# 150-Year-Old Lincoln's Law Recovers **$30 Billion Stolen Tax Dollars**

By James B. Helmer, Jr.

Protecting the public treasury so that tax dollars can be wisely spent by our elected representatives is of paramount importance to our nation's survival. The primary device for recovering stolen tax dollars and for deterring such theft is the federal False Claims Act.

By early 1863, after two years of bloody civil war, Abraham Lincoln's Army of the North had suffered increasingly catastrophic battlefield setbacks. At the same time, unscrupulous government contractors had pillaged the public fiscally. Contractors had substituted sawdust for gun powder, had sold the same horses over and over again to the calvary, boots disintegrated after a mile of marching, freshly painted rotted hulls were sold as new boats, and recycled cloth which melted when wet had been purchased for uniforms. An overwhelmed war department seemed helpless either properly to supply its troops or to fight a civil war.

One of Congress's responses was to enact the False Claims Act (FCA), which President Lincoln promptly signed on March 2, 1863.[1] The FCA essentially established a bounty hunter statute which permitted anyone to bring suit on behalf of the United States against a government contractor who had submitted a false claim. The person bringing the suit is called a "relator" and the suit is known as a "qui tam" action based on ancient English law.[2] If the *qui tam* suit was successful, the responsible contractor had to repay the government double the damages caused plus a $2,000 penalty for every false claim. The government then awarded a share or a bounty to the relator of 50 percent of the recovery.

During WWII the United States Government was again besieged by defense contractor profiteers. Since the end of the Civil War, numerous government investigative agencies now aided the Attorney General in pursuing criminal prosecutions against those who would cheat the taxpayers. But, the attorney General often neglected to bring civil actions under the FCA at the same time that criminal indictments were returned. Enterprising citizens waited in federal courthouses for the criminal indictments to be filed publicly and then immediately filed copy-cat civil *qui tam* cases against the same contractor defendants.

Such actions, known as "parasitic lawsuits," enraged the Attorney General who then unsuccessfully challenged the *qui tam* provisions in court. The Supreme Court upheld both Congress's right to enact such legislation as well as the citizen's right to recover a bounty for successfully prosecuting a *qui tam* case.[3]

The Attorney General then went to Congress in an attempt to have *qui tam* dropped from the law. Again the Attorney General failed, but he was able to convince Congress that parasitical suits were of little benefit to the nation. Accordingly, in 1943 the False Claims Act was amended in two significant ways. First, the 50 percent bounty was reduced to no more than 10 percent. More importantly, Congress added an "any government knowledge" defense which required the dismissal of any *qui tam* action in which it could be shown that any government employee had any knowledge of the false claim. As a result of those two amendments, *qui tam* cases virtually disappeared from the American landscape for the next 40 years.

But greedy government contractors did not disappear. Congress became concerned about reports of fantastic charges being paid by the Department of Defense for supplies: $400 for a hammer, $1,000 for a small refrigerator, $6,000 for a toilet seat. Congress also became aware of a federal *qui tam* suit pending in Cincinnati involving widespread time card cheating in the revitalized B-1B "Lancer" bomber engine project at the General Electric plant in Evendale, Ohio.[4] Congress used those experiences to enact wide ranging changes to the FCA which President Reagan signed on October 27, 1986.

The 1986 FCA Amendments increased the bounty to a range of 15 to 30 percent of the recovery, changed the damages provision from doubles to trebles, increased the penalty per false claim from $2,000 to between $5,000 and $10,000, added whistleblower protection and recovery of attorney fees and costs for the successful relator, clarified that the preponderance of evidence standard should apply to all cases, and eliminated the "any government knowledge" defense in favor of a public disclosure bar with those relators who were original sources of the suit's information allowed to proceed even if there was a public disclosure.

These changes have proven to be transformational in the fight against government contracting fraud. In 1985, the last year before the 1986 FCA amendments, the entire government apparatus

recovered approximately $26 million for fraud. Now, using the FCA with most cases driven by *qui tam* actions, the government annually recovers billions of dollars.

Indeed, in fiscal year 2012, the United States will recover $11 billion pursuant to the FCA.

Government contractors and their lobbyists have made numerous attempts to have Congress water down the FCA. All such attempts have failed. As a result the contractors have chipped away at the 1986 Amendments in the Courts leading to several judicial opinions which had the effect of limiting the effectiveness of the FCA. Finally, prompted by a United States Supreme Court opinion based on another Cincinnati case,[5] Congress again stepped in and enacted a series of clarifications designed to undo years of judicial decisions. These clarification amendments to the FCA were enacted in 2009[6] and twice in 2010,[7] all signed by President Obama.

Since the enactment of the 1986 FCA Amendments, more than $30 billion has been recovered under the statute. Defense contractors, pharmaceutical companies, hospitals, doctors, universities and others who have abused their privilege of working for the taxpayers have learned that Lincoln's Law, even after 150 years, still protects the treasury.

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1 Now found at 31 U.S.C. §§ 3729-3733.

2 *Qui tam pro domino rege quam pro si ipso in hac parte sequitur*, which translates as "who sues on behalf of the king as well as for himself." Black's Law Dictionary 1251 (6th ed. 1990).

3 *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

4 *United States ex rel. Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied sub nom.*, *General Electric Co. v. United States*, 488 U.S. 901 (1988).

5 *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008).

6 The Fraud Enforcement and Recovery Act, Pub. L. No. 111-21 at §4, 123 Stat. 1617, 1621-25 (May 20, 2009).

7 The Patient Protection and Affordable Case Act, Pub. L. No. 111-148 at §10104(j)(2), 124 Stat. 119, 901-902 (March 23, 2010) and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §1079A(c), 124 Stat. 1376, 2077 (July 21, 2010).