

**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**

Joel D. Hesch[†]

TABLE OF CONTENTS

ABSTRACT	774
I. INTRODUCTION.....	775
II. THE FCA AND ITS SOL PROVISIONS	776
III. UNDERSTANDING THE FCA’S SIX-YEAR SOL.....	777
A. <i>When Does a Violation of the FCA Occur?</i>	778
1. <i>Violations of Section 3729(a)(1)(A)</i>	779
2. <i>Violations of Section 3729(a)(1)(B)</i>	783
3. <i>Violations of Section 3729(a)(1)(C)</i>	783
4. <i>Violations of Section 3729(a)(1)(G)</i>	785
B. <i>The SOL Clock Stops when a Qui Tam Complaint Is Filed</i>	788
III. UNDERSTANDING THE FCA’S TEN-YEAR SOL	789
A. <i>The Ten-Year SOL Applies to Relators in Declined Qui Tam Cases</i>	790
B. <i>Who is the Official Charged with Responsibility to Act?...</i>	791
C. <i>What Level of Information Must be Known by the AG?</i>	794
1. <i>The Level and Credibility of the Allegations</i>	796
2. <i>The Ease of Access to Information to Establish Scienter</i>	800
V. UNDERSTANDING “RELATION BACK” UNDER THE FCA PROVISIONS	803
A. <i>All Amended Filings Concerning the Same Fraud Scheme Relate Back</i>	803

[†] Joel D. Hesch is a Professor of Law, Liberty University School of Law; J.D., The Catholic University of America, 1988. From 1990 through mid-2006, Mr. Hesch was a Trial Attorney with the Civil Fraud Section of the Department of Justice in Washington, D.C., which is the office responsible for nationwide administration of the *qui tam* provisions of the FCA. The author handled FCA and *qui tam* cases throughout the nation in many different circuits, including the trial aspects of *Rockwell Int’l Corp. v. United States*, 549 U.S. 457 (2007). He has authored two books, four amicus briefs before the United States Supreme Court, and many law review articles on the False Claims Act. Mr. Hesch extends a special note of thanks to his research assistant, Dalton Kane, J.D. (2021), who provided valuable assistance in editing this article.

	<i>B. The FCA Relation Back Provisions Trump Any Default Rules</i>	805
VI.	RESTATING THE FCA’S SOL PROVISIONS AND PROCEDURES	808
	<i>A. The FCA Statute of Limitations</i>	808
	<i>B. The Start Date of the SOL</i>	808
	1. <i>Violations of Section 3729(a)(1)(A)</i>	809
	2. <i>Violations of Section 3729(a)(1)(B)</i>	809
	3. <i>Violations of Section 3729(a)(1)(C)</i>	810
	4. <i>Violations of Section 3729(a)(1)(G)</i>	810
	<i>C. The SOL Clock Stops when a Qui Tam Complaint Is Filed</i>	812
	<i>D. The Ten-Year SOL</i>	812
	<i>E. Who Is the Government Official Charged with Responsibility to Act?</i>	812
	<i>F. What Information Must Be Known by the AG?</i>	813
	<i>G. Relation Back Under the FCA</i>	814
	<i>H. The FCA Relation Back Provision Trumps any Default Rules</i>	815
VII.	CONCLUSION.....	816

ABSTRACT

The False Claims Act (FCA) is the government’s most important anti-fraud tool. It provides treble damages and civil penalties when a defendant wrongfully obtains government funds. Either the government or a whistleblower may file a suit to redress the harm. Because fraudulent schemes are often concealed, the FCA contains a two-tiered statute of limitations (SOL). The first tier consists of a minimum of six years from the date of the violation. The second tier extends the period to ten years if a FCA complaint is filed within three years of when “facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances.” The Supreme Court recently resolved a major source of conflict among the circuits regarding whether a different SOL applies depending on whether the government or a private person initiates the lawsuit. The Court made short work of this by concluding that the FCA statute of limitations, by its terms, does not apply differently based upon who initiates the lawsuit. There are, however, several key issues remaining that the Supreme Court did not resolve. These include: when does the SOL begin for certain violations, who is “the official” with responsibility to act that triggers the three-year period within the ten-year statute of limitations, and what constitutes “information material to the right of action”

claim from cases in which the plaintiff is also seeking FCA damages to recover treble damages based on when the false claim was paid. If the plaintiff is seeking damages, the plaintiff bears the additional burden of alleging and proving damages.²⁷ However, proof of damage to the government is not required when a plaintiff is seeking only civil penalties under the FCA.²⁸ Put another way, proof of a violation does not include proving damages; thus the SOL begins for a claim seeking civil penalties at the moment of the violation. However, when the plaintiff is seeking treble damages, an additional element is present and the SOL does not begin until the last element (damages) occurs.²⁹

With respect to when the SOL begins under Section 3729(a)(1)(A), the courts are divided. At least two courts of appeals have ruled that the SOL starts at the presentment of the false claim.³⁰ However, two other courts of appeals have ruled that if FCA damages are sought, as opposed to only civil penalties for presenting a false claim, the SOL begins when the payment is made.³¹ The latter is the better approach, as explained below.

The FCA allows for the recovery of both civil penalties and damages. When a person violates the FCA, she “is liable to the United States Government for a civil penalty . . . , plus 3 times the amount of damages which the Government sustains because of the act of that person.”³² Under this statutory scheme, civil penalties are available simply for

27. See cases cited *infra* note 34.

28. *E.g.*, United States *ex rel.* Howard v. Lockheed Martin Corp., 14 F. Supp. 3d 982, 994 (S.D. Ohio 2014) (citing U.S. *ex rel.* Hagood v. Sonoma Cty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991); and then citing United States v. Killough, 848 F.2d 1523, 1533–34 (11th Cir. 1988)) (noting damages do not need to be proved to establish a violation).

29. *Jana, Inc. v. United States*, 41 Fed. Cl. 735, 743 (Fed. Cl. 1998).

30. *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) (noting the FCA “attaches liability, not to . . . the government’s wrongful payment, but to the ‘claim for payment’”); *Smith v. United States*, 287 F.2d 299, 304 (5th Cir. 1961) (citing *United States v. Borin*, 209 F.2d 145, 147 (5th Cir. 1954) (“Little need be said as to the statute of limitations. The six-year period is to be computed from the time of ‘the commission of the act,’ 31 U.S.C.A. § 235. The ‘act’ in question is the filing of the false claim.”)).

31. *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) (“Further, as to each such claim, the six-year limitations period of § 3731(b)(1) ‘begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.’”) (quoting *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (collecting cases), *aff’d*, 817 F.2d 1007 (2d Cir. 1987)); *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994) (citing *Miller v. United States*, 550 F.2d 17, 23 (Ct. Cl. 1977)) (“In order to recover damages for violation of the False Claims Act, the government must establish that . . . the United States suffered damages as a result of the false or fraudulent claim.”); *Jana*, 41 Fed. Cl. at 742–43 (stating that if the government makes payment on a submitted false claim, the FCA violation occurs on the date payment was made, rather than on the date the claim was submitted).

32. 31 U.S.C. § 3729(a)(1) (2018).