

Setting a rogue to catch a rogue: the changing face of Lincoln's Law

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Background

The False Claims Act is big business for the US government. Since January 2009, the government has recovered more than \$30 billion through False Claims Act cases, with more than half of that from cases involving alleged fraud against federal healthcare programmes.⁽¹⁾ It is a far cry from the act's humble beginnings – a law first conceived during the American Civil War as Congress sought a solution to the problem of fraudulent sales to the military. The importance of the act to the healthcare sector was still a century away.

American Civil War and creation of 'Lincoln's Law'

Less than one year into the American Civil War, reports began to circulate about alleged fraudulent sales to the military: gunpowder cut with sawdust; cardboard boots; uniforms that disintegrated in the rain; old, repainted ships falsely advertised as new; and old mules resold to different quartermasters.⁽²⁾

On July 26 1861 Congress passed its initial solution. It created a law that all military contracts must be written and signed by the contracting parties. A copy of each written contract would be filed by the contracting officer with a newly created Returns Office of the Department of the Interior.⁽³⁾ The contracting officer would affix an affidavit to the contract, sworn to before a magistrate, that the contract copy was accurate.⁽⁴⁾ Yet the bill provided only for a single clerk to file and organise every contract submitted by all military officers.⁽⁵⁾

While the House of Representatives considered grammatical amendments to the bill, the quartermaster general and the chairman of naval affairs submitted letters expressing their disapproval of the filing system.⁽⁶⁾ They argued that military officers might need to enter into thousands of contracts, and as quickly as possible during wartime. Requiring officers to spend enormous amounts of time drafting and notarising contracts would hurt the war effort.⁽⁷⁾ It was also unfeasible to have a magistrate available at all times.⁽⁸⁾ The quartermaster general declared the filing system to be "almost, if not entirely, impracticable",⁽⁹⁾ while the chairman of naval affairs requested an appropriation of \$12,500 to try and cover the cost of hiring clerks to serve as magistrates.⁽¹⁰⁾ Upon receipt of the letters, Congress hotly debated the filing system, ultimately concluding that the government could not successfully create the requisite infrastructure to support the system.⁽¹¹⁾

Nearly two years later, Congress landed on a more practical solution. On January 16 1863 Senator Henry Wilson introduced Senate Bill 467 "to prevent and punish frauds upon the Government of the United States".⁽¹²⁾ Congress decided to rely on individual informers, "setting a rogue to catch a

AUTHORS

[Jennifer Brechbill](#)



[Stephanie L Carman](#)



[Natalie Theresa Sinicrope](#)



rogue".(13) This model of relying on private citizens to protect government (or the king's) property can be traced back to 14th century England.(14) But here, private whistleblowers, known as 'relators', would sue on behalf of the United States and share in the government's recovery. Wrongdoers were required to pay double damages plus \$2,000 for each false claim submitted. Relators were entitled to receive 50% of the government's award.(15) On March 2 1863 President Lincoln signed the False Claims Act into law.

1943 False Claims Act amendments

The creation of the Federal Bureau of Investigation in 1935 increased the government's ability to combat fraud. By 1943 the Department of Justice eagerly pursued actors for defrauding the government.(16) During the new wave of criminal prosecutions, some private citizens would wait at courthouses for fraud indictments to come down. When one did, the citizens would file a civil suit pursuant to the False Claims Act against the party in the criminal action, basing the civil claim on the existence of the criminal claim. These suits were dubbed 'parasitic lawsuits'.(17)

The attorney general at the time, Francis Biddle, detested these suits and led the charge to get rid of them. Biddle filed an *amicus curiae* brief in the Supreme Court case *US ex rel Marcus v Hess* in which he argued that False Claims Act *qui tam* actions should be eliminated.(18) The Supreme Court did not eliminate *qui tam* actions, but Biddle used the case as an example when he began to lobby Congress. He argued that private citizens were abusing the False Claims Act for personal benefit and the government need not rely on citizen suits for protection, as demonstrated through the existence of the criminal actions.(19)

On December 23 1943 President Roosevelt signed into law the 1943 False Claims Act amendments, which made parasitic *qui tam* suits more difficult to file. The most significant change came from a new provision requiring dismissal of a *qui tam* when the government was already aware of the fraud in question.(20) The 1943 amendments also limited the role that a relator could play in False Claims Act cases after the government intervened,(21) and lessened the award that a relator could receive.(22)

1986 False Claims Act amendments

False Claims Act lawsuits became far less common following the 1943 amendments.(23) However, military expansion during the Cold War once again raised concerns about fraudulent sales to the military. Reports circulated that the Navy was spending \$400 for each hammer purchased and \$7,000 for each coffeepot.(24) Congress became concerned that the barriers for relators were too great and proposed a new round of amendments to revive the act.

On October 27 1986 President Reagan signed into law the 1986 amendments, expanding the overall ability and incentive to bring False Claims Act *qui tam* actions. These amendments:

- increased the potential damages and awards;
- allowed relators to remain more involved in a case when the government intervened; and
- eliminated the provision requiring dismissal where the government had prior knowledge of the fraud in question, substituting it with limitations based on public disclosures.(25)

In the years following the 1986 amendments, the healthcare industry replaced defence as the primary focus of False Claims Act litigation.

In 1989 the Supreme Court took an important step to limit the reach of these amendments. Irwin Halper was charged and convicted in criminal court of submitting 65 separate false Medicare claims. The government then brought additional civil charges under the act. In *US v Halper* a unanimous court held that because Halper had already been jailed and fined, additional punishment in a False Claims Act proceeding would violate the double jeopardy clause of the Fifth Amendment.(26)

21st century

The wars in Iraq and Afghanistan reinvigorated the original purpose of the act, as relators brought suits relating to the war efforts. Yet during the 1990s and the 2000s, the majority of False Claims Act

cases related to allegations of healthcare fraud. It is a trend that shows no signs of slowing.

In recent years, Congress passed additional laws to help clarify the act.⁽²⁷⁾ Most recently, the Supreme Court decided *Universal Health Services v US ex rel Escobar*, which clarified the materiality standard (while raising additional questions for counsel as to how lower courts will apply the *Escobar* standard).⁽²⁸⁾

Comment

After 154 years, the False Claims Act is now far different from 'Lincoln's Law' as it was originally imagined. False Claims Act cases are now more complex, lucrative and healthcare focused than ever. However, interest in the act has waxed and waned over the years. What is the future of the act? Only time will tell.

For further information on this topic please contact Jennifer D Brechbill, Stephanie L Carman or Natalie Sinicrope at Hogan Lovells US LLP by telephone (+1 202 637 5600) or email (jennifer.brechbill@hoganlovells.com, stephanie.carman@hoganlovells.com or natalie.sinicrope@hoganlovells.com). The Hogan Lovells US LLP website can be accessed at www.hoganlovells.com.

Endnotes

(1) Press release, US Department of Justice, *Johnson & Johnson Subsidiary Acclarent Inc Pays Government \$18 Million to Settle False Claims Act Allegations* (July 22 2016).

(2) See, for example, 132 Cong Rec H6482 (daily ed September 9 1986) (statement of Rep Berman); Wayne Andrews, *The Vanderbilt Legend: The Story of the Vanderbilt Family, 1794-1940*, 77-84 (1941); Cong Globe, 37th Cong, 3d Sess 955 (1863); "Shoddy Army Contracts", *Sacramento Daily Union*, September 27 1861, at 4.

(3) Cong Globe, 37th Cong, 1st Sess 276 (1861); Cong Globe, 37th Cong, 1st Sess 369 (1861); Cong Globe, 37th Cong, 1st Sess 403 (1861); see also, Act of June 2 1862, ch 93, 12 Stat 411, 411-12.

(4) Cong Globe, 37th Cong, 1st Sess 276 (1861); Cong Globe, 37th Cong, 1st Sess 369 (1861); Cong Globe, 37th Cong, 1st Sess 403 (1861).

(5) Cong Globe, 37th Cong, 1st Sess 276 (1861); Cong Globe, 37th Cong, 1st Sess 403 (1861), at 404.

(6) Cong Globe, 37th Cong, 1st Sess 276 (1861); Cong Globe, 37th Cong, 1st Sess 403 (1861); Act of June 2 1862, ch 93, 12 Stat 411, 411-12; Gideon Welles, "Letter of the Secretary of the Navy to the Chairman of the Committee on Naval Affairs", S Misc Doc No 105, at 1-2 (2d Sess 1862); MC Meigs, "Letter of the Quartermaster General to the Chairman of the Committee on Military Affairs and the Militia", S Misc Doc No 105, at 2-4 (2d Sess 1862).

(7) Welles, *supra* note 6, at 1-2; Meigs, *supra* note 6, at 2-4; Cong Globe, 37th Cong, 1st Sess 403 (1861); see also, SP Chase, "Letter from the Secretary of the Treasury Transmitting a Report of the Solicitor of the Treasury Department in Relation to Frauds Committed Upon the Revenue", HR Misc Doc No 18 (3d Sess 1863).

(8) Welles, *supra* note 6, at 1-2.

(9) Meigs, *supra* note 6, at 2-4; Cong Globe, 37th Cong, 1st Sess 403 (1861).

(10) Welles, *supra* note 6, at 1-2.

(11) Cong Globe, 37th Cong, 1st Sess 369 (1861); Cong Globe, 37th Cong, 1st Sess 403 (1861); Cong Globe, 37th Cong, 2nd Sess 206 (1862); Cong Globe, 37th Cong, 2nd Sess 2826 (1862); Cong Globe, 37th Cong, 2nd Sess 2914 (1862); Cong Globe, 37th Cong, 2nd Sess 3305 (1862); Cong Globe, 37th Cong, 2nd Sess 3368 (1862).

(12) Cong Globe, 37th Cong, 3d Sess 348 (1863) (statement of Sen Wilson).

(13) *Id* at 955-56 (statement of Sen Howard).

(14) James B Helmer, Jr, *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots* (81 U Cin L Rev (2013), at 1262; see also 9 Edward III ch 1 (1335).

(15) Act of March 2 1863, ch 67, 12 Stat 696, 698.

(16) Helmer, *supra* note 13, at 1267.

(17) Helmer, *supra* note 13, at 1267-68.

(18) Brief for the United States as *amicus curiae*, 317 US 537 (1943) (Nos 173, 236), 1942 WL 54209.

(19) Helmer, *supra* note 13, at 1267-69.

(20) Pub L No 78-213, ch 377, 57 Stat 608 (1943); 31 USC §232(c) (1943).

(21) The Act of December 23 1943 provided: "If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit." Pub L No 78-213, ch 377, 57 Stat 608 (1943).

(22) *Id*.

(23) Patricia Meador & Elizabeth S Warren, "The False Claims Act: A Civil War Relic Evolves into A Modern Weapon", 65 Tenn L Rev 455 (1998), at 459-60.

(24) 131 Cong Rec H5135 (daily ed June 27 1985) (statement of Rep Weiss); James B Helmer, Jr and Robert Clark Neff, Jr, "War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the *United States ex rel. Gravitt v General Electric Co. Litigation*", 18 Ohio NUL Rev 35 (1991), at 40-41.

(25) False Claims Amendments Act "31 USC 3701 note" of 1986, Pub L No 99-562 (S 1562), 100 Stat 3153.

(26) *United States v Halper*, 490 US 435 (1989), abrogated by *Hudson v United States*, 522 US 93 (1997).

(27) See, for example, Fraud Enforcement and Recovery Act (FERA), Pub L No 111-21, 123 Stat 1617 (2009); Patient Protection and Affordable Care Act of 2010, Pub L No 111-148, 124 Stat 119 (2010) (codified as amended at 42 USC § 18001); Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub L No 111-203, § 929-Z, 124 Stat 1376, 1871 (2010) (codified at 15 USC § 780).

(28) *Universal Health Servs, Inc v US ex rel Escobar*, 136 S Ct 1989 (2016).

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