
CORPORATE CRIME REPORTER

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

Neil Getnick graduated from Cornell Law School in 1978. He worked with Manhattan district attorney's office as a government prosecutor in the trial division and the fraud bureau. He has been in private practice since 1982 with his own firm, Getnick & Getnick.

Getnick's firm represents a wide range of commercial clients and handles all forms of litigation with a special emphasis in the area of commercial fraud.

We interviewed Neil Getnick on October 1, 1990.

CCR: What are some of the major cases you're working on now in the area of commercial fraud?

GETNICK: One of the major cases that we are working on right now is a class action case, in which we represent some 200 families and entities against a number of defendants, one of the most important being the Bank of New York.

In that case, we allege that an attorney by the name of Steven Mishkin was at the center of a massive investment fraud through which these 200 families lost in excess of \$10 million. We began that case in 1982, together with the law firm of Bailey, Marshall & Hoeniger. In fact, it was that firm that commenced the lawsuit and I came on as counsel in 1983. I joined as counsel on behalf of one of my clients, and then by the end of 1983, we were certified as a class to bring this action against the individual who spearheaded the fraud as well as the bank, which we alleged aided and abetted it.

Approximately two years ago, we were joined by additional co-counsel, the law firm of Goodkind, Labaton, & Rudoff.

CCR: What is the status of that litigation?

GETNICK: That lawsuit, which has been working its way through the courts for the past seven years, is now on a fast track for trial. The court set a trial date of March 11, 1991.

CCR: Why has it taken seven years to come to this point?

GETNICK: It was a massive case with many twists and turns along the way. Frankly, we've taken the position throughout that, not surprisingly, the defendant bank and other defendants engaged in motion practice which we believe was frivolous, and which was designed to delay this action from coming to a point where it would reach trial. To a certain extent, those actions did delay the case, but the moment of truth has arrived.

As a result, at the end of a two-month trial that starts in March, everyone's going to know who's right, who's wrong, and who's won and who's lost.

CCR: I understand you're also working on a case in Southern California. Could you also outline that case?

GETNICK: That case, which I imagine is known as the Alliance case to most people, involves a group of attorneys and others alleged to have defrauded the insurance industry in excess of \$200 million through a pattern of racketeering activity, specifically by creating lawsuits and infiltrating lawsuits for the purpose of defrauding insurance carriers, including my client, Fireman's Fund. My co-counsel in that case representing Fireman's Fund are Richard Edwards of the firm of McNitt, Edwards & Schraner, and G. Robert Blakey from the firm of Cornwell & Blakey.

CCR: What is the status of that case?

GETNICK: We filed our complaint in March of this year. It was a detailed civil RICO complaint. One month later, the U.S. attorney's office followed with an indictment of its own naming many of the parties in our action in a criminal RICO indictment.

We proceeded to argue earlier this month against dismissal motions from the various defendants which had been made in the interim. In fact about an hour ago, the decision of the district court arrived on my desk denying those dismissal motions, giving us a green light to go forward.

CCR: Were there pleas in the criminal cases?

GETNICK: There have been some pleas in the criminal cases up to this point. Certain pleas had even preceded the RICO indictment. Naturally, we have relied on them in corroborating the allegations which we've made.

CCR: In the New York case, is there an ongoing criminal investigation that you're aware of?

GETNICK: I guess that should be handled in two stages. The attorney defendant whose name is closely associated with this, Steven Mishkin, has been prosecuted in two separate actions, one state and one federal -- both following the commencement of our lawsuit. In the state prosecution he was tried and convicted of defalcation -- theft -- from various escrow and trust funds. And in the federal action -- perhaps even more on point in terms of our case -- he pleaded guilty to a criminal information which literally conceded the various allegations of our class action.

CCR: You're one of the pioneers in the small but growing field of what you call "civil prosecution." The word prosecution implies criminal. What do you mean by "civil prosecution?"

GETNICK: The word prosecution is most often considered in a criminal context, it being understood that such criminal prosecution involves a public authority. Such a prosecution is only framed in terms of the "people" or the "government." And the remedies likewise are so geared.

Civil prosecution, on the other hand, involves a private party, and accordingly, it is targeted to the aims of that private party. Those aims would include stopping the activity, compensating the aggrieved party, deterring future similar behavior, and laying the predicate for criminal action.

The term prosecution is used because it's an approach to fraudulent conduct which allows attorneys and aggrieved parties to act as private attorneys general, as well as addressing the rights of the individual or the entity which has been defrauded.

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

CCR: What is insurance fraud and at what kind of problem are we looking?

GETNICK: If you're talking about insurance fraud per se, you're talking about a significant problem. The Alliance case alone was enough to have a clearly defined impact on the market.

What's happening there is indicative of what's happening on a nationwide basis.

CCR: By insurance fraud, do you mean people stealing from insurance companies?

GETNICK: That's correct. In the insurance fraud area, it's important to note that the people who do so are aided and abetted by professionals, including attorneys.

CCR: One of the tools which you use are the federal and state racketeering laws. The media gives us the impression that business doesn't like this law. But on the other hand, insurance companies are using this law to get judgements against those engaging in fraud against them. How does the insurance company feel about the racketeering statute?

GETNICK: I wouldn't begin to speak for the insurance industry. In fact, I wouldn't even speak to the specific positions of the companies I represent regarding this legislation.

Fraud is not something that we have to look at and say "big business is responsible for fraud." Big business and all forms of business are subject to fraud as well.

The RICO statute is not an anti-business statute, it's an anti-fraud statute. It's almost a slur on the business community to say that an anti-fraud statute somehow is anti-business. It's anti those businesses which commit frauds and it's also anti those individuals who attempt to defraud businesses.

CCR: Yet the Attorney General and the Bush administration are engaged in a debate about amending the RICO statute. At a press conference, I asked the Attorney General about his position on the Hughes bill (H.R. 5111). He said that it's a complicated issue, and that we're dealing not with federal prosecution, but rather with civil actions, so we're not taking a position on it. How do you see the Hughes bill, how would it effect civil prosecutions, and would it effect any of your cases?

GETNICK: The Hughes bill uses what is commonly called the "gatekeeper" approach, which essentially is an attempt to place certain requirements into the law up front which will allow the courts to determine which are worthwhile cases and which are not worthwhile cases. I will say that I do not oppose a gatekeeper law in concept. But I do strongly believe that the Hughes bill as it is currently drafted would cripple civil RICO's effectiveness in combatting organized and complex fraud.

For one thing the bill, as presently drafted, incorporates retroactivity provisions, which means that individuals and companies which have been named in RICO lawsuits and which have been litigating on one set of terms for as long as those lawsuits have existed, have the potential benefit of a windfall by the substitution of a measure of single rather than treble damages. That has a number of effects, one of them being to make it extremely difficult for parties that are engaged in current lawsuits to have any idea of the terms under which to settle. Is the lawsuit worth some amount, or is it worth three times that amount, or is it worth one-third that amount? All that is up in the air so long as the Hughes bill is pending.

There is no doubt that the RICO law has been used or attempted to be used in ways not originally intended. Frankly, a well-drafted gatekeeper law, one drafted differently from the Hughes law, could succeed in facilitating the early removal of inappropriate civil RICO cases. And that would certainly be a benefit.

But the Hughes bill contains provisions that would bar worthwhile actions and which will complicate and raise the litigation costs of those cases which do go forward. On that subject, it should be emphasized that, with the impact of the insider trading scandals and the savings and loan debacle, we can ill afford at this time to weaken the most effective civil weapon to combat organized and complex fraud.

CCR: You've been a prosecutor and now you're engaged in civil litigation. People are concerned about blurring the lines between civil and criminal, that the criminal law is expanding too much, and that using the word prosecution in the civil context is incorrect. What are your thoughts on this?

GETNICK: I think that what we need to be looking for at this time is an expansion of the ability of society to successfully deter fraudulent activity.

Another good example of a well-thought out law -- one which has, interestingly, the support of both liberals and conservatives on both sides of the aisle and one which passed during the Reagan administration is the federal False Claims Act. The federal False Claims Act is a way of taking whistleblowers and empowering them to proceed as private attorneys to bring suit on behalf of the U.S. government to effectively address the situation where individuals attempt to defraud the U.S. government through false billing practices. In the law, there is a built-in gatekeeper approach because every case has to be reviewed by the Justice Department.

CCR: Private attorneys can proceed independently even if the U.S. attorney passes under the False Claims Act. Isn't that true?

GETNICK: Yes, but the Justice Department makes an independent review of whether the case is worthwhile entering.

By analogy, a well-drafted RICO gatekeeper amendment or the use of RICO case statements would allow the courts to make an early decision as to which cases are worthwhile, which cases are not, to allow the worthwhile ones to proceed, and to throw the worthless ones out as soon as possible.

CCR: How did RICO get such a bad reputation?

GETNICK: For many reasons, none of which have to do with the statute. For one thing, white-collar crime has been taken very, very lightly for a long period of time and the RICO statute has begun to address that in a very significant way. Everyone is willing to stand up and cheer when an organized criminal in the traditional godfather sense is prosecuted. But up until recently, bankers were never seen in this way. I think that Charles Keating has given people cause to rethink those preconceptions. The insider trader scandals have given people cause to rethink those standards. As a result, RICO may have a bad name among those

who have reason to fear it, but I do not believe it has a bad name among the general public.

CCR: How does a parallel criminal prosecution help or hurt your pursuit of justice in the cases you're going after?

GETNICK: Because of grand jury secrecy requirements and other considerations, a prosecutor's office is not going to be in a position to share with a private attorney the results of a prosecutor's investigation as it proceeds. Still, the ultimate indictment and conviction of individuals who figure in the civil case is a tremendous advantage that really cannot be overemphasized.

First, one convicted individual can be estopped from denying, in a civil case, the facts underlying that conviction. Second, the conviction in itself provides powerful evidence to a trial jury justifying a civil judgement based on a pattern of racketeering activity or whatever else that conviction is about. And third, as part of a sentence in a criminal case, the court may include a restitution order which will allow for the partial or complete recovery of losses by the aggrieved party.

Clearly, civil prosecution can be pursued effectively on an independent basis, but almost without exception, that effectiveness is increased when the civil prosecution is pursued parallel to, or in tandem with, the public prosecutor's office.

CCR: Why, then, shouldn't we just rely on criminal prosecution? Isn't a good honest police force enough?

GETNICK: The answer is no. For one thing, because of the variety, the complexity and expansion of fraud as it currently exists in our society.

CCR: Do you have any numbers indicating the depth of the problem?

GETNICK: I am not really in the position to quote statistics on that point. But again, I will simply point out that we're dealing with a situation with the RICO law alone that each time the statute comes before Congress, with lobbyists working very, very hard to tear it down, the headlines of the moment have made it very, very difficult to do.

What were those headlines? The headlines of insider trading scandals, of savings and loan scandal, and those of Pentagon procurement fraud. These are not individual, discreet problems, but indicative of a societal problem that we need societal tools to deal with.

CCR: Do most insurance companies have their in-house lawyers or investigators deal with this? Are you aware of other lawyers like yourself doing this kind of thing?

GETNICK: There are a number of attorneys who devote a portion of their practice to this type of activity. I do not know of that many attorneys who essentially have developed a dedicated practice to the civil prosecution of business fraud in the way that I have. I believe that we will be seeing more of that, especially as the federal False Claims Act begins to come into its own. In the same way that RICO in 1982 -- when we began the Bank of New York case -- was little heard of and less often used, the federal False Claims Act is just now coming into the view of the public's eye. And I think that, in the next five to seven years, we will see a burgeoning of those types of those lawsuits.

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