

RACKETEERING

Many attorneys assume that Racketeering cases are only brought against the mob or large corporations. Unfortunately attorneys have found themselves tossed into the fray in the Yamhill County real estate fraud cases or the DMV cases around the state. Counsel is often onfroned with a 33 or 39 count Racketeering indictment and boxes of reports.

My client, a non-computer savvy construction worker, found himself up against the Tobacco Compliance unit of the Attorney General's office facing long odds. I successfully tried his cigarette racketeering case but found it to be a large undertaking I am writing for you small firm and solo practitioners who don't expect to be defending an ORICO charge, but have to learn fast.

FACTS

Mr. G. entered the Internet cigarette business at a time he was injured and needed to supplement his income. A friend, in the computer industry, told him about an Internet business he bought in March 2003. Mr. G. bought "InexpensiveSmokes.com" in August 2003. The business facilitated people who independently imported their own cigarettes in quantities of 200, a carton. The seller had researched the legality of the site over a four-month period of time including hiring a big firm lawyer to review the business.

The importation business involved a bonded Swiss warehouse, the Swiss post, DHL (who delivered the cartons to Kennedy airport), the US Customs service, the US Postal Service and the seller of the website. The website itself very clearly stated in its home page "Save \$\$\$'s by importing your own cigarette's duty fee". The FAQ and Shipping pages clearly indicated that the customer, the importer, was responsible for taxes due. There was no statement that the cigarettes were tax-free.

Unbeknownst to Mr. G. the 2003 legislative session passed new laws, effective January 1, 2004, reducing the legal importation limit to 199 cigarettes. There is still no prohibition on individuals under ORS 323.060 from importing cigarettes if less than 200 at a time.

Mr. Guthrie was charged with racketeering including predicate crimes ranging from failure to *secure* a distribution license, *selling and distributing* cigarettes without a tax stamp, computer fraud, fraud via the wire and mail, improper age verification, insufficient disclosure and notice, failing to reporting said *delivery and sales*. The above counts were also named as additional subsequent counts.

A. Enterprise Element

The term "enterprise" includes both legal and illegal parties. The concept of an "enterprise" in ORICO is somewhat amorphous. 'Enterprise' includes any individual, corporation, or other profit or nonprofit legal entity, and both illicit and licit enterprises." *Pennel v Titan Value Equities group*, 127 Or. App. 195 (1994). ORS 166.725(7), provides in subsection (3): "It is unlawful for any person employed by, or associated with, **any enterprise** to conduct or participate, directly or indirectly, **in such enterprise** through a pattern of racketeering activity * * *." Because ORICO was drafted in light of RICO, Oregon courts use Federal RICO decisions to help guide them in interpreting the State statute, especially in cases where the language used is identical.

In *National Organization for Women, Inc. et al. v. Scheidler et al.*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994), the Supreme Court interpreted the RICO equivalent of ORS 166.720(3). It said that "enterprise" as used in that subsection "**connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed * * ***."

An informal agreement between two or more people to act for a purpose is sufficient to satisfy the enterprise element. Oregon courts have consistently held that a "gang" is an

“enterprise” and thus most gang activity could be a “predicted act” two or more of which could subject one to ORICO prosecution. Although gang association may be protected by constitution, the “the enterprise element “is not unconditionally overbroad because it does criminalize gang membership, but instead criminalizes being “*associated with the gang, (and participating) in that gang through a pattern of racketeering activity.*” *State v Harris*, 159 Or. App. 553 (1986).

B. What constitutes a “pattern of racketeering activity”?

As stated above, ORICO defines “pattern” as **committing two acts** that fall within the ORICO statute, there is no requirement that there should be a continuing threat of racketeering activity by either the defendant or the “enterprise.” The only real issues here are whether the acts fall within the ORICO statute, the timing element of the ORICO statute imposes, and Oregon’s double jeopardy protections.

Do the acts fall within the ORICO statute?

The ORICO statute, by way of reference, at ORS 166.715(6)(a), lists a body of criminal acts as predicate acts. Two acts of “racketeering” must take place within five years of each other

Double Jeopardy

Oregon has a more expansive constitutional protection than the US constitution relating to double jeopardy. The federal government has “use” immunity, but Article I, section 12, of the Oregon Constitution is interpreted as “transactional immunity”. This bars successive prosecutions for the same offense for all known charges arising out of the same criminal episode. *State v Lyons*, 161 Or. App. 355, 360 (1999).

Juvenile Crimes

Certain crimes committed, as a juvenile cannot be “predicate acts” for an ORICO prosecution. “We recently held that the juvenile code’s former jeopardy provision, ORS

419A.190, bars the use of a juvenile adjudication as a predicate offense in an ORICO prosecution.” State v Lyons id at 161 Or. App. 355.

C. Challenge by way of Demurrer

A Demurrer may be appropriate where the State fails to include an essential element of the ORICO offense in its pleading. An “enterprise” must be explicit and precise thus not uncertain or indefinite. Defendant must be able to anticipate which enterprise the State is going to attempt to prove he was participating in for each predicate act. That problem is not remedied through discovery.

. “The very volume of the discovery material, together with the large number of predicate offenses on which the [S]tate can potentially **rely in ORICO** prosecutions, is what makes discovery inadequate as an alternative to notifying an ORICO defendant by indictment of the "acts constituting the offense in ordinary and concise language * * * in such manner as to enable a person of common understanding to know what is intended.” *State v. Kincaid*, 78 Or. App. 23, 30.

a. Essential allegation from the “incident of racketeering activity”

According to *State v. Fair*, 326 Or. 485, an indictment is generally sufficient to withstand a demurrer if it trails the indictment wording of the statute defining the crime. *at 490*. The essential relationship is apparent where all of the predicates are the same type irrespective of the length of time over which they were committed or the details of the predicate crimes. *Fair* at 100 citing *State v. Vermaas*, 116 Or App 413. However, where the offenses are not self evident from the predicate offense and are not the same “type” then the essential relationship to the pattern must be alleged in the allegations. *Id* at 102.

The Oregon courts have departed from RICO in a significant way. The court has rejected as an inaccurate statement of law that the “enterprise” must function as a “unit” or that

the association must be “ongoing.” *Sate v Fair* 100 Or. App. 501.

Conclusion

By now you know a small firm and solo practitioners can defend an ORICO charge. My notes are available to all OCDLA members. I need to say that my forms and research are based upon the research of Ransom and Blackman in *State v Fair et al*, my experiences representing one of the co-defendants, my work in the Yamhill real estate fraud case (which generally consisted in negotiating my way out of the enterprise) and Mr. G’s trial in Washington County, where he was acquitted of racketeering. I should note the assistance of. Tulsir Rogers (tulsir@yahoo.com) and Texas attorney Alexis Brink in the research and writing of this article. I wish to acknowledge the other Oregon attorneys I shamelessly plagiarized but can’t credit because I can’t remember.

Dated this _____ day of _____, 2005

Tyner And Associates

John J. Tyner III OSB#82415