NOTE

United States v. Baylor University Medical Center: Impact of FRCP 15(c)(2) on the False Claims Act's Seal Provision*

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* The subsection numbering of FED. R. CIV. P. 15 has recently been amended so that former Rule 15(c)(1) is now 15(c)(1)(A) and former Rule 15(c)(2) is now 15(c)(1)(B). FED. R. CIV. P. 15. All references in this note will be to the earlier version of the Federal Rules of Civil Procedure for ease of comparison with cases and articles citing the Rules.

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INTRODUCTION

In 1994, Sam Eden filed a complaint under seal alleging Dexter Pharmaceuticals had defrauded the government by making false Medicare claims between 1989 and 1994.[1] Now, fourteen years later, the United States Attorney's Office has intervened by filing a complaint-in-intervention.[2] The court unseals the complaint and serves it upon Dexter Pharmaceuticals.[3] Dexter Pharmaceuticals, however, has several problems: its records only go back ten years, the directors have changed, and the former CEO has died.[4] How is it to defend against the action?[5]

The Second Circuit Court of Appeals faced a similar scenario in *United States v. Baylor University Medical Center*.[6] More than eight years had passed between the filing of the original complaint and the filing of the government's complaint-in-intervention.[7] As this Note argues, in holding that the statute of limitations barred the government action, the court placed a necessary limit on the government's ability to investigate false claims.[8]

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[1] This hypothetical presents a variation on the facts in *United States v. Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006), and the parties are fictitious. *See infra* Part II (discussing *Baylor*'s facts, holding, and rationale).

[2] Per 31 U.S.C. § 3730(b)(4)(A) (2000 & Supp. V 2005) the government has the option to elect to intervene and take over the action. If the government intervenes, it typically files an amended complaint called a "complaint-in-intervention." *See* Donald H. Caldwell, *Qui Tam Actions: Best Practices for Relator's Counsel,* 38 J. HEALTH L. 367, 375-76 (2005) (noting government takes over action by filing amended complaint); *see also* Cardiac Devices Qui Tam Litig., 221 F.R.D. 318, 357 (D. Conn. 2004) (stating Rule 15(c)(2) may apply to government's complaint-in-intervention even though it is not technically original party's amended complaint).

[3] *See infra* Part I.A (outlining procedure in FCA actions).

[4] Robert D. Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671, 682 (1988) (stating statutes of limitations keep litigation from occurring so long after event that witnesses and evidence may be unavailable).

[5] *See generally infra* Part III.B (discussing protections offered by statutes of limitations).

[6] *Baylor*, 469 F.3d at 265-66.

[7] *Id.* (noting government filed complaint-in-intervention after it made numerous requests to extend complaint's seal)

[8] *Id.* at 270 (holding statute of limitations barred government action because Rule 15(c)(2) required notice for its complaint to relate back to original filing). *See generally* United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1191-92 (N.D. Cal. 1997) (criticizing government for seemingly needless extensions); S. REP. NO. 99-345, at 24-25 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-90 (articulating desire to limit government to sixty-day investigatory period).

A false claim occurs anytime a person submits a claim for money knowing that the claim is fictitious.[9] False claims filed for federal government monies amount to a fraudulent use of taxpayer funds and a waste of valuable government resources.[10] Individuals and corporations essentially steal billions of dollars every year from the federal government through false claims.[11] In enacting the False Claims Act ("FCA") of 1863, Congress sought to address this problem and safeguard government resources.[12]

The FCA is an important tool in the federal government's arsenal to combat fraud.[13] In the past twenty years, FCA actions have enabled

[9] 31 U.S.C. § 3729 (2000 & Supp. V 2005); AM. BAR ASS'N, SECTION OF PUB. CONTRACT LAW PROCUREMENT FRAUD COMM., *QUI TAM* LITIGATION UNDER THE FALSE CLAIMS ACT 17-18 (1994) (outlining how courts have construed "falsity" and "claims" for purposes of FCA); *see also* James B. Helmer & Julie Webster Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839, 844-46 (2003) (discussing meaning of "false claim" as construed by courts). A "person" is defined in the FCA as any "natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." 31 U.S.C. § 3733(l) (2000 & Supp. V 2005).

[10] Helmer & Popham, *supra* note 9, at 839 (characterizing false claims as misspent taxpayer funds); *see also* James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the* Qui Tam *Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the* United States *ex rel.* Gravitt v. Gen. Elec. Co. *Litigation*, 18 OHIO N.U. L. REV. 35, 37 (1991) (stating Congress passed original False Claims Act to protect U.S. Treasury from fraud); Press Release, U.S. DOJ, Justice Department Recovers More Than $2 Billion in False Claims Act Awards and Settlements (Oct. 23, 1998), *available at* http://www.usdoj.gov/opa/pr/1998/October/503_civ.htm [hereinafter FCA Press Release] (stating FCA effectively fights fraudulent use of public funds).

[11] Helmer & Popham, *supra* note 9, at 839 (indicating recoveries under FCA exceed one billion dollars per year); Medicare Fraud Costs Billions Each Year, http://quitam.blogspot.com/2007/04/Congressional-testimony-on-medicare.html (Apr. 19, 2007, 14:25 EST) (reporting Medicare official's statement that Medicare fraud costs billions every year); Taxpayers Against Fraud, *What is the False Claims Act and Why is it Important?*, http://www.taf.org/whyfca.htm (last visited Aug. 18, 2008) (stating government loses billions each year through fraud).

[12] False Claims Act, 31 U.S.C. §§ 3729-31 (2000 & Supp. V 2005). *See generally* Caldwell, *supra* note 2, at 367 (stating Congress passed FCA to facilitate united front against fraud); Helmer & Neff, *supra* note 10, at 35-44 (providing detailed history of FCA's origins and subsequent amendments).

[13] *See* S. REP. NO. 99-345, at 2 (calling FCA government's primary tool for combating fraud); Jonathon H. Gold, *Legal Duties that Qui Tam Relators and Their Counsel Owe to the Government*, 20 GEO. J. LEGAL ETHICS 629, 629 (2007) (calling FCA government's primary tool in deterring and remedying fraud); Helmer & Popham, *supra* note 9, at 839 (calling FCA principal tool to remedy waste, abuse, and fraud by government contractors); Ross Pearlson, *New Limits on False Claims Act Suits: Cases Impose New Obstacles on Whistleblower and Government Plaintiffs*, 189 N.J. L.J. 370, 370 (2007) (noting FCA is important weapon for both whistleblowers and

the government to recover more than twenty billion dollars for the United States Treasury.[14] This tremendous success has led critics and courts to begin questioning the government's potential abuse of its prosecutorial powers under the FCA.[15] Indeed, the *Baylor* court criticized the government's use of Federal Rule of Civil Procedure 15(c)(2) ("Rule 15(c)(2)") to circumvent the FCA's statute of limitations.[16]

This Note argues the *Baylor* decision correctly applied Rule 15(c)(2) and principles of statutory construction.[17] In doing so, the court properly limited the period in which the government can investigate false claims.[18] The court also placed a necessary restriction on the government's ability to intervene in false claims actions.[19] Part I describes the FCA and how it operates to fight and eradicate fraud.[20] It also discusses Rule 15(c)(2)'s "relation back" provision, which

government in pursuing fraud claims against corporations).

[14] Press Release, James Moorman, President, Taxpayers Against Fraud, On Introduction of the False Claims Correction Act of 2007 (Sept. 12, 2007), *available at* http://www.taf.org/pressrelease.htm; *see also* Press Release, U.S. DOJ, Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006 (Nov. 21, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html; CIVIL DIV., U.S. DOJ, FRAUD STATISTICS — OVERVIEW: OCTOBER 1, 1986-SEPTEMBER 30, 2006, 1-7 (2006), http://www.taf.org/stats-fy2006.pdf [hereinafter FRAUD STATISTICS] (providing overview of FCA recoveries and actions from 1986 through 2006). Taxpayers Against Fraud is a non-profit organization dedicated to fighting fraud against the government. Taxpayers Against Fraud Home Page, http://www.taf.org/ (last visited Aug. 18, 2008). Their website keeps track of successful FCA cases and provides general information to the public. *Id.*

[15] *See generally* United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188 (N.D. Cal. 1997) (contemplating abuse of extensions of FCA's seal provision); Keith D. Barber et al., *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 IND. HEALTH L. REV. 131, 174 (2004) (pointing out recent prolific use of FCA in health care law enforcement has led to potentially abusive prosecution); Robert Fabrikant & Nkechinyem Nwabuzor, *In the Shadow of the False Claims Act: "Outsourcing" the Investigation by Government Counsel to Relator Counsel During the Seal Period*, 83 N.D. L. REV. 837 (2007) (examining potential abuses of FCA's seal provision and noting immediate action is required to prevent continued abuse); Steven Malanga, *A Foolish Way to Fight Fraud*, N.Y. POST, Mar. 29, 2006, http://www.manhattan-institute.org/html/_nypost_a_foolish_way_to_fight.htm (suggesting that huge payoffs for government and whistleblowers invite abuse).

[16] *See* United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006) (holding Rule 15(c)(2) was inconsistent with FCA's seal provisions).

[17] *See id.* (holding Rule 15(c)(2) does not allow relation back to original complaint).

[18] *See id.* (requiring government's complaint-in-intervention to comply with FCA's statute of limitations).

[19] *See generally infra* Part III (discussing reasons court correctly decided *Baylor*).

[20] *See infra* Part I.A (outlining FCA's general provisions and procedures).

allows parties, including the government, to defeat a statute of limitations.[21] Finally, it explores how courts have interpreted Rule 15(c)(2)'s notice requirement, which requires an original complaint to have provided sufficient notice to a defendant of the claims against him.[22] Part II describes the facts, procedure, holding, and rationale of *Baylor*.[23] Part III argues that *Baylor* correctly held the relation back provision did not apply to the government's complaint-in-intervention because the whistleblower filed the original complaint under seal and therefore without notice.[24] First, legislative history indicates that Congress intended to limit the government's investigatory period under the FCA.[25] Second, Rule 15(c)(2)'s notice requirement is inconsistent with certain provisions of the FCA.[26] Finally, *Baylor* protects potential defendants by restricting the government's ability to engage in protracted fraud investigations.[27]

I. BACKGROUND

The FCA is the principal means of deterring and remedying fraud perpetrated against the federal government.[28] Since the last congressional amendments in 1986, FCA actions have dramatically increased in number.[29] In 2006 alone, the United States Department

[21] *See infra* Part I.B (discussing Rule 15(c)(2)'s relation back provision).

[22] *See infra* Part I.B (discussing Rule 15(c)(2)'s relation back provision).

[23] *See infra* Part II (discussing *Baylor* decision).

[24] *See generally infra* Part III (discussing reasons court correctly decided *Baylor*).

[25] *See infra* Part III.A (discussing FCA's legislative history).

[26] *See infra* Part III.B (discussing Rule 15(c)(2)'s notice requirement in relation to FCA).

[27] *See infra* Part III.C (indicating *Baylor* strengthens congressional goals).

[28] ALICE G. GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE § 5:10, at 201 (2008) (calling FCA most frequently used tool in fighting health care fraud); Gold, *supra* note 13, at 639 (noting importance of FCA in deterring fraud); Helmer & Popham, *supra* note 9, at 839 (describing FCA as government's principal tool in remedying fraud).

[29] Stuart M. Gerson, *Issues and Developments in Qui Tam Suits Under the Federal False Claims Act, in* CITIZEN SUITS AND *QUI TAM* ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY 119, 119 (Roger Clegg & James L.J. Nuzzo eds., 1996) (noting FCA claims have increased in number and importance since 1986 amendments); Helmer & Neff, *supra* note 10, at 74 (noting resurgence in FCA claims following 1986 amendments); Jonathan T. Brollier, Note, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of* Qui Tam *Actions Brought Under the False Claims Act*, 67 OHIO ST. L.J. 693, 694 (2006) (noting prior to 1986 amendments Justice Department received only about six *qui tam* cases per year and post-1986 it received average of 237 per year). Some of the more significant amendments to the FCA included removing the specific intent requirement, clarifying the degree of knowledge necessary to file a claim, increasing the relator's role, and increasing penalties. *See generally* Helmer &

of Justice ("Justice Department") reported more than 400 newly filed FCA actions.[30] The federal government uses the FCA to recover billions of misappropriated taxpayer dollars every year.[31] Indeed, the increasing number of FCA claims and recoveries highlight both the expansiveness and usefulness of the FCA.[32] Thus, it is worthwhile to explore the FCA's history and development to understand its important role in combating fraud.[33]

A. The False Claims Act

The government first addressed false claims involving military contracts during the Civil War.[34] In 1863, Congress began receiving reports of widespread war profiteering at the expense of Union troops.[35] Military contractors were billing the government for shipping crates filled with sawdust instead of muskets, and the same horses were sold to the cavalry three and four times.[36] In response, Congress passed the False Claims Act of 1863 ("1863 Act").[37] The 1863 Act imposed civil and criminal penalties for submitting fraudulent claims to the government.[38] Congress sought to protect the United States Treasury from fraud by making private citizens bounty hunters for the government.[39] In the way bounty hunters captured

Neff, *supra* note 10, at 44-51 (outlining 1986 amendments to FCA and indicating how they strengthened FCA).

[30] FRAUD STATISTICS, *supra* note 14, at 1-7 (providing overview of FCA recoveries and actions from 1986 through 2006).

[31] *See supra* note 11.

[32] *See* Helmer & Neff, *supra* note 10, at 74 (indicating increase in claims enhances government's ability to recover money for Treasury); Gerson, *supra* note 29, at 140-41 (noting substantial increase in monies recovered since FCA's 1986 amendments); Brollier, *supra* note 29, at 694 (noting 1986 amendments reinvigorated FCA). *See generally* S. REP. NO. 99-345, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266 (noting need to increase FCA actions to deter and remedy fraud).

[33] *See infra* Part I.A.

[34] Barber et al., *supra* note 15, at 136; *see also* Caldwell, *supra* note 2, at 368 (noting Congress passed first FCA during Civil War to combat fraud against military); Helmer & Neff, *supra* note 10, at 35-44 (providing detailed history of FCA's origins and subsequent amendments). The government called the original FCA "Lincoln's Law." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863) (codified as amended at 31 U.S.C. §§ 3729-31 (2000 & Supp. V 2005)).

[35] Helmer & Neff, *supra* note 10, at 35 (stating that United States had significant problems with war profiteers overcharging for supplies or not sending them at all).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 36.

[39] *Id.* at 36; *see also* Caldwell, *supra* note 2, at 372 (noting FCA creates private

fugitives for monetary rewards, Congress allowed private citizens to report war profiteers and receive a portion of the recovery.[40]

In the years since, the government has successfully used the FCA to pursue defense contractors that were cheating the government during wartime and the Cold War arms race.[41] Today, most actions brought under the FCA include government contractor fraud, Medicare and Medicaid fraud, construction fraud, and grant fraud.[42] Commentators have called the FCA the single most potent weapon in the government's arsenal to combat fraud.[43] Its potency comes from provisions that create a partnership between private citizens and the government.[44] In this partnership, the government and private citizen work together to recover ill-gotten gains.[45] The FCA's low standard of

attorneys general to combat fraud); Brollier, *supra* note 29, at 699 (indicating Congress designed FCA to deputize private citizens to combat fraud) . *See generally* S. REP. No. 99-345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67 (indicating desire for coordinated effort between government and private citizens to fight fraud).

[40] *See* Helmer & Neff, *supra* note 10, at 36-37 (noting private citizen became bounty hunter for Attorney General).

[41] *Id.* at 36-40 (pointing out government used FCA during Civil War, World War II, and 1980s arms race to prosecute war profiteers); *see also* AM. BAR ASS'N, *supra* note 9, at 1 (noting government used FCA during Civil War and in 1980s against defense contractors and war profiteers); Caldwell, *supra* note 2, at 368 (noting government initially used FCA to fight fraud perpetrated against military).

[42] ROBIN PAGE WEST, ADVISING THE *QUI TAM* WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 4-6 (2001); *see also* Barber et al., *supra* note 15, at 135 (indicating FCA plays important role in health care law enforcement); Caldwell, *supra* note 2, at 368 (stating use of FCA in health care fraud outnumbers its use in actions involving defense contractors); Gold, *supra* note 13, at 630 (noting FCA most often targets health care organizations and defense contractors).

[43] Barber et al., *supra* note 15, at 135; *see also* J. ANDREW JACKSON & EDWARD W. KIRSCH, THE *QUI TAM* QUAGMIRE: UNDERSTANDING THE LAW IN AN ERA OF AGGRESSIVE EXPANSION, at v (1998) (calling FCA most powerful and frequently relied upon weapon against fraud); Pearlson, *supra* note 13, at 370 (calling FCA potent weapon for government).

[44] *See* Barber et al., *supra* note 15, at 135 (recognizing FCA's potency comes from right of action by private citizens); FCA Press Release, *supra* note 10 (praising partnership between private citizens and government for making FCA effective tool in fighting fraud). *See generally* Caldwell, *supra* note 2, at 372 (noting Congress believed combined effort of government and private citizens would decrease fraud).

[45] 31 U.S.C. § 3729(a)(7) (2000 & Supp. V 2005) (outlining civil penalty for false claims, including provision for treble damages); *id.* § 3730(d) (2000 & Supp. V 2005) (outlining recovery awards for *qui tam* plaintiffs); *see also* GOV'T ACCOUNTABILITY OFFICE, INFORMATION ON FALSE CLAIMS ACT LITIGATION, at 5 (2006), *available at* http://www.gao.gov/new.items/d06320r.pdf (noting that of $15 billion collected in FCA actions between 1987 and 2005, relator's portion amounted to over $1.6 billion); Caldwell, *supra* note 2, at 380-83 (discussing factors Justice Department uses in determining percentage of relator's award and noting successful relator will also

proof, treble damages, and recovery-sharing provisions make it attractive to both whistleblowers and the government.[46]

The FCA incorporates into modern law the old English law notion of *qui tam pro domino rege quam pro se ipso in hoc parte sequitur*.[47] This phrase translates to "he who sues for the king as well as for himself."[48] The *qui tam* doctrine vindicates public wrongs by allowing one who knows of a fraudulent government claim to bring an action on the government's behalf.[49] Commentators commonly refer to FCA claims as *qui tam* actions to indicate that a private party has brought the complaint.[50]

The private party whistleblower, commonly referred to as the "relator," has powerful incentives to bring a *qui tam* action.[51] If the government intervenes and succeeds in its action, the relator receives between fifteen and twenty-five percent of the proceeds.[52] If the government does not intervene, the relator may pursue the action and

recover attorneys fees).

[46] *See generally* 31 U.S.C. § 3729(a)(7) (outlining civil penalty for false claims including provision for treble damages); 31 U.S.C. § 3730(d) (outlining recovery awards for *qui tam* plaintiffs); GOSFIELD, *supra* note 28 (outlining FCA features that make it attractive to both government and whistleblowers).

[47] WEST, *supra* note 42, at 1; Mary Thompson & Michael D. Siemer, Qui Tam *Litigation: Pursuing Public Claims for Private Gain Under the Federal False Claims Act*, 37 HOUS. LAW. 18, 18 (2000); Dick Thornburgh, *Introduction*, CITIZEN SUITS AND *QUI TAM* ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY, *supra* note 29, at 3, 4.

[48] WEST, *supra* note 42, at 1.

[49] Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774-77 (2000) (providing brief history of *qui tam* actions); *see also* WEST, *supra* note 42, at 1-6 (providing basic framework of *qui tam* actions); Thornburgh, *supra* note 47, at 4.

[50] Caldwell, *supra* note 12, at 373 (noting cases brought under FCA by person other than Justice Department is *qui tam* action); Gold, *supra* note 13, at 629-30 (indicating civil action filed by whistleblower is *qui tam* action); Brollier, *supra* note 29, at 698 (referring to cases where relator brings FCA action as *qui tam* suits).

[51] *See* S. REP. NO. 99-345, at 12 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5277 (indicating desire to counter so-called conspiracy of silence by increasing *qui tam* plaintiffs' recovery); Gold, *supra* note 13, at 629 (noting fraud case settled for $900 million and relator received portion of recovery); *see also* JACKSON, *supra* note 43, at v (stating enticement of large awards has created cottage industry of whistleblowers and relator attorneys). Note, however, the court has discretion to reduce the award to zero if the relator was involved in planning and initiating the fraud. JACKSON, *supra* note 43, at 65-66.

[52] 31 U.S.C. § 3730(d)(1) (2000 & Supp. V 2005); *see also* Dr. Carl Pacini & Michael Bret Hood, *The Role of Qui Tam Actions Under the False Claims Act in Preventing and Deterring Fraud Against the Government*, 15 U. MIAMI BUS. L. REV. 273, 298-99 (2007) (outlining federal guidelines for establishing relator's appropriate share of recovery).

receive twenty-five to thirty percent of the recovery if he succeeds.[53] Furthermore, the FCA provides the relator numerous protections against retaliation.[54] For example, the FCA entitles an employee to compensatory relief if an employer discharges or harasses an employee for bringing an FCA action.[55] Such relief may include back pay, reinstatement, litigation costs, and attorneys' fees.[56]

In a typical *qui tam* action, the relator files a civil action in federal court on the government's behalf.[57] In most civil actions, the plaintiff serves the complaint upon the defendant.[58] In a *qui tam* action, however, the relator files a complaint under seal and serves it upon the United States.[59] The seal provision requires the relator to file the complaint privately, in judicial chambers (*in camera*), without notifying the defendant.[60] Because the relator does not serve the complaint upon the defendant, courts and commentators refer to the seal provision as the FCA's secrecy component.[61]

The FCA's seal provision is the only one of its kind in federal civil law.[62] Congress added the seal provision to the FCA in 1986 at the

[53] 31 U.S.C. § 3730(d)(2); *see also* Pacini & Hood, *supra* note 52, at 298-99 (outlining federal guidelines for determining relator's share of recovery).

[54] 31 U.S.C. § 3730(h).

[55] *Id.* (stating retaliation claims allow relators to recover relief necessary to make them whole).

[56] *Id.*

[57] *Id.* § 3730(b)(2); *see also* Caldwell, *supra* note 2, at 373 (noting *qui tam* action begins with relator filing complaint under seal); Gold, *supra* note 13, at 629-30. *See generally* AM. BAR ASS'N, *supra* note 9, at 23-32 (discussing general *qui tam* procedures before unsealing complaint). The government may file an action under the FCA without a relator. 31 U.S.C. § 3730(a).

[58] Gold, *supra* note 13, at 629-30; *see also* Barber et al., *supra* note 15, at 138 (indicating FCA is only statute that allows civil action complaint filed under seal); Thompson & Siemer, *supra* note 47, at 18 (noting *qui tam* suits are not ordinary lawsuits in part because of seal provision).

[59] 31 U.S.C. § 3730(b)(2); *see also* AM. BAR ASS'N, *supra* note 9, at 25-27 (discussing requirements for relator's complaint including certain written disclosures and affidavits); Caldwell, *supra* note 2, at 373 (noting plaintiff in *qui tam* action files complaint under seal).

[60] 31 U.S.C. § 3730(b)(2); Barber et al., *supra* note 15, at 138 (noting FCA requires filing complaint *in camera* with no notification to defendant for minimum of 60 days).

[61] United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006) (calling FCA's seal provision inherently secret and noting secrecy occurs because there is no notice to defendants of action pending against them).

[62] Barber et al., *supra* note 15, at 138 (noting no other statute for civil action contains seal provision); *see also* WEST, *supra* note 42, at 13 (noting one unique procedural requirement of *qui tam* actions is that complaint must be filed under seal); Thompson & Siemer, *supra* note 47, at 18 (noting *qui tam* suits are not ordinary

Justice Department's request.[63] The Justice Department was concerned that the typical public filing of claims could warn individuals of a simultaneous criminal investigation.[64] Although not every FCA action includes a corresponding criminal component, Congress felt it was important to protect the government's interest in prosecuting criminal matters.[65] By sealing the relator's complaint, the government could prevent the civil action from alerting a potential defendant to the government's ongoing criminal investigation.[66]

After the relator files a complaint, the government has sixty days to investigate the alleged fraud.[67] During that time, the government must decide whether it should intervene, move for an extension, seek dismissal, or settle the case.[68] The court unseals and permits service only when the government decides to intervene.[69] If the government declines to intervene, the court unseals the complaint and allows the plaintiff to serve it upon the defendant.[70] In most cases, the government requests many extensions of the investigatory period, usually for six months at a time.[71]

lawsuits in part because of seal provision).

[63] S. REP. NO. 99-345, at 24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5289 (noting Congress added provision at Justice Department's request).

[64] *Id.* (highlighting Justice Department's reasons for requesting seal provision); *see also* AM. BAR ASS'N, *supra* note 9, at 7 (noting Congress included seal provision to prevent complaint from alerting potential criminal defendants); Barber et al., *supra* note 15, at 138 (noting Justice Department requested addition of seal provision).

[65] S. REP. NO. 99-345, at 24 (stating government had important interests in criminal matters but failing to outline them in detail). *See generally* AM. BAR ASS'N, *supra* note 9, at 7 (noting sixty-day seal provision was to allow government time to assess impact on criminal investigations and prevent alerting potential defendant to government investigation).

[66] S. REP. NO. 99-345, at 24 (stating government had important interests in criminal matters but failing to outline them in detail). *See generally* AM. BAR ASS'N, *supra* note 9, at 7 (discussing reasoning behind sixty-day seal provision).

[67] 31 U.S.C. § 3730(b)(2) (2000 & Supp. V 2005).

[68] *Id.* § 3730(b)(4).

[69] *Id.* § 3730(b)(2); Barber et al., *supra* note 15, at 138 (noting court order is required before plaintiff gives notice to defendant).

[70] 31 U.S.C. § 3730(c)(3); *see also* AM. BAR ASS'N, *supra* note 9, at 30 (noting government's failure to intervene allows action to proceed).

[71] WEST, *supra* note 42, at 13-14 (stating government typically requests many extensions arguably because sixty-day investigatory period is unrealistically short); Memorandum from the U.S. DOJ, False Claims Act Cases: Government Intervention in *Qui Tam* (Whistleblower) Suits, *available at* http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (providing general overview of *qui tam* litigation under FCA); *see also* AM. BAR ASS'N, *supra* note 9, at 30 (stating 60 days is rarely sufficient for investigation); Fabrikant & Nwabuzor, *supra* note 15, at 839 (indicating Government Accountability Office concludes that government investigations take median of 38

The statute of limitations for an FCA claim is relatively complex.[72] A statute of limitations is the primary bar to enforcing claims after a specified time period has passed.[73] It seeks to protect potential defendants in cases where so much time has passed that obtaining evidence becomes difficult.[74] Indeed, in such cases, a statute of limitations minimizes the risk that defendants will be unable to defend themselves against potentially baseless allegations.[75]

The FCA's statute of limitations prescribes three possible time periods.[76] A relator must file a *qui tam* complaint within six years of the violation's occurrence.[77] Alternatively, the relator or the

months and range from 4 months to 187 months); Pacini & Hood, *supra* note 52, at 281 (noting that government investigations commonly take one to two years). *But see* S. REP. NO. 99-345, at 24-25 (stating 60 days is sufficient to allow government coordination, review and decision on intervention in majority of cases). Courts have also begun to question the routine nature of granting extensions. *See* United States v. St. Joseph's Reg'l Health Ctr., 240 F. Supp. 2d 882, 888 (W.D. Ark. 2002) (criticizing government for requesting multiple extensions spanning decade); United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1191 (N.D. Cal. 1997) (stating government's argument that it did not have sufficient time to investigate was not legitimate reason to keep complaint under seal); United States v. Rogers, 781 F. Supp. 1181, 1191 (S.D. Miss. 1991) (stating that maintaining seal to allow investigation into other charges was inappropriate).

[72] *See* 31 U.S.C. § 3731(b) (2000 & Supp. V 2005); WEST, *supra* note 42, at 3-4 (outlining FCA's statute of limitations and calling it complex); *see also* AM. BAR ASS'N, *supra* note 9, at 20-23 (outlining FCA's statute of limitations and noting ample room for interpretation).

[73] 3A SUTHERLAND STATUTORY CONSTRUCTION § 72:3, at 698 (6th ed. 2007) (outlining policy behind statutes of limitations); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142, at 396-97 (1971) (discussing general rule and rationale behind statutes of limitations); BLACK'S LAW DICTIONARY 1179-80 (8th ed. 2004) (defining statute of limitations).

[74] *See* Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) (noting statutes of limitations assure fairness to defendants); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (stating statutes of limitations protect courts and defendants from stale claims); *Costa*, 955 F. Supp. at 1189 (noting defendants have interest in mounting defense while evidence is still fresh); Lynch v. Am. Motorists Ins. Co., 101 F. Supp. 946, 949 (N.D. Tex. 1951) (noting statutes of limitations guard against unfairly handicapping defendants); sources cited *supra* note 73; *see also infra* Part III.B (discussing purposes and policy behind statutes of limitations).

[75] *Burnett*, 380 U.S. at 428 (noting statutes of limitations assure fairness to defendants); Pearson v. Ne. Airlines, Inc., 309 F.2d 553, 559 n.13 (2d Cir. 1962) (stating statutes of limitations protect potential defendants); *Costa*, 955 F. Supp. at 1189 (noting defendants have interest in mounting defense while evidence is still fresh); *see also* Brussack, *supra* note 4, at 682 (discussing policy behind statutes of limitations).

[76] 31 U.S.C. § 3731(b) (stating applicable limitations period is whichever occurs last).

[77] *Id.*

government must file a complaint within three years of when the Justice Department discovers material facts.[78] The FCA forbids the government and the relator from bringing an action more than ten years after the date of an alleged fraudulent act.[79] Together, these rules provide for a statute of limitations as short as three years and as long as ten.[80]

At least one district court has addressed how long an FCA complaint may remain under seal.[81] In *United States ex rel. Costa v. Baker & Taylor, Inc.*, relators brought a *qui tam* action alleging that a bookseller had repeatedly overcharged federally funded libraries.[82] The relators filed the complaint under seal, and the court granted the government three extensions of the sixty-day investigation period.[83] The relators petitioned the court to lift the seal and allow them to notify their employer, the City of Richmond.[84] The court agreed, holding the government had no legitimate reason to maintain the seal.[85] The court noted that nothing in the statute's language or legislative history indicated courts should disregard the interests of the defendant and the public.[86] The court concluded Congress did not intend the seal provision to allow attorneys to conduct unlimited one-sided discovery.[87] It further stated that Congress believed the sixty-day investigatory period would be sufficient for the government to determine whether to intervene.[88] The court did not impose a bright-line rule on how long a complaint may remain under seal.[89] It did hold, however, that further extensions were unwarranted because the government failed to provide a single cogent reason for maintaining the seal.[90] The court not only limited the government's investigatory

[78] *Id.*

[79] *Id.*

[80] *See supra* notes 76-79.

[81] United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1191-92 (N.D. Cal. 1997) (criticizing government for seemingly needless extensions).

[82] *Id.* at 1189.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 1191.

[86] *Id.* at 1189.

[87] *Id.* at 1191.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 1191-92 (noting ease of granting extensions often leads to government unnecessarily prolonging seals but failing to indicate how long would be proper).

powers, it also highlighted a plausible inconsistency between the FCA's seal provision and Rule 15(c)(2)'s notice requirement.[91]

B. FED. R. CIV. P. 15(c)(2): The "Relation Back" Provision and Notice

Federal Rule of Civil Procedure 15 governs amendments and supplements to pleadings.[92] Rule 15(c) governs the relation back of amendments to pleadings and subsection (c)(2) provides special provisions for relation back of pleadings involving the United States as a party.[93] The touchstone of Rule 15(c)(2)'s relation back provision is notice.[94] Rule 15(c)(2) requires that the original pleading give a potential defendant fair notice of the plaintiff's claim.[95] Rule 15(c)(2) is predicated on the notion that a defendant with fair notice receives the protections afforded by the statute of limitations.[96] Failure to give notice prevents an amendment to a complaint from relating back to the time of the original filing.[97]

Historically, courts have consistently found that under Rule 15(c)(2), the government's complaint-in-intervention relates back to the filing date of the relator's original complaint.[98] These courts

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[91] *See generally id.* at 1191 (indicating lack of notice to defendants gives government significant advantage).

[92] FED. R. CIV. P. 15.

[93] FED. R. CIV. P. 15(C)(2).

[94] Wilson v. Fairchild Republic Co., 143 F.3d 733, 738 (2d Cir. 1998), *overruled on other grounds by* Salyton v. Am. Express Co., 460 F.3d 215 (2d Cir. 2006); *see also* United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006) (calling notice requirement "settled law"); 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1497, at 79 (2d ed. 1982 & Supp. 2007) (stating Rule 15(c)(2) requires notice). A court overrides the statute of limitations if it allows an amendment to relate back to the original complaint. Brussack, *supra* note 4, at 674.

[95] FED. R. CIV. P. 15(c)(2); *Wilson*, 143 F.3d at 738; *see also* Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (noting pleadings must be sufficient to give defendants notice of claims against them).

[96] Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 150 n.3 (1984). *See generally* Pearson v. Ne. Airlines, Inc., 309 F.2d 553, 559 n.13 (2d Cir. 1962) (stating statutes of limitations protect potential defendants); Brussack, *supra* note 4, at 682 (indicating notice requirement is logical when considering aims of statutes of limitations).

[97] WRIGHT, *supra* note 94, at 85 (noting relation back doctrine requires notice); *see also Baldwin*, 466 U.S. at 150 n.3 (stating initial pleading did not contain notice therefore Rule 15(c) could not rehabilitate it); Azarbal v. Med. Ctr. of Del., Inc., 724 F. Supp. 279, 283 (D. Del. 1989) (noting most important factor in determining propriety of proposed amendment is whether defendant had proper notice).

[98] *See* United States *ex rel.* Wyke v. Am. Int'l, Inc., No. 01-60109, 2005 WL 1529669, at *2 (E.D. Mich. June 20, 2005) (stating courts consistently allow government's complaint to relate back to relator's complaint because it is essentially

reason that the relator acts on behalf of the federal government, the real party in interest.[99] The government is the injured party; the relator merely acts in its stead to remedy the fraud.[100] Because the government and the relator share a common interest, the complaint-in-intervention simply constitutes an amendment to the relator's original complaint.[101] Thus, it relates back to the original complaint's filing date.[102]

In recent years, courts have started to question the government's seemingly broad powers under the FCA.[103] More importantly, they have started scrutinizing the FCA's seal provision and its compatibility with Rule 15(c)(2).[104] In *Baylor*, the Second Circuit Court of Appeals was the first to hold that the FCA's secrecy provision is inconsistent with Rule 15(c)(2)'s notice requirements.[105] Since *Baylor*, only a few

amendment of relator's complaint, not new filing); United States *ex rel.* Tillson v. Lockheed Martin Energy Sys., Inc., No. Civ.A. 5:00CV-39-M, 2004 WL 2403114, at *20 (W.D. Ky. Sept. 30, 2004) (stating government's complaint amends relator's original complaint and may relate back to relator's filing); United States *ex rel.* Purcell v. MWI Corp., 254 F. Supp. 2d 69, 75-76 (D.D.C. 2003) (finding government's complaint relates back to date of relator's complaint under Rule 15(c)(2)).

[99] Don Zupanec, *Statute of Limitations—False Claims Act—Relation Back*, 22 NO. 1 FED. LITIGATOR 4, 4 (2007) (stating government and relator's shared interests provide rationale for court viewing government's complaint-in-intervention as amendment to relator's complaint and noting *Baylor* decision was unusual). *See generally Wyke*, 2005 WL 1529669, at *2 (stating courts consistently allow government's complaint to relate back to relator's complaint because it is essentially amendment of relator's complaint, not new filing); *Tillson*, 2004 WL 2403114, at *20 (stating government's complaint amends relator's original complaint and may relate back to relator's filing date).

[100] Zupanec, *supra* note 99, at 4.

[101] *Id.* (stating because government's complaint-in-intervention is simply amendment to relator's original complaint, if relator's complaint is timely, so too is government's complaint).

[102] *See supra* notes 98-101 (discussing precedent for allowing government's complaint-in-intervention to relate back to relator's original complaint).

[103] *See, e.g.*, United States v. St. Joseph's Reg'l Health Ctr., 240 F. Supp. 2d 882, 888 (W.D. Ark. 2002) (criticizing government for utilizing multiple extensions and interventions to investigate and settle claims while keeping potential defendants in perpetual limbo); United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1191-92 (N.D. Cal. 1997) (finding government had no legitimate reason to continuously extend statutory investigation period as long as it had).

[104] United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 269 (2d Cir. 2006) (stating seal provisions are inherently secretive and therefore cannot possibly provide notice required by Rule 15(c)(2)); *see also St. Joseph's Reg'l Health Ctr.*, 240 F. Supp. 2d at 888 (criticizing government for utilizing multiple extensions of seal); *Costa*, 955 F. Supp. at 1191 (expressing concern over government's multiple extensions of seal).

[105] *Baylor*, 469 F.3d at 269; *see also* United States *ex rel.* Cericola v. Fed. Nat'l Mortgage Ass'n, 529 F. Supp. 2d 1139, 1150 (C.D. Cal. 2007) (calling *Baylor* outlier decision); Pearlson, *supra* note 13, at 370 (noting Second Circuit broke ranks from

courts have directly considered *Baylor*'s stance on relation back.[106] For example, the district court in *In re Pharmaceutical Industry Average Wholesale Price Litigation v. Dey, Inc.* rejected *Baylor*'s reasoning.[107] Instead, that court held relation back is proper under Federal Rule of Civil Procedure 15(c)(1) ("Rule 15(c)(1)").[108] Despite such opposition, however, one court and several commentators have conceded that the reasoning in *Baylor* is sound.[109] Indeed, the reasoning becomes clearer when one considers the statutory approach *Baylor* employed to arrive at its holding.[110]

II. *UNITED STATES V. BAYLOR UNIVERSITY MEDICAL CENTER*

In *Baylor*, the Second Circuit refused to apply Rule 15(c)(2)'s relation back provision to the government's complaint-in-

other circuits in disallowing use of relation back doctrine); Zupanec, *supra* note 99, at 4 (calling *Baylor* decision unusual in light of contrary precedent).

[106] *See, e.g.*, United States *ex rel.* Serrano v. Oaks Diagnostics, Inc., No. CV03-2131, 2008 WL 2930348, at *3-*5 (C.D. Cal. July 25, 2008) (declining to follow *Baylor* and, arguably incorrectly, asserting that Rule 15(c)(2) requires no notice); Miller v. Holzmann, 563 F. Supp. 2d 54, 138 n. 132 (D.D.C. 2008) (stating in dicta that FCA implicitly permits relation back under Rule 15(c)(1)(A)); *In re* Pharm. Indus. Average Wholesale Price Litig. v. Dey, Inc., 498 F. Supp. 2d 389, 398-99 (D. Mass. 2007) (finding FCA allows relation back under Rule 15(c)(1)). Yet another court has sidestepped the *Baylor* decision by holding that it is not mandatory authority. United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., No. 95-1231, 2007 WL 851855, at *2 (D.D.C. Mar. 14, 2007) (stating this court was not obligated to follow *Baylor*'s reasoning because Second Circuit decision was not binding authority). Another recent decision distinguished *Baylor* on the facts and indicated that it was an outlier decision not applicable to the action before the court. *Cericola*, 529 F. Supp. 2d at 1150.

[107] *In re Pharm.*, 498 F. Supp. 2d at 388-89.

[108] *Id.*

[109] *See, e.g.*, United States *ex. rel.* Rama-Doss v. Caremark, Inc., No. SA99CA00914, 2008 WL 3978086, at *27-*28 (W.D. Tex. Aug. 27, 2008) (adopting *Baylor* court's holding and stating that filing of relator's complaint does not begin statute of limitations for government); Brief of Defendant at *1, United States *ex rel.* Bauchwitz v. Holloman, No. 04-2982, 2007 WL 3116032 (E.D. Pa. Sept. 13, 2007) (noting government did not attempt relation back because it conceded *Baylor* reasoning was sound); Defendant's Reply Memorandum at *6, United States *ex rel.* Moran v. Auto. Testing Labs., Inc., No. 1:98cv825, 2007 WL 3321700 (S.D. Ohio Feb. 28, 2007) (citing *Baylor* for proposition that government's complaint could not relate back and calling it miscarriage of justice for weakening FCA and federal rules); *see also* Pearlson, *supra* note 13, at 370 (stating *Baylor* levels playing field between government and defendants).

[110] *Baylor*, 469 F.3d at 270 (refusing to consider relation back under Rule 15(c)(1)).

intervention.[111] *Baylor* also limited the government's use of the FCA's seal provision to investigate fraud claims for limitless periods.[112] In doing so, it leveled the playing field by forcing the government to pursue its claims within the applicable statute of limitations.[113]

In *Baylor*, relator Kevin Cosens filed a *qui tam* complaint alleging fraud against hospitals in thirty states.[114] Cosens filed the complaint under seal in March 1994 and simultaneously served the complaint upon the government.[115] The complaint alleged that from as early as 1986, these hospitals had defrauded Medicare by seeking reimbursement for services not covered by the program.[116] Cosens filed an amended complaint under seal in December 1995, adding two hospitals as defendants.[117]

The government repeatedly sought to extend the sixty-day investigatory period, which ultimately spanned eight years.[118] Within this period, the government negotiated settlements with several hospitals and voluntarily dismissed complaints against several others.[119] In early 2003, the government filed complaints-in-intervention against the remaining defendants.[120] The defendants filed a motion to dismiss the government's complaint on several grounds.[121] They argued the government failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b) ("Rule 9(b)").[122] They further contended that the applicable statute of limitations barred the government's complaint.[123] The district court refused to dismiss the FCA claims.[124] It concluded that the statute of limitations did not bar the government's FCA claims because they related back to

[111] *Id.* at 270 (stating seal provision of FCA was inconsistent with Rule 15(c)(2)).

[112] Pearlson, *supra* note 13, at 370 (arguing *Baylor* places new limits on *qui tam* suits).

[113] *Id.*

[114] *Baylor*, 469 F.3d at 265 (noting relator filed complaints against 132 hospitals in 30 states).

[115] *Id.*

[116] *Id.* at 265-66.

[117] *Id.* at 266 n.3.

[118] *Id.* at 266.

[119] *Id.* at 267.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* (holding Rule 15(c)(2) permitted relation back of complaint-in-intervention to relator's filing date).

Cosens's original 1994 complaint.[125] The defendants sought interlocutory appeal and the Second Circuit granted review.[126]

The Second Circuit acknowledged that the government's actions were vulnerable to the FCA's statute of limitations.[127] Unless the government's complaint-in-intervention could relate back to Cosens's complaint under Rule 15(c)(2), the statute of limitations barred the action.[128] The court held that the relation back provision did not apply to the government's complaint-in-intervention because Cosens filed his original complaint under seal.[129] Although the court noted other jurisdictions commonly allow claims to relate back under similar circumstances, it explicitly declared its disagreement with such a practice but failed to fully articulate why it disagreed with this common practice.[130]

In disagreeing with other jurisdictions, the court declared Rule 15(c)(2)'s notice requirement is inherently inconsistent with the FCA's seal provisions.[131] Because the FCA requires the relator to file the complaint under seal, Cosens did not notify the defendants about his claims against them.[132] Indeed, the defendants were unaware that they had been under federal investigation for eight years.[133] Thus, the court concluded the defendants lacked the fair notice Rule 15(c)(2) requires.[134]

The court acknowledged the "colorable argument" that the FCA implicitly permits relation back without notice.[135] Rule 15(c)(1) allows an amendment to a complaint to relate back when the law

[125] *Id.*

[126] *Id.*

[127] *Id.* at 268 (noting government's complaint-in-intervention alleged defendants had made fraudulent claims as late as 1995, meaning six-year statute of limitations had expired by 2002).

[128] *Id.* (noting that date on which government actions commenced was date when government filed complaints-in-intervention and that because complaint alleged claims as late as 1995, six-year statute of limitations had expired for all claims by 2002) .

[129] *Id.*

[130] *Id.*

[131] *Id.* at 270.

[132] *Id.*; *see also* FED. R. CIV. P. 15(c)(1); Zupanec, *supra* note 99, at 4 (noting Rule 15(c)(1) allows relation back where statute permits such result).

[133] *Baylor*, 469 F.3d at 270.

[134] *See supra* notes 94-98 and accompanying text (discussing notice requirement under Rule 15(c)(2)).

[135] *Baylor*, 469 F.3d at 270 (raising notion that implicit relation back under Rule 15(c)(1) may be possible but declining to address issue).

providing the statute of limitations permits such a result.[136] The court noted it would have to find that the FCA implicitly allowed relation back under Rule 15(c)(1).[137] The court declined, however, to consider this argument because neither party had raised the issue at trial.[138]

Not all onlookers were pleased with *Baylor*, notably some members of Congress. On September 12, 2007, Senators Grassley, Durbin, Leahy, and Specter introduced the False Claims Act Correction Act of 2007 ("Correction Act") with bipartisan support.[139] One of its most significant provisions seeks to counteract the limits *Baylor* places on the relation back doctrine.[140] The Corrections Act amends the FCA's statute of limitations to expressly state that the government's complaint-in-intervention relates back to the relator's original pleading.[141] The bill also extends the statute of limitations to ten years without qualification.[142] Currently, the bill is under review in the Senate Judiciary Committee.[143]

Given the bill's bipartisan support, the Corrections Act has a good chance of becoming law.[144] The defense and healthcare industries,

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[136] *Id.*; *see also* FED. R. CIV. P. 15(c)(1).

[137] *Baylor*, 469 F.3d at 270.

[138] *Id. But see In re* Pharm. Indus. Average Wholesale Price Litig., 498 F. Supp. 2d 389, 398-99 (D. Mass. 2007) (holding FCA implicitly permits relation back under Rule 15(c)(1)).

[139] False Claims Act Correction Act of 2007, S. 2041, 110th Cong. (2007). Senator Grassley is a Republican from Iowa, Senator Durbin is a Democrat from Illinois, Senator Leahy is a Democrat from Vermont, and Senator Specter is a Republican from Pennsylvania. United States Senate, Senators of the 110th Cong., http://www.senate.gov/general/contact_information/senators_cfm.cfm. Other important reforms seek to allow government employees to act as relators under certain conditions and eliminate certain court-constructed defenses. Press Release, Grassley, Durbin, Leahy, Specter Legislation to Fortify Taxpayers Against Fraud (Sept. 12, 2007), *available at* http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=fa770c04-1321-0e36-ba19-486c19da895e&Region_id=&Issue_id= (noting Senators proposed legislation in response to courts limiting scope and applicability of FCA).

[140] S. 2041, 110th Cong. § 6 (2007). As amended, section 3731(b)(2) of Title 31 would read in part, "[f]or statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person." *Id.*

[141] *Id.*

[142] *Id.*

[143] THOMAS (Library of Cong.), Status of S. 2041, http://www.thomas.gov/cgi-bin/bdquery/z?d110:SN02041:@@@X (last visited Sept. 14, 2008).

[144] *See* 153 CONG. REC. S11,507 (daily ed. Sept. 12, 2007) (statement of Sen. Charles Grassley) (implying that tremendous bipartisan support of Corrections Act is

however, are likely to increase lobbying efforts to persuade Congress to cut the amendments.[145] With powerful forces on both sides, whether the Senators will succeed in passing these broad changes to the FCA is unclear.[146]

III. ANALYSIS

Baylor articulated an important policy holding the government accountable to the FCA's express statute of limitations.[147] It did not fully explain, however, its decision to reject many years of precedent.[148] Therefore, *Baylor* warrants a more extensive evaluation to clarify its rather novel approach to relation back under the FCA.[149]

important to its passage). *But see* Anne S. Kimbol, *The False Claims Act Correction Act of 2007: Will It Bring a Third Era of False Claims Cases?*, (Sept. 24, 2007) (unpublished manuscript, http://www.law.uh.edu/healthlaw/perspectives/2007/(AK)%20FCA.pdf) (last visited Sept. 14, 2008) (indicating Correction Act would be broader than relators or defendants could have foreseen). *See generally* John J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821, 827-28 (1999) (concluding unified government is more effective in producing significant enactments); David Epstein, *Legislating from Both Sides of the Aisle: Information and the Value of Bipartisan Consensus*, 101 PUB. CHOICE 1, 3-5, 19 (1999) (discussing research on nature of bipartisan support in legislating and concluding bipartisan support of legislation is highly informative).

[145] *See* Helmer & Neff, *supra* note 10, at 68-69 (noting defense industry engaged in extensive lobbying efforts to curtail 1986 amendments to FCA); *see also Health Care Initiatives Under the False Claims Act That Impact Hospitals: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 23 (1999) (statement of Lisa Hovelson, Executive Director and General Counsel, Taxpayers Against Fraud) (noting American Hospital Association had aggressively lobbied to weaken FCA); 153 CONG. REC. S11,507 (daily ed. Sept. 12, 2007) (statement of Sen. Grassley) (noting pharmaceutical companies lobbied against FCA amendments in 1986 and had already begun similar efforts against Corrections). These lobbying efforts are due in large part to the fact that the FCA targets these industries. *See generally* Gold, *supra* note 13, at 630 (noting FCA most often targets health care organizations and defense contractors).

[146] *See* 153 CONG. REC. S11,507 (daily ed. Sept. 12, 2007) (statement of Sen. Grassley) (noting tremendous bipartisan support of Corrections Act is important to its passage). *But see id.* (statement of Sen. Grassley) (noting pharmaceutical companies are working against Corrections Act and in 1986 such lobbying efforts delayed amendments for one year); Helmer & Neff, *supra* note 10, at 74-75 (noting defense industry engaged in extensive lobbying efforts to curtail 1986 amendments to FCA).

[147] United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006) (holding FCA's secrecy provision does not allow government to defeat statute of limitations under Rule 15(c)(2)).

[148] *Id.* at 268-89 (indicating court disagreed with precedent but failing to fully explain its reasons for this).

[149] *See In re* Pharm. Indus. Average Wholesale Price Litig., 498 F. Supp. 2d 389, 395 n.4 (D. Mass. 2007) (noting relator called *Baylor* decision renegade); Zupanec,

The *Baylor* court correctly held the government's complaint-in-intervention did not relate back to the original complaint's date of filing for three reasons.[150] First, legislative history indicates that Congress contemplated some limits on the government's power to investigate false claims allegations.[151] Second, precedent indicates that the FCA's secrecy provision is inconsistent with Rule 15(c)(2)'s well-settled notice requirement.[152] Third, policies underlying both Rule 15(c)(2) and the FCA call for limitations on how far back claims of fraud may extend.[153] *Baylor* places important limits on the government's powers under the FCA without undermining its ability to prosecute fraudulent claims.[154]

A. Legislative History Supports Limiting the Government's Ability to Extend FCA Actions

A careful examination of legislative history indicates that Congress intended to limit the government's power to investigate claims of fraud.[155] The Senate Judiciary Committee ("Committee") made several relevant comments regarding the 1986 amendments to the FCA.[156] First, the Committee noted it did not intend the FCA's seal provisions to infringe on defendants' rights.[157] Once a court unseals the complaint, the government can properly serve the defendant and provide him with the usual twenty days to respond.[158] The Committee stated that "[b]y providing for sealed complaints, [it did] not intend to affect defendants' rights in any way."[159] By indicating its concern for

supra note 99, at 4 (noting *Baylor* decision is unusual given contrary precedent).

[150] *See generally infra* Part III (discussing reasons why *Baylor* court was correct).

[151] *See infra* Part III.A (discussing FCA's legislative history).

[152] *See infra* Part III.B (discussing Rule 15(c)(2)'s notice requirement).

[153] *See infra* Part III.C (discussing *Baylor* in light of congressional goals to strengthen FCA).

[154] *See infra* Part IV (concluding limitations imposed by *Baylor* do not hinder government's ability to combat fraud under FCA).

[155] *See generally* S. REP. No. 99-345, at 24-25 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-90 (outlining limitations on government's investigatory period and ability to seek extensions); AM. BAR ASS'N, *supra* note 9, at 6-7 (outlining 1986 amendments adding government's investigatory period); JACKSON, *supra* note 43, at 10-11 (discussing government's investigatory period).

[156] S. REP. NO. 99-345, at 24.

[157] *Id.*

[158] *Id.*; *see also* FED. R. CIV. P. 4 (outlining proper procedure for serving defendants).

[159] In its original form, the FCA required a defendant to respond within two days of being served. S. REP. NO. 99-345, at 24 (noting 1986 amendments to FCA would

defendants' rights, Congress thus signaled its intent to limit the government's ability to burden defendants unfairly under the FCA.[160]

The Committee also felt that a sixty-day period was adequate to review the complaint, investigate the allegations, and decide whether to intervene.[161] The Committee clearly stated that the government may petition the court for extensions of the sixty-day investigatory period.[162] It noted, however, that courts should only grant extensions upon a showing of good cause.[163] The Committee stated that proving the government is overburdened is insufficient to establish good cause.[164] It also made clear that good cause did not include arguments that the sixty-day period was too short to review or investigate the complaint.[165] Furthermore, it stated that the government "should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the qui tam litigation."[166] Instead, the Committee cautioned that courts should carefully examine any requests for extensions of the seal.[167] In doing so, it indicated its intention to limit the amount of time courts keep a complaint under seal.[168]

In *Costa*, the *qui tam* action against a bookseller overcharging federally funded libraries, the court similarly decided to prohibit the government from extending the seal. In so doing, the court highlighted Congress's intent to limit the government's investigatory

correct two-day response time to bring it in line with Federal Rules of Civil Procedure).

[160] *Id.*; *see also* AM. BAR ASS'N, *supra* note 9, at 7 (indicating 1986 amendments aimed to provide defendant adequate time to answer charges once unsealed). *But see* Barber et al., *supra* note 15, at 139 (noting Congress did not intend to affect defendant's rights with seal provision but criticizing the provision for inviting abuse).

[161] S. REP. NO. 99-345, at 24-25.

[162] *Id.*

[163] *Id.* (noting 60 days was adequate and stating court could grant extensions but could not unnecessarily delay lifting of seal); *see also* United States *ex rel.* Kalish v. Desnick, 765 F. Supp. 1352, 1355 (N.D. Ill. 1991) (noting courts should not equate good cause with routinely granting of extension); James T. Blanch, *The Constitutionality of the False Claims Act's* Qui Tam *Provisions*, *in* CITIZEN SUITS AND *QUI TAM* ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY, *supra* note 29, at 55, 60 (stating legislative history suggests courts should construe good cause narrowly). The government can establish good cause when there is a pending criminal investigation. S. REP. NO. 99-345, at 25. This is not, however, grounds for an automatic extension. *Id.*

[164] S. REP. NO. 99-345, at 25.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 24-25; *see also* Blanch, *supra* note 163, at 60 (interpreting FCA legislative history to indicate courts should construe good cause narrowly).

[168] S. REP. NO. 99-345, at 24-25.

period.[169] The court indicated that allowing the government to seek endless extensions is contrary to congressional intent.[170] And it concluded Congress did not intend to allow the government to pursue one-sided discovery through limitless extensions of the seal period.[171] This same reasoning is applicable to *Baylor,* where the government sought eight years of extensions.[172] In both cases, the court clarified that the sixty-day period was sufficient.[173] In holding that relation back is permissible only with notice to defendants, *Baylor* comports with congressional intent to limit the government's ability to extend investigations needlessly.[174]

Critics have argued that the sixty-day period places an unrealistic burden on the government.[175] The government needs ample time to review the complaint, assign the case, and assess the merits of the allegations.[176] Some contend that the Justice Department is overworked and that *qui tam* actions unduly place a strain on its resources.[177] *Qui tam* actions are complicated and require a great deal of time and personnel.[178] Assistant U.S. Attorneys sometimes have

[169] United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1191 (N.D. Cal. 1997) (noting Congress had not intended unlimited seal extensions).

[170] *Id.* at 1190 (stating Congress intended extensions only for good cause).

[171] *Id.* at 1191.

[172] United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 266 (2d Cir. 2006) (noting government filed extensions of 60-day seal period spanning eight years); *Costa*, 955 F. Supp. at 1189 (noting government filed extensions of 60-day period spanning 18 months).

[173] *See supra* note 172 and accompanying text.

[174] *See generally supra* Part III.A (discussing FCA's legislative history).

[175] *See, e.g.*, AM. BAR ASS'N, *supra* note 9, at 30 (arguing 60 days is rarely long enough for government to investigate complaint); WEST, *supra* note 42, at 13-14 (arguing 60 days is unrealistic); Gerson, *supra* note 29, at 144-45 (indicating that Congress should adopt proposals to expand 60-day investigatory period).

[176] AM. BAR ASS'N, *supra* note 9, at 30 (noting complexity of case, issuance of subpoenas, and existence of related criminal case could delay government action); *see also* WEST, *supra* note 42, at 47 (noting FCA investigations require investigative and audit work of many federal agencies); Gerson, *supra* note 29, at 142 (noting that 1986 amendments increased FCA cases and thus demands on Justice Department resources Assistant U.S. Attorneys' time).

[177] WEST, *supra* note 42, at 47 (outlining several reasons why prosecutors may disfavor *qui tam* suits); *see also id.* at 46 (suggesting government receives so many *qui tam* filings that it routinely declines to intervene even when cases have merit); Gerson, *supra* note 29, at 143-44 (noting Justice Department appropriations have not expanded despite increasing *qui tam* caseload).

[178] WEST, *supra* note 42, at 47 (indicating Assistant U.S. Attorneys often disfavor *qui tam* actions); *see also* AM. BAR ASS'N, *supra* note 9, at 29 (noting investigation may require involvement of auditors); Gerson, *supra* note 29, at 142 (noting increased

difficulty securing investigators and often lack resources to confer with the relator and various agencies involved.[179] In addition, *qui tam* actions comprise only one part of a U.S. Attorney's many responsibilities.[180] Scholars note these actions sometimes occur at a rate of more than twenty a month in some districts.[181] Given the amount of time and resources necessary to investigate these complaints, a sixty-day investigatory period may be unnecessarily burdensome.[182] Thus, these critics argue courts should permit relation back to the relator's original complaint, regardless of the number of extensions granted.[183]

However, this undue burden argument fails because the government has several options available in addressing *qui tam* actions.[184] First, the government may request an extension for good cause.[185] Congress indicated that the government may establish good cause in cases where there is an ongoing corollary criminal investigation to the *qui tam* action.[186] Provided the government files extensions while remaining within the statute of limitations, there is no need to utilize the relation back doctrine.[187] Given this alternative, it becomes unnecessary for the government to extend the seal and circumvent Rule 15(c)(2)'s notice requirement.[188]

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demands on Justice Department resources since 1986 amendments to FCA).

[179] WEST, *supra* note 42, at 47-48; *see also* AM. BAR ASS'N, *supra* note 9, at 29 (indicating resources available to pursue *qui tam* actions vary considerably depending upon issues at stake). *But see* Gerson, *supra* note 29, at 141 (indicating U.S. Attorneys are not lacking commitment, diligence, or resources in pursuing *qui tam* actions).

[180] WEST, *supra* note 42, at 47 (stating U.S. Attorneys may have difficulty balancing their existing caseload in addition to *qui tam* suits).

[181] *Id.* at 47; *see also* Caldwell, *supra* note 2, at 385 (noting nearly 70% of Justice Department's Fraud Section caseload consists of *qui tam* actions despite intervention in only 20% to 25% of those cases); Gerson, *supra* note 29, at 140 (discussing data trends indicating large increase in *qui tam* cases since 1986 amendments).

[182] *See generally supra* notes 176-82 (outlining reasons critics claim 60-day period is insufficient).

[183] *See generally supra* notes 176-82 (outlining criticisms of 60-day investigatory period).

[184] *See infra* notes 183-203 and accompanying text. *See generally* Pacini & Hood, *supra* note 52, at 283 (discussing various options available to government).

[185] S. REP. NO. 99-345, at 24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5289.

[186] *Id.* Anecdotal evidence seems to indicate courts freely grant extensions even though Congress indicated they should not be routine. AM. BAR ASS'N, *supra* note 9, at 31 n.90.

[187] S. REP. NO. 99-345, at 24. *See generally* 31 U.S.C. § 3731(b) (2000 & Supp. V 2005) (outlining FCA's statute of limitations); FED. R. CIV. P. 15(c).

[188] *See* 31 U.S.C. § 3730(b) (2000 & Supp. V 2005); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 150 n.3 (1984); Stevelman v. Alias Research Inc., 174 F.3d

Second, the government may petition the court to partially unseal the complaint.[189] Partially unsealing a complaint permits the government to notify defendants of the allegations against them.[190] It also allows the government to continue its investigation while satisfying Rule 15(c)(2)'s notice requirement.[191]

In addition, relators already perform much of the investigation for the government when they initially file a complaint, alleviating a great deal of the burden for potentially overworked United States Attorneys.[192] To persuade the government to intervene, relators present documents, witness lists, and theories upon which the fraud claims rest.[193] This initial investigation negates the need to conduct further lengthy investigations.[194]

79, 86 (2d Cir. 1999) (stating central inquiry is whether opposing party had adequate notice within statute of limitations); Wilson v. Fairchild Republic Co., 143 F.3d 733, 738 (2d Cir. 1998), *overruled on other grounds by* Salyton v. Am. Express Co., 460 F.3d 215 (2d Cir. 2006) (stating pertinent inquiry is whether defendant received fair notice of newly alleged claims); WRIGHT, *supra* note 94, at 85 (indicating notice requirement is implicit in relation back doctrine); *infra* Part III.B; *see also* WEST, *supra* note 42, at 13 (noting relator in *qui tam* action must file complaint under seal); Barber et al., *supra* note 15, at 138 (noting FCA requires filing complaint *in camera* with no notice to defendant for minimum of 60 days); Thompson & Siemer, *supra* note 47, at 18 (noting *qui tam* suits are not ordinary lawsuits in part because of seal provision); Zupanec, *supra* note 99, at 4 (noting because relator files complaint under seal, defendants do not receive notice of claim until court unseals it and serves complaint).

[189] WEST, *supra* note 42, at 26; *see also* AM. BAR ASS'N, *supra* note 9, at 30-31 (noting government may request that court partially unseal complaint to contact defendant and enter into settlement negotiations). *See generally* JACKSON, *supra* note 43, at 11 (outlining government's permissible actions at conclusion of seal period).

[190] WEST, *supra* note 42, at 26; *see also* AM. BAR ASS'N, *supra* note 9, at 30-31 (noting government may request that court partially unseal complaint to contact defendant and enter into settlement negotiations); Caldwell, *supra* note 2, at 378 (noting government sometimes petitions court to partially unseal complaint to notify defendants and open negotiations without general public's knowledge).

[191] WEST, *supra* note 42, at 26. This also allows the government to begin settlement negotiations with the defendant. *Id.*; *see also* United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1191 (N.D. Cal. 1997) (noting government may not use extensions of seal as bargaining chip in settlement negotiations).

[192] WEST, *supra* note 42, at 15 (stating most important work done in *qui tam* action is packaging of case for government); *see* Caldwell, *supra* note 2, at 377-78 (indicating relator presents evidence to government in form of documents, damage theories, lists of witnesses, and names of potential expert witnesses).

[193] *See* Caldwell, *supra* note 2, at 377-78.

[194] *See* WEST, *supra* note 42, at 15; *see also* AM. BAR ASS'N, *supra* note 9, at 23-27 (outlining work relator does in *qui tam* action prior to filing complaint); Caldwell, *supra* note 2, at 377-78 (indicating relator presents much evidence to government).

Moreover, the relator is bound to follow strict procedural requirements that protect the integrity of the investigation.[195] The relator's original complaint must fulfill the standard pleading requirements in order to satisfy particularity.[196] A fraud complaint under the FCA must allege sufficient facts to support a strong inference of fraud.[197] Relators must also serve the government with a written disclosure containing substantially all material evidence in their possession.[198] They may submit sworn affidavits from potential witnesses.[199] These affidavits may include other background information and facts supporting the relator's complaint.[200] Further, relators and their counsel remain available if the government requires further assistance in assembling the case.[201] Given the relator's pre-packaging of *qui tam* actions, the sixty-day period is therefore adequate for government investigation and intervention.[202] The initial

[195] *See generally* AM. BAR ASS'N, *supra* note 9, at 23-27 (outlining procedures relator must follow in filing *qui tam* action); WEST, *supra* note 42, at 23-24 (outlining requirements of relator's disclosure document); Caldwell, *supra* note 2, at 374 (noting relator must provide government with complaint and all material evidence).

[196] Under Rule 9(b), plaintiffs must plead fraud with particularity. FED. R. CIV. P. 9(b); *see also* 37 AM. JUR. 2D *Fraud and Deceit* § 464 (2007) (outlining particularity requirement for pleading allegations of fraud); 71 C.J.S. *Pleadings* § 71 (2007) (discussing requirement for pleading fraud claims).

[197] Stinson v. Blue Cross Blue Shield of Ga., Inc., 755 F. Supp. 1040, 1052 (S.D. Ga. 1990); *see also* Ouakine v. MacFarlane, 897 F.2d 75, 79 (2d Cir. 1990) (indicating fraud pleadings must allege sufficient facts such as time and place); Stern v. Leucadia Nat'l Corp., 844 F.2d 997, 1003 (2d Cir. 1988) (stating plaintiffs cannot base fraud pleadings merely on information and belief).

[198] 31 U.S.C. § 3730(b)(2) (2000 & Supp. V 2005); *see also* AM. BAR ASS'N, *supra* note 9, at 25-26 (noting considerable disagreement among courts on interpretation of "substantially all" language).

[199] AM. BAR ASS'N, *supra* note 9, at 27 (noting relators provide affidavits in effort to persuade government of case's merits).

[200] *See id.* (noting affidavits may include such things as relator's work history, specific facts regarding fraud, other contacts relator may have, and facts relating to retaliation suffered).

[201] *See* AM. BAR ASS'N, *supra* note 9, at 29 (noting role of relator and her counsel will depend on how much assistance government needs); WEST, *supra* note 42, at 48 (noting government and relator's counsel should form partnership to advance *qui tam* action); *see also* Gold, *supra* note 13, at 644 (noting that ability of relator to continue participation after government intervenes allows them to influence course of action).

[202] WEST, *supra* note 42, at 42 (noting government relies on relator to obtain facts, analyze them, and explain case to prosecutors). Relator's counsel also bears the burden of investigating and presenting the case to the government to increase chances of intervention. *Id.*; *see also id.* at 48 (noting where relator spends time packaging case, Justice Department has more time to spend on doing things relator is unable to); *supra* notes 193-202 and accompanying text (illustrating relator's contribution to

investigation, the high pleading standard, the assistance of relators and their counsel, and the potential for sworn affidavits negate the government's need for extending its investigation under seal.[203]

Finally, if the government chooses not to intervene, it may later petition the court to intervene provided it has "good cause."[204] Unfortunately, what sort of showing this requires the government to make is not entirely clear.[205] Nor does there appear to be very many cases in which the government has exercised this option.[206]

B. The FCA's Secrecy Provision is Inconsistent with Rule 15(C)(2)'s Notice Requirement

Baylor not only implicates the adequacy of the sixty-day period but also highlights the inconsistency between Rule 15(c)(2) and the FCA.[207] Rule 15(c)(2)'s notice requirement helps promote the aims of the statute of limitations doctrine.[208] Statutes of limitations exist primarily to protect potential defendants.[209] These statutes protect defendants from litigation occurring so long after an event that it jeopardizes their ability to defend against the action.[210] They also give

investigation).

[203] *See supra* notes 193-203 and accompanying text (illustrating relator's role in investigation).

[204] 31 U.S.C. § 3730(c)(3) (2000 & Supp. V 2005).

[205] Pacini & Hood, *supra* note 71, at 282-83.

[206] *Id.* at 283 (indicating that there are few existing cases in which this option is exercised and those that exist do not explain what, if any, limitations are placed on government in exercising option).

[207] United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 269-70 (2d Cir. 2006) (discussing Rule 15(c)(2)'s inconsistency with FCA's seal provision).

[208] Brussack, *supra* note 4, at 682 (stating notice requirements make sense when considered along with policy behind statutes of limitations); *see also Amendments to Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims Rules of Criminal Procedure*, 39 F.R.D. 69, 83 (1966) (indicating relation back is intimately connected with policy of statute of limitations); WRIGHT, *supra* note 94, at 85 (noting rationale of relation back rule to override effect of statute of limitations).

[209] Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) (noting statutes of limitations assure fairness to defendants); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (stating statutes of limitations protect courts and defendants from stale claims); Pearson v. Ne. Airlines, Inc., 309 F.2d 553, 559 n.13 (2d Cir. 1962) (stating statutes of limitations protect potential defendants); *see also* Brussack, *supra* note 4, at 682 (discussing policy behind statutes of limitations); Harv. L. Rev. Ass'n, *Developments in the Law Statutes of Limitation*, 63 HARV. L. REV. 1177, 1185-86 (1950) (discussing purpose of statutes of limitations and noting that, beyond protecting defendants, they also increase effectiveness of courts).

[210] Brussack, *supra* note 4, at 682; *see also* United States v. Kubrick, 444 U.S. 111, 117 (1979) (noting statutes of limitations protect defendants against stale claims);

parties peace of mind in knowing that once a certain date has passed, the parties may live free from future threats of litigation.[211]

In contrast, the relation back doctrine seeks to extinguish the effect of the statute of limitations.[212] It allows an action to relate back to the date of an original complaint, thereby defeating the statute's time bar.[213] Typically, courts will allow an amendment to relate back only if the original pleading provides notice to the defendant.[214]

Given substantial precedent indicating Rule 15(c)(2)'s notice requirement is well-settled law, it is difficult to argue that the FCA's secrecy provisions are compatible.[215] Claims under the FCA do not provide notice in the usual manner because the relator must file the complaint under seal.[216] The defendant becomes aware of the claim against her only when the court unseals the complaint and permits service.[217] Thus, allowing the complaint-in-intervention to relate back

Harv. L. Rev. Ass'n, *supra* note 209, at 1185-86 (noting statutes of limitations protect defendants).

[211] Brussack, *supra* note 4, at 682.

[212] WRIGHT, *supra* note 94, at 85 (noting relation back inquiry must include whether defendant received notice because relation back provides relief from statute of limitations); *see also* 54 C.J.S. *Limitations of Actions* § 275 (2007) (stating goal of relation back is to relieve harshness of applying statute of limitations strictly); Brussack, *supra* note 4, at 672 (noting Congress revised Rule 15(c) to ensure statutes of limitations would not be problematic in certain cases).

[213] WRIGHT, *supra* note 94, at 85.

[214] *Id.* at 85-89 (noting failure to provide notice prevents relation back); *see also* Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 150 n.3 (1984) (stating that because initial pleading did not provide notice to defendant, it was not original pleading and Rule 15(c)(2) could not rehabilitate it); Azarbal v. Med. Ctr. of Del., Inc., 724 F. Supp. 279, 283 (D. Del. 1989) (allowing relation back because original complaint provided defendant notice of additional claim).

[215] *See Baldwin*, 466 U.S. at 150 n.3; Stevelman v. Alias Research Inc., 174 F.3d 79, 86 (2d Cir. 1999) (stating central inquiry is whether opposing party had adequate notice within statute of limitations); Wilson v. Fairchild Republic Co., 143 F.3d 733, 738 (2d Cir. 1998), *overruled on other grounds by* Salyton v. Am. Express Co., 460 F.3d 215 (2d Cir. 2006) (stating pertinent inquiry is whether defendant received fair notice of newly alleged claims); WRIGHT, *supra* note 94, at 85 (indicating notice requirement is implicit in relation back doctrine).

[216] 31 U.S.C. § 3730(b) (2000 & Supp. V 2005); *see also* Barber et al., *supra* note 15, at 138 (noting FCA requires filing complaint *in camera* with no notice to defendant for minimum of 60 days); Thompson & Siemer, *supra* note 47, at 18 (noting *qui tam* suits are not ordinary lawsuits in part because of seal provision).

[217] Zupanec, *supra* note 99, at 4 (noting because relator files complaint under seal, defendants do not receive notice of claim until court unseals it and serves complaint); *see also* WEST, *supra* note 42, at 13 (noting relator in *qui tam* action must file complaint under seal); Barber et al., *supra* note 15, at 138 (noting FCA requires filing complaint *in camera* with no notice to defendant).

under such circumstances defeats Rule 15(c)(2)'s notice requirement.[218]

Providing the government unrestricted time to intervene by allowing relation back under Rule 15(c)(2) ultimately defeats the purpose of the statute of limitations.[219] For example, the FCA allows a maximum of ten years to lapse before barring a relator or the government from filing a complaint.[220] If courts allow the government to file unlimited extensions, however, relation back would defeat the ten-year time bar.[221] Again, this creates uncertainty for defendants and undermines the goals that statutes of limitations seek to accomplish.[222]

Some argue that the FCA's statute of limitations permits relation back without notice through an implied use of Rule 15(c)(1).[223] Rule 15(c)(1) allows an amended pleading to relate back when it is "permitted by the law that provides the statute of limitations applicable to the action."[224] Indeed, the *Baylor* court acknowledged that this was at least a "colorable argument."[225] The general argument is that the government's complaint-in-intervention simply "piggybacks" on the relator's complaint because the parties share an interest in the action.[226] So long as relators file their complaint within the statute of limitations, the government can always relate back to the

[218] *See generally supra* notes 217-21 and accompanying text (discussing reasons FCA's seal provision is incompatible with notice requirement of Rule 15(c)(2)).

[219] *See supra* notes 213-16 and accompanying text (discussing policy underlying statutes of limitations).

[220] 31 U.S.C. § 3731(b) (2000 & Supp. V 2005).

[221] *See, e.g.*, *In re* Pharm. Indus. Average Wholesale Price Litig. v. Dey, Inc., 498 F. Supp. 2d 389, 393, 399 (D. Mass. 2007) (expressing concern where relator filed original complaint in 1995 and government chose not to intervene until 2006).

[222] *See supra* notes 209-14 and accompanying text (discussing statutes of limitations underlying policy).

[223] FED. R. CIV. P. 15(c)(1); *see In re Pharm.*, 498 F. Supp. 2d at 398-99; Zupanec, *supra* note 99, at 4 (noting such implicit relation back under Rule 15(c)(1) eliminates need to utilize Rule 15(c)(2)). *But see* United States *ex rel.* Koch v. Koch Indus., Inc., 188 F.R.D. 617, 627 (N.D. Okla. 1999) (finding Rule 15(c)(1) inapplicable because FCA's statute contains no provisions dealing with relation back of amendments).

[224] FED. R. CIV. P. 15(c)(1).

[225] United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006).

[226] Zupanec, *supra* note 99, at 4; *see also* United States *ex rel.* Wyke v. Am. Int'l. Inc., No. 01-60109, 2005 WL 1529669, at *2 (E.D. Mich. June 20, 2005) (stating courts consistently allow government's complaint to relate back to relator's complaint because it is essentially amendment of relator's complaint, not new filing); United States *ex rel.* Tillson v. Lockheed Martin Energy Sys., Inc., No. Civ.A. 5:00CV-39-M, 2004 WL 2403114, at *20 (W.D. Ky. Sept. 30, 2004) (stating government's complaint amends relator's original complaint and may relate back to date of relator's filing).

date of the relator's filing.[227] This argument fails for several reasons.[228] First, Congress did not expressly provide that the government's complaint-in-intervention automatically relates back to the relator's original complaint.[229] Courts should follow a plain meaning approach in evaluating statutes.[230] Under this canon of statutory construction, courts must interpret a statute based only on the statutory text if its language contains no ambiguity.[231] The FCA does not explicitly state that relation back can occur without notice.[232] Instead, it merely outlines a complex statutory scheme with no concrete reference to relation back.[233] Without a clear indication of congressional intent, courts should not interpret the FCA to implicitly allow such relation back.[234] *Baylor* comports with this long-standing canon of statutory

[227] Zupanec, *supra* note 99, at 4 (noting implicit relation back under Rule 15(c)(1) eliminates need for notice under Rule 15(c)(2)); *see also In re Pharm.*, 498 F. Supp. 2d at 398-99 (utilizing argument ignored in *Baylor* that FCA allows implicit relation back). *See generally* Scott K. Zesch, Annotation, *When Does Statute of Limitations Begin to Run in Action Under False Claims Act (31 U.S.C.A. §§ 3729-3733)*, 139 A.L.R. FED. 645 (1997) (discussing application of statute of limitations to false claims actions).

[228] *See infra* notes 233-42 and accompanying text.

[229] *See generally* S. REP. NO. 99-345 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266 (illustrating Congress never mentions relation back in any form).

[230] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (noting starting point for statutory interpretation is plain meaning and, absent legislative intent to contrary language, courts must regard such language as conclusive); Caminetti v. United States, 242 U.S. 470, 485 (1917) (stating courts must seek meaning of statute in plain language); Hamilton v. Rathbone, 175 U.S. 414, 421 (1899) (noting no need for interpretation where statutory language is plain).

[231] *See Consumer Prod. Safety Comm'n*, 477 U.S. at 108 (noting starting point for statutory interpretation is plain meaning and, absent legislative intent to contrary, courts must regard such language as conclusive); *Caminetti*, 242 U.S. at 485 (stating courts must seek meaning of statute in plain language); *Hamilton*, 175 U.S. at 421 (noting no need for interpretation where statutory language is plain); Natasha Dasani, Note, *Class Actions and the Interpretation of Money Damages Under Federal Rule of Civil Procedure 23(B)(2)*, 75 FORDHAM L. REV. 165, 177-78 (2006) (discussing plain meaning approach to statutory interpretation).

[232] *See generally* 31 U.S.C. § 3731 (2000 & Supp. V 2005); S. REP. NO. 99-345 (illustrating Congress does not mention relation back).

[233] 31 U.S.C. § 3731.

[234] United States v. Turkette, 452 U.S. 576, 580 (1981) (noting where language is plain court's interpretation must end there); *Consumer Prod. Safety Comm'n*, 477 U.S. at 108 (indicating absent legislative intent to contrary, courts must interpret statute based on plain meaning); Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1088-89 (D.C. Cir. 1996) (indicating court cannot ignore statutory text even if court disagrees or believes it is product of congressional oversight). Note, however, that the False Claims Act Correction Act of 2007 would make relation back explicit. *See supra* Part I.A (discussing proposed Correction Act and its primary amendments to FCA).

interpretation by declining to imply a relation back provision where none exists.[235] In addition, although some courts have found implicit relation back under Rule 15(c)(1), many courts have disagreed.[236] Finally, Rule 15(c)(1) was originally designed to help parties utilizing diversity jurisdiction who may have been entitled to a longer statute of limitations under state law than under Rule 15(c)(2).[237] Thus it has no application in *qui tam* actions.[238]

C. Baylor *Carries Out Congress's Intention to Strengthen the FCA*

Baylor also pays due recognition to the motivations behind Congress's 1986 amendments to the FCA.[239] By including additional penalties for false claims, Congress sought to strengthen the FCA in light of the growing problem of fraudulent claims against the government.[240] It wanted to enhance the government's ability to recover losses resulting from such claims.[241] *Baylor* adheres to the limits Congress imposed in passing the 1986 amendments and promotes Congress's goal of protecting defendants against the government's potentially abusive powers.[242]

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[235] *See supra* Part I.C (discussing plain meaning approach to statutory interpretation).

[236] *Compare In re* Pharm. Indus. Average Wholesale Price Litig. v. Dey, Inc., 498 F. Supp. 2d 389, 398-99 (D. Mass. 2007) (finding FCA allows relation back under Rule 15(c)(1)), *and* Zupanec, *supra* note 99, at 4 (noting such implicit relation back under Rule 15(c)(1) eliminates need to utilize Rule 15(c)(2)), *with* United States *ex rel.* Ortega v. Columbia Healthcare, Inc., 240 F. Supp. 2d 8, 14 n.7 (D.D.C. 2003) (noting Rule 15(c)(1) has "no application" to FCA claims and stating that "Rule 15(c)(1) permits relation back when permitted by the applicable statute of limitations," and "[t]he FCA statute of limitations makes no mention of relation back"), *and* United States *ex rel.* Koch v. Koch Indus., Inc., 188 F.R.D. 617, 627 (N.D. Okla. 1999) (finding Rule 15(c)(1) inapplicable because FCA's statute contains no provisions dealing with relation back of amendments).

[237] *See* FED. R. CIV. P.15(c)(1) advisory committee's note to 1991 Amendments; *see also* Saxton v. ACF Indus., Inc., 254 F.3d 959, 963 (11th Cir. 2001) (citing Arendt v. Vetta Sports, Inc., 99 F.3d 231, 236 (7th Cir. 1996)); Lundy v. Adamar of N.J., Inc., 34 F.3d 1173, 1184 (3d Cir. 1994); McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 863 n.22 (5th Cir. 1993)).

[238] *See supra* note 237.

[239] *See generally* S. REP. NO. 99-345 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266 (discussing proposed 1986 amendments to FCA).

[240] *Id.* at 1-2 (noting Congress had not made substantial amendments to FCA since 1863 and observing FCA required amendments to increase its utility).

[241] *Id.* (discussing purpose of 1986 amendments).

[242] *See generally id.* (supplying background on 1986 amendments to FCA).

Congress amended the FCA in part to increase the effectiveness of the government's investigative tools.[243] It gave the government an additional tool in the form of a pre-suit investigatory period as embodied in the sixty-day seal provision.[244] The 1986 amendments also increased the statute of limitations to permit claims within three years of when the government discovers a violation.[245] By strengthening the government's investigative tools, Congress believed it would reach fraud that typically goes undetected.[246] In passing these reforms, however, Congress also declared it would not tolerate abusive prosecution.[247] Thus, it kept the FCA's statute of limitations in place to ensure the government does not abuse its ability to maintain a complaint under seal.[248]

Baylor furthers Congress's goals of strengthening the FCA by balancing the government's enhanced ability to investigate with the need to protect defendants.[249] It compels the government to comply with the purposes of both the sixty-day seal provision and Rule 15(c)(2)'s notice requirement.[250] The *Baylor* court held that relation back is inapplicable in this context because the FCA's seal provision deprives the defendant of notice.[251] In such cases, the statute of

[243] *Id.* at 6 (noting government's inadequate investigative tools restricted successful fraud recovery).

[244] *Id.* (noting government did not file some cases because information was unavailable and government could obtain such information in pre-suit investigations); *see* 31 U.S.C. § 3730(b)(2) (2000 & Supp. V 2005).

[245] *See* S. REP. NO. 99-345, at 15 (noting three-year period was necessary to prevent evasion of liability where there is successful deception).

[246] *Id.* at 3-4 (noting government rarely catches, prosecutes and jails those committing crimes against it); *see also id.* at 4 (noting current investigative tools were inadequate).

[247] *See id.* at 21 (noting amendment to intent requirement was designed to ensure overzealous Justice Department could not prosecute mere negligence); *id.* at 24 (stating seal provision was not intended to adversely affect defendants' rights).

[248] *See id.* at 24-25 (discussing limits placed on seal provision).

[249] *See id.* (indicating 60-day seal sufficient). *See generally supra* Part III.A (discussing FCA's legislative history).

[250] *See* Defendant's Reply Memorandum at *6, United States *ex rel.* Moran v. Auto. Testing Labs., Inc., No. 1:98cv825, 2007 WL 3321700 (S.D. Ohio Feb. 28, 2007) (stating allowing relation back under Rule 15(c)(2) when relator files complaint under seal weakens FCA and Federal Rules of Civil Procedure); Brussack, *supra* note 4, at 696-97 (stating those who wait years to bring case against defendants without real excuses do not merit relation back).

[251] United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006); *see also id.* at n.10 (stating relation back under these circumstances creates danger FCA's statute of limitations may fail to serve its purpose).

limitations must continue to run.[252] Therefore, *Baylor* comports with congressional goals and protects defendants from the government's potential abuse of its prosecutorial powers.[253]

CONCLUSION

The *Baylor* court correctly held that Rule 15(c)(2)'s notice requirement is inconsistent with the FCA's seal provision.[254] *Baylor* adheres to congressional policies that seek to limit the duration of secret investigations.[255] Its decision not only serves the goals of the FCA but also bolsters protections for defendants.[256] In the end, the FCA remains a strong tool for the government in its efforts to combat fraud.[257] In determining whether to permit relation back, courts should look to *Baylor* as a guidepost in evaluating *qui tam* actions.[258] Further, Congress should give serious consideration to the goals and potential abuses of the FCA before it passes the sweeping changes included in the Corrections Act.[259]

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[252] *Id.*

[253] *See* S. REP. NO. 99-345, at 24-25 (noting seal provision not intended to adversely affect defendants' rights). *See generally supra* Part III.A (discussing FCA's legislative history).

[254] *See supra* Part III.B (discussing Rule 15(c)(2)'s notice requirement in relation to *Baylor*).

[255] *See generally supra* Parts III.A, C (discussing legislative history and policy behind FCA).

[256] *But see* Barber et al., *supra* note 15, at 144-46 (pointing out potential for seal provisions to cause due process violations which *Baylor* did not address).

[257] *See generally supra* Part III (analyzing reasons *Baylor* was correct in placing limits on government).

[258] *See* United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006) (holding statute of limitations barred government action because FCA's seal provisions are inconsistent with Rule 15(c)(2)'s notice requirement).

[259] *See generally* Peter B. Hutt II, *The False Claims Act Correction Act of 2007: The Wrong Direction*, 43 WTR PROCUREMENT LAW. 4 (2008) (discussing reasons why author believes Corrections Act takes FCA in wrong direction); *supra* notes 140-47 and accompanying text (discussing Corrections Act).