Nunc Pro Tunc: The Application of the Private Securities Litigation Reform Act of 1995 to Pending Civil Rico Claims Based on Securities Fraud

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THE APPLICATION OF THE PRIVATE SECURITIES
LITIGATION REFORM ACT OF 1995 TO PENDING CIVIL
RICO CLAIMS BASED ON SECURITIES FRAUD

Todd A. Noteboom
Michael A.G. Korengold++

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† Nunc pro tunc is a Latin phrase meaning “now for then.” BLACK’S LAW
DICTIONARY 1069 (6th ed. 1990). The phrase applies “to acts allowed to be done
after the time when they should be done, with a retroactive effect.” Id.

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I. INTRODUCTION

In 1995, Congress instituted sweeping legislative reform in the securities industry with the enactment of the Private Securities Litigation Reform Act (PSLRA). The purpose of the PSLRA is to limit abusive practices in securities litigation. Among the many notable provisions of the PSLRA is section 107, which amends the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). Section 107 eliminates “RICO liability for most securities fraud claims, except for those premised on securities violations where criminal convictions have been entered,” and is meant to “protect corporations against the filing of frivolous securities actions.” Accordingly, Congress eliminated the pleading of mail fraud, wire fraud, and securities fraud as predicate acts under civil

2. See infra text accompanying notes 27-34.
RICO if the offenses are based on conduct that also would be actionable as securities fraud. In doing so, Congress precluded the availability of a civil RICO cause of action in securities fraud cases; however, Congress did not clearly dictate whether section 107 applies prospectively only or whether pending RICO claims are extinguished as well. The amendments under the PSLRA “shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act”, however, the Act is silent as to its retroactive application to civil RICO claims. Furthermore, various courts have interpreted the application of section 107 differently to pending civil RICO claims.

This Article reviews the use of civil RICO in the context of securities fraud claims and sets forth section 107 of the PSLRA as it amends civil RICO. In an attempt to determine the applicability of section 107 to pending cases, this Article discusses various theo-
ries of statutory interpretation and legislative intent. This Article then reviews the body of law governing the retroactive application of laws, including the case of Landgraf v. USI Film Products, in which the United States Supreme Court set forth a test to determine whether a statute can be applied retroactively. In addition, this Article reviews recent court decisions that analyze whether section 107 of the PSLRA applies to pending RICO claims. Based on statutory construction, legislative intent, and principles of retroactivity, this Article concludes that section 107's amendment to civil RICO contained in section 107 of the PSLRA should apply to pending RICO claims, thereby precluding plaintiffs from relying on civil RICO in pending securities fraud cases.

II. CIVIL RICO IN THE CONTEXT OF SECURITIES FRAUD CLAIMS

After almost twenty years of investigation into the problem of organized crime, Congress enacted RICO in 1970. The criminal

11. See discussion infra Part IV.
12. See discussion infra Part V.
14. Id. at 280.
15. See discussion infra Part VI.
16. See G. Robert Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 249-80 (1982) (discussing the legislative history of RICO). In 1951, the Special Committee to Investigate Organized Crime in Interstate Commerce (the Kefauver Committee, named after Senator Estes Kefauver) reported that organized crime had infiltrated businesses and state and local governments. See id. at 249. The American Bar Association thereafter established the ABA Commission on Organized Crime to explore legislative solutions to the problem of organized crime. See id. In 1967, the President's Commission on Law Enforcement and the Administration of Justice (the Katzenbach Commission) reported on the infiltration of organized crime into legitimate business, and recommended that new approaches be taken to stop the infiltration. See id. at 251-53. After initial attempts in 1967 to amend antitrust laws to make them applicable to organized crime, and after several organized crime bills failed in Congress, Congress finally passed RICO in 1970. See id. at 253-80.

RICO provision provides:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.  

In addition to the criminal RICO provision, Congress also enacted a civil RICO provision, which allows private individuals to sue for RICO violations. Prior to the enactment of the PSLRA, the civil RICO statute provided:

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.  

Plaintiffs have a four-year statute of limitations within which to bring these civil RICO claims.


19. Id. § 1964(c). Civil RICO was enacted, in part, substantially to supplement the Department of Justice’s limited resources allotted to enforce antitrust laws and deter violations. See Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).


21. The Supreme Court has established a uniform four-year statute of lim-
Although commentators disagree about whether civil RICO can and should be used in the securities context, plaintiffs often

tations for civil RICO claims. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987). Before Agency Holding Corp., courts used several different approaches to RICO statute of limitations issues. Some courts "used the state limitations period most similar to the predicate offenses alleged in the particular RICO claim." Id. at 148 (citing Silverberg v. Thomson McKinnon Sec., Inc., 787 F.2d 1079 (6th Cir. 1986); Burns v. Ersek, 591 F. Supp. 837 (D. Minn. 1984)). Other courts used "a uniform statute of limitations applicable to all civil RICO actions brought within a given State." Id. at 148-49 (citing Tellis v. United States Fidelity & Guar. Co., 805 F.2d 741 (7th Cir. 1986); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984); Teltrons Servs., Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724 (E.D.N.Y. 1984)). The only similarity in the courts' approaches to RICO's statute of limitations was the use of state statutes of limitations instead of the federal statutes of limitations. See id. at 149. However, the Court found that the Clayton Act, 15 U.S.C. § 15 (1994), was "a far closer analogy to RICO than any state law alternative." Id. at 150. Accordingly, the Court held that the Clayton Act's four-year statute of limitations should also apply to civil RICO causes of action. See id. at 152, 156.

22. See, e.g., Arthur F. Mathews, Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation, 65 NOTRE DAME L. REV. 896, 928-29 (1990). Mr. Mathews argues that despite academicians' strong support of civil RICO as a replacement for a federal commercial fraud statute in securities and corporate matters, the legislature intended RICO primarily to eradicate organized crime from legitimate business and labor unions. See id. Mr. Mathews further notes that civil RICO has been "overused or abused in a floodgate of cases having nothing to do with driving organized crime out of legitimate business." Id. at 929. But see Mother of God, supra note 16, at 860-69 (arguing that RICO was not designed only to drive organized crime out of legitimate business).

file civil RICO claims along with, or instead of, traditional securities claims. Civil RICO makes it unlawful to engage in a variety of

should amend section 1961(1)(D) of RICO to state that a plaintiff need not be a purchaser or seller of securities to have standing to sue under RICO; Michael N. Glanz, Comment, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513 (1983) (examining the current proliferation of RICO charges in securities cases).


Section 11 "creates an express cause of action for damages for purchasers of securities in an SEC-registered public offering when the relevant registration statement contains false or misleading statements of material fact or omissions of material fact." Mathews, *supra* note 22, at 906 (footnote omitted). Anyone who acquires securities issued under the defective registration statement can bring a cause of action unless the person acquiring the securities knew that the registration statement was defective when he or she brought the action. See id. at 907. The plaintiff must prove that the securities he or she purchased are traceable directly to the offering covered by the defective registration statement. See id. Furthermore, actions under section 11 must be filed within one year of the discovery of the defective nature of the registration statement but not more than three years after the security was offered to the public. See 15 U.S.C. § 77m (1994).

Section 12 of the Securities Act of 1933 provides for two separate causes of action. Section 12(1) provides that anyone who "offers or sells a security in violation of section 77e" of title 15 is liable for damages to those buying the security. Id. § 77l(1). Section 12(2) provides a cause of action for the buyer of a security when the offer or sale of such security included a false statement of material fact or an omission of material fact which was necessary to avoid making the statement not misleading where the buyer was unaware of the false statement or omission. Id. § 77l(2). Like section 11 claims, claims brought under section 12(1) must be filed within one year of the discovery of the defective nature of the registration statement but not more than three years after the security was offered to the public. See id. § 77m. A buyer must bring a section 12(2) claim within one year after the discovery of the misstatement or omission but not longer than three years after the sale of the security in question. See id.; Mathews, *supra* note 22, at 910.

Rule 10b-5 "is a general anti-fraud and anti-manipulative provision which creates an implied right of action in favor of anyone injured as a result of fraudulent activity in connection with the purchase or sale of a security." Mathews, *supra* note 22, at 914. Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

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racketeering activities and defines “racketeering activity” using a list of predicate acts. Included among these predicate acts are those that securities plaintiffs use to plead RICO causes of action: mail, wire, and securities fraud.

The possibility of treble damages and attorneys’ fees, the use of mail, wire, and securities fraud as predicate acts, and the four-year statute of limitations period encourage plaintiffs with securities fraud claims to structure their complaints, oftentimes creatively, to fall within civil RICO. Doing so gives plaintiffs the opportunity for increased damage awards and, essentially, greater bargaining power to negotiate pretrial settlements. Moreover, the

17 C.F.R. § 240.10b-5; see also Mathews, supra note 22, at 914-26 (discussing Rule 10b-5 under the Securities Exchange Act of 1934). For discussion of additional causes of action under securities laws, see Mathews, supra note 22, at 902 n.26 (discussing claims and citing cases and commentary).

24. 18 U.S.C. § 1962(a) (1994). To determine whether a person violates the RICO statute the necessary and requisite factors used are that a person must:
(a) use income derived from a pattern of racketeering activity to acquire an interest in an enterprise engaged in interstate commerce; (b) acquire or maintain an interest in an enterprise engaged in interstate commerce through a pattern of racketeering activity; (c) conduct the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activity; or (d) conspire to commit (a), (b), or (c).


26. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 149 (1987) (stating that most civil RICO complaints are predicated on the use of mail fraud, wire fraud or securities fraud); Gary G. Lynch & Thomas P. Ogden, The Private Securities Litigation Reform Act of 1995: Civil RICO Reform, 923 PLI/Corp. 623, 630-31 (1996) (reporting that “[b]y the mid-1980’s, it was estimated that thirty-five percent of published civil RICO decisions relied solely or primarily on allegations of securities fraud; approximately ninety percent relied upon one of the three ‘commercial fraud’ predicate offenses – mail fraud, wire fraud, or securities fraud”).

27. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 504-06 (1985) (Marshall, J., dissenting) (“It does not take great legal insight to realize that such a plaintiff would pursue his case under RICO,” because “a successful plaintiff will recover both treble damages and attorney’s fees”); Mathews, supra note 22, at 936-44 (discussing the plaintiff’s advantages of pursuing a civil RICO claim over other securities claims); Chief Justice William H. Rehnquist, Address at the Eleventh Seminar on the Administration of Justice (Apr. 7, 1989), in 21 St. Mary’s L.J. 5, 12 (1989) (stating that RICO’s treble damages strongly encourage attorneys to bring facts typically thought to underlie other causes of action within RICO’s reach).

28. See Sedima, 473 U.S. at 506 (Marshall, J., dissenting) (noting that due to the possibility of treble damages under civil RICO, many defendants would rather settle a meritless case than face “ruinous exposure”); Mathews, supra note 22, at
longer statute of limitations under civil RICO provides an alternative for stale claims that otherwise would be precluded. Accordingly, in many instances, plaintiffs will use civil RICO "for extortive purposes, giving rise to the very evils it was designed to combat." In essence, civil RICO has become "a feeding frenzy for plaintiffs' lawyers." Commentators, legislators, and judges alike have called for reform.

III. THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

A. Legislative History

1. The House Bill

The original version of the PSLRA, House Bill 1058, was introduced in the United States House of Representatives on February 27, 1995. The bill provided in part: “This Act and the amendments made by this Act are effective on the date of enactment of this Act and shall apply to cases commenced after such date of enactment.” The original version of the House bill made no reference to RICO claims.

Although the bill had been referred to the House Committee on Commerce and to the Judiciary Committee, the House Rules Committee adopted a modified open rule on March 7, 1995, whereby the bill would be brought straight to the House floor for a one-hour general debate and not more than eight hours of amendments. Despite vocal opposition from House Democrats, Congress adopted the modified open rule. Immediately thereafter, the House resolved itself into the Committee of the Whole to consider the bill.

Following general debate, Representative Christopher Cox, a Republican from California, proposed an amendment to the bill that would bar plaintiffs from bringing RICO claims “if the racketeering activity, as defined in [18 U.S.C. §] 1961(1)(D), involve[d] conduct actionable as fraud in the purchase or sale of securities.” Responding to criticism that the modified open rule unreasonably
curtailed meaningful debate on such an important issue, Repre-
sentative Cox stated that the amendment's omission was inadvertent
and that the amendment had not been opposed in committee. After much debate, Congress passed the amendment. The savings
clause prohibiting a RICO cause of action for conduct actionable
as securities fraud remained in the bill, and on March 10, 1995,
the House referred House Bill 1058 to the Senate.

2. The Senate Bill

The original version of Senate Bill 240, the Senate companion
to House Bill 1058, was introduced on January 18, 1995. It con-
tained RICO language strongly resembling the House bill's, but it
contained no general savings clause. After hearings before the
Senate Subcommittee on Securities, the Banking, Housing, and
Urban Affairs Committee reported the bill back to the Senate with
an amendment that essentially rewrote the bill. While retaining
many of the features of the original Senate Bill 240, this amend-
ment considerably expanded the legislation's reach. An amend-
ment to the RICO provision would prevent any person from rely-
ing on conduct that would have been actionable as fraud in the
purchase or sale of securities to establish a violation of section
1962. Also included was a savings clause with respect to securities
claims: "The amendments made by this title shall not affect or ap-
ply to any private action arising under title I of the Securities Ex-
change Act of 1934 or title I of the Securities Act of 1933, com-
menced before the date of enactment of this Act."

The full Senate began debate on the committee's substitute

45. See 141 CONG. REC. H2765, H2770 (daily ed. Mar. 7, 1995). Representative Cox's remarks regarding committee debate apparently were made in reference to House Bill 10, which contained the RICO language and was succeeded by House Bill 1058. Id.
47. See H.R. 1058 § 9 (2d & 3d versions Mar. 10 & 12, 1995).
50. See S. 240 § 105 (1st version Jan. 22, 1995). The Senate bill read: Section 1964(c) of RICO "is amended by inserting 'except that no person may bring an action under this provision if the racketeering activity as defined in section 1961(1)(D), involves fraud in the sale of securities' before the period." Id.
51. See S. REP. NO. 104-98, at 1; see also 141 CONG. REC. S8614 (daily ed. June 19, 1995).
52. See S. 240, 104th Cong. § 107 (2d version June 20, 1995).
53. S. 240, 104th Cong. § 110 (2d version June 20, 1995).
bill on June 22, 1995. On June 26, 1995, Senator Joseph Biden, a Democrat from Delaware, proposed an “exception to the exception” RICO amendment, whereby a plaintiff still could pursue RICO relief “if any participant in the [securities] fraud is criminally convicted in connection therewith.” The Senate adopted this amendment by a voice vote.

The Senate returned House Bill 1058 to the House after striking everything following the enacting clause and substituting the language from the Senate’s amended version of Senate Bill 240. Thus, the Senate version of House Bill 1058 included RICO provisions and Senate Bill 240’s savings clause regarding securities claims.

3. The Final Bill

The House rejected the Senate’s amended version of House Bill 1058. Accordingly, a House/Senate Conference Committee met in late November 1995 and returned a bill that contained the Senate’s version of the RICO amendment, the “exception to the exception” version, and a new savings clause with respect to private securities actions: “The amendments made by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of the enactment of this Act.” The Senate approved the conference report and the House followed suit. Although President Clinton vetoed the bill on December 19, 1995, the House and Senate overrode the Presi-

55. 141 Cong. Rec. S9163 (daily ed. June 27, 1995); see also H.R. 1058, 104th Cong. § 111 (4th version June 29, 1995). The Senate also adopted other amendments not pertinent to this Article. See id.
58. Id. §§ 107, 111.
59. See id. § 112.
dent's veto,\textsuperscript{65} and on December 22, 1996, the Private Securities Litigation Reform Act became law.\textsuperscript{66}

B. The Purpose and Relevant Provisions of the Act

Congress enacted the PSLRA to cure certain evils that had surfaced in some securities lawsuits. In addition, PSLRA amends the civil provision of RICO by barring claims predicated on securities fraud, unless the potential civil defendants are first convicted under RICO's criminal provisions.\textsuperscript{67} Congress included the civil RICO amendment in response to growing concern over the misuse of civil RICO in securities fraud claims.\textsuperscript{68} Specifically, section 107

\begin{itemize}
  \item \textsuperscript{65} See Sharon Walsh, \textit{House Overrides Veto of Securities Bill; Senate May Vote Today on Frivolous Shareholder Lawsuits}, \textit{WASH. POST}, Dec. 21, 1995, at A20.
  \item \textsuperscript{66} Aaron Zitner, \textit{For First Time, Veto by Clinton Overridden}, \textit{BOSTON GLOBE}, Dec. 23, 1995, at 1.
  \item \textsuperscript{68} See 141 CONG. REC. H2771 (daily ed. Mar. 7, 1995). Many other representatives also supported the civil RICO amendment to prevent further abuse of civil RICO for securities fraud claims. For example, "Rep[resentative] McCollum, a supporter of the amendment, advanced the argument that RICO was originally intended to strike a major blow to organized crime and racketeering, and it was an abuse to use RICO against \textit{ordinary} fraud in the context of commercial and securities disputes." \textit{A Lawyer's Dream}, supra note 17, at 805-06 (quoting 141 CONG. REC. H2773-74 (daily ed. Mar. 7, 1995) (emphasis added)). Representative McCollum argued that the remedies of civil RICO were calculated to help private citizens fight against criminal enterprises and other corrupt organizations. \textit{See id}. However, Representative McCollum stressed that Congress did not design the remedies to be used to litigate disputes between parties to bona fide securities transactions. \textit{See id}. at 806 (citing 141 CONG. REC. H2774 (daily ed. Mar. 7, 1995) (statement by Rep. McCollum)). Further, proponents of the proposed securities reforms emphasized that Congress designed the proposed changes to RICO to stop abuses such as "strike suits" and "shake downs," in which "plaintiffs' lawyers bring massive lawsuits against small, vulnerable companies merely because their stock prices dropped." \textit{Id}. (citing 141 CONG. REC. H2775 (daily ed. Mar. 7, 1995) (statement by Rep. Tauzin)). They argued that the lawyers sue everybody connected to the company -- officers, board members, accountants, lawyers -- "and then sit back and do discovery and continue the litigation until somebody says, wait a minute, we have had enough, here is 10 cents on the dollar." \textit{See} 141 CONG. REC. H2775 (daily ed. Mar. 7, 1995); \textit{see also} \textit{A Lawyer's Dream}, supra note 17, at 806. Arthur Levitt, chair of the Securities and Exchange Commission, wrote the following in a prepared statement to the House subcommittee:
  \begin{quote}
    For many years, the Commission has supported legislation to eliminate the overlap between the private remedies under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and under the Federal Securities laws. Because the securities laws generally provide adequate remedies for those injured by securities fraud, it is both unnecessary and unfair to expose defendants in securities cases to the threat of treble
amended a portion of the civil RICO statute contained in section 1964(c) of RICO, which now 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 the 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 becomes final.

The RICO amendment constitutes a key element in a comprehensive strategy to foil "those who seek to line their own pockets by bringing abusive and meritless suits," while preserving suitable remedies for those genuinely victimized by securities fraud. Congress clearly intended the RICO amendment to "prevent duplicative recovery" for claims arising out of securities fraud and to give broader protection to corporate defendants by limiting the filing of "frivolous" securities claims.

Congress was not clear, however, as to the scope of section 107 damages and other extraordinary remedies provided by RICO.

Hearings on Securities Litigation Reform Proposals before the Subcomm. on Sec. of the Senate Comm. on Banking, Hous., and Urban Affairs, 104th Cong., 1st Sess. 1251 (1995).

69. 18 U.S.C. § 1964(c) (Supp. 11995) (emphasis added).
71. See District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Reps. v. Prudential Sec., Inc., 925 F. Supp. 1551, 1567 (N.D. Ga. 1996). The Act received support from numerous members of Congress, including Senator D'Amato, who stated:

This legislation has been four years in the making. It is a thoughtful and carefully crafted bill. The provisions in the conference report are balanced to make the legal system fairer for investors. The current system does not protect investors, it exploits them . . . . Plaintiffs' lawyers know that and take advantage. It is time to reform the securities class action litigation from a moneymaking enterprise for lawyers into a better means of recovery for investors.

of the PSLRA. With respect to its curtailment of actions under RICO, Congress did not clarify whether the Act is restricted to prospective application only, or whether it is intended to apply to pending RICO claims as well. The savings clause of the PSLRA, contained in section 108, provides, "The amendments made by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act."73 Notably, this provision is devoid of any reference to the application of the RICO amendment, but refers only to claims brought under the 1933 and 1934 Securities Acts. The ambiguity inherent in the savings clause fails to provide a bright-line rule with respect to the RICO amendment's effect on pending litigation.

IV. STATUTORY INTERPRETATION AND LEGISLATIVE INTENT

The absence of any savings clause in regard to RICO claims leads to speculation and requires evaluation. When a statute is silent as to any part of its application, courts necessarily must interpret the statute to apply it to various situations. Accordingly, courts have developed canons of statutory construction to assist in analyzing how statutes should be interpreted.74 Three such canons are:


74. See Jonathan R. Macey & Geoffrey P. Miller, The Canons of Statutory Construction and Judicial Preferences, 45 VAND. L. REV. 647, 671 (1992) (concluding that canons of statutory construction "allow judges to decide cases that involve increasingly technical legal issues on the basis of familiar, if content-free, generic legal rules that can be transported from case to case and from legal problem to legal problem like a set of handy, all-purpose tools"); see also T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 MICH. L. REV. 20, 38 (1988) (emphasizing that the canons of statutory construction provide the interpreter with an ability to understand "later-enacted legislation on the earlier"); Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL. 59, 61 (1988) (contending that the relevant inquiry is not legislative intent, but statutory language) (citing Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 419 (1899), reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 204, 207 (1920)); Richard A. Epstein, The Pitfalls of Interpretation, 7 HARV. J.L. & PUB. POL. 101, 106 (1984) (offering questions to various modes of interpretation and how they work with a specific statute); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 294-95 (1989) (arguing that while "legislative supremacy" is an incomplete guide to judicial decision-making, it is far from inconsequential); Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Method, 86 COLUM. L. REV. 223, 225 (1986) (arguing that judicial interpretation is consistent with the consti-
(1) the plain meaning rule,\textsuperscript{75} (2) \textit{expressio unius est exclusio alterius},\textsuperscript{76} and (3) an evaluation of legislative intent.\textsuperscript{77}

The plain meaning rule is often the first place courts look to interpret statutes.\textsuperscript{78} Although different interpretations of the plain meaning rule exist,\textsuperscript{79} basically, if a word or phrase is not defined in

\textit{tutional scheme when it serves as a check on the legislature and does not intrude upon the legislature's lawmakers' authority); Geoffrey P. Miller, \textit{Pragmatics and the Maxims of Interpretation}, 1990 Wis. L. Rev. 1179, 1180-81 (stating that when a court defers to statutory language and the result is misguided in terms of societal policy, the possibility exists that other decision-makers may solve problems in similar ways rather than on more sound grounds); Richard A. Posner, \textit{Legislation and Its Interpretation: A Primer}, 68 Neb. L. Rev. 431, 439 (1989) (redefining the three canons of statutory construction as being formulative, mentalist, and purposive).

\textsuperscript{75.} See infra text accompanying notes \textsuperscript{78-80}.
\textsuperscript{76.} See infra text accompanying notes \textsuperscript{81-83}.
\textsuperscript{77.} See infra text accompanying notes \textsuperscript{84-87}.
\textsuperscript{79.} See Norman J. Singer, \textit{Sutherland on Statutory Construction} § 46.01, at 81 (5th ed. 1994) [hereinafter SUTHERLAND] ("What has come to be known as the plain meaning rule has been given expression in a variety of ways."). "The plain meaning rule has several variants, ranging from a virtually conclusive presumption that the plain language governs, to milder formulations under which the plain meaning governs except in 'rare' or 'exceptional' circumstances, or under which the plain meaning 'ordinarily' controls." Miller, supra note 74, at 1222-23 (footnotes omitted); see also United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) ("[W]here . . . the statute's meaning is plain, 'the sole function of the court is to enforce it according to its terms.'" (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))); Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 548 (1987) ("Although language seldom attains the precision of a mathematical symbol, where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually intended another meaning."); NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); Rodriguez v. Compass Shipping Co., 451 U.S. 596, 617 (1981) ("The wisest course is to adhere closely to what Congress has written."); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive."); Richards v. United States, 369 U.S. 1, 9 (1962) ("[L]egislative purpose is expressed in the ordinary meaning of the words used."); \textit{In re Haas}, 48 F.3d 1153, 1155 (11th Cir. 1995) ("Generally, the plain meaning of a statute controls.").
the context of a statute, courts will apply the common, plain, and established meaning of that word or phrase.  

The maxim *expressio unius est exclusio alterius* — the "expression of one thing is the exclusion of another" — also is used by courts to interpret statutes. The maxim holds that "where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions."  

In addition, courts also look to legislative intent to establish statutory meaning and to construe vague or unclear statutes. Legislative history aids courts in interpreting and applying ambiguous statutory language the way Congress intended. Legislative history includes congressional records, statements made by members of Congress, committee reports, and legislative debates. For example, courts often examine the full history of a statute, from its introduction to its enactment. Courts use the reports of standing committees, special committees, conference committees, and statements made at committee hearings to interpret statutory lan-

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80. *See Sutherland*, *supra* note 79, § 46.01, at 82-83; *see also* Perrin v. United States, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").


82. *See, e.g.,* Lukhard v. Reed, 481 U.S. 368, 376 (1987) (stating that Congress intended to include personal injury awards in AFDC recipients' incomes because Congress was silent in the AFDC statute but had been explicit elsewhere); Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987) (opining that Congress will "authorize nationwide service of process when it wants to provide for it"); *cf., e.g.,* Taylor v. Investors Assocs., Inc., 29 F.3d 211, 215 (5th Cir. 1994) (providing that the terms of a contract must be "apparent from the construction of the contract to allow a third party beneficiary").

83. *Sutherland*, *supra* note 79, § 47.23, at 216 (footnotes omitted).

84. *See, e.g.,* *Omni Capital Int'l*, 484 U.S. at 106-07 (determining that Congress did not authorize nationwide service for §22 of the CFA by examining a House of Representatives report); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 607-08 (1979) (beginning its analysis of a 42 U.S.C. § 1983 claim by stressing that the Court's task is to interpret statutory language in light of Congress' purpose for the statute); Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972) (emphasizing that the court must focus on congressional intent).

85. *See Sutherland*, *supra* note 79, §§ 48.01-20 (discussing the use of legislative history in statutory interpretation).

86. *See id.* § 48.04, at 324. Courts can also consider the parts of bills that were never enacted into law by the legislature. *Id.* at 325 ("[W]here the language under question was rejected by the legislature and thus not contained in the statute it provides an indication that the legislature did not want the issue considered.").
V. RETROACTIVITY JURISPRUDENCE

Until the United States Supreme Court’s 1994 decision in Landgraf v. USI Film Products, retroactivity law was in a state of flux. Traditionally, American jurisprudence has disfavored retroactive application of statutes and, before Landgraf, courts had been unwilling to apply a statute retroactively absent clear statutory intent. The principle against retroactivity is based on valued, deeply-rooted beliefs about autonomy and fundamental fairness.

[T]he antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Art. I, § 10, cl. 1 prohibits States from passing another type of retroactive legislation, laws ‘impairing the Obligation of Contracts.’ The Fifth Amendment’s Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a ‘public use’ and upon payment of ‘just compensation.’ The prohibitions on ‘Bills of Attainder’ in Art. I, §§ 9-10, prohibit legislatures from singling out

87. See id. §§ 48.06-.08, 48.10.
88. 511 U.S. 244 (1994).
89. See id. at 286 (Scalia, J., concurring) (“[T]here exists a judicial presumption, of great antiquity, that a [nonpenal] legislative enactment affecting substantive rights does not apply retroactively absent clear statement to the contrary.”) (emphasis omitted); District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Sec., Inc., 925 F. Supp. 1551, 1569 (N.D. Ga. 1996); see also Nelson Lund, Retroactivity, Institutional Incentives, and the Politics of Civil Rights, 1995 PUB. INTEREST L. REV. 87 (arguing that the Supreme Court has become sensitive to political criticism of its civil rights jurisprudence and that this sensitivity has warped its opinion of retroactivity in recent opinions such as Landgraf); Elmer S. Smead, The Rule Against Retroactive Legislation, A Basic Principle of Jurisprudence, 20 MINN. L. REV. 775, 775 (1936) (contending that bias against retroactive laws is outdated).
90. The principle against retroactivity is derived from the idea that persons should be entitled to have their behavior governed by laws that exist in advance of their proscribed conduct. See Stephen R. Munzer, A Theory of Retroactive Legislation, 61 TEXAS L. REV. 425, 470-72 (1982). Moreover, retroactive legislation is a powerful tool which could be used as a means of retribution against unpopular individuals or groups, and thus, must be carefully guarded against potential abuse. See Landgraf, 511 U.S. at 266-68. Thus, if a statute is supposed to apply retroactively, the general policy is for the legislature to explicitly state that intent. See id. at 268-69. However, the retroactive application of statutes may serve legitimate purposes such as correcting mistakes or responding to emergencies. See id. at 267-68.
disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant its retroactive application.\footnote{91}{Landgraf, 511 U.S. at 266 (footnotes, citations, and internal quotation omitted).}

Two Supreme Court cases prior to \textit{Landgraf} show the Court's indecision with regard to the retroactive application of statutes.\footnote{92}{See Bradley v. Richmond Sch. Bd., 416 U.S. 696 (1974); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).} Although the Court in \textit{Bradley v. Richmond School Board} allowed a law to be applied retroactively,\footnote{93}{416 U.S. at 705-21; see also infra notes 96-102 and accompanying text.} the Court subsequently reaffirmed the traditional unwillingness to apply laws retroactively in \textit{Bowen v. Georgetown University Hospital}.\footnote{94}{488 U.S. at 208; see also infra notes 103-07 and accompanying text.} Finally, in \textit{Landgraf}, the Court set forth a test to determine whether a statute can be applied retroactively absent clear legislative intent.\footnote{95}{Landgraf, 511 U.S. at 280; see also infra notes 108-36 and accompanying text.}

\section*{A. Bradley v. Richmond School Board}

In \textit{Bradley}, the Supreme Court considered whether a statutory amendment, which authorized courts to grant attorneys' fees in school desegregation cases, pertained to expenses incurred prior to the amendment's effective date.\footnote{96}{Bradley v. Richmond Sch. Bd., 472 F.2d 318, 330-31 (4th Cir. 1972).} Exercising its equitable powers, the district court had awarded such fees to the \textit{Bradley} plaintiffs,\footnote{97}{Id. at 706-08.} but the Fourth Circuit reversed on the ground that Congress should authorize such awards, not the courts.\footnote{98}{See id.} Before the Fourth Circuit issued its decision, however, Congress passed the amendment allowing attorneys' fees in school desegregation cases.\footnote{99}{Bradley v. Richmond Sch. Bd., 472 F.2d 318, 330-31 (4th Cir. 1972).}

The Supreme Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice, or there is statutory direction or legislative history to the contrary."\footnote{100}{Bradley, 416 U.S. at 711. The \textit{Bradley} Court grounded its conclusion on}
fees did not expressly state whether it was intended to apply to pending suits. Because Congress chose to strike a clause from the final version of the amendment expressly stating that the amendment applied only to prospective claims, the Court was "reluctant specifically to read into the statute the very fee limitation that Congress had eliminated." Hence, the Court concluded that the legislative history indicated implicit support for the statute's application to pending and prospective cases.

B. Bowen v. Georgetown University Hospital

In *Bowen v. Georgetown University Hospital*, the Supreme Court shifted away from the *Bradley* decision and reaffirmed the traditional notion disfavoring retroactivity. In *Bowen*, the Court examined whether a Medicare Act provision, allowing the United States Secretary of Health and Human Services to set cost reimbursement regulations and make retroactive corrective adjustments, extended to retroactive promulgation of cost-limit rules. The Court affirmed the court of appeals' decision, which held that the Administrative Procedure Act generally prohibits retroactive rulemaking and that the Medicare Act's terms forbid retroactive cost-limit

*United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), in which the Court held it must apply the terms of a convention that was entered into while the case was on appeal. See id. at 711-13; see also *Thorpe v. Housing Auth.*, 393 U.S. 268, 281-83 (1969) (holding that although a new HUD regulation did not state whether it applied to pending cases or to events occurring prior to its promulgation, it was applicable to any resident who lived in the housing in question at the time the rule was issued).

101. An earlier version of the bill contained an effective date clause providing that successful litigants would be entitled to reasonable attorneys' fees "for services rendered, and costs incurred, after the date of enactment of this Act." *Bradley*, 416 U.S. at 716 (1974) (quoting S. 92-683 § 11(a) (1971)) (emphasis supplied by the Court).

102. See id. at 716.


104. Id. at 208.

105. Id. at 204-05. The cost-limit provision dealt with a schedule that changed the method for determining the 'wage index,' used to reflect salary levels in various geographic regions. See id. at 206. The former rule determined the geographic wage index by calculating the average salary levels for all hospitals within that geographical area. See id. The new rule however, excluded wages paid by federal government hospitals. See id. This new rule was subsequently invalidated by a federal district court and the Secretary used the former rule. See id. Thereafter, the Secretary reinstated the new rule and began collecting the sums formerly paid to the hospitals as a result of the district court's ruling. See id. at 206-07. The respondents initiated litigation to determine the validity of the retroactive application of the cost-limit schedule. See id. at 207.
rules. The Court emphasized that retroactivity is not favored in the law, and that absent specific language to the contrary, congressional enactments and administrative rules will not be applied retroactively.

The Court's requirement of an express statutory grant in order to validate retroactive application departed from its holding in Bradley. Rather than yield a concise rule regarding retroactive application, the Court's decision merely fueled the already heated debate over the proper interpretation.

C. Landgraf v. USI Film Products

In Landgraf v. USI Film Products, the United States Supreme Court attempted to resolve the "apparent tension" between the Bradley and Bowen decisions to determine whether a statute can be applied retroactively. In Landgraf, the plaintiff alleged that she had been sexually harassed and constructively discharged from her job in violation of Title VII. The district court found that harassment had occurred, but that the plaintiff had not been constructively discharged. Accordingly, because Title VII, as then formulated, provided only equitable relief and because the plaintiff was not entitled to equitable relief based on the court's finding, the complaint was dismissed. Thereafter, however, Congress amended Title VII to afford compensatory and punitive damages for certain violations and to allow a party to demand trial by jury if such damages are sought.

On appeal, the plaintiff contended that the amended version of Title VII should apply to her case, but the Fifth Circuit refused to remand the case for a jury trial because it was obligated to apply the law in effect at that time. On further appeal, the United States Supreme Court's task was to determine whether the Fifth Circuit "should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision."

106. Id. at 208.
107. Id.
108. 511 U.S. 244 (1994).
109. Id. at 263.
110. See id. at 248.
111. See id.
112. See id. at 249.
113. See id.
114. See Landgraf, 511 U.S. at 250.
115. Id.
Although an earlier version of the legislation expressly applied to cases that arose before its enactment, the amendment actually passed by Congress merely stated that it would take effect upon enactment "[e]xcept as otherwise specifically provided." The plaintiff argued that two sections of the legislation, which specified that application of those particular provisions be prospective, strongly implied that all of the Act's sections not specifically deemed prospective applied to pending cases. The Supreme Court disagreed:

It is entirely possible that Congress inserted the 'otherwise specifically provided' language not because it understood the 'takes effect' clause to establish a rule of retroactivity to which only two 'other specific provisions' would be exceptions, but instead to assure that any specific timing provisions in the Act would prevail over the general 'take effect on enactment' command . . . . We are also unpersuaded by petitioner's argument that both [sections specifying prospective application] merely duplicate the 'take effect upon enactment' command of [the main effective date clause] unless all other provisions . . . apply to pending cases . . . . Congressional doubt concerning judicial retroactivity doctrine, coupled with the likelihood that the routine 'take effect upon enactment' language would require courts to fall back upon that doctrine, provide a plausible explanation . . . that makes neither [statutory] provision redundant . . . . The history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.

Finding no guidance in the statute or its legislative history, the Court turned to judicial default rules. The Court acknowledged the "apparent tension" between canons of statutory construction, as illustrated by the Bradley and Bowen decisions. While Bradley relied on the rule that "a court is to apply the law in effect at the time it renders its decision," Bowen relied on the standard presump-

116. Id. at 257. The Court observed "[t]hat language does not, by itself, resolve the question before us. A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred on an earlier date." Id.
117. See id. at 258.
118. Id. at 261-63.
119. Id. at 263.
tion against retroactivity.\textsuperscript{121}

According to the \textit{Landgraf} Court, when the statute at issue is unambiguous, no conflict exists between the principle embraced in \textit{Bradley} and a presumption against retroactivity.\textsuperscript{122} Even when a new statute’s language is not crystalline, its application is undeniable in numerous situations.\textsuperscript{123} According to the Court, the intervening statute could be applied properly in such situations where the legislation confers or ousts jurisdiction, authorizes or affects the propriety of prospective relief, or alters applicable procedural rules.\textsuperscript{124}

The Court ultimately concluded that the provision affording a jury trial “is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date,” regardless of when the discriminatory conduct occurred.\textsuperscript{125} However, because application of the provision authorizing punitive damages would suggest a significant constitutional issue, and because the statute did not explicitly authorize punitive damages for preenactment conduct, the Court declined to find the provision applicable.\textsuperscript{126}

The Court struggled more with the compensatory damages provision but arrived at the same result.\textsuperscript{127} In the Court’s view, although the compensatory damage provision did not make unlawful that conduct which was lawful when it occurred, the provision did attach a vital new legal burden to discriminatory conduct.\textsuperscript{128} Absent clear congressional intent, therefore, such a provision should not be applied to preenactment events.\textsuperscript{129} The Court concluded: “The extent of a party’s liability, in the civil context as well as the crimi-

\textsuperscript{122} See Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994) (citing United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 107 (1805); illustrating that a statute which was passed while \textit{The Schooner Peggy} was pending was applied at the time of the court’s decision).
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 274.
\textsuperscript{125} Id. at 280.
\textsuperscript{126} Id. at 281, 283.
\textsuperscript{127} See id. at 281-82. The Court discussed the difficulty of classifying compensatory damages. It explained that the provision “does not make unlawful conduct that was lawful when it occurred,” nor does it fit under any other “suspect legislative purpose.” \textit{Id.} Thus, the court concluded that the provision “is not in a category in which objections to retroactive application on grounds of fairness have their greatest force.” \textit{Id.} at 282.
\textsuperscript{128} Landgraf, 511 U.S. at 282-83.
\textsuperscript{129} Id. at 283.
nal, is an important legal consequence that cannot be ignored.\textsuperscript{130}

The Court suggested the following analysis be employed to determine whether a statute is impermissibly retroactive:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, \textit{i.e.}, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.\textsuperscript{131} Hence, the presumption against retroactivity "has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact."\textsuperscript{132}

Thus, according to the \textit{Landgraf} court, when a statute contains no express savings clause, courts construing that statute must apply a three-prong test to determine whether the statute may be applied to pending claims.\textsuperscript{133} The first prong of the test is to determine whether applying the statute to pending claims "would impair rights a party possessed when he acted."\textsuperscript{134} The second prong of the test focuses on whether applying the statute to pending claims would "increase a party's liability for past conduct."\textsuperscript{135} Finally, the third prong involves determining whether applying the statute to pending claims would "impose new duties with respect to transactions already completed."\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{130} \textit{Id.} at 283-84.
\item \textsuperscript{131} \textit{Id.} at 280.
\item \textsuperscript{132} \textit{Id.} at 270 (emphasis added).
\item \textsuperscript{133} \textit{Id.} at 280.
\item \textsuperscript{134} \textit{Landgraf}, 511 U.S. at 280.
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\end{itemize}
VI. COURT DECISIONS INTERPRETING THE PSLRA'S RICO AMENDMENT

Since the enactment of the PSLRA of 1995, the legislation's effective reach has encountered differing interpretations by various courts. In 1996, four courts examined the applicability of section 107 of the PSLRA to pending claims. Three of these courts held that section 107 applies prospectively only, and not to claims pending at the time Congress enacted the PSLRA. One court, however, has held that in fact section 107 does apply to pending claims.

A. Prospective Application to Pending RICO Claims

Three federal courts have held that the RICO amendment applies only prospectively. In reaching this conclusion, these courts relied primarily upon the Landgraf test to determine retroactivity in light of statutory interpretation and legislative intent.


In District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Securities, Inc., the statute of limitations had run on the plaintiffs' securities fraud claims. Accordingly, RICO was the only available avenue for redress of their securities fraud allegations. The plaintiffs claimed wire and mail fraud as predicate acts under RICO. Therefore, because these
acts were pleaded in relation to underlying activity that would have been actionable as securities fraud, section 107 required the court had to determine whether the amendment applied retroactively to bar these claims.146

Relying on the Landgraf test, the United States District Court for the Northern District of Georgia concluded that "[e]liminating predicate acts upon which plaintiffs have rested their complaint for civil RICO remedies, and thereby causing their RICO claims to collapse, impairs the plaintiffs' ability to recover for actions which may have violated federal law. Thus, the statute would operate retroactively."147 Furthermore, the court held that in accordance with Landgraf, the statute should apply retroactively only upon a showing of clear congressional intent favoring such a result.148 The court found that because Congress specifically provided for prospective application for securities claims, its failure to express similar intent in regard to RICO claims demonstrates a lack of clear intent.149 Accordingly, the court declined to apply the statute retroactively.150 Interestingly, however, the court qualified its holding by recognizing that there was latitude for difference of opinion on the issue of retroactivity:151 "Immediate appeal of this order may materially advance the ultimate termination of this case."152

2. In re Prudential Securities Incorporated Limited Partnerships Litigation

In In re Prudential Securities Incorporated Limited Partnerships Litigation,153 a class of defendants, relying on the PSLRA, contested the court's jurisdiction over the plaintiffs' RICO claims that were based

146. Id. at 1568. The court deferred to the Congressional Record, which stated, ""[T]he Conference Committee intends that a plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud."" Id. at 1567 (quoting 141 CONG. REC. H13,691-98, H13,704 (Nov. 28, 1995)).
147. Id. at 1570.
149. Id.
150. Id.
151. See id.
152. Id.
upon predicate acts of securities fraud.\textsuperscript{154}

The United States District Court for the Southern District of New York first discussed the legislative history surrounding the Act and, specifically, section 107.\textsuperscript{155} The court acknowledged that neither proponents nor opponents of the action questioned whether the provision should apply to pending claims.\textsuperscript{156} However, "both sides refer\textsuperscript{[red]} to the provision as putting a stop to RICO suits with securities fraud as predicate acts."\textsuperscript{157} Accordingly, the court found that the legislative history, like the Act itself, was silent as to the application of the provision to pending claims.\textsuperscript{158}

The court did not discuss its specific findings with respect to the \textit{Landgraf} test but, rather, restated the analysis set forth in \textit{District 65}.\textsuperscript{159} The court then focused its attention on the overriding factor of clear congressional intent.\textsuperscript{160} The court acknowledged that the best argument for retroactive application was based in the traditional support given to the RICO amendment by the Chairman of the SEC and members of the judiciary.\textsuperscript{161} The court further recognized that statements made in a House debate "may support the urgency of altering RICO and the notion that Congress in-

\textsuperscript{154} Id.
\textsuperscript{155} See id. at 77-78.
\textsuperscript{156} Id. at 78.
\textsuperscript{157} Id. Several representatives voiced their support of the RICO amendment, and it may be gleaned from some statements that the Act was to have retroactive effect. See id. Notably, Representative McCollum stated:
I intend to introduce RICO reform. It is my hope that the subcommittee will bring forward legislation to help ensure that the RICO statutes are used in the manner that Congress originally intended. In the interim, however, this amendment will stop some of the most egregious abuses of the civil RICO statute . . . . This amendment will put an \textit{immediate} stop to one of the greatest abuses of the civil RICO statute.
\textsuperscript{158} \textit{In re Prudential Sec.}, 930 F. Supp. at 78.
\textsuperscript{159} Id. at 79-80.
\textsuperscript{160} See id. at 80. This factor is key to both the statutory interpretation and \textit{Landgraf} lines of analysis. A retroactive finding under \textit{Landgraf} can be defeated if a litigant can show that Congress clearly intended the statute to apply retroactively. See \textit{id.} at 81; District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Reps. v. Prudential Sec., Inc., 925 F. Supp. 1551, 1570 (N.D. Ga. 1996).
\textsuperscript{161} See \textit{In re Prudential Sec.}, 930 F. Supp. at 80 (referencing 141 CONG. REc. H2771 (daily ed. Mar. 7, 1995), wherein Representative Cox explained that SEC Chairman Arthur Leavitt, "[i]n testimony before the [House Committee on the Judiciary], stated that [the Act] contained the kind of civil RICO reform that is necessary.").
tended an immediate halt (including pending cases) to what it considered an extremely deleterious use of the statute." 162 In further support of retroactivity, the court put forth the argument that Congress could have explicitly provided for only prospective application, if it so intended. 163 Nonetheless, the court held that while it was possible the lack of clear intent in the statute was the result of the rushed nature of the debate and proposal, the fact remains that "[w]hatever the reason, the statute does not include the type of clear expression that the RICO provision is to apply retroactively required under the Landgraf decision." 164 As a result, the court determined that the RICO provision applied prospectively and, thus, did not bar plaintiffs' claims. 165

3. Bromm v. Premier Capital Investments Corporation

In Bromm v. Premier Capital Investments Corporation, the United States District Court for the District of Nebraska denied the defendant's motion to dismiss and held that the Act's RICO amendment did not apply retroactively to bar pending claims. 166 The court did not discuss its reasoning except for a brief, one-sentence statement:

Suffice it to say that the words and structure of the Reform Act (particularly sections 107 and 108), the legislative history, and precedent from the United States Court of Appeals for the Eighth Circuit and the Supreme Court convince me that the Reform Act should not be applied to RICO cases like this one pending before the date of enactment. 167

The court did not expand further upon its holding or specific fac-

162. In re Prudential Sec., 990 F. Supp. at 80. The court was referencing statements made by persons testifying before the House, including a comment by Judge Milton Pollack in which he stated:

[O]ne of the proliferating developments in civil litigation has been the use of RICO . . . in civil claims, in routine commercial disputes, including those arising under the federal securities laws. I think that the proliferation of these claims and the use of a law that was designed to eliminate organized crime is a very bad influence on the commercial community.

Id. (quoting 141 CONG. REC. H2773 (daily ed. Mar. 7, 1995) (statement of Judge Milton Pollack)).

163. See id. at 80.

164. Id. at 81.

165. Id. at 77, 81.


167. Id. The court's only cited support was District 65, which held that the amendment did not apply retroactively. See id.
tual determinations.\textsuperscript{168}

4. \textit{Synthesizing the Decisions}

Although the three courts finding prospective application of the RICO amendment varied somewhat in the weight accorded to particular lines of analysis or canons, the bases for their conclusions were the same.\textsuperscript{169} The courts agreed that the plaintiffs in these actions were denied access to a right which previously existed and that despite evidence of congressional intent regarding the purpose of the RICO amendment, the plain language and legislative history failed to demonstrate a clear intent to apply the amendment retroactively.\textsuperscript{170} Hence, the courts ruled in accordance with the general presumption disfavoring retroactive application absent clear congressional intent to the contrary.

B. \textit{Retroactive Application of the Act to Pending RICO Claims: Reading Wireless Cable Television Partnership v. Steingold}

Although three courts have held that section 107 of the PSLRA applies to prospective claims only, the United States District Court for the District of Nevada, relying upon statutory interpretation and legislative intent viewed in conjunction with the \textit{Landgraf} test, recently interpreted section 107 to call for application of section 107 to pending RICO claims.\textsuperscript{171} In \textit{Reading Wireless Cable Television Partnership v. Steingold}, the defendants sought to dismiss the RICO causes of action based on underlying securities fraud and asserted that section 107 of the Private Securities Litigation Reform Act applied retroactively so as to preclude pending claims.\textsuperscript{172} The court, relying heavily upon statutory interpretation and legislative intent,

\textsuperscript{168} \textit{Id.}


\textsuperscript{170} \textit{See In re Prudential Sec.}, 930 F. Supp. at 80-81; District 65, 925 F. Supp. at 1569-70. Although the court in \textit{Bromm} did not detail its reasoning, it summarily stated that its opinion was based on the plain language of the statute, legislative history, case precedent, and specifically, the findings in District 65. \textit{See Bromm}, No. 4: CV-95-3327, slip op. at 4.


\textsuperscript{172} \textit{Id.} at *1.
held that the purpose of section 107 was to remove a damages provision that Congress considered inequitable and unnecessary. Additionally, the court noted that this provision, "taken together with the implication given by the omission from section 108's specific temporal reach language of any mention of the RICO amendment, calls for retrospective application... as to plaintiffs' RICO claims."  

In reaching its conclusion, the court looked to the purpose of the RICO amendment and concluded that its only purpose was to eradicate what Congress viewed as an "unfair piling on of liability in cases where remedies for the same conduct had long since been in place and were adequate to address it."  

The court recognized the presumption of Landgraf but discounted its application in this case. Specifically, the court noted "retroactively taking away an unnecessary and unfairly cumulative remedy in no way runs counter to the underpinnings of the usual presumption against retroactivity described by Justice Stevens in Landgraf. Therefore, relying on the nature of section 107, the court concluded the amendment did not come within the class to which the general presumption against retroactivity applies.

173. Id. at *3.  
174. Id.  
175. Id. at *2.  
176. Id.  
177. Reading Wireless, 1996 WL 728045, at *2. In Landgraf, Justice Stevens said the court's duty is to ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Landgraf v. USI Film Prods., 511 U.S. 244, 269-70 (1994), quoted in Reading Wireless, 1996 WL 728045, at *2. Accordingly, when the statute is enacted subsequent to the events being litigated, and congressional intent is unclear with respect to the statute's application, the court must decide whether retroactive application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280, quoted in Reading Wireless, 1996 WL 728045, at *2.  
VII. RETROACTIVE APPLICATION OF SECTION 107 TO PENDING RICO CLAIMS

The application of section 107 of the PSLRA has produced significant conflict among litigants and courts. With respect to statutory interpretation and legislative intent, litigants defending against RICO claims argued:

[B]ecause Congress expressly provided for prospective application in section 108 [of the PSLRA] for lawsuits arising under the securities laws, it should be inferred from its failure to so provide for lawsuits arising under RICO that Congress intended the opposite for the RICO amendment in the immediately preceding section 107.179

Alternatively, RICO plaintiffs in securities fraud cases argue that “[i]f Congress had truly sought to distinguish section 107 from section 108’s clearly expressed prospective application, it could have inserted the appropriate retroactive language in either statutory provision.”180 While both sides present tenable arguments, the fact that the amendment is open to varying interpretations has caused some courts to conclude that it is impossible to discern clear congressional intent from the plain language of the statute.181

These litigants rise and fall in light of the traditional prohibition disfavoring retroactivity182 and the test set forth in Landgraf.183 Under Landgraf, the court evaluates whether a party is deprived of a right that previously existed to determine if a statute should apply retroactively.184 Naturally, defendants assert that section 107 does


180. In re Prudential Sec., 930 F. Supp. at 78. In Landgraf, the Supreme Court considered a similar “negative inference” argument and denied the prospective application of a statutory provision where Congress only implied its intent. See District 65, 925 F. Supp. at 1568-69.


183. 511 U.S. 244, 280 (1994).

184. Id.; see also Reading Wireless, 1996 WL 728045, at *3 (applying the Landgraf test); In re Prudential Sec., 930 F. Supp. at 79 (applying the standards set forth in Landgraf); District 65, 925 F. Supp. at 1569 (following the Landgraf instruction on a test regarding retroactivity).
not impair a right that previously existed because that right remains available under securities fraud causes of action.\textsuperscript{185} Meanwhile, plaintiffs emphasize that application of section 107 to pending claims extinguishes a right that existed prior to the enactment of the PSLRA and, in some cases, effectively eliminates a party's ability to recover under traditional securities-based claims.\textsuperscript{186}

The cases construing section 107 understandably have yielded conflicting interpretations regarding its application, as courts have been forced to impart their impressions of congressional intent amidst legislative silence.\textsuperscript{187} In reaching their conclusions, the courts have placed unwarranted reliance upon the traditional presumption disfavoring retroactive application.\textsuperscript{188} Instead, a proper analysis of the canons of statutory construction leads to the conclusion that section 107 does apply to pending claims.\textsuperscript{189} In addition, an application of the \textit{Landgraf} test dictates that section 107 of the PSLRA should apply to pending RICO claims in the securities context.\textsuperscript{190}

A. Statutory Construction Favors Application of Section 107 to Pending Claims

The use of accepted canons of statutory construction to interpret section 107 of the PSLRA clearly indicates that the amendment to RICO should apply to both future claims and pending claims. Three canons are pertinent here: the plain meaning rule, \textit{expressio unius est exclusio alterius}, and legislative intent.

\textsuperscript{185} See, e.g., \textit{District 65}, 925 F. Supp. at 1569 (considering whether section 107 impairs rights that a party previously possessed); \textit{In re Prudential Sec.}, 930 F. Supp. at 79 (stating that section 107 does impair a plaintiff's right to recover).

\textsuperscript{186} See, e.g., \textit{District 65}, 925 F. Supp. at 1570.

\textsuperscript{187} See \textit{Reading Wireless}, 1996 WL 728045, at *3 (applying retroactive application of Title I of plaintiff's claims); \textit{District 65}, 925 F. Supp. at 1570 (holding that section 107 did not apply retroactively to bar plaintiff's claims); \textit{In re Prudential Sec.}, 930 F. Supp. at 79 (stating the statute should not apply retroactively absent a clear expression of intent by Congress to that effect).

\textsuperscript{188} See \textit{District 65}, 925 F. Supp. at 1568; \textit{In re Prudential Sec.}, 930 F. Supp. at 79.

\textsuperscript{189} See discussion \textit{infra} Part VII.A.

\textsuperscript{190} See discussion \textit{infra} Part VII.B.
1. The Plain Meaning Rule

The plain meaning rule dictates that courts apply the common and established meaning of words and phrases.191 Section 107 of the PSLRA provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of the securities" to establish a RICO violation.192 The amendment does not directly address limiting the claims to which it applies. Instead, the provision states that no one can bring a claim under RICO for securities fraud violations.193 The plain language of the statute does not indicate any sort of prospective application requirement. The statute is silent as to application. Thus, the plain meaning of such silence is that the section applies to all pending and future RICO claims.

2. Expressio Unius Est Exclusio Alterior

The statutory maxim expressio unius est exclusio alterius dictates that where the applicability of a statute is expressed therein, omissions of application should be understood to be excluded purposefully.194 The savings clause in section 108 of the PSLRA states that the Act does not apply to pending private securities claims, but only to future claims.195 The Act is silent as to the applicability of section 107 to pending RICO claims. If Congress had not intended section 107 to apply to pending claims, either it would have included RICO in the savings clause in section 108 or it would have provided a general prospective savings clause without restriction. Because Congress specifically included a savings clause in section 108 stating that the Act does not apply to pending securities claims, Congress' omission of a savings clause in section 107 should be understood to be purposefully excluded. In other words, Congress did not intend section 108's savings clause to apply to RICO claims. If Congress did not intend section 108's "prospective only" savings clause to apply to RICO claims under section 107, it follows that section 107 does apply to pending RICO claims.

191. See SUTHERLAND, supra note 79, § 46.01, at 81.
193. Id.
194. See SUTHERLAND, supra note 79, § 47.23, at 216-17.
3. Legislative Intent

Although the original House and Senate bills that were to become the PSLRA contained no general savings clauses, a savings clause with respect to claims brought under the 1933 and 1934 Securities Acts was added to the Senate bill in committee.\(^{196}\) The amended Senate bill stated that the amendments in the PSLRA “shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933 commenced before the date of enactment of this Act.”\(^{197}\) After the House rejected the Senate bill, the House and Senate both adopted a bill with a different savings clause as to securities claims.\(^{198}\) The new savings clause, which later became section 108 of the PSLRA, provided that the PSLRA amendments “shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933 commenced before and pending on the date of the enactment of this Act.”\(^{199}\) Although this provision expressly applies only to prospective claims brought under the 1933 and 1934 Securities Acts, nothing in the PSLRA states whether section 107, which limits civil RICO claims, applies to pending claims.\(^{200}\) Moreover, at no time during the adoption or modification of the savings clause was there discussion of the RICO amendment.\(^{201}\) Yet, by enacting the PSLRA, Congress clearly intended to end frivolous RICO claims in the securities context.\(^{202}\) In order to achieve fully Congress’ goal of ending frivolous RICO claims in the securities context, and with no evidence to the contrary, section 107 should apply to pending claims.

Congress likely failed to include civil RICO in the PSLRA savings clause in section 108 in response to the growing abuses of the civil RICO remedy in the context of securities litigation. As Justice Marshall noted in his dissent in *Sedima S.P.R.L. v. Imrex Co.*, “private civil actions under the statute are being brought almost solely

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\(^{196}\) See *supra* notes 49-53 and accompanying text.

\(^{197}\) S. 240, 104th Cong. § 110 (2d version June 20, 1995).

\(^{198}\) See *supra* notes 60-63 and accompanying text.

\(^{199}\) Private Securities Litigation Reform Act § 108, 109 Stat. at 758 (emphasis added).


\(^{201}\) See *id*.

\(^{202}\) See *id.* at 77; *supra* notes 70-72 and accompanying text.
against [respected businesses], rather than against the archetypal, intimidating mobster. Yet this defect— if defect it is—is inherent in the statute as written, and its correction must lie with Congress.\textsuperscript{203} Justice Marshall recognized that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."\textsuperscript{204} Thus, the inherent abuses of civil RICO were recognized as problematic a decade before any legislative action was taken. Congress was well aware of the abusive use of civil RICO in the context of securities fraud litigation when it enacted the reformative measures, and therefore likely declined to include civil RICO in the specific prospective savings clause in section 108 of the PSLRA.\textsuperscript{205} Because the RICO reform was so long in coming, it logically follows that section 107 was meant to put an immediate halt to the frivolous pleading of civil RICO in securities fraud litigation. In doing so, it did not preclude all remedial measures for securities fraud or valid civil RICO violations. It merely attempted to restore the use of civil RICO to its proper context.

Before the PSLRA, it was too easy to satisfy the pleading requirements under the civil RICO provision with respect to securities fraud violations.\textsuperscript{206} In the criminal RICO context, prosecutors exercise restraint and discretion in bringing such actions.\textsuperscript{207} In the private context, however,

[L]itigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney’s fees, have a strong incentive to invoke RICO’s provisions whenever they can allege in good faith two instances of mail or wire fraud. Then the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a ‘racketeer,’ will have a strong interest in settling the dispute.\textsuperscript{208}

Congress’ enactment of section 107 was a long-awaited re-

\begin{itemize}
\item \textsuperscript{204} Id. at 500.
\item \textsuperscript{205} See In re Prudential Sec., 930 F. Supp. at 77-78.
\item \textsuperscript{206} See id. at 79 (quoting Representative Cox, who argued that without section 107, a plaintiff’s attorney alleging a single violation is able to obtain a hefty settlement).
\item \textsuperscript{207} See Sedima, 473 U.S. at 503 (Marshall, J., dissenting).
\item \textsuperscript{208} Id. at 504 (citing Rakoff, Some Personal Reflections on the Sedima Case and on Reforming Rico, RICO: CIVIL AND CRIMINAL 400 (Law Journal Seminars-Press 1984)).
\end{itemize}
sponse to a serious misuse of a statutory remedy. The long-standing abuse demonstrates the immediate need for reform and retroactive application. It is not meant as a prospective deterrent, but rather an immediate attempt to remedy a serious and abusive practice.

From an economic perspective, the misdirected use of civil RICO in the securities fraud context places a severe financial burden on defendants, who, when threatened with potential treble damages, settle cases that are often without merit, simply to avoid greater economic loss. Basic economic principles dictate that such occurrences result in higher costs to consumers. Thus, not only does civil RICO burden corporate defendants, it places further economic burdens upon consumers. Again, Congress was aware of the burdens civil RICO placed on defendants, and likely enacted section 107 to immediately halt the abuses and burdens of civil RICO.

B. Using the Landgraf Test

Not only do statutory maxims and principles of legislative intent dictate that section 107 should apply to both pending and future RICO claims in the securities context, but an application of the Landgraf test clearly indicates that the application of section 107 to pending claims is not impermissibly retroactive. Using the principles set forth in Landgraf, the validity of retroactivity is determined by using a three-prong test. This test evaluates whether the new legislation would impair rights a party possessed when the action occurred, increase a party's liability for past conduct, or impose new duties regarding transactions already completed. In the civil RICO context, only the first of the three prongs is relevant. The two remaining prongs are irrelevant because section 107 would not increase a party's liability or impose new duties with respect to completed transactions. In fact, the amendment would decrease a party's potential compensatory liability by restricting the use of civil RICO and the accompanying treble damages provision.

209. See id. at 505.
210. See Letter from L. Ralph Mecham, Director, Administrative Office of the United States Courts, to the Honorable William J. Hughes, Chair, House Subcommittee on Crime (June 9, 1989) (stating that of the 855 civil RICO cases in 1988, only 14 went to jury trial).
211. Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).
212. See id.
Instead, the only relevant issue under *Landgraf* is whether application of section 107 to pending claims would impair rights a party possessed at the time of the complained-of conduct or when a suit was filed. If an amendment operates so as to impair the rights a party possessed before its enactment, it is said to have retroactive effect, and therefore, traditionally is disfavored in the law. Generally, the presumption is that a law with retroactive effect will not govern absent clear congressional intent in favor of application to pending claims. The presumption disfavoring retroactivity is relied upon by plaintiffs in pending civil RICO actions to overcome challenges by defendants seeking dismissal of the actions in light of the amendment.

Contrary to the findings of the majority of the courts to decide this issue, the application of section 107 to pending RICO claims does not deny plaintiffs access to a right they possessed before section 107 was enacted. Plaintiffs alleging securities fraud violations may still pursue a cause of action, but are confined to the remedies and restrictions contained in the Securities Acts of 1933 and 1934. Retroactive application of section 107 does not leave plaintiffs whose suits are pending without a remedy. It merely limits redress to the proper provisional remedies and limitations. In the event there is an underlying RICO violation, a plaintiff may pursue a civil RICO action in conjunction with a securities fraud claim in cases where the defendant is first criminally convicted. This prerequisite restores RICO to its original intended purpose of deter-

213. *See id.*

214. *See District 65 Retireement Trust for Members of the Bureau of Wholesale Sales Reps. v. Prudential Sec., Inc., 925 F. Supp. 1551, 1569 (N.D. Ga. 1996) (indicating that the focus of the court’s analysis is whether section 107 impairs rights a party possessed when he acted, increases a party’s liability for past conduct, or imposes new duties with respect to transactions already completed); In re Prudential Sec. Inc. Ltd. Partnerships Litig., 930 F. Supp. 68, 79 (S.D.N.Y. 1996) (concluding the RICO amendment does impair the plaintiff’s ability to recover because the plaintiff’s complaint will be stripped of RICO claims after the statute of limitations for securities fraud claims likely has expired).*

215. *See District 65, 925 F. Supp. at 1569 (analyzing the canons of statutory construction outlined in *Landgraf* regarding whether the RICO amendment should be applied to pending claims).*

216. *See, e.g., In re Prudential Sec., 930 F. Supp. at 77-81; District 65, 925 F. Supp. at 1568-70.*

217. *See discussion supra Part VI.A.*

ring racketeering practices. 219

A notable exception exists with respect to claims that take advantage of the extended statute of limitations period contained in civil RICO because they failed to meet the three-year limitations period for securities fraud allegations. 220 Arguably, failing to allow these plaintiffs to pursue their civil RICO claims denies them access to a right they possessed before the amendment was enacted. In essence, applying section 107 to their pending claims denies then the right to any recovery at all, because the shorter statute of limitations has run on their securities claims under the 1933 and 1934 Securities Acts. However, these plaintiffs are using civil RICO as a back door to initiate otherwise stale claims. Before the PSLRA, plaintiffs needed to allege only two instances of wire or mail fraud in order to resurrect their stale claims and take advantage of civil RICO's four-year statute of limitations. In so doing, these plaintiffs are accorded an added bonus of potential treble damages. The incentives and inherent abuses in this practice are obvious. It is precisely this type of frivolous litigation that Congress sought to eliminate by passing the PSLRA and, specifically, section 107. Section 107 itself does not deny a plaintiff access to a previously existing right. Rather, the statute of limitations of the securities claim that the plaintiff should have brought extinguishes the underlying right to bring a securities-based fraud claim. Accordingly, section 107 does not have detrimental retroactive effects as described by the Landgraf court.

VII. CONCLUSION

By enacting section 107, Congress clearly intended to put an end to frivolous RICO claims. It is unlikely Congress intended section 108's prospective savings clause regarding private securities claims to incorporate pending RICO claims when the purpose of section 107 is to remove RICO from private securities actions. Congress apparently intended to separate RICO from private securities claims.

The plain language of section 107, as well as the statutory maxim expressio unius est exclusio alterius, dictates that the statute should apply to both pending and prospective RICO claims. Moreover, Congress' intent to put an end to frivolous RICO claims

219. See discussion supra Part II.
220. See Mathews, supra note 22, at 938-39.
and to deter abusive litigation practices would be served by applying section 107 to pending RICO claims.

Although retroactive application of congressional enactments traditionally is disfavored in the law, section 107 of the PSLRA warrants an exception. The rule against retroactivity is generally appropriate in most circumstances. Section 107, however, passes the three-prong Landgraf test and does not subject plaintiffs or defendants to the traditional inequities found in retroactive application. Accordingly, courts should apply section 107 to pending RICO claims and end abusive litigation practices.