

ESTABLISHING A “DUE CARE” STANDARD UNDER THE LACEY ACT AMENDMENTS OF 2008

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INTRODUCTION

The Lacey Act was first enacted in 1900 as a narrow measure for domestic bird preservation and agriculture protection. It was significantly amended in 1981¹ and 1988² to prohibit trafficking in fish and wildlife “taken, possessed, transported, or sold” in violation of state and foreign laws.³ For the past three decades, the amended statute has provided the federal government with a powerful tool for regulating imports of fish and wildlife. In 2008 Congress expanded its reach still further, responding to widespread concern about the effects of illegal logging on local governance, the environment, and American business by extending the Act’s protections to imported plants.⁴

The Lacey Act’s penalty provision imposes both civil and criminal liability for wildlife trafficking. At its most stringent, the Act imposes felony liability on those who “knowingly” import fish and wildlife harvested in violation of foreign laws. Importers and subsequent purchasers of imports who fail to exercise “due care” in determining whether their products are legal may be subject to misdemeanor liability or civil penalties.⁵ The due care standard, which originated in the 1981 amendments, is now almost three decades old, yet key differences exist between companies in the timber market and the business enterprises whose operations were traditionally regulated under the Lacey Act’s fish and wildlife provisions. These differences limit the applicability of the few existing precedents that have interpreted and applied this standard.

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1. Pub. L. No. 97-79, 95 Stat. 1074 (1981).
2. Pub. L. No. 100-653, 102 Stat. 3825 (1988).
3. 16 U.S.C. § 3372(a)(2)(A).
4. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204, 122 Stat. 923 (to be codified at 16 U.S.C. § 3372).
5. 16 U.S.C. § 3373(d)(2).

This Essay proposes a set of criteria to guide enforcement in the context of illegal timber imports. Part I explains the significance of the due care standard. Part II argues that because of the fact-driven nature of Lacey Act cases, fish and wildlife precedents do not provide enough guidance for importers attempting to comply with the Act. The Department of Justice (“DoJ”) should emphasize distinctive features of the timber market to inform prosecutors’ understanding of due care.

I. THE SIGNIFICANCE OF DUE CARE

This Part presents the limited range of Lacey Act case law on due care as part of a broader development in environmental law and explains why a clear understanding of due care is important for distinguishing among the responsibilities of different actors in a complicated supply chain. Next, it argues that more than a generalized objective standard of care is needed to produce successful enforcement of the 2008 amendments.

A. *The Global Enforcement Trend*

The Lacey Act’s incorporation of foreign law violations can be viewed as part of a broader “emerging trend” toward global enforcement, which represents a dramatic departure from conventional priorities.⁶ Whereas conventional investigations involved physical tracking of items from one site to another and ensuing direct action against transporters, the government must now increasingly look at the supply chain history of products entering the United States. Importers are difficult to track and supply chains are hard to monitor. It therefore takes time for the government to develop effective information-gathering methods for policing different kinds of regulated parties.

As the government learns what should be expected from different actors in the supply chain, the problem of defining “due care” has become especially pressing for the timber industry. The 2008 amendments extended the Lacey Act’s reach to a much larger range of corporate actors: the United States is the world’s largest wood products consumer and one of the top importers of tropical hardwoods. A high percentage of these imported products comes from regions known to have widespread illegal logging problems. Thus, many companies are likely to be subject to the new legislation.

B. *Insufficiency of Existing Precedent*

The need to prove due care provides timber importers with an incentive to ask questions of their suppliers, thus sending demand-side signals with

6. See, e.g., *The New Frontier of Cross-Border Enforcement*, 40 ENVTL. L. REP. NEWS AND ANALYSIS 10127, 10132–34 (2010).

the potential to “ripple down the chain.”⁷ The success of the incentive depends on two factors, however. First, the government must be able to prove statutory violations in a sufficient range of cases. A low risk of prosecution may fail to produce the intended deterrent effect, transforming compliance efforts into a mere cost of doing business. In fact, it was concern about the feasibility of enforcement that originally led the EU to conclude that a Lacey Act-like ban on the possession and sale of illegal wood products would pose “significant difficulties in . . . implementation.”⁸ The EU accordingly proposed a due diligence regulation that clearly outlines measures companies must take to ensure the legality of their product. The European Parliament appears to have overcome its qualms, however, having passed legislation including both the due diligence requirements and a ban on illegally sourced timber in early July.⁹ The European Council has informally agreed to the legislation and is expected soon to pass it into law.

Second, industry must view compliance as a feasible goal. While insufficient understanding of due care on the government’s part might lead to underenforcement, insufficient understanding on industry’s part might produce inefficient overcompliance. For example, a common piece of compliance advice under the 2008 amendments is that companies should simply avoid sourcing from countries with high risks of illegal logging. Such country-based sourcing decisions would effect a dramatic and unnecessary change in business practices.

Existing case law is not sufficient to define responsibilities under the 2008 amendments. The modern Lacey Act has been in place for almost three decades, yet there is relatively little case law under the statute¹⁰ and even less on the issue of due care.¹¹ This means there are few precedents upon which the government may draw or industry may rely. More importantly, the fact-driven nature of Lacey Act prosecutions limits the precedential value of fish and wildlife cases. Although the cases continue to provide some guidance, existing standards are not enough to define due care.

A couple of broadly applicable principles from existing cases are worth identifying. First, courts have emphasized the defendant’s level of experience in the industry in determining whether he sought information pertinent to a shipment’s legality. For example, in *United States v. Proceeds from Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, the court

7. *Hearing on H.R. 1497 Before the H. Subcomm. on Fisheries, Wildlife and Oceans, Comm. on Natural Resources*, 110th Cong. 27 (2007) (testimony of Alexander von Bismarck, Environmental Investigation Agency, Inc.).

8. *Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market*, at 6, COM (2008) 644/3.

9. See Press Release, European Parliament, MEPs Vote To Cut Illegal Timber Out of the EU Market (July 7, 2010), available at <http://www.europarl.europa.eu>.

10. A Westlaw search in the ALLFEDS database for “lacey act,” limited to 1981 and after, yielded 223 cases.

11. Searching for the phrase “due care” within the results described above limited the pool of relevant cases to twenty-three.

emphasized that the defendant had been in the business “for years.”¹² In *United States v. 2,507 Live Canary Winged Parakeets*,¹³ the court gave great weight to an importer’s failure to take “affirmative action” to make sure that the species he was importing could be lawfully exported from the country of origin.

Inquiring into the defendant’s experience and engagement in information-seeking activities is a good starting point in many cases. Nevertheless, both the legislative history of the 1981 statute and existing federal case law emphasize the importance of determining what constitutes due care on a case-by-case basis. The Ninth Circuit, which has decided more cases involving questions of due care under the Lacey Act than any other federal court,¹⁴ has issued a pattern jury instruction for Lacey Act offenses that presents due care as an objective standard, constituting “that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.”¹⁵ This fact-based negligence standard indicates the importance of determining what is reasonable for individual defendants. Because certain circumstances are consistent within the timber industry, however, under the 2008 amendments the government should first consider what is reasonable for timber defendants collectively.

II. DEVELOPING A DUE CARE STANDARD FOR THE TIMBER INDUSTRY

This Part identifies three features of the timber industry that distinguish it from fish and wildlife importation and explains how each should give rise to distinct responsibilities for that industry. It accordingly advocates interpreting the traditional “reasonably prudent person” test to incorporate specific factors the government should emphasize when prosecuting timber companies for Lacey Act violations.

It might be argued in response that clarifying the due care standard will actually reduce the incentive for businesses to develop improved best practices over time. This Part takes account of such a concern by emphasizing broadly articulated factors such as industry custom whose specific qualities may evolve as companies become more knowledgeable about how to monitor supply chains. It might also be argued that emphasizing a clear set of factors will hinder enforcement efforts by unnecessarily constraining the ability of federal prosecutors to develop an informed standard over time. Identifying common traits of timber industry defendants and corresponding responsibilities, however, is unlikely to cause ossification of prosecutorial methods as long as the government weighs in its analysis the extent to which individual defendants express those traits. Small businesses that import in low quantities and have unique business plans, for example, should

12. 34 F. Supp. 385, 392 (S.D. Fla. 1993).

13. 689 F. Supp. 1106 (S.D. Fla. 1988).

14. Of the twenty-three cases addressing “due care” identified above, ten were in the 9th Circuit.

15. Model Crim. Jury Instr. 9th Cir. 9.11 (2003).

be less subject to a presumption of knowledge about well-known industry standards.

Inquiries into individual circumstances will ensure that methods remain fair in specific cases. Yet the need to be sensitive to exceptions does not reduce the need to emphasize specific factors for the industry. Because the timber industry is a broad market with many large corporate entities, a more specific standard is likely to be helpful in many cases. A clear test will therefore provide the government with a useful analytical starting point when deciding whom to prosecute and what level of offense to charge.

A. Efforts to Comply with Industry Custom

Many prospective defendants in timber cases not only participate in a large market, but also are likely to conduct large-scale operations. The wood flooring market provides a good example. In 2006, U.S. consumption of wood flooring reached \$3.1 billion. Imported products accounted for 36.4 percent of the market.¹⁶ Of 155 total firms, the 5 largest manufacturers accounted for almost 60 percent of the overall U.S. production. Such companies present a stark contrast to defendants in key Lacey Act precedents. In *Lobster Tails*, the individual defendant was present in the country of origin at the time of the purchase; he was the company’s sole employee; and he ran the importing business from his home. Although the fishing industry does involve large corporate players, it remains that existing federal cases have not tended to deal with these defendants. Whereas *personal* experience has usually been considered highly probative in fish and wildlife cases, large-scale industries usually have the benefit of established industry custom that supplies them with guidance about what constitutes responsible behavior.

The unique situation of commercial defendants under the Lacey Act has been established by the National Oceanic and Atmospheric Administration (“NOAA”),¹⁷ which has consistently held that the duty of care is “high in a commercial context.”¹⁸ When establishing what constitutes due care in a particular commercial context, prosecutors should identify the kinds of knowledge a responsible participant in a particular part of the industry would be likely to have or to seek. In *In re Duong Vo*, the ALJ deciding the case for NOAA reasoned that a group of commercial fishermen who had imported fish harvested illegally in Mexican waters had not exercised due care because they should have known, simply from being in the profession,

16. U.S. INT’L TRADE COMM’N, WOOD FLOORING AND HARDWOOD PLYWOOD: COMPETITIVE CONDITIONS AFFECTING THE U.S. INDUSTRIES, 3–11 tbl.3.5 (2008).

17. It should be noted that the standard of care imposed in administrative proceedings, where less is at stake in terms of penalties, cannot be readily imported into federal courts, particularly where the court is considering criminal sanctions. Accordingly, this Section does not advocate importing an administrative law standard; rather, it looks to administrative cases to develop the standard of care for a particular type of defendant.

18. See, e.g., *In re Brooks*, 6 O.R.W. 535 (N.O.A.A. 1991); *In re Albert*, 5 O.R.W. 374 (N.O.A.A. 1988); *In re Brownsville Shrimp Cases*, 3 O.R.W. 828 (N.O.A.A. 1984).

that they were “responsible for knowing their vessel location . . . and . . . having adequate navigational equipment aboard to ascertain their location.”¹⁹

Private sector initiatives to guide procurement, green building rating systems, and well known voluntary certification programs such as the Forest Stewardship Council and the Sustainable Forestry Initiative alert industry members to the kind of behavior viewed by others in the business as environmentally responsible and thus likely to effect compliance with legal obligations. In addition to these initiatives, specialized industry publications provide more targeted information about what certain kinds of producers should do to fulfill their legal duties.

In products liability suits, compliance with trade or industry custom often provides meaningful evidence for a party defending against a negligence claim. Similarly, compliance with procurement standards, rating systems, or certification programs intended to address illegal logging should provide meaningful evidence of due care under the Lacey Act. As in tort law, compliance with commercial standards should not be an absolute defense.²⁰ Prosecutors may nevertheless draw on such standards to obtain information about measures a defendant might have taken to exercise due care.

B. *Responsiveness to Legality Standards and Conservation Hot Spots*

Another distinctive characteristic of the timber market is the complicated set of foreign laws to which it is subject. Laws governing timber and logging often include forest management schemes that can be difficult for foreign companies to monitor. Indonesia, for example, has over nine hundred laws, regulations, and decrees that govern timber exploitation, transportation, and trade. The difficulty of determining one’s legal duties suggests that a prosecutor charging a due care violation, rather than focusing narrowly on the defendant company’s noncompliance with the foreign law at issue, should assess whether it was responsive to available information about “legality standards” issued by the government in the country of origin and conservation “hot spots.”

Importers especially should attempt to comply with the “legality standards” that some countries have begun to issue in an attempt to help foreign companies comply with domestic laws. Indonesia has issued a legality standard to help buyers differentiate between legal and illegal wood. The standard consists of seven principles, each supported by several indicators linking it to existing legislation; in addition, the government has issued guidance notes to assist auditors in verifying compliance with each indicator. Evidence of audits or good-faith attempts to assess relevant indicators should help a defendant establish due care.

19. Nos. SE990435FM, SE990436FM, 2002 WL 31742934 (N.O.A.A. Oct. 22, 2002) (citing *Brownsville Shrimp*, 3 O.R.W. at 841).

20. See 57A Am. Jur. 2d Negligence § 165 (2010).

Although in some cases it may be difficult for importers and purchasers to discover exactly where a product originated, companies that sell timber products should be careful to construct supply chains that avoid known problem areas. Some regions are widely known to face illegal logging problems or to pose conservation concerns. Timber sourced from these regions is particularly likely to implicate the Lacey Act's provisions. The International Paper Company has emphasized the important role of Conservation International-identified "hot spots" in the company's decision making about where to conduct logging operations. The Floor Covering Institute has warned the industry to be careful about sourcing from the Chinese-Russian border, where much of the timber is illegally harvested. When companies do source from these regions, they should be careful to monitor their trading partners through careful contracting and site visits.

C. Good-Faith Efforts to Monitor the Supply Chain

A final distinctive factor is an often a complex supply chain. Timber products, unlike lobster tails or parakeets,²¹ often go through many intermediaries, making it increasingly difficult to recognize a particular product or to keep track of its origin. Even companies recognized as industry leaders in promoting sustainable wood harvesting may wind up using illegally harvested wood, as demonstrated by the recent government raid on the Gibson guitar factory in Nashville, Tennessee.

In deciding whether to prosecute timber cases, prosecutors should focus on whether defendants engaged in particular kinds of information-seeking activities. As the former Deputy Assistant Attorney General for the DoJ's Environment and Natural Resources Division emphasized during hearings in the House, purchasers should be expected to verify certifications before purchasing products or visit harvest areas in order to understand their supply chains. The American Hardwood Federation has also recommended that companies must be sure to question suppliers thoroughly and review published information on the concerns particular to timber markets in each country of origin.

CONCLUSION

Timber companies complain that they are left in a state of uncertainty about how to comply with their obligations under the Lacey Act Amendments of 2008. Prosecutors should help dispel this uncertainty by emphasizing the importance of the following three factors: compliance with industry custom; responsiveness to legality standards and conservation hot spots; and evidence of good-faith efforts to monitor the supply chain.

In products liability law, compliance with standards is not an absolute defense to liability but nevertheless provides evidence of reasonable care.

21. *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106 (S.D. Fla. 1988).

Judicial attention to nongovernment standards allows industry to innovate effectively while changing safety standards over time. If Lacey Act enforcement authorities were similarly responsive to the factors listed above, timber companies would be less likely to engage in inefficient overcompliance and more likely to continue to develop effective best practices.