898 F.Supp. 25 (1995)

UNITED STATES of America, Plaintiff,
v.
Peter D. VANOOSTERHOUT, Defendant.

Civ. A. No. 94-1911.

United States District Court, District of Columbia.

August 31, 1995.

The False Claims Act Counts

Counts One and Five are both premised on River Capital's August 3, 1987 submission of an allegedly false statement certifying the continuing correctness of an earlier statement of River Capital's financial position as of December 31, 1986, and both counts seek the recovery of the proceeds of River Capital's $2.5 million debenture financing provided as part of Series SBIC 1987-C under the September 23, 1987 offering circular. *28 In Count One, the government charges that Vanoosterhout knowingly made or used that allegedly false statement, or caused it to be made or used, "to get a false or fraudulent claim paid or approved by the government." 31 U.S.C. § 3729(a)(2). In Count Five, the government charges that the same statement was the overt act of a conspiracy between Vanoosterhout and River Capital to defraud the government "by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3).

An action for violation of the False Claims Act may be brought by the Attorney General under 31 U.S.C. § 3730(a) or by private persons under the *qui tam* provisions of 31 U.S.C. § 3730(b). In either case:

> "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." 31 U.S.C. § 3731(b)

It is the 6-year statute that applies to this case. It is assumed, for purposes of this motion, that Vanoosterhout committed the alleged violations of 31 U.S.C. § 3729. In order to determine when the statute of limitations began to run, it is necessary to decide exactly what the violations were and when they were committed.

The analysis begins with *United States v. McNinch,* 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958). The Supreme Court decided in that case that an application for credit insurance under a federal program was not a "claim" within the meaning of the False Claims Act. The Court quoted with approval the observation of the Third Circuit in *United States v. Tieger,* 234 F.2d 589, 591, *cert. denied* 352 U.S. 941, 77 S.Ct. 262, 1 L.Ed.2d 237 (1956), that "the conception of a claim against the government normally connotes a demand for money or some transfer of public property" and reasoned on the facts before it that the federal agency "in agreeing to insure a home improvement loan ... disburses no funds nor does it otherwise suffer immediate financial detriment." Because there was no default in the *McNinch* case, however, the Court expressed no view as to whether "a lending institution's demand for reimbursement on a defaulted loan originally procured by a fraudulent application would be a `claim' covered by the FCA." 356 U.S. at 598 n. 6, 78 S.Ct. at 952 n. 6.

McNinch has been understood to mean that, in the context of an insurance or guarantee program, the making of the false statement only establishes an "inchoate" violation of the False Claims Act, one that does not ripen "until such time as a false claim or demand actually is prompted by default upon insured indebtedness," *Jankowitz v. United States,* 533 F.2d 538, 545, 209 Ct.Cl. 489 (1976). But whether it is the default, the demand for reimbursement or the actual payment that completes the violation for statute of limitations purposes has been less than clear.[2] There are no D.C. Circuit cases on point.

The government acknowledges that the "usual" rule emerging from the *McNinch* line of cases is that the statute of limitations "begins to run when the bank or other third party or other intermediary presents the claim to the government for payment under its guarantee, rather than the date of false statement or the date of default." The government argues, however, that the "usual" rule does not apply in the case at bar because the government's obligation to make guarantee payments on the River Capital debentures arose, and the payments were made, "without formal demand or the presentation of a claim" and simply by operation of the SBA's own rules. Therefore, the government argues, "the statute of limitations *29 does not begin to run until the government actually *pays* the claim."

The government's cases do not support the proposition for which they are cited. *Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2962, 125 L.Ed.2d 663 (1993), is factually distinguishable and deals with the *qui tam* provisions of the False Claims Act. It contains no analysis of the government's proposition and cites only *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824 (S.D.N.Y.1986). The opinion in *Blusal Meats* announces, again without analysis, that "the six-year limitations period under the False Claims Act begins to run on the date the claim is filed or, if the claim is paid, on the date of the payment." *Id.* at 829. That ambiguous holding, in turn, recites its reliance upon three cases: *Jankowitz v. U.S.*, *supra* at 545, whose holding appears to favor default or presentment over payment as the trigger for the statute of limitations; *U.S. v. Cripps*, 451 F.Supp. 598, 600 (E.D.Mich.1978), where Chief Judge Kennedy found it "clear that the statute of limitations period began to run on the date each voucher was presented to HUD for payment"; and *U.S. v. Klein*, 230 F.Supp. 426 (W.D.Pa.1964), *aff'd* 356 F.2d 983 (3d Cir.1966), whose ambiguous holding is that "until the Government *had to pay* under its guarantee program, the statute did not begin to run." (emphasis added).

A recent decision of the First Circuit provides analysis that is both helpful and persuasive. U.S. v. Rivera, 55 F.3d 703 (1st Cir.1995), was a False Claims Act case brought against officers of a hospital in Puerto Rico for fraudulently diverting the proceeds of a federally insured mortgage loan. The hospital defaulted on the loan and filed a bankruptcy petition. The lender declared the loan in default and presented HUD with a formal application for insurance benefits. The False Claims Act suit was filed more than six years after all of these events—but it was filed six years to the day after the lender formally assigned its mortgage on the hospital's property to the government, thereby complying with a condition precedent to HUD's obligations to pay. The district court found that the action was timely filed because the government's obligation to pay did not arise until the mortgage was assigned. 839 F.Supp. 92, 95 (D.P.R.1993).

The First Circuit reversed. After reviewing the *McNinch* decision and its progeny, the court articulated the "theory" that, for purposes of 31 U.S.C. § 3731(b), the violation was committed, and the statute began to run, whenever the lender "can properly be said to have presented its insurance claim to the government." The court then concluded that the lender's claim, even if not perfected by the assignment of the mortgage, amounted to a "demand for money" that would induce the government to disburse funds or to "otherwise suffer immediate financial detriment," referring again to the *McNinch* opinion. *Id.* at 709. The First Circuit's extensive analysis concludes: "Thus, in deciding whether a given false statement is a claim or demand for payment, a court should look to see if, *within the payment scheme* the statement has practical purpose and effect, and poses the attendant risk, of inducing wrongful payment." *Id.* at 709 (emphasis added).

Application of the First Circuit's analysis to the facts of the instant case, including particularly the payment scheme reflected by the offering circular, leads to the conclusion that *the SBA's own act of transferring River Capital to a liquidation status* operated as the "claim" or "demand for money" required by the *McNinch* decision and its progeny. That act took place on August 24, 1988, which was more than six years before the instant suit, including Counts One and Five, was filed. Accordingly, the False Claims Act statute of limitation bars those two counts.

Count Two is based on 31 U.S.C. § 3729(a)(7) and requires a different, but much simpler, analysis of the statute of limitation defense. For this count, the false statement itself is the "violation," which is charged as the knowing use of "false statements or records to conceal, avoid or decrease an obligation to pay or transmit money or property to the SBA." The relevant date is March 3, 1988—the day River Capital submitted its financial statements for the year ended December 31, 1987. The statute of limitations began to run at that time. *30 Count Two was filed more than six years later and is barred.