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RCRA Citizen Suits and Restitution: The Eighth Circuit’s Full *Cort* Press Strangles Equity’s Traditional Remedial Play

*Furrer v. Brown*¹

I. INTRODUCTION

Congress creates a federal right of action for private citizens in two ways. First, Congress can expressly grant this right in the statute’s language. Second, Congress can implicitly create a right of action. In *Cort v. Ash*,² the Supreme Court set forth a method of analyzing a statute to determine whether Congress implied a private right of action.

As a separate matter, courts sometimes must determine the remedies available to citizens who have an express or implied right of action under a statute. In *Davis v. Passman*,³ the Supreme Court made it clear that *Cort v. Ash* does not apply when the question solely concerns the nature of the remedies available under a statute.⁴ Nonetheless, courts continue to confuse these two distinct questions. This Note will address *Furrer v. Brown*,⁵ a recent decision highlighting the Eighth Circuit’s confusion in the distinction between finding an implicit right of action and determining the available remedies for an existing right of action.

II. FACTS AND HOLDING

In 1982, J. Richard and Margaret Furrer purchased property from Donald and Dorothy Brown and Louis and Geraldine Fagas.⁶ Shell Oil Company occupied and leased the property from 1933 until the mid-1970s and installed underground gasoline storage tanks on the property.⁷ In 1991, the Furrers discovered that gasoline had leaked from the underground storage tanks at

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¹. 62 F.3d 1092 (8th Cir. 1995).
². 422 U.S. 66 (1975).
³. 442 U.S. 228 (1979).
⁴. *Id.* at 241.
⁵. *See Furrer*, 62 F.3d 1092.
⁶. *Furrer*, 62 F.3d at 1093.
⁷. *Furrer*, 62 F.3d 1093. It is clear that Shell leased the property from the Browns and Fagas. It is unclear, however, if other persons owned the property during Shell’s lease period. *See* Appellant’s Brief at 3-4, *Furrer v. Brown*, 62 F.3d 1092, 1093 (8th Cir. 1995)
some time during Shell's occupancy. The Missouri Department of Natural Resources ordered the Furrers to remediate the contaminated property. The Furrers complied at a cost of over $260,000.

The Furrers filed suit to recover their remediation costs in the United States District Court Eastern District of Missouri. They named as defendants the Browns and Fagases and Shell as the operator of the underground tanks. The Furrers sought equitable restitution based on the citizen suit provision of the Resource Conservation and Recovery Act (RCRA). The district court granted defendants' motions to dismiss for lack of subject matter jurisdiction, and the Eighth Circuit affirmed. The Eighth Circuit held that RCRA failed to expressly create a private cause of action for

8. Id. When the Furrers purchased the property on April 1, 1982, there were no operative gasoline pumps on the property and there was no gasoline in the underground tanks. See Appellant's Brief at 3-4, Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995).

11. Furrer, 62 F.3d at 1093.
12. Id.
13. Id.; 42 U.S.C. § 6972 (1988). The citizen suit provision reads in part: Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf . . .
   (B) Against any person, including . . . any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; . . .
   . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce [permits and other such requirements], to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . to order such person to take such other action as may be necessary, or both . . .

The Furrers did not bring suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994) because CERCLA's definition of hazardous substance excludes "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance." 42 U.S.C. § 9601(14) (1994).
14. Furrer, 62 F.3d at 1093.
the recovery of remediation costs. The court then applied a Cort v. Ash analysis to determine whether Congress implicitly created a private cause of action in RCRA. After considering the Cort factors, the court held that RCRA did not implicitly create a private remedy for recovering cleanup costs.

III. LEGAL BACKGROUND

A. When Courts Should Apply Cort v. Ash

Courts frequently display confusion in the application of the Cort v. Ash analysis. The Supreme Court's analysis in Cort refers to the congressional creation of a private cause of action. Yet courts often improperly rely on the Cort analysis to determine whether Congress implicitly authorized a specific type of relief in a statute that expressly grants a private cause of action.

In Davis v. Passman, the Supreme Court attempted to clarify the misunderstanding over the difference between a congressionally created cause of action and the relief afforded under it. The Fifth Circuit ruled in Davis, based upon the factors set out in Cort, that the Due Process Clause of the Fifth Amendment did not include an implied private right of action. The

15. Id. at 1094.
16. 422 U.S. 66 (1975). The Cort test applies four factors in assessing whether Congress intended to create an implied cause of action: 1) is the plaintiff one of the class for whose especial benefit the statute was enacted? 2) is there any indication of legislative intent to create or deny such a remedy? 3) is it inconsistent with the underlying purposes of the legislative scheme to imply such a remedy? 4) is the cause of action traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law? Id. at 78.
17. Furrer, 62 F.3d at 1094-1102.
18. See supra note 16.
19. Furrer, 62 F.3d at 1100.
20. 422 U.S. 66 (1975). See supra note 16 for the four factors. Cort interpreted a criminal statute that did not expressly provide for civil enforcement. This is significant in that it infers that Cort should apply only when a statute fails to grant any express right of action to a private plaintiff. Nonetheless, the different meanings courts have placed on "cause of action" have resulted in confusion.
22. Davis, 442 U.S. at 238.
Supreme Court reversed, holding that the Due Process Clause of the Fifth Amendment contains an implied right of action.\textsuperscript{25} The Supreme Court in \textit{Davis} made clear that the question whether a private citizen has a cause of action is analytically distinct from the question of what relief that cause of action is afforded.\textsuperscript{26} The \textit{Davis} court established two prerequisites to using the \textit{Cort} analysis. First, Congress must have enacted a statute which created enforceable rights and obligations.\textsuperscript{27} Second, the court must be deciding whether a particular class of litigants can enforce those rights and obligations.\textsuperscript{28}

The Supreme Court addressed this question again, as it relates to Title IX of the Education Amendments of 1972, in \textit{Franklin v. Gwinnett County Public Schools}.\textsuperscript{29} Because the Court previously recognized that the statute granted a cause of action,\textsuperscript{30} the Court had to decide whether money damages served as an appropriate remedy.\textsuperscript{31} The Supreme Court did not use a \textit{Cort} analysis to decide this issue.\textsuperscript{32} Instead, the \textit{Franklin} Court repeatedly referenced the holding from \textit{Davis} that determining if a cause of action exists is analytically distinct from deciding what relief is available.\textsuperscript{33} The decision in \textit{Franklin} relied on the principle that if a right of action exists and Congress fails to limit the enforcement powers of the courts, a federal court may order any appropriate relief.\textsuperscript{34}

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.} at 241. The Court further found that damages were an appropriate form of relief. \textit{Id.} at 248-49.
  \item \textsuperscript{26} \textit{Id.} at 239.
  \item \textsuperscript{27} \textit{Id.} at 239-40.
  \item \textsuperscript{28} \textit{Id.}
  \item \textsuperscript{29} 503 U.S. 60, 62-63 (1992). The Supreme Court had previously recognized a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1991). \textit{See infra} note 30. The question in \textit{Franklin} was whether the remedies available included monetary damages.
  \item \textsuperscript{30} Title IX did not grant an express private right of action, but the Supreme Court previously implied such an action in \textit{Cannon v. University of Chicago}, 441 U.S. 677 (1979). This statute provides in part that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1991).
  \item \textsuperscript{32} \textit{Id.} at 76.
  \item \textsuperscript{33} \textit{Id.} at 65-66, 69.
  \item \textsuperscript{34} \textit{Id.} at 69. The statute in \textit{Franklin} was silent on the question of remedies available.
\end{itemize}
B. Equitable Powers of Federal District Courts

A principle deeply rooted in our legal system suggests that when Congress invokes the equitable jurisdiction of courts, that jurisdiction includes all inherent equitable powers.\(^35\) Congress, therefore, must explicitly limit the scope of the equitable remedies available.\(^36\) Any inference of limitation must be necessary and inescapable from the language of the statute.\(^37\) Describing this equitable jurisdiction, the Supreme Court stated that the courts need the power to mold each decree to the necessities of the particular case; this requires flexibility rather than rigidity.\(^38\) These equitable powers assume an even broader and more flexible character when the public interest is at stake.\(^39\)

Equitable jurisdiction unquestionably includes injunctive powers.\(^40\) Therefore, the Supreme Court often has held that a statute that invokes the court's injunctive powers also invokes the full scope of equitable remedies.\(^41\) In *Hecht Co. v. Bowles*\(^42\) and *Weinberger v. Romero-Barcelo*,\(^43\) the Supreme Court, based on the above principle, found that even if a statute says courts "shall" issue an injunction for proven violations, courts have discretion to decide the propriety of an injunction in each case.\(^44\)

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43. 456 U.S. 305, 312 (1982).

44. In *Hecht*, the statute in question was § 205(a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C. App. Supp. II, §§ 901, 925) which provides that upon a showing that a person was in violation of the statute, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." *Hecht*, 321 U.S. at 321-22.

In *Romero-Barcelo*, the statute was the Federal Water Pollution Control Act, 33 U.S.C. § 1251, with the same language as above. Again the Court upheld the discretion of the district court saying that authorizing injunctive relief invoked the full equitable powers of the courts. *Romero-Barcelo*, 456 U.S. at 320.
The scope of equitable jurisdiction encompasses much more than discretion in implementing statutorily authorized remedies. Equitable powers also allow district courts to grant equitable relief not mentioned in the statute.\textsuperscript{45} The \textit{Porter} court, applying the analysis from \textit{Hecht Co.}, stated that once a statute invokes equity, all equitable remedies are presumed available.\textsuperscript{46} The fact that the statute authorized the court to grant any "other order" necessary reinforced the Court's conclusion.\textsuperscript{47} The Court said "the term "other order" contemplates a remedy other than that of an injunction or restraining order . . . [and an] order for . . . restitution . . . may be considered a proper 'other order.'"\textsuperscript{48}

In \textit{United States v. Moore},\textsuperscript{49} the Court allowed restitution under a statute that gave district courts jurisdiction to enjoin violative acts or to enter "an order enforcing compliance."\textsuperscript{50} This case displayed an added facet of equitable jurisdiction in that the Court awarded restitution even though the district court failed to issue an injunction, the remedy that invoked equity in the statute.\textsuperscript{51}

The cases discussed thus far have dealt with statutes that authorize injunctions and "other orders." In addition, the Court has applied full equitable powers through a statute that grants courts only the power to enjoin and does not mention "other orders."\textsuperscript{52} In \textit{Mitchell}, the statute gave district courts injunctive power to restrain violations of the statute, but specifically barred the courts from ordering the payment of unpaid minimum wages or overtime wages.\textsuperscript{53} Despite this limitation, the Court held that courts have the

\begin{itemize}
\item \textsuperscript{45} Courts often cite as an example \textit{Porter v. Warner}, 328 U.S. 395 (1946), which dealt with the same statute as \textit{Hecht}. \textit{See supra} note 44. The Court later stated that the equitable principles in both \textit{Hecht} and \textit{Porter} are not to be limited by the fact that the statute considered was a wartime statute. They also are not to be limited on the grounds that the Court found affirmative confirmation to order reimbursement in the language of the statute. \textit{See Mitchell}, 361 U.S. at 291.
\item \textsuperscript{46} \textit{Porter}, 328 U.S. at 398.
\item \textsuperscript{47} \textit{Id.} at 399.
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} 340 U.S. 616 (1951).
\item \textsuperscript{50} \textit{Id.} at 618. The action was brought under \textsection 206(b) of the Housing and Rent Act of 1947, 50 U.S.C. \textsection 1881-1910 (Supp. IV 1951).
\item \textsuperscript{51} \textit{Moore}, 340 U.S. at 619-21.
\item \textsuperscript{52} \textit{See Mitchell v. De Mario Jewelry, Inc.}, 361 U.S. 288, 291 (1960).
\item \textsuperscript{53} \textit{Mitchell}, 361 U.S. at 289. Secretary of Labor Mitchell brought the action under \textsection 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. \textsection 217. This section clearly gave district courts the power to enjoin violations of \textsection 15 of the Act. The question was whether the equitable jurisdiction invoked through \textsection 17 empowered a court to order reimbursement of lost wages.
\end{itemize}
authority to order the payment of lost wages under the statute. 54 Similarly, the Fifth and Eighth Circuits found full equitable powers under a statute only authorizing injunctive relief. 55

These cases highlight the fact that when Congress invokes a district court’s equitable jurisdiction, the court should not imply any limitation on that jurisdiction absent a clear declaration from Congress to that effect. The Court in Hecht stated that a departure from several hundred years of history requires an unequivocal statement of that purpose. 56 Porter stressed that "unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." 57 The Porter Court further stated that courts should not deny or limit the comprehensiveness of equitable jurisdiction without a clear and valid legislative command. 58

Courts, however, sometimes infer limitations on the equitable remedies available under a statutory right of action. These courts reason that when Congress intends to grant a certain power or discretion to district courts, it does so specifically. In other words, if Congress intended the desired remedy in the disputed statute, it would have said so explicitly. 59 For example, in Mitchell, the Supreme Court reversed the appellate court’s reasoning that the statute must expressly confer or necessarily imply the equitable power sought. 60 In Hecht, Porter and Mitchell, the Supreme Court rejected this approach. 61 The Court stated in Hecht, "[w]e cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." 62 Thus, to limit equity by inference, the inference must be necessary

54. Mitchell, 361 U.S. at 296. The Court said that the statute barred recoupment of underpayments but not unpaid wages. Id. at 294-95. Mitchell clearly demonstrates how specifically Congress must limit the equitable powers of courts once invoked.


56. Hecht, 321 U.S. at 329-30. Mitchell also states that when Congress invokes the equitable powers of the court, it must be assumed that they have acted cognizant of this historic power of equity to provide complete relief. Mitchell, 361 U.S. at 292.


58. Id.


and inescapable from the language of the statute.\textsuperscript{63} The Mitchell Court subsequently explained that Porter laid down the proper criterion for determining the scope of equitable remedies.\textsuperscript{64} Porter requires a necessary and inescapable inference to \textit{limit} not to grant equitable jurisdiction.\textsuperscript{65}

In 1991, in \textit{Pierce v. Amaral},\textsuperscript{66} the Eighth Circuit applied this traditional equitable jurisdiction analysis to an action brought under the Interstate Land Sales Full Disclosure Act.\textsuperscript{67} The district court granted summary judgment in favor of the state and ordered an injunction, disgorgement of profits, an appointment of a receiver and ordered the defendants to submit annual financial statements to assist the court in enforcing the judgment.\textsuperscript{68} Except for the injunction, the statute failed to expressly authorize any of these equitable remedies.\textsuperscript{69} Nevertheless, the Eighth Circuit affirmed the district court’s actions.\textsuperscript{70} The Eighth Circuit first found that by authorizing an injunction, section 1714(a) invoked the district court’s equitable jurisdiction.\textsuperscript{71} The court then cited Porter and an earlier Eighth Circuit opinion for the proposition that invoking a court’s equitable powers invokes all inherent equitable powers unless the statute explicitly or by necessary and inescapable inference limits the scope of that jurisdiction.\textsuperscript{72}

\textsuperscript{63} \textit{Porter}, 328 U.S. at 398.

\textsuperscript{64} \textit{Mitchell}, 361 U.S. at 290.

\textsuperscript{65} \textit{Porter}, 358 U.S. at 398.

\textsuperscript{66} \textit{Pierce v. Amaral}, 938 F.2d 94, 95 (8th Cir. 1991).

\textsuperscript{67} 15 U.S.C. §§ 1701-20 (1988); the enforcement section was § 1714(a) which reads in pertinent part:

\begin{quote}
Whenever it shall appear to the Secretary [of Housing and Urban Development] that any person is engaged . . . in any acts or practices which constitute . . . a violation of the provisions of this chapter, . . . he may, in his discretion, bring an action in any district court of the United States . . . to enjoin such acts or practices, and, upon a proper showing, a permanent or temporary injunction or restraining order shall be issued without bond. . . .
\end{quote}

The Secretary of Housing and Urban Development brought the enforcement action for violations of the Act’s registration, disclosure and sales practice provisions. \textit{Pierce}, 938 F.2d at 95.

\textsuperscript{68} \textit{Pierce}, 938 F.2d at 95.

\textsuperscript{69} \textit{See supra} note 67.

\textsuperscript{70} \textit{Pierce}, 938 F.2d at 96.

\textsuperscript{71} \textit{Id.} at 95.

\textsuperscript{72} \textit{Id.} (citing FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314 (8th Cir 1991); \textit{Porter v. Warner Holding Co.}, 328 U.S. 395, 398 (1946); \textit{Mitchell v. De Mario Jewelry, Inc.}, 361 U.S. 288, 290-92 (1960)).
Some argue that the Supreme Court has withdrawn from some of the broad language of older cases. In *Franklin v. Gwinnett County Public Schools*, Justice Scalia summarized the rationale for limiting the scope of equitable remedies. He stated that "when rights of action are judicially 'implied,' categorical limitations upon their remedial scope may be judicially implied as well." The restrictions on the availability of equitable remedies apply if a statute fails to expressly grant a private citizen any right of action to enforce the rights or obligations contained in the statute. These restrictions do not apply when a court decides the scope of remedies available under an expressly granted private right of action.

This discretion in applying equitable powers is limited by the purpose of the enforcing statute. An equitable remedy must be reasonably appropriate and necessary to enforce compliance with the statute and effectuate its purposes. Courts must act primarily to effectuate the policy of the statute. The presumption, however, is profoundly in favor of full equitable jurisdiction. The cases discussed above demonstrate that the equitable jurisdiction of courts is a viable doctrine that has maintained the necessary qualities of flexibility, mercy and practicality.

73. See George W. Dent, Jr., *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 67 MINN. L. REV. 865, 885 (1983). Dent points to a "literalist" approach to reading statutes as opposed to a "purposive" approach. He recognizes, however, that this view is often stated in minority opinions and still must rely on the purpose of the statute and historical equitable principles.

75. *Id.*
76. *Id.*
77. *Id.*
80. See supra note 35 and accompanying text.
C. Conflicting Decisions: KFC Western, Inc. v. Meghrig

1. Ninth Circuit’s Treatment

In a case decided six months before Furrer, the Ninth Circuit, in KFC Western, Inc. v. Meghrig, addressed the same question as Furrer but reached the opposite result. Ironically, the Ninth Circuit did so relying on two Eighth Circuit decisions.

In KFC, the plaintiffs purchased contaminated property and the Los Angeles Department of Health Services ordered the plaintiffs to clean up the property. Three years later the plaintiffs sought restitution for the clean up costs. The Ninth Circuit first stated that RCRA's "imminent and substantial endangerment" provision allowed suits with respect to contamination that posed an imminent and substantial danger at some point in the past.

The court then held that RCRA authorized a restitutionary remedy for private citizens to collect clean up costs. It found this authority in the statutory language authorizing "such other action as may be necessary." The court cited as persuasive authority the Eighth Circuit’s holdings in Aceto and Northeastern Pharmaceutical. In those cases, the Eighth Circuit found that the language in RCRA section 7003, which is nearly identical to the

82. 49 F.3d 518 (9th Cir. 1995).
83. The Supreme Court reversed the Ninth Circuit’s decision in Meghrig v. KFC Western, Inc., 116 S. Ct. 1251 (1996); see infra notes 95-106 and accompanying text. The Ninth Circuit’s treatment remains relevant in that the Eighth Circuit decided Furrer against the background of the Ninth Circuit’s decision, not the Supreme Court’s.
84. KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995).
86. KFC, 49 F.3d at 519.
87. Id.
88. See supra note 13.
89. KFC, 49 F.3d at 521. The court relied on the Eighth Circuit’s reading of "imminent and substantial danger" in RCRA § 7003, which authorizes suits by the Administrator of the Environmental Protection Agency. Id. (citing Aceto, 872 F.2d at 1383). Section 7003 is worded nearly identical to § 6972(a)(1)(B), the citizen suit provision. Id.
90. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521 (9th Cir. 1995).
91. Id.
92. Id. at 521-22. See also supra note 85.
language in section 6972, authorized the government to recover under equitable remedies not expressly in the statute.93

While the Ninth Circuit did not couch its holding in the equitable jurisdiction terms of Porter or Hecht, it clearly recognized that the authorization for plaintiffs "to take such other action as may be necessary" invokes broader powers of the courts than simply injunctive relief.94

2. The Supreme Court's Decision

In an unanimous decision, the Supreme Court reversed the Ninth Circuit stating that KFC's claim failed for two reasons.95 First, KFC did not bring the claim while the hazardous waste presented an "imminent and substantial endangerment to health or the environment."96 Second, RCRA did not contemplate the recovery of past cleanup costs.97

The Court gave several justifications for refusing the recovery of past cleanup costs under RCRA. According to the Court, a "plain reading" of the remedial language of section 6972(a)98 allowed only two remedies.99 A private citizen could seek a "mandatory injunction" which orders a responsible party to attend to the cleanup and disposal of toxic waste or a "prohibitory injunction" which restrained a responsible party from further violating RCRA.100

The Court also relied on the differences between the CERCLA and RCRA citizen suit provisions.101 The Court relied on the maxim that since Congress knew how to provide for the recovery of cleanup costs in CERCLA the absence of such a provision in RCRA meant that Congress did not intend for recovery of past cleanup costs under RCRA.102

The Court gave several justifications related to the timing provisions in RCRA. The Court pointed to a lack of a statute of limitations on citizen suits,

93. Aceto, 872 F.2d at 1383; Northeastern Pharmaceutical, 810 F.2d at 738.
94. KFC, 49 F.3d at 521.
96. Id. (quoting RCRA § 6972(a)(1)(B)). Failing this requirement is enough to deny KFC recovery; therefore, the Court's opinion regarding the remedies available under RCRA is not necessary to the judgment.
97. Id.
98. See supra note 13.
100. Id. at 1254-1255.
101. Id. CERCLA expressly provides that "any person may seek contribution from any other person who is liable or potentially liable" for cleanup costs. 42 U.S.C. § 9613(f)(1).
102. Id. at 1255.
reasoning that the imminent danger requirement placed a timing limitation on RCRA citizen suits in that such suits could be brought only while the danger was imminent. Also, the Court pointed out that a ninety day waiting period could create an anomaly such that only the smaller hazardous waste sites could recover cleanup costs. 103

Finally, the Court superficially addressed the equitable powers issue. The Court acknowledged that "district courts retain inherent authority to award any equitable remedy that is not expressly restricted by Congress."104 The Court then stated that the preservation of statutory and common law remedies, the "limited" remedies described in section 6972(a) and the differences between CERCLA and RCRA’s citizen suit provisions "amply demonstrate that Congress did not intend for a private citizen to be able to undertake a clean up and then proceed to recover its costs under RCRA."105 In a final shot, the Court said that where Congress has provided "elaborate enforcement provisions" a court "must be chary of reading others into it."106

IV. INSTANT DECISION

In Furrer v. Brown, the Eighth Circuit began its analysis by looking to the language of section 6972, the citizen suit provision of RCRA.107 The court found no express authority to award money judgments for costs incurred in cleaning up contaminated sites.108 Therefore, the court stated that a remedy must be found implicitly through the authority "to order . . . such other action as may be necessary" or through federal common law.109 The

103. Id. A private party must give ninety days notice to the Administrator of the Environmental Protection Agency, the state in which the alleged endangerment occurred and to potential defendants before bringing a suit. 42 U.S.C. §§ 6972(b)(2)(A)(i)-(iii). No citizen suit can proceed if either the EPA or the state is diligently prosecuting an enforcement action. 42 U.S.C. §§ 6972(b)(2)(B) and (C). The anomaly this creates, according to the Court, is that "[t]hose parties with insubstantial problems, problems that neither the State nor the Federal government feel compelled to address, could recover their response costs, whereas those parties whose waste problems were sufficiently severe as to attract the attention of Government officials would be left without a recovery."


105. Id.

106. Id. (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1 (1981)).


108. Id. See supra note 13.

109. Furrer, 62 F.3d at 1094. By "federal common law," the Furrer court was
court reasoned that no remedy would be available unless Congress intended to authorize a monetary remedy for private citizens when it amended RCRA in 1984.\textsuperscript{110} In searching for this intent, the court applied a \textit{Cort v. Ash}\textsuperscript{111} analysis.\textsuperscript{112} 

\textit{Cort} and its progeny set out four factors that the \textit{Furrer} court utilized to determine whether an implied cause of action existed under RCRA.\textsuperscript{113} Under its \textit{Cort} analysis, the \textit{Furrer} court first determined that section 6972 benefits all American citizens and that Congress did not enact the statute for the "special benefit" of the Furrers.\textsuperscript{114} Second, the \textit{Furrer} court found RCRA’s legislative history ambiguous and unhelpful in determining whether Congress intended to authorize this type of remedy.\textsuperscript{115} The court did not want to imply a cause of action from congressional silence.\textsuperscript{116} 

The \textit{Furrer} court stated that the analysis could end here denying the Furrers action; but, out of caution, the court discussed the remaining two \textit{Cort} factors.\textsuperscript{117} The court found that allowing landowners who clean up contaminated property to seek restitution from the contaminating landowners is not necessary to accomplish the congressional purpose of RCRA.\textsuperscript{118} The court stated that "RCRA’s goal is to prevent the creation of hazardous waste sites, rather than to promote the cleanup of existing sites."\textsuperscript{119} They summarized their policy findings by stating: "[i]n conclusion, we cannot say that the purposes of environmental law and of § 6972 would be served by providing for a monetary remedy in a citizen suit under § 6972."\textsuperscript{1120} 

Under the final factor of the \textit{Cort} analysis, if state law traditionally regulates the cause of action, the court will not find an implied federal cause referring to case law which had exercised judicial power to "fashion appropriate remedies for unlawful conduct." \textit{Id.} (citing Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 90 (1981)). The court did not discuss whether federal common law granted jurisdiction because the parties did not rely on this source of authority. \textit{Id.}

\begin{itemize}
  \item \textsuperscript{110} \textit{Furrer}, 62 F.3d at 1094.
  \item \textsuperscript{111} 422 U.S. 66 (1975).
  \item \textsuperscript{112} \textit{Furrer}, 62 F.3d at 1094.
  \item \textsuperscript{113} \textit{Id.} at 1094-95. (citing Suter v. Artist M., 503 U.S. 347, 363 (1992)). For the four factors, see \textit{supra} note 16.
  \item \textsuperscript{114} \textit{Furrer}, 62 F.3d at 1095.
  \item \textsuperscript{115} \textit{Id.} at 1097.
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.} at 1099.
  \item \textsuperscript{119} \textit{Id.} at 1098.
  \item \textsuperscript{120} \textit{Id.} at 1099.
\end{itemize}
of action.\textsuperscript{121} Congress preserved relevant state remedies under section 6972(f) and evidence existed from the legislative history that Congress did not want citizen suits to become overwhelmed by the search for private state law remedies.\textsuperscript{122} Therefore, the court found this to be at best a neutral factor.\textsuperscript{123}

The Furrers argued that by authorizing courts to grant injunctive relief, Congress invoked the full equitable powers of the court, including the power to grant equitable restitution.\textsuperscript{124} They believed Congress expressly granted this power through the authority "to order . . . such other action as may be necessary."\textsuperscript{125} The court did not agree, stating that the Furrers read too much into the statute.\textsuperscript{126} The court primarily based this finding on two factors. First, they relied on cases that urged caution in expanding remedies when Congress has provided for specific remedies.\textsuperscript{127} Second, the court pointed to other statutes where Congress expressly granted similar relief, demonstrating that if Congress intended to do so here, they would have.\textsuperscript{128} The court stated that "jurisdiction 'to enforce' or 'to restrain' does not encompass the authority to award monetary relief."\textsuperscript{129}

The \textit{Furrer} court disagreed with the Ninth Circuit's decision in \textit{KFC}.\textsuperscript{130} The court did not believe that the cases cited in \textit{KFC} supported finding a monetary remedy for landowners.\textsuperscript{131} The court pointed out that both Eighth Circuit cases relied on by \textit{KFC} failed to specifically address subject matter jurisdiction.\textsuperscript{132}

The \textit{Furrer} court concluded that all four factors from \textit{Cort} prevented an implied private cause of action under the citizen suit provision of RCRA.\textsuperscript{133} The court directly disagreed with the Ninth Circuit, concluding that \textit{KFC} began with a faulty premise and mis-analyzed the question.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item 121. \textit{Id.} (quoting \textit{Cort} v. \textit{Ash}, 422 U.S. 66, 78 (1975)).
\item 122. \textit{Id.} at 1099-1100.
\item 123. \textit{Id.} at 1100.
\item 124. \textit{Id.} at 1095. \textit{See also supra} note 35 and accompanying text.
\item 125. \textit{Furrer}, 62 F.3d at 1095.
\item 126. \textit{Id.}
\item 127. \textit{Id.} at 1096.
\item 128. \textit{Id.}
\item 129. \textit{Id.}
\item 130. \textit{Id.} at 1100 (disagreeing with \textit{KFC} Western, Inc. v. \textit{Meghrig}, 49 F.3d 518 (9th Cir. 1995)).
\item 131. \textit{Id.} at 1100-01.
\item 132. \textit{Id.} at 1101.
\item 133. \textit{Id.} at 1100.
\item 134. District Judge Bennett "unreservedly" concurred. He wanted to emphasize that the role of federal courts was as interpreter of statutes, not as policy makers or
\end{enumerate}
\end{footnotesize}
V. COMMENT

In *Furrer*, the Eighth Circuit faced the question of whether innocent landowners who complied with the cleanup mandates of the Missouri Department of Natural Resources could sue under RCRA for restitution of those cleanup costs from the culpable parties.\(^{135}\) The plaintiffs brought the action under RCRA which specifically allows private citizens to sue for an injunction or "other action."\(^{136}\) According to "several hundred years of history,"\(^{137}\) recent decisions of the Supreme Court and even the Eighth Circuit's own decisions, the "other order" language should be enough to satisfy subject matter jurisdiction.\(^{138}\)

Congress expressly granted the Furrers a right of action to enforce the rights and obligations created under RCRA.\(^{139}\) Congress invoked the full range of equitable remedies by authorizing injunctive relief.\(^{140}\) Once invoked, Congress must limit the court's equitable jurisdiction explicitly.\(^{141}\) Courts can not infer any limitation on this equitable jurisdiction unless the limitation is necessary and inescapable from the language of the statute.\(^{142}\) Instead of limiting the court's equitable jurisdiction, Congress clearly granted the court full discretion by authorizing "other orders" as necessary.\(^{143}\) Congress explicitly appealed to the discretion of the district court.

The *Furrer* court asked the question: "Did Congress intend to authorize a monetary remedy for private citizens under section 6972?"\(^{114}\) This query combines two analytically distinct questions. First: "Did Congress intend to authorize a private right of action under section 6972?" If the answer to the

enlargers of congressional intent. *Id.* at 1102.

Circuit Judge Fagg dissented in a brief opinion. *Id.* Relying upon the reasons stated by the Ninth Circuit in *KFC Western, Inc. v. Meghrig*, the dissent would allow an innocent private purchaser of contaminated property to bring an equitable action for reimbursement of cleanup costs. *Id.* He "readily agree[d] with the Ninth Circuit that 'it would be unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions.'" *Id.*

135. *Furrer*, 62 F.3d at 1093.
138. Subject matter jurisdiction should be satisfied in that the statute invoked the district court's equitable jurisdiction. *See supra* note 35 and accompanying text.
139. *See supra* note 13.
140. *See supra* note 35 and accompanying text.
141. *See supra* note 36 and accompanying text.
142. *See supra* note 36 and accompanying text.
143. *See supra* note 13 for the text of the statute.
first question is "yes," the second question is: "Is a monetary remedy available under this right of action?"

Because the citizen suit provision of RCRA expressly grants a private right of action, the answer to the first question should be undeniably "yes". Nevertheless, the Eighth Circuit applied a Cort v. Ash analysis, attempting to answer the first question, but Cort applies only if Congress did not expressly grant a private right of action.

Since Congress expressly granted the Furrers a right of action, the Eighth Circuit should have looked to the language of the statute to see if Congress expressly or by necessary and inescapable inference limited the scope of the court’s equitable jurisdiction. If Congress did not do so, the district court has the power to grant any equitable remedy that is reasonably appropriate. The language of the statute only limits the equitable jurisdiction of the court to those orders that "may be necessary." This is the very boundary that courts have placed on equitable jurisdiction throughout history.

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145. See supra note 13.
146. Furrer, 62 F.3d at 1095.
147. Indeed that is exactly how the Eighth Circuit has always applied it in the past. See, e.g., McMaster v. Minnesota, 30 F.3d 976 (8th Cir. 1994), cert. denied, 115 S. Ct. 1116 (1995); Marshall v. Green Giant Co., 942 F.2d 539 (8th Cir. 1991); Zajac v. Federal Land Bank, 909 F.2d 1181 (8th Cir. 1990); Roberts v. Wamser, 883 F.2d 617 (8th Cir. 1989); Tallarico v. TWA, (8th Cir. 1989); Amin Gonzalez v. U.S. INS, 867 F.2d 1108 (8th Cir. 1989); FSLIC v. Capozzi, 855 F.2d 1319 (8th Cir. 1988); Campillo v. Sullivan, 853 F.2d 593 (8th Cir. 1988), cert. denied, 490 U.S. 1082 (1989); Redd v. Federal Land Bank, 851 F.2d 219 (8th Cir. 1988); Arcoren v. Peters, 811 F.2d 392 (8th Cir. 1987), cert. denied, 485 U.S. 987 (1988); Hill v. Group Three Hous. Dev. Corp., 799 F.2d 385 (8th Cir. 1986); Shidler v. All American Life & Fin. Corp., 775 F.2d 917 (8th Cir. 1985); Wilson v. Mason State Bank, 738 F.2d 343 (8th Cir. 1984); Crawford v. Janklow, 710 F.2d 1321 (8th Cir. 1983); Hofbauer v. Northwestern Nat'l Bank, 700 F.2d 1197 (8th Cir. 1983); Miener v. Missouri, 673 F.2d 969 (8th Cir.), cert. denied, 459 U.S. 909 (1982); McCabe v. City of Eureka, 664 F.2d 680 (8th Cir. 1981); Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Cedar-Riversides Assocs. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979); Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979), cert. denied, 444 U.S. 1017 (1980); Gabauer v. Woodcock, 594 F.2d 662 (8th Cir.), cert. denied, 444 U.S. 841 (1979); General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978), judgment vacated by, 441 U.S. 919 (1979); Girardier v. Webster College, 563 F.2d 1267 (8th Cir. 1977); Wentworth v. Solem, 548 F.2d 773 (8th Cir. 1977); Jones v. United States, 536 F.2d 269 (8th Cir. 1976), cert. denied, 429 U.S. 1039 (1977).

148. This search does not include legislative intent. Intent is superfluous. If Congress has not expressly or specifically limited equity, all remedies are available. See supra notes 35-37 and accompanying text.
In reaching its decision in *Furrer*, the court did not address *Pierce*, an extremely similar case.\(^\text{149}\) Instead, the Eighth Circuit silently retreated from the traditional scope of equitable jurisdiction enunciated in *Pierce*. The most glaring retreat from traditional equitable jurisdiction by the *Furrer* court was their statement that "jurisdiction ‘to enforce’ or ‘to restrain’ does not encompass the authority to award monetary relief."\(^\text{150}\) This statement directly contradicts the Supreme Court holding in *Porter*.\(^\text{151}\)

The court based its reasoning on the maxim that a court should be "chary" of creating causes of action when Congress could have done so and did not.\(^\text{152}\) The Supreme Court in *Hecht* rejected this argument when applied to the scope of equitable jurisdiction.\(^\text{153}\) In matters of equity, tradition must prevail.\(^\text{154}\) When Congress invokes equity, courts must assume Congress did so aware of the powers historically invoked.\(^\text{155}\) Courts must assume that Congress knew that in order to limit the scope of this jurisdiction, it must do so explicitly.\(^\text{156}\) Therefore, by allowing restitution, a district court would not be creating a new cause of action not anticipated by Congress as the *Furrer* court contends. Such an equitable remedy is well within the bounds of equitable precedent.

Using a *Cort v. Ash* analysis in *Furrer* allowed the Eighth Circuit to circumvent the history of equity as applied by the Supreme Court and the Eighth Circuit themselves. Without even addressing it, *Furrer* drastically curtailed the historical power of the district courts.

The Eighth Circuit’s approach of silently circumventing prior case law and equitable tradition has found implicit approval. The Supreme Court in *Meghrig v. KFC Western, Inc.* avoided the misapplication of *Cort*, but did not give adequate consideration to the equitable argument raised in *KFC*.\(^\text{157}\) The Court cited the traditional view of a court’s equitable powers by saying once

\(149\). *See supra* note 67. In fact, RCRA presents a stronger argument for full equitable powers in that Congress has authorized "other action."


\(151\). *Porter* specifically stated that equitable restitution is a proper "other order." *See supra* notes 46-48 and accompanying text.

\(152\). *Furrer*, 62 F.3d at 1096.

\(153\). *See supra* note 62 and accompanying text.

\(154\). *See supra* note 57 and accompanying text.

\(155\). *See supra* note 57.

\(156\). *See supra* note 57.

\(157\). That may be explained by the fact that the case could have been disposed of as not timely filed. *See supra* note 96 (suit must be filed while an "imminent and substantial danger" exists). However, given that the Court purports to have addressed this issue, the Court will not likely re-examine the issue by hearing the *Furrer* case.
invoked, Congress must expressly limit equitable remedies. However, the Court apparently decided that several circumstantial factors can add up to an express limitation. Just as in Furrer, this represents a silent limitation on the traditional equitable powers of courts.

By only implicitly limiting the courts’ equitable jurisdiction, the Supreme Court now has two avenues available for answering any equitable jurisdiction issue. Under the guise of limiting its equitable powers, the Court has created an easy escape from tough equitable issues while retaining its previous, unlimited equitable powers. The next time the Court is faced with a private plaintiff who is seeking a remedy under a federal statute, the Court may invoke Porter v. Warner and find full equitable powers or it may invoke Meghrig v. KFC Western, Inc. and proclaim the absence of authority to grant relief.

VI. CONCLUSION

Traditional equitable jurisdiction has developed over hundreds of years. The Supreme Court consistently has upheld the traditional method of invoking equitable jurisdiction and it consistently has upheld the traditional scope of equitable jurisdiction. In a sudden departure from this tradition, the Eighth Circuit limited the equitable remedies available to a district court to those remedies expressly provided for and those that meet the criteria in Cort v. Ash. The Furrer court effectively overrules Pierce v. Amaral and the traditional analysis it espoused. The Furrer court has also broadened the application of the Cort analysis. After Furrer, a district court must apply Cort to search for Congressional intent to grant a certain remedy to a private plaintiff, not just to find Congressional intent to create a private right of action.

The Supreme Court followed the Eighth Circuit’s lead and ignored its prior decisions and equitable tradition in KFC. While ostensibly limiting its equitable jurisdiction, the Court has actually expanded its power. The Court has not overruled Hecht, Porter, et al.; therefore, full equitable authority once invoked remains available. However, Furrer and KFC could also be relied on to limit equitable jurisdiction without express limitation. The next private plaintiff to face this issue will not know which way the courts may go.

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158. See supra note 104 and accompanying text.
159. See supra note 105 and accompanying text.