

WHETTING THE WHISTLE

*Firms getting fed funds
may find the most powerful watchdogs
are now inside their company*

By **JOHN CALLEGARI**

If your company was awarded a federal contract or grant and hasn't lived up to the terms, there's a chance you're being scrutinized from within.

More protection for whistleblowers and more opportunities for them to embroil their companies in legal trouble have dramatically driven up the number of federal False Claims Act cases and settlements in the last year.

Since 2009, Congress twice has strengthened the FCA, meaning bigger potential headaches for companies and employers that receive either contracts or grants from the federal government.

Thousands of Long Island businesses and nonprofits receive funding through grants or contracts from the federal government, and thus are at risk for severe penalties in whistleblower cases.

In a September Court of Appeals decision, Cornell University had to pay close to \$1 million because the university's HIV/AIDS research differed markedly from that for which it received a 1998 renewal of a federal grant. A former participant in the research program brought claims against the university.

Even though the federal government

didn't stand to gain any monetary benefit from the grant, the school still had to pay a fine plus reimburse the federal treasury for the full amount of the grant.

Under the FCA, businesses and organizations are liable for up to three times the amount they received in funding from the government. Whistleblowers, also known as relators, typically receive between 15 percent and 25 percent of the government's recovery.

The Department of Justice reported recovering \$2.8 billion in settlements and judgments under the FCA in 2011. In addition, the DOJ reported that the number of FCA lawsuits in 2011 increased significantly, rising from between 300 and 400 cases per year in the preceding few years to 638.

Kevin Mulry, a partner at Uniondale-based Farrell Fritz, said the Cornell decision was the first time damages based on the full amount of a grant were awarded for false statements made in a renewal.

"This decision should be of great interest to anyone receiving federal grant funding," Mulry said. "There have been a number of amendments over the last couple of years that makes it easier than ever to bring these types of cases."

While the FCA has gotten stricter, not

everyone receiving federal funds is aware of the changes.

Long Island Forum for Technology President Frank Otto said he had never really worried about the FCA, but would begin looking at it after being contacted by Long Island Business News. LIFT recently received an extension to its \$450,000 U.S. Small Business Administration grant for its rail alliance. Otto said he felt LIFT's grants were too small to warrant FCA action. But with whistleblowers standing to make a buck from any potential claims, Otto said he's ready to reconsider his position.

"I think I should take more of a look at it," Otto said. "We do follow all the ground rules and guidelines, and we're not that controversial, but I think I'll still bring it up with my board on Thursday."

Heightening the urgency: Further expansions of whistleblower protections are expected.

Last week, President Barack Obama issued a directive granting greater protections to relators who blow the whistle on federal agencies and departments. And the House of Representatives in September passed the Whistleblower Protection Enhancement Act, which expands protection to all relators who report an incident of



Kevin Mulry: Recent amendments have made it easier to bring whistleblower cases.

misconduct, not just the first one to do so. The Senate is expected to act on the legislation during its lame-duck session later this year, according to reports from The Washington Post.

Alan Miller, chief financial officer of Mitchel Field-based Frequency Electronics, which recently received several new contract awards from the federal government for satellite communications equipment totaling more than \$10 million, said the company had whistleblower troubles in the late 1980s when the FCA became law. As a result, and due to additional regulations such as Sarbanes-Oxley, the company has internal controls to ensure compliance with all federal contracts.

“Regulations have gotten much more explicit in the last few years,” Miller said. “There’s so much more to comply with.”

Two major amendments to the FCA have been passed since 2009, expanding protections for relators beyond just employees to include contractors and agents, broadening the definition of a claim and re-

quiring overpayments be refunded within 60 days of discovery.

In addition, Congress passed a law allowing the government to drastically increase the number of FCA cases it could investigate, as cases can now be delegated to lower-ranking officials in the U.S. Attorney General’s Office. The government has only 20 days to investigate a case from the date a claim is filed.

That legislation appears to be working.

Since 1986, whistleblowers have filed nearly 8,000 actions and the Department of Justice has recovered more than \$30 billion under the FCA. Nearly 30 percent of that – \$8.8 billion – has been recovered since 2009, with \$6.6 billion stemming from health care fraud recoveries.

As Long Island’s largest health care provider and receiver of federal funds, the North Shore-Long Island Jewish Health System has hired its own compliance officer to protect it against FCA claims and manage risk. In September, North Shore-LIJ received a \$2 million federal grant to

treat women, adolescents and children with HIV.

“The North Shore-LIJ Health System takes compliance matters very seriously,” said Gregory Radinsky, chief compliance officer for North Shore-LIJ. “We provide annual education to our employees and applicable business partners on compliance topics.”

Mulry said it may sound obvious, but the best way for a company receiving federal money to avoid problems with the FCA is to have strict corporate compliance programs and policies.

But the effectiveness of those programs and policies can’t always protect against rogue employees.

“If a company has a problem with an employee acting against the company, it should present the case to the government proactively,” Mulry said. “The government will usually be more lenient when an employee is acting [outside of company policy]. It’s not a complete defense, but it puts the company in a better spot.”



Farrell Fritz, P.C.
1320 RXR Plaza, Uniondale, NY 11556