Conservatives
for
Property Rights

October 19, 2021

The Honorable Richard Durbin
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Grassley:

The False Claims Act Amendments (S. 2428) raise grave concerns, especially with respect to property rights and constitutional perspectives. The Judiciary Committee should tread cautiously as it considers this legislation. In its present form, S. 2428 is unacceptable.

The False Claims Act (FCA) and its qui tam provisions serve an important role in countering fraud and abuse of the U.S. government. This law carries heavy penalties, which help to deter fraud. However, the FCA has the potential for government misuse and punitive enforcement. Further, the Department of Justice (DOJ) and other agencies have used the FCA to expand an agency's reach, injecting unwarranted risks of liability. Heavy-handed or selective usage causes great uncertainty about what is permissible, as well as exposes individuals and organizations to significant civil penalties for each claim plus treble damages on the amount the government lost, while the law leaves courts little discretion for penalties. The FCA should not tilt so far in the government's favor that it risks the abuse of property rights, notably those the Constitution protects.

Unfortunately, S. 2428 is very likely to abuse property rights in a number of serious, dangerous ways. The bill reverses the burden of proof to defendants, requires defendants to pay the government's costs of response to discovery requests without reciprocal cost-shifting, makes it harder for DOJ to dismiss frivolous or unmeritorious qui tam suits, and retroactively expands certain retaliation protections.

First, to establish the materiality of an alleged false claim, a "preponderance" evidentiary standard suffices under S. 2428. Such a finding shifts the burden of proof to the defendant, who must prove under a "clear and convincing" evidentiary standard. The backwards burden and asymmetric reconstruction in favor of the government, which constitutionally should carry the higher burden, is an affront to property rights, due process, and the rule of law.

This is no small matter. Materiality serves to prevent the FCA from becoming a "vehicle for punishing garden-variety breaches of contract or regulatory violations."[1] Thus, S. 2428's set-

[1] U.S. Supreme Court in *Universal Health Services v. United States ex rel. Escobar*.

up of a "prove yourself innocent by proving a negative under a 'clear and convincing' standard of evidence" is unjust. It also makes the FCA a tool for greater abuse by government agencies or qui tam relators who may or may not have meritorious cases.

Second, S. 2428 would enable the government to shift its costs of responding to a defendant's discovery requests unless the defendant proves the requested information "relevant," "proportionate," and not "unduly burdensome" for the government. This provision violates fairness and due process. The Federal Rules of Civil Procedure already cover adequate relevancy, proportionality, and the ability to shift costs when appropriate. Yet, the bill provides no reciprocal imposition on the government to have discovery costs shifted onto it. This asymmetrical design potentially piles significant additional costs onto defendants while freeing the government from having to pay defendants' costs for irrelevant, disproportionate, burdensome demands for discovery materials. It creates a loophole of temptation for the government to harness defendants with burdensome, expensive, extensive discovery demands.

To insert such abuse-prone measures into the FCA, along with reversed burden of proof under a stringent evidentiary standard for materiality, heavily favors the government, which ought to bear the burden to prevail under the FCA or other laws. The government should have to live up to its due-process obligations.

Third, S. 2428 would significantly raise the hurdle for dismissal of qui tam cases. S. 2428 would force DOJ to explain to courts its reasons for seeking dismissal of a suit that private parties, or relators, have brought on behalf of the government. This change is strongly unadvised as it would hand the judicial branch discretion regarding whether to pursue a case — authority that presently, properly belongs in the executive branch. This would amount to a separation of powers issue. And what begins with one set of constitutional violations would lead to Fifth Amendment due-process liability arising from this provision.

Further, qui tam is a powerful weapon. This would only increase the prospects for FCA's abuse. Relators stand to collect 15 percent to 30 percent of the recovery. That includes recoveries from actions or settlements in qui tam cases plaintiffs brought in which the government does not intervene. More than 600 qui tam cases are filed yearly. Sizable financial incentives and self-interested prosecutions are apt to spur filings of unmeritorious or frivolous suits. Defending against qui tam actions carries high risk and high costs. Defendants often settle these cases, even if they have strong defenses against the allegations.

This provision could well lead to more qui tam cases, among them "parasitic" cases filed by those having only secondary knowledge. Why should the Justice Department have to expend additional resources asking courts to dismiss what DOJ currently could dismiss at will? The very likely results of S. 2428 would be more litigation, even on cases DOJ would have dismissed, and pecuniary benefit for attorneys.

Fourth, S. 2428 would retroactively expand certain retaliation protections postemployment. Retroactive application of a substantive change to a statute, as S. 2428 would do, creates serious issues of fairness. This provision would punish people for conduct that was not illegal when it was committed. Thus, this measure would cause due process and other constitutional problems.

The FCA already enables a whistleblower to come forward when that person is the "original source" having "direct and independent knowledge" of fraud. The law also protects whistleblowers against retaliation, which is appropriate. However, expanding this part of the FCA substantively and retroactively is unacceptable, highly likely unconstitutional, and unfair.

The False Claims Act Amendments go much too far, such that an already heavy weapon is turned into a nuclear one. S. 2428 dramatically encroaches on property rights, including several the Constitution appropriately safeguards against. The committee should not approve this bill.

Sincerely,

James Edwards
Executive Director
Conservatives for Property Rights

(Organization name appears for identification purposes only.)