



## Section of **Litigation** Appellate Practice

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### Jurisdictional Divestiture: Staying a Case Pending Interlocutory Appeal

By R. Aaron Chastain – September 24, 2012

Litigants who believe that they have an enforceable arbitration agreement often move the court early in the litigation to compel arbitration under section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, seeking to take advantage of the prevailing wisdom that arbitration “is usually cheaper and faster than litigation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)). See David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (1998) (reporting that two-thirds of respondents to a survey of Fortune 1000 companies cited savings of money and time as the reason for choosing arbitration over litigation). But when a motion to compel arbitration is denied and litigation proceeds in the district court, the cost- and time-saving benefits of arbitration are irretrievably lost and cannot be regained by an appeal following final judgment, after the parties have participated in time-consuming and expensive motion practice, discovery, and trial. Recognizing the issue, Congress amended the FAA in 1988 to allow for interlocutory appellate review of a district court’s order denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(c).

But the availability of an interlocutory appeal is not always enough to maintain the potential benefits of arbitration. Although the FAA allows a party to appeal immediately from an order denying a motion to compel arbitration, it does not provide an automatic stay of the litigation pending the outcome of that appeal. Without such a stay, district courts can push the litigation forward, requiring the parties to incur costs—costs that may prove to be not just burdensome but also unnecessary if the order denying arbitration is ultimately reversed.

This article highlights a mechanism through which parties can secure a stay of district court proceedings pending an interlocutory appeal from an order denying a motion to compel arbitration: jurisdictional divestiture. Relying on the basic principle that “[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,” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58–59 (1982), parties can argue that an appeal from a district court’s order denying a motion to compel arbitration divests the district court of jurisdiction to continue to consider the merits of the underlying case. The federal courts of appeals are divided, however, over whether filing a notice of appeal of an order denying a motion to compel arbitration divests the district court of jurisdiction and thus effectively stays the underlying case.

### The Circuit Split

The majority view—adopted by the Third, Fourth, Seventh, Tenth, and Eleventh Circuits—is that the filing of a notice of an FAA interlocutory appeal is an event of jurisdictional significance that divests the district court of jurisdiction (so long as the appeal is not frivolous). See *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 262 (4th Cir. 2011); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162–63 (10th Cir. 2005); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1253 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 507 (7th Cir. 1997); see also *Bombardier Corp. v. Nat’l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at \*1 (D.C. Cir. Dec. 12, 2002) (unpublished per curiam decision adopting the majority view). The Fourth Circuit’s recent decision is illustrative. In *Levin*, a group of investors sued their financial services advisor for negligence and negligent misrepresentation. 634 F.3d at 262. After the district court denied the defendant’s motion to dismiss or stay the suit pending arbitration, the defendant filed a notice of appeal and moved the district court to stay all proceedings pending appeal. The district court noted that the appeal was not frivolous, but it nonetheless denied the motion to stay and permitted the plaintiffs to commence discovery. The defendant then moved the Fourth Circuit for a stay of the district court proceedings pursuant to Federal Rule of Appellate Procedure 8.

The Fourth Circuit granted the stay, holding that the pending appeal of an order denying a motion to compel arbitration divested the district court of jurisdiction over the merits of the underlying dispute, including the power to direct the parties to commence or continue discovery. *Id.* at 264. The court reasoned that the appeal necessarily involved the same issues as those pending in district court because “[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims.” *Id.* The court also noted that “allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration” and “could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter”—a bell that could not be un-rung by a later ruling that the dispute should have been sent to arbitration. *Id.* at 265.

The Fourth Circuit also addressed the concern that applying the doctrine of jurisdictional divestiture to interlocutory appeals under the FAA creates an incentive for parties to bring frivolous appeals to stall the litigation. *Id.* The court noted, however, that if a party files a frivolous appeal, “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,” which “will prevent the divestiture of district court jurisdiction.” *Id.* (quoting *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005)).

In contrast to *Levin*, the Fifth Circuit recently joined the Second and Ninth Circuits in adopting the minority view that filing an FAA interlocutory appeal does not prevent a district court from proceeding with the merits of the case pending the outcome of the appeal. See *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 909 (5th Cir. 2011); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004); *Britton v. Co-Op Banking Grp.*, 916 F.2d 1405, 1411–12 (9th Cir. 1990). In *Weingarten*, the Fifth Circuit narrowly construed the Supreme Court’s statement in *Griggs* that the filing of a notice of appeal transfers jurisdiction from the district court to the appellate court concerning “those aspects of the

case involved in the appeal,” concluding that “[a]n appeal of a denial of a motion to compel arbitration does not involve the merits of the claims pending in the district court.” *Weingarten*, 661 F.3d at 909.

### **Making the Argument**

To use jurisdictional divestiture in the First, Sixth, Eighth, Federal, and D.C. Circuits, where there is no circuit-level, published precedent adopting either the majority or minority rule, litigants who have unsuccessfully moved to compel arbitration should move for a stay in the district court under Federal Rule of Civil Procedure 62(c). In addition to asserting the typical grounds for a stay—the likelihood of success on appeal, the probability of irreparable harm by proceeding with litigation, the lack of harm to other parties, and the public interest of avoiding dual tracks of litigation—the appellant should raise jurisdictional divestiture as a separate ground for a stay. *See, e.g., Baron v. Best Buy Co.*, 79 F. Supp. 2d 1350, 1354 (S.D. Fla. 1999) (granting motion for stay).

If the motion for a stay is denied, the appellant, like the appellants in *Levin*, should move the court of appeals for a stay under Federal Rule of Appellate Procedure 8. In seeking such a stay, appellants should emphasize both the practicality of a jurisdictional divestiture rule and its conformity with congressional intent in amending the FAA to allow interlocutory appeals. Appellants should contend that the underlying merits of the case are “necessarily ‘involved in the appeal’” under *Griggs* because “[w]hether the case should be litigated in the district court. . . is the mirror image of the question presented on appeal.” *Levin*, 634 F.3d at 263 (quoting *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997)). Furthermore, appellants should argue that allowing the district court to compel discovery destroys much of 9 U.S.C. § 16’s rationale in allowing appeals of orders denying motions to compel arbitration in the first place. *Levin*, 634 F.3d at 264.

In the Second, Fifth, and Ninth Circuits, which have rejected the jurisdictional divestiture argument, an appellant still should advance the same reasoning underlying the jurisdictional divestiture rule in support of a motion for a discretionary stay pending appeal made either in the district court or in the court of appeals. For instance, even if an appeal does not trigger jurisdictional divestiture, the inefficiencies of parallel litigation nonetheless may conflict with the public interest. *See, e.g., Sutherland v. Ernst & Young LLP*, 2012 WL 751970, at \*4 (S.D.N.Y. Mar. 6, 2012) (noting that “considerations of judicial economy counsel, as a general matter, against investment of court resources in proceedings that may prove to have been unnecessary” and partially granting discretionary stay pending appeal of an order denying motion to compel arbitration). Furthermore, courts have recognized that the costs of discovery pose a threat of irreparable harm if an order denying a motion to compel arbitration is reversed on appeal. *See, e.g., Rajagopalan v. Noteworld, LLC*, No. C11-5574-BHS, 2012 WL 2115482, at \*3 (W.D. Wash. June 11, 2012) (granting a stay pending an appeal of an order denying a motion to compel arbitration due to the possibility of irreparable harm caused by proceeding with the merits of the case, thus “defeat[ing] the important, cost-limiting purpose of arbitration agreements” (internal quotation marks omitted)). Thus, even in circuits that have rejected the jurisdictional divestiture argument, appellants can advance similar arguments in seeking to obtain a stay.

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