



## THE FEDERAL LACEY ACT EXEMPLIFIES THE OVERCRIMINALIZATION OF FREE ENTERPRISE

by C. Jarrett Dieterle

In October 2015, Lumber Liquidators, the nation’s largest specialty retailer of wood flooring, was charged in federal court with one felony count of importing goods through false statements and four misdemeanor violations of the Lacey Act.<sup>1</sup> The Lacey Act, which makes it illegal to “import, export, transport, sell, receive, acquire, or purchase” any type of plant or wildlife that was “taken, possessed, transported, or sold” in violation of a foreign or domestic law,<sup>2</sup> has become a prime example of overcriminalization in America.

Lumber Liquidators’ alleged crime was illegally importing and mislabeling hardwoods that were originally harvested (via Chinese suppliers) from the Russian Far East—specifically, from woodlands that form the habitat of the endangered Siberian tiger and Amur leopard.<sup>3</sup> The company ultimately pleaded guilty and was sentenced in February 2016. Its punishment was a \$13 million fine—the largest fine ever under the Lacey Act—which included over \$4 million in forfeited assets and \$1.23 million in “community service” payments.<sup>4</sup> The Lumber Liquidators case shows both the comprehensive power of the modern Lacey Act and the reality that aggressive enforcement of the act is likely to continue.

### Lacey Act Background

As America’s overcriminalization problem has gained attention, the Lacey Act has achieved particular notoriety<sup>5</sup> on account of its murky *mens rea* standards and the fact that violations of *foreign* laws can trigger the act’s penalties. Several highly-publicized examples of the Lacey Act in action have only cemented the law’s dubious reputation. In *United States v. McNab*,<sup>6</sup> for instance, American seafood distributors were sentenced under the act to eight years in jail for running afoul of Honduran fishing regulations requiring lobsters with tails under 5½ inches to be packaged in plastic bags (rather than cardboard boxes). Alleged Lacey Act violations were also at issue in

<sup>1</sup> Criminal Information, *United States v. Lumber Liquidators, Inc.*, Criminal No. 2:15cr126 (E.D. Va. Oct. 7, 2015) [hereinafter “Criminal Information”], <http://ftpcontent4.worldnow.com/wbvt/news/Lumber%20Liquidators%20Felony%20Information.pdf>.

<sup>2</sup> 16 U.S.C. §§ 3371–3378 (2012). In addition to banning the transportation and importation of illegally taken wildlife and plants, the Lacey Act also imposes complex labeling requirements on imported plants and animals. Violators of the act can face misdemeanor or felony convictions, fines, asset forfeitures, and jail time.

<sup>3</sup> Statement of Facts, *United States v. Lumber Liquidators, Inc.*, Criminal No. 2:15cr126, at 3–5 (E.D. Va. Oct. 22, 2015) [hereinafter “Statement of Facts”], <https://www.scribd.com/doc/286491719/Lumber-Liquidators-Statement-of-Facts>.

<sup>4</sup> See Press Release, U.S. Dep’t of Justice, Lumber Liquidators Inc. Sentenced for Illegal Importation of Hardwood and Related Environmental Crimes (Feb. 1, 2016) [hereinafter “Lumber Liquidators Sentencing Press Release”], <https://www.justice.gov/opa/pr/lumber-liquidators-inc-sentenced-illegal-importation-hardwood-and-related-environmental>.

<sup>5</sup> See Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J., July 23, 2011, <http://www.wsj.com/articles/SB10001424052748703749504576172714184601654>.

<sup>6</sup> 331 F.3d 1228 (11th Cir. 2003).

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the dramatic 2011 raid of the Gibson Guitar Company. Far removed from its humble origins, the Lacey Act is now being enlisted as an international environmental justice tool—a development that could ultimately harm both American citizens and businesses.<sup>7</sup>

### The Law's Origins

Congress enacted the Lacey Act in the early 1900s in response to the threat posed to native birds by wildlife poachers.<sup>8</sup> Iowa Representative John F. Lacey, the act's chief sponsor, described the law as a "supplement" to allegedly inadequate state game laws.<sup>9</sup> The original act had markedly lower fines, violations could not result in jail time, and foreign laws could not trigger the act's penalties.<sup>10</sup>

Over the next century, Congress amended the Lacey Act numerous times. With each amendment, the law strayed further from its original purpose, and mutated into a sweeping statute that encourages aggressive enforcement. Congress watered down the law's *mens rea* requirements, added foreign-law violations as triggering acts, and enhanced the available penalties.<sup>11</sup> Most noteworthy, the 2008 amendments extended the act's coverage beyond the animal kingdom to all *plants* "taken, possessed, transported, or sold" in violation of domestic or foreign laws.<sup>12</sup> As a result, the Lacey Act became the world's first ban on the importation of illegal wood.<sup>13</sup>

Rep. Lacey, upon introducing his law in 1900, warned his fellow legislators to address "our own" problems before attempting to "reform the world."<sup>14</sup> Needless to say, Rep. Lacey would hardly recognize his eponymous law were he alive today.

### The Lumber Liquidators Case

Of the four Lacey Act counts charged against Lumber Liquidators, three were for transporting wood pursuant to a false declaration on a form that misidentified the origin and type of wood being transported. The fourth count was a classic Lacey Act offense of importing a plant taken in violation of foreign law—in this case, a Russian law that regulated the amount of wood that could be harvested from a particular parcel of land.<sup>15</sup>

The four counts all involved a "due care" standard—*i.e.*, "in the exercise of due care," Lumber Liquidators "should have known" that its importation declarations were false and that the wood was being imported from an at-risk source and in violation of foreign law.<sup>16</sup> Although the Lacey Act violations were all misdemeanors, the company also was charged with the felony of Entry of Goods by Means of False Statements<sup>17</sup> based on the false declarations that had accompanied the wood.<sup>18</sup> Lumber Liquidators' plea agreement provides three key takeaways about the future of the Lacey Act.

<sup>7</sup> Les Christie, *Gibson Guitar CEO Fights Back*, CNN MONEY (Sept. 2, 2011), [http://money.cnn.com/2011/09/02/smallbusiness/gibson\\_guitar/](http://money.cnn.com/2011/09/02/smallbusiness/gibson_guitar/); C. Jarrett Dieterle, *Gibson Guitar CEO on Overcriminalizing Businesses*, POINT OF LAW (July 25, 2012), <http://www.pointoflaw.com/archives/2012/07/gibson-guitar-ceo-on-overcriminalizing-businesses.php>.

<sup>8</sup> See C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279, 1286–88 (2014), available at <http://georgetownlawjournal.org/files/2014/04/DieterleLacey.pdf>.

<sup>9</sup> *Id.* at 1287–88.

<sup>10</sup> *Id.* at 1293–95, 1297–99.

<sup>11</sup> *Id.* at 1293–97, 1297–1300, 1300–05.

<sup>12</sup> Food Conservation and Energy Act of 2008, Pub. L. No. 100-234, 122 Stat. 923 (2008).

<sup>13</sup> Jonathan Lash, *When A Tree Falls Illegally In The Forest*, World Resources Inst. (Jan. 9, 2009), <http://www.wri.org/blog/2009/01/when-tree-falls-illegally-forest>.

<sup>14</sup> Dieterle, *supra* note 9, at 1291, 1297.

<sup>15</sup> Criminal Information at 5-8.

<sup>16</sup> *Ibid.*; 16 U.S.C. § 3373(d)(2).

<sup>17</sup> 18 U.S.C. § 542.

<sup>18</sup> Criminal Information at 4.

## **1. The US Government Is Likely to Continue Its Role as a Crusader for International Environmental Justice**

According to the available court documents, Lumber Liquidators' importation practices and internal policies do not appear to have been a model of clarity. The Joint Statement of Facts—to which the company stipulated—details how Lumber Liquidators repeatedly ignored “red flags” signaling that it was importing some of its hardwood from at-risk regions via Chinese suppliers known for sloppy documentation practices.<sup>19</sup>

DOJ seized upon Lumber Liquidators' compliance shortcomings, determined, it seems, to make an example of the company: “We hope this sends a strong message that we will not tolerate such abuses of U.S. laws that protect and preserve the world's endangered plant and animal species.”<sup>20</sup> Even though it may be tempting to cheer efforts to save rare animals like the Siberian tiger, this laudable goal does not make the Lacey Act the proper *means* for achieving it—especially when the act can ensnare defendants with no culpable state of mind.

The plea agreement with Lumber Liquidators failed to address the root of the illegal logging problem in this case—Chinese suppliers with shoddy business ethics operating in violation of Russian law. Concerned nations would do better to enter into a treaty or international agreement concerning illegal logging practices that would ban exports by offending suppliers.

## **2. The Act's Mens Rea Requirements Remain Problematic**

The plea agreement in the Lumber Liquidators case demonstrates the jumbled and problematic nature of the Lacey Act's *mens rea* standards. Felony charges under the act require that the defendant acted “knowingly”—a standard that federal courts have construed to mean nothing more than volitional conduct in which a defendant consciously engaged.<sup>21</sup> Notably, DOJ did not charge Lumber Liquidators with a Lacey Act felony under the act's already watered-down “knowing” standard.<sup>22</sup> Instead, it charged the company with four Lacey Act *misdemeanors*, which use a “due care” standard—meaning that, in the exercise of due care, the company “should have known” it was violating the act.<sup>23</sup>

Legal commentators have expressed skepticism about whether negligence-based standards (such as “should have known”), which traditionally have been reserved for civil tort law, are even appropriate in the criminal law context.<sup>24</sup> After all, acting with *mens rea* (a “guilty mind”) is traditionally considered a necessary component of a crime, and mere carelessness is not the same thing as possessing a “guilty mind.”<sup>25</sup>

Furthermore, in the specific context of the Lacey Act, many plant importers argue that a “due care” standard is impractical in light of how the importation process works in the real world. As a lumber company executive noted in 2007 congressional hearings about the Lacey Act:

When we go to foreign countries we do as much investigation as we can ... [But] [s]omewhere along the line as a business owner I have to rely on somebody to say that this is legal ... I cannot audit the entire supply chain, and I cannot audit the entire documentation ... All I can do is work

<sup>19</sup> See Statement of Facts at 6, 13.

<sup>20</sup> Press Release, U.S. Dep't of Justice Lumber Liquidators Inc. Pleads Guilty to Environmental Crimes and Agrees to Pay More Than \$13 Million in Fines, Forfeiture and Community Service Payments (Oct. 22, 2015), <https://www.justice.gov/opa/pr/lumber-liquidators-inc-pleads-guilty-environmental-crimes-and-agrees-pay-more-13-million>.

<sup>21</sup> Dieterle, *supra* note 9, at 1300–01.

<sup>22</sup> The company did not admit to engaging in deliberate or willful illegal conduct. See Statement of Facts at 7 n.2.

<sup>23</sup> Criminal Information at 5-8; 16 U.S.C. § 3373(d)(2).

<sup>24</sup> Professor John Hasnas, *Mens Rea Requirement: A Critical Casualty of Overcriminalization*, WLF LEGAL OPINION LETTER, Dec. 12, 2008, available at [http://www.wlf.org/upload/12-12-08\\_Hasnas\\_LegalOpinionLetter.pdf](http://www.wlf.org/upload/12-12-08_Hasnas_LegalOpinionLetter.pdf).

<sup>25</sup> John G. Malcolm, *The Pressing Need for Mens Rea Reform*, Legal Memorandum No. 160 (The Heritage Found., Washington, DC), Sep. 1, 2015, at 3, available at [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM160.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM160.pdf).

with the best of my knowledge, and work with the export documents from foreign countries and expect the [foreign] government to do their due diligence.<sup>26</sup>

Lumber Liquidators' plea agreement also shows that Lacey Act defendants can be charged for misdemeanors under the act's "due care" standard, but *still face felony violations under other parts of the U.S. Code*. Lumber Liquidators' inaccurate Lacey Act declarations led to a felony count of Entry of Goods by Means of False Statements, demonstrating how prosecutors can take misdemeanor violations of the act and leverage them into felonies under other penal code provisions.

### **3. Environmental Activists Will Continue to Support Aggressive Enforcement**

As one legal commentator put it when describing the Lacey Act, "You can often learn a lot about a law by identifying its key supporters."<sup>27</sup> True to form, the biggest supporters of the modern Lacey Act provide a window into the law's enforcement regime. The 2008 Lacey Act amendments (which brought plants within the scope of the act) were supported by a coterie of environmental-justice groups, including Greenpeace, the World Wildlife Fund, the Nature Conservancy, the Wildlife Conservation Society, the Rainforest Action Network, and the Sierra Club, to name a few.<sup>28</sup> These groups remain the act's most enthusiastic supporters, and in the months leading up to Lumber Liquidators' plea agreement, many of them explicitly pressured the Obama Administration to pursue more aggressive Lacey Act enforcement in general and to specifically target Lumber Liquidators.

The Lumber Liquidators saga traces back to a 2013 report by the Environmental Investigation Agency, which suggested that Lumber Liquidators was importing illegal wood from Russia via shady Chinese suppliers. This prompted investigations by three separate governmental agencies, with numerous environmental groups—such as Sierra Club and the Rainforest Action Network, both backers of the 2008 amendments—putting explicit pressure on the Obama Administration to bring Lacey Act charges against Lumber Liquidators.<sup>29</sup>

## **Conclusion**

The Lacey Act and its enforcement exemplify the ever-creeping criminalization of free enterprise in America. At the behest of activists, Congress diminished the original law's *mens rea* standards, increased the law's penalties, and deemed behavior that occurred entirely overseas a federal crime. Prosecutors made an example of a flooring company that appears to have acted, at most, negligently. Public-interest advocates applauded when DOJ threw the book at Lumber Liquidators, while overlooking the Russian and Chinese actors directly responsible for the alleged environmental harm.

Given that congressional reform of the Lacey Act is unlikely in the near term, forthcoming enforcement targets are left to hope that prosecutors use their broad discretion more wisely. In the (likely) event that law enforcers do not utilize restraint, the federal judiciary will need to protect defendants' due-process rights.

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<sup>26</sup> H.R. 1497, *Legal Timber Protection Act: Legislative Hearing Before the Subcomm. on Fisheries, Wildlife, and Oceans of the H. Comm. on Natural Res.*, 110th Cong. 46 (2007), at 55 (statement of Craig S. Forester, Vice President and General Manager, Rex Lumber Company).

<sup>27</sup> See K. William Watson, *The Lacey Act: Protectionism through Criminalization*, CATO AT LIBERTY (Aug. 8, 2012, 3:35 PM), <http://www.cato.org/blog/lacey-act-protectionism-through-criminalization>.

<sup>28</sup> 153 Cong. Rec. 10,622 (Aug. 1, 2007).

<sup>29</sup> Michael Brune, "Tigers Don't Want Their Forests Liquidated," *Coming Clean: The Blog of Executive Director Michael Brune*, Sierra Club (Oct. 2, 2014), <http://blogs.sierraclub.org/michaelbrune/2014/10/tigers-lacey-act-illegal-logging.html>.