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Two Steps forward, One Step back: Must the District Court Issue a Stay after a Decision Adverse to Arbitration Is Appealed, and to What Extent Are Arbitration Clauses Applied Retroactively Note

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NOTES

Two Steps Forward, One Step Back: Must the District Court Issue a Stay After a Decision Adverse to Arbitration Is Appealed, and to What Extent Are Arbitration Clauses Applied Retroactively?

Levin v. Alms & Assocs., Inc.[1]

I. INTRODUCTION

Contracting parties often agree to arbitration agreements to avoid the time, expense, and procedure that permeate litigation in the United States court system.[2] Congress passed the Federal Arbitration Act ("FAA") in 1924 to "ensure the validity and enforcement of arbitration agreements."[3] FAA §§ 4 and 206 empower courts to compel arbitration of valid agreements according to their terms, and FAA § 3 compels courts to stay litigation of an issue until it has been arbitrated.[4] FAA § 16(a)(1) provides that an appeal may be taken following either a denial of a § 4 motion to compel arbitration or a refusal of a § 3 motion to stay litigation.[5] However, § 16(a)(1) does not address the fate of the litigation after a § 16(a)(1) appeal has been made. In other words, § 3 compels a court to stay litigation after finding that a matter is properly referable to arbitration, but the issue remains whether courts are required to stay litigation when the matter's reference to arbitration is itself in dispute. This procedural quagmire is a large and vigorously litigated gap in the FAA, and federal appellate court decisions have fallen on both sides of the divide.[6] In *Levin v. Alms & Associates, Inc.*, the Fourth Circuit of the U.S. Court of Appeals found that if a district court denies a motion to compel

1. Levin v. Alms & Assocs., Inc., 634 F.3d 260 (4th Cir. 2011).

2. *See* Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d 504, 506 (7th Cir. 1997); *see also Levin*, 634 F 3d at 264-65.

3. *See* 9 U.S.C. §§ 1-16 (2011). The Federal Arbitration Act was enacted by Congress in 1924 to "ensure the validity and enforcement of arbitration agreements." JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 1 (2003), *available at* http://digital.library.unt.edu/ark:/67531/metacrs3879/m1/1/high_res_d/RL30934_2003Aug15.pdf; *see also* H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

4. 9 U.S.C. §§ 3-4, 206.

5. *Id.* § 16(a)(1).

6. *Levin*, 634 F.3d 260.

arbitration, the district court is automatically divested of jurisdiction to continue litigation while the denial is being appealed.[7]

The *Levin* court also decided an important substantive issue in the arbitration context when it found that if a contract contains both an integration clause and an arbitration agreement, the presence of the integration clause can retroactively bind the parties to arbitration.[8] From its inception, the FAA was intended to put arbitration agreements on "equal footing" with other contracts, but many courts to this day view arbitration agreements with a heightened skepticism.[9] The *Levin* court, by finding that an arbitration agreement can be applied retroactively in the same manner as other types of contracts, may have upheld the express purpose of the FAA, but its decision may exceed the intended scope of the rule of law created and generate unwelcome consequences.

By creating new rules to fill in the gaps left by the FAA, the federal circuit courts may have muddied the waters of how and why parties assent to arbitration, and the ramifications of their decisions could change how and why parties bind themselves and each other to arbitration in the future.[10] This note will address these issues in six remaining parts. Part II will briefly outline the pertinent facts of *Levin*.[11] Part III addresses the circuit split on whether federal courts should issue an automatic stay of legislation pending an appeal to compel arbitration under § 16(a)(1)(A) of the FAA.[12] Further, this part concerns the retroactive application of arbitration clauses in continuing relationships, and analyzes the manner in which some federal circuits have pieced together rules of contract interpretation with Supreme Court precedent regarding arbitration to arrive at the result ultimately reached by the Fourth Circuit in *Levin*.[13] Part IV addresses how the *Levin* court applied the law to the facts of the case and its reasons for doing so.[14] Part V contains the author's own opinions and observations of the Fourth Circuit's holding in *Levin*: that the Fourth Circuit was correct in its decision requiring automatic stays after a § 16(a)(1)(A) appeal, and that its decision regarding the circumstances under which arbitration clauses can be applied retroactively unnecessarily broadened the rules of contract interpretation for contracts containing arbitration agreements.[15] Part VI closes the note with a summary of the issues addressed and some final thoughts on how *Levin* strengthened federal precedent in favor of arbitrability.[16]

7. *Id.* at 263-65.
8. *Id.* at 269.
9. H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).
10. *See infra* sections III(B), IV, and V(B).
11. 634 F.3d 260; *see infra* section II.
12. 9 U.S.C. § 16(a)(1)(A) (2006); *See infra* section III(A). Section 3 of the FAA requires that any U.S. court, "upon being satisfied that the issue involved...is referable to arbitration...shall on application of one of the parties stay the trial of the action until such arbitration has been had...." 9 U.S.C. § 3.
13. 634 F.3d 260; *see infra* section III(B).
14. 634 F.3d 260; *see infra* section IV.
15. 634 F.3d 260; *see infra* section V.
16. 634 F.3d 260; *see infra* section VI.

II. FACTS AND HOLDING

In 2004, Eric M. Levin hired Alms & Associates, Inc. for financial advisement.[17] In each of the following three years, Levin entered into a new contract with Alms & Associates.[18] The final agreement in 2007 contained an arbitration clause[19] extending to "[a]ny dispute," as well as an integration clause[20] stating that the contract "encompass[ed] and embod[ied] all terms, understandings, and agreements," between the two parties.[21] In 2009, Levin sued Alms & Associates in the United States District Court for the District of Maryland for breach of contract, negligence, negligent misrepresentation, and violation of the Investment Advisers Act of 1940.[22]

Alms & Associates filed a motion in the district court to either dismiss the case or to stay litigation pending arbitration, arguing that the contract executed in 2007 subjected all of Levin's claims, before and after 2007, to arbitration.[23] The district court found that the arbitration agreement in the 2007 contract was worded in such a way that it should have been applied only to claims that arose after that agreement was executed.[24] Alms & Associates filed notice of appeal in the U.S. Court of Appeals for the Fourth Circuit, and moved the district court to stay litigation pending appeal.[25] This motion was denied in part, allowing discovery to proceed for claims accruing prior to the 2007 contract.[26] Alms & Associates then petitioned the appellate court to stay proceedings in the district court.[27] This motion was granted soon thereafter by a temporary order, pending resolution of the motion to stay on its merits.[28]

After hearing oral arguments on the motion to stay proceedings in the district court, the Fourth Circuit Court of Appeals agreed with Alms & Associates' argument that the general rule requiring divestiture of the district court's jurisdiction upon appeal applies when an issue of arbitrability is appealed.[29] The court of

17. *Levin*, 634 F.3d at 261.

18. *Id* The contracts were titled "CFO Advisory Agreements."

19. The arbitration clause read in full: "Any dispute shall be submitted to binding arbitration before a single arbitrator in Howard County, Maryland, under the rules of the American Arbitration Association, and the decision of the arbitrator shall be final and binding upon the parties." *Id.* at 266-67.

20. The integration clause read in full: "It is agreed by and between the parties hereto that this agreement encompasses and embodies all terms, understandings and agreements by and between those parties and the terms may not be amended except in writing by the parties hereto." *Id.* at 266.

21. *Id.* at 266. The 2004, 2005, and 2006 agreements did not contain arbitration agreements.

22. *Id.* at 262; Levin alleged in his complaint that Alms & Associates failed to disclose that they were paid consultants for a land development company in which they advised Levin to invest over $500,000, that Alms & Associates had reason to believe that the land development company had financial difficulties, that Alms & Associates failed to disclose a commission received by them for placing Levin's investment account with an outside firm, failed to reduce their fees based on the commission with the outside firm, and misled Levin into loaning Alms & Associates money under disfavorable terms. *Id.*; *see* The Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 (2011).

23 *Levin*, 634 F.3d at 261. Alms & Associates argued that the arbitration and integration clauses, taken together, dictated that Levin's claims be addressed in arbitration. *See supra* notes 3 and 4.

24 *Levin*, 634 F.3d at 262.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 265-66.

appeals joined the majority of jurisdictions in its determination that because the continuation of proceedings in the district court is involved in an appeal to determine arbitrability, the district court was divested of jurisdiction to proceed with litigation following such an appeal.[30] The court of appeals then noted an exception to this rule in cases where the district court has certified that the appeal is frivolous or has been forfeited.[31] Because the district court expressly found Alms & Associates' appeal not to be frivolous, the appellate court granted its motion to stay further proceedings in the district court until resolution of the issue of arbitrability.[32]

On the issue of the arbitrability of Levin's pre-2007 claims, the court of appeals found that because the Supreme Court has interpreted the FAA[33] to establish a presumption of arbitrability as a matter of federal policy, when a contract or clause is open to interpretation on the issue of arbitrability, resolution should be made in favor of arbitrability.[34] Therefore, the court of appeals held, when parties contract to arbitrate "any dispute" or "all disputes," the arbitration clause applies retroactively.[35] The case was remanded to the district court to be decided in a manner consistent with the appellate court's determination that Levin's claims arising before 2007 were subject to arbitration.[36]

III. LEGAL BACKGROUND

A. Automatic Stays in the District Court Following an Arbitrability Appeal

The FAA provides that "[a]n appeal may be taken from an order refusing a stay of any action [pending arbitration] under section 3 of [the FAA]."[37] However, the FAA does not provide a rule dictating whether the district court should stay proceedings during such an appeal. The general rule, set out by the U.S. Supreme Court in *Griggs v. Provident Consumer Disc. Co.*,[38] is that an appeal "confers jurisdiction on the court of appeal and divests the district court of its control *over those aspects of the case involved in the appeal.*"[39] The federal circuits have split on whether the merits of a case are involved in an appeal from a denial to compel arbitration in such a way as to divest the district court of jurisdiction over them.[40]

30. *Id.* at 263-65. In addition, the court of appeals found that if district courts retained jurisdiction to allow litigation during an arbitrability appeal, underlying principles of arbitration (time and cost efficiency) would be defeated.

31 *Id.* at 266. The court also found that if the district court did certify the appeal as frivolous of forfeited, then the party seeking arbitration is able to appeal the certification and move the appellate court to stay proceedings in the district court pending the outcome of the review of the certification.

32. *Id.*

33. See *supra* note 3 for more background on the FAA.

34. *Id. See* 9 U.S.C. § 2 (2006); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr Co., 460 U.S. 1 (1983).

35 *Levin*, 634 F.3d at 269.

36. *Id.*

37. 9 U.S.C. § 16(a)(1)(A); *see supra* note 9

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

39. *Id.* (emphasis added).

40. *See* Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207 (3d Cir. 2007); McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158 (10th Cir. 2005), Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249 (11th Cir. 2004); Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d

The majority of circuits deciding the issue have held that the question of whether the case can proceed on the merits is essentially the contrapositive of the question of whether the case should be arbitrated, which is why one court called proceeding on the merits "the mirror image" of the question of whether a dispute should be arbitrated.[41] If this is true, then pursuant to the *Griggs* rule, the district court must stay proceedings following an appeal from a denial to compel arbitration.[42] This is the position adopted by the Third, Seventh, Tenth, Eleventh, and D.C. Circuits, and now, following *Levin*, the Fourth Circuit.[43] The Second and Ninth Circuits have, conversely, determined that a district court need not stay its own proceedings following such an appeal.[44]

The first federal circuit to issue a ruling on the question of whether litigation should be stayed in the lower court pending an appeal of arbitrability was the Ninth, in *Britton v. Co-op Banking Group*.[45] In *Britton*, one of the defendants appealed the district court's denial of a motion to stay pending his appeal of the district court's refusing to compel arbitration.[46] It is worth noting that the court in *Britton* had no incentive to evaluate, as did the Seventh Circuit, the possibility of duplicative adjudication that resulted from its decision. The district court in *Britton* had already entered a default judgment against the defendant, so no further litigation would proceed in the district court absent a stay, which foreclosed the possibility of duplicative proceedings.[47]

The defendant in *Britton* relied on *Griggs* in his argument that the district court was divested of jurisdiction upon an appeal from a denial of a motion to compel arbitration.[48] The court rejected the argument, and found that Supreme Court precedent provided that "arbitrability is easily severable from merits of underlying dispute," and therefore, because "the issue of arbitrability was the only substantive issue presented in th[e] appeal, the district court was not divested of jurisdiction to proceed with the case on the merits."[49] The court stressed in its reasoning that if it was to decide that proceedings in the district court were automatically stayed pending an appeal on arbitrability, then defendants would have at their disposal the opportunity to bring a motion to compel arbitration for the sole

504 (7th Cir. 1997); and Bombardier Corp. v. Nat'l Railroad Passenger Corp., 2002 U.S. App LEXIS 25858 (D.C. Cir.) (per curiam) (unpublished opinion). *See also* Edward L. Jones III, *Stop in the Name of Arbitration: Should Trial in District Court Continue While Court of Appeals Decides Arbitrability?*, 92 IOWA L. REV. 1107, 1129-1130 (2007).

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

42. Weingarten Realty Investors v. Miller, 661 F.3d 904, 908 (5th Cir. 2011).

43. *See Ehleiter*, 482 F.3d at 207; *McCauley*, 413 F.3d at 1158; *Blinco*, 366 F.3d at 1249; *Bradford-Scott*, 128 F.3d at 504; *Bombardier Corp.*, 2002 App LEXIS at 25858; *and* Levin v. Alms & Assocs., Inc., 634 F.3d 260, 260 (4th Cir. 2011).

44. *See* Britton v. Co-Op Banking Group, 916 F.2d 1405 (9th Cir. 1990); Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004); and *Weingarten Realty Investors*, 661 F.3d 904.

45. *Britton*, 916 F.2d at 1405.

46. *Id.* at 1407, 1409.

47. *Id.* at 1407-08, 1414. Similarly, in *Motorola Credit Corp.*, the party seeking arbitration had already been the subject of a judgment on the merits in the district court when they appealed the stay to the appellate court. They claimed that the district court lacked jurisdiction after their initial appeal from the denial of arbitration, and therefore were requesting that the appellate court "undo" the trial in the district court. *Motorola Credit Corp.*, 388 F.3d at 42, 54.

48. *Britton*, 916 F.2d at 1411.

49. *Id.* at 1412.

purpose of stalling litigation in the district court.[50] The court noted that because the district court had discretion to stay proceedings, but was not required to, the issue was properly addressed.[51]

However, the circuit courts that have adopted the rule of automatic divestiture following an appeal from a denial to compel arbitration have dealt with this issue in a different way.[52] Adopting the rules on interlocutory appeals for double-jeopardy and qualified immunity, the majority circuits have held that the appellee may petition the court of appeals to dismiss the appeal as frivolous.[53] If the district court did find that the appeal was frivolous, then it had discretion to decide whether to stay or continue litigation while the appeal was pending.[54]

In one such case, *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*,[55] the federal district court determined that the dispute between the parties was not subject to arbitration, and refused to grant a motion to stay litigation pending the subsequent appeal on arbitrability.[56] On appeal from the district court's denial of the motion to stay, the Seventh Circuit determined that the filing of an appeal from a district court's decision to deny a motion to compel arbitration automatically divested the district court of jurisdiction over the underlying claims.[57]

The Seventh Circuit Court of Appeals rested its decision on two principles. First, it decided that the issue of whether the case can proceed on the merits in the district court is involved in an arbitrability appeal in such a way as to divest the district court of jurisdiction under the general rule that an appeal "confers jurisdiction on the court of appeal and divests the district court of its control over those aspects of the case involved in the appeal".[58] Second, given the benefits sought by the parties who have entered into an arbitration agreement, proceeding on the merits in two forums (judicial and arbitral) would undermine the purpose of entering into such an agreement.[59]

To support its holding on the first principle, the Seventh Circuit Court of Appeals stated that the question of whether a case can be heard on its merits in the district court is identical to the issue of whether the appellate court should reverse the decision of the district court refusing to compel arbitration.[60] The court addressed the Ninth Circuit's holding on this issue in *Britton*,[61] that "arbitrability is

50. *Id.*

51. *Id.*

52. *See* Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d 504 (7th Cir. 1997); *see also* McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158.

53. *See Bradford-Scott*, 128 F.3d at 506. *See also supra* note 40

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

55. *Id.* at 504.

56. *Id.* at 505.

57. *Id.* at 505-07.

58. *Id.* at 505; Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982).

59. *Bradford-Scott*, 128 F.3d at 506. The court stated further that because parties enter into arbitration agreements to effect efficient and expedient dispute resolution (avoid litigation), "cases of this kind are. . poor candidates for exceptions to the principle that a notice of appeal divest the district court of power to proceed with the aspects of the case that have been transferred to the court of appeals." *Id.*

60. *Id.* at 505. "[w]hether the case should be litigated in the district court. . . is the mirror image of the question presented on [an appeal from a denial to compel arbitration]." *Id.*

61. Britton v. Co-Op Banking Group, 916 F.2d 1405 (9th Cir. 1990).

distinct from the merits of the litigation," and therefore an arbitrability appeal does not divest the district court of jurisdiction, stating that while "[t]he premise may be correct, . . . the conclusion does not follow . . . .Whether the litigation may go forward in the district court is precisely what the court of appeals must decide."[62]

On the second point, concerning the practical consequences of following the Ninth and Second Circuits, the Seventh Circuit was particularly concerned with the effect of duplicative proceedings.[63] First, proceeding in the lower court would present the problem of inconsistent outcomes from the judicial and the arbitral tribunal, should the appellate court find the issue in the district court to in fact be arbitrable.[64] In addition, the cost- and time-saving goals of arbitration clauses would be defeated if, for example, the case was litigated in the district court during the appeal and subsequently found by the appellate court to be subject to arbitration.[65] In this case, the dispute, already litigated erroneously, would be arbitrated, and then possibly *return* to a judicial forum for enforcement of the arbitration award.[66]

The Fourth Circuit Court of Appeals, in *Levin v. Alms*, overlooked neither of the previously mentioned cases when making their decision, and paid close attention to the reasoning behind the decisions of both the Ninth Circuit and Seventh Circuit on the issue of divestiture of jurisdiction after a § 16(a)(1)(A) appeal.[67]

Given the circuit split, the issue of whether the district court has jurisdiction to proceed on the merits after a motion to stay pending an appeal on the issue of arbitrability is not an issue that has been resolved completely. This point is made clear by the most recent federal court of appeals case, *Weingarten Realty Investors v. Miller*,[68] which addresses the reasoning of the majority circuits in their disaffirmations of the decisions of the minority circuits. In *Weingarten Realty Investors*, a real estate developer (Miller) defaulted on a loan provided to him by a real estate finance company (Weingarten).[69] Miller moved in the district court to compel arbitration, and the motion was denied.[70] Miller then moved in the district court for a stay pending appeal, which was also denied.[71]

On appeal from the denial of the motion to stay, the Fifth Circuit Court of Appeals found that a district court is not required to automatically issue a stay pending an appeal from a denial of a motion to compel arbitration.[72] The court based its holding on what it called a "narrow" application of the *Griggs* rule.[73] In doing so, it applied the holding of the U.S Supreme Court in *Moses H. Cone* that the issue of arbitrability "is easily severable from the merits of the underlying

62. *Bradford-Scott*, 128 F.3d at 506 (citing *Britton*, 916 F.2d at 1405). *Britton* used *Moses* as support for its holding.

63. *Id.* at 505-506.

64. *Id.* at 505. "Continuation of proceedings in the district court . . . creates a risk of inconsistent handlings of the case by two tribunals."

65. *Id.* at 506.

66. *Id.*

67. Levin v. Alms & Assocs., Inc., 634 F.3d 260, 266-269 (4th Cir. 2011).

68. Weingarten Realty Investors v. Miller, 661 F.3d 904 (5th Cir. 2011).

69. *Id* at 905.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 906.

disputes," and decided that for an issue to be "involved in an appeal" in such a way as to divest the district court of jurisdiction over it, that issue must be one that would be decided in the district and appellate courts simultaneously, if the district court retained jurisdiction.[74] According to the court, because "a determination on the arbitrability of a claim...does not itself decide the merits," the district court retained discretion as to whether to grant or deny a motion to stay pending appeal from a denial to compel arbitration.[75] The court also addressed the analogous treatment given by the majority circuits to the manner in which, and the reasons why, districts courts lose jurisdiction following an appeal on the grounds of qualified immunity and double-jeopardy.[76] It found that the automatic stays granted in these cases were distinguishable from arbitration cases in that they are constitutional guarantees of immunity.[77]

Weingarten Realty Investors, along with the other minority circuits, employ the traditional four-factor test to determine when a stay should be granted under the United States Supreme Court's decision in *Hilton v. Braunskill*.[78] Applying this test, the Fifth Circuit Court of Appeals found that Miller's claim that he would "be required to incur the time and expense of litigation and may lose the cost saving benefits of arbitration," was not an irreparable injury.[79] Contrary to the holdings of the majority circuits, the Fifth Circuit stated, "we reject the idea that arbitration ensures substantial speed and cost savings."[80]

B. Arbitration Agreement + Integration Clause = Retroactive Application?

In *Levin*, the Fourth Circuit pieced together an array of Supreme Court and circuit court precedent to reach their conclusion that because a 2007 contract containing an arbitration agreement also contained an integration clause, the arbitration agreement applied to contracts of the previous three years, despite the fact that the pre-2007 contracts contained no arbitration language.[81] The court first sought to determine what language in the contract was to be applied in their analysis, and then needed to decide what deference to give that language.[82] The court then needed to decide whether the contract containing both arbitration and integration clauses applied to claims arising before its execution.[83]

In *Universal Concrete Products v. Turner Const. Co.*, the U.S. Court of Appeals for the Fourth Circuit decided that the appropriate interpretation of a contract containing provisions seeming to be in conflict, was, if the provisions can

74. *Id.* at 907 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 21 (1983)).
75. *Id.*
76. *Id.*
77. *Id.*
78 *Id* at 908; The four factor test is as follows: "[W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured absent a stay; whether issuance of the stay will substantially injure the other parties interested in the proceeding; and where the public interest lies." *Id.* at 910.
79. *Id.* at 910.
80. *Id.* However, in a footnote, the court points out that absent a stay, the parties could be forced to participate in discovery, disclosing potentially damaging information, and incurring additional costs, which could potentially be considered irreparable injuries. *Id.* at n.19.
81. Levin v. Alms & Assocs, Inc., 634 F.3d 260, 267-68 (4th Cir. 2011).
82. *Id.* at 267.
83. *Id.*

"comfortably be read together," to combine the two provisions.[84] In *Universal,* Turner Construction Company was hired by a property owner as the general contractor for a construction project, and hired Universal as a subcontractor.[85] The subcontract between Turner and Universal included language that incorporated the original contract between Turner and the property owner by reference.[86] The subcontract contained a "pay-when-paid agreement", expressly providing that Turner was not required to pay Universal unless the property owner had paid Turner.[87] However, Universal claimed that the original contract between Turner and the property owner conflicted with the pay-when-paid clause in the subcontract, and therefore the contract as a whole was ambiguous.[88]

The court of appeals held that "whether one of . . . two purportedly conflicting provisions controls is irrelevant where, as here...two provisions can be comfortably read together."[89] As a result, no ambiguity existed as to the pay-when-paid arrangement between the parties, and the court of appeals affirmed the decision of the district court, enforcing the pay-when-paid agreement.[90] It was this "read together" approach that the *Levin* court took when deciding the proper interpretation of a contract with an arbitration agreement and an integration clause.[91]

In *AT&T Tech. v. Commc'n Workers of Am.*,[92] The United States Supreme Court made clear the federal policy favoring arbitration.[93] In this case, the parties disputed whether certain layoffs were arbitrable under a collective-bargaining agreement ("CBA").[94] Article 8 of the CBA provided that differences between the parties over the interpretation of the agreement were to be arbitrated.[95] Article 9 provided, in relevant part, that termination of employees was not subject to the arbitration clause in Article 8.[96] Article 20 provided the sequence in which employees were to be laid off "when a lack of work" required AT&T to do so.[97]

Following a decision by AT&T to lay off seventy-nine union members, the union claimed AT&T had violated Article 20 because there was no lack of work in the area, and sought to take their grievance to arbitration.[98] AT&T claimed that under Article 9 of the CBA, decisions regarding termination of employees were not subject to arbitration.[99] The case eventually reached the United States Su-

84. Universal Concrete Products Corp. v. Turner Constr. Co., 595 F.3d 527, 530-31 (4th Cir. 2010).
85. *Id.* at 528-29.
86. *Id.* at 528-29. The dispute arose when the construction project fell apart, and the property owner had not paid Turner. *Id.*
87. *Id.* at 530. In Virginia, this arrangement is called a "pay-when-paid agreement." *Id.*
88. *Id.* at 530. Under Virginia state law, an ambiguous pay-when-paid clause is unenforceable. *Id.* at 529-30. According to Universal, two provisions in the contract between Turner and the property owner conflicted with one another, and the one that controlled, when applied to the subcontract, created an ambiguity as to whether the arrangement was or was not pay-when-paid. *Id* at 531.
89. *Id.* at 530.
90. *Id.* at 531-32.
91. Levin v. Alms & Assocs, Inc., 634 F.3d 260, 267 (4th Cir. 2011).
92. AT&T Tech., Inc. v. Commc'n Workers of Am., 106 U.S. 643 (1986).
93. *Id.*
94. *Id.* at 644.
95. *Id.* at 645.
96. *Id.*
97. *Id.*
98. *Id.* at 645-46.
99. *Id.*

preme Court, which declined to interpret the CBA.[100] However, it did consolidate previous rules of law regarding the interpretation of arbitration clauses.[101] The Court found that when a contract includes an arbitration clause, a presumption of arbitrability exists, and "doubts should be resolved in favor of [arbitration]," unless it is clear and certain that the particular issue should not be subject to the arbitration clause.[102] Further, the court found that the presumption applies even more so to broad arbitration clauses.[103]

The U.S. Court of Appeals for the Fourth Circuit's decision in *Cara's Notions, Inc. v. Hallmark Cards, Inc.*[104] turned on the presumption of arbitrability set out in *AT&T Technologies*.[105] In *Cara's Notions*, the owners of a Hallmark store entered into a contract with Hallmark concerning the licensing and operation of the store.[106] This contract contained no arbitration clause.[107] However, four years later, the storeowners and Hallmark executed a second contract for a second store, which did contain an arbitration agreement.[108] After Hallmark allegedly breached the agreement under the first contract, Cara's Notions brought suit against them for breach of contract.[109] Hallmark responded by moving to compel arbitration pursuant to the terms of the second contract.[110] The district court denied Hallmark's motion to compel arbitration, holding that because the issue involved the first store, only the first contract applied to the dispute, and the terms of the second contract did not mandate that the claim be arbitrated.[111] On appeal, the Fourth Circuit found that the arbitration clause in the second contract did in fact require the dispute to be arbitrated.[112] The court specifically addressed the "any controversy or claim" language in the arbitration clause, and held that it was broad enough to warrant application to conflicts arising under the first contract, paying due regard to the "federal policy favoring arbitra[tion]."[113]

In another case addressing retroactive application of arbitration agreements, *Hendrick v. Brown & Root, Inc.*,[114] the United States District Court for the Eastern District of Virginia heard a case that would be relied on by the district court in *Levin* when it decided that the arbitration clause in the 2007 contract between Levin and Alms & Associates did not apply to claims that arose before its execu-

100. *Id.* at 651.
101. *Id.* at 650.
102. *Id.* (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).
103. *Id.* "Such a presumption is particularly applicable where the clause is as broad as the one employed in this case." *Id.* Article 8 stated that "any differences arising out with respect to the interpretation of this contract . . . shall . . . be referred . . . to an impartial arbitrator." *Id.* at 645, n.1.
104. 140 F.3d 566 (4th Cir. 1998).
105. *Id* at 571-72.
106. *Id* at 568.
107. *Id.*
108. *Id.* The arbitration agreement stated in relevant part: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, *or any aspects of the relationship between Hallmark and Retailer* . . . shall be settled by binding arbitration." *Id.* (emphasis in original).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 569, 571.
113. *Id.* at 571 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymoth, Inc., 473 U.S. 614 (1985)).
114. 50 F. Supp. 2d 527 (E.D. Va. 1999).

tion.[115] In *Hendrick,* Brown & Root, Inc. employed an electrician, Hendrick, on four different occasions over a period of five years to complete specific jobs.[116] He was formally terminated after each job was completed, and underwent extensive application procedures before entering each term of employment.[117] After Henrick was terminated from the third job, and before he was hired for the fourth, Brown & Root, Inc. established a "Dispute Resolution Program" (DRP), under which employees agreed to arbitrate any claims against them.[118] The DRP agreement was included as a condition of employment in the fourth contract, and by its terms was every bit as broad as those in *AT&T* and *Levin.*[119] When Hendrick sued Brown & Root, Inc. for alleged tortious conduct that occurred during his third period of employment, Brown & Root, Inc. moved to compel arbitration based on the DRP.[120] The court denied the motion on the basis that the DRP did not go into effect until after the incident had occurred, and that the parties evinced no intent to arbitrate the claim at that time, or by the terms of the fourth contract.[121] Invoking the caveat of the Supreme Court's decision in *AT&T* that the presumption in favor of arbitrability does not apply if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," the court found that the arbitration clause did not apply retroactively.[122]

The *Hendrick* court also distinguished a decision by the Tenth Circuit Court of Appeals, *Zink v. Merrill Lynch*[123], in which an arbitration clause *was* given retroactive effect.[124] The difference between *Zink* and *Hendrick*, the court found, was that in *Zink*, the transaction at issue was "part and parcel of the ongoing business relationship between the parties."[125] Because Hendrick was formally terminated and re-hired after each job, the court found, such a relationship did not exist between him and Brown & Root, Inc., and therefore *Zink* did not support Brown & Root Inc.'s proposition that the DRP should be applied retroactively.[126]

The cases discussed above represent the myriad of cases the Fourth Circuit examined to direct their analysis of the issue of whether a contract containing both an arbitration agreement and an integration clause subjects disputes arising before the contract was executed to arbitration.[127] The Fourth Circuit ultimately used the

115. Levin v. Alms & Assocs., 634 F.3d 260, 268 (4th Cir. 2011).

116. Hendrick v. Brown & Root, Inc., 50 F. Supp. 2d 527, 528-29 (E.D. Va. 1999).

117. *Id.* at 529-30.

118. *Id.* at 529.

119. *Id.* at 529-30. The agreement encompassed "*any legal or equitable claim, demand or controversy* . . . which *relates to, arises from, concerns or involves in any way:* (1) this Plan; (2) *the employment of any employee* . . . or (4) *any other matter related to the relationship between the employee and the Company*" (emphasis in original); AT&T Techs. Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986); *Levin*, 634 F.3d at 266-67.

120. *Hendrick*, 50 F. Supp. 2d at 528-30.

121. *Id.* at 534.

122. *Id.* at 534 (citing *AT&T Techs.*, 106 U.S. at 650).

123. Zink v. Merrill Lynch Pierce Fenner & Smith, Inc., 13 F.3d 330 (10th Cir. 1993).

124. *Hendrick*,50 F. Supp. 2d at 536. In *Zink*, a bond salesman and his client agreed to arbitrate "any controversy between us arising out of your business or this agreement," *after* the bond purchase at issue in the suit. *See Zink*, 13 F.3d at 331 (arbitration clause applied retroactively).

125. *Hendrick*, 50 F. Supp. 2d at 536.

126. *Id.*

127. Levin v. Alms & Assocs., 634 F.3d 260 (4th Cir. 2011). *See also* J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) (broad application of arbitration agreement); Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006) (an agreement to arbitrate "any claim or

presumption of arbitrability from *AT&T*, the rule of contract interpretation from *Universal*, and the example set by *Cara's Notions*, to decide that the 2007 contract between Levin and Alms & Associates applied retroactively.[128]

IV. INSTANT DECISION

In *Levin v. Alms & Assocs., Inc.*,[129] the U.S. Court of Appeals for the Fourth Circuit expressly decided to follow the position of the majority of circuits, holding that in an appeal from a denial of a motion to compel arbitration, the district court is automatically divested of jurisdiction over the underlying claims.[130] The court found that because the issue before the court on an arbitrability appeal is whether the district court should move forward with litigation of the underlying claims, pursuant to the general rule that the district court is divested of jurisdiction over issues involved in the appeal, the district court lacked jurisdiction to proceed on the merits following an appeal from its denial to compel arbitration.[131] The court also noted that because the parties' intention when entering into an agreement to arbitrate is to save both time and money, allowing litigation to continue in the district court while the issue of arbitrability is being appealed would undermine the principal purposes of arbitration.[132] In the instant case, the only aspect of the case that the district court allowed to continue while arbitrability was being appealed was discovery.[133] However, the fourth circuit saw no reason why even that process should be permitted to proceed, finding that if the court of appeals found the issues being litigated to in fact be arbitrable, the parties would not be able to "unring any bell rung by discovery."[134]

The *Levin* court also adopted the frivolousness exception espoused by the circuits accepting the automatic divestiture rule.[135] Specifically, it adopted the procedure set out by the Tenth Circuit that the appellee may seek to have the district court certify the appellant's appeal as frivolous.[136] If the appeal is determined to be frivolous by the district court, the appellant may then challenge that determina-

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dispute relating to or arising out of this agreement or the services provided" applies retroactively); *Zink*, 13 F.3d 330 (an agreement to arbitrate "any controversy between [the parties] arising out of [plaintiff's] business or this agreement" applies retroactively); Coenen v. R.W. Pressprich & Co., 453 F.3d 1209 (2d Cir. 1972) (an agreement to arbitrate "any controversy between. . . members" applies retroactively); Peerless Importers, Inc. v. Wine, Liquor & Distillery Workers Union Local One, 903 F.2d 924 (2d Cir. 1990) (agreement to arbitrate issues "arising under this agreement and its term" does not apply retroactively).

128. *Levin*, 634 F.3d 260; AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986); Universal Concrete Products Corp. v. Turner Constr. Co., 595 F.3d 527 (4th Cir. 2010); Cara's Notions, Inc. v. Hallmark Cards, Inc., 140 F.3d 566 (4th Cir. 1998).

129. *Levin*, 634 F.3d 260.

130. *Id.* at 264-66.

131. *Id.* at 264, 266.

132. *Id.* at 263-66.

133. *Id.* at 264-65.

134. *Id.*

135. *Id.* at 265-66. *See* Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207 (3d Cir. 2007); McCauley v. Halliburton Energy Svs., Inc., 413 F.3d 1158 (10th Cir. 2005); Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249 (11th Cir. 2004); Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d 504 (7th Cir. 1997); and Bombardier Corp. v. Nat'l Railroad Passenger Corp., 2002 App LEXIS 25858 (D.C. Cir.).

136. *Levin*, 634 F.3d 265-66. *See also McCauley*, 413 F.3d at 1161-62.

tion in the court of appeals.[137] The court noted that the idea behind the frivolousness exception is preventing appellants from appealing for the sole purpose of stalling litigation in the district court.[138] Therefore, an appeal certified as frivolous will *not* divest the district court of jurisdiction to proceed with trial on the underlying claims.[139] In *Levin*, because the district court initially found that the appeal was not frivolous, the court granted the motion to stay proceedings pending the appeal on arbitrability.[140] Therefore, the fourth circuit held, because proceeding in the district court was an aspect in the case involved in the appeal, it was subject to the general rule that the district court was divested of jurisdiction over it.[141] The court further determined that because the appeal was determined by the district court not to be frivolous, the district court had denied the stay of litigation pending appeal in error.[142]

Regarding whether the arbitration agreement in the 2007 contract between Levin and Alms & Associates subjected claims accruing before 2007 to arbitration, the fourth circuit held that the agreement should be given retroactive application.[143] It began its analysis of the issue by stating that it would be applying the "federal policy favoring arbitration,"[144] and further, that if there were any question as to whether the arbitration agreement should be enforced, then the answer would be in favor of arbitration.[145]

The fourth circuit court of appeals next addressed Levin's contention that the arbitration agreement was narrower than the integration clause, and thus should not have retroactive effect.[146] Drawing on *Universal,*[147] the court held that it was not necessary to come to a conclusion on the issue of which clause was narrower, or which controlled, because the two could be combined easily and read together.[148] The language that was the subject of further analysis was "that the agreement encompasses all terms, understandings, and agreements by and between th[e] parties. . . and. . . [a]ny dispute shall be submitted to binding arbitration."[149]

Applying the United States Supreme Court's rule stated in *AT&T v. Commc'n Workers of Am.*[150] that the presumption of arbitrability carried special weight when analyzing broad arbitration clauses, the Fourth Circuit found that the 2007 agreement extended to disputes arising between the parties prior to its execution.[151] The court went on, however, to support its conclusion with its own prece-

137. *Levin*, 634 F.3d at 265.
138. *Id.*; *see also McCauley*, 413 F.3d at 1161.
139. *Levin*, 634 F.3d 260.
140. *Id.* at 266. The court also noted that this approach was in line with the Fourth Circuit's "dual jurisdiction doctrine" in double-jeopardy cases, which allows the district court to continue litigation while the defendant appeals on the basis of double-jeopardy, if the district court has determined the appeal to be frivolous. *Id.* at 265-66.
141. *Id.* at 266.
142. *Id.*
143. *Id.* at 269.
144. *Id.* at 266 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
145. *Id.*
146. *Id.* at 267.
147. Universal Concrete Products Corp. v. Turner Constr. Co., 595 F.3d 527 (4th Cir. 2010).
148. *Levin*, 634 F.3d at 267; *see also Universal Concrete Products*, 595 F.3d 527.
149. *Levin*, 634 F.3d at 267.
150. AT&T Techs. Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986).
151. *Levin*, 634 F.3d at 267; *see also AT&T Techs.*, 475 U.S. at 650.

dent, as well as that of other federal circuit courts of appeal.[152] It noted that the First, Second, and Tenth Circuits have also decided in favor of retroactive application of broad arbitration clauses.[153] The court also distinguished a case relied upon heavily by Levin, *Hendrick v. Brown & Root, Inc.*.[154] The court stated that the case did not control because, unlike the instant case, the parties in *Hendrick* had no ongoing business relationship.[155] Because Levin and Alms & Associates did have a continuous, uninterrupted relationship, the court said, the dispute between the parties was "part and parcel" of the ongoing relationship between them, as opposed to being related solely to one contract.[156]

Therefore, the court held, because of the strong federal policy favoring arbitration, especially applied to broad arbitration clauses, the arbitration clause extended to any and all disputes between the parties, before and after the 2007 contract was executed.[157] The district court's holding was reversed and remanded to proceed in accordance with the opinion of the court of appeals.[158]

V. COMMENT

In *Levin*, the Fourth Circuit Court of Appeals made two distinct decisions, one procedural and one substantive, which furthered the efficiency goals of utilizing arbitration as a substitute for traditional litigation.[159] The procedural issue, whether the district court must automatically stay litigation following an appeal from a denial of a motion to compel arbitration, is particularly significant, as it represents the sixth federal court of appeals to adopt an affirmative answer to the above question.[160] However, the substantive issue, whether a contract containing both an arbitration agreement and an integration clause subjects claims accruing prior to the execution of the contract to arbitration, is no less important.[161] If there was any question prior to this case as to the weight of the federal policy in favor of arbitration, there is now, at least in the Fourth Circuit, a clear and satisfactory answer.[162]

A. A Step in the Right Direction

Of the nine federal circuits courts of appeal that have decided the issue of whether a district court is automatically divested of jurisdiction following an ap-

152. *Levin*, 634 F.3d at 267-68.
153. *See* Cara's Notions v. Hallmark Cards, Inc., 140 F.3d 566 (4th Cir. 1998); Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006); Zink v. Merrill Lynch Pierce Fenner & Smith, 13 F.3d 330 (10th Cir. 2006); and Coenen v. R.W. Pressprich & Co., 453 F.3d 1209 (2d Cir. 1972).
154. *Levin*, 634 F.3d at 268-69 (citing Hendrick v. Brown & Root, Inc., 50 F. Supp. 2d 527 (E.D. Va. 1999)).
155. *Id.*
156. *Id.* at 269.
157. *Id.*
158. *Id.*
159. *Id.* at 264-65.
160. *See* cases cited *supra* note 40.
161. *See supra* Parts III(B) and IV.
162. *Levin*, 634 F.3d at 266-67, 269.

peal from a denial to compel arbitration, six have ruled in the affirmative.[163] Prior to *Weingarten Realty Investors* (*Weingarten*), only one federal circuit had ruled contrary to the majority rule in the past two decades.[164] Before *Weingarten*, the argument could have been made that the minority rule was but an aberration. However, that is no longer the case. The distinct federal circuit split on the issue, coupled with the short interval of time that passed between *Levin* and *Weingarten* reinvigorates the debate over which method of handling appeals from denials to compel arbitration is in line with the intent of the FAA and the policies behind arbitration in general.

The divide in the pre-*Weingarten* decisions is even more pronounced after examining the procedural history of the Second and Ninth circuits.[165] In both *Britton* and *Motorola Credit Corp. v. Uzan* (*Uzan*),[166] representing the Ninth and Second circuits (respectively), the trial in the district court was already over.[167] In fact, the *Uzan* court explicitly distinguished its decision from both *Britton* and the majority circuits in that regard.[168] The significance of this difference is that neither the Second Circuit in *Uzan*, nor the Ninth in *Britton*, had any reason whatsoever to take into account the efficiency and duplicity arguments that were so convincing to the Seventh Circuit in *Bradford-Scott* (the first federal circuit court of appeals to decide the issue in favor of divestiture), and the Fourth Circuit in *Levin*.[169] One could even go so far as to say that there was *no circuit split* – that is, no federal circuit court of appeals had decided that the district court could not *continue* with proceedings following an appeal from a denial to compel arbitration. However, this procedural distinction across the split no longer exists. In Weingarten, as in *Levin*, the trial in the district court had not yet begun on its merits.[170] Interestingly, though, the decision in *Weingarten* very easily could have come out the other way.

In *Weingarten,* after disposing of the matter of whether a stay in the district court should be automatic, the Federal Circuit Court of Appeals for the Fifth Circuit applied the traditional four-factor test governing discretionary stays.[171] When the court got to the second factor, "whether [the party seeking arbitration] will suffer irreparable injury without a stay," it found that missing out on the cost- and time-saving aspects of arbitration does not constitute an irreparable injury, and

163. *See* cases cited *supra* note 40.

164. Weingarten Realty Investors v. Miller, 661 F.3d 904, 907 (5th Cir. 2011) (citing Motorola Credit Corp. v. Uzan, 388 F.3d 39, 53-54 (2d Cir. 2004)).

165. *See* Britton v. Co-Op Banking Group, 916 F.2d 1405 (9th Cir. 1990); *Uzan*, 388 F.3d at 44-46.

166. 388 F.3d 39.

167. *See Britton*, 916 F.2d at 1408; *Uzan*, 388 F.3d at 47.

168. "In *no case* has a Court of Appeals granted the relief that defendants now seek-undoing a trial because the district court lacked jurisdiction to proceed after an appeal from an order denying arbitration." *Uzan*, 388 F.3d at 54 (emphasis in original).

169. "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." Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d 504, 506 (7th Cir. 1997); "[A]llowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration." Levin v. Alms & Assocs., Inc., 634 F.3d 260, 264 (4th Cir. 2011).

170. Weingarten Realty Investors v. Miller, 661 F.3d 904, 907 (5th Cir. 2011); *Levin*, 634 F.3d at 261.

171. *Weingarten Realty Investors*, 661 F.3d at 910. *See supra* note 78 for the *Hilton* four-factor test.

expressly rejected the notion that arbitrating a matter achieves those goals.[172] A closer look at the footnote to that statement, however, reveals that the Fifth Circuit agrees with the *Levin* court's reasons why a stay should be automatically granted.[173] It pointed out that engaging in discovery, which would occur absent an automatic stay, could result in irreparable harm to the party seeking the stay because of the potential for substantial cost increases due to discovery, and more importantly, the possibility of revealing sensitive information that could have an adverse effect on the parties' right to arbitrate.[174] As the Fourth Circuit put it in *Levin*, litigants cannot "unring any bell rung by discovery."[175] However, the party seeking arbitration had not brought this point to the court of appeals in his brief, and the court deemed it to have been waived.[176] Had the *Weingarten* court read into the content of its own decision, it would have realized absent a stay, a matter on appeal for arbitrability will almost always go to discovery, and the issues of disclosing sensitive information and increased costs would thus be present in every case of this kind. Therefore, by applying the four-factor test to stays pending appeals of arbitrability, the result would always be "yes." The party seeking to arbitrate would *always* suffer irreparable harm absent a stay, and thus a stay should be automatically granted absent extenuating circumstances, as will be discussed below.[177]

The most compelling argument against divestiture put forth by the minority circuits is the risk of frivolous appeals for the purpose of stalling litigation.[178] However, the majority circuits have dealt with this issue in a way that furthers the efficiency goals of arbitration.[179] The *Levin* court adopted the Tenth Circuit's fine-tuning of this rule, that the appellee may ask the district court at the outset of the appeal to declare the appeal frivolous, which gives the district court discretion, to an extent, to grant or deny a stay.[180] If the district court does say that the appeal is frivolous, the party seeking the appeal may then appeal the frivolousness determination.[181] This procedural safeguard not only allows the trial court an amount

172. *Weingarten Realty Investors*, 661 F.3d at 913. "For the reasons previously discussed, we reject the idea that arbitration ensures substantial speed and cost savings." *Id.* However, the opinion lacks any evidence of the "reasons" behind this statement. The only part of the opinion that could be construed to support this statement is the exhaustive analysis the court gives to the arbitrability of the claim itself.

173. *Id.* at 619 n.19.

174. *Id. See also Levin*, 634 F.3d at 264-65.

175. *Levin*, 634 F.3d at 265.

176. *Weingarten Realty Investors*, 661 F.3d at 619 n.19.

177. Automatic stays also have been held to satisfy the fourth prong of the four-part test (where the public interest lies). *See, e.g.*, C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Secs. Corp., 716 F. Supp. 307, 310 (W.D. Tenn. 1989)("[P]ublic policy . . . favors an efficient allocation of judicial resources.").

178. Britton v. Co-Op Banking Grp., 916 F.2d 1405, 1412 (9th Cir. 1990). "The rule urged by [the appellant] would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration...[staying proceedings] is a proper subject for the exercise of discretion by the trial court." *Id.*

179. "[Frivolous appeals are] a serious concern, but one met by the response that the appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily." Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc., 128 F.3d 504, 506 (7th Cir. 1997).

180. *Levin*, 634 F.3d at 265 (discussing McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1162 (10th Cir. 2005)).

181 *Id.* at 266.

of discretion in the matter, but prevents the case from being heard on the merits while the case is on appeal, whether the court of appeals is looking at the frivolousness determination or the issue of arbitrability.[182] To allow duplicative proceedings to take place is not only against the goals of arbitration and the purpose of the FAA, but is also against the rule of divestiture set out by the United States Supreme Court in *Griggs*.[183]

To better understand the circuit split, it might be helpful to ask "why" the minority circuits decided these cases the way that they did. Of course, like any other decisions, they were applying the law to facts, but the existence of the split show that there was, and is, another answer to the question of whether a district court must stay proceedings after an appeal from a decision to denying a motion to compel arbitration. There is evidence that the Ninth Circuit, which provided the minority opinion to which the other minority circuits defer, is particularly hostile to arbitration in general.[184] It is also possible that the facts and circumstances surrounding the pre-*Weingarten* minority decisions indicate that the parties seeking the stay were doing so out of frivolity, as a part of a last-ditch attempt to forestall litigation.[185] In addition, all of the minority circuits take a narrow, literal precedent out of the U.S. Supreme Court's decision in *Moses H. Cone* that "arbitrability is easily severable from [the] merits of [the] underlying dispute," an approach that the Seventh Circuit, in *Bradford-Scott*, dismissed.[186] The minority circuits take a similarly narrow approach to the *Griggs* rule.[187] In contrast, the majority circuits, as shown, have taken a more flexible approach to the issue, and, despite the conclusion of the Fifth Circuit, an approach that is better suited for arbitration issues, especially given the federal policy favoring arbitration, as discussed below.[188]

The argument against allowing a district court to proceed on the merits after an appeal on arbitrability is a common sense argument. The district court clearly loses jurisdiction over the question of whether the case should be arbitrated following an appeal on the issue.[189] Why then, should the district court be allowed to continue litigating a matter while the court of appeals is deciding whether it may do so at all? For this very reason, the majority of federal circuits have decided

182. At least one commentator has explored the idea that district courts in minority circuits apply the frivolity rule in deciding whether to grant discretionary stays, and argues that this standard should be formally adopted, as the majority circuits have. *See* Michael P. Winkler, Comment, *Interlocutory Appeals Under the Federal Arbitration Act and the Effect on the District Court's Proceedings*, 59 OKLA. L. REV. 597, 636 (2006).

183. *Bradford-Scott*, 128 F.3d at 505-06.

184. Winkler, *supra* note 182, at 606 n 85, 631 n. 326.

185. *Id.* at 630-32.

186. Britton v. Co-Op Banking Group, 916 F.2d 1405, 1412, n.7 (9th Cir. 1990); Weingarten Realty Investors v. Miller, 661 F.3d 904, 909 (5th Cir. 2011); *Bradford-Scott Data Corp.*, 128 F.3d at 506 ("The premise may be correct, but the conclusion [that an appeal concerning arbitrability does not affect *proceedings* to resolve the merits] does not follow.")(emphasis added).

187. *Weingarten Realty Investors*, 661 F.3d at 908 ("The Ninth Circuit interpreted *Griggs* narrowly, . . . [and] the Seventh Circuit interpreted *Griggs* broadly . . . . The narrower interpretation better comports with our precedents and the nature of arbitration.").

188. *See supra* note 40.

189. "[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." *Bradford-Scott*, 128 F.3d at 505.

this issue correctly.[190] To conclude that the district court may proceed on the merits of a case that's very existence in the district court is being appealed is not only engaging in hair-splitting, it promotes inefficiency and uncertainty, the very problems that arbitration that the FAA were created to solve.[191]

B. Retroactive Application: Arbitrary Arbitration?

The decision by the Fourth Circuit in *Levin* to apply the arbitration agreement in the 2007 contract retroactively is not groundbreaking in and of itself. Broad arbitration clauses have been given retroactive effect across different circuits, in line with traditional rules of contract interpretation, Supreme Court precedent, and federal policy.[192] However, in *Levin*, the Fourth Circuit combined this trend with their rule of interpretation in *Universal*[193] and the Supreme Court's rule that "any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration," to arrive at the narrow conclusion that arbitration language, coupled with integration language, binds the parties to arbitration retroactively for issues arising before the execution of the arbitration contract.[194]

The ramifications of the Fourth Circuit's decision on this issue are slightly troubling. Putting the pieces of the contract together to bind parties to arbitration, in essence stripping them of their right to trial, should not be as simple as invoking "federal policy" to tip the scales in favor of arbitration. The procedure of interpretation utilized by the *Levin* court provides sophisticated parties with an opportunity to "trap" the unwary into signing away their rights to trial. Integration language is present in many, if not most contracts, and is the kind of boilerplate language that is often easily glossed over by consumers.[195] One practice-oriented article suggests that a drafter can achieve retroactive application of an arbitration agreement simply by making slight modifications to their standard integration clause.[196]

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190. *See supra* note 40.

191. *See* Levin v. Alms & Assocs., Inc., 634 F.3d 260, 265 (4th Cir. 2011). "The core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims. Therefore, because the district court lacks jurisdiction over 'those aspects of the case involved in the appeal,' it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue." *Id.* at 264 (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)); *see also Bradford-Scott*, 128 F.3d at 505 ("[w]hether the case should be litigated in the district court is...the mirror image of the question presented on appeal"). *See also* Roger J. Perlstadt, *Interlocutory Review of Litigation-Avoidance Claims. Insights From Appeals Under the Federal Arbitration* Act, 44 AKRON L. REV. 375 (2011). For a detailed analysis of the economic impacts of the decisions of the split circuits, and an argument against granting automatic stays, see Gabrical Taran, Comment, *Towards a Sensible Rule Governing Stays Pending Appeals of Denials of Arbitration*, 73 U. CHI. L. REV. 399, 421-423 (2006).

192. Kristian v. Comcast Corp., 446 F.3d 25, 33-36 (1st Cir. 2006); Zink v. Merrill Lynch Pierce Fenner & Smith, 13 F.3d 330, 332 (10th Cir. 2006); Coenen v. R.W. Pressprich & Co., 453 F.3d 1209, 1212 (2d Cir. 1972); J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 319-320 (4th Cir. 1988); Cara's Notions, Inc. v. Hallmark Cards, Inc., 140 F.3d 566, 571-72 (4th Cir. 1998).

193 *Levin*, 634 F.3d at 267 (discussing Universal Concrete Products Corp. v. Turner Constr. Co., 595 F.3d 527 (4th Cir. 2010)).

194. *Id.* at 266-69 (quoting Moses H. Cone Mem'l Hosp v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

195. 11 Richard A. Lord, WILLISTON ON CONTRACTS § 33:21 (4th ed. 1990).

196. Shawn Bates & David Hricik, *Arbitration Clauses for Ongoing Relationships*, 42 FEB HOUS. LAW. 10, 15-16 (2005).

However, the article also suggests using language indicating that prior agreements between the parties are superseded by the contract containing the arbitration clause, language that was neither present nor implied in the *Levin* contract.[197] The use of integration clauses to bind parties to arbitration, however, is especially troubling. If, as in the *Levin* contract, the arbitration language is separated from the integration language, it is not difficult to see how one might not put together that they are effectively signing away their right to trial for everything that has ever transpired between themselves and the party they are contracting with.[198] However, by indiscriminately applying its "read together" rule from *Universal*, the Fourth Circuit did not face itself with that issue.[199]

The *Levin* opinion goes into considerable detail distinguishing two other cases involving retroactive application of arbitration clauses, *Zink v. Merrill Lynch*, a Tenth Circuit case, and *Hendrick v. Brown & Root*, a case out of a Virginia federal district court.[200] In doing so, the *Levin* court further muddied the waters on the issue. The distinction boiled down to the difference between contracting parties who have an "ongoing relationship," and those who do not.[201] *Zink* represented the former, in which a bond salesman and his client executed a formal account agreement one year and six months after the account was opened.[202] The court in *Zink* found the dispute arising out of the initial bond purchase to be arbitrable pursuant to the terms of the later agreement.[203] It is important to note the reasons for which the *Levin* court distinguished *Zink* from *Hendrick*, a case in which an arbitration agreement was found to not be retroactively applicable.[204] The facts in *Hendrick* showed a "stop-and-go" relationship between the parties, where a contractor was hired for different jobs over the course of several years.[205] The Fourth Circuit in *Levin* found that the facts in the case before it were more similar to those in *Zink* than in *Hendrick*, and held that because Levin and Alms & Associates had an "ongoing relationship," and the dispute concerned events that were "part and parcel" of the relationship, the arbitration agreement should apply retroactively.[206] But were they right?

There may not be a clear answer, because the facts of *Levin* place it squarely in between the other two cases. On one extreme (*Zink*), the parties had a true stop-and-go relationship.[207] On the other (*Hendrick*), the parties executed a single contract pertaining to their relationship.[208] *Levin* is very different from both of these cases, in that the parties executed contracts annually.[209] The court in *Levin* found that the relationship was renewed "seamlessly," which may be true, but the facts do not indicate that the relationship would have continued had the annual

197. *Id.*; *Levin*, 634 F.3d at 266.
198. *Levin*, 634 F.3d at 266-67.
199. *Id.* at 267.
200. Zink v. Merrill Lynch Pierce Fenner & Smith, 13 F.3d 330 (10th Cir. 2006); Hendrick v. Brown & Root, Inc., 50 F. Supp. 2d 527 (E.D. Va. 1999).
201. *Levin*, 634 F.3d at 269.
202. *Zink*, 13 F.3d at 331.
203. *Id.* at 333.
204. *Hendrick*, 50 F. Supp. 2d at 534.
205. *Id.* at 528-29.
206. *Levin*, 634 F.3d at 269.
207. *Hendrick*, 50 F. Supp. 2d at 528-29.
208. *Zink*, 13 F.3d at 331.
209. *Levin*, 634 F.3d at 261.

contracts not been executed.[210] Instead, by implication, they indicate the relationship would *not* have continued, given the fact that the parties executed the annual contracts at all. If however, the renewals were "seamless," it still does not solve the issue of whether an integration clause buried in a contract will bind a party retroactively to the arbitration agreement on its face. Is it reasonable to believe that after signing annual contracts in each of three years, the arbitration agreement in the fourth would bind Levin to arbitration? Through the lens of the federal policy favoring arbitration, the Fourth Circuit thought so, which raises another issue: should a federal presumption affect traditional understandings of mutual assent? How vague can parties be when executing contracts that bind each other to arbitration? With *Levin*, the floor has been lowered.

By mechanically applying precedent under the umbrella of federal policy favoring arbitration, the Fourth Circuit, in *Levin*, may very well have interpreted the contract as the parties intended. However, unlike its analysis of the divestiture issue, it failed to take into consideration the impact its decision will have on the future of how parties submit to arbitration. In any case, *Levin* reinforces an important piece of wisdom all should take into account when entering into written agreements: *always read the fine print.*

VI. CONCLUSION

In *Levin*, the Fourth Circuit Court of Appeals resolved two separate and distinct issues.[211] First, it imposed a rule of automatic divestiture of jurisdiction of district courts following an appeal from a denial to compel arbitration, safeguarded against abuse with an exception for frivolous appeals.[212] Second, it found that a contract containing an arbitration agreement and an integration clause should be applied retroactively to all disputes between the parties that arose throughout the course of their dealings.[213] However, the court's decisions on these two issues should not be viewed as narrowly as stated above, as their impact will surely be far-reaching.

In reaching these decisions, the Fourth Circuit Court of Appeals drew frequently upon "the federal policy favoring arbitration,"[214] the "arbitrability presumption,"[215] and the "purposes of arbitration."[216] In doing so, the Fourth Circuit established a broad precedent, extending beyond divestiture of jurisdiction and arbitration agreements and integration clauses that strongly emphasizes the favorable light under which federal courts view arbitration.

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210. *Id.* at 269.
211. *Id.* at 261.
212. *Id.* at 266.
213. *Id.* at 269.
214. *Id.* at 266 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
215. *Id.* at 269.
216. *Id.* at 264-65.