

**A COMPREHENSIVE ANALYSIS OF THE FALSE
CLAIMS ACT'S UNIQUE STATUTE OF LIMITATIONS:
THE SUPREME COURT'S RULING IN COCHISE
CONSULTANCY, INC. WAS A GOOD START BUT
LEFT MUCH TO DO**

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3. Violations of Section 3729(a)(1)(C)

A violation of § 3729(a)(1)(C) occurs when a person “conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G).”⁵⁴ Most

46. *United Techs. Corp.*, 985 F.2d at 1157.

47. 31 U.S.C. § 3729(a)(1)(B).

48. “[Section (a)(1)(A)] often works in tandem with subparagraph (a)(1)(B), which prohibits making or using a false statement or record that is material to a false or fraudulent claim. Courts do not always distinguish between the two subparagraphs, and both are often involved in the same case. For example, a false claim for payment under (a)(1)(A) may be made in the form of a record or statement, which also would support a claim under (a)(1)(B).”

SYLVIA, *supra* note 17.

49. *United States ex rel. Brooks v. Stevens-Henager Coll., Inc.*, 359 F. Supp. 3d 1088, 1109 (D. Utah 2019) (citing 31 U.S.C. § 3729(a)(1)(B)).

50. *Jana*, 41 Fed. Cl. at 743; *Rivera*, 55 F.3d at 709.

51. *See supra* Section III.A.1.

52. *Jana*, 41 Fed. Cl. at 743.

53. *Id.*

54. 31 U.S.C. § 3729(a)(1)(C) (2018); SYLVIA, *supra* note 17, § 4.8 (“The False Claims Act does not define the term ‘conspires.’ In interpreting former subsection (a)(3), now (a)(1)(C), courts have looked to general civil conspiracy principles. The essence of a conspiracy is an agreement between the defendant and one or more persons to commit a wrongful

courts have held that, in addition to reaching an agreement to conspire to violate the FCA, the plaintiff must also allege the commission of an act in furtherance of the conspiracy; i.e., “an overt act.”⁵⁵ However, the courts are split as to whether the violation of this provision occurs at the first overt act necessary to complete the conspiracy, or if it runs anew for each subsequent overt act; this is referred to as the last overt act rule. Some courts follow *Blusal Meats, Inc. v. United States*, which rejects the last overt act rule and fixes the conspiracy at the moment when all elements are met.⁵⁶ Other courts follow *United States ex rel. Fisher v. Network Software Assocs., Inc.*, which holds that the “statute of limitations in a civil damages action for conspiracy runs separately from each overt act that is alleged to cause damage.”⁵⁷ The better approach is the standard adopted by the court in *Fisher*. Thus, any overt act triggers anew the FCA’s conspiracy SOL because each overt act could separately give rise to a violation of the FCA if the prior overt acts had not occurred.

A defendant should not be able to avoid FCA liability simply because a scheme was ongoing for a long time. For example, assume the government caught an entity that had been defrauding the military for eleven years. Clearly the government could seek repayment for up to ten years of fraud by relying upon either Section 3729(a)(1)(A) (presenting a false claim) or Section 3729(a)(1)(B) (making or using a false record or statement).⁵⁸ Assume further that another defendant had conspired with the first defendant. If the first overt act occurred eleven years ago, it would not make sense to say that the conspiracy that occurred over the last ten years would not apply to the conspirator. If it did, such a co-conspirator would not face FCA liability under the conspiracy provision for his role in defrauding the government over the last ten years.⁵⁹ Thus, this

act. In a False Claims Act case, the wrongful act to which the parties must agree is an act that violates the FCA.”).

55. SYLVIA, *supra* note 17, § 4:11 (“Most courts that have described the elements of a claim under former subsection (a)(3), now (a)(1)(C), have stated that in addition to an agreement, the Government must allege commission of an act in furtherance of the conspiracy (or ‘an overt act’), although they have not necessarily analyzed the issue. Unlike some conspiracy statutes, the False Claims Act does not expressly require an overt act, but courts could imply this requirement. Although resolution of this issue is unclear, to the extent an overt act is required, a single overt act by any one conspirator is sufficient to support a conspiracy.”).

56. 638 F. Supp. 824, 828 (S.D.N.Y. 1986), *judgment aff’d*, 817 F.2d 1007 (2d Cir. 1987).

57. 180 F. Supp. 2d 192, 195 (D.D.C. 2002) (following the last overt act rule) (quoting *Lawrence v. Acree*, 665 F.2d 1319, 1324 (1981)).

58. SYLVIA, *supra* note 17, § 4:2 (“The primary source of liability under the False Claims Act is subparagraph (a)(1)(A).”).

59. It is quite possible that the second defendant would be liable under § 3729(a)(1)(B) to the extent it can be shown that he caused the first defendant to make or use a false record or statement material to a false or fraudulent claim, because that section applies to those who

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Article argues that each new act in furtherance of a conspiracy triggers the start of a new conspiracy violation of the FCA and triggers anew the FCA's SOL for conspiracy.

The SOL for conspiracy is also influenced by whether a plaintiff is seeking only civil penalties or also treble damages. As established earlier, when a plaintiff is seeking FCA damages, the SOL for Section 3729(a)(1)(A) and (B) should start on the date the government wrongfully paid the defendant.⁶⁰ Again, if the plaintiff is only seeking civil penalties, the date of the conspiracy (whether it is the first or last overt act) is the proper starting point of the SOL. But, when the plaintiff seeks FCA treble damages, the SOL must begin on the date of payment.⁶¹