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## A NARROWING VIEW: THE SIXTH CIRCUIT AND *BAE*

By  
Alexander Park\*

### I. INTRODUCTION

In *United States ex. rel Paige v. BAE Sys. Tech.* the Sixth Circuit held that an arbitration agreement, which was limited to disputes arising out of an employment contract, did not reach an action brought under the False Claims Act (“FCA”).<sup>1</sup> The Sixth Circuit found that there were no grounds for compelling arbitration because the FCA retaliation claim was brought under a statute. Specifically, the Sixth Circuit narrowly construed the arbitration clause, which compelled arbitration for disputes “arising from this Agreement” and not for disputes relating to the agreement or employment generally.<sup>2</sup> With this decision the Sixth Circuit continued to muddy what exactly is needed to prove that parties originally intended to arbitrate a given issue and suggested that deference to arbitrability may be lesser than it was before. In this the Court is certainly not alone, though *BAE* appears to emphasize starkly contrasting views on the ease of proving arbitrability regarding statutorily based actions.

### II. BACKGROUND FACTS

Matt Paige and Jim Gammon (“Relators”) filed a *qui tam* action against BAE Systems Technology Solutions & Services, Inc. (“BAE”) claiming that BAE violated the fraud and retaliation provisions of the False Claims Act.<sup>3</sup> Relators were employees of MTC Technologies, Inc. (“MTC”), which was purchased by BAE in 2008.<sup>4</sup> As a result of their new employment with BAE, Relators were required to sign an employment agreement, which contained an arbitration clause that required arbitration of any disputes “arising from this Agreement.”<sup>5</sup> BAE provided a laundry list of services to the United States Department of Defense and various other federal agencies.<sup>6</sup> Throughout Relators

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<sup>1</sup> *United States ex. rel Paige v. BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App’x 500 (6<sup>th</sup> Cir. 2014); 31 USCS § 3730(h).

<sup>2</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App’x at 504.

<sup>3</sup> *Id.* at 501; 31 USCS §§ 3729(a), 3730.

<sup>4</sup> *United States ex rel. Paige v. BAE Sys. Tech. Solutions & Servs., Inc.*, No. 09-CV-11657, 2013 U.S. Dist. LEXIS 188644 (E.D. Mich. Aug. 22, 2013).

<sup>5</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App’x at 504.

time with BAE, they noticed possibly fraudulent activities, including the alleged use of insider information to illegally improve BAE's chances of obtaining government contracts and the alleged falsification of time sheets to fraudulently obtain money from their federal contracts.<sup>7</sup> Concerned with the improprieties they were witnessing, Relators "blew the whistle" on BAE and informed the appropriate United States authorities of the apparent fraudulent activity.<sup>8</sup>

After cooperating with those investigating the charges, Matt Paige was placed on administrative leave and allegedly had a reduction in responsibilities, had a transfer denied, and was subsequently reassigned.<sup>9</sup> Paige alleged that these conditions constructively forced him to quit.<sup>10</sup> Additionally, Jim Gammon, was passed over for promotion and later laid off with a number of others.<sup>11</sup> These actions prompted Relators to file a *qui tam* complaint in the United States District Court Eastern District of Michigan in 2009.<sup>12</sup> A number of extensions were requested by the United States to allow time for further investigation which resulted in the matter stretching into 2013 before the District Court issued any ruling on the matter.<sup>13</sup>

This ruling was issued as a result of BAE's Motion to Dismiss on February 22, 2013, which attempted to dismiss the matter pending its submission to arbitration.<sup>14</sup> BAE pointed to the arbitration clause of the agreement, and argued that it bound the parties to arbitrate the retaliation claim.<sup>15</sup> Focusing on the issues pertaining to the arbitration clause, BAE referenced a plethora of cases that supported its argument that FCA retaliation claims were arbitrable because all federal statutory claims are arbitrable.<sup>16</sup> Further, BAE pointed to a plethora of cases from other courts finding that FCA claims do not lack

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<sup>6</sup> BAE Sys. Tech. Solutions & Servs., 2013 U.S. Dist. LEXIS 188644.

<sup>7</sup> *Id.*

<sup>8</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 501.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Paige et al v. BAE Systems Technology Solutions & Services, Inc., Qui Tam Complaint, Docket No. 2:09-cv-11657, Document #1 (E.D. Mich. 2013) (copy on file with author).

<sup>13</sup> BAE Sys. Tech. Solutions & Servs., Inc., 2013 U.S. Dist. LEXIS 188644.

<sup>14</sup> Paige et al v. BAE Systems Technology Solutions & Services, Inc., Defendant's Motion to Dismiss, Docket No. 2:09-cv-11657, Document #39 (E.D. Mich. 2013) (copy on file with author).

<sup>15</sup> *Id.* at 24-25.

<sup>16</sup> *Id.* at 24-25 (E.D. Mich. 2013) (copy on file with author) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

arbitrability, and arbitrating such claims generally forwarded the federal policy favoring of arbitration.<sup>17</sup>

The relevant portion of the arbitration clause reads:

Employer hereby agrees that any dispute arising from this Agreement, which cannot be resolved through normal practices and procedures of the Company, shall be resolved through a mediation/arbitration approach. The Employee agrees to elect, with the Company, a mutually agreeable, neutral third party to help mediate any dispute, which arises under the terms of this Agreement.<sup>18</sup>

Focusing on the precise wording of the clause, Relators argued that the retaliation claims fell outside the entirety of the agreement.<sup>19</sup> Instead of arguing that the arbitration clause was invalid or unconscionable, Relators focused the contrasting breadth of arbitration clauses involved all other cases, which typically covered any dispute or controversy.<sup>20</sup>

After reviewing the filings, the District Court granted BAE's motion to dismiss, dismissed Relators' fraud claims with prejudice, and dismissed Relators' retaliation claim in favor of arbitration.<sup>21</sup> In evaluating the Relators' arguments, the District Court relied on *Simon v. Pfizer Inc.* and *Fazio v. Lehman Bros., Inc.*, and held that unless there was a specific exclusion within the arbitration clause than it would be interpreted as broadly as possible.<sup>22</sup> Understandably unsatisfied with the result, Relators appealed only the dismissal of their retaliation claim in favor of arbitration.<sup>23</sup>

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<sup>17</sup> Paige et al v. BAE Systems Technology Solutions & Services, Inc., Defendant's Motion to Dismiss, Docket No. 2:09-cv-11657, Document #39, 25 (E.D. Mich. 2013) (copy on file with author) (citing United States ex rel. Wilson v. Kellogg, Brown & Root, Inc., 525 F.3d 370, 381-82 (4<sup>th</sup> Cir. 2008); United States ex. rel. Cassaday v. KBR, Inc., 590 F. Supp. 2d 850, 858-63 (S.D. Tex. 2008) and others).

<sup>18</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 502.

<sup>19</sup> Paige et al v. BAE Systems Technology Solutions & Services, Inc., Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, Docket No. 2:09-cv-11657, Document #45, 23 (E.D. Mich. 2013) (copy on file with author).

<sup>20</sup> *Id.*

<sup>21</sup> BAE Sys. Tech. Solutions & Servs., Inc., 2013 U.S. Dist. LEXIS 188644, at \*17.

<sup>22</sup> *Id.* (citing *Simon v. Pfizer Inc.*, 398 F.3d 765, 775 (6<sup>th</sup> Cir. 2005); *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 395 (6<sup>th</sup> Cir. 2003)).

<sup>23</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 501.

### III. THE SIXTH CIRCUIT'S ANALYSIS

#### A. *Arbitration Agreements Should Be Limited to Their Express Scope*

The Sixth Circuit began its analysis by reflecting upon the fact that the first step in this process is determining the existence of an arbitration agreement.<sup>24</sup> No dispute as to the existence of an arbitration clause existed in the case, and consequently the Sixth Circuit quickly moved on to say that the only question to be decided is whether the FCA retaliation claim is covered under the scope of the agreement and proceeds into a *de novo* review.<sup>25</sup>

In determining the scope of an arbitration agreement, the Court noted that all issues of arbitrability should be resolved by giving preference to arbitration.<sup>26</sup> It then narrowed this policy by providing a series of quotations from Sixth Circuit precedent that describe in great detail how no federal preference for arbitration can force arbitration into a dispute where no agreement existed, and that all arbitration agreements should be enforced just as any other private contract.<sup>27</sup> Admitting that any ambiguities should be resolved in favor of arbitration, the Court cited itself in saying “we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract.”<sup>28</sup> The Sixth Circuit stated that the proper method to determine the scope of an arbitration agreement is to examine the plain language of the agreement and to limit the clause to only the explicit areas which it purports to cover.<sup>29</sup>

Utilizing this framework, the Court referred back to the term “dispute” as it is utilized in the agreement at issue.<sup>30</sup> Under its analysis, every instance of “dispute” within the agreement referred to a dispute arising explicitly under the terms and conditions of the employment agreement and no further.<sup>31</sup> With this understanding of the clause, the Court concluded that the FCA retaliation claim did not arise under the terms of the

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<sup>24</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 503.

<sup>25</sup> *Id.* at 503 (citing *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, 383 Fed. App'x. 517, 520 (6<sup>th</sup> Cir. 2010)).

<sup>26</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 503. (citing *NCR Corp. v. Korala Associates, Ltd.*, 512 F.3d 807, 812 (6<sup>th</sup> Cir. 2008)).

<sup>27</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 503. (citing *Simon v. Pfizer Inc.*, 398 F.3d 765, 775 (6<sup>th</sup> Cir. 2005); *Inhalation Plastics v. Medex Cardio-Pulmonary, Inc.* 383 Fed. App'x. 517, 520 (6<sup>th</sup> Cir. 2010)).

<sup>28</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 503. (quoting *Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861, 863 (6<sup>th</sup> Cir. 2006)).

<sup>29</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App'x at 503.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

agreement.<sup>32</sup> Restating the entire relevant portion of the FCA, the Court found that the FCA claim was not arbitrable because it could exist independent of the employment agreement.<sup>33</sup> As a result of this determination, the Sixth Circuit found that the arbitration agreement did not restrict Relators from proceeding to court.<sup>34</sup>

*B. The Narrowly Crafted Agreement in this Case is Substantially Narrower than Agreements Seen in Other Comparable Cases.*

Drawing direct comparisons between the disputed clause and the related arbitration agreements in previous cases, the Court emphasized how other similar agreements included broader language—such as requiring arbitration in all matters “related to” a contract or in “all issues having a bearing” on potential disputes.<sup>35</sup> This distinction was key, as the Sixth Circuit certainly seemed to infer that the issue in this matter was an oversight on the part of the drafters of the contract, which rendered statutory claims outside the scope of the agreed upon arbitration.<sup>36</sup>

Along those same lines, the Sixth Circuit made clear that the disputed involved contract construction rather than arbitration policy.<sup>37</sup> They noted taking BAE’s stance that all disputes related to employment are by their very nature arising out of an employment agreement, and therefore binding all such disputes to arbitration, would be similar to creating a contract the original parties never agreed to.<sup>38</sup> The fine line of arbitrability drawn by the Sixth Circuit ultimately lead the Court to reverse and remand the retaliation claim for further proceedings.<sup>39</sup>

#### IV. SIGNIFICANCE

*BAE* evidences a continuing, and admitted, trend of Sixth Circuit precedent that interprets arbitration clauses as narrowly as possible, especially where the matter at hand

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<sup>32</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App’x at 503.

<sup>33</sup> *Id.* at 503-504.

<sup>34</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App’x at 504; 31 USCS. §3730(h)(1)

<sup>35</sup> NCR Corp. v. Korala Associates, Ltd., 512 F.3d 807, 812 (6<sup>th</sup> Cir. 2008); Panepucci v. Honigman Miller Schwartz & Cohn LLP, 281 Fed. App’x 482, 486 (6<sup>th</sup> Cir. 2008); Fazio v. Lehman Bros., Inc., 340 F.3d 386, 396 (6<sup>th</sup> Cir. 2003); JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 391 (6<sup>th</sup> Cir. 2008).

<sup>36</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App’x at 504

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

involves a statutory claim.<sup>40</sup> In 2011, the Sixth Circuit found in *Turi v. Main Street Adoption Services, LLP* that an arbitration agreement did not cover a RICO claim due, in part, to the fact that it was based entirely on statute and not on contract.<sup>41</sup> Additionally, the *Turi* Court noted that the arbitration clause appeared to be limited to disputes “regarding fees” and not “any and all disputes.”<sup>42</sup> The Sixth Circuit drew this same interpretive distinction to formulate their ruling in *BAE*.<sup>43</sup> The Sixth Circuit again explicitly took a strict approach to interpreting arbitration agreements in *Simon v. Pfizer, Inc.*<sup>44</sup> There, the Sixth Circuit held an arbitration agreement limited to “disputes concerning both Constructive Termination and Termination for Just cause” did not cover retaliation claims brought under ERISA § 510.<sup>45</sup>

Similarly, the Sixth Circuit has demonstrated that it is more than willing to follow the federal policy in favor of arbitration when it believes that an arbitral clause is broadly constructed and has done so as recently as January 2014.<sup>46</sup> When an arbitral clause is written in a fashion that is in any way non-inclusive, however, the Sixth Circuit is more than willing to depart from federal policy and strictly interpret the arbitration clause at issue.<sup>47</sup>

Though there are no directly analogous cases to *BAE* from other federal courts, other jurisdictions have been far more stringent in narrowing the scope of a clause than the one before the Sixth Circuit in *BAE*. For instance, the Seventh Circuit narrowly construed an arbitration clause because the clause only stated that arbitration would cover “invoice amounts” and not claims “arising out of” invoice disputes.<sup>48</sup> Presumably, had those three words been added the clause in *Welborn* would have been broadly construed by the Seventh Circuit. Further, the Tenth Circuit has found that a clause that covered “all controversies” in one matter explicitly barred arbitration of other disputes was

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<sup>40</sup> See, e.g., *Turi v. Main St. Adoption Servs., LLP.*, 633 F.3d 496, 510-11 (6<sup>th</sup> Cir. 2011); *Simon v. Pfizer, Inc.*, 398 F.3d 765, 775 (6<sup>th</sup> Cir. 2005).

<sup>41</sup> *Turi*, 633 F.3d at 510-11.

<sup>42</sup> *Id.* at 510

<sup>43</sup> *Id.* at 510; *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App'x at 504.

<sup>44</sup> *Simon*, 398 F.3d at 775.

<sup>45</sup> *Id.*

<sup>46</sup> *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 627 (6<sup>th</sup> Cir. 2004) (“Where, as here, the arbitration clause is broad...” only express exclusions can limit arbitration); *Pureworks, Inc. v. Unique Software Solutions, Inc.*, 554 Fed. App'x. 376 (6<sup>th</sup> Cir. 2014) (finding that even though Pureworks asserted the arbitration clauses were meant to be narrow the plain text of the contract seemed to include all related disputes over a balance sheet).

<sup>47</sup> See *supra* note 43.

<sup>48</sup> *Welborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 640 (7<sup>th</sup> Cir. 2002) (“If the parties intended to arbitrate all claims “related to” or even “arising out of” invoice disputes, then why not simply say that?”)

narrow because the clause included an express limitation on disputes that could be submitted to arbitration.<sup>49</sup> In *BAE* there was no express limitation of arbitrability, only what the Sixth Circuit deemed an implied limitation.<sup>50</sup> Finally, in perhaps the most striking contrast to the Sixth Circuit in *BAE*, the Fifth Circuit found that a plaintiff asserting sexual harassment and retaliation claims was bound by a “broad” arbitration agreement that stated, “...any action contesting the validity of this Agreement, the enforcement of its financial terms, or *other disputes* shall be submitted to arbitration...”<sup>51</sup> Whereas the Sixth Circuit found that the mere mention of the terms of the agreement narrowed the scope, the Fifth Circuit held that just by including the phrase “other disputes” that the agreement was undoubtedly broad enough to submit the statutory claims at issue to arbitration.<sup>52</sup> The list of courts that tend to broadly interpret arbitration clauses seems to outnumber the Sixth significantly, including not only those mentioned previously but the Eighth and Fourth Circuits as well.<sup>53</sup>

*BAE* is particularly significant because it would appear to evidence an anomaly in the federal court system. In the Sixth Circuit, if an arbitration agreement is crafted in any fashion, which fails to incorporate all-inclusive terms, then the practitioner must exhibit caution. While *BAE* stands at odds with decisions in other federal circuits, its holding is clearly not an outlier in the Sixth Circuit’s jurisprudence. Rather, it is a continuation of the Court’s narrow interpretation of the scope of arbitration agreements. Further evidencing the Sixth Circuit’s internal consistency with this ideal, the Sixth Circuit ruled that a clause that stated “any and all controversies or claims arising out of, or relating to” the employee handbook was narrow and barred arbitration of a civil rights claim because the handbook had not been entered into the record.<sup>54</sup>

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<sup>49</sup> *Chelsea Family Pharm., PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191, 1193-1194 (10<sup>th</sup> Cir. 2009) (“Such an explicit limitation of scope is analytically equivalent to an express exclusion of other issues”).

<sup>50</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App’x at 502 (clause contained no express limitation only an arguably implicit limitation by covering “any dispute, which arises under the terms of this Agreement”).

<sup>51</sup> *Rojas v. TK Communs.*, 87 F.3d 745, 746 (5<sup>th</sup> Cir. 1996) (emphasis added) (holding that because the arbitration was sufficiently broad it could encompass the relevant claims, and therefore inferring if it had been more narrow such claims may fall outside the scope of the agreement). Check highlighted term for correct abbreviation.

<sup>52</sup> *Id.* at 747 (“...we conclude that the district court was correct when it found that “any other disputes” was sufficiently broad to encompass Rojas’ Title VII claims.”)

<sup>53</sup> *3m Co. v. Amtex Sec., Inc.*, 542 F.3d 1193 (8<sup>th</sup> Cir. 2008) (finding in their analysis that an arbitration clause limited to three distinct contractual issues was broad); *American Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88 (4<sup>th</sup> Cir. 1996) (holding that the arbitration agreement’s language covering disputes that “arose out of or related to” an agreement was a broad enough provision to cover claims related to the contract even if the specific terms of the agreement were not implicated).

<sup>54</sup> *Kay v. Minacs Group (USA), Inc.*, 580 F. App’x 327 (6<sup>th</sup> Cir. 2014).



In essence, the key to understanding and utilizing *BAE* in the future is that drafting a “broad” arbitration clause in the Sixth Circuit requires explicitly inclusive language to be included in an arbitration agreement. To err on the side of caution, a prudent practitioner would use the phrases “arising out of” and “related to,” but should add specific wording adding that the agreement is meant cover “any and all disputes” between the parties arising out of state or federal law. Though seemingly redundant in other jurisdictions, the assurance that statutory claims will not fall outside of the scope of the agreement would be a significant burden off the mind of drafters in the Sixth Circuit.

## V. CRITIQUE

In reversing the District Court’s holding, the Sixth Circuit may have been internally consistent, but further evidenced their departure from the federal policy favoring arbitration applied by other courts. Resultantly, the Sixth Circuit has partially undermined the stability and surety that usually accompanies arbitration. Practitioners are now left to wonder if “standard” arbitration clauses will fall victim to a narrow interpretation by the Sixth Circuit should disputes be adjudicated in the jurisdiction.

The District Court, using the same precedent as the Sixth Circuit, came to the conclusion that an arbitration clause which would cover “any dispute” arising out of the contract should be considered broad.<sup>55</sup> Considering the initial contracts were signed by Relators and BAE it can be presumed that they agreed to arbitration, and that given the wording of the agreement it could certainly be argued that the parties intended to arbitrate anything related to their employment with the company.

Indeed, no stretch of the imagination is required to believe that submitting any and all claims by its employees was a motivating factor for BAE to draft its Employment Agreements in the manner it did. While it is certainly not illogical to require a strict interpretation of contractual provisions, where the only significant drafting oversight in a disputed agreement appears to be the omission of “or related to your employment,” it would seem that the intent of the parties should be readily inferable.<sup>56</sup>

The larger issue with the Sixth Circuits decision appears to be that even if the arbitration clause had been constructed with greater precision, the Court still could have conceivably overlooked the language and justified its decision by the fact that the FCA claims is a statutory claim that existed independent of the parties’ agreement.<sup>57</sup> This is evidenced by the technicalities on which the Sixth Circuit relies upon to support its ruling.<sup>58</sup> Moreover, the Sixth Circuit’s focus on whether the retaliation claim arose

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<sup>55</sup> BAE Sys. Tech. Solutions & Servs., Inc., 2013 U.S. Dist. LEXIS 188644, at \*2-3 (quoting Simon, 398 F.3d 765, 775).

<sup>56</sup> *But see* Welborn, 301 F.3d 634, 640 (“If the parties intended to arbitrate all claims “related to” or even “arising out of” invoice disputes, then why not simply say that?”)

<sup>57</sup> BAE Sys. Tech. Solutions & Servs., Inc., 566 F. App’x at 503.

<sup>58</sup> *Id.* (limited the term “dispute” because the agreement only refers to disputes regarding terms of the agreement, despite the fact that the natural reading of the clause would be significantly broader).

specifically under the terms of the agreement ignores the simple fact that the retaliation claim could not exist unless Relators were indeed employed.<sup>59</sup> Certainly the argument can be made that the supposedly strict wording of the arbitration clause gave credence to the Court's uncompromisingly textual approach. Upon closer examination, however, the arbitration clause itself appears to call for a broader interpretation.<sup>60</sup> In fact, the first portion of the clause states that it shall pertain to all "arising from this Agreement," a fairly commonplace phrase used in many arbitration agreements.<sup>61</sup> Arguably, it is only by ignoring this introductory language and claiming the later portion of the clause limited the preceding language that the Sixth Circuit was able to prevent the arbitration agreement from reaching this statutory action.<sup>62</sup>

More importantly, even if the drafter utilized the standard arbitration clause approved by the American Arbitration Association, there would still be questions as to whether the Sixth Circuit, post-*BAE*, would find an arbitration agreement to be "broad." Said AAA standard arbitration agreement reads:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>63</sup>

While AAA standard agreement is certainly a more general agreement than the agreement in *BAE*, it would not be unrealistic for the Sixth Circuit to state that an FCA claim neither "arose out of" nor was "related to" an employment contract, and therefore hold the claim fell outside the express intent of the parties when the contract was signed.<sup>64</sup> If the specific terms of employment are wholly separate from any FCA claim, then an FCA claim could not be "related to" an employment contract more generally. The Sixth Circuit impliedly endorsed this view when it stated that an FCA retaliation claim is "completely separate from the contract and asserts an independent claim that would exist even without the contract."<sup>65</sup> This interpretation could just as readily apply if *BAE* had used the AAA standard arbitration agreement, and therefore seems prone to

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<sup>59</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App'x at 503, 504.

<sup>60</sup> *See BAE Sys. Tech. Solutions & Servs., Inc.*, 2013 U.S. Dist. LEXIS 188644 (interpreting the agreement in question as broad).

<sup>61</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App'x at 502.

<sup>62</sup> *Id.* at 503.

<sup>63</sup> American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* (Sept. 25, 2014 5:00 PM).

<sup>64</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App'x at 503.

<sup>65</sup> *Id.* at 504.

cause confusion as to what is considered broad and what is considered narrow. Certainly FCA retaliation claims are arbitrable, but the Sixth Circuit's narrowing of a seemingly broad arbitration agreement makes it more difficult to predict whether or not a clause.<sup>66</sup>

Ultimately, a stricter view of arbitration clauses partially subverts the intent of the parties that signed the arbitration agreement; to adjudicate disputes through means other than the judiciary. The Sixth Circuit may believe that it would be creating a contract from nothing if it were to read past the explicit terms of the arbitration clause, but in reality it would likely maintain the spirit of the initial contract.<sup>67</sup>

Perhaps Relators refusal to arbitrate evidences that they never intended to agree to arbitrate statutory claims in the first place. More likely, however, was that Relators were willing to submit to arbitration in all instances in order to obtain gainful employment, and then perceived a weakness in the clause mid-litigation and proceeded accordingly.

Considering that there appears to be some consensus regarding the arbitrability of FCA and other statutory claims, it is rather perplexing that four or five words stand between BAE and adjudicatory efficiency.<sup>68</sup> On a purely practical level that retaliation claims, which directly pertain to the termination of employment, are somehow completely removed from the employment agreement itself, defies even a simple understanding of the FCA.<sup>69</sup> Therefore, liberal federal policy favoring arbitration would seem to run contrary to the path that the Sixth Circuit treads.

The approach taken by the District Court appeared to more appropriate.<sup>70</sup> Even without the more precise wording of a more finely crafted arbitration clause, it would appear that any and all disputes relating to the agreement or employment generally would be arbitrable.<sup>71</sup> Such an interpretation of the disputed clause not only supports the federal policy favoring arbitration, but also provides clarity concerning the scope of similarly drafted instruments. Using the Sixth Circuit's rationale, any amount of statutory claims could slip through the cracks of otherwise stable and "broad" arbitration agreements in the name of preserving the intent of the parties. The reality is, however, that when an arbitration agreement is drafted, there is no evidence that either party considered or wished for statutory claims of any sort to be precluded from arbitration. Thus, in its attempt to preserve the intent of the parties, the Sixth Circuit instead placed a stumbling block in the path of arbitrability determinations.

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<sup>66</sup> See *United States ex rel. Cassaday v. KBR, Inc.*, 590 F. Supp. 2d 850 (S.D. Tex. 2008) (holding that nothing precludes FCA claims from being arbitrable and appropriately drafted arbitration agreements may compel arbitration in FCA matters).

<sup>67</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App'x at 504.

<sup>68</sup> *KBR*, 590 F. Supp. 2d 850.

<sup>69</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 566 F. App'x at 503.

<sup>70</sup> *BAE Sys. Tech. Solutions & Servs., Inc.*, 2013 U.S. Dist. LEXIS 188644 (finding that the *qui tam* action was covered under the "any dispute arising out of this agreement" language).

<sup>71</sup> *Id.*

## VI. CONCLUSION

*BAE* provides a substantial examination of contemporary views on the scope of arbitration clauses. Though certainly this comment does not wish to indicate that the Sixth Circuit is somehow hostile to arbitration, it would be accurate to state that the Sixth Circuit views arbitral clauses with caution. Using *BAE* as a reminder of how to determine the breadth of arbitration clauses, practitioners should proceed in drafting their agreements with great caution. Arbitration agreements are only safe in the Sixth Circuit if they include references to any and all disputes between the parties.