

No. 42933-1-II  
COURT OF APPEALS, DIV. II  
OF THE STATE OF WASHINGTON

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In re the Estate of MARK EUGENE DUXBURY,  
Deceased.

SOJOURNER T. DUXBURY, Petitioner,  
and  
CHINYELU DUXBURY, Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY   
DEPUTY

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APPELLEE 'S OPENING BRIEF

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## **INTRODUCTION**

When does a relator in a Federal Claims Act case have a property interest in the claim they are alleging? Does the relator have a property interest as soon as the potential qui tam plaintiff becomes aware of fraud, or does the property interest of the claim begin when the qui tam plaintiff makes the government aware of the possible fraud by filing the complaint and supporting evidence with the federal government? That is the central question of this case.

## **STATEMENT OF THE CASE**

Mark Duxbury and Chinyelu Duxbury D.O. were married in February 2001. (CP) 1 On November 6, 2003, Mark Duxbury filed a complaint in the District Court for the District of Massachusetts. The Duxbury complaint alleges that Johnson & Johnson's Ortho Biotech Products unit paid kickbacks which led to inflated reimbursements under

the federal Medicare program for the elderly and disabled. The kickbacks, rebates, free samples, consulting fees, educational grants, payments to participate in studies, were allegedly given to doctors and hospitals to induce them to prescribe Procrit. (CP) 2

The drug was promoted as a cure for chemotherapy related fatigue and for anemia in kidney dialysis patients.

In 1992 Mark Duxbury became a Procrit sales representative for J&J's biotech division, Ortho. By 1993, he was a company award winner for sales in the drug.

He was fired in 1998. Mark Duxbury learned of the kickback scheme and off-label use while working for Ortho Biotech. Before Mr. Duxbury filed his claim another complaint was filed by different relators alleging that Ortho Biotech engaged in a kickback scheme. Their claim was filed in September 2002. The fraud had already been publicly disclosed in 2002 before Mark Duxbury filed his claim.

Although Mr. Duxbury was not the first to file his claim, the Court did not dismiss his claim because the court held he fell within the original source exception of the Federal Claims Act. Mark Duxbury did not

challenge the federal District Court holding that his claim was based on the allegations made public in September 2002 by the previous claim.

The false Claims act was designed to combat fraud. Because the government often lacks the resources or access to information necessary to prosecute sophisticated and widespread fraud, the FCA allows private enforcement suits on behalf of the federal government to supplement governmental enforcement. These are qui tam claims. The purpose of the qui tam provisions is provide information of fraud to the United States government.

The Federal Claims Act requires the relator to file his action under seal, during which time the United States may investigate and evaluate the allegations and determine to intervene in the action. On July 12, 2005, The United States gave notice of its declination to intervene and the court ordered Mark Duxbury to serve defendant Ortho Biotech.

Mark Duxbury was supported by his wife, Dr. Chinyelu Duxbury. Mark Duxbury was able to pursue the claim because he could rely on Dr. Duxbury's support. The Duxbury qui tam suit against Ortho Biotech is ongoing. (CP) at 2, 7 Mark Duxbury died intestate in October 2009. His wife is the personal representative of the estate. Mark Duxbury has a

child from a prior marriage, Sojourner Truth Duxbury. (CP) at 1

Chinyelu Duxbury 's declaration to the trial court states, “without my support, and my financial support, Mark Duxbury would not have been able to engage in this legal crusade. “ (CP) 81

#### Issues

# 1 Is the FCA cause of action community property because provided information about the Fraud to the Federal Government during his marriage, and the Complaint with supporting Evidence were filed during Mark Duxbury's marriage to Chinyely Duxbury ?

Issue # 2 Was Mark Duxbury's Federal Claims Act claim Community Property, if Community resources were instrumental in filing the claim?

### **ARGUMENT**

1. The qui tam claim becomes a property interest to the marital community when they delivered a copy of the complaint and supporting evidence to the government.

S. T. Duxbury, gives three reasons why the potential qui tam plaintiff acquires the claim as a property interest once he or she becomes aware of

the fraud. The first is that since the statute of limitations begins when the qui tam plaintiff learns of the fraud, the relator has a property interest at that time. However the beginning of the statute of limitation and the time a property interest is created for the relator are different because the relator is not the injured party. The relator is suing on behalf of the federal government.

The second argument is that since the relator could sign away the right to pursue a qui tam claim in an employment release, the relator has a property interest at the time of signing the release. The third argument is related ; since the relator must list the potential qui tam claim on a bankruptcy petition, it follows that the relator has a property interest at the time they file the bankruptcy petition. Both are these argument do not recognize that employment releases and petitions in bankruptcy refer to contingent property interests as well as actual property interests.

When is the property interest in the Federal Claims Act , qui tam claim for the relator created? The statute says a claim is initiated by filing the action. In this case, the action was filed with the federal government after the marriage of Mark Duxbury and Dr. Chinyelu Duxbury. The FCA statute says that a relator initiates the FCA action, by delivering a copy of the complaint, and any supporting evidence, to the Government, §3730(b)

which then has 60 days to intervene in the action, §§3730(b)(2), (4). This action alerts the government to the fraud and creates a claim for the qui tam plaintiff. The purpose of the Federal Claims Act is to alert the government of fraud.

The United States Supreme Court held that a claim is initiated by filing with the government. The court quoting the statute found that a claim is initiated when the relator makes the §3730(b) filing. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770–73 (2000). If the claim is initiated by filing, then before the filing the claim has not been initiated. That means the qui tam plaintiff's claim does not exist in relationship to the Federal Claims Act prior to the filing required by the statute.

That action of bringing the information to the government creates the relationship between the relator and the government whereby the government assigns part of the claim to the relator.

The Ninth Circuit court described the relationship between the relator and the government as an “enforceable unilateral contract, the terms and conditions of the contract are accepted by the relator upon filing suit.” *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir.1993) The Court held an individual has standing to sue because the government assigns the

government's claim to the relator who can then sue on behalf of the federal government. The assignment takes place and the contract is created when the relator makes the 3730(b)(2) filing. The United States Court of Appeals for the Ninth Circuit held, “ that the FCA effectively assigns the government's claims to qui tam plaintiffs such as Kelly, who then may sue based upon an injury to the federal treasury. Under this theory of standing, the FCA's qui tam provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit. If the government declines to prosecute the alleged wrongdoer, the qui tam plaintiff effectively stands in the shoes of the government.” U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir.1993) The trial court relied on the unilateral contract assignment theory. The Honorable Bryan E. Chushcoff said, “ the whole point of the Qui Tam statutes is to get somebody to actually take the step of going forward to file a lawsuit. That's a big deal.”(RP) 5 ( Page 5 In re the estate of Mark Eugene Duxbury-Court's Decision) The relator has not accepted the terms of the unilateral contract until they come forward.

Before the creation of the contract between the relator and the government, the relator does not have a right to the qui tam award. Since the claim is assigned by the contract, before the assignment there is no

contract and no rights exist that are created by the contract.

The potential claim is actualized by the creation of the contract.

This analysis supports the rationale of the qui tam provisions in the Federal Claims Act. The purpose is to reveal fraud to the Federal government. Information about fraud that exists in the mind of a person who may report it has no value to the federal government. Concealed information of fraud does not protect the Federal treasury.

S.T. Duxbury, the daughter, argues that the claims accrues once the relator has the right to sue. The relator cannot file a lawsuit until the relator provides information about the fraud to the government. “The plain language of the FCA only requires the relator to provide his information to the government prior to filing his action.” U.S. ex rel. Duxbury v. Ortho Biotech Products, 551 F. Supp.2d 100 (D.Mass. 2008). (CP) 8 If Mark Duxbury had not provided information regarding the fraud to the federal government before filing the lawsuit his claim would have been dismissed by The United States Court of Appeals for the 1<sup>st</sup> Circuit. His claim was not dismissed based on the first to file rule, because he complied with the statute by providing information to the government prior to filing his suit.

The significance of that holding to this case is that the court says Mark

Duxbury did not have the right to file a lawsuit until he provided information to the federal government. Mr. Duxbury provided information to the government during his marriage. Therefore, he acquired the right to file a lawsuit while he married Dr. Chinyelu Duxbury. If the claim accrues when the relator has the right to file a lawsuit, then the claim accrued during the marriage, because Mark Duxbury acquired the right to sue during the marriage.

Mark Duxbury is not the injured party in the qui tam claim. His right to sue comes from the federal government. The government is the injured party and it assigns its interest when the contract is created. The contract is created by filing the lawsuit and the supporting evidence with the federal government. The court says, “ we are unconcerned that the assignment of the government's claim is contingent on a qui tam plaintiff filing suit, that the qui tam plaintiff is only assigned part of the government's claim, and that the government retains the right to intervene.” U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir.1993) If the relator does not file the claim with the federal government, there is no assignment of the government's claim.

The court says the basis of the the relator's personal stake in the claim derives from three factors: (1) the qui tam plaintiff must fund the

prosecution of the FCA suit; (2) the qui tam plaintiff receives a sizable bounty if he prevails in the action; and (3) the qui tam plaintiff may be liable for costs if the suit is frivolous. Kreindler & Kreindler, 985 F.2d at 1154. (quoted in Kelly).

The relator's stake in the lawsuit is a result of filing. In this case, the marital community funded the prosecution of this qui tam claim. The community will receive a bounty if the action prevails. Since the action was filed during the marriage, the community will be liable if the suit is found to be frivolous. The relator has no personal stake in the claim until the claim is filed with the federal government.

The United States Supreme Court has embraced the Ninth Circuit assignment theory. "The federal claims act can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770–73 (2000).

The relator has no right to sue until the partial assignment takes place. The Supreme Court says that the relator is not suing based on an injury suffered by the relator.

Justice Scalia noted that "[a] *qui tam* relator has suffered no such

invasion [of a concrete private interest]—indeed, the ‘right’ he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails.” *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770–73 (2000).

In footnote 3 Justice Scalia writing for the majority writes, “Blackstone noted, with regard to English *qui tam* actions, that “no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after action brought,” and that the bounty constituted an “inchoate imperfect degree of property ... [which] is not consummated till judgment.” 2 W. Blackstone, *Commentaries* \*437. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770–73 (2000).

A. The Qui tam claim does become a property interest when the Statute of limitations for the relator starts.

S.T. Duxbury, the daughter of Mark Duxbury, argues there is an actual claim and the right to sue created as soon as the relator has the material facts underlying the claim. They argue knowledge creates the property interest. Knowledge gives the potential *qui tam* plaintiff a right to the *qui tam* award.

They support this argument with case law that says the statute of limitations of the qui tam claim begins once the relator knows the material facts that support the claim. However, court does not say property rights are created by this knowledge. The court does not says the claim accrues as soon as the relators possesses the material knowledge that is the basis for the claim. U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, (9th Cir.1996). The time the claim accrues and the time the property interest is created for the relator are different.

S.T. Duxbury assumes the relator has a property interest in the claim as soon as the statute of limitations starts. The trial court rightly distinguishes this case, based on a federal statute from a personal injury case. In a personal injury case the statute of limitations inception and the time the claim accrues are the same because the injured party is aware of the claim at that time. There is no assignment of the claim. The injured party is no assigning an agent to sue on its behalf. There is no contract between the injured party and the party relating knowledge of the the injury, that allows the relating party to sue on behalf of the injured party.

In this case, based on a federal statute the person cannot sue as soon as they learn of the injury. Before they can sue, they must bring their information to the federal government, the injured party. They can only

sue, after they have complied with the terms of the statute because the relator is suing based on an injury to the federal government. The 9<sup>th</sup> Circuit noted in *Schimmels* that “the relators’ right to recovery under the FCA exists solely as a mechanism for deterring fraud and returning funds to the federal treasury; therefore, the rights of recovery created by the *qui tam* provisions of the FCA exist to compensate the government, not the relators.” *In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997).

The Hyatt court does not hold that the relator has a property interest in the claim as soon as they are aware of the fraud. The Court ties the statute of limitations to the relators knowledge rather than the time the relator made the government aware of the fraud to make the statute of limitations period shorter for the relator. If the statute of limitations were based on when the relator made the government aware of the fraud, the relator could wait up to ten years to report the fraud. The Court wants to encourage relators to report sooner.

“Granting *qui tam* relators the power to wait nearly ten years to sue would allow fraud to continue and losses to mount. Furthermore, allowing a *qui tam* plaintiff to wait ten years might interfere with law enforcement: false claims are subject to criminal prosecution only within five years after the wrongful act is committed. 18 U.S.C. §§ 287, 3282 (1986). If relators

wait over five years to report the fraud, the government will lose the right to seek a criminal penalty.” U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1216 (9th Cir.1996).

The Ninth Circuit in both the Kelly and Hyatt decisions encourage relators to reveal fraud as soon as they are aware of it.

The Federal government cannot assign a claim they are unaware of. It does not make sense to say the government assigned a claim before they knew they were injured. That is why the statute requires relators to provide information to the government of the claim before the relator can file a lawsuit.

No Federal court has said possession of information creates a property interest for a relator in a qui tam case. No court interpreting the Federal Claims Act has said a claim becomes a property interest at the time the Statute of limitations for the relator begins.

The reason the claim is initiated by delivering the complaint and the supporting evidence to the government is because the purpose of the FCA is to reveal fraud. Revealing the fraud to the government triggers the statute. Possession of information of fraud that is not revealed to the government does not further the end of preventing fraud.

B. Even if Mark Duxbury could have signed away his qui tam claim with

an employer release, that does not mean he had a actual property interest in the claim at the time of signing

S.T. Duxbury, the daughter, next argues that because some courts have dismissed qui tam claims and upheld releases signed by relators with their employer's before filing those claims, the relators had a property interest in the qui tam claim at the time they signed the release. However, general releases often include interests other than actual property interests. Releases usually refer to possible or contingent interests in addition to actual property interests. In the case S.T. Duxbury cites to support her proposition, the court wrestles with the inchoate, indefinite interest that is signed away in a release. The Radcliffe court says in footnote 8 of its decision, "This is not to say that Radcliffe possessed an indefinite, indefeasible claim. For example, another relator alleging the same fraudulent conduct could have preempted Radcliffe's suit or Radcliffe could have let the statute of limitations expire. *See* 31 U.S.C. § 3730(b)(5) (barring a relator from bringing "a related action based on the facts underlying [a] pending action"). The Release, of course, did not prohibit the government or another relator from pursuing similar claims against Purdue. *U.S. ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319, 329

(4th Cir. 2010). The court says the interest the relator had before filing the claim is contingent. If the claim is not, “indefeasible,” that means it is a defeasible claim.

The Ninth Circuit reasoned that the existence of the claim was contingent on filing. This case does not contradict the Ninth circuit holding or the holding of the United States Supreme Court. Before filing the relator has a contingent interest. The existence of the claim is contingent on filing.

S.T. Duxbury's argument is also flawed because in most cases employment releases will not bar a qui tam claim. A general release will only bar a qui tam claim if the government had already learned of and investigated the the allegations at the time the release was signed. U.S. ex rel. Green v. Northrop Corp., 59 3d 953 (9th Cir. 1995), cert. den. 518 U.S. 1018 (1996)

S.T. Duxbury says if Mark Duxbury had signed a release he could not bring a qui tam claim. This is not true unless the release was signed after the filing of the first set of relators in the Ortho Biotech case. If the government had knowledge of the claim, and if the government had been

given the opportunity to investigate the claim, only then could it be barred by an employment release.

The United States Supreme court held that releases, when entered into without the United States' knowledge or consent, and prior to the filing of an action based on that claim are not enforceable. U.S. ex rel. Green v. Northrop Corp., 59 3d 953 (9th Cir. 1995), cert. den. 518 U.S. 1018 (1996). The Supreme Court relies on Town of Newton v. Rumery, 480 U.S. 386 (1987): A promise [will be found] unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement. (480 U.S. At 392.) The Court concluded, “[e]nforcing the release at issue in this case would impair a substantial public interest. Specifically, we find that enforcing the Release would threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986.” (Id. At 963).

C. The Fact the Mark Duxbury would have had to list a potential qui tam claim on a bankruptcy petition does not give him an actual property interest in the claim

The next reason S.T. Duxbury proposes to support the claim that Mark

Duxbury had a property interest in the qui tam before providing the federal government with information regarding the fraud is that if Mark Duxbury had filed bankruptcy, bankruptcy law requires him to list the qui tam claim on his bankruptcy petition. However, a bankruptcy petition must include more than actual property interests. A bankruptcy petition must contain, possible claims, contingent claims, claims that may never come into existence. The case the appellant cites says “ The Bankruptcy estate includes as property interests that are “conditional, speculative, future and equitable.” U.S. ex rel. Gebert v. Transp. Admin. Services, 260 F.3d 909 (8th Cir. 2001)

The fact that a thing must be included in a bankruptcy petition does not prove that thing is actual property. Bankruptcy petitions include contingent interests, just as general employment releases do. This fact does not conflict with the Ninth circuit holding that the claim is contingent on filing. Mark Duxbury had a possible claim or a contingent claim before the marriage, but he acquired an actual property claim during the marriage. The fact of a contingent claim or speculative claim before marriage does not dispute Dr. Duxbury's proposition that the qui tam claim became an actual divisible property interest during the marriage.

The claim in this case, was created during the marriage, with the support of the marital community. A speculative claim is not an actual claim. Bankruptcy involves considerations not present in other types of cases. The Gebert court articulated the idea that the bankruptcy case involved concerns unique to bankruptcy. U.S. ex rel. Gebert v. Transp. Admin. Services, 260 F.3d 909 (8th Cir. 2001). The bankruptcy estate is very inclusive because the bankruptcy trustee wants debtors to be forthright about their assets.

All three of S.T Duxbury's arguments assume that once Mark Duxbury had information regarding the fraud, he could have sued Ortho Biotech. This is not true. Mark Duxbury filed his claim in 2003, after the fraud had been public by another case. Mr. Duxbury did not deny that he relied on the claims in the previous cases, in addition the the information he acquired while working for Ortho Biotech in filing his claim. If Mark Duxbury relied on the claims of other relators, who disclosed their information in 2002, before he filed his claim in 2003, it follows that he could not have filed his claim before 2002. The First circuit appellate court found he relied on claims disclosed by others in 2002. However, the court also held that he had independent knowledge of the claims based on

his employment. His claim survived the first to file jurisdiction bar because the First Circuit court held he fell within the original source exception : he had direct and independent knowledge of the fraud and he provided the information to the government before filing an action.

Based on the undisputed facts, Mark Duxbury could not have served a lawsuit on the defendants in the Duxbury qui tam lawsuit before September 2002. He could not serve a lawsuit on Ortho Biotech before he provided information to the government. Mark Duxbury could not have served the lawsuit on Ortho biotech before the marriage.

Another fact supporting the idea that Mark Duxbury could not have filed the lawsuit 2003 is that his claim was almost dismissed for failing to comply with Rule 9(b). The federal district court dismissed his claim for failure to plead fraud with particularity. The First circuit applied a relaxed standard, reinstated his claims, but said it was a close call. U.S. ex rel. Duxbury v. Ortho Biotech Products, 579 F.3d 13 (1st Cir. 2009) The relevance to this case is the fact the claim was almost dismissed means the filing is more difficult than most civil filings. Effort is required to marshall the evidence of fraud.

2. The Marital Community was instrumental in making the filing of the claim possible.

S. T. Duxbury argues since he had material facts to support the claim in 1998, he had everything he needed at that time. He could have filed the claim then. The community did not contribute to the filing of the claim. This argument contradicts the only direct evidence presented to the trial court-the declaration of Dr. Duxbury. She supported Mark Duxbury while he was unemployed. She helped him with the claim. The community bore the expense of the gathering the documentation to support the claim, finding appropriate counsel, and assumed the risk if the claim were found to be frivolous.

**REQUEST FOR ATTORNEY FEES**

A plain reading of the statute requires the relator to inform the government before the relator has a right to sue. Mark Duxbury acquired the right to sue by providing information regarding the fraud to the government. The right to sue was created after the marriage of Mark Duxbury and Dr. Chinyelu Duxbury. S.T. Duxbury argues for attorney's fees based on overwhelming case law support. Even though this is a case

of first impression in the state of Washington and involves complex legal questions, the respondents make the same request.

## **CONCLUSION**

The Superior Court was correct in holding that the Federal Claims Act is a unilateral contract the terms of which are accepted by filing. Because the filing occurred during the marriage, an award would be community property .

The trial judge, used an analogy that brilliantly describes the case. “ I will offer you \$1,000.00 to climb the space needle. If you don't do it until after you are married, now when I pay you \$1,000.00 it's community property.” (RP) 6 The government is offering the qui tam award in exchange for information regarding the fraud. It is not enough to know about it. The relator has to bring the information to the government. Once the relator brings the information to the government, the contract is formed. If that contract is formed during the marriage, the award is community property. The determination of the characterization of marital property is based on when the contract is formed, not when the offer is made.

Because Mark Duxbury was supported by his wife, Dr. Chinyelu Duxbury, he was able to pursue the claim against OBP. Mark Duxbury had information regarding the fraud before the marriage, but there is a difference between having information and having the ability to file a qui tam claim. The claim is a community effort and the Superior court rightly held that it is community property.

Respectfully submitted this 7<sup>th</sup> day of June, 2012

A handwritten signature in black ink, appearing to read 'Hari Alipuria', is written over a horizontal line. The signature is cursive and somewhat stylized.

Hari Alipuria, Attorney for Appellee

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