

19 F. 3d 562, 566 (11th Cir. 1994): "Requiring that allegations specific to a particular defendant be publicly disclosed before finding the action potentially barred encourages private citizen involvement and increases the changes that every instance of specific fraud will be revealed. To hold otherwise would preclude any qui tam suit once widespread—but not universal—fraud in an industry was revealed." See also U.S. ex rel. Lidenthan v. General Dynamics Corp., 61 F. 3d 1402 (9th Cir. 1995) cert. denied 517 U.S. 1104 (1996) (disclosures that make no mention of specific defendant insufficient to invoke bar).⁴

Not only must the particular defendant be identified, so too must all of the elements necessary to bring a fraud action. As the D.C. Circuit explained in U.S. ex rel Springfield Terminal Ry Co. V. Quinn, 14F.3d 645 (D.C. Cir. 1994), "Congress sought to prohibit qui tam actions only when either the allegation of fraud of the critical elements of the fraudulent transaction themselves were in the public domain." Bits and pieces of information about a defendant and some of its actions—even when publicly disclosed—rarely add up to an allegation of fraud. There must be "enough information * * * in the public domain to expose the fraudulent transaction." U.S. ex rel. Rabushka v. Crane Co., 40 F.3d 1509, 1513-14 (8th Cir. 1994) quoting Springfield, 14 F.3d at 65. To hold otherwise, as some courts have, would undermine the stated purposes of the False Claims Act.

"Embracing too broad a definition of 'transaction' threatens to choke off the efforts of qui tam relators in their capacity as 'private attorneys general.' By allowing [qui tam] complaint[s] to proceed beyond the jurisdictional inquiry, we help ensure that private actions designed to protect the public fisc can proceed in the absence of governmental notice or potential fraud. This is not the type of case that Congress sought to bar, precisely because the publicly disclosed transactions involved do not raise such an inference of fraud."—*Id.*, at 1514.

The last issue we want to raise with respect to public disclosure concern the "original source" exception to the bar. The public disclosure bar applies "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information" 31 U.S.C. §3730(e)(4)(A). Section 3730(e)(4)(B) defines "original source" as a relator with "direct and independent knowledge of the information on which the allegations are based who has voluntarily provided the information to the Government before filing an action under this section which is based on the information." This provision, too, is a source of considerable confusion and controversy in the courts. Again, however, what Congress intended when it drafted the original source exception is easy to discern both from the statute itself and from its legislative history.

First, the language of the statute makes plain that by "original source," Congress meant an original source of information provided to the government and did not, as some courts have held, add an additional requirement that the relator also be the original source of the public disclosure that triggers the bar. See, e.g. U.S. ex rel. *Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990); U.S. ex rel. *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). There is no statutory nor logical linguistic connection between an original source and the public disclosure that triggers the bar. Of course, a relator could be an original source of the information publicly disclosed, if the relator first provided the information to the Government.

Nor is there any policy rationale that would justify such an interpretation of the original source provision. When Congress enacted the original source provision, we had in mind a scenario where an individual reports fraud to the government and then there is a subsequent public disclosure of the allegations or transactions before that person has filed a qui tam complaint. The disclosure could be, for example, a criminal indictment brought by the Government as a result of the relator's information. It could also be a press story, based on a leak from a Government investigation or an enterprising reporter's investigative skills. Under these circumstances, the relator would not be barred from bringing a qui tam case. To the contrary, he or she should be rewarded for bringing to the Government information about the fraud.

Defendants have also sought the dismissal of relators by urging that "direct and independent knowledge" somehow requires the relator to be an eyewitness to the fraudulent conduct as it occurs. To the contrary, as the Eleventh Circuit concluded in *Cooper v. Blue Shield of Florida, Inc.*, 19 F.3d 562 (1994) a relator's knowledge of the fraud is "direct and independent" if it results from his or her own efforts. For example, a relator who learns of false claims by gathering and comparing data could have direct and independent knowledge of the fraud, regardless of his or her status as a precipitant witness.

In light of these policies, it should not be surprising that we support emphatically the courts that have held that §3730(e)(4)(B) does not require that the qui tam relator possess direct and independent knowledge of "all of the vital ingredients to a fraudulent transaction." Springfield, 14 F.3d at 656-57. As Representative Berman explained, "A person is an original source if he had some of the information related to the claim which he made available to the government . . . in advance of the false claims being publicly disclosed." 132 Cong. Rec. 29322 (Oct. 7, 1986).

In closing, we want to urge you to consider seriously the Department's obligation to shape the courts' interpretation of the False Claims Act. We are frankly troubled by the fact that the majority of cases confronting the public disclosure bar are cases in which the Department has not intervened and in which there is no reference at all to the Department's views. To us, it appears that the courts take the Department's decision not to intervene in a case as a verdict on the merits of the relator's claims and are using the public disclosure bar in order to dismiss the case quickly. Even if some of those cases should be dismissed on the merits, we cannot countenance a tortured interpretation of the public disclosure bar to reach a desired result. Moreover, if the public disclosure provisions continue to be misinterpreted, relators and their counsel will be deterred from filing truly meritorious claims.

Further, not all of the cases in which the public disclosure bar is raised are those in which the government has declined to intervene. Defendants make public disclosure motions after the government has joined a case, and they do so for only one reason: to deprive the government of the resources that relators and their counsel bring to the case. Yet in those cases, too, the Department is typically silent, refusing to take a position on the public disclosure issue. That stance, too, may well undermine Congress' expressed intent.

One of the principal goals of the 1986 Amendments was to ameliorate the "lack of resources on the part of Federal enforcement

agencies." S. Rep. 99-345 at 7. That was one of the reasons we strengthened the qui tam provisions of the law. Thus, we expected some meritorious cases to proceed without the Government's intervention, and we fully expected that the Government and relators would work together in many cases to achieve a just result. By dismissing relators based on spurious interpretations of the public disclosure bar, the courts are depriving the government of these additional resources. And those resources have been considerable. In numerous cases, relators and their counsel have contributed thousands of hours of their time and talent and spend hundreds of thousands of their own dollars investigating and pursuing their allegations. The Department must act to protect those resources, even in cases where it has not intervened. When a question of statutory interpretation arises, particularly with respect to the public disclosure bar, the Department must make its views known to the court. As we stated emphatically at the time the Amendments were adopted, Congress enacted the Amendments based on the belief that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." We continue to hold that view.

Sincerely,

HOWARD L. BERMAN,
Member of Congress.
CHARLES E. GRASSLEY,
U.S. Senator.

FOOTNOTES

¹The same is true for civil complaints filed in state court or discovery obtained as a result of state court proceedings, which several Circuits have held constitute public disclosures within the meaning of §3720(3)(4)(A). See e.g. U.S. ex rel. *Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), cert. denied, 113 S.Ct. 2962 (1993) (holding that discovery materials contained in unsealed court records was "publicly disclosed"); U.S. ex rel. *Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991) (holding that the disclosure of discovery material—even if not filed in court—constitutes a public disclosure). We believe those cases are wrongly decided. Disclosure of fraud in a state court proceeding, even a state criminal proceeding, is unlikely to get to the attention of the federal government, unless it is publicized in the news media, a contingency the public disclosure bar addresses.

²Some courts do get it right. In U.S. ex rel. *Fallon v. Accudyne Corp.*, 921 F.Supp. 611 (W.D. Wisc. 1995), the court held that an audit report produced by a state agency did not constitute a public disclosure. "Under these circumstances there is no reason to believe that the United States would become aware of such information." *Id.*, at 625.

³Senator Grassley made a similar comment during the debate on the 1986 Amendments: "The publication of general, non-specific information does not necessarily lead to the discovery of specific, individual fraud which is the target of the qui tam action." False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. On the Judiciary, 101st cong. 6 (1990) Statement of Senator Grassley.

PRESCRIPTION DRUGS

HON. BARBARA LEE

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 14, 1999

Ms. Lee. Mr. Speaker, I rise to today in strong support of the President's plan to modernize and strengthen Medicare for the 21st century. This proposal will create an affordable prescription drug benefit program that will expand the accessibility and autonomy of all Medicare patients.

Currently, Medicare offers a very limited prescription drug benefit plan for the 39 million aged and disabled persons obtaining its services. Many of these beneficiaries have to supplement their Medicare health insurance program with a private or public health insurance in order to cover the astronomical costs not met by Medicare. Unfortunately, most of these plans offer very little drug coverage if any at all. Therefore, Medicare patients across the U.S. are forced to pay over half of their total drug expenses out-of-pocket. Due to these circumstances, patients do not get the adequate medication needed to successfully treat their conditions.

In 1995, we find that persons with supplementary prescription drug coverage used 20.3 prescriptions per year compared to 15.3 for those individuals lacking supplementary coverage. The patients without supplementary coverage are forced to compromise their health because they cannot afford to pay for the additional drugs they need. The quality and life of these individuals continues to deteriorate while we continue to limit their access to basic health necessities. The President's measure will tackle this problem by allowing our patients to purchase prescription drugs at a lower price.

Why should our patients have to continually compromise their health by being forced to decide which prescription drugs to buy and which drugs not to take, simply because of budgetary caps that limit their access to treat the health problems they struggle with? These patients cannot afford to pay these burdensome costs. We must work together to expand Medicare by making it more competitive, efficient, and accessible to the demanding needs of our patients. The federal government is expecting a surplus of \$2.9 trillion over the next 10 years. By investing directly in Medicare, we choose to invest in the lives, health, and future of our patients.

The House Committee on Government Reform conducted several studies identifying the price differential for commonly used drugs by senior citizens on Medicare and those with insurance plans. These surveys found that drug manufacturers engage in widespread price discrimination, forcing senior citizens and other individual purchasers to pay substantially more for prescription drugs than favored customers, such as large HMOs, insurance companies, and the federal government.

According to these reports, older Americans pay exorbitant prices for commonly used drugs for high blood pressure, ulcers, heart problems, and other serious conditions. The report reveals that the price differential between favored customers and senior citizens for the cholesterol drug Zocor is 213%; while favored customers—corporate, governmental, and institutional customers—pay \$34.80 for the drug, senior citizens in the 9th Congressional District may pay an average of \$109.00 for the same medication. The study reports similar findings for four other drugs investigated in the study: Norvase (high blood pressure): \$59.71 for favored customers and \$129.19 for seniors; Prilosec (ulcers): \$59.10 for favored customers and \$127.30 for seniors; Procardia XL (heart problems): \$68.35 for favored customers and \$142.21 for seniors; and Zolof (depression): \$115.70 for favored

customers and \$235.09 for seniors. If Medicare is not paying for these drugs, then the patient is left to pay out-of-pocket. Numerous patients are forced to gamble with their health when they cannot afford to pay for the drugs needed to treat their conditions. Every day, these patients have to live with the fear of having to encounter major medical problems because they were denied access to prescription drugs they could not afford to pay out of their pocket. Often times, senior citizens must choose between buying food or medicine. This is wrong.

Many Medicare patients have significant health care needs. They are forced to survive on very limited resources. They are entitled to medical treatments at affordable prices. The President's plan will benefit 31 million patients each year. This plan will address many of the problems relating to prescription drugs and work to ensure that patients have adequate access to their basic health needs. Let's stop gambling with the lives of Medicare patients and support this plan to strengthen and modernize Medicare for the 21st century.

TRIBUTE TO VIKKI BUCKLEY

HON. BOB SCHAFFER

OF COLORADO

IN THE HOUSE OF REPRESENTATIVES

Wednesday, July 14, 1999

Mr. SCHAFFER. Mr. Speaker, I rise today to recognize the life and contributions of Vikki Buckley, Colorado's Secretary of State, who passed away this morning after suffering an apparent heart attack on Tuesday. Quoting a friend of hers, "Vikki's no longer in the hands of doctors. She's now in the arms of God."

Vikki, who proudly proclaimed herself to not be a hyphenated American, but a proud American. She held the distinction of being the first Black Secretary of State and the first Black Republican woman elected to a statewide constitutional office. Winning her first election by 57 percent to 36 percent in 1994, she was re-elected last November. Running for office for the first time, Vikki was selected for the Republican ballot after defeating several opponents at the Colorado Republican State Assembly in 1994. She distinguished herself from her opponents when she stood up and delivered one of the best speeches I've had the pleasure of hearing.

An outspoken conservative, Vikki served as the state's chief election official and traveled around the state and country continuing to speak out on varying issues of importance to her, enduring the wrath of liberals. Most recently, she gave the opening remarks at the National Rifle Association's annual meeting in Denver, CO. Her speech has been acknowledged nationwide and most insightful concerning the heart of humanity and the preservation of the entire Constitution of the United States, including the Second Amendment.

Mr. Speaker, I hereby submit Vikki's speech for the record.

WELCOMING REMARKS OF THE COLORADO SECRETARY OF STATE Ms. VIKKI BUCKLEY

Good morning! I greet you as Secretary of State of Colorado and I welcome you to Colorado, a state where some of us believe

strongly in the entire Constitution of these United States, including the Second Amendment.

Isn't it ironic that many who would run you out of town would themselves be unable to even vote had we as a nation not honored all provisions of the United States Constitution?

To them I say—shame on you!

I stand before you today as one who has worked closely with the family of Isaiah Shoels. Isaiah was the Columbine High School student who was killed in part because of the color of his skin.

I must agree with Isaiah's father Michael who has stated that guns are not the issue. Hate is what pulls the trigger of violence.

We are witnesses to new age hate crimes which we must eliminate if we are to remain the greatest nation on earth.

What is a new age hate crime?

When our children leave for school without a value system which places a premium on human life—we are accessories to a new age hate crime.

Parents, when you raise your children and send them to school without a value system which teaches the difference between right and wrong; then parents, we have committed a new age hate crime.

I say to those who run our schools, when you allow children to graduate who are technologically and functionally illiterate—you have committed a new age hate crime because those children are destined to be economically tortured to death as though they had been chained and dragged behind a pickup truck in Jasper, Texas.

Those who would run the NRA out of town need to look at our own children who are engaging in irresponsible sex and having children they cannot take care of. Such irresponsible sex is a new age hate crime—raise as much heck about that as you do the NRA and you will save more lives in 5 years than are taken with guns in a century.

If we allow the language of hate in our homes—when terms such as "nigger" are freely used then we are laying the foundation for new age hate crimes. The language of hate must be challenged.

Just before a skinhead gunned down a black man on a downtown Denver street last year he asked, "Are you ready to die, nigger?" Columbine eyewitness accounts reveal that just before Isaiah's killers fired they asked, "Where is that little nigger?" The language of hate must go.

Now I know that some of what I say here today can make some of us squirm a little bit. We are all guilty of harboring some prejudices and stereotypes. But it is when we are most uncomfortable about addressing an issue that we become so close to real problem solving.

People we can do better. I am not a hyphenated American. I am an American. That is why I know we can do better.

I find it difficult to discuss—but I have been a victim of a gun-shot wound. I know first hand the pain and fear—but that experience has not made me an opponent of the NRA or the Second Amendment.

That is why I stand before you today and ask you to join me and commit NRA resources to combat violence and hate. I am not talking a slick PR campaign, I am talking about a programmatic approach designed to combat violence and hate. I will be in touch to make this proposal a reality.

Together, we can work for a living memorial to those who perished at Columbine. But we must stand ever strong against those who would ignore sections of the U.S. Constitution which they do not like. We are a strong