

Introduction to Whistleblower Acts Syllabus

Lesson 1: Introduction to the False Claims Act

A whistleblower or *qui tam* action can provide financial rewards to individuals who are retaliated against for providing information that a company or individual has defrauded the government. The primary statutes under which this relief may be sought are the federal and state False Claims Acts (“FCAs”), which are not specific to any particular type of fraud. In addition to the FCAs, there are federal statutes which apply to tax fraud and securities fraud.

During this hour I will provide an introduction to the False Claims Act, discuss the history of the federal False Claims Act and the False Claims Acts in twenty-nine (29) States and the District of Columbia, the procedures for filing a False Claims Act case, statute of limitations, jurisdictional bars to filing a case, and the importance in protecting the court’s seal. I will also discuss the pros/cons of bringing a case and important information you should bring to the attention of your clients prior to filing.

Lesson 2: The False Claims Act and Healthcare Fraud

State and federal governments pay hundreds of billions of dollars each year for pharmaceutical drugs, medical devices, hospital care, and nursing home care through Medicare, Medicaid, and other programs. During this hour, I will discuss examples of health care fraud and give participants an idea of the types of fraud that have been or could be the basis of whistleblower lawsuits. The following is an example of the types of healthcare fraud cases that will be discussed.

Pharmaceutical or medical device companies have been and can be charged with the following types of fraud: (1) *Price fraud* – companies may conceal discounts that they receive from the government and which they are expected to pass on to Medicaid clients; (2) *“Off-label” marketing* – this occurs when a company, in an effort to increase sales, markets its product for uses not approved by the Federal Drug Administration; and (3) *Defective Devices* – if a device is defective and the company, knowing about the defect, nonetheless bills and is reimbursed for same, the government has been defrauded.

Hospitals and physicians have been and can be charged with the following types of fraud: (1) *“Phantom Billing”* – billing the government for a service which was not provided to the patient; (2) *Billing for Unneeded Procedures* – providing and billing for a procedure, even though the patient did not need that type or quantity of care. For example, a patient only needs a basic x-ray

which costs \$75, but the physician orders an MRI and related testing which costs additional money; (3) *Up-coding* – medical procedures have a “code” which determines how much the provider is going to get paid by the government. If a provider bills for a higher “code” – and is paid more by the government – a fraud has been committed; (4) *Kickbacks* – kickbacks are items of value (money, gifts, trips, meals, etc.) which are provided by one party in exchange for referrals or business from the other party. This can include waiving co-payments and deductibles; and (5) *Stark Violations* – there are complex laws limiting certain physician referrals. It is generally illegal for a doctor to make a referral to a business with which he has a financial relationship unless a “safe harbor” applies. For example, a doctor may not refer one of his patients to a physical therapy business that the doctor also owns.

Lesson 3: The False Claims Act and Fraud in Areas Other Than Healthcare, Including Fraud in Department of Defense Contracting and the Financial Industry

During this hour I will discuss False Claims Act theories and cases brought in areas other than healthcare fraud. These other areas include, False Claims Act cases in the financial industry, which have seen an increase since the economic downturn in 2008 and government spending in the financial sector. I will also discuss fraud that occurs in defense contracting and grant fraud.

There are many ways in which financial transactions, accounting practices, lending/borrowing, and other financial activities can run afoul of the FCAs, including: (1) *Financial Assistance Fraud* - submitting fraudulent or falsified information in conjunction with a request for financial assistance under the Troubled Asset Relief Program (TARP) and the Capital Purchase Program (CPP). By way of explanation, in order to receive TARP funds, a bank certifies it will use such funds for lending or to strengthen capital. But, a whistleblower claim may arise if instead the money is used to make an acquisition; (2) *Mortgage Fraud* – submitting fraudulent or falsified information in conjunction with securing Federal Housing Administration (FHA) or Housing and Urban Development (HUD) funds, loan guarantees, or mortgage insurance that results in government financial assistance being paid based on this fraud/falsification; (3) *Loan fraud* - violations of the Federal Reserve’s Term-Asset-Backed Securities Loan Program (TALF), such as the improper use of off-shore vehicles by hedge funds; (4) *Securities pricing fraud* - fraudulent pricing of securities or financial products purchased by public pension funds or government entities; and (5) *Emergency fund fraud* – receiving funds in to serve the Federal Emergency Management Agency (FEMA) and fraudulently failing to provide services or provide services in a substandard manner.

Defense Contractor Fraud: The federal government spends hundreds of billions of dollars each year in defense of the United States. A huge portion of the services utilized by the armed forces comes from private companies. Defense contractors may commit FCA violations by, among other things, representing parts are purchased from American companies when they are not, failing to comply with contract specifications, misrepresenting qualifications to complete the work, overbilling or overcharging for goods or services, billing for services not provided, utilizing sub-standard goods, or violating the Truth-in-Negotiations Act (TINA) which stipulated

that the government would have access to all the cost or pricing data the contractor used in making a bid for a government project; if a contractor withheld relevant data which resulted in an overstated price this would be a violation.

Grant Fraud: Every year, the federal government also funds millions of dollars in research in a broad range of fields, from clinical medicine, to education, to healthcare, to nutrition and fitness, and to highway safety. Research fraud involves using these funds for inappropriate purposes, including siphoning of funds into for-profit ventures, using funds for other, unrelated projects, inflating project-related costs, or making misrepresentations in grant proposals to obtain funds.

Lesson 4: The IRS Whistleblower Act: Reporting Tax Fraud

The Internal Revenue Service (“IRS”) Whistleblower law rewards whistleblowers that lead the IRS to the recovery of unpaid taxes and/or violations of the internal revenue laws, including failure to disclose income from overseas, underreporting income, overstating deductions, concealing of assets from a foreign country, and using of tax shelters to show deductions. To be eligible to receive a reward under this statute if the IRS recovers, whistleblowers must complete a Form 211 disclosing all relevant facts and evidence of the alleged fraud and submit it to the IRS.

During this session, I will discuss the history of the IRS whistleblower statute, the procedures for filing a complaint with the IRS whistleblower office, the IRS whistleblower program in general, specific theories of tax fraud and cases that have been successfully resolved in the program.

Lesson 5: The SEC Whistleblower Act: Reporting Securities Fraud

Section 922 of the Dodd-Frank Act provides rewards to whistleblowers for exposing significant violations of the securities laws. Unlike the FCAs these frauds do not have to relate to government money. Types of fraud that can be pursued under this statute include: bribery of foreign officials in violation of the Foreign Corrupt Practices Act, and securities law violations that create an unfair playing field for the investing public. To be eligible to receive a reward under this statute if the Securities and Exchange Commission (“SEC”) recovers, whistleblowers must complete a Form TCR disclosing all relevant facts and evidence of the alleged fraud and submit it to the SEC.

I will discuss the SEC Whistleblower statute, its specific anonymity provisions, interacting with the SEC Whistleblower Office, applying for an SEC award, and examples of cases and recoveries that have been brought to the attention of the SEC through the whistleblower program.

Lesson 6: Litigating Under the Whistleblower Statutes: Traps for the Unwary and Practice Pointers

During this final session, I will provide a general overview of the whistleblower statutes previously discussed as well as discuss the California and Illinois Insurance whistleblower statutes which allow individuals to bring actions on behalf of private insurance companies.

After I provide a general overview of the whistleblower statutes, I will discuss common issues that arise when representing whistleblowers including litigating employment claims and claims under the FCAs while protecting the seal, discussing the effect of pre-filing release of claims has on the potential to bring a whistleblower claim, issues surrounding gathering evidence to support the whistleblower claim, how to interact with the government, and first-to-file issues.