Denver Law Review

Volume 83
Issue 3 *Tenth Circuit Surveys*

Article 19

Spring 4-1-2006

McCauley v. Halliburton Energy Services, Inc.: Treatment of a Motion to Stay Proceedings Pending an Arbitrability Appeal

NIckolas J. McGrath

McCauley v. Halliburton Energy Services, Inc.: Treatment of a Motion to Stay Proceedings Pending an Arbitrability Appeal

McCAULEY V. HALLIBURTON ENERGY SERVICES, INC.: TREATMENT OF A MOTION TO STAY PROCEEDINGS PENDING AN ARBITRABILITY APPEAL

INTRODUCTION

Arbitration is a method of dispute resolution "involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding."[1] The arbitration proceeding is distinct from litigation and its underlying purpose is to "encourag[e] dispute resolution without resort to the courts."[2] Arbitration is an attractive form of dispute resolution because it "leads to the efficient resolution of disputes without resort to the time and expense of litigation."[3]

Although arbitration is an efficient form of dispute resolution, a party cannot be forced to arbitrate in the absence of an arbitration agreement.[4] Generally, the parties, subject to such an agreement, will choose to arbitrate on their own. However, when a party is resolute on trying to avoid arbitration, "a federal district court may be required to ascertain whether an arbitration clause contained in an agreement between or among the involved parties requires that the dispute be submitted to arbitration."[5] When a party to an arbitration agreement files a motion to compel arbitration, the federal district court will determine whether to grant or deny the motion.

When a motion to compel arbitration is granted, the parties are required to submit to arbitration to resolve their disputes. When the motion to compel arbitration is denied, the Federal Arbitration Act (FAA) permits the moving party to appeal. Several issues arise in this scenario. How should the district court, which denied the motion to compel arbitration, proceed? Should the district court grant a motion to stay the proceedings pending the arbitrability appeal? Or, should the district court deny a motion to stay and proceed with the case on the merits?

The former is in line with the purpose of arbitration—to save time and money by avoiding litigation, but the latter has favorable arguments as well—namely to avoid frivolous appeals in an effort to stall the litigation process. When a district court denies a party's motion to compel arbitration, circuits are divided on whether proceedings should be stayed

---

1. BLACK'S LAW DICTIONARY 112 (8th ed. 2004).
2. 6 C.J.S. *Arbitration* § 6 (2005).
3. James R. Foley, *Recent Development: Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 13 OHIO ST. J. ON DISP. RESOL. 1071, 1071 (1998).
4. 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 203.12 (3d ed. 2005).
5. *See* Foley, *supra* note 3, at 1071.

during an appeal of that decision. Recently, the Tenth Circuit, in a case of first impression, addressed this issue. In *McCauley v. Halliburton Energy Services Inc.*,[6] the Tenth Circuit adopted the approach of the Seventh and Eleventh Circuits and held that a motion to stay proceedings in the district court should be granted pending an arbitrability appeal.[7]

Part I of this article discusses the arbitration process; the Federal Arbitration Act, the four-prong test for determining whether a court should generally stay proceedings, the growing popularity of arbitration in the United States, and the circuits' opposing views on whether to grant a stay pending an arbitrability appeal. Part II of this article discusses the recent Tenth Circuit case of *McCauley v. Halliburton*. Finally, Part III presents two main arguments supporting the holding in *McCauley*. First, procedurally, a stay should be granted because a district court lacks jurisdiction to continue with a case on the merits pending an arbitrability appeal; and second, allowing for a stay is consistent with the FAA and the purpose of arbitration generally. Finally, I address whether the issue will likely reach the United States Supreme Court.

I. BACKGROUND

A. Arbitration—Alternative Dispute Resolution

Arbitration is one of several alternative processes that parties can use to resolve disputes. The main reason parties agree to arbitrate is to avoid the time and expenses that often accompany the litigation process. Furthermore, unlike litigation, arbitration is private, and thus appeals to those wishing to keep their disputes out of the public eye. Arbitration can be defined as a private process where one or more neutrals renders a decision after hearing arguments and reviewing evidence.[8] Generally, in arbitration, the neutral's decision is binding unless the parties contract in such a way as to allow for an appeal of the decision.[9] However, most often arbitration is used as a binding dispute resolution procedure.

There are several steps in the arbitration process. First, the parties generally agree to arbitrate in the event that a dispute arises. Parties usually do so by entering into an arbitration agreement. Once a dispute arises there are six standard stages in the arbitration process.[10]

The first step in the arbitration process is the initiation—one party will submit a "demand" or "notice" to the other party stating that, pursuant to the parties' agreement, arbitration shall be used to settle a given dispute.[11] If both parties agree to arbitrate, then the parties enter the sec-

6. 413 F.3d 1158 (10th Cir. 2005).
7. *McCauley*, 413 F.3d at 1163.
8. JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 2 (1998).
9. *Id.*
10. *Id.*
11. *Id.*

ond stage of the arbitration process, preparation, where the parties prepare for the case.[12] However, if one party refuses to arbitrate or honor the arbitration agreement, the moving party may, pursuant to the Federal Arbitration Act, file a motion to compel arbitration in any district court with jurisdiction over the matter.[13] If the motion is granted, the parties are required to arbitrate and the second stage, preparation, begins. In the preparation stage, the parties will prepare for the arbitration hearing.[14] This may include pre-hearing discovery if necessary.[15] However, if the motion to compel arbitration is denied, the moving party may appeal the denial of the motion to compel arbitration.[16]

The third and forth stages of the arbitration process are the pre-hearing conference and hearing.[17] In the pre-hearing conference the parties and the arbitrator deal with administrative tasks such as scheduling the arbitration.[18] The hearing is an evidentiary-type hearing where both parties present their evidence to the arbitrator.[19]

Finally, the fifth and sixth stages of the arbitration process are the decision-making stage and the award stage.[20] Upon the completion of the hearing, the arbitrator will decide the dispute. Often this is done immediately upon completion of the hearing, but no more than thirty days after the hearing.[21] Once a decision is made, the arbitrator will render a decision in the form of an award, which generally, unlike litigation, is binding with no option for appeal.[22]

B. The Federal Arbitration Act

In 1925, Congress enacted the Federal Arbitration Act[23] (FAA) "to ensure that arbitration agreements would be given the same legal effect as other contracts"[24] and "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by the widespread

---

12. *Id.*
13. *See infra* Part I.B.
14. *Id.*
15. Because one of the main qualities of arbitration is the expediency of the process, often times pre-hearing discovery in arbitration is limited. The limitations of discovery are usually established by the arbitrator, but nonetheless, discovery in arbitration is very rarely as extensive as the discovery process in litigation. *See* COOLEY, *supra* note 8, at 30.
16. *See infra* Part I.B.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. 9 U.S.C.S. § 1 - 16 (2005).
24. Thomas G. Stenson, *Punitive Damages Under the Federal Arbitration Act: Have Arbitrators' Remedial Powers Been Circumscribed by State Law*, 7 ST. JOHN'S J. LEGAL COMMENT. 661, 661 (1992).

unwillingness of state courts to enforce arbitration agreements."[25] Furthermore, following the enactment of the FAA the United States Supreme Court has required courts to "rigorously enforce" arbitration agreements.[26]

Under Section 4 of the FAA, a party to an arbitration agreement may petition any United States district court, with proper jurisdiction, for an order to compel arbitration.[27] When determining the arbitrability of a dispute, the court must decide "whether the parties agreed to arbitrate and, if so, whether the scope of that agreement encompasses the asserted claims."[28] If the district court is satisfied that the dispute shall be resolved through arbitration, the court will order the parties to proceed to arbitration.[29] On the other hand, if the district court denies a party's Section 4 motion to compel arbitration, Section 16(a) of the FAA allows for an interlocutory appeal of the order denying arbitration.[30] Allowing such an appeal demonstrates the FAA's "liberal policy favoring arbitration."[31] Specifically, the FAA, allowing such an appeal, supports the policy favoring arbitration "by permitting interlocutory appeals of orders favoring litigation over arbitration . . . ."[32] Conversely, the FAA does not allow interlocutory appeals of orders favoring arbitration over litigation in the presence of an arbitration agreement.[33]

---

25. Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (citing Metro Indus. Painting Corp. v. Terminal Constr. Corp., 287 F.2d 382, 387 (2d Cir. 1961)).

26. Catherine Burnham, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit*, 73 GEO. WASH. L. REV. 767, 769 (2005) (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

27. The FAA states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C.S. § 4 (2005).

28. MOORE ET AL., *supra* note 4, § 203.12 (quoting Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional, 991 F.2d 42, 44 (2d Cir. 1993)).

29. 9 U.S.C.S. § 4 (2005).

30. 9 U.S.C.S. § 16(a)(1)(C) (2005) (This section was enacted by Congress in 1988 and reads, "An appeal may be taken from an order denying an application under section 206 of this title to compel arbitration.").

31. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)).

32. MOORE ET AL., *supra* note 4, § 203.12 (quoting Forsythe Int'l S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1020 (5th Cir. 1990)).

33. The rationale behind this idea goes directly to Congress' intent in enacting the FAA. Congress desired courts to honor arbitration agreements and give then the same legal effect as other contracts. Stenson, *supra* note 24, at 661. Allowing an appeal of an order favoring arbitration over litigation, in the presence of an arbitration agreement, would undermine this purpose, as one must assume that parties understand the implications of an arbitration agreement if they willingly form a contract which includes such an agreement (of course, this statement is directed more towards commercial contracts between parties of equal bargaining power rather than consumer contracts where companies clearly have unequal bargaining power over consumers who, in most cases, do not choose to enter arbitration agreements when they purchase a service or good).

The FAA is explicit about courts enforcing valid arbitration agreements, and equally explicit about allowing for an appeal of a district court order denying a party's motion to compel arbitration. However, the FAA does not instruct courts on whether a stay of proceedings in the district court should be granted pending an arbitrability appeal,[34] which one can assume has led to the circuit split on this issue. Among the circuits that have addressed this issue, two dominant approaches and supporting arguments have developed. The Second and Ninth Circuits refuse to stay proceedings on the merits while the Seventh and Eleventh Circuits take the position that an automatic stay should be granted pending an arbitrability appeal.

C. Stay of Proceedings Generally: The Four Prong Test

Simply put, a stay postpones or halts court proceedings and judgments.[35] If a motion to stay is granted, the district court postpones proceeding with the case. However, if the motion is denied, the moving party may appeal. Section 3 of the FAA calls for the district court to grant a stay of proceedings when a motion to compel arbitration is granted and the parties are ordered to arbitrate.[36] However, the FAA does not expressly address whether a stay should be granted pending an appeal of an arbitrability determination.

Traditionally, a four-prong test has been used to determine whether a stay should be granted pending the appeal. In *Hilton v. Braunskill*,[37] the Supreme Court established a four-prong test for determining whether a stay of proceedings should be granted pending an appeal.[38] The four factors are:

> [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured absent a stay; whether issuance of the stay will substantially injure the other parties interest in the proceeding; and where the

34. *See* Foley, *supra* note 3, at 1071 (citing C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 716 F. Supp. 307, 309 (W.D. Tenn. 1989)).

35. BLACK'S LAW DICTIONARY 1453 (8th ed. 2004).

36. The FAA states:

> If any suit of proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit of proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.S. § 3 (2005).

37. 481 U.S. 770 (1987).

38. *Hilton*, 481 U.S. at 776.

public interest lies.[39] This four-prong test is applied widely throughout the federal courts, and is not limited to issues of arbitrability.[40]

However, the different circuits have applied the test in different ways by favoring some factors over others.[41] For example, some circuits give more weight to the likelihood of success on the merits, and yet other circuits allow a strong showing on one factor to compensate a weak showing on another factor.[42]

Although the four-prong test is widely used to determine whether a stay of proceedings should be granted, the application of the four-prong test in the context of arbitrability is being abandoned by some circuits. Specifically, as discussed elsewhere,[43] the Seventh and Eleventh circuits have abandoned the four-prong test, and instead have held that an automatic stay should be granted pending an arbitrability appeal.

D. The Growing Popularity of Arbitration as a Dispute Resolution Procedure

Recent data suggest that arbitration is becoming an increasingly popular form of dispute resolution in the United States.[44] However, according to a 2004 study conducted by the National Arbitration Forum, very few people use post-dispute arbitration agreements to arbitrate, leaving pre-dispute arbitration agreements as the only real avenue for parties to gain access to arbitration.[45] This fact, coupled with the increasing popularity of arbitration, suggests that more and more arbitration agreements are being created and used. This is very important in the context of how courts handle arbitrability issues. Below, data is presented on the public's general awareness and knowledge about the use of arbitration; on the use of arbitration to resolve disputes arising from consumer transactions; and on the use and benefits of arbitration for resolving commercial contract disputes.

1. General Awareness and Knowledge about the Use of Arbitration

Recent data indicates that the general awareness and knowledge about the use of arbitration is increasing.[46] As an update to a 1999 study, data from the 2004 study conducted by the National Arbitration forum suggests that Americans are increasingly finding arbitration to be a pre-

39. *Id.*
40. Foley, *supra* note 3, at 1076.
41. *Id.*
42. *Id.*
43. *See infra* Part I.F.
44. NAT'L ARBITRATION FORUM, THE CASE FOR PRE-DISPUTE ARBITRATION AGREEMENTS: EFFECTIVE AND AFFORDABLE ACCESS TO JUSTICE FOR CONSUMERS, EMPIRICAL STUDIES & SURVEY RESULTS 13 (2004), http://www.arbitration-forum.net/resources/articles/emprcl_study_04/emprcl_full_04.pdf.
45. *Id.*
46. *Id.*

ferred method of dispute resolution over litigation.[47] In 1999, 59% of individuals surveyed stated that they would choose arbitration over litigation in a lawsuit for monetary damages.[48] In 2003, 64% of individuals surveyed said they would choose arbitration.[49] While this is only a 5% increase, the more astounding finding is that in 1999, 50% of individuals surveyed felt it was worthwhile to initiate a lawsuit.[50] In 2003, only 34% felt initiating a lawsuit was worthwhile.[51] Clearly, these figures suggest that the general mindset concerning dispute resolution is heading away from litigation in favor of arbitration.

2. The Use of Arbitration for Consumer Transaction Disputes

Generally speaking, consumers are increasingly favoring arbitration for resolving consumer disputes. Although the data from the 2004 National Arbitration Forum survey pertaining to arbitration and consumer transactions focused on securities arbitration, it is nevertheless a telling indicator for the trends concerning arbitration and consumer transaction disputes. One reason why arbitration may be gaining popularity amongst consumers is because the consumer win rate is greater in arbitration as opposed to in court. Specifically, a 2002 report, by Professor Michael Perino of St. John's University School of Law, contained within the 2004 National Arbitration Forum survey, states that the consumer win rate in arbitration from 1980 to 2001 was 52.56% while the consumer win rate in federal court in 2000 was only 32%.[52] This suggests that consumers enjoy a 20% greater win rate when they choose to resolve their disputes using arbitration as opposed to litigation. This is a large percentile difference, and surly is enough to increase the attractiveness and popularity of arbitration as a means of resolving consumer transaction disputes.

Moreover, and perhaps more importantly for the credibility of arbitration as a dispute resolution procedure, a study surveying responses of investor-participants to the arbitration process found that 91% of respondents stated that the arbitration process was handled fairly and without bias.[53] This is encouraging because a process must be credible and fair if people are going to use it with confidence. At least from this data, arbitration appears to be a procedure that consumers are starting to believe in and trust.

47. *Id.*
48. *Id.*
49. *Id.* at 10.
50. *Id.*
51. *Id.*
52. *Id.* at 8.
53. *Id.*

3. The Use of Arbitration for Resolving Commercial Contract Disputes

Finally, there is a trend that more companies are not only beginning to use arbitration, but that using arbitration also has substantial benefits for these companies. A study released in October 2003 by the American Arbitration Association (AAA), which included interviews with 254 corporate general counsel, associate general counsel, and the like from over one hundred Fortune 1000 organizations, found that arbitration is becoming increasingly popular for resolving commercial contract disputes.[54] Of those interviewed, 85% reported using arbitration to resolve these types of disputes.[55] Additionally, the study found that companies relying on arbitration or mediation to resolve disputes were more successful at "preserving business relationships" and keeping their costs down.[56] With this, respondents indicated that, because they approached dispute resolution from a broader risk and business management perspective, they were "stretched to the limit" 20% less than those who were less focused on preserving relationships while settling their disputes.[57]

E. The Second and Ninth Circuits

The Second and Ninth Circuits have both held that there should not be a stay of proceedings on the merits while a motion to compel arbitration is pending. The following discusses the facts, procedural history, and rationale from both.

1. The Second Circuit: *Motorola Credit Corp. v. Uzan*[58]

In *Motorola Credit Corp. v. Uzan*, the plaintiffs, Motorola Credit Corporation (Motorola) and Nokia Corporation (Nokia) sued the defendants, members of the Uzan family of Turkey and the companies the family controls, Telsim and Rumeli Telefon.[59] In 1998, Motorola lent Telsim $360 million to purchase cellular infrastructure and equipment from Motorola Ltd., and $200 million so Telsim could acquire a national cellular license for Turkey.[60] In subsequent years, Motorola provided more financing for Telsim eventually totaling roughly $2 billion.[61] As collateral for these loans Motorola received a substantial portion of Telsim's outstanding shares.[62] Throughout the time of this financing, Mo-

54. Press Release, American Arbitration Association, Groundbreaking Study Finds Companies that Use ADR to Manage Conflicts Excel in Controlling Costs, Preserving Relationships: Playing to Win Can be a Losing Strategy, Data Indicates (Oct. 15, 2003), http://www.adr.org (follow "Press Room" hyperlink; then follow "Press Releases" hyperlink).
55. *Id.*
56. *Id.*
57. *Id.*
58. 388 F.3d 39, (2d Cir. 2004).
59. *Motorola Credit Corp.*, 388 F.3d at 42-43.
60. *Id.* at 43.
61. *Id.*
62. *Id.*

torola signed several agreements providing that the parties agree to arbitrate any dispute arising under the agreement in front of a three arbitrator panel in Switzerland, in accordance with the laws of Switzerland.[63]

Motorola and Nokia brought suit against the defendants on various claims including fraud.[64] Subsequently, the district court denied the defendants motion to compel arbitration and refused to stay the proceedings pending an appeal of the denial of the motion to compel arbitration.[65] Ultimately, the plaintiffs received an award of nearly $4.2 billion dollars in compensatory and punitive damages.[66] The defendants appealed claiming several errors, including that the district court erred in not granting the motion to compel arbitration and that the district court was without jurisdiction to proceed with the case on the merits while the appeal of the denied motion to compel arbitration was pending.[67]

On appeal, the Second Circuit found that the district court properly denied the defendants' motion to compel arbitration and that the district court was not divested of jurisdiction to proceed on the merits while the appeal to the denial of the motion to compel arbitration was pending.[68] Ultimately, the court vacated the district court's award of punitive damages and remanded for a new calculation of punitive damages.[69]

2. The Ninth Circuit: *Britton v. Co-op Banking Group*[70]

In *Britton v. Co-op Banking Group*, the plaintiffs alleged that Liebling, among other defendants, participated in a "securities fraud scheme by selling a fraudulent tax shelter investment."[71] The plaintiffs purchased securities from defendants, Gold Depository and Loan Company, a Co-op Banking Group company.[72] The contract of sale for these securities included an arbitration provision.[73]

After filing the original complaint, the plaintiffs subsequently filed three amended complaints.[74] During the time the plaintiffs continued to amend their complaint, Liebling attempted to informally reach a settlement with the plaintiffs.[75] When settlement appeared unlikely, Liebling contacted the plaintiffs and demanded arbitration pursuant to the arbitration provision in the contract of sale for the securities.[76] The plaintiffs

63. *Id.*
64. *Id.* at 44.
65. *Id.* at 45.
66. Motorola Credit Corp. v. Uzan, 274 F. Supp, 2d 481, 583 (S.D.N.Y. 2003).
67. *Motorola Credit Corp.*, 388 F.3d at 49.
68. *Id.* at 49.
69. *Id.* at 65-66.
70. 916 F.2d 1405 (9th Cir. 1990).
71. *Britton*, 916 F.2d at 1407.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1407-08.

refused to arbitrate, so Liebling filed a motion pursuant to the FAA[77] seeking to compel arbitration.[78] The district court denied Liebling's motion to compel arbitration reasoning that he waived his right to arbitration by actively pursuing litigation.[79] Liebling appealed the denial of the motion to compel arbitration, and filed a motion to stay proceedings.[80] The district court denied Liebling's motion for a stay of proceedings pending his appeal to the denial of the motion to compel arbitration.[81] During the time Liebling was seeking arbitration and subsequently a stay of the proceedings, the plaintiffs continually pushed for discovery.[82] Liebling resisted, which ultimately resulted in a default judgment entered against Liebling.[83] To this, Liebling argued that, because an appeal was filed, the district court lacked jurisdiction to enter a default judgment against him.[84]

3. Analysis—Second and Ninth Circuit Holdings

The Second and Ninth Circuits hold that a motion to stay proceedings should not be granted pending an arbitrability appeal. In *Motorola Credit Corp.*, decided in 2004, the Second Circuit followed the Ninth Circuit's rationale and holding in *Britton*, decided in 1990. Therefore, the following analysis of the Second and Ninth Circuits holdings will focus on the rationale of the Ninth Circuit in *Britton*.

Judge Fletcher, writing the *Britton* opinion, gave two main reasons for refusing to stay proceedings while the arbitrability appeal was pending. First, Judge Fletcher explained the general rule, filing a notice of appeal divests the district court of jurisdiction, does not apply to an arbitrability appeal because the issue of arbitrability is completely independent of the merits of the case.[85] In support of this contention, Judge Fletcher quotes *Moore's Federal Practice*, which states that "where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal."[86] Therefore, the district court retains jurisdiction, and the court may proceed with the merits of the case.[87]

The second reason Judge Fletcher provides for refusing to stay proceedings is that allowing an automatic stay pending an arbitrability ap-

77. 9 U.S.C.S. § 4 (2005).
78. *Britton*, 916 F.2d at 1408.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1411.
85. *Id.*
86. *Britton*, 916 F.2d at 1411 (quoting MOORE ET AL., *supra* note 4, § 203.11)).
87. *Britton*, 916 F.2d at 1412.

peal would "allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration."[88] Based on these two reasons, the Ninth Circuit in *Britton* held that a motion to stay proceedings should not be granted pending an arbitrability appeal.[89] Subsequently, for identical reasons, the Second Circuit adopted the same holding.[90]

F. The Seventh and Eleventh Circuits

The Seventh and Eleventh Circuits have both held that there should be a stay of proceedings on the merits while a motion to compel arbitration is pending. The following discusses the facts, procedural history, and rationale from both.

1. The Seventh Circuit: *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*[91]

In *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, the plaintiff, Bradford-Scott Data Corp. (Bradford-Scott), entered into an agreement to distribute computer software written by VERSYSS Incorporated.[92] Bradford-Scott and VERSYSS entered into two contracts, the Vertical Value-Added Reseller Agreement (VAR) and the Master License Agreement.[93] The VAR agreement contained an arbitration clause, covering "any dispute or controversy between the parties . . . relating to this Agreement."[94] The Master License Agreement had a narrower arbitration clause covering only "payments dispute[s] concerning license or support fees."[95] Subsequent to entering into the software distribution agreement and executing the VAR and Master License Agreements, VERSYSS was acquired by Physician Computer Network (PCN), which offered a software package competing with the VERSYSS software Bradford-Scott licensed.[96]

Shortly after PCN acquired VERSYSS, Bradford-Scott filed suit against PCN and VERSYSS, claiming that VERSYSS violated its obligations under the Master License Agreement due to the acquisition and subsequent conduct of PCN and VERSYSS.[97] Ultimately, the district court concluded that the dispute was not arbitrable.[98] In response, PCN and VERSYSS appealed the arbitrability determination under Section 16(a)(1)(A) of the FAA and requested a stay of proceedings pending the

88. *Id.*
89. *Id.*
90. *Motorola Credit Corp.*, 388 F.3d 39 at 54.
91. 128 F.3d 504 (7th Cir. 1997).
92. *Bradford-Scott*, 128 F.3d at 504.
93. *Id.*
94. *Id.* at 505.
95. *Id.*
96. *Id.* at 504.
97. *Id.* at 505.
98. *Id.*

appeal.[99] The district court refused to stay the proceedings.[100] However, based on the reasons discussed in the analysis,[101] the Seventh Cicruit held that a stay should be granted pending the arbitrability appeal.

2. The Eleventh Circuit: *Blinco v. Green Tree Servicing*[102]

In *Blinco v. Green Tree Servicing*, Jack and Deborah Blinco, in a putative class action, claimed that Green Tree Servicing (Green Tree) failed to give notification of a transfer of the servicing of their loan in violation of the Real Estate Settlement Procedures Act.[103] Since an arbitration clause was included in the note executed by Jack Blinco, Green Tree moved the district court to compel arbitration and to stay the litigation.[104] The district court denied the motion to compel arbitration and the motion to stay.[105] Pursuant to the FAA,[106] Green Tree appealed the denial of the motion to compel arbitration.[107] Upon Green Tree's appeal, the district court refused to stay proceedings pending the appeal, which resulted in Green Tree asking the Circuit Court for relief.[108] The district court's rationale for denying the stay pending the arbitrability appeal was that, although the appeal was not frivoulous, the district court did not want "to set a precedent of placing cases on hold while defendants seek interlocutory appeals of the court's order."[109] The district court stated that a delay of discovery and proceedings pertaining to class certification was unnecessary, and further stated that a stay was unnecessary because the appeal would be decided before trial.[110] However, based on the reasons discussed in the analysis,[111] the Eleventh Circuit held that a stay should be granted pending the arbitrability appeal.

3. Analysis—Seventh and Eleventh Circuit Holdings

On the issue of granting a stay of proceedings on the merits while an appeal to a denied motion to compel arbitration is pending, the Seventh and Eleventh Circuits held that the district court should not proceed on the merits, and therefore grant motions to stay the proceedings. In *Blinco*, a case decided in 2004, the Eleventh Circuit followed the rationale and holding of the Seventh Circuit in *Bradford-Scott*, which was decided in 1997. Thus, the analysis of the Seventh and Eleventh Circuit

99. *Id.*
100. *Id.*
101. *See infra* Part I.F.3.
102. 366 F.3d 1249 (11th Cir. 2004).
103. *Blinco*, 366 F.3d at 1250.
104. *Id.*
105. *Id.*
106. 9 U.S.C. § 16(a)(1)(A) (2005).
107. *Blinco*, 366 F.3d at 1250.
108. *Id.*
109. *Id.*
110. *Id.* at 1251.
111. *See infra* Part I.F.3.

holdings will focus on the rationale of the Seventh Circuit in *Bradford-Scott*.

In *Bradford-Scott*, Judge Easterbrook, writing the opinion for the court, began by stating the district court's reason for denying a stay pending appeal of the arbitrability determination was "untenable."[112] The lower court reasoned that the denial of the motion to compel arbitration was unappealable, and therefore held that a stay of the proceedings pending appeal should not be granted.[113] Judge Easterbrook responded to the lower court's decision by making note of Section 16(a)(1)(A) of the FAA, which expressly authorizes an appeal to a denied motion to compel arbitration.[114] After establishing that the appeal was proper under the FAA, Judge Easterbrook continued by stating that the "appellant's request would fail at the outset" if the four-prong test of *Hilton v. Braunskill*[115] was used to determine whether a stay should be granted.[116] Instead, Judge Easterbrook stated that the court shall "approach the subject from a different perspective . . . asking not whether appellants have shown a powerful reason why the district court must halt proceedings, but whether there is any good reason why the district court may carry on once an appeal has been filed."[117]

In essence, Judge Easterbrook announced a departure from applying the four-prong test, and instead rationalized that the district court should grant a stay in these cases because an appeal divests the district court of jurisdiction over the matter. He opined, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control . . . ." [118]

According to the Seventh and Eleventh Circuits, this approach makes sense and is in line with the purpose of arbitration. First, as Judge Easterbrook stated in *Bradford-Scott*, "[c]ontinuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals."[119] This "inconsistent handling" could lead to the worst and most inefficient outcome: "to litigate the dispute, to have the court of appeals revise and order the dispute arbitrated, to arbitrate the dispute, and finally return to the court to have the award enforced."[120] An arbitration clause reflects the parties'

112. *Bradford-Scott*, 128 F.3d at 505.
113. *Id.*
114. *Id.*
115. *See supra* Part I.C.
116. *Id.*
117. *Id.*
118. *Id.* (citing Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)).
119. *Bradford-Scott*, 128 F.3d at 505.
120. *Id.* at 506.

intentions to avoid litigation and opt for non-judicial dispute resolution that is faster and less expensive.[121] Potential exposure to the "worst possible outcome" completely defeats the underlying purposes of arbitration.[122] Allowing for an immediate appeal under Section 16(a) of the FAA helps to cut duplication losses and maintain the purpose and benefit of arbitration.

Judge Easterbrook also addressed the reasons why the Second and Ninth Circuits are incorrect for denying a stay of proceedings during an appeal of the arbitrability determination.[123] The Second and Ninth Circuits first argue that because arbitrability is completely separate from the merits of the case, it therefore does not affect any proceedings to resolve the issue on the merits.[124] Judge Easterbrook responds to this position by stating, "[a]n appeal authorized by section 16(a)(1)(A) presents the question whether the district court must stay its own proceedings pending arbitration. Whether the litigation may go forward in the district court is precisely what the court of appeals must decide."[125] In other words, the issue on appeal, arbitrability, is directly related to whether the district court can hear the case, and therefore the proceedings must be stayed.

The second reason the Second and Ninth Circuits refuse to issue stays is because an automatic stay would allow "crafty" litigants to file frivolous appeals to disrupt the district court.[126] Judge Easterbrook admits that this is a serious concern, but a problem easily avoided because an appellee may ask that the frivolous appeal be dismissed.[127] He stated, "[e]ither the court of appeals or the district court may declare that the appeal is frivolous, and if it is the district court may carry on with the case."[128] The Supreme Court and Tenth Circuit have made suggestions on how to combat this problem. For example, in *Abney v. United States*,[129] the Supreme Court stated that policies can be put in place giving certain appeals expedited treatment as courts of appeals have the supervisory power "to establish summary procedures and calendars to weed out frivolous claims."[130] Moreover, in *United States v. Hines*,[131] the Tenth Circuit held that a frivolous appeal may be dismissed if the district court (1) after a hearing and, (2) for substantial reasons given, (3) found the claim to be frivolous.[132] Furthermore, the *Hines* court held that upon such a procedure and finding the "[district] court should not be held

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. 431 U.S. 651 (1977).
130. *Id.* at 662 n.8
131. 689 F.2d 934 (10th Cir. 1982).
132. *Id.* at 937.

divested of jurisdiction."[133] However, in *Apostol v. Gallion*,[134] the Tenth Circuit cautioned that dismissing a motion because it is frivolous is anomalous, and therefore must be used with restraint.[135]

In summary, in contrast to the Second and Ninth Circuits, the Seventh and Eleventh Circuits hold that a district court shall grant a stay of proceedings pending an arbitrability appeal because during appellate review, the district court is divested of jurisdiction, and therefore cannot proceed on the merits. Moreover, although measures can be put in place to discourage litigants from filing frivolous appeals, it is important that courts use restraint in making such a dismissal.

II. *MCCAULEY V. HALLIBURTON ENERGY SERVICES, INC.*[136]

A. Facts and Procedural History

Rodney McCauley is a former employee of Halliburton Energy Services Inc.[137] Mr. McCauley and Halliburton are parties to an agreement to arbitrate all claims that fall within the scope of Halliburton's Dispute Resolution Program (DRP).[138] Mr. McCauley was injured while applying foam insulation to the exterior of a bulk tank owned by Halliburton.[139] Subsequent to his injury, Halliburton decided to terminate Mr. McCauley.[140]

As a result of the injuries he sustained from the accident and Halliburton's subsequent action of terminating him, Mr. McCauley sued Halliburton for negligence, fraud and deceit, intentional infliction of emotional distress, and wrongful termination.[141] Additionally, Mr. McCauley's family brought actions for loss of consortium.[142]

The United States District Court for the Western District of Oklahoma granted Halliburton's motion to arbitrate all claims except the negligence and consortium claims.[143] In denying the motion to arbitrate on the negligence and consortium claims, the district court held that they arose from work Mr. McCauley performed as an independent contractor and outside the scope of his employment.[144] Subsequently, Halliburton appealed the denial of the motion to compel arbitration as permitted by the FAA.[145] Halliburton then moved the United States Court of Appeals

133. *Id.*
134. 870 F.2d 1335 (7th Cir. 1989).
135. *Id.* at 1339.
136. 413 F.3d 1158 (10th Cir. 2005).
137. *McCauley*, 413 F.3d at 1159.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*

for the Tenth Circuit to stay proceedings in the district court pending the arbitrability appeal.[146] The Tenth Circuit granted Halliburton's motion and held that the district court was divested of jurisdiction by "Halliburton's filing of its notice of appeal."[147]

B. Tenth Circuit's Rationale in Reaching Its Holding

The Tenth Circuit held that an automatic stay of proceedings shall be granted pending a non-frivolous appeal the denial of a motion to compel arbitration.[148] The Tenth Circuit's holding mainly hinged on the argument by the Seventh and Eleventh Circuits that an appeal on an arbitrability issue divests the district court of jurisdiction, which warrants an automatic stay.[149] In determining that this approach was sound, the Tenth Circuit looked to its own precedent addressing divestiture. In *Stewart v. Donges*,[150] the Tenth Circuit held that a district court was automatically divested of jurisdiction pending a non-frivolous appeal to the denial of a motion for summary judgment based on qualified immunity.[151] In *Stewart*, the Tenth Circuit stated:

> The divestiture of jurisdiction occasioned by the filing of a notice of appeal is especially significant when the appeal is an interlocutory one . . . . The interruption of the trial proceedings is the central reason and justification for authorizing such an interlocutory appeal in the first place. When an interlocutory appeal is taken, the district court [only] retains jurisdiction to proceed with *matters not involved in that appeal.*[152]

Furthermore, the court held that "a finding of frivolousness enabled the district court to retain jurisdiction and to proceed to trial absent intervention by the court of appeal."[153]

In *McCauley*, the Tenth Circuit found this line of reasoning persuasive for two reasons. First, Section 16(a) appeals are similar to appeals based on denial of qualified immunity because a failure to grant a stay pending either type of appeal denies or impairs the appellant's ability to obtain its "legal entitlement to avoidance of litigation, either constitutional entitlement to qualified immunity or the contractual entitlement to arbitration."[154] Second, the *Stewart* holding is persuasive because it addresses the possible misuse of interlocutory review by allowing a district

146. *Id.*
147. *Id.* at 1163.
148. *Id.* at 1162.
149. *Id.* at 1160-61.
150. 915 F.2d 572 (10th Cir. 1990).
151. *Stewart*, 915 F.2d at 573.
152. *Id.* at 575-76.
153. *Id.* at 576.
154. *McCauley*, 413 F.3d at 1162.

court to deny frivolous appeals and continue absent intervention by the court of appeals.[155]

Relying on the divesture principle used by the Seventh and Eleventh Circuits and the previous Tenth Circuit panel in *Stewart*, the Tenth Circuit held that a non-frivolous appeal to a denied motion to compel arbitration warrants an automatic stay of proceedings.[156]

III. ANALYSIS

The following sections will discuss whether the Tenth Circuit's holding in *McCauley v. Halliburton Energy Services, Inc.*[157] is in line with Tenth Circuit precedent; whether the Tenth Circuit's holding is in line with the purpose of arbitration and the FAA; and finally, the likelihood of the issue reaching the Supreme Court.

A. The Tenth Circuit's Holding and Tenth Circuit Precedent

Although this was a case of first impression in the Tenth Circuit, the *McCauley* holding is in line with Tenth Circuit precedent. In addition to relying on the rationale of the Seventh and Eleventh Circuits, the Tenth Circuit relied on past precedent by referencing *Stewart v. Donges*.[158] In *Stewart*, the Tenth Circuit discussed the divesture principle whereby an interlocutory appeal, such as an arbitrability appeal, divests the district court of jurisdiction to proceed with the case on the merits.[159] Based on this argument, the Tenth Circuit in *McCauley* concluded that the district court does not have jurisdiction to proceed with a case on the merits pending an arbitrability appeal.[160] So, procedurally, granting a stay is the appropriate course of action based on the divesture principle whereby an interlocutory appeal divests the district court of jurisdiction to continue with the case.

B. The Tenth Circuit's Holding and the Purpose of Arbitration

Parties enter into pre-dispute arbitration agreements because arbitration is an attractive dispute resolution procedure. The attributes of arbitration include: (1) allowing parties to resolve their disputes faster and with less effort; and (2) fostering a less expensive dispute resolution process. According to a 2004 study by the National Arbitration Forum, 78% of respondents found faster recovery in arbitration and 59.3% found arbitration less expensive than litigation.[161] With this established, it be-

155. *Id.*
156. *Id.*
157. 413 F.3d 1158 (10th Cir. 2005).
158. 915 F.2d 572 (10th Cir. 1990).
159. *Stewart*, 915 F.2d at 575-76.
160. *McCauley*, 413 F.3d at 1162.
161. NAT'L ARBITRATION FORUM, *supra* note 44, at 3.

comes useful to determine whether a stay of proceedings pending an arbitrability appeal corresponds with the two purposes of arbitration.

1. Resolving Disputes Faster and With Less Effort

Pending an appeal, the district court may require that the parties proceed with the case on the merits. If the appellate court determines that the motion to compel arbitration was properly denied by the district court then essentially no time and effort was lost by proceeding with the case on the merits because the parties' would have been ordered to litigate regardless. However, if the appellate court decides that the district court erred in denying the motion to compel arbitration, then proceeding with the case on the merits is useless. In this scenario, not only have the parties wasted their time and effort by proceeding with the litigation process, but the district court has clogged its docket with proceedings that are essentially nullified by the appellate court's decision. Moreover, the parties then must arbitrate and possibly submit the issue to the district court again to have the award enforced.[162] This situation does not provide for an efficient resolution of the issues—a main purpose of arbitration. On the other hand, if a stay of proceedings is granted pending the arbitrability appeal, the district court may continue with other matters and the parties can avoid wasting the time and effort of proceeding with a case on the merits that will inevitably be ordered to arbitration.

2. Fostering a Less Expensive System

If the district court does not grant a stay of proceedings, the parties are required to proceed with the case on the merits. Again, if the appellate court determines that the district court properly denied the motion to compel arbitration then there is no consequence to not staying the proceedings. However, if the appellate court determines that the district court erred in not granting the motion to compel arbitration then the parties must incur the expenses of proceeding with the case, the expenses associated with arbitration, and possibly the expenses of having the district court enforce the arbitrator's award. The parties are incurring expenses that would have been avoided had a stay been granted. This is not in line with the purpose of arbitration—to resolve issues in a manner that is less expensive than litigation.

Parties generally enter into pre-dispute arbitration agreements because they find the arbitration process attractive. The approach of the Tenth Circuit, to grant an automatic stay, allows the parties to avoid the

162. The FAA states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award . . . .

9 U.S.C.S. § 9 (2005)

time, effort, and expenses associated with litigation, which the parties intended to avoid in the first place by entering into a pre-dispute arbitration agreement.

C. The Tenth Circuit's Holding and Congressional Intent in Enacting the FAA

It seems logical that courts interpret a statute consistent with Congress' intent when the plain language is unclear. Congress enacted the FAA so courts would give the same legal effect to arbitration agreements as is given to other contracts,[163] and to ensure that parties' desire for arbitration would not be undermined by federal and state courts that are unwilling to enforce arbitration agreements.[164] In other words, Congress' intent in enacting the FAA was to encourage the use of arbitration by making pre-dispute arbitration agreements enforceable. While Congress' intent is clear, the FAA remains unclear on whether to grant a stay pending an arbitrability appeal. As a result, it seems appropriate to analyze the outcome of a district court that grants a stay pending an arbitrability appeal and a district court that does not grant a stay in an effort to determine which approach is in line with Congress' intent in enacting the FAA.

A district court undermines the parties' preference for arbitration by refusing to grant a stay and ordering the parties to begin the litigation process. If parties enter into a valid pre-dispute arbitration agreement an assumption can be made that the parties contracted with the intention of avoiding litigation. If a district court can order the parties to continue with the case on merits, regardless of whether an arbitration agreement exists, it detracts from the legal effect that courts were intended to give arbitration agreements and discourages the use of arbitration.

In contrast, by granting a stay, a district court is acting in line with Congress' intent in enacting the FAA. By granting a stay, a district court is not only acknowledging the fact that an arbitration agreement should have the same legal effect as other contracts by allowing the parties to act in a manner consistent with their contracted preference, but also encouraging arbitration by not undermining the parties' preference for avoiding litigation. Granting a stay pending an arbitrability appeal is in line with the purpose of the FAA.

D. The United States Supreme Court

The criterion for an issue reaching the Supreme Court is stringent, as the Court grants certiorari in relatively few cases. However, the Court will often review an issue that is in conflict among the circuits and that is

163. *See* Stenson, *supra* note 24, at 661.

164. Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (citing Metro Indus. Painting Corp. v. Terminal Constr. Corp., 287 F.2d 382, 387 (2d Cir. 1961)).

a legal issue of national importance.[165] Including the Tenth Circuit's decision in *McCauley*, only five circuits have addressed the issue of whether to grant a stay pending an appeal to an arbitrability determination. With *McCauley*, three circuits hold that an automatic stay should be granted and two circuits hold that a stay should not be granted. The issue is unresolved in five circuits, the D.C. circuit, and the federal circuit.

The issue will likely reach the Supreme Court in the future. First, there is a clear conflict among the circuits on this issue as the five circuits that have addressed the issue are split three-to-two. Following this pattern, the other circuits will likely be split as well. Second, as indicated by the statistical data,[166] arbitration is growing in popularity. As arbitration becomes more popular, more arbitration agreements will be created because: "Virtually all American businesses and individuals with legal capacity to contract . . . have entered into agreements that specify arbitration as the forum for resolving most or all disputes that might arise between the parties."[167]

Arbitration is impacting businesses and individuals alike – increasingly receiving attention not only in the lower courts but in the Supreme Court as well. For example, the Supreme Court "has decided more than thirty arbitration cases since 1983, including ten since the turn of the century."[168] Therefore, a strong presumption can be made that issues dealing with arbitration are matters of national importance, and accordingly, there is a strong likelihood that the particular issue addressed in this article and perhaps many others dealing with arbitration will face review by the Supreme Court in the future.

In the event that the issues discussed in this article reaches the Supreme Court, there is a strong likelihood that the Supreme Court will adopt the Tenth Circuit's approach—in line with the purpose of arbitration and Congress' intent in enacting the FAA. Furthermore, the opposing view, refusing to grant a stay, relies heavily on the fact that it discourages litigants from bringing frivolous appeals. However, there are measures in place for combating this problem, and therefore the opposing view's argument is substantially discredited.[169]

---

165. *See* Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 216 (2004).

166. *See supra* Part I.D.

167. Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit*, 35 TEX. TECH L. REV. 497, 498 (2004).

168. *Id.* at 499.

169. *See supra* Part I.F.

CONCLUSION

In *McCauley v. Halliburton Energy Services Inc.*,[170] the Tenth Circuit adopted the reasoning of the Seventh and Eleventh Circuits and held that a non-frivolous appeal of a denied motion to compel arbitration warrants issuance of an automatic stay of proceedings. This is the correct approach for several reasons. First, an appeal divests the district court of jurisdiction over a matter. If the district court does not have jurisdiction over the matter then the district court should not be able to proceed with the case on the merits. Second, a main argument for not granting a stay of proceedings is that it prevents frivolous appeals. However, the Tenth Circuit has addressed this concern by adopting a procedure by which the district court can deny the appeal as frivolous.

Moreover, the Tenth Circuit's approach corresponds to the purposes of arbitration. Generally, a party's decision to enter a pre-dispute arbitration agreement reflects their desire for arbitration. By granting a stay, the parties avoid the time, effort, and expenses associated with litigation, and the district court may proceed with other matters while the appellate court handles the arbitrability issue. Furthermore, based on Congress' intent in enacting the FAA, granting a stay is appropriate. By doing so, the district court gives full effect to the parties' contracted preference for avoiding litigation.

Although the approach of the Tenth Circuit appears to be correct, there is nevertheless a circuit split. As more circuits confront this issue, the split may become more prominent, and when there is a conflict among the circuits on an issue of national importance, such as the issue here, it is likely the issue will reach the Supreme Court. Arbitration is growing in popularity and increasingly making its way into the American legal system, and as a result, the circuits and possibly the Supreme Court will continue to face important issues pertaining to alternative dispute resolutions procedures such as arbitration.

Nickolas J. McGrath[*]

170. 413 F.3d 1158 (10th Cir. 2005).

* J.D./MS-RECM Candidate, May 2007, University of Denver Sturm College of Law. The author would like to thank Arthur Best, Professor of Law at The University of Denver Sturm College of Law, and the *Denver University Law Review* Board for their assistance in the development of this article.