

Remarks of Neil V. Getnick before the New York City Council on the Proposed False Claims Act to Amend the Administrative Code of the City of New York in Relation to Creating Civil Penalties and a Private Right of Action for False and Fraudulent Claims.

November 9, 2004

In June, I gave testimony before the you in support of the proposed New York City False Claims Act. Reviewing the history of the federal False Claims Act¹ ("FCA") from its initial enactment at the urging of President Lincoln during the height of the Civil War,² through its amendment in 1986 under the bipartisan sponsorship of Senator Grassley and Congressman Berman, I noted that by the end of 2003 recoveries to the government under the federal FCA topped \$12 billion, \$8 million of which was directly attributable to FCA *qui tam* whistleblower lawsuits.³

The FCA is the weapon of choice for federal (and an increasing number of state)⁴ prosecutors seeking to recover defrauded taxpayer funds. It has achieved that status through the simple mechanism of encouraging citizens with knowledge of fraud against the government to come forward, authorizing them to file a civil suit in the name of the government and awarding them a percentage of the government's recoveries. The FCA has the strong support of the United States Department of Justice ("DOJ"), which

¹ 31 U.S.C. §3729 *et seq.*

² Act of March 2, 1863, at ch. 67, 12 Stat. 696-98. For a history of the enactment of the statute, see *U.S. ex rel. Walsh v. General Electric*, 808 F. Supp. 580, 581 (S.D. Ohio 1992), *reversed in part*, *Taxpayers Against Fraud v. GE*, 41 F.3d 1032 (6th Cir. 1994). The original FCA was inspired by widespread reports of fraud in military procurement. A critical position known as Little Roundtop, for example, was almost overrun by Confederate troops because of a lack of Union rifles and ammunition; the boxes in which they had supposedly been shipped by private suppliers contained only sawdust.

³ Taxpayers Against Fraud, False Claims Act Legal Center, Washington DC, <http://www.taf.org.statistics.htm>. See also Press Release, U.S. Department of Justice, *Justice Dept. Civil Fraud Recoveries Total \$2.1 Billion for FY 2003; False Claims Act Recoveries Exceed \$12 Billion Since 1986*, (November 10, 2003).

⁴ 15 states have followed the federal lead by enacting False Claims Acts to combat fraud committed against their own programs: Ark. Code Ann. § 20-77-901 *et seq.* (2000) (Medicaid only); Cal. Govt. Code § 12650 *et seq.* (1991); Del. Code Ann. Tit. 6, § 1201 *et seq.* (2000); D.C. Code Ann. § 1-1188.13 *et seq.* (1986); Fla. Stat. 68.081 *et seq.* (1994); Haw. Rev. Stat. § 661-22 *et seq.* (2000); 740 Ill. Comp. Stat. Ann. § 175/1 *et seq.* (1991); La. Rev. Stat. Ann. § 46:439.1 *et seq.* (2000) (Medicaid only); Mass. Ann. Laws Ch.12, § 5(A)-(O) (2000); Nev. Rev. Stat. § 357.010 *et seq.* (1999); 2004 N. M. Laws (2004); Tenn. Code Ann. § 71-5-181 *et seq.* (1968); Tex. Hum. Res. Code §§ 36.001-36.117; Utah Code Ann. § 26-20-1 *et seq.* (2000) (Medicaid only); Va. Code Ann. §§ 8.01-216.1-216.19 (2002).

has publicly praised "the vision of its sponsors . . . as well as the thousands of private citizens who have reported fraud by filing suit under the Act."⁵ The magnitude of the recoveries under the statute, the DOJ has declared, "demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against the fraudulent use of public funds."⁶

In the five months since I gave testimony before you in June of this year, approximately \$490 million has been recovered as a result of cases brought under the federal FCA.⁷ That's an average of almost \$100 million per month.

But the sheer size of the numbers don't tell the whole story. For example, a study prepared this year by economist Jack Meyer for the Taxpayers Against Fraud Education Fund, a nonprofit organization focused on enforcement of the FCA, looked at total federal health care investigation and prosecution **costs**, and compared them to the amount of the **recoveries** to the federal Treasury as a result.⁸ The study deducted the cost of awards to whistleblowers who uncovered and helped the government to understand these often-complex frauds. The study concluded that in the five year period from 1998 through 2003, every \$1 that the government invested in the investigation and prosecution of health care fraud returned \$13 to the American people.

⁵ Press Release, U.S. Department of Justice, *Justice Department Recovers Over \$1 Billion In FY 2002. False Claims Act Recoveries Exceed \$10 Billion Since 1986* (December 16, 2002). The \$10 billion figure represents all False Claims Act recoveries since 1986, whether or not a *qui tam* case was filed.

⁶ Press Release, U.S. Department of Justice, *Justice Department Recovers Over \$1 Billion In Qui Tam Awards And Settlements* (October 18, 1995). The figure of \$1 billion represents one-third of all recoveries achieved by the Department of Justice in civil fraud cases in the same time period.

⁷The major settlements were as follows: Schering-Plough (\$345 million for Medicaid prescription drug fraud, consisting of \$292 million in civil recoveries and \$52 million in criminal fines); Strategic Resource Solutions (\$43.2 million for allegedly defrauding the San Francisco Unified School District by installing faulty heating, power and lighting systems in schools); Polymedica (\$35 million for allegedly shipping diabetes test strips to people who didn't order them and not reimbursing Medicare for returned packages); Travelers Life and Annuity and United Health Group (\$20.6 million; the companies, as contractors for Medicare, allegedly falsified reports and figures so that the government would pay hundreds of millions of dollars without getting the services promised); Adventist Health System and others (\$20.3 million for allegedly charging for ambulance transports that were not medically necessary); Rite Aid (\$7 million for allegedly submitting false prescription claims to the government); Banner Health (\$6.1 million for alleged submission of false claims to Medicare for services that were not necessary or reasonable); and Boeing Co. (\$6 million to settle allegations that it sold military aircraft to the government containing parts made with Russian titanium; federal law provides that only domestic titanium can be used).

⁸ *Fighting Medicare Fraud: More Bang for the Federal Buck*, by Jack Meyer, President, Economic and Social Research Institute, April 22, 2004, available online at www.taf.org.

As Mr. Meyer noted in his study, recoveries and cost-benefit ratios underestimate the real return to the taxpayers because they do not take into account the deterrent effect of FCA enforcement. "Major settlements with large recoveries have a ripple effect that reduces the likelihood of similar fraud ... These deterrent effects cannot be measured accurately, but they may be a substantial multiple of the direct, measurable benefits in the form of actual monetary recoveries."⁹

Sometimes the success of the FCA can be seen in smaller ways. In July this year, a North Carolina energy company agreed to pay \$43.1 million to settle an FCA *qui tam* lawsuit alleging that it had defrauded the San Francisco Unified School District. The company was hired to install and maintain energy-efficient heating and cooling equipment in more than 100 district schools, but the equipment repeatedly malfunctioned, delivering heat on hot days and failing to deliver anything on cold days, according to the lawsuit. As part of the settlement, \$25 million will be funneled directly back to shoring up school facilities, and \$5 million was committed for rehiring laid off teachers and other workers and buying classroom supplies. Teachers and parents alike reportedly were ecstatic. One principal, whose supply budget had earlier been cut by \$37,000, said that he would use the money to buy elementary school essentials like construction paper and paint; a teacher said that her school would be able to buy a new computer; and a parent said that she hoped the funds could be used to reinstate teachers' aides and librarians, buy textbooks and restock supply cabinets.¹⁰

The bill currently before you will bring the benefits of the federal FCA to New York City in these large and small ways. Over the past decade, the City Council has aggressively attacked the fraud and corruption that historically has plagued key City industries such as the commercial waste hauling business and the wholesale markets. The enactment of this legislation will represent yet another milestone in this crusade. It will address the continuing, and insufficiently addressed, problem of fraud on the City in construction, health care, education and a host of other taxpayer-financed endeavors. It will supplement the efforts of dedicated City authorities with the vigilance of private citizens.

The proposed False Claims Act provides a powerful and tested means of fighting fraud in government contracting. The City Council should embrace it.

⁹ *Id.*

¹⁰ Heather Knight, *Schools to get big payout in fraud suit; \$30 million windfall for S.F. district*, San Francisco Chronicle, July 1, 2004.