Whistleblower Defense Alert: District Court Holds that DOJ Can Still Dismiss Qui Tam Cases After It Declines To Intervene—With No Justification Required for Dismissal

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In a recent decision, the United States District Court for the District of Minnesota held that the Department of Justice (DOJ) can still dismiss a *qui tam* filed under the False Claims Act even after it has declined to intervene in the case. In *United States ex rel. Davis v. Hennepin Cty.*, No. 18-cv-01551, 2019 U.S. Dist. LEXIS 23482 (D. Minn. Feb. 13, 2019), the Relators alleged that Defendants Hennepin County and various county administrators "conspired to cover up and conceal the causes of the Interstate 35W bridge collapse so that false claims could be made by Hennepin County to obtain some $250 million in federal disaster relief, grants, congressional and other stimulus funding." (*Id.* at *3) (internal quotation omitted). The Relators also made allegations regarding intentional contamination of the disaster scene to obtain additional recovery funds, and regarding use of foreign materials and labor during the bridge reconstruction.

This was the third time the Relators had made these allegations. Their first two complaints were dismissed because they attempted to proceed *pro se*, and the law is clear that non-lawyers may not pursue *qui tam* cases on the Government's behalf. After the Relators actually obtained representation in their third action, the Government filed a motion to dismiss the case. Subsequent to that Motion, the Government filed its notice that it elected to decline intervention.

The Relators challenged the Government's dismissal on two separate grounds. First, the Relators claimed that, because the Government had declined intervention, it did not have the authority to dismiss the case. Second, the Relators argued that even if the Government could dismiss the case, its power to dismiss was not absolute, and the Government had to provide some rational standard to support the decision to dismiss. (*Id.* at **5-6.)

The District Court made quick work of the Relators' first claim. The court thoroughly examined the statutory language of the relevant FCA provisions. Although some provisions seem to condition their applicability on the Government's election to proceed with the action, the court noted that 31 U.S.C. § 3730 (c)(2)(A) is not one of those provisions. Instead, that provision simply provides that the "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." Absent any sort of limiting language in the dismissal provision, the court concluded that the Government's election not to intervene does not affect its right to dismiss an action—a determination in accord with the D.C. Circuit's decision in *Swift v. United States*, 318 F.3d 250, 251 (D.C. Cir. 2003), and the Tenth Circuit's decision in *Ridenour v. Kaiser-Hill Co.,* 397 F.3d 925, 940 (10th Cir. 2005).

Although the court concluded that DOJ could dismiss even after declining to intervene, the question remained whether that dismissal required the Government to offer a sufficient justification before it could be effective. Here, the law is not clear. As the District Court wrote, federal courts "disagree on the standard of review for dismissal: whether dismissal under § 3730(c)(2)(A) is conditioned on any standard at all, and if so, what that standard is." (*Davis*, 2019 U.S. Dist. LEXIS 23482, at *11.) The Ninth Circuit was the first to address the issue, deciding in *Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139 (9th Cir. 1998) that a two-step rational-relation test applies requiring (1) the identification of a valid government purpose, and (2) a rational relation between dismissal of the FCA action and that purpose. *Id.* at 1145. Other circuits subsequently took a different approach. In *Swift*, the D.C. Circuit found that the Government's right to dismiss FCA cases is "unfettered" and requires no justification. 318 F.3d at 252. The Fifth Circuit, while not squarely addressing the issue, has also suggested that it would follow *Swift* and permit the Government to unilaterally dismiss a relator's FCA case without offering any justification. *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997).

The District Court noted that the Eighth Circuit has not squarely addressed the issue, although it has hinted in dicta that it might follow *Swift*. *E.g. Zissler v. Regents of Univ. of Minn.*, 154 F.3d 870, 875 (8th Cir. 1998). With no clear guidance from the Eight Circuit, the District Court concluded that the "plain language" of the FCA supports the conclusion that the Government's right to dismiss is "unfettered." Under the statute, according to the court, all that is required is a "two-part inquiry: (1) Was relator notified of the motion? and (2) Did relator have an opportunity for a hearing?" (*Id*. at *15.) Applying this approach, the court concluded that no justification was required and the standard had been met. For good measure, however, the court added that even if the *Sequoia Orange* rational-relation test applied, the Government would be entitled to dismissal, because of the burden of the litigation with no likely recovery.

While the *Davis* court's decision on the Government's right to dismiss despite non-intervention is uncontroversial, its determination that this right is "unfettered" puts the court squarely in line with the D.C. Circuit's *Swift* approach. In our view, this circuit split on the proper standard for DOJ dismissal will continue to find the spotlight, given the current DOJ approach of aggressively moving to dismiss qui tam cases, as set forth in the DOJ's Granston Memo. For years, FCA defendants have hoped that DOJ will dismiss questionable *qui tam* suits that proceed without Government involvement—now, it remains to be seen how the courts react to those dismissals.