

Granston Memo in Action: Eighth Circuit Affirms Government Dismissal of FCA Claims Related to Minnesota Bridge Collapse

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Just days after the twelfth anniversary of the Minnesota 35W bridge collapse, the Eighth Circuit summarily affirmed the dismissal of a False Claims Act case alleging that Minnesota government officials conspired to submit false claims and obtain \$250 million in federal funding. *United States ex rel. Davis v. Hennepin Cty.*, No: 19-2298 (8th Cir. Aug. 14, 2019). Focused on the aftermath of the 35W bridge collapse of 2007, the case alleged that Hennepin County and Minnesota Department of Transportation officials fabricated material, labor, and other expenses related to bridge reconstruction for the purpose of obtaining federal disaster relief funding, grants, and stimulus funding by false pretenses.

Relators filed the first version of this case in June 2015. *United States ex rel. Davis v. Hennepin Cty.*, No. 15-cv-2671, 2016 U.S. Dist. LEXIS 192496 (D. Minn. July 8, 2016). The Government declined to intervene, and the lawsuit was dismissed for relators' failure to be represented by counsel (relators must be represented by counsel to pursue FCA cases on behalf of the government). *Id.* Relators tried again in the Northern District of Florida, but met the same fate—declination by the Government, then dismissal. *United States ex rel. Davis v. Hennepin Cty.*, No. 5:17-cv-81-RH-GRJ, 2017 U.S. Dist. LEXIS 96013 (N.D. Fla. May 23, 2017). In June 2018, relators filed their complaint yet again—this time represented by counsel. *United States ex rel. Davis v. Hennepin Cty.*, No. 18-cv-01551 (ECT/HB), 2019 U.S. Dist. LEXIS 23482 (D. Minn. Feb. 13, 2019). The Government declined intervention for the third time, and then moved to dismiss the case pursuant to 31 U.S.C. § 3730(c)(2)(A).

Under Section 3730(c)(2)(A), “[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.” Though this FCA provision has long been on the books, it had been largely unused until the release of the “Granston Memo” in January 2018. The Granston Memo encouraged prosecutors to consider dismissing FCA *qui tam* cases even after declination, to avoid the strain on DOJ resources and potential

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for developing unfavorable precedent in weak cases.

Relators challenged the Government's dismissal, citing *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998) to argue that dismissal is only appropriate under Section 3720(c)(2)(A) if "supported by a valid government purpose and a rational relation between dismissal and accomplishment of the articulated purpose." *Davis*, 2019 U.S. Dist. LEXIS 23482, at *1, 11-12. In response, the Government argued that the plain text of Section 3730(c)(2)(A) sets forth only two requirements for dismissal—notification to the plaintiff and opportunity for a hearing—leaving no room for court intervention, so long as those requirements were met. *Id.* at *1, 13-15 (citing *Swift v. United States*, 318 F.3d 250, 251 (D.C. Cir. 2003)).

The district court recognized that the parties represented both sides of a circuit split regarding the standard for dismissal under Section 3730(c)(2)(A). After analyzing *Sequoia Orange*, *Swift*, and legislative history, the court concluded that the statute required "nothing more or less" than its explicit requirements: notice and an opportunity for a hearing. *Id.* at *18-19. Even so, the court found the Government to have met either standard, accepting "a great deal of burden and expense for the United States, with no resulting recovery" as a rational reason for dismissal. *Id.* at *19-21.

On appeal, the Eighth Circuit affirmed the lower court's holding in its entirety, with a two-sentence judgment: "This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed." *United States ex rel. Davis v. Hennepin Cty.*, No: 19-2298 (8th Cir. Aug. 14, 2019).

This case marks a victory for the objectives set forth in the Granston Memo—namely, cutting off a declined *qui tam* case that the Government believes strains its resources while offering only a small likelihood of success. Other currently-pending appellate cases should provide further insight into the Government's FCA dismissal power, including *United States v. United States ex rel. Thrower et al.*, No: 18-16408 (9th Cir.), where the Government has appealed the *denial* of its Section 3730(c)(2)(A) dismissal, asking the Ninth Circuit to set aside or distinguish the "valid government purpose" and "rational relation" requirements in *Sequoia Orange*.