**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.**

June 23, 2004

In 1995, the United States Department of Justice ("DOJ") marked the recovery of its first billion dollars under the *qui tam* provisions of the amended 1986 federal False Claims Act providing for a private right of action for false and fraudulent claims, 31 U.S.C. §3729 *et seq.,* with a press release. The DOJ praised the bipartisan efforts of the bill's sponsors, Senator Grassley and Congressman Berman, as a work of "leadership and vision." The recovery of over $1 billion, the DOJ 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."[1]

By the end of 2002, *qui tam* recoveries under the amended False Claims Act had grown to an awe-inspiring $6 billion. In its press release, the DOJ again attributed the success of the statute to "the vision of its sponsors . . . as well as the thousands of private citizens who have reported fraud by filing suit under the Act."[2] By the end of 2003, *qui tam* lawsuits had resulted in recoveries to the government of nearly $8 billion.[3]

The *qui tam* law is now well established as the weapon of choice for federal (and an increasing number of state) prosecutors seeking to recover defrauded taxpayer funds. Fifteen States[4] have followed the federal lead by enacting False Claims Acts to combat fraud committed against their own programs. Since 1986, *qui tam* plaintiffs have been the DOJ's partners in the recovery of billions of dollars. The qui tam law has become in practice what it was intended to be in theory -- a "public-private partnership" of the government and the people.

The False Claims Act, including its *qui tam*[5] provisions, was initially enacted at the urging of President Lincoln in 1863, a few months before the Battle of Gettysburg. A response to reports of widespread fraud by Civil War profiteers,[6] the Act encouraged citizens with knowledge of fraud against the government to come forward by authorizing them to file a civil suit in the name of the government. As a reward, the whistleblower received a payment amounting to 50% of the recovery of twice the government's actual damages plus a $2,000 penalty for each false claim.[7]

Although the "Lincoln Law" was a wartime initiative, it was not limited to defense fraud. In 1863, private citizen enforcement was an integral part of the U.S. statutory framework. Ten of the fourteen statutes passed by the first Congress contained *qui tam* provisions designed to supplement government enforcement, including statutes relating to bank regulation, import duties and copyright infringement.[8] As a California

court noted in 1989, the *qui tam* laws "are firmly rooted in the American legal tradition."[9]

The 1986 amendments overhauled and strengthened the Act, whose *qui tam* provisions had all but fallen into disuse as a result of amendments that followed a Supreme Court ruling in 1943.[10] Like the congressional initiative that resulted in the original False Claims Act, the 1986 amendments were prompted by reports of pervasive fraud against federal agencies, notably in the area of defense procurement.[11] A revamped *qui tam* law was seen as the most powerful and effective means of addressing these problems. "[O]nly a coordinated effort of both the Government and the citizenry," wrote the Senate Committee on the Judiciary, "will decrease this wave of defrauding public funds."[12]

The success of the federal False Claims Act in achieving that goal has been nothing short of spectacular. In 1988, recoveries under the qui tam provisions of the statute were a mere $355,000. In 2003 alone, those recoveries had grown to $2.1 billion. Initially, the 1986 False Claims Act was aimed primarily at defense procurement fraud. Since 1996, however, more than half of all *qui tam* cases has involved health care fraud, and in 2003 health care fraud accounted for the lion's share of recoveries - $1.7 billion.[13] Other areas in which the qui tam law has recovered millions of dollars include oil and gas,[14] securities,[15] construction,[16] computers,[17] and environmental testing.[18]

The bill currently before the City Council would seek to replicate the success of the federal False Claims Act in the New York City context. The need for powerful anti-fraud legislation in New York City is self-evident. New York City is not only the largest city in the United States, its budget is larger than any single state budget other than New York and California.

While the City administration over the past decade has launched an aggressive attack on corruption in key City industries, including the commercial waste hauling business and the wholesale produce, meat and fish markets, fraud on the government remains a continuing problem. The construction industry, for example, particularly in the area of public works, is a case in point. The New York State Organized Crime Task Force noted in a 1990 report:

> The City's development and infrastructure needs are enormous and acute - schools, jails, office buildings, homeless shelters, housing, pollution control plants, recreational facilities, tunnels, bridges and roads must be built to meet basic individual, social and economic needs ... When public works programs are riddled with fraud, waste and abuse, costs proliferate, quality deteriorates, delays increase, and the capacity to respond to critical infrastructure needs declines. In short, the quality of life for all New Yorkers is severely threatened."[19]

The vigilance of City law enforcement and anti-corruption agencies and programs that mandate the hiring of integrity monitors on some public construction

projects have achieved unprecedented successes, but more is needed. The False Claims Act bill currently before the City council would supplement the efforts of dedicated City authorities with the vigilance of private citizens. It would afford those agencies the benefit of unique inside knowledge of fraud that otherwise would not have come to light. The proposed False Claims Act provides a powerful and tested means of fighting fraud in government contracting. The City Council should embrace it.

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Endnotes:

1. 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.

2. 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.

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. 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).

5. *Qui tam* is the short form of *qui tam pro domino rege quam pro seipso*: "he who as much for the king as for himself." The *qui tam* action was borrowed from the English common law, which had recognized it since the thirteenth century. *See generally,* Edmund C. Baird, III, *The Use of Qui Tam Actions to Enforce Federal Grazing Permits*, 72 Wash. U. L. Q. 1407 (1994) (referencing *Note, The History and Development of Qui Tam*, 1972 Wash. U.L.Q., 81, 83 (citing 3 Blackstone, Commentaries on the Laws of England 160 (1st ed. 1768)); Dan D. Pitzer, *Comment, the Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 Tex. Int'l L.J. 415, 417-18 (1972)).

6. 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. 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).

7. Act of March 2, 1863, at ch. 67, 12 Stat. 696-98.

8. U.S. *ex rel.* Stillwell v. Hughes Helicopters, 714 F. Supp. 1084, 1086 n.2 (C.D. Cal. 1989)

9. *Id.* at 1086.

10. In 1943, the Supreme Court held in U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537, *reh'g denied*, 318 U.S. 799 (1943), that nothing in the False Claims Act barred a *qui tam* suit based entirely on information already disclosed in a government indictment. Consequently, Congress amended the Act to bar all suits based on information already in the government's possession. The amendment was intended to bar "parasitic suits" but had the effect of prohibiting *qui tam* actions not only where the government was already pursuing an action based on the fraud in question, but where the government had the information but was not taking steps to investigate or prosecute an action. The amendment severely inhibited the use of the *qui tam* law. The 1986 amendments included a provision to ease this restriction by barring only those suits based on defined categories of publicly disclosed information, unless the plaintiff is the "original source" of the information (31 U.S.C. § 3730(e)(4)). The 1986 amendments, in addition, imposed an upper limit of 10% on recoveries to the relator in a *qui tam* action based primarily on public disclosures (31 U.S.C. § 3730(d)(1)).

11. The Senate Committee on the Judiciary noted the following in its Report accompanying the bill: fraud investigations by the Department of Defense ("DOD") increased by 30% from 1983 to 1984; in 1985, 45 of the top 100 defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses; 4 of the largest defense contractors had been convicted of criminal offenses; according to the DOD Inspector General, the DOD loses $1 billion per year as a result of fraud. S. Rep. No. 345, 99th Cong., 2nd Sess. (July 28, 1986), reprinted in U.S. Code Cong. & Admin. News 5266, p.2.

12. *Id.* at 2.

13. Press Release, U.S. Department of Justice, *supra* note 3.

14. Including but not limited to settlements of $215 million from Shell Oil Co., $95 million from Chevron, $45 Million from Mobil, $43 million from Texaco, $32 million from BP Amoco, $26 million from Conoco and $21.5 million from UNOCAL. United States *ex rel.* Johnson v. Shell Oil Co. et al., Civ. No. 9:96 CV66 (ED TX); *see also, Judgments and Settlements*, 25 TAF QR 30 (January 2002); See also *Judgments and Settlements*, 22 TAF QR 34 (April 2001); see also DOJ Press Release, *supra* note 3.

15. Over a dozen securities firms settled to pay over $120 million for over-charging state and local governments for Treasury securities. The most significant "yield burning" settlement came from Solomon Smith Barney, which agreed to pay nearly $40 million to resolve these allegations. Patrick McGeehan, *Settlement Reported in Bond-Pricing Case,* N.Y. Times, April 6, 2000, at C8.

16. $15.7 million settlement with Contech Construction in 2001 for alleged false claims submitted to the Department of Transportation and the usage of substandard materials in a federal highway construction project. United States *ex rel.* Hill v. Contech Construction Products, Inc., No. 99-400-B-M2 (MD La.); *see also, Highway Fraud Case Nets $30 Million Settlement*, FDCH Federal Department and Agency Documents, January 17, 2001.

17. $9 million settlement with Gateway in 2000 for allegedly failing to pass along to the government price reductions required under a multiple award schedule contract for computers and components. Press Release, U.S. Department of Justice, *Gateway Computer Pays $9 Million to Settle Claims of Overcharging United States,* October 31, 2000 <www.usdoj.gov/opa/pr/October/636civ.htm>.

18. There was a $8.7 million settlement with Intertek Testing Services Environmental Testing Laboratories in 2002. Intertek held contracts with the Air Force, Navy, Army Corps of Engineers, and Environmental Protection Agency to test air, liquid, and soil samples for hazardous substances. The settlement resolved claims that Intertek failed to perform tests as required by its contracts. United States v. Intertek Testing Services Environmental Lab., No. 3-01CR-318-D (N. D. Tex); *see also, Judgments and Settlements*, 26 TAF QR 47 (April 2002).

19. New York State Organized Crime Task Force, CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY (1990), pp. 125, 146.