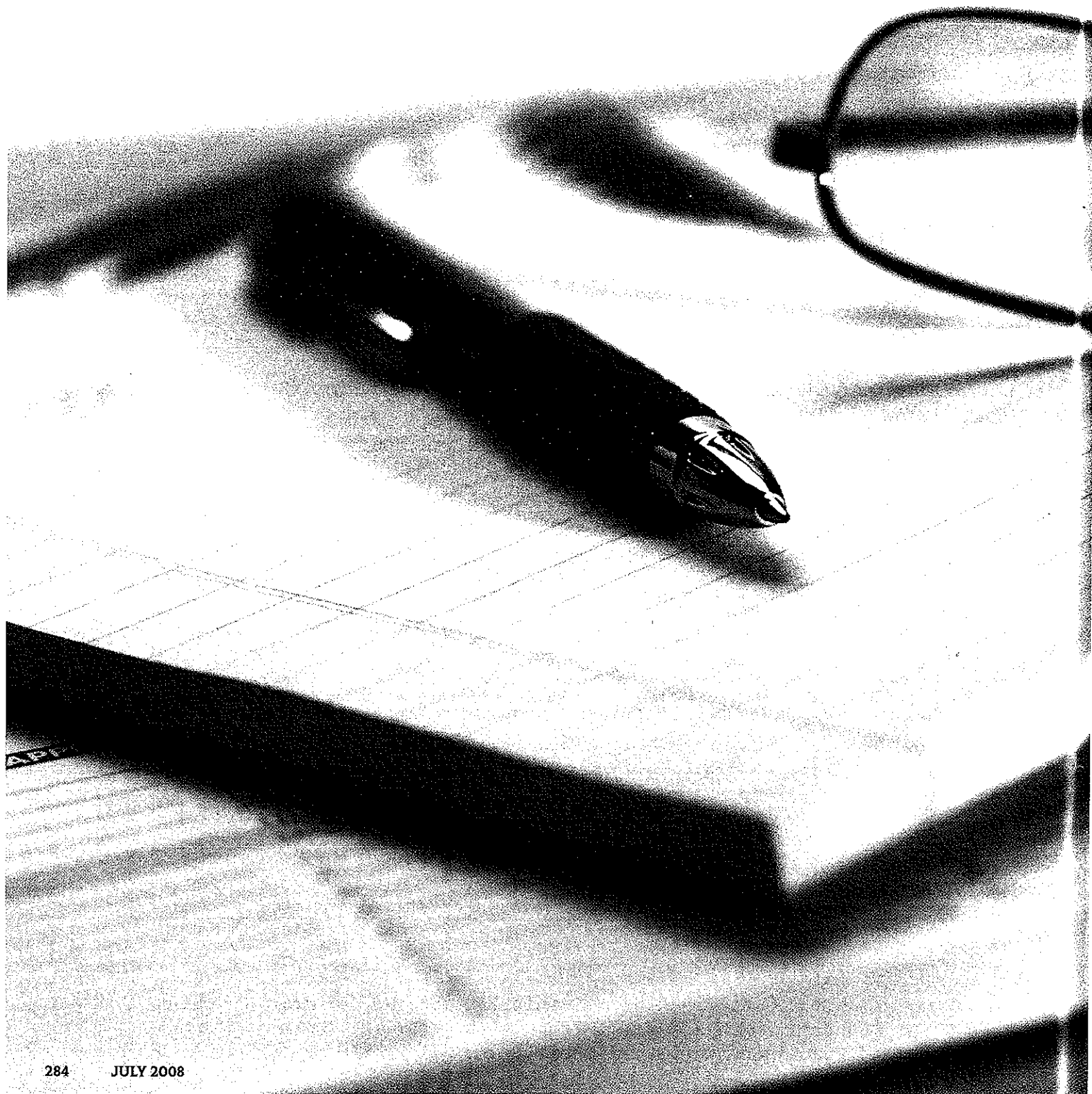


Notes on Stays Pending Appeals in Alabama's Appellate Courts





By Marc James Ayers

Obtaining a stay pending either an appeal or consideration of a petition for an extraordinary writ can be essential to successfully pursuing relief from Alabama's appellate courts. Of course, without a stay, the prevailing party can act to enforce a judgment, which can be problematic for the losing party.¹ In certain circumstances, the failure to obtain a stay pending appeal can even render an appeal moot.²

While the general procedures for obtaining a stay pending appeal are fairly clear, the applicable standards for when a stay is proper are not necessarily so. The intent of this article is to briefly outline the procedures and applicable standards that are and should be followed in seeking a stay pending an appeal, and to address a unique case that has caused some disagreement in the federal courts: when a stay is proper pending an appeal from a denial of a motion to compel arbitration.

Procedures for obtaining a stay pending appeal

Except where provided by statute³ the procedures governing stays pending appeal are found in Rule 62 of the *Alabama Rules of Civil Procedure* and Rule 8 of the *Alabama Rules of Appellate Procedure*.⁴ As indicated in those rules, many stays pending appeal are not discretionary; they depend only on whether a party has properly submitted a *supersedeas* bond "approved by the clerk of the trial court, payable to the appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render."⁵ "The purpose of the *supersedeas* bond is to maintain the status quo between the parties pending an appeal. It ensures that the party who has obtained a judgment will not be prejudiced by a stay of execution of the judgment pending the

final determination of an appeal.”⁶ Posting a *supersedeas* bond does not waive an argument on appeal that the trial court lacked jurisdiction.⁷

As set forth in Rule 8, *Ala. R. App. P.*, a party is entitled to a stay pending appeal of a *money* judgment if the party executes a proper *supersedeas* bond in an amount “equal to 150 percent of the amount of the judgment if the judgment does not exceed \$10,000, or 125 percent if the judgment exceeds \$10,000.”⁸

If the judgment appealed from is “[f]or the payment of money and also for the performance of some other act or duty, or for the recovery or sale of property or the possession thereof,” then the appellant is entitled to a stay pending appeal when he executes and submits a bond in the amount of what would be required for the money judgment itself, *plus* an additional amount “as the trial court may in writing prescribe.”⁹

If the judgment appealed from is “[o]nly for the performance of some act or duty, or for the recovery or sale of property or the possession thereof,” then the appellant is entitled to a stay upon the execution and submission of a bond in an amount “as the trial court may in writing prescribe.”¹⁰

Although the trial court has discretion in determining the proper bond amount with respect to non-money judgments, under Rule 8 the trial court generally has no discretion as to setting bonds on money judgments.¹¹ However, the Alabama Supreme Court has recognized one narrow exception to this principle, now known as the “*Ware* exception.” As explained by the court, the *Ware* exception allows a trial court to avoid the strictures of Rule 8 if an appellant makes a satisfactory showing that he does not have the funds to satisfy the Rule 8 bond requirements:

In *Ware v. Timmons*, case no. 1030488, in response to a motion to suspend the requirement of Rule 8(a)(1), this Court issued an order in which it recognized a narrow exception to Rule 8. In that case, this Court directed the trial court to accept “the maximum bond obtainable, based on the appellants’ entire net worth and available insurance coverage. . . .” The *Ware* exception is now recorded in the Committee Comments to Rule 8(a) and (b), Adopted January 12, 2005. The Comments note that the modification to the *supersedeas* bond requirement in *Ware* was derived from this court’s authority under Rule 2(b), *Ala. R. App. P.*, to suspend a rule of procedure for “good cause shown.”¹²

An appellant seeking a stay should first apply to the trial court if “practicable,”¹³ and then to the appellate court if necessary. When a stay is sought from an appellate court, the party should explain that a stay could not be obtained from the trial court, explain why a stay is appropriate and include the pertinent parts of the record:

The motion [for a stay] shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be

filed such photocopied parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court.¹⁴

The appellate court may condition a stay upon the giving of a bond or other security.¹⁵

Applicable standards for obtaining a discretionary stay on appeal—and why there are no Alabama appellate decisions regarding such stays

Many often wonder why there are no Alabama appellate decisions setting forth a standard for acquiring a stay pending appeal in those cases not specifically delineated in Rule 8, such as stays sought along with a petition for a writ of mandamus.¹⁶ These stays do not depend solely on the posting of a bond, but are discretionary in the nature of an injunction. The reason for the lack of published precedent is because the Alabama appellate courts resolve stay motions and certain other matters on a separate docket *before* the appeal is resolved (in the Alabama Supreme Court, this is referred to as the “miscellaneous docket”).¹⁷ Therefore, these stays are granted or denied by order of the appellate court and not by published opinion.

The common practice in crafting an argument as to why a stay is appropriate in these circumstances is to follow those standards set forth in federal decisions.¹⁸ In the federal courts, whether a stay pending appeal is appropriate usually depends upon a balancing of some or all of the following factors: “(1) whether 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) where the public interest lies.”¹⁹ The test is not intended “to be reduced to a set of rigid rules,”²⁰ and, accordingly, “the nature of the showing required to justify a stay pending appeal may vary with the circumstances presented.”²¹ For example, the Eleventh Circuit has held that a stay pending appellate review can be warranted where there exists only “a substantial case on the merits when a serious legal question is involved” and “the balance of equities weighs heavily in favor of granting the stay.”²²

Stays pending the appeal of a denial of a motion to compel arbitration

A unique situation arises when an appeal is taken from a trial court’s denial of a motion to compel arbitration. Orders granting or denying motions to compel arbitration are appealable as a matter of right.²³ However, no Alabama appellate decision addresses whether a trial court must stay further proceedings during the appeal of a denial of such a motion.

In Alabama, “the general rule is that a trial court is divested of its jurisdiction during a pending appeal.”²⁴ Accordingly, “while an appeal is pending, the trial court can do nothing in respect to any matter or question which is involved in the appeal, and which may be adjudged by the appellate court.”²⁵ During an appeal of its judgment or order, “a trial court may proceed in matters that are entirely ‘collateral’ to the appeal.”²⁶ A denial of a motion to compel arbitration is a ruling that it is

for the court, rather than an arbitrator, to hear and rule on the claims at issue. Therefore, it would seem that proceeding to trial would not be collateral to the denial, but would be purely dependent on its correctness. Moreover, allowing a trial court to proceed to trial during the appeal of its denial of a motion to send the claims to arbitration would undermine the point of arbitration in the first place, which is to provide a fast and efficient method of resolving disputes.²⁷ It would appear, then, that under Alabama law a stay of further proceedings would be required upon the appeal of a trial court's denial of a motion to compel arbitration.

This is precisely the conclusion reached by the majority of federal circuit courts of appeal that have addressed the issue—including the Eleventh Circuit. In addition to the Eleventh Circuit, the Third, Seventh, Tenth, and D.C. (and perhaps the Federal) circuits hold that stays pending appeal are mandatory following the denial of a motion to compel arbitration unless it can be shown that the appeal is frivolous.²⁸ Underlying this holding is the jurisdictional principle noted above that “[t]he 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. . . .”²⁹ As the Seventh Circuit put it, “[w]hether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal . . . ; it is the mirror image of the question presented on appeal.”³⁰

Furthermore, these courts have recognized that if litigation is allowed to continue even though a party has appealed an order denying arbitration, then the purposes of arbitration will be completely frustrated:

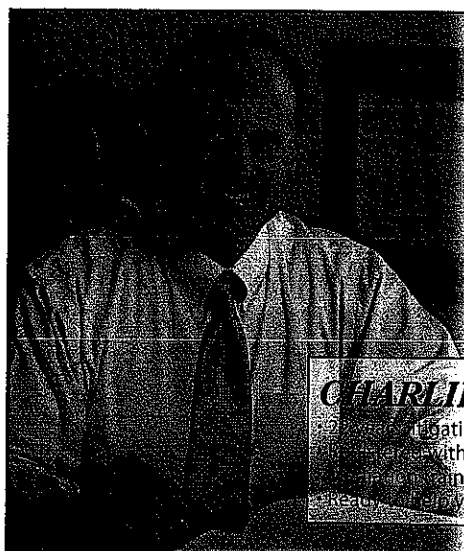
By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums. If the 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. . . . Thus, the underlying reasons for allowing immediate appeal of a denial of a motion to compel arbitration are inconsistent with continuation of proceedings in the district court, and a non-frivolous appeal warrants a stay of those proceedings.³¹

Two federal circuit courts of appeal—the Second and the Ninth—have endorsed the contrary view that stays pending appeal of a denial of a motion to compel arbitration are not required.³² However, the majority rule, which one noted commentary has approved as “the sounder approach,”³³ appears to accord more fully with Alabama law concerning the transfer of jurisdiction between the trial and appellate courts and the purposes of arbitration. ▲▲▲

Endnotes

1. Rule 62(a), *Ala. R. Civ. P.* provides for a 30-day automatic stay on execution on and enforcement of a judgment except “an interlocutory or final judgment in an action for an injunction or in a receivership action.” Rule 62(a), *Ala. R. Civ. P.* And Rule 62(b), *Ala. R. Civ. P.*, allows the trial court to further stay execution of a judgment during consideration of a post-judgment motion “[i]n its discretion and on such conditions for the security of the adverse party as are proper.” But if the losing party wishes to prevent execution on or enforcement of a judgment pending appeal, that party must seek a stay pending appeal as discussed in this article.
2. See *Masonry Arts, Inc. v. Mobile County Comm’n*, 628 So. 2d 334 (Ala. 1993) (dismissing appeal of trial court’s denial of injunction to prevent the award of a public contract because bidder failed to request a stay pending appeal and contract was awarded and executed pending appeal); *Skelton v. J & G, LLC*, 973 So. 2d 1066 (Ala. Civ. App. 2006) (holding that the plaintiffs’ appeal was rendered moot by their failure to acquire a stay of judgment concerning their right to redeem an apartment building; the time period for redemption set by the court elapsed without having been stayed); see also *Reeb v. Murphy*, 481 So. 2d 372 (Ala. 1985) (appeal dismissed because appellant failed to stay issuance of redemption deed and therefore ratified action of trial court).
3. For example, see, e.g., *Ala. Code* § 9-16-10(b) (1975) (appeals from decisions concerning violations of statutes governing mining operations).
4. This article concerns stays in civil proceedings. Stays pending appeal in criminal matters are governed by *Ala. R. Crim. P.* 7.2(c) and *Ala. R. App. P.* 8(d). See generally *Ex parte Watson*, 757 So. 2d 1107 (Ala. 2000).
5. *Ala. R. App. P.* 8(a); see *Ala. R. Civ. P.* 62(d) (“When an appeal is taken the appellant by giving a *supersedeas* bond may obtain a stay subject to the exceptions contained



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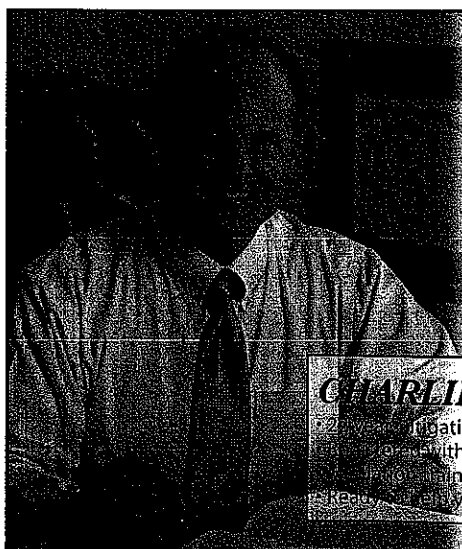
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- in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the *supersedeas* bond is approved by the court.”); *see also St. Regis Paper Co. v. Kerlin*, 476 So. 2d 64, 66 (Ala. 1985) (“The common law rule, that an appeal automatically superseded the judgment, in and of itself, has been changed to the extent that an appeal does not ordinarily supersede the judgment in the absence of a *supersedeas* bond. Under Rule 62, *A.R.Civ.P.*, and [Rule 8], *A.R.A.P.*, a *supersedeas* bond must be posted in order to stay the execution of a judgment.”) (citation omitted).
6. *Ex parte Lumbermen’s Underwriting Alliance*, 662 So. 2d 1133, 1137 (Ala. 1995) (quoting *Employers Ins. Co. of Ala. v. American Liberty Ins. Co.*, 495 So. 2d 1039, 1041 (Ala. 1986)).
 7. *Baker v. Bennett*, 660 So. 2d 980, 983 (Ala. 1995).
 8. *Ala. R. App. P.* 8(a)(1).
 9. *Ala. R. App. P.* 8(a)(2).
 10. *Ala. R. App. P.* 8(a)(3).
 11. *See Ex parte Spriggs Enters., Inc.*, 376 So. 2d 1088, 1089 (Ala. 1979) (“The plain meaning of Rule 8(a)(1) is that one who appeals a judgment against him for money damages only must execute a *supersedeas* bond in an amount equal to 125 percent of the amount of the judgment when the judgment exceeds \$10,000. The language utilized in the rule is mandatory; the trial judge is given no discretion in setting the amount of the *supersedeas* bond.”); *Scrushy v. Tucker*, 955 So. 2d 988, 1000-01 (Ala. 2006) (citing *Ex parte Spriggs Enters.*).
 12. *Scrushy*, 955 So. 2d at 1000-01 (footnote omitted); *see also id.* (holding that there was no sufficient evidence that Appellant *Scrushy* could not post a bond as required under Rule 8).
 13. *Ala. R. App. P.* 8(b).
 14. *Id.*
 15. *Id.*
 16. *But see Ex parte Licensure Comm’n of Ala., (Morrison v. Gurley)*, [Ms. 2070245, March 21, 2008] ___ So. 2d ___, 2008 WL 748100, at *11 (*Ala. Civ. App.*) (opining that at least a part of a trial court’s analysis in considering a stay on appeal is to “balance the equities between the parties” as the trial court would in considering an injunction). *Ala.Civ.App.*, 2008.
 17. In addition to stay motions, the Alabama appellate courts also address other preliminary matters (such as initial rulings on petitions for extraordinary writs) on a separate docket. *See* Marc James Ayers, *The Use and Review of the Extraordinary Writs of Mandamus and Prohibition in Alabama’s Appellate Courts*, 68 *Ala. Law.* 396, 398 (2007).
 18. Rule 62, *Ala. R. Civ. P.*, and Rule 8, *Ala. R. App. P.* are substantially similar to, and in some instances identical to, their federal counterparts. Accordingly, the federal courts’ interpretations of the federal counterparts will be persuasive. *See, e.g., Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So. 2d 557, 561 n.3 (Ala. 2005) (“Cases interpreting the Federal Rules of Civil Procedure can be persuasive authority in construing the Alabama Rules of Civil Procedure because of the similarities between the Alabama rules and the federal rules.”).
 19. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).
 20. *Hilton*, 481 U.S. at 777.
 21. 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3954 (3d ed. 1999).
 22. *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A 1981); *see United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992) (following *Ruiz*); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (same). *See also Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (discussing the “continuum” on which stays are evaluated, and stating: “At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. [T]he relative hardship to the parties is the critical element in deciding at which point along the continuum a stay is justified.”) (citations and internal quotations omitted); 16A Wright, Miller & Cooper, *Federal Practice and Procedure*, at § 3954 (“If the balance of hardships tips decidedly in favor of the party seeking a stay, it may be sufficient showing on the merits to show the existence of serious legal questions.”) (citing cases).
 23. *See Ala. R. App. P.* 4(d).
 24. *Reynolds v. Colonial Bank*, 874 So. 2d 497, 503 (Ala. 2003).
 25. *Reynolds*, 874 So. 2d at 503 (internal quotations omitted).
 26. *Id.*
 27. *See, e.g., Ocwen Loan Servicing, LLC v. Washington*, 939 So. 2d 6, 13 (Ala. 2006) (noting that “a key purpose” of arbitration is “to permit speedy resolution of disputes”) (quoting *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 12-14 (1st Cir. 2005)).
 28. *See Blinco v. Green Tree Servicing LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (“Upon motion, proceedings in the district court ... should be stayed pending resolution of a non-frivolous appeal from the denial of a motion to compel arbitration.”); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 507 (7th Cir. 1997) (holding that a district court must stay litigation during the pendency of appeal upon the filing of a non-frivolous notice of appeal of a denial of a motion to compel arbitration); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162-63 (10th Cir. 2005) (same); *Ehleiter v. Grapetree Shores Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (agreeing with majority rule); *Bombardier Corp. v. National R.R. Passenger Corp.*, 2002 WL 31818924 (D.C. Cir. 2002) (unpublished); *see also Ecolab, Inc. v. Gardner Mfg. Co.*, 56 Fed. Appx. 484, 485 (Fed. Cir. 2003) (citing *Bradford-Scott* for the principle that an appeal from a denial of a motion to compel arbitration “divests the district court of jurisdiction to conduct the trial”) (unpublished). *Cf. In re White Mountain Mining Co.*, 403 F.3d 164, 170-71 (4th Cir. 2005) (stating that “[o]ur court has not decided whether a stay of the entire action is required pending appeal of an order denying a motion to compel arbitration or whether the filing of an interlocutory appeal divests the trial court of jurisdiction”; and holding that the issue was moot).
 29. *Blinco*, 366 F.3d at 1251; *see also Bradford-Scott*, 128 F.3d at 505 (“[I]t is fundamental to a hierarchical judiciary that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal 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.”) (internal quotations omitted)
 30. *Bradford-Scott*, 128 F.3d at 505.
 31. *Blinco*, 366 F.3d at 1251-52.
 32. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1411-12 (9th Cir. 1990).
 33. 19 *Moore’s Federal Practice* § 203.12[3][a] (3d ed. 2007) (discussing the circuit split, and concluding that “[t]he sounder approach appears to be that adopted by the Eleventh Circuit, which holds that the district court should grant a motion to stay the litigation pending an appeal from the denial of a motion to compel arbitration, so long as the appeal is not frivolous”).



Marc James Ayers practices with Bradley Arant Rose & White LLP. He is a 1998 graduate of the Cumberland School of Law of Samford University and served as clerk and staff attorney to Alabama Supreme Court Justice J. Gorman Houston, Jr.