

2000

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Sarah Baxter

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Recommended Citation

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Appeals from Arbitration Orders under the Federal Arbitration Act: Pro-arbitration Policy Clashes with the Right to Appeal Final Decisions

*Randolph v. Green Tree Financial Corp.*¹

I. INTRODUCTION

Congress amended the Federal Arbitration Act (“F.A.A.”) in 1988 to add section 16, which governs the appeal of arbitration orders. Generally, orders refusing to compel arbitration may be appealed. Orders compelling arbitration may be appealed if they are final decisions, but not if they are interlocutory. While the F.A.A. unified this area of the law, the circuit courts remain divided on an important issue. The circuits disagree about whether orders compelling arbitration in “embedded” proceedings are final decisions, when the court dismisses the underlying claims. An embedded proceeding is one in which an order seeking to compel or deny arbitration arises in a case involving other substantive claims. In contrast, an independent proceeding is one in which the arbitration issue is the only matter before the court. In many cases, a court ruling on an arbitration order in an embedded proceeding will stay the underlying claims in the action. In such cases, the ruling on the arbitration order is not considered final and appealable.

Some circuits have also taken the position that when a court rules on an arbitration order in an embedded proceeding and dismisses the remaining claims in the action, those decisions are also not final or appealable. Other circuits, however, have taken the view that when a court rules on an arbitration order and dismisses the remaining claims in an action, such a decision is final and appealable. A decision on an arbitration order in an independent action is a final decision. This Note explores the circuit split over the issue of whether orders compelling arbitration in embedded proceedings may be classified as final decisions when the district court dismisses the remaining claims. *Randolph v. Green Tree Financial Corp.* addresses this issue, which remains unsettled more than ten years after the adoption of section 16 of the F.A.A.

II. FACTS AND HOLDING

Larketta Randolph sued Green Tree Financial Corporation, the lender who financed her purchase of a mobile home, asserting claims under the Truth in Lending Act (“TILA”) and Equal Credit Opportunity Act (“ECOA”).² Randolph bought the

1. 178 F.3d 1149 (11th Cir. 1999).

2. *Id.* at 1151.

mobile home in January 1994 from Better Cents Home Builders in Opelika, Alabama.³ She signed a retail installment contract with Better Cents, which named Green Tree as the assignee.⁴ The contract contained an arbitration provision, which required the parties to submit all claims arising from the contract to an arbitrator.⁵

One year after she purchased the mobile home, Randolph asserted that Green Tree had required her to purchase an insurance policy which protects a vendor or lienholder against the costs of repossession in the event of default, but failed to mention this requirement in its Truth in Lending Act disclosure.⁶ She brought suit against Green Tree, alleging that Green Tree violated the TILA by failing to mention the insurance requirement in its TILA disclosure.⁷ She also alleged that Green Tree violated the ECOA by requiring arbitration of all claims.⁸ In addition, Randolph sought certification of a class of individuals who made similar agreements with Green Tree.⁹ In response, Green Tree moved to compel Randolph to arbitrate her complaint, in accordance with the arbitration provision in the contract.¹⁰ Green Tree also moved to stay the lawsuit pending arbitration, or, in the alternative, to dismiss the lawsuit.¹¹

The United States District Court for the Middle District of Alabama granted Green Tree's motion to compel arbitration and declined to certify a class.¹² Because the court determined that Randolph must submit all the issues raised in her complaint to arbitration, it denied the motion to stay the action and dismissed her claims with prejudice.¹³

Randolph appealed the decision, and Green Tree moved to dismiss the appeal for lack of jurisdiction.¹⁴ In making its argument, Green Tree argued that Randolph's claim was an "embedded" proceeding.¹⁵ In a case of first impression, the United States Court of Appeals for the Eleventh Circuit held that if an arbitration issue arises in an embedded proceeding, and the district court issues an order compelling arbitration and dismisses the remaining claims with prejudice, the court has appellate jurisdiction over the case.¹⁶ The court also held that the arbitration clause signed by Randolph was unenforceable, because it failed to provide the minimum guarantees required to ensure she could vindicate her rights under the TILA.¹⁷

3. *Id.*

4. *Id.*

5. *Id.* The term "vendor's single interest" insurance was used by Green Tree to identify these policies.
Id.

6. *Id.* at 1151-52.

7. *Id.* at 1152.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1153.

16. *Id.* at 1156.

17. *Id.* at 1158. The basis for the court's holding on this point was its finding that the arbitration clause contained provisions that could defeat its remedial purpose; namely steep filing fees and arbitrators' fees. *Id.*

III. LEGAL HISTORY

In 1988, Congress amended the F.A.A. by adding section 16, which governs when parties may appeal court orders dealing with arbitration.¹⁸ In general, section 16 allows the appeal of district court orders refusing to compel arbitration and denies the appeal of orders granting arbitration.¹⁹ One purpose of the amendment was to “give clarity to an area of the law that had become confused, obscure and relied on the procedural posture of the case.”²⁰ To understand why so much confusion surrounded the appeal of arbitration orders, it is important to take a brief look at the history behind section 16.

Before Congress adopted section 16, appeals from orders dealing with arbitration were controlled by sections 1291 and 1292 of Title 28.²¹ Under section 1291, the courts of appeals had jurisdiction over all appeals from final district court decisions.²² In an independent proceeding, the motion to compel arbitration is the only issue before the court.²³ Courts found that independent proceedings were final decisions under section 1291 and, therefore, were immediately appealable.²⁴

Much confusion surrounded the appeal of orders compelling arbitration that arose in embedded proceedings.²⁵ In contrast to independent proceedings, an embedded proceeding involves an arbitration issue embedded within a broader action dealing with other substantive claims.²⁶ While appeals of interlocutory decisions were generally not permitted, there were some exceptions under section

18. 9 U.S.C. § 16 (1994). The provision states:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

Id.

19. Carla Kemp, Note, *Appeals of Orders Compelling Arbitration in Embedded Proceedings Must Wait*, 1997 J. DISP. RESOL. 143, 145 (1997).

20. *Arnold v. Arnold Corp.*, Printed Communications for Bus., 920 F.2d 1269, 1275 n.5 (6th Cir. 1990).

21. Kemp, *supra* note 19, at 144.

22. 28 U.S.C. § 1291 states that the “courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .” 28 U.S.C. § 1291 (1994).

23. *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1153 (11th Cir. 1999).

24. Kemp, *supra* note 19, at 144.

25. *Id.* at 144-45.

26. *Randolph*, 178 F.3d at 1153.

1292. Specifically, section 1292(a)(1) permitted appeals from interlocutory decisions involving injunctions.²⁷

This rule created confusion because under the Enelow-Ettelson doctrine, courts treated the grant or denial of motions to stay proceedings pending arbitration as injunctions.²⁸ The doctrine was based on old distinctions between law and equity.²⁹ The United States Supreme Court treated a motion for an equitable stay as asking a chancellor to enjoin an action at law.³⁰ At common law, the equity courts could enjoin a law court, but the reverse was not true.³¹ Now that the two systems have merged, cases arise where plaintiffs plead law claims and defendants argue equitable defenses.³² Under Enelow-Ettelson, if a trial court allowed the equitable defense to be tried first and stayed the law claim, the doctrine held that this was essentially the same thing as granting an injunction against a law claim.³³ Therefore, under section 1292(a)(1), an immediate appeal was allowed.³⁴ Arbitration was treated as an equitable defense, which meant that the grant or denial of a stay of legal proceedings pending arbitration was viewed as an injunction.³⁵ Such an "injunction" against a law action was appealable under section 1292(a)(1).³⁶

If the underlying claim was in equity, however, and a stay was sought in deference of arbitration, this would not amount to an "injunction" under Enelow-Ettelson.³⁷ The reasoning was that at common law, it was not possible for a law court to enjoin an equity court.³⁸ Recognizing that the doctrine was "sterile and antiquated," the U.S. Supreme Court eventually abandoned the doctrine in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, holding that orders granting or denying a stay of legal proceedings on equitable grounds were not automatically appealable under section 1292(a)(1).³⁹

Shortly after *Gulfstream* was decided, section 16 was adopted. The amendment replaced the law/equity distinctions with a clear policy favoring arbitration. In general, orders compelling arbitration may not be appealed, while those refusing to compel arbitration may be appealed.⁴⁰ While section 16 has done much to clarify this area of the law, confusions still surrounds at least one issue. More than ten years

27. 28 U.S.C. § 1292 states: "(a)[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ." 28 U.S.C. § 1292 (1994).

28. Edith H. Jones, *Appeals of Arbitration Orders—Coming out of the Serbonian Bog*, 31 S. TEX. L. REV. 361, 365-66 (1990).

29. Michael L. Taviss, Comment, *Adventures in Arbitration: The Appealability Amendment to the Federal Arbitration Act*, 59 U. CIN. L. REV. 559, 568 (1990).

30. *Id.*

31. David D. Siegel, *Appeals From Arbitrability Determinations Under the New § 15 of the U.S. Arbitration Act*, 126 F.R.D. 589, 596 (1989). Section 16 was enacted as part of section 15 in 1988. An amendment in 1990 separated the part of section 15 dealing with appeals and changed it to section 16. 9 U.S.C. § 16 (1994).

32. Siegel, *supra* note 31, at 596.

33. *Id.*

34. *Id.*

35. Jones, *supra* note 28, at 366.

36. *Id.* at 365.

37. Siegel, *supra* note 31, at 596.

38. *Id.*

39. 485 U.S. 271, 287 (1987).

40. See Kemp, *supra* note 19.

after the adoption of the amendment, the circuit courts remain divided over the question of whether a party may appeal an order compelling arbitration when the issue arises in a broader action that includes other claims, and the court dismisses the remaining claims.

Much of the controversy stems from divergent interpretations of the statutory language. Section 16 identifies two broad categories where appeals are permitted. First, pursuant to sections 16(a)(1) and (2), appeals are allowed from orders that deny arbitration.⁴¹ Second, section 16(a)(3) permits appeals from final decisions with respect to an arbitration subject to the title.⁴² However, section 16 denies appeals from interlocutory orders that allow the arbitration to proceed.⁴³ The disagreement among the circuits concerns the meaning of the term "final decision" under section 16(a)(3).⁴⁴

The majority of courts have held that orders compelling arbitration in embedded proceedings are always interlocutory, and are therefore not final decisions under section 16(a)(3).⁴⁵ Regardless of whether a court dismisses or stays the underlying claims, the majority courts do not treat orders compelling arbitration in embedded proceedings as final decisions.⁴⁶ These circuits have opted for a clear rule that gives considerable weight to the distinctions between embedded and independent claims.⁴⁷ The Seventh Circuit wrote in *Napleton* that, "[T]his circuit has focused, almost myopically, on whether a proceeding is independent or embedded."⁴⁸

There are several policy goals behind the majority view. First, there is the obvious goal of promoting arbitration. Prohibiting appeals from orders to compel arbitration in all embedded actions will mean that parties in such cases will be required to arbitrate before seeking appeal. As stated by the *McCarthy* court, "[s]ection 16 'is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration.'"⁴⁹

Under the majority rule, it is possible that a party could spend more time and money pursuing arbitration, even if the district court made an error by compelling

41. *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1153 (11th Cir. 1999).

42. *Id.*

43. *Id.*

44. See *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir. 1998); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1243-44 (9th Cir. 1997); *Pigsah Contractors, Inc. v. Rosen (In re Pigsah Contractors, Inc.)*, 117 F.3d 133, 136 (4th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771-72 (5th Cir. 1996); *Gammara v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (holding that arbitration orders in embedded proceedings are never final decisions). But see *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1153-54 (11th Cir. 1999); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 796-97 (10th Cir. 1995); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 45-46 (3d Cir. 1991); *Arnold v. Arnold Corp.-Printed Communications for Bus.*, 920 F.2d 1269, 1274-75 (6th Cir. 1990) (holding that arbitration orders in embedded proceedings are final decisions when the court dismisses the remaining claims).

45. See *Seacoast*, 143 F.3d at 629; *Napleton*, 138 F.3d at 1214; *McCarthy*, 122 F.3d at 1245; *Pigsah Contractors*, 117 F.3d at 137; *Altman Nursing*, 84 F.3d at 772; *Gammara*, 15 F.3d at 96.

46. See *supra* note 45.

47. *Napleton*, 138 F.3d at 1213.

48. *Id.*

49. *McCarthy*, 122 F.3d at 1245 (quoting 9 U.S.C.A. § 16 practice commentary (West Supp. 1997)).

arbitration.⁵⁰ The party opposing arbitration would have to arbitrate before they would have a chance to appeal the court's order, and if the order compelling arbitration was erroneous, this would result in lost resources.⁵¹ While this may seem unfair, the majority courts argue that such a result comports with the intent of the statute.⁵² The "pro-arbitration tilt" of the act requires parties opposing arbitration to "bear the initial consequence of an erroneous district court decision requiring arbitration."⁵³ In some cases, the majority rule may promote judicial economy because if the party who opposed arbitration is later satisfied with the result, there will never be an appeal.⁵⁴ Even if there is an appeal, the discovery and preparation conducted during arbitration will be useful to the parties at trial.⁵⁵ Also, as the Seventh Circuit suggested in *Napleton*, the majority rule promotes judicial economy because appellate review of embedded claims is likely to result in the court simply affirming the lower court's deference to the arbitration clause.⁵⁶

The minority courts hold that orders compelling arbitration in embedded proceedings are final decisions, but only when the court also dismisses the underlying claims.⁵⁷ Like the majority, these courts treat orders compelling arbitration in embedded proceedings as non-appealable when the court stays the remaining claims.⁵⁸ The minority courts have looked to the legislative history of section 16 to find support for their argument that appeals should be preserved when there is nothing left for the court to do but execute the judgment.⁵⁹ "[A]ppealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including . . . a final judgment dismissing an action in deference to arbitration."⁶⁰

Some courts are concerned that the minority rule allows the district court to determine the jurisdiction of the appellate court.⁶¹ Under the minority rule, appeals are permitted from orders compelling arbitration in embedded proceedings, when the court dismisses the remaining claims.⁶² Therefore, if the court dismissed the claims, the party who wanted to avoid arbitration could appeal.⁶³ If the court stayed the action, however, and compelled arbitration, the decision would not be immediately

50. *Napleton*, 138 F.3d at 1214.

51. *Id.*

52. *Id.*

53. *Id.* (quoting *Gammara v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (quoting *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 61 (2d Cir. 1993))).

54. *Kemp*, *supra* note 19, at 148.

55. *Jones*, *supra* note 28, at 375.

56. *Napleton*, 138 F.3d at 1214.

57. *See Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir. 1999); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44 (3d Cir. 1991); *Arnold v. Arnold Corp.-Printed Communications for Bus.*, 920 F.2d 1269 (6th Cir. 1990) (holding that arbitration orders in embedded proceedings are final decisions when the court dismisses the remaining claims).

58. *See cases cited supra* note 57.

59. *Arnold*, 920 F.2d at 1274.

60. *Id.* at 1274-75.

61. *McCarthy*, 122 F.3d at 1245.

62. *See cases cited supra* note 57.

63. *McCarthy*, 122 F.3d at 1245.

appealable.⁶⁴ The majority courts state that adhering to a strict embedded versus independent rule keeps the focus on “the nature of the underlying action” and not “the style of the district court’s decision.”⁶⁵ Those courts have stated that “[w]e do not believe that Congress intended this arbitrary result when it barred appellate review of interlocutory orders compelling arbitration.”⁶⁶

While the minority courts (and dissenting opinions from the majority courts) concede the pro-arbitration policy goals of the statute, they give considerable weight to the “general policy that appeals should be available where there is nothing left to be done in the district court.”⁶⁷ For the minority courts, the crux of the matter is whether or not district courts choose to give weight to the difference between a stay and a dismissal in an embedded proceeding. The standard practice in ordering arbitration in an embedded proceeding is to stay the case.⁶⁸ When the district court deviates from this practice, however, and dismisses the case, the court does not retain jurisdiction over the case. By ignoring the distinction between a stay and a dismissal, the majority courts create “a jurisdictional loophole that unjustifiably precludes immediate appeal in cases where the arbitrability issue is embedded but the action is dismissed”⁶⁹ For these courts, the right to appeal final decisions must be given as much weight as the pro-arbitration policy of the statute.

The circuit court decisions present two different views on the appeal of arbitration orders. Several pro-arbitration commentators have suggested a third view, which would essentially bar appeals from postponing arbitration in all cases, even in an independent proceeding.⁷⁰ Such a policy would require an amendment to the statute, but it is worth considering in this discussion because the commentators’ view purports to reflect the true intent of section 16.⁷¹

Professor David Siegel argues that while section 16 assures an appeal from an order compelling arbitration in an independent proceeding, this result may not have been intended.⁷² Professor Siegel suggests that while the statute permits appeal from “a final decision with respect to arbitration” the intent may have been to only assure appeal of final arbitration awards.⁷³ Professor Siegel argues that section 16 was designed to prevent the appellate process from slowing down the arbitration process. Arbitration is designed to save the parties time and money by providing a quick remedy, and proponents believe that judicial intervention should be kept to a bare minimum.⁷⁴ Allowing appeals from arbitration orders in independent proceedings violates these policies by “tying the parties down in continued litigation.”⁷⁵

64. *Id.*

65. *Napleton*, 138 F.3d at 1212.

66. *McCarthy*, 122 F.3d at 1245.

67. *Arnold*, 920 F.2d at 1275.

68. *McCarthy*, 122 F.3d at 1248 (Pregerson, J., dissenting).

69. *Id.* at 1249.

70. See Siegel, *supra* note 31. See also Brian T. McCartney, Note, *Rethinking Appeal of Arbitrability Decisions: When to Review “That Which Long Process Could Not Arbitrate”*, 1997 J. DISP. RESOL. 229, 242 (1997); Taviss, *supra* note 29.

71. Siegel, *supra* note 31, at 591.

72. *Id.*

73. *Id.*

74. *Id.* at 589, 591.

75. *Id.* at 591.

Despite Professor Siegel's argument, section 16 clearly preserves the right to appeal an order compelling arbitration in an independent proceeding. The right to appeal arbitration orders in embedded proceedings, however, is not so clear. The conflicting district court decisions create a split of authority on the issue of whether arbitration orders may be appealed in embedded proceedings, when the court dismisses the remaining claims.

IV. INSTANT DECISION

In a case of first impression for the Eleventh Circuit, *Green Tree* argued that the court lacked jurisdiction over the appeal because it arose out of an embedded proceeding and, therefore, was not a final decision under section 16 of the F.A.A.⁷⁶ In analyzing the case, the *Randolph* court began with a lengthy discussion of the circuit split on the appealability of orders compelling arbitration in embedded proceedings, where the circuit court dismisses the remaining claims.⁷⁷ The court then chose to focus on the meaning of the term "final decision" in the statute. Noting that "final decision" is a long-standing term of art, the court looked to prior judicial decisions for guidance in interpreting the meaning of the term as used in the statute.⁷⁸ The court determined that its interpretation of the term has tended to follow the traditional definition, meaning that the decision has disposed of all issues in the litigation, leaving nothing for the court to do but execute the judgment.⁷⁹

The court went on to note that in most arbitration appeals, there will be no difference between a decision based on the traditional definition of "final decision" or one that relies on the distinction between embedded and independent proceedings.⁸⁰ The reason for this is that in most embedded proceedings, the district court stays the action, leaving other issues unresolved.⁸¹ In such cases, the court has more to do than simply execute the judgement, so there is no final decision.⁸²

The court then drew a distinction between cases where the court issues a stay, and cases such as *Randolph*, where the court has disposed of the remaining issues by dismissing the case.⁸³ The court determined that it would lack jurisdiction over the appeal only if it attached "excessive significance" to the difference between embedded and independent claims.⁸⁴

In rejecting the reasoning adopted by a majority of circuits, the *Randolph* court chose to focus on the legislative history behind the enactment of section 16. The court emphasized the Senate Judiciary Committee's statement that "under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from . . . a final judgment dismissing an action in deference to

76. *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1153 (11th Cir. 1999).

77. *Id.* at 1153-54.

78. *Id.* at 1154.

79. *Id.*

80. *Id.* at 1155.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

arbitration. These appeals preserve the general policy that appeals should be available where there is nothing left to be done in the district court.”⁸⁵ The court noted that the amendment came shortly after the demise of the Enelow-Ettelson doctrine, which had determined the appealability of stays by relying on the old distinctions between law and equity.

The purpose of section 16, the court reasoned, was to “‘furnish a clear rule for appealability of orders relating to arbitration proceedings,’ not to erect a set of distinctions as esoteric as the law-equity distinction.”⁸⁶ Allowing appeals in cases where the district court has dismissed the case promotes the policy goal of ensuring appeals where there is nothing left to be done in the district court.

The court noted that in *Randolph*, the district court dismissed the case with prejudice, which is clearly a decision that ends the litigation on the merits.⁸⁷ Many cases relying on the embedded versus independent distinction have involved dismissals without prejudice, and the *Randolph* court declined to address whether such cases should be treated as final decisions.⁸⁸

Based on its interpretation of “final decision” and the legislative history behind section 16, the *Randolph* court joined the minority of circuits and held that orders compelling arbitration in embedded proceedings are appealable, when the district court dismisses the case with prejudice.⁸⁹

V. COMMENT

The *Randolph* decision follows the minority rule, holding that orders compelling arbitration in embedded proceedings are final decisions, when the district court dismisses the remaining claims.⁹⁰ Thus, these orders may be appealed immediately. The decision of the Eleventh Circuit to reject the majority rule widens the split between the circuits on this issue.

Two major policy goals are at odds in this disagreement. First, there is the policy that immediate appeals should be available after the court has disposed of all the issues in the case and nothing remains but to execute the order. The second policy goal is to enforce the pro-arbitration goals of the F.A.A.

The circuit split identifies two conflicting points of view regarding the appeal of orders compelling arbitration. The majority seeks to uphold the pro-arbitration policy behind the statute, holding that orders to compel arbitration are never final decisions when they arise in embedded proceedings.⁹¹ The minority purports to

85. *Id.* at 1156 (quoting 134 CONG. REC. S16284 (daily ed. Oct. 14, 1988)).

86. *Id.* at 1155-56 (quoting *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1217 (7th Cir. 1998) (Wood, J., dissenting)).

87. *Id.* at 1156.

88. *Id.*

89. *Id.*

90. *Id.*

91. See *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998); *Napleton v. General Motors Corp.*, 138 F.3d 1209 (7th Cir. 1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997); *Pigsah Contractors, Inc. v. Rosen (In re Pigsah Contractors, Inc.)*, 117 F.3d 133 (4th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996); *Gammara v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994).

strike a balance between the pro-arbitration goal of the statute with the longstanding policy allowing appeals from final court decisions by allowing appeals in embedded proceedings when the court dismisses the remaining claims.⁹² Both sides have strong arguments, and it is difficult, if not impossible, to reconcile these decisions. Ironically, some guidance may be found by considering the extreme view of one legal commentator, who argues for an amendment to the statute that would prohibit appeals from all orders compelling arbitration, including those which arise in independent proceedings.⁹³ While this viewpoint is unlikely to be adopted by Congress, it may provide the necessary backdrop for resolving the split between the circuits.

The majority of circuits have opted for a clear rule that bars appeal of all orders compelling arbitration in embedded proceedings. These circuits favor the pro-arbitration policy behind the F.A.A. By making all orders compelling arbitration in embedded claims non-appealable, the majority of circuits seem to be taking steps to promote alternative dispute resolution.⁹⁴ This decision will ensure that in all embedded proceedings, when a district court compels arbitration, the parties will have to wait to appeal a decision until the dispute has run its course through arbitration. Another benefit of the majority rule is that it promotes predictability by adopting a clear distinction between embedded and independent claims.

The minority rule appears to undercut the pro-arbitration goals of the F.A.A. These courts claim to strike a balance between the statute's policy favoring arbitration and the longstanding policy that appeals should be available to parties after the district court has disposed of all the claims in an action.⁹⁵ According to the minority courts, the legislative history shows that the drafters did not intend for the pro-arbitration goal of the statute to preclude the right of parties to seek appeals from final judgments.⁹⁶ Allowing appeals assures the parties that they will be able to rely on the courts to correct erroneous orders compelling arbitration, and could result in more confidence in the arbitration process.⁹⁷

Taken in isolation, the majority appears to offer a pro-arbitration view while the minority appears to offer a compromise between the pro-arbitration goals of the statute and the general rule of allowing appeals from final decisions. The picture changes, however, when Professor Siegel's view is added to the debate. Professor Siegel advocates a much more pro-arbitration view than the majority, suggesting an amendment to the statute which would bar appeals of all orders compelling arbitration until after the arbitration had run its course.⁹⁸ He, too, relies on the legislative history behind the amendment, arguing that the potential for appeals in independent proceedings will result in an increase in the time and money spent to

92. See *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir. 1999); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44 (3d Cir. 1991); *Arnold v. Arnold Corp.-Printed Communications for Bus.*, 920 F.2d 1269 (6th Cir. 1990).

93. Siegel, *supra* note 31, at 593.

94. Kemp, *supra* note 19, at 148.

95. *Randolph*, 178 F.3d at 1156.

96. See, e.g., *Arnold*, 920 F.2d at 1274-75.

97. Kemp, *supra* note 19, at 148.

98. Siegel, *supra* note 31, at 593.

resolve disputes, which is “wholly at war” with the pro-arbitration goals of the statute.⁹⁹

Professor Siegel’s view was evidently not embraced by Congress because section 16 clearly allows appeals of orders compelling arbitration in independent proceedings.¹⁰⁰ One could infer that it was considered and rejected. However, it provides a valuable perspective for resolving the conflict between the circuits. Professor Siegel’s proposal represents an extreme, pro-arbitration view, prohibiting the immediate appeal of all orders compelling arbitration. In contrast, the minority circuits offer an opposing view. They allow appeals of all orders compelling arbitration, except those that arise in embedded proceedings where the court stays the remaining claims. Between these two poles, lies the majority of circuits, which allow appeals in independent proceedings but deny appeals in embedded proceedings.

The real compromise, then, is offered by the majority view. The majority of circuits supports the pro-arbitration policy behind the statute. The assertion by the minority courts, that their view reflects the intent of the statute by striking a balance between the pro-arbitration goals of the statute and the general rule of allowing appeals from final decisions, seems dubious when one looks at the practical effect of the minority rule. Essentially, judges can determine the appealability of an order compelling arbitration by either granting a stay or a dismissal.¹⁰¹ If a stay is granted, there will be no appeal.¹⁰² If a dismissal is granted, the party opposing arbitration may appeal immediately.¹⁰³ As the majority courts have indicated, it seems doubtful that Congress intended such a result.¹⁰⁴

Arbitration is designed to save parties time and money, and the intent of the statute was to prevent judicial intervention from impeding the arbitration process and undermining these benefits.¹⁰⁵ It is true that a party opposing arbitration may have to bear the burden of an erroneous decision to arbitrate and wait until the arbitration has run its course to be vindicated. The majority concedes this, and points out that this was a deliberate policy choice.¹⁰⁶

In summary, the majority view seems to reflect the true intent of section 16 by supporting the pro-arbitration goals of the statute and keeping judicial intervention to a minimum. Parties contesting arbitration orders in embedded proceedings may still appeal, but only after the arbitration has run its course. The *Randolph* court, however, has joined the minority in holding that arbitration orders in embedded proceedings may be appealed when the court dismisses the remaining claims. These courts are concerned that the pro-arbitration goals of the statute have overshadowed the right to appeal a final judgement. While the argument has merit, it undercuts a deliberate policy choice behind the statute to reduce judicial interference with the arbitration process.

99. *Id.* at 591.

100. *See supra* note 18.

101. *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1245 (9th Cir. 1997).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* (quoting 9 U.S.C.A. § 16 practice commentary (West Supp. 1997)).

106. *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1214 (7th Cir. 1998).

VI. CONCLUSION

The *Randolph* decision creates a wider split among the circuits on the issue of whether orders compelling arbitration in embedded actions should be treated as final decisions, when the court dismisses the remaining claims. The court purports to strike a fair balance between the competing policies at stake and does not favor the pro-arbitration goals of the statute as strongly as the majority courts. The court's decision to follow the minority view indicates that considerable disagreement still exists among the circuit courts of appeal about the true policy goals behind section 16. While the amendment attempted to clarify this area of the law, this case shows the circuits are far from resolving the split of authority on this issue.

SARAH BAXTER