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GUEST COLUMN

9th Circuit rejects broad public disclosure bar in whistleblower cases

The 9th Circuit clarifies that prior media reports and earlier lawsuits won't automatically block whistleblower claims unless they reveal the same critical facts firsthand.

By Stephen D. Kaus

What lawyer, or prospective lawyer, has not dreamed for at least a moment of the riches to be earned by representing a whistleblower under the federal False Claims Act (FCA), 31 U.S.C. § 3729. In September, the 9th Circuit Court of Appeals, consistently with other courts, confirmed that the road to a substantial recovery for an FCA or qui tam action is less rocky than one might think.

The Biotronik case

Even when there has been an article in the *New York Times* describing fraudulent conduct and two prior cases brought under the same statutes, there still can be a valid claim if you present "genuinely new and material information."

United States ex rel. Sam Jones Company, LLC v. Biotronik, Inc. (Biotronik) (9th Cir. Sept. 10, 2025) ___ F.4th ___; 2025 WL 2609850, concerns a medical implant device manufacturer, Biotronik Inc., that apparently gained market share by questionable actions such as giving doctors kickbacks in various forms or by employing doctors' family members as commissioned sales representatives.

Applicable laws: Stark Law and Anti-Kickback Statute

This could be illegal if the medical procedure is billed to Medicare or Medicaid. The Stark Law, 42 U.S.C. § 1395nn, prohibits Medicare or Medicaid claims where a referring doctor or an immediate family member has a financial relationship with the provider. The Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), prohibits payoffs to induce business payable by Medicare or Medicaid.

The whistleblowers step forward

Even after a *New York Times* article generally described Biotronik's problematic practices and two previous qui tam suits had been filed, former Biotronik sales representatives Leo Williams and Mark O'Connor filed a qui tam suit claiming that the company built its business by employing surgeons' family members as commissioned sales representatives in violation of the Stark Law and the Anti-Kickback Statute.

As an example of a "nationwide scheme," Williams and O'Connor, through a company they formed called Sam Jones Company LLC, claimed that they had firsthand knowledge that Biotronik employed the brother of an implant surgeon at Cedars-Sinai Medical Center in Los Angeles as a sales representative. The result was that the surgeon, who had implanted no Biotronik devices in 2008 and one in 2009, implanted at least 692 Biotronik devices from 2013 through 2018 while his brother, the Biotronik sales representative, made millions of dollars.

When the brother left Biotronik for competitor Medtronic, the surgeon switched 100% to implanting Medtronic devices. Because the Medicare and Medicaid claims made by Cedars-Sinai and the surgeon required certification of compliance with the Stark Law and the Anti-Kickback statute, Williams and O'Connor sued for false claims under the FCA.

Overview of the FCA

The FCA, or qui tam law, allows a whistleblower, called a "relator," to sue on behalf of the federal government if they are aware of a false claim that has been presented to the federal government. Qui tam is the abbreviation of the Latin phrase describing a person suing on behalf of both the king and themselves. There are other federal as well as state and local qui tam statutes, but the FCA is the granddaddy of them all.

Procedures and incentives for relators

The procedure is that the relator files the suit under seal and gives the federal government a chance to intervene and take over. Where, as was the case in Biotronik, the government declines to intervene, the relator (and their attorney) can continue in the name of the government and receive 25% to 30% of any recovery, as well as expenses and reasonable attorneys' fees, all paid by the defendant.

A persistent issue since the FCA was adopted during the Civil War has been how to properly incentivize "whistle-blowing insiders with genuinely valuable information" and not reward "opportunistic plaintiffs who have no significant information to contribute of their own." *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson* (2010) 559 U.S. 280, 294.

Evolution of the FCA and the public disclosure bar

The original law allowed claims regardless of how the relators discovered the underlying fraud. This led to the notorious "parasitic" case of *United States ex rel. Marcus v. Hess* (1943) 317 U.S. 537, where the Supreme Court upheld a percentage award to a relator who read about the fraud in a criminal indictment and audaciously copied the government's allegations into his own qui tam complaint.

After a 1943 modification prohibiting qui tam cases where the government had prior knowledge, even if the knowledge came from the relator, qui tam suits dried up altogether. In 1986, led by Sen. Charles Grassley (R-Iowa) and Rep. Howard Berman (D-Calif.), Congress amended the law again to ban lawsuits based on certain publicly disclosed information, but with an exception where the relator was the "original source" of the information who voluntarily provided independent and direct knowledge.

Thus were born the public disclosure bar and the original source exception.

Health Care as the main driver of FCA cases

Although the poster child for the revision was alleged defense procurement fraud — the $600 toilet seat and the $7,600 coffee maker—65% to 90% of all qui tam recoveries in recent years have been for health care claims, such as those involving Medicare and Medicaid.

The problem for the relators in Biotronik was that although they had firsthand knowledge of events at Cedars-Sinai when they brought their qui tam suit in 2017, there had been a 2011 article on the front page of the *New York Times* business section that described a Department of Justice investigation of Biotronik's tactics, such as making doctors "consultants," sending payments to doctors putatively for enrolling patients in "studies" and hiring family members of implanting cardiologists. The article did not further describe what the family members might do.

As the Biotronik court described it, the *New York Times* article "explained that Biotronik's share of the … market had grown from 1 to 5 percent 'in the last few years' and suggested the increase was at least partly the result of incentives Biotronik paid to physicians." Biotronik at __.

Also, there were two previous qui tam cases concerning Biotronik, both also alleging violation of the Stark Law and the Anti-Fraud Statute. *United States ex rel. Bennett v. Biotronik, Inc.* (9th Cir. 2017) 876 F.3d 1011 and *United States ex rel. Sant v. Biotronik, Inc.* (No. 2:09-cv-03617, Dkt. 85; E.D. Cal. Dec. 31, 2009) alleged that "Biotronik promoted off-label uses for its devices, paid consulting fees to physicians for referring patients to sham studies, paid 'training' fees to physicians for allowing Biotronik employees to observe implant procedures, and supplied implant specialists with a steady stream of sports tickets, gift cards, seats to Broadway plays and operas, and extravagant dinners and travel." Biotronik at __.

The public disclosure bar issue

The public disclosure bar requires that a case be dismissed if "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." § 3730(e)(4)(A). In Biotronik, the question was whether the allegations concerning the surgeon's brother at Cedars-Sinai were "substantially the same" as the revelations in the *New York Times* or the charges in the two earlier lawsuits.

The district court granted a motion to dismiss based on the public disclosure bar. However, the 9th Circuit panel found that the "critical mass of the underlying facts" had not previously been disclosed. Although general and somewhat similar information had been made known, the transactions described in the Biotronik complaint "do not merely repeat what the public already knew about Biotronik's tactics to increase its sales. When viewed with the appropriate level of generality … Sam Jones's complaint provided genuinely new and material information." *Id.* at __.

Why the 9th Circuit reversed dismissal

The article had referred to doctors being employed as questionable consultants, doctors being paid referral fees and the hiring of doctors' relatives, but did not describe the family members' positions or suggest "employing family members as sales representatives who would be compensated on a commission basis according to the number of Biotronik devices implanted by their family member doctor." Biotronik at __. It also did not discuss federal law violations or improper billing practices.

Also, the improprieties alleged in the previous qui tam suits were not sufficiently like the Biotronik allegations to be preclusive. They alleged different improprieties, not that Biotronik hired doctors' relatives to receive commissions when their family members implanted Biotronik devices.

The court's conclusion

Because no combination of the *New York Times* article or the other qui tam complaints "disclosed the three-way compensation arrangement central to Sam Jones's second amended complaint," they did not trigger the public disclosure bar.

So, eight years after they filed suit, the Biotronik relators have defeated the defendants' Rule 12 motion to dismiss and appear primed to obtain a responsive pleading on the merits.

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Hon. Stephen Kaus (Ret.) *is a JAMS mediator and arbitrator with more than 50 years of legal experience, including 12 years as a judge on the Alameda County Superior Court. Before joining the bench, he practiced civil litigation, handling complex commercial, employment, insurance and professional liability matters. He now focuses on resolving complex disputes through mediation and arbitration, drawing on his extensive courtroom and settlement experience*