
HB
1884

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	3-7-85	1:30 pm
" "	5-7-85	7:00 pm

Edwards
5/3/85

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 184 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to illegally controlled enterprises; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11 is amended by adding a new chapter to read:

CHAPTER 59. ILLEGALLY CONTROLLED ENTERPRISES.

ARTICLE 1. PROHIBITED ACTIVITIES.

Sec. 11.59.010. UNLAWFUL ACTS. A person may not

(1) acquire or maintain, directly or indirectly, an interest in or control of an enterprise through racketeering;

(2) participate in or conduct, directly or indirectly, the affairs of an enterprise through racketeering; or

(3) use or invest property derived, directly or indirectly, from racketeering, or the proceeds of that property, to acquire or maintain an interest in or control of an enterprise or to participate in or conduct the affairs of an enterprise.

Sec. 11.59.020. PROOF OF RACKETEERING. (a) The instances of illegal activity used to establish racketeering must include

(1) one instance of illegal activity that is in violation of state law;

(2) one instance of illegal activity that occurred after the effective date of this Act; and

(3) one instance of illegal activity that was committed within three years before or after the alleged acquisition or maintenance of an interest in or control of the enterprise, or the alleged

has elements similar to a current class A felony or unclassified felony in this state.

(b) Illegal control of an enterprise in the first degree is a class A felony.

Sec. 11.59.040. ILLEGAL CONTROL OF AN ENTERPRISE IN THE SECOND DEGREE. (a) A person commits the crime of illegal control of an enterprise in the second degree if the person violates AS 11.59.010 or attempts or solicits a violation of AS 11.59.010.

(b) Illegal control of an enterprise in the second degree is a class B felony.

Sec. 11.59.050. CHARGING UNDERLYING ACT. In a criminal prosecution under AS 11.59.030 or 11.59.040, a violation of a criminal law that is used to prove racketeering may be charged as a separate count in the same indictment or information as the violation of AS 11.59.030 or 11.59.040.

ARTICLE 3. CIVIL REMEDIES.

Sec. 11.59.060. INJUNCTIVE RELIEF. (a) In addition to any other action authorized by law, the attorney general may bring a separate action in the superior court to enjoin a violation of AS 11.59.010. The superior court may prevent or restrain violations of AS 11.59.010 by issuing appropriate temporary or permanent orders that provide for the rights of innocent persons and that may include

(1) divestiture of an interest in an enterprise;

(2) performance bonds;

(3) reasonable restrictions on future activities or investments;

(4) the attachment and freezing of assets;

(5) prohibitions against engaging in the same type of activities as the enterprise engaged in; and

(6) dissolution or reorganization of an enterprise.

(b) At any time after a civil or criminal proceeding arising out of a violation of AS 11.59.010 has been instituted, the superior court may issue appropriate orders and injunctive relief that may include the remedies listed in (a) of this section, or any other order to prevent disposal or diminution in value of property.

(c) Upon a criminal conviction or a civil judgment arising out of a violation of AS 11.59.010, the superior court may issue appropriate orders that may include the remedies listed in (a) of this section.

(d) In this section, the term "violation of AS 11.59.010" includes an attempt or solicitation under AS 11.31 to violate AS 11.59.-010.

ARTICLE 4. GENERAL PROVISIONS.

Sec. 11.59.900. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "enterprise" includes an individual, partnership, corporation, association, or other legal entity, and a union or group of persons associated in fact although not a legal entity;

(2) "illegal activity" means

(A) a felony against the person under AS 11.41, other than custodial interference in the first degree under AS 11.41.-320;

(B) a crime against property under AS 11.46, that is punishable as a class B felony;

(C) a felony against public administration under AS 11.56, a felony against public order under AS 11.61, or a felony involving alcoholic beverages under AS 04;

(D) a crime involving controlled substances under

AS 11.71, that is punishable as an unclassified or class A or class B felony;

(E) promoting prostitution in the first degree under AS 11.66.110, promoting gambling in the first degree under AS 11.66.210; and possession of gambling records in the first degree under AS 11.66.230;

(F) felony conduct that is defined as "racketeering activity" under 18 U.S.C. 1961(1)(B) and (C);

(3) "property" means anything of value, including real or personal property, claims against or interests in business or property, contractual rights, securities, income, profits, an interest in an enterprise, or any other business or financial interest;

(4) "racketeering" means two or more instances of illegal activity that have the same or similar purposes, results, victims, participants, or methods of commission, or are interrelated by distinguishing characteristics.

* Sec. 2. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Edwards
4/29/85

Original sponsors: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 184 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to illegally controlled enterprises; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11 is amended by adding a new chapter to read:

CHAPTER 59. ILLEGALLY CONTROLLED ENTERPRISES.

ARTICLE 1. PROHIBITED ACTIVITIES.

Sec. 11.59.010. UNLAWFUL ACTS. A person may not

(1) acquire or maintain, directly or indirectly, an interest in or control of an enterprise through racketeering;

(2) participate in or conduct, directly or indirectly, the affairs of an enterprise through racketeering; or

(3) use or invest property derived, directly or indirectly, from racketeering, or the proceeds of that property, to acquire or maintain an interest in or control of an enterprise or to participate in or conduct the affairs of an enterprise.

Sec. 11.59.020. PROOF OF RACKETEERING. (a) The instances of illegal activity used to establish racketeering must include

(1) one instance of illegal activity that is in violation of state law;

(2) one instance of illegal activity that occurred after the effective date of this Act; and

(3) one instance of illegal activity that was committed within three years before or after the alleged acquisition or maintenance of an interest in or control of the enterprise, or the alleged

participation in or conducting of the affairs of the enterprise as described in AS 11.59.010.

(b) The requirements of (a) of this section may be satisfied by a single instance of illegal activity.

(c) Past illegal activity may be used to establish racketeering if less than five years have elapsed between the date of the most recent instance of illegal activity and the immediately preceding instance of illegal activity.

(d) Illegal activity that is used to establish racketeering may be proved by

(1) a certified copy of a judgment of conviction;

(2) proof beyond a reasonable doubt in a criminal prosecution under AS 11.59.030 or 11.59.040; or

(3) proof by a preponderance of the evidence in any other proceeding.

(e) For purposes of calculating the three-year period specified in (a)(3) of this section and the five-year period specified in (c) of this section, a period of imprisonment, probation, parole, conditional executive clemency, suspended imposition of sentence, formal deferred prosecution or formal pretrial diversion shall be excluded.

ARTICLE 2. CRIMES INVOLVING ILLEGALLY CONTROLLED ENTERPRISES.

Sec. 11.59.030. ILLEGAL CONTROL OF AN ENTERPRISE IN THE FIRST DEGREE. (a) A person commits the crime of illegal control of an enterprise in the first degree if the person violates AS 11.59.040, and if one of the instances of illegal activity used to establish racketeering is

(1) an unclassified or class A felony in this state; or

(2) a crime in this state or in another jurisdiction that

has elements similar to a current class A felony or unclassified felony in this state.

(b) Illegal control of an enterprise in the first degree is a class A felony.

Sec. 11.59.040. ILLEGAL CONTROL OF AN ENTERPRISE IN THE SECOND DEGREE. (a) A person commits the crime of illegal control of an enterprise in the second degree if the person violates AS 11.59.010 or attempts or solicits a violation of AS 11.59.010.

(b) Illegal control of an enterprise in the second degree is a class B felony.

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Sec. 11.59.060. INJUNCTIVE RELIEF. (a) In addition to any other action authorized by law, the attorney general may bring a separate action in the superior court to enjoin a violation of AS 11.59.010. The superior court may prevent or restrain violations of AS 11.59.010 by issuing appropriate temporary or permanent orders that provide for the rights of innocent persons and that may include

(1) divestiture of an interest in an enterprise;

(2) performance bonds;

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(4) the attachment and freezing of assets;

(5) prohibitions against engaging in the same type of activities as the enterprise engaged in; and

(6) dissolution or reorganization of an enterprise.

(b) At any time after a civil or criminal proceeding arising out of a violation of AS 11.59.010 has been instituted, the superior court may issue appropriate orders and injunctive relief that may include the remedies listed in (a) of this section, or any other order to prevent disposal or diminution in value of property.

(c) Upon a criminal conviction or a civil judgment arising out of a violation of AS 11.59.010, the superior court may issue appropriate orders that may include the remedies listed in (a) of this section.

(d) In this section, the term "violation of AS 11.59.010" includes an attempt or solicitation under AS 11.31 to violate AS 11.59.-010.

ARTICLE 4. GENERAL PROVISIONS.

Sec. 11.59.900. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "enterprise" includes an individual, partnership, corporation, association, or other legal entity, and a union or group of persons associated in fact although not a legal entity;

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(B) a crime against property under AS 11.46, that is punishable as a class B felony;

(C) a felony against public administration under AS 11.56, a felony against public order under AS 11.61, or a felony involving alcoholic beverages under AS 04;

(D) a crime involving controlled substances under

AS 11.71, that is punishable as an unclassified or class A or class B felony;

(E) promoting prostitution in the first degree under AS 11.66.110, promoting gambling in the first degree under AS 11.66.210; and possession of gambling records in the first degree under AS 11.66.230;

(F) felony conduct that is defined as "racketeering activity" under 18 U.S.C. 1961(1);

(3) "property" means anything of value, including real or personal property, claims against or interests in business or property, contractual rights, securities, income, profits, an interest in an enterprise, or any other business or financial interest;

(4) "racketeering" means two or more instances of illegal activity that have the same or similar purposes, results, victims, participants, or methods of commission, or are interrelated by distinguishing characteristics.

* Sec. 2. This Act takes effect immediately in accordance with AS 01.-10.070(c).

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: HB 184

Title: "An Act relating to illegally controlled enterprises..."

Sponsor: Governor

Requestor: House Judiciary

Date of Request: 3/8/85

FISCAL DETAIL

Agency Affected: Public Safety

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Paul Conger

Phone: 465-4338

Division: Administrative Services

Date: 3/8/85

Approved by Commissioner: [signature]

Date: 3/8/85

Agency: Public Safety

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

STATE OF ALASKA 1986 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: 2/28/86

REQUEST

Bill/Resolution No.: HB 184
Title: "An act relating to illegally controlled enterprises..."

Sponsor: Governor Sherfield
Requestor: Judiciary and Finance
Date of Request:

FISCAL DETAIL

Agency Affected: Department of Administratic
BRU: Public Defender Agency

Components: Third Judicial District

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91
PERSONAL SERVICES		99.3	103.8	108.0	112.3	116.8
TRAVEL		5.0	5.2	5.4	5.6	5.8
CONTRACTUAL		10.0	10.4	5.4	5.6	5.8
SUPPLIES		2.5	2.6	2.7	2.8	2.9
EQUIPMENT		6.0				
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	123.3	122.0	121.5	126.3	131.3
CAPITAL						
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND	-0-	123.3	122.0	121.5	126.3	131.3
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME	-0-	2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

(See Attached)

Prepared by: Dana Fabe, Public Defender
Phone: 279-7541
Division: Public Defender Agency
Date: 2/28/86

Approved by Commissioner: Eleanor Andrews
Date: 3/6/86
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

10/25/85

Fiscal Note Analysis
Prepared by Division of Public Defender Agency
Department of Administration
February 28, 1986

This bill is patterned after the federal racketeering statute. Although at first glance a statute relating to racketering and organized crime would not appear to impact an agency providing public counsel to the indigent, a more detailed analysis of this bill reveals that both the Public Defender Agency and the Office of Public Advocacy will undoubtedly be appointed to represent defendants charged under this statute.

The definition of racketeering in this bill requires proof of a pattern of illegal activity involving two or more instances of that activity. Illegal activity is defined as almost any felony found under AS 11. The commentary to this legislation indicates specifically that the bill is not limited to "organized crime".

This bill is modeled on federal law, and the experience in federal cases is that the legislation has been applied to a wide variety of defendants, including members of the Hell's Angels motorcycle club, a factory worker at an automobile plant, and employees of a court system. Various states with similar bills have urged inclusion of a wide range of defendants within the statute, from members of prison gangs to members of narcotics trafficking operations. There appears to be a wide range of offenses which could be included within the purview of this statute, and while some persons involved in a criminal enterprise may be able to afford their own attorney, this by no means provides assurance that all members of an illegal enterprise under this statute could do so.

Of particular interest in analyzing whether persons charged under this statute may qualify for public counsel are the provisions in the statute which provide for forfeiture of illegal proceeds arising from the activity. The language of the bill is intended to permit seizure of assets and proceeds of the illegal enterprise, and the illegal profits will not become "legal" merely because they have been subsequently committed to a legal investment. Thus, even if a person charged with this offense has assets resulting from the illegal enterprise in which he is involved, those assets can be seized prior to his hiring a lawyer, making it necessary for the court to appoint the Public Defender Agency or Office of Public Advocacy to represent him.

Cases filed under racketeering bills routinely involve substantial attorney time, particularly for preparation of pre-trial motions. Due to the fact that the Department of Law's investigation activity will apparently focus on the Anchorage area, the Public Defender Agency is requesting one experienced attorney and one clerk typist to handle representation of clients charged under this bill.

Fiscal Analysis

Personal Services:	Attorney IV	72.4	
	Clerk-Typist III	27.4	
			99.8
Travel:	Expert witnesses and investigation		5.0
Contractual:	Expert witnesses, space, etc.		10.0
Supplies:	Office, law library, etc.		2.5
Equipment:	(one time) Furniture, office machines, etc.		6.0
	Total		123.3

Position Title	Time Status	Staff Months	RP Number
Attorney IV	PFT	12.0	

No. of Positions	Range/Step	Barg. Unit	Gov.	Approv.	Disapp
1	24/A	PX			

Location	Election District	Leg.
Anchorage	8	

Type of Expenditure	1	2	Amount 3
Salary	4687 x 12	56.244	
Benefits		16.109	
Premium Pay			
Other			
Total Personal Services			72.353
Travel			5.000
Contractual			10,000
Commodities			1,500
Equipment			1,500
Other			
Total Cost			90,353

Receipt Code	Funding Source		
	Federal Receipts	1002	
	G. F. Match	1003	
	General Funds	1004	90.353
	I-A Receipts	1005	
	Program Receipts	1028	
	CIP Receipts	1061	
	Other		

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Key Number __ __ - __ __ - __ __ - __ __ - __ __

Justification

This bill, which relates to illegally controlled enterprises is broad enough in scope that indigents may be included, thereby requiring the services of the Public Defender Agency. Since the felony caseload of the agency would be increased an experienced Attorney IV is requested for Anchorage. The travel and contractua monies would go for professional experts and investigations.

Request For New Position

Agency Department of Administration
BRU Public Defender Agency
Component Third Judicial District

FY 87

Position Title	Clerk/Typist III		
Time Status: PFT	Staff Months: 12.0	RP Number:	

Type of Expenditure	1	2	Amount 3
Salary	1631 x 12	19,572	
Benefits		7,804	
Premium Pay			
Other			
Total Personal Services			27,376
Travel			-0-
Contractual			-0-
Commodities			1,000
Equipment			4,500
Other			
Total Cost			32,876

Receipt Code	Funding Source		
	Federal Receipts	1002	
	G. F. Match	1003	
	General Funds	1004	32,876
	I-A Receipts	1005	
	Program Receipts	1028	
	CIP Receipts	1061	
	Other		

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Key Number __ __ - __ __ - __ __ - __ __ - __ __

No. of Positions	Range/Step	Barg. Unit	Gov.	Approv.	Disapp
1	8A	GC			
Location	**Election District**		Leg.		
Anchorage	8				

Justification

This bill, which relates to illegally controlled enterprises, is broad enough in scope that indigents may be included, thereby requiring the services of the Public Defender Agency. Since the felony caseload of the agency would be increased a Clerk Typist III is requested for Anchorage to provide necessary support services.

Request For New Position

Agency: Department of Administration
BRU: Public Defender Agency
Component: Third Judicial District

Revised Date

FY 87

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

Page 1 of 5

REQUEST
Bill/Resolution No.: HB184 No. 3
Title: "An Act relating to illegally influenced and corrupt enterprises"
Sponsor: Governor Sheffield
Requestor:
Date of Request: February 4, 1985

FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: Due Process
BRU, Program or Subprogram(s) Affected: Office of Public Advocacy

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		100.6	106.6	112.9	119.6	126.7
200 TRAVEL		10.0	10.6	11.2	11.9	12.6
300 CONTRACTUAL		75.0	79.5	84.3	89.4	94.8
400 SUPPLIES		2.0	2.1	2.2	2.3	2.4
500 EQUIPMENT		14.0	-0-	-0-	-0-	-0-
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	201.6	198.8	210.6	223.2	236.5
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	-0-	201.6	198.8	210.6	223.2	236.5
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Brant McGee, Public Advocate for Phone: 274-1684
Division: Office of Public Advocacy Date: February 4, 1985

Approved by Commissioner: Lisa Rudd for Date: 2-15-85
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Fiscal Note Analysis
Prepared by Division of Office of Public Advocacy
Department of Administration
February 4, 1985

This bill is patterned after the federal racketeering statute. Although at first glance a statute relating to racketeering and organized crime would not appear to impact an agency providing public counsel to the indigent, a more detailed analysis of this bill reveals that both the Public Defender Agency and the Office of Public Advocacy will undoubtedly be appointed to represent defendants charged under this statute.

The definition of racketeering in this bill requires proof of a pattern of illegal activity involving two or more instances of that activity. Illegal activity is defined as almost any felony found under AS 11. The commentary to this legislation indicates specifically that the bill is not limited to "organized crime."

This bill is modeled on federal law, and the experience in federal cases is that the legislation has been applied to a wide variety of defendants, including members of the Hell's Angels motorcycle club, a factory worker at an automobile plant, and employees of a court system. Definitions of the persons included under such statutes have ranged from members of prison gangs to members of narcotics trafficking operations. There appears to be a wide range of offenses which could be included within the purview of this statute, and while some persons involved in a criminal enterprise may be able to afford their own attorney, this by no means provides assurance that all members of an illegal enterprise under this statute could do so.

Of particular interest in analyzing whether persons charged under this statute may qualify for public counsel are the provisions in the statute which provide for forfeiture of illegal proceeds arising from the activity. The language of the bill is intended to permit seizure of assets and proceeds of the illegal enterprise. The illegal profits will not become "legal" merely because they have been subsequently committed to a legal investment. Thus, even if a person charged with this offense has assets resulting from the illegal enterprise with which he is allegedly involved, those assets can be seized prior to his ability to hire a lawyer, making it necessary for the court to appoint the Public Defender Agency or Office of Public Advocacy.

Cases filed under racketeering bills routinely involve substantial attorney time, particularly preparation of pretrial motions. Due to the fact that its investigation activity will focus on the Anchorage area, the Office of Public Advocacy is requesting one experienced attorney and one secretary to handle representation of clients charged under this bill.

Enactment of this statute is intended to allow the prosecution of multiple co-defendants. The Office of Public Advocacy is responsible by statute for providing legal representation to all indigent defendants with whom the Public Defender Agency has a conflict of interest. While staff attorneys can represent one co-defendant, in a given case the Office of Public Advocacy must contract with private counsel for the representation of all other co-defendants determined to be indigent by the court. It is anticipated that the complexity of this litigation will dictate high contract costs which are estimated at $15,000 per defendant. The Department of Law has not estimated the number of prosecutions it will initiate during FY 86. The projected $75,000 in contract costs is thus based on an assumption the Office of Public Advocacy will be responsible for only five defendants for which it cannot provide staff coverage.

	POSITION TITLE				RANGE/STEP	BARG. UNIT	PAGE/LINE	COV.	APPROV.	DISAPP.
1.	Legal Secretary I				10/A	GGU				
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION: EBA	ELECTION DISTRICT: 8	LEG.		
3.	CONTINUATION LEVEL		ADDITION							

	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary	22,020	
6.	Benefits	3,738	
7.	Supplemental Benefits	1,350	
8.	Fixed Benefits	2,732	
9.	TOTAL PERSONAL SERVICES	01	29,850
10.	Travel	02	
11.	Contractual	03	
12.	Commodities	04	
13.	Equipment	05	11,600
14.	Other		
15.	TOTAL COST		41,440

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.		General Funds	1004	41,440
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

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KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

This position is necessary to provide sufficient clerical support for an additional attorney. Presently, the Anchorage office has two Legal Secretary I positions who provide clerical support to six attorney positions, five deputy guardians, and one associate attorney position. An additional attorney handling racketeering cases throughout the state will increase the professional staff in Anchorage to thirteen positions. Given the complex litigation involved in these cases which may require specialized clerical support, the need for an additional Legal Secretary I position in Anchorage is evident.

2/4D1/0207-05

REQUEST FOR NEW POSITION

AGENCY: Department of Administration

PROGRAM: Due Process

BRU: Office of Public Advocacy

COMPONENT:

No. 3

Page 4 of 5

Revised Date

FY 86

01-1136 (7/82) - 15

1.	POSITION TITLE: Attorney IV			RANGE/STEP: 24/A	BARG. UNIT: PX	PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION: EBA	ELECTION DISTRICT: 8	LEG.		
3.	CONTINUATION LEVEL		ADDITION						

4. TYPE OF EXPENDITURE	1	2	3 AMOUNT
	PERSONAL SERVICES		
5.	Salary	55,956	
6.	Benefits	9,500	
7.	Supplemental Benefits	2,680	
8.	Fixed Benefits	2,630	
9.	TOTAL PERSONAL SERVICES	01	70,766
10.	Travel	02	10,000
11.	Contractual	03	
12.	Commodities	04	
13.	Equipment	05	2,400
14.	Other		
15.	TOTAL COST		83,166

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		C.F. Match	1003	
18.		General Funds	1004	83,166
19.		I-A Receipts	1005	
20.		Program Receipts	1020	
21.		Other		

FOR B&R USE ONLY
KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

This position is necessary to assure representation of defendants charged under the racketeering statute. The defense of such cases involves not only review of the inevitably extension prosecution investigation, but litigation of complex legal issues in every case. While the position will be located in Anchorage, this attorney will be expected to provide representation statewide to those charged under the statute.

2/4D1/0207-06

REQUEST FOR NEW POSITION

AGENCY Department of Administration

PROGRAM Due Process

BRU Office of Public Advocacy

COMPONENT

No. 3

Page 5 of 5

Revised Date

FY 86

01-1136(7/81)-13

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB184
Title: "An Act relating to illegally influenced and corrupt enterprises"
Sponsor: Governor Sheffield
Requestor:
Date of Request: February 4, 1985

FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: Due Process
BRU, Program or Subprogram(s) Affected: Public Defender Agency

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		97.6	103.4	109.7	116.2	123.2
200 TRAVEL		5.0	5.3	5.6	5.9	6.3
300 CONTRACTUAL		10.0	10.6	11.2	11.9	12.6
400 SUPPLIES		3.0	2.1	2.2	2.4	2.5
500 EQUIPMENT		4.0	0	0	0	0
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	119.6	121.4	128.7	136.4	144.6
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		119.6	121.4	128.7	136.4	144.6
FEDERAL FUNDS						
OTHER						
TOTAL	0	119.6	121.4	128.7	136.4	144.6

POSITIONS:

FULL-TIME	0	2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: slp for Dana Fabe, Public Defender
Phone: 279-7541
Division: Public Defender Agency
Date: February 4, 1985

Approved by Commissioner: Lisa Rudd
Date: 2-15-85
Agency: Department of Administration

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Fiscal Note Analysis
Prepared by Division of Public Defender Agency
Department of Administration
February 4, 1985

This bill is patterned after the federal racketeering statute. Although at first glance a statute relating to racketeering and organized crime would not appear to impact an agency providing public counsel to the indigent, a more detailed analysis of this bill reveals that both the Public Defender Agency and the Office of Public Advocacy will undoubtedly be appointed to represent defendants charged under this statute.

The definition of racketeering in this bill requires proof of a pattern of illegal activity involving two or more instances of that activity. Illegal activity is defined as almost any felony found under AS 11. The commentary to this legislation indicates specifically that the bill is not limited to "organized crime."

This bill is modeled on federal law, and the experience in federal cases is that the legislation has been applied to a wide variety of defendants, including members of the Hell's Angels motorcycle club, a factory worker at an automobile plant, and employees of a court system. Various states with similar bills have urged inclusion of a wide range of defendants within the statute, from members of prison gangs to members of narcotics trafficking operations. There appears to be a wide range of offenses which could be included within the purview of this statute, and while some persons involved in a criminal enterprise may be able to afford their own attorney, this by no means provides assurance that all members of an illegal enterprise under this statute could do so.

Of particular interest in analyzing whether persons charged under this statute may qualify for public counsel are the provisions in the statute which provide for forfeiture of illegal proceeds arising from the activity. The language of the bill is intended to permit seizure of assets and proceeds of the illegal enterprise, and the illegal profits will not become "legal" merely because they have been subsequently committed to a legal investment. Thus, even if a person charged with this offense has assets resulting from the illegal enterprise in which he is involved, those assets can be seized prior to his hiring a lawyer, making it necessary for the court to appoint the Public Defender Agency or Office of Public Advocacy to represent him.

Fiscal Note Analysis
Prepared by Division of Public Defender Agency
Department of Administration
February 4, 1985

Cases filed under racketeering bills routinely involve substantial attorney time, particularly for preparation of pre-trial motions. Due to the fact that the Department of Law's investigation activity will apparently focus on the Anchorage area, the Public Defender Agency is requesting one experienced attorney and one clerk typist to handle representation of clients charged under this bill.

Fiscal Analysis

Personal Services:	Attorney IV	70.8	
	Clerk-Typist III	26.8	
			97.6
Travel:	Expert witnesses and investigation		5.0
Contractual:	Expert witnesses, space, etc.		10.0
Supplies:	Office, law library, etc.		3.0
Equipment:	(one time) furniture, office machines, etc.		4.0
	Total		119.6

1.	POSITION TITLE: Attorney IV			RANGE/STEP: 24A	BARG. UNIT: PX	PAGE/LINE	COV.	APPROV.	DISAPP.
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12.0	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION: Anchorage	ELECTION DISTRICT: 8	LEG.		
3.	CONTINUATION LEVEL		ADDITION						

4. TYPE OF EXPENDITURE	1	2	AMOUNT 3
	PERSONAL SERVICES		
5.	Salary $4663/mo.	55,956	
6.	Benefits	9,499	
7.	Supplemental Benefits	2,680	
8.	Fixed Benefits	2,630	
9.	TOTAL PERSONAL SERVICES	01	70,765
10.	Travel	02	5,000
11.	Contractual	03	10,000
12.	Commodities	04	1,500
13.	Equipment	05	2,000
14.	Other		
15.	TOTAL COST		89,265

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.		General Funds	1004	89,265
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR BSM USE ONLY
KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

This bill, which relates to illegally controlled enterprises or criminal conspiracy and will be focused in the Third District, is broad enough in scope that indigents may be included, thereby requiring the services of the Public Defender Agency. Since the felony caseload of the agency would be increased, an experienced Attorney IV is requested for Anchorage. The travel and contractual monies would go for professional experts and investigations.

5/1D2/0207-08

REQUEST FOR NEW POSITION

AGENCY Department of Administration

PROGRAM Due Process

BRU Public Defender Agency

COMPONENT Third Judicial District

Revised Date

FY 86

01-5136 (7/82) - 13

1.	POSITION TITLE: Clerk Typist III			RANGE/STEP: 8A	BARG. UNIT: GG	PAGE/LINE	GOV.	APPROV.	DISAPP.
2.	TYPE OF POSITION: PFT	STAFF MONTHS: 12.0	RP NUMBER	PCN NUMBER	BRU PRIORITY	LOCATION: Anchorage	ELECTION DISTRICT: 8	LEG.		
3.	CONTINUATION LEVEL	ADDITION							

4. TYPE OF EXPENDITURE	1	2	AMOUNT 3
	PERSONAL SERVICES		
5.	Salary $1631/mo.	19,572	
6.	Benefits	3,322	
7.	Supplemental Benefits	1,199	
8.	Fixed Benefits	2,732	
9.	TOTAL PERSONAL SERVICES	01	26,825
10.	Travel	02	0
11.	Contractual	03	0
12.	Commodities	04	1,500
13.	Equipment	05	2,000
14.	Other		
15.	TOTAL COST		30,325

	RECEIPT CODE	FUNDING SOURCE		
16.		Federal Receipts	1002	
17.		G.F. Match	1003	
18.		General Funds	1004	30,325
19.		I-A Receipts	1005	
20.		Program Receipts	1028	
21.		Other		

FOR BSM USE ONLY
KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

JUSTIFICATION

This bill, which relates to illegally controlled enterprises or criminal conspiracy and will be focused in the Third District, is broad enough in scope that indigents may be included, thereby requiring the services of the Public Defender Agency. Since the felony caseload of the agency would be increased, a Clerk Typist III is requested for Anchorage to provide necessary support services.

5/1D2/0207-07

REQUEST FOR NEW POSITION

AGENCY Department of Administration

PROGRAM Due Process

BRU Public Defender Agency

COMPONENT Third Judicial District

Page 5 of 5

Revised Date

FY 86

01-1136 (7/82) - 13

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST:
Bill/Resolution No.: HB 184, No. 2
Title: "An Act relating to illegally controlled enterprises..."
Sponsor: Rules/Governor
Requestor: Governor
Date of Request: January 23, 1985

FISCAL DETAIL:
Agency Affected: DEPARTMENT OF CORRECTIONS
Program Category Affected: Administration of Justice
BRU, Program or Subprogram(s) Affected: Offender Confinement, Reformation and Supervision

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary.

This legislation will enhance Alaska's ability to investigate organized crime and to coordinate these investigations with the Federal Government. It is assumed that most cases would be prosecuted at the Federal level, creating negligible fiscal impact on the Department of Corrections.

Prepared By: William W. Ladwig
Division: Deputy Commissioner - Administration
Phone: 465-3376
Date: February 4, 1985

Approved by Commissioner:
Agency: DEPARTMENT OF CORRECTIONS
Date: February 4, 1985

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency (ies)

7/1/84

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.:

Title: "...relating to illegal control of an enterprise..."

Sponsor: Req. of the Governor

Requestor:

Date of Request: 10/30/84

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: Admin. of Justice - Due Process

BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES		77.5	85.3	90.4	95.8	101.5
200 TRAVEL		10.0	10.6	11.2	11.9	12.6
300 CONTRACTUAL		51.2	54.3	57.6	61.1	64.2
400 SUPPLIES		7.0	7.4	7.8	8.3	8.8
500 EQUIPMENT		3.0				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	148.7	157.6	167.0	177.1	187.1
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	148.7	157.6	167.0	177.1	187.1
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	2	2	2	2	2
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

See attached.

Prepared By: Richard L. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: 10/30/84

Approved by Commissioner: Richard L. Pegues / for Norman C. Gorsuch Date: 10/30/84

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

Fiscal Note
Analysis
RICO Bill

October 29, 1984

This bill would provide both criminal and civil sanctions to combat organized racketeering activities through the illegal control of enterprises in Alaska. The bill provides both stiff penalties and severe financial disincentives to the infiltration into legitimate business through criminal activity. The bill is also designed to address the operation of an enterprise through a pattern of illegal activity. This level of criminal activity involves the use of highly sophisticated economic structures. Enactment of the bill will provide the state with the legal tools necessary to respond to the increasingly sophisticated criminal activity being experienced in Alaska.

The Department of Law estimates that four to six investigations/prosecutions of this nature will be undertaken annually. Each investigation will require painstaking examination and evaluation of large numbers of financial documents and business transactions to track and identify the funds that originate from criminal activities and the individuals who control those funds. The bill can be implemented with existing prosecutor resources because of the power granted to the Attorney General to conduct investigations into suspected organized criminal activity. The department believes, however, that the addition of some case preparation resources will enable it to do a far more effective job under the bill. The department therefore recommends the addition of an Associate Attorney II and a Paralegal Assistant II to conduct primary research of financial records of suspected criminal activities. These two positions would be assigned to the Office of Special Prosecutions and Appeals to assist existing attorneys "make" these types of cases. The department also recommends setting aside sufficient funds to contract for the services of document analysis experts and accountants for use as expert witnesses during the preparation for and conduct of trials.

Fiscal Analysis RICO Bill
Cost Schedule

FY 86

	Assoc. Atty. II	Paralegal Asst. II	Expert Witness Contractors	Total
100	42.4	35.1		77.5
200	5.0	5.0		10.0
300	5.6	5.6	40.0	51.2
400	3.5	3.5		7.0
500 (one-time expense)	1.5	1.5		3.0
	58.0	50.7	40.0	148.7

Contractor's time, including the costs for travel and the preparation of court room visual displays, is estimated at $100 per hour for 400 hours of services.

Costs beyond FY 86 include a 6% annual inflation factor.

1.	POSITION TITLE Associate Attorney II			RANGE/STEP 19A	BARG. UNIT PX	FORM 12 PAGE/LINE	COV.	APPROV.	DIS.
2.	TYPE OF POSITION PFT	STAFF MONTHS 10	RP NUMBER	PCN NUMBER	ORU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT 8	LEG.		
3.	CONTINUATION LEVEL		ADDITION						

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary 3,303 X 10	33,030	
6.	Benefits 15.61 %	5,156	
7.	Supplemental Benefits 6.13%	2,025	
8.	Fixed Benefits 219.20 X 10	2,192	
9.	TOTAL PERSONAL SERVICES 01		42,403
10.	Travel 02		5,000
11.	Contractual 03		5,600
12.	Commodities 04		3,500
13.	Equipment 05		1,500
14.	Other		
15.	TOTAL COST		58,003

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	58,003
19.		I-A Receipts 1005	
20.		Program Receipts 1020	
21.		Other	

FOR O&M USE ONLY
4A KEY NUMBER ___ - ___ - ___ - ___ - ___

JUSTIFICATION

This is one of two positions needed to implement the RICO bill. The position will serve as case legal researcher and collect, organize and analyze the substantial amounts of evidence required to prove the infiltration of criminal activity into legitimate enterprises. Because of the complex nature of the evidence used in these types of cases, allocation to the senior para-professional classification of Associate Attorney II is recommended.

13 REQUEST FOR NEW POSITION

AGENCY DEPARTMENT OF LAW

PROGRAM DUE PROCESS

ORU PROSECUTION

CRIM. APPLS. & SPEC. PROS.

Revised Date

FY 8

1.	POSITION TITLE Paralegal Assistant II			RANGE/STEP 16A	SALARY UNIT G	FORM 12 PAGE/LINE	COV.	APPROV.	DIST
2.	TYPE OF POSITION PFT	STAFF MONTHS 10	RP NUMBER	PCN NUMBER	ORU PRIORITY	LOCATION Anchorage	ELECTION DISTRICT 8	LEG.		
3.	CONTINUATION LEVEL		ADDITION		JUSTIFICATION				

4.	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
	PERSONAL SERVICES		
5.	Salary 2,702 X 10	27,020	
6.	Benefits 15.61%	4,218	
7.	Supplemental Benefits 6.13%	1,656	
8.	Fixed Benefits 219.20 X 10	2,192	
9.	TOTAL PERSONAL SERVICES 01		35,086
10.	Travel 02		5,000
11.	Contractual 03		5,600
12.	Commodities 04		3,500
13.	Equipment 05		1,500
14.	Other		
15.	TOTAL COST		50,686

	RECEIPT CODE	FUNDING SOURCE	
16.		Federal Receipts 1002	
17.		G.F. Match 1003	
18.		General Funds 1004	50,686
19.		I-A Receipts 1005	
20.		Program Receipts 1020	
21.		Other	

JUSTIFICATION

This is the second of two positions needed to implement the RICO bill. The position will serve as case legal researcher and assist the Associate Attorney collect, organize and analyze the substantial amounts of evidence required to prove the infiltration of criminal activity into legitimate enterprises. Because the position will assist a senior researcher/case preparer, classification of Paralegal Assistant II is recommended.

FOR O&M USE ONLY
4A KEY NUMBER __ __ - __ __ - __ __ - __ __ - __ __

13. REQUEST FOR NEW POSITION

AGENCY DEPARTMENT OF LAW

PROGRAM DUE PROCESS

ORU PROSECUTION

CRIM. APPLS. & SPEC. PROS.

Revised Date

FY 8

KENAI POLICE DEPT.

P.O. BOX 3173, KENAI, ALASKA 99611

TELEPHONE 283-7879

April 2, 1985

Representative Mike Miller
Chairman, House Judiciary Committee
Pouch V
Juneau, AK. 99811

Dear Representative Miller,

The Alaska Association of Chief's of Police at its annual meeting in March of 1985 endorsed the passage of House Bill ~~184~~. While this legislation would be somewhat limited in its application, it would be effective in dealing with major criminal enterprises.

We believe that the passage of this piece of legislation, in combination with passage of general conspiracy statute, would greatly enhance the enforcement and prosecutorial resources available to address criminal enterprises.

We request your support, and that of your committee, to accomplish this goal.

Sincerely,

Chief Richard A. Ross
Kenai Police Dept.
President Alaska Chief's of Police

RAR/mp

FUNK, BAXTER & COMPANY
A PROFESSIONAL CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS
9309 GLACIER HIGHWAY, SUITE B-101
JUNEAU, ALASKA 99801
(907) 789-3178

LEROY T. FUNK, C.P.A.
FRANK SEXSMITH BAXTER, C.P.A.
CATHERINE R. BARRETT, C.P.A.
SHERRY L. YOUNG, C.P.A.

December 19, 1985

Mr. Jim Ayers
Director of Legislation
Office of the Governor
Pouch A
Juneau, Alaska 99811

Dear Mr. Ayers:

Thank you for taking the time to discuss HB 184 with me today. After talking to you, I found a copy of a letter from Mr. William M. Crane, Technical Manager, State Legislation Department, American Institute of Certified Public Accountants (AICPA) setting forth guidelines for RICO Legislation. I have enclosed a copy of the article from the Journal of Accountancy.

As you will discern from reading the article, the AICPA has been working closely with Congressman Boucher. If I may be of any further assistance on this issue, please do not hesitate to call me.

Sincerely,

LeRoy T. Funk
Enclosure

cc: Senator Bill Ray
Mike Miller
Jim Duncan
Ashley Reed

AICPA

American Institute of Certified Public Accountants
1211 Avenue of the Americas, New York, NY 10036-8775 (212) 575-6200 Telex: 70-3396

March 27, 1985

Le Roy T. Funk, CPA
Funk, Baxter & Co.
9309 Glacier Highway, Suite B- 101
Juneau, AK 99803

Dear LeRoy,

Thank you for filling out and returning our Legislative Survey form. Thanks, too, for the copy of House Bill 184, the Alaska RICO bill.

As I believe you are aware, LeRoy, the AICPA State Legislation Committee has established a high priority on handling of state RICO legislation. A committee task force on RICO has established general guidelines for responses to such legislation. In descending order of priority, the guidelines are:

1. Eliminate private (civil) suit provisions
2. Require a RICO criminal conviction before private suits may be filed
3. Require a RICO criminal indictment before private suits may be filed
4. Eliminate treble damage awards

With the above guidelines in mind, a review of House Bill 184 may be done. We find that the bill does permit private (civil) suits and does provide for treble damage awards. Therefore, to meet the guidelines of the RICO task force, the bill, if it is going to be enacted, should be amended.

I would appreciate it if you could provide an update of the current status of the bill and information on other RICO bills that may have been introduced or which are in the planning stages.

Sincerely,

Bud Crane

William M. Crane
Technical Manager
State Legislation Department

WHY CIVIL RICO MUST BE REFORMED

RICO hits hard: treble damages and destroyed reputations.

by Congressman Rick Boucher

A new form of extortion is sweeping the country, and business people of all types—especially such professionals as CPAs, as well as bankers, insurance agents and securities brokers—are among its primary victims. They are being threatened with a weapon that can be more effective than brass knuckles, arson or vandalism, one that can inflict huge damages and can rain unjustified shame and ruin on them.

Ironically, it was Congress that inadvertently created this new method of extortion as part of a bill designed to help legitimate businesses defend themselves against organized crime. Instead, this weapon—the Racketeer Influenced and Corrupt Organizations Act (RICO)—has been turned against the very people Congress intended to protect.

Origin of RICO

RICO was originally passed by Congress in 1970 as part of the Organized Crime Control Act. The bill's laudable goal was the eradication of organized crime in the United States. It aimed to accomplish this goal through a variety of reforms in law enforcement designed to strengthen the hand of the federal government in its battle against the pernicious influence of organized crime. As Senator John McClellan (D-Ark.), the bill's chief sponsor, put it at the time, Congress created the RICO title of the act to attack the growing problem of organized crime moving into legitimate businesses and then using "all the techniques of violence and intimidation which it used in its illegal businesses to injure legitimate competitors."

Congress, however, did not believe it could define *organized crime* in a criminal statute in a way that would fairly, accurately and precisely identify the targets of its concern or, indeed, in a way that would avoid the constitutional prohibition against creating so-called status offenses (such as saying "members of the Mafia"). Therefore, Congress chose instead to focus on the types of activities in which organized crime typically engages. The core of RICO, then, is an extensive list of criminal statutes that are defined to constitute "racketeering activities."

This list includes a variety of crimes normally associated with organized criminals: murder, kidnapping, hijacking, extortion and arson. Yet, in addition, because of some indications in 1970 that organized crime figures were beginning to traffic in stolen or counterfeit securities, the Securities and Exchange Commission asked the Senate to expand the list of criminal acts to include mail fraud, wire fraud and fraud in the sale of securities.

The statute makes it a separate federal crime to engage in a "pattern of racketeering activity" in certain relationships to an "enterprise." (And the definition of *enterprise* is broad.) The "pattern of racketeering activity" defined in the statute may require nothing more than an accusation—not a conviction—that the defendant twice within a 10-year span committed any of the acts listed as "racketeering activities."

Owing to the insidious nature of organized crime, Congress purposely wrote the provisions of RICO to cast a wide net. Congress realized that, if the list of criminal activities defining organized crime was too narrow, the hard-core criminal could simply get around the statute by moving his activities into a new arena not reached by the statute. As Senator McClellan explained, Congress could not "anticipate everything" and needed to write a broad, general statute.

At the time these provisions were being

FREDERICK C. (RICK) BOUCHER, JD, represents the ninth district of Virginia and is a Democratic member of the House Judiciary Committee and Criminal Justice Subcommittee. He is a member of the American and Virginia bar associations.

given careful consideration by Congress, it seemed reasonable to write a broad statute because experienced federal prosecutors were to be responsible for enforcing it. Congress was counting on the Department of Justice to take this potent weapon and to use it—not against every conceivable person who could be swept within its terms but only against the type of hard-core organized crime figures who framed the purview of congressional concern.

Such reliance by Congress on the exercise of prosecutorial discretion is not at all unusual. The difficulty of writing laws to fit precisely the problem being attacked and the difficulty in "anticipating everything" mean that Congress often must give the executive branch of government broad authority to address a problem and also must rely on the executive branch to apply the law reasonably and responsibly. This was precisely the intent of Congress when it enacted the RICO statute.

Indeed, the Department of Justice responded by promulgating guidelines for all federal prosecutors and instructed them not to use RICO in "imaginative prosecutions" that would take advantage of the full theoretical reach of RICO. These guidelines delineate various principles designed to confine the use of RICO by the federal government to "the activity which Congress most directly addressed—the infiltration of organized crime in the nation's economy." Guided by these sensible restraints, RICO has in fact become a valuable tool for federal prosecutors, who have employed it both responsibly and effectively in the war against organized crime.

The Problem with RICO

Unfortunately, with little consideration of the full impact of what it was doing, Congress, at virtually the last minute and with minimal debate, added a provision to RICO that permits private parties to bring civil suits under its provisions and to collect treble damages as well as attorneys' fees. Private parties and private attorneys, of course, are not restrained in their use of RICO by any of the public-policy considerations that restrain the actions of federal prosecutors; nor are they under any obligation to use the statute only for the purposes that Congress intended. On the contrary, many believe that a private attorney is obligated to make any claim that he can reasonably assert under the letter of the law on behalf of his client.

Thus, the result of combining this broadly worded statute with the unfettered use made of it by private parties has been an explosion of RICO treble-damage claims in cases against people Congress never intended to be victimized by this powerful weapon.

Because of the breadth of the criminal fraud

statutes and the breadth of the RICO statute, in almost any instance in which a venture has lost money or a stock has fallen in value a disappointed investor can allege that the business person's behavior fell within the legal standard for "fraud" and can accuse the person of being a "racketeer."

In fact, nearly every type of commercial dispute can be and has been converted into a RICO action because such controversies often involve allegations of fraud. Civil RICO accusations have turned up in a wide variety of such disputes, including the churning of stock, representations about a broker's expertise, projections used in a real estate syndication, disputes between a landlord and a tenant, the disallowance of an insurance claim, alleged overcharges by a printer, and the failure to publish a medical journal according to a contractual agreement.

In one recent case, for example, the U.S. Court of Appeals for the Fourth Circuit, which includes my home state of Virginia, ordered reinstatement of a RICO case brought by a condominium developer who alleged that the purchasers of an office condominium unit were trying to "extort" an unreasonably high price from him in connection with the developer's effort to repurchase the condo unit in order to include it in a block of units the developer wanted to sell to IBM. The trial judge had aptly characterized this dispute as "at best a garden-variety commercial breach of contract" case.

Nevertheless, the appeals court said that the developer's allegations against his purchasers—two husband-and-wife couples—might make out a claim of "extortion" under state law and, therefore, that the developer could press a "racketeering" case against them under RICO. The two businessmen who originally bought the condominium unit and their wives thus now stand accused of being racketeers.

Although the most pernicious use of civil RICO is the converting of such commercial disputes into treble-damage racketeering claims, the broad sweep of RICO's language has meant that RICO claims have turned up in a variety of other situations in which its use can only be described as bizarre. In one recent case a district court said that a plaintiff could press a RICO claim in a dispute between the Church of Scientology and some of its ex-members over the "theft" and "perversion" of the "church's scriptures." RICO claims have surfaced in other religious disputes, as well as in disputes between spouses and heirs.

In yet another recent case RICO was used to sue former Vice-President Walter Mondale and members of the Democratic National Committee for allegedly offering political contributions to other Democratic candidates in exchange for promises not to oppose Reagan administration policies. This use of RICO was thrown out of court, not because of any fundamental problem with calling on RICO in such a case but merely because the specific form of bribery alleged did not fall within the specific bribery acts listed in RICO.

In what may be the most perverse use of civil RICO to date, a federal trial court held that a RICO claim could go forward against FBI agents who had orchestrated an undercover "sting" operation. It is hard to imagine a use of RICO further afield from the intent of Congress, but the courts have found themselves powerless to cope with misuses of this poorly drafted statute. As a result, the courts have repeatedly called on Congress to correct its mistake.

Not only has civil RICO been used in types of cases unintended by Congress; in fact, it has been used principally against the legitimate businesses it was designed to protect. The sad fact is that only a handful of civil cases in which gangsterlike conduct is alleged have been brought under RICO—and in each of these cases the defendants had first been prosecuted and convicted under criminal statutes.

Not surprisingly, business people injured by organized crime have been reluctant to take the risk of bringing such lawsuits for damages unless the government has first successfully gone after the criminals. When the federal government needs the aid of the Witness Protection Program, administered by the U.S. Marshals Service, in order to prosecute members of organized crime, it is unrealistic to expect a private business person to take on the mob alone in a civil suit.

Although most organized crime figures have not felt the effects of civil RICO, the list of leading U.S. businesses that have found themselves targets of civil RICO accusations runs for pages. It includes virtually all of the eight largest CPA firms; such major brokerage houses as Merrill Lynch and Dean Witter; such banks as Citibank, Crocker National Bank and First American Bankshares; such

Congressman Boucher (left), at a House Criminal Justice Subcommittee hearing, discusses his proposed RICO legislation with Congressman John Conyers, Jr. (D-Mich.), chairman of the subcommittee.

manufacturers as General Motors, Miller Brewing and Rockwell International; insurance companies, including State Farm, Travelers and Lloyd's of London; and even law firms.

Not by any stretch of the imagination is any of these businesses the type of organized criminal enterprise that Congress meant to be subject to attack under the RICO statute. Despite the legitimacy of these businesses, they—not organized crime figures—have been the principal defendants in civil RICO cases.

RICO and the Supreme Court

This picture of misuse of civil RICO is not just derived from the complaints of business people who have been caught on the wrong side of expensive litigation. A special task force of the American Bar Association recently completed an extensive study of civil RICO. It found that only about 9 percent of all civil RICO cases involve offenses commonly associated with professional criminal activity. The task force accordingly called for substantial reform of civil RICO to eliminate its misuse.

Even more recently, in *Sedima* v. *Imrex Company* (decided in July 1985), the Supreme Court had occasion to look at civil RICO. The Court was unanimous in recognizing that civil RICO has strayed far from the target that Congress had in mind when it wrote and passed the act. The Court's majority opinion stated that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors" and that "private civil actions under the statute are being brought almost solely against" what the Court called "respected and legitimate enterprises" rather than against "the archetypal, intimidating mobster."

Justice Thurgood Marshall, writing for the four dissenting justices, including Justices Harry Blackmun, William Brennan and Lewis Powell, was even more explicit in detailing the ways in which civil RICO has unintentionally revolutionized federal litigation. This revolution is occurring because civil RICO allows plaintiffs both to federalize claims that have traditionally been litigated in state courts under state law and also to avoid carefully structured civil remedies in such areas of federal law as securities and commodities regulation.

Justice Marshall, a person who could never be accused of being a front man for business interests, worried openly about the impact of these suits: "These cases take their toll; their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect."

The pervasive impact of legislation run amok goes far beyond the simple measurement of the excessive damages awards that may be won under its provisions or the distortion of state and federal law it causes. Indeed, civil RICO may be described quite accurately,

as I did at the beginning of this article, as a new form of extortion. The threat of filing a civil RICO action carries with it not just the risk of being hit with treble damages at the end of the suit and the additional threat of an award of attorneys' fees; it also entails an almost certain enormous expense associated with the liberal and wide-ranging discovery that has been allowed by the federal courts.

In addition, a threatened RICO suit carries with it the opprobrium associated with being branded in public as a "racketeer." Nothing is more important to professionals or business people than their reputations. Nothing can be more devastating to a professional or personal reputation than the publicity that usually is associated with the filing of a "racketeering" charge. Thus, merely by threatening to bring and publicize a RICO claim, a business rival or other person can "extort" money almost as easily as the gangster with brass knuckles.

Again, this fear is not just voiced by interested defendants but is the conclusion of Justices Marshall, Blackmun, Brennan and Powell: "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat."

The majority of the Supreme Court did not disagree with the observations of these four justices. The majority parted company from the dissenters in the civil RICO case only on the question of whether the courts may properly give the statute a narrow interpretation in order to eliminate some of these difficulties. The bare majority held that there is nothing that the courts can do, that the wording of the statute does not allow for a narrow judicial construction, and that any correction in the statute's defects "must lie with Congress."

Thus, without congressional action, the use of civil RICO in this unintended and disruptive manner is likely to grow. Despite the fact that the statute has been on the books since 1970, the plaintiff's bar has begun to recognize the power of civil RICO only in the last few years. The ABA RICO task force found that only 3 percent of all reported RICO decisions were decided before 1980 and that the number of such decisions has grown substantially each year since then. Moreover, it is only in the last few years that bar groups and publications aimed at lawyers have begun to focus attention on civil RICO.

Congressman Boucher (right) confers on RICO with Theodore C. Barreaux, vice-president in charge of the Washington, D.C., office of the AICPA.

In addition, only recently have the appellate courts confirmed the sweep of civil RICO by turning back various attempts to read the statute narrowly. With the Supreme Court decision in *Sedima*, which both confirmed the breadth of the statute and focused even more attention on its potential uses, the number and variety of disputes that will be turned into civil RICO claims can be expected to grow at an accelerated rate. Unless there is action by Congress, the shadow that civil RICO casts over business disputes will grow larger and darker.

The Best Solution

With my introduction in Congress of HR 2943, I have tried to respond to the Supreme Court's and other courts' invitations to Congress to reform civil RICO. My bill would

limit the private civil treble-damage provision by allowing a private plaintiff to bring suit only when the claim arises from an injury caused by conduct that has first led to the defendant's conviction either of one of the criminal offenses listed in the statute or of a criminal violation of RICO itself.

This amendment would make it clear that the private civil provisions of RICO are to be used only against persons whom prosecutors have decided to charge and whom juries have decided to convict of criminal violations of RICO or the underlying criminal offenses. The statute would thus recognize the critical role that federal and local prosecutors and juries should play in determining whether a person has actually engaged in criminal activity and, as a consequence, whether this person is properly subject to the special treble-damage liabilities created by RICO.

I hope to obtain strong support to ensure the passage of this important legislation. One might think such legislation would sail through Congress easily, given the widespread unintended use to which civil RICO has been put. But reform will not come easily.

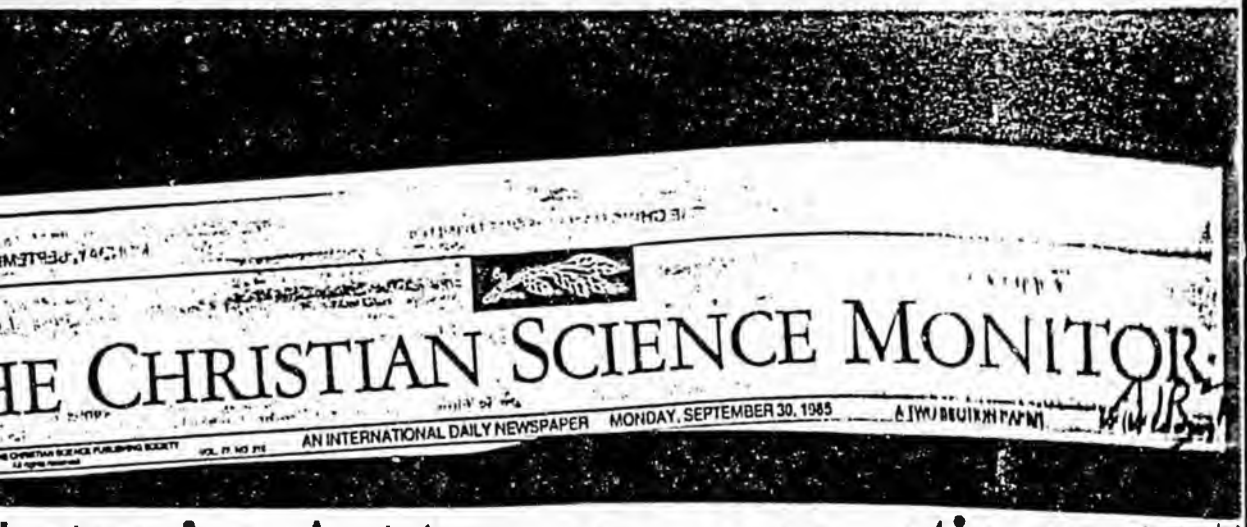
Lawyers who make a living bringing damage actions have a vested interest in preserving this unintended gift from Congress with which they can extort settlements. These lawyers have an effective lobby and could be successful in promoting merely cosmetic reforms that would preserve the ability to misuse civil RICO.

The effort to reform civil RICO also suffers from a cacophony of proposals. Space does not permit an attempt to detail all these proposals and explain why they reach inappropriate, inadequate or unmanageable results. After studying the various alternatives, however, I am satisfied that amending civil RICO to require a prior criminal conviction is the simplest, most direct way to refocus RICO on its intended target—organized crime—without adversely affecting the use of criminal and civil RICO by the federal government, whose war on organized crime was always intended to be the act's primary beneficiary.

Under this approach, private parties who have truly been victims of organized crime will still have a civil action; their use of the statute will be unaffected, since, as noted earlier, history has shown that they use the statute now only after the government has successfully pressed criminal charges.

Congress must address this significant piece of anticrime legislation and set it back on the correct course. Criminal RICO has been an effective weapon in the hands of the federal government in attacking organized crime. Unfortunately, civil RICO has inadvertently become a potent and an inappropriate weapon in the hands of private plaintiffs and their attorneys in attacking ordinary and respected business people.

Congress must rid our courts of this new form of government-sponsored extortion and must return this statute to its intended use—as a remedy for legitimate businesses besieged by the scourge of organized crime. ■



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Washington

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it passed RICO," says Irvin B. Nathan, a Washington lobbyist for the insurance industry.

RICO has proved to be one of the government's most powerful weapons in striking back at organized crime nationwide. In recent years mafia bosses have been convicted or indicted on broad criminal RICO charges in New York, Cleveland, Los Angeles, and many others cities. But now, private-sector lawyers are discovering that the same broad interpretation of RICO, so essential to gaining convictions against mobsters, can also be useful in boosting the stakes in favor of their clients in common commercial legal disputes.

'RICO is likely to be a prominent feature of the commercial dispute landscape in a wide range of cases,' says Ste[illegible] Glasser.

On July 1, the Supreme Court upheld this broad reading of RICO, in effect giving lawyers nationwide a go-ahead to tack civil RICO counts on lawsuits ranging from routine contract disputes, to landlord-tenant and possibly even divorce suits. Not only are RICO suits relatively easy to file, but they offer a reward of triple damages plus legal fees for anyone who can prove he or she was a victim of a "pattern of racketeering."

Under RICO, racketeering exists when an individual or an enterprise commits at least two offenses within a 10-year period. The long list of offenses includes murder, extortion, and kidnapping, as well as mail, wire, and securities fraud.

Because of extensive use of telephone and mail services by most businesses, mail and wire fraud charges are particularly easy to bring in the context of most business disputes.

Defending against such charges is another matter entirely.

For some firms just the threat of substantial legal fees while being tarred with federal racketeering charges — no matter how groundless the allegations — are enough to persuade them to settle out of court.

For others, enduring such charges

Please see RICO next page

RICO from preceding page

is becoming a regular part of doing business.

In 1983, Lloyd's of London and the Lincoln Insurance Company were sued in Michigan because they refused to pay a fire claim to the person they believed set the fire.

One of the charges was a racketeering charge, based allegations that the insurance companies collected premiums with no intention of ever paying claims should they arise. Because policy documents and payments were sent by mail on more than two occasions, the actions constituted a "pattern of racketeering" under RICO.

The federal judge in the case refused to dismiss the RICO charge before the trial, but the charge was ultimately dropped by the filing attorneys because they did not think it would hold up under judicial scrutiny during the trial.

The attorney for the insurance company, Charles Tuffley, says including a RICO count in a business dispute case generally "makes the case more expensive to litigate. [And] "most of those claims are brought to give the insured additional leverage to obtain a settlement." As a result of such cases, RICO has taken on a life of its own. Some legal experts suggest that it has already eclipsed state fraud laws.

"It really is revolutionizing commercial litigation," says Susan O'Connor of the American Law Institute in Philadelphia.

"RICO is likely to be a prominent feature of the commerical dispute landscape in a wide range of cases from corporate takeovers to loan defaults," says Stephen Glasser, president of Legal Times, a weekly law review.

In the meantime, several members of Congress are examining how to amend RICO to prevent what some consider abuses by private lawyers. The problem is that no one can agree on what constitutes "racketeering."

Business groups would like to see the racketeering statute apply only to illicit criminal enterprises, such as Mafia syndicates.

Others maintain that the RICO statute should stay as is, applying to both legal and illegal organizations. Some lawyers contend that the current RICO statute, if left alone, will help restore true ethics to the US business community and help reduce fraud in America.

Still others contend that the ultimate costs of maintaining civil RICO in its current form will be a growing case load in federal court and increasingly expensive commercial lawsuits.

How RICO emphasis has changed

Washington

Congress passed RICO as part of the Organized Crime Control Act of 1970. In it, federal prosecutors are granted broad powers to charge alleged organized criminals with committing a series of crimes or what amounts to a "pattern of racketeering." Rather than stop there, Congress also wanted to encourage the private sector's participation in the fight against organized crime. A civil section was included in the anti-racketeering law. It was aimed at encouraging businessmen and their lawyers to, in effect, become private-sector prosecutors.

Fifteen years ago, the congressional spotlight was on the archetypal godfather version of racketeering. Members of Congress were concerned that Mafia bosses using strong-arm tactics and stolen riches could make offers that honest but frightened businessmen couldn't refuse.

Today, only 9 percent of RICO civil suits relate to typical mobster activity such as embezzlement, extortion, political corruption, and bribery. And 81 percent of all RICO suits filed involve either alleged securities fraud, business disputes, or antitrust allegations, according to an American Bar Association study.

— W. R.

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APR 30 1985

April 26, 1985

Representative Mike M. Miller
Pouch V
Mail Stop 3100
Juneau, Alaska 99811

Dear Representative Miller:

We would like to comment on H.B. 184, the proposed state RICO act. This firm represents Alaska Native corporations, other corporations and partnerships and does a considerable amount of security law work. We are concerned that H.B. 184, as proposed, will adversely impact the Alaska business community. Our comments are not directed to the necessity of providing Alaska prosecutors additional tools to combat organized crime. Rather, we here wish to express our concern that the proposed tool, H.B. 184, is overbroad because it does not distinguish between the activities of organized crime or big-time crime organizations in the state and what a number of federal courts have described as "garden-variety fraud" already adequately policed by a wide array of federal and state criminal and civil penalties.

Proposed H.B. 184 would provide civil business fraud plaintiffs a new and potentially powerful weapon. Yet it is our understanding that the Committee does not intend to add to the existing and adequate array of plaintiffs causes of action in the every day business fraud context. It is our understanding that the Committee instead intends a statute that will focus on the infiltration of legitimate businesses by criminal elements. As drafted H.B. 184 applies to far more than criminal infiltration. H.B. 184 significantly increases the exposure of entrepreneurs, officers and directors, and potentially may affect the risks legitimate business people are willing to assume.

The civil RICO provisions of H.B. 184 are essentially duplicative of other already extant anti-fraud statutes. As an example, in the securities law area, satisfactory federal and state causes of action already exist for plaintiffs damaged under

the anti-fraud provisions of the securities acts. It is not at all clear why those causes of action need to be supplemented or supplanted by a RICO treble damage cause of action.

The intent of the drafters of both federal and state securities acts, who we may assume specifically focused upon problems in the securities law field, was to make whole a defrauded investor by providing for the return of his investment if he successfully litigated his claim. The drafters of those acts chose not to give defrauded investors what one court has called "a treble damage bonanza."

We have heard no argument that such additional penalties are necessary and until a persuasive argument can be made for treble damage penalties in the securities law area such penalties should not be adopted. Adequate remedies already exist, carefully tailored by the legislature when it specifically focused on securities law problems. It has not been suggested that current remedies are deficient. Further, a treble damage provision in the securities fraud area significantly increases the likelihood of increased litigation of marginal claims based upon plaintiffs' expectations that the specter of a treble damage recovery may coerce a monetary settlement out of a defendant who believes his actions did not constitute fraud and who believes he has solid defenses.

H.B. 184 was patterned after the Federal RICO statute, 18 USC § 1961 et. seq. The potential breadth of H.B. 184 is illuminated by a review of the types of civil cases filed under the federal act. The federal act has been applied by banks against their borrowers and borrowers against their banks; by investors against their brokers; by clients against their accountants and accountants against their clients; by minority shareholders against management; by shareholders against corporate insiders; in corporate proxy fights; by contractees against government entities; by partners against partners; by limited partners against general partners; between joint venturers; by real estate investors; between competitors. RICO defendants have included Shearson/American Express, Inc., Morgan Stanley, Inc., Merrill, Lynch, Pierce, Fenner & Smith, Inc. and E. F. Hutton and Co. These are not the kinds of entities most people expect to discover as defendants in racketeering actions. Alleged RICO enterprises have included the offices of a governor, a state legislator, a court, and a prosecutor's office. It is our understanding that the Committee does not intend a statute of this breadth.

It is our belief that a state RICO act can be artfully drafted to avoid the overbreadth illustrated by the above cited examples. First, the civil cause of action might be eliminated. Second, treble damages might be eliminated. Third, as an element of a RICO claim a criminal conviction might be required. Fourth, proof of racketeering injury or infiltration of business might be required.

We also wish to apprise the Committee that because H.B. 184 is an extremely vague and ambiguous statute, considerable litigation over the meaning of its fundamental terms may be expected. This is not a desirable result when Alaska's courts are already overburdened.

Under H.B. 184, to plead successfully for treble damages a civil plaintiff must first allege a violation of the criminal provisions of the bill. This requirement is satisfied if the plaintiff alleges (1) that a person (the defendant), (2) through the commission of two or more predicate acts, (3) constituting a pattern, (4) of illegal activity or "racketeering", (5) directly or indirectly acquires or maintains an interest in, or participates in or conducts the affairs of, or invests proceeds derived from commission of the predicate offenses in, (6) an enterprise. A plaintiff must also allege that defendant's violation of AS 11.59.010 harms him in his business or property.

These elements are essentially identical to those which a federal plaintiff must prove under the federal RICO Act. In the federal case law each one of these elements has engendered disparate judicial interpretations. The federal RICO case law is characterized by deep divisions between the courts on the meaning of each of the elements a civil plaintiff must prove. It seems to us ill-advised for Alaska to adopt federal RICO language when the federal courts cannot agree upon the meaning of that language.

The following is a partial list of the issues surrounding the Federal RICO Act that have occupied and divided the federal judiciary. The Committee may expect similar interpretive demands to be placed upon the Alaska judiciary if H.B. 184 is passed.

1. What is the "person" and is it distinct from the enterprise? Compare Lopez v. Dean Witter, 1984 Fed. Sec. L. Rep. (CCH) ¶91,634 (N.D.CA. 1984) holding that a plaintiff must allege the existence of separate enterprise distinct from the person, with Mauriber v. Shearson, 1983-1984 Fed. Sec. L. Rep. (CCH)

¶99,444 (S.D. N.Y. 1983) holding that RICO applies to intracorporation conspiracies in which corporations conspire with their agents.

2. What is the meaning of fraud in the sale of securities? See Spencer Cos. v. Agency Rent-A-Car, Inc., 1981-82 Fed. Sec. L. Rep. (CCH) ¶98,361 (D. Mass. 1981) holding that false schedule 13D filings constitute fraud for purposes of RICO even though they would not for purposes of a 10b-5 cause of action. Compare Spencer, supra, holding that purchasers as well as sellers have standing under RICO with, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) holding that only sellers have standing under the 1934 Act, worded similarly to the RICO Act.

3. What constitutes a "pattern"? Compare Deavis Materials, Inc. v. Borneman, 1982 Trade Cases (CCH) ¶64,690 (N.D.Cal. 1981) holding that only two predicates act are necessary to establish a pattern with, Teleprompter of Erie, Inc. v. City of Erie, 437 F.Supp.6 (W.D. PA 1981) holding an additional showing of a continuing scheme necessary.

4. What is meant by "enterprise"? Enterprise is defined as including associations in fact. Courts have determined that this definition is unambiguously broad. But see Friedlander v. Nims, 1983 Fed. Sec. L. Rep. (CCH) ¶99,512 (N.D. Ga. 1983) holding that a camera system was not an enterprise.

5. Can the enterprise be coextensive with the culpable person? Compare Dakis v. Chapman, 1983-1984 Fed. Sec. L. Rep. (CCH) ¶99,498 (N.D.Cal. 1983) concluding that they can be with, Haroco v. American National Bank, 747 F.2d 384 (7th Cir. 1984) holding that they cannot be.

6. Must the enterprise have an independent existence from the pattern of racketeering activity? Compare Moss v. Morgan Stanley, 1983-1984 Fed. Sec. L. Rep. (CCH) ¶99,478 (2nd Cir. 1983) holding that such independent is not necessary with Kimmel v. Peterson, 1983-1984 Fed. Sec. L. Rep. (CCH) (D.C. Pa. 1983), finding an independent enterprise.

7. Must the enterprise benefit from the pattern of racketeering activity? Compare J.S. v. Nerone, 563 F.2d 836 (7th Cir. 1977), holding a benefit necessary with Spencer Cos. v. Agency Rent-A-Car, Inc., supra, holding only that the predicate acts must relate to the enterprise.

8. Is there a requirements that the RICO plaintiff suffer injury "by reason of" a pattern of racketeering activity or, in other words, does a plaintiff have to suffer a special racketeering injury? Compare Dakis v. Chapman, supra, holding a racketeering injury necessary with, Haroco v. American National Bank, supra holding such an injury not necessary.

The federal RICO act is ambiguous in a number of other ways, however, we feel this list is sufficient to indicate the kinds of issues the Committee might expect to be litigated in the state courts if H.B. 184 passed.

While H.B. 184 suffers many of the deficiencies of the federal act discussed above, it in addition contains several provisions the federal act does not have which concern us. First, the predicate offense covered by A.S. 11.59.020(b)(3) involves a felony involving takeover bids under A.S. 45.57. AS 45.57 is patterned after the Illinois takeover bid disclosure law which was found unconstitutional by the U.S. Supreme Court in Edgar v. MITE Corp., 457 U.S. 624 (1982). Thus a violation of this presumptively unconstitutional act constitutes a predicate RICO act violation. If the mails were used in connection with the takeover bid a RICO crime might be provable--based on an unconstitutional act.

Second, H.B. 184 defines racketeering as a "pattern of illegal activity that involves two or more instances of illegal activity" AS 11.59.020(a). One illegal activity is a state felony involving securities or takeover bids, AS 11.59.020(b)(3). The use of the term felony suggests a conviction, however, AS 11.59.010(b)(6) encompassed the federal predicate acts which include "any offense involving fraud in the sales of securities". Is a conviction required? When incorporating the federal predicate offenses under A.S. 10.59.020(b)(6) is it the Committee's intent to incorporate as well the legislative history of the federal act? The issue of whether a conviction is required under the federal act is currently before the U.S. Supreme Court. Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 2d Cir., 1984 cert. granted. If the Supreme Court concludes that a conviction is required under the federal act and H.B. 184 is passed with the legislature not intending the standing requirement of a conviction, then a plaintiff may have to allege a conviction in a securities fraud case under A.S. 11.59.020(b)(6) (the federal law incorporation section) but may not have to allege a criminal conviction in the same securities fraud case under A.S. 11.59.020(b)(3).

Third, "enterprise" is not defined in the bill. Identifying the enterprise and distinguishing the enterprise from the culpable person are the two most difficult pleading tasks for the plaintiff's attorney under the federal act. Yet H.B. 184 gives counsel no interpretive assistance. We have additional concerns about H.B. 184, however, our comments here should indicate to you our difficulty with the bill.

In summary, H.B. 184 is unacceptably overbroad and will have a deleterious impact upon the Alaska business community. H.B. 184 should be drafted to suppress the precise problem the Committee wishes to address. The operative terms of the bill should be defined with precision. In addition, we have suggested that the civil cause of action be eliminated from the bill, treble damages be eliminated from the bill or a standing requirement of a criminal conviction be added to the bill.

Sincerely,

COPELAND, LANDYE, BENNETT and WOLF

Erik LeRoy

Mark G. Copeland

EL:db3:1

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to illegally controlled enterprises and the forfeiture of property used in violation of state law.

Section 1 of the bill is a declaration of legislative purpose. The heart of the bill is contained in sec. 2, which creates a new chapter in AS 11, the Criminal Code. Section 3 of the bill adds a new article to AS 09.50, setting out general forfeiture provisions. Sections 4 -- 11 of the bill make various complementary amendments in AS 11, AS 12, and AS 17.

This bill authorizes a unified and comprehensive public and private response to one of the most invidious forms of criminal conduct: the acquisition and operation of businesses through a pattern of illegal activity. As Alaska's economy continues to grow, our state unfortunately has become an increasingly more tempting target for a more sophisticated, and therefore more dangerous, type of criminal. This bill will allow us to address that problem by authorizing civil and criminal penalties for three forms of conduct: (1) the use of a pattern of criminal activity to acquire an interest in a business; (2) the use of a pattern of criminal activity to conduct some or all of the affairs of a legitimate or completely illegitimate business; and (3) the use of the ill-gotten gains from a pattern of criminal activity to acquire an interest in a business or to conduct the affairs of a business.

Many provisions in this bill have been based on the federal Racketeer Influenced and Corrupt Organizations title of the Organized Crime Control Act of 1970 (18. U.S.C. secs. 1961 -- 1968). That legislation has served as a model for 19 states that have enacted legislation authorizing a state

response to some of the same concerns addressed by Congress in 1970. Although in most circumstances the coverage of the federal and state laws will be the same, the federal law is restricted to enterprises that affect interstate commerce, whereas this bill contains no such limitation and is therefore also applicable to solely in-state enterprises. This bill does, however, require that at least one of the acts forming the pattern of illegal activity be in violation of Alaska law.

In addition to its criminal provisions, this bill establishes significant civil remedies for the victim of illegal activity. It creates a private right of action for treble damages that is available to a person who is injured as a result of the prohibited acts described in the legislation. This section serves two purposes. First, it provides another powerful deterrent against those who desire to victimize Alaskans. Secondly, it authorizes compensation to the victim of the criminal activity and provides an incentive for that person to seek recovery by authorizing the award of treble damages. Finally, the forfeiture procedures included in the bill insure that a defendant will not be able to profit from illegal activity. The forfeiture provisions are made applicable to all instances where forfeiture is authorized by state law. This will insure consistency in coverage and reduce the volume of statutes that the legislature is required to pass each time it authorizes forfeiture.

The bill also provides for preliminary measures, such as injunctions and other court orders, to stop illegal activity before it actually succeeds in taking over a legitimate business. Additionally, the attorney general is authorized to conduct investigations into racketeering activity and is given the authority to obtain evidence necessary to successfully complete that investigation.

As previously mentioned, this bill is based on existing federal law. Many federal cases have interpreted the scope of that law, and it is expected that those cases will be of invaluable assistance to Alaska's courts in interpreting the scope of this legislation. An extensive commentary has been prepared to accompany the bill, which analyzes each section and cites those federal cases that reflect the intent behind a particular provision. This commentary will be of assistance to the legislature in reviewing the bill, and, after passage, to the courts in interpreting the intent behind individual provisions. I would urge that during committee consideration of the bill, the commentary also be carefully reviewed and revised in accordance with any revisions made

to the bill. The Department of Law will be available to assist in this effort as individual committees find appropriate. Ultimate adoption of the commentary as an expression of legislative intent and publication in the Journal will be extremely helpful in the implementation and interpretation of the bill.

Because of its length and complexity, I have not attached the commentary at this time. However, a condensed version of it in the form of a much briefer sectional analysis which summarizes the bill is attached. This sectional analysis will be of assistance in understanding both the purposes of the bill and how individual provisions achieve those purposes. Please publish it in the Journal Supplement so that it will be easily accessible to everyone interested.

In summary, this bill creates a comprehensive and unified public and private response to some of the most serious forms of criminal activity occurring in Alaska today. I therefore urge your prompt and favorable action on this measure.

Sincerely,

Bill Sheffield
Governor

SECTIONAL ANALYSIS TO THE 1985 ACT RELATING TO ILLEGALLY CONTROLLED ENTERPRISES

Introduction. In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations (RICO) title of the Organized Crime Control Act of 1970. The federal law, and this bill after which it is modelled, is based on the premise that a pattern of sophisticated and at times conspiratorial crime engaged in by a single person, or an organized group of persons, poses a much greater danger to society than individual unrelated criminal acts. Concerned that repeated and sometimes highly sophisticated crime was being used to finance the infiltration and takeover of legitimate businesses, and that crime itself had effectively become a business, Congress enacted new statutes to help respond to these serious problems. The federal legislation, however, only applies to conduct which affects interstate commerce. This proposed legislation covers situations where at least one crime is committed in Alaska and is also applicable to solely in-state enterprises.

Section 1. Declaration of Purpose

This section makes it clear that the overall purpose of the bill is to provide specific statutory provisions to combat the acquisition, establishment or operation of businesses through a pattern of criminal activity.

Section 2. Illegally Controlled Enterprises

Sec. 11.59.010. UNLAWFUL ACTS. Three types of prohibited conduct form the basis for both the criminal penalties and civil remedies that are authorized in this legislation. They are:

(1) taking over an enterprise through racketeering;

(2) running an enterprise through racketeering; and

(3) using income from racketeering to take over or run an enterprise.

Each of these three types of prohibited conduct require that "racketeering" be involved. This means that at least two crimes be committed as a part of a pattern of illegal activity, and not simply two isolated unrelated acts. Each also requires that an "enterprise" be involved. The term enterprise is defined in the bill to include any "individual, partnership, corporation, association, or other legal entity, and any union or group of persons associated in fact although not a legal entity."

Paragraph (1) is aimed primarily at the use of crime to take over a legitimate business, although it is broad enough to

cover an attempt by one crime organization to take over another crime organization. Paragraph (1) would cover, for example, a person who assaults the owner of a business and sets fire to the owner's property with the intent of "persuading" the owner to sell the business or to give up some share in it. Alternatively, this paragraph will also apply where several persons join in an effort to acquire an interest in a legitimate business through racketeering. One defendant may bribe a municipal inspector to deny a needed permit to the business while the other commits a felony assault on the owner with the intent of persuading the owner to sell an interest in the business. Together, both defendants can be convicted since each defendant can be charged with the acts of the other under the general principals of criminal liability specified in AS 11.16, and both have therefore engaged in conduct prohibited by paragraph (1).

Paragraph (2) is aimed at the person who participates in or conducts the affairs of an enterprise through racketeering. There is no requirement in the definition of enterprise that the enterprise constitute a legal entity. Consequently, this paragraph would apply to an enterprise that has been established solely to further illegal purposes. One example of the type of conduct covered by paragraph (2) is summarized in a recent opinion by the United States Supreme Court:

> Briefly, the evidence showed that a group of individuals associated for the purposes of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowner, promoters, investors, and arsonists, operated to destroy properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows: 'At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds' (footnote omitted).

Russello v. United States, 104 S.Ct. 296, 298 (1983) (quoting United States v. Martino, 681 F.2d 952, 953 (5th Cir. 1982) (en banc)).

Paragraph (3) prohibits using money that has been derived from racketeering to finance an enterprise. This prohibition is designed to prevent a racketeer from "sheltering" illegal gains by investing in a legal enterprise. There is

no requirement that the investment in the enterprise be per se illegal; rather, the investment becomes illegal since it was made possible by using the fruits of racketeering. Paragraph (3) also prohibits using the "proceeds" of property derived from racketeering. This language is intended to permit tracing of assets derived from racketeering in order to prove that such assets were, in effect, used to take over a legitimate business. Thus illegal profits do not later become legal merely because they have been laundered, or augmented, by an intervening legal investment.

Sec. 11.59.020. DEFINITION OF "RACKETEERING". In order to establish racketeering, it must be shown that the defendant engaged in "a pattern of illegal activity that involves two or more instances of illegal activity." Unlike federal law, this legislation specifically defines the term "pattern" in subsection (c). The definition is based on a definition of "pattern" appearing in several state statutes and court cases.

The crimes that are sufficient to constitute illegal activity for purposes of the definition are described in subsection (b). They are all classified as felonies. In this regard this legislation differs from federal law which allows prosecution based on underlying crimes that are misdemeanors. In view of the substantial penalties that will arise from a violation of this legislation, it seems appropriate to require that the underlying illegal activity be serious enough to be classified by the legislature as felonies. The felonies that are listed have been chosen either on the basis that they pose a danger to personal physical security, are crimes that may be used in an effort to obtain control over an enterprise, or are crimes that are typically committed by an enterprise that is in the business of crime.

Sec. 11.59.030. PROOF OF RACKETEERING. This section addresses several issues pertaining to the type of evidence that can be used to establish the element of racketeering.

Secs. 11.59.040 and 11.59.050. ILLEGAL CONTROL OF AN ENTERPRISE IN THE FIRST AND SECOND DEGREE. Sections 11.59.040 and 11.59.050 define the only two crimes created by this legislation. The first degree crime is an unclassified felony punishable by presumptive sentencing and a maximum sentence of 30 years. Additionally, the defendant will be subject to a maximum $75,000 fine if the defendant is a natural person, or a higher fine if an organization is charged. The second degree crime is a class A felony punishable by up to 20 years imprisonment, as well as substantial fines.

In order to convict a person of the first degree crime, it is necessary to establish that one of the crimes used to prove racketeering is identical or substantially similar to an unclassified or class A felony under Alaska law.

Sec. 11.59.060. CHARGING UNDERLYING CRIME. This section deals with technical issues that may arise in charging a defendant under this legislation.

Sec. 11.59.070. EFFECT OF CONVICTION ON OTHER PROCEEDINGS. This section, which is based on federal law, precludes a defendant who has been convicted of illegal control of an enterprise from denying the essential elements of the crime in subsequent litigation. Since the defendant's violation has already been established beyond a reasonable doubt in the earlier criminal prosecution, there is no reason to require a private plaintiff in a civil proceeding brought against the same defendant to relitigate the basis of the criminal conviction.

Sec. 11.59.080. CIVIL ACTION FOR TREBLE DAMAGES. This section creates a civil action for triple damages available to any person, including the state, who is injured as a result of a violation of proposed AS 11.59.010.

This section serves two purposes. First, it compensates those who have been injured as a result of racketeering. Second, it imposes severe financial disincentives over and above any criminal penalty that may be imposed and any forfeiture that is ordered.

In addition to providing for a civil cause of action for treble damages, this legislation authorizes a wide variety of injunctive and similar relief in connection with an action brought under this section. An injured person may obtain a restraining order to prevent future violations, as well as restrictions on the future conduct of the enterprise, including its dissolution or reorganization. See proposed AS 11.59.100.

Sec. 11.59.090. PROPERTY SUBJECT TO FORFEITURE. One of the principle goals of the federal law upon which this legislation is based was to remove the profit from criminal activity "by separating the racketeer from the dishonest gain." Russello v. United States, 104 S.Ct. 296, 303 (1983). The mechanism used to accomplish that goal was the adoption of an effective forfeiture law. A similar approach is taken in this legislation, with this section providing that property used and assets acquired in violation of proposed AS 11.59.010 is subject to forfeiture. The procedures specifying how the property is forfeited appears in section 3 of the bill.

Sec. 11.59.100. INJUNCTIVE RELIEF. This section provides a mechanism to insure that equitable relief can be obtained to minimize the harm caused by racketeering as well as to preserve the assets of the defendant for future recovery in both civil and criminal proceedings.

Sec. 11.59.110. CIVIL INVESTIGATIVE DEMAND. This section, which is based on federal law, provides the state with the necessary mechanism to insure that investigations can be completed successfully. The provisions are largely self explanatory, and considering that no appellate cases have arisen under the similar federal statute in the fourteen years since enactment, the provisions of this section will apparently present no problems in administration.

Section 3. Forfeitures

This section of the bill has two related purposes. First, it specifies the procedures applicable to the forfeiture of property authorized in proposed AS 11.59.090. Secondly, it effectively consolidates many state forfeiture procedures in a single new article added to Title 9 (Civil Procedure). The consolidation of state forfeiture procedures accomplished by this legislation will minimize the possibility of unintended inconsistencies in coverage.

Sections 4-7

These sections make several conforming amendments to insure that gambling paraphernalia and records, controlled substances, and imitation controlled substances are subject to the forfeiture procedures specified in section 3 of the bill.

Section 8

This section amends the existing extortion statute to specifically provide that extortion is committed when the defendant makes threats to assist in the collection of a debt. This provision will insure coverage under this legislation of conduct commonly associated with loan sharking.

Section 9

This technical amendment insures that all unclassified felonies, including Illegal Control of an Enterprise in the First Degree, are subject to the fine authorized by this section.

Section 10

This technical amendment is necessary to authorize a term of imprisonment for a violation of proposed AS 11.59.040.

Section 11. Repeals

This section repeals several statutes pertaining to procedures applicable in drug forfeiture cases which are unnecessary with the enactment of section 3 of the bill.

Section 12. Effective Date

This section specifies a January 1, 1986, effective date.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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March 6, 1985

Honorable Mike Miller
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: House Bill 184 Racketeering

Dear Representative Miller:

As mentioned in the Governor's transmittal letter on HB 184, an extensive commentary has been prepared which analyzes each section and cites those federal cases which reflect the intent behind a particular provision. Enclosed is a copy of that commentary. A copy has already been provided to Mr. Kaden, of your staff, so that copies could be made available for the members of the judiciary committee prior to the hearing scheduled for March 7.

I believe this commentary will be an invaluable aid for the judiciary committee in its consideration of this important legislation and, after passage, to the courts in interpreting the intent behind specific provisions. I would urge that the commentary be reviewed and revised in accordance with any revisions made to the bill. My staff will be available at your request to assist the committee in revising both the bill and the commentary. Ultimate adoption of this commentary as an expression of legislative intent and publication in the Journal Supplement will be extremely helpful in the implementation and interpretation of the bill.

Very truly yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Dean L. Guard FOR
Daniel W. Hickey
Chief Prosecutor

Enclosure

03-C31LH

COMMENTARY AND SECTIONAL ANALYSIS TO THE 1985 ACT RELATING TO ILLEGALLY CONTROLLED ENTERPRISES

Introduction

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations title of the Organized Crime Control Act of 1970. The legislation was designed to provide adequate criminal penalties and civil remedies to combat large-scale and sometimes highly sophisticated criminal activity. The federal law was based on the premise that a pattern of crime that was engaged in by a single person, or an organized group of persons, posed a much greater danger to society than individual unrelated criminal acts. Concerned that repeated instances of criminal activity were being used to finance the infiltration and takeover of legitimate businesses, and that crime itself had effectively become a business, Congress enacted new statutes to help respond to these two serious problems.

The federal legislation only applies to conduct which affects interstate commerce. That showing might be possible in many cases. Nevertheless, individual states have recognized that the resources available to the federal government are generally inadequate to respond to criminal activity that primarily affects state interests. Additionally, the prosecution of criminal conduct that occurs

within a state and does not directly affect federal interests has traditionally been viewed primarily as a state, rather than a federal responsibility.

During the past 14 years, at least 19 states have adopted legislation which has authorized a state response to some of the concerns addressed by Congress in 1970. (A list of those states is included as Appendix "A".) Significantly, states such as Oregon and Arizona, which like Alaska had only recently revised their criminal codes, concluded that existing laws were inadequate to respond to the problems addressed by the federal legislation. While each of the 19 states has relied on the federal legislation as a model, none has simply enacted the federal law verbatim. Instead, each has selected the best features of the federal legislacion.

A similar approach was followed by the Alaska legislature in 1978 when it revised the criminal code. While individual sections were based on provisions appearing in the Model Penal Code, the criminal code revision was tailored to respond to particular Alaskan problems and concerns. A similar approach has also been followed in this legislation. While this bill differs from federal law in a number of important respects, the basic goal remains the same: to assist public officials and individual citizens in their effort to combat the criminal infiltration of

legitimate businesses and to provide appropriate penalties against those who engage in the business of crime.

Section 1. Declaration of Legislative Purpose

This section states the purpose of this bill and requires that its provisions be interpreted liberally by the courts to effectuate that remedial purpose. The purpose of the bill has already been addressed in the introduction to this commentary. The direction that the Act be liberally construed by the courts extends to both the civil and criminal provisions included in this bill. See U.S. v. Forsythe, 560 F.2d 1127, 1135 (3rd Cir. 1975).

Section 2. Illegally Controlled Enterprises

ARTICLE 1. PROHIBITED ACTIVITIES

Sec. 11.59.010. UNLAWFUL ACTS

This section defines the three prohibited acts that form the basis for both the criminal penalties and civil remedies that are authorized in this bill. The section is based substantially on 18 U.S.C. sec. 1962, and it is expected that the numerous federal decisions interpreting the scope of that statute will be of assistance to Alaska courts in interpreting any ambiguities in the Alaska

statutory language. As a general matter, if a specific decision under the federal legislation is intended to be binding on the Alaska courts in interpreting this Act, it is expressly cited in this commentary.

Each of the three instances of prohibited conduct require that "racketeering" be involved. The term "racketeering" is defined in AS 11.59.020, and is discussed in the commentary accompanying that section. It should be noted that at least two instances of illegal activity will be required to establish racketeering. Additionally, the instances of illegal activity must be part of a pattern of illegal activity, and not simply two isolated unrelated crimes.

Each of the three unlawful acts also requires that an "enterprise" be involved. The term enterprise is defined in AS 11.59.900(1), as including any "individual, partnership, corporation, association, or other legal entity, and any union or group of persons associated in fact although not a legal entity." As noted by the United States Supreme Court "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." United States v. Turkette, 452 U.S. 576, 580 (1981). The scope of this definition is discussed further in the commentary accompanying AS 11.59.900(1).

The three unlawful acts described in this section prohibit (1) acquiring or maintaining an interest in or control of an enterprise through racketeering (primarily, the use of a pattern of criminal activity to acquire an interest in a legitimate business); (2) conducting the affairs of an enterprise through racketeering (the use of a pattern of criminal activity to conduct some or all of the affairs of legitimate or completely illegitimate business); and (3) the use of the proceeds of racketeering to acquire or maintain an interest in an enterprise or to conduct the affairs of an enterprise (the use of the ill-gotten gains from a pattern of criminal activity in what would otherwise be a legal attempt to acquire an interest in or run an enterprise). The three prohibited acts can be committed by any person. The term "person" is defined in AS 11.81.900(b). Note that this section merely describes the type of conduct that can result in criminal or civil liability under this legislation. It does not specify the penalties for that conduct, which appear in other sections of this bill. See, e.g., AS 11.59.040.

AS 11.59.010(1) covers the conduct of acquiring or maintaining an interest in or control over an enterprise through racketeering. This prohibition is aimed primarily at the use of illegal activity to take over a legitimate business, although it is broad enough to cover an attempt

by one illegitimate enterprise to take over another illegitimate enterprise.

The conduct prohibited by paragraph (1) covers any attempt to take over an enterprise by the type of illegal activity defined as racketeering in AS 11.59.020. For example, a defendant may violate this paragraph by assaulting the owner of a business and setting fire to property belonging to the owner with the intent of "persuading" the owner to sell the business to the defendant or to take the defendant as a partner. Alternatively, several persons may violate this paragraph if together they engage in the prohibited conduct. For example, assume that two defendants join in an effort to acquire an interest in a legitimate business through racketeering. One defendant bribes a municipal inspector to deny a needed permit to the business while the other commits a felony assault on the owner with the intent of persuading the owner to sell an interest in the business. Together, both defendants have satisfied the definition of racketeering in AS 11.59.020 if the illegal activity of each defendant is chargeable to the other under the general principles of criminal liability specified in AS 11.16, and both have therefore engaged in conduct prohibited by paragraph (1).

As is the case with each of the three prohibited acts described by AS 11.59.010, there is no requirement that the

conduct of the defendants be part of "organized crime" or that the defendant is a member of "organized crime." See Bennett v. Berg, 685 F.2d 1053, 1063-64 (8th Cir. 1982) cert. denied, 104 S.Ct. 527 (1983), and cases cited therein. It is apparent, however, that some of the conduct prohibited by this legislation will indeed fall within a commonly accepted definition of "organized crime." See, e.g., United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982). Nevertheless, it is the intent of this legislation that no "organized crime" connection need be shown in any criminal prosecution or civil proceeding authorized by this chapter.

AS 11.59.010(2) is aimed at the person who participates in or conducts the affairs of an enterprise through racketeering. There is no requirement in the definition of enterprise that the enterprise constitute a legal entity. Consequently, this paragraph would apply to an enterprise that has been established solely to further illegal purposes. United States v. Turkette, 452 U.S. 576 (1980). See also commentary accompanying AS 11.59.900(1).

Paragraph (2) requires that the affairs of the enterprise be conducted "through" racketeering. There is no requirement that the racketeering benefit the enterprise or result in profits for the enterprise. It is sufficient that the defendant engaged in the racketeering activity as part

of the enterprise or that the illegal activity is related to the activities of the enterprise. See United States v. Webster, 669 F.2d 185 (4th Cir. 1982), cert. denied, 456 U.S. 935 (1982); United States v. Welch, 656 F.2d 1039, 1960-62 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Scotto, 641 F.2d 47 (2d Cir. 1980). There is no requirement that the illegal activity that is used to establish racketeering be part of the day-to-day business operation of the enterprise. Engl v. Berg, 511 F.Supp. 1146, 1156 (E.D. Pa. 1981) (quoting United States v. DePalma, 461 F.Supp. 778 (S.D.N.Y. 1978)). It is enough, for example, that the enterprise was used as a front for illegal activity. See United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

One example of the type of conduct covered by paragraph (2) is summarized in a recent opinion by the United States Supreme Court:

> Briefly, the evidence showed that a group of individuals associated for the purposes of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowner, promoters, investors, and arsonists, operated to destroy properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows: 'At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement

> and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds' (footnote omitted).

Russello v. United States, 104 S.Ct. 296, 298 (1983) (quoting United States v. Martino, 681 F.2d 952, 953 (5th Cir. 1982) (en banc)). Other examples of conduct that is intended to be covered by paragraph (2) are provided in United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981); United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

AS 11.59.010(3) primarily prohibits the use of property derived from racketeering, or the proceeds of that property, to obtain an interest in an enterprise. See United States v. McNary, 620 F.2d 621 (7th Cir. 1980). The term "property" (defined in AS 11.59.900(2)) has been used rather than the undefined term "income" which appears in the federal statute.

At first glance the prohibition described in paragraph (3) appears similar to that contained in paragraph (1). However, unlike paragraph (1), which requires that otherwise illegal means be used to acquire an interest in an enterprise, this paragraph makes unlawful specified conduct

relating to an enterprise when the property used to finance that conduct has been derived from racketeering. Unlike federal law, there is no exception for investments that take the form of securities purchased in the open market amounting to less than one percent of the total securities available in the enterprise. Only four of the state statutes that are based on the federal provision contain a similar provision, and there seems to be little justification for exempting this particular class of investment from the coverage of this legislation.

Considered in conjunction with AS 11.59.100, the prohibition in paragraph (3) will be of significant importance in civil proceedings where a legitimate enterprise attempts to require that the defendant divest himself of any interest in the enterprise that was obtained through the use of property derived from racketeering. This prohibition may also be of assistance in cases where the state seeks forfeiture of the defendant's illegally obtained profits from racketeering since it effectively prevents the racketeer from "sheltering" those gains by investing in a legal enterprise. See AS 11.59.090. Note that there is no requirement that the investment in the enterprise be otherwise illegal. Rather, the investment becomes illegal since it was made possible by using the fruits of racketeering.

Paragraph (3) also prohibits using the "proceeds" of property derived from racketeering. This language is intended to permit tracing of assets derived from racketeering in order to prove that such assets were, in effect, used to take over a legitimate business. Thus illegal profits do not later become legal merely because they have been laundered, or augmented, by an intervening legal investment.

Another point should be noted regarding the applicability of paragraph (3) to cases where the defendant claims that it is impossible to establish that the particular investment in the enterprise was derived from racketeering. The "sufficient nexus" test adopted by the court in United States v. McNary, 620 F.2d 621 (7th Cir. 1980), is intended to apply to such cases. In McNary, the court emphasized that the federal prohibition similar to paragraph (3) is violated if the gains from racketeering "allowed or facilitated" a subsequent investment even though the money derived from racketeering was not directly invested. Id. at 628-29.

Also note that there is no requirement that the defendant himself participate in the racketeering under paragraph (3) -- it is enough that the circumstance exists that the property was derived from racketeering. There may be cases under paragraph (3) where the defendant claims that he or she had no knowledge that the property was derived

from racketeering. In such cases, it is intended that the burden of proof be placed on the state to establish that the defendant acted at least recklessly as to the circumstance that the property was derived from racketeering.

Sec. 11.59.020. DEFINITION OF "RACKETEERING"

In defining the prohibited acts that can form the basis of a criminal prosecution or civil action authorized by this chapter, each of the three paragraphs in AS 11.59.010 uses the term "racketeering." AS 11.59.020 defines that term.

In order to establish racketeering, it must be shown that the defendant engaged in "a pattern of illegal activity that involves two or more instances of illegal activity." Proof of two instances of illegal activity that are held to meet the pattern requirement are sufficient to constitute racketeering. There is no requirement that the two or more instances of illegal activity involve different crimes. See United States v. Davis, 576 F.2d 1065 (3d Cir. 1978), cert. denied, 439 U.S. 836 (1978).

Unlike federal law, this legislation specifically defines the term "pattern" in AS 11.59.020(c). The definition is based on a definition of "pattern" appearing in several state statutes. That definition in turn was derived from United States v. Stofsky, 409 F.Supp. 609, 613-14

(S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2nd Cir. 1975), cert. denied, 429 U.S. 819 (1976), where the court held that the "pattern" requirement could not be satisfied by mere accidental or unrelated acts.

The fact that there was but one objective underlying separate acts of racketeering does not place the conduct outside the definition. United States v. Starnes, 644 F.2d 673, 678 (7th Cir. 1981), cert. denied, 454 U.S. 826 (1981). The issue is rather whether the illegal acts, undertaken to further a single objective or multiple objectives, constitute a pattern of illegal activity.

To establish a pattern of illegal activity, it must be shown that two or more instances of illegal activity were involved. The acts that are sufficient to constitute illegal activity for purposes of the definition are described in subsection (b).

One common characteristic of each crime listed in AS 11.-59.020(b)(1) -- (6) is that they are all classified as felonies. In this regard this legislation differs from federal law which allows prosecution based on underlying crimes that are misdemeanors. In view of the substantial penalties that will arise from a violation of this legislation, it seems appropriate to require that the underlying illegal activity be serious enough to be classified

by the legislature as a felony. The felonies that are listed have been chosen either on the basis that they pose a danger to personal physical security, are crimes that may be used in the effort to obtain control over an enterprise, or are crimes that may be committed by an enterprise that is in the business of crime.

AS 11.59.020(b)(6) refers to felony conduct that has been defined as "racketeering activity" under federal law. It should be noted that this paragraph does not have the effect of granting the state jurisdiction over conduct that exclusively involves federal interests. AS 11.59.030(a)(1) specifically requires that at least one instance of illegal activity that is used to establish a pattern of racketeering must violate Alaska law. A person, for example, is not covered by this legislation for acquiring an interest in an Alaskan business through a pattern of illegal activity that involved the out-of-state bribery of a federal official and the interstate transportation of stolen property between Washington and Oregon. However, if one of the instances of illegal activity involved conduct falling within AS 11.59.020(b)(1) -- (5), a federal crime listed in 18 U.S.C. sec. 1961(1) will be sufficient to sustain an action under this chapter.

Note finally that there is no requirement that the defendant was previously convicted of the illegal activity that

is used to establish racketeering. See USACO Coal v. Carbornin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982) and cases cited therein. To the extent that a recent opinion by the Second Circuit Court of Appeals is inconsistent with this approach, it is expressly rejected as not reflecting the intent of this legislation. See Sedima, S.P.R.L. v. Imrex Co., 53 U.S.L.W. 2062 (2d Cir. July 15, 1984).

Sec. 11.59.030. PROOF OF RACKETEERING

While AS 11.59.020 defines racketeering, AS 11.59.030 addresses several issues pertaining to the type of evidence that can be used to establish the requirements of that definition.

Subsection (a) places three restrictions on the type of illegal activity that can be used to satisfy AS 11.59.020(b)(1) -- (6). AS 11.59.030(a)(1) requires that one of the instances of illegal activity used to establish racketeering must be in violation of Alaskan law. As discussed in the commentary accompanying AS 11.59 020, this limitation prevents the institution of a proceeding authorized by this Act based on conduct that exclusively involves federal interests.

AS 11.59.030(a)(2) requires that at least one instance of

illegal activity that is used to establish racketeering must occur after the effective date of this Act, thus eliminating any ex post facto concerns in criminal prosecutions. See United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

AS 11.59.030(a)(3) requires that at least one instance of illegal activity used to establish racketeering must occur within a three-year period either before or after the defendant becomes involved with an enterprise under the circumstances prohibited by AS 11.59.010. This restriction effectively creates an automatic bar to a finding of racketeering if both instances of illegal activity occur outside the three-year period. While a similar provision does not apply in federal law, the restriction appears appropriate to add to this legislation.

AS 11.59.030(b) clarifies a point that is probably already implicit in the language of subsection (a): the same instance of illegal activity may be used to satisfy each of the requirements specified in (a)(1) -- (3). For example, if one of the instances of illegal activity used to obtain control over an enterprise on December 15, 1985, was an assault committed in Alaska on November 15, 1985, each of the three paragraphs of subsection (a) will be satisfied, assuming that this legislation took effect on January 1, 1985.

AS 11.59.030(c) places a limitation on how far back a prosecutor or civil litigant can go in using illegal activity to establish racketeering. If more than five years has elapsed between the most recent instance of illegal activity and the immediately preceding incident of illegal activity, the past instances of illegal activity cannot be considered. For example, assume that this Act takes effect January 1, 1986. On January 1, 1987, the defendant commits one instance of illegal activity. If the prior instance of illegal activity used to establish racketeering occurred on or after January 1, 1982, it and other past acts may be considered in establishing racketeering under AS 11.59.030. However, if the prior instance of illegal activity took place before January 1, 1982, it may not be considered.

Note that AS 11.59.030(e) qualifies the five-year period specified in subsection (c) by providing that the five-year period does not begin to run until the defendant has satisfied all conditions of a sentence, or conditions of an alternative to a prosecution, for the prior instance of illegal activity. Similarly, subsection (e) also qualifies the three-year period specified in paragraph (a)(3).

An example of the relationship between subsection (e) and (c) is provided by considering the case of a defendant who is 1986 is convicted of felony assault and is sentenced to

two years' imprisonment followed by a two-year probationary period. Assume further that the probationary period is successfully completed in 1990 and that the defendant commits another felony assault in 1993. If the other requirements necessary to establish a violation of this legislation can be established, it may be alleged that the 1986 and 1993 assaults were part of a pattern of illegal activity. In this case, subsection (e) provides that the prior conviction may be considered under subsection (c) since the five-year period did not begin until 1990, the year the defendant completed the probationary period on the earlier assault. A provision similar to subsection (e) appears in AS 12.55.145(a)(1). It is intended that the decision in Griffith v. State, 653 P.2d 1057 (Alaska Ct. App. 1982), interpreting the scope of AS 12.55.-145(a)(1) also apply in interpreting the application of subsection (e).

AS 11.59.030(d) specifies how illegal activity that is used to prove racketeering is established in a proceeding brought under this legislation. In any proceeding a certified judgment of conviction for the illegal activity will always be sufficient to establish that the illegal activity occurred. If a conviction has not been obtained, the illegal activity may be established by proof beyond a reasonable doubt in a criminal prosecution and by a preponderance of the evidence in all other proceedings.

ARTICLE 2. CRIMES INVOLVING ILLEGALLY CONTROLLED ENTERPRISES

Secs. 11.59.040 and 11.59.050. ILLEGAL CONTROL OF AN ENTERPRISE IN THE FIRST AND SECOND DEGREE

AS 11.59.040 and 11.59.050 define the only two crimes created by this legislation. The first degree crime is an unclassified felony punishable by presumptive sentencing and a maximum sentence of 30 years. Additionally, the defendant will be subject to a maximum $75,000 fine under AS 12.55.035(b)(1) if the defendant is a natural person. If an organization is charged under this section, a higher fine may be imposed under AS 12.55.035(c).

Key to both crimes is the requirement that the defendant commit an act prohibited by AS 11.59.010 or attempt or solicit such an act. The coverage of AS 11.59.010 has been discussed in the commentary accompanying that section. If the state can only prove a violation of AS 11.59.010, the crime will be Illegal Control of an Enterprise in the Second Degree, a class A felony.

The second degree crime can be aggravated to the more serious first degree offense depending on the seriousness of the illegal activity used to establish racketeering. If one of the instances of illegal activity was an

unclassified or class A felony in Alaska, AS 11.59.-040(a)(1) provides that the first degree crime has be established. Additionally, the crime will be first degree under AS 11.59.040(a)(2) if one of the instances of illegal activity used to establish racketeering is a crime in Alaska or in another jurisdiction having elements similar to a class A or unclassified felony. This provision will cover crimes repealed when the revised criminal code became effective in 1980, current crimes in Alaska defined outside the criminal code, and crimes committed in other jurisdictions. For example, if in 1979 the defendant committed conduct that would have constituted Murder in the First Degree under the Alaska statute repealed in 1980, the defendant can be convicted of Illegal Control of an Enterprise in the First Degree provided that the other elements of that crime can be established. Similarly, if the defendant committed conduct in Oregon that would be the equivalent of a class A or unclassified felony in Alaska, the first degree crime may also be established.

Under AS 11.59.040(a)(2), the elements of the offense need only be similar to a current unclassified or class A felony offense in Alaska. An identical standard is followed in calculating prior convictions for purposes of presumptive sentencing. AS 12.55.145(a)(2).

Note finally that no culpable mental state requirement is

specified in either of the two crimes. Consequently, the criminal code's general rules on culpability will be applicable and it will be necessary to establish that conduct was engaged in knowingly and that the defendant acted recklessly as to circumstance and result elements. AS 11.81.610(b).

Sec. 11.59.060. CHARGING UNDERLYING CRIME

This section clarifies an issue that may arise in charging a defendant under this legislation. If the prosecutor decides to proceed against the defendant for both a violation of AS 11.59.040 or 11.59.050, and the underlying illegal activity, he or she may do so in the same charging instrument. In the event that consecutive or concurrent sentences are not otherwise prohibited, they may be appropriate in cases where the underlying criminal activity is charged in addition to a violation of AS 11.59.040 or 11.59.050. See United States v. Boylan, 620 F.2d 359, 361 (2nd Cir. 1980) cert. denied, 449 U.S. 833 (1980).

ARTICLE 3. CIVIL REMEDIES

Sec. 11.59.070. EFFECT OF CONVICTION ON OTHER PROCEEDINGS

This section, which is based on 18 U.S.C. sec. 1964, precludes a defendant who has been convicted under AS 11.59.040 or 11.59.050 from denying the essential elements of the crime in subsequent litigation. Unlike the federal statute which only estops the defendant in subsequent litigation with the government, this section estops the defendant in all subsequent litigation with any party. Since the defendant's violation of AS 11.59.010 has already been established beyond a reasonable doubt in the earlier criminal prosecution, there is no reason to require the plaintiff in a civil proceeding brought against the same defendant to relitigate the basis of the criminal conviction. This is particularly the case since the burden of the civil litigant to establish a violation of AS 11.59.010 is by a preponderance of the evidence, while the government has already established a violation beyond a reasonable doubt.

Sec. 11.59.080. CIVIL ACTION FOR TREBLE DAMAGES

This section creates a civil action for treble damages available to any person, including the state, who is injured in business or property as a result of a violation

of AS 11.59.010. This section serves two purposes. First, it compensates those who have been injured as a result of racketeering. Second, it imposes severe financial disincentives on persons who violate AS 11.59.0' that are over and above any criminal penalty that may be imposed and any forfeiture that is ordered. The civil remedies authorized by th' section provide another powerful deterrent against persons who may engage in conduct prohibited by AS 11.59.010. The plaintiff is only required to establish an injury "to business or property". "An allegation of commercial or competitive injury is not required...." Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), cert. denied, 104 S.Ct. 527 (1983).

Assuming that a violation of AS 11.59.010 can be established, there is no requirement that the plaintiff additionally show that the injury to his business or property was caused by the defendant's racketeering, as opposed to the illegal activity that was used to establish racketeering under AS 11.59.020. This nebulous and artificial distinction has been recognized in a few recent cases interpreting the federal law, but it is specifically rejected here as being contrary to the intent of this legislation. See Bankers Trust Co. v. Rhoades, 53 U.S.L.W. 2063 (2d. Cir. July 26, 1984); Moss v. Morgan Stanley Inc., 553 F.Supp. 1347 (S.D. N.Y. 1983), cert. denied, 104 S.Ct. 1280 (1984).

Unlike a criminal prosecution under this legislation where the proof required to establish a violation must be beyond a reasonable doubt, the elements of a civil action brought under this section need only be established by a preponderance of the evidence. See United States v. Capetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); Herman & MacLean v. Huddlestom, 51 U.S.L.W. 4099 (Jan. 24, 1983). As previously discussed, there is no requirement that the defendant be shown to be a part of "organized crime."

AS 11.59.080 does not require that a criminal prosecution against the defendant be instituted or successfully completed as a prerequisite for a person to bring a private cause of action. Consequently, it is the intent of this legislation to specifically reject a recent contrary interpretation of the similar federal law. See Sedima, S.P.R.L. v. Imrey Co., 53 U.S.L.W. 2063 (2d Cir. Aug. 7, 1984). However, if a criminal prosecution is first successfully brought, AS 11.59.070 prevents the defendant from denying the essential allegations of the crime in a subsequent civil action.

In addition to allowing a civil cause of action for treble damages, this legislation authorizes a court to grant a wide variety of equitable relief in connection with an action brought under this section. The person may obtain

a restraining order to prevent future violations of AS 11.59.010, as well as restrictions on the conduct of the enterprise, including its dissolution or reorganization. See AS 11.59.100.

Sec. 11.59.090. PROPERTY SUBJECT TO FORFEITURE

One of the principal goals of the federal law upon which this legislation is based was to remove the profit from criminal activity "by separating the racketeer from the dishonest gain." Russello v. United States, 104 S.Ct. 296, 303 (1983). The mechanism used to accomplish that goal was the adoption of an effective forfeiture law. A similar approach is taken in this legislation, with this section providing that property used in violation of AS 11.59.010 is subject to forfeiture. The procedures specifying how the property is forfeited appear in section 3 of this legislation discussed infra. The term "property" is defined in AS 11.59.900(2) to mean "any thing of value, including real or personal property, claims against or interests in business or property, contractual rights, securities, income, profits, or any other business or financial interest." The key to the definition is that the item, claim, interest or right must be a thing of value.

Also covered by this forfeiture provision are the proceeds of property, including profits acquired from a violation

of AS 11.59.010. In Russello v. United States, 104 S.Ct. 296, 301 (1983), the Supreme Court stressed the importance of covering profits derived from racketeering under a forfeiture statutes.

> Forfeiture of an interest in an illegitimate association-in-fact ordinarily would be of little use because an association of that kind rarely has identifiable assets; instead, proceeds or profits usually are distributed immediately. Thus construing [the federal forfeiture statute] to reach only interests in an enterprise would blunt the effectiveness of the provision in combatting illegitimate enterprises, and would mean that "[w]hole areas of organized criminal activity would be placed beyond" the reach of the statute. United States v. Turkette, 452 U.S. at 589.

Under AS 11.59.090(1), property is subject to forfeiture if it was acquired or maintained in violation of, or in the course of violating, AS 11.59.010. Thus the defendant's interest in the enterprise itself is subject to forfeiture if it was acquired in violation of AS 11.59.010. For example, if the defendant acquired a business through racketeering, that business will be forfeited to the state. Moreover, property such as firearms and automobiles is subject to forfeiture if acquired in the course of violating AS 11.59.010. Even if such property is never actually used as part of the illegal activity, it is subject to forfeiture if it was intended to be used to conduct or facilitate illegal activity, or to further the goals of the enterprise.

AS 11.59.090(2) subjects to forfeiture any property used or invested in violation of, or in the course of violating, AS 11.59.010. This paragraph in part permits the forfeiture of property obtained through racketeering to obtain an interest in an enterprise or to run an enterprise. This paragraph also covers property that may not have been originally derived from racketeering, but is nonetheless actually used in the course of violating AS 11.59.010. Property such as firearms, automobiles, cash receipts obtained while running the enterprise, or other business equipment or supplies are thus subject to forfeiture.

Finally, AS 11.59.090(3) covers property, or its proceeds, that is derived from racketeering (i.e., from a pattern of illegal activity) without the requirement that some enterprise actually be taken over. Thus if the scheme is stopped before it can infiltrate a legitimate business, the illegitimate gains from the racketeering are nonetheless subject to forfeiture, even though the defendants are not subject to the severe criminal penalties provided under AS 11.59.040 and 11.59.050. Because it is important to take away the profit motive existing in repeated criminal activity, AS 11.59.090 has been included in this bill.

Sec. 11.59.100. INJUNCTIVE RELIEF

This section provides a mechanism to insure that equitable relief can be obtained to minimize the harm caused by racketeering as well as to preserve the assets of the defendant for future recovery in the context of civil recovery, a criminal fine, or a forfeiture. The type of equitable relief authorized by this section depends on the stage of the litigation in which it is sought and who is requesting the relief. Subsection (a) applies to relief that is sought before an action under this legislation is actually filed and may only be sought by the attorney general. Subsection (b) applies to relief that may be granted once an action is filed. This relief may be sought by either the attorney general or a civil plaintiff. Subsection (c) applies to equitable relief that may be granted once an action is successfully concluded. The relief may be sought in connection with either a civil or criminal proceeding authorized by this legislation.

In reference to equitable relief that may be sought in conjunction with a civil proceeding, this section is subject to due process requirements governing equitable relief. United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). The person seeking the injunction must show some potential injury, but need not show "irreparable injury other than the

injury to the public which [is] inherent in the conduct made unlawful...." Cappetto, 502 F.2d at 1358-59. The breadth of the equitable relief authorized by this action evidences the concern of this legislation that the plaintiff's right to recovery could be seriously impaired by the concealment, disposal, or removal from the jurisdiction of the property at issue.

In reference to equitable relief sought in conjunction with a criminal prosecution, no preseizure hearing is required if the injunction is necessary to achieve important governmental purposes. Preseizure notice might defeat the purposes of this section. Moreover, the injunction is initiated by government officials rather than private parties. United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982). Due process requirements are satisfied by a prompt postseizure hearing once the injunction has been entered. Spilotro 680 F.2d at 617. It is within the discretion of the superior court to continue the injunction if it is satisfied that there is probable cause to believe that the defendant is guilty of violating AS 11.59.040 or 11.59.050 and that the property at issue in the injunction is subject to forfeiture under AS 11.-59.090. United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Long, 654 F.2d 911, 915 (3rd Cir. 1981). "It is not necessary that the hearing duplicate the criminal trial." The prosecution is required

only to establish the probability that the defendant will be convicted and properties will be subject to forfeiture. Spilotro, 680 F.2d at 618. The likelihood of conviction may be established by such evidence as testimony of law enforcement officials concerning the sources of defendant's income and the legality of that income. See Long, 654 F.2d at 915.

Sec. 11.59.110. CIVIL INVESTIGATIVE DEMAND

This section, which is based on 18 U.S.C. sec. 1968 provides the state with the necessary mechanism to insure that investigations into suspected criminal or civil violations of this legislation can be completed successfully. The provisions are largely self explanatory, and considering that no appellate cases have arisen under the similar federal statue in the 14 years since enactment, the provisions of this section will apparently present no problems in administration.

Sec. 11.59.120. ATTEMPT OR SOLICITATION TO VIOLATE AS 11.59.010

This section is included solely for drafting convenience to insure that the quoted phrase does not have to be repeated in the numerous references in AS 11.59.070 -- 11.59.120 that depend on establishing a violation of

AS 11.59.010.

ARTICLE 4. GENERAL PROVISIONS

Sec. 11.59.900. DEFINITIONS

This section defines two key terms that are used throughout this chapter, "enterprise" and "property."

(1) Enterprise: To commit any of the three prohibited acts described in AS 11.59.010 an "enterprise" must be involved. This section defines that term. The definition is not limited to those examples specifically listed, but is merely illustrative. See United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 444 U.S. 1085 (1980). "There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact". United States v. Turkette, 452 U.S. 576, 580 (1980).

The definition specifically includes legal as well as illegal entities. See United States v. Turkette, 452 U.S. 576 (1980); see also United States v. Griffin, 660 F.2d 996 (4th Cir. 1981), cert. denied 102 S.Ct. 1029 (1982). There is no requirement that the membership of the enterprise remain static throughout its existence. See United States v. Clemones, 577 F.2d 1247, 1253, modified, 582

F.2d 1373 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980). Further, the definition of enterprise is broad enough to include a single-person enterprise. See United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), cert. denied, 103 S.Ct. 834 (1983); United States v. Benny, 559 F.Supp. 264, 266-71 (N.D. Cal. 1983).

The federal definition of enterprise has been interpreted on numerous occasions to apply to commercial entities, benevolent organizations, and governmental entities. This legislation intends to adopt the federal approach of broadly interpreting the definition of enterprise, as illustrated by such cases as United States v. Weisman, 624 F.2d 1118, 1120 (2d Cir.) cert. denied, 449 U.S. 871 (1980); United States v. Provenzano, 688 F.2d 194, 199-200 (3rd Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Thompson, 685 F.2d 993, 994-95 (6th Cir.), cert. denied, 459 U.S. 1072 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1980) and cases cited approvingly therein; United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980); United States v. Dozier, 672 F.2d 531, 543 and n. 8 (5th Cir.) cert. denied, 459 U.S. 943 (1982); United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 104 S.Ct. 283 (1983).

Establishing a pattern of racketeering is not automatically sufficient by itself to establish the existence of an enterprise. "While the proof used to establish those separate elements may in a particular case coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." United States v. Turkette, 452 U.S. at 583-85. See generally United States v. Mazzei, 700 F.2d 85, 87-90 (2d Cir.), cert. denied, 103 S.Ct. 2124 (1983); United States v. Cagnina, 697 F.2d 915, 921 (11th Cir.), cert. denied, 104 S.Ct. 175 (1983).

(2) Property: This definition will be of primary importance in applying the forfeiture provisions in sec. 3 of the bill. Those forfeiture provisions apply to property and proceeds of property acquired, maintained, used, invested, or derived from violation of AS 11.59.010. Consistent with the recent decision of the Supreme Court in Russello v. United States, 104 S.Ct. 296, the definition of property specifically includes profits.

Section 3. Forfeitures

This section of the bill has two related purposes. First, it specifies the procedures applicable to the forfeiture of property authorized by this legislation in

AS 11.59.090. Secondly, it effectively consolidates many state forfeiture procedures in a single new article added to AS 9. This consolidation of state forfeiture procedures will minimize the possibilities of unintended inconsistencies in coverage and reduce the volume of laws that are required whenever forfeiture is authorized. Additionally, since many instances of racketeering may involve conduct that violates crimes defined outside this legislation, it is appropriate to include the general procedures pertaining to forfeiture in this legislation.

ARTICLE 7. FORFEITURE

Sec. 09.50.400. PROCEDURES APPLICABLE IN FORFEITURE PROCEEDINGS

This section accomplishes the consolidation of forfeiture procedures referred to above. For forfeiture procedures to be initiated, forfeiture must be authorized by state law. AS 11.59.090 specifically authorizes the forfeiture of property used in violation of AS 11.59.010, while other state statutes also authorize forfeiture in specified circumstances. See e.g., AS 11.66.270 and AS 17.30.110 as amended in secs. 5 and 9 of this bill.

If forfeiture is authorized by state law, the sections in this article will govern the procedures applicable to the

forfeiture procedure. There is, however, one important exception to the general rule that all forfeiture proceedings are governed by AS 09.50. In cases where the legislature wishes to make property subject to forfeiture procedures that are different from those included in this article, it can specifically do so. However, if different forfeiture procedures are not "otherwise specifically provided in the state law authorizing forfeiture," the property is subject to forfeiture under the procedure specified in this article.

Sec. 09.50.410. SEIZURE AND CUSTODY OF PROPERTY

Property subject to forfeiture may be seized with or without a court order under the provisions of AS 09.50.410(a). When property is seized without a court order under paragraph (a)(3), it may not be held for more than 48 hours unless an extension is obtained from the court.

Once property has been seized, the commissioner of public safety or a local law enforcement agency is responsible for assuming custody of the property under AS 09.50.-410(b). Only the court with jurisdiction over the property can require a subsequent movement of the property.

AS 09.50.410(c) provides that the property must be inventoried within 10 days after it is seized, and that the

value of any items, other than controlled substances, must be estimated. The results of this estimate will be of importance in determining the required notices that must be sent under AS 09.50.420.

Sec. 09.50.420. NOTICE OF SEIZURE AND FORFEITURE ACTION; ANSWERS

Once property has been seized under AS 09.50.420, the commissioner of public safety is required to comply with the notice provision outlined in this section.

AS 09.50.420(a) pertains to the notice required after seizure of the property but before the state institutes formal forfeiture proceedings. Notice must be sent to any person who has an interest in the property as described in this subsection. However, if a forfeiture proceeding has been instituted within 30 days after seizure of the property, the notice required by subsection (a) need not be given. This is because the notice required in AS 09.50.-420(b) will provide sufficient notice to persons with interests in the property.

AS 09.50.420(b) describes a separate and additional notice that must be sent within 30 days after the state actually institutes the forfeiture proceeding. Since a defendant in a criminal case has already received notice of the

proceeding under AS 09.50.430(a), no additional notice need be sent to the defendant.

AS 09.50.420(c) provides a mechanism whereby parties with an interest in the property sought to be forfeited can file an answer in order to argue against forfeiture or for a remission of the property. Since controlled substances and imitation controlled substances are summarily forfeited to the state under AS 17.30.126, AS 09.50.420(d) provides that the notice requirements specified in this section do not apply to the forfeiture of controlled substances.

Sec. 09.50.430. PROCEEDINGS RESULTING IN FORFEITURE; BURDEN OF PROOF

This section lists the underlying proceedings in which forfeiture may be initiated, and specifies the burden of proof requirement in all forfeiture proceedings.

Under AS 09.50.430(a), a forfeiture proceeding may be initiated in one of three proceedings. In the event that the state has instituted a criminal prosecution or civil action relating to the conduct making the property subject to forfeiture, the filing of a motion to forfeit in that proceeding will initiate the forfeiture action. For example, if the defendant is charged under AS 11.59.040 or

11.5[illegible].050 for conduct involving the takeover of an enterprise through racketeering, the state may also file a motion seeking forfeiture of the enterprise and all profits obtained by the defendant as a result of the illegal conduct. See AS 11.59.090. Similarly, if the state has filed a civil action for an injunction or for treble damages, it may also include a motion to forfeit property.

Alternatively, the state may institute a forfeiture proceeding simply by filing a complaint seeking forfeiture in an in rem proceeding involving the property subject to forfeiture. In this instance, there is no requirement that any additional civil or criminal action be instituted that relates to the property which is the subject of the forfeiture.

AS 11.50.430(b) provides that forfeiture proceedings are tried before a judge sitting without a jury. At the hearing, the state must establish by a preponderance of the evidence that the property is subject to forfeiture. The same burden of proof applies regardless of whether the forfeiture is sought by motion in a criminal or civil proceeding relating to the property or in an in rem proceeding.

Sec. 09.50.440. DEFENSES EXEMPTED

This section emphasizes that a forfeiture proceeding is distinct from any criminal proceeding involving the property sought to be forfeited. It is therefore irrelevant in the forfeiture proceeding that an earlier criminal prosecution involving the same property that the state seeks to forfeit resulted in an acquittal or a conviction of a lesser included offense. This is because the burden of proof applicable in the civil proceeding is less than required for a criminal conviction. See United States v. One (1) 1969 Buick Riviera, 493 F.2d 553 (5th Cir. 1974); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972); United States v. Kismetoglu, 476 F.2d 269 (9th Cir.) cert. dismissed, 410 U.S. 976 (1973).

In the civil proceeding the state must only prove by a preponderance of the evidence that the property is subject to forfeiture. AS 09.50.430(b). In a criminal prosecution, the violation of the underlying crime must be established beyond a reasonable doubt. Therefore, a jury determination in a criminal case that the defendant is not guilty of the charged offense does not mean that it has also determined that the state has failed to establish the violation of state law under the preponderance of the evidence standard applicable in civil forfeiture proceedings.

Secs. 09.50.450, 09.50.460. PETITION FOR RELEASE AND DISPOSITION OF SEIZED PROPERTY

Under certain circumstances, property may be released or disposed of under AS 09.50.450 and 09.50.460 before the court's decision on forfeiture. AS 09.50.450(b) provides that property that is not likely to be used in a court proceeding can be released if release is found to be in the best interests of the state and the claimant posts adequate security for the property. Additionally, the claimant or state can request disposition of the property before the decision on forfeiture. This may occur, for example, when the property is perishable or when its value may otherwise decrease during the proceedings. The proceeds of the sale are then treated as the property which is subject to forfeiture.

Sec. 09.50.470. FORFEITURE AND REMISSION

Subject only to the right of an innocent party to protect his interest in the property, this section makes forfeiture mandatory once it is established that the property is subject to forfeiture, regardless of the proceeding in which forfeiture is sought. The court does not retain discretion on the issue of forfeiture once it is shown that the property is subject to forfeiture.

The introductory clause of AS 09.50.470(a) refers to "the law authorizing forfeiture." To resolve any possible ambiguity on this point, the law authorizing the forfeiture

of property obtained in violation of AS 11.59.010 is AS 11.59.090. Other laws, besides AS 11.59.090, authorize the forfeiture of property, and once it is shown that the property was subject to forfeiture under those laws, that property must also be forfeited to the state under AS 09.50. For example, AS 17.30.110, as repealed and reenacted by sec. 9 of this bill, authorizes the forfeiture of property used in violation of the laws involving controlled substances. Once it is shown that the property met the requirements of forfeiture specified in AS 17.30.110, that property must be forfeited to the state in accordance with the procedures specified in this chapter.

The right of an innocent person to obtain the return of his interest in property is sometimes referred to a "remission." Remission is a form of "pardon" of the forfeited property. The Laura, 114 U.S. 411 (1885). Under AS 09.50.470(a)(1) -- (3), a totally innocent person with an interest in property subject to forfeiture may protect his or her interest in the property. In allowing an innocent person to protect his or her interest, this section recognizes that the failure to provide such an opportunity would violate the Alaska Constitution. State v. Rice, 626 P.2d 104, 111-15 (Alaska 1981). Assuming that the claimant can satisfy the requirements of paragraphs (a)(1) -- (3), the court is provided with several options in

AS 09.50.470(b) for protecting the claimant's interest depending on the extent of that interest.

Federal statutory and case law has established that only parties who are ignorant of the illegal use or intended use of property sought to be forfeited, and who are non-negligent in lending or leasing their property, can qualify as claimants entitled to "remission" or "remittance." See, e.g., 18 U.S.C. sec. 3617(b), which codifies case law from the prohibition era. The burden is placed upon the claimant to prove by a preponderance of the evidence that he or she deserves relief under the remission standards. See, e.g., Wilson Motor Co. v. United States, 96 F.2d 29, 30 (9th Cir. 1938); United States v. C.I.T. Corp., 93 F.2d 469, 470 (2d Cir. 1937); United States v. One 1933 Ford V-8 Coach, 14 F.Supp. 243 (E.D. Ill. 1936).

The claimant must establish under AS 09.50.470(a)(1) that he or she had a good faith property interest in the item at the time of the illegal use. Florida Dealers and Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960); United States v. One 1936 Model Ford Coach, 58 F.Supp. 802 (M.D. Ga. 1944). Additionally, AS 09.50.470(a)(2) and (3) require the claimant to establish that he was ignorant of the illegal use or intended use and was not negligent in lending or leasing the property. This provision is based on 18 U.S.C. sec. 3617(b)(2). See One 1941 Ford 1/2 Ton

Pickup Truck v. United States, 140 F.2d 255 (6th Cir. 1944); Federal Credit Co. v. United States, 109 F.2d 121 (5th Cir. 1940). Compare Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

Sec. 09.50.480. STATE DISPOSAL OF FORFEITED PROPERTY

Once the property is forfeited, the commissioner of administration is responsible for determining the eventual disposition of the property. Various options are listed in this section.

Sections 4-12. MISCELLANEOUS SECTIONS

The remaining sections of the bill make several miscellaneous complementary amendments to existing laws.

Section 4. This section amends the existing extortion statute to specifically provide that extortion is committed when the defendant makes one of the threats described in AS 11.41.520(a)(1) -- (7) to assist in the collection of a debt. This provision will insure coverage of conduct commonly associated with loan sharking under this legislation.

Sections 5, 6, 9, and 10. These sections make several conforming amendments to insure that gambling, controlled

substances, and imitation controlled substances are subject to the forfeiture proceedings specified in AS 09.50.

Section 7. This amendment insures that all unclassified felonies, including Illegal Control of an Enterprise in the First Degree, are subject to the fine authorized by this section.

Section 8. This amendment is necessary to authorize a term of imprisonment for a violation of AS 11.59.040.

Section 11. REPEALS. This section repeals several statutes pertaining to procedures applicable in drug forfeiture cases which are unnecessary with the enactment, in sec. 3 of the bill, of the new article in AS 09. Note that existing AS 17.30.126, which pertains to the summary forfeiture of certain controlled substances, is not repealed.

Section 12. EFFECTIVE DATE. This section specifies a January 1, 1986, effective date.

APPENDIX A

States that have adopted legislation similar to the federal Racketeering Influenced and Corrupt Organizations title:

1. Ariz. Rev. Stat. Ann. § 13-2312 (1978).
2. Cal. Penal Code § 186 (West Supp. 1983).
3. Colo. Rev. Stat. § 18-17-101 (1981).
4. 1982 Conn. Pub. Acts. 343.
5. Fla. Stat. Ann. § 895.01 (West Supp. 1982).
6. Ga. Code Ann. § 16-14-1 (Sup. 1982).
7. Hawaii Rev. Stat. § 842-1 (1976).
8. Idaho Code § 18-7801 (Supp. 1982).
9. The Illinois Narcotics Profit Forfeiture Act, H.R. 2450 (1982).
10. Ind. Code Ann., § 34-45-6-1 (Burns Sup. 1982).
11. Nevada Rev. Stat., chapter 207 (1983).
12. N.J. Stat. Ann. § 2C:41 (West 1982).
13. N.M. Stat. Ann. § 30-42-1 (Supp. 1978).
14. N.D. Cent. Code § 12.1-106.1 (C.Cupp. 1983).
15. Or. Rev. Stat. § 166-715 (1981).
16. 18 Pa. Cons. Stat. § 911 (1978).
17. R.I. Gen. Laws § 7-15-1 (Supp. 1982).
18. Utah Code Ann. § 76.10-1601 (Supp. 1981).
19. Wis. Stat. Ann. § 946.80 (Supp. 1982).

HB 184

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - RICO

Support

February 8, 1985

RICO - "An Act relating to illegally controlled enterprises and the forfeiture of property that is used in violation of state law; and providing for an effective date."

This legislation addresses both criminal penalties and civil remedies to combat organized Racketeer Influenced and Corrupt Organizations (RICO). Additionally, forfeiture provisions are included that provide for the seizure of property illegally obtained.

Passage of this bill will provide the law enforcement community with a tool that is presently not available. It will simplify and further define forfeiture requirements and thus streamline any seizures that take place as a result of investigations into the activities of organized crime operations.

Robert J. Sundberg
Commissioner

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3860

MEMORANDUM March 13, 1985

SUBJECT: Comparison of HB 184 to federal RICO legislation

TO: Representative Max Gruenberg

FROM: George W. Edwards GWE
Legislative Counsel

This is in response to your request for a comparison of HB 184, which concerns illegally controlled enterprises, with federal racketeer influenced organizations (RICO) laws. Copies of all RICO laws are attached.

Section 1 of HB 184 is a statement of purpose not found in RICO.

Section 2 amends existing law by adding a new chapter 59 that concerns illegally controlled enterprises.

Section 11.59.010 identifies the unlawful acts under this chapter as acquisition or control of an enterprise through racketeering and acquisition of an enterprise in exchange for property obtained through racketeering. RICO section 1962 prohibits similar activities but only within interstate commerce.

Section 11.59.020(a) defines racketeering as a pattern of illegal activity involving at least two acts. It is similar to RICO section 1961(5).

Subsection (b) defines "illegal activity" as offenses generally similar to those specified in RICO section 1961(1) and specifically incorporates the RICO section by reference. A significant difference is that illegal activity under the bill must be felonious while misdemeanor or felony conduct will satisfy the requirements of RICO.

Subsection (c) provides a definition of "pattern" of illegal activity that does not appear in RICO.

Section 11.59.030(a) applies to intrastate crime and requires that at least one instance of illegal conduct be within Alaska to bring the racketeering conduct under this chapter. RICO concerns only interstate activity. The other qualifications are unique to the bill.

Subsection (c) requires that relevant past criminal activity be less than five years old. RICO section 1961(b) sets the limit at 10 years.

Subsection (d) concerns methods of proof and appears to be unique to the bill.

Subsection (e) excludes for purposes of time computations periods in which a person was under criminal jurisdiction. RICO section 1961(5) addresses this but to a much more limited extent.

Sections 11.59.040 and 11.59.050 designate crimes under this chapter. Penalties range from 20 years and $50,000 as an A felony to 30 years and $75,000 as an unclassified felony pursuant to changes in sections 7 and 8 of the bill. RICO section 1963 provides for a maximum penalty of 20 years and $25,000.

Section 11.59.060 appears to be unique to the bill.

Section 11.59.070 is similar to RICO section 1964(d).

Section 11.59.080 is similar to RICO section 1964(c)

Section 11.59.090 is a forfeiture provision similar to RICO section 1963(c) but more specific as to property.

Section 11.59.100 is conceptually similar to RICO section 1964(a) and (b).

Section 11.59.110 (a) is similar to RICO section 1968(a).

Subsection (b) is similar to RICO section 1968(b).

Subsection (c) is similar to RICO section 1968(d).

Subsection (d) is similar to RICO section 1968(g).

Subsection (e) is similar to RICO section 1968(f)(3).

Subsection (f) is similar to RICO section 1968 (f)(5).

Section 11.59.120 appears to be unique to the bill.

Section 11.59.900 adopted the definition for "enterprise" from RICO section 1961(4). The definition of "property" is not found in RICO.

No additional sections of the bill appear within RICO.

GWE:csh
c3/043

Enclosure

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

[1] So in original. Does not conform to section catchline.

Historical Note

1970 Amendment. Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, added chapter 96 and items 1961 to 1968.

Cross References

Registration revoked for violation of this chapter by commodity dealer, see section 12a of Title 7, Agriculture.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation

of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to

carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95–575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95–598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677.)

Historical Note

References in Text. Sections 201, 224, 471, 472, 473, 659, 664, 891 to 894, 1084, 1341, 1343, 1503, 1510, 1511, 1951, 1952, 1953, 1954, 1955, 2314, 2315, and 2421 to 2424 of title 18, United States Code, referred to in par. (1)(B), are sections 201, 224, 471, 472, 473, 659, 664, 891 to 894, 1084, 1341, 1343, 1503, 1510, 1511, 1951, 1952, 1953, 1954, 1955, 2314, 2315, and 2421 to 2424 of this title, respectively.

Sections 186 and 501(c) of title 29, United States Code, referred to in par. (1)(C), are sections 186 and 501(c) of Title 29, Labor, respectively.

The effective date of this chapter, referred to in par. (5), is Oct. 15, 1970.

1978 Amendments. Par. (1)(B). Pub.L. 95–575 inserted "sections 2341–2346 (relating to trafficking in contraband cigarettes)," following "sections 2314 and 2315 (relating to interstate transportation of stolen property),".

Par. (1)(D). Pub.L. 95–598 substituted "fraud connected with a case under title 11" for "bankruptcy fraud".

Effective Date of 1978 Amendments. Amendment by Pub.L. 95–598 effective Oct. 1, 1979, see section 402(a) of Pub.L. 95–598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

Amendment by Pub.L. 95–575 effective Nov. 2, 1978, see section 4 of Pub.L. 95–575, set out as an Effective Date note under section 2341 of this title.

Short Title. Section 1 of Pub.L. 91–452 provided in part: "That this Act [enacting sections 841 to 848, 1511, 1623, 1955, 1961 to 1968, 3331 to 3334, 3503, 3504, 3575 to 3578, and 6001 to 6005 of this title, and section 1826 of Title 28, Judiciary and Judicial Procedure, amending sections 835, 1073, 1505, 1954, 2424, 2516, 2517, 3148, 3486, and 3500 of this title, sections 15, 87f, 135c, 499m, and 2115 of Title 7, Agriculture, section 25 of Title 11, Bankruptcy, section 1820 of Title 12, Banks and Banking, sections 49, 77v, 78u, 79r, 80a–41, 80b–9, 155, 717m, 1271, and 1714 of Title 15, Commerce and Trade, section 825f of Title 16, Conservation, section 1333 of Title 19, Customs Duties, section 3[illegible] of Title 21, Food and Drugs, section 161 of Title 29, Labor, section 506 of Title 33, Navigation and Navigable Waters, sections 40[illegible] and 2201 of Title 42, The Public Health and Welfare, sections 157 and 362 of Title 45, Railroads, section 1124 of Title 46, Shipping, section 409 of Title 47, Telegraphs, Telephones, and Radio telegraphs, sections 9, 43, 46, 916, 1017, and 1484 of former Title 49, Transportation, section 792 of Title 50, War and National Defense, and sections 643a, 1152, 2026, and former section 2155 of Title 50, Appendix, repealing sections 837, 895, 1406, and 2514 of this title, sections 32 and 33 of Title 15; sections 4874 and 7493 of Title 26, Internal Revenue Code, section 827 of Title 46, sections 47 and 48 of former Title 49, and sections 121 to 144 of Title 50, enacting provisions set out as notes under this section and sections 841, 1511, 1955, preceding 3331, preceding 3481, 3504, and 6001 of this title, and repealing provisions set out as a note under section 2510 of this title] may be cited as the 'Organized Crime Control Act of 1970'."

Separability of Provisions. Section 1301 of Pub.L. 91–452 provided that: "If the provisions of any part of this Act [see Short Title note set out above] or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected thereby."

President's Commission on Organized Crime; Taking of Testimony and Receipt of Evidence. Pub.L. 98–368, July 17, 1984, 98 Stat. 490, provided that:

"TAKING OF TESTIMONY AND RECEIPT OF EVIDENCE

"SECTION 1. The Commission established by the President by Executive Order 12435, dated July 28, 1983 [set out as a note under this section] (hereinafter in this joint resolution referred to as the 'Commission'), may hold hearings. The powers authorized by

[illegible] resolution shall be limite[illegible] forth in section 2 of that [illegible] Commission, or a mem[illegible]sion or member of the [illegible]sion designated by the [illegible] purpose, may administe[illegible]ions, examine witnesses,

"SUBPENA PO

"SEC. 2. (a) The Comm[illegible]mber of the Commission [illegible] by the Commission, shal[illegible] issue subpenas requiring [illegible] testimony of witnesses [illegible] of information relating [illegible]estigation by the Commis[illegible]s require the person to w[illegible] produce such information [illegible] such person is to testif[illegible]ce of witnesses and the pr[illegible]idence may be required [illegible]om the jurisdiction of th[illegible] designated place of inte[illegible] person to whom a subp[illegible] this subsection is directed [illegible] may move to enlarge or sh[illegible]ttendance and testimony, [illegible]sh or modify a subpena f[illegible] information if it is unreas[illegible]. In the case of a subp[illegible] purpose of taking a depo[illegible]amination, the person to [illegible]ake any motion permitted [illegible] the Federal Rules of Civ[illegible]

"(b)(1) In case of contum[illegible]ny a subpena issued to a [illegible]tion, a court of the Un[illegible] jurisdiction of which th[illegible] to appear or produce info[illegible] in the jurisdiction of wh[illegible] found, resides, or transact[illegible] upon application by the A[illegible]ue to such person an ord[illegible] person to appear before th[illegible] before a member of the [illegible] member of the staff of the [illegible] ated by the Commission [illegible] there to give testimony or [illegible] tion relating to the matte[illegible]tion, as required by the subp[illegible] to obey such order of t[illegible] punished by the court as a [illegible]

"(2) The Commission is [illegible] United States for the purpo[illegible] of the Federal Rules of Civ[illegible]

"(c) Process of a court [illegible]tion may be made under th[illegible] served in a judicial district w[illegible] required to be served is [illegible] transacts business.

of this chapter, and that all the members of the conspiracy knowingly agreed to participate in or conduct the enterprise through a pattern of racketeering. U.S. v. Riccobene, C.A.Pa.1983, 709 F.2d 214, certiorari denied 104 S.Ct. 157.

As entity providing numerous legitimate services, and as incorporated body under state laws, corporation which owned and operated retirement community had ascertainable structure apart from any predicate acts of mail fraud and was thus appropriately named as "enterprise" in complaints for purposes of stating claim under this chapter. Bennett v. Berg, C.A.Mo.1982, 685 F.2d 1053, on rehearing 710 F.2d 1361, certiorari denied 104 S.Ct. 527.

Lengthy association between two defendants, who on number of occasions sought to introduce agent and informant to sources of narcotics located in various parts of country so that they could obtain percentage of any resulting narcotics transactions, defendants' demand of payments from agent for introductions to narcotics sources, and attempt to provide informant with "crew" to facilitate narcotics distribution, standing apart from predicate acts of charged narcotics distribution, established existence of criminal "enterprise" required for charge under this chapter. U.S. v. DeRosa, C.A.Cal.1982, 670 F.2d 889, certiorari denied 103 S.Ct. 353, 372, 459 U.S. 993, 1014, 74 L.Ed.2d 391, 507.

This chapter's definition of "enterprise" covered the enterprise alleged in the instant case, viz., a "group of individuals associated in fact with various corporations." U.S. v. Thevis, C.A.Ga.1982, 665 F.2d 616, rehearing denied 671 F.2d 1379, certiorari denied 102 S.Ct. 2300, 456 U.S. 1008, 73 L.Ed.2d 1303, certiorari denied 102 S.Ct. 3489, 458 U.S. 1109, 73 L.Ed.2d 1303, certiorari denied 103 S.Ct. 57, 459 U.S. 825, 74 L.Ed.2d 61.

Enterprise charged in indictment under this chapter, a group of individuals associated in fact for purpose of establishing a pattern of racketeering activity in the New York and New Jersey waterfront businesses, was not outside scope of term "enterprise" as employed in this chapter. U.S. v. Clemente, C.A.N.Y.1981, 640 F.2d 1069, certiorari denied 102 S.Ct. 102, 454 U.S. 820, 70 L.Ed.2d 91.

Defendant's circle of bribed racehorse jockeys who were joined through defendant with a circle of informed bettors who profited from the illegal fixing of races constituted an enterprise that was unlawful under this chapter. U.S. v. Errico, C.A.N.Y.1980, 635 F.2d 152, certiorari denied 101 S.Ct. 3142, 453 U.S. 911, 69 L.Ed.2d 994.

Evidence that defendant conducted affairs of local union by serving as chief steward when he appointed himself as a union steward and accepted payment as union steward from contractors for services which were not rendered was sufficient to show that his illegal activities were in the conduct of the union's affairs and that he was thus engaged in an "enterprise" for purposes of this chapter. U.S. v. Kaye, C.A.Ill.1977, 556 F.2d 855, certiorari denied 98 S.Ct. 395, 434 U.S. 921, 54 L.Ed.2d 277.

This chapter could properly be applied to the conduct of the affairs of an enterprise whose only business was the loaning of money at usurious interest rates, through the collection of unlawful debts and conspiracy to accomplish the same. U.S. v. Castellano, D.C.N.Y.1975, 416 F.Supp. 125.

102. Miscellaneous entities not considered enterprises

Securities accounts in which defendant broker allegedly gained an interest as result of violations of securities laws were not "enterprises" within meaning of this chapter. In re Cantanella and E.F. Hutton and Co., Inc. Securities Litigation, D.C.Pa.1984, 583 F.Supp. 1388.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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. A purchase of securities on the open market for purposes of investment, and without the intention of

controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections [1] (a), (b), or (c) of this section.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

[1] So in original. Probably should be "subsection".

Historical Note

References in Text. Section 2, title 18, United States Code, referred to in subsec. (a), is section 2 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91–452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

Cross References

Civil action for threefold damages, see section 1964 of this title.
Court orders to restrain violations of this section, see section 1964 of this title.

Federal Practice and Procedure

Rendering of verdicts, see Wright: Criminal 2d § 511 et seq.

West's Federal Forms

Indictment—conspiracy, see § 7165.30.
Mandatory nature of forfeiture, see Comment preceding § 7101.

Notes of Decisions

Wharton's rule did not bar maintenance of counts charging conspiracy under this section and substantive violation of this section. U.S. v. Boffa, D.C.Del.1980, 513 F.Supp. 444.

103. Single or multiple conspiracies

Even if jury in acquitting defendants on conspiracy count concluded that they were not members of the enterprise, same did not preclude subsequent conspiracy conviction, if two conspiracies were distinct criminal schemes. U.S. v. Russotti, C.A.N.Y.1983, 717 F.2d 27, certiorari denied 104 S.Ct. 1273.

Brief cessation of arson activity did not divide arson-insurance fraud enterprise into two conspiracies so long as there was an overlap in method and personnel between the two stages of the group's operations. U.S. v. Lemm, C.A.Neb.1982, 680 F.2d 1193, certiorari denied 103 S.Ct. 739, 459 U.S. 1110, 74 L.Ed.2d 960.

Because indictment charging defendants with violating this section properly defined the enterprise as Florida's Third Judicial Circuit, and properly alleged a single pattern of racketeering activity, the indictment properly charged a single conspiracy. U.S. v. Stratton, C.A.La.1981, 649 F.2d 1066.

Indictment charging conspiracy under this section did not allege multiple conspiracies but, rather, only single conspiracy to participate in activities of enterprise through pattern of racketeering encompassing 62 predicate acts of mail fraud; however, if evidence offered at trial presented variance in proof demonstrating multiple conspiracies, which affected substantial rights of defendants, they would be entitled to acquittal on conspiracy charge. U.S. v. Boffa, D.C.Del.1980, 513 F.Supp. 444.

Evidence demonstrated single conspiracy making proper joinder of defendants in indictment charging violation of this section and conspiracy to commit that offense. U.S. v. Clemente, D.C.N.Y.1980, 494 F.Supp. 1310, certiorari denied 640 F.2d 1069, certiorari denied 102 S.Ct. 102, 454 U.S. 820, 70 L.Ed.2d 91.

104. Termination of conspiracy

Fact that some conspirators withdraw or that methods used to perpetuate the scheme change slightly does not indicate that one conspiracy has ended and that another has begun or that a fatal variance exists when the indictment alleges a single conspiracy. U.S. v. Lynch, C.A.Ill.1983, 699 F.2d 839.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in

respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

Historical Note

Transfer of Functions. All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise in the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, with such offices to be terminated not later than Dec. 31, 1966, by Reorg. Plan No. 1 of 1965, eff. May 25, 1965, 30 F.R. 7035, 79 Stat. 1317, set out in the Appendix to Title 5, Government Organization and Employees. All functions of the offices eliminated were already vested in the Secretary of the Treasury by Reorg. Plan No. 26 of 1950, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, set out in the Appendix to Title 5.

Legislative History. For legislative history and purpose of Pub.L. 91–452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

Cross References

Wire or oral communications, authorization for interception, to provide evidence of offenses under this section, see section 2516 of this title.

West's Federal Forms

Forfeitures, see § 5891 et seq.
Sentence and fine, see § 7531 et seq.

Notes of Decisions

167. —— Immunity of witnesses

There was no violation of use immunity conferred on Alcoholic Beverage Control Commissioner regarding use in his prosecution for violations of this section, Hobbs Act, section 1951 of this title, and mail fraud statute, section 1341 of this title, of grand jury transcript of his earlier testimony in investigation of gubernatorial campaign financing or of his statements made to Federal Bureau of Investigation during such investigation where government was unaware of transcript until late in its investigation of defendant and had not used transcript for investigation purposes or for preparation for trial of defendant and where government satisfactorily established that immunized statements included in Federal Bureau of Investigation interview forms had not been used in connection with prosecution of defendant. U.S. v. Barber, C.A.W.Va.1982, 668 F.2d 778, certiorari denied 103 S.Ct. 66.

In prosecution for, among other things, participation in affairs of police department through a pattern of racketeering activity, court did not err in denying motion to immunize defense witnesses inasmuch as defendant made no showing that there was any exculpatory evidence he wished to present. U.S. v. Nacrelli, D.C.Pa.1979, 468 F.Supp. 241.

168. Credibility of witnesses

In prosecution involving alleged violations of this chapter, it was not an abuse of discretion to exclude defense evidence seeking to attack principal witness' credibility at trial by showing he was biased against defendants because they had repelled his homosexual advances. U.S. v. Diecidue, C.A.Fla.1979, 603 F.2d 535, certiorari denied 100 S.Ct. 1345, 445 U.S. 946, 63 L.Ed.2d 781, certiorari denied 100 S.Ct. 1842, 446 U.S. 912, 64 L.Ed.2d 266.

§ 1964. Civil remedies

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

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) 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.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91–452, see 1970 U.S. Code Cong. and Adm. News, p. 4007

Cross References

Service of process, see section 1965 of this title.

Federal Practice and Procedure

Provision that criminal conviction shall estop defendant in subsequent civil proceeding brought by United States, see Wright, Miller & Cooper: Jurisdiction § 44

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see §§ 4601 to 4611.
Taxation of costs, see §§ 4612 to 4632.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 4651 et seq.

Notes of Decisions

I. GENERALLY 1–40
II. PRACTICE AND PROCEDURE—GENERALLY 41–80
III. COMPLAINT 81–100

of defendants operated as gang and conspired to ients as ostensible carpet ey could steal jewelry. lls, D.C.N.Y.1983, 564

similar to bill of particu- dings seeking civil treble chapter. Bache Halsey v. Tracy Collins Bank & 1983, 558 F.Supp. 1042.

complaints sufficient

alleged that defendants cted and participated in which engaged in a pat- activity and affected in- stated cause of action ufficient to withstand mo- nker Ramo Corp. v. Unit- Inc., C.A.Ill.1983, 713

ate Director of Insurance, tor of insurer, sufficiently under this chapter by offi- parent corporation, who tly continued insurer in int of insolvency and loot- most profitable and least ggravating the insolvency. t, C.A.Ill.1983, 711 F.2d

nissions and misrepresenta- sufficient to state claims f Title 15 were sufficient to this chapter. In re Cantaton and Co., Inc. Securities 1984, 583 F.Supp. 1385.

ing that former vice-pre i- ankruptcy, while emplo ed later, by a newly for ned ich one of debtor's custom- ntracts almost immediately for bankruptcy, conducted n conduct of debtor's affairs rmed corporation's affairs rn of racketeering activity of action under this chap- IDT Corp., D.C.Del.1984, .

stated claims for several sale of securities, and third nt incorporated all prior alle- eeded to allege a pattern of ed on the earlier accounts, a pattern of racketeering f this chapter. Yancoski v. Co., Inc., D.C.Pa.1983, 581

Allegations by New York Commissioner of Agriculture and Markets that slaughterhouse and principals thereof, through repeated instances of underweighting and misgrading slaughtered cattle and through use of the mails and wire communications, defrauded both the farmers whose cattle were slaughtered and the New York State Brucellosis Indemnity Program and that operation of the slaughterhouse affected interstate commerce were sufficient to plead claim for relief under this chapter. Gerace v. Utica Veal Co., Inc., D.C.N.Y.1984, 580 F.Supp. 1465.

Complaint alleging that plaintiffs were defrauded out of substantial sums of money thereby suffering injury in "their business or property" within meaning of this section and that plaintiffs were defrauded by defendants acting jointly as "enterprise" and that defendants conducted affairs of that enterprise "through a pattern of racketeering activity" was sufficient to state claim under this section. Windsor Associates, Inc. v. Greenfeld, D.C.Md.1983, 564 F.Supp. 273.

Complaints which alleged that certain individual defendants were "persons" who conducted affairs of two interstate "enterprises," i.e., two banks, through "patterns of racketeering activity" consisting of several acts of mail fraud adequately described violation of this chapter to state claim for relief. Lode v. Leonardo, D.C.Ill.1982, 557 F.Supp. 675.

In civil suit under this chapter and federal securities laws, allegations that appraiser destroyed accurate appraisals of property in decedent's estate and substituted fraudulent appraisals for purpose of justifying transfer of estate property at deflated prices and allegations that appraiser fraudulently converted assets of the estate for his own benefit were sufficient to state claim for relief against appraiser. Gunther v. Dinger, D.C.N.Y.1982, 547 F.Supp. 25.

Action brought by buyer of low pressure, high speed, flexible couplings installed in main propulsion units of lighter-aboard-ship vessel owned by buyers for damages involving alleged failures of couplings did not state claim on which relief could be granted under this section. Waterman S.S. Corp. v. Avondale Shipyards, Inc., D.C.La.1981, 507 F.Supp. 256.

Alleged breach by defendant assignee of agreement for assignment of lease of premises and activities of defendant attorneys in returning sum held in escrow to assignee pursuant to agreement after landlord executed lease of premises to another corporation, which in fact was allegedly assignee's alter ego, fell within broad scope of this chapter and stated cause of action for violation of this chapter. Greenview Trading Co., Inc. v. Hershman & Leicher, P.C., 1984, 473 N.Y.S.2d 722, 123 Misc.2d 152.

[10]. Miscellaneous complaints insufficient

Complaint which simply asserted that defendant used the mails or wires "in connection with his business enterprise" was insufficient to show how the defendant used the mails or wire communications in furtherance of a scheme to defraud and thus insufficient to state a claim under this section. Caliber Partners, Ltd. v. Affeld, D.C.Ill.1984, 583 F.Supp. 1308.

Wire fraud as predicate offense under this chapter was inadequately pled by insurance company against its former employee, where execution of wire fraud was premised on telephone calls to company's policyholders in which false representations about company were allegedly made, but there was no allegation that former employee was one of representatives of rival insurance company making calls or that he was responsible for acts of those representatives. Saine v. A.I.A., Inc., D.C.Colo.1984, 582 F.Supp. 1299.

Allegations of churning by brokerage firm did not state a claim under this section. Divino Const. & Realty Corp., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc., D.C.Fla. 1983, 575 F.Supp. 712.

Complaint which did not allege any garden variety fraud as the predicate for a claim under this chapter but which alleged a failure to produce money for a business venture as agreed, which alleged that the failure to produce the money was the result of fraud, and which alleged that four letters were mailed as part of the scheme did not adequately allege the mail fraud which was assertedly the predicate for the claim under this chapter. Serig v. South Cook County Service Corp., D.C.Ill. 1984, 581 F.Supp. 575.

Complaint grounded solely in securities fraud actions did not state cause of action under this chapter, alleged fraudulent conduct being merely predicate act of racketeering activity prohibited by this chapter. Richardson v. Shearson/American Express Co., Inc., D.C.N.Y.1983, 573 F.Supp. 133.

Complaint, in which investor alleged that there had been churning, trading in unsuitable programs, violation of exchange rules, misrepresentations and omissions, controlling person liability as aiders and abettors and for failure to supervise, all in violation of federal securities laws, did not state cause of action under subsec. (c) of this section, in view of fact that purposes and intent of this chapter were not directed towards such alleged activities and that sufficient remedies were available to investor under federal and state securities laws and the common law. Noland v. Gurley, D.C.Colo.1983, 566 F.Supp. 210.

Where complaint under this chapter against broker did not allege that he ever had any ownership interest in brokerage partnership alleged as the "enterprise," nor was it alleged that he used 5 percent commission he earned on plaintiffs' transactions to invest in partnership, plaintiffs failed to adequately allege, on part of broker, violation of section 1962 of this title prohibiting an individual from using money received through a pattern of racketeering to invest in the enterprise. Kimmel v. Peterson, D.C.Pa.1983, 565 F.Supp. 476.

Complaint alleging that attorneys violated this chapter by assisting pro se defendants in state court action failed to state claim for relief; limited assistance attorneys provided in preparing pleadings for pro se defendants did not constitute any form of fraud but was wholly proper, especially where law firm had to appear for one of the defendants in the state court action. Martin-Trigona v. D'Amato & Lynch, D.C.N.Y.1983, 559 F.Supp. 533.

Claim of civil violation of this chapter by stockbroker, who advised certain of his customers to buy target corporation's stock and purchased target corporation's stock for his own account based upon nonpublic information regarding planned tender offer obtained through unauthorized disclosure of investment banker's employee, failed to state cause of action where claim rested on mere fact that stockbroker had been convicted of violating some of provisions listed by this chapter as underlying felonies. Moss v. Morgan Stanley Inc., D.C.N.Y.1983, 553 F.Supp. 1347, affirmed 719 F.2d 5, certiorari denied 104 S.Ct. 1280.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91–452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.
Service of process, see § 1201 et seq.
Subpenas, see § 3981 et seq.

Notes of Decisions

1. Construction with other laws

If venue in district court for the Northern District of Georgia was proper under broad jurisdictional provisions of section 78aa of Title 15, it was also proper for other related violations of law that were alleged, but claims under this chapter were required to satisfy independent venue requirements of this section. Clement v. Pehar, D.C.Ga.1983, 575 F.Supp. 436.

Where venue is improper under special venue provision of this section, it is appropriate to inquire whether action can be maintained under section 1391 of Title 28. Van Schaick v. Church of Scientology of California, Inc., D.C.Mass.1982, 535 F.Supp. 1125.

Term "transacts his affairs" in this section is synonymous with term "transacts business" in section 22 of Title 15. King v. Vesco, D.C.Cal.1972, 342 F.Supp. 120.

2. Purpose

This section is not intended to be exclusive, but is intended to liberalize existing venue provisions. Van Schaick v. Church of Scientology of California, Inc., D.C.Mass.1982, 535 F.Supp. 1125. See, also Farmers Bank of State of Del. v. Bell Mortg. Corp., D.C.Del. 1978, 452 F.Supp. 1278.

3. Agents

Under this section relating to venue in private actions, term "has an agent" was restricted to individual defendants and did not apply as against co[illegible]e defendants.

King v. Vesco, D.C.Cal.1972, 342 F.Supp. 120.

4. Found

For corporate defendant, in private action under this section, providing that venue is proper where defendant "resides, is found, has an agent, or transacts his affairs," to be "found" in district within meaning of this section, it must be present in district by its officers and agents carrying on business of corporation. Van Schaick v. Church of Scientology of California, Inc., D.C.Mass. 1982, 535 F.Supp. 1125.

Where corporate defendant in private action under this chapter maintained no office in district, had no officers or employees carrying on its business there, and did not perform any services, sell any services or sell any products within district, and did not pay any corporate or franchise taxes in district, defendant was not "found" within district within this section. King v. Vesco, D.C.Cal. 1972, 342 F.Supp. 120.

5. Transacts affairs

Venue in the Southern District of New York over civil claim brought under this chapter against certain individual defendants was improper, where none of those defendants resided in that district or maintained offices in New York and oil trading company on whose behalf the defendants acted transacted all of its business from offices in Pennsylvania; "transacts his affairs" language in this section refers to personal affairs of the defendant, not affairs he may have transacted on behalf of his employer. Bulk Oil (USA) Inc. v. Sun Oil Trading Co., D.C.N.Y.1983, 584 F.Supp. 36.

6. Weight of contacts test

To meet "weight of the contacts" test for venue in a civil action brought under this chapter, it must be shown that there is venue over defendant due to his own contacts with district. Farmers Bank of State of Del. v. Bell Mortg. Corp., D.C.Del.1978, 452 F.Supp. 1278.

7. Summoning parties

Where there was no district in which venue was proper as to all defendants on the basis of residency or the transacting of business and where venue lay in Delaware with respect to a majority of defendants, and where interests of justice and judicial economy dictated that the whole action be tried in one court if possible, ends of justice required that nonresident defendant be brought before court under this section. Farmers Bank of State of Del. v. Bell Mortg. Corp., D.C.Del.1978, 577 F.Supp. 34.

8. Transfer

There was no substantial prejudice in refusal to transfer to another district prosecution for violations of this chapter where defendants pointed only to newspaper articles dealing with apprehension of several allegedly notorious subversives about the time of trial and failed to show any connection between those articles and the indictment. U.S. v. Dickens, C.A.N.J.1982, 695 F.2d 765, certiorari denied 103 S.Ct. 1792.

In prosecution for interstate transportation of stolen property, engaging in a pattern of racketeering activity, and conspiring to participate in racketeering activity, trial judge did not abuse his discretion in denying defendant's motion for change of venue from the District of Utah to the District of Nevada on the grounds that he, another defendant, and witnesses they intended to call resided in Nevada, and that character witnesses enjoyed reputations for integrity in Nevada, in that Utah was the location of events likely to be in issue as well as the location of documents and records likely to be involved, and thus while factors cited by defendant would have supported granting of the motion, when weighed in context they did not compel that result. U.S. v. Calabrese, C.A. Utah 1981, 645 F.2d 1379, certiorari denied 101 S.Ct. 3008, 451 U.S. 1018, 69 L.Ed.2d 390, certiorari denied 102 S.Ct. 127, 454 U.S. 831, 70 L.Ed.2d 108.

Inasmuch as none of the defendants in action seeking damages for violations of this chapter resided in Northern District of New York and that there were absolutely no contacts with Northern District of New York except that plaintiffs alleged that the impact of the conspiracy was felt in that district, venue in the Northern District of New York was inappropriate; however, in interest of justice, court would transfer action to the Southern District of New York where, for venue purposes, the weight of the contacts lay and where venue was proper as to all parties. Soper v. Simmons Intern., Ltd., D.C.N.Y. 1983, 582 F.Supp. 987.

Action seeking to enjoin order of North Carolina Utilities Commission setting retail rates for utility was transferred from Eastern District of Tennessee to Eastern District of North Carolina, as venue was proper only in judicial district where all defendants resided or in which claim arose, no defendants resided in Eastern District of Tennessee, rates were set in North Carolina, direct object of challenged rates was North Carolina public utility and majority of relevant evidence and

witnesses was located in North Carolina. Aluminum Co. of America v. Utilities Com'n of North Carolina, D.C.Tenn.1982, 548 F.Supp. 18.

Pretrial publicity surrounding charges of mail fraud under section 1341 of this title and racketeering under this chapter against six defendants, including governor of the state, was not of such a quality that it could be considered inherently prejudicial so as to warrant grant of change of venue prior to voir dire of potential jurors. U.S. v. Mandel, D.C.Md.1976, 415 F.Supp. 1033.

9. Complaint

Even though complaint brought under this chapter alleged facts indicating that the claim against some of the coconspirators arose in the district, where defendant was not alleged to have had any substantial or significant contacts with the district in connection with the conspiracy, venue as to defendant was improper in that it was not alleged that claim against him arose in district. Farmers Bank of State of Del. v. Bell Mortg. Corp., D.C.Del.1978, 452 F.Supp. 1278.

10. Miscellaneous actions venue improper

Venue was not proper in Georgia as to claim that defendants violated this chapter in transaction involving sale of interests in Nevada gold and silver mining venture where no defendant resided, was found or had agent in Georgia and minimal contacts of defendants with Northern District of Georgia in connection with purchase of interests were not sufficient to constitute transaction of their affairs within Georgia. Clement v. Pehar, D.C.Ga. 1983, 575 F.Supp. 436.

Evidence in private treble damage action brought under this chapter was insufficient to establish venue with respect to either individual defendant or corporate defendant. King v. Vesco, D.C.Cal.1972, 342 F.Supp. 120.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91–452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91–452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General

pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control any documentary material delivered by any person in compliance with a such demand, such person may file, in the district court of the United Stat for the judicial district within which the office of such custodian is situate and serve upon such custodian a petition for an order of such co requiring the performance by such custodian of any duty imposed upon hi by this section.

(j) Whenever any petition is filed in any district court of the Unite States under this section, such court shall have jurisdiction to hear an determine the matter so presented, and to enter such order or orders as ma be required to carry into effect the provisions of this section.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91–452, see 1970 U.S. Code Cong. and Adm. News, p. 4007.

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.
Proceedings to compel discovery and enforcement of penalties for refusal to make discover see § 3681 et seq.

CHAPTER 97–

Historical and

Reviser's Note. This chapter does not in- clude motor busses, interstate trucking facili- ties or airplanes within the protection of exist- ing law. Motor busses and trucks already carry a huge amount of interstate commerce. It is reasonable to presume that much inter-

Cross F

Imparting or conveying false information con see section 35 of this title.
Wire or oral communications, authorization f robbery, see section 2516 of this title.

§ 1991. Entering train to co

Whoever, in any Territory or Dist the exclusive jurisdiction of the U trespasses upon or enters upon any locomotive, with the intent to comm more than $5,000 or imprisoned

Whoever, within such jurisdicti upon or enters upon any railroad t with intent to commit any unlawfu on said train, or car, or upon or a brakeman, or any officer or employ or car, or upon or against any expr or in any car thereof, or to commi or property thereon, shall be fined more than one year, or both.

Upon the trial of any person c section, it shall not be necessary t against whom it was intended to c to commit such offense against a

(June 25, 1948, c. 645, 62 Stat. 794.)

Historical

Reviser's Note. Based on Title 18, U.S 1940 ed., § 522 (Mar. 4, 1909, c. 321, § 35 Stat. 1150).

After the word "Whoever" the folle was inserted: "in any Territory or Distric