



Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

STATE RACKETEERING LAW

House Bill 4367 (Substitute H-3) First Analysis (2-28-95)

Sponsor: Rep. Frank M. Fitzgerald
Committee: Judiciary and Civil Rights

THE APPARENT PROBLEM:

Michigan criminal law generally addresses the commission of specific individual criminal acts, rather than patterns of criminal activity. Although a convicted felon with a number of prior offenses may be sentenced as an habitual offender, there is no Michigan statute analogous to the federal Racketeering Influence and Corrupt Organizations (RICO) law that enables federal authorities to combat organized crime by criminalizing racketeering behavior and seizing racketeering-related property. The President's Commission on Organized Crime in a 1986 report named RICO statutes as one of the statutory weapons that a state must have in order to successfully fight organized crime within its borders. Since that time, the number of states with state RICO laws has grown from 23 to 32. Many have urged that Michigan, too, enact a state law aimed at punishing those who engage in patterns of criminal activity and seizing the property gained from or used in the commission of it.

THE CONTENT OF THE BILL:

The bill would add a new chapter (Chapter XXVa) to the Michigan Penal Code, creating a state racketeering law analogous to the federal Racketeering Influence and Corrupt Organizations (RICO) law. The bill would prohibit engaging in certain behaviors involving a "pattern of racketeering activity," meaning at least two instances of specified criminal acts for financial gain, at least one of which occurred after the bill took effect, with the last act occurring within ten years after the commission of any prior incident (excluding any period of imprisonment). The bill would: specify prohibited acts; establish criminal penalties (including criminal forfeiture of racketeering-related property); provide for civil *in rem* seizure, forfeiture, and disposal of racketeering-related property (under provisions paralleling those in effect for civil forfeiture of other crime-related property); and, under certain circumstances, authorize prosecutors

to compel testimony and evidence in connection with racketeering investigations. A county prosecutor could petition the attorney general for authority to proceed under the bill. The bill would take effect June 1, 1995. A more detailed explanation follows.

Racketeering. "Racketeering" would be committing, attempting, conspiring to commit, aiding or abetting, or soliciting or coercing a person to commit for financial gain any of a number of specified offenses that were chargeable or indictable, including the following: felony cigarette tax offenses; felonious disposal of hazardous waste; felony controlled substances or anabolic steroid offenses; felony welfare fraud; Medicaid fraud; securities fraud; display or dissemination of obscene matter to minors; felony arson offenses; various offenses concerning bank bonds, bills, and notes; bribery; jury tampering; child pornography; felony credit card or bank card fraud; felony embezzlement offenses; felony violations of penal code provisions regarding bombs and explosives; extortion; felony false pretenses; felony forgery or counterfeiting; securities fraud; gambling; murder; violation of penal code provisions on horse racing; kidnapping; felony larceny; perjury and subornation of perjury; money laundering; prostitution; robbery; felony violations involving stolen property; and obscenity.

The bill's proscriptions are aimed at patterns of racketeering activity. A "pattern of racketeering activity" would be at least two incidents of racketeering meeting several conditions: (1) they have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts; (2) they amount to or pose a threat of continued criminal activity; and (3) at least one of the incidents occurred on or after the bill's effective date, and the last of the incidents occurred within ten years after any prior incident, excluding

House Bill 4367 (2-28-95)

any period of imprisonment served by a person engaging in the racketeering activity.

Prohibited racketeering behavior. The bill would prohibit any person associated with an enterprise from knowingly conducting or participating in, directly or indirectly, the enterprise's affairs through a pattern of racketeering activity. The bill also would prohibit a person from knowingly, through a pattern of racketeering activity, acquiring or maintaining an interest in or control of an enterprise, or real or personal property. The bill also would prohibit a person who had knowingly received any proceeds derived directly or indirectly from a pattern of racketeering activity from using those proceeds (or any money derived from the investment of them) in the acquisition of any real or personal property, or in the establishment or operation of an enterprise. Also prohibited would be conspiring or attempting to violate any of these proscriptions.

An "enterprise" would be "an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity. "Enterprise" would include illicit as well as licit enterprises.

Criminal penalties. Engaging in prohibited racketeering behavior would be a felony punishable by imprisonment for up to 20 years, a fine of up to \$100,000, or both. In addition, the court could order a convicted defendant to pay court costs, and/or to pay the costs of investigation and prosecution. The amount of costs to be imposed would be set at a hearing. Certain property also would be subject to criminal forfeiture (see below). Criminal penalties under the bill would not be mutually exclusive, and would not preclude the application of any other criminal or civil remedy under the bill or any other provision of law.

Criminal forfeiture; reach. The court would have to order a person convicted of prohibited racketeering behavior to criminally forfeit to the state any personal, real, or intangible property in which he or she had an interest and that was used in the course of, intended for use in the course of, derived from, or realized through, prohibited racketeering behavior. Also to be forfeited would be property constituting an interest in, means of control over, or influence over the enterprise involved in

racketeering, and any property constituting proceeds derived from prohibited racketeering behavior.

The court also could order the convicted person to divest himself or herself of any direct or indirect interest in the enterprise; impose reasonable restrictions on the convicted person's future activities or investments; and, under certain circumstances, order the surrender of a Michigan corporation's charter, or a foreign corporation's certificate to conduct business in this state. The court also could order the dissolution or reorganization of an enterprise, or order the suspension or revocation of an enterprise's governmental license, permit, or prior approval, if the court found that the public interest required such action to prevent future criminal activity.

Criminal forfeiture; procedures. Criminal forfeiture could not be ordered unless the indictment or information alleged the extent of the property subject to forfeiture, or unless the sentence required the forfeiture of property that was not reasonably foreseen to be subject to forfeiture at the time of the indictment or information (the prosecutor, however, would have to promptly notify the defendant when such property was discovered to be forfeitable). At sentencing and following a hearing, the court would determine the extent of any property subject to forfeiture, and would enter an order of forfeiture. The court's determination could be based on evidence in the trial record. If property subject to forfeiture could not be reached for certain reasons (such as because it could not be located, or was placed beyond the court's jurisdiction, or could not be divided from commingled property without unduly affecting innocent persons), the court would order forfeiture of any other reachable property up to the value of the property that was unreachable.

An order of criminal forfeiture would authorize an appropriate law enforcement agency to seize the property under times and conditions specified by the court. Criminally forfeited property would be retained by the law enforcement agency that seized it until disposal as provided by the bill (see below).

Criminal forfeiture; competing interests. Upon ordering forfeiture, the court would see to it that notice of the order was sent by certified mail to all persons known or appearing to have an interest in the property to be forfeited. To assist the court, the prosecuting agency would search county, state, and

federal public records where notice of liens and security interests are normally recorded. If the name and address of a person were not reasonably ascertainable or if delivery of the notice could not reasonably be accomplished, notice would be published for ten days in a newspaper of general circulation in the county in which prosecution occurred.

Someone claiming an interest in the property would have 21 days after notification or publication in which to petition the court for a hearing to determine the validity of the claim. The petition would have to contain specified information and the petitioner would have to give a copy of it to the prosecutor. The court, to the extent practicable, would hold a hearing within 28 days after the petition was filed. Testimony, presentation of evidence, and cross-examination would be allowed at the hearing. In making its decision, the court could consider evidence presented at the hearing, plus relevant portions of the record of the criminal proceeding.

The court would amend the forfeiture order to protect the rights of innocent persons if it determined by a preponderance of the evidence any of the following: that the petitioner had a legal right or interest in the property that was vested in the petitioner and not the defendant at the time the acts giving rise to the forfeiture were committed; that the petitioner was a bona fide purchaser for value of the property right or interest and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture; that the property was encumbered by a security interest and the holder of the interest did not have prior actual knowledge of the racketeering activity; or, that the property was encumbered by an unpaid balance on a land contract and the land contract vendor did not have prior actual notice of the racketeering activity.

Criminal forfeiture; restraining orders. In a racketeering prosecution, the court could issue restraining orders, injunctions, or other orders (including the requiring of satisfactory performance bonds) in connection with any property subject to criminal forfeiture. Within 14 days of such an order, the prosecutor would notify by certified mail all persons known or appearing to have an interest in the property. In determining who to notify, the prosecutor would search county, state, and federal public records where liens and security interests are normally recorded.

Civil forfeiture; reach. Property subject to civil *in rem* forfeiture would be: all real, personal, or intangible property that was the proceeds of racketeering, the substituted proceeds of racketeering, or an instrumentality of racketeering. Forfeiture would be to a local unit of government or the state.

Real property that was the primary residence of a spouse or dependent child of the owner would not be subject to civil forfeiture unless the spouse had prior actual knowledge of and consented to the commission of the racketeering activity. Property would not be subject to civil forfeiture if the owner did not have prior actual knowledge of the commission of the racketeering activity, or if the owner had notified an appropriate law enforcement agency of the commission of the crime. Civil forfeiture would be subject to the interest of a security interest holder who did not have prior actual knowledge of the racketeering activity. Similarly, civil forfeiture also would be subject to the interest of a land contract vendor who did not have prior actual knowledge of the racketeering activity.

Civil forfeiture; initiation, seizure. A civil *in rem* forfeiture proceeding would be a proceeding against property instituted by the filing of a petition by the prosecuting agency. Personal or intangible property subject to civil forfeiture could be seized under a seizure order issued by the court having jurisdiction over the property. Seizure could occur without notice to persons having an interest in the property if a court determined there was probable cause to believe that such notice would result in the loss or destruction of the property. If the court determined that there was probable cause to believe that property was subject to civil forfeiture, but not probable cause to believe that notice would cause loss or destruction, the court would order service on all persons known to have or claim an interest in the property; this service would have to occur before a further hearing on whether seizure should be ordered.

Personal or intangible property subject to civil forfeiture could be seized without process under any of the following circumstances: the seizure was incident to a lawful arrest, made according to a valid search warrant, or made under an inspection under a valid administrative inspection warrant; there was probable cause to believe that the property was directly or indirectly dangerous to

health or safety; exigent circumstances precluded obtaining a court order, and there was probable cause to believe that the property was subject to civil forfeiture; or, the property was the subject of a prior judgment in favor of the state in a forfeiture proceeding.

The bill would specify procedures for prosecutorial filing of a lien notice on real property subject to civil forfeiture. Real property could not be seized without notice and a hearing.

Property belonging to a crime victim would be promptly returned, unless the property was contraband, or there was an unresolved dispute regarding ownership, or the property needed to be retained as evidence.

Personal or intangible property seized under the bill's civil forfeiture provisions would not be subject to any other action to recover personal property, but would be considered to be in the custody of the seizing agency subject only to the bill, or to an order and judgment of the court having jurisdiction over the civil forfeiture proceedings.

Civil forfeiture; notices. When personal or intangible property was seized, the seizing agency would have to immediately notify the prosecuting agency of the seizure and the intent to forfeit and dispose of the property under the bill. Within 14 days after seizure or filing of a lien notice (although an extension could be granted), the prosecuting agency would notify by certified mail various persons of the intent to forfeit and dispose of the property. Notice would be given to: the person charged, if charges had been filed; each person known or appearing to have an ownership interest in the property; each mortgagee, person holding a security interest, or person having a lien that appeared on a certificate of title or was on file with the secretary of state or appropriate register of deeds; holders of preferred ship mortgages; persons with recorded security interests in aircraft; each person with a known security interest in the property; and, each victim of the crime. If notice by certified mail could not be accomplished, notice would be published in a newspaper of general circulation in the county.

Civil forfeiture; competing interests. Someone claiming an interest in property or proceeds subject to forfeiture could file a verified claim with the prosecuting agency within 28 days after the last date

of published notice or within 21 days after receipt of actual notice. If no claim was forfeited within the specified period, the prosecuting agency would declare the property forfeited and would dispose of the property as prescribed by the bill. If a claim was filed, the prosecuting agency would institute a civil *in rem* forfeiture action within seven days after the deadline for filing a claim.

Civil forfeiture; proceeding, burden of proof. At the civil forfeiture proceeding, the court would act as the trier of fact, and the prosecuting agency would have the burden of proving both of the following by a preponderance of the evidence: that the property was subject to civil forfeiture, and that the person claiming an ownership or security interest had actual prior knowledge of the commission of the offense listed in the definition of racketeering.

If the burden of proof was met, the property would be disposed of as prescribed by the bill.

If the burden of proof was not met, the property would be returned to the owner within 28 days after the court ordered its return, unless an appellate court stayed the order. In addition, the prosecuting agency would reimburse the owner for damages related to towing costs, storage fees and expenses, foreclosure costs, and other similar expenses. The prosecuting agency would notify persons who had been notified of the seizure or prosecutorial lien of the results of the proceeding; this notice would be by mail or publication.

Civil forfeiture; related prosecutions. If a civil forfeiture action had been commenced under the bill, subsequent dismissal of or acquittal on related criminal charges would not preclude or adversely affect the continuation of the civil forfeiture proceeding. The testimony of a person at a civil forfeiture proceeding under the bill would not be admissible against him or her, except for the purpose of impeachment, in a criminal proceeding other than a prosecution for perjury. A defendant convicted in a criminal proceeding could not deny in a civil action the essential allegations of the criminal offense of which he or she was convicted. The testimony of a person at a civil forfeiture proceeding under the bill would not waive the person's constitutional right against self-incrimination.

Disposal of forfeited property. Whether property had been criminally or civilly forfeited, the unit of government that seized or filed a lien against the

property could sell it, providing it was not legally required to be destroyed and was not harmful to the public. The court could appoint a receiver to dispose of real property. The unit of government could dispose of the money received from the sale in the following order of priority: payment of any outstanding security interest or unpaid land contract balance of a party who did not have prior actual knowledge of the crime; satisfaction of any order of restitution; payment of the claim of each crime victim to the extent the claim is not covered by an order of restitution; payment of any valid outstanding lien imposed by a governmental unit; and, payment of the expenses of the forfeiture and sale. Any balance remaining would be distributed by the court to the unit or units of government substantially involved in effecting the forfeiture; this money would have to be used to enhance enforcement of the criminal laws.

Civil forfeiture; statute of limitations. A civil forfeiture action related to an offense included in the definition of racketeering or related to prohibited racketeering behavior would have to be commenced within six years after the activity terminated or the cause of action accrued, whichever was later.

First Amendment. Notwithstanding anything in the bill, a prosecuting agency could not seize materials presumptively subject to protection under the First Amendment to the U.S. Constitution in a manner that violated that constitutional provision.

Private causes of action. The bill would not create a civil cause of action between two or more persons.

Legitimate enterprises. The bill could not be construed to permit the termination, suspension, or interruption of an enterprise's legitimate activities that were unrelated to any felonious or racketeering activity forming the object of the criminal case or civil forfeiture action, when that suspension or interruption could cause harm to innocent employees or members of the enterprise.

Other forfeitures. The bill would not preclude a prosecuting agency from pursuing a forfeiture proceeding under any other Michigan law.

Prosecutorial demands. If a prosecuting agency had probable cause to believe that a person had information or materials relevant to a racketeering-related investigation, the prosecutor could, before

bringing any action, serve upon the person a written demand to appear and be examined under oath, and to produce the materials for inspection and copying. The written demand would have to include information prescribed by the bill, including the nature of the conduct under investigation, and any written interrogatories. Service of the demand could be by any of several methods prescribed by the bill.

If the person failed to comply with the demand, the prosecutor could seek enforcement from the circuit court. If the court found that the demand was proper, it would order the person to comply, subject to any modification that the court might prescribe. Upon motion by the person and for good cause shown, the court could make any further order required to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

Any procedure, testimony taken, or material produced would be kept confidential by the prosecutor before bringing an action against a person under the bill. Such material and information would be exempt from the Freedom of Information Act.

FISCAL IMPLICATIONS:

The House Fiscal Agency (HFA) reports that since the bill would create new felony provisions, increased costs could be incurred in the Department of Corrections if additional people are incarcerated or if they receive longer sentences. Information on the number of people who might receive such sentences is unavailable. Annual per-bed prison costs, including allocated capital outlay costs, are estimated to be \$24,500. Effects on court caseloads and related costs are unknown. (2-27-95)

ARGUMENTS:

For:

The bill would arm state authorities with a tool essential for successfully combating organized crime and continuing criminal enterprises in Michigan. Although there is an analogous federal law, having a state statute would mean that the necessary interstate aspect necessary to go forward under the federal law would not have to be established. More importantly, the bill would free the state from reliance on federal prosecutorial priorities and enable forfeited crime proceeds to stay with

Michigan agencies. Those proceeds can be considerable, meaning that asset forfeiture provisions offer not only the potential to recover significant sums for the war on crime, but also the potential to reduce financial incentives for crime by making the financial risks commensurate with the perceived financial benefits. With asset forfeiture, crime does not pay. Asset forfeiture is a key element of the RICO concept, enabling authorities to dismantle an organization that might otherwise survive the conviction of a few of its members.

With stiff criminal penalties for proscribed racketeering-related behavior, and with both criminal and civil asset forfeiture provisions, authorities would have effective means to go after crime kingpins who may be adept at insulating themselves from prosecution through the use of underlings and businesses that may appear legitimate, but actually provide a "front" for illicit activities. That ability that some criminals have to insulate themselves from the law also would be eroded by new prosecutorial powers to obtain evidence and testimony in connection with racketeering investigations. The bill would enable law enforcement to break up crime rings and incapacitate major crime lords without filling prisons with low-level criminals and drug users. The bill would simultaneously promote the protection of the public and the efficient use of limited law enforcement and correctional resources.

Against:

The bill, like some say has been the case with some anti-drug laws, could end up being used inappropriately against relatively minor offenders while having little effect on major criminal figures. For sophisticated criminals, it would be relatively simple to protect property from the reach of Michigan courts. Forfeiture provisions could tend to be used against lower-echelon offenders, sometimes to the harm of innocent family members or employees. Although the bill would provide some protection for family homesteads when a resident spouse did not consent to the racketeering activity, this could prove inadequate for the interests of justice. There could be a number of situations where a spouse "knew" of the criminal activity, but because of fear or family considerations did not report it, and thus could be said to "consent" to it. Further, whether a spouse remained silent out of loyalty or intimidation, forfeiture of the family home along with other assets could throw children into poverty and homelessness. Consideration of these

issues also raise questions of spousal immunity and how that concept and the bill may affect each other.

Civil forfeiture can proceed absent any accompanying criminal conviction and under standards of proof lower than the "beyond a reasonable doubt" requisite for successful criminal prosecutions. Proponents of civil forfeiture consider this aspect a major point in its favor, enabling the law to reach people and assets that might otherwise escape. However, many may continue to be uncomfortable with the concept of civil forfeiture, despite its use in Michigan for drug-related assets, and, more recently, for assets associated with a variety of other crimes (this general forfeiture law, however, does require seized property to be returned if criminal charges are not sustained). Skepticism may linger over whether justice is necessarily done when property can be taken under a crime-fighting rationale, but without an attendant criminal conviction. That skepticism may be fed by the fact that authorities are allowed to benefit financially from forfeiture actions, leading some people to question whether venal considerations can play too large a role in forfeiture decisions.

Finally, the bill may be too broad in scope, applying when a person commits two of a wide range of offenses within ten years; this does not comport with what many people would consider to be a "pattern of racketeering activity." Further, some of those offenses may be relatively minor, such as misdemeanor gambling or pornography offenses. Moreover, the bill would require a court to order forfeiture when someone had been convicted of proscribed racketeering-related behavior. This could prove overly harsh, and would intrude on judicial power to tailor punishment to fit the crime; flexibility to accommodate individual circumstances would be lacking.

Response:

Prosecutorial abuses under the bill, whether in criminal prosecutions or in civil forfeiture actions, would be unlikely for a number of reasons. For one thing, local prosecutors could not proceed absent attorney general approval, lending a measure of review and perspective to local initiatives. In addition, the bill provides explicit protection for innocent employees and members of organizations that may have been only partly corrupted by criminal influences; the bill could not be construed to permit the disruption of legitimate activities when harm might ensue to employees. Similarly, explicit protection would be provided for lienholders

and family members who had no knowledge of the criminal activity. Finally, although the commission of two of the predicate offenses within ten years would be an element in a "pattern of racketeering activity," this would be only part of the picture: the offenses would have to bear a connection with each other, having a substantially similar purpose, result, participant, victim, method of commission, or other distinguishing relationship. The incidents also would have to pose a threat of continued criminal activity. Finally, the bill, through its definition of "racketeering," would focus on offenses committed for financial gain.

POSITIONS:

The Department of the Attorney General supports the bill. (2-22-95)

The Department of State Police supports the bill. (2-23-95)

The Prosecuting Attorneys Association of Michigan supports the bill. (2-22-95)