

Model Ongoing Criminal Conduct Act

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Model Ongoing Criminal Conduct Act Policy Statement

Ongoing criminal activity tears at the economic and democratic fabric of society each year. Millions of dollars are diverted from the lawful economy through the provision of illegal goods and services. Free competition weakens as legitimate businesses struggle to survive against enterprises bankrolled with an endless source of criminal profits. Illegal money and power are used to take over legitimate businesses; to intimidate or bribe officials and witnesses; and to buy-off service providers. The Model Ongoing Criminal Conduct Act is intended to help prevent and remedy this economic and social damage by deterring and holding financially accountable those persons who knowingly participate in or facilitate the activities of a criminal network.

The Model Act is similar to existing racketeering, criminal syndicate/network and continuing criminal enterprise statutes. It includes several modifications to clarify civil liability and prevent non-specific pleadings that were suggested by reform efforts relating to the federal civil Racketeer Influenced Corrupt Organizations Act (RICO). The Model Act's primary thrust is the creation of civil liability. However, it does provide criminal liability for violations other than its negligent empowerment of specified unlawful activity provision, and money laundering, for which criminal sanctions are provided in the Model Money Laundering Act.

Highlights of the Model Ongoing Criminal Conduct Act

- Provides legislative findings on the economic rationale for financial remedies.
- Guides the application of financial remedies and allows reciprocal agreements encouraging interstate cooperation and uniformity through special purpose and uniformity sections.
- Creates the following five “violations,” each a species of economic crime or facilitation of economic crime:
 - (1) the infiltration of legitimate commerce through investment of illegal proceeds; the control of an enterprise through crime itself (as by an extortionate takeover); and conducting an enterprise through specified unlawful activity. This violation is based on federal RICO.
 - (2) the knowing facilitation of a criminal network by engaging in subsidiary crimes, such as obstruction of justice, extortion, facilitation of the network by providing property or services (other than legal services) and fraud.
 - (3) money laundering, by reference to the Model Money Laundering Act.
 - (4) the commission of specified unlawful activity under circumstances in which the acts are for financial gain.
 - (5) the negligent empowerment of specified unlawful activity. The Model Act provides only civil remedies for this violation. It fixes limited financial responsibility in the nature of a tort remedy for negligently providing property or services that facilitate specified unlawful activity.
- Creates special civil remedies for violations, including private treble damages actions, public parens patriae actions and injunctive relief.
- Defines the scope of civil liability to assure protection of legal entities and clarify the measure of damages and statutory liability for the acts of joint ventures and other persons acting in concert.

Section by Section Summary of the Model Ongoing Criminal Conduct Act

Section 1.

Provides short title.

Section 2.

Provides legislative findings on the economics of ongoing criminal activity and provides an economic rationale for financial remedies.

Section 3.

Sets out the goals of the [Act], defending legitimate commerce from criminal activity and remedying the economic effects of crime.

Section 4.

Defines key phrases including “criminal network,” “enterprise,” and “specified unlawful activity.”

Section 5.

Defines certain forms of ongoing criminal activity that are particularly damaging to the economic health of the state as “violations.” Violations include conduct in violation of existing state racketeering laws or a generic version that is supplied in the event the state has no such statute; facilitation of a criminal network; money laundering; and specified unlawful activity (“SUA”) as defined in Section 4, paragraph (5) of this act.

Section 6.

Creates several civil causes of action designed to prevent and remedy the civil “violations.” The causes of action include private injunctive and treble damages actions, a state action on behalf of injured persons, and a state parens patriae action on behalf of the general economy,

resources and welfare of the state. These actions are limited to protect against abuse of this section by mercenary plaintiffs’ lawyers and to assure equitable division among victims of the proceeds of suits. Special civil liability provision in Section 6, paragraphs (1)-(3) define the damages and joint liability applicable to the various “violations” proscribed in Section 5.

Section 7.

Creates generic criminal penalty language.

Section 8.

Encourages uniformity in the application, liberal construction and interstate employment of the [Act].

Section 9.

States that the provisions of the [Act] are severable so the invalidity of one does not affect the validity of the others.

Section 10.

Makes the [Act] effective on a date to be specified.

Model Ongoing Criminal Conduct Act (RICO/CCE)

Section 1. Short Title.

This [Act] shall be known and may be cited as the “Model Ongoing Criminal Conduct Act.”

Section 2. Legislative Findings.

(a) Criminal activity and the networks that characterize criminal industries divert millions of dollars from the legitimate commerce of this state each year through the provision of illicit goods and services, force, fraud, and corruption.

(b) Individuals and groups associated together to conduct criminal activity pose an additional threat to the integrity of legitimate commerce by obtaining control of legitimate enterprises through criminal means, by force or fraud, and by manipulating those enterprises for criminal purposes.

(c) Money and power generated by criminal activity are being used to obtain control of legitimate enterprises, to invest in legitimate commerce, and to control the resources of facilitating ongoing criminal activity.

(d) Criminal activity and proceeds of criminal activity subvert the basic goals of a free democracy by expropriating the government’s monopoly of the legitimate use of force, by undermining the monetary medium of exchange and by subverting the judicial and law enforcement processes that are necessary for the preservation of social justice and equal opportunity.

(e) Criminal activity impedes free competition, weakens the economy, harms in-state and out-of-state investors, diverts taxable funds, threatens the domestic security, endangers the health, safety, and welfare of the public and debases the quality of life of the citizens of this state.

(f) Criminal activity becomes entrenched and powerful when the social sanctions employed to combat it are unnecessarily limited in their vision of the goals that may be achieved, in their legal tools or in their procedural approach.

(g) Societal strategies and techniques that emphasize bringing criminal remedies to bear on individual offenders for the commission of specific offenses are inadequate to reach the economic incentive supporting the criminal network, are expensive to implement, and are costly in terms of the loss of personal freedom of low-level participants in criminal networks. Comprehensive strategies are required to complement the criminal enforcement strategies by focusing on the financial components and motivations of criminal networks; enlisting the assistance of private victims; empowering courts with financially oriented tools; and developing new substantive, procedural and evidentiary laws creating effective financial remedies for criminal activity.

COMMENT

Legislative findings are useful in providing guidance to interpreting courts and publicizing and memorializing the goals and objectives of the [Act]. *Block v. Hirsch*, 256 U.S. 135, 154 (1921) (“entitled at least to great respect”).

Section 3. Purposes.

The purposes of this [Act] are:

- (a) to defend legitimate commerce from criminal activity;
- (b) to provide economic disincentives for criminal activity;
- (c) to remedy the economic effects of criminal activity; and
- (d) to lessen the economic and political power of criminal networks in this state by providing to the people and to the victims of criminal activity new preventive measures through criminal sanctions and civil remedies.

Section 4. Definitions.

In this [Act], unless the context otherwise requires:

(a) “Criminal network” means any combination of persons engaging, for financial gain on a continuing basis, in conduct which is chargeable or indictable under the laws of this state and punishable by imprisonment for more than one year, regardless of whether such conduct is charged or indicted. Persons “combine” if they collaborate or act in concert in carrying on or furthering the activities or purposes of a network even though: such persons may not know each other’s identity; membership in the network changes from time to time; or one or more members of the network stand in a wholesaler-retailer, service provider or other arm’s length relationship with others as to conduct in furtherance of the financial goals of the network.

(b) “Enterprise” includes any sole proprietorship, partnership, corporation, trust or other legal entity, or any unchartered union, association, or group of persons associated in fact although not a legal entity, and includes unlawful as well as lawful enterprises.

(c) “Proceeds” means property acquired or derived directly or indirectly from, produced through, realized through, or caused by an act or omission and includes any property of any kind.

(d) “Property” means anything of value, and includes any interest in property, including any benefit, privilege, claim or right with respect to anything of value, whether real or personal, tangible or intangible, without reduction for expenses incurred for acquisition, maintenance, production, or any other purpose.

(e) “Specified unlawful activity” means any act, including any preparatory or completed offense, committed for financial gain, that is punishable [as a felony] [by confinement for more than one year] under the laws of this state, or, if the act occurred outside this state, would be punishable [as a felony] [by confinement for more than one year] under the laws of the state in which it occurred and under the laws of this state, involving:

(1) [trafficking in controlled substances, homicide, robbery, extortion, extortionate extensions of credit, trafficking in explosives or weapons, trafficking in stolen property, or obstruction of justice,] [a reference to those acts or offenses described in 18 U.S.C. 1956(c)(7)].

(2) [reference to grades of offenses, such as “any

first degree misdemeanor or higher,” or “any felony,” and/or to other appropriate specified state offenses].

(3) [for states with state racketeering or criminal profiteering statutes, reference to “predicates” to the racketeering offenses and to the racketeering offenses, e.g., illegal investment in an enterprise, illegal control of an enterprise, illegal conduct of an enterprise].

COMMENT

Key terms are defined. The concept of a “criminal network,” is somewhat broader than the enterprise concept. It refers to entire criminal industries. A network may be made up of numerous enterprises, and it may contain numerous components, each made up of participants who have no contact with participants in other components. The classic example of a criminal network is the illegal drug industry, with production, transportation, sales, and money laundering as its key components.

The term “enterprise” is adapted from the federal Racketeer Influenced Corrupt Organizations (RICO) Act, but limited by exclusion of one-person enterprises.

The definitions of “proceeds” and “property” also appear in the Commission Forfeiture Reform Act (CFRA). If they are enacted together, the CFRA definition of “proceeds” should be retained because its additional clause has meaning in the context of forfeiture of proceeds. The CFRA definition of property should be deleted as duplicative.

“Specified unlawful activity” the so-called predicate offenses, should incorporate and build on the definition of racketeering if any exists. It should include state offenses that represent the key components of ongoing criminal networks. They should include not only the core offenses, such as offenses related to the provision of illicit goods and services such as drugs, fraud, theft, gambling, prostitution, child pornography, etc. but also offenses related to support services such as violence, corruption, obstruction of justice, money laundering and fencing. Civil remedies may be most effective preventing support service providers from participating by increasing the risk of economic loss to offset the opportunity for disproportionate gain. The definition is self-limiting to offenses committed for financial gain. Inclusion of a type of offense that is often committed for other reasons, such as murder, may therefore be safely done without including the inappropriate occurrences

of that offense, such as family-related homicides. The definition should also include intentional environmental crimes that involve danger to human life or threaten vital resources.

The three subparagraphs are a guided menu of choices. If the key concept is to be given adequate reach, one choice should be selected from each of (1), (2) and (3).

The references to federal law are recommended if permitted under state constitutional limitations on the delegation of legislative authority.

Section 5. Violations.

(a) Specified Unlawful Activity Influenced Enterprises: [Conduct in violation of (reference to the state racketeering influenced and corrupt organization (RICO) statute, if any) is unlawful.]

(1) It is unlawful for any person who has knowingly received any proceeds of specified unlawful activity to use or invest, directly or indirectly, any part of such proceeds in the acquisition of any interest in any enterprise or any real property, or in the establishment or operation of any enterprise.

(2) It is unlawful for any person to knowingly acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property through specified unlawful activity.

(3) It is unlawful for any person to knowingly conduct the affairs of any enterprise through specified unlawful activity or to knowingly participate, directly or indirectly, in any enterprise that the person knows is being conducted through specified unlawful activity.

(4) It is unlawful for any person to conspire or attempt to violate or to solicit or facilitate the violations of the provisions of paragraph (1), (2), or (3) of this subsection.]

COMMENT

This subsection incorporates either the existing state RICO statute as a civil violation or, as a bracketed alternative, a version of RICO modeled on federal RICO, 18 U.S.C.A. 1962. This version deletes the pattern requirement to avoid the conflicting and complex case law that has overwhelmed the federal pattern requirement. Since *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, n.14 (1985) suggested that the pattern element would be a useful device in limiting the federalization of state

fraud actions, the federal courts have pressed it into service as suggested. Unfortunately, they have produced widely divergent rulings on its meaning and effect, hopelessly clouding the concept's function in the statute. The federal goal of reduction of RICO fraud cases in federal courts is inapplicable to the state courts, which will have nowhere to send excluded plaintiffs. It is best to abandon the pattern requirement and its case law baggage entirely.

This subsection also deletes the federal jurisdictional requirement of effect on interstate or foreign commerce and the separate reference to collection of an unlawful debt. The wording of paragraph (1) was changed to reflect its incorporation of the term "proceeds," and adds real estate investment as a violation in addition to investment in an enterprise. The wording of paragraph (3) was substantially amended to make clear that a person may be accountable under paragraph (3) for participation that does not include personally committing an act of specified unlawful activity. It further clarifies that an enterprise may be accountable as a "person" for knowing participation in its own enterprise activities when those activities are being conducted through specified unlawful activity. If the general law of the state does not supply a provision delineating enterprise liability, language similar to that in subsection (h) of Section 6 should be adopted. Arizona Revised Statute 13-305 is a good model.

(b) Facilitation of a Criminal Network. It is unlawful for a person acting with knowledge of the financial goals and criminal objectives of a criminal network to knowingly facilitate criminal objectives of the network by:

(1) engaging in violence or intimidation or inciting or inducing another to engage in violence or intimidation;

(2) inducing or attempting to induce a person believed to have been called or who may be called as a witness to unlawfully withhold any testimony, testify falsely or absent themselves from any official proceeding to which the potential witness has been legally summoned;

(3) attempting by means of bribery, misrepresentation, intimidation or force to obstruct, delay, or prevent the communication of information or testimony relating to a violation of any criminal statute to a peace officer, magistrate, prosecutor or grand jury;

(4) injuring or damaging another person's body or

property because that person or any other person gave information or testimony to a peace officer, magistrate, prosecutor or grand jury;

(5) attempting to suppress by an act of concealment, alteration or destruction any physical evidence that might aid in the discovery, apprehension, prosecution or conviction of any person;

(6) making any property available to a member of the criminal network;

(7) making any service other than legal services available to a member of the criminal network;

(8) inducing or committing any act or omission by a public servant in violation of the public servant's official duty;

(9) obtaining any benefit for a member of a criminal network by means of false or fraudulent pretenses, representation, promises or material omissions;

(10) making a false sworn statement regarding a material issue, believing it to be false, or making any statement, believing it to be false, regarding a material issue to a public servant in connection with an application for any benefit, privilege or license, or in connection with any official investigation or proceeding.

COMMENT

This violation advances the evolution of effective civil remedies for criminal activity by making explicit the duty of each citizen to refrain from facilitating known criminal networks. It creates no duty of care in finding out whether or not a person or transaction is part of such a network, but operates only when the actor already has such knowledge, and knowingly acts to facilitate the criminal objectives of the network. It is based on the accepted criminal prohibition of aiding and abetting a conspiracy or an illicit enterprise, and the related prohibition of facilitation of any offense.

Subsection (b) is structurally modeled on Arizona's Participation in or Assisting a Criminal Syndicate statute, A.R.S. 13-2308, and borrows language from various Arizona and other facilitation and obstruction related statutes and from both Continuing Criminal Enterprise (CCE) and RICO. It is the foundation for civil liability for knowing facilitators of criminal networks under Sections 6 and 7. Criminal networks cannot function without goods and services provided by persons other than the core criminal participants. Services range in inde-

pendent moral content from contract killings of witnesses to mere financial services, such as money laundering advice. Criminal sanctions are not always appropriate, and civil remedies may be more effective as a deterrent in any event. When the facilitation is done with knowledge of the criminal nature of the criminal network and that the conduct will facilitate its criminal objectives, civil liability is appropriate.

(c) Money Laundering. It is unlawful for a person to commit money laundering as defined in the [Model Money Laundering [Act]].

COMMENT

This subsection simply provides the foundation for special civil remedies for money laundering on the dual bases that money laundering, like the other conduct enumerated as violations, is particularly damaging to the economic well-being of society, and is susceptible to deterrence through civil remedies.

(d) Acts of Specified Unlawful Activity. It is unlawful for a person to commit specified unlawful activity as defined in Section 4 of this [Act].

COMMENT

Inclusion of acts of specified unlawful activity here sets up civil remedies for all such conduct as "violations" of this Act. The definition of "specified unlawful activity" limits it to acts committed for financial gain and the conduct constituting a violation here must be continuing and substantial, borrowing the operative language from federal Continuing Criminal Enterprise (CCE), 21 U.S.C. 848.

(e) Negligent Empowerment of Specified Unlawful Activity.

(1) It is unlawful for a person to negligently allow property owned or controlled by that person or services provided by that person, other than legal services, to be used to facilitate specified unlawful activity, whether by entrustment, loan, rent, lease, bailment or otherwise.

(2) Damages for negligent empowerment of specified unlawful activity shall include all reasonably foreseeable damages proximately caused by the specified unlawful activity, including, in a case brought or intervened in by the state, the costs of investigation and criminal and civil litigation of the specified unlawful activity incurred by the government for the prosecution and defense of any person involved in the specified unlawful activity, and

the imprisonment, probation, parole or other expense reasonably necessary to detain, punish, and rehabilitate any person found guilty of the specified unlawful activity, except that:

(A) if the person empowering the specified unlawful activity acted only negligently and was without knowledge of the nature of the activity and could not reasonably have known of the unlawful nature of the activity or that it was likely to occur, damages shall be limited to the greater of:

(i) the cost of the investigation and litigation of the person's own conduct plus the value of the property or service involved as of the time of its use to facilitate the specified unlawful activity, or

(ii) all reasonably foreseeable damages to any person, except any person responsible for the specified unlawful activity, and to the general economy and welfare of the state proximately caused by the person's own conduct.

(B) If the property facilitating the specified unlawful activity was taken from the possession or control of the person without that person's knowledge and against that person's will in violation of the criminal law, damages shall be limited to reasonably foreseeable damages to any person, except persons responsible for the taking or the specified unlawful activity, and to the general economy and welfare of the state proximately caused by their negligence, if any, in failing to prevent its taking.

(C) If the person was aware of the possibility that the property or service would be used to facilitate some form of unlawful activity and acted to prevent the unlawful use, damages shall be limited to reasonably foreseeable damages to any person, except any person responsible for the specified unlawful activity, and to the general economy and welfare of the state proximately caused by their failure, if any, to act reasonably to prevent the unlawful use.

(D) The plaintiff shall carry the burden of proof by a preponderance of the evidence that the specified unlawful activity occurred and was facilitated by the property or services. The

defendant shall have the burden of proof by a preponderance of the evidence as to circumstances constituting lack of negligence and on the limitations on damages in this subsection.

COMMENT

This violation allocates some of the financial responsibility for the occurrence of serious financially motivated offenses to those who negligently facilitate such conduct by supplying property and services to the perpetrators. The language is that of tort, and the statute creates a cause of action in persons harmed by the conduct as well as in the state for its damages. The costs of investigating, prosecuting, incarcerating and rehabilitating of offenders are specifically designated as part of the public's damage to avoid potential uncertainty on this issue. This puts potential violators on notice of the substantial social costs of offenses and the fact that failure to act reasonably may place these costs on them. The statute gives a wide berth to legal services to avoid any possible Sixth Amendment issue, and also avoids creating liability to those who are involved in the criminal conduct. The burden of proof is the standard tort burden, as repeated in Section 6, subsection (c). The burden of proof with respect to lack of negligence and evidence of special defenses is placed on the defendant in conformance with the normal rule that "the burden of proving a fact is put on the party who presumably has peculiar means of knowledge enabling him to prove the fact," 9 J. Wigmore, Evidence 2486, at 275 (3d ed. 1940), *G.E.J. Corp. v. Uranium Aire, Inc.*, 311 F.2d 749, 751 (9th Cir. 1962) (value of ore in mine); *Selma, Rome and Dalton Railroad Co. v. United States*, 139 U. S. 560, 567, 568, 11 S. Ct. 638, 640, 35 L.Ed.266 (1891) (stating general rule). Setting the damages at the value of the property or services provided is similar to liquidated damages. It is rationally related to the social harm done because, generally speaking, more valuable property or service provides more empowerment. It has the further advantage of spreading the risk of loss to an insurable item while relieving the public, i.e. the taxpayers, of the losses caused by the defendant's negligence. This provision more than any other serves the goal of preventing the necessity of incarceration by providing direct economic disincentives for facilitation of economically motivated criminal conduct. For each person who is helped into prison by a facilitator, even by negligence alone, there should at least be a strong financial remedy for the facilitation.

Section 6. Civil Remedies; Actions.

(a) The [appropriate prosecutorial authority] or any aggrieved person may institute civil proceedings against any person in [appropriate court] seeking relief from conduct constituting a violation of this [Act] or to prevent, restrain or remedy such violation.

(b) The [appropriate court] has jurisdiction to prevent, restrain or remedy such violations by issuing appropriate orders. Prior to a determination of liability such orders may include, but are not limited to, entering restraining orders or injunctions, requiring the execution of satisfactory performance bonds, creating receiverships, and enforcing constructive trusts in connection with any property or interest subject to damages, forfeiture or other remedies or restraints pursuant to this [Act].

(c) If the plaintiff in such a proceeding proves the alleged violation by a preponderance of the evidence, the [appropriate court] shall, after making due provision for the rights of innocent persons, grant relief by entering any appropriate order or judgment, including:

- (1) ordering any defendant to divest himself of any interest in any enterprise, or in any real property;
- (2) imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as any enterprise in which he was engaged in violation of this [Act];
- (3) ordering the dissolution or reorganization of any enterprise;
- (4) ordering the payment of all reasonable costs and expenses of the investigation and prosecution of any violation, civil and criminal, including reasonable attorney fees in the trial and appellate courts. [Such payments received by the state, by judgment, settlement or otherwise, shall be deposited in the Special Asset Forfeiture Fund established by the Commission Forfeiture Reform Act (CFRA)];
- (5) ordering the forfeiture of any property subject to forfeiture under CFRA, pursuant to the provisions and procedures of CFRA;
- (6) ordering the suspension or revocation of any license, permit, or prior approval granted to any person by any agency of the state; or
- (7) ordering the surrender of the charter of any

corporation organized under the laws of this state or the revocation of any certificate authorizing a foreign corporation to conduct business within this state, upon finding that for the prevention of future violations, the public interest requires the charter of the corporation to be surrendered and the corporation dissolved or the certificate revoked.

(d) Relief under paragraphs (5), (6) and (7) of subsection (c) shall not be granted in civil proceedings instituted by an aggrieved person unless the [appropriate prosecutorial authority] has instituted the proceedings or intervened. In any action under this section brought by the state or in which the state has intervened, the state may employ any of the powers of seizure and restraint of property as are provided for forfeiture actions under CFRA, or as are provided for the collection of taxes payable and past due, and whose collection has been determined to be in jeopardy.

(e) In a proceeding initiated under this section, injunctive relief shall be granted in conformity with the principles that govern the granting of relief from injury or threatened injury in other civil cases, but no showing of special or irreparable injury shall have to be made. Pending final determination of a proceeding initiated under this section, a temporary restraining order or a preliminary injunction may be issued upon a showing of immediate danger of significant injury, including the possibility that any judgment for money damages might be difficult to execute, and, in a proceeding initiated by a non-governmental aggrieved person, upon the execution of proper bond against injury for an injunction improvidently granted.

(f) Any person who is in possession or control of proceeds of any violation is an involuntary trustee and holds the property in constructive trust for the benefit of persons entitled to remedies under this [Act], unless the holder acquired the property as a bona fide purchaser for value who was not knowingly taking part in an illegal transaction.

(g) Any person whose business or property is directly or indirectly injured by conduct constituting a violation, by any person, may bring a civil action, [subject to the *in pari delicto* defense] and shall recover three-fold the actual damages sustained and the costs and expenses of the investigation and prosecution of the action including reasonable attorney fees in the trial and appellate courts. Damages shall not include pain and suffering. Any person injured shall have a claim to any property against which any fine, or against

which treble damages under subsections (k) or (l) of this section may be imposed, superior to any right or claim of the [state, other authority] to the property, up to the value of actual damages and costs awarded in an action under this subsection. The [state, other authority] shall have a right of subrogation to the extent that an award made to a person so injured is satisfied out of property against which any fine or civil remedy in favor of the state may be imposed.

(h) (1) Whenever liability of a legal entity is based on the conduct of another, through respondeat superior or otherwise, the legal entity shall not be liable for more than actual damages and costs, including a reasonable attorney's fee, if the legal entity affirmatively shows by a preponderance of the evidence that:

(A) the conduct was not engaged in, authorized, solicited, commanded or recklessly tolerated by the legal entity, by the directors of the legal entity or by a high managerial agent of the legal entity acting within the scope of employment; and

(B) the conduct was not engaged in by an agent of the legal entity acting within the scope of employment and in behalf of the legal entity.

(2) For the purposes of this subsection:

(A) "Agent" means any officer, director or employee of the legal entity, or any other person who is authorized to act in behalf of the legal entity.

(B) "High managerial agent" means any officer of the legal entity or, in the case of a partnership, a partner, or any other agent in a position of comparable authority with respect to the formulation of policy of the legal entity.

(C) Notwithstanding any other provision of law, any pleading, motion, or other paper filed by a non-governmental aggrieved party in connection with a proceeding or action under subsection (g) of this section shall be verified. Where such aggrieved person is represented by an attorney, such pleading, motion, or other paper shall be signed by at least one attorney of record in his individual name, whose address shall be stated. Where such pleading, motion, or other paper includes an averment of fraud, coercion, accomplice, respondeat superior, conspiratorial, enterprise or other vicarious accountability, it shall state, insofar as practicable, the circumstances with particularity. The verification and the signature by an attorney required by this subsection shall consti-

tute a certification by the signor that he has carefully read the pleading, motion, or other paper and, based on a reasonable inquiry, believes that:

(i) it is well grounded in fact;

(ii) it is warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law; and

(iii) it is not made for an improper purpose, including to harass, to cause unnecessary delay, or to impose a needless increase in the cost of litigation. The court may, after a hearing and appropriate findings of fact, impose upon any person who verified the complaint, cross-claim or counterclaim, or any attorney who signed it in violation of this subsection, or both, a fit and proper sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the complaint or claim, including reasonable attorney fees. If the court determines that the filing of a complaint or claim under subsection (g) of this section by a non-governmental party was frivolous in whole or in part, it shall award double the actual expenses, including attorney fees, incurred because of the frivolous portion of the complaint or claim.

(j) Upon the filing of a complaint, cross-claim or counterclaim under this section, an aggrieved person shall, as a jurisdictional prerequisite, immediately notify the attorney general of its filing and serve one copy of the pleading on the attorney general. Service of the notice does not limit or otherwise affect the right of the state to maintain an action under this section or intervene in a pending action nor does it authorize the person to name the state or the attorney general as a party to the action. The attorney general may, upon timely application, intervene or appear as amicus curiae in any civil proceeding or action brought under this section if the attorney general certifies that, in the opinion of the attorney general, the proceeding or action is of general public importance. In any proceeding or action brought by an aggrieved person, the state shall be entitled to the same relief as if it had instituted the proceeding or action.

(k) (1) Any [appropriate prosecutorial authority] may bring a civil action on behalf of persons whose business or property is directly or indirectly injured by conduct constituting a violation, and shall recover threefold the damages sustained by such persons and the costs and expenses of the investigation and prosecution of the action, including reasonable attorney fees in the trial and appellate courts. The court shall exclude from the amount of monetary relief awarded any amount of monetary relief:

(A) which duplicates amounts which have been awarded for the same injury; or

(B) which is properly allocable to persons who have excluded their claims under paragraph (3) of this subsection.

(2) In any action brought under this subsection, the [appropriate prosecutorial authority] shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process to any person, the court may direct further notice to such person according to the circumstances of the case.

(3) Any person on whose behalf an action is brought under this subsection may elect to exclude from adjudication the portion of the state claim for monetary relief attributable to that person by filing notice of such election within such time as specified in the notice given under this subsection.

(4) Any final judgment in an action under this subsection shall preclude any claim under this subsection by any person on behalf of whom such action was brought who fails to give notice of exclusion within the time specified in the notice given under paragraph (2) of this subsection.

(5) An action under this subsection on behalf of persons other than the state shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

(l) The attorney general may bring a civil action as parens patriae on behalf of the general economy, resources and welfare of this state, and shall recover threefold the proceeds acquired, maintained, produced or realized by or on behalf of the defendant by reason of a violation, plus the costs and expenses of the inves-

tigation and prosecution of the action, including reasonable attorney fees in the trial and appellate courts.

(1) A person who has knowingly conducted or participated in the conduct of an enterprise in violation of paragraph (a)(3) of Section 5 is also jointly and severally liable for the greater of threefold the damage sustained directly or indirectly by the state by reason of conduct in furtherance of the violation or threefold the total of all proceeds acquired, maintained, produced or realized by or on behalf of any person by reason of their participation in the enterprise except that:

(A) a person is not liable for conduct occurring prior to his first knowing participation in or conduct of the enterprise; and

(B) if a person shows that, under circumstances manifesting a voluntary and complete renunciation of culpable intent, the person withdrew from the enterprise by giving a complete and timely warning to law enforcement authorities or by otherwise making a reasonable and substantial effort to prevent the conduct or result which is the criminal objective of the enterprise, that person is not liable for conduct occurring after the person's withdrawal.

(2) A person who has facilitated a criminal network in violation of subsection (b) of the [Model Ongoing Criminal Conduct Act] is also jointly and severally liable for:

(A) the damages resulting from the conduct in furtherance of the criminal objectives of the criminal network, to the extent that the person's facilitation was of substantial assistance to the conduct; and

(B) the proceeds of conduct in furtherance of the criminal objectives of the criminal network, to the extent that the person's facilitation was of substantial assistance to the conduct.

(C) A person who has engaged in money laundering in violation of the [Model Money Laundering Act] is also jointly and severally liable for the greater of threefold the damages resulting from their conduct or threefold the property that is the subject of the violation.

COMMENT

Subsection (g) allows for private as well as public recovery of three times the damage done by specified violations.

Subsections (h), (i) and (j) address the concern that treble damages may attract inappropriate plaintiffs seeking windfall returns or attempting to obtain settlement through the threat of treble liability. These subsections provide three disincentives. First, action against legal entities are limited to circumstances in which the entity would be criminally liable. Second, frivolous actions determined by language borrowed from Rule 11, Fed. R. Civ. P., are subject to double damages in favor of the wronged defendant. Third, all actions must be sent to the attorney general, who may intervene. Mercenary counsel will have to advise their clients that there are substantial financial disincentives for misuse of this cause of action.

Subsection (k) is modeled on *parens patriae* actions in antitrust cases under 15 U.S.C. 15c. It provides a workable procedure for notification of persons on whose behalf the treble damages action is brought, protects them against settlement or dismissal without notice, and protects defendants against duplicate judgments.

Subsection (l) takes antitrust style *parens patriae* standing another step, authorizing a treble damages action for damage to the commonwealth. See, *Hawaii v. Standard Oil Company of California*, 406 U.S. 251, 92 S. Ct. 885, 31 L.Ed.2d 184 (1972) (action for money damages to general economy not available under Clayton Act). Victims are entitled to damages from this recovery under subsection (g). The measure of damages for this cause of action is actual damages, computed from either the point of view of injury to the State's economy, tax base, resource misallocation and loss, investment potential, programmatic costs of civil and criminal justice, etc. or from the point of view that all proceeds of conduct constituting a violation warps and debases the economy and therefore damages it. Environmental crimes and social victimization crimes such as drug dealing are therefore compensable, as well as more traditional fraud, theft, arson, etc., which are generally based on loss computation of individual victims. The liability of persons who have engaged in violations of the Model Money Laundering Act or the Model Ongoing Criminal Conduct Act is based on concepts similar to those underlying tort liability of persons acting in concert, *Persons Acting in Concert*, Restatement (Second) of Torts 876 (1977). Liability relating to enterprise membership is generally analogous to that under 876(a), while liability relating to facilitation of a criminal network is more analogous to that under 876(b) and (c). Mandatory trebling is necessary to assure that the state is compensated for actual damage given the uncertainty, expense and difficulty of

detecting and investigating the conduct involved, of bringing and collecting on such actions, and of restoring the state to its prior condition with money damages.

Subsection (c)'s reference, in paragraph (4), to a Special Asset Forfeiture Fund is bracketed to flag the need to either create such a fund, as described in CFRA, 20(b), or delete this sentence.

Section 7. Criminal Sanctions.

A person who violates subsections [(a)] (b), or (d) of section 5 of this [Act] is guilty of a crime and upon conviction may be imprisoned for not more than [] years, fined not more than [], or both.

COMMENT

This Section provides generic criminal penalty language. Subsection (a) is bracketed because if it is currently a crime in the adopting state, the existing criminal sanctions will form the basis of the new treatment, whether it is altered or not. Subsection (c) is deleted because criminal sanctions for money laundering are included in the [Model Money Laundering Act].

Section 8. Uniformity of Construction and Application.

(a) The provisions of this [Act] shall be liberally construed to effectuate its remedial purposes. Civil remedies under this [Act] shall be supplemental and not mutually exclusive. They do not preclude and are not precluded by any other provision of law.

(b) The provisions of this [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

(c) The attorney general is authorized to enter into reciprocal agreements with the attorney general or chief prosecuting attorney of any state to effectuate the purposes of this [Act].

COMMENT

Uniformity of statutory provisions and cooperative enforcement mechanisms are important goals in the development of effective state enforcement mechanisms. Cooperation between sister states becomes increasingly necessary as travel, communications and wide-spread criminal networks "shrink" the country.

Section 9. Severability.

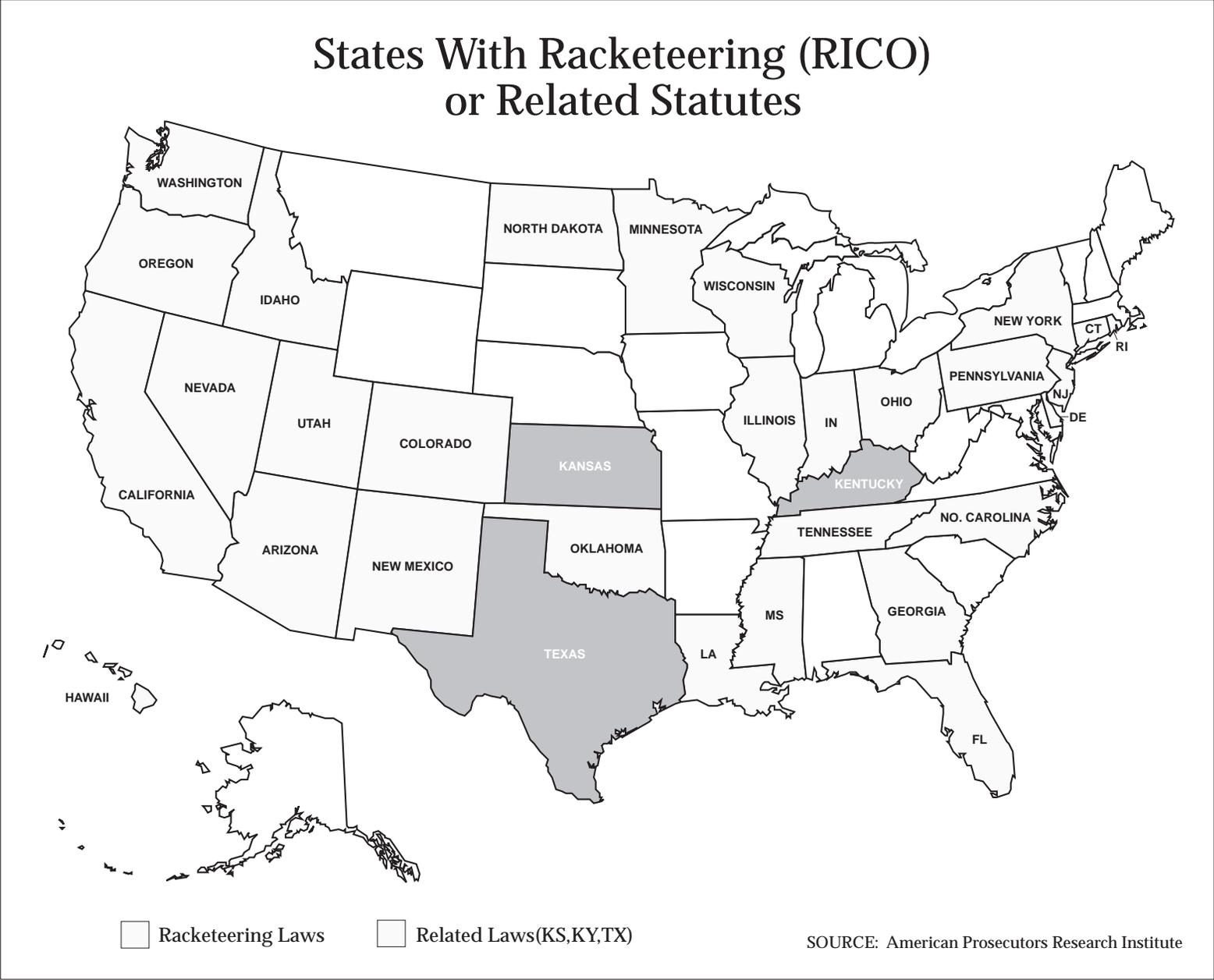
If any provision of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provisions or application, and to this end the provisions of this [Act] are severable.

Section 10. Effective Date.

This [Act] shall be effective on [reference to normal state method of determination of the effective date] [reference to specific date].

Appendix F

States With Racketeering (RICO) or Related Statutes



State Racketeering (RICO) and Related Statutes¹

	<u>STATE</u>	<u>CITATION</u> ²
1.	Arizona	Ariz.Rev.Stat.Ann. §§13-2301 to 13-2315 (Supp.1992)
2.	California	Cal.Penal Code §§186 to 186.8 (Supp.1993)
3.	Colorado	Colo.Rev.Stat.Ann. §§18-17-101 to 18-17-109 (Supp.1992)
4.	Connecticut	Conn.Gen.Code Ann. §§53-393 to 53-403 (Supp.1992)
5.	Delaware	Del.Code Ann.tit. 11 §§1501 to 1511 (Supp.1992)
6.	Florida	Fla.Stat.Ann. §§895.01 to 895.09 (Supp.1992)
7.	Georgia	Ga.Code Ann. §§16-14-1 to 16-14-15 (1992)
8.	Hawaii	Hawaii Rev.Stat. §§842-1 to 842-12 (Supp.1992)
9.	Idaho	Idaho Code §§18-7801 to 18-7805 (Supp.1992)
10.	Illinois	Ill.Ann.Stat.Ch.56 1/2, §§1651 to 1660 (Supp.1992)
11.	Indiana	Ind.Code Ann. §§35-45-6-1 to 35-45-6-2(criminal) and §§34-4-30.5-1 to 34-4-30.5-7(civil)(Supp.1992)
12.	Louisiana	La.Rev.Stat.Ann.tit. 15, Ch.11 §§1351 to 1356 (Supp.1993)
13.	Minnesota	Minn.Stat.Ann. §§609.901 to 609.912 (Supp.1993)
14.	Mississippi	Miss.Code Ann. §§97-43-1 to 97-43-11 (Supp.1992)
15.	Nevada	Nev.Rev.Stat. §§207.350 to 207.520 (1992)
16.	New Jersey	N.J.Stat.Ann. §§2C: 41-1 to 2C: 41-6.2 (Supp.1992)
17.	New Mexico	N.M.Stat.Ann. §§30-42-1 to 30-42-6 (Supp.1992)
18.	New York	N.Y.Civ.Prac.Law. §§1353 to 1355 (civil) and N.Y.Penal Law §460.00 to 460.80(criminal)(Supp.1993)
19.	North Carolina	N.C.Gen.Stat. §§75D-1 to 75D-14 (1990)

¹ Citation information current through April 10, 1993.
Citation list prepared by American Prosecutors Research Institute.

² Includes statutes which are not titled "Racketeering" but serve the same purpose as and are applied similarly to racketeering laws. See e.g. California's "Criminal Profiteering" statute.

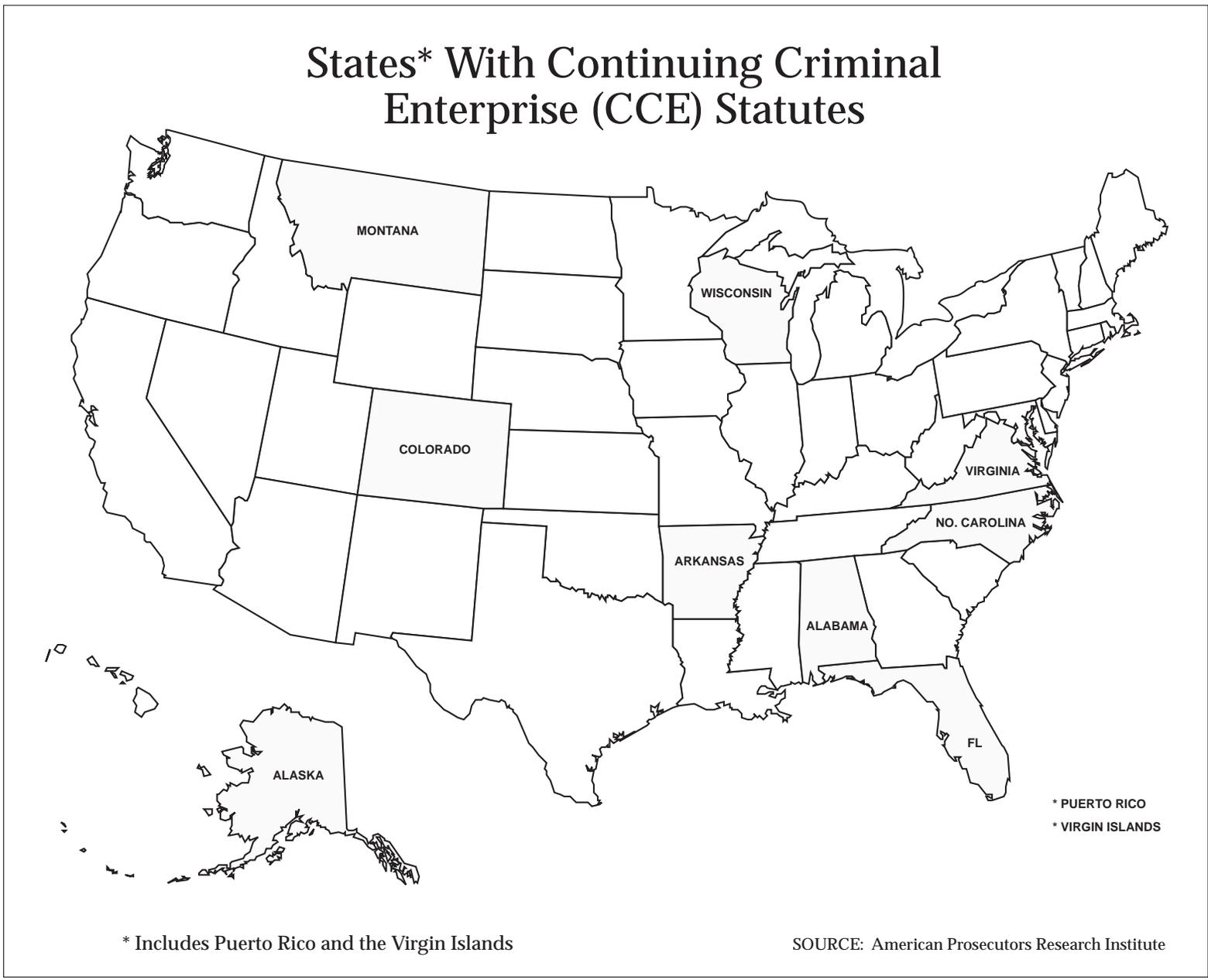
20.	North Dakota	N.D.Cent.Code §§12.1-06.1-01 to 12.1-06.1-08 (Supp.1991)
21.	Ohio	Ohio Rev.Code Ann. §§2923.31 to 2923.36 (1992)
22.	Oklahoma	Okl.Stat.Ann.tit. 22, §§1401 to 1419 (Supp.1993)
23.	Oregon	Or.Rev.Stat.Ann. §§166.715 to 166.735 (Supp.1992)
24.	Pennsylvania	Pa.Cons.Stat.Ann.tit. 18 §911 (Supp.1992)
25.	Rhode Island	R.I.Gen.Laws §§7-15-1 to 7-15-11 (1992)
26.	Tennessee	Tenn.Code Ann. §§39-12-201 to 39-12-210 (Supp.1992)
27.	Utah	Utah Code Ann. §§76-10-1601 to 76-10-1609 (Supp.1992)
28.	Washington	Wash.Rev.Code Ann. §§9A.82.001 to 9A.82.904 (Supp.1993)
29.	Wisconsin	Wis.Stat.Ann. §§946.80 to 946.88 (Supp.1992)

RELATED STATUTES³

1.	Kansas	Kan.Stat.Ann. §21-4401 (Supp.1992)
2.	Kentucky	Ky.Rev.Stat.Ann. §506.120 (Supp.1992)
3.	Texas	Texas Penal Code Ann. §§71.01 to 71.05 (Supp.1993)

³ These statutes differ substantially from the typical racketeering statute which is based on federal RICO. The Kentucky and Texas laws are primarily sophisticated conspiracy laws. Kansas focuses on coercion by threats or intimidation. However, because they do target continuing organized crime activities, they have been included for informational purposes.

States* With Continuing Criminal Enterprise (CCE) Statutes



State Continuing Criminal Enterprise Statutes¹

	<u>STATE</u>	<u>CITATION</u>
1.	Alabama	Al. Code Ann. tit. 13 §13A-12-233 (Supp. 1992)
2.	Alaska	Ak. Stat. §11.71.010 (Supp. 1992)
3.	Arkansas	Ar. Code Ann. §5-64-414 (Supp. 1993)
4.	Colorado	Colorado Rev. Stat. Ann. tit. 18 §18-407 (Supp. 1992)
5.	Florida	Fl. Stat. Ann. §893.20 (Supp. 1993)
6.	Montana	Mt. Code Ann. §45-9-125 (Supp. 1992)
7.	North Carolina	N.C. Gen. Stat. §90-95.1 (Supp. 1992)
8.	Puerto Rico	P.R. Code Ann. tit. 24 §2408 (1992)
9.	Virgin Islands	V.I. Code Ann. tit. 19 ch. 29 §611 (1992)
10.	Virginia	Va. Code §18.2-248 (Supp. 1992)
11.	Wisconsin	Wi. Stat. Ann. §946.85 (Supp. 1992)

¹ Citation information current through April 10, 1993.
Citation list prepared by American Prosecutors Research Institute.

State Continuing Criminal Enterprise Statutes

	AL	AK	AR	CO	FL	MT	NC	PR	VI	VA	WI
I. PREDICATE ACTIVITY											
A. Type of Offense											
1. violation of controlled substances act		X	X	X	X	X	X	X	X	X	
2. drug trafficking	X										
3. violation of racketeering act											X ¹
B. Severity of Offense Required											
1. felony		X	X	X	X	X	X	X	X	X	X
2. unspecified	X										
II. COMMISSION OF PREDICATE ACTIVITY											
A. Series Requirement											
1. specific # of instances		5	2	2	3	2					3
2. undefined "series" of instances											
B. In Concert With Specific # of Others											
	5	5	5	5	5	5	5	3	5	5	5
C. Position of Organizer or Manager of Others											
	X	X	X	X	X		X	X	X	X	X
D. Derive Substantial Income or Resources											
	X ²	X	X	X	X		X	X	X	X ³	X ⁴
E. Must Have Intent to Commit a Crime											
											X
III. PENALTIES											
A. First Offense											
1. up to 2x term of imprisonment and fine for the predicate offense			X			X					
2. 10 to 20 yrs. imprisonment plus up to \$10,000											X
3. 25 yrs. to life imprisonment plus \$50,000 to \$500,000	X				X ⁵						
4. 30 to 99 yrs. plus \$100,000								X			
5. 10 yrs to life plus \$100,000									X		
6. felony		X		X ⁶			X				
B. Second or Subsequent Offense											
1. up to 3x term of imprisonment and fine for the predicate offense			X			X					
2. 50 to 99 yrs imprisonment plus \$200,000								X			
3. 20 yrs to life imprisonment plus \$200,000									X	X ⁷	
4. life imprisonment plus \$150,000 to \$1,000,000	X										

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	AL	AK	AR	CO	FL	MT	NC	PR	VI	VA	WI
IV. CIVIL ACTION											
A. Party Permitted to Bring Action											
1. prosecuting attorney			X								
2. private party											X
B. Recovery											
1. 2x damages											X
2. 3x proceeds acquired			X								
3. costs of investigation and prosecution			X								X
4. attorneys fees											X
5. punitive damages											X
V. INCORPORATION OF FORFEITURE PROVISIONS	X		X				X	X	X		X
VI. SENTENCING											
A. No Parole, Suspension, or Deferral	X		X		X ⁸			X	X	X ⁹	
B. Separate Convictions for CCE Violation and Predicates					X	X					

Endnotes

1. The Wisconsin Continuing Criminal Enterprise statute is incorporated into its Racketeering Act. A person commits a CCE violation if he violates one of the prohibited activities of the Racketeering Act in the manner proscribed by the CCE statute. To establish the commission of such prohibited activity, there must be a “pattern of racketeering activity” as defined in the statute. This consists of 3 felony predicate offenses, the first committed within 7 years of the last. A person must then have invested in an enterprise, gained control of an enterprise or otherwise received proceeds by conducting an enterprise through this “pattern of racketeering activity.” Finally, this activity must be conducted in the manner proscribed by the CCE statute. That is, in concert with 5 or more others, etc...
2. “Substantial Income or Resources” is defined as being anything above minimum wage.
3. In Virginia, engaging in a continuing criminal enterprise is a requisite element of a “drug kingpin” violation. The enterprise involved must have received at least 2 million dollars in gross receipts during any 12 month period or engage in the enterprise to intentionally manufacture, sell, give distribute or possess listed drugs in a given quantity.
4. “Substantial Income or Resources” is defined as anything exceeding \$25,000.
5. In Florida, the fine is set at \$500,000.
6. In Colorado, engaging in a continuing criminal enterprise is an aggravating circumstance in the commission of the predicate activity. The presence of this circumstance designates the defendant a “special offender,” which carries a term of imprisonment greater than the presumptive range for a class 2 felony, but not more than twice the maximum term for a class 2 felony.
7. The penalty for a “drug kingpin” conviction is 20 yrs. to life imprisonment plus a fine of up to \$1,000,000
8. A person convicted of a CCE violation is eligible for parole only after serving the mandatory minimum of 25 years imprisonment.
9. Parole is available only after serving the mandatory minimum sentence of 20 years imprisonment.