

BILL ANALYSIS

C.S.H.B. 4635
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Transnational gangs and criminal enterprises have proliferated in Texas through highly sophisticated, diversified, and widespread criminal activity. All of this harms Texas and its citizens. There are a variety of state laws that address criminal activity, including organized crime statutes. However, law enforcement entities lack statutory authority to target the lifeblood of criminal enterprises: their financial assets. C.S.H.B. 4635 seeks to provide law enforcement entities with the authority to target organized crime entities and limit their ability to utilize their financial resources to escape prosecution by providing for certain civil actions, remedies, and enforcement for racketeering and unlawful debt collection.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 4635 sets out provisions relating to civil actions and remedies for conduct that constitutes organized crime, racketeering, or unlawful debt collection offenses and the filing of RICO liens with respect to such a civil action or criminal offense.

Definitions

C.S.H.B. 4635 defines certain terms, as follows:

- "racketeering" as committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit any of the following offenses:
 - a felony offense under The Securities Act;
 - kidnapping or aggravated kidnapping;
 - operation of stash house;
 - perjury and other falsification offenses;
 - resisting arrest, search, or transportation of a person by using force against a peace officer or another person;
 - hindering apprehension or prosecution of a person;
 - a public indecency offense; or
 - engaging in organized criminal activity;
- "investigative agency" as the Department of Public Safety, the Office of the Attorney General, or a local prosecutor; and

- "local prosecutor" means a district attorney, criminal district attorney, or county attorney with felony criminal jurisdiction.

C.S.H.B. 4635 defines certain terms, as follows:

- "real property" as any real property or any interest in real property, including any lease of or mortgage on real property;
- "cash or cash proceeds" as damages, penalties, or any other monetary payment, monetary proceeds from property forfeited to the state from a civil action filed under the bill, or any payment made by a defendant by reason of a decree or settlement in such an action;
- "unlawful debt" as any money or other thing of value constituting principal or interest of a debt that is wholly or partly legally unenforceable in Texas because the debt was incurred or contracted:
 - in gambling activity in violation of federal law or in the business of lending money at a rate usurious under state or federal law; or
 - in violation of the Texas Racing Act, Texas Credit Title provisions relating to interest, Texas Constitution provisions relating to usury, or statutory provisions relating to the offense of gambling; and
- "beneficial interest" as the interest of a person:
 - as a beneficiary under a trust established under the Texas Trust Code in which the trustee for the trust holds legal or record title to real property;
 - as a beneficiary under any other trust arrangement under which a trustee holds legal or record title to real property for the benefit of the person; or
 - under any other form of express fiduciary arrangement under which any other person holds legal or record title to real property for the benefit of the person.

The term "beneficial interest" does not include the interest of a shareholder in a corporation or the interest of a partner in either a general partnership or a limited partnership.

C.S.H.B. 4635 defines "trustee" as follows:

- a person acting as trustee under a trust established under the Texas Trust Code in which the trustee holds legal or record title to real property or a successor trustee to such a person; or
- a person who holds legal or record title to real property in which another person has a beneficial interest or a successor trustee to the title holder.

The term "trustee" does not include a person appointed or acting as a personal representative or appointed or acting as a trustee of a testamentary trust or as a trustee of an indenture of trust under which any bonds have been or are to be issued.

C.S.H.B. 4635 also provides definitions for "civil investigative demand," "documentary material," "money," and "product of discovery," among other terms.

Racketeering and Unlawful Debt Collection Offenses

C.S.H.B. 4635 amends the Penal Code to create the second degree felony offense for the use of proceeds derived from racketeering or unlawful debt collection for a person who intentionally uses or invests, whether directly or indirectly, any part of any proceeds knowingly derived, directly or indirectly, from a pattern of racketeering or through the collection of an unlawful debt, or the proceeds derived from the investment or use of those proceeds, in acquiring title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

C.S.H.B. 4635 creates the second degree felony offense for the acquisition of an interest in property or control of an enterprise through racketeering or unlawful debt collection for a person who, knowingly through a pattern of racketeering or through the collection of an unlawful debt, acquires or maintains, directly or indirectly, any interest in or control of any enterprise or real property.

C.S.H.B. 4635 creates the second degree felony offense of participation in an enterprise through racketeering or unlawful debt collection for a person who is employed by or associated with an enterprise and knowingly conducts or participates, directly or indirectly, in that enterprise through a pattern of racketeering or the collection of an unlawful debt.

C.S.H.B. 4635 authorizes a court, after a hearing, to impose a fine instead of an otherwise applicable fine, on a person convicted of any such offense created by the bill through which the person derived pecuniary value or by which the person caused personal injury, property damage, or other loss, capped at the following amounts:

- three times the gross value gained as a result of the offense or three times the gross loss caused as a result of the offense, whichever is greater; and
- the amount of the court costs and the reasonably incurred costs of investigation and prosecution.

C.S.H.B. 4635 lowers the minimum number of persons that constitutes a criminal street gang for purposes of provisions relating to organized crime offenses from three persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities to two such persons. The bill expands the conduct that constitutes the offense of engaging in organized criminal activity to include committing or conspiring to commit an offense of unlawful possession with intent to deliver a controlled substance or dangerous drug with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang. These provisions apply only to an offense committed on or after the bill's effective date. The bill provides for the continuation of the law in effect before the bill's effective date for purposes of an offense, or any element thereof, that occurred before that date.

C.S.H.B. 4635 amends the Code of Criminal Procedure to set the statute of limitations for an offense created by the bill at five years from the date of the commission of the offense. If the Office of the Attorney General (OAG) or a local prosecutor brings an action in the name of the state under the bill's provisions during that limitations period, the statute of limitations is suspended while the action is pending and the statute of limitations period is extended for two years.

Civil Remedies and Enforcement Related to Racketeering and Unlawful Debt Collection

General Provisions

C.S.H.B. 4635 amends the Civil Practice and Remedies Code to authorize the OAG or a local prosecutor to file with the clerk of the district court in which an action is brought under the bill's provisions a certificate stating that the case is of special public importance. The clerk must immediately furnish a copy of the certificate to the administrative judge of the district court of the county in which the action is pending. The bill requires the administrative judge, on receiving the copy of the certificate, to immediately designate a judge to hear and determine the action. The bill requires the designated judge to promptly assign the action for hearing, participate in hearings, make determinations, and cause the action to be expedited.

C.S.H.B. 4635 prohibits a remedy provided by the bill from being assessed against, and the OAG from claiming or pursuing in an action brought under the bill, any proceeds, contraband, or other property of any kind over which a law enforcement authority has previously asserted jurisdiction under statutory provisions governing the seizure and forfeiture of contraband at the time an action under the bill was filed.

The bill's provisions relating to civil remedies and enforcement related to racketeering and unlawful debt collection apply only to a cause of action that accrues on or after the bill's effective date.

Civil Investigative Authority

C.S.H.B. 4635 authorizes the OAG or a local prosecutor, if the OAG or local prosecutor has reason to believe that a person may be in possession, custody, or control of any documentary material or other evidence or may have any information relevant to a civil racketeering investigation, before beginning a civil proceeding under the bill, to issue in writing and serve on the person a civil investigative demand requiring the person to:

- produce any of the documentary material for inspection and copying;
- answer in writing any written interrogatories;
- give oral testimony; or
- provide any combination of civil investigative demands for such material, interrogatories, or testimony.

The bill defines "racketeering investigation" as any inquiry conducted by the OAG or a local prosecutor for the purpose of ascertaining whether any person is or has been engaged in or is actively preparing to engage in activities that may constitute a felony offense created by the bill.

C.S.H.B. 4635 sets out the required contents of each civil investigative demand and provides for service of the demand on either a natural person or any person other than a natural person and for proof of service. The bill provides the terms under which a person on whom a civil investigative demand for documentary material, for written interrogatories, or oral examination is served must comply, including producing documentary material or answering interrogatories under sworn certificate, and the OAG or local prosecutor must bear specified expenses. The bill authorizes any person compelled to appear under a demand for oral testimony to be accompanied, represented, and advised by counsel and authorizes counsel to advise the person in confidence, either on the request of the person or on the counsel's own initiative, with respect to any question arising in connection with the examination. The bill requires the individual conducting the examination to exclude from the place of examination all other persons except the person being examined, the person's counsel, the counsel of the person to whom the demand has been issued, the person before whom the testimony is to be taken, any stenographer taking the testimony, audiographer, videographer, and any person assisting the individual conducting the examination. The bill authorizes the person being examined or the person's counsel to object on the record to any question in accordance with the Texas Rules of Civil Procedure during the examination. The bill establishes the following with respect to objections during an oral examination:

- an objection may properly be made, received, and entered on the record when it is claimed that the person is entitled to refuse to answer the question on grounds of any constitutional or other privilege, including the privilege against self-incrimination; and
- neither that person nor the person's counsel may otherwise object to or refuse to answer any question or interrupt the oral examination.

If the person refuses to answer any question, the OAG or local prosecutor may petition the district court in the county where the examination is being conducted for an order compelling the person to answer the question. The bill requires the person before whom the testimony was taken, after the testimony has been fully transcribed, to promptly transmit the transcript of the testimony to the witness and a copy of the transcript to the OAG or local prosecutor. The witness must have a reasonable opportunity to examine the transcript and make any changes in form or substance accompanied by a statement of the reasons for the changes. The bill requires the witness to sign and return the transcript. The bill establishes that if the witness does not return the transcript to the person before whom the testimony was taken by a specified deadline, the witness may be deemed to have waived the right to make changes. The bill requires the applicable officer to certify on the transcript that the witness was duly sworn and promptly transmit a copy of the certified transcript to the OAG or local prosecutor. The bill requires the OAG and local prosecutor to furnish a copy of the certified transcript to the witness on the witness's request.

C.S.H.B. 4635 authorizes the person who has been served, or in the case of a demand for a product of discovery the person from whom the discovery was obtained, to file a petition for an order modifying or setting aside the demand in the district court in the county of the person's residence or principal office or place of business or a district court of Travis County. The petition may be filed at any time before the return date specified in a civil investigative demand or not later than the 30th day after the date the demand was served, whichever period is shorter. The petition must specify each ground upon which the petitioner relies in seeking the relief sought. The petition may be based on any failure of a demand to comply with the bill's provisions or on any constitutional or other legal right or privilege of the petitioner. The bill requires the petitioner to serve a copy of the petition on the OAG or local prosecutor, as applicable, in accordance with the bill's provisions relating to service and proof of service. The bill authorizes the OAG or local prosecutor to submit an answer to the petition. The bill requires the court, in ruling on the petition, to presume absent evidence to the contrary that the OAG or local prosecutor issued the demand in good faith and within the scope of the OAG's or local prosecutor's authority.

C.S.H.B. 4635 requires a person on whom a civil investigative demand is served to comply with the terms of the demand unless otherwise provided by court order. The bill establishes that the time for compliance with the demand wholly or partly does not run during the pendency of any petition filed to modify or set aside the demand, provided that the petitioner complies with any portions of the demand not sought to be modified or set aside. If a person fails to comply with a civil investigative demand duly served on the person, the OAG or local prosecutor may file in the district court in the county in which the person resides, is found, or transacts business or in a district court of Travis County and may serve on the person a petition for an order of the court for enforcement. If the person transacts business in more than one county and the OAG or local prosecutor elects not to file the petition in Travis County, the petition must be filed in the county of the person's principal office or place of business in Texas or in any other county as may be agreed on by the person and the OAG or local prosecutor.

C.S.H.B. 4635 creates a misdemeanor offense for a person who, with intent to avoid, evade, or prevent compliance with a civil investigative demand, knowingly removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material or otherwise provides inaccurate information. The bill makes the offense punishable by a fine capped at \$5,000, confinement in a county jail for not more than one year, or both a fine and confinement.

C.S.H.B. 4635 excepts the following from disclosure under state public information law and from disclosure, discovery, subpoena, or other means of legal compulsion:

- the civil investigative demand issued by the OAG or local prosecutor;
- any information obtained, maintained, or created in response to the demand; or
- any documentary material, product of discovery, or other record derived or created during an investigation from the information.

The bill prohibits the OAG or local prosecutor from releasing or disclosing information that is obtained in response to a demand or any documentary material, product of discovery, or other record derived from the information, unless the release or disclosure is:

- by court order for good cause shown;
- with the consent of the person who provided the information to the OAG or local prosecutor;
- to an employee or other person under the direction of the OAG or local prosecutor;
- to a state agency, an agency of the United States, or an agency of another state or foreign country;
- to a political subdivision of the state; or
- to a person authorized by the OAG or local prosecutor to receive the information.

The bill authorizes the OAG or local prosecutor to use information obtained in response to a demand, or any documentary material, product of discovery, or other record derived or created

from the information as the OAG or local prosecutor determines necessary in the enforcement of the bill's provisions, including presentation before court.

C.S.H.B. 4635 grants jurisdiction to any district court in which a petition is filed to hear and determine the matter presented and to enter any order required to implement the bill's provisions. The bill makes any final order subject to appeal and failure to comply with any final order punishable by the court as contempt of the order. The bill establishes that nothing in the bill's provisions regarding the civil remedies and enforcement related to racketeering and unlawful debt collection precludes the OAG or local prosecutor from using any procedure not specified in those provisions in conducting a racketeering investigation.

Civil Remedies

C.S.H.B. 4635 authorizes a district court, after making due provision for the rights of innocent persons, to enjoin conduct constituting a felony offense created by the bill, by issuing appropriate orders and judgments, including:

- ordering a defendant to divest of any interest in any enterprise, including real property;
- imposing reasonable restrictions on the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which the defendant was engaged in conduct constituting the offense;
- ordering the dissolution or reorganization of an enterprise;
- ordering the suspension or revocation of a license, permit, or approval previously granted to an enterprise by any state agency; or
- ordering the forfeiture of the charter of a corporation organized under the laws of this state, or the revocation of a certificate allowing a foreign corporation to conduct business within this state, on finding that:
 - the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct constituting the offense; and
 - for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked.

C.S.H.B. 4635 makes all property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct constituting a felony offense created by the bill subject to civil forfeiture to the state.

C.S.H.B. 4635 authorizes an investigative agency, on behalf of the state, to bring a civil action for forfeiture as follows:

- in the district court for the judicial district in which the real or personal tangible property is located;
- in a district court in Texas regarding intangible property; and
- in the county in which the real or personal tangible property was seized.

On entry of a final judgment of forfeiture in favor of the state, the title of the state to the forfeited property must relate back:

- in the case of real property or a beneficial interest:
 - to the date of filing of a RICO lien notice under the bill's provisions in the official records of the county where the real property or beneficial trust is located;
 - if no lien notice is filed, to the date of the filing of any notice of lis pendens under the bill's provisions in the official records of the county where the real property or beneficial interest is located; or
 - if no lien notice or notice of lis pendens is filed, to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located; or
- in the case of personal property, to the date the personal property was seized by the investigative agency.

The bill establishes that, for purposes of these provisions, a beneficial interest is considered to be located where real property owned by the trustee is located.

C.S.H.B. 4635 authorizes an investigative agency, on behalf of the state, if property subject to forfeiture is conveyed, alienated, disposed of, diminished in value, or otherwise rendered unavailable for forfeiture, to bring an action in any district court against the person named in the RICO lien notice or the defendant in the relevant civil action or criminal proceeding. If a civil action is pending, the action must be filed in the court where the civil action is pending. The bill requires the court in such an action brought to either:

- enter final judgment against the person named in the lien notice or the defendant in the relevant civil action or criminal proceeding in an amount equal to the following:
 - the fair market value of the property; and
 - the investigative costs and attorney fees incurred by the investigative agency in the action; or
- order the forfeiture of any other property of the defendant up to the value of the property subject to forfeiture.

C.S.H.B. 4635 requires the state to dispose of all forfeited property as soon as commercially feasible. If property is not exercisable or transferable for value by the state, the state may destroy or otherwise dispose of the property. The bill requires all forfeitures or dispositions under the bill's provisions to be made with due provision for the rights of innocent persons and requires the state to promptly distribute the proceeds realized from the forfeiture and disposition of property in accordance with the bill's provisions relating to disposition of funds obtained through forfeiture actions.

C.S.H.B. 4635 authorizes the seizure of property that is subject to forfeiture under the bill's provisions by a law enforcement officer on court process. The bill limits seizure without court process to the following circumstances:

- the seizure is incident to a lawful arrest or search conducted under a warrant issued under the law; or
- the property subject to seizure has been the subject of a previous judgment in favor of the state in a forfeiture action brought under the bill's provisions.

The bill requires an investigative agency to promptly commence a forfeiture action for a seizure conducted under these provisions.

C.S.H.B. 4635 excepts property taken or detained under the bill's provisions from replevin and establishes that the property is considered to be in the custody of the law enforcement officer making the seizure, subject only to the order of the court. The bill authorizes the officer, when property is seized, pending forfeiture and final disposition, to do the following:

- place the property under seal;
- remove the property to a place designated by a court; or
- require another agency authorized by law to take custody of the property and remove it to an appropriate location.

C.S.H.B. 4635 authorizes the OAG, a local prosecutor, or a state agency having jurisdiction over conduct constituting a felony offense created by the bill to institute a civil action under the bill's provisions but conditions the authority of the OAG or a state agency to institute an action for remedies or forfeiture on receiving the consent of the applicable local prosecutor. The bill requires the district court, in an action brought under the bill's provisions, to proceed as soon as practicable to the hearing and determination. The bill authorizes the court, pending final determination, to enter at any time injunctions, prohibitions, or restraining orders, or take actions, including the acceptance of satisfactory performance bonds, the court considers proper.

C.S.H.B. 4635 authorizes an aggrieved person to bring an action for civil remedies as authorized under the bill's provisions. The bill requires the court in the action to grant relief in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage

in other civil cases, except the bill expressly does not require a showing of special or irreparable damage to the aggrieved person. The bill authorizes the court, on the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, to issue a temporary restraining order and a preliminary injunction in the action before a final determination on the merits.

C.S.H.B. 4635 authorizes the OAG, on timely application, to intervene in a civil action brought by such an aggrieved person if the OAG certifies that, in the OAG's opinion, the action is of general public importance. The bill entitles the state to the same relief as if the OAG had instituted the action.

C.S.H.B. 4635 requires a prevailing claimant in an action under the bill's provisions other than the state or a political subdivision to have a right or claim to forfeited property or proceeds derived from the property superior to any right or claim the state or political subdivision has in the same property or proceeds. The bill establishes that a final judgment or decree rendered in favor of the state in a criminal proceeding under state law prevents the defendant from asserting in any subsequent civil action brought under the bill's provisions any matter as to which that judgment or decree would be an estoppel as between the parties.

C.S.H.B. 4635 authorizes the OAG to bring an action against a person who engages in conduct constituting a felony offense created by the bill to obtain the following:

- injunctive relief;
- a civil penalty; and
- reasonable attorney's fees and reasonably incurred costs of investigation or litigation.

A defendant in an action brought by the OAG is subject to a civil penalty capped at \$100,000 if the defendant is an individual or \$1 million if the defendant is not an individual. The bill requires the OAG to deposit the civil penalty to the credit of the general revenue fund and to deposit attorney's fees and costs into the OAG law enforcement account, which may be used to investigate and enforce the bill's provisions. The bill authorizes any party to an action brought by the OAG to petition the court for entry of a consent decree or for approval of a settlement agreement. The proposed decree or settlement must specify the alleged violations, the future obligations of the parties, the relief agreed on, and the reasons for entering into the consent decree or settlement agreement.

C.S.H.B. 4635 sets the statute of limitations for a civil action under the bill's provisions at not later than the fifth anniversary of the later of:

- the date the conduct that is the basis for the action terminates; or
- the date the cause of action accrues.

If an indictment for a felony offense created by the bill is presented or a civil action is brought or intervened in, for purposes of punishing, preventing, or restraining conduct constituting such an offense, the statute of limitations for a cause of action brought by an aggrieved person or the OAG that is wholly or partly based on a matter complained of in the indictment or pleadings, as in the action, as applicable, is suspended during the pendency of the prosecution or litigation of the action. Accordingly, the bill extends the statute of limitations period for the cause of action by two years following the termination of the action.

C.S.H.B. 4635 establishes that the application of one civil remedy under a provision of the bill does not preclude the application of any other remedy, civil or criminal, under the bill or any other law. The bill establishes that civil remedies under the bill's provisions are supplemental and not mutually exclusive.

Disposition of Funds Obtained Through Forfeiture Actions

C.S.H.B. 4635 establishes that a court entering a judgment of forfeiture in an action brought for civil remedies under the bill retains jurisdiction to direct the distribution of any cash or cash

proceeds realized from the forfeiture and disposition of the property. The bill requires the court to direct the distribution of the funds in the following order of priority:

- statutory fees to which the clerk of the court may be entitled;
- claims against the property by persons who have previously been judicially determined to be innocent persons and whose interests are preserved from forfeiture by the court and not otherwise satisfied; and
- claims for restitution by victims of the racketeering activity.

The bill establishes that a claim against the property by persons who have previously been judicially determined to be innocent persons may include a claim by a person appointed by the court as receiver pending litigation. With respect to the distribution of restitution, the bill sets out the following conditions:

- if the OAG brought the forfeiture action, restitution must be distributed through the compensation to victims of crime fund; or
- if the OAG did not bring the forfeiture action, restitution must be distributed by the clerk of the court.

C.S.H.B. 4635 provides for the deposit of the remaining money obtained in a forfeiture proceeding, following satisfaction of all valid claims as directed by the court, as follows:

- 25 percent into the appropriate trust fund of the OAG or applicable local prosecutor's office;
- 25 percent into the law enforcement trust fund of the applicable investigative agency; and
- 50 percent into the general revenue fund.

With respect to a forfeiture action filed by the OAG or a local prosecutor or the contributive efforts of multiple investigative agencies toward a forfeiture, the bill provides for the pro rata apportionment by the court of the money available among such agencies.

C.S.H.B. 4635 requires any money distributed to an investigative agency to be deposited in the applicable law enforcement fund or account established for that agency and expended for the purposes and in the manner authorized for that fund or account. The bill authorizes the use of any money distributed to an investigative agency or obtained by a district or county attorney in a forfeiture action filed by the attorney to pay the costs of investigations under the bill's provisions and the resulting criminal prosecutions and civil actions. The costs may include the following:

- all taxable costs;
- costs of protecting, maintaining, and forfeiting the property;
- employees' base salaries and compensation for overtime; and
- other costs that are directly attributable to the investigation, prosecution, or civil action.

C.S.H.B. 4635 provides for the deposit of any money obtained by the OAG in a forfeiture action filed by the OAG to an escrow account for satisfying judgments to a victim of a crime for damages. The money may be transferred to the compensation to victims of crime fund as authorized by state law.

C.S.H.B. 4635 establishes that the bill's provisions relating to the disposition of funds obtained through forfeiture actions may not be construed to limit the authority of an entity that files a forfeiture action under the bill's provisions to settle a claim for forfeiture. However, the bill requires any proceeds arising from a settlement or from the sale of property obtained in a settlement to be distributed under the bill's provisions relating to the disposition of funds. The bill authorizes a court, pending the final distribution of the cash or cash proceeds under such provisions, to authorize the cash or cash proceeds to be deposited in the court registry or in a qualified public depository.

RICO Liens

C.S.H.B 4635 amends the Property Code to authorize an investigative agency, on the institution of a civil action brought under the bill's provisions, then or at any time during the pendency of the action, to file a RICO lien notice in the official records of any one or more counties. The OAG must receive the consent of the applicable local prosecutor before filing a RICO lien. The bill prohibits a filing fee or other charge from being required as a condition for filing the RICO lien notice and requires the clerk of the district court, on the presentation of a RICO lien notice, to immediately record it in the official records.

C.S.H.B. 4635 authorizes the OAG or a local prosecutor, in addition to such an authorization to file a RICO lien notice, to apply ex parte to a district court and, on petition supported by sworn affidavit, obtain an order authorizing the filing of a RICO lien notice against real property on a showing of probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct constituting a felony offense created by the bill. If the RICO lien notice authorization is granted, the OAG or local prosecutor, after filing the notice, must immediately provide notice to the owner of the property as follows:

- by serving the notice in the manner provided by law for the service of process;
- by mailing the notice, postage prepaid, by certified mail to the owner at the owner's last known address and obtaining evidence of the delivery; or
- if service by either method cannot be accomplished, by posting the notice on the premises.

The bill authorizes the owner of the property to move the court to discharge the lien and requires that motion to be set for hearing at the earliest possible time.

C.S.H.B. 4635 requires the court to discharge the lien if the court finds that:

- there is no probable cause to believe that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct constituting an applicable offense; or
- the owner of the property neither knew nor reasonably should have known that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct constituting an applicable offense.

C.S.H.B. 4635 establishes that testimony presented by the property owner at the hearing is not admissible against the property owner in any criminal proceeding except in a criminal prosecution for perjury or false statement and does not constitute a waiver of the property owner's constitutional right against self-incrimination. The bill establishes that a RICO lien notice secured under the bill's provisions is valid for a period of 90 days from the date the court granted authorization and may be extended for an additional 90 days by the court for good cause shown. However, if a civil action is instituted for civil remedies under the bill, and a RICO lien notice is filed under the bill's provisions authorizing the notice, the term of the lien notice is governed by the provisions authorizing the notice. The bill establishes that the filing of a RICO lien notice, regardless of whether subsequently discharged or otherwise lifted, constitutes notice to the owner and knowledge by the owner that the property was used in the course of, intended for use in the course of, derived from, or realized through conduct constituting a felony offense created by the bill, such that lack of such notice and knowledge is not a defense in any subsequent civil action for civil remedies under the bill or a subsequent criminal proceeding under the felony offenses created by the bill.

C.S.H.B. 4635 provides for the required format of a RICO lien notice and requires notice to apply only to one person and, to the extent applicable, any other aliases, names, or fictitious names of that person, including the names of corporations, partnerships, or other entities, to the extent permitted by the bill's provisions. A separate notice must be filed for each person against whom the investigative agency desires to file a RICO lien notice under the bill's provisions. The bill requires an investigative agency, as soon as practicable after the filing of each RICO lien notice, to provide to the person named in the notice a copy of the recorded notice or a copy of

the notice that states each county in which the notice has been recorded. The bill establishes that the failure of the investigative agency to provide a copy of a RICO lien notice does not invalidate or otherwise affect the notice.

C.S.H.B. 4635 establishes that filing a RICO lien notice creates a lien in favor of the state from the time of its filing on the following property of the person named in the notice and against any other names set forth in the notice:

- any real property situated in the county where the notice is filed then or thereafter owned by the person or under any of the names; and
- any beneficial interest situated in the county where the notice is filed then or thereafter owned by the person or under any of the names.

The lien is required to commence and attach as of the time of filing of a RICO lien notice and continue thereafter until expiration, termination, or release of the notice under the bill's provisions. The bill establishes that the lien created in favor of the state is superior to the interest of any other person in the real property or beneficial interest if the interest is acquired subsequent to the filing of the notice. The bill establishes that, for purposes of the lien, a beneficial interest is considered to be located where real property owned by the trustee is located.

C.S.H.B. 4635 authorizes an investigative agency, in conjunction with a civil action for remedies brought under the bill's provisions, to file without prior court order in any county a notice of lis pendens. If the real property or beneficial interest is acquired subsequent to the filing of the notice of lis pendens, a person acquiring an interest in the subject real property or beneficial interest must take the interest subject to the civil action and any subsequent judgment of forfeiture. The bill authorizes an investigative agency, in conjunction with a civil action for civil remedies under the bill, if a RICO lien notice has been filed, to name as a defendant, in addition to the person named in the notice, any person acquiring an interest in the real property or beneficial interest subsequent to the filing of the notice. The bill makes the interest of any person in the property that was acquired subsequent to the filing of the notice, if a judgment of forfeiture is entered in the action in favor of the state, subject to the notice and judgment of forfeiture.

C.S.H.B. 4635 requires a trustee who acquires actual knowledge that a RICO lien notice or a civil action brought under the bill's provisions or criminal proceeding for a felony offense created by the bill has been filed against a person for whom the trustee holds legal or record title to real property to immediately furnish the following to the appropriate investigative agency:

- the name and address of the person, as known to the trustee;
- the name and address, as known to the trustee, of each other person for whose benefit the trustee holds title to the real property; and
- if requested by the investigative agency, a copy of the trust agreement or other instrument under which the trustee holds legal or record title to the real property.

The bill creates a Class B misdemeanor offense for a trustee who violates this requirement.

C.S.H.B. 4635 makes liable to the state a trustee who conveys title to real property for which, at the time of the conveyance, a RICO lien notice naming a person who, to the actual knowledge of the trustee, holds a beneficial interest in the trust has been filed in the county where the real property is situated for the greatest of the following:

- the amount of proceeds received directly by the person named in the notice as a result of the conveyance;
- the amount of proceeds received by the trustee as a result of the conveyance and distributed to the person named in the notice; or
- the fair market value of the interest of the person named in the notice in the real property conveyed.

If a trustee conveys the real property and holds the proceeds that would otherwise be paid or distributed to the beneficiary or at the direction of the beneficiary or the beneficiary's designee, the trustee's liability does not exceed the amount of the proceeds held for so long as the proceeds are held by the trustee. The bill authorizes an investigative agency to bring a civil action in any

district court against a trustee to recover the amount for which the trustee is liable and entitles an investigative agency to recover investigative costs and attorney's fees incurred by the agency.

C.S.H.B. 4635 establishes that the filing of a RICO lien notice does not do the following:

- constitute a lien on the record title to real property as owned by a trustee except to the extent that the trustee is named in the notice; or
- affect the use to which real property or a beneficial interest owned by the person named in the notice may be put or the right of the person to receive any avails, rents, or other proceeds resulting from the use and ownership, but not the sale, of the property until a judgment of forfeiture is entered.

C.S.H.B. 4635 establishes that its RICO liens provisions do not apply to a conveyance by a trustee under a court order, unless that court order is entered in an action between the trustee and the beneficiary. Those provisions also do not apply to the following conveyances, unless the trustee has actual knowledge that a person owning a beneficial interest in the trust is named in a RICO lien notice or is otherwise a defendant in a civil action brought under the bill's provisions:

- a conveyance by the trustee required under the terms of the trust agreement that is a matter of public record before the filing of the lien notice; or
- a conveyance by the trustee to all of the persons who own beneficial interests in the trust.

C.S.H.B. 4635 requires all forfeitures or dispositions under the bill's RICO liens provisions to be made with due provision for the rights of innocent persons.

C.S.H.B. 4635 provides for the expiration and renewal of a RICO lien notice filed under the bill's provisions and authorizes the investigative agency filing the notice to wholly or partly release the notice or release any specific real property or beneficial interest from the notice on the investigative agency's own terms. A release of the notice may be filed in the official records of any county. The bill prohibits a charge or fee may from being imposed for the filing of the release.

C.S.H.B. 4635 terminates a RICO lien notice and voids its filing under the following circumstances:

- a civil action has not been brought under the bill's provisions by an investigative agency seeking a forfeiture of any property owned by the person named in the notice; and
- the person named in the notice is acquitted in a criminal proceeding for a felony offense created by the bill or the proceeding for the offense is dismissed.

However, if the criminal proceeding has been dismissed or the person named in the notice has been acquitted, the notice continues for the duration of a civil action that is brought under the bill's provisions.

C.S.H.B. 4635 authorizes a person, if a civil action brought under the bill's provisions is not pending against a person named in a RICO lien notice, to bring an action in the county where a notice has been filed against the investigative agency that filed the notice seeking a release or extinguishment of the notice. The bill requires the court, on motion of the person named in the RICO lien notice, to immediately enter an order setting a date for hearing by a specified deadline and requires the order and a copy of the complaint to be served on the investigative agency by a specified deadline. The bill requires the court to take evidence at the hearing on the issue of whether any real property or beneficial interest owned by the person named in the RICO lien notice is covered by the notice or is otherwise subject to forfeiture under the bill's provisions. If the person named in the RICO lien notice shows at the hearing by a preponderance of the evidence that the notice is not applicable to the person or that any real property or beneficial interest owned by the person is not subject to forfeiture, the court is required to enter a judgment terminating the notice or releasing the real property or beneficial interest from the notice.

C.S.H.B. 4635 requires a court to immediately enter its order releasing from a RICO lien notice any specific real property or beneficial interest if a sale of that real property or beneficial interest is pending and the filing of the notice prevents the sale of the property or interest. Proceeds resulting from the sale of that real property or beneficial interest must be deposited into the registry of the court, subject to the further order of the court. The bill authorizes a court to release any real property or beneficial interest from the RICO lien notice, on the posting by the person named in the notice of security that is equal to the value of the real property or beneficial interest owned by the person. The bill authorizes a court, if a civil action brought under the bill's provisions is pending against a person named in a RICO lien notice, on the motion by the person, to grant relief as authorized by the bill.

EFFECTIVE DATE

September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 4635 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

While both the introduced and substitute define "racketeering" as committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit certain offenses, the substitute makes the following changes:

- omits trafficking of persons from the offenses;
- includes kidnapping and aggravated kidnapping among the offenses;
- includes operation of a stash house among the offenses; and
- includes public indecency among the offenses.

Whereas the introduced authorized an investigative agency that has reason to believe a person or enterprise has engaged in or is engaging in conduct constituting a felony offense created by the bill to administer oaths, subpoena witnesses or material, and collect evidence and included content requirements for such a subpoena, the substitute does not include this authorization or those related requirements. The substitute authorizes the OAG or a local prosecutor, if the OAG or local prosecutor has reason to believe that a person may be in possession, custody, or control of any documentary material or other evidence or may have any information relevant to a civil racketeering investigation, before beginning a civil proceeding, instead to issue and serve on the person a civil investigative demand. The substitute includes a provision not in the introduced for such a civil investigative demand to require a person to do the following:

- produce any of the documentary material for inspection and copying;
- answer in writing any written interrogatories;
- give oral testimony; or
- provide any combination of civil investigative demands for such material, interrogatories, or testimony.

The substitute includes the following provisions not in the introduced:

- provisions setting out the required contents of a civil investigative demand or petition;
- provisions regarding the service and proof of service of a civil investigative demand or petition;
- provisions regarding the expenses the OAG or local prosecutor must bear relating to a civil investigative demand; and
- provisions regarding the terms under which a person on whom a civil investigative demand for documentary material, for written interrogatories, or oral examination is served must comply, including providing information under sworn certificate or signing and returning a transcript of an oral examination.

With respect to a civil investigative demand for an oral examination, the substitute includes the following provisions, not in the introduced:

- an authorization for any person compelled to appear under a demand for oral testimony to be accompanied, represented, and advised by counsel and for counsel to advise the person in confidence with respect to any question arising in connection with the examination;
- a requirement for the individual conducting the examination to exclude from the place of examination all other persons except specified individuals;
- an authorization for a person being examined or the person's counsel to object on the record to any question in accordance with the Texas Rules of Civil Procedure during the examination;
- a requirement for the person before whom the testimony was taken, after the testimony has been fully transcribed, to promptly transmit the transcript of the testimony to the witness and a copy of the transcript to the OAG or local prosecutor;
- a requirement for a witness to have a reasonable opportunity to examine the transcript and make any changes in form or substance accompanied by a statement of the reasons for the changes and a provision relating to the waiver of the right to make changes; and
- a requirement for the OAG or local prosecutor to furnish a copy of the certified transcript to the witness on the witness's request.

The substitute does not include the following provisions from the introduced:

- the provision making a subpoena issued under the introduced version confidential until the 120th day after the date of issuance and prohibiting a person from disclosing the existence of the subpoena to any person other than the person's attorney during that period;
- provisions relating to a court order directing a subpoenaed person not to disclose the existence to any person other than the person's attorney;
- the authorization for a person who is subpoenaed to make a matter that an investigative agency seeks to obtain under the subpoena but is located outside Texas to make such matter available to an investigative agency or its representative; or
- the authorization for the investigative agency to designate representatives to inspect the matter on its behalf and respond to similar requests from officials of other jurisdictions.

The substitute includes an authorization not in the introduced for a person who has been served or a person from whom discovery was obtained to file a petition for modifying or setting aside a civil investigative demand and related provisions not in the introduced regarding the filing, contents, and service of the petition.

The substitute includes a requirement not in the introduced for a person on whom a civil investigative demand is served to comply with the terms of the demand unless otherwise provided by court order and a provision not in the introduced establishing that the time for compliance does not run during the pendency of any petition to modify or set aside the demand.

Whereas the introduced authorized an investigative agency to apply for a court order to compel compliance with a subpoena issued under the bill's provisions, the substitute authorizes the OAG or a local prosecutor to file a petition for a court order for enforcement of a civil investigative demand and serve the order on the person. Whereas the introduced restricted the venue to which the investigative agency may apply for the order to the district court in which the applicable civil action for the subpoena is pending, the substitute authorizes the OAG or local prosecutor to file the petition as follows:

- in the district court in the county in which the person resides, is found, or transacts business; or
- in a district court of Travis County.

The substitute includes a provision not in the introduced establishing that if the person transacts business in more than one county and the OAG or local prosecutor elects not to file the petition in Travis County, the petition must be filed in the county of the person's principal office or place of business in Texas or in any other county as may be agreed on by the person and the OAG or local prosecutor.

The substitute includes a provision that grants jurisdiction to any district in which a petition is filed to hear and determine the matter presented and to enter any order required to implement the bill's provisions. The substitute also includes a provision that makes any final order subject to appeal. Neither of these provisions appeared in the introduced.

The substitute includes a provision not in the introduced creating a misdemeanor offense punishable by a fine, confinement in a county jail, or both a fine and confinement for a person who, with intent to avoid, evade, or prevent compliance with a civil investigative demand, knowingly removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material or otherwise provides inaccurate information.

The substitute does not include the following provisions from the introduced:

- the prohibition against the use of testimony or material provided by an individual who complies with a court order and asserts a privilege against self-incrimination to which the individual is entitled by law against the individual in any criminal investigation or proceeding; and
- the authorization for an investigative agency to stipulate to protective orders with respect to documents and information submitted in response to a subpoena.

Whereas the introduced made confidential and excepted from disclosure under state public information law information held by an investigative agency related to an investigation of conduct constituting a felony offense created by the bill, the substitute makes the following confidential and excepted from disclosure under that law:

- a civil investigative demand issued under the substitute's provisions;
- any information obtained, maintained, or created in response to the demand; or
- any documentary material, product of discovery, or other record derived or created during an investigation from the information.

The substitute includes a provision that excepts such information from disclosure, discovery, subpoena, or other means of legal compulsion for release, which did not appear in the introduced.

Whereas the introduced authorized the disclosure of information held by an investigative agency related to an investigation of conduct constituting a felony offense created by the bill that is otherwise confidential and excepted from disclosure under state public information law to a governmental entity in the performance of its official duties or a court or tribunal, the substitute does not include this authorization. However, the substitute includes a prohibition against the OAG or local prosecutor releasing or disclosing information that is obtained in response to a civil investigative demand, unless the release or disclosure is:

- by court order for good cause shown;
- with the consent of the person who provided the information to the OAG or local prosecutor;
- to an employee or other person under the direction of the OAG or local prosecutor;
- to a state agency, an agency of the United States, or an agency of another state or foreign country;
- to a political subdivision of the state; or
- to a person authorized by the OAG or local prosecutor to receive the information.

The substitute does not include the provision in the introduced that established that information made confidential and excepted from disclosure under state public information law is no longer

confidential and exempt under that law once all applicable investigations are completed, unless otherwise protected by law. The substitute includes an authorization for the OAG or a local prosecutor to use information obtained in response to a demand, or any documentary material, product of discovery, or other record derived or created from the information as determined necessary in the enforcement of the bill's provisions, including presentation before court. This authorization did not appear in the introduced.

The substitute includes a provision not in the introduced establishing that nothing in the bill's provisions regarding civil remedies and enforcement related to racketeering and unlawful debt collection precludes the OAG or a local prosecutor from using any procedure not specified under the bill's provisions in conducting a racketeering investigation.

While both the introduced and substitute authorize an investigative agency to bring a civil action for forfeiture on behalf of the state in certain venues, the substitute includes among those venues the county in which real or personal tangible property used in the course of, intended for use in the course of, derived from, or realized through conduct constituting a felony offense created by the bill was seized. The introduced did not include such a county among the eligible venues.

Whereas the introduced authorized the OAG or an applicable state agency to institute any civil action under the bill's provisions, the substitute conditions the authorization for the OAG or state agency to institute an action for remedies or forfeiture on receiving the consent of the applicable local prosecutor. While both the introduced and substitute authorize a district attorney having jurisdiction over conduct constituting the felony offenses created by the bill to institute civil actions, the substitute also includes an authorization for a criminal district attorney or county attorney with felony criminal jurisdiction to institute such an action.

The substitute does not include the authorization from the introduced for the state, a state agency, or a political subdivision to bring an action against a person who engages in conduct constituting a felony offense created by the bill.

Whereas the introduced authorized an investigative agency to file a RICO lien notice on the institution of any civil action and at any time during the pendency of the action, the substitute makes the following changes:

- limits the authorization with respect to the institution of a civil action by an investigative agency for civil remedies brought under the bill's provisions; and
- conditions the authorization for the OAG, as an investigative agency, to file a RICO lien on receiving the consent of the applicable local prosecutor before filing the lien.

The substitute includes a definition of "money" by reference to the Penal Code for purposes of the bill's provisions regarding the offense of racketeering and unlawful debt collection and civil remedies and enforcement related to racketeering and unlawful debt collection. The introduced did not include this definition.