671 F.Supp.2d 674 (2009)

UNITED STATES of America, ex rel. Robert BAUCHWITZ, M.D., Ph.D.
v.
William K. HOLLOMAN, Ph.D., et al.

Civil Action No. 04-2892.

United States District Court, E.D. Pennsylvania.

December 1, 2009.

there is no `genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation omitted).

The False Claims Act Statute of Limitations

The FCA prohibits "any person from making false or fraudulent claims for payment to the United States." *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,* 545 U.S. 409, 411, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005); 31 U.S.C. § 3729(a). Any person found liable for violating the FCA is subject to a civil penalty of $5,000 to $10,000 per violation and treble damages. 31 U.S.C.A. § 3729(a) (West Supp.2008); *Hutchins v. Wilentz, Goldman & Spitzer,* 253 F.3d 176, 181 (3d Cir.2001).

An action under the FCA may be commenced in one of two ways. The attorney general may sue on behalf of the United States government; or, a private individual, known as a relator, can bring a *qui tam* action. 31 U.S.C.A. § 3730(a), (b)(1); *Graham County,* 545 U.S. at 411-12, 125 S.Ct. 2444 (citing *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 769-72, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)). Because the relator brings the action on behalf of the government, he must give the government notice of the action. The government has sixty days from the filing of a *qui tam* complaint to elect to intervene in the action, and, for good cause shown, can petition the court to permit it to intervene at a later date. *Graham County,* 545 U.S. at 412, 125 S.Ct. 2444; § 3730(b)(2) and (c)(3).

A civil action under the FCA must be brought within six years of the violation or within three years of the date when the government learned or should have learned the facts material to the violation, whichever is later. *Id.* §§ (b)(1), (2). In no event may an action be brought after ten years of a violation. *Id.* Specifically, the FCA statute of limitations provides:

> (b) A civil action under [the False Claims Act] may not be brought —
>
> (1) more than 6 years after the date on which the violation of [the False Claims Act] 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.

31 U.S.C.A. § 3731(b) (2003).

The critical difference between § (b)(1) and (b)(2) is that under § (b)(1), the statute of limitations begins to run when the violation occurs, whereas under § (b)(2), it begins to run when the appropriate person learned or should have learned facts putting him on notice that a violation occurred. A conflict arises from the interplay between the unusual procedure allowing a private party to bring a *qui tam* action on behalf of the government and the language of the tolling provision, which appears to relate only to the government. It is this conflict that raises the issues confronting us in this case.

The Tolling Provision — 31 U.S.C. § 3731(b)(2)

The three-year tolling provision permits suit to be brought after the six-year period where the fraud was not discovered during or until late in that period. In most cases, the three-year discovery period expires within six years of the violation. In that event, subsection (b)(1), with its longer limitations period, applies. If the fraud is discovered early in the six-year period, subsection (b)(2) will not be implicated. For example, if the fraud is discovered within one year of the violation, the three-year tolling period does not come into play because the six-year period in § (b)(1) would apply. Where the fraud is not discovered until after six years or late in the six-year period, subsection (b)(2) extends the limitations period. If the fraud is not discovered until seven years after the violation, the limitations period is extended for three years after the discovery. If it is discovered five years afterwards, the period is extended three years, effectively moving the limitations bar to eight years after the violation.

In determining whether Bauchwitz's claims are timely, we must answer three questions. First, when did the violation occur with respect to each grant to trigger the running of the applicable limitations period under § 3731(b)(1)? Second, does § 3731(b)(2), the tolling provision, apply to private relators when the government has not intervened? Third, if it does, when does the limitation period start running — when the relator learned of the violation or when the government did?

Accrual of Action Under § 3731(b)(1)

In applying § 3731(b)(1), the FCA speaks of a "violation." Is the violation the filing of the claim or is it the payment? There is a lack of unanimity as to whether the statute of limitations begins to run when the false claim is filed or when the government pays the claim. *Compare United States ex rel. Karvelas v. Melrose-Wakefield Hosp.,* 360 F.3d 220, 225 (1st Cir.2004) (stating that the "statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the `claim for payment'") (quoting *United States v. Rivera,* 55 F.3d 703, 709 (1st Cir.1995)), *with Jana, Inc. v. United States,* 41 Fed.Cl. 735, 742-43 (Fed.Cl.1998) (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).[36]

Section 3729 does not define the words "false claim." It does define "claim" as "any request or demand ... for money." 31 U.S.C. § 3729(c). Setting out what constitutes a violation of the FCA, it reads: "any person who ... (1) knowingly presents, or causes to be presented, to an officer ... of the United States Government... a false or fraudulent claim for payment or approval; (2) knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government...." 31 U.S.C. § 3729(a).

Bauchwitz argues that the six-year statute of limitations period begins to run on the date the government paid the claim. He contends that is when the final payment was made, which, he asserts, was at the end of each project period after the grantees submitted their final FSRs.[37] The defendants, on the other hand, argue that the statute of limitations begins to run at the time the grantees submitted the request for a grant[38] containing a false statement, not when the grant applications were approved and paid by government. According to the defendants, their position is consistent with the language of the FCA and the FCA's purpose of preventing fraud on the government by "attacking the activity that presents the risk of wrongful payment."[39]

Both the plain language of § 3729(a) and statements made by the Supreme Court and the Third Circuit support the principle that the application for payment, rather than payment of the claim, triggers the accrual of an action. The language of § 3729(a) focuses on the means and not the end. Liability arises from the use of fraudulent submissions intended to cause the government to issue payment. The statute does not fix liability on the receipt of payment. In fact, payment is not a prerequisite to liability. Payment need only besought or approved in reliance on the false representations. In other words, liability begins with the false statement that is intended to induce payment. *See* *United States v. Neifert-White Co.,* 390 U.S. 228, 230, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968).

The Supreme Court, in analyzing the applicability of § 3731(b)(1) to retaliation claims under § 3730(h) of the FCA, made clear that federal statutes of limitations start running when the cause of action accrues. *Graham County,* 545 U.S. at 418, 125 S.Ct. 2444. Although it did not address the issue of whether the application for payment or the actual payment itself triggers the running of the limitations, it did use language that suggests that the period starts when the claim is made rather than when payment is issued. It said, "the language in § 3731(b)(1) [ties] the start of the time limit to `the date on which the violation of section 3729 is committed.' In other words, the time limit begins to run on the date the defendant submitted a false claim for payment." *Id.* at 415, 125 S.Ct. 2444. This language imparts that the cause of action accrues before payment and is keyed to the "claim for payment."

Although the Third Circuit has not ruled on the issue, it has intimated that the trigger date is when the claim is made. In *United States ex rel. Malloy v. Telephonics Corp.,* 68 Fed.Appx. 270, 273 (3d Cir. 2003), when applying the six-year limitation period under § 3731(b)(1), the court treated the date that the defendant made the claim, not the date of payment, as the start date for calculating the limitations period. The court noted, "Malloy concedes that the claim accrued when Telephonics filed the original false claim...." *Id.* The government attempts to minimize the import of the court's language by characterizing the statement as the relator's concession and not the court's position. Contrary to the government's argument, the court's analysis cannot be reduced to meaningless verbiage. Although it was not the court's holding, it is meaningful because the court would not have used that starting point in its analysis of the applicability of the statute of limitations merely because the relator did not challenge it. In other words, it would not have misapplied a legal principle even if the parties had. Otherwise, its entire analysis and the result would have been flawed. Therefore, the *Malloy* court's approach endorses, albeit implicitly, the principle that a § 3729 action accrues when the claim is made.

Prior to *Malloy,* the Third Circuit in *Hutchins v. Wilentz, Goldman & Spitzer,* 253 F.3d 176 (3d Cir.2001), signaled that an FCA violation is complete at the time the claim is made. In considering what constitutes a false claim, it did not decide what established a violation for purposes of applying the statute of limitations. Nor did it rule out that submissions of false statements for approval of payment were false claims under the FCA. Indeed, the court held that the FCA "prohibits fraudulent claims that cause or *would cause* economic loss to the government." *Hutchins,* 253 F.3d at 179 (emphasis added).[40] *See also* *United States ex rel. Sanders v. American-Amicable Life Ins. Co.,* 545 F.3d 256, 259 (3d Cir.2008) (stating that the FCA "cover[s] instances of fraud `that *might* result in financial loss to the Government,'" but finding the FCA inapplicable because no claim was made to the government) (quoting *Hutchins,* 253 F.3d at 183) (emphasis added).

In reaching its decision, the *Hutchins* court explained that the FCA covers all fraudulent attempts to cause the government to pay money and actual payment is not necessary. *Id.* at 183, 184. *See also* *Neifert-White,* 390 U.S. at 233, 88 S.Ct. 959 (a "claim" under the FCA consists of "all fraudulent attempts to cause the government to pay out sums of money."); *Sanders,* 545 F.3d at 259 ("`[R]ecovery under the [FCA] is not dependent upon the government's sustaining monetary damages.") (quoting *Hutchins,* 253 F.3d at 183). *Hutchins* cited the statutory definition of "claim," which includes "any request or demand," and does not mention "paid." *Id.* at 183. It observed that "the conception of a claim against the government normally connotes a demand for money or for some transfer of public property." *Id.* at 184 (quoting *United States v. McNinch,* 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958)).

The Federal Court of Claims, which the relator and the government urge us to follow, has held that payment of the claim is what starts the limitations period. *See* Jana, 41 Fed.Cl. 735. Though it acknowledged that the submission of the fake claim itself is a violation of the FCA even when it is not paid, the *Jana* court concluded that the statute of limitations in the case before it did not begin to run until the claim was paid. It reasoned that the FCA cause of action accrues only when all events necessary to state a claim have occurred. *Id.* at 743. The last event, in its view, is payment.

The *Jana* court relied on dictum in *United States ex rel. Kreindler & Kreindler v. United Technologies, Corp.,* 985 F.2d 1148, 1157 (2d Cir.1993). In a discussion that was not necessary to its decision in *Kreindler,* the Second Circuit sought to correct the district court's comments with respect to the relator's continuing fraud theory. It pointed out that where there are multiple false claims in connection with a single contract, the statute of limitations for each claim runs from the date each claim accrued. Then, without analysis, it quoted the district court's holding that "the six-year limitation 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.'" *Id.* at 1157 (quoting *Blusal Meats, Inc. v. United States,* 638 F.Supp. 824, 829 (S.D.N.Y.1986), *aff'd,* 817 F.2d 1007 (2d Cir.1987)).

To reconcile its conclusion with the fact that it is the false claim itself that constitutes the violation of the FCA, the *Jana* court distinguished between cases seeking civil penalties and those seeking damages. It concluded that in the former cases, the cause of action accrues upon presentation of the false claim; and, in the latter, it occurs upon payment because it is not until then that the government suffers damage. *Id.* at 743. In effect, it established two statutes of limitations, one for civil penalty cases and another for damages cases.

There is no justification for importing an optional statute of limitations into the statute. Nowhere in the FCA is there a distinction between civil penalty and damages cases for purposes of applying the statute of limitations. Both types of cases are treated the same. Nor is there anything in the legislative history that suggests that Congress intended two different statutes of limitations depending on whether the cause of action was for civil penalties or for damages. Thus, the foundation of the *Jana* court's reasoning cannot support its holding that the limitations period in *qui tam* actions is not triggered until payment is made.

Relying on the *Jana* decision, the government and Bauchwitz argue that until payment is made, there are no damages. Consequently, so they reason, the cause of action cannot accrue until then. This argument ignores the language of § 3731(b)(1) that refers to "the date on which the violation is committed" as the trigger date. Waiting for damages to start accumulating before starting the FCA clock ticking is inconsistent with established legal principles and the purpose of the FCA.

In the federal grant context, the government suffers harm at the time the false application is made. The government relies upon the false statements in determining whether the applicant's contributions will benefit the public interest. When it awards a grant to the applicant on the basis of the false representations, it excludes other applicants, thus losing the benefits of their contributions. At the same time, it commits public monies to an undeserving applicant at the expense of the public. Additionally, it expends time and resources during the evaluation of the application. Thus, the government is harmed by the false claim even before payment is made, giving rise to a cause of action.

If a private relator knows a claim is false when it is made, he cannot wait until payment is made to blow the whistle. In a case where payment is not due for years or a substantial period of time after the false claim is made, the government will suffer increased harm while losses increase. The government will have paid monies that it would not have had to pay had it been aware of the fraud, and it would not have to surrender a portion of the recovered monies with the relator. In effect, by waiting until the claim is paid, the relator gets a benefit at the expense of the government that was not intended by Congress.

To summarize, the Third Circuit's analysis of what constitutes a false claim in *Hutchins* and followed in *Sanders* shows that the violation is complete when the claim is made and not when paid. Where the defendant has put in motion the payment process and payment is a matter of mere ministerial procedure, the violation is complete. Here, the funds were committed after the defendants' applications had been submitted and approved. Thus, the false claim occurs at the time the grant application is submitted, not at the time the government releases the funds.