POLICING THE CORPORATE CITIZEN: ARGUMENTS FOR PROSECUTING ORGANIZATIONS

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ABSTRACT

Alaska's corporate criminal liability statute exposes organizations to criminal liability for the actions of their agents, as long as agents intended the organization to benefit from their actions. Organizations cannot disclaim liability through codes of conduct or corporate policies, and their liability extends beyond any merger, consolidation, or dissolution. This Article argues that criminally prosecuting an organization is advantageous because it allows greater criminal fines and carries collateral consequences. In addition, criminally prosecuting an organization may be easier than criminally prosecuting an individual because Fifth Amendment privileges and hearsay obstacles do not apply. Corporations accrue the knowledge of their agents, so proving specific intent may also be less difficult. Finally, this Article describes considerations that should be weighed when deciding whether to prosecute a particular organization. The author argues that Alaska's corporate criminal liability statute is a powerful tool that, where appropriate, should be used more often.

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The author wishes to thank James Fayette for the use of his prior writings on this topic and his suggestions for improvements, as well as Jeff David for his suggestions and editing contributions. In addition, he would like to thank Michael F. Heffron with the firm of Fitzgerald, Schorr, Barmettler & Brennan in Omaha, Nebraska for his advice at the outset of this project.

Any opinions that are expressed in this article are those of the author. This article is not an expression of the policy of the Criminal Division of the State of Alaska, Department of Law.

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INTRODUCTION

When charging cases, Alaska prosecutors too often overlook crucial potential defendants: the organizations[1]—corporations, companies, partnerships, and other entities—on whose behalf individual wrongdoers act. Alaska law casts a wide net for liability by making organizations liable for the criminal conduct of their agents,[2] and by authorizing larger criminal fines against convicted organizations than

1. The term "organization" is used throughout this article because, under Alaska criminal law, "organization" encompasses multiple entity types. ALASKA STAT. § 11.81.900(b)(43) (2006). Nevertheless, much of the case law and academic work on this topic is couched in terms of "corporations." For the purposes of this article, there is no distinction between these terms and they are used interchangeably.

2. *See* ALASKA STAT. § 11.16.130 (2006).

against convicted individuals.[3] These considerations beg the obvious question: why are organizations not investigated and prosecuted more frequently? The most likely explanation is that few prosecutors are aware of how far-reaching an organization's criminal liability extends. In addition, correctly or incorrectly, some prosecutors likely view the prosecution of an organization as an unwanted hassle—the prosecution would be different than their typical cases and may well involve high-paid corporate counsel unfamiliar with criminal practice.[4] Finally, some prosecutors might mistakenly believe that organizational prosecutions punish innocent shareholders rather than actual wrongdoers.[5] Thus, it has not been common practice in state prosecutor offices to charge organizations.[6]

The Author hopes this Article will change these views and encourage prosecutors to examine their caseloads for potential organizational defendants. There are significant benefits to be gained by charging organizations rather than individuals: courts will likely impose larger fines against organizations, prosecution of an organization may effect change within the organization, and negative publicity and other collateral consequences will pressure the organization to settle. Furthermore, should the case go to trial, the defense will not be able to protect organizations' records or utilize certain other evidentiary tools to hamstring the prosecution's presentation of evidence.

The aftermath of the 1989 *Exxon Valdez* oil spill provides a good illustration of why prosecuting an organization is often superior to prosecuting an individual wrongdoer. The 1989 grounding of the tanker *Exxon Valdez* spilled approximately eleven million gallons of crude oil into Prince William Sound.[7] Following the grounding, the State of Alaska prosecuted Joseph Hazelwood, the captain of the ill-fated vessel.[8] Hazelwood was convicted by a jury of negligent discharge of oil[9] but

3. *See* ALASKA STAT. § 12.55.035 (2006).

4. The court of appeal's recent decision in *State v. Greenpeace, Inc.*, 187 P.3d 499 (Alaska Ct. App. 2008), which is discussed *infra* Part II.A, will do little to dispel such trepidation.

5. *See* Spencer R. Fisher, *Corporate Criminal Liability*, 41 AM. CRIM. L. REV. 367, 368 (2004) (citations omitted).

6. The author is not aware of any statistics kept by the Department of Law that quantify how often organizations are charged with crimes. However, the department is small and, anecdotally, it is evident that prosecutors bring charges against organizations infrequently.

7. State v. Hazelwood, 836 P.2d 943, 944 (Alaska Ct. App. 1992), *aff'd in part, rev'd in part*, 866 P.2d 827 (Alaska 1993).

8. *See id.*

9. *See id.* at 945. The negligent discharge of oil is a misdemeanor. *Id.* at 944.

received only a conditionally suspended sentence.[10] Conversely, the United States prosecuted Exxon, ultimately resulting in a negotiated plea agreement and a combined criminal fine of one hundred million dollars.[11] The latter was a better use of prosecutorial resources and obtained a better result.[12]

It is particularly common for organizations to be defendants in several niche areas of Alaska criminal law. For example, Title 4 criminalizes various aspects of alcohol-related behavior.[13] Bush pilots who knowingly or negligently allow passengers to carry alcohol aboard their flights can expose their air carrier to criminal liability.[14] Titles 8 and 16 criminalize violations of the state's hunting and fishing laws and regulations.[15] Fishing guides who assist their clients by knowingly or negligently violating state fishing regulations expose their employers, such as lodges or guiding outfits, to criminal liability.[16]

These principles also apply to the more "traditional" crimes defined in Title 11 of the Alaska Criminal Code. One well-publicized example of such a prosecution was that of Whitewater Engineering Corporation.[17] Gary Stone, a Whitewater employee, was killed in an

10. *Id*. The court imposed ninety days of suspended jail time and a one thousand dollar suspended fine. Hazelwood was required to serve a one-year period of probation and complete one thousand hours of community work service. *Id*.

11. Press Release, Envtl. Prot. Agency, Exxon to Pay Record One Billion Dollars in Criminal Fines and Civil Damages in Connection with Alaskan Oil Spill (Mar. 13, 1991) (on file with author). The U.S. Department of Justice prosecuted both Exxon Corporation and Exxon Shipping Corporation. The plea agreements reached with these companies required Exxon Corporation to plead guilty to a misdemeanor violation of the Migratory Bird Treaty Act and Exxon Shipping Company to plead guilty to misdemeanor violations of the Clean Water Act, Refuse Act, and Migratory Bird Treaty Act. *Id*.

12. The author does not mean to criticize the choices made by either state or federal prosecutors in the *Exxon Valdez* matter. The author was not a party to those decisions but is confident those involved thoroughly and adequately debated the matter.

13. *See* ALASKA STAT. §§ 4.11.501, 16.205 (2006) (importation of alcohol to dry bush communities); ALASKA STAT. § 4.16.030 (2006) (sale of alcohol to already-intoxicated individuals); ALASKA STAT. §§ 4.16.051–.052 (2006) (sale of alcohol to people less than twenty-one years of age).

14. *See* ALASKA STAT. §§ 4.11.501, 4.16.205 (2006) (importation of alcohol to dry bush communities).

15. *See* ALASKA STAT. §§ 8.54.720, 16.40.290, 16.43.970 (2006).

16. *See* ALASKA STAT. §§ 16.40.290, 43.970 (2006).

17. *See* State v. Whitewater Eng'g Corp., No. 3AN-S00-5235CR (Alaska Super. Ct. indicted July 21, 2000); State v. Thom Fischer, No. 3AN-S00-6147CR (Alaska Super. Ct. indicted July 21, 2000).

avalanche at a Whitewater jobsite near Cordova.[18] Prosecutors charged the corporation and its president, Thom A. Fischer, with manslaughter because key employees failed to heed avalanche warnings and failed to observe necessary safety precautions.[19] Although charges against Fischer were ultimately dismissed, the company pled no contest to a charge of criminally negligent homicide.[20]

This Article examines criminal liability of organizations under Alaska law. Part I begins with the historical development of organizational criminal liability in the United States and Alaska. Part II covers the current contours of organizational criminal liability, as codified in the Alaska Statutes and interpreted by Alaska courts. Part III discusses the various consequences typically flowing from a conviction. Additionally, Part IV explores practical considerations for prosecutors, and Part V explores charging considerations for prosecutors who decide to file charges against an organization. Within these sections and in the Conclusion, this Article explains why it is advantageous to prosecute organizations as opposed to solely prosecuting the individual wrongdoers.

I. HISTORICAL UNDERPINNINGS

Courts were the first to recognize corporations as legal entities capable of suing and being sued.[21] Early decisions established that corporations could be sued in tort. In *Philadelphia, Wilmington and Baltimore R.R. Co. v. Quigley*,[22] the United States Supreme Court explained in detail the policy considerations that mandated this result.[23] Quigley sued the railroad for libel due to the conduct of one of its

18. Ashby Jones, *Pardons Received in Whitewater (No, Not That Whitewater)*, WALL ST. J., January 26, 2008, http://blogs.wsj.com/law/2007/01/26/pardons-received-in-whitewater-no-not-that-whitewater.

19. *Id.*

20. *See* State v. Whitewater Eng'g Corp., No. 3AN-S00-5235CR (Alaska Super. Ct. entered judgment Nov. 14, 2001). The *Whitewater* case was in the news again at the end of Governor Frank Murkowski's term in office. Governor Murkowski granted the corporation a pardon. *See* Megan Holland, *Company Off Hook Thanks to Pardon; Family Stunned: Man was killed in an avalanche near Cordova in 1999*, ANCHORAGE DAILY NEWS, Dec. 24, 2007, at A1.

21. *Cf.* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809); Louisville , Cincinnati, and Charleston R.R. Co. v. Leston, 43 U.S. (2 How.) 497 (1844) (recognizing that corporations can sue and be sued but holding that the court would look to the citizenship of the individuals who comprise the corporation to determine jurisdiction); N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) (providing a detailed discussion of the development of corporate liability, including criminal liability).

22. 62 U.S. 202 (1958).

23. *Id.* at 210.

employees. The company argued that a corporation could only act within the limits of its charter and therefore could not be held liable for any acts of its agents that exceeded those limits. The Court rejected this argument because it would allow corporations to do business and interact with the public while escaping liability when corporate agents, conducting corporate business, injure members of the public.[24] By the latter part of the nineteenth century, corporate tort liability was no longer in dispute and lawsuits against corporations were commonplace.[25] The law imputed tortious intent from the agent to the corporation, making the corporation liable for actual damages. The courts would not, however, impute the intent necessary to award punitive damages for any injuries absent a showing of wrongdoing by the corporation itself.[26]

Corporate criminal liability grew from these civil liability roots. Courts slowly acknowledged that corporations could be criminally liable for the conduct of their agents. For example, in *Commonwealth v. Proprietors of New Bedford Bridge*,[27] the Massachusetts Supreme Court upheld the indictment of a corporation for a public nuisance.[28] In 1899, the same court affirmed that corporations could be guilty of criminal contempt in *Telegram Newspaper Co. v. Commonwealth*.[29] Regarding corporate criminal liability, the court stated:

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24. *Id*. at 209–10 ("There is scarcely an object of general interest for which some association has not been formed . . . . The powers of the corporation are placed in the hands of a governing body selected by members, who manage its affairs, and who appoint agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives.").

25. *See* Reed v. Home Sav. Bank, 130 Mass. 443, 445 (Mass. 1881) ("The books of reports for a quarter of a century show that a very large proportion of actions of this nature, both for nonfeasance and for misfeasance, are against corporations.")

26. *See Quigley*, 62 U.S. at 213–14; Lakeshore & Michigan Ry. Co. v. Prentice, 147 U.S. 101, 116–17 (1893).

27. 68 Mass. (2 Gray) 339 (Mass. 1854).

28. *Id*. at 353 (upholding the indictment for constructing and maintaining a bridge obstructing navigation on the Acushnet River).

29. 52 N.E. 445, 446 (Mass. 1899). The contempt arose from a newspaper story about an ongoing civil case. Silas Loring had sued the town of Holden seeking compensation for a piece of land taken by the town during a railroad modification project. *Id*. The offending story included details about how much the town had offered Loring before the filing of the suit and how much money Loring demanded. Neither fact was admissible in the ongoing trial. *Id*. at 447. When the presiding judge learned of the story, he, on his own initiative, instituted the contempt proceeding, issued subpoenas for the corporations to

> We think that a corporation may be liable criminally for certain offenses, of which specific intent may be a necessary element. There is no more difficulty in imputing to a corporation specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings; but its property may be taken, either as compensation for a private wrong or as punishment for a public wrong.[30]

The United States Supreme Court affirmed the general principle of corporate criminal liability in *New York Central & Hudson River Railroad Co. v. United States*,[31] in which it upheld convictions of the railroad corporation for paying illegal rebates.[32] The Court applied the principles governing civil liability and held that the acts of agents are imputed to their employers, who may be penalized when the employees act within the scope of their employment.[33] Without expressly mentioning the legal concept of respondeat superior, the Court was using it to impute criminal liability to the corporation from the acts of its agents. Numerous Ninth Circuit cases have endorsed this principle.[34]

Courts in Alaska slowly recognized organizational criminal liability. The Alaska federal district court first addressed corporate criminal liability in *United States v. Alaska Packers' Ass'n*.[35] There, the court considered the defendant corporation's indictment for fishing violations. The corporation took the position that it could not be indicted for a felony because corporations cannot be imprisoned, a punishment for a felony.[36] The court disagreed, pointing out that a corporation may be fined just like an individual,[37] that such a penalty may be levied for

appear, and held the corporations in contempt when they appeared. *Id.* at 445–46.

30. *Id.* at 446. ("That a corporation may be indicted for a misfeasance as well as for a nonfeasance had been decided in this commonwealth.").

31. 212 U.S. 481 (1909).

32. *Id.* at 494. The corporations had paid illegal rebates to parties that had shipped sugar on the corporation's railway. *Id.* at 489–91.

33. *Id.* at 494.

34. *See* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004–07 (9th Cir. 1972), and cases cited therein. *See also* United States v. Miller, 676 F.2d 359, 362 (9th Cir. 1982) (holding knowledge and acts of company agents could be imputed to company and were sufficient to sustain criminal convictions against company); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979) (holding company liable for criminal acts of agent committed in scope of agent's employment).

35. 1 Alaska 217 (D. Alaska 1901).

36. *Id.* at 219.

37. *Id.*

acts which would result in imprisonment for individuals,[38] and that there was no reason a corporation should escape such punishment.[39] Essentially, the district court came to the same conclusion that the Massachusetts Supreme Court reached fifty years earlier in *Proprietors of New Bedford Bridge*[40]—criminal conduct and criminal intent can be imputed to an organization from its agents.[41]

The Alaska legislature codified organizational criminal liability in 1978 when it revised the state criminal code according to the recommendations of the Alaska Criminal Code Revision Commission.[42] The first version of section 11.16.130 of the Alaska Statutes proposed by the Commission was very limited.[43] The Commission extended criminal liability only to corporations and only in instances when the alleged offense was a violation, a misdemeanor, or otherwise defined so as to clearly indicate a legislative intent to impose criminal liability on a corporation.[44] The statute also applied to a company if the conduct was "engaged in, authorized, solicited, requested, commanded or knowingly tolerated by" the corporation's board of directors or a "high managerial agent."[45]

The Commission greatly expanded the scope of the preliminary draft in the course of its deliberations. Significantly, the Commission extended criminal liability to "organizations,"[46] and the definition of the

38. *Id*. at 222–23.

39. *Id*. at 223.

40. 68 Mass. (2 Gray) 339, 345–46 (1854) (holding that a corporation could be prosecuted for misfeasance and nonfeasance crimes committed by its agents if committed in the scope of the agent's employment and to benefit the corporation).

41. Interestingly, a Ninth Circuit court hearing an appeal on an Alaska case expressed some reservations about applying the theory of respondeat superior to impute criminal intent to a corporation. In *Empire Printing Co. v. Roden*, 247 F.2d 8 (9th Cir. 1957), a case concerning libel claims brought by the former territorial governor, treasurer and highway engineer against a Juneau newspaper, the court provided dicta on point. The court of appeals stated that the doctrine of respondeat superior does not generally apply to impose criminal liability because the requisite mens rea cannot be inferred through agency relationships. *Id*. at 17.

42. ALASKA CRIM. CODE REV. Introduction at 11–14 (Preliminary Report 1976). The Commission was made up of legislators, lawyers, judges, law enforcement officers, and correctional agency personnel. *Id.* at 11.

43. *See id*. at 115–16. The original version of the statute considered by the Criminal Code Revision Commission was based on OR. REV. STAT. § 161.170 (1971) and was similar to N.Y. PENAL LAW § 20.20 (1965) and MODEL PENAL CODE § 2.07 (1962). *Id*., Commentary at 1116 (Preliminary Report 1976).

44. *See id*.

45. *See id*.

46. ALASKA CRIM. CODE REV., Part 2 at 27–28 (Tentative Draft 1977). The Commentary explains this change: "[T]he considerations which support holding

term was nearly identical to the current definition of the term.[47] The Commission also changed the requirements for imposing liability under the first subparagraph to the disjunctive, thus imposing liability if the act was committed by the employee in the scope of his employment *or* to benefit the organization.[48] The legislature ultimately rejected this construction, however, and required that the act be committed both in the scope of the employment *and* to benefit the organization. The version of the statute ultimately passed by the legislature mirrors the current version of the statute.[49]

II. CURRENT CONTOURS OF ORGANIZATIONAL LIABILITY

An organization, once constituted, has a legal identity distinct from its owners, officers and directors.[50] It is, by statute, an artificial, legal "person."[51] As such, an organization may commit crimes and may be charged as a defendant in criminal cases.[52] The criminal liability of organizations is defined in section 11.16.130 of the Alaska Statutes:

> (a) Except as otherwise expressly provided, an organization is legally accountable for conduct constituting an offense if the conduct
>
> (1) is the conduct of its agent, and
>
> (A) within the scope of the agent's employment and in behalf of the organization; or
> (B) is solicited, subsequently ratified, or subsequently adopted by the organization; or
>
> (2) consists of an omission to discharge a specific duty of affirmative performance imposed on organizations by law.

corporations liable for crimes apply equally to organizations which happen to be unincorporated. This conclusion is embodied in the Proposed Federal Criminal Code § 402 and the Revised Arkansas Criminal Code § 41-402." *Id.* at 37.

47. *Id.* at 36. The definition did not include "government" in the list of included entities; the legislature added that term in 1982. H.C.S. C.S.S.B. 535, 12th Leg., 2d Sess. (Alaska 1982).

48. *See id.* (emphasis in original) (explaining the Commission's intent in making this change was to "expand the principle of respondeat superior on an organization" under either scenario).

49. S.C.S. C.S.H.B. 661, 10th Leg., 2d Sess. (Alaska 1978).

50. *See* State v. ABC Towing, 954 P.2d 575, 577 (Alaska Ct. App. 1998).

51. ALASKA STAT. § 01.10.060(a)(8) (2006) ("'[P]erson' includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.").

52. ALASKA STAT. § 11.16.130 (2006).

> (b) In this section "agent" means a director, officer, or employee of an organization or any other person who is authorized to act in behalf of the organization.

The Alaska Court of Appeals described the essence of this liability in *State v. ABC Towing*.[53] The decision contrasts the theories of organizational criminal liability, set forth in section 11.16.130 of the Alaska Statutes, with the better known theories of accomplice criminal liability, set forth in section 11.16.110 of the Alaska Statutes.[54] In drawing this comparison, the court of appeals noted organizations face broader criminal liability than individuals because organizations are liable for conduct of their agents that owners, members, officers or directors do not know about until after the fact.[55]

The kinds of entities subject to such liability are also defined by statute: "'[O]rganization' means a legal entity, including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, government, society, union, club, church, or any other group of persons organized for any purpose."[56] As such, organizations are broadly exposed to criminal liability for the acts of their agents. This poses an obvious problem for organizations, whose main purpose is to pool resources, maximize profit potential, and *limit* the liability of those individuals involved.[57] At cross purposes with this last principle, Alaska law imposes criminal liability in cases where individual conduct, when appropriately construed as corporate conduct, runs afoul of state criminal law.

Many critics question whether organizations should be prosecuted at all and argue that such prosecutions punish innocent shareholders rather than the actual wrongdoer. The Ninth Circuit provided a succinct rebuttal to that suggestion in *United States v. Hilton Hotels Corp*:

> Legal commentators have argued forcefully that it is inappropriate and ineffective to impose criminal liability upon

53. 954 P.2d 575 (Alaska Ct. App. 1998).
54. *See id.* at 576–77.
55. *See id.*
56. ALASKA STAT. § 11.81.900(b)(43) (2006). The definition does not include "sole proprietorship." The court of appeals interprets this omission to mean the legislature did not intend to expose such entities to criminal liability in their own right. To the contrary, a sole proprietorship is the alter ego of the sole proprietor and therefore any charges must be alleged against the sole proprietor in his or her individual capacity. *ABC Towing*, 954 P.2d at 577–78.
57. 1 WILLIAM MEAD FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 1–5 (rev. vol. 2006). The common law fostered this purpose; it did not expose organizations to criminal liability. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492–93 (1909).

> a corporation, as distinguished from the human agents who actually perform the unlawful acts . . . particularly if the acts of the agents are unauthorized. . . . But it is the legislative judgment that controls, and "the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate a regulatory policy."[58]

The crux of the argument is that organizational criminal liability prompts organizations to more rigorously police their agents. Regardless of whether this is true, the existence of corporate and, more generally, organizational criminal liability is beyond debate.[59]

A. Alaska Jurisprudence

Most examples of organizational criminal liability in Alaska occur under section 11.16.130(a)(1)(A) of the Alaska Statutes—conduct of an agent that is done in the scope of the agent's employment and on behalf of the organization.[60]

The Alaska appellate courts have discussed the substance of organizational criminal liability only twice.[61] In *State v. ABC Towing*,[62] the court of appeals was called on to determine whether a towing company, formed as a sole proprietorship, could be prosecuted for violating a state pollution law, based on an employee's illegal discharge of gasoline. The issue for the court was whether a sole proprietorship is an "organization" as defined in section 11.81.900 of the Alaska Statutes.[63] The court held that it was not, because a sole proprietorship is the mere alter ego of the sole proprietor.[64] In other words, there is no legal

58. 467 F.2d 1000, 1006 (9th Cir. 1972) (internal citations omitted), *cert. denied*, 409 U.S. 1125 (1973). The court continued: "Moreover, the strenuous efforts of corporate defendants to avoid conviction, particularly under the Sherman Act, strongly suggests that Congress is justified in its judgment that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent violations by employees." *Id.*

59. *See* Steere Tank Lines, Inc. v. United States, 330 F.2d 719, 721 (5th Cir. 1963) ("It is now beyond doubt that a corporation may be held criminally liable.").

60. That this is the most typical mode of organizational criminal liability is not surprising. Most organizations, do not typically solicit, ratify, adopt criminal conduct, or fail to do something required by law. ALASKA STAT. § 11.16.130(a)(1)(B)–(a)(2) (2006).

61. It was briefly commented on in a third case, *Stock v. State*, 526 P.2d 3 (Alaska 1974).

62. 954 P.2d 575 (Alaska Ct. App. 1998).

63. *Id.* at 579.

64. *Id.* at 577–78.

distinction between the sole proprietor and the proprietorship; to prosecute the proprietorship, the state must charge the proprietor.[65]

The court of appeals provided more recent guidance in *State v. Greenpeace, Inc.*[66] The State prosecuted and convicted Greenpeace, Inc. for bringing a Greenpeace ship, the *M/V Arctic Sunrise*, into state waters without a state-approved oil spill contingency plan or a certificate of financial responsibility.[67] Following the jury's guilty verdicts against the corporation, the district court granted a defense motion for acquittal and set the convictions aside.[68] The court of appeals affirmed the district court based on findings that Greenpeace, Inc., a United States corporation, was not in charge of the ship and did not control its operators.[69] According to the court, the prosecution charged the wrong parties.[70] The case involved Stichting Phoenix,[71] a Dutch foundation that owned the *Arctic Sunrise*, and Stichting Marine Services (SMS), a second Dutch foundation that operated it.[72] SMS chartered the ship to Greenpeace International, a third Dutch entity, that owns the name "Greenpeace."[73] Greenpeace International licenses this name to independent environmental organizations around the world including Greenpeace, Inc. in the United States.[74] In 2004, Greenpeace International agreed to let Greenpeace, Inc. use the *Arctic Sunrise* for an anti-logging campaign.[75] SMS supplied the crew and was also responsible for making sure the ship complied with all local regulatory requirements.[76] The prosecution argued that SMS and the *Arctic Sunrise*

65. Further discussion regarding this holding is beyond the scope of this article. However, the author takes issue with the court's reasoning because it needlessly insulates sole proprietorships from criminal liability where one of its agents commits a wrong in furtherance of a business enterprise. The legislature should fix this omission by amending the "organization" definition to specifically include sole proprietorships. *See supra* note 60 and accompanying text.

66. 187 P.3d 499 (Alaska Ct. App. 2008).

67. *Id.* at 500.

68. *Id.*

69. *Id.* at 503–11. The district court also granted a motion for acquittal propounded by the captain of the *Arctic Sunrise* who had also been convicted. *Id.* The court of appeals affirmed as to the first count but reversed as to the second. *Id.*

70. *Id.* at 505.

71. "Stichting" is the Dutch word for "foundation." *Id.* at 500.

72. *Id.* at 501.

73. *Id.* at 504.

74. *Id.*

75. *Id.*

76. *Id.* at 505.

captain were agents of Greenpeace, Inc. and, therefore, Greenpeace, Inc. was liable for the criminal conduct.[77] The court of appeals disagreed:

> A person or organization does not qualify as the authorized agent of a principal unless the principal controls or has the right to control the purported agent. The State offered no evidence that Greenpeace, Inc., controlled how (or if) SMS or [the captain] operated the *Arctic Sunrise* or complied with Alaska's requirements for nontank vessels.[78]

The prosecution also argued that Greenpeace, Inc. ratified or adopted the criminal conduct of SMS and the *Arctic Sunrise* and was therefore liable for their conduct.[79] Again, the court of appeals disagreed. The court held that adoption or ratification requires the principal's "awareness of the misconduct and some action to ratify or adopt the misconduct."[80] It found that the prosecution had not produced any evidence Greenpeace, Inc. knew of the illegal conduct or took any actions to ratify or adopt that conduct.[81]

Though the court does not explicitly say, its decision suggests that SMS, or arguably Greenpeace International, was the proper defendant.[82] This holding nevertheless begs the question of whether Alaska could effectively prosecute either of these foreign entities in state court. Service of process on these entities would be problematic,[83] and even if service were achieved, the entities would likely argue that the Alaska state

77. *See id*. at 504. The State further argued that Greenpeace, Inc., Greenpeace International, and SMS were all the same organization but were constructed as separate entities as part of a "shell game" to avoid liability. The court disagreed with this argument as well. *Id*.

78. *Id*. at 505.

79. *See id.* at 505–06; *see also* ALASKA STAT. § 11.16.130(a)(1)(B) (2006).

80. *Id*. at 506.

81. *Id*. This was a somewhat curious conclusion considering the fact that Greenpeace, Inc.'s chief financial officer was on board the *Arctic Sunrise* at the time of the infractions.

82. *See id*. ("It was SMS, not Greenpeace, Inc., that hired and paid for the ship's agent in Portland. . . . [I]t was SMS's obligation to comply with regulatory requirements for the vessel.").

83. *See* ALASKA CRIM. R. 4(c)(2) (making service difficult by limiting the service of a summons to places "within the jurisdiction of the State of Alaska"); *see also* ALASKA STAT. § 10.06.763 (2006) (service on foreign corporations); ALASKA STAT. § 10.20.046 (2006) (service on not-for-profit corporations); ALASKA STAT. §10.40.130 (2006) (service on religious corporations); and ALASKA STAT. § 10.50.065 (2006) (service on limited liability companies). *But see* ALASKA STAT. §§ 10.06.175(b), 06.765 (2006) (allowing the Alaska Commissioner of Commerce, Community and Economic Development to be served if a corporation fails to appoint or maintain a registered agent in the state).

courts lack personal jurisdiction over them.[84] Finally, it is difficult to imagine how the state could effectively enforce any sentence ultimately imposed by its courts.

Collectively, *ABC Towing* and *Greenpeace, Inc.* confirm the existence of organizational criminal liability under state law. These decisions do little, however, to define the contours and limitations of that liability and, in fact, highlight problems with the existing laws. *ABC Towing* carves out an exemption for sole proprietorships.[85] *Greenpeace* is also problematic in that it illustrates the ease with which organizations might compartmentalize their operations or duplicate themselves and thereby thwart criminal prosecution.[86] These are shortcomings legislators need to address if the prosecution of organizations is to be effectively and consistently utilized.

Given the paucity of pertinent Alaska jurisprudence regarding organizational criminal liability, Alaska courts would likely rely on relevant federal authority.[87] Federal cases frequently acknowledge that a

84. In fact, Alaska's jurisdiction is quite broad. Under section 44.03.010 of the Alaska Statutes, state territorial jurisdiction extends to waters offshore and encompasses the "high seas" to the extent the United States exercises its jurisdiction. The Alaska Supreme Court has interpreted this provision broadly to include all ocean waters seaward of the Alaska coast. *See* State v. Jack, 125 P.3d 311, 315–16 (Alaska 2005) (allowing defendant to be prosecuted in Alaska for sexual assault that took place onboard an Alaska Marine Highway ferry while in Canadian waters during a voyage between Alaska and Washington). Arguably, both entities would have sufficient contacts with the State of Alaska, based on the sailing and operation of the *Arctic Sunrise* in Alaska waters, to make them subject to the personal jurisdiction of a state court. *See* Int'l Shoe Co. v. Wash., 326 U.S. 310, 317–19 (1945) (holding contacts exist when the in-state activities of the corporation give rise to the liabilities at issue, or the corporation fails to satisfy obligations that exist due to its in-state activities); Kuk v. Nalley, 166 P.3d 47, 51 (Alaska 2007) (explaining that *International Shoe* and its progeny significantly broadened the understanding of personal jurisdiction).

85. *See* 954 P.2d 575, 577–79 (Alaska Ct. App. 1998). The *ABC Towing* decision is unsatisfying. *Id.* The court of appeals favorably compared sole proprietorships and partnerships—both are the alter egos of the proprietor or partners, both exist solely to carry out the business purpose for which they were created, and both are not common law "legal entities." *Id.* Nevertheless, the court interprets the definition of "organization" in a way that treats the two entities differently, i.e., partnerships can be prosecuted, sole proprietorships cannot. *Id*. The ruling is defensible from a statutory construction standpoint, but it is unsatisfactory from a public policy standpoint. The same policy arguments that support the prosecution of partnerships for criminal offenses apply to sole proprietorships. *See id.* There is no reason these entities should be treated differently.

86. *See supra* notes 63–81 and accompanying text.

87. *See* State v. Lee, 999 P.2d 755, 761 (Alaska 2000) (noting Alaska courts use federal Sherman Act cases to construe Alaska antitrust law); State v. Abbott, 498 P.2d 712, 717 (Alaska 1972) (holding where no Alaska cases are on point, court may rely on federal cases that discuss a similarly worded federal statute);

corporation can act only through its officers, agents, and employees.[88] Courts therefore hold that a corporation may be liable for the acts of its officers, employees, and other agents even though the questioned act may be illegal, contrary to specific company policy, or not expressly authorized beforehand by the corporation.[89]

B. Existence of Organization Policies Prohibiting the Criminal Conduct and the Requisite Quantum of Benefit

Federal cases hold that an organization may be found guilty of a criminal offense as long as the employee was motivated, at least in part, to benefit the organization.[90] It follows that organizations often attempt to absolve themselves of liability by relying on corporate policies that preclude criminal conduct. These attempts have generally been unsuccessful. The Ninth Circuit addressed such an effort in the context of Sherman Act prosecutions.[91] In *Hilton Hotels Corp.*,[92] charges were premised on proof that the hotel's purchasing agent threatened a supplier with the loss of the hotel's business unless the supplier paid an assessment to a trade association of which the hotel was a member.[93] Hotel personnel testified that company policy required purchasing

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Langfeldt-Haaland v. Saupe Enter., Inc., 768 P.2d 1144, 1147 (Alaska 1989) (Moore, J., dissenting) (noting Alaska courts rely on interpretations of federal rules when interpreting a similarly worded Alaska rule).

88. *See, e.g.*, Braswell v. United States, 487 U.S. 99, 110 (1988) (citing Bellis v. United States, 417 U.S. 85, 90 (1974)).

89. Meyer v. Holley, 537 U.S. 280, 285 (2003); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998); *see also* N.Y. Cent. & Hudson R.R. v. United States, 212 U.S. 481, 494 (1909) ("[A] corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act.").

90. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 892–93 (D.D.C. 2006) ("[I]f a corporate agent exercises the authority conferred upon him and performs an act within the course of his employment, the corporation is liable—even if the act was unlawful or was done contrary to instructions or policies, as long as the agent acted with an intent to benefit the corporation."); United States v. Cincotta, 689 F.2d 238, 241–42 (1st Cir. 1982) ("[C]riminal liability may be imposed on the corporation only where the agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation.").

91. United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); *see also* Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809); Louisville, Cincinnati & Charleston R.R. Co. v. Leston, 43 U.S. (2 How.) 497 (1844).

92. 467 F.2d 1000 (9th Cir. 1972).

93. *Id.* at 1002.

supplies solely on the basis of price, quality, and service, and they had specifically instructed the purchasing agent not to boycott suppliers.[94] The Ninth Circuit held that the hotel could not insulate itself from criminal liability by adopting general instructions not to participate in a boycott if it did not take sufficient actions to enforce those instructions.[95] The fact remained that the hotel authorized a purchasing agent to act on its behalf and the agent exercised complete authority as to those responsibilities and, pursuant to that authority, added the hotel's buying power to the force of the boycott. [96] Other circuits have taken a similar position when employees act contrary to company policy.[97]

An important corollary is that courts generally permit defendants to admit evidence of corporate policies or instructions that forbid the conduct at issue to support an argument that an agent was acting outside the scope of employment or to the principal's detriment. The Ninth Circuit summarized this view:

> [A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but that the

94. *Id.* at 1005.

95. *Id.* at 1007 (affirming trial court's ruling excluding a jury instruction that precluded criminal liability where the employee's acts were unauthorized by the corporation).

96. *Id.* ("The purchasing agent was authorized to buy all of appellant's supplies. Purchases were made on the basis of specifications, but the purchasing agent exercised complete authority as to the source. He was in a unique position to add the corporation's buying power to the force of the boycott. Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks.").

97. In *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006), the First Circuit squarely rejected an argument that a corporation might fend off liability by adopting abstract rules that no agent can make an unlawful price-fixing contract or that no driver may exceed the speed limit. *Id.* at 25–26 (citing United States v. Automated Med. Labs., Inc., 770 F.2d 399, 406 & n. 5 (4th Cir. 1985)). Thus, a corporation may be charged and convicted, even if there is a specific company directive forbidding the questioned acts. The court explained that this is simply an extension of familiar agency law principles: the principal is held liable for acts done on its account by an agent which are customarily actions the agent is authorized to perform. *Potter*, 463 F.3d at 26 (citing H. Reuschlein & Gregory, THE LAW OF AGENCY AND PARTNERSHIP 167 (1990) (footnote omitted)).

The Fourth Circuit adopted very similar reasoning in *United States v. Basic Constr. Co.*, wherein it rejected a corporation's attempt to insulate itself from liability using evidence that the corporation had expressly forbidden the conduct at issue. 711 F.2d 570, 573 (4th Cir. 1983), *cert. denied*, 464 U.S. 956 (1983).

The *Restatement (Second) of Agency* explains the general rule these decisions expound by way of an illustration: P directs the salesman in selling guns, never to insert a cartridge while exhibiting a gun. A, a salesman, does so, and negligently harms a bystander. Notwithstanding P's instructions otherwise, the salesman's act is within the scope of employment. *Restatement (Second) of Agency* § 230, illus. 1 (1958) (forbidden acts).

> existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation. Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment. It is a question of fact whether measures taken to enforce corporate policy in this area will adequately insulate the corporation against such acts . . . [98]

Other courts have reached similar rulings.[99]

It is not necessary that the organization actually accrue a benefit from the agent's actions for criminal liability to attach. In *Beusch*,[100] the Ninth Circuit rejected a corporation's argument that it could not be liable if the criminal conduct did not in fact benefit the corporation.[101] The Fourth Circuit's decision in *United States v. Automated Medical Laboratories, Inc.*[102] is frequently cited on this point—the court affirmed a jury's conviction of American Medical Laboratories for falsifying logbooks and records required to be maintained by the Federal Drug Administration.[103] In *Automated Medical Laboratories*, the court held that benefit was an evidential fact, stating:

> [W]hether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.[104]

98. United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979).

99. *See, e.g., Basic Constr. Co.*, 711 F.2d at 572–73 (allowing a jury to consider a company's antitrust compliance policy in the prosecution of the company for Sherman Act antitrust violations by its employees who rigged bidding on state road paving contracts); *Potter*, 463 F.3d at 26 (allowing a jury to consider a company president's specific instructions to a subordinate not to make illegal payments in considering fraud charges against company who bribed a state representative).

100. 596 F.2d at 877.

101. *Id.*; *see also* Liu v. Republic of China, 892 F.2d 1419, 1428–29 (9th Cir. 1989) (having purpose to benefit the principal is required, rather than actual benefit, if agent's actions are to be imputed to the principal).

102. 770 F.2d 399 (4th Cir. 1985).

103. *Id.* at 407–08.

104. *Id.* at 407 (emphasis in original; internal citations omitted).

These cases collectively illustrate that whether the agent's conduct benefits the organization is a question of fact for the jury. The cases also demonstrate that appellate courts will let convictions stand so long as there is some evidence that the organization gained some benefit. In comparison, criminal conduct by an agent falling outside the scope of employment will not be imputed to the organization where the conduct solely benefits the agent. Such was the case in *Standard Oil Co. of Texas v. United States*,[105] in which the Fifth Circuit reversed convictions against two corporate defendants because the criminal acts by the employees, while benefiting themselves, actually injured the corporation.[106]

Alaska cases contemplating the application of respondeat superior liability in the context of tort claims have echoed the holding of *Standard Oil*. Notable among these are *Taranto v. North Slope Borough*,[107] *Northern Fabrication Co., Inc. v. Arco, Inc.*,[108] and *Ondrusek v. Murphy*.[109] All three cases apply the Restatement (Second) of Agency section 228 criteria to determine whether an agent acted in the scope of his employment. Pursuant to section 228, conduct is only in the scope of employment if—among other requirements—it is done at least in part to serve the employer. Thus, in *Northern Fabrication Co., Inc.*, the Alaska Supreme Court reversed the trial court's grant of summary judgment in favor of the defendant corporations and held that the corporations could only negate the plaintiff's claim of vicarious liability for the theft of equipment by the defendants' employees if the corporations could prove they did not control the employees' actions and the employees acted solely in furtherance of their own personal motives.[110]

These cases demonstrate that an organization cannot insulate itself from liability with general policies or guidance that forbid the conduct at issue. However, an organization can use policies or guidance in an effort to convince a jury that the organization took sufficient action to prevent the wrongful conduct and should not be liable for the actions of an agent. Moreover, the organization will not be liable for conduct that an agent takes solely for his or her own benefit, or that is inimical to the organization's interests.

105. 307 F.2d 120 (5th Cir. 1962).
106. *Id*. at 129. The employees falsified documents related to shipments of oil through a pipeline. The employees personally profited by this deceit, but their employer, the owner of the oil, lost money. *Id*.
107. 909 P.2d 354 (Alaska 1996).
108. No. S-8368, 1999 WL 33958767 (Alaska Jan. 27, 1999).
109. 120 P.3d 1053 (Alaska 2005).
110. 1999 WL 33958767, at *2 (citing Los Ranchitos v. Tierra Grande, Inc., 861 P.2d 263 (N.M. App. 1993)).

C. Collective Corporate Knowledge

For a time, specific intent crimes that require proof of knowing or intentional conduct were difficult to apply against large or diverse organizations. Organizations tend to compartmentalize their operations and decision-making between different units or divisions. Therefore the requisite mens rea or conduct is often not present in any one individual, making imputing mens rea to the organization difficult. Many courts have resolved this problem through the collective corporate knowledge theory best described by the First Circuit in *United States v. Bank of New England*.[111]

> The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this. . . . Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . .[112]

This line of reasoning enables prosecutors to impute the summed knowledge of various employees to the organization as a whole.[113]

111. 821 F.2d 844 (1st Cir. 1987).

112. *Id*. at 856 (internal citations omitted) (quoting United States v. T.I.M.E.-D.C., Inc., 381 F.Supp. 730, 738 (W.D. W. Va. 1974) ("[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.")).

113. *See* Riss & Co. v. United States, 262 F.2d 245, 250 (8th Cir. 1958); Inland Freight Lines v. United States, 191 F.2d 313, 315 (10th Cir. 1951); Camacho v. Bowling, 562 F. Supp. 1012, 1025 (N.D. Ill. 1983); United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738–39 (W.D. W. Va. 1974); United States v. Sawyer Transp., Inc., 337 F. Supp. 29 (D. Minn. 1971), *aff'd*, 463 F.2d 175 (8th Cir. 1972); People v. Am. Med. Ctrs. of Mich., Ltd., 324 N.W.2d 782, 793 (Mich. Ct. App. 1982); State v. Zeta Chi Fraternity, 696 A.2d 530, 535 (N.H. 1997). The author is unaware of any similar Alaska or Ninth Circuit cases.

D. Effect of Merger, Consolidation, and Dissolution

Any liability imputed to an organization will generally survive the organization's merger, consolidation, or dissolution. The common law analogized the dissolution of an organization (either directly, or by merger or consolidation) to the death of a natural person,[114] meaning that dissolved, merged, or consolidated organizations could not be prosecuted.[115]

State statutes that continue the legal existence of these entities have eroded this common law principle. It is now generally true that organizations can be prosecuted (or sued civilly) following their dissolution, merger or consolidation. In *Melrose Distillers, Inc. v. United States*,[116] the United States Supreme Court discussed this abrogation of the common law. Prosecutors indicted three related corporations for violations of the Sherman Act.[117] While the indictments were pending, the corporations dissolved and became new divisions in a single, separate corporation.[118] The district court and court of appeals held that the dissolution of the original corporations did not abate the indictments.[119] The Supreme Court affirmed, looking to both Maryland and Delaware law and finding that the states had statutes "saving" claims against dissolved corporations.[120] The Court interpreted these statutes to include criminal charges under the Sherman Act.[121] Other courts have come to the same conclusion respecting corporations and partnerships organized under the laws of other states.[122]

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114. H. Lowell Brown, *Successor Corporate Criminal Liability: The Emerging Federal Common Law*, 49 ARK. L. REV. 469, 471 (1996) (citing Okla. Natural Gas Co. v. Okla., 273 U.S. 257, 259 (1927)).

115. *Id*.

116. 359 U.S. 271 (1959).

117. *Id*. at 271.

118. *Id*. at 272–73.

119. *Id*. at 272.

120. *See id*. at 272–74. The applicable Maryland statute provided that dissolution did not "'abate any pending suit or proceeding by or against the corporation.'" *Id*. at 273 (citing Flack's MD. CODE ANN., art. 23, § 78(a) (1951)). The applicable Delaware statute provided that "any 'proceeding' begun by or against a corporation before or within three years after dissolution shall continue 'until any judgments, orders, or decrees therein shall be fully executed.'" *Id*. (citing DEL. CODE ANN. tit. 8, § 278 (1953)).

121. *Id*. at 273–74.

122. *See*, *e.g*., United States v. Mobile Materials, Inc., 776 F.2d 1476, 1479–80 (10th Cir. 1985) (holding Sherman Act and mail fraud prosecutions of Oklahoma corporation and partnership, both of which dissolved prior to their indictments, did not abate under Oklahoma statutory law); United States v. Polizzi, 500 F.2d 856, 906–09 (9th Cir. 1974) (Duniway, J., concurring) (noting that criminal charges against surviving corporation of a merger, formed when a former New

There is no analogous holding in Alaska case law. The closest case on point, *Gossman v. Greatland Directional Drilling, Inc.*,[123] discusses the viability of civil claims brought against a dissolved corporation for negligent conduct during the corporation's existence.[124] Greatland dissolved in 1993 following the purchase of its assets by Anadrill, a distinct corporation.[125] In 1995, plaintiff Gossman was injured while working for Anadrill at one of the facilities Anadrill purchased from Greatland.[126] The injury was caused by a piece of equipment that had been negligently modified by a Greatland employee years before the corporation's dissolution.[127] In 1996, Gossman filed negligence claims against Greatland.[128] The Alaska Supreme Court looked to section 10.06.678 of the Alaska Statutes—a survival statute for claims against corporations—to determine whether any provision abrogated the common law abatement theory.[129] At the time (and currently), section 10.06.678, in pertinent part, provided:

> (a) A corporation that is dissolved voluntarily or involuntarily continues to exist for the purpose of winding up its affairs, defending actions against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and divide its assets. A dissolved corporation does not continue to exist for the purpose of continuing business except so far as necessary for winding up the business.
> (b) An action or proceeding to which a corporation is a party does not abate by the dissolution of the corporation or by reason of proceedings for winding up and dissolution of the

York company merged into its New York parent corporation, that arose from the criminal conduct of the former subsidiary, did not abate under New York corporation law which contains a saving statute preserving claims against merged or consolidated corporations); United States v. San Diego Grocers Ass'n, Inc., 177 F. Supp. 352, 354–55 (C.D. Cal. 1959) (holding that Sherman Act prosecution against California corporations that dissolved before indictments were filed did not abate under California Code where Code contains section extending life of dissolved corporations for the purpose of defending actions against it); Commonwealth v. Lavelle, 555 A.2d 218, 230 (Pa. Super. Ct. 1989) (holding that state corruption prosecution against successor corporation did not abate under Pennsylvania law where there was a de facto merger or fraudulent transaction).

123. 973 P.2d 93 (Alaska 1999).
124. *Id.* at 94–95.
125. *Id.* at 94.
126. *Id.*
127. *Id.*
128. *Id.*
129. *See id.* at 95 n.4. (citing Hood Bros. Partners, L.P. v. USCO Distrib. Servs. Inc., 140 F.3d 1386, 1387–88 (11th Cir. 1998) (finding that a survival statute extended the life of a corporation for litigation purposes)).

> corporation. A corporation that is dissolved voluntarily or involuntarily may not commence a court action, except for a court action under [section] 10.06.675.[130]

The court reviewed the legislative history of section 10.06.678 and examined treatment of similar statutes in other jurisdictions before deciding claims do not abate against a dissolved corporation.[131]

Gossman does not address criminal prosecutions. However, the court's analysis in this civil case mirrors the analysis the Supreme Court used in *Melrose Distillers* in a criminal context.[132] There is no reason to believe an Alaska court would analyze the issue any differently in the context of a criminal case. Moreover, Alaska courts routinely rely on federal authorities when interpreting Alaska law that has no case precedent and is similar to federal laws.[133] A number of jurisdictions have adopted *Melrose Distillers*,[134] and Alaska courts have cited *Melrose Distillers* for other propositions.[135]

Further, as is discussed above, the Alaska Supreme Court in *Gossman* interpreted section 10.06.678 of the Alaska Statutes liberally to include claims that accrued after the dissolution of the corporation.[136] This suggests that the court would likewise liberally interpret the statute if faced with the question of whether the statute is inclusive of criminal charges. In short, dissolution, merger, and consolidation of a corporation should not foreclose the State's ability to prosecute the corporation, although it might make it more difficult to collect fines that are ultimately imposed.[137]

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130. ALASKA STAT. § 10.06.678(a)–(b) (2006).

131. *Gossman*, 973 P.2d at 95–99. If Gossman were to obtain a judgment against Greatland, he could seek to recover the damages from Anadrill because Anadrill purchased all of Greatland's liabilities. *Id*. at 99.

132. 359 U.S. 271 (1959).

133. *See* Odom v. Lee, 999 P.2d 755, 761 (Alaska 2000) (Alaska courts use federal Sherman Act cases to construe Alaska antitrust law); *see also* State v. Abbott, 498 P.2d 712, 717 (Alaska 1972) (where no Alaska cases on point, court may rely on federal cases discussing similarly worded federal statute).

134. *See* United States v. Polizzi, 500 F.2d 856, 908 (9th Cir. 1974) (Duniway, J. concurring); People v. Boyce, 509 N.E.2d 776, 778 (Ill. App. 2d Dist. 1987); People v. Pymm Thermometer Corp., 591 N.Y.S.2d 459, 460 (N.Y. App. Div. 1992).

135. *See* Univ. of Alaska v. Thomas Architectural Products, Inc., 907 P.2d 448, 450 (Alaska 1995) (recognizing that Washington survival statutes supplant the common law rule of abatement and prolong the life of a corporation so that it can be sued); Hartwell v. State, 423 P.2d 282, 283 (Alaska 1967).

136. *Gossman*, 973 P.2d 95–99.

137. *See id*. Under Alaska law, corporations, prior to dissolution, must provide for their outstanding liabilities by purchasing liability insurance, setting aside assets, or having a successor assume its liabilities. *Id*. at 99 (citing §§ ALASKA STAT. 10.06.620(2), 06.668(1)). Anadrill had assumed all of Greatland's liabilities and this would include any judgment plaintiff Gossman obtained from

Alaska has similar survival statutes that are applicable to other organizations. However, some of the survival statutes—such as those that apply to non-profit corporations[138] or limited liability companies[139]—carry time limitations which may affect potential claims or charges.

III. PROSECUTORIAL CONSEQUENCES

A. Penalty Provisions

Organizations are not subject to the same penalties as individual defendants. While organizations can only act through their agents, organizations cannot be punished in the same way as their agents.[140]

Special penalty provisions exist for organizations based on the severity of the underlying crime.[141] In assessing a fine under these provisions the sentencing court considers:

> (1) measures taken by the organization to discipline an officer, director, employee, or agent of the organization;
> (2) measures taken by the organization to prevent a recurrence of the offense;
> (3) the organization's obligation to make restitution to a victim of the offense, and the extent to which imposition of a fine will impair the ability of the organization to make restitution; and
> (4) the extent to which the organization will pass on to consumers the expense of the fine.[142]

his lawsuit. *Id.* The State would face a similar situation if it successfully prosecuted a dissolved corporation. Depending on how the corporation provided for its post-dissolution liabilities, the State may try to collect the penalties imposed against an insurance policy, against a successor corporation, or against a finite pool of assets set aside prior to the corporation's dissolution. In that final scenario, the assets might be insufficient, particularly if the corporation left numerous creditors, and the State could get stuck with a judgment it cannot collect (or not easily collect without some veil-piercing litigation).

138. ALASKA STAT. § 10.20.450 (2006).

139. ALASKA STAT. § 10.50.440 (2006).

140. Melrose Distillers, Inc. v. United States, 359 U.S. 271, 274 (1959) (holding that corporations cannot be sent to jail, they can only be fined).

141. Under section 12.55.035(c)(1) of the Alaska Statutes, an organization can be fined up to a million dollars for felony offenses or misdemeanor offenses that result in death, up to two hundred thousand dollars for Class A misdemeanor offenses, up to twenty five thousand dollars for Class B misdemeanor offenses, and up to ten thousand dollars for violations. Alternatively, greater fines can be imposed under sections 12.55.035(c)(2) or (3) of the Alaska Statutes, which allow for fines up to three times the pecuniary gain realized, or three times the damages caused by the offense.

These considerations are in addition to statutory and common law factors Alaska courts consider in deciding any criminal sentence.[143] Generally, it is not difficult to frame these factors in a way to justify substantial fines under any of the penalty matrices available for use against organizations. If the organization is large, a substantial fine would be justified so that it has an appreciable penalty or deterrent impact on the organization's operations. The fine would likewise need to be large to cause other similarly situated organizations to take notice and action to ensure they do not commit similar errors.

Consider two examples. First, if a fishing lodge allows its clients to commit hunting and fishing violations to ensure they catch a lot of fish and have a good time, a small fine would not act as a sufficient deterrent. Because these lodges often have significant revenues, fines at the top of the penalty range set forth in section 12.55.035(c) of the Alaska Statutes would be necessary and justified. These are common sense arguments that are likely to have traction with the sentencing court. Second, imagine a service station operating as an LLC that knowingly functions with leaking underground fuel tanks. The situation comes to light when diesel range organics are discovered in a nearby creek. Investigation traces the fuel back to the service station and additional investigation produces evidence that the manager had been aware of the leak for several months. The Alaska Department of Environmental Conservation (DEC) hires a private environmental services firm to design and implement a clean-up and remediation plan for the polluted land and water and to monitor the water quality of the creek for five years. The total cost for these services exceeds a million dollars. Under section 12.55.035(c)(3) of the Alaska Statutes, the potential fine against the LLC could exceed three million dollars. This fine could be in addition to the restitution owed to the state for the cost of the clean-up and remediation work itself. Admittedly, the sentencing court, in imposing the fine, would have to consider how section 12.55.035(e)(3) of the Alaska Statutes would affect the company's ability to pay restitution to the DEC. However, if the company is large enough, it is easy to picture the court imposing the full fine. Penalties of this magnitude can

142. ALASKA STAT. § 12.55.035(e) (2006).

143. The court considers a defendant's prospects for rehabilitation, the need to confine or isolate the defendant to prevent further public harm, the extent to which the sentence to be imposed will deter the defendant as well as other members of the community from future criminal conduct, and the extent to which the sentence will reaffirm societal norms or the community's condemnation of the conduct. *See* ALASKA STAT. § 12.55.005; *State v. Chaney*, 477 P.2d 441, 443 (Alaska 1970).

provide a strong incentive for organizations to resolve potential criminal liability quickly.[144]

Because criminal conduct exposes the organization to potentially substantial criminal penalties and negative publicity, an organization will often terminate or discipline the responsible employees, cooperate with investigating agencies, and may hire consultants for the design of new protocols to avoid similar mistakes in the future. These are all constructive steps moving forward from the misconduct and are factors a sentencing court is to consider in assessing a fine against an organization pursuant to section 12.55.035(e) of the Alaska Statutes.

B. Collateral Consequences

Collateral consequences triggered by a conviction will also be a powerful force shaping the course of many prosecutions. Organizations are generally required to report all pending liabilities in their annual financial statements. This typically includes pending criminal cases as well as any completed cases for which the organization is on probation.[145] Disclosure of a pending criminal case or conviction can be damaging to an organization's public image or reputation. The publicity from prosecution would likely tarnish the image of a company and undo any marketing efforts that the company previously undertook. Further, the prosecution would likely damage the company's image amongst stockholders, creditors and Wall Street analysts, causing significant financial repercussions.

Debarment is another significant collateral consequence. Both federal and state law allows the respective sovereigns to refuse to do business with organizations that have been convicted of or otherwise suspected of crimes or dishonest business practices.[146] At the federal level, the Environmental Protection Agency (EPA) is particularly vigilant in debarring organizations that are convicted or suspected of

144. Defense attorneys commonly argue that the State should not seek the full measure of fines authorized by section 12.35.055 of Alaska Statutes because doing so would preclude the organization from devoting resources to correct the problem that led to the violation, or to pay restitution. This is a fair argument in many instances.

145. Probation is imposed by the sentencing court and can be up to ten years. ALASKA STAT. § 12.55.090(c) (2006).

146. In response to Congressional oversight hearings regarding the mismanagement of federal contracts, the Office of Management and Budget developed a government-wide debarment and suspension system in the early 1980s. *See* Brief History of EPA's Debarment Program, http://www.epa.gov/ogdunix1/sdd/history.htm (last visited Oct. 9, 2008).

environmental crimes.[147] Debarment is damaging because a large percentage of Alaska companies are the recipients of federal or state contracts.[148] The loss of these contracts can be financially crippling to companies. The State of Alaska also has legislative authority to debar companies but, unfortunately, rarely uses that power.[149]

By way of an example, consider a small bush air service that transports mail year round and a steady number of government biologists as passengers during the summer. If the company knowingly allows passengers to transport alcohol to local option dry communities[150] on its flights, it could be prosecuted for violations of Alaska's alcohol importation laws.[151] A conviction could potentially trigger federal or state debarment and thereby jeopardize the air service's ability to retain the mail or biologist travel contracts. This could constitute another financial blow to the company in addition to the fines or consequences that flow from the prosecution.[152]

147. The EPA is statutorily required to debar companies convicted of violations of section 508 of the Clean Water Act or section 306 of the Clean Air Act. The EPA also has the discretionary authority to suspend or debar companies based on indictments, information or adequate evidence involving environmental crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, non-performance, or false statements. *See* Suspension and Debarment Program, http://www.epa.gov/ogdunix1/sdd/debarment.htm (last visited Oct. 10, 2008.) Other executive branch agencies also have the authority to suspend and debar.

148. Based on the Author's anecdotal observations that the federal government is very active in Alaska and therefore contracts with many Alaskan companies for services and products.

149. While the state has legislative authority to debar entities, it rarely does so. State debarment is controlled by sections 36.30.635–36.30.685 of the Alaska Statutes. The grounds for debarment are set out in section 36.30.640 of the Alaska Statutes and include a broad range of unethical or fraudulent conduct. Nevertheless, these consequences are rarely, if ever, invoked. In response to an inquiry to the Alaska Department of Law, the Department told the Author of only one state suspension or debarment matter. In the Author's view, the State, by failing to more proactively utilize its debarment authority, forgoes a powerful deterrence tool.

150. Communities can elect to ban the sale or possession of alcohol. ALASKA STAT. § 4.11.491 (2006).

151. The Alaska Statutes criminalize such conduct. ALASKA STAT. §§ 4.11.499, 16.200(e) (2006).

152. Significantly, the plane used to illegally transport the alcohol could be subject to forfeiture. ALASKA STAT. § 4.16.220(a)(3) (2006).

IV. PRACTICAL CONSIDERATIONS FOR PROSECUTORS

A. No Fifth Amendment Privilege

Prosecutors gain several practical advantages by filing charges against organizations as opposed to individuals. The first, and perhaps most significant, is that an organization does not have a Fifth Amendment right against self-incrimination. A prosecutor can use organizational agents as witnesses to testify about corporate practices or records.[153] In *Amato v. United States*,[154] the First Circuit, relying largely on the Supreme Court's decision in *Braswell v. United States*,[155] explained why the Fifth Amendment's protection against self-incrimination does not protect corporate records.[156]

The Alaska Supreme Court subscribed to the collective-entity doctrine in *Pratt v. Kirkpatrick*.[157] Citing many of the same cases relied upon in *Amato*, the court held that a records custodian for the financial records of a limited partnership could not rely upon the Fifth Amendment or Article I, section 9 of the Alaska Constitution to resist a subpoena for the partnership's financial records.[158] Importantly, the court found the self-incrimination protections provided by the Alaska Constitution were no broader than protections provided by the Fifth Amendment to the United States Constitution.[159]

Because of these principles, defense attorneys will be hard-pressed to successfully preclude the production of an organization's documents sought pursuant to a subpoena or search warrant. Organizations are prolific producers of documents, reports, memoranda, and email that evidence their decisions and actions. In the event of criminal conduct,

153. This presumes the agent does not have a personal Fifth Amendment right to assert.

154. 450 F.3d 46 (1st Cir. 2006).

155. 487 U.S. 99 (1988).

156. 450 F.3d at 49–50 (holding that the Fifth Amendment privilege is a personal privilege enjoyed only by individuals). The Fifth Amendment's privilege "'is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.'" *Id.* (quoting United States v. White, 322 U.S. 694, 698 (1944)). This is true even if the records incriminate the custodian personally. *Id.* (citing Bellis v. United States, 417 U.S. 85, 88 (1974)).

157. 718 P.2d 962, 967–68 (Alaska 1986).

158. *See id.* at 968.

159. *Id.* ("While we are not limited by the federal courts in interpreting our own constitution, in this instance we are not persuaded by [the appellant's] arguments to interpret the Alaska self-incrimination provision more broadly than the federal courts have construed the fifth amendment.").

any such documents would be invaluable to the prosecution, as they may demonstrate the organization's knowledge or intent. At the very least, the documents can confirm the individual agent's intent or knowledge.

B. Avoiding Hearsay

Common hearsay problems can also be avoided if an organization rather than an individual is charged. Employee or agent statements regarding the conduct of the organization will be admissible against the organization should the declarant invoke a personal Fifth Amendment right not to testify or otherwise make him or herself unavailable for trial. The admissions of these agents are not hearsay if offered against the organization because the law imputes them to the organization itself; under Alaska Rule of Evidence 801(d)(2), the admissions are considered admissions of the party opponent.[160] This subsection excludes as non-hearsay statements that are made by an agent or servant concerning matters within the scope of that individual's agency or employment and made during the existence of the agency or employment relationship. This is a broadly interpreted exclusion[161] that encompasses a wide range of employee statements regarding employer practices, work conditions, and decision-making that frequently provide invaluable evidence for the prosecution.

C. Corporations Can Be Tried In Absentia

Corporations cannot ignore a summons to appear for arraignment. Pursuant to Rule 4(a)(3) of the Alaska Rules of Criminal Procedure, corporations that fail to appear may be tried in absentia.[162] The trial of an absent corporation would be a slam-dunk for the state. The prosecutor could admit evidence to the jury without objection. The

160. *See also* United States v. Petraia Mar., Ltd., 489 F. Supp. 2d 90, 94–99 (D. Me. 2007) (discussing the analogous provision under the federal rules).

161. *See* Klawock Heenya Corp. v. Dawson Constr., 778 P.2d 219, 220 (Alaska 1989) (the exclusion covers statements that "merely 'concern' the employee's duties" (citations omitted)).

162. The rule provides, "[i]f a defendant corporation fails to appear after being duly summoned, a plea of not guilty shall be entered by the court if the court is empowered to try the offense for which the summons was issued and the court may proceed to trial and judgment without further process." ALASKA R. CRIM. PROC. 4(a)(3). The rule does not define "corporation" and the author is not aware of any case that interprets this rule. Admittedly, a court could interpret "corporation" to be narrower than the term "organization" as it is used in section 11.16.130 (2006) of the Alaska Statutes. It is therefore unclear whether other types of organizations could be tried in absentia.

prosecutor could then ask the jury to convict a business which was perfectly happy to injure Alaska or Alaskans in some way but was unwilling to show up when invited to an Alaskan courtroom for its own trial. Assuming the prosecutor has presented sufficient evidence of the charged offenses, it is likely juries will feel little compunction in returning guilty verdicts. Upon conviction, the prosecutor could ask the judge to issue a judgment against the corporation and that judgment could be sent to the Attorney General's Collection Section for collection.

D. Organizations Engender Less Sympathy

The criminal jury instructions commonly employed in Alaska state courts invariably include an instruction that directs the jury to disregard any sympathy for the defendant during its deliberations.[163] Nevertheless, any prosecutor will tell you that jurors rarely dispatch their obligations without sympathizing to some degree with the defendant. If an employee engages in improper conduct to primarily benefit his or her employer (as opposed to directly benefiting him or herself) or if the employee engages in conduct at the behest of his or her employer, jurors may be loathe to find the individual guilty of the offense. This problem is largely eliminated if the company is tried. Regardless of the factual scenario involved, juries are far less prone to feel sympathy for an organization.[164] Most often, the organization is a for-profit company, and juries realize their decision, like the organization's decision to engage in the criminal conduct, is a decision about money. Juries seem to struggle far less with the question of whether an organization should pay a fine than the question of whether an individual should go to jail.

163. Alaska Pattern Jury Instruction 1.07, "Evaluation of Evidence," is one such example. It instructs jurors "not be influenced by sentiment, prejudice, passion or public opinion" in evaluating the evidence. Criminal Pattern Jury Instruction Committee, Pattern Jury Instruction 1.07, *available at* http://www.state.ak.us/courts/ins/1.07.doc.

164. This is true notwithstanding Alaska Pattern Jury Instruction 1.48, "Corporate Defendant," which instructs juries not to treat a corporate defendant any differently than it would an individual defendant. Criminal Pattern Jury Instruction Committee, Pattern Jury Instruction 1.48, *available at* http://www.state.ak.us/courts/ins/1.48.doc.

V. CHARGING CONSIDERATIONS

A. Factors to Weigh

The foregoing discussion is meant to illustrate that organizational criminal liability is very broad and has potential application to many situations. Nevertheless, these prosecutions can be complex and time intensive, and the outcome of any such prosecution is seldom, if ever, certain. It follows that a prosecution may not be warranted or be the best use of limited resources in every instance. A number of practical considerations should inform any decision to prosecute or not prosecute an organization.

Assuming the prosecutor believes he or she can prove all the elements of the potential charges, the foremost consideration is the prosecution's objective in pursuing the criminal charges against this organization. Key to this concern is the question of punishment. Is the goal to punish the organization? Is the goal to achieve restitution? Or is the goal to ensure future compliance by this organization or similarly-situated organizations? Most often the answer is a mixture of all three, but that is not always the case. If the organization is one that has few assets or no longer exists, the prosecution may yield a conviction and a fine or restitution order that cannot be collected. Alternatively, if the organization continues to operate and the conduct at issue could reoccur, or involves an activity that has not been monitored or heavily regulated in the past, a better result may be achieved through less adversarial means. Instead of a criminal prosecution, perhaps there is an administrative or civil remedy.[165]

In answering these questions, the prosecutor should consider the following factors.[166] The first and foremost consideration is whether the prosecution is deserved. Multiple factors will weigh on this determination, including whether the injury was caused by egregious or intentional conduct or a rogue employee, and the degree to which management was complicit in causing the injury. It will also be important to determine whether the conduct was an isolated violation or part of a series of violations, and if the organization knew the conduct was prohibited.

165. To be sure, if such options exist, defense counsel will suggest it to the prosecution.

166. This list is not exhaustive or universally applicable. Depending on the circumstances, other factors not listed may be relevant and some listed factors may be irrelevant.

These factors beg the question: is a prosecution warranted? A corollary to this question is the recognition that a criminal prosecution carries a significant stigma and is not warranted or necessary in every circumstance. With respect to considerations of practicality, the following factors should be evaluated and go to the central question of what can and will be achieved by prosecuting the organization:

First, will prosecution deter this organization? Answering this question will require analyzing the likelihood of significant penalties such as fines or probation. It will also mean determining if any illegal gains will be returned, and if the conduct gave the organization an advantage over its competitors.[167]

Second, will prosecution deter other similarly-situated organizations? Determining this means researching whether similarly-situated organizations exist and if the potential penalties would deter them. The penalties may also impact the industry as a whole.

Third, will prosecution promote future compliance? Prosecutors must consider whether including a compliance program in the penalty would address the conduct at issue.

Fourth, is restitution owed to a broad range of entities or individuals? Considerations will include the necessity of prosecution to obtain restitution, the effectiveness of individual claims, and the ability of the organization to pay damages.

Finally, will a prosecution play well in the public's view? Prosecutors should determine whether the public will support legal action, an enforcement program more generally, and participate in such a program by reporting violations.

Depending on the answers to these questions, a prosecutor may determine that prosecution is not the best alternative. The best practice is to make this determination early and not to pursue prosecutions in situations not warranting the effort or resources.

To illustrate these points, consider as an example the potential prosecution of a bartender for selling alcohol to an underage patron. Faced with an underage "furnishing" crime, police officers will typically

167. A sentencing court may suspend criminal fines for the period of probation. ALASKA STAT. §§ 12.55.080, 12.55.090 (2006). Such "suspended fines" are used as a "hammer" to force a defendant to comply with the conditions of probation the court imposes. If, during the probation period, the defendant does not comply with these conditions, the prosecution can petition the sentencing court to revisit the sentence and impose all or a portion of the sentence that was suspended. Those determinations are made by the trial judge pursuant to a preponderance of the evidence standard. *See* Wallace v. State, 829 P.2d 1208, 1210 (Alaska Ct. App. 1992); Andrew v. State, 835 P.2d 1251, 1254 (Alaska Ct. App. 1992).

cite the individual bartender for a Title 4 "furnishing" offense.[168] If convicted, and if a first-time offender, the bartender will likely receive a suspended imposition of sentence, a year's probation, and a small fine, assuming the prosecutor can convince a jury not to nullify the verdict. On the other hand, if there is a good reason to charge the bartender's employer—perhaps a large bar or restaurant—with the same Title 4 violation, that employer will face a much larger potential fine. If the employer has committed similar offenses through other employees, each of those incidents may be brought to the sentencing judge's attention and would powerfully bolster the prosecutor's sentencing case. Fines could be conditioned on the employer ensuring that its employees commit no further violations. The employer could also be affirmatively required to notify law enforcement officers of any and all future violations.[169] In addition, the court may require the employer to provide enhanced training for employees at their own expense. Prosecuting the employer is a better use of prosecutorial resources. Importantly, the prosecution of the employer provides a mechanism to prevent future, similar infractions by other employees. The employer will likely be more proactive in policing its employees and will be under an affirmative duty to report all future violations. Further, it is likely that other similar establishments or employers will take notice of the sentence and will likewise do a better job of policing their operations and employees. These would all be positive outcomes.

B. Case Study: Strategica Import-Export Financial Group, LLC

A four-defendant case recently prosecuted by the Office of Special Prosecutions, *State v. Jeremy Oliver*,[170] further illustrates why prosecutors should consider charging organizations and how they can use those prosecutions to achieve better case outcomes.

The case arose from a failed salmon processing facility in Ekuk, Alaska in 2004.[171] The failure was an economic disaster for the local economy.[172] None of the fishermen who had delivered fish to the facility

168. ALASKA STAT. § 4.16.051 (2006).

169. As explained *supra* Part IV.A, organizations do not have Fifth Amendment protection and may be compelled to make statements against their interest.

170. These defendants were prosecuted as codefendants under case numbers 3DI-07-016CR, 3DI-07-017CR, 3DI-07-018CR, 3DI-07-019CR, respectively (Alaska Dist. Ct. information filed Jan. 5, 2007).

171. Information at 7, State v. Strategica Imp.-Exp. Fin. Group, LLC, 3DI-07-018CR (Nov. 26, 2007).

172. *Id*. at 18.

were paid for their catches and none of the workers who had worked at the facility were paid for their labor.[173] Jeremy Oliver, a young man with limited fishing and processing experience, had formed Wild Alaskan Seafood Company, LLC ("Wild Alaskan Seafood Company") for the purpose of the Ekuk processing venture.[174] Oliver was able to lease and open the Ekuk facility using financing brokered by Jay Enis, a Florida merchant banker.[175] Enis formed Strategica Import-Export Financial Group, LLC ("Strategica") for the purpose of financing the Ekuk salmon processing venture.[176] Oliver and Wild Alaskan Seafood Company hired dozens of workers to run the facility and accepted more than a million pounds of fish from the fishermen.[177] The venture failed before the fish could be processed, and very little of the fish was ever delivered to a purchaser.[178] The vast majority of the fish spoiled and ultimately had to be destroyed.[179] As a result, the fishermen and Ekuk processors were never paid.[180]

Alaska statutes criminalize the processing of adulterated seafood.[181] The offense is a class A misdemeanor.[182] The state prosecuted all four defendants—Oliver, Wild Alaska Seafood Company, Enis, and Strategica—for this offense, as well as several additional, related offenses.[183] Ultimately, Oliver, Wild Alaskan Seafood Company and Strategica each pled guilty to a charge.[184] The court sentenced Oliver to serve 180 days in jail (with 140 days suspended) and to pay, along with Wild Alaskan Seafood Company, more than $56,000 in restitution to the fishermen and workers.[185] Because Oliver and Wild Alaskan Seafood

173. *Id*.
174. *Id*. at 4, 7–8.
175. *Id*. at 7–10 .
176. *Id*.
177. *Id*. at 15.
178. *Id*. at 17.
179. *Id*.
180. *Id*. at 18.
181. *See* ALASKA ADMIN. CODE tit. 18, § 34.030 (2006); ALASKA STAT. § 17.20.305 (2006).
182. *See* ALASKA STAT. § 17.20.305 (2006).
183. Information at 1–2, State v. Strategica Imp.-Exp. Fin. Group, LLC, 3DI-07-018CR (Nov. 26, 2007).
184. State v. Jeremy Oliver, 3DI-07-015CR (Alaska Dist. Ct. judgment entered Nov. 26, 2007); State v. Wild Alaska Seafood, LLC, 3DI-07-016CR (Alaska Dist. Ct. judgment entered Nov. 26, 2007); State v. Strategica Imp.-Exp. Fin. Group, 3DI-07-017CR (Alaska Dist. Ct. judgment entered Nov. 26, 2007).
185. State v. Oliver, 3DI-07-015CR (Alaska Dist. Ct. judgment entered Nov. 26, 2007); State v. Wild Alaskan Seafood Co., LLC, 3DI-07-016CR (Alaska Dist. Ct. judgment entered Nov. 26, 2007).

Company have few assets,[186] it is unlikely that much of this restitution will ever be paid. Oliver and Wild Alaskan Seafood Company were prosecuted to punish them for their misdeeds rather than to make the injured fishermen and workers whole.[187] The court ordered Strategica to pay more than $180,000 in restitution.[188] The state agreed to dismiss the charges against Enis in exchange for Strategica's plea and payment.[189] The case against Strategica was meant to prosecute that company for its misconduct, as well as to provide at least some restitution to the fishermen and workers.

Oliver was clearly the primary culprit of this scheme. Oliver came up with the plan to operate the Ekuk facility and was in charge when it failed. Nevertheless, once the scheme failed, Oliver and Wild Alaskan Seafood Company lacked assets and would never be able to pay much in restitution. Enis and Strategica had assets but were not as directly involved in the management and operation of the Ekuk facility. Thus, the question for the Office of Special Prosecutions was whether it could prove Enis and Strategica were criminally liable for the Ekuk failure and, if so, whether they warranted criminal prosecution. The answer to both questions was "yes."[190]

Strategica's conduct was egregious. Enis and Strategica had no experience in the Alaska seafood industry. Nevertheless, with little due diligence and equally little oversight, Strategica provided Wild Alaskan

186. Information at 8–11, State v. Strategica Imp.-Exp. Fin. Group, LLC, 3DI-07-018CR (Nov. 26, 2007).

187. Though Oliver had few assets, there was a financial interest that the Author suspects prompted Oliver to plea the case on his behalf and on behalf of Wild Alaskan Seafood Company. When Oliver formed that company, he included his father Michael , a real estate agent in California, as a member. Information at 7, State v. Strategica Imp.-Exp. Fin. Group, LLC, 3DI-07-018CR (Nov. 26, 2007). Oliver's father had assets and was troubled about his potential financial exposure for the company's liabilities. The father signed off on the plea agreement for Wild Alaskan Seafood Company on the understanding that he would not be a prosecution target and would most likely not have to personally satisfy the restitution judgment entered against Wild Alaskan Seafood Company. Michael Oliver Aff., State v. Wild Alaska Seafood, LLC, 3DI-07-016CR.

188. State v. Strategica Imp.-Exp. Fin. Group, LLC, 3DI-07-018CR (Alaska Dist. Ct. judgment entered Nov. 26, 2007). Strategica's restitution was paid up-front. The plea agreement required Strategica to pay the total restitution amount prior to the company's change of plea and sentencing. *Id.*

189. State v. Enis, 3DI-07-019CR (Alaska Dist. Ct. dismissal signed Nov. 23, 2007).

190. Both Enis and Strategica warranted prosecution for the same reasons. The discussion herein is limited to Strategica because of the focus of this article on organizational criminal liability.

Seafood Company with $650,000 in financing for a risky venture[191] that would operate in a remote locale more than five thousand miles from Strategica's location in Miami.[192] Strategica enabled Oliver and Wild Alaskan Seafood Company by providing the financial means for them to launch the Ekuk facility. Thereafter, Strategica did little to oversee their operations or to ensure their success. This conduct was careless, it was intentional, and it had a devastating impact on the Ekuk fishery and the local economy.

Practical considerations also supported the decision to prosecute Strategica. Most importantly, the State believed prosecution would be the most effective way to collect restitution for the fishermen and workers. More than a hundred, perhaps more than two hundred, people were financially injured due to the Ekuk failure.[193] While some of these people filed civil actions against the defendants, those suits made little progress and, even if successful, stood to benefit a small number of individuals. In contrast, a criminal prosecution could recover restitution for all those who did not get paid. Of the potential defendants, only Enis and Strategica had any real financial resources.[194] Therefore, it was important that Strategica be prosecuted.

Additionally, the prosecution of Strategica would play well in the realm of public opinion. Strategica was a company that recklessly entered the state fishing industry to make a profit for out-of-state investors and ended up causing significant financial injuries to many Alaskans. In addition to the direct financial losses inflicted on the Ekuk fishermen and workers, Strategica's actions could have inflicted significant harm to the reputation of Alaskan salmon. The Alaska seafood industry relies on the high reputation of "wild Alaskan salmon" to market its product and has spent years and millions of public relations dollars to build up that reputation.[195] If some of the damaged Ekuk salmon had actually made it into the marketplace and sickened unsuspecting consumers, the reputation and marketability of Alaskan salmon would have been dealt a significant blow. Considering the

191. Salmon processing is by its very nature a risky undertaking. Catches, and the market, vary from year to year and can always be impacted by factors—fish counts, weather events, economic uncertainties—that are beyond anyone's control.

192. Information at 6–8, 11, State v. Strategica Imp.-Exp. Fin. Group, LLC, 3DI-07-018CR (Nov. 26, 2007).

193. *Id*. at 18.

194. *Id*. at 8.

195. *See*, *e.g.*, Press Release, Sarah Palin, Governor, State of Alaska, Palin Asks for Changes to Fish Farm Proposal (Apr. 4, 2007), *available at* http://gov .state.ak.us/archive-51004.html.

reckless manner in which Strategica acted to enable and finance Oliver and Wild Alaskan Seafood Company, the State believed the Alaskans would overwhelmingly support Strategica's prosecution and the Department of Environmental Conservation's continued efforts to regulate seafood processing facilities.

Finally, the State believed prosecuting Strategica would serve as a deterrent to future reckless investment in the Alaska seafood industry by outside entities. The prosecution resulted in significant financial penalties—the restitution payment—and would receive significant publicity. This result would certainly deter Strategica from future similar conduct and, it is hoped, would deter other similarly situated entities from doing anything similar.

CONCLUSION

The ability to file criminal charges against an organization in addition to, or in lieu of, charges against individual agents is a powerful tool available to prosecutors. The prosecution of organizations must be considered, whenever feasible, to deter future wrongdoing. Furthermore, it is far more efficient to prosecute the organization that controls a large number of agents engaging in prohibited conduct rather than prosecuting each agent individually.

Prosecuting the organization makes sense for a variety of additional reasons. First, significant criminal fines can be imposed against organizations. Second, organizations—rational entities with a bottom line and a strong preference against negative publicity—tend to be prosecution averse. This fact is good news for the prosecution because it means a trial can be avoided and constructive changes can be implemented as part of any resolution.[196] Third, organizations enjoy fewer constitutional protections than do individual defendants and, as such, can make use of fewer evidentiary rules to limit the prosecution's evidence. Lastly, the prosecution of an organization as well as individual defendants could strengthen the prosecution's hand during plea negotiations. The organization may be persuaded to accept a plea in

196. For example, in pollution cases, resolutions often require defendant companies to implement environmental compliance management systems—detailed plans that dictate the specific procedures and safety measures the company is required to implement for a period of time. These compliance agreements are typically more stringent than any planning or contingency plan requirements imposed by statute or regulation. In other words, to resolve the criminal charges, organizations will agree to be far more proactive in guarding against future infractions. Such agreements are not only helpful, but also provide good publicity for both the organization and the prosecution.

return for dismissal against certain individual officers, or vice-versa. By charging both, the prosecution increases its options for a successful and beneficial resolution.

Several potential explanations for why Alaska prosecutors rarely charge organizations for the criminal conduct of their agents are proffered in the introduction. None satisfactorily explain this phenomenon. Yes, such prosecutions will likely differ in some respects from the prosecution of individual defendants. Yes, organizational defendants may hire experienced defense counsel. And yes, such prosecutions might, in some cases, penalize stockholders who did not know about the wrongdoing. But these drawbacks, to the extent they are legitimate at all, are insignificant compared to the potential benefits that such prosecutions can realize. Quite simply, prosecutors should file charges against organizations more frequently. Such change may not happen quickly; nonetheless, it is time to adjust course and to start looking more closely at organizational targets. Successful criminal prosecutions of organizations can be a significant deterrent that causes organizations to take significant steps to better monitor the behavior of their agents and to prevent criminal conduct in the course of their operations.