BNA's

HEALTH CARE FRAUD REPORT

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In Baylor, Second Circuit Limits Government From Keeping FCA Cases Under Seal

BY BRIAN J. MURRAY

In our legal system, statutes of limitations protect defendants from having to litigate stale claims after memories have faded and evidence has disappeared.

But what if an adversary could circumvent the statute of limitations at will, through a procedural loophole, and force you to defend against claims that are years, if not decades, old? Worse, what if the adversary were the Federal Government—and it could devote extensive resources to conducting one-way discovery against you for years, all the while tolling the statute of limitations, while you could do nothing but respond and helplessly wait to be sued?

This disturbing scenario is exactly how many federal courts have understood the Federal False Claims Act (FCA) to work.

Essentially, these courts allowed the Government unilaterally to keep FCA complaints filed by relators under seal, and shielded from public view, almost indefinitely while the Government conducted one-way discovery. Once the Government finally did decide to unseal the complaint, courts gave the Government's complaint containing the formerly under-seal FCA claims—and even brand new non-FCA claims—the benefit of the under-seal complaint's filing date for statute of limitations purposes, using the procedural device of ''relation back'' under Federal Rule of Civil Procedure 15(c)(2).

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But there is new hope. In a recent decision, *U.S. v. The Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006), the U.S. Court of Appeals for the Second Circuit broke ranks with myriad district courts to consider the issue and held that the Government may not use Rule 15(c)(2) ''relation back'' to circumvent the FCA's statute of limitations.

This article, which analyzes that decision, proceeds in three parts.

First, it sets out a general description of the FCA and how courts prior to *Baylor* understood it to work. Second, it analyzes *Baylor*, and the significant change in FCA law that *Baylor* represents. Finally, it examines some of the questions *Baylor* left open, and whether the Government could be successful in using these open issues as a toehold to undoing *Baylor*'s holding.

I. Background: The FCA Pre-*Baylor*.

The False Claims Act provides a cause of action against those who defraud the Federal Government through submission of false claims for payment. *See generally* 31 U.S.C. § 3729(a). While the United States can bring suit under the FCA in its own name, *id.* § 3730(a), the FCA also permits private persons to bring claims on behalf of the United States through the device of a *qui tam* lawsuit. (''Qui Tam'' comes from the Latin phrase ''qui tam pro domino rege quam pro seipse,'' meaning ''he who acts for the king as well as for himself.'')

The basic theory of the FCA *qui tam* action is that it encourages private individuals to ferret out fraud against the Government, and to act as ''private attorneys general'' by bringing an action seeking reimbursement for the Government. The relator also seeks a bounty for himself in the form of a percentage of the amount recovered. *Id.* § 3730(d).

FCA *qui tam* lawsuits are unusual in that the relator is required, by statute, to file claims arising under the

FCA under seal. The complaint is assigned to a judge and placed on a secret docket; only the relator and the Court have access to it. The relator then must serve the sealed complaint on the United States, which has 60 days to determine whether it will intervene and take over the lawsuit in its own name. *Id.* § 3730(b)(2).

While the complaint is under seal, the Government is supposed to investigate its merits. The Government has ample procedural devices at its disposal to do so, and, indeed, essentially mount a one-way discovery campaign without revealing the allegations of the under-seal lawsuit. *Id.* § 3733. The Government can request production of documents, answering of interrogatories, and even oral testimony. *Id.* A target defendant, meanwhile, has no matching power to demand discovery while the complaint is under seal.

Moreover, ''for good cause shown,'' the Government can extend the 60-day investigative period. Such extension requests are made *ex parte*, and a defendant has no opportunity to contest them. *Id.* § 3730(b)(3). Standard procedure is for the Government to ''request an extension of the seal for six months at a time.'' *See* www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf.

Because the FCA does not explicitly set a maximum time that the complaint can be kept under seal, such extensions could, in theory, go on indefinitely. Indeed, one Department of Justice Web site candidly admits that while ''[t]here are no statistics reported on the length of time the average qui tam case remains under seal,'' at least in the Eastern District of Pennsylvania, ''most intervened or settled cases are under seal for at least two years'' if not more. *Id.*

In practice, it seems that in a number of recent cases the under-seal period is even longer often half a decade or more. *United States v. The Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006) (Government took over eight years to intervene); *Miller v. Holzmann*, 2006 U.S. Dist. LEXIS 9165 (D.D.C. Mar. 9, 2006) (Government took nearly six years to intervene); *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006) (Government took nearly eight years to intervene); *United States v. St. Joseph's Regional Health Ctr.*, 240 F. Supp. 2d 882 (W.D. Ark. 2002) (Government took over five years to intervene).

The potential for real prejudice to an FCA defendant inherent in this scheme is self-evident. While a complaint is under seal, and the Government is making its record, a defendant can do little more than wait for the Government to make its decision whether to unseal. While a defendant might become suspicious after receiving Government discovery, and undertake efforts to preserve its own evidence, it is hard to do so without knowing exactly what the allegations of the complaint are, to which the defendant will have to respond.

As years go by, inevitably, memories of witnesses who might be key to the defense's case will cloud; some witnesses may even retire or perish. Documents and other evidence, too, can be destroyed. And that is to say nothing of potential government or third-party evidence and witnesses, from which the defendant does not have the means to compel production or testimony while the Government continues to maintain the complaint under seal. *See, e.g.*, *St. Joseph's*, 240 F. Supp. at 893 (noting that such actions by an FCA defendant to preserve evidence ''can only be taken within the context of litigation'').

Typically, statutes of limitation protect against such a dilemma, ''assur[ing] fairness to defendants'' by ''preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'' *Health Outcomes*, 409 F. Supp. 2d at 52.

The FCA has a statute of limitations. It provides that FCA claims may not be brought: ''(a) more than 6 years after the date on which [a] violation . . . is committed, or (b) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which [a] violation is committed.'' 31 U.S.C. § 3731(b).

For many years, though, federal district courts stripped this statute of limitations of its power to sort out stale claims by providing a technical loophole through Federal Rule of Civil Procedure 15(c)(2).

Rule 15(c) permits later-filed pleadings to take advantage of the filing date of earlier-filed pleadings (''relate back'') in three distinct situations. Among these, an amended complaint relates back to an earlier-filed one when ''the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'' Fed. R. Civ. P. 15(c)(2).

The theory behind this provision is that, where a complaint sets out enough information to put a defendant on notice as to what is at issue in the lawsuit, even if it does so imperfectly, a later-filed complaint that fills in details or fixes earlier mistakes ought to be permitted without depriving the plaintiff of the earlier filing date. *E.g.*, *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 86 (2d Cir. 1999) (''[T]he central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading.'')

One might wonder how this provision could apply to the FCA *qui tam* paradigm. For one thing, the Government typically proceeds in FCA cases by way of its own complaint-in-intervention, rather than by way of ''amending'' the relator's complaint as Rule 15(c)(2) envisions. For another thing, the relator's complaint is typically under seal from the time it is filed until the Government files its complaint-in-intervention, depriving the defendant of the notice so crucial to the purpose of Rule 15(c)(2) relation back.

Notwithstanding these obvious concerns, however, for many years district courts generally permitted the FCA claims in a Government's complaint-in-intervention to relate back to the originally-filed relator's complaint. *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318, 357 (D. Conn. 2004); *U.S. ex rel. Purcell v. MWI Corp.*, 254 F. Supp. 2d 69, 75 (D.D.C. 2003); *cf. U.S. ex rel. Vosika v. Starkey Labs.*, 2004 WL 2065127, *3 (D. Minn. Sept. 8, 2004); *U.S. ex rel. Costa v. Baker & Taylor, Inc.*, 1998 WL 230979, at *3 (N.D. Cal. Mar. 20, 1998); *U.S. v. Templeton*, 199 F. Supp. 179, 184 (D. Tenn. 1961).

Indeed, some courts even permitted new non-FCA counts added by the Government in its complaint, which were not and could not have been in the relator's original complaint (the *qui tam* mechanism is only authorized for FCA counts), to relate back under Rule

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15(c)(2) to claim the filing date of the relator's original complaint for statute of limitations purposes, as well. *E.g.*, *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. at 357 (''Although the Government's complaints . . . include common-law counts that were not set forth in the *qui tam* complaint,'' those counts relate back to relator's complaint) (citing *Purcell* 254 F. Supp. 2d at 75); *U.S. ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324 (M.D. Fla. 2003) (holding that Government's common law claims related back to relator's complaint); *but see United States v. Reagan*, 1999 U.S. Dist. LEXIS 22287, *4-*5 (D. Ariz. April 19, 1999) (dismissing unjust enrichment claim because claim did not relate back to relator's complaint, which only alleged FCA claims); *see also United States ex rel. Wilkins v. North American Constr. Corp.*, 2001 WL 34109383, *12-*14 (S.D. Tex. Sept. 26, 2001) (dismissing common law fraud claim because it did not relate back to the relator's complaint).

It is against this backdrop of courts generally permitting broad relation back of the Government's complaint-in-intervention to a relator's complaint that the *Baylor* court recently ruled. In light of that backdrop, the ruling is all the more remarkable.

II. *Baylor*: The Second Circuit's Holding.

United States v. The Baylor University Medical Center, 469 F.3d 263 (2d Cir. 2006) began as a *qui tam* complaint filed by a relator in the U.S. District Court for the Western District of Washington. The complaint named as defendants 132 hospitals from 30 states. Raising claims under the FCA, the complaint alleged that the defendant hospitals had defrauded the Federal Medicare Program by obtaining reimbursement for hospital services provided to patients participating in clinical trials involving investigational cardiac devices that had not received FDA pre-market approval.

According to the complaint, reimbursement for such services contravened a provision in the manuals that Medicare issued to its fiscal intermediaries. The violations were alleged to date from 1986 through 1995. Neither the original complaint, nor a later amended complaint by the relator, however, linked individual hospitals to specific fraudulent acts or alleged that the individual hospitals had conspired or collaborated in perpetrating the fraud. *Id.* at 265-66, 269.

The relator followed the procedures set forth in the FCA for pursuing his *qui tam* complaint. He first filed it under seal with the federal court in March 1994, then served a copy on the Government. The Government originally had 60 days, by statute, to investigate and determine whether to intervene while the complaint remained under seal. The Government did not make that decision within 60 days, though.

Instead, it kept the complaint under seal for an additional eight years—requesting and receiving *ex parte* extensions of the seal on sixteen different occasions to continue its investigation (and *de facto* one-way discovery of the defendants). The defendants did not, of course, participate in those proceedings. *Id.* at 266.

Beginning in June 1999, the Government—without intervening—declared that it was the real party in interest in the suit and began filing *ex parte* motions to sever and transfer cases as to particular hospitals, seeking to transfer each hospital's case to the federal district where the hospital was located. All these motions, too, were granted. At the same time, the Government negotiated settlements with various defendants and voluntarily dismissed others.

Finally, in late 2002 to early 2003—more than eight years after the original complaint was filed—the Government filed complaints-in-intervention against the remaining defendants, asserting FCA claims and also adding common law claims. On motion by the relator and the Government, the resulting cases were consolidated in an MDL in Connecticut. *Id.* at 266-67.

The defendants moved to dismiss the Government's complaints arguing, among other things, that they were untimely. The district court dismissed the Government's common-law claims as time-barred, but refused to dismiss the FCA claims. In essence, the district court ruled—consistent with the then-extant body of precedent—that, by virtue of relation back under Rule 15(c)(2), the controlling date for statute of limitations purposes was the date of the relator's original *qui tam* complaint. All FCA claims had accrued within the applicable limitations period for that original complaint. *Id.* at 267.

Amazingly, on appeal, the Second Circuit went even further. Breaking with the overwhelming weight of authority, it held that all of the Government's claims—FCA and non-FCA alike—were untimely and should have been dismissed because they did not relate back to the relator's complaint under Rule 15(c)(2).

First, the Court analyzed the FCA's six-year statute of limitations, and three-year tolling provision extending from ''the date when facts material to the right of action are known or reasonably should have been known'' by the Government. 31 U.S.C. § 3731(b). The Court reasoned that the Government's complaints-in-intervention alleged wrongdoing only between 1986 and 1995, so that the six year statute of limitations had expired for all claims by 2002, when the complaints-in-intervention were filed.

Nor, the Court held, could the three-year tolling provision save the claims; assuming that the allegations in the relator's complaint sufficiently pled ''facts material to the right[s] of action''—such that the Government should have known of such facts based on the complaint—the three-year toll under § 3731(b)(2) expired in 1997.

The Court therefore concluded that ''[a]ll the claims . . . succumb to the statute of limitations, unless the Government's filing relates back to the filing of [the relator's original] complaint under [Rule 15(c)(2)].'' *Id.* at 267-68.

Second, the Court held that, notwithstanding the significant contrary authority from the federal district courts, relation back under Rule 15(c)(2) could not be permitted: ''We . . . hold that—in light of the scheme created by 31 U.S.C. § 3730(b)—Rule 15(c)(2) does not allow complaints-in-intervention filed by the government to relate back to a relator's *qui tam* complaint.'' *Id.* at 269. The Court noted that the FCA, with its *qui tam* provisions, is ''distinctive for the secrecy that it affords the relator's . . . complaint.'' *Id.* The complaint is hidden from public view, allowing the Government to investigate and conduct discovery until unsealing.

This secrecy, the Court explained, ''is incompatible with Rule 15(c)(2), because (as it is well-settled) the touchstone for relation back pursuant to Rule 15(c)(2) is notice, *i.e.*, whether the original pleading gave a party adequate notice of the conduct, transaction, or occur-

rence that forms the basis of the claim or defense.'' *Id.* at 270 (citation and internal quotation marks omitted).

''By design,'' the seal provision of § 3730(b) ''deprives the defendant in an FCA suit of the notice usually given by a complaint.'' *Id.* Accordingly, ''[b]ecause any relation back of subsequent filings to the original complaint is incompatible with the core requirement of notice under Rule 15(c)(2),'' the Court held that ''continued running of the statute of limitations is warranted.'' *Id.*

The Second Circuit therefore affirmed in part and reversed in part the judgment of the district court, and remanded with instructions to dismiss all of the Government's claims. *Id.*

III. *Baylor*'s Impact, Unanswered Questions.

Clearly, *Baylor* represents a sea change in how courts think about Rule 15(c)(2) relation back in FCA cases. Until *Baylor*, the federal district courts were monolithic in holding that such relation back should be permitted. In *Baylor*, the appellate court concluded otherwise.

If followed outside the Second Circuit, *Baylor* thus has the potential to limit dramatically the Government's ability to make its record through discovery of its FCA claims while depriving FCA defendants of the ability to do the same by maintaining complaints under seal, through *ex parte* motion practice, indefinitely.

Even though *Baylor* answers with a resounding ''no,'' the question of whether Rule 15(c)(2) relation back could be permitted in an FCA lawsuit, the decision also leaves unanswered various questions that potentially could undermine the import of its holding for FCA defendants. While it is unclear how courts following *Baylor* will work out these details, a few important issues left on the table are among those described below.

A. Could FCA Permit Relation Back?

To begin with, while the mine run of FCA relation back cases deal with Rule 15(c)(2), there is one other at least arguable basis for allowing a Government complaint-in-intervention to relate back to a relator's original complaint set out in Rule 15: specifically, Rule 15(c)(1). *See One Beacon Ins. Co. v. Electrolux*, 223 F.R.D. 21, 24 (D. Mass. 2004) (noting that ''Subsection (c)(1) is phrased in the disjunctive'' to subsection (c)(2)) (citations omitted).

Rule 15(c)(1) provides that a later amended pleading may relate back to an original pleading when ''relation back is permitted by the law that provides the statute of limitations applicable to the action . . . .'' Interestingly, none of the parties before the Court in *Baylor* raised this argument, and the court ''exercised its discretion not to'' consider it. 369 F.3d at 270.

This argument—which even the *Baylor* court described as merely ''colorable,'' *id.*—does not seem likely to provide the Government relief from the *Baylor* decision.

The plain text of Rule 15(c)(1) makes clear that, for it to apply, relation back must be permitted ''by the law that provides the statute of limitations'' for FCA claims. While there is a three-year tolling provision for FCA claims based on what the government knows, and when, there is nothing in the FCA's statute of limitations provision—or anywhere else in the FCA, for that matter—that explicitly provides for relation back. Indeed, the Second Circuit recognized as much. *Id.* at 270 (describing the 15(c)(1) argument as whether the FCA ''implicitly 'permit[s]' a form of relation back'').

Three district courts that have considered the question agree. *See U.S. ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 14 n.7 (D.D.C. 2003) (noting that Rule 15(c)(1) has ''no application'' to FCA claims; ''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.''); *U.S. ex rel. Koch v. Koch Industries, Inc.*, 188 F.R.D. 617, 627 (N.D. Okla. 1999) (''The law that provides the statute of limitations applicable to this action is the FCA's statute of limitations at 31 U.S.C. § 3731(b). Section 3731(b) contains no provisions dealing with the relation back of amendments to complaints stating qui tam claims. Thus, Rule 15(c)(1) is not applicable to this case.''); *U.S. ex rel. Colunga v. Hercules Inc.*, 1998 WL 310481, *2 (D. Utah 1998).

The Government, therefore, would have to argue that the FCA implicitly allows relation back, bringing Rule 15(c)(1) into play. That seems doubtful. To begin with, Rule 15(c)(1) was not designed to deal with ''implicit'' relation back in federal statutes, whatever that means. To the contrary, Rule 15(c)(1), added in 1991, was designed primarily to help parties invoking the federal courts' diversity jurisdiction, who would be entitled to greater relation back under the state law involved in the case than they would under Rule 15(c)(2): ''As explained in Wright and Miller, Rule 15(c) was amended [by adding Rule 15(c)(1)] 'to clarify that relation back may be permitted even if it does not meet the standards of the federal rule if it would be permitted under the applicable limitations law.' '' *Electrolux*, 223 F.R.D. at 24 (citations omitted); *see* Rule 15, Advisory Committee Note 1991 Amendment (''This provision is new. It is intended to make it clear that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law.''); *id.* (noting that ''[g]enerally, the applicable limitations law will be state law''); *Estate of Butler ex rel. Butler v. Maharishi University of Management*, 460 F. Supp. 2d 1030, 1040 (S.D. Iowa 2006) (''Rule 15(c)(1) allows federal courts sitting in diversity to apply relation-back rules of state law where, as here, state law provides the statute of limitations for the action.'') (collecting cases). Accordingly, where ''there is no applicable state law, such as in federal question cases wherein federal law supplies the relevant statute of limitations,'' it makes sense that Rule 15(c)(1) does not apply. *Id.*

Even taken on its own terms, though, the notion that the FCA provides for ''implicit'' relation back seems dubious. Any such implication would have to come from the bare fact that the FCA contains a statutory seal period, and a right of Government intervention in the under-seal complaint. The mere existence of the under-seal provision in the FCA, however, does not support an inference of relation back.

To the contrary, Congress recognized that the 60-day seal period ordinarily should furnish the Government sufficient time to evaluate a case: ''Keeping the *qui tam* complaint under seal for the initial sixty day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit . . . .'' S. Rep. 99-345 (1986), *reprinted in* 1986 U.S.S-.C.A.N. 5266, at 5289.

Indeed, Congress observed that ''the initial 60-day sealing of the allegations'' should have ''the same effect as if the *qui tam* relator had brought his information to the Government and notified the Government of his in-

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tent to sue.'' *Id.* Any extensions of the seal, Congress cautioned, should be ''carefully scrutinized'' to avoid any ''unnecessary delay'' in unsealing. *Id.* After all, as Congress made clear, ''[b]y providing for sealed complaints,'' it ''d[id] not intend to affect defendants' rights in any way.'' *Id.*

Moreover, beyond the under-seal provision, the FCA already provides the above-described three-year tolling provision based on what the Government knew or should have known about claims in suit. 31 U.S.C. § 3731(b)(2). That provision was added in 1986, at the same time Congress amended the FCA's *qui tam* provisions. *See* S. Rep. 99-345 (1986), *reprinted in* 1986 U.S.S.C.A.N. 5266, at 5288-89.

Had Congress wanted, in addition to the tolling provision, to provide the Government further time to investigate FCA claims while keeping relators' complaints under seal, it could have done so by explicitly providing for relation back in addition to tolling. It did not do so. To infer that it did would be inferring a right of the Government to keep complaints under seal indefinitely, pursue one-way discovery against the FCA defendant involved, and perhaps even continue to accumulate further ''false claims'' violations, all the while keeping the grounds of the complaint entirely hidden from the defendant—a result only possible because of the FCA's seal provision.

That plainly is not what Congress envisioned when, in amending the FCA seal provisions, it avowed not ''to affect defendants' rights in any way.''

B. What Kinds of Claims Can Be Saved?

Even if a court were to rule that a Government complaint-in-intervention could relate back to a relator's *qui tam* complaint under Rule 15(c)(1)—unlikely though that seems—it is not clear that such a holding would save all Government complaints, or even all Government claims.

First, as the *Baylor* court itself pointed out, even under Rule 15(c)(1) a Government complaint-in-intervention cannot relate back to a relator's complaint which, as ''drafted and filed, could [not] serve as a sufficient placeholder to achieve relation back . . . .'' 469 F.3d at 270.

Citing the Eighth Circuit's decision in *Biby v. Kansas City Life Ins. Co.*, 629 F.2d 1289, 1294 (8th Cir. 1980), the *Baylor* Court noted that ''a complaint that is egregiously defective does not commence an action for statute of limitations purposes.'' *Id.* at 270 n.10.

The Court continued:

> If grossly insufficient complaints are deemed sufficient to support relation-back for a complaint-in-intervention filed by the government, and if the government's ''good cause'' for delay is its need to get done what would have been done if the relator's complaint had been minimally sufficient, the FCA's statute of limitations may fail to serve its purpose. This case illustrates that risk: The original and amended complaints joined the 132 defendant hospitals in a single complaint that alleged a single, omnibus cause of action encompassing tens of thousands of alleged FCA violations; no allegation was made that the hospitals collaborated or conspired; no particular fraudulent transactions were ascribed to any of the 132 individual hospitals; of those hospitals, just two were located in the Western District of Washington, where the complaints were filed.

Id.

Thus, the *Baylor* court concluded that even if the FCA did admit of Rule 15(c)(1) relation back, ''it is not at all clear that [the relator's] *qui tam* complaint would be sufficient to commence the action for statute-of-limitations purposes.'' *Id.*

Second, and relatedly, it seems that a Government complaint in-intervention could not relate back to a relator's complaint if the relator's was not the first complaint filed on the FCA allegations it contains. It is possible to imagine the same relator filing multiple complaints in various jurisdictions, and perhaps even amending those complaints over time, resulting in substantial overlap—or even multiple relators filing multiple complaints in multiple jurisdictions resulting in such overlap.

But the FCA is clear that ''[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.'' 31 U.S.C. § 3730(b)(5). Accordingly, only the first complaint alleging a given set of facts and FCA violations can be valid. *Cf. U.S. ex rel. St. Lacorte v. SmithKline Beecham Clinical Lab., Inc.*, 1999 WL 639683, *8 (E.D. La. Aug. 19, 1999) (noting that § 3730(b)(5) ''prevent[s] a relator . . . from filing claims that are the subject of existing suits''). And under the rationale of *Baylor*, there can be no relation back to an invalid complaint. *Cf.* 469 F.3d at 270 & n.10.

Finally, as set out above, even under Rule 15(c)(2), some courts did not permit non-FCA claims added by the Government to its complaint-in-intervention—such as common law fraud or unjust enrichment claims—to relate back to the relator's complaint.

The case for non-FCA claims to relate back to an under-seal *qui tam* complaint under Rule 15(c)(1) is even weaker. Again, Rule 15(c)(1) allows relation back only where ''relation back is permitted by the law that provides the statute of limitations applicable to the action . . . .'' Even if a court were to hold that the FCA's under-seal provisions implicitly permit such relation back for FCA, they could not permit it for non-FCA claims, because such claims by definition are not included in the under-seal complaint. Nor could they be, as there is no *qui tam* mechanism for such claims.

IV. Conclusion.

It is difficult to overstate the potential importance of the Second Circuit's *Baylor* decision. If widely followed, it has the potential to restore fairness to FCA actions by forcing the Government—as with any other litigant—to pursue its claims promptly or lose them to the FCA's statute of limitations.

The decision is all the more remarkable for the clean break it made with overwhelming contrary prior precedent, which permitted Rule 15(c)(2) relation back without serious question.

To be sure, the Government might try to use questions *Baylor* left open to regain some of its former advantage; specifically, by arguing that relation back is proper under Rule 15(c)(1), but that argument seems destined to fail.

Even if it did (somehow) succeed, Rule 15(c)(1) still would make it significantly harder for the Government to keep under-seal cases alive indefinitely than it was under the former Rule 15(c)(2) regime.