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# When Does Statute of Limitations Begin to Run in Action under False Claims Act (31 U.S.C.A. §§ 3729-3733)

Actions brought under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) are generally subject to a six–year statute of limitations (31 U.S.C.A. § 3731(b)(1)), which starts to run at the time a violation of the Act is committed. Courts have developed different theories as to what constitutes a violation triggering the statute. For example, in United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813, the court—while recognizing the majority rule that for statute of limitations purposes a False Claims Act violation is committed when a claim for payment is presented to the government—still held that the statute started to run when an insured lender filed an application for insurance benefits from the Department of Housing and Urban Development (HUD) after an obligor defaulted on a loan. The majority rule is that the limitations period begins when a claim is presented to an agency of the federal government for payment. Other cases state that an action does not accrue until the government pays the false claim. The following annotation collects and analyzes those cases in which courts have determined when the statute of limitations starts to run under the False Claims Act, as well as when the statute is tolled or suspended.

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**STATUTORY TEXT**

The relevant statutory text from 31 U.S.C.A. § 3731(b) reads as follows:

**§ 3731. False claims procedure**

(a) [omitted]

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date 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, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

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28 U.S.C.A. § 2401(b). See [9.5]
31 U.S.C.A. § 3729(a)(3). See [9]
31 U.S.C.A. § 3729(a)(7). See [4]
31 U.S.C.A. §§ 3729-3733. See [1[a], 2[a], 3, 4, 5, 6, 7, 8[a], 8[b], 9, 10, 11[a], 11[b], 12[a], 12[b], 14[a], 14[b]]
31 U.S.C.A. § 3730(a). See [2[a], 2[b], 13]
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31 U.S.C.A. § 3731(b). See [3, 4, 5, 6, 7, 8[a], 8[b], 9, 10, 11[a], 11[b], 12[a], 12[b]]
31 U.S.C.A. § 3731(b)(1). See [2[a], 15]
31 U.S.C.A. § 3731(b)(2). See [2[a], 2[b], 9, 10, 13, 14[a], 14[b], 14[c], 15]
31 U.S.C.A. § 5324. See [9.5]

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U.S. v. Rivera, 55 F.3d 703, 139 A.L.R. Fed. 813 (1st Cir. 1995) — [2[a], 2[b], 3, 4, 8[a], 8[b], 14[b]]

**Second Circuit**
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U.S. v. Globe Remodeling Co., 196 F. Supp. 652 (D. Vt. 1960) — [4]
U.S. v. Incorporated Village of Island Park, 888 F. Supp. 419 (E.D. N.Y. 1995) — [2[a], 4, 5, 8[a], 9, 14[b]]
U.S. ex rel. Duvall v. Scott Aviation, a Div. of Figgie Intern., Inc., 733 F. Supp. 159 (W.D. N.Y. 1990) — [6]
U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993) — [4, 5, 6, 9]

**Third Circuit**
United States v. Cephalon, Inc., 159 F. Supp. 3d 550 (E.D. Pa. 2016) — [13]
U.S. v. Kensington Hosp., 760 F. Supp. 1120 (E.D. Pa. 1991) — [10]
U.S. v. Klein, 230 F. Supp. 426 (W.D. Pa. 1964) — [7]
U.S. ex rel. Bauchwitz v. Holloman, 671 F. Supp. 2d 674 (E.D. Pa. 2009) — [4, 10]
U. S. ex rel. Vance v. Westinghouse Elec. Corp., 363 F. Supp. 1038 (W.D. Pa. 1973) — [2[b], 7, 13]

**Fourth Circuit**
U.S. v. CFW Const. Co., Inc., 649 F. Supp. 616 (D.S.C. 1986) — [2[a], 2[b]]
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**Fifth Circuit**
Smith v. U.S., 287 F.2d 299 (5th Cir. 1961) — [4]
U.S. v. Borin, 209 F.2d 145 (5th Cir. 1954) — [2[a]]

**Sixth Circuit**
Blakely v. First Federal Savings Bank & Trust, 93 F. Supp. 2d 799 (E.D. Mich. 2000) — [9.5]
U.S. v. Cripps, 451 F. Supp. 598 (E.D. Mich. 1978) — [4, 9, 11[b]]
U.S. v. Ekelman & Associates, Inc., 532 F.2d 545, 35 A.L.R. Fed. 794 (6th Cir. 1976) — [4]
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U.S. v. Ueber, 299 F.2d 310 (6th Cir. 1962) — [4, 8[a]]

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U.S. v. Ettrick Wood Products, Inc., 774 F. Supp. 544 (W.D. Wis. 1988) — [2[b]], [4], [6], [14[b]]
U.S. ex rel. Nitkey v. Dawes, 151 F.2d 639 (C.C.A. 7th Cir. 1945) — [2[a]]

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U.S. ex rel. Woodruff v. Hawaii Pacific Health, 560 F. Supp. 2d 988 (D. Haw. 2008) — [9.5]

**Tenth Circuit**
U.S. v. Stillwater Community Bank, 645 F. Supp. 18 (W.D. Okla. 1986) — [2[b]], [3], [4], [8[b]]
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**District of Columbia Circuit**
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U.S. v. Vanoosterhout, 898 F. Supp. 25 (D.D.C. 1995) — [2[b]], [4]

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Erie Basin Metal Products, Inc. v. U.S., 138 Ct. Cl. 67, 150 F. Supp. 561 (1957) — [12[b]]
Jana, Inc. v. U.S., 34 Fed. Cl. 447 (1995) — [2[b]], [14[a]], [15]
Jankowitz v. U. S., 209 Ct. Cl. 489, 533 F.2d 538 (1976) — [2[a]], [3]
Tyger Const. Co. Inc. v. U.S., 28 Fed. Cl. 35 (1993) — [2[a]], [14[b]]

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## I. Preliminary Matters

### § 1[a] Introduction—Scope

This annotation collects and analyzes federal cases in which the courts have determined when the statute of limitations begins to run in actions under the False Claims Act (31 U.S.C.A. §§ 3729-3733), as well as when the statute is tolled or suspended.

### § 1[b] Introduction—Related annotations

Related Annotations are located under the Research References heading of this Annotation.

### § 2[a] Summary and comment—Generally

Civil actions brought under the False Claims Act[1] (the Act) are subject to a specific statute of limitations, which provides that such actions are timely if commenced:

(1) Not more than six years from the date of the violation of the Act;[2] or

(2) Not more than three years after the facts material to the action became known or reasonably should have been known by the government official charged with responsibility to act, provided that no more than ten years have elapsed since the

violation was committed.[3] The latter provision was added in 1986 as an amendment to the False Claims Act,[4] although prior to this amendment a number of courts had applied the doctrine of equitable tolling in cases where defendants had concealed their fraudulent acts from government officials.[5]

**comment**

Early cases construing the False Claims Act held that the statute of limitations was jurisdictional and could not be tolled.[6]

Ordinarily, a cause of action under the False Claims Act accrues upon a violation of the Act.[7] However, it is arguable at exactly what point an actionable violation occurs for purposes of applying the statute of limitations. The majority rule is that the statute starts to run when a claim is presented to an agency of the federal government for payment (§ 4, infra). However, one case holds that the statute starts to run earlier, i.e., when a defendant defaults on a federally guaranteed loan (§ 3, infra), while other cases hold that it starts to run later, i.e., when the government finally pays the false claim (§ 6- 7, infra). Furthermore, the Second Circuit, while recognizing the majority rule, has expressed a caveat that if the government subsequently pays a false claim after presentation, the statute does not start to run until the date of payment (§ 5, infra).

The majority rule's focus on a defendant's presentation of a claim or a demand for payment reflects the policy that fraud is best prevented by attacking an activity when it first poses the risk of wrongful payment, rather than by waiting until the public coffers are actually damaged.[8] On the other hand, most courts believe that an earlier accrual date would be inappropriate; until a claim for payment is actually made, the defendant's fraudulent conduct remains inchoate.[9]

The fact that a defendant's false claim is presented to the government through an innocent intermediary, such as an insured lender, is immaterial for statute of limitations purposes (§ 8[a], infra). In one case, the court held that a lender's request that the government repurchase a defaulted mortgage from the mortgage holder was insufficient to trigger the statute of limitations, since the loan guarantee agreement required that the mortgage holder make a written demand on the government (§ 8[b], infra). In applying the statute, courts generally treat a defendant's multiple or continuing acts as separate violations (§ 9, infra).

The provision tolling the statute of limitations until discovery of the fraud recognizes that it would be inconsistent with the legislative scheme of the False Claims Act to allow defendants to avoid liability simply by concealing their wrongdoing.[10] However, this rationale assumes due diligence on the part of the government official charged with the responsibility of uncovering the fraud (§ 10, infra). Furthermore, while some courts have rejected the argument that amended pleadings (§ 11[a], infra) or counterclaims (§ 12[b], infra) brought under the False Claims Act after the statute of limitations has run relate back to the filing date of the original pleadings, even if they arise out of the same transactions that form the basis of the complaint, the opposite conclusion has also been reached on occasion (§ 11[a], 12[a], infra).

Finally, with respect to tolling of the statute of limitations, a number of courts have held that the amendment to the False Claims Act statute of limitations establishing the three–year tolling rule (31 U.S.C.A. § 3731(b)(2)) may be applied retroactively (§ 14[a], infra), while other courts have held that the amendment could only be applied prospectively (§ 14[b], infra). One court has expressed the view that the common–law doctrine of equitable tolling is not applicable to False Claims Act suits governed by the statutory tolling rule (§ 15, infra).

One court held that the three–year tolling provision of 31 U.S.C.A. § 3731(b)(2) applies only to False Claims Act suits brought by the government under 31 U.S.C.A. § 3730(a), and not to qui tam actions brought by private individuals under 31 U.S.C.A. § 3730(b) (§ 13, infra).

**§ 2[b]** **Summary and comment—Practice pointers**

  

In determining whether a particular false statement is a claim or demand for payment that triggers the running of the False Claims Act statute of limitations, courts consider whether, within the payment scheme, the statement has the practical purpose and effect, and poses the attendant risk, of inducing wrongful payment. The key inquiry is whether the demand for payment has the practical effect of inducing the government to suffer immediate financial harm, regardless of whether or not it gives rise to an unconditional legal obligation to pay immediately.[11] The phrase "within the payment scheme" is especially important; in each case, it is essential to examine the requirements of the particular payment scheme established by the federal agency involved.[12] Courts have strictly construed the terms of any agreement between the government agency and the claimant or intermediary when deciding whether a particular act may be considered a "claim."[13]

It is important to note that the three–year tolling provision of the statute of limitations,[14] which has displaced the common–law doctrine of equitable tolling (§ 15, infra), may be applied only to extend, not to reduce, the six–year limitations period.[15] Furthermore, this tolling provision applies only to suits brought by the government under 31 U.S.C.A. § 3730(a), and not to qui tam actions[16] brought by private individuals under 31 U.S.C.A. § 3730(b) (§ 13, infra). In applying the tolling provision, some courts have noted that the "official of the United States charged with responsibility to act" refers to the appropriate official of the Civil Division of the Department of Justice, which has sole authority to initiate litigation under the False Claims Act.[17]

Courts are divided as to whether the 1986 amendment adding the tolling provision applies retroactively (§ 14, infra), although that issue has become less significant because of the statute's ten–year limitation on bringing any action.[18] Nonetheless, in cases where some of the defendant's concealed fraudulent acts occurred before the amendment's effective date of October 27, 1986, it is conceivable that a court in a circuit that has refused to apply the amendment retroactively might instead choose to apply the common–law doctrine of equitable tolling, which imposes no absolute time limit, but instead tolls the statute indefinitely until the government knows or should know of the violation.[19]

## II. What Constitutes Violation Triggering Statute of Limitations

### § 3. Default on loan guaranteed by government

The court in the following case held that in actions brought under the False Claims Act (31 U.S.C.A. §§ 3729-3733'>) (the Act), the statute of limitations (31 U.S.C.A. § 3731(b)) starts to run when the defendant defaults on a loan guaranteed by an agency of the federal government.

Rejecting an obligor's argument that the statute of limitations under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) started to run when he filed a loan application containing false statements, the court in United States v Goldberg (1966, DC Mass) 256 F Supp 540, held that the action did not accrue until the date the obligor defaulted on a loan guaranteed by the Federal Housing Administration (FHA), thereby causing the insured lenders to present their claims for payment to the FHA. The court reasoned that the violation of the Act occurred when the obligor caused a claim for payment to be presented to the United States, which in this case was upon default. Therefore, the court concluded that although the government did not bring its action until August of 1963 on loans first accepted and advanced in December 1954, the action was not time–barred by the six–year statute, since the default did not occur until November 1957.

**observation**

One court, noting that this holding has not been followed, points out that the *Goldberg* court was not faced with choosing between the date of default and a different date of demand or presentation of the claim. United States v Stillwater Community Bank (1986, WD Okla) 645 F Supp 18.

  

**caution**

This case was decided prior to the First Circuit Court of Appeal's decision in United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813 (§ 4, infra), holding that for statute of limitations purposes, a False Claims Act violation is committed when a claim for payment is presented to the government.

See Jankowitz v United States (1976) 209 Ct Cl 489, 533 F2d 538, in which the court noted that the earliest the statute of limitations could start to run is the date of the obligor's default; however, the court declined to determine whether the statute was triggered by default or by the subsequent filing of an application for insurance benefits, since both acts occurred within the six–year limitations period.

## § 4. Presentation of false claim to government for payment

**[Cumulative Supplement]**

The courts in the following cases recognized the majority rule that in actions brought under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act), the statute of limitations (31 U.S.C.A. § 3731(b)) starts to run when a claim is presented to an agency of the federal government for payment.

**First Circuit**
United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813
U.S. v. Cabrera-Diaz, 106 F. Supp. 2d 234 (D.P.R. 2000)
**Second Circuit**
United States ex rel. Kreindler & Kreindler v United Technologies Corp. (1993, CA2 NY) 985 F2d 1148, 10 BNA IER Cas 1603, 38 CCF ¶ 76474, cert den 508 US 973, 125 L Ed 2d 663, 113 S Ct 2962
United States v Globe Remodeling Co. (1960, DC Vt) 196 F Supp 652
Blusal Meats v United States (1986, SD NY) 638 F Supp 824, affd on other grounds (CA2 NY) 817 F2d 1007
United States v Incorporated Village of Island Park (1995, ED NY) 888 F Supp 419
**Fifth Circuit**
Smith v United States (1961, CA5 Tex) 287 F2d 299
**Sixth Circuit**
United States v Ueber (1962, CA6 Mich) 299 F2d 310
United States v Ekelman & Assoc., Inc. (1976, CA6 Mich) 532 F2d 545, 35 ALR Fed 794
United States v Cripps (1978, ED Mich) 451 F Supp 598, 25 FR Serv 2d 1218
**Seventh Circuit**
United States v Ettrick Wood Products, Inc. (1988, WD Wis) 774 F Supp 544, adopted, in part on other grounds (WD Wis) 683 F Supp 1262
**Tenth Circuit**
United States v Stillwater Community Bank (1986, WD Okla) 645 F Supp 18
**Eleventh Circuit**
United States v Entin (1990, SD Fla) 750 F Supp 512
**District of Columbia Circuit**
United States v Vanoosterhout (1995, DC Dist Col) 898 F Supp 25, affd (App DC) 1996 US App LEXIS 26366
Recognizing the majority rule that for statute of limitations purposes, a False Claims Act violation is committed when a claim for payment is presented to the government, the court in United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813, held that the statute started to run when an insured lender filed an application for insurance benefits from the Department of Housing and Urban Development (HUD) on July 17, 1979, after an obligor defaulted on a loan. Rejecting the government's argument that the lender's claim was not presented until its mortgage was assigned to HUD on October 25,

1979, as required by the terms of the insurance contract, the court found that the lender's initial application had the practical effect of inducing payment in a sufficiently immediate manner to constitute a claim for payment. The court reasoned that the key inquiry is whether, within the particular payment scheme, the demand for payment has the practical purpose and effect, and poses the attendant risk, of inducing the government to suffer immediate financial harm, regardless of whether it gives rise to an unconditional legal obligation to pay immediately. Since the mortgage assignment was not a demand for money, but merely a required transfer of the mortgage to the government, the court concluded that the government's action filed on October 25, 1985 was time–barred under the six–year statute.

See Smith v United States (1961, CA5 Tex) 287 F2d 299, in which the court held that the applicable date for determining when a false claim is presented is the date on which the defendant files a false report with the government, not the date of the report itself.

Applying the principle that a violation of the False Claims Act occurs when a false claim is presented for payment, the court in United States v Ueber (1962, CA6 Mich) 299 F2d 310, a case involving allegations that a government defense subcontractor had improperly charged the time of its employees, held that the statute of limitations did not start to run until the subcontractor's invoices were first presented to the government for payment, rather than when its fraudulent charging practices began 4 months earlier. The court observed that the cause of action did not come into being until the false claim was made to the government, pointing out that had the subcontractor changed its mind and not caused the false invoices to be submitted, no cause of action would have arisen.

In a False Claims Act suit filed on October 12, 1984—alleging that the defendants had conspired to falsely represent to the Small Business Administration (SBA) the amount of private, unencumbered and unrestricted capital of a small business investment corporation to obtain matching funds—the court in United States v Entin (1990, SD Fla) 750 F Supp 512, applied the rule that the statute of limitations does not begin to run until a claim for payment is submitted to the United States or an agency thereof. The court found that the defendants' application for funds submitted to the SBA on October 13, 1978, rather than their previous letter of September 21, 1978 which falsely represented to the SBA the amount of the capital, constituted the claim for payment; therefore, the government's action was timely.

Citing the rule that the statute of limitations under the False Claims Act starts to run when a demand for payment is presented to the government, and that the crucial inquiry is whether a certain act has the practical purpose and effect of inducing wrongful payment within the particular payment scheme, the court in United States v Vanoosterhout (1995, DC Dist Col) 898 F Supp 25, affd (App DC) 1996 US App LEXIS 26366, held that the Small Business Administration's own act of transferring the defendants' small business investment company to liquidation status on August 24, 1988, pursuant to its own procedures and without any demand on the part of the insured lender, operated as a claim or demand for money that commenced the running of the limitations period. With respect to the government's cause of action under 31 U.S.C.A. § 3729(a)(7), which makes the false statement itself a violation, the court held that the statute started to run on March 3, 1988, when the company submitted fraudulent financial statements that falsely stated its financial position. Thus, because the government did not file its action until August 31, 1994, all of its claims under the False Claims Act were time–barred by the six–year statute.

**CUMULATIVE SUPPLEMENT**

**Cases:**

Limitations period under False Claims Act (FCA) accrues upon initial application for payment by claimant, rather than government's subsequent payment of claim. 31 U.S.C.A. § 3731(b)(1); 31 U.S.C.(2000 Ed.) § 3729(a). U.S. ex rel. Bauchwitz v. Holloman, 671 F. Supp. 2d 674 (E.D. Pa. 2009).

Limitations period on False Claims Act action, in which relators alleged that health care provider defrauded United States by submitting Medicare and Medicaid reimbursement claims after improperly obtaining certificate of need (CON), began to run when provider made requests for reimbursement, not when CON was granted. 31 U.S.C.A. § 3731(b). U.S. ex rel. Sanders v. East Alabama Healthcare Authority, 953 F. Supp. 1404 (M.D. Ala. 1996).

  

[Top of Section]

**[END OF SUPPLEMENT]**

### § 5. —As affected by whether or not claim is subsequently paid

The following cases, while recognizing the majority rule that the statute of limitations (31 U.S.C.A. § 3731(b)) under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) generally starts to run when a claim is presented to the federal government for payment, express a caveat that if the government actually pays a false claim after a demand for payment, the statute does not start to run until the date of payment.

In an action brought under the False Claims Act alleging that a manufacturer had presented fraudulent claims for payment of defective helicopters delivered to the United States Army, the court in United States ex rel. Kreindler & Kreindler v United Technologies Corp. (1993, CA2 NY) 985 F2d 1148, 10 BNA IER Cas 1603, 38 CCF ¶ 76474, cert den 508 US 973, 125 L Ed 2d 663, 113 S Ct 2962, noted in dictum that the limitations period begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.

In determining the timeliness of the government's counterclaim filed on February 17, 1984 under the False Claims Act alleging that the plaintiff had accepted and redeemed stolen food stamps, the court in Blusal Meats v United States (1986, SD NY) 638 F Supp 824, affd (CA2 NY) 817 F2d 1007, adopted the rule that the statute of limitations begins to run on the date that the claim is made, or, if the claim is paid, on the date of payment. Applying this rule, the court dismissed the government's counterclaim with respect to those food stamp redemption payments made before February 17, 1978, as well as unpaid redemption claims presented before that date.

In an action filed by the government on March 22, 1990 under the False Claims Act alleging that the defendants had misused Housing and Urban Development funds in their Community Development Block Grant (CDBG) program and Section 235 housing program, the court in United States v Incorporated Village of Island Park (1995, ED NY) 888 F Supp 419, stated that the statute of limitations begins to run on the date the claim is made, or, if the claim is paid, on the date of payment. Thus, the court found that the government's claims were timely with respect to each claim for a mortgage subsidy payment, and each payment of CDBG program funds, made after March 22, 1984.

**observation**

This caveat has been applied in Second Circuit cases involving continuing or multiple violations of the False Claims Act (§ 9, infra) to determine which of the government's claims are time–barred based on the date of particular violations.

### § 6. Payment of false claim by government

In the following case, the court held that in actions brought under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act), the statute of limitations (31 U.S.C.A. § 3731(b)) starts to run at the time of payment by the government.

In an action brought under the False Claims Act alleging that a manufacturer's emergency escape breathing device could not

provide the protection factor that the defendant had represented to the United States Navy and to the National Institute for Occupational Safety and Health, the court in United States ex rel. Duvall v Scott Aviation, Div. of Figgie Int'l, Inc. (1990, WD NY) 733 F Supp 159, rejected the defendant's contention that the period of limitations began to run upon a request or approval for payment, holding instead that the statute starts to run at the time of payment by the United States government.

**caution**

This case was decided prior to the Second Circuit Court of Appeal's decision in United States ex rel. Kreindler & Kreindler v United Technologies Corp. (1993, CA2 NY) 985 F2d 1148, 10 BNA IER Cas 1603, 38 CCF ¶ 76474, cert den 508 US 973, 125 L Ed 2d 663, 113 S Ct 2962 (§ 5, supra), which notes in dictum that the limitations period begins to run on the date that the claim is made, or, if the claim is paid, on the date of payment.

See United States v Ettrick Wood Products, Inc. (1988, WD Wis) 774 F Supp 544, adopted, in part on other grounds (WD Wis) 683 F Supp 1262, later proceeding on other grounds (CA7 Wis) 916 F2d 1211, 17 FR Serv 3d 1372 (disapproved on other grounds as stated in Strasburg v State Bar (CA7 Wis) 1 F3d 468, 26 FR Serv 3d 39, reh, en banc, den (CA7) 1993 US App LEXIS 20524 and cert den 510 US 1047, 126 L Ed 2d 665, 114 S Ct 698 and (ovrld in part on other grounds by Otis v City of Chicago (CA7 Ill) 29 F3d 1159, 65 BNA FEP Cas 705, 65 CCH EPD ¶ 43268, 29 FR Serv 3d 606, amd (CA7 Ill) 65 BNA FEP Cas 992)), in which the court, while recognizing the majority view that the statute of limitations does not begin to run until at least a demand has been made upon the government for payment, declined to decide whether the date of the demand or the date of actual payment triggered the statute, since the facts of this case made that determination unnecessary.

### § 7. —Initial versus final payment

The courts in the following cases held that in actions brought under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act), the statute of limitations (31 U.S.C.A. § 3731(b)) does not start to run until the government makes final payment on a claim.

In a suit brought under the False Claims Act to recover payments made by the Veterans Administration on fraudulent home loans, where the government had paid out small gratuity payments to inaugurate the loan guarantees and disbursed final payments at later dates, the court in United States v Klein (1964, WD Pa) 230 F Supp 426, affd on other grounds United States v Klein (1966, CA3 Pa) 356 F2d 983 and (disapproved on other grounds by United States v Bornstein (1976) 423 US 303, 46 L Ed 2d 514, 96 S Ct 523 (superseded by statute on other grounds as stated in United States ex rel. Stevens v McGinnis, Inc. (1994, SD Ohio) 1994 US Dist LEXIS, held that the statute of limitations does not start to run when the government first makes payment on the false claims, but upon final payment. Noting that it is only when a false claim is made that an actionable right accrues to the government, and that false or fictitious representations remain inert unless or until they are activated by the making of a claim, the court went on to point out that the statute is tolled until the last date the government paid any money on each claim.

In an informer's action brought on June 23, 1972 under the False Claims Act, alleging that between 1961 and 1972 a subcontractor had submitted false claims to the government for payment under the Nuclear Engine for Rocket Application program, the court in United States ex rel. Vance v Westinghouse Electric Corp. (1973, WD Pa) 363 F Supp 1038, held that the statute of limitations does not start to run until the final payment date of each claim, reasoning that no actionable false claims exist until the government makes payment. Since some of the claims in this case were not paid by the government until 1968, the court found that the suit was timely.

**observation**

The court in *Vance* did not discuss whether any of the multiple claims had been fully paid more than six years before the suit was brought, and, if so, whether those claims were subject to dismissal as time–barred. More recent cases dealing with multiple or continuing violations have applied the statute of limitations separately to each violation (§ 9, infra).

## § 8[a] Effect of presentation of claim by intermediary—In general

It was held by the courts in the following cases that the fact that a defendant's claim is presented to the government through an intermediary is immaterial for purposes of determining when the statute of limitations (31 U.S.C.A. § 3731(b)) starts to run under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act).

Where the defendant fraudulently caused an insured lender to present a false claim for mortgage loan insurance benefits to the Department of Housing and Urban Development, the court in United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813, held that the lender's claim constituted a demand for payment that prompted the running of the statute of limitations under the False Claims Act. Acknowledging that the case was complicated by the fact that the defendants' fraud acted in the first instance upon a private lender rather than directly upon the government, the court went on to adopt the theory that the lender's claim in effect completed the defendants' violation of the False Claims Act, commencing the running of the statute of limitations. The court found that a demand existed where, after fraud was perpetrated on a lending institution for which the perpetrator of the fraud had secured government insurance, the lender presented its own claim to the government for payment.

In a suit brought under the False Claims Act to recover damages arising from the defendant's allegedly false Title I loan applications to Federal Housing Administration (FHA) insured banks, where the banks had presented their claims for payment to the FHA upon the defendant's default, the court in United States v Goldberg (1966, DC Mass) 256 F Supp 540, took the view that presentation of the claims by intermediary banks rather than by the defendant himself did not alter the computation of the time period for statute of limitations purposes.

In an action brought under the False Claims Act alleging the defendants' misuse of Housing and Urban Development funds in their Community Development Block Grant program and Section 235 housing program, the court in United States v Incorporated Village of Island Park (1995, ED NY) 888 F Supp 419, held that it was irrelevant that the claims for mortgage subsidies were submitted to the government by the lender. The court stated that when claims for payment are submitted by innocent mortgagees, the fraudulent acts pursuant to which the mortgages were approved emerge in full vigor and become a part of those claims, which therefore constitute false claims within the meaning of the False Claims Act.

See United States v Ueber (1962, CA6 Mich) 299 F2d 310, in which the court, without commenting on the issue of presentation by an intermediary, held that for statute of limitations purposes, the defendant subcontractor presented a false claim for payment when the primary contractor submitted the defendant's invoice to the government.

## § 8[b] Effect of presentation of claim by intermediary—As determined by terms of agreement

In the following case, the court held that a lender's request that the government repurchase a defaulted mortgage from the mortgage holder was insufficient to trigger the statute of limitations (31 U.S.C.A. § 3731(b)) under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act), since the loan guarantee agreement required that the mortgage holder make written demand on the government.

In United States v Stillwater Community Bank (1986, WD Okla) 645 F Supp 18, the court strictly construed the terms of a Farmers Home Administration (FmHA) loan guarantee agreement, concluding that a demand for payment sufficient to trigger

  

the statute of limitations under the False Claims Act did not occur until the mortgage holder made written demand on the government for the repurchase of the defaulted loans. The court found that the lender's earlier letter to the FmHA notifying it that the lender would not repurchase the loans from the mortgage holder, and requesting the FmHA to do so, failed to commence the running of the statute.

See United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813 (§ 4, supra), in which the court rejected the government's argument that the statute of limitations did not start to run until the insured lender assigned a defaulted mortgage to the government as required by the terms of the insurance contract, since the mortgage assignment was not a demand for money.

## § 9. Effect of continuing or multiple violations

In the following cases, the courts adopted the view that each false claim for payment constitutes a separate violation of the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act), triggering the running of a separate limitations period under 31 U.S.C.A. § 3731(b).

In an action brought on December 30, 1987 under the False Claims Act alleging that the defendant manufacturer had presented fraudulent claims for payment of over 700 defective helicopters delivered to the United States Army, where the defendant argued that the action was time–barred under 31 U.S.C.A. § 3731(b)(2) because the government had known of the alleged defect since 1979, the court in United States ex rel. Kreindler & Kreindler v United Technologies Corp. (1993, CA2 NY) 985 F2d 1148, 10 BNA IER Cas 1603, 38 CCF ¶ 76474, cert den 508 US 973, 125 L Ed 2d 663, 113 S Ct 2962, adopted the view that each false claim constitutes a separate violation that triggers the running of a separate limitations period. After holding that the limitations period for each claim begins to run on the date that the claim is made, or, if the claim is paid, on the date of payment (§ 5, supra), the court noted that the number of assertable claims is not measured by the number of contracts the defendant has with the government, but rather by the number of fraudulent acts the defendant committed.

See Blusal Meats v United States (1986, SD NY) 638 F Supp 824, affd (CA2 NY) 817 F2d 1007, in which the court held that in an action for conspiracy under 31 U.S.C.A. § 3729(a)(3), the False Claims Act statute of limitations starts to run upon the formation of the conspiracy; the fact that acts in furtherance of the conspiracy may have occurred within the limitations period did not render every related, but otherwise time–barred, conspiratorial act actionable.

In a suit filed on March 22, 1990, under the False Claims Act, alleging that the defendants had misused Housing and Urban Development funds, the court in United States v Incorporated Village of Island Park (1995, ED NY) 888 F Supp 419, adopted the government's position that a separate claim for liability existed with respect to each post–March 22, 1984 claim by the defendants for payment of a mortgage subsidy. The court noted that as to each claim, the statute of limitations period began to run on the date the claim was made, or, if the claim was paid, on the date of payment (§ 5, supra). Thus, the court found that the government's suit was timely with respect to each claim for funds used in connection with the Section 235 program, and for each monthly claim for a mortgage subsidy on behalf of each of the Section 235 purchasers, that was made after March 22, 1984.

In an action under the False Claims Act alleging that the defendant contractors had entered into a conspiracy to defraud the government by submitting collusive bids for the renovation of homes conveyed to the Secretary of Housing and Urban Development (HUD), the court in United States v Cripps (1978, ED Mich) 451 F Supp 598, 25 FR Serv 2d 1218, recognized the rule that the statute of limitations period began to run on the date that each voucher was presented to HUD for payment.

## § 9.5. Other

[Cumulative Supplement]

  

The following authority adjudicated whether other events not the subject of §§ 3-9 triggered the statute of limitations under the False Claims Act.

**CUMULATIVE SUPPLEMENT**

**Cases:**

Taxpayers' cause of action against government under Federal Tort Claims Act (FTCA) for damages and remission of assets forfeited as result of consent judgment accrued when their underlying convictions for structuring currency transactions were vacated, not when government committed allegedly fraudulent acts that resulting in forfeiture. 28 U.S.C.A. § 2401(b); 31 U.S.C.A. § 5324. Blakely v. First Federal Savings Bank & Trust, 93 F. Supp. 2d 799 (E.D. Mich. 2000).

Two-year statute of limitations for retaliation claims under False Claims Act (FCA) began to run when employees either resigned upon demand or were fired. 31 U.S.C.A. § 3730(h); HRS § 378–63(a). U.S. ex rel. Woodruff v. Hawaii Pacific Health, 560 F. Supp. 2d 988 (D. Haw. 2008).

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**[END OF SUPPLEMENT]**

## III. Tolling or Suspension of Statute

### § 10. Due diligence requirement

[Cumulative Supplement]

In the following case, the court pointed out that tolling of the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) statute of limitations (31 U.S.C.A. § 3731(b)) until discovery of the fraud is justified only if the government has exercised due diligence in uncovering the fraud.

See United States v Kensington Hosp. (1991, ED Pa) 760 F Supp 1120, motion gr, in part, motion den, in part on other grounds (ED Pa) 1992 US Dist LEXIS 11150, summary judgment gr, in part, summary judgment den, in part on other grounds (ED Pa) 1993 US Dist LEXIS 383, in which there was insufficient evidence for the court to determine whether a private investigator's report contained enough information to charge the government with knowledge of the defendants' violation of the False Claims Act for statute of limitations purposes.

In an action under the False Claims Act brought in 1985 alleging that the defendants had filed false claims under Small Business Administration (SBA) programs, in which the defendants argued that the government's action was time–barred with respect to two requests for disbursements filed in 1978 and 1979, and the SBA responded that it did not discover the falsity of the disbursement requests until a 1981 audit, the court in United States v Uzzell (1986, DC Dist Col) 648 F Supp 1362, 33 CCF ¶ 74856, while recognizing that the doctrine of equitable tolling allows the statutory period to begin running after the government has discovered the fraud, also pointed out that the term "discovered" assumes due diligence on the part of the party charged with the responsibility of uncovering the fraud. Although the defendants contended that adoption of the

  

discovery rule would allow the government to bring an action whenever it had the inclination to discover the material facts, the court, in concluding that the action was timely, noted that the due diligence requirement mitigated the defendants' concern.

## CUMULATIVE SUPPLEMENT

**Cases:**

Limitations period under False Claims Act (FCA) tolling provision begins to run when injured party knows sufficient critical facts to put him on notice that wrong has been committed, and that he needs to investigate to determine whether he is entitled to redress. 31 U.S.C.A. § 3731(b)(2). U.S. ex rel. Bauchwitz v. Holloman, 671 F. Supp. 2d 674 (E.D. Pa. 2009).

Even assuming that tolling provision of the False Claims Act (FCA) extending limitations from six to ten years after the violation when the limitations period is triggered by knowledge of government official, could be invoked by private relators, six-year period still applied where private relators had knowledge of the alleged fraud more than three years before action was filed. 31 U.S.C.A. § 3731(b)(2). U.S. ex rel. Koch v. Koch Industries, Inc., 188 F.R.D. 617 (N.D. Okla. 1999).

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## [END OF SUPPLEMENT]

### § 11[a] Timeliness of amended pleading—Statute tolled

In the following case, the court found that the government's amended pleading related back to the date the original complaint was filed, and therefore was not time–barred under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) statute of limitations (31 U.S.C.A. § 3731(b)).

Where the government filed suit for forfeiture in 1952 under the False Claims Act, alleging that the defendant had obtained improper loans on cotton from the Commodity Credit Corporation, and the government subsequently filed an amended complaint in 1960 seeking recovery of double damages under the Act, the court in United States v Templeton (1961, ED Tenn) 199 F Supp 179, 5 FR Serv 2d 202, held that the amendment related back to the date of the filing of the original complaint and was not time–barred. The court applied the rule that if there is an identity between the amendment and the original complaint with regard to the general wrong suffered and the general conduct causing the wrong, then the statute of limitations does not preclude a hearing on the merits. The critical inquiry, according to the court, was whether the amended complaint's claim for damages, as opposed to forfeiture, should be permitted as merely a claim for another item of damages growing from the original transaction, or whether it should be denied as a separate cause of action that was time–barred. The court concluded that the amendment in essence sought only an amplification of the damages arising out of the original transaction, and thus related back.

### § 11[b] Timeliness of amended pleading—Statute not tolled

In the following case, the court found that the government's amended pleading did not relate back to the date the original complaint was filed, and therefore was time–barred under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) statute of limitations (31 U.S.C.A. § 3731(b)).

Where the government brought an action under the False Claims Act alleging that the defendant contractors had entered into a conspiracy to defraud the government by submitting collusive bids for the renovation of homes conveyed to the Secretary of Housing and Urban Development, and the government later sought to amend its complaint to include all overt acts of the conspiracy for which it sought relief, the court in United States v Cripps (1978, ED Mich) 451 F Supp 598, 25 FR Serv 2d 1218, held that the amendment did not relate back to the filing of the original complaint and therefore was time–barred. The court noted that for statute of limitations purposes, the question of whether an amendment relates back depends on whether the claim asserted in the amended pleading arose out of the same conduct, transaction, or occurrence set forth in the original pleading. The court found that the Act was intended to cover two separate wrongs—a conspiracy to defraud and actual conduct that defrauds—and that the statute of limitations begins to run separately as to each act. The court concluded that the violations asserted in the amended complaint did not relate back to the time the original complaint was filed, since it involved an overt act giving rise to a separate cause of action that was time–barred.

### § 12[a] Timeliness of counterclaim—Statute tolled

In the following case, the court held that the government's timely filing of an action under the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) tolled the statute of limitations (31 U.S.C.A. § 3731(b)) with respect to the government's counterclaim subsequently filed in a separate, pending action brought by the defendant against the government.

Where the government filed an action under the False Claims Act against the defendant on April 29, 1959, pleading 11 instances between June 22, 1953 and October 26, 1953 in which false applications for funds were presented to the government, and the government stated the same claims in a counterclaim filed on October 23, 1959, in the defendant's pending action against the government involving the same transaction, the court in United States v Woodbury (1966, CA9 Or) 359 F2d 370, held that the statute of limitations did not bar any of the government's claims. Dismissing the defendant's argument that the government's claims should have been asserted as compulsory counterclaims in the defendant's earlier action (an issue on which the court expressed no opinion), the court pointed out that the mere fact that the government may have been mistaken in its view as to whether its claims were compulsory counterclaims should not deprive the government of its rights, at least absent some showing of prejudice to the defendant. The court further held that the government's failure to appeal an order dismissing its False Claims Act suit against the defendant did not prevent the filing of that suit from tolling the statute of limitations with respect to the counterclaim in the defendant's suit, since it was the commencement of the government's action, rather than its disposition, that tolled the statute.

### § 12[b] Timeliness of counterclaim—Statute not tolled

In the following cases involving counterclaims filed by the government after the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) statute of limitations (31 U.S.C.A. § 3731(b)) had run, the courts held that the counterclaims were time–barred.

Where a meat wholesaler brought an action on November 28, 1983, challenging the Department of Agriculture's administrative determination that the wholesaler had made false claims under the food stamp program, and the government brought a counterclaim under the False Claims Act on February 17, 1984, alleging that between 1976 and 1978 the wholesaler had accepted and redeemed stolen food stamps, the court in Blusal Meats v United States (1986, SD NY) 638 F Supp 824, affd on other grounds (CA2 NY) 817 F2d 1007, held that the government's counterclaim did not relate back to the date the wholesaler filed its complaint, and therefore was time–barred. The court rejected the government's argument that its counterclaim arose out of the same transactions underlying the complaint, noting that the wholesaler's complaint primarily challenged the procedure followed in the administrative hearing rather than its outcome, and that since the government had first acted in 1980 by bringing its administrative proceeding, it was not unfair to apply the strictly enforced limitations period to the government's counterclaim brought in 1984. The court went on to opine that even if the counterclaim did arise out of the same transactions that formed the basis of the wholesaler's claims, the limitations period of the False Claims Act is not tolled by the institution of a suit against the United States related to the false claims.

Where a corporation sued to recover the unpaid amount due on canned peas sold and delivered to the United States Army, and the government filed a counterclaim under the False Claims Act after the statute of limitations had run, alleging that the corporation falsely certified that all the peas were from a particular pack, the court in Canned Foods, Inc. v United States (1956) 135 Ct Cl 862, 146 F Supp 470, held that the government's counterclaim was non–compulsory and therefore time–barred. Responding to the government's argument that the statute of limitations was tolled by the corporation's filing of its action prior to the expiration of the limitations period, the court noted that since the government's counterclaim was one that did not have to be asserted in the corporation's suit, but could have been prosecuted in a separate cause of action, the rule of equitable tolling did not apply.

Where a contractor sued to recover costs incident to the termination of certain contracts it had with the government, and the government filed a counterclaim under the False Claims Act nearly five years later alleging fraudulent acts on the part of the contractor, the court in Erie Basin Metal Products, Inc. v United States (1957) 138 Ct Cl 67, 150 F Supp 561, found that the counterclaim was non–compulsory and therefore time–barred. Responding to the government's argument that the filing of the contractor's petition, which occurred before the limitations period under the False Claims Act had expired, tolled the running of the statute of limitations, the court stated that the filing by a debtor of a suit against a creditor, on an unrelated cause of action, afforded no reason for tolling the statute against the filing of a counterclaim by the creditor. While acknowledging the rule that the filing of a suit tolls the running of the statute against a counterclaim arising from the same transaction, the court refused to apply this rule where the defense to the counterclaim would necessarily rely on witnesses and documents other than those by which the contractor would attempt to prove its claim. The court further held that the government was barred from using the False Claims Act even as a defense with respect to transactions that occurred prior to the prescribed limitations period, noting that any right under the False Claims Act that is not asserted within the limitations period is lost.

## § 13. Applicability of tolling rule to qui tam action

**[Cumulative Supplement]**

In the following case, the court held that the three–year tolling provision of 31 U.S.C.A. § 3731(b)(2) applies only to False Claims Act suits brought by the government under 31 U.S.C.A. § 3730(a), and not to qui tam actions[20] brought by private individuals under 31 U.S.C.A. § 3730(b).

In a qui tam action brought under 31 U.S.C.A. § 3730(b) alleging the defendants' fraudulent acts in connection with various defense programs, the court in Hyatt v Northrop Corp. (1995, CD Cal) 883 F Supp 484, affd, in part, revd, in part on other grounds, remanded (CA9 Cal) 80 F3d 1425, 96 CDOS 2529, 96 Daily Journal DAR 4196, 11 BNA IER Cas 1020, 131 CCH LC ¶ 58122, petition for certiorari filed (Jul 2, 1996) and appeal after remand on other grounds (CA9 Cal) 91 F3d 1211, 96 CDOS 5510, 96 Daily Journal DAR 9024, 11 BNA IER Cas 1713, held that the three–year tolling provision of 31 U.S.C.A. § 3731(b)(2) applies only to False Claims Act suits brought by the government under 31 U.S.C.A. § 3730(a), and not to qui tam actions brought by private individuals under 31 U.S.C.A. § 3730(b). After holding that the 1986 amendment to the False Claims Act statute of limitations applied retroactively (§ 14[a], infra), the court adopted the defendants' view that the amendment was not intended to extend the statutory period for private individuals to file suit but was only intended to extend the government's time period, noting that when a relator bringing suit knows the material facts well prior to 3 years before bringing the action, it is not the inherent difficulty of discovering the fraud that has prevented initiation of the action, but rather the relator's own delay. If 31 U.S.C.A. § 3731(b)(2) were held to apply to actions brought by qui tam relators, the court pointed out, a relator who knows about a violation soon after it occurs could wait until nearly ten years before notifying the government of the alleged wrongdoing, thereby depriving the government of the ability to prosecute the defendant criminally.

**CUMULATIVE SUPPLEMENT**

**Cases:**

Under False Claims Act's (FCA) three-year tolling provision that began to run when facts underlying fraud were or should have been discovered by United States official, FCA's six-year limitations period for qui tam relators' claims against drug manufacturer for violation of FCA by alleged off-label marketing scheme for drugs was not tolled, where government had declined to intervene. 31 U.S.C.A. §§ 3731(b)(1), 3731(b)(2). United States v. Cephalon, Inc., 159 F. Supp. 3d 550 (E.D. Pa. 2016).

Tolling provision of False Claims Act's limitations section applies both to government and to qui tam plaintiffs and, as to qui tam plaintiffs, statute of limitations begins to run when plaintiff knew or should have discovered facts underlying alleged fraud. 31 U.S.C.A. § 3731(b)(2). U.S. ex rel. Saaf v. Lehman Brothers, 123 F.3d 1307, 38 Fed. R. Serv. 3d 919 (9th Cir. 1997).

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**[END OF SUPPLEMENT]**

**§ 14[a]** Retroactive application of statutory tolling rule—Statute applied retroactively

The courts in the following cases have taken the position that the amendment to the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) statute of limitations establishing the three–year tolling rule (31 U.S.C.A. § 3731(b)(2)) may be applied retroactively.

**Fourth Circuit**
United States ex rel. Milam v Regents of the Univ. of Cal. (1995, DC Md) 912 F Supp 868
**Sixth Circuit**
United States v Macomb Contracting Corp. (1990, MD Tenn) 763 F Supp 272, 37 CCF ¶ 76162
**Ninth Circuit**
Hyatt v Northrop Corp. (1995, CD Cal) 883 F Supp 484, affd, in part, revd, in part on other grounds, remanded (CA9 Cal) 80 F3d 1425, 96 CDOS 2529, 96 Daily Journal DAR 4196, 11 BNA IER Cas 1020, 131 CCH LC ¶ 58122, petition for certiorari filed (Jul 2, 1996) and appeal after remand on other grounds (CA9 Cal) 91 F3d 1211, 96 CDOS 5510, 96 Daily Journal DAR 9024, 11 BNA IER Cas 1713
**Eleventh Circuit**
United States v Entin (1990, SD Fla) 750 F Supp 512
**Claims Court**
Jana, Inc. v United States (1995) 34 Fed Cl 447, 40 CCF ¶ 76862
In a case filed on February 14, 1990, involving the submission of 24 allegedly false grant applications for brain tumor research to the National Institute of Health between 1982 and 1989, the court in United States ex rel. Milam v Regents of the Univ. of Cal. (1995, DC Md) 912 F Supp 868, applied the amended False Claims Act statute of limitations retroactively to a grant application dated April 21, 1982, holding that retroactive application would not impair the defendant's rights. The court reasoned that it is generally permissible to apply a new or amended statute of limitations to a cause of action filed after it was enacted but arising out of events that predated its enactment, since procedural rules ordinarily affect secondary rather than primary conduct.

In Hyatt v Northrop Corp. (1995, CD Cal) 883 F Supp 484, affd, in part, revd, in part on other grounds, remanded (CA9 Cal) 80 F3d 1425, 96 CDOS 2529, 96 Daily Journal DAR 4196, 11 BNA IER Cas 1020, 131 CCH LC ¶ 58122, petition for certiorari filed (Jul 2, 1996) and appeal after remand on other grounds (CA9 Cal) 91 F3d 1211, 96 CDOS 5510, 96 Daily Journal DAR 9024, 11 BNA IER Cas 1713, the court held that the 1986 amendment to the False Claims Act statute of limitations applied retroactively. The court cited the rule that if a provision is procedural rather than substantive, a presumption in favor of retroactive application attaches, further noting that statutes of limitation are generally procedural and may be applied retroactively in the absence of statutory direction or legislative history to the contrary, as long as retroactive

application does not work to resurrect stale claims or otherwise result in manifest injustice. Since the plaintiff's claims did not become stale prior to the enactment of the 1986 amendments, and since the defendants did not show that the retroactive application of the amendment would cause manifest injustice, or would otherwise contravene the legislative intent of the amendment, the court concluded that the 1986 amendment to the statute of limitations applied retroactively.

**comment**

In United States ex rel. Newsham v Lockheed Missiles & Space Co. (1995, ND Cal) 907 F Supp 1349, 96 Daily Journal DAR 1662 (§ 14[c], infra), the court considered a factual situation in which retroactive application of the amended statute to violations that occurred before October 27, 1980 would revive stale claims.

**§ 14[b]** **Retroactive application of statutory tolling rule—Statute not applied retroactively**

The courts in the following cases took the position that the amendment to the False Claims Act (31 U.S.C.A. §§ 3729-3733) (the Act) statute of limitations establishing the three–year tolling rule (31 U.S.C.A. § 3731(b)(2)) may only be applied prospectively from its October 27, 1986 enactment date.

See United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813, in which it was not necessary for the court to address the retroactivity issue, because all the parties apparently agreed that the pre–1986 statute of limitations applied where the events occurred prior to the date on which the amendment was enacted.

See United States v Incorporated Village of Island Park (1995, ED NY) 888 F Supp 419, in which the court held that the increased penalty provisions added by the 1986 amendments to the False Claims Act did not apply retroactively.

In United States v Ettrick Wood Products, Inc. (1988, WD Wis) 774 F Supp 544, adopted, in part on other grounds (WD Wis) 683 F Supp 1262, later proceeding on other grounds (CA7 Wis) 916 F2d 1211, 17 FR Serv 3d 1372 (disapproved on other grounds as stated in Strasburg v State Bar (CA7 Wis) 1 F3d 468, 26 FR Serv 3d 39, reh, en banc, den (CA7) 1993 US App LEXIS 20524 and cert den 510 US 1047, 126 L Ed 2d 665, 114 S Ct 698 and (ovrld in part on other grounds by Otis v City of Chicago (CA7 Ill) 29 F3d 1159, 65 BNA FEP Cas 705, 65 CCH EPD ¶ 43268, 29 FR Serv 3d 606, amd (CA7 Ill) 65 BNA FEP Cas 992)), the court concluded that the 1986 amendment to the False Claims Act statute of limitations may not be given retroactive effect, although the court also found that the three–year tolling provision added by the amendment would not apply to this case in any event. In response to the defendant's argument that the three–year provision should be applied to bar the government's claim, the court noted that 31 U.S.C.A. § 3731(b)(2) serves only to extend, not to reduce, the six–year limitations period.

In Tyger Constr. Co. v United States (1993) 28 Fed Cl 35, 38 CCF ¶ 76499, later proceeding on other grounds 31 Fed Cl 177, 39 CCF ¶ 76627, amd (Mar 15, 1994) and reconsideration gr, in part on other grounds (Ct Fed Cl) 1994 US Claims LEXIS 92, the court held that the 1986 amendment to the False Claims Act statute of limitations must be applied prospectively from its October 27, 1986 enactment date. After reviewing conflicting United States Supreme Court decisions on retroactive application of legislation, and noting that neither the plain language of the 1986 amendments nor their legislative history addressed the retroactivity issue, the court concluded that it should not presume retroactive application in the absence of statutory language requiring such a result.

**§ 14[c]** **Retroactive application of statutory tolling rule—Statute applied retroactively to violations occurring no more than six years before amendment**

  

In the following case, the court held that the amended False Claims Act statute of limitations (31 U.S.C.A. § 3731(b)(2)) applies retroactively, except as to conduct occurring more than six years before the date of the amendment.

In United States ex rel. Newsham v Lockheed Missiles & Space Co. (1995, ND Cal) 907 F Supp 1349, 96 Daily Journal DAR 1662, the court held that the False Claims Act statute of limitations as amended on October 27, 1986, applies retroactively, except as to conduct that occurred more than six years before the date on which the amendment became effective. Noting that a revival of stale claims by retroactive application of a subsequently adopted statute of limitations would alter substantive rights and increase a party's liability, the court found that pursuant to the six–year statute of limitations that existed prior to the 1986 amendment, claims arising earlier than October 27, 1980 were stale, and that retroactive application of the amended statute to violations that took place before that date would serve to revive stale claims.

### § 15. Effect of statutory tolling rule on common–law doctrine of equitable tolling

The court in the following case took the view that the common–law doctrine of equitable tolling is not applicable to False Claims Act suits governed by the statutory tolling rule of 31 U.S.C.A. § 3731(b)(2).

In a case in which the government filed counterclaims under the False Claims Act on May 17, 1995, alleging that a Navy contractor had submitted false payment vouchers for supplies and services between July 1984 and March 1987, and that the government did not discover the fraud until April 26, 1990 at the earliest, the court in Jana, Inc. v United States (1995) 34 Fed Cl 447, 40 CCF ¶ 76862, took the view that the common–law doctrine of equitable tolling is inapplicable to cases governed by the amended False Claims Act statute of limitations (31 U.S.C.A. § 3731(b)(2)), the plain language of which provides the sole means of extending the statute to account for the government's lack of knowledge of the fraud. Rejecting the government's argument that the amended statute of limitations incorporated equitable tolling principles and that the six–year limitations period of 31 U.S.C.A. § 3731(b)(1) did not start to run until the date the government discovered the fraud, the court stated that the statute may not be extended beyond ten years from the violation, even if the fraud is not discovered until more than seven years afterwards. Otherwise, the court observed, the three–year tolling provision added by the amendment would be superfluous.

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Footnotes

[1] 31 U.S.C.A. §§ 3729-3733.

[2] 31 U.S.C.A. § 3731(b)(1).

[3] 31 U.S.C.A. § 3731(b)(2).

[4] PL 99–562, § 5, 100 Stat 3158 (Oct. 27, 1986).

[5] See, e.g., United States v Uzzell (1986, DC Dist Col) 648 F Supp 1362, 33 CCF ¶ 74856; United States v CFW Constr. Co. (1986, DC SC) 649 F Supp 616, dismd without op (CA4 SC) 819 F2d 1139 and dismd without op (CA4 SC) 819 F2d 1139 and dismd without op (CA4 SC) 819 F2d 1139; Tyger Constr. Co. v United States (1993) 28 Fed Cl 35, 38 CCF ¶ 76499, later proceeding on other grounds 31 Fed Cl 177, 39 CCF ¶ 76627, amd and reconsideration gr, in part on other grounds (Ct Fed Cl) 1994 US Claims LEXIS 92.

[6] See, e.g., United States ex rel. Nitkey v Dawes (1945, CA7 Ill) 151 F2d 639, cert den United States ex rel. Nitkey v Dawes (1946) 327 US 788, 90 L Ed 1015, 66 S Ct 808; United States v Borin (1954, CA5 Tex) 209 F2d 145, cert den 348 US 821, 99 L Ed 647, 75 S Ct 33.

[7] Jankowitz v United States (1976) 209 Ct Cl 489, 533 F2d 538.

[8] United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813.

[9] United States v Incorporated Village of Island Park (1995, ED NY) 888 F Supp 419; Jankowitz v United States (1976) 209 Ct Cl 489, 533 F2d 538.

[10] United States v Uzzell (1986, DC Dist Col) 648 F Supp 1362, 33 CCF ¶ 74856; Tyger Constr. Co. v United States (1993) 28 Fed Cl 35, 38 CCF ¶ 76499, later proceeding on other grounds 31 Fed Cl 177, 39 CCF ¶ 76627, amd (Mar 15, 1994) and reconsideration gr, in part on other grounds (Ct Fed Cl) 1994 US Claims LEXIS 92.

[11] United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813; United States v Vanoosterhout (1995, DC Dist Col) 898 F Supp 25, affd (App DC) 1996 US App LEXIS 26366.

[12] United States v Rivera (1995, CA1 Puerto Rico) 55 F3d 703, 139 ALR Fed 813.

[13] See, e.g., United States v Vanoosterhout (1995, DC Dist Col) 898 F Supp 25, affd (App DC) 1996 US App LEXIS 26366; United States v Stillwater Community Bank (1986, WD Okla) 645 F Supp 18.

[14] 31 U.S.C.A. § 3731(b)(2).

[15] United States v Ettrick Wood Products, Inc. (1988, WD Wis) 774 F Supp 544, adopted, in part on other grounds (WD Wis) 683 F Supp 1262, later proceeding on other grounds (CA7 Wis) 916 F2d 1211, 17 FR Serv 3d 1372 (disapproved

  

on other grounds as stated in Strasburg v State Bar (CA7 Wis) 1 F3d 468, 26 FR Serv 3d 39, reh, en banc, den (CA7) 1993 US App LEXIS 20524 and cert den 510 US 1047, 126 L Ed 2d 665, 114 S Ct 698 and (ovrld in part on other grounds by Otis v City of Chicago (CA7 Ill) 29 F3d 1159, 65 BNA FEP Cas 705, 65 CCH EPD ¶ 43268, 29 FR Serv 3d 606, amd (CA7 Ill) 65 BNA FEP Cas 992)).

16 A qui tam action is an informer's suit brought by one who sues for the United States as well as for himself or herself. The government is given the option to enter and assume primary responsibility for prosecuting the action. United States ex rel. Vance v Westinghouse Electric Corp. (1973, WD Pa) 363 F Supp 1038; United States ex rel. Newsham v Lockheed Missiles & Space Co. (1995, ND Cal) 907 F Supp 1349, 96 Daily Journal DAR 1662.

17 United States v Macomb Contracting Corp. (1990, MD Tenn) 763 F Supp 272, 37 CCF ¶ 76162; Jana, Inc. v United States (1995) 34 Fed Cl 447, 40 CCF ¶ 76862.

18 31 U.S.C.A. § 3731(b)(2).

19 See United States v CFW Constr. Co. (1986, DC SC) 649 F Supp 616, dismd without op (CA4 SC) 819 F2d 1139 and dismd without op (CA4 SC) 819 F2d 1139 and dismd without op (CA4 SC) 819 F2d 1139.

20 A qui tam action is an informer's suit brought by one who sues for the United States as well as for himself or herself. United States ex rel. Vance v Westinghouse Electric Corp. (1973, WD Penn) 363 F Supp 1038.

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