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Ex-Philly US Atty Predicts No Falloff In FCA Enforcement

By **Dan Packel**

Law360, Philadelphia (March 31, 2017, 1:25 PM EDT) -- Drug and device manufacturers and other players in the health care world should not expect relief in enforcement of the False Claims Act with Jeff Sessions as attorney general, Zane David Memeger, former U.S. attorney for the Philadelphia region, told Law360 in a wide-ranging recent interview that also touched on the region's ongoing legacy of public corruption.

Memeger rejoined Morgan Lewis & Bockius LLP in January after spending seven years overseeing an office that was at the front line of anti-fraud efforts impacting a wide range of health fields.

Returning to private practice at the firm where he served as partner before becoming U.S. attorney, Memeger has seen his attention turn toward Asia, advising organizations and businesses on compliance with statutes including the Foreign Corrupt Practices Act and the United Kingdom's Bribery Act.



Zane David Memeger

But he is also monitoring the workings of the U.S. Department of Justice and the transition process, informed by his experience both as U.S. attorney and as a prosecutor in the office during the changeover between the Clinton and Bush administrations.

"The attorney general sets priorities, those priorities get communicated out to the field and the field takes appropriate steps to try to pursue those priorities," he said. "At the same time, U.S. attorneys are also delegated authority to pursue priorities based on things that may be going on in their district, and as long as they meet up with the priorities and don't run counter to the goals of the attorney, you generally are going to be able to pursue those type of cases."

In Pennsylvania's Eastern District, home to a number of drug and device manufacturers, the expertise accumulated by career prosecutors is not going away.

Memeger also cited Sessions' confirmation hearings as proof that the new attorney general remains committed to the FCA, which proved a particularly powerful tool during his time in office, highlighted by eight- and nine-figure settlements with companies including Johnson & Johnson, Endo Pharmaceuticals Inc. and Shire PLC.

"[Sessions] indicated that, from his perspective, the False Claims Act was a very valuable tool in terms of rooting out fraud, waste and abuse," Memeger said. "He indicated he sees value in whistleblowers, he believes whistleblowers ensure that companies try to do the

right thing, because if you're concerned about having whistleblowers in your organization, the last thing you want them to do is go forward to the government. And he indicated that enforcement of the False Claims Act would continue under his administration."

Some uncertainties remain, however, given Sessions' avowed commitment to cracking down on violent crime and illegal immigration, and the issue of national security, which is perpetually in the background.

"To deal with those type of matters, it takes resources," Memeger said. "When you're talking about resources within the Department of Justice, you're talking about people. When it comes to a point where resources are getting moved to address those type of issues, then the question will be, 'What's going to happen in the white collar arena, or the fraud arena, or other areas of interest to the Department of Justice?'"

During his time as U.S. attorney, Memeger's office and others across the country had resources that allowed the expansion of FCA litigation past drug and device makers, reeling in hospitals, doctors, nurses, clinical labs, nursing homes and hospice providers. One result was that districts unmarked by the presence of Big Pharma were still able to bring significant cases under the law.

"I think part of that was due to the ability of the Medicare strike forces that were set up by the Department of Justice to attack fraud that was occurring across the country using data analytics," he said. "There was a concerted effort to train U.S. attorneys' offices across the country about how to do FCA cases and health care fraud cases."

Several years removed from when enforcement efforts against drug and device makers reached their apex — in the **2014 fiscal year**, the \$2.3 billion in fines and settlements brought in by the Eastern District was almost 10 percent of the total collected by the Department of Justice — Memeger noted that businesses in the sector now seemed focused on compliance. But device makers appear to trail pharmaceutical firms.

"You have a number of pharma companies — whether they are small, medium or large — that seem to understand the concept that compliance matters and you want to try to reduce those risks," Memeger said. "Some of the medical device companies haven't necessarily understood that need for compliance."

He pointed to a recent case out of New Jersey, where two diabetic medical equipment companies **agreed in September** to pay \$12 million to settle allegations they used a fictitious entity to make unsolicited phone calls to Medicare beneficiaries in order to sell them medical equipment.

"Cold-calling people to sell them expensive medical equipment is prohibited for a reason: Unsuspecting patients shouldn't be coerced into making medical decisions about devices and equipment — which they may not even need — on the basis of a sales pitch," former U.S. Attorney for the District of New Jersey Paul J. Fishman said at the time.

Memeger also watched with pride when another fraud case against a pharmaceutical-related business that was charged during his tenure was tried to a **guilty verdict** in March. Drug refund company Guaranteed Returns, its CEO and its chief financial officer were all convicted on charges that they stole \$116 million worth of refunds from pharmaceutical manufacturers and then obstructed a subsequent investigation into the scheme.

"When I walked out the door, when I gave my last talk to the [assistant U.S. attorneys] and the leadership in my office, I said, 'I'm always going to be cheering you all from the sidelines, as long as it's not my client,'" he shared when asked about the case.

In addition to his work policing medical and health care entities, Memeger also confronted a substantial amount of public corruption while U.S. attorney. His office secured convictions against former U.S. Rep. Chaka Fattah and judges on Philadelphia's Traffic Court and Municipal Court.

And the region's legacy of embarrassing behavior by public officials continues seemingly unabated. In March, the U.S. attorney for New Jersey **unveiled an indictment** against Philadelphia District Attorney Seth Williams, which was handed to investigators across the Delaware River to protect the "outstanding working relationship" between state and federal prosecutors in Philadelphia.

Memeger would not comment on the case against Williams, but he did say that his office made inroads against crooked officials.

"I want to say that the vast majority of politicians, elected officials and persons employed by government entities are not corrupt by any stretch of the imagination. But unfortunately, you have a small group of individuals who — when they engage in this conduct — create a very negative picture of those who have dedicated their lives to public service, and my goal was to make sure those persons were getting rooted out," he said.

He added that they were not easy cases to make, especially when there's a blurry line between friendship and the existence of a quid pro quo.

"The law isn't always on the government's side," he noted.

Memeger called serving as U.S. attorney "probably the greatest legal job that you could ever have," but noted he was relieved to be free of the pressure of the position and back in private practice.

"When you are U.S. attorney, your job is to do the right thing, and sometimes doing the right thing means that some people are going to be unhappy with the decisions you make, whether or not it's in the community or whether or not it's in law enforcement, but you really need to stay the course and make the right calls," he said.

"At the end of the day, when you walk out of that office, you want to walk out of that office with integrity, grace and no regrets, and I was happily able to walk out of my office on Dec. 23 knowing that my integrity was intact — I walked out with grace, and I knew that I didn't have any regrets and that I was leaving the office in good hands," he added.

--Editing by Katherine Rautenberg and Kelly Duncan.

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