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Interlocutory Review of Litigation-Avoidance Claims: Insights From Appeals Under the Federal Arbitration Act

Roger J. Perlstadt

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**INTERLOCUTORY REVIEW OF LITIGATION-AVOIDANCE
CLAIMS: INSIGHTS FROM APPEALS UNDER THE
FEDERAL ARBITRATION ACT**

*Roger J. Perlstadt**

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* Associate, Miller Shakman & Beem LLP, Chicago; J.D. University of Chicago 2002; B.A. Carleton College 1997.

I. INTRODUCTION

In certain situations, a civil or criminal defendant may enjoy a privilege against being haled into court and facing the burdens of litigation. For example, in the civil context, a defendant may enjoy absolute, qualified, or sovereign immunity from suit,¹ or the dispute at issue may be subject to an arbitration agreement that requires plaintiff to arbitrate, rather than litigate, the dispute.² In the criminal context, a defendant may be protected from prosecution by the constitutional prohibition against double jeopardy.³ In all of these cases, however, whether the defendant is in fact privileged to avoid litigation may itself be in dispute. Thus, a civil plaintiff or the government may sue or indict a defendant, believing that the defendant is not privileged to avoid the action. The defendant, in turn, believing that it is privileged to avoid the action, may ask the court to recognize the claimed privilege and dismiss the suit against it. If the defendant's request is denied and the court finds that defendant is subject to suit, the litigation proceeds. Clearly, the court's finding that the defendant is indeed subject to suit is not a termination of the case on the merits. In general, orders that do not terminate a case on the merits are not immediately appealable under the final judgment rule.⁴ Nevertheless, some orders rejecting a defendant's

1. See, e.g., *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 860 (2009) (“[L]egislators have long enjoyed absolute immunity for their official actions . . . , the common law grant[s] immunity to judges and jurors acting within the scope of their duties, and . . . the law has also granted prosecutors absolute immunity from common-law tort actions.”) (internal quotations omitted); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009) (“[Q]ualified immunity . . . shields Government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights.”) (internal quotations omitted); *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2186 (2009) (“Under the venerable principle of foreign sovereign immunity, foreign states are ordinarily immune from the jurisdiction of the courts of the United States and of the States.”) (internal quotations omitted).

2. See, e.g., 9 U.S.C. § 3 (West 2010) (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration . . . the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had.”).

3. *Abney v. United States*, 431 U.S. 651, 661 (1977) (“[The double jeopardy clause] is a guarantee against being twice put to trial for the same offense.”).

4. See 28 U.S.C. § 1291 (West 2010) (“The courts of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States.”) (emphasis added); *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 497-98 (1989) (“Title 28 U.S.C. § 1291 provides for appeal to the courts of appeals *only* from ‘final decisions of the district courts of the United States.’ For purposes of § 1291, a final judgment is generally regarded as a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”) (emphasis added, internal quotations omitted). This article addresses only lawsuits brought in federal court.

claimed right to avoid suit are immediately appealable either expressly by statute or under the collateral order doctrine.⁵

If such an appeal is taken, the question then arises whether the district court should proceed with litigation of the merits of the case pending interlocutory appeal of the issue of defendant's amenability to suit.⁶ On the one hand, if litigation is not stayed pending the appeal and the district court was wrong about the defendant's amenability to suit, the defendant will have been subjected to litigation that it was actually entitled to avoid. On the other hand, if litigation is stayed pending the interlocutory appeal but the district court was correct that defendant was not privileged to avoid suit, the litigation, to which defendant is properly subject, was unnecessarily delayed. The approaches of various courts have not been uniform as to whether the underlying merits litigation must or should be stayed pending interlocutory appeal in these circumstances.⁷

The majority approach across contexts appears to be that, so long as the appeal is not frivolous, the district court may not proceed with the

5. See *Will v. Hallock*, 546 U.S. 345, 350 (2006) ("On the immediately appealable side are orders rejecting absolute immunity and qualified immunity. A State has the benefit of the [collateral order] doctrine to appeal a decision denying its claim to Eleventh Amendment immunity, and a criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy."); *Princz v. Fed. Republic of Ger.*, 998 F.2d 1, 1 (D.C. Cir. 1993) ("A district court's denial of a foreign state's motion to dismiss on grounds of sovereign immunity is immediately appealable."); 9 U.S.C. § 16(a)(1)(A)-(C) (West 2010) (allowing immediate appeals of orders refusing to enforce a purported arbitration agreement).

6. This question arises with some frequency. For example, in the arbitration context alone, the issue arose at least 136 times over a nine-year period, see *infra* Part III.C, or an average of over once a month.

7. Compare, e.g., *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) ("[A]n interlocutory appeal from an order refusing to dismiss on double jeopardy or qualified immunity grounds . . . divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant."), *Goshtasby v. Bd. of Trs. of the Univ. of Ill.*, 123 F.3d 427, 428-29 (7th Cir. 1997) (applying prior precedent that "when a public official takes an interlocutory appeal to assert a colorable claim to absolute or qualified immunity from damages, the district court must stay proceedings," to Eleventh Amendment sovereign immunity claims), *Princz*, 998 F.2d at 1 (holding that district court could not proceed until appeal of denial of foreign state's sovereign immunity claim resolved), and *McCauley v. Halliburton Energy Servs. (McCauley I)*, 413 F.3d 1158, 1160 (10th Cir. 2005) ("[U]pon the filing of a non-frivolous [interlocutory appeal of a refusal to enforce a purported arbitration agreement], the district court is divested of jurisdiction until the appeal is resolved on the merits."), with *McSurely v. McClellan*, 697 F.2d 309, 317-18 (D.C. Cir. 1982) (denying request to stay litigation pending appeal of district court's rejection of absolute and qualified immunity claims), *McCue v. City of New York (In re World Trade Ctr. Disaster Site Litig.)*, 503 F.3d 167, 170-71 (2d Cir. 2007) (applying balancing test and concluding that pretrial proceedings could continue pending interlocutory appeal of district court's denial of immunity claims), and *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004) (holding that district court had jurisdiction to continue with case pending interlocutory appeal of motion to compel arbitration).

underlying merits litigation pending interlocutory appeal of its denial of the claimed right to avoid suit.⁸ Such an approach, however, is in tension with the fact that, as a whole, about 80% of district court decisions are ultimately affirmed.⁹ As just noted, if the district court was correct in holding that the defendant was not entitled to avoid suit, any stay pending interlocutory appeal of that determination unnecessarily delays the litigation. This article explores this tension by examining in depth one category of interlocutory appeals of denials of a claimed right to avoid suit: appeals of refusals to enforce a purported arbitration agreement.

Section 16(a) of the Federal Arbitration Act (“FAA”)¹⁰ expressly provides for interlocutory appeals from a district court’s refusal to enforce a purported arbitration agreement. However, it does not state whether the underlying litigation must be stayed pending appeal, and, as noted above, courts addressing the issue are split, with a majority holding that the district court may not proceed with the litigation.¹¹ Part I of this article outlines and critiques current law on stays pending appeal of refusals to enforce purported arbitration agreements. Part II proposes a simple analysis of expected error costs to determine whether to stay litigation pending interlocutory appeal of rejections of litigation-avoidance claims. This analysis looks to (1) potential harm to plaintiffs of erroneously staying litigation pending appeal, (2) potential harm to defendants of erroneously refusing to stay litigation pending appeal, and (3) the likelihood of each of those types of harms arising, which is based on the likelihood that the district court’s denial of the litigation-avoidance claim is affirmed. Part II then examines these factors through the lens of § 16(a) appeals of district courts’ refusals to enforce purported arbitration agreements and suggests that, while the potential harms to plaintiffs and defendants from erroneous stay decisions can be determined on a case-by-case basis by the district court, the likelihood of

8. See, e.g., *Williams v. Brooks*, 996 F.2d 728, 729-30 (5th Cir. 1993) (“A number of other circuits . . . have uniformly held that the filing of a non-frivolous notice of interlocutory appeal following a district court’s denial of a defendant’s immunity defense divests the district court of jurisdiction to proceed against that defendant.”); Gabriel Taran, *Towards a Sensible Rule Governing Stays Pending Appeals of Denials of Arbitration*, 73 U. CHI. L. REV. 399, 413 (2006) (“[C]ircuits facing appeals from denials of double jeopardy claims generally mandate automatic issuance of stays of trial-level proceedings unless the appeal is found to be frivolous.”); *infra* notes 14-15 and accompanying text (noting majority position that litigation must be stayed pending interlocutory review of refusals to enforce purported arbitration agreements).

9. See *infra* note 102 and accompanying text.

10. 9 U.S.C. §§ 1-16 (West 2010).

11. See *supra* notes 7-8 and accompanying text; *infra* Part II.

affirmance is best determined on an aggregate level. Part III reports the methodology and results of an analysis of § 16(a) appeals, finding an almost even split of affirmance and reversal. This article concludes that based on the essentially even odds that a district court's refusal to enforce a purported arbitration agreement will be affirmed, district courts should, at least in the arbitration context, simply engage in an unweighted balancing of the magnitude of potential harms to plaintiffs and defendants to determine whether a stay pending interlocutory appeal is warranted in any particular case. The article closes by noting that while the results of this analysis are applicable only to appeals under the FAA, the analysis itself is applicable to other interlocutory appeals of rejected litigation-avoidance claims.

II. CURRENT LAW

As noted above, section 16(a) of the FAA provides for immediate appeal of a federal district court's refusal to enforce a purported arbitration agreement.¹² While the FAA explicitly provides an exception to the final judgment rule for such an appeal, it does not specify whether litigation of the underlying substantive dispute may proceed while the interlocutory appeal is pending.¹³ As a result, the circuit courts are split as to whether litigation must be stayed pending an appeal of a district court's refusal to enforce an arbitration agreement. The Third, Seventh, Tenth, and Eleventh Circuits have all held that litigation in the district court must be stayed pending a § 16(a) appeal of the refusal to enforce a purported arbitration agreement.¹⁴ In contrast, the Second and Ninth Circuits have held that litigation may proceed while a refusal to enforce a purported arbitration agreement is on appeal, and that whether to stay

12. 9 U.S.C. § 16(a) (West 2010). Note that, in contrast to a refusal to enforce a purported arbitration agreement, a district court's enforcement of an arbitration agreement is not immediately appealable. *Id.* See also David D. Siegel, Practice Commentary, Appeals from Arbitrability Determinations, 9 U.S.C. § 16 (“[9 U.S.C. § 16(a)] is a pro-arbitration statute. . . . [It] explicitly allow[s] an immediate appeal from an anti-arbitration decision while precluding an appeal when the decision is in favor of arbitration.”).

13. See *McCauley v. Halliburton Energy Servs. (McCauley I)*, 413 F.3d 1158, 1160 (10th Cir. 2005) (“[The FAA] does not specify whether a motion to stay proceedings during an appeal should be granted.”).

14. See *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc. (Bradford-Scott I)*, 128 F.3d 504, 505-06 (7th Cir. 1997); *McCauley I*, 413 F.3d at 1160; *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004). The D.C. Circuit has also applied this rule in an unpublished opinion. *Bombardier Corp. v. Amtrak*, No. 02-7125, 2002 U.S. App. LEXIS 25858, at *1 (D.C. Cir. Dec. 12, 2002) (citing *Bradford-Scott I*).

the litigation pending the appeal is a matter within the district court's discretion.¹⁵

A. *Courts Holding Litigation Must Be Stayed Pending Appeal*

Those courts holding that litigation must be stayed pending a § 16(a) appeal base their argument on the principle of divestiture. Under this principle, “[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”¹⁶ This principle stems from the notion that a district court and an appellate court should not attempt to assert jurisdiction over a case simultaneously.¹⁷ The critical inquiry in applying the divestiture principle is determining which, if any, aspects of the case are not involved in the appeal, and thus remain subject to the jurisdiction of the district court.¹⁸ Circuit courts requiring an automatic stay of litigation while a § 16(a) appeal is pending assert that determination of the arbitrability of a dispute and litigation of its merits involve the same aspects of the case, and the district court is thus divested of jurisdiction to proceed with litigation of the merits while the appellate court is reviewing the arbitrability decision. For example, the Seventh Circuit has stated that “[w]hether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A) . . . it is the mirror image of the question presented on appeal.”¹⁹

15. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004); *Britton v. Co-Op Banking Grp.*, 916 F.2d 1405, 1411-12 (9th Cir. 1990).

16. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

17. *Id.*

18. *See, e.g., Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros.*, 198 F.3d 391, 394 (3d Cir. 1999) (“Exceptions to the rule in *Griggs* allow the district court to retain jurisdiction to issue orders staying, modifying, or granting injunctive relief, to review applications for attorney’s fees, to direct the filing of supersedeas bonds, to correct clerical mistakes, and to issue orders affecting the record on appeal and the granting or vacating of bail.”).

19. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc. (Bradford-Scott I)*, 128 F.3d 504, 505 (7th Cir. 1997). *See also id.* at 506 (“An appeal authorized by § 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.”); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (“The only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court. The issue of continued litigation in the district court is not collateral to the question presented by an appeal under § 16(a)(1)(A); ‘it is the mirror image of the question presented on appeal.’”) (quoting *Bradford-Scott I*).

The main problem with this argument is that it is not at all clear that determination of the arbitrability of a dispute (the issue on appeal) involves the same aspects of the case as litigation of the substantive merits of the dispute (the issue remaining before the district court). In *Moses H. Cone Memorial Hospital v. Mercury Construction*, the Supreme Court stated that the issue of whether a certain dispute is arbitrable “is easily severable from the merits of the underlying dispute[.]”²⁰ Indeed, those circuits holding that district courts are *not* required to stay litigation of the merits pending a § 16(a) appeal rely on *Moses H. Cone* to support the proposition that determination of arbitrability by the appellate court and determination of the merits by the district court do not involve the same aspects of the case under the divestiture principle.²¹

Given the lack of a clear answer as to whether litigation of the merits of a dispute in the district court involves the same aspects of the case as a pending § 16(a) appeal, courts applying the divestiture principle in this context turn to consideration of other factors for support. This is entirely appropriate, given the fact that, although couched in the language of jurisdiction, divestiture is a judge-made doctrine, not a rule of constitutional or statutory jurisdiction.²² Because it is a judge-made doctrine, the divestiture principle is not an absolute rule and should not be applied mechanically to the exclusion of prudential concerns.²³ The two prudential concerns cited by courts requiring automatic stays of litigation pending a § 16(a) appeal are (1) the rights of parties to an

20. 460 U.S. 1, 20-21 (1983).

21. See *Britton v. Co-Op Banking Grp.*, 916 F.2d 1405, 1412 & n.7 (9th Cir. 1990) (“Since the issue of arbitrability was the only substantive issue presented in this appeal, the district court was not divested of jurisdiction to proceed with the case on the merits.”) (citing *Moses H. Cone*); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004) (“We . . . explicitly adopt the Ninth Circuit’s position [in *Britton*] that further district court proceedings in a case are not ‘involved in’ the appeal of an order refusing arbitration, and that a district court therefore has jurisdiction to proceed with a case absent a stay from this Court.”). See also *Taran*, *supra* note 8, at 412 (concluding that “the view more consistent with Supreme Court precedent holds that the district court is not divested of jurisdiction by the filing of an appeal of a denial of arbitration”).

22. *McCauley v. Halliburton Energy Servs. (McCauley I)*, 413 F.3d 1158, 1162 n.1 (10th Cir. 2005) (quoting 20 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 303.32[1] (3d ed. 1999)) (“We note that we are not talking about constitutional or statutory jurisdiction, but rather ‘a judge-made doctrine, designed to promote judicial economy and avoid . . . confusion and inefficiency.’”).

23. 20 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 303.32[1] (3d ed. 1999) (“Although the general rule should ordinarily be followed, courts have noted that it is not absolute, nor always desirable.”); *id.* § 303.32[2][B][III] (“These cases recognize that restrictions on the power of the district court that are grounded in nothing more than the technical consideration that jurisdiction ‘passes’ when a notice of appeal is filed are impractical and unwise.”).

arbitration agreement not to be subjected to litigation and (2) general principles of efficiency.

For example, with respect to a right not to be subjected to litigation, in holding that district courts are divested of jurisdiction while a § 16(a) appeal is pending, the Tenth Circuit explained that the failure to stay litigation pending such an interlocutory appeal “results in a denial or impairment of the appellant’s ability to obtain its legal entitlement to avoidance of litigation.”²⁴ The Eleventh Circuit has likewise noted in explaining why district court litigation should be stayed pending a § 16(a) appeal that “[t]he arbitrability of a dispute . . . gives the party moving to enforce an arbitration provision a right not to litigate the dispute in a court and bear the associated burdens.”²⁵

In addition to a right not to be subject to litigation, the other prudential concern cited in support of divesting the district court of jurisdiction over the underlying substantive dispute pending a § 16(a) appeal is one of efficiency. As the Seventh Circuit has argued:

Arbitration clauses reflect the parties’ preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced. Immediate appeal under § 16(a) helps to cut the loss from duplication. Yet combining the costs of litigation and arbitration is what lies in store if a district court continues with the case while an appeal under § 16(a) is pending. Cases of this kind are therefore poor candidates for exceptions to the [divestiture principle].²⁶

24. *McCauley I*, 413 F.3d at 1162.

25. *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004).

26. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc. (Bradford-Scott I)*, 128 F.3d 504, 506 (7th Cir. 1997). *See also Blinco*, 366 F.3d at 1251 (“If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration.”); *McCauley I*, 413 F.3d at 1162 (quoting *Bradford-Scott I*). *See also Hardin v. First Cash Fin. Servs.*, 465 F.3d 470, 474 n.2 (10th Cir. 2006) (refusing to limit *McCauley* such that district courts would not be divested of jurisdiction over non-dispositive matters such as amendments to pleadings and discovery while a § 16(a) appeal is pending, stating that “[a]rbitration is an attempt to avoid unnecessary court costs; by keeping non-dispositive matters within the purview of the district court, the parties continue to face costs for which they did not bargain”). Speed and cost, however, are not the only reasons why parties enter into arbitration agreements. Other potential benefits of arbitration include specialized arbitrator expertise and tailored rules of evidence. *See Taran, supra* note 8, at 416. These benefits are not compromised by not staying litigation pending a § 16(a)

The problem with both of these prudential arguments—that litigation of the underlying substantive dispute must be stayed pending a § 16(a) appeal in order to (1) avoid infringing on the parties’ right not to be subject to litigation and (2) avoid unnecessary duplicative proceedings—is that they only apply in the event that the district court is ultimately wrong about the non-arbitrability of the dispute. If the district court is correct that the dispute is not subject to an enforceable arbitration agreement, there is no right of either party to avoid litigation and any litigation that occurred while the appeal was pending would not have been unnecessary and duplicative. To the contrary, it is any delay resulting from a stay of the merits litigation pending appeal that would have been unnecessary. Those courts applying the divestiture principle in this context and requiring stays pending § 16(a) appeals seem to assume the validity of the alleged arbitration agreement, which is exactly the issue on appeal. For example, the Seventh Circuit’s statement that “combining the costs of litigation and arbitration is what lies in store if a district court continues with the case while an appeal under § 16(a) is pending”²⁷ is true only if, contrary to the district court’s holding, the dispute is indeed subject to an enforceable arbitration agreement.

This myopic view is evidenced by those courts’ reference to “the parties’ preference” for arbitration.²⁸ Clearly there is no “parties’ preference” for arbitration when one of the parties is refusing to arbitrate, and it may be the case that such party never had a preference for arbitration. For example, both commentators and Congress have noted that, particularly in the consumer and employment contexts, pre-dispute arbitration agreements often do not truly reflect a preference for arbitration.²⁹ Indeed, one study has found “little basis for believing that

appeal, even if the district court’s determination of non-arbitrability is ultimately reversed. *See id.* (“As long as the dispute eventually ends up in arbitration, those benefits will be realized.”).

27. *Bradford-Scott I*, 128 F.3d at 506.

28. *Bradford-Scott I*, 128 F.3d at 506 (“Arbitration clauses reflect the parties’ preference for non-judicial dispute resolution, which may be faster and cheaper.”); *McCauley I*, 413 F.3d at 1162 (same, quoting *Bradford-Scott I*).

29. *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1240 (2001) (“[T]he consumer rarely, if ever, chooses arbitration; pre-dispute arbitration is imposed upon the consumer by a contract of adhesion in which the consumer has no real choice.”); Margaret L. Moses, *Privatized “Justice,”* 36 LOY. U. CHI. L.J. 535, 535 (2005) (“Although a party’s consent is supposed to be required in order for the dispute to be resolved in a private forum, in many consumer transactions, there is no willing and knowing consent to arbitration.”); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 108 (1997) (“[V]oluntariness is often presumed on the theory that the adherent is free to shop for better terms. But that is only true if shopping is feasible; if all the firms in the market impose the same terms, shopping is impossible. For example, private individual health insurance plans are not

consumers are making informed decisions when they ‘agree’ to arbitrate in pre-dispute arbitration clauses.”³⁰ It may be for just this reason that the district court refused to enforce the purported arbitration agreement in the first place.³¹

This problem—that the prudential concerns justifying divestiture in the context of § 16(a) appeals are really only applicable where the district court was wrong in finding the dispute not arbitrable—is illustrated vividly by the Seventh and Tenth Circuit cases that first applied the divestiture principle in the § 16(a) context, *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*³² and *McCauley v. Halliburton Energy Services, Inc.*³³ Both *Bradford-Scott* and *McCauley* established the rule in their respective circuits requiring stays pending § 16(a) appeals, making the prudential arguments about efficiency and the right to avoid litigation described above.³⁴ In making those arguments, both cases seemed implicitly to assume (despite the district court’s holding to the contrary) that the disputes were indeed arbitrable.³⁵ Yet in

available without pre-dispute arbitration provisions. Likewise, one cannot invest or obtain professional employment in the securities industry without stipulating to arbitration clauses.”); Celeste M. Hammond, *A Real Estate Focus: The (Pre)(As)Sumed “Consent” of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 596 (2003) (“Where consumers, employees, and other unsophisticated persons are parties to contracts with businesses, especially where the terms of the contract are mandated by the business, the ‘voluntary nature’ of pre-dispute arbitration clauses is open to question.”); Arbitration Fairness Act of 2009, S. 931, 111th Congress (2009) (“The Congress finds the following: . . . Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand, the importance of deliberately fine print that strips them of rights, and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.”); Arbitration Fairness Act of 2009, H.R. 1020, 111th Congress (2009) (same).

30. Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 73 (2004) (noting that more than one third of pre-dispute arbitration clauses fail to inform consumers that they are waiving their right to litigate disputes in court, one fifth do not explicitly state that the outcome of arbitration is final and binding, more than one third fail to provide consumers with information regarding expenses they may incur in arbitration, almost one third fail to state what organization will provide the arbitration, and many are silent on issues such as arbitrator selection and the rules of discovery and evidence).

31. See, e.g., *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 783-84 (9th Cir. 2002) (affirming district court’s refusal to enforce arbitration agreement that was imposed as a non-negotiable condition of employment).

32. 128 F.3d 504 (7th Cir. 1997) (*Bradford-Scott I*).

33. 413 F.3d 1158 (10th Cir. 2005) (*McCauley I*).

34. *Bradford-Scott I*, 128 F.3d at 506; *McCauley I*, 413 F.3d at 1162.

35. See *Bradford-Scott I*, 128 F.3d at 504; *McCauley I*, 413 F.3d at 1162.

both cases, the decision of the district court finding the dispute at issue not subject to arbitration was ultimately upheld. In *Bradford-Scott*, plaintiff filed a complaint in the district court based on a 1993 agreement, which contained a narrow arbitration clause.³⁶ Defendant moved to stay or dismiss the complaint pending arbitration, citing a broad arbitration clause in a 1988 agreement.³⁷ The district court held that the parties were not required to arbitrate the dispute, and defendant filed a § 16(a) appeal.³⁸ The district court further refused to stay discovery or trial pending the appeal.³⁹ That ruling was then appealed, and it was in reversing that ruling and requiring that the underlying merits litigation be stayed pending the appeal that the Seventh Circuit laid out its rule applying the divestiture principle to § 16(a) appeals as discussed above.⁴⁰ Nevertheless, in later addressing the issue as to whether the district court actually was correct in refusing to require the parties to arbitrate the dispute, the Seventh Circuit affirmed the district court, holding that the broad arbitration clause of the 1988 agreement did not require arbitration of disputes arising under the 1993 agreement, whose narrow arbitration agreement did not apply to the dispute.⁴¹ Thus, the Seventh Circuit's reliance in applying the divestiture principle to § 16(a) appeals on "the parties' preference" for arbitration and the supposed inefficiencies that follow from failing to stay litigation pending appeal if the district court is reversed⁴² was undermined by its later finding that the district court actually was correct in holding that the parties had not agreed to arbitrate the dispute at issue.

The experience of the Tenth Circuit in *McCauley* is similar. In that case, plaintiff McCauley worked for defendant Halliburton as a technician.⁴³ McCauley also independently owned and operated McCauley Insulation as a sole proprietorship.⁴⁴ Halliburton hired McCauley Insulation to spray one of Halliburton's tanks, and McCauley was injured as he performed the work.⁴⁵ When McCauley and his family

36. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc. (Bradford-Scott II)*, 136 F.3d 1156, 1157 (7th Cir. 1998).

37. *Id.* at 1157-58.

38. *Bradford-Scott I*, 128 F.3d at 505.

39. *Id.*

40. *Bradford-Scott I*, 128 F.3d at 505-07.

41. *Bradford-Scott II*, 136 F.3d at 1158.

42. *Bradford-Scott I*, 128 F.3d at 506.

43. *McCauley v. Halliburton Energy Servs. (McCauley II)*, No. 05-6011, 2005 U.S. App. LEXIS 29192, at *3 (10th Cir. Dec. 30, 2005).

44. *Id.*

45. *Id.*

sued Halliburton over the injury and Halliburton's subsequent termination of McCauley, Halliburton moved to compel arbitration of all claims, alleging that the dispute was covered by a Halliburton dispute resolution program covering all employees.⁴⁶ The district court granted the motion to compel arbitration of those claims relating to McCauley's termination, but refused to compel arbitration of those claims relating to the injury, because those claims arose out of work McCauley was doing as an independent contractor, not as an employee subject to the dispute resolution program.⁴⁷ Halliburton appealed the partial denial of its motion to compel arbitration under § 16(a) and moved to stay the district court litigation pending the appeal.⁴⁸ As in *Bradford-Scott*, the court in *McCauley* initially held that the underlying district court litigation should be stayed pending the appeal, applying for the first time in that circuit the divestiture principle to § 16(a) appeals.⁴⁹ Also like *Bradford-Scott*, however, a subsequent opinion addressing the merits of the § 16(a) appeal ultimately upheld the district court's refusal to compel arbitration, agreeing that the claims unrelated to McCauley's status as an employee were not covered by the Halliburton dispute resolution program.⁵⁰ Again, this result undermines the supposed "parties' preference" for arbitration, relied on in the earlier decision applying the divestiture principle to § 16(a) appeals.⁵¹

What these two cases illustrate is a breakdown in the rule requiring an automatic stay of the underlying merits litigation pending a § 16(a) appeal. Such a rule is premised on an argument that parties to an arbitration agreement should not be required to litigate a dispute that they have agreed to arbitrate, and that the worst possible outcome is one in which the dispute is litigated while the arbitrability decision is on appeal, followed by an appellate court reversal and order that the dispute instead be arbitrated.⁵² *Bradford-Scott* and *McCauley* represent a breakdown of this rule because the district court in each of these cases was ultimately vindicated and the disputes at issue were held by the

46. *Id.* at *3-4.

47. *McCauley v. Halliburton Energy Servs. (McCauley I)*, 413 F.3d 1158, 1159 (10th Cir. 2005).

48. *Id.*

49. *Id.* at 1160-62.

50. *McCauley II*, 2005 U.S. App. LEXIS 29192, at *17.

51. *McCauley I*, 413 F.3d at 1162 (citing *Bradford-Scott I*).

52. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc. (Bradford-Scott I)*, 128 F.3d 504, 506 (7th Cir. 1997); *McCauley I*, 413 F.3d at 1161 (citing *Bradford-Scott I*).

appellate court not to be arbitrable.⁵³ Any rights of the parties not to be forced to litigate the disputes would not have been harmed by not staying the litigation pending appeal because there were no such rights. Likewise, the party seeking arbitration would not have been harmed by unnecessary duplicative litigation while the interlocutory appeal was pending because such litigation was not unnecessary or duplicative. Indeed, to the extent any parties were harmed, it was the parties seeking to avoid arbitration and litigate their claims who were potentially harmed by the delay from postponing the litigation while the district court's arbitrability decision was affirmed on appeal.⁵⁴

Basically, the more likely it is that the district court got it right that the substantive dispute at issue is not covered by a purported arbitration agreement, the less applicable the arguments in favor of staying litigation pending § 16(a) appeals become. Those courts applying the divestiture principle to § 16(a) appeals seem to acknowledge this, at least to some extent, by creating an exception for frivolous appeals. In those circuits, either the district or appellate court can declare the § 16(a) appeal frivolous, in which case, the district court litigation of the merits is not stayed.⁵⁵ Thus, those courts hold that if the likelihood of affirming the district court's refusal to compel arbitration surpasses some threshold (namely frivolousness of the appeal), the divestiture principle does not

53. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc. (Bradford-Scott II)*, 136 F.3d 1156, 1158 (7th Cir. 1998); *McCauley II*, 2005 U.S. App. Lexis 29192, at *18.

54. *See infra* Part II.B.

55. *See Bradford-Scott I*, 128 F.3d at 506 (“[A]ppellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily. . . . Either 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.”); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1253 (11th Cir. 2004) (“When a litigant files a motion to stay litigation in the district court pending appeal from the denial of a motion to compel arbitration, the district court should stay the litigation so long as the appeal is non-frivolous. If the district court denies the motion to stay, then the appellant may file a motion to stay in this Court. If this Court then determines that the appeal is non-frivolous, then this Court should stay the litigation in the district court pending the appeal of the denial of the motion to compel arbitration.”); *McCauley I*, 413 F.3d at 1162 (“[U]pon the filing of a motion to stay litigation pending appeal from the denial of a motion to compel arbitration, the district court may frustrate any litigant’s attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited. That certification will prevent the divestiture of district court jurisdiction. Appellant may then move this court for a stay pending appeal, asserting that the district court’s finding of frivolousness is not supported by the record. If this court determines that the appeal is not frivolous, we will stay the litigation in the district court pending the appeal of the denial of the motion to compel arbitration.”) (internal citations omitted); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (“In [a previous order] we expressed our agreement with the majority rule of automatic divestiture *where the Section 16(a) appeal is neither frivolous nor forfeited.*”) (emphasis added).

apply and litigation may continue in the district court.⁵⁶ Frivolousness is an extremely high bar, however,⁵⁷ and what these courts do not explain is why some threshold lower than frivolousness is not sufficient to allow litigation to proceed pending appeal. The § 16(a) appeals in *Bradford-Scott* and *McCauley* do not appear to have been frivolous; nevertheless, the district courts' determinations of non-arbitrability were ultimately affirmed in those cases, and those courts requiring automatic stays of litigation pending § 16(a) appeals offer no suggestion as to why a standard (frivolousness) that results in errors such as those that occurred in *Bradford-Scott* and *McCauley* should be acceptable.⁵⁸

B. Courts Not Requiring Stay Pending Appeal

In contrast to the Third, Seventh, Tenth, and Eleventh Circuits, which have all held that district court litigation must be stayed pending an interlocutory § 16(a) appeal of a refusal to enforce an alleged arbitration agreement, the Second and Ninth Circuits in *Motorola Credit Corp. v. Uzan*⁵⁹ and *Britton v. Co-Op Banking Group*,⁶⁰ respectively, have held that the district court is not divested of jurisdiction while a § 16(a) appeal is pending and may continue to litigate the substantive underlying dispute.⁶¹ Those cases rejecting application of the divestiture principle in this context do not *require* that the district court proceed with litigation while the § 16(a) appeal is pending, however; they hold

56. See *Bradford-Scott I*, 128 F.3d at 506; *Blinco*, 366 F.3d at 1253; *McCauley I*, 413 F.3d at 1162; *Ehleiter*, 482 F.3d at 215.

57. See, e.g., Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L. J. 845 (1984) (explaining that federal courts find appeals frivolous where they are “utterly without merit” or have “no chance of success”); BLACK’S LAW DICTIONARY 113 (9th ed. 2009) (defining frivolous appeal as “[a]n appeal having no legal basis”).

58. *Bradford Scott II*, 136 F.3d 1156, 1158 (7th Cir. 1998); *McCauley II*, 2005 U.S. App. Lexis 29192, at *18.

59. 388 F.3d 39, 53-54 (2d Cir. 2004).

60. 916 F.2d 1405, 1411-12 (9th Cir. 1990).

61. The First, Fourth, Fifth, Sixth, Eighth, and Federal Circuits do not appear to have directly addressed this question. *But see* *Combined Energies v. CCI, Inc.*, 495 F. Supp. 2d 142, 143 (D. Me. 2007) (“*Lummus [Co. v. Commonwealth Oil Refining Co.]*, 273 F.2d 613 (1st Cir. 1959)] strongly suggests that a party should not be allowed to proceed with discovery when the other party has appealed an order denying arbitration.”); *Videsh Sanchar Nigam Ltd. v. Startec Global Comm. Corp.*, 303 B.R. 605, 608 (D. Md. 2004) (“The Fourth Circuit has not explicitly stated a position on whether an appeal from the denial of arbitration divests the trial court of jurisdiction to proceed. It has, however, expressed a preference for a stay pending such an appeal.”) (citing *Technosteel, LLC v. Beers Constr. Co.*, 271 F.3d 151 (4th Cir. 2001)). As noted above, *see supra* note 14, the D.C. Circuit has endorsed the Seventh Circuit’s approach in an unpublished opinion. *Bombardier Corp. v. Amtrak*, No. 02-7125, 2002 U.S. App. LEXIS 25858, at *1 (D.C. Cir. Dec. 12, 2002) (citing *Bradford-Scott I*).

only that it is within the discretion of the district court to decide.⁶² Those decisions, however, provide little guidance to district courts on how to exercise such discretion. The Ninth Circuit in *Britton* suggested only that district courts may decide to stay litigation pending a § 16(a) appeal if the claim for arbitration, which the district court has just rejected, “presents a substantial question.”⁶³ The court failed to explain, however, what it means for a claim for arbitration to present a substantial question. The Second Circuit in *Motorola* provided even less guidance to district courts as to how to exercise their discretion whether or not to stay litigation pending a § 16(a) appeal, stating only that it “explicitly adopt[ed]” the Ninth Circuit’s position in *Britton*, and that “a district court therefore has jurisdiction to proceed with a case absent a stay from [the Second Circuit].”⁶⁴

In stating the “substantial question” standard, *Britton* cited two cases, *Pearce v. E.F. Hutton Group*⁶⁵ and *C.B.S. Employees Federal Credit Union v. Donaldson*.⁶⁶ District courts have subsequently looked to these cases in an attempt to understand how to exercise their discretion in determining whether to grant stays pending § 16(a) appeals.⁶⁷ *Pearce* itself offers no analysis of the issue, simply noting that “[t]he District Court found that [defendant’s] arguments that [plaintiff’s] claims were subject to arbitration raised ‘issues . . . of first

62. *Britton*, 916 F.2d at 1412 (“The system created by the Federal Arbitration Act allows the district court to evaluate the merits of the movant’s claim [to enforce arbitration], and if, for instance, the court finds that the motion presents a substantial question, to stay the proceedings pending an appeal from its refusal to compel arbitration. . . . This is a proper subject for the exercise of discretion by the trial court.”); *Motorola*, 388 F.3d at 54 (adopting Ninth Circuit’s position in *Britton*, which it characterized as observing that “either the district court or the court of appeals may—but is not required to—stay the proceedings upon determining that the appeal presents a substantial question.”). Despite the fact that staying litigation pending a § 16(a) appeal is not required in those circuits, it may be the case that a number of district courts are nonetheless exercising their discretion in favor of stays. See *Stiener v. Apple Computer, Inc.*, No. C 07-04486, 2008 U.S. Dist. LEXIS 90335, at *17 (N.D. Cal. Apr. 29, 2008) (“[T]he Court finds almost every California district court to recently consider whether to stay a matter, pending appeal of an order denying a motion to compel arbitration, has issued a stay.”).

63. 916 F.2d at 1412.

64. 388 F.3d at 54.

65. 828 F.2d 826 (D.C. Cir. 1987).

66. 716 F. Supp. 307 (W.D. Tenn. 1989).

67. See, e.g., *Stiener*, 2008 U.S. Dist. LEXIS 90335, at *6 (“The Ninth Circuit did not define the term ‘substantial’ but instead cited to two cases, [*Pearce* and *C.B.S. Employees*].”); *Bradberry v. T-Mobile USA, Inc.*, No. C 06-6567, 2007 U.S. Dist. LEXIS 58801, at *3-5 (N.D. Cal. Aug. 2, 2007) (“*Britton* refers to two cases which provide guidance as to how a trial court should exercise discretion regarding whether to grant a stay pending an appeal.”); *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2006 U.S. Dist. LEXIS 88855, at *6 (S.D. Cal. Mar. 14, 2006) (analyzing *Pearce* and *C.B.S. Employees* in an effort to interpret *Britton*).

impression,⁶⁷ and that [defendant] would suffer substantial harm if [plaintiff's] action were not stayed pending appeal and the District Court was later reversed."⁶⁸ *C.B.S. Employees*, on the other hand, applied a four-factor test from the Supreme Court case of *Hilton v. Braunskill*⁶⁹ traditionally used to determine whether to stay a district court order pending appeal.⁷⁰ These four factors are:

- (1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) [whether] public interest [favors a stay].⁷¹

Based on *Britton's* citation of *C.B.S. Employees*, some district courts have utilized the four-factor *Hilton* test when determining whether to stay litigation pending a § 16(a) appeal.⁷²

Unfortunately, application of the *Hilton* factors generally has been far from uniform. One commentator has noted at least four different procedures that have been used by courts to weigh the various *Hilton* factors.⁷³ This lack of uniformity may be due, at least in part, to the somewhat curious requirement of having a district court consider, under the first *Hilton* factor, whether the loser of a ruling it just made has a substantial likelihood of prevailing on an appeal of that ruling. It is not at all clear how a party who has just lost on an issue before a district court is supposed to convince that court that it has a substantial

68. 828 F.2d at 829.

69. 481 U.S. 770, 776 (1987).

70. 716 F. Supp. at 309-10. See also *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009) (describing the four-factor test from *Hilton* as "the 'traditional' one" for determining whether to stay district court orders pending appeal).

71. *C.B.S. Employees*, 716 F. Supp. at 309 (quoting *Hilton*, 481 U.S. at 776).

72. See, e.g., *Winig v. Cingular Wireless, LLC*, No. C-06-4297, 2006 U.S. Dist. LEXIS 83116, at *2 n.1 (N.D. Cal. Nov. 6, 2006) ("Although the Ninth Circuit did not expressly adopt the test set forth in *C.B.S.*, this Court will discuss the four prongs of the *C.B.S.* test in determining whether to stay the instant action pending appeal."); *Triton Container Int'l Ltd. v. Baltic Shipping Co.*, No. 95-0427, 1995 U.S. Dist. LEXIS 18924, at *3 (E.D. La. Dec. 20, 1995) ("[A]n appeal [of a denial of a motion to stay litigation pending arbitration] does not affect my jurisdiction to determine the remaining issues in this case [citing *Britton*]. I may, however, exercise discretion to stay this proceeding on the merits after considering the [*Hilton*] factors."); See also *RA Invs. I, LLC v. Deutsche Bank A.G.*, No. 3:04-CV-1565-G, 2005 U.S. Dist. LEXIS 9961, at *12-13 (N.D. Tex. May 20, 2005) ("To determine whether a stay should be granted pending [a § 16(a)] appeal, a court must consider [the four *Hilton* factors].").

73. John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809, 819 (1993) ("In general, four procedures have been used to weigh the [*Hilton*] factors in deciding whether to grant the stay: (1) the sequential test; (2) two-alternative test; (3) balancing-of-the-factors test; and (4) the two-tier sliding scale test.").

likelihood of prevailing on the merits of that issue before the appellate court.⁷⁴ Presumably, if the district court believes that party is likely to prevail on appeal, the court should have ruled in that party's favor in the first place.⁷⁵

Finally, in contrast to those courts examining the *Hilton* factors, some district courts simply decide whether to stay litigation pending a § 16(a) appeal with little, if any, discussion of the standards guiding such a determination.⁷⁶

C. *Summary of Current Law*

Current law on determining whether litigation of a dispute should be stayed or should proceed pending a § 16(a) interlocutory appeal of a refusal to enforce an arbitration agreement is clearly not uniform. In those circuits applying the divestiture principle, the analysis is straightforward: determine whether the appeal is frivolous, and if not, district court proceedings must be stayed pending appeal. In those circuits that do not apply an automatic divestiture principle, district courts may either proceed with litigation of the underlying substantive dispute or stay proceedings pending the appeal, but they have been given little guidance on how to make such a determination, other than an oblique reference to the four-factor *Hilton* test.

Despite the different analyses and conclusions, what all of these courts appear to be looking at is the potential harm to one side or the other from staying or not staying the pending litigation. Whether through examination (by those courts applying the divestiture principle)

74. See, e.g., *Avery v. Prelesnik*, No. 1:04-CV-289, 2008 U.S. Dist. LEXIS 861, at *5 (W.D. Mich. Jan. 7, 2008) (“Respondent’s arguments concerning the merits of the appeal are the same as those rejected in the Court’s previous Opinion and Writ. These arguments are no more convincing now than they were then. Thus, the Court finds that Respondent has failed to make a strong showing that he is likely to succeed on the merits.”).

75. See *infra* note 96 and accompanying text.

76. See, e.g., *Manigault v. Macy’s East, LLC*, No. 06-CV-3337, 2008 U.S. Dist. LEXIS 6101, at *1 (E.D.N.Y. Jan. 25, 2008) (declining to stay discovery pending appeal of refusal to compel arbitration because of apparent delay in calendaring appeal and because “whether this matter ultimately progresses before this Court or in an arbitral forum, information adduced through discovery will be useful to the litigants”); *Denney v. Jenkins & Gilchrist*, 362 F. Supp. 2d 407, 417-18 (S.D.N.Y. 2004) (lifting stay of litigation pending appeal of denial of motion to compel arbitration in light of new evidence making “the likelihood of success [on appeal] appear[] somewhat diminished”); *Hill v. PeopleSoft USA, Inc.*, 341 F. Supp. 2d 559, 560-61 (D. Md. 2004) (noting that “the Court should evaluate prudential concerns” in order to determine whether to stay proceedings pending appeal of a refusal to compel arbitration, and holding that parties could amend pleadings and take discovery, but that court would not allow proceedings to reach trial stage or act on any motions for summary judgment while appeal was pending).

of “prudential concerns” such as efficiency and the right of a party to an arbitration agreement not to be subjected to litigation, or through application (by those courts not requiring an automatic stay) of the *Hilton* factors, what all of these courts are doing, without expressly saying so and with varying degrees of thoroughness and success, is looking at the costs associated with making an incorrect stay determination. A more systematic method of examining error costs—that is, the costs of staying litigation when there really is no valid agreement to arbitrate covering the dispute at issue, or not staying litigation when there is—would allow courts to perform this analysis more formally, openly, and consistently. Part II proposes such an analysis, which is applicable not only to the § 16(a) appeals discussed here, but to interlocutory appeals of all denials of litigation-avoidance claims.

III. PROPOSAL

Simplifying slightly,⁷⁷ there are four possible outcomes when deciding whether to stay litigation pending interlocutory appeal of a denial of a claimed right to avoid suit: (1) litigation is stayed pending the appeal and the district court’s finding that defendant is amenable to suit is affirmed, (2) litigation is stayed pending the appeal and the district court’s finding that defendant is amenable to suit is reversed, (3) litigation is not stayed pending the appeal and the district court’s finding that defendant is amenable to suit is affirmed, or (4) litigation is not stayed pending the appeal and the district court’s finding that defendant is amenable to suit is reversed. The four scenarios can be summarized in the following 2 x 2 table:

77. See *infra* note 82.

	District Court Affirmed	District Court Reversed
Litigation Stayed Pending Appeal	Scenario (1): Plaintiff bears cost of delay	Scenario (2): No error cost
Litigation Not Stayed Pending Appeal	Scenario (3): No error cost	Scenario (4): Defendant bears cost of wrongful litigation

In scenarios (2) and (3), the stay decision was the “right” one. In scenario (2), where the district court was incorrect in refusing to recognize the defendant’s litigation-avoidance claim, the defendant was not amenable to suit, and thus having stayed the litigation pending appeal imposes no extra costs on either party because the litigation should never have proceeded. There is no error cost because there was no error. Likewise, in scenario (3), where the district court was correct in refusing to recognize the defendant’s litigation-avoidance claim, the defendant is indeed amenable to suit and not having stayed the litigation in that case similarly imposes no error costs on either party because the litigation must proceed. Conversely, in scenarios (1) and (4), the stay decision was “wrong.” In scenario (1), because the district court correctly refused to recognize a litigation-avoidance defense, defendant is properly subject to suit and a stay delays proper litigation of the dispute. As noted above, this is how *Bradford-Scott* and *McCauley* ultimately played out.⁷⁸ Likewise, in scenario (4), because the district court incorrectly refused to recognize a litigation-avoidance claim, a failure to have stayed the litigation pending appeal forced litigation (at least during the period while on appeal) against a defendant that was not properly amenable to suit. Both scenarios (1) and (4) potentially impose error costs on one of the parties: in scenario (1) the plaintiff bears the cost of incorrectly delayed litigation, while in scenario (4) the defendant bears the cost of being incorrectly subjected to litigation. In *Bradford-Scott* and *McCauley*, the appellate courts seem to have assumed the

78. See *supra* text accompanying notes 32-51.

district courts were wrong in refusing to enforce the purported arbitration agreements and sought to avoid the costs associated with scenario (4).⁷⁹ In doing so, however, they ended up in scenario (1).⁸⁰

The expected harm for each scenario is the probability of that scenario occurring multiplied by the magnitude of harm arising out of that scenario. To find the expected error costs associated with each of the two options (whether to stay or not to stay litigation pending interlocutory appeal), we add the expected harm from the two scenarios in each row corresponding to the two possible outcomes (affirmance or reversal of the district court's rejection of the litigation-avoidance claim). In other words, the expected error cost of staying litigation is the sum of the expected harm from Scenario (1) and Scenario (2), while the expected error cost of not staying litigation is the sum of the expected harm from Scenario (3) and Scenario (4). Thus, if p is the probability that the district court's rejection of the litigation-avoidance claim is affirmed, q the probability that the district court's determination is reversed, H_{Π} the harm to plaintiff from delayed litigation based on an incorrect stay (Scenario (1)), and H_{Δ} the harm to defendant in having to wrongfully continue litigation (Scenario (4)), then the expected error cost of staying litigation is $pH_{\Pi} + q(0)$ and the expected error cost of not staying litigation is $p(0) + qH_{\Delta}$. If the goal is to minimize expected error cost,⁸¹ a simple comparison of these values suggests that litigation should be stayed where $pH_{\Pi} < qH_{\Delta}$, and should not be stayed where $pH_{\Pi} > qH_{\Delta}$. Further, treating an appeal as a binary event resulting in either affirmance or reversal, $q = (1-p)$. Thus, litigation should be stayed pending interlocutory appeal of a district court's rejection of a litigation-avoidance claim where $pH_{\Pi} < (1-p)H_{\Delta}$, and should not be stayed where $pH_{\Pi} > (1-p)H_{\Delta}$.⁸²

79. See *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.* (*Bradford-Scott I*), 128 F.3d 504, 506-07 (7th Cir. 1997); *McCauley v. Halliburton Energy Servs.* (*McCauley I*), 413 F.3d 1158, 1162-63 (10th Cir. 2005).

80. See *Bradford Scott II*, 136 F.3d 1156 (7th Cir. 1998); *McCauley II*, No. 05-6011, 2005 U.S. App. LEXIS 29192 (10th Cir. Dec. 30, 2005).

81. See generally Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L. J. 363, 364 (2003) (noting that "scholars . . . have long recognized [minimizing expected error costs] as important in the design of our dispute resolution system").

82. There are, of course, possible results other than affirmance or reversal, and treating q as equal to $(1-p)$ is therefore an approximation. In reporting statistics on merits terminations by the appellate courts, the Federal Judiciary categorizes merits terminations as "Affirmed/Enforced" (which includes cases affirmed in part and reversed in part), "Reversed," "Dismissed," "Remanded," and "Other." See Federal Judicial Caseload Statistics 2001-2008, Table B-5, <http://www.uscourts.gov/caseloadstatistics.html>. Nonetheless, categories other than "Affirmed/Enforced" and "Reversed" account for less than 10% of merits terminations. See *id.*

One refinement of this model arises out of the fact that the district court could enter a partial stay pending the interlocutory appeal. For example, the district court could allow some discovery to proceed while not allowing dispositive motions or trial.⁸³ In such a situation, where the district court stays some aspects of the litigation but allows others to go forward, both sides face potential harms. If the denial of the litigation-avoidance claim is ultimately affirmed, then the plaintiff may suffer harm from the delay of the portions of the litigation that were stayed. Alternatively, if the denial of the litigation-avoidance claim is ultimately reversed, then the defendant may have incurred harm in being forced to litigate those aspects of the matter that were not stayed.

After performing the initial error cost analysis described above to determine whether litigation should proceed or be stayed pending an interlocutory appeal, a second error cost analysis should be performed to determine whether some available partial stay would be preferable to either a complete stay or no stay at all. If H_{Π}' is the potential harm to plaintiff from a partial stay in the event that the matter is ultimately held by the appellate court to be subject to litigation and H_{Δ}' is the harm to defendant from a partial stay where the district court's rejection of the litigation-avoidance claim is ultimately reversed, then the expected error cost of issuing a partial stay is $pH_{\Pi}' + (1-p)H_{\Delta}'$, again, where p is the probability that the district court's rejection of the litigation-avoidance claim is ultimately affirmed. Thus, where no stay is warranted (because the expected error cost of not staying litigation is less than the expected error cost of completely staying litigation, that is, $(1-p)H_{\Delta} < pH_{\Pi}$), a partial stay is preferable to no stay where $pH_{\Pi}' + (1-p)H_{\Delta}' < (1-p)H_{\Delta}$. In other words, a partial stay is preferable to no stay where a partial stay will lessen the potential harm to defendant from having to proceed with litigation should the district court's rejection of the litigation-avoidance claim be reversed, so long as that reduced harm (multiplied by the

Using a formula containing an approximation that disregards alternative outcomes that occur less than 10% of the time may not lead to mathematical certainty, but does not undermine its value as a useful analytic tool. As one circuit court noted in applying an error cost formula in the context of explaining when a district court should grant a preliminary injunction, "[t]his formula . . . is intended not to force analysis into a quantitative straitjacket but to assist analysis by presenting succinctly the factors that the court must consider in making its decision and by articulating the relationship among the factors." *Am. Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986). *See also Villanova v. Abrams*, 972 F.2d 792, 796 (7th Cir. 1992) ("An algebraic formulation of legal rules . . . has value in expressing rules compactly, in clarifying complex relationships, in identifying parallels between diverse legal doctrines, and in directing attention to relevant variables that might otherwise be overlooked.").

83. *See infra* note 88 and accompanying text.

probability of reversal) is not outweighed by a corresponding increase in potential harm to plaintiff from a partial stay should the district court's rejection of the litigation-avoidance claim be affirmed (multiplied by the probability of affirmance). Likewise, where a complete stay is warranted (because $pH_{\Pi} < (1-p)H_{\Delta}$), a partial stay is preferable where $pH_{\Pi'} + (1-p)H_{\Delta'} < pH_{\Pi}$. That is, a partial stay is preferable to a complete stay where a partial stay will lessen the potential harm to plaintiff from an erroneous delay of all litigation if such reduction in harm is not outweighed by the potential harm to defendant from having to proceed with some aspects of the litigation wrongfully (again, weighted by the probability of affirmance or reversal, respectively, of the district court's rejection of the litigation-avoidance claim).

Under the analysis proposed here, there are three relevant variables to examine in determining whether district court litigation should be stayed (either completely or partially) pending interlocutory appeal of a denial of a claimed right to avoid litigation: (1) probability that the district court's rejection of the litigation-avoidance claim will be affirmed on appeal (p), (2) harm to the plaintiff if litigation (or some portion of litigation) is incorrectly stayed (H_{Π} and $H_{\Pi'}$), and (3) harm to the defendant if litigation (or some portion of litigation) is incorrectly permitted to proceed (H_{Δ} and $H_{\Delta'}$). The next three sections examine these variables (in reverse order) through the lens of § 16(a) appeals of refusals to enforce purported arbitration agreements.

A. *Harm from Incorrect Failure to Stay Litigation Pending Appeal*

The most obvious potential error cost, and the one on which those courts applying the divestiture principle focus,⁸⁴ is the harm to a defendant from being forced to litigate a dispute that is properly the subject of arbitration between the time the district court refuses to enforce the arbitration agreement and the time the appellate court reverses that refusal. As the Eleventh Circuit noted in endorsing the automatic stay rule, “[i]f the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration.”⁸⁵

84. See *supra* text accompanying notes 23-26.

85. *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004). See also Edith H. Jones, *Appeals of Arbitration Orders—Coming out of the Serbonian Bog*, 31 S. TEX. L. REV. 361, 375-76 (1990) (“[T]he expense and delay associated with preparation for trial would obviate the benefits of arbitration, producing a costly error should the district court’s refusal to enforce an arbitration agreement be reversed on appeal.”).

It is not necessarily the case, however, that all costs incurred in continued litigation while a § 16(a) appeal is pending are wasted if the district court's decision is reversed and the case ultimately sent to arbitration. For example, at least some discovery and information exchange between the parties occurs whether a dispute is arbitrated or litigated.⁸⁶ Discovery taken in litigation while a § 16(a) appeal is pending would not have to be repeated should the dispute ultimately be sent to arbitration, and the costs associated with such discovery would not have been wasted, at least to the extent such discovery would have been performed in arbitration.⁸⁷ Further, to the extent that other aspects of continued litigation may turn out to have been unnecessary and wasteful should arbitration ultimately be ordered, such as proceedings on class certification, proceedings on summary judgment motions, or ultimate trial, a complete stay of litigation is not necessary to avoid incurrence of those potential error costs, and a district court can issue a partial stay to limit such potential harms.⁸⁸

86. See Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 634-35 (2001) (noting that while depositions are more limited in arbitration than in court, “[t]he scope of document discovery allowed by arbitrators is often as broad as in court, and sometimes more so”).

87. See *Manigault v. Macy’s East, LLC*, No. 06-CV-3337, 2008 U.S. Dist. LEXIS 6101, at *2 (E.D.N.Y. Jan. 28, 2008) (“[W]hether this matter ultimately progresses before this Court or in an arbitral forum, information adduced through discovery will be useful to the litigants.”). See also *Bailey v. Ameriquest Mortg. Co.*, No. 01-545, 2002 U.S. Dist. LEXIS 14866, at *1-2 (D. Minn. Aug. 5, 2002) (refusing to stay litigation pending § 16(a) appeal, including discovery of information regarding persons similarly situated to plaintiffs, noting that the information was in all reasonable likelihood discoverable in either arbitration or litigation, and defendant therefore would suffer little, if any, prejudice in producing it).

88. See, e.g., *Hill v. PeopleSoft USA, Inc.*, 341 F. Supp. 2d 559, 561 (D. Md. 2004) (“Although this Court will not issue a stay of all proceedings, it is mindful of the undesirable consequences of a ruling on the merits prior to a decision regarding arbitration by the higher court. Therefore, this Court will not permit the proceedings to reach the stage of a trial, nor will the Court act upon any motions for summary judgment. The Court will, however, permit discovery to move forward and it will permit the parties to amend their pleadings.”) (internal citation omitted); *Kaltwasser v. Cingular Wireless, LLC*, No. C 07-00411, 2008 U.S. Dist. LEXIS 68601, at *10 (N.D. Cal. Aug. 22, 2008) (“The parties may proceed with discovery, and [plaintiff] may file a motion for class certification. However, [defendant] need not file opposition to that motion, and a briefing schedule will not be established, until the pending appeal [of a refusal to compel arbitration] has been decided.”). See also *Bradberry v. T-Mobile USA, Inc.*, No. C 06-6567, 2007 U.S. Dist. LEXIS 58801, at *9-10 n.2 (N.D. Cal. Aug. 2, 2007) (“[B]ecause Defendant’s motion to stay is denied without prejudice, it may move to stay when the trial date approaches.”). But see *Hardin v. First Cash Fin. Servs.*, 465 F.3d 470, 474 n.2 (10th Cir. 2006) (refusing to limit application of divestiture principle such that district courts would not be divested of jurisdiction over non-dispositive matters such as amendments to pleadings and discovery while a § 16(a) appeal is pending, and stating that “[a]rbitration is an attempt to avoid unnecessary court costs; by keeping non-dispositive matters within the purview of the district court, the parties continue to face costs for which they did not bargain”). Note that this statement in *Hardin* again illustrates the unstated

The language used by some courts staying litigation pending appeal suggests that another harm resulting from an erroneous refusal to stay litigation pending a § 16(a) appeal is the loss of the benefit of speedy resolution of a dispute through arbitration.⁸⁹ Putting aside the issue of whether arbitration truly offers a quicker resolution than litigation,⁹⁰ delayed resolution is not a cost imposed by an incorrect decision not to stay litigation pending a § 16(a) appeal. Assuming the dispute at issue is arbitrable and the district court will be reversed on appeal, the arbitration will be delayed pending appeal regardless of whether litigation is stayed during the pendency of the appeal. This is a cost of an error in the initial determination not to enforce the arbitration agreement, not in the subsequent decision whether to stay litigation pending a § 16(a) appeal of that determination.

In any event, though perhaps overstated by some courts, and possibly redressable at least in part by a partial stay, there clearly may be potential harms to a defendant in any particular case who is forced to proceed with litigation while an appeal is pending to correct an erroneous determination of non-arbitrability. The magnitude of such potential harms can be evaluated by a district court contemplating a stay on a case-by-case basis.

B. *Harm from Incorrect Stay of Litigation Pending Appeal*

On the other side of the equation are potential harms borne by a plaintiff where litigation of a dispute not subject to arbitration is delayed by a stay pending an interlocutory appeal of a district court's correct

assumption of the courts applying the automatic stay rule that the dispute is indeed subject to arbitration—a claim rejected by the district court and precisely the issue on appeal.

89. See, e.g., *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.* (*Bradford-Scott I*), 128 F.3d 504, 506 (7th Cir. 1997) (“Arbitration clauses reflect the parties’ preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially.”); *Winig v. Cingular Wireless, LLC*, No. C-06-4297, 2006 U.S. Dist. LEXIS 83116, at *6 (N.D. Cal. Nov. 6, 2006) (“[I]f a party must undergo the expense and delay of a trial before being able to appeal an order denying a motion to compel arbitration, the advantages of arbitration—speed and economy—are lost forever.”) (internal quotations and alterations omitted).

90. See David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1312 (2009) (“It is generally assumed that arbitration is faster and cheaper than litigation, but there is reason to believe that it is not. . . . [I]f one compares all case dispositions in the two forums—including settlements, pretrial dismissals, and the like—the average time to disposition may well be shorter in litigation than arbitration.”); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J. L. & PUB. POL’Y 579, 585 (2007) (noting that while the average time to resolve an arbitration is 16.5 months, the median time from filing a federal district court case to disposition is 9.5 months).

determination of non-arbitrability. One such potential harm to plaintiff resulting from a delay in litigation is the effect on plaintiff's ability to gather evidence, for example, from lessened availability of physical evidence and witness memory.⁹¹ Another possible harm borne by a plaintiff whose litigation is erroneously stayed pending appeal is the cost of delayed relief or recovery to which the plaintiff might ultimately be entitled.⁹²

In addition to the actual plaintiff, third parties may be harmed if litigation is stayed while a § 16(a) appeal of an ultimately affirmed determination of non-arbitrability is pending. For example, delayed resolution of a plaintiff's claims seeking satisfaction of a debt can result in delayed resolution of third-party, lower-priority, creditors' claims against the defendant.⁹³ To the extent potential harms to nonparties exist

91. See, e.g., *Ciolti v. Iravani*, No. 2:08-cv-02601, 2008 U.S. Dist. LEXIS 74514, at *9 (E.D. Pa. Sept. 23, 2008) (“[A]ny delay in litigation will have a subsequent effect on plaintiff’s ability to gather evidence as the passage of time inevitably impacts the availability of physical evidence and the sharpness of witness memories.”); *Kaltwasser v. Cingular Wireless, LLC*, No. C 07-00411, 2008 U.S. Dist. LEXIS 68601, at *10 (N.D. Cal. Aug. 22, 2008) (denying motion to stay litigation pending appeal of refusal to compel arbitration, agreeing with plaintiff that “further delay of this action, which has been pending for over a year, will lead to a loss of evidence and ‘fading memories’”); *Bradberry v. T-Mobile USA, Inc.*, No. C 06-6567, 2007 U.S. Dist. LEXIS 58801, at *12 (N.D. Cal. Aug. 2, 2007) (citing risk of lost evidence as a harm to plaintiff weighing against staying litigation pending interlocutory appeal). But see *Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 474 (1997) (citing a study finding that memory fades very rapidly after initial observation, but much more slowly thereafter, and suggesting that “[t]he difference in what is recalled between one year and four years . . . is comparatively slight”).

92. See, e.g., *RA Investments I, LLC v. Deutsche Bank AG*, No. 3:04-CV-1565-G, 2005 U.S. Dist. LEXIS 9961, at *19-20 (N.D. Tex. May 20, 2005) (finding that plaintiffs, who alleged that defendants encouraged them to engage in an unsuccessful tax strategy, would suffer substantial harm if litigation were stayed pending defendants’ appeal of the court’s refusal to enforce an arbitration agreement, because plaintiffs were facing the possibility of paying millions of dollars in back-taxes, penalties, and interest to the IRS, and could face economic hardship if compensation from responsible parties were delayed); *Ciolti*, 2008 U.S. Dist. LEXIS 74514, at *9 (“Any stay in this matter would delay plaintiff’s recovery, thereby perpetuating alleged falsehoods about the plaintiff, burdening plaintiff’s ability to seek employment, and temporarily withholding any monetary relief to which plaintiff may be entitled.”). See also *Perricone v. Unimed Nutritional Servs.*, No. 3:01CV512, 2002 U.S. Dist. LEXIS 17613, at *9 (D. Conn. July 18, 2002) (“[A] stay [of patent infringement litigation pending USPTO reexamination of the patent] may continue to deprive the plaintiff, during the pendency of the reexamination, of the right to exclude others from making, using, offering to sell, or selling the patented invention.”).

93. See, e.g., *Triton Container Int’l Ltd. v. Baltic Shipping Co.*, No. 95-0427, 1995 U.S. Dist. LEXIS 18924, at *5-6 (E.D. La. Dec. 20, 1995) (refusing to stay litigation pending § 16(a) appeal based on harm to third parties from stay, noting that “[s]ince it is doubtful that there are sufficient proceeds in the court’s registry to satisfy all claims asserted against [defendant], the claimants ranking below [plaintiff] would have difficulty obtaining disbursement of funds if [plaintiff’s] claim is left unresolved.”). See also *Bailey v. Ameriquist Mortg. Co.*, No. 01-545, 2002 U.S. Dist. LEXIS 14866, at *2-3 (D. Minn. Aug. 5, 2002) (“[T]he issuance of a stay [pending § 16(a) appeal] and

from an erroneous decision whether to stay litigation pending a § 16(a) appeal, such harm can be added to H_{Π} or H_{Δ} in the analysis as appropriate.⁹⁴

C. Probability That District Court's Refusal to Enforce Arbitration Agreement Will Be Affirmed

The purpose of pointing out the types of potential harms each side may incur from an erroneous stay decision is not to attempt to weigh or otherwise compare such harms on a general level. Indeed, it is impossible to determine as a general matter what exactly the harms faced by each party from an erroneous stay decision are in any particular case; this determination is best made by the district court on a case-by-case basis. The point here is only to suggest that in any given case, there may be such potential harms to either side.

In contrast to potential harms, however, which are best analyzed on a case-by-case basis, the likelihood of one side or the other incurring those harms—that is, the likelihood that the district court's rejection of a litigation-avoidance defense will be affirmed or reversed—is not easily determined in any particular case by the presiding judge.⁹⁵ Presumably, any district court judge refusing to enforce a purported arbitration agreement believes it is not sufficiently likely that such a decision will be reversed on appeal; if the judge did so believe, he or she should have ruled the other way.⁹⁶ In addition, judges, like all individuals, are

further delay in production of the list in question [of employees similarly situated to plaintiffs] could substantially injure other parties interested in the case whose statute of limitations continues to run. . . .”).

94. See *American Hosp. Supply Corp. v. Hosp. Products Ltd.*, 780 F.2d 593, 601 (7th Cir. 1986) (explaining how to incorporate public interest, i.e., potential harm to nonparties, in an error cost formula relating to injunctions).

95. But see *Davis*, *supra* note 81, at 424 (proposing a model for deciding whether to award injunctive relief that includes a judge's “recogniz[ing] that she may err, and . . . provid[ing] a rough assessment of the likelihood that she has done so”).

96. See *RA Investments I, LLC v. Deutsche Bank AG*, No. 3:04-CV-1565-G, 2005 U.S. Dist. LEXIS 9961, at *18 n.5 (N.D. Tex. May 20, 2005) (“[I]t is unlikely that a district court would ever be able to find that defendants will be likely to succeed on the merits of their appeal. In order to make such a finding, this court would be admitting that it erred in denying defendant's original motion to stay the proceedings [in favor of arbitration], and that the court of appeals is likely to reverse its decision.”) (internal citations omitted); *Desktop Images, Inc. v. Ames*, 930 F. Supp. 1450, 1452 (D. Colo. 1996) (“Such a finding [that defendants are likely to succeed on an appeal] would have a rational basis only if the district court followed a precedent which it thought was clearly overdue for reversal by a court possessing the authority to reverse.”). See also Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals* 3 (Jan. 5, 2009) (University of Chicago Working Paper Series), available at <http://ssrn.com/abstract=1536723> (hypothesizing that “district judges care

susceptible to the egocentric bias of overestimating their own ability.⁹⁷ For example, nearly 88% of federal magistrate judges participating in one study believed that they were among the lower half of their peers in terms of reversal rates.⁹⁸ Indeed, over 56% believed they were in the lowest quartile.⁹⁹ Thus, there is no reason to believe that the best, or even a good, measure of the likelihood in any particular case that a judge's refusal to enforce a purported arbitration agreement will be affirmed on appeal is that judge's own assessment of that likelihood. Unlike potential harms, probability of affirmance cannot be examined on a case-by-case basis by the ruling district court judge, and should instead be looked at more generally. This is the problem with the first factor of the *Hilton* test (likelihood of success on the merits),¹⁰⁰ and why that test does not provide good guidance for determining whether to stay litigation pending a § 16(a) appeal.¹⁰¹

In recent years, the general affirmance rate in federal private civil appeals has been almost 80%.¹⁰² Plugging 80% into our error cost comparison suggests that in order to justify a stay of litigation pending appeal, the harm to a defendant from litigation wrongfully proceeding

about minimizing their workload and maximizing their reputation (and hopes for elevation to an appellate court) by avoiding appellate reversal").

97. Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 814 (2001) ("The judges in our study exhibited a strong egocentric bias concerning the likelihood that they would be overturned on appeal.").

98. *Id.*

99. *Id.*

100. *See supra* text accompanying notes 73-75.

101. *But see* Taran, *supra* note 8, at 419 (proposing that the four-factor *Hilton* test be adopted to govern the issuance of stays pending appeals of denials of arbitration). It should also be noted that this problem applies only to *district* court determinations whether to stay litigation pending interlocutory appeal. If the district court denies a stay, the appellate court may itself grant a stay. *See* FED. R. APP. P. 8(A). The problems described above of a district court judge trying to determine the likelihood of its own decision being affirmed on appeal are not present when it is an appellate court trying to determine likelihood of affirmance. In the case of an appellate court, it may be sufficient for the court to take a preliminary look at the merits of the appeal and decide likelihood of affirmance on a case-by-case basis, rather than by resort to generalized affirmance rates as this article suggests district courts should do.

102. This figure was determined by examining the Federal Judicial Caseload Statistics for 2001 to 2008, *supra* note 82. Table B-5 to each annual report provides statistics for appeals terminated on the merits for each U.S. Court of Appeal except the Federal Circuit for the twelve-month period ending March 31 of each year. *Id.* The percentage of total terminated appeals reported as "Affirmed/Enforced" (which includes merit terminations affirmed in part and reversed in part) in the 2001 through 2008 reports was 79.19%, with yearly rates during that period ranging from 78.09% for the year ending March 31, 2003 to 80.06% for the year ending March 31, 2001. *Id.* These were determined using data from proceedings reported as "other private civil," which do not include prisoner petitions, bankruptcy appeals, administrative appeals, or original proceedings in the circuit court. *Id.*

must be four times greater than the harm to a plaintiff from litigation wrongfully being delayed by a stay pending appeal.¹⁰³ To more accurately compare expected error costs in the context of determining whether to stay litigation pending a § 16(a) appeal, however, the affirmance rate should be limited to such appeals. Part III endeavors to determine that rate.

IV. METHODOLOGY AND RESULTS

A terms and connectors search of “9 w/5 16(a)” for the years 2000 through 2008 was conducted on the “US Courts of Appeals, Combined” database of Lexis. The search returned 288 total cases. All 288 cases were reviewed and assigned one of three codes: Affirmed, Reversed, or Not Applicable.¹⁰⁴

A. Cases Coded Not Applicable

The search was intended to be, and was, overbroad. There are two ways in which a party can seek to enforce a purported arbitration agreement, sometimes referred to as embedded and non-embedded proceedings.¹⁰⁵ This article is concerned only with the so-called embedded proceedings, in which the request to enforce a purported arbitration agreement is raised as a defense to pending litigation. In contrast is the non-embedded proceeding, in which a party to an arbitration agreement seeks a court’s assistance to force a reluctant party to arbitrate in the absence, or independent, of any pending litigation.¹⁰⁶ Because there is no underlying litigation to stay or not stay pending an appeal of a refusal to enforce the purported arbitration agreement in a non-embedded proceeding, cases involving non-embedded proceedings are not relevant to the analysis here, and were consequently coded as Not Applicable.

In addition, several of the cases returned did not involve interlocutory appeals of refusals to enforce purported arbitration

103. As explained above, *supra* text accompanying notes 81-82, a stay of litigation pending appeal is justified where $pHII < (1-p)H\Delta$, where p is the probability of affirmance on appeal, HII is the harm to a plaintiff from litigation wrongfully being delayed by appeal, and $H\Delta$ is the harm to a defendant from litigation wrongfully proceeding. If p is 80%, a stay pending appeal is justified where $.8HII < .2H\Delta$, or $4HII < H\Delta$.

104. A list of the 288 cases and the codes assigned appears at the end of this article as Appendix A.

105. See Siegel, *supra* note 12, at 495.

106. See, e.g., *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646 (6th Cir. 2008).

agreements at all, but rather appeals of orders compelling arbitration,¹⁰⁷ or appeals of orders confirming or vacating arbitration awards.¹⁰⁸ Finally, some individual cases that did in fact involve interlocutory appeals of refusals to enforce purported arbitration agreements in embedded proceedings were nonetheless coded as Not Applicable based on unique circumstances of those various cases.¹⁰⁹ All in all, 152 of the 288 cases were coded as Not Applicable.¹¹⁰

B. *Cases Coded Affirmed or Reversed*

Cases not coded as Not Applicable were coded as either Affirmed or Reversed. As noted above,¹¹¹ appellate court decisions can have outcomes other than affirmance or reversal, and thus do not always neatly fit into those two categories. The results of the search performed here (that were not initially coded Not Applicable) could basically be divided into four groups: (1) cases in which the relevant district court ruling was affirmed, (2) cases in which the relevant district court ruling was reversed, (3) cases in which the relevant district court ruling was affirmed in part and reversed in part, and (4) cases in which the appeal was dismissed for lack of jurisdiction. As discussed more fully below,

107. See, e.g., *3M v. Amtex Sec.*, 542 F.3d 1193 (8th Cir. 2008).

108. See, e.g., *Merrill Lynch, Inc. v. Clemente*, No. 07-1021, 2008 US App LEXIS 6848 (3d Cir. Mar. 31, 2008); *Beers Const. Co. v. Pikeville Hosp.*, No. 03-6264, 2005 US App LEXIS 7458 (6th Cir. Apr. 28, 2005).

109. For example, in some cases, the appellate court affirmed the district court's refusal to compel arbitration, but substantive merits litigation was nonetheless stayed for some prudential reason. See, e.g., *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1216 (10th Cir. 2005) (affirming Colorado district court's refusal to compel arbitration where agreement specified Washington D.C. as the site of arbitration, but staying litigation pending determination by D.C. court as to whether dispute was arbitrable); *Hill v. G.E. Power Systems, Inc.*, 282 F.3d 343 (5th Cir. 2002) (refusing to compel arbitration where defendant was not a signatory to the relevant arbitration agreement, but holding that litigation should be stayed pending arbitration of claims against a co-defendant who *had* signed the agreement). Admittedly, some judgment was exercised in coding ostensibly applicable cases (interlocutory appeals of refusals to enforce arbitration agreements in embedded proceedings) as Not Applicable. The guiding principle in determining such coding was whether there appeared to be pending litigation that would continue in the district court absent a stay pending the interlocutory appeal.

110. See Appendix A. While the search was intended to be overinclusive, it is, of course, possible that the search was underinclusive as well. For example, there may be cases in which an appellate court did not expressly invoke 9 U.S.C. § 16(a) when deciding an appeal under that section, or in which the appellate court referenced only 9 U.S.C. § 16 generally, but not § 16(a) specifically. Such cases would not have been caught by the search here. See, e.g., *Price Plaintiffs v. Humana Ins. Co. (In re Humana Inc. Managed Care Litig.)*, 285 F.3d 971 (11th Cir. 2002) (no mention of bases of jurisdiction in appeal of order granting in part and denying in part motion to compel arbitration).

111. See *supra* note 82.

cases in the first and fourth groups were coded as Affirmed, cases in the second group were coded as Reversed, and cases in the third group were coded as either Affirmed or Reversed, depending on the circumstances. The touchstone in coding all of these cases was whether the appellate court decision meant that the underlying dispute on the merits would be litigated or arbitrated. Because the objective of the analysis here was to compare the probability of incurring Scenario (1) error costs (plaintiff harmed by delay from an unnecessary stay) to the probability of incurring Scenario (4) error costs (defendant harmed by not staying litigation to which it should not have been subjected), the issue is whether staying litigation pending appeal would be a Scenario (1) error (because following the decision of the appellate court the substantive dispute is to be litigated) or not an error (because following the appeal the dispute is to be arbitrated), and conversely, whether refusing to stay litigation would be a Scenario (4) error (because following the appeal the dispute is to be arbitrated) or not an error (because following the appeal the dispute is to be litigated). Those cases in which an erroneous stay decision would be a Scenario (1) error were coded as Affirmed, and those cases in which an erroneous stay decision would be a Scenario (4) error were coded as Reversed.

C. Cases Affirming the District Court's Ruling

The first two categories of cases were the simplest to code. If the appellate court affirmed the district court's refusal to enforce a purported arbitration agreement, the underlying dispute would not be arbitrated. In that case, staying litigation pending the appeal would have been a Scenario (1) error imposing potential error costs on the plaintiff, and not staying litigation pending the appeal would not have been an error. This is true even if the appellate court affirmed on different grounds than the district court. Consequently, all cases in which the district court's refusal to enforce the purported arbitration agreement was affirmed, even if on different grounds, were coded as Affirmed.

D. Cases Reversing the District Court's Ruling

Likewise, all cases in which the district court's refusal to enforce a purported arbitration agreement was reversed were coded as Reversed. This included cases in which the appellate court reversed or vacated the district court's ruling but remanded for consideration of other grounds that could potentially support the refusal to enforce the purported

agreement.¹¹² Such cases were coded Reversed because absent the district court's finding an alternative ground to refuse to enforce the purported arbitration agreement, reversal of the district court's original refusal to compel arbitration means that the substantive underlying dispute should be arbitrated. Consequently, a failure to stay litigation pending the appeal would impose Scenario (4) error costs on the party seeking to avoid litigation, while a stay of litigation would not have been an error.¹¹³

E. Cases Affirming in Part and Reversing in Part the District Court's Ruling

In two of the otherwise applicable cases returned in the search, the district court's refusal to enforce a purported arbitration agreement was essentially affirmed in part and reversed in part. Thus, in *Iberia Credit Bureau v. Cingular Wireless, LLC*,¹¹⁴ after the district court denied motions to compel arbitration brought by three different defendants, the appellate court affirmed with respect to one defendant, and reversed with respect to the other two defendants. Similarly, in *Choice Hotels International, Inc. v. BSR Tropicana Resort, Inc.*,¹¹⁵ after the district court held two claims non-arbitrable, the appellate court agreed that one claim was non-arbitrable, but held that the other claim was arbitrable. One way to code these cases would have been to treat each individual ruling separately and code each accordingly—that is, code *Iberia Credit Bureau* as two Affirmed and one Reversed, and *Choice Hotels International* as one Affirmed and one Reversed. Such a coding system

112. See, e.g., *Schwartz v. Comcast Corp.*, No. 06-4855, 2007 U.S. App. LEXIS 27617 (3d Cir. Nov. 30, 2007) (reversing district court holding that no arbitration agreement existed, but remanding to determine whether agreement was unconscionable contract of adhesion and whether dispute fell within scope of agreement); *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224 (3d Cir. 2008) (reversing district court's holding that arbitration agreement was unconscionable, but remanding for further proceedings to determine whether employer had waived right to compel arbitration).

113. In the event the district court did, on remand, again deny a motion to compel arbitration based on alternative grounds, and that denial were appealed, the second appeal should also have shown up in the search and been counted independently. See, e.g., *Al-Safin v. Circuit City Stores*, No. 00-35241, 2002 U.S. App. LEXIS 19153 (9th Cir. Sept. 9, 2002) (reversing district court's denial of motion to compel arbitration, finding arbitration agreement valid under federal law, but remanding for consideration of validity of arbitration agreement under state law); *Al-Safin v. Circuit City Stores*, 394 F.3d 1254 (9th Cir. 2005) (affirming district court denial of motion to compel arbitration on remand, finding arbitration agreement unconscionable under state law). Thus, the 2002 *Al-Safin* decision was coded as Reversed, and the 2005 *Al-Safin* decision was coded as Affirmed.

114. 379 F.3d 159 (5th Cir. 2004).

115. 252 F.3d 707 (4th Cir. 2001).

was not used, however, in order to maintain consistency with the coding of other cases where individual rulings were not counted separately if all decided in the same way.¹¹⁶ Instead, *Iberia Credit Bureau* was coded as Reversed because the majority of the rulings were reversed, and *Choice Hotels International* was coded as Not Applicable because an equal number of the rulings were affirmed and reversed.

F. Cases Dismissing the Appeal for Lack of Jurisdiction

In several of the cases, the appellate court held that it had no jurisdiction over an interlocutory appeal of the district court's refusal to compel arbitration. There are several reasons why, despite § 16(a), an appellate court might find it has no jurisdiction over an interlocutory appeal of an order refusing to compel arbitration.¹¹⁷ Whatever the reason for the appellate court declining to exercise jurisdiction, however, the end result is that the district court's refusal to enforce the purported arbitration agreement stands, and litigation of the underlying dispute therefore proceeds. Thus, a stay of litigation pending the appeal (ultimately dismissed for lack of jurisdiction) would have imposed Scenario (1) error costs on the plaintiff, while a failure to stay litigation would not have been in error. Thus, applicable cases in which the appellate court found that it did not have jurisdiction over a § 16(a) interlocutory appeal were coded Affirmed.

G. Results

Of the 288 cases returned in the search, 152 were ultimately coded as Not Applicable.¹¹⁸ Of the 136 applicable cases, 70 were coded as

116. See, e.g., *In re NBR Antitrust Litig.*, No. 05-4535, 2006 U.S. App. LEXIS 27284 (3d Cir. Nov. 2, 2006) (reversing district court's denial of motion to compel arbitration of three different claims). *NBR* was coded as Reversed, but was not counted as three separate Reversed cases, even though the appellate court reversed the district court's refusal to compel arbitration of three different claims.

117. For example, prior to the 2009 Supreme Court decision in *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896 (2009), some circuit courts held that they did not have jurisdiction over appeals of orders denying motions to compel arbitration brought by non-signatories to the arbitration agreement at issue. See *Carlisle v. Curtis Mallet-Prevost*, 521 F.3d 597 (6th Cir. 2008) (describing circuit split). Another example where appellate jurisdiction may be lacking despite § 16(a) is where the purported arbitration clause is part of a contract not covered by the FAA. *Seven-Up/RC Bottling Co. v. Amalgamated Indust. Workers Union*, No. 04-56051, 2006 U.S. App LEXIS 14092 (9th Cir. June 5, 2006) (finding no jurisdiction under 9 U.S.C. § 16(a) to hear an appeal of an order denying a motion to compel arbitration because the FAA does not apply to employment contracts of interstate transportation workers).

118. See Appendix A.

Affirmed and 66 were coded as Reversed.¹¹⁹ Thus, of the applicable cases, 51.5% of appeals were Affirmed and 48.5% were Reversed, a roughly even split.¹²⁰ In contrast to the 80% general overall affirmance rate, which suggested that litigation be stayed pending an interlocutory appeal where potential harm to a defendant from litigation wrongfully proceeding must be four times greater than potential harm to a plaintiff from litigation being stayed pending appeal,¹²¹ the essentially even probability of affirmance in the subset of § 16(a) interlocutory appeals suggests that litigation should be stayed simply when the magnitude of potential harm to a plaintiff from erroneously staying litigation is less than the magnitude of potential harm to a defendant from erroneously refusing to stay litigation, and vice versa.¹²² In either case, the district court should further consider the possibility of issuing a partial stay as an alternative to either a complete stay or no stay, and, given the essentially even odds of affirmance of the determination that the dispute is not arbitrable, the court need consider only the magnitude of the potential harm to each side when considering a partial stay.¹²³

119. *See id.*

120. *See id.* It should be noted that any selection effects of examining only appeals that resulted in a decision are likely minimal because cases once appealed appear unlikely to settle before an appellate court ruling. *See* Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 69 n.54 (2007) (noting that decisions to settle after an appeal has been filed are anomalous); Daniel Kessler, Thomas Meites, & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 245 (1996) (suggesting that at the appellate stage, transaction costs of settling may exceed litigation costs because appeals involve questions of law that the parties have already briefed and argued in the trial court).

121. *See supra* notes 102-03 and accompanying text.

122. Technically, a 51.5% affirmance rate suggests that litigation should be stayed pending interlocutory appeal only if the potential harm to defendant in not staying litigation is more than 1.06 times greater than the potential harm to plaintiffs in staying litigation. The objective here is not mathematical precision, however, and clearly, trying to discern whether potential harm to one side is 1.06 times greater than potential harm to another, as opposed to, say, .96 or 1.16 times greater, is not likely a fruitful endeavor for a district court to undertake. However, it certainly seems possible for a district court to weigh the magnitudes of potential harms evenly and determine whether the magnitude of one potential harm is greater or lesser than the magnitude of some other potential harm.

123. As noted above, *see supra* text accompanying note 82, a partial stay is preferable to no stay where $pHII' + (1-p)H\Delta' < (1-p)H\Delta$ and is preferable to a complete stay where $pHII' + (1-p)H\Delta' < pHII$. Given that here, essentially, $p = (1-p)$, a partial stay is preferable to no stay where $HII' + H\Delta' < H\Delta$, that is, where the harm to defendant from an erroneous holding that the dispute is not arbitrable can be lessened by a partial stay without causing harm to the plaintiff greater than the reduction in the defendant's harm. Likewise, a partial stay is preferable to a complete stay where $HII' + H\Delta' < HII$, that is, where the harm to plaintiff from delaying all litigation should the district court's determination of non-arbitrability be affirmed can be lessened by a partial stay allowing some litigation to proceed without causing a correspondingly greater harm to defendant.

V. CONCLUSION

A significant gap exists in the Federal Arbitration Act, which provides for interlocutory appeals of district court orders refusing to enforce purported arbitration agreements but fails to state whether litigation should be stayed pending such an appeal. While all the courts addressing this lacuna appear to implicitly suggest avoiding error cost as a guiding principle, none of them apply that principle in a satisfactory manner. Those circuits that allow district courts discretion whether to stay litigation pending a § 16(a) appeal fail to offer any meaningful guidance as to how to exercise such discretion. Equally problematic is the approach of those circuits applying an automatic stay rule, which seems to be based on an assumption (shown here to be false) that the district court's refusal to enforce a purported arbitration agreement is likely to be reversed. Those courts seek to avoid what are described here as Scenario (4) errors at all costs, without considering the likelihood of incurring Scenario (1) errors. As the ultimate outcomes of *Bradford-Scott* and *McCauley* show, this approach can backfire.

This article suggests that a more effective analysis of potential error costs look to three factors: (1) potential harm to plaintiff if a stay of litigation pending an interlocutory appeal of a district court's refusal to enforce a purported arbitration agreement turns out to have been erroneous, (2) potential harm to defendant if a failure to stay litigation pending an interlocutory appeal turns out to have been erroneous, and (3) the probability that the district court's arbitrability determination will be affirmed on appeal. Specifically, litigation should be stayed pending an interlocutory appeal when $pH_{\Pi} < (1-p)H_{\Delta}$, where p is the probability of affirmance on appeal, H_{Π} the harm to a plaintiff from an erroneous stay, and H_{Δ} the harm to a defendant from an erroneous failure to stay.¹²⁴

The potential harm to plaintiffs and defendants in any particular case can best be determined by the district court on a case-by-case basis. The likelihood that the district court will be affirmed on appeal, however, is best determined by looking at aggregate data. In general, the affirmance rate of district courts has recently been around 80%, suggesting that litigation be stayed pending appeal only if the potential harm to the defendant in not staying litigation is more than four times greater than the potential harm to plaintiffs in staying litigation. Limiting the data to the subset of interlocutory appeals of refusals to enforce purported arbitration agreements, however, produces an

124. *See id.* This article also suggests that a court further consider whether a partial stay would be preferable to either a complete stay or no stay at all based on the same three variables. *See id.*

essentially 50/50 affirmance rate, suggesting that district courts should simply compare the magnitude of potential harm from erroneously staying litigation pending appeal to potential harm from erroneously refusing to stay litigation pending appeal. Such an approach is easy to administer, and seems best suited to actually reducing the costs resulting from erroneous stay determinations.

While this article focuses specifically on interlocutory appeals under the Federal Arbitration Act, there is no reason why the analysis proposed here would not be applicable more generally to interlocutory appeals of denials of other litigation-avoidance defenses such as absolute, qualified, or sovereign immunity, or double jeopardy. The potential harms to one side or the other from an erroneous stay decision (or their magnitude) may be different than in the arbitration context, but the analysis presented here would be the same. Those potential harms could be determined on a case-by-case basis, while an examination of affirmance rates in each of the other litigation-avoidance claim contexts would allow courts to perform the error cost analysis proposed here in those cases as well.

APPENDIX A

Image Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044 (10th Cir. 2006) (not applicable).

2200 M St. LLC v. Murphy, No. 05-7035, 2005 U.S. App. LEXIS 26081 (D.C. Cir. Nov. 29, 2005) (affirmed).

3M Co. v. Amtex Sec., Inc., 542 F.3d 1193 (8th Cir. 2008) (not applicable).

Ace Capital RE Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24 (2d Cir. 2002) (reversed).

Aceros Prefabricados, S.A. v. TradeArbed, Inc., 282 F.3d 92 (2d Cir. 2002) (reversed).

Adams v. Ga. Gulf. Corp., 237 F.3d 538 (5th Cir. 2001) (not applicable).

Adams v. Monumental Gen. Cas. Co., 541 F.3d 1276 (11th Cir. 2008) (not applicable).

Adams v. Suozzi, 433 F.3d 220 (2d Cir. 2005) (affirmed).

Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 524 F.3d 1235 (11th Cir. 2008) (affirmed).

AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 242 F.3d 777 (8th Cir. 2001) (affirmed).

Albert M. Higley Co. v. N/S Corp., 445 F.3d 861 (6th Cir. 2006) (affirmed).

Alejandro v. L.S. Holding Inc., No. 04-2053, 2005 U.S. App. LEXIS 8270 (3d Cir. May 10, 2005) (not applicable).

Airon Int'l, Inc. v. Cherokee Nation Indus., Inc., 531 F.3d 863 (D.C. Cir. 2008) (not applicable).

Alpine Glass, Inc. v. Ill. Farmers Ins. Co., 531 F.3d 679 (8th Cir. 2008) (not applicable).

Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (9th Cir. 2005) (affirmed).

Al-Safin v. Circuit City Stores, Inc., No. 00-35241, 2002 U.S. App. LEXIS 19153 (9th Cir. Sept. 9, 2002) (reversed).

Alticor, Inc. v. Nat'l Union Fire Ins. Co., 411 F.3d 669 (6th Cir. 2005) (affirmed).

Am. Int'l Specialty Lines Ins. Co. v. Elec. Data Sys. Corp., 347 F.3d 665 (7th Cir. 2003) (not applicable).

Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533 (5th Cir. 2003) (not applicable).

Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702 (5th Cir. 2002) (not applicable).

- Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214 (10th Cir. 2005) (not applicable).
- Apache Bohai Corp. v. Texaco China, B.V.*, 330 F.3d 307 (5th Cir. 2003) (not applicable).
- Arbercheski v. Oracle Corp.*, No. 06-3472, 2007 U.S. App. LEXIS 6545 (2d Cir. Mar. 19, 2007) (reversed).
- Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231 (2d Cir. 2006) (reversed).
- Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir. 2002) (not applicable).
- Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, No. 04-2000, 2006 U.S. App. LEXIS 2786 (4th Cir. Feb. 3, 2006) (not applicable).
- Ass'n of Mex.-Am. Educators v. California*, 231 F.3d 572 (9th Cir. 2000) (not applicable).
- ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091 (6th Cir. 2002) (not applicable).
- Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821 (8th Cir. 2003) (reversed).
- Bailey v. Fannie Mae*, 209 F.3d 740 (D.C. Cir. 2000) (affirmed).
- Bank of N.S. v. Suitt Constr. Co.*, No. 05-3463, 2006 U.S. App. LEXIS 32100 (10th Cir. Dec. 28, 2006) (not applicable).
- Barnett v. Cigna Health Plan*, No. 02-16460, 2003 U.S. App. LEXIS 15155 (9th Cir. July 25, 2003) (affirmed).
- Bates v. 84 Lumber Co.*, No. 04-6493, 2006 U.S. App. LEXIS 23640 (6th Cir. Sept. 14, 2006) (not applicable).
- Beers Constr. Co. v. Pikeville United Methodist Hosp. of Ky., Inc.*, No. 03-6264, 2005 U.S. App. LEXIS 7458 (6th Cir. Apr. 28, 2005) (not applicable).
- Berenson v. Nat'l Fin. Servs. LLC*, 485 F.3d 35 (1st Cir. 2007) (not applicable).
- Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002) (reversed).
- Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002) (not applicable).
- Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004) (not applicable).
- Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270 (7th Cir. 2001) (not applicable).
- Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721 (8th Cir. 2003) (not applicable).
- Bogen Commc'ns, Inc. v. Tri-Signal Integration, Inc.*, No. 06-1987, 2007 U.S. App. LEXIS 8605 (3d Cir. Apr. 13, 2007) (not applicable).

Bombardier Corp. v. Nat'l R.R. Passenger Corp., 333 F.3d 250 (D.C. Cir. 2003) (not applicable).

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Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347 (5th Cir. 2003) (not applicable).

Brown & Root, Inc. v. Breckenridge, 211 F.3d 194 (4th Cir. 2000) (not applicable).

Brown v. Pacific Life Ins. Co., 462 F.3d 384 (5th Cir. 2006) (not applicable).

Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321 (1st Cir. 2000) (not applicable).

Burlington Ins. Co. v. Trygg-Hansa Ins. Co., No. 00-1373, 2001 U.S. App. LEXIS 10625 (4th Cir. May 23, 2001) (reversed).

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Burns v. N.Y. Life Ins. Co., 202 F.3d 616 (2d Cir. 2000) (affirmed).

Bushley v. Credit Suisse First Bos., 360 F.3d 1149 (9th Cir. 2004) (not applicable).

Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005) (affirmed).

Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel, 346 F.3d 360 (2d Cir. 2003) (not applicable).

Cargill Ferrous Int'l v. Highgate MV, No. 03-30042, 2003 U.S. App. LEXIS 14509 (5th Cir. July 18, 2003) (reversed).

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Cerveceria Cuauhtemoc Moctezuma S.A. de C.V. v. Montana Beverage Co., 330 F.3d 284 (5th Cir. 2003) (affirmed).

Chiron Corp. v. Ortho Diagnostic Sys., 207 F.3d 1126 (9th Cir. 2000) (not applicable).

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Clarendon Nat'l Ins. Co. v. Kings Reins. Co., 241 F.3d 131 (2d Cir. 2001) (not applicable).

Coca-Cola Bottling Co. of N.Y. v. Soft Drink and Brewery Workers Union Local 812, 242 F.3d 52 (2d Cir. 2001) (not applicable).

Colon v. R.K. Grace & Co., 358 F.3d 1 (1st Cir. 2003) (not applicable).

Comanche Indian Tribe of Okla. v. 49, L.L.C., 391 F.3d 1129 (10th Cir. 2004) (not applicable).

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Dahiya v. Talmidge Int'l, Ltd., 380 F.3d 218 (5th Cir. 2004) (not applicable).

Dambrosio v. Comcast Corp., No. 04-4330, 2005 U.S. App. LEXIS 15690 (3d Cir. July 29, 2005) (reversed).

Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007) (not applicable).

Dees v. Billy, 394 F.3d 1290 (9th Cir. 2005) (not applicable).

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Glazer v. Lehman Bros., 394 F.3d 444 (6th Cir. 2005) (reversed).

Goins v. Ryan's Family Steakhouses, Inc., No. 05-51549, 2006 U.S. App. LEXIS 12471 (5th Cir. May 18, 2006) (affirmed).

Graham v. Hartford Life & Accident Ins. Co., 501 F.3d 1153 (10th Cir. 2007) (not applicable).

Grain v. Trinity Health, 551 F.3d 374 (6th Cir. 2008) (not applicable).

Great Earth Cos. v. Simons, 288 F.3d 878 (6th Cir. 2002) (not applicable).

Green v. Ameritech Corp., 200 F.3d 967 (6th Cir. 2000) (not applicable).

Greene v. Famous Pawn, Inc., No. 02-2263, 2003 U.S. App. LEXIS 16672 (4th Cir. Aug. 14, 2003) (affirmed).

Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476 (5th Cir. 2002) (not applicable).

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In re Universal Serv. Fund Tel. Billing Practice Litig., 428 F.3d 940 (10th Cir. 2005) (affirmed).

In re White Mountain Mining Co., 403 F.3d 164 (4th Cir. 2005) (affirmed).

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