



# ORC Legislation

## Addressing Loss Prevention or Competition Prevention?

By Jack Trlica, Editor and Publisher

After a seven-year lobbying effort by retailers, product manufacturers, and their trade associations, significant legislation was introduced in the U.S. Congress in July to criminalize organized retail crime (ORC) and associated activities, such as selling stolen merchandise via the Internet. The legislation was applauded by the retail industry at the same time it was criticized by its on-line industry opponents.

"Selling stolen goods anywhere, on-line or on the corner, is already illegal, so the point of the proposed legislation seems to be more about limiting competition," says Catherine England, a spokesperson for eBay. "Big retailers don't like the honest sellers who rely on on-line marketplaces like eBay to offer consumers more choices and better deals."

Retailers adamantly disagree with this viewpoint.



RILA's Al Thompson (seated center) and Paul Jones (standing at right) coordinated a successful "fly-in" of representatives from nine major retailers to Washington, DC, in May to lobby members of Congress for ORC legislation. Above, Thompson reviews the two-day agenda with a packed conference room of loss prevention executives and their government relations counterparts.

"Organized retail crime, facilitated by e-fencing, continues to have a significant financial impact on retailers. This legislation is important in illuminating this escalating crime and a critical step toward resolution," says Brad Brekke, vice president of assets protection for Target. "While eBay is characterizing this legislation as intending to limit competition, this is simply not the case. We and other retailers have engaged in competition in an open market for decades, but have never experienced a time when another retailer is selling stolen property as part of its business model."

And so the real lobbying battle begins. Is ORC legislation a tool for loss prevention or an attempt to prevent on-line competition?

### A Coalition of Retailers

While not every retail segment is affected by ORC to the same degree, and even some loss prevention professionals question the extent of the problem, most retail LP executives believe ORC

is a significant and growing problem, especially in the apparel, pharmacy, and supermarket segments.

Estimates of the cost of ORC to U.S. retailers is in the billions of dollars annually. Legislation advocates also believe ORC puts store employees and consumers at risk due to reselling adulterated and outdated pharmaceuticals and baby formula. They also argue that on-line sales of stolen merchandise deprive states of the sales tax revenues used to fund essential government services.

While the exact dollars lost to retail from ORC activity may be difficult to quantify, the fact remains that the growth of ORC is significant and shows no signs of slowing. As the battle to combat this new kind of crime marches on, it's critical that loss prevention practitioners remain informed on legislative efforts to reduce ORC and know how to take action and ensure their voice is heard.

To that end, the Coalition Against Organized Retail Crime was formed in 2001 to organize retailers and product manufacturers directly impacted by

this crime [see box, page 28, for a list of coalition members]. The coalition has not only worked to understand the problem within the LP industry, it has also coordinated prevention, apprehension, and recovery efforts with state and federal law enforcement, and most importantly, worked to educate lawmakers on the issue.

It was through these efforts that several bills addressing ORC were officially introduced in Washington D.C. this summer.

"We've been involved in the lobbying effort now for three years, so we're thrilled that not only one legislator has stepped up, but four," says Kathleen Smith, vice president of corporate security at Safeway. "Hopefully, that means the bi-partisan effort will help move these bills through Congress quickly so that we can have the tools to better address the ORC problem."

### Why Federal Legislation

In the past, retail criminals have relied exclusively on sale locations, flea markets, swap meets, or pawn shops to sell stolen goods. Nowadays, retail criminals are embracing technology and using on-line marketplaces to sell their goods. This new venue for disposing of stolen merchandise, commonly referred to as "e-fencing," enables criminals to take advantage of the anonymity of on-line marketplaces and the limitless access to buyers they find there. Criminals value this new venue as being far more lucrative than the profits tied to old-style black market sales.

The rampant growth of ORC theft and e-fencing is outpacing state and local authorities' ability to combat it. Although state and local law enforcement track, apprehend, and prosecute these crimes when they uncover them, they are often unable to pursue these criminals thoroughly, if at all, because jurisdictional limitations prevent it...and criminals know it. Organized retail criminals are exploiting these legal gaps to accumulate, store, transport, and eventually sell stolen goods in such a way that often avoids prosecution and serious punishment if caught.

The broad disparity nationwide on felony theft levels alone highlights a need for federal oversight. In thirty-four states, the felony theft level is over \$500; seventeen of those states have a felony theft level of \$1,000 or more. Taking advantage of current law, thieves often steal below the felony threshold, thus risking little more than a misdemeanor charge and small fine. Even if they are caught, they usually see limited jail time or probation and are soon free to steal again.

Some states have addressed this activity by allowing prosecutors to view multiple infractions as one larger crime, which increases the penalty, but doesn't solve the larger problem. Ultimately, the Internet is a boundary-less marketplace that affords criminals access to an endless supply of unwitting buyers. State laws were not designed to combat this. Criminals have thrived because of this patchwork of state laws and will only be deterred if Congress passes a federal ORC statute with teeth.

"Throughout the industry, retailers... especially large retailers... have partnered with law enforcement to combat the challenges presented by organized

retail crime," said Monica Mullins, vice president of asset protection for Wal-Mart Stores. "New tools and stiffer penalties are needed to help stop these criminals from selling stolen merchandise through on-line auction sites, flea markets, and fencing operations. We have to fix the current system that enables criminals to profit at the expense of legitimate businesses and their customers."

### Safety Risks to Consumers

Sometimes overlooked in the statistics and war of words between the retail and on-line industries are very real public health issues.

Consumer confidence and product safety are generally paramount concerns of retailers and manufacturers. Legitimate retailers devote enormous resources to ensuring that the products they sell are safe. From toys to food, retailers build their supply chains to ensure the products are handled and stored safely so when a customer picks an item off the shelf, they can be confident that it will be safe.

Criminals don't share this commitment. In fact, they often disregard it entirely. For favorite items of ORC criminals, such as baby formula,

over-the-counter medicines, diabetic test strips, and other health and beauty products, proper storage conditions are critical to maintaining a safe product. Consumers that purchase these types of items from nontraditional retailers or on-line sources are at significant risk of unknowingly acquiring a product that has been mishandled.

"This is a serious crime issue with real health and safety implications," says Paul Jones, vice president for asset protection at the Retail Industry Leaders Association (RILA). "Without a secure supply chain, consumers could easily be exposed to harmful products that have been potentially tampered with."

RILA, who serves as co-chair of the Coalition Against Organized Retail Crime, as well as other trade associations, including the Food Marketing Institute (FMI) and National Retail Federation (NRF), have issued numerous consumer warnings addressing this matter.

### Retailers Fight Back

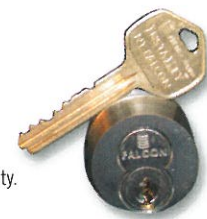
The members of the Coalition Against Organized Retail Crime have dedicated their time to engaging lawmakers at both the state and federal level, law

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## Proposed ORC Legislation

Following are key points in the proposed legislation. To read the actual bills introduced before Congress, visit the magazine's web site, [www.LPportal.com](http://www.LPportal.com).

- Adds organized retail crime to the federal code, making it more difficult for criminals to hide behind state laws.
- Provides a narrow definition of "on-line marketplace," protecting other on-line companies, such as Internet service providers or other Internet entities whose actions are not intertwined with the on-line marketplace.
- Require on-line marketplaces to investigate the sale of stolen goods or services on its site when credible evidence is evident, and remove or disable access to the material when there is reasonable cause to believe the goods or services were acquired through ORC. They must also maintain a record of all investigations for a minimum of three years.
- Require sellers whose merchandise packaging identifies the product as being available from a particular or exclusive retail source to post such identifying information conspicuously on the site.
- Require on-line marketplaces to maintain the name, telephone number, email address, legitimate physical address, any user identification, company name, and transactions conducted of each high-volume seller. The bill defines high-volume sellers as someone selling more than \$12,000 in merchandise annually.
- Requires any high-volume seller to conspicuously post its name, telephone number, and legitimate address on the Internet site where other information about the property being sold by the high-volume seller is posted; or to provide that information upon request to any business that has a reasonable suspicion that goods or services were acquired through organized retail crime.



Brad Ellsworth (D-IN)



Jim Jordan (R-OH)



Bobby Scott (D-VA)



Richard Durbin (D-IL)

enforcement, consumer groups, and other likeminded organizations to educate them on the growth and risks that organized retail crime pose to the community.

In the past few years, the coalition has seen some success in their efforts. In 2006 President Bush signed legislation establishing an organized retail crime task force within the FBI. In 2007 nine states passed legislation mandating stiffer penalties for organized retail crimes.

Finally, last October the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the issue at which members of the coalition testified [see "Enacting ORC Legislation," January-February 2008]. The coalition members who testified advocated for a federal solution that updates the U.S. criminal code and recognizes the shift of fencing activities from solely flea markets and pawn shops onto the Internet.

The hearing was a breakthrough moment for the coalition. It showed that Congress had been listening and that there was finally recognition that this was a problem that needed to be addressed. Although the hearing itself did not produce legislation, it proved to be a launching pad for future legislative efforts.

### Building Momentum and Turning the Tide

On May 21, 2008, RILA invited loss prevention practitioners from several member companies to Washington to participate in a series of meetings with members of Congress and their staffs. Participants noted that these meetings provided policymakers with first-hand

accounts of the growth of ORC and how it impacts companies and consumers.

Sixteen loss prevention executives and their government relations counterparts, representing nine major retailers, descended on Capitol Hill and took the opportunity to make their case in person to the people best able to put forth an effective solution.

The fly-in, as the practice is commonly referred to, was orchestrated by Paul Jones and RILA. An experienced loss prevention practitioner himself, Jones served as senior vice president of loss prevention at Limited Brands before joining RILA earlier this year.

During the meetings, executives spoke candidly and passionately about the rapid growth of sophisticated crime rings and the dangers they pose. Executives were impressed with the level of cooperation and thoughtful consideration they received from members of Congress and their staff as they expressed success in putting forward their message.

"Our meetings on Capitol Hill were extremely productive," says Jones. "The caliber of the executives in attendance was exceptional, and we were successful in conveying our message."

The visits afforded retailers and lawmakers the opportunity for a thorough examination of the problem and solutions. These meetings proved effective in turning the tide on the effort, as soon after lawmakers took action.

### Congress Speaks and Speaks Loudly

On July 15, 2008, the first of several pieces of legislation were introduced in

Washington. Congressman Brad Ellsworth (D-IN) along with Congressman Jim Jordan (R-OH) introduced the Organized Retail Crime Act of 2008. The bill, HR 6491, would amend the federal criminal code, making it illegal to engage in activities that further organized retail crime. To deter illegal activities of organized retail criminals, it also would impose specific and narrow obligations upon on-line marketplaces known to be used by high-volume sellers of stolen merchandise.


"The bill will provide law enforcement officers and retailers with the tools they need to remove the cloak of anonymity and bring these criminals to justice; while at the same time, preserving the on-line marketplace for law-abiding citizens," said Ellsworth.

Congressman Jordan added, "Organized retail crime is a growing problem that costs Ohio retailers and consumers millions of dollars each year. I am proud to join my colleague Mr. Ellsworth in this well-balanced bill and applaud him for his leadership in combating this serious issue."

"This new legislation protects consumers and deters crime by bringing the federal criminal code into the twenty-first century," says Al Thompson, vice president for global supply chain at RILA and one of the association's legislative coordinators. "This bi-partisan bill will provide law enforcement officials the tools they need to curtail ORC and protect consumers from unknowingly purchasing fraudulent or unsafe consumer goods."


Congress didn't stop there. In the final week of July, two more legislators

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introduced bills to address this crime. [See sidebar on page 23 for a summary of the critical elements in the proposed ORC legislation.]

First, just as Congress was adjourning for the August district work period, Congressman Bobby Scott (D-VA) introduced HR 6713, the E-Fencing Enforcement Act of 2008. This carefully tailored bill takes on what is clearly a significant cause of ORC growth, the selling of stolen goods on-line. Congressman Scott, who chairs the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, knows full well the importance of crime deterrence and drafted a bill that will do just that.

HR 6713 would address ORC by imposing reasonable duties on on-line marketplaces to collect information that law enforcement can in turn use to prosecute those that fence goods on their websites. Further, the bill requires that on-line marketplaces halt the sale of goods on their web sites if the goods are reasonably known to be stolen.

The following day, on August 1st, Senate Majority Whip Richard Durbin (D-IL) introduced a Senate bill titled Combating Organized Retail Crime Act of 2008. As the second highest ranking Democrat in the Senate, Durbin's commitment to providing law enforcement with the tools to fight ORC sends a clear message that Congress is ready to act.

Durbin's bill would clarify existing law to give law enforcement the tools to prosecute ORC, require on-line and off-line marketplaces to investigate suspicious sales, and place basic disclosure requirements on on-line marketplaces.

Thompson expressed his enthusiasm modestly, "July proved to be a good month for our cause."

### Roadblocks to Legislation

Opponents to ORC legislation remain committed to using their lobbying power to halt the coalition's progress.

"Your opposition is always an issue when it comes to problem solving in Washington," says Thompson. "As we build our case for a solution, our

opponents will try to divert attention from the problem."

Opponents to a legislative solution, led by eBay and others, contend that the legislation represents an attempt by conventional retailers to limit on-line competitors.

In an August 4th interview on American Public Media's *Marketplace* radio show, Steve DelBianco, executive director of NetChoice, a coalition of e-commerce companies and trade associations, claimed that attempts to regulate e-commerce are meant to scare consumers into thinking on-line bargains are shady. "It's really about competition prevention," said DelBianco. "It's an organized effort by big box retailers, I think, to squash competition from other angles."

"That's nonsense," asserts Jones. "This is about crime and consumer safety and any suggestion otherwise is an attempt to divert attention away from the risks that ORC poses to American communities."

"Clearly the opponents of this legislation fail to recognize organized retail crime is a serious priority for large and small retailers nationwide," says Joe LaRocca, NRF's vice president of loss prevention. "The continuing growth of retail crime and the damage it causes to communities dictates something needs to be done to control the theft and resale market for stolen goods."

eBay, however, insists that it is already assisting law enforcement and retailers in combating the problem.

"Attempting to sell stolen goods on eBay is one of the quickest ways to get caught. eBay's marketplace is incredibly open and transparent," says eBay's Catherine England. "We also have teams dedicated to collaborating with retailers and law enforcement to investigate and prosecute individuals who abuse our platform. The proposed legislation would restrict honest competition and limit consumer choice while doing very little to effectively address the issue of retail theft."

Testifying at the October 2007 legislative hearing, Robert Chestnut, eBay's vice president for rules, trust, and safety, acknowledged that criminals

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may make use of Internet web sites, but criticized the retail industry's response. "While some tech-savvy criminals are finding ways to use Internet technologies, sensible solutions should address the entire range of distribution methods and not place disproportionate focus on less popular methods," Chestnut said.

At the same hearing, Karl Langhorst, then director of LP for Randalls and Tom Thumb Food Markets and now director of LP for The Kroger Co., refuted both eBay's assertions that they currently assist retailers' investigations as well as the claim that regulation would be "disproportionate."

"Operators of sites such as eBay have historically failed to provide any meaningful information to retail investigators. Without this cooperation, we are severely hampered in securing the evidence needed by federal investigators to even open an investigation," Langhorst testified.

He added, "The information we are seeking from on-line marketplaces is no more cumbersome than is currently in place for brick-and-mortar providers of the same type operations. In many states



Members of the Coalition Against Organized Retail Crime spread across Washington, DC, in early May lobbying for ORC legislation with members of Congress. Shown here are Paul Jones of RILA (left) and Deanna Bonachea, organized retail crime manager for Big Lots Stores, heading to a meeting on Capitol Hill.

sellers of product such as HBC [health, beauty, and cosmetic] must have proof upon demand of where they acquired the product, and, if they are pawning it, they must have valid identification and serial numbers of the product, if any are noted. Legitimate retailers, both those operating on-line and as brick-and-mortar businesses, as well as consumers have a right to this type of protection."

### What Happens Next?

For the moment it appears the coalition of retailers has won the initial battle.

"Having three separate bills being introduced in the House and Senate to combat ORC and e-fencing is a great development, and show that, while e-Bay was able to delay introduction of these bills for several months, the members of Congress involved in this effort believe that ORC and e-fencing are serious issues deserving of Congressional attention," said NRF's LaRocca.

With bills introduced and some in Congress on the record supporting a legislative solution to this problem, progress has been made, but a long road lies ahead. Before loss prevention practitioners can begin to applaud, these bills need to become law, a process that can take considerable time. But RILA's Jones suggests there's a way to hasten the process.

"Loss prevention practitioners, the men and women who know this issue best, need to reach out to their members of Congress and tell them how important this legislation is," says Jones. "Those opposed to providing retailers and consumers with necessary protections from this crime are writing and calling. Bill supporters need to make sure their voice is heard loud and clear."

Jones promises that RILA and the coalition will continue to lead the industry in support of these bills by keeping the loss prevention industry informed about the legislation and organizing grass roots support as part of its ongoing legislative advocacy for these bills.

*EDITOR'S NOTE: Additional information on the ORC legislation is provided in the LP and Food Retailing column on page 30 ■*

## Coalition Against Organized Retail Crime

Members of the coalition are listed below. The coalition's web site can be accessed at [www.stopretailcrime.com](http://www.stopretailcrime.com).

- Abbott Laboratories
- Ahold USA
- Consumer Healthcare Products Association
- Cosmetic, Toiletry, and Fragrance Association
- CVS/pharmacy
- Duane Reade
- Eastman Kodak Company
- Food Lion
- Food Marketing Institute
- Giant Food Stores
- GlaxoSmithKline
- Grocery Manufacturers/Food Products Association
- The Home Depot
- International Formula Council
- The Kroger Co.
- Macy's
- National Association of Chain Drug Stores
- National Association of Convenience Stores
- National Community Pharmacists Association
- National Retail Federation
- Nestle
- Publix Super Markets
- Retail Alliance
- Retail Industry Leaders Association
- Rite Aid Corporation
- Safeway
- Security Industry Association
- The Stop & Shop Supermarket Company
- Target Corporation
- Tops Markets
- Wal-Mart Stores
- Walgreen Co.