordo* evinces at least the rationale and effect of the *expressio unius est exclusio alterius* doctrine. Similarly, *Kennecott Copper Corporation v. Anderson*[30] sets forth the validity of the doctrine. *Kennecott Copper* involved a Utah workmen's compensation proceeding. At issue was the availability of unlimited medical expenses for the injured party, even though the applicable statute expressly limited other forms of compensation. The court reasoned as follows: "It is often said that it should be assumed that all of the words used in a statute were used advisedly and were intended to be given meaning and effect. For the same reasons, the omissions should likewise be taken note of and given effect."[31] At first reading, it might seem that, by giving effect to omissions, the court is taking a stand contrary to the doctrine of *expressio unius est exclusio alterius.* However, in reality, the Utah Supreme Court went on to conclude just the opposite. The court held that, because medical expenses were not mentioned in the statutory provision which expressly limited certain types of compensation, the statute cannot be read as including medical expenses. Accordingly, the court held that medical expenses were not subject to the limits. This reasoning, when applied to RICE, would allow equitable remedies to the parties mentioned (the state and any county), but not to those not mentioned (private litigants).

This argument becomes even stronger when considered in light of the *Lynch* case. *Lynch* was concerned with whether a county was eligible for equitable remedies under federal RICO which expressly allows the Attorney General to seek equitable relief. Counties are not mentioned in federal RICO as a party who may seek such relief. The federal court of appeals ruled for the county. Though the legislative history of Utah's RICE does not tell us, it might be assumed that in order to avoid a *Lynch*-type issue, the Utah legislature included counties (along with the state) as parties who may seek equitable relief. Similarly, it can be argued that the Utah legislature was aware that not only counties, but also private citizens and businesses would want equitable relief under RICE, but, nevertheless, chose not to include private litigants as parties eligible for such relief. Accordingly, the doctrine of *expressio unius est exclusio alterius*

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[29]*See* note 24, *supra.*

[30]Kennecott Copper Corporation v. Anderson, 30 Utah 2d 102, 514 P.2d 217 (1973).

[31]*Id.* at 219.

would, by implication, disallow equitable relief for private RICE litigants. RICE litigants.

Once again, however, there are other rules of construction that will allow Utah courts to avoid the establised doctrine. In a 1968 case, the Utah Supreme Court held that the doctrine of *expressio unius est exclusio alterius* is "helpful in determining the meaning of an otherwise questionable statute. But . . . [i]t has no force of law; and it has no proper application when its effect would be to obstruct rather than to carry out the purpose of the statute."[32] In Utah, then, it is appropriate to look, not only to the wording of the statute, but to the overall purpose of the statute as well, to determine whether application of the doctrine of *expressio unius est exclusio alterius* is proper. The purpose of Utah's RICE, like that of federal RICO, is to eradicate organized crime.[33] Accordingly, the question is whether disallowing equitable relief for private RICE litigants would obstruct, rather than carry out this stated purpose. The *Lynch* court set forth the argument that allowing equitable relief for private RICO parties would further the purpose of the statute. This assertion can hardly be rebutted; however, those opposed to equitable relief for private RICO/RICE litigants might argue that the *Lynch* rationale, carried to its logical extreme, would allow anything, so long as it serves to eradicate organized crime—obviously an undesirable interpretation. On the other hand, limiting equitable relief for only governmental bodies would serve the purpose of the statute without obstructing it.

But, even assuming that the purpose of RICE can be carried out by strictly adhering to the technicalities of the statute, the Utah case of *Andrus v. Allred*[34] reminds one that "[i]n order to give[a] statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness."[35] The U.S. Supreme Court affirmed this notion in *Porter v. Warner Holding Co.*,[36] concluding:

> [T]he comprehensiveness of . . . equitable jurisdiction is not to be denied or limited to 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. "The great principles of equity, securing complete jus-

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[32]Rio Grande Motor Way, Inc. v. Public Service Commission, 21 Utah 2d 377, 380, 445 P.2d 990, 992 (1968). *See also* Johnson v. General Motors Corporation, 199 Kan. 720, 433 P.2d 585 (1967); Noble v. Glenns Ferry Bank, LTD., 91 Idaho 364, 421 P.2d 444 (1966).

[33]*See* note 2, *supra.*

[34]17 Utah 2d 106, 404 P.2d 972 (1965).

[35]*Id.* at 974.

[36]328 U.S. 395 (1946).

tice, should not be yielded to light inferences, or doubtful construction."[37]

Because the RICE issue at hand concerns equity and the equitable powers of the courts, rather than a mere legal technicality, Utah courts will most likely adopt the *Porter* rationale and rule in favor of private litigants on the issue of *expressio unius est exclusio alterius* versus the general purpose of RICE.

C. [§ 4.3] AVOIDING STRICT CONSTRUCTION OF A PENAL STATUTE

The final obstacle Utah courts must hurdle before granting equitable relief to private RICE litigants is the general rule that "penal statutes are to be strictly construed in favor of defendants . . . and they are to be construed as written."[38] They "cannot be enlarged by implication or extended by inference."[39] As a penal statute, Utah's RICE would be subject to the above stated rule. The effect that strict constructionism has been on federal RICO has already been discussed. A strict construction of Utah's RICE would produce a similar effect—the denial of equitable relief for private litigants. In order to avoid the strict construction of RICE as a penal statute, Utah courts may employ one or more of three approaches.

1. [§ 4.3.1] Utah—Exception to the General Rule

The first, and easiest approach the courts could pursue in order to avoid the general rule mandating strict construction of penal statutes is to simply ignore the rule. And, indeed, that is precisely what Utah courts have done in the past. In doing so, they have relied on an introductory section of the Utah Criminal Code which states: "The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state."[40] Thus, by statute, Utah is an exception to the rule of strict construction for penal statutes. Accordingly, the courts may liberally construe the statute to allow equitable relief to private RICE litigants. However, it should be remembered that even if it is appropriate for Utah courts to liberally construe penal statutes, their discretion to do so is not unlimited.[41] This being the

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[37]*Id.* at 398, quoting Brown v. Swann, 10 Pet. 497, 503.

[38]People v. Wright, 38 Colo. App. 271, 272, 559 P.2d 249, 250 (1976).

[39]State v. Humphrey, 620 P.2d 408, 409 (Okla. Crim. App. 1980).

[40]UTAH CODE ANN. § 76-10-106 (1978).

[41]*See* State v. Sawyer, 54 Utah 275, 182 P. 206 (1919), holding that notwithstanding the statute provided that criminal statutes were not to be strictly construed, it was beyond the court's power to extend the statutory time for filing a motion for new trial.

case, it may be necessary for Utah courts to rely on authority other than the Utah statute allowing liberal construction of penal statutes in general.

2. [§ 4.3.2] RICE as a Civil Statute

The second approach the courts may take to avoid strict construction of a valid penal statute is to declare that Utah's RICE is not a penal statute. Naturally, this idea flies in the face of the fact that RICE is part of Utah's criminal code, thus creating a strong presumption that the statute is penal in nature. However, the mere location of a statute in a state's scheme of codification does not by itself determine the nature of the statute involved. For example, though Utah's RICE is found in the criminal code, much of its procedure and effect is civil. In true criminal cases, the burden of proof placed on the prosecutor is that of "beyond reasonable doubt." Additionally, the right to and responsibility for criminal prosecution is placed exclusively in the hands of the government. Conversely, Utah's RICE calls for only a "preponderance of the evidence," and allows private parties, as well as governmental entities, to bring an action pursuant to violations of the act. These provisions indicate that, though penal by title, RICE is civil by nature, and, as such, does not necessitate strict construction.

3. [§ 4.3.3] RICE—a Remedial Statute

In addition to treating RICE as civil in nature, there is a strong argument for classifying it as a remedial statute as well. Both *Lynch* and Professor Blakey, *supra*, insist that the purpose of federal RICO is remedial. Both RICE and RICO contain remedial provisions. The issue is whether these remedial provisions make the entire statute remedial by nature. BLACK'S LAW DICTIONARY sets forth a standard by which one might determine whether a statute is penal or remedial:

> The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class.[42]

Arguably, because Utah's RICE seeks to redress parties injured by racketeering, it is a remedial statute, and, as such, "is to be liberally construed to effectuate the purpose for which it was enacted."[43] Idaho's

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[42]BLACK'S LAW DICTIONARY 672 (abridged 5th ed. 1983)

[43]Gonzales v. Callison, 9 Kan. App. 2d 567, 600, 683 P.2d 454, 457 (1984).

Supreme Court has held that statutes defining acts which, if done within the state, subject the acting party to the jurisdiction of that state's courts "are designed to provide a forum for [state] residents. As such, the law is remedial legislation of the most fundamental nature. It, therefore, is to be liberally construed."[44] Under this standard, Utah's RICE is definitely remedial—it 1) outlines acts which, if done within Utah, would subject the acting party to the jurisdiction of Utah courts, and, 2) provides a forum for Utah citizens harmed by violators of the act. Accordingly, it could be liberally construed, thus, allowing equitable relief for private RICE litigants.

In addition to the Idaho courts, at least one jurisdiction within the Tenth Circuit Court of Appeals, Kansas, has held not only that remedial statutes are to be liberally construed, but that "[a] statute which is designed to protect the public must be construed in light of legislative intent and is entitled to broad interpretation."[45] That RICE is designed to protect the public is hardly an issue. Accordingly, by the Kansas standard, RICE should be broadly interpreted. Again, this would allow equitable remedies for private litigants.

V. [§ 5] CONCLUSION

The issue of whether private RICO/RICE parties are entitled to equitable relief persists. Federal courts continue to be split, and the Utah Supreme Court has yet to squarely confront the issue. When Utah's Supreme Court is faced with the issue, as it most assuredly will be, it will probably rule in favor of private RICE litigants. The ambiguity of RICE calls for judicial construction of the statute. In construing the act, the Utah Supreme Court will probably give more weight to the overriding purpose of RICE than to specific technicalities contained therein; thus, the court will be able to set aside the doctrine of *expressio unius est exclusio alterius*. Additionally, as a civil or remedial statute, RICE is entitled to broad, liberal interpretation in order to effect the purpose of the statute. And, even if RICE is classified as a penal statute, Utah courts, by statute, are exempt from the general rule, and are not bound to strictly construe the act.

However, rather than battling with rationale, and groping for justification, the logical and simple solution to the problem would be for the legislature to adopt an amendment to RICE clarifying its (the legislature's) intent. Unfortunately, such an amendment has yet to be passed.

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[44]Doggett v. Electronics Corp. of America, Combustion Control Division, 93 Idaho 26, 30, 454 P.2d 63, 67 (1969). *See also* Smith v. Marshall, 225 Kan. 70, 587 P.2d 320 (1978).

[45]*Gonzales*, 683 P.2d at 457.

Until such time as an amendment is passed delineating the equitable rights of private RICE litigants, or, until the Utah Supreme Court resolves the issue, the debate, the confusion, and the speculation will undoubtedly continue.

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