
CORPORATE CRIME REPORTER

INTERVIEW WITH NEIL V. GETNICK, PARTNER, GETNICK & GETNICK, NEW YORK, NEW YORK

If it were up to Neil V. Getnick, many private law firms would be turned into economic crime units, working on behalf of defrauded individuals and corporations, and for state and federal governments, ferreting out fraud and corruption, restructuring corrupt corporations, and monitoring them to make sure they walk a straight line.

Getnick is one of a few lawyers in the country specializing in a field known roughly as civil prosecution of business crime. The New York State Bar, at Getnick's suggestion, created a Civil Prosecution Committee focusing on issues related to the area. And the State of California Bar might create one soon.

Getnick is partner in the New York City firm of Getnick & Getnick, which specializes in commercial fraud. The firm has developed a team approach for litigating matters arising from commercial fraud, coordinating attorneys, investigators and accountants. The firm specializes in the civil prosecution of business crime utilizing a wide variety of common law and statutory remedies.

We interviewed Getnick on July 15, 1992.

CCR: Tell us about the New York State Bar's Civil Prosecution Committee.

GETNICK: For some time now, our firm has concentrated in the area of civil prosecution, which we define as that area in the law which fashions civil remedies for criminal misconduct.

In 1991, I recommended that the New York State Bar Association, Commercial and Federal Litigation Section recognize civil prosecution as a distinct practice area and create a committee around that area of practice. The section chair approved that idea and asked me to organize and chair that committee.

The committee is called the Civil Prosecution Committee. It was organized at the end of 1991.

We have attracted a very impressive membership, including two former chiefs of the criminal division from the U.S. Attorney's Office, Southern District of New York, the director of the New York State Organized Crime Task Force, a host of other current and former public officials, and major practitioners in the private bar in New York State.

The committee has approximately 20 members. It has approximately ten reports in progress. We published our first report last month analyzing the federal False Claims Act. The reports in progress examine the self-evaluation privilege, the certified investigative auditing firm concept, parallel prosecutions, deputized prosecutions, private search warrants, proposed amendments to civil RICO, criminal restitution to fraud victims, abatement of illegal business operations, financial institution fidelity bond recovery, and the civil prosecution of insurance fraud.

These reports help to give definition and scope to this area we call civil prosecution.

CCR: The word prosecution implies criminal action. So what does civil prosecution mean?

GETNICK: The term prosecution is most often considered in its criminal context. Criminal prosecution involves a public prosecutorial authority. Such a prosecution is brought in the name of The Government or The People. And the remedies sought are likewise so geared.

Civil prosecution involves a private party or a governmental entity functioning in a non-prosecutorial capacity. And accordingly it is targeted to the aims of that party. Those aims include stopping the activity, compensating the aggrieved party, deterring future similar behavior, and laying the predicate for a future criminal action.

CCR: How does that differ from what a tort or product liability lawyer does?

GETNICK: It is different in the type of investigation that takes place, the emphasis on parallel public prosecution, and the manner in which assets are traced and recoveries are obtained.

Civil prosecution of business crime includes the following steps: investigating the fraudulent activity, initiating legal action, encouraging parallel public prosecution, tracing funds and locating assets, obtaining a judgement for money damages, and where appropriate, an injunction prohibiting future fraudulent activity, and effecting recovery, including attaching funds and property.

CCR: Well, wouldn't a civil tort lawyer do all those things anyway?

GETNICK: The distinction is in terms of how the litigation team is assembled. The traditional tort action involves attorneys and others, but it tends to be an attorney-driven case from inception to completion.

But the most effective team to handle civil prosecutions is, in effect, a private economic crime unit where attorneys join with investigators, forensic accountants, along with industry experts, to address a particular problem in a coordinated and systematic way.

The distinction is that this is not simply an attorney-driven operation, but rather an approach where each individual component of the team brings its perspective and special expertise to planning, investigation and litigation.

CCR: Your efforts have been focused on financial fraud, insurance fraud, and corruption in the construction industry. Is this model applicable to other areas, such as product liability, for example?

GETNICK: Absolutely. The most exciting thing that has happened within the Civil Prosecution Committee is that members of the bar who have never before seen themselves as involved in a common practice area, suddenly find that the techniques that they are applying have a commonality of purpose.

For example, corporate attorneys with a general defense orientation who represent the computer industry have been called upon to protect their clients by initiating investigations of corrupt activity directed against that industry. As a result, individuals who might otherwise see themselves in a defense posture in representing their clients have to suddenly shift gears and begin to engage in civil prosecution activity.

And yet, these attorneys would think of themselves more traditionally as part of the corporate defense bar rather than part of a civil prosecution bar. Still, we have such representation on our committee.

Attorneys who represent manufacturers of luxury goods are concerned about counterfeit products. One of the members of our committee is highly regarded for structuring the Louis Vuitton sting operation. This was an undercover investigation designed to ferret out a counterfeiting ring that ultimately turned into a very successful public and private prosecution.

The insurance industry, which for many years was thought of as defending lawsuits brought by consumers, has taken a much more aggressive posture in recent years, demonstrating that it has a commonality of interests with consumers and insurers in preventing fraudulent activity which raises premiums and causes dollars to be paid out

unnecessarily on false claims.

And so this is not a situation where civil prosecution is restricted to an individual field. Rather, wherever there is criminal conduct affecting the marketplace, civil prosecution techniques are called for.

CCR: So the Getnick & Getnick firm's practice could be considered a hybrid of various types of practice, ranging from plaintiffs' practice, investigative, and defensive corporate counselling aiming to reorganize corporations.

GETNICK: That is very much a description of what we do. We are first and foremost a commercial law firm. We counsel clients. Often those clients are companies seeking advice in the normal course of their business. We are also a commercial litigation firm.

Companies seek our counsel to help them monitor their activity to ensure that they are in compliance with state and federal regulations. These companies are seeking to develop adequate systems to protect themselves from criminal misconduct both from within and from without.

The incentive for that type of approach has always been there. But it has been highlighted within the past year with the passage of federal sentencing guidelines which provide for much harsher penalties against companies which do not have such compliance programs in place.

CCR: How do you see this new field of civil prosecution developing?

GETNICK: I see it as having developed dramatically over the last ten years. I like to think of myself and my law firm as having been involved at the cutting edge in each of the four major stages of development.

First, there were the actions brought by defrauded individuals. These cases began to develop in the early 1980s using the civil RICO (Racketeering Influenced Corrupt Organization) statute and very often they took the form of investor fraud actions going beyond the securities class action case of earlier years.

Business and the business community was generally hostile to this type of action. But by the mid-1980s, the business community had come to recognize that like it or not, the RICO statute was here to stay, at least for a while, and that the RICO statute was not an anti-business statute, but rather was an anti-fraud statute.

Businesses themselves were victims of fraud and therefore RICO could become a pro-business statute, by allowing businesses to attack those who attempted to defraud them.

By the mid-1980s, the business community began to use civil RICO and civil prosecution against fraud, representing the second phase of the development.

Our firm, together with co-counsel, filed the first civil RICO class action on behalf of a group of defrauded investors in 1983. And later, we found ourselves filing such cases on behalf of the business community, most notably the Alliance case, in which we came to represent an insurance industry consortium against a group of corrupt attorneys who had organized in southern California for the sole purpose of defrauding the insurance industry through fraudulent billings.

We are now entering a third phase. That phase is the employment of civil prosecution techniques by the government itself. The most recent example is the New York County District Attorney's Office prosecution of the Gambino family crime interests in the garment center in New York.

There, a criminal prosecution aimed at the sons of Carlo Gambino -- Thomas and Joseph -- ended in their convictions, but also ended in a plea bargain that did not send those individuals to jail, but rather caused them to forfeit their business interests in the garment center, to pay a \$12 million fine. That fine in part funds a court-appointed special master to oversee the turnover of the corrupt Gambino trucking interests to legitimate interests to do business in a free and open market.

That is a very different approach which government now finds itself taking.

Another example of that in the New York City area was the employment of a private monitoring firm by the U.S. Attorney's office in the Southern District to oversee the transition to new owners of a corrupt concrete manufacturer, which was paying off the mob and mob controlled unions.

Interestingly enough, that monitor's role became well known to the public just recently when it was disclosed that the so called new owners were continuing in the exactly the same line of activity, causing the monitor to expose them and the U.S. Attorney to prosecute those individuals as well.

Civil prosecution is a major focus for government now and in the future. My firm is very much involved. Some time in the coming week, we will be filing the first of what will probably be a series of new civil RICO actions on behalf of the New York City School Construction Authority.

That Authority has been a leader in applying civil prosecution approaches -- first in debarring corrupt contractors from doing business with the city; second,

in employing firms to monitor suspect activity, and now initiating parallel public prosecutions and civil RICO prosecutions against those who have defrauded the school construction authority.

The case we file next week will be against an alleged corrupt asbestos company that held itself out as capable of providing expert air monitoring on asbestos projects -- but instead falsified its data and failed to perform this important testing.

CCR: So that is where we are now. What do you see as the fourth phase?

GETNICK: That would be the ultimate privatization of the prosecutorial function, which is made possible through the federal False Claims Act and parallel state acts. These statutes empower private individuals, through private attorneys, to bring lawsuits in the name of the state or federal government where individuals or entities have attempted to defraud the government. The best known examples of such cases are the Pentagon fraud cases.

CCR: But you don't foresee the government turning over its criminal authority to private economic crime units?

GETNICK: We have been talking about the imposition of civil penalties for criminal misconduct. Criminal prosecution clearly remains in the hands of the government where it should remain for a whole set of public policy reasons.

CCR: But are you also saying that you get more bang for your buck if private actors bring civil prosecutions, as opposed to having the government bring these civil prosecutions?

GETNICK: It's not an either/or thing. The government is capable of initiating these actions. However, the government is limited in terms of the resources which it has at its disposal.

The best example is the construction industry in New York City. The New York State Organized Crime Task Force (OCTF) has issued a comprehensive report on the degree of organized crime influence and corruption in the New York City construction industry. That report concludes that literally 20 cents of every construction dollar on a New York City construction project goes to pay for some form of fraud, waste or abuse. The OCTF, under the leadership of its director, Ron Goldstock, proposed the institution of a comprehensive program enabling the city to monitor every public construction project over \$5 million.

The reality is that the government by itself simply is not geared up to providing that type of comprehensive response. So the OCTF recommended

the establishment of a certified, investigative auditing firm program, where private entities, combining the multidisciplinary approach of attorneys, investigators, accountants and industry experts, would be certified to act as ongoing monitors to audit these projects at all stages in an effort to ferret out potential fraud, waste and abuse and to control it -- to in effect, develop an army of private inspectors general to take control of that industry.

What we are talking about here is not replacing government with private entities, but rather government working together with private entities to control a massive problem affecting us not only in this one subindustry in New York, but in many industries with a pervasive effect and influence on our economy.

CCR: You filed an action recently in the Payroll Express case. Tell us about that.

GETNICK: The Payroll Express Case is a good example of how the business community is now readily prepared to take an aggressive civil prosecution approach when it has been defrauded. In that case, the principal officer of a payroll company responsible for cashing payrolls for New York City businesses, allegedly stole the money entrusted to the company resulting in losses exceeding \$25 million.

We filed on behalf of one of the victimized companies a civil RICO class action lawsuit which will hopefully enable all of the corporate victims to band together to maximize their opportunity to prosecute civilly the perpetrators of this fraud and to maximize their opportunities to obtain a complete recovery.

By doing that, we are able to vindicate the interests of those corporate victims in a variety of forums -- first, our class action lawsuit, second, in the bankruptcy courts, where the Payroll Express company has filed for bankruptcy, and third, in monitoring the criminal prosecution which has been undertaken by the U.S. Attorney's office against the company and its principal officer.

CCR: Who are the players in this young and developing field of civil prosecution?

GETNICK: The New York State Bar Association has recognized civil prosecution as a distinct practice area. California will likely be the next state that

organizes a civil prosecution committee within its state bar association. Hopefully, the American Bar Association will then recognize civil prosecution as a distinct practice area as well.

I see our firm getting involved in the fourth stage of civil prosecution which I identified earlier -- taking it beyond the whistleblower stage and the Pentagon fraud stage.

We are scheduled to unveil at the 1993 ABA National Institute on Health Care Fraud a private economic crime unit approach to combat health care fraud. This would be a private unit designed to prosecute health care fraud on behalf of the federal government and in the name of the United States.

If that is achieved, we will have developed a far more effective mechanism for the prosecution of fraud against the government, allowing greater recoveries by the government and more efficient use of taxpayer funds. These dollars, dedicated for health care, will go to people in need of health care and not to individuals and entities determined to steal these monies for themselves.

CCR: Is this private economic crime unit proposal based on the assumption that the private sector is more efficient than government?

GETNICK: I don't think that is necessarily the assumption. The reality is that the problem of fraud in our society has reached massive proportions where it has pervaded every aspect of our economic life. It is unreasonable to expect that government prosecutors, working on their own, with limited budgets and with limited resources, can attack this problem completely.

What we are saying is that government plays an important role, perhaps the principal role, but that the private sector can contribute significantly to conquering this problem.

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