

2002

No out for the Federal Government: Enforcing Contractual Arbitration Clauses in Federal Government False Claims Actions - U. S. v. Bankers Ins. Co.

Sarah A. Wight

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Sarah A. Wight, *No out for the Federal Government: Enforcing Contractual Arbitration Clauses in Federal Government False Claims Actions - U. S. v. Bankers Ins. Co.*, 2002 J. Disp. Resol. (2002)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2002/iss1/15>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

No Out for the Federal Government: Enforcing Contractual Arbitration Clauses in Federal Government False Claims Actions

*U. S. v. Bankers Ins. Co.*¹

I. INTRODUCTION

As a party to one-fourth of all civil litigation² the federal government exerts a looming presence in American judicial proceedings. Thus, attempts by the government to elude obligations under arbitration agreements, if successful, would significantly impact the elite status that pre-dispute contractual arbitration clauses currently hold.³ This casenote examines how the United States Court of Appeals for the Fourth Circuit recently addressed this issue in the context of a false claims action.

II. FACTS AND HOLDING

Bankers Insurance Company (Bankers), a private company, was a participant in the Write-Your-Own (WYO) program of the National Flood Insurance Program (NFIP).⁴ As a WYO participant, Bankers was allowed to sell and administer flood insurance policies to the public under terms and conditions governed by a Financial Assistance/Subsidy Arrangement (Arrangement) between Bankers, the Federal Emergency Management Agency (FEMA), and the Federal Insurance Administration (FIA).⁵ Article VIII of the Arrangement contains an arbitration provision which reads:

1. 245 F.3d 315 (4th Cir. 2001).

2. In 1990, twenty-five percent of all federal civil cases involved the government. *See Favoring ADR, Bush Sets Rules to Stem Suits by U.S. Agencies*, 10 *Alts. to the High Cost of Litig.* 2 (1992).

3. *See* Stephen K. Huber & E. Wendy Trachte-Huber, *Top Ten Developments in Arbitration in the 1990s*, 55 *Dis. Res. J.* 24, 83-84 (2001).

4. *Bankers*, 245 F.3d at 317. The NFIP was established by Congress in the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-129 (1994) (hereinafter NFIA).

5. *Id.* The FIA oversees the administration of the NFIP under the charge of FEMA. *See* 44 C.F.R. § 2.31 (1999).

If any misunderstanding or dispute arises between the Company [Bankers] and the FIA with reference to any factual issue under any provision of this arrangement . . . such misunderstanding or dispute may be submitted to arbitration for a determination [that] shall be binding upon approval by the FIA.⁶

The Arrangement was renewed annually from 1984 until 1997.⁷ Thereafter, the United States, on behalf of FEMA, filed a complaint in the United States District Court for the District of Maryland against Bankers alleging a violation of the False Claims Act (FCA), breach of contract, negligent misrepresentation, and unjust enrichment.⁸ Bankers responded with a motion to stay the proceedings pending arbitration as prescribed in Article VIII of the Arrangement.⁹ The district court denied the stay request finding, “traditional principles governing arbitration have no application to a suit brought by a federal agency asserting a claim under the False Claims Act.”¹⁰ Subsequently, Bankers brought an interlocutory appeal pursuant to the Federal Arbitration Act (FAA)¹¹ before the Fourth Circuit Court of Appeals.¹²

Bankers’ contention that the Arrangement’s arbitration provision was binding in this case rested on three assertions.¹³ First, Bankers argued that the language of the Arrangement’s arbitration clause made arbitration mandatory rather than permissive.¹⁴ Second, Bankers argued the district court erred by ignoring the “heavy presumption of arbitrability” merely because the case involved an FCA claim.¹⁵ Finally, Bankers contended that all claims in the government’s complaint, including the FCA claim, arose from the Arrangement and therefore should have been submitted to arbitration as prescribed in the Arrangement’s arbitration clause.¹⁶

6. *Bankers*, 245 F.3d at 318 (quoting 44 C.F.R. § 62 App. A and J.A. 42 1999) (The Arrangement’s arbitration provision duplicates a form agreement established and mandated by FEMA in 44 C.F.R. § 62 App. A.).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. 9 U.S.C. §§ 1-16 (1994). Section two of the FAA, which was originally passed as the United States Arbitration Act in 1925, declares that “[a] written provision . . . [to arbitrate] a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Under the FAA “an appeal may be taken from an order refusing a stay of any action under section three of this title.” 9 U.S.C. § 16(a)(1)(A). Section three of the FAA governs actions, which have an issue referable to arbitration under a written agreement. 9 U.S.C. § 3.

12. *Bankers*, 245 F.3d at 317.

13. *Id.* at 318-19.

14. *Id.* at 318.

15. *Id.* at 318-19.

16. *Id.* at 319.

The government responded by asserting that sovereign immunity precluded the application of the arbitration agreement absent the government's consent to arbitrate.¹⁷ Additionally, the government argued the Arrangement's arbitration clause was permissive rather than mandatory, and binding arbitration is statutorily prohibited under the NFIA, which established the NFIP.¹⁸ Finally, the government asserted that because the Attorney General was not a party to the Arrangement, the government was not bound by the Arrangement to arbitrate an FCA claim.¹⁹

The Fourth Circuit Court of Appeals reversed the district court's denial of the stay request.²⁰ The court remanded the case finding: (1) where the United States initiates a suit it cannot invoke the doctrine of sovereign immunity to escape contractual obligations concerning the litigation procedure; (2) the language of the arbitration clause provided an aggrieved party with a choice between arbitration or abandonment of the claim; (3) a non-binding arbitration provision does not necessarily make arbitration futile and the arbitration provision was enforceable; and (4) the presence of a FCA claim does not render an arbitration provision unenforceable.²¹

III. LEGAL BACKGROUND

A. The Current Position on Contractual Arbitration Clauses

Pre-dispute contractual arbitration clauses that come before United States courts today are receiving virtually unwavering affirmation.²² However, this resounding support for arbitration agreements reflects a shift from the judicial attitude of just a few decades ago.²³ The movement toward recognition of arbitration clauses began in 1925 with the enactment of the FAA.²⁴ The Congressional intent of the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."²⁵ While the FAA enjoyed a somewhat slow inception period, concerns in the 1980's that the American judicial system was overburdened and judicial

17. *Id.*

18. *Id.* (quoting 42 U.S.C. § 4083(b)). The NFIA specifically states: "Such arbitration shall be advisory in nature . . . final only upon the approval of the [FEMA] Director."

19. *Id.*

20. *Id.* at 317.

21. *See id.* at 320-24.

22. *See* Huber & Trachte-Huber, *supra* n. 3, at 83-84.

23. *Id.*

24. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 644 (1996).

25. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

resources were too strained brought arbitration to the forefront of the effort to decrease growing dockets.²⁶

This effort to conserve judicial resources produced case law that proclaimed arbitration as a viable method to resolve claims.²⁷ The Supreme Court, in *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*,²⁸ announced its preference for arbitration over litigation and instructed that all arbitration covenants must be broadly construed and that all doubts be resolved in favor of arbitration, including fraud in the inducement of the agreement. Since *Moses*, the Court has consistently enforced arbitration clauses²⁹ and language reiterating that public policy favors arbitration is now common³⁰ and it requires courts to rigorously enforce agreements to arbitrate.³¹

The preference for arbitration has been carried out through the Court's broad interpretation of "commerce" which falls within the FAA.³² The modern interpretation allows the FAA to apply to almost all business disputes.³³ Additionally, the Supreme Court has thwarted any state efforts to restrict or discourage arbitration.³⁴ In *Southland Corp. v. Keating*, the Court issued a controversial opinion holding that the FAA not only applied to state courts but state courts' interpretation of their state's statutes.³⁵ Thus, the Court established that the FAA preempted states from overriding arbitration agreements.³⁶ Despite protests

26. See Harold Brown, *Alternative Dispute Resolution*, 30 Suffolk U.L. Rev. 743, 747-48. See also Sternlight, *supra* n. 24, at 661.

27. See Sternlight, *supra* n. 24, at 661.

28. 460 U.S. 1, 25 (1983) (instructing courts to resolve procedural or substantive defects over scope of arbitration clause in favor of arbitration).

29. Sternlight, *supra* n. 24, at 641. See e.g. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that would provide grounds for the revocation of any contract the Arbitration Act provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.").

30. A Westlaw search conducted Oct. 2, 2001, revealed twenty-eight federal court decisions in 2000 expounding language that public policy favors arbitration. See e.g. *Mediterranean Shipping Co. S.A. Geneva v. POL-Atlantic*, 229 F.3d 397 (2d Cir. 2000); *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n as Trustee for Trust No. 1*, 218 F.3d 1085 (9th Cir. 2000).

31. See e.g. *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308 (6th Cir. 1998).

32. See *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (asserting the FAA embodies congressional intent to enforce arbitration agreements "within the full reach of the Commerce Clause").

33. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274-77 (1995) (The Court found a contract between a small, locally owned business and a home owner was within the FAA as it was a transaction "involving commerce" and congressional intent was to exercise commerce powerfully.).

34. See *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984) (voiding California's law overriding arbitration agreements).

35. *Id.*

36. *Id.*

from many state attorneys general³⁷ the Court reaffirmed *Southland* in *Allied-Bruce Terminix Cos., Inc.*³⁸ *Allied-Bruce* further extended the scope of the FAA into state territory by adopting an extremely broad interpretation of interstate commerce that included any transaction Congress would have the power to regulate directly under its commerce power, regardless of party intention.³⁹

The monumental step away from the traditional notion that statutory claims were inarbitrable has increased the use of arbitration.⁴⁰ The divergence from the traditional attitude began with the Supreme Court's announcement, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."⁴¹ Subsequently, arbitration has been upheld in "controversies under various federal statutes historically shielded from arbitration, such as the antitrust laws, the securities acts, and [the] Racketeer Influenced and Corrupt Organization Act (RICO),"⁴² and claims under the Age Discrimination in Employment Act.⁴³ Thus, "arbitration is now viewed as an alternative forum for raising statutory as well as contractual claims."⁴⁴ The presumption that a statutory claim is arbitrable can only be overridden with explicit evidence from the text or legislative history of a statute showing Congress's affirmative intent to preclude arbitration of a statutory claim.⁴⁵ This places a heavy burden on the party opposing arbitration⁴⁶ and this burden has been rarely satisfied in cases before the Supreme Court.⁴⁷

B. Contractual Arbitration Clauses

Based on the judicial system's willingness to uphold arbitration clauses, it is not surprising that there has been an explosion in the use of arbitration clauses.⁴⁸ Between 1985 and 1986 the American Arbitration Association's commercial

37. Twenty state attorneys general joined together in an amicus brief to ask the Court to reverse its holding in *Southland* when the Court granted certiorari in *Allied-Bruce Terminix Cos., Inc.* See Sternlight, *supra* n. 24, at 665.

38. 513 U.S. 265.

39. *Id.*

40. Huber & Trachte-Huber, *supra* n. 3, at 27.

41. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (holding that even if antitrust claims could not be domestically arbitrated, they should be arbitrable as an international transaction).

42. Brown, *supra* n. 26, at 749-50.

43. *Gilmer*, 500 U.S. at 30-33.

44. Huber & Trachte-Huber, *supra* n. 3, at 27.

45. *Id.* See e.g. *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840 (2d Cir. 1987).

46. Huber & Trachte-Huber, *supra* n. 3, at 27.

47. See Sternlight, *supra* n. 24, at 672.

48. *Id.* at 638. See also Huber & Trachte-Huber, *supra* n. 3, at 30.

arbitrations increased from 6,000 to 53,000 and the trend has continued.⁴⁹ Traditionally, the pre-dispute arbitration clauses are “the most prevalent method of creating arbitration proceedings, as evidenced by arbitrations organized under the American Arbitration Association, of which ninety-five percent of its 70,000 arbitrations occur as a result of pre-dispute clauses.”⁵⁰ Pre-dispute arbitration covenants are now common in numerous legally binding agreements including stockbroker agreements, bank contracts with depositors and borrowers, franchise arrangements,⁵¹ insurance claims, attorney/client contracts, physician/patient agreements, and employment contracts.⁵²

The increasing use of arbitration clauses and the preferential treatment given these clauses has affected both civil parties and the federal government,⁵³ which has traditionally opposed the use of binding arbitration.⁵⁴ For over 150 years “the United States, acting through the Department of Justice, positioned that the Constitution bars the United States from submitting to binding arbitration by an independent arbitrator.”⁵⁵ However, on September 7, 1995, the United States Department of Justice, Office of Legal Counsel (OLC) reversed its previous view and issued an opinion that the OLC, “no longer takes the view that the Appointments Clause bars the United States from entering into binding arbitration.”⁵⁶ In addition, the OLC did “not view any other constitutional provision or doctrine as imposing a general prohibition against the federal government entering into binding arbitration.”⁵⁷ The memo concluded:

Where there is no statute requiring parties to enter into binding arbitration, the parties may nevertheless agree to do so. The same may be said of the government when it is a party. Absent a statute to the contrary and assuming the availability of authority to effect any remedy that might result from the arbitration, we perceive no broad constitutional prohibition on the government entering into binding arbitration.⁵⁸

49. Brown, *supra* n. 26, at 748.

50. Jonathan D. Mester, *The Administrative Dispute Resolution Act of 1996: Will the New ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?*, 13 Ohio St. J. on Dis. Res. 167, 178 (1997).

51. Brown, *supra* n. 26, at 745.

52. Huber & Trachte-Huber, *supra* n. 3, at 30.

53. P. Jean Baker, *Binding Arbitration: Federal v. Private*, 55 Dis. Res. J. 19, 20 (May 2000).

54. *See Tenaska Washington Partners II, L.P. v. U.S.*, 34 Fed. Cl. 434, 438 (1995).

55. *Id.*

56. Walter Dellinger, *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 7 World Arb. & Mediation Rep. 23, 23 (1996).

57. *Id.* at 33.

58. *Id.* at 32.

While the memorandum is binding on the Department of Justice and other executive branch agencies, it does not force courts to accept the asserted legal theory.⁵⁹ However, courts have accepted this theory and bound federal agencies to agreements to arbitrate in the absence of a statutory barrier.⁶⁰ The court held the government's immunity precluded a specific performance order against the government but monetary awards were enforceable.⁶¹

IV. INSTANT DECISION

A. Sovereign Immunity

In *Bankers*, the court faced echoes of traditional anti-arbitration attitudes in determining whether the government should be bound by a pre-dispute contract arbitration clause when it initiates a federal statutory claim against a private party. The court began its analysis by rejecting the argument that sovereign immunity⁶² precluded the government from being forced to engage in arbitration, and thus relieved the government of any contractual obligation to arbitrate claims.⁶³ The court found that the government's status as instigator was fatal to the government's sovereign immunity argument because sovereign immunity could only be utilized as a shield from suit - not a sword.⁶⁴ Citing *Guaranty Trust Co. v. United States*,⁶⁵ the court held that "by voluntarily appearing in the role of suitor [the sovereign] abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought."⁶⁶ The government not only initiated the civil action before the court, it also created and mandated the terms of its legal relationship with *Bankers* under the Arrangement including the arbitration clause.⁶⁷ The court concluded the government could not evoke sovereign immunity to evade its contractual obligations.⁶⁸

59. *Tenaska*, 34 Fed. Cl. at 440.

60. *Id.* at 438-40.

61. *See id.* at 443-44 (holding specific performance is not available as a remedy because of immunity).

62. Sovereign immunity is a common law doctrine that provides the United States with absolute immunity from suit absent its consent. *See Block v. North Dakota*, 461 U.S. 273, 287 (1983) ("[T]he United States cannot be sued at all without the consent of Congress.").

63. *Bankers*, 245 F.3d at 319.

64. *Id.* at 320.

65. 304 U.S. 126, 134 (1938).

66. *Bankers*, 245 F.3d at 320.

67. *Id.* at 319-20.

68. *Id.*

B. Permissive Language

Denial of the government's sovereign immunity argument necessitated that the court further analyze whether other grounds existed that might discharge the government from its contract responsibilities under the Arrangement arbitration clause.⁶⁹ The court first examined the language of the Arrangement's arbitration clause to determine if there was any merit to the government's argument that the clause used permissive language, making arbitration non-mandatory.⁷⁰ The clause read, "any such misunderstanding or dispute may be submitted to arbitration."⁷¹ Following guidance lent by the Fourth Circuit and three other circuits in interpretation of similar clauses,⁷² the court concluded that the language used in the Arrangement arbitration clause created a choice between arbitration or abandonment of the action.⁷³ The court reasoned that because parties can always voluntarily submit to arbitration any contrary interpretation would render the arbitration provision meaningless.⁷⁴

C. Futility of Non-Binding Arbitration

The court continued its analysis by addressing the government's assertion that the arbitration provision should not be applied because it is non-binding⁷⁵ on the government and, as a result, will not adequately resolve the dispute with Bankers.⁷⁶ Though the court conceded that the government's right to reject an arbitration award or decision left open the possibility that the case will not be resolved by a mandatory arbitration, the court refused to classify non-binding arbitration as a futile exercise.⁷⁷ The court's resistance rested on the rationalization that "the government would

69. *Id.* at 320.

70. *Id.*

71. *Id.*

72. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 886 (4th Cir. 1996) (holding the phrase "may be referred to arbitration" gives "an aggrieved party the choice between arbitration and abandonment of his claim"); *Am. Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990) (holding the phrase "if both parties agree" mandates arbitration); *Ceres Marine Terminals, Inc. v. Int'l Longshoremen's Assn.*, 683 F.2d 242, 246-47 (7th Cir. 1982) (stating "may refer the grievance to arbitration" is mandatory); *Local 771, I.A.T.S.E. v. RKO Gen., Inc.*, 546 F.2d 1107, 1116 (2d Cir. 1977) (stating "may submit to arbitration" is mandatory).

73. *Bankers*, 245 F.3d at 320.

74. *Id.* at 321.

75. Under the NFIA the FIA Director must approve an arbitration award, decision, or recommendation before it is permitted to "become final." 42 U.S.C. § 4083(b). While the government is thus not bound by any arbitration decision, Bankers is bound under the Arrangement by the arbitration decision. *Bankers*, 245 F.3d at 322.

76. *Id.* at 321.

77. *Id.* at 322-23.

presumably act reasonably and rationally, and would approve an arbitration award or decision that it found favorable.”⁷⁸ Furthermore, citing *Wosey, Ltd. v. Foodmaker, Inc.*,⁷⁹ the court concluded that even if the arbitration proved to be futile that fact does not present a legal obstacle to the enforceability of a non-binding arbitration clause.⁸⁰

D. Preclusion of FCA Claims from Arbitration

The court’s final analysis addressed the government’s contention that the arbitration clause could not be enforced because of the Attorney General’s presence in the action as representative of the United States’ interests and the nature of an FCA claim.⁸¹ The government argued that because the Attorney General was not a party to the Arrangement he should not be forced to abide by the Arrangement’s provisions when asserting his exclusive statutory authority⁸² to enforce the FCA.⁸³ The court rejected this argument finding that as the Attorney General’s rights and responsibilities under the Arrangement consisted solely of those derivative of FEMA and the FIA, agencies which possessed no right to ignore the arbitration agreement, the Attorney General also could not ignore the agreement.⁸⁴ To allow the Attorney General to do so would be to ignore applicable precedent which established, “when a third party sues on a contract, any arbitration provision contained therein remains in force.”⁸⁵

The government argued alternatively that even if the other claims were subject to arbitration, the statutory civil FCA claim should not be arbitrated because the Attorney General was the exclusive enforcer of the FCA and to force him to arbitrate an FCA claim would dilute his authority.⁸⁶ The court found the government failed to provide sufficient reasoning to support divergent treatment of an FCA claim from other civil statutory claims, which the Supreme Court has held are subject to

78. *Id.* at 323.

79. 144 F.3d 1205, 1209 (9th Cir. 1998) (holding non-binding arbitration clause to be enforceable).

80. *Bankers*, 245 F.3d at 322.

81. *Id.* at 323.

82. *Id.*

83. “If the Attorney General finds that a person has violated or is violating [the FCA], the Attorney General may bring a civil action under this section against the person.” 31 U.S.C. § 3730 (1994).

84. *Bankers*, 245 F.3d at 323.

85. *Id.* In support of its finding the court cited *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, which held that it would “both disregard equity and contravene [the FAA]” to allow a plaintiff “to claim the benefit of the contract and simultaneously avoid its burdens.” *Int’l Paper Co.*, 206 F.3d 411, 418 (4th Cir. 2000).

86. *Id.* at 324.

arbitration.⁸⁷ The court reasoned the arbitration would be non-binding on the government and that the government provided no valid basis for its claim that arbitration would impair the Attorney General's authority.⁸⁸ To the contrary, the court noted that the Department of Justice policy favors use of alternative dispute resolution in FCA cases.⁸⁹ Thus, the court concluded the government had no special right to ignore its contract responsibilities, and it could not avoid these responsibilities by invoking a civil statutory claim.⁹⁰

The court's determination that there was no valid basis for treating the FCA claim differently than other statutory claims led to its final analysis, which required the court to determine whether the claim's underlying factual allegations were "within the scope of the arbitration clause, regardless of the legal label assigned to the claim."⁹¹ Following this model the court held that the FCA claim was within the scope of the Arrangement's arbitration clause, because the Arrangement governs the duties that were imposed on Bankers.⁹² The court concluded "where the Government has previously agreed to an arbitration process, the statutory authority of the Attorney General is not compromised by that agreement being honored" and the government should be bound by the law like all other parties.⁹³

E. The Dissent Regarding the Arbitrability of FCA Claims

In a separate decision concurring in part and dissenting in part Judge Seymour dissented to the majority's conclusion that the FCA claim was arbitrable.⁹⁴ In Seymour's opinion the FCA claim did not arise pursuant to the Arrangement and therefore the issue of arbitration was governed by the language of the controlling

87. *Id.* The court specifically cited *Shearson/American Express, Inc. v. McMahon*, which held statutory claims under RICO and the federal securities laws are subject to arbitration. *Shearson*, 482 U.S. 220, 226 (1987)

88. *Bankers*, 245 F.3d at 324.

89. *Id.* (citing Policy on the Use of Alternative Dispute Resolution, 61 Fed. Reg. §§ 36895, 36899 (1996)) ("[L]itigation . . . under the False [C]laims Act . . . [is a] good candidate for ADR mechanisms.")

90. *Id.* The court cited *U.S. v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) for the proposition that a contract signed by an authorized official of the government binds the entire government. The court noted that under 28 U.S.C. § 516, the Attorney General is entrusted with the power to direct all litigation involving the United States. Although the FIA possessed authority to enter into the Arrangement and the arbitration provision therein, nothing prevents the Attorney General from using his position (to control litigation on behalf of the government) to insure that federal agencies refrain from agreeing to arbitrate potential FCA claims. The court cited *Thomas v. INS*, 35 F.3d 1332, 1340-41 (9th Cir. 1994) in support of this proposition.

91. *Bankers*, 245 F.3d at 325 (citing *J.J. Ryan & Sons, Inc. v. Rhone Pulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988)).

92. *Id.*

93. *Id.*

94. *Id.*

statute - not the arbitration provision.⁹⁵ Because the FCA granted the Attorney General discretion to elect arbitration in any claim arising under the Act and did not grant Bankers any corresponding right to seek arbitration, the government should not be forced to arbitrate the FCA claim.⁹⁶

V. COMMENT

With language falling right in line with federal public policy favoring arbitration and requiring courts to rigorously enforce arbitration agreements,⁹⁷ the Fourth Circuit repudiated the government's objections to the enforceability of the Arrangement arbitration clause leaving little support for future attempts by the government to elude contract arbitration obligations. The court's eagerness to resolve government resistance to participate in arbitration proceedings⁹⁸ is not surprising given the federal government's common appearance in civil actions⁹⁹ and the popular concern for managing judicial dockets and litigation costs.¹⁰⁰ The court's citation to the *Department of Justice's Policy on the Use of Alternative Dispute Resolution and Case Identification Criteria for Alternative Dispute Resolution*,¹⁰¹ which states the Fraud Unit of the Department of Justice recovered over one billion dollars in 1995 primarily from FCA claims,¹⁰² evidences the court was cognizant of the potential increase in arbitrable claims if the government was required to arbitrate FCA claims.

A. *The Shortcomings of the Majority Opinion*

After soundly rejecting the government's arguments in favor of exemption from any obligation to arbitrate its claims against Bankers, the majority opinion failed to consider whether the FCA claim really arose under a contract and thus was bound by the contract terms. Consistent with the Supreme Court's holding in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*,¹⁰³ the Bankers court announced it "must determine whether the factual allegations underlying the claim

95. *Id.*

96. *Id.*

97. *Andersons, Inc.*, 166 F.3d 308.

98. *See Tenaska*, 34 Fed. Cl. at 438.

99. *See Favoring ADR supra* n. 2.

100. *See Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060 (2d Cir. 1993) (holding the FAA requires federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as means of reducing costs and delays associated with litigation). *See also Campaniello Imports, Ltd. v. Saporiti Italia S.P.A.*, 117 F.3d 655 (2d Cir. 1997).

101. *Bankers*, 245 F.3d at 324.

102. 61 Fed. Reg. §§ 36895, 36899 (1996).

103. 473 U.S. 614, 622 (1985).

are within the scope of the arbitration clause, regardless of the legal label assigned” to determine if an arbitration agreement applies.¹⁰⁴ However, in an apparent rush to finally dispose of the case, the court skirted this analysis and failed to address relevant precedent. The court dismissed the issue in cursory fashion stating that “whether there has been a civil violation of the FCA depends on the duties imposed on Bankers by the Arrangement, measured against its compliance thereunder.”¹⁰⁵

In a separate opinion concurring in part and dissenting to the extent that the FCA claim was arbitrable, Judge Seymour correctly points out that precedence in this area has held that FCA claims do not arise under a contract.¹⁰⁶ Citing *United States v. The Boeing Co.*,¹⁰⁷ Judge Seymour casts doubt on whether FCA claims are bound by contract arbitration clauses. While *Boeing* is not binding precedent on the Fourth Circuit, the *Boeing* court extracted its authority from the Supreme Court decision *United States v. Woodbury* which held that the legal basis of FCA claims is an intentional violation of the FCA and not a mere breach of contract.¹⁰⁸ According to the *Boeing* court, “claims under the FCA arise when a person knowingly presents or causes to be presented a false or fraudulent claim or knowingly makes, uses or causes to be made a false record or statement to get a false or fraudulent claim paid.”¹⁰⁹ As a knowing act of submitting a false claim is irrelevant to any duties that are imposed by a contract, FCA claims could easily be found, and have in fact been found, to be independent of a contract relationship.¹¹⁰ Thus, the holdings of *Boeing* and *Woodbury* appear to be in direct opposition to the Fourth Circuit’s conclusion that whether Bankers violated the FCA depended on the duties imposed on Bankers by the Arrangement.¹¹¹ The court’s failure to address precedent on the relationship of FCA claims to contracts leaves the issue of whether FCA claims are subject to pre-dispute contract arbitration provisions on unstable ground and exposed to attack.

B. The Issue of Contractual Arbitration Clauses’ Control Over FCA Claims

It is likely that future courts may divide on this issue. A clear trend has developed favoring the arbitrability of statutory claims which has resulted in an

104. *Bankers*, 245 F.3d at 325 (citing *J.J. Ryan & Sons, Inc.*, 863 F.2d at 319).

105. *Bankers*, 245 F.3d at 325.

106. *Id.*

107. 73 F. Supp. 2d 897, 910-11 (S.D. Ohio 1999) (holding “claims under the FCA do not arise pursuant to a contract”).

108. 359 F.2d 370, 377 (9th Cir. 1966).

109. *Id.*

110. *U.S. v. The Boeing Co.*, 73 F. Supp. 2d at 910. See also *U.S. v. Ueber*, 299 F.2d 310, 313 (E.D. Mich. 1962).

111. *Bankers*, 245 F.3d at 325.

increasing number of statutory claims within the FAA.¹¹² Combined with the deference with which courts must view pre-dispute arbitration provisions,¹¹³ it is very possible that courts motivated by policy reasons may interpret broadly written arbitration provisions to include FCA claims, as the Fourth Circuit has done. If future courts can adequately support a finding that the factual allegations underlying the FCA claim are within the scope of the arbitration clause, then such a court would be well within its authority to compel the government to arbitrate FCA claims. Statutory claims only override federal policy in favor of arbitration where the party opposing arbitration is able to show that Congress reserved a federal forum to vindicate rights under the statute.¹¹⁴ On its face, the statutory language of the FCA does not evidence that Congress had such an intent with respect to FCA claims.¹¹⁵

However, as the court's authority to compel arbitration under the FAA hinges on finding that FCA claims are within the scope of contract arbitration provisions,¹¹⁶ the apparent textual support for finding that FCA claims are independent of contracts presents a significant obstacle for such an outcome. The exemption of FCA claims from the broad, seemingly all-encompassing scope of the FAA would mark a significant departure from the trend of finding statutory claims within the FAA scope.¹¹⁷

Courts like the Fourth Circuit, which are not persuaded that FCA claims are subject to contract provisions, are likely to conclude that a court cannot compel the government to arbitrate an FCA claim. The federal policy favoring arbitration may not extend the reach of arbitration beyond the intended scope of the clause providing for it.¹¹⁸ In the absence of a controlling contract provision, the issue of arbitrability of a FCA claim must be determined by looking at the language of the controlling statute.¹¹⁹ Title thirty-one of the United States Code calls for the Attorney General to diligently investigate any potential violations of the FCA and, if she finds a violation, the Attorney General may bring a civil action.¹²⁰ The statutory language places the pursuit of FCA claims within the discretion of the Attorney General.¹²¹ None of the provisions of the FCA grants defendants in FCA actions the right to seek arbitration when the Attorney General has chosen an alternate form of adjudication

112. Huber & Trachte-Huber, *supra* n. 3, at 27.

113. *Andersons, Inc.*, 166 F.3d 308.

114. *Genesco, Inc.*, 815 F.2d 840.

115. *Bankers*, 245 F.3d at 325.

116. *Adamovic v. METME Corp.*, 961 F.2d 652 (7th Cir. 1992) (holding where no agreement to arbitrate exists the courts cannot compel arbitration).

117. See *Brown*, *supra* n. 26, at 749-50. See also Huber & Trachte-Huber, *supra* n. 3, at 27.

118. *Spear, Leeds & Kellogg v. Central Life Assur. Co.*, 85 F.3d 21 (2d Cir. 1996).

119. *Id.*

120. 31 U.S.C. § 3730(a).

121. *Bankers*, 245 F.3d at 326.

of the issue. Thus, a court's finding that FCA claims are not governed by a contract provision places defendants at the will of the Attorney General for such claims.

While *Bankers* strengthened the argument that the federal government, like all other parties, is bound to pre-dispute contract arbitration provisions, its weak analysis of whether FCA claims fall within broad contract arbitration provisions fails to resolve the issue for future courts. In light of the potential for varying outcomes regarding this issue, and the potential effect due to the sheer volume of FCA cases, this issue should be resolved by the Supreme Court.

VI. CONCLUSION

The *Bankers* court held: (1) the federal government cannot invoke the doctrine of sovereign immunity to elude contractual obligations when it initiates suits; (2) the language of an arbitration clause which appears permissive rather than mandatory can only be interpreted to provide an aggrieved party with a choice between arbitration or abandonment of the claim; (3) a non-binding arbitration provision is enforceable; and (4) FCA claims are within the scope of pre-dispute resolution arbitration contract provisions and thus subject to arbitration.¹²² While the court's findings in *Bankers* have furthered efforts to erode the government's resistance to arbitration, its treatment of the issue of the applicability of pre-dispute contract provisions to FCA claims is inadequate to resolve the issue for future courts. Thus, FCA claims cannot confidently be counted among the growing number of statutory claims that are arbitrable under the FAA.

SARAH A. WIGHT

122. *See id.* at 320-24.