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tobacco — Ejection of passenger. (1) A person is guilty of a class C misdemeanor, if he:

(a) Threatens a breach of the peace, is disorderly, or uses obscene, profane or vulgar language on a bus; or

(b) Is in or upon any bus while unlawfully under the influence of a controlled substance as defined in section 58-37-2; or

(c) Fails to obey a reasonable request or order of a bus driver, bus company representative or other person in charge or control of a bus or terminal; or

(d) Ingests any controlled substance, unless prescribed by a physician or medical facility, in or upon any bus, or drinks intoxicating liquor in or upon any bus, except a chartered bus; or

(e) Smokes tobacco or other products in or upon any bus, except a chartered bus.

(2) If any person violates the preceding subsection, the driver of the bus or person in charge thereof may stop at the place where the offense is committed or at the next regular or convenient stopping place and remove such person, using only such force as may be necessary to accomplish the removal, and the driver or person in charge may request the assistance of passengers to assist in the removal, and the driver or person in charge may cause the person so removed to be detained and delivered to the proper authorities.

History: L. 1979, ch. 72, § 6.

76-10-1507. Exclusion of persons without bona fide business from terminal — Firearms and dangerous materials — Surveillance devices and seizure of offending materials — Detention of violators — Private security personnel. (1) In order to provide for the safety, welfare and comfort of passengers, a bus company may refuse admission to terminals to any person not having bona fide business within the terminal. Any such refusal shall not be inconsistent or contrary to state or federal laws or regulations, or to any ordinance of the political subdivision in which the terminal is located. An authorized bus company representative may require any person in a terminal to identify himself and state his business. Failure to comply with such request or to state an acceptable business purpose shall be grounds for the representative to request that the person depart the terminal. Any person who refuses to comply with such a request shall be guilty of a class C misdemeanor.

(2) Any person who carries a concealed dangerous weapon, firearm, or any explosive, highly inflammable or hazardous materials or devices into a terminal or aboard a bus shall be guilty of a third degree felony. The bus company may employ reasonable means, including mechanical, electronic or x-ray devices to detect such items concealed in baggage or upon the person of any passenger. Upon the discovery of any such item, the company may obtain possession and retain custody thereof until it is transferred to law enforcement officers.

(3) An authorized bus company representative may detain within a terminal or bus any person violating the provisions of this act for a reasonable time until law enforcement authorities arrive. Such detention shall not constitute unlawful imprisonment and neither the bus company nor the representative shall be civilly or criminally liable upon grounds of unlawful imprisonment or assault, provided that only reasonable and necessary force is exercised against any person so detained.

(4) A bus company may employ or contract for private security personnel. Such personnel may detain within a terminal or bus any person violating the provisions of this act for a reasonable time until law enforcement authorities arrive, and may

use reasonable and necessary force in subduing or detaining any person violating this act.

History: L. 1979, ch. 72, § 7.

Cross-References.

Loitering, 76-9-703.

76-10-1508. Theft of baggage or cargo. Any person who removes any baggage, cargo or other item transported upon a bus or stored in a terminal without consent of the owner of the property or the bus company, or its duly authorized representative is guilty of theft and shall be punished pursuant to section 76-6-412.

History: L. 1979, ch. 72, § 8.

76-10-1509. Obstructing operation of bus. Any person who unlawfully obstructs or impedes by force or violence, or any means of intimidation, the regular operation of a bus is guilty of a class C misdemeanor.

History: L. 1979, ch. 72, § 9.

76-10-1510. Obstructing operation of bus — Conspiracy. Two or more persons who willfully or maliciously combine or conspire to violate section 76-10-1509 shall each be guilty of a class C misdemeanor.

History: L. 1979, ch. 72, § 10.

76-10-1511. Cumulative and supplemental nature of act. The provisions of this act shall be cumulative and supplemental to the provisions of any other law of the state.

History: L. 1979, ch. 72, § 11.

PART 16

RACKETEERING ENTERPRISES

Section

76-10-1601. Short title. This act shall be known and may be cited as the "Utah Racketeering Influences and Criminal Enterprise Act."

History: C. 1953, 76-10-1601, enacted by L. 1981, ch. 94, § 1.

Title of Act.

An act relating to organized fraudulent and illegal enterprise crime; designating the following activities as unlawful: to use or invest proceeds from a pattern of racketeering conduct in an enterprise; to acquire or maintain an interest in, or to conduct an enterprise through a pattern of racketeering conduct; or to conspire to engage in such conduct; providing criminal penalties; providing for enforcement; providing civil and equitable remedies; providing for the rights of innocent persons; and providing that any aggrieved person may insti-

tute civil proceedings to seek damages; and providing an effective date.

This act enacts part 76, chapter 10, Title 76, Utah Code Annotated 1953. — Laws 1981, ch. 94.

76-10-1602. Definitions. As used in this part:

(1) "Racketeering" means any act committed for financial gain which is illegal under the laws of Utah regardless of whether such act is in fact charged or indicted, involving:

(a) Criminal homicide;

(b) Aggravated robbery or robbery;

(c) Aggravated kidnapping or kidnapping;

(d) Forgery;

(e) Aggravated burglary or burglary;

(f) Asserting false claims including, but not limited to, false claims asserted through fraud, arson, unlawful public assistance, or Medicaid fraud;

(g) Theft, including theft by deception, theft by extortion, theft of lost, mislaid or mistakenly delivered property, receiving stolen property, theft of services and theft by any person having custody of property pursuant to repair or rental agreement;

(h) Bribery;

(i) Gambling;

(j) Illegal kickbacks, including bribery to influence official or political actions and receiving a bribe or bribery for endorsement of a person as a public servant;

(k) Extortionate extension, collection and financing of credit;

(l) Trafficking in controlled substances, explosives, weapons or stolen property;

(m) Aggravated arson or arson;

(n) Promoting prostitution;

(o) Obstructing or hindering criminal investigations or prosecutions;

(p) False statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands;

(q) Resale of realty with intent to defraud;

(r) Sale of unregistered securities or real property securities or transactions involving such securities by unregistered dealers or salesmen;

(s) A scheme or artifice to defraud;

(t) Perjury;

(u) Fraud in purchase or sale of securities;

(v) The soliciting, requesting, commanding, encouraging, or intentionally aiding another in commission of any of the above enumerated offenses;

(w) Conspiracy to commit any of the above enumerated offenses; or

(x) An attempt to commit any of the above enumerated offenses.

(2) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property.

(3) "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities.

(4) "Pattern of racketeering activity" means engaging in at least two episodes of racketeering conduct which have the same or similar objectives, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events, provided at least one of such episodes occurred after the effective date of this part and the last of which occurred within five years after the commission of a prior episode of racketeering conduct.

History: C. 1953, 76-10-1602, enacted by L. 1981, ch. 94, § 1.

76-10-1603. Unlawful acts — Felony — Forfeitures. (1) It shall be unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of racketeering activity in which such person has participated, as a principal, to use or invest, directly or indirectly, any part of such proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any interest in, or the establishment or operation of, any enterprise.

(2) It shall be unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly any interest in or control of any enterprise.

(3) It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of such enterprise's functions through a pattern of racketeering activity.

(4) It shall be unlawful for any person to attempt or to conspire to violate any provision of subsections (1), (2), or (3) of this section, or to solicit, request, command, encourage, or intentionally aid another in the violation of any of the provisions of subsections (1), (2), or (3) of this section.

(5) Whoever violates any subsection of section 76-10-1603 shall be guilty of a second degree felony and in addition to the penalties prescribed by law shall forfeit to the state of Utah:

(a) any interest acquired or maintained in violation of section 76-10-1603; and

(b) 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 76-10-1603 of this act.

(6) In any action brought by the state of Utah or, any county in the state under this part, the district court shall have jurisdiction to enter such restraining orders or prohibitions, and 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.

(7) Upon conviction of a person under this part, the court shall authorize the attorney general or the county attorney 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 convicted person it shall expire, and shall not revert to the convicted person.

History: C. 1953, 76-10-1603, enacted by L. 1981, ch. 94, § 1.

76-10-1604. Enforcement authority of peace officers. Notwithstanding any law to the contrary, peace officers in the state of Utah shall have authority to enforce the criminal provisions of this act by initiating investigations, assisting grand juries, obtaining indictments, filing informations, and assisting in the prosecution of criminal cases through the attorney general or county attorneys' offices.

History: C. 1953, 76-10-1604, enacted by L. 1981, ch. 94, § 1.

76-10-1605. Remedies of person injured by pattern of racketeering activity — Authorized orders of district court. (1) A person who sustains injury to his person, business, or property by a pattern of racketeering activity, in which he is not a participant, may file an action in the district court for the recovery of treble damages, the costs of the suit, including reasonable attorney's fees, and any punitive damages the court may deem reasonable. The state or any county may file an action on behalf of these persons injured or to prevent, restrain or remedy racketeering as defined by this part.

(2) The district court has jurisdiction to prevent, restrain and remedy racketeering as defined by this part after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. The court shall determine issues by a preponderance of the evidence, and proceedings under this section shall be independent of any other proceedings, whether civil or criminal, under the laws of this state.

(3) Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or prohibitions or such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other restraints pursuant to this section as the court deems proper.

(4) Following a determination of liability such orders may include, but are not limited to:

(a) Ordering any person to divest himself of any interest, direct or indirect, in any enterprise.

(b) Imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the laws of Utah, to the extent the constitutions of the United States and Utah permit.

(c) Ordering dissolution or reorganization of any enterprise.

(d) Ordering the payment of treble damages to those persons who are not found to be participants and are injured by the racketeering.

(e) Ordering the payment of all costs and expenses of the prosecution and investigation of any offenses included in the definition of racketeering, incurred by the state, to be paid to the general fund of the state.

History: C. 1953, 76-10-1605, enacted by L. 1981, ch. 94, § 1.

76-10-1606. Payments to general fund of state. The court may order payment to the general fund of the state as appropriate, to the extent not already ordered to be paid in other damages, of:

(1) Any interest acquired or maintained by a person in violation of section 76-10-1603.

(2) Any interest in, security of, claims against or property or contractual rights of any kind affording a source of influence over any enterprise which a person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 76-10-1603.

(3) An amount equal to the gain a person has acquired or maintained through an offense included in the definition of racketeering.

History: C. 1953, 76-10-1606, enacted by L. 1981, ch. 94, § 1.

76-10-1607. Evidentiary value of criminal judgment in civil proceeding. A final judgment or decree rendered in favor of the state or a county in any criminal proceeding brought by this state or a county shall preclude the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding.

History: C. 1953, 76-10-1607, enacted by L. 1981, ch. 94, § 1.

76-10-1608. Separability clause. If any part of application of the Utah Racketeering Influences and Criminal Enterprises Act is held invalid, the remainder of this part, or its application to other situations or persons, shall not be affected.

History: C. 1953, 76-10-1608, enacted by L. 1981, ch. 94, § 1.

Effective Date.

Section 2 of Laws 1981, ch. 94 provided: "This act shall take effect July 1, 1981."

PART 17

CABLE TELEVISION PROGRAMMING DECENCY ACT

Section

76-10-1701. Short title — Application. This act shall be known and may be cited as the "Cable Television Programming Decency Act." This act shall apply to cable television systems and pay-for-viewing television programming.

History: L. 1983, ch. 207, § 1

Title of Act.

An act relating to the regulation of indecent material; enacting the cable television programming decency act; prohibiting the distribution of indecent material over certain television systems; defining indecent material and other terms; providing civil penalties and enforcement procedures; and providing an effective date. — Laws 1983, ch. 207.

76-10-1702. Definitions. As used in this act:

(1) "Knowingly" means an awareness, whether actual or constructive, of the character of the material involved. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the material involved and if a failure to inspect or observe is either for the purpose of avoiding the disclosure or is negligent.

(2) "Distribute" means to send, transmit, retransmit, telecast, disseminate, or cablecast by any means, including by wire or satellite, or to provide material to send, transmit, retransmit, telecast, disseminate, or cablecast.

(3) "Contemporary community standards" means those current standards in the vicinage where a nuisance alleged under this act has occurred or is occurring.

(4) "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:

(a) A human sexual or excretory organ or function; or

(b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

(c) An ultimate sexual act, normal or perverted, actual or simulated; or

(d) Masturbation

which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

History: L. 1983, ch. 207, § 2.

76-10-1703. Distribution of indecent material as nuisance. A person shall be deemed to have maintained a nuisance when, as a continuing course of conduct, he knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming.

History: L. 1983, ch. 207, § 3.

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 legislation.

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. 509, 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. Carbomin 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 been 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 <u>similar</u> 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 11.59.010 that are over and above any criminal penalty that may be imposed and any forfeiture that is ordered. The civil remedies authorized by this 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. Imrev 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 was 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

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

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

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

11.59.050 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 cpportunity 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).

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

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.

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.

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

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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.

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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.

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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.

Supreme Court to review fraud law

by Aaron Epstein
Knight-Ridder Newspapers

Washington — The Supreme Court agreed Monday to decide whether the nation's bitterly controversial anti-racketeering law is being used legally to force businesses to pay triple damages in hundreds of civil fraud cases.

The law, widely known as RICO (the Racketeer Influenced and Corrupt Organizations Act of 1970), had been interpreted broadly by lower courts until last summer. But then the 2nd U.S. Circuit Court of Appeals in New York surprisingly called a halt to the "extraordinary, if not outrageous" application of RICO to legitimate businesses.

The appeals court concluded that the broad interpretation of RICO had spawned an "explosion" of litigation aimed not at mobsters but at "such respected and legitimate enterprises as the American Express Co., E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co. and Merrill Lynch, to name a few defendants labeled as 'racketeers' in civil RICO claims."

In case after case, courts have opened their doors to anyone to become "his own one-person grand jury" or "his own prosecutor" by filing a RICO lawsuit, the appellate judges said.

"If Congress had intended to permit defendants in every 'garden-variety' fraud or securities violation case to be stigmatized as 'racketeers' . . . it would have said so in plainer language," the New York court observed.

A dissenting judge said that Congress meant to "purge society of commercial organized criminal activities regardless of the group perpetrating them.

"Because the disease is long standing and deeply entrenched, the treatment employed radical new civil remedies, including treble damages, award of attorneys' fees, injunction, forfeiture, divestment of interests and dissolution of corporations," the dissenter observed.

He said that Congress chose to cast its net wide to catch racketeers, taking a "calculated risk that others . . . would also be netted."

Another dissenting judge said: "Fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm."

Analysis

The Supreme Court never has ruled on civil remedies provided by RICO. The justices have encouraged a broad interpretation of RICO's criminal law provisions in earlier cases.

RICO allows a triple-damage suit to be filed by anyone "injured in his business or property" by any interstate enterprise which participated in at least two acts of "racketeering activity" within a 10-year period.

The Court of Appeals in New York made it extremely difficult to file RICO lawsuits by imposing two requirements. First, a suit can be filed only against a defendant convicted of a crime. Second, those filing suit must have been been injured by a pattern of racketeering, not merely by fraud or some other specific crime.

Sedima, a Belgian corporation seeking triple damages against the Imrex Co., an exporter of aircraft parts, attracted support from New York City in its appeal to the Supreme Court.

The high court justices voted to weigh both the Sedima case and a lawsuit from Chicago, in which the 7th U.S. Circuit Court of Appeals refused to narrow the scope of RICO in a fraud claim of commercial borrowers against the American National Bank and Trust Co. If RICO needs to be limited, "then Congress, not the courts, is the body to do it," the judges in Chicago declared.

In other cases accepted for review, the Supreme Court will decide:

- Whether cities may force firefighters to retire before age 70 without showing that their age hampers their ability to do their jobs.

Baltimore defends its mandatory retirement age of 55 by noting that federal firefighters are required to retire at 55. But Baltimore firefighters and the U.S. Equal Employment Opportunity Commission argue that the city rule contradicts the intent of the Age Discrimination In Employment Act to bar forced retirement before age 70.

- Whether an undercover police officer may buy magazines in an adult book store, peruse them and then arrest a store employee on obscenity charges without a warrant.

'Batman and Robin' come

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April 26, 1985

Representative Mike M. Miller
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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 U.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 /ch

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EL:db3:1

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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. ■

THE CHRISTIAN SCIENCE MONITOR
AN INTERNATIONAL DAILY NEWSPAPER MONDAY, SEPTEMBER 30, 1985

Racketeering Act turns on corporations

By Warren Richey
Staff writer of The Christian Science Monitor

Washington

There was a time when only mobsters had anything to fear from the federal government's anti-racketeering laws. Those days are gone.

Today, reputable corporations and businesses — companies such as Shearson-American Express, Lloyd's of London, and Price Waterhouse — are just as likely as underworld mobsters to face racketeering charges.

The culprit in this development is the increasingly popular civil section of the 1970 Racketeer Influenced and Corrupt Organizations (RICO) Act. Today, it is being used by creative private-sector lawyers against the very companies it was designed 15 years ago to protect.

"It seems redundant to say that the Racketeer Influenced and Corrupt Organizations Act . . . of the Organized Crime Control Act of 1970 was intended to deal with organized crime," says John M. Finch of the National Association of Manufacturers. "Redundant, perhaps, but necessary," he adds.

"This is not what Congress had in mind when 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 Stephen 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 civ section was included in the anti-racketeering law. It wa aimed at encouraging businessmen and their lawyers tc in effect, become private-sector prosecutors.

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

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

— W. R

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M 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

SB

30

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM April 15, 1987

SUBJECT: Draft CSSB 30(Jud), relating to termination of the parental rights of certain sexual offenders

TO: Senator Jalmar Kerttula

FROM: George Utermohle
Legislative Counsel

The draft CSSB 30(Jud) contains amendments adding sexual assault and sexual abuse of a minor in the fourth degree to the list of grounds on which parental rights may be terminated and providing for inheritance rights unless a court terminates inheritance rights.

The draft committee substitute does not address the issue of retrospective application of SB 30. At this time it is not clear to what extent the bill should apply retrospectively. The Department of Health and Social Services has requested that I contact Andy Harrington with Alaska Legal Services in Fairbanks for information on this issue. I will contact Mr. Harrington to obtain his suggestions. However the retrospective application of civil laws may be challenged by those persons whose rights are affected by the change in the law. It is possible that the courts may strike down the retrospective aspect of SB 30 if it adversely affects the constitutional rights of a person subject to the bill.

As soon as I receive the necessary information from Mr. Harrington and conduct preliminary legal research into retrospective application of civil laws, I will prepare the necessary amendment to achieve retroactivity or a memorandum discussing why retroactivity is not appropriate.

GU:mkz
m11/024

Enclosure

5-0151L
Utermohle
4/15/87

Original sponsors: Fischer and Sturgulewski

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 30 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to termination of parental rights of perpetrators of certain sexual offenses."

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

* Section 1. AS 25.23.030(b) is amended to read:

(b) If the court finds in the interest of substantial justice, under AS 22.10.040, that the adoption proceeding [MATTER] should be heard in another judicial district, the court may transfer, stay or dismiss the proceeding in whole or in part on [ANY] conditions that are just.

* Sec. 2. AS 25.23.030 is amended by adding a new subsection to read:

(c) Proceedings for the termination of parental rights on the grounds set out in AS 25.23.180(c)(3) shall be brought in the superior court for the district in which the child that is the subject of the action resides.

* Sec. 3. AS 25.23.050(a) is amended to read:

(a) Consent to adoption is not required of

(1) for purposes of this section, a parent who has abandoned a child for a period of at least [NOT LESS THAN] six months;

(2) a parent of a child in the custody of another, if the parent for a period of at least one year has failed significantly without justifiable cause, including but not limited to indigency,

(A) to communicate meaningfully with the child, or

(B) to provide for the care and support of the child as required by law or judicial decree;