

CORPORATE CRIME REPORTER

NEIL GETNICK ON USING FALSE CLAIMS LAW TO COMBAT TAX AND CONSUMER FRAUD

State and federal false claims laws have been used predominantly in recent years to combat health care fraud.

But now the laws are starting to catch tax frauds – and soon – consumer frauds.

Last week, Neil Getnick and co-counsel Jordan Thomas secured a major settlement in the second stage of the largest tax whistleblower recovery in New York state history.

New York Attorney General Barbara Underwood announced the \$30 million settlement. It follows a related \$40 million settlement in April 2017, bringing the total recovery to \$70 million.

The whistleblower, whose identity remains protected, will receive 22 percent of the \$30 million settlement or \$6.6 million.

The case was brought against Harbinger Capital Partners Offshore Manager, the investment manager for New York-based hedge funds run by Philip Falcone from 2002 to 2009.

The case alleges that the defendants evaded New York State and City taxes by shifting income derived from Harbinger from New York to Alabama to avoid New York's higher tax rates.

The previous \$40 million settlement announced in April 2017 was with Harbert Management Corporation, an Alabama-based investment company that had an investment and business relationship with Harbinger Capital Partners Offshore Manager.

"Offshore Manager made profits remarkable even by Wall Street standards but failed to pay what should have been paid to the city and state where it made these profits and misled tax authorities to ensure that it would not have to pay its fair share," the state alleged.

The case was filed under the New York False Claims Act, which was amended to cover tax claims in 2010.

Getnick says that "New York State at this point in time has the most robust False Claims Act in the country – more so than the federal False Claims Act and more so than any other state law."

"Let me mention a few ways that the law leads the pack," Getnick told *Corporate Crime Reporter* in an interview last week. "First of all, there is no tax bar. Virtually all false claims laws make an exception for tax claims – they are not permissible. As of 2010, when strengthening amendments were passed by the New York legislature, such claims became specifically allowed in New York State."

"That opened up a very wide area for pursuit. In addition, while there is a desire to make sure that these cases are not based purely on facts that are already out there in the public, the New York State False Claims Act allows for a wider use of information. For example, information gathered under the Freedom of Information law is permissible for use in a New York State False Claims Act whistleblower case. That provides for a much more substantial base of knowledge from which to proceed."

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"The anti-retaliation provision in New York is unique in that it not only bars retaliation by the employer, but it also specifically prohibits industry wide blacklisting of whistleblowers. When the whistleblower applies for his or her next job, that prospective employer is not permitted to discriminate in hiring by virtue of the fact that that individual was once a whistleblower. It's a very impressive and powerful statutory tool."

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(See GETNICK, page three)

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Where do you see the future of whistleblower lawsuits going?

“I try to stay on the leading edge of expanding the boundaries of these laws,” Getnick said. “One of the most important areas is the potential use of the False Claims Act as a consumer fraud enforcement tool. Within the last year, Ralph Nader and the Center for Study of Responsive Law brought together a group of people in the consumer rights movement to discuss the fact that it is becoming more and more difficult over time to pursue consumer fraud enforcement. There are impediments such as mandatory arbitration clauses and class action limitations.”

“It’s essential to look for alternative means of undertaking this important work. If we think of government as a consumer of services, it is probably one of the largest in the country. And certain consumer frauds are not only impacting private citizens. They are also impacting governments. By way of an example, if you think of utility services, an area where private citizens are impacted, the government itself is a consumer of utility services. If one is able to point to a fraud on the government in the provision of utility services, it likely will also expose parallel activity adversely affecting private consumers and provide a remedy for those private consumers as well.”

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Is there a case on consumer fraud brought under the False Claims Act?

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(For the complete Interview with Neil Getnick, see page 11.)

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

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We interviewed Neil Getnick on October 2, 2018.

CCR: You graduated from Cornell Law School in 1978. What have you been doing since?

GETNICK: My first job out was with the Manhattan District Attorney's Office. I served both in the Trial Division and later in the Frauds

Division.

I then joined my father's law practice. We formed Getnick & Getnick in 1983. And we have been operating as a law firm ever since.

CCR: What is your practice?

GETNICK: Our firm is dedicated to fighting fraud and promoting business integrity. We work with whistleblowers, government agencies and companies. We are guided by the principle that anti-fraud is not anti-business. Since our practice was founded in 1983, it is now both national and international in scope.

CCR: Give us your top cases?

GETNICK: Our biggest recoveries have been in whistleblower cases. We have recovered more than \$1 billion for taxpayers. And our clients have received record awards, including the largest ever award for a single whistleblower.

In 2010, we had a recovery involving GlaxoSmithKline. We scored a \$750 million global recovery, \$600 million civil recovery and a \$150 million criminal fine.

That case stemmed from the manufacturing quality issues associated with one of the large GSK manufacturing plants. That recovery went back to the federal and state Medicare and Medicaid programs, as well as related federal healthcare programs.

In 1983, we scored the largest Medicaid fraud False Claims Act recovery at that time. That was \$257 million. That case involved a whistleblower who was a middle level Bayer Pharmaceuticals executive who exposed a marketing scheme that was defrauding Medicaid.

And in the late 1990s, we had a case leading to a \$182 million recovery. At the time, that was the largest False Claims Act recovery. That involved a whistleblower who shed light on a diagnostic laboratory scheme that was part of a much larger national problem.

And the result of that and other similar cases created a level of structural reform that cleaned up the industry as a whole.

I should point out that in all of these cases we worked in partnership with the government.

CCR: How many cases are you handling at one time?

GETNICK: We tend to have a low volume practice of highly complex cases. We are typically handling no more than a dozen cases at any particular time. And those involve federal and state whistleblower

cases and also private litigation on behalf of individuals and companies as well.

CCR: Of those twelve, how many are False Claims Act cases?

GETNICK: Our whistleblower practice typically occupies fifty percent or more of our entire litigation caseload. That includes cases under the federal and state False Claims Acts, as well as the Securities and Exchange Commission (SEC), Internal Revenue Service (IRS) and Commodities and Futures Trading Commission (CFTC) whistleblower programs.

CCR: How many cases come into your office every year? Are you taking only ten percent of the cases that come in?

GETNICK: We could be looking at two potential cases a week. But we only pursue one out of every twenty-five to one hundred potential cases.

CCR: How many law firms are there like yours that specialize in whistleblower and false claims cases and recover the kinds of recoveries that you get?

GETNICK: When you limit it in that way, there are probably no more than a dozen firms that are so situated. Interestingly, they are both our competitors and our colleagues. We have very good relationships with the lawyers who practice in this area.

CCR: How has the whistleblower practice changed under the Trump administration?

GETNICK: We are still waiting to see the answer to that question. The fact of the matter is that there is a professional core to the Department of Justice as well as in various regulatory agencies. At least until this point in time, we are seeing these cases pursued vigorously.

That does not come that much as a surprise to me. For the False Claims Act and whistleblower laws more generally, there has been consistent bipartisan support.

When you go back in time, when the False Claims Act was resurrected in 1986 with strengthening amendments, the forces behind that were two co-sponsors – Senator Charles Grassley, a conservative Republican from Iowa, and Congressman Howard Berman, a liberal Democrat from California.

They maintained that partnership right through 2010 and 2011 when various strengthening amendments were passed by the Congress.

With the False Claims Act, the focus is fighting fraud. And that has proved appealing to both

Republicans and Democrats.

CCR: Public Citizen put out a report recently documenting a decline in corporate crime enforcement under President Trump. But it appears that whistleblower false claims cases seem to be immune from these kinds of political headwinds. If that is the case, why is it the case?

GETNICK: To some extent, it may be our own good fortune with our caseload and relationship with the government. But I believe it's likely a more general proposition than that. It is also because there is an emphasis on pursuing claims that are brought by private citizens in conjunction with the government.

False Claims Act cases are cases of clear, widespread abuses that need to be pursued in order to ensure that the value of taxpayer dollars are maximized.

It's not a question of simply whether or not people are going to get taxed. But rather – are the dollars being taxed being put to good use? In my experience, we have been able to find a resonance with governments to pursue these matters aggressively.

CCR: This recent New York tax case that you settled – how did it come in the door?

GETNICK: I want to be careful not to say more than I should about the whistleblower associated with that case in order to protect that whistleblower's identity.

Suffice it to say that it came to us through a whistleblower. That whistleblower had information with respect to the Falcone hedge fund. And that in turn gave rise to an investigation on our part, working up the case together with our co-counsel Jordan Thomas of Labaton Sucharow. And then filing a complaint in the New York State Court system under seal so that we in turn could work with the New York State Attorney General's Office generally and with the Taxpayer Protection Bureau specifically.

CCR: Give us some history of the New York law governing tax whistleblowers.

GETNICK: Everything flows from that. The fact of the matter is that New York State at this point in time has the most robust False Claims Act in the country -- more so than the federal False Claims Act and more so than any other state law.

Let me mention a few ways that the law leads the pack. First of all, there is no tax bar. Virtually all false claims laws make an exception for tax claims

– they are not permissible. As of 2010, when strengthening amendments were passed by the New York legislature, such claims became specifically allowed in New York State.

That opened up a very wide area for pursuit. In addition, while there is a desire to make sure that these cases are not based purely on facts that are already out there in the public, the New York State False Claims Act allows for a wider use of information. For example, information gathered under the Freedom of Information law is permissible for use in a New York State False Claims Act whistleblower case. That provides for a much more substantial base of knowledge from which to proceed.

The law also has an expansive statute of limitations – a ten year statute of limitations for all such actions as opposed to a fluctuating statute of limitations from six to ten years under the federal False Claims Act.

In addition, if a case doesn't go forward, the whistleblower or relator under New York Law is able to withdraw the case under seal so that the identity of a whistleblower in a dismissed case does not become revealed.

In addition, the anti-retaliation provision in New York is unique in that it not only bars retaliation by the employer, but it also specifically prohibits industry wide blacklisting of whistleblowers.

When the whistleblower applies for his or her next job, that prospective employer is not permitted to discriminate in hiring by virtue of the fact that that individual was once a whistleblower.

It's a very impressive and powerful statutory tool.

Many state Attorneys General have specialized investigative units known as Medicaid Fraud Control Units. New York has that as well. But as of 2011, New York went one step further and created a special unit – known as the Taxpayer Protection Bureau – to deal with non-Medicaid fraud False Claims Act cases.

And even though it is known as the Taxpayer Protection Bureau, it doesn't deal simply with tax cases. It's basically saying it is there to protect taxpayers against all types of non-Medicaid fraud.

There is a dedicated unit, a dedicated group of attorneys who work those cases and have a clear understanding of the public/private partnership that is the foundation of that law.

CCR: Is New York the only state with that kind of set up?

GETNICK: I am not familiar with any other state that has replicated what New York has put into place, both in terms of its statutory scheme and also in terms of having a dedicated unit to work non-Medicaid False Claims Act cases.

CCR: When you say non-Medicaid cases, we are talking primarily tax cases?

GETNICK: Not necessarily. A case that involves highway funds could be a non-Medicaid case. A case that involves consumer utilities falls into that category. Think of all the ways a government spends money. All of those cases are potential False Claims Act cases.

CCR: Is it true that New York is the only state where you can bring this kind of false claims action in a tax fraud case?

GETNICK: That is a more complicated question than it appears to be at first blush. But for all intents and purposes, the answer is yes. Why is it more complicated? In Illinois for example, one can bring a case involving sales tax. But in terms of an across the board False Claims Act tax whistleblower provision, only New York has that.

CCR: There has been criticism of the IRS in its failure to enforce its whistleblower provision. Is the IRS getting any better?

GETNICK: The criticism you are pointing to is to some extent a function of how the enforcement of the IRS whistleblower law is structured. For example, one can file a claim with the IRS. Some people have said, after that, it goes into a black box.

What that means is that unlike a False Claims Act law, where the whistleblower and the whistleblower counsel remain actively involved in litigating the case and actively involved in working in a public/private partnership with the state's Attorney General, that opportunity doesn't exist in the IRS whistleblower enforcement structure.

There has been criticism in terms of lack of information. There has been criticism in terms of a lack of speed and a fair degree of frustration with that program.

It is interesting to explore how these various tools can synergize so as to provide a better result for IRS whistleblower cases, along with state False Claims Act cases.

CCR: Have you had any successful settlements under the IRS whistleblower program?

GETNICK: Yes, we have had successful results.

But the interesting thing about the IRS whistleblower program is that even a successful result does not immediately result in an award because of the way that aspect of the process is managed.

The New York False Claims Act provides a vehicle for the whistleblower and the whistleblower's lawyer to be actively involved with a motivated state Attorney General to move these cases to conclusion.

The Falcone hedge fund case was filed in 2015 and it produced results as early as 2017 and again in 2018. In 2017, we had a \$40 million recovery. And last week we had a \$30 million recovery. All that was done in a three and a half year period.

In terms of the life of a lawsuit, that is a fairly quick turnaround. No one is seeing those types of results in the IRS whistleblower program. The Falcone case is a pure state tax case.

But many cases involve both the failure to pay state taxes and federal taxes. If you have one of those types of cases and you are able to advance it through the New York State False Claims Act, you lay the foundation for the IRS whistleblower case, the federal case to follow suit.

Rather than a federal case having to come to fruition and then piggy backing on that, the reverse is the case.

You are able to pursue the state case with the resources of the whistleblower, the whistleblower's counsel, the Attorney General's office, the New York State Department of Taxation and Finance, and get a result. And once you get a result, you now have the predicate for a recovery under the IRS whistleblower program.

CCR: It appears that the federal False Claims Act is immune to politics. It keeps chugging along producing cases.

The IRS seems similarly immune to politics in the sense that no matter who is in charge, there are very few results. There are probably thousands of cases filed with the IRS and yet there have only been a handful of settlements.

GETNICK: The point is well taken. And the question becomes – how do we fashion a solution for the situation you have just described?

The New York State False Claims Act provides a potential new paradigm to accomplish that. You bring a case under the New York State False Claims Act and take it through to a successful conclusion.

The predicate has now been laid for an IRS

whistleblower recovery, if there are federal tax issues involved.

CCR: If the IRS were settling cases, we would know it right? They would be public?

GETNICK: They would be public. But whether or not we would know it depends on whether they were announced widely and whether or not people were paying attention. There may be some recoveries that have escaped wide attention. But the fact of the matter remains that a lot of cases have gone in, not that many cases have come out. And that has been a consistent source of concern and criticism.

CCR: The Falcone cases involved the largest settlement under the New York State tax program. What was the whistleblower alleging?

GETNICK: This case involves one of the most successful hedge funds. This hedge fund, not surprisingly, was situated in midtown Manhattan. And it had back office partners in the state of Alabama. At some point, everyone figured out that the tax rate in New York is higher than it is in Alabama.

And by virtue of the enormous amount of revenue that this hedge fund was producing, that delta was very significant. A decision was made. The decision that was made was to somehow declare that income as being entirely attributable to Alabama.

In the first instance, that saved a lot of money for people associated with that hedge fund. But in the second instance, it didn't survive scrutiny. A lot of things were done in order to disguise the fact that the principal office of that hedge fund operated out of midtown Manhattan.

CCR: The previous \$40 million settlement – was that the same whistleblower?

GETNICK: Both cases involved the same whistleblower. The first case involved the Alabama group. That was the \$40 million settlement. The second part of the case involved the New York group. That was the \$30 million settlement.

CCR: Under the New York law, the whistleblower gets confidentiality. But under the False Claims Act, there is no whistleblower confidentiality.

GETNICK: It's not so much a matter of law as a matter of structuring the lawsuit so as to provide that level of anonymity.

CCR: It's a condition of settlement?

GETNICK: In this case, the whistleblower filed as a limited liability corporation so that the identity of

any individual is not immediately obvious.

CCR: Under the SEC whistleblower provision, there is a condition in the law to provide for confidentiality.

GETNICK: Yes. However, the SEC whistleblower law is very specific. It requires the whistleblower to be an individual. That is quite limiting. Under the federal False Claims Act a corporation can be the whistleblower.

One of the interesting things that has taken some time to come to fruition is that mainstream companies are taking advantage of the federal False Claims Act in order to prevent their competitors from engaging in unfair or illegal competition.

CCR: What is a case that has been settled where a company has secured a settlement under the False Claims Act?

GETNICK: One of the principal whistleblowers in the Mylan Epipen \$465 million False Claims Act recovery was its competitor Sanofi. Simply put, Sanofi refused to put up with unfair competition and the unlevel playing field that created.

By blowing the whistle on its competitor, Sanofi ended the offending practice and recovered an approximate \$39 million whistleblower share.

CCR: Most False Claims Act whistleblowers are publicly known?

GETNICK: At the time the case comes to a successful conclusion, the answer is yes.

CCR: As a matter of public policy, why should that be the model as opposed to the SEC model where it is confidential?

GETNICK: Ultimately, no matter how hard the law tries to prevent retaliation, it is very difficult to deliver on that goal.

The ability to create greater assurance to the whistleblower that they will be able to maintain anonymity, the greater the chance those cases will come forward. At the end of the day, those cases have to stand on the evidence.

Whether or not the whistleblower remains anonymous is irrelevant from the standpoint of the merits of the case – adequate proof to ensure the statute is not abused.

My preference would be for whistleblowers to remain anonymous for as long as feasible. In virtually any case, if it gets to a point where litigation testimony becomes required, at that point anonymity can no longer be preserved. And that is true in all whistleblower cases if they reach that stage.

Most do not. But it's very important for counsel to inform their clients of that possibility so they fully understand that anonymity cannot be 100 percent guaranteed under any whistleblower program.

CCR: Why would a whistleblower incorporate before filing a complaint?

GETNICK: There could be any of a number of reasons. One of the principal reasons would be to further ensure anonymity.

CCR: Let's say the company wants to find out who incorporated the limited liability corporation. Isn't that public record?

GETNICK: Yes. That is a matter of public record. But it may not trace back to the whistleblower so easily, if at all.

CCR: Where do you see the future of whistleblower lawsuits going?

GETNICK: I try to stay on the leading edge of expanding the boundaries of these laws. One of the most important areas is the potential use of the False Claims Act as a consumer fraud enforcement tool.

Within the last year, Ralph Nader and the Center for Study of Responsive Law brought together a group of people in the consumer rights movement to discuss the fact that it is becoming more and more difficult over time to pursue consumer fraud enforcement. There are impediments such as mandatory arbitration clauses and class action limitations.

It's essential to look for alternative means of undertaking this important work. If we think of government as a consumer of services, it is probably one of the largest in the country. And certain consumer frauds are not only impacting private citizens.

They are also impacting governments. By way of an example, if you think of utility services, an area where private citizens are impacted, the government itself is a consumer of utility services.

If one is able to point to a fraud on the government in the provision of utility services, it likely will also expose parallel activity adversely affecting private consumers and provide a remedy for those private consumers as well.

That is a means of using the False Claims Act to expand the fight against consumer fraud.

CCR: Is there a case on consumer fraud brought under the False Claims Act?

GETNICK: Given court sealing requirements, all I'm comfortable saying in that regard is – stay tuned.

CCR: Taxpayers Against Fraud is having its annual meeting this week. What can you say about the False Claims Act bar and its growth and what it means for law and law enforcement?

GETNICK: I am the chairman of Taxpayers Against Fraud. And I am familiar with many if not most of the lawyers who work in this area. It is not an understatement to say that this is one of the most collegial group of professionals that I have ever been associated with.

Almost anyone who observes us as a group comes to the same conclusion. Yes we are competitors. But we are colleagues first and foremost. And that is because there is a sense of mission to the work that is being done here. There is a sense of vision to the work that is being done here.

There is a bipartisan nature to this work. This is not work confined to liberals or conservatives, Democrats or Republicans. This is a group of professionals dedicated to promoting integrity and fighting fraud. It focuses on whistleblowers. But it has a lot to do with shared values and shared purpose.

CCR: Maybe the False Claims Act will heal the great divide.

GETNICK: In 2016, I was asked to testify at a House hearing at the invitation of the minority on the federal False Claims Act. And at that same hearing, Larry Thompson, the former Deputy Attorney General under George W. Bush appeared at the invitation of the majority.

There really was significant common ground in terms of our message. The question was being posed – which is it – compliance programs or whistleblower programs?

And our mutual answer was – both. We need active compliance programs in businesses in order to encourage good conduct in the first instance. And we need strong whistleblower laws to back those programs up if they fail.

And that is something that can be embraced by both parties. That can be embraced by people of different political philosophies. In the end, we are talking about promoting good conduct and then having smart enforcement to back it up.

As citizens, we need to be looking for opportunities to find common ground. And the False Claims Act is one of those opportunities.

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