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Entrapment by Estoppel

by Mark S. Cohen

This article presents an overview of the judicially created "entrapment by estoppel" defense, examines the evolution and elements of the defense, deals with a few common

procedural questions, and reviews the status of the defense in Colorado.

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The common law's refusal to recognize mistake of law as a defense came to be summarized in the phrase "ignorance of the law is no excuse." Although this rule remains deeply rooted in the American legal system,1 it is not absolute. As the law has grown increasingly complex, courts and legislatures have fashioned a number of exceptions. Among these is the judicially created defense known as "entrapment by estoppel."2

Briefly stated, the defense applies when a government official, employee, or agent tells the defendant certain conduct is legal, and the defendant reasonably believes the official. This defense differs from the traditional entrapment defense because a defendant claiming entrapment by estoppel need not show that a government official induced his or her conduct, only that the official offered an honest (albeit mistaken) opinion that the defendant's conduct was lawful.

This article provides an overview of the defense by outlining the evolution of the defense, examining its elements, and answering a few common procedural questions. It also reviews the status of the defense in Colorado.

Roots of Entrapment

By Estoppel

The defense of entrapment by estoppel grew from a trio of U.S. Supreme Court decisions. Earlier decisions laid the foundation for the defense by establishing two important limitations on the government's power to convict. One limitation clarified the nature of the traditional entrapment defense. In Sorrells v. United States, the government induced a defendant to commit a crime by repeatedly requesting that he sell illegal alcohol.3 The Court took a broad view of entrapment, holding that entrapment may be a defense whenever an innocent person (one not predisposed to commit an offense) is by persuasion, deceit, or inducement lured into committing a criminal act.

The other limitation on the government's power to convict concerned the clarity with which penal statutes must be expressed. In Lanzetta v. New Jersey,4 the defendants were convicted of violating a New Jersey statute making it unlawful to be a member of a "gang" or to be a "gangster." The state's appellate courts affirmed, but the U.S. Supreme Court reversed, reasoning that the statute was so vague that it did not afford a fair warning of what conduct was prohibited. Taken together, the limitations articulated in Sorrells and Lanzetta provided the theoretical basis for the defense that would become known as "entrapment by estoppel."

The Supreme Court

Trilogy

As noted above, the defense of entrapment by estoppel is traced to three decisions: Raley v. Ohio;5 Cox v. Louisiana;6 and United States v. Pennsylvania Industrial Chemical Corporation ("PICCO").7 In Raley, the Court first articulated the concept of unintentional entrapment by an official whose erroneous advice misleads a person into a violation of the law.

The 1959 Raley case centered on four witnesses called to testify before the Ohio Un-American Activities Commission. The Commission's chairman told the witnesses they could refuse to answer questions by

invoking the privilege against self-incrimination guaranteed in Ohio's constitution. However, the advice was incorrect, as an Ohio immunity statute deprived the witnesses of that privilege. Relying on the chairman's erroneous representation, the witnesses refused to answer certain questions and subsequently were convicted of contempt. Holding that the defendants were presumed to know the law, the Ohio Supreme Court affirmed the convictions. However, the U.S. Supreme Court granted certiorari and reversed the convictions of three of the defendants. Citing Sorrells and Lanzetta, the Court wrote:

While there is no suggestion that the Commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the State clearly had told him was available to him. . . . We cannot hold that the Due [P]rocess Clause permits convictions to be obtained under such circumstances.8

Cox, the second decision in the Supreme Court trilogy (written in 1965), concerned a defendant who led a demonstration outside a local courthouse.9 The chief of police had told the defendant his group could picket as long as they remained at least 101 feet from the courthouse steps. The demonstrators complied, but the defendant was nevertheless arrested and convicted under a statute prohibiting certain demonstrations "near" any courthouse. The Louisiana Supreme Court affirmed the conviction, but the U.S. Supreme Court reversed. Citing Raley, the Court reasoned that the chief of police had, in effect, advised the defendant that the location of the demonstration would not be considered "near" the courthouse within the terms of the statute. Under those circumstances, the Court held that due process precluded a conviction.10

The final decision in the Supreme Court trilogy came in 1973. In PICCO, the defendant was charged with discharging refuse into navigable waters without a permit. At trial, the defendant attempted to introduce evidence showing it had been misled by the Corps of Engineers' regulations interpreting the applicable statute as applying only to deposits hindering navigation, but the trial judge excluded this evidence as irrelevant. Holding that the district court had erred in disallowing the defendant's proffered evidence, the Pennsylvania Court of Appeals set aside the conviction in PICCO and remanded the case. The government subsequently obtained review by certiorari. In affirming the Pennsylvania Court of Appeals, the U.S. Supreme Court held that to the extent the regulations deprived the defendant of fair warning as to what conduct the government intended to make criminal, traditional notions of fairness prevented the government from proceeding with the prosecution.11

The constitutional principle articulated by the Supreme Court in Raley, Cox, and PICCO came to be known as the defense of entrapment by estoppel.12 As assertion of the defense became more common, lower courts were left to establish and clarify the elements of the defense.

Elements of Entrapment

By Estoppel

Appellate courts have adopted various tests to determine the circumstances under which a defendant may rely on entrapment by estoppel. Although the wording or formulation of the test varies slightly from one jurisdiction to another, the essential elements of the defense are that: (1) the government affirmatively represented that the charged conduct was legal; (2) the defendant relied on such representation; (3) the defendant's reliance was reasonable; and (4) prosecution of the defendant would be unfair given the defendant's reliance.13 Each of these elements is discussed below.

Representation by Government

The first element requires an affirmative government representation that the charged conduct was lawful. This requires proof that there was an affirmative representation and that such representation was made by the government.

Affirmative Representation: The representation may be oral or written. In most cases, it will be a statement made by an individual government official, employee, or agent. However, it also may take the form of a regulation14 or official opinion.15 The representation must be an affirmative representation that the charged conduct is lawful. For example, in United States v. Nichols,16 the court held that a probation officer's statement that a defendant could not possess a weapon while on probation was not an affirmative representation that the defendant could possess weapons on completion of probation. Thus, the court disallowed the defense.

Generally, government conduct, standing alone, is not an affirmative representation. Thus, the failure to enforce a particular law in the past does not constitute an affirmative representation that the prohibited conduct is lawful.17 Similarly, government silence on an issue, if construed as tacit approval of the defendant's conduct, is not an affirmative representation that the conduct is lawful.18

The requirement of an affirmative representation as to the legality of the defendant's conduct stems from the Court's holding in Raley that there must be "active misleading" by the government. However, the defendant is not required to prove trickery or fraud by the government to establish the

defense.19 Even innocent misrepresentations as to the legality of the defendant's conduct are sufficient to warrant assertion of the defense.

Government Made the Representation: When a government regulation or publication represents that certain conduct is lawful, the representation clearly is made by the government. Similarly, when a government employee makes a representation concerning a matter within that employee's area of authority, the representation is made by the government.

A more interesting issue arises when the representation is made by an employee of one government and a different government institutes the prosecution. State and federal courts have not always addressed this issue the same way. The federal courts are nearly unanimous in holding that a defendant charged with a federal offense may not rely on representations made by state or local officials.20 A few federal courts have criticized this view, arguing that the applicability of the defense should be determined by the element of unfairness rather than arcane principles of agency.21 However, state courts have not necessarily adopted the view of the federal courts on this issue.22

Generally, statements of private citizens cannot establish the defense of entrapment by estoppel.23 The due process concerns embodied in the defense of entrapment by estoppel are implicated only when the source of the information is a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue.24

Reliance by Defendant

Even if the government represented that certain conduct was lawful, entrapment by estoppel is not available unless the defendant relied on the representation. If the defendant was aware of the representation, but did not rely on it, entrapment by estoppel is unavailable. For example, in U.S. v. West Indies Transport, Inc., the government charged the defendant with illegal dumping. The defendant claimed to have relied on certain government representations that its conduct was legal. However, the court rejected that argument because the defendant's consistent dumping of scrap metal under cover of darkness showed that defendant's claimed reliance was neither actual nor in good faith.25

Reasonableness of Defendant's Reliance

Reliance by a defendant on government representation that certain conduct was legal must have been reasonable for a defendant successfully to assert entrapment by estoppel. The reasonableness of a defendant's reliance must be determined by an objective, not subjective, standard.26

The courts consider a number of factors in determining the reasonableness of a defendant's reliance. Some courts hold the reliance must be reasonable in light of the identity of the government official, the point of law represented, and the substance of the misrepresentation.27 Others hold that for reliance to be reasonable, the defendant must establish that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.28

Unfairness to the Defendant

Entrapment by estoppel is about fairness. In Raley and Cox, the Supreme Court concluded that to sustain the convictions "would be to sanction an indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the state had clearly told him was available to him."29 Similarly, in PICCO, the court suggested that to sustain the conviction would contravene "traditional notions of fairness inherent in our system of criminal justice."30

If the entrapment by estoppel defense is about fairness, it follows that where a conviction would not result in unfairness to the defendant, the defense should fail. Generally, unfairness always will be present if the other elements of the defense are established, but some courts consider unfairness a separate element.31

Applicability to Strict

Liability and Specific

Intent Crimes

Motive or intent is irrelevant with respect to strict liability offenses. Although prosecutors have argued entrapment by estoppel is not available to defendants charged with such crimes, the courts have rejected this argument, reasoning that the defense focuses on the conduct of the government, not on the state of mind of the defendant.32

It also has been argued, with some merit, that entrapment by estoppel should not be available to someone charged with a specific intent crime because the defendant's good faith would be a complete defense.33 A defendant's good faith reliance on a government representation would negate the element of specific intent, so an instruction on entrapment by estoppel would be a superfluous argument. However, thus far, only one court has openly embraced this argument.34 Other courts facing the same issue have not had to address the issue.35

Entrapment by Estoppel

In Colorado

The U.S. Court of Appeals for the Tenth Circuit36 and the U.S. District Court for the District of Colorado37 have recognized the defense of entrapment by estoppel, but there has been no reported decision specifically addressing the defense by a Colorado appellate court. The lack of Colorado case law likely is due to the fact that the mistake of law defense in Colorado is codified at CRS § 18-1-504(2). That statute provides that:

A person is not relieved of criminal liability for conduct because he [or she] engages in that conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless the conduct is permitted by one or more of the following:

(a) A statute or ordinance binding in this state;

(b) An administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant the permission under the laws of the state of Colorado;

(c) An official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, order, or law. If such interpretation is by judicial decision, it must be binding in the state of Colorado.

As a result of Colorado's codification of the mistake of law defense, Colorado courts have tended to analyze mistake of law claims within the framework of the statute. However, it seems likely that the constitutional defense known as entrapment by estoppel is broader than the statute. For instance, assuming no public body or official has authority to grant permission to break the law, it is difficult to imagine a situation in which a defendant ever could use CRS § 18-1-504(2)(b) as a defense.

In People v. Lesslie,38 for example, the defendant, a deputy sheriff, was convicted of conspiracy to commit criminal eavesdropping for placing a listening device in the men's room of a tavern. The defendant claimed the sheriff had ordered him to place the device, and later sought post-conviction relief, arguing that his attorney had been ineffective because counsel had not raised several defenses, including mistake of law. In upholding the trial court's denial of the motion for post-conviction relief, the Colorado Court of Appeals reasoned that even if the sheriff had ordered the deputy to place the device, the sheriff lacked authority to do so without a court order. Consequently, the defendant could not have relied on the codified mistake of law defense.

In dealing with claims of entrapment by estoppel, on the other hand, the courts are concerned with fairness, not with whether the defendant's conduct fits a certain statutory peg. Had the facts of the Lesslie case been considered under an entrapment by estoppel analysis, the inquiry would have focused on the reasonableness of the defendant's belief that the sheriff had authority to order him to place a listening device without a court order, rather than whether the sheriff actually possessed such authority. The result might well have been the same. However, it is important to remember, as the Colorado Supreme Court noted in People v. Holmes,39 constitutional demands of due process limit the rule that ignorance of the law is no excuse.

Procedural Issues

Having reviewed the substantive law pertaining to entrapment by estoppel, practitioners also must be familiar with some procedural issues that may arise when a defendant attempts to assert the defense. This section examines ways in which the defense may be raised, entitlement to a jury trial, and the burden of proof.

Raising the Defense

The defense of entrapment by estoppel may be raised in any number of ways. A defendant may raise the issue by: (1) filing a pretrial motion to dismiss;40 (2) requesting an instruction on entrapment by estoppel;41 (3) filing a motion for a judgment of acquittal;42 or (4) making the defense part of a conditional guilty plea.43 In addition, the prosecution may raise the issue by filing a motion in limine asking the court to hold that entrapment by estoppel is unavailable as a matter of law and excluding any evidence pertaining to it.44

Entitlement to a Jury Trial

Where a defendant alleges facts sufficient to make out a prima facie case for entrapment by estoppel, the majority of courts hold that the defendant is entitled to a jury trial.45 Only one court has adopted the view that entrapment by estoppel is never an issue for the jury.46 There may be situations in which the defendant's allegations are such that entrapment by estoppel is unavailable as a matter of law. For instance, in U.S. v. Funches, the defendant was charged with being a felon in possession of a firearm. Defendant argued he had been advised by a local law enforcement official that he could lawfully possess a firearm. The Court ruled that entrapment by estoppel was not available as a matter of law because the alleged representation had been made by a local, rather than federal, official.47

Burden of Proof

Entrapment by estoppel is an affirmative defense for which the defendant bears the burden of proof.48 The courts rarely have addressed the degree of proof required. Where the

issue has been specifically discussed, the courts have held the defendant must prove the defense by a preponderance of the evidence.49

Conclusion

The common law rule that ignorance of the law is no excuse remains deeply rooted in the American legal system, but it is not absolute. The defense known as entrapment by estoppel, with its origins in the Due Process Clause of the U.S. Constitution, applies when a government official tells the defendant that certain conduct is legal and the defendant reasonably believes the official. As the U.S. Supreme Court noted in Raley, to allow a conviction "would be to sanction the most indefensible sort of entrapment by the State."50 With this in mind, prosecutors and criminal defense lawyers should be alert to situations in which defendants may have acted in reliance on the advice of a government official, employee or agent, or statements contained in a government regulation. When such situations present themselves, entrapment by estoppel may be a viable defense.

NOTES

1. Cheek v. U.S., 498 U.S. 192 (1991).

2. Although the term "entrapment by estoppel" has found favor in the courts, this defense has been known by many names. Courts also have referred to the defense as "official misleading," "quasi-entrapment," "executive estoppel," and the "due process defense."

3. Sorrells v. U.S., 287 U.S. 435 (1932).

4. Lanzetta v. State of New Jersey, 306 U.S. 451 (1939).

5. Raley v. State of Ohio, 360 U.S. 423 (1959).

6. Cox v. State of Louisiana, 379 U.S. 559 (1965).

7. U.S. v. Pennsylvania Industrial Chemical Corp. ("PICCO"), 411 U.S. 655 (1973).

8. Raley, supra, note 5 at 438-39.

9. Cox, supra, note 6.

10. Id.

11. PICCO, supra, note 7 at 674.

12. The U.S. Supreme Court has never referred to the defense as "entrapment by estoppel," but the term has become so common in the lower courts that it is likely to continue to be used unless the high court expressly disavows it.

13. See U.S. v. Nichols, 21 F.3d 1016 (10th Cir. 1994); U.S. v. Levin, 973 F.2d 463 (6th Cir. 1992); U.S. v. Smith, 940 F.2d 710 (1st Cir. 1991). The elements of the defense as set forth in § 2.04(3)(b) of the Model Penal Code are virtually identical, except there is no explicit requirement of unfairness; if the other elements are established, the Model Penal Code assumes unfairness is present.

14. See PICCO, supra, note 7; U.S. v. Neufeld, 908 F.Supp. 491 (S.D.Ohio 1995).

15. See Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993).

16. Nichols, supra, note 13.

17. U.S. v. Hurst, 951 F.2d 1490 (6th Cir. 1991); U.S. v. Conley, 859 F.Supp. 909 (W.D.Pa. 1994). See also Flinn v. Treadwell, 207 P.2d 967 (Colo. 1949) (failure to enforce zoning ordinance in past did not constitute repeal of ordinance).

18. U.S. v. French, 46 F.3d 710 (8th Cir. 1995); Fisher v. State, 720 S.W.2d 900 (Ark. 1986).

19. U.S. v. Tallmadge, 829 F.2d 767 (9th Cir. 1987).

20. See, e.g., U.S. v. Funches, 135 F.3d 1405 (11th Cir. 1998); U.S. v. Rector, 111 F.3d 505 (7th Cir. 1997).

21. See Conley, supra, note 17; U.S. v. Brady, 710 F.Supp. 290 (D.Colo. 1989).

22. See People v. Studifin, 504 N.Y.S.2d 608, 132 Misc.2nd 326 (Sup.Ct. 1986) (defendant charged with state law firearms violations found not guilty as a result of reliance on a letter from the federal Bureau of Alcohol, Tobacco and Firearms).

23. U.S. v. West Indies Transport, Inc., 127 F.3d 299 (3rd Cir. 1997); U.S. v. Clark, 986 F.2d 65 (4th Cir. 1993).

24. Miller v. Commonwealth, 492 S.E.2d 482 (Va.App. 1997).

25. West Indies Transport, supra, note 23.

26. Funches, supra, note 20 at 1407; Rector, supra, note 20 at 506.

27. Funches, supra, note 20 at 1405; U.S. v. Soskin, 100 F.3d 1377 (7th Cir. 1996).

28. U.S. v. Trevino-Martinez, 86 F.3d 65 (5th Cir. 1996); U.S. v. Abcasis, 45 F.3d 39 (2nd Cir. 1995).

29. See Raley, supra, note 5 at 438; Cox, quoting Raley, supra, note 6 at 571.

30. PICCO, supra, note 7 at 674.

31. Levin, supra, note 13.

32. U.S. v. Thompson, 25 F.3d 1558 (11th Cir. 1994); U.S. v. Brebner, 951 F.2d 1017 (9th Cir. 1991); U.S. v. Hedges, 912 F.2d 1397 (11th Cir. 1990); Brady, supra, note 21.

33. See Connelly, "Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law," 48 U. Miami L.Rev. 627 (1994).

34. See Conley, supra, note 17.

35. French, supra, note 18; U.S. v. Woodley, 9 F.3d 774 (9th Cir. 1993).

36. Nichols, supra, note 13.

37. Brady, supra, note 21.

38. People v. Lesslie, 24 P.3d 22 (Colo.App. 2000).

39. People v. Holmes, 959 P.2d 406 (Colo. 1998).

40. Levin, supra, note 13.

41. Funches, supra, note 20.

42. U.S. v. Aldridge, 985 F.2d 960 (8th Cir. 1993).

43. U.S. v. Ramos, 961 F.2d 1003 (1st Cir. 1992).

44. U.S. v. Etheridge, 932 F.2d 318 (4th Cir. 1991).

45. See, e.g., U.S. v. Caron, 64 F.3d 713 (1st Cir. 1995); French, supra, note 18; Abcasis, supra, note 28; Thompson, supra, note 32.

46. Conley, supra, note 17.

47. Funches, supra, note 20.

48. West Indies Transport, supra, note 23.

49. Id. at 313; Twitchell, supra, note 15 at 620.

50. Raley, supra, note 5 at 438.

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