
CORPORATE CRIME REPORTER

GETNICK SEES CRACKDOWN COMING ON HEALTH CARE FRAUD IN NEW YORK

White collar defense law firms might want to beef up their health care fraud practices in New York.

A storm is brewing.

And it's not looking good for pharmaceutical companies and other health care providers who would seek to rip-off the government.

Governor Eliot Spitzer has just signed into law a False Claims Act modeled after the federal whistleblower law.

He has appointed James Sheehan, one of the nation's top health care fraud prosecutors, to be the state's Medicaid Inspector General.

Attorney General Andrew Cuomo has appointed another former federal prosecutor, Heidi Wendel, to be head of his Medicaid Fraud Control Unit.

And private attorneys, like Neil Getnick of Getnick & Getnick, are gearing up for a field day against fraud in New York.

It's still unclear as to who will have primary enforcement authority over the new False Claims Act in New York – Sheehan or Wendel.

But Getnick sees synergies, not rivalries.

"Sheehan has control over significant resources in his new position," Getnick told *Corporate Crime Reporter*. "It is still somewhat of an unanswered question as to how the Medicaid Inspector General, a newly created position, will interact with the head of the Medicaid Fraud Control Unit. We have a proactive Governor. We have a proactive Attorney General. They have joined forces in this fight. And there is every reason to believe that this will be a cooperative effort in which we are talking about synergies, as opposed to rivalries."

It was Sheehan who led the nationwide effort to crack down on Medicare fraud. Isn't New York's gain of Sheehan a loss for the country?

"No," Getnick says. "Increasingly, Medicaid fraud cases have national significance. New York can now synergize the efforts of health care fraud units all over the country. Increasingly, we are seeing lawsuits where the brand of Medicaid fraud is nationwide. It is not just simply restricted to a

given state. We don't want the first jurisdiction that learns of such a case to be restricted to its own resources. We want to see a situation where local, state and federal resources can be joined together throughout the country to fight these cases. The cases that Jim Sheehan and Heidi Wendel will be fighting in New York will likely have implications far beyond the boundaries of New York State."

**INTERVIEW WITH NEIL GETNICK,
PARTNER, GETNICK & GETNICK, NEW
YORK, NEW YORK**

New York State has a new False Claims Act. It has a new set of cops that will oversee enforcement under the law.

And as a result, some are predicting health care fraud fireworks in New York.

And Neil Getnick has a front row seat.

He's a partner in a major qui tam law firm – Getnick & Getnick.

He's chair of both Taxpayers Against Fraud and the International Association of Independent Private Inspectors General.

We interviewed Getnick on April 23, 2007.

CCR: What is your practice?

GETNICK: Getnick & Getnick is a private commercial law firm with public interest goals. We have a dedicated anti-fraud and anti-corruption law. We represent individuals, corporations, and governmental entities seeking civil remedies to combat fraud and corruption.

We aim through our law practice to develop and implement means to prevent and detect corrupt business practices, to generate and initiate creative remedies through law to fight fraud and corruption, and to help reform structurally the way business is conducted – based on principles of honesty and integrity.

We are organized as a core group of attorneys that in turn networks with other attorneys, investigators, forensic accountants and industry experts, assembled in teams tailored to specific applications. We use a multi-disciplinary team approach, emphasizing pre-litigation discovery and parallel prosecution.

We focus on four areas of practice – federal and state whistleblower cases, internal and independent monitoring, complex fraud investigation and litigation, and business integrity and transparency counseling – increasingly in an international context.

CCR: What percentage of your business is False Claims Act related?

GETNICK: It's fair to say that forty percent of our practice is in the whistleblower area.

CCR: What is the other big chunk?

GETNICK: Complex fraud investigation and litigation. And internal and independent monitoring.

CCR: So, sixty percent of your practice represents

business?

GETNICK: And government as an independent monitor.

CCR: You are coming up on the 25th anniversary of your firm next year.

Over those 25 years, has the False Claims Act had a deterrent effect on fraud?

GETNICK: Yes. It has. For the first five years of our practice – between 1983 and 1987 – there was a weakened False Claims Act that needed to be amended and strengthened. That took place in 1987. But during that initial period of our practice, whistleblowers were at a distinct disadvantage.

In 1987, the False Claims Act was amended to make it far more effective and accessible. And it became increasingly effective over the years. And now, for every dollar that the federal government spends on False Claims Act enforcement, it recovers \$15 in return.

So, it is an enormously effective statute. And even those numbers don't tell the full story because of the preventive effect of the law.

CCR: But is there any way to make a judgment whether there is a real deterrent impact?

GETNICK: Yes. Under the False Claims Act, there is not simply the recovery of dollars, but the structural reform of the businesses and industries that are so affected. Typically, when there is a large False Claims Act action, in addition to a civil damages settlement, or for that matter a criminal conviction, there is also left behind a corporate integrity agreement.

Under the corporate integrity agreement, the corporation is monitored to determine that it no longer continues to engage in those unlawful practices. And it in fact implements a program of self-reform.

Rather than just simply leaving that to chance, there is a monitor appointed to ensure that that is actually taking place.

CCR: Is there anything you can tip us off to as to upcoming False Claims Act cases?

GETNICK: It is difficult to say too much about the False Claims Act and the cases that are pending. By definition, most are under seal and therefore not open to discussion.

But we are going to continue to see the development of industry-wide cases for a time in the health care arena – in particular, the pharmaceutical industry and the durable medical equipment industry.

CCR: New York State just recently passed its own

False Claims Act. How did that happen?

GETNICK: The history of this law is a window on a national movement. The federal False Claims Act has been the result of bipartisan support. If you go back to 1987, the law was sponsored in the Senate by Charles Grassley, a conservative Republican from Iowa, and in the House by Howard Berman, a liberal Democrat from California. And it was signed into law by President Reagan. And it has continued to enjoy that level of bipartisan support.

Last year, very quietly, something happened in the Congress that has already begun to evoke tremendous change, as demonstrated by the passage of the New York State law. And that was the passage, under the sponsorship of Senator Grassley, of a key provision in the Federal Deficit Reduction Act.

Within that law was a provision that says – for every state that passes the state equivalent of the federal False Claims Act, those states will be allowed to retain a greater percentage of their Medicaid fraud recoveries.

That is a huge incentive for those states that do not already have a False Claims Act.

CCR: Without their own False Claims Act, how would states recover Medicaid fraud dollars?

GETNICK: Typically, states would rely on their governmental units – their Medicaid fraud control units – to investigate these matters and bring such lawsuits.

But despite their best intentions, those states that do not have the help of a False Claims Act are missing one of their most powerful resources – citizen whistleblowers – who can key the units into the most important information and the best cases out there to pursue.

The fight for a False Claims Act in New York developed over the last decade. A number of factors resulted in its passage this year.

The first is the Deficit Reduction Act and the incentives attached to it. The second is the election of our new Governor – Eliot Spitzer – and our new Attorney General – Andrew Cuomo – who campaigned on the pledge to pass a False Claims Act.

And the law passed within their first hundred days in office. That's a fulfillment of their pledge and promise.

Governor Spitzer and Attorney General Cuomo then made key appointments that immediately will vault New York to the forefront in fighting Medicaid fraud. Governor Spitzer appointed Jim

Sheehan to be the Medicaid Inspector General. Sheehan is an extraordinary public servant. He was the former chief of the Civil Division in the Philadelphia U.S. Attorney's Office.

He was a lead prosecutor exploring and pioneering the use of the False Claims Act in fighting health care fraud.

Indeed, it was Sheehan who a decade ago brought in the SmithKline Beecham case, resulting in a \$332 million recovery, which at the time was the largest recovery ever under the law.

For him to come to New York State at this particular time to help lead this effort takes us beyond the theoretical and immediately launches us into the practical implementation stage.

Attorney General Cuomo has appointed Heidi Wendel to be chief of the Medicaid Fraud Control Unit.

She previously was the health care fraud coordinator at the U.S. Attorney's office for the southern district of New York, where she supervised large scale health care fraud investigations and civil prosecutions.

CCR: She's not of the same stature of Sheehan in this field, right?

GETNICK: There are very few individuals in this field of the same stature of Jim Sheehan. Wendel, however, has established a track record of her own, including a nearly \$73 million recovery from a major hospital institution for health care and accounting fraud.

CCR: Sheehan will not have enforcement authority under the state's False Claims Act, right?

GETNICK: Sheehan has control over significant resources in his new position. It is still somewhat of an unanswered question as to how the Medicaid Inspector General, a newly created position, will interact with the head of the Medicaid Fraud Control Unit.

But we have a proactive Governor. We have a proactive Attorney General.

They have joined forces in this fight. And there is every reason to believe that this will be a cooperative effort in which we are talking about synergies, as opposed to rivalries.

CCR: Does Sheehan's move to New York help the people of New York while hurting the country by taking him off the Medicare fraud beat nationwide?

GETNICK: No.

Increasingly, Medicaid fraud cases have national significance. New York can now synergize the efforts of health care fraud units all over the

country.

Increasingly, we are seeing lawsuits where the brand of Medicaid fraud is nationwide. It is not just simply restricted to a given state. We don't want the first jurisdiction that learns of such a case to be restricted to its own resources. We want to see a situation where local, state and federal resources can be joined together throughout the country to fight these cases.

The cases that Jim Sheehan and Heidi Wendell will be fighting in New York will likely have implications far beyond the boundaries of New York State.

CCR: How many states have their own False Claims Act?

GETNICK: Eighteen jurisdictions have enacted such statutes – seventeen states – including New York – and the District of Columbia. Georgia, where the bill was passed by the legislature and is awaiting the Governor's signature, is expected to be next in line.

CCR: In New York, will the Attorney General have the enforcement authority under the new law?

GETNICK: There will be joint enforcement authority over the False Claims Act – between the Medicaid Inspector General and the Medicaid Fraud Control Unit. The litigation of those matters will be handled by the Medicaid Fraud Control Unit.

CCR: That unit is a unit of the Attorney General's office?

GETNICK: Yes.

CCR: A whistleblower comes to Neil Getnick and says – I have a case of a pharmaceutical company ripping off the state of New York. You file on behalf of the state. Who are you going to be dealing with from the state?

GETNICK: That may be the initial conversation that the client chooses to have with us. We will then undertake a vetting and due diligence process. If those allegations turn out to be true, it is more likely than not that that fraudulent activity will extend beyond the borders of New York State and very well may have national scope. It is unusual for a pharmaceutical company to design and implement a fraud that is New York specific.

Ideally, what we will begin to see is the ability to utilize multiple resources in fighting these large scale frauds – starting with the private client or relator, that individual's counsel, and the resources of the prosecutor's office.

You will see the civil and criminal divisions of the prosecutor's office getting involved. The state

Medicaid fraud units will get involved. And the local U.S. Attorney's office, and main Justice. All of those resources can and should be brought to bear.

And increasingly, with the passage of state False Claims acts, this will be the trend in the future.

CCR: When did Spitzer sign the New York legislation into law?

GETNICK: Earlier this month.

CCR: Have any cases been brought under the new law yet?

GETNICK: I do not know the answer to that, in part, because if such cases have been brought, then by definition they have been brought under seal.

CCR: New York State law mirrors the federal law?

GETNICK: Yes.

CCR: In terms of the recovery to the relator?

GETNICK: Yes. And it's also important to emphasize that the new law is not restricted to Medicaid fraud. The law talks about all forms of fraud on public treasuries.

CCR: But Medicaid fraud is going to be the big game under this law, right?

GETNICK: Medicaid fraud is going to be a focal point, yes.

But it is important to emphasize that there is a broad scope to this law that goes not only beyond Medicaid fraud, and not only beyond health care fraud more generally, but to virtually all of the varieties of fraud that can be committed against a federal or state treasury.

CCR: At the federal level, the two big waves were defense procurement fraud and health care fraud. What do you anticipate at the state level, other than health care fraud?

GETNICK: The False Claims Act includes any false claims against the government – including reverse false claims – where an entity fails to pay the government a rebate, a royalty, or similar sum. That also is fertile ground for the state false claims laws.

Also, look for cases in highway construction, construction more generally, cases impacting on the environment. Think through the various functions of state government. And all of those are potential areas for fraud.

CCR: State false claims laws have been on the books in other states for a while. So, if there is a nationwide fraud, will an attorney like yourself file in federal court and in every case that has a state false claims law?

GETNICK: It depends. There are some cases that are purely federal. There are some cases that are purely state. And there are others that overlap. If you are dealing with a highway fraud, almost certainly that is going to involve both federal highway funds and state highway funds.

On the other hand, if you are dealing with contracts that are limited to a particular municipality, in which there is no matching federal funding, that will tend to be purely state in its application. If you are dealing with a federal defense procurement case, that type of case would typically be purely federal.

The important thing is by having the combination of federal and state statutes, there is a way to get at all of these types of fraud, where in the past, that was not the case.

CCR: At the federal level, there were a couple of U.S. Attorneys offices that specialized in False Claims Act cases – Boston and Philadelphia. And then main Justice.

On the whole, you have only a small group of federal attorneys working on these cases. Will the Cuomo/Sheehan operation rival the federal operation?

GETNICK: True, the Boston and the Philadelphia offices have emerged over the years as leaders in this area. But that is certainly not exclusively so. One could point immediately to Los Angeles as another office with a recognized and successful track record.

And there are other offices as well that have established themselves in that area. It's not healthy or necessary to be thinking in terms of rivalries. The wave of the future is to be thinking in terms of partnerships and synergies. There are more than enough cases to go around.

It has been reported that there are some 125 plus pharmaceutical cases standing in line in Boston.

That tells us that there are a reservoir of cases in need of resources. And the passage of these state False Claims Acts, and the ability to apply the resources of Medicaid fraud control units and other state and local enforcement officials to assist in the investigation and prosecution of these cases could really write the chapter of the new way to make progress in this area.

CCR: Even though seventeen jurisdictions have had this law prior to New York, no state stands out as being aggressive in pursuing cases under the law.

GETNICK: Texas has proven itself to be singularly aggressive. It has established an impressive track record in this area. One of the main reasons Texas has proven to be so successful is its ability to recognize the value of the public/private partnership in pursuing these cases.

Texas encourages citizen whistleblowers and their counsel. Texas has found a way to partner with the private bar and to utilize the resources the private bar can bring to bear. And Texas has fine tuned its machine for getting successful results. That type of an approach is and should be the wave of the future. Just last week, the Georgia legislature passed its own bill. And there are other states with pending legislation as well.

CCR: Under the Deficit Reduction Act, how much money do the states stand to earn if they pass their own False Claims Act?

GETNICK: Each state will vary depending on the size of their budgets. The raw numbers mean that right from the start, a state will typically retain 20 percent more in terms of its Medicaid fraud recoveries.

That will be true both in whistleblower initiated lawsuits and government initiated lawsuits. It makes for a far more cost-effective enforcement operation on the state level.

The federal government rightly has determined that it is not forfeiting anything in the long run because while it may take a smaller percentage, it will likely take a smaller percentage of a much larger pie.

CCR: California has had a law for 15 years. But you don't hear that much of cases under that law. Why is that?

GETNICK: There are actions under the California law. To some extent, it is simply a matter of taking full advantage of the resources present. The federal law was barely recognized upon its passage in 1987. Then it came into its own. Now, it is resulting in recoveries that are increasing annually. A large part of this is a commitment to take advantage of what is on the books.

CCR: You have been very supportive of Taxpayers Against Fraud – a non-profit set up to promote the False Claims Act.

GETNICK: Yes, and I'm the chairman of Taxpayers Against Fraud. The group is supportive of both the federal and state False Claims laws to serve as a means of combating fraud against public treasuries. It certainly is an organization that

continues to educate the public about the value of these laws. It publishes a quarterly periodical to organize the body of law with respect to the act. It is highly supportive of the whistleblowers who come forward to pursue their cases under the law.

CCR: You were also present at the creation of a group called the International Association of Independent Private Sector Inspectors General. What is that?

GETNICK: While TAF and IAIPSIG are not in any way affiliated, they represent two ways of attacking the same brand of problem. They encourage good conduct so that good conduct can result in good business. IPSIG is a mechanism first developed in New York City.

It is now having increasing national and international application. Among other things, it provides for the monitoring of companies that perform public contracts.

Getnick & Getnick specializes in IPSIG work. For example, in the wake of 9/11, our firm was appointed to act in the capacity of integrity monitor, supervising construction companies tasked to perform the 9/11 World Trade Center disaster clean up.

Just this past summer, the House Homeland Security Oversight Committee, upon reviewing the distribution of 9/11 funds, pointed to that monitoring program, which was supervised by the New York City Department of Investigation and labeled it a best practice. In fact, if you examine the results, you see that the clean-up effort came in ahead of time, under budget, to spec.

That needs to be compared and contrasted with the disaster recovery efforts after Hurricane Katrina, with very different results, as well as with the performance of the Iraqi defense contracts, likewise with very different results.

To summarize, IPSIG is a very powerful independent monitoring mechanism, that likewise serves to keep business on the right track. And it is aimed at structurally reforming the way individual businesses perform and the way entire business sectors perform.

CCR: How does an IPSIG differ from a corporate monitor?

GETNICK: An IPSIG is a corporate monitor. But it's the platinum standard of corporate monitors, particularly in terms of the degree of independence they exercise.

An IPSIG, unlike a corporate monitor that

might report back to the management of a company, has a dual reporting responsibility – both to the entity being monitored, and perhaps more importantly and typically – to the governmental body for whom that corporation is performing.

It is a way of extending public resources in order to provide the best performance by corporations serving the government. And in all of this, the underlying vision is that good conduct is good business.

When we say good conduct, we mean a combination of integrity, transparency, good governance and social responsibility. And while those factors may define good conduct, it is also necessary to judge that by the indices of good business, which I would describe as profitability, productivity, effectiveness and efficiency.

And it is our mission to see that those two things go together. And if we can make them go together, then what we find is that good conduct becomes business driven rather than simply law driven – and truly enculturated into the way we do business.

CCR: In how many cases have IPSIGs been used?

GETNICK: Many cases, particularly in New York City, but increasingly elsewhere. One of the reasons the Giuliani administration was so effective in its city wide anti-corruption programs was the wide use of IPSIGs.

They helped clean up the trade waste industry, the school construction industry, and our wholesale markets. These were traditionally sectors of the business community that were infiltrated and dominated by organized crime. As a result of the use of IPSIGs in this area, there is general agreement that things are very, very different today than they were a decade ago.

CCR: So, when you think IPSIG, you think organized crime. But what about big business?

GETNICK: Well, you don't have to be thinking organized crime.

CCR: Except, when I asked for examples, you gave organized crime examples.

GETNICK: Yes. Those were the first uses of IPSIG – where it cut its teeth and gained its reputation. But now you are seeing IPSIG style monitors being used increasingly in big business – particularly coupled with deferred prosecution agreements.

CCR: So, would you say that the Bristol Myers Squibb monitorship would be an IPSIG style monitor?

GETNICK: I don't know enough about that monitor to say whether it qualifies. It comes out of the same philosophy. But I'm not prepared to say that any monitor is an IPSIG monitor unless it meets specific standards, which are posted on the IPSIG web site. (iaipsig.org)

CCR: About twenty years or so ago, there was a criminal environmental case against Con Edison. And the court appointed a monitor. Do you remember that case?

GETNICK: Yes. And it's fair to say that IPSIG grew out of trusteeships, receiverships, special referee appointments. The thought process was to incorporate the best of those in the IPSIG methodology. The IPSIG methodology differs from the others in that it requires a multi-disciplinary approach.

It's not just simply a matter of putting a lawyer, an accountant or an investigator in charge of a monitoring program. But IPSIG uses a combined set of skills that on the one hand prevents the problem and then detects problems and corrects them if necessary.

CCR: Jim Cramer said last year that usually, these monitors are phonies, where in the Bristol Myers case, it seemed as if they had a lawyer who came down pretty hard.

GETNICK: There has been a lot of progress over time. One of the real problems in the mid-1990s was the trend that corporations, facing problems, would go out and retain a big name lawyer, typically a former high-level public official, who was in effect not so much a monitor as an advocate for the company.

And that person then reported back to the very individuals who were under investigation. That was a troubling trend – one that the IPSIGs took on quite aggressively. When people today talk about an independent monitor, it is universally understood that the model of the 1990s does not qualify.

CCR: A couple of years ago, Getnick & Getnick was named as the independent monitor to supervise the thoroughbred racing industry in New York State. How did that end up?

GETNICK: That was a troubled industry that caused it to become the subject of attention by the comptroller in New York State, by the Attorney General, and ultimately the U.S. Attorney's office in Brooklyn. Federal officials handed down an indictment and there was a resolution with a deferred prosecution agreement. One of the

conditions of the agreement was this independent monitorship. That was in 2004.

CCR: And that was one of the first deferred prosecution agreements, right?

GETNICK: Yes. During the course of that monitorship, a new leadership grew up within the ranks of the New York Racing Association which joined forces with the monitor and in the process not only succeeded in reforming itself, but set down some new standards for the rest of the industry to follow.

At the end of the monitorship, the state comptroller praised the monitor for its business acumen, but perhaps as important, the monitored entity itself came to the conclusion that this was a successful exercise, both from a business perspective, as well as an ethical perspective.

It wasn't just simply a matter of the organization getting beyond the prosecution. It was a matter of good conduct becoming good business. When the monitor finished its term, the reform program was continued and expanded by NYRA acting on its own initiative.

CCR: In all of these dozens of deferred prosecution agreements that have come and gone since, how would you rate the monitors that resulted?

GETNICK: They differ. Each has to be rated on its own. Depending on how you define the monitor from the outset will no doubt affect the outcome. I believe strongly there is a vision attached to this work.

Good conduct is good business. You can't just say it. You have to demonstrate it in concrete terms so that it becomes the mission of the monitored entity after the monitorship comes to an end.

CCR: You have defined two types of monitorships – tough ones, and cheerleaders for the management. On the whole, if you look at these 30 or 40 that have come and gone since the New York Racing Association, where do they fall?

GETNICK: I would like to see more aggressive monitorships where the monitor can stop corrupt practices and inculcate a culture of ethics and honesty which in turn is married to profitability and productivity. Some people think that is just a pipedream. I know from personal experience that it can and should be the goal every time.

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