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Appealability of District Court Orders Staying Court Proceedings Pending Arbitration

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THE APPEALABILITY OF DISTRICT COURT ORDERS STAYING COURT PROCEEDINGS PENDING ARBITRATION

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I. FORMULATING THE PROBLEM

The established prerequisite of review in the federal courts of appeals has been the condition that an appeal can be taken only from "final orders or decisions" or from specified interlocutory orders which grant or deny injunctions.[1] In 1934 the United States Supreme Court was presented with an issue of first impression: should a nonfinal district court order which grants or denies a stay of court proceedings until the completion of arbitration be considered an appealable interlocutory order.[2] Prior to the fusion of law and equity, orders entered by a court of equity which stayed proceedings at law uniformly were appealable. In *Enelow v. New York Life Insurance Co.*, the Supreme Court analogized this rule in equity to an order entered after the fusion of law and equity which stayed proceedings at law pending resolution of an equitable claim or defense.[3] The Court found the analogy to be dispositive and held that such an order, though interlocutory, was an appealable injunction and thus subject to immediate appellate review.

Since 1935 the Supreme Court on four occasions has amplified the scope of appellate jurisdiction over the noted species of order.[4] In the end, a clear-cut, arbitrary and mechanical rule was fashioned and reaffirmed. This rule, almost self-applying once it is understood, has been followed rigorously by most circuit courts of appeals.[5] The present rule on the appealability of stay orders achieves highly predictable results but turns on the historical distinction between proceedings at law and in

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1. *See* notes 7, 10, & 16 *infra.*

2. *See* text accompanying notes 7-45 *infra.*

3. 293 U.S. 379, 381-82 (1935). *See* text accompanying notes 13-18 *infra.*

4. *See* text accompanying notes 18-45 *infra.*

5. *See* note 9 and section II, part B *infra.* There has been expressed dissatisfaction with the rule, however. *See, e.g.*, Wallace v. Norman Indus., Inc., 467 F.2d 824, 827 (5th Cir. 1972) discussed at text accompanying notes 69-75 *infra.*

equity which is irrelevant to considerations underlying the need for immediate appellate review of stay orders. It is the thesis of this article that an alternative rule can be fashioned which will grant or deny appeal of stay orders with reference to a constellation of factors. The proposed rule is no more difficult to apply and should not result in a greater number of appeals.

After briefly setting out the relevant statutes describing appellate jurisdiction, an analysis of Supreme Court law from *Enelow* to the present will be undertaken. A brief summary of those problems causing the most difficulty at the court of appeals level in applying the Supreme Court law follows.[6] The third section of the article will assess the present law in light of the policy reasons underlying arbitration and the concomitant desirability of permitting appellate review of stay orders.

The main premise of the third section is that parties should be encouraged to enter into lawful and binding arbitration agreements which might remove the necessity of recourse to the courts. To accomplish a conservation of judicial resources it is necessary that some decision-making authority, in the practical if not in the absolute sense, be delegated to the arbitrator selected by the parties and, in the second instance, to the district courts. Once a district court has determined that the arbitration agreement encompasses the contested issues and that no exigent countervailing reason exists for the exercise of federal jurisdiction prior to arbitration, there should be no need to resort to immediate appellate review. While a case-by-case rule is flexible in its application and is somewhat unpredictable in the results it mandates, there is no reason why standards similar in principle to those which apply to a district court's grant or denial of an injunction cannot be adopted with reference to appellate review of orders staying district court proceedings pending arbitration. Finally, a number of concrete proposals are set out in order to aid both litigants and courts which must deal with the *Enelow-Ettelson* rule.

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6. *See* text accompanying notes 46-186 *infra*. For an example of how the appealability of a stay order is procedurally raised within the context of a suit, *see* text accompanying notes 55-56 *infra; see also* note 63 *infra*.

II. COURT-MADE LAW ON THE APPEALABILITY OF ORDERS STAYING COURT PROCEEDINGS PENDING ARBITRATION

Section 1291 of the federal Judicial Code provides that the federal courts of appeals have jurisdiction over appeals from all "final decisions" of the federal district courts.[7] The United States Supreme Court and the lower federal courts have uniformly held[8] that district court orders staying or refusing to stay legal proceedings pending arbitration are interlocutory and thus are not appealable under section 1291.[9] Thus, the

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7. 28 U.S.C. § 1291 (1976) provides in its entirety:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

8. *But see* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 185-86 (1955) (Black, J., dissenting).

9. The Supreme Court cases are: Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942); Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454 (1935); Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449 (1935); Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935).

The Circuit Court of Appeals cases are: Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831 (7th Cir. 1977); Zell v. Jacoby-Bender, Inc., 542 F.2d 34 (7th Cir. 1976); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied,* 423 U.S. 832 (1975); Gray Line Motor Tours, Inc. v. City of New Orleans, 498 F.2d 293 (5th Cir. 1974); Danford v. Schwabacher, 488 F.2d 454 (9th Cir. 1974); Mercury Motor Express v. Brinke, 475 F.2d 1086 (5th Cir. 1973); J.S. & H. Constr. Co. v. Richmond City Hosp. Auth., 473 F.2d 212 (5th Cir. 1973); Wallace v. Norman Indus., Inc., 467 F.2d 824 (5th Cir. 1972); New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 (1st Cir. 1972); *In re* Revenue Properties Litigation Cases, 451 F.2d 310 (1st Cir. 1971); County of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53 (1st Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); Dickstein v. du Pont, 443 F.2d 783 (1st Cir. 1971); Western Geophysical Co. of America v. Bolt Assocs., Inc., 440 F.2d 765 (2d Cir. 1971); Southeastern Enameling Corp. v. General Bronze Corp., 434 F.2d 330 (5th Cir. 1970); United Transp. Union v. Illinois Cent. R.R., 433 F.2d 566 (7th Cir. 1970), *cert. denied,* 402 U.S. 915 (1971); Hart v. Orion Ins. Co., 427 F.2d 528 (10th Cir. 1970); Power Replacements Inc. v. Air Preheater Co., 427 F.2d 980 (9th Cir. 1970); Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2d Cir. 1970); H.W. Caldwell & Sons v. United States, 407 F.2d 21 (5th Cir. 1969); Chapman v. International Ladies' Garment Workers' Union, 401 F.2d 626 (4th Cir. 1968); Hilti, Inc. v. Oldach, 392 F.2d 368 (1st Cir. 1968); American Safety Equip. Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2d Cir. 1968); Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2d Cir. 1968); Standard Chlorine, Inc. v. Leonard, 384 F.2d 304 (2d Cir. 1967); Blount Bros. Constr. Co. v. Troitino, 381 F.2d 267 (D.C. Cir. 1967); Travel Consultants, Inc. v. Travel Management Corp., 367 F.2d 334 (D.C. Cir. 1966); Wirtz v. Mississippi Publishers Corp., 364 F.2d 603 (5th Cir. 1966); Alexander v. Pacific Maritime Ass'n, 332 F.2d 266 (9th Cir.), *cert. denied,* 379 U.S. 882 (1964); Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir.), *cert. denied,* 371 U.S. 891

question of appealability turns on whether granting or denying a stay pending arbitration is tantamount to the granting or denial of an injunction within the meaning of section 1292(a)(1).[10] An examination of the applicable case law shows that the consensus of the courts has been to consider a stay pending arbitration tantamount to the granting or denial of an injunction pursuant to section 1292(a)(1), if the stay has been sought in an action at common law in order to permit the prior determination of an equitable claim or defense. The origin and elements of this test of appealability will be examined in the remaining sections of this part.

A. *The* Enelow-Ettelson *Rule*

The Supreme Court interpreted section 1292(a)(1) and its

(1962); Kirschner v. West Co., 300 F.2d 133 (3d Cir. 1962); Glen Oaks Utils., Inc. v. City of Houston, 280 F.2d 330 (5th Cir. 1960); Hering Realty Co. v. General Constr. Co., 272 F.2d 371 (4th Cir. 1959); Armstrong-Norwalk Rubber Corp. v. Local 283, 269 F.2d 618 (2d Cir. 1959); Day v. Pennsylvania R.R., 243 F.2d 485 (3d Cir. 1957); Cuneo Press, Inc. v. Kokomo Paper Handlers' Union, 235 F.2d 108 (7th Cir. 1956); Wilson Bros. v. Textile Workers Union, 224 F.2d 176 (2d Cir.), *cert. denied,* 350 U.S. 834 (1955); Hudson Lumber Co. v. United States Plywood Corp., 181 F.2d 929 (9th Cir. 1950); United States v. Baker-Lockwood Mfg. Co., 138 F.2d 48 (8th Cir. 1943).

10. 28 U.S.C. § 1292 (1976) provides in pertinent part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
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> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a district review may be had in the Supreme Court . . . .

The statutory authorization of an appeal from a district court's grant or continuance of an injunction has been in effect since 1891, and the statute permitting appeal from an order refusing or dissolving an injunction has been in effect since 1895. 26 Stat. 826 (1891); 28 Stat. 666 (1895). In 1925 the statute was further amended to expand the number of orders which were appealable (orders modifying or refusing to modify injunctions; orders in receiverships) and to omit the words "in equity" from the phrase "where upon a hearing in equity in a district court." In *Baltimore Contractors* the Supreme Court noted in dictum that the omission of the phrase "in equity" was not intended to remove the limitation on appealability to those orders which were an exercise of the district court's equity powers. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 180 n.6 (1955).

Although there is no legislative history which outlines the policy reasons underlying the enactment of § 1291(a)(1) it has been stated repeatedly that Congress wished to prevent the irreparable injury which a party might suffer if he cannot appeal the grant or denial of an injunction until a final judgment has been entered. *Id.* at 181; Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897). The history of 28 U.S.C. § 1292 is outlined in the opinion of Reed, J., in Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 179-83 (1955). *See also* Wright, *The Interlocutory Appeals Act of 1958,* 23 F.R.D. 199 (1959).

predecessor section 227[11] in five cases.[12] The rule on the appealability of stay orders, however, has been denominated the *Enelow-Ettelson* rule, thus arbitrarily immortalizing two of those cases. Careful analysis shows that *Enelow* and *Ettelson* are really at odds with one another. *Enelow* established the baseline rule, *Ettelson* expanded its applicability, and subsequent cases reinterpreted *Ettelson* and thereby limited its scope. While current Supreme Court law places the principles of *Enelow* in the ascendancy, the suggested rule set out in part three of this article places greater reliance on the central logic of *Ettelson.*

1. *Enelow*

In *Enelow v. New York Life Insurance Co.,*[13] decided before the merger of law and equity, plaintiff sued at law upon a life insurance contract issued in December, 1931, on the life of plaintiff's husband who died in May, 1933. Defendant insurance company set up an affirmative defense that the policy had been obtained by means of a materially fraudulent application. Defendant requested that its equitable defense be heard in advance of trial by jury of the legal issues.[14] The district court granted the petition, and the Third Circuit Court of Appeals affirmed. The Supreme Court granted certiorari and reversed on the ground that the district court should not have ordered a hearing in equity prior to the trial of the action at law.[15] In

11. Section 129 of the Judicial Code, 28 U.S.C. § 227 (1940) is quoted in note 16 *infra.*

12. *See* the Supreme Court cases cited in note 9 *supra. See also* Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454 (1935).

13. 293 U.S. 379 (1935).

14. This petition was presented pursuant to 28 U.S.C. § 398 (1934) (§ 274b of the Judicial Code). The text of § 398 is as follows:

> **Equitable defenses and equitable relief in actions at law.** In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of this suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

15. 293 U.S. at 385-86.

its analysis the Court addressed the preliminary issue of the appealability of the order under review.

Whether any court of appeals has the jurisdiction to review a district court order granting a hearing on the equitable issues prior to the jury trial on the legal issues depends on whether the order can be considered as one granting an injunction within the purview of section 227, the predecessor to section 1292(a)(1).[16] The *Enelow* Court concluded that, although interlocutory, the order was appealable as one that granted an injunction. It reasoned that prior to the enactment of section 274b of the Judicial Code, the defendant could have raised his equitable defense only by bringing an independent suit. Thus, the district court was using its power as chancellor in granting or refusing to grant a stay of the prosecution of the legal claims and the order, in effect, is one granting or refusing an injunction.[17]

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16. Section 129 of the Judicial Code (28 U.S.C. § 227 (1940)) provided in part as follows:

> Where . . . an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused . . . an appeal may be taken from such interlocutory order or decree . . . .

The companion section 128 of the Judicial Code (28 U.S.C. § 225 (1938)) provided as follows:

> (a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions —
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> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238.
>
> Second. In the United States District Courts for Hawaii and for Puerto Rico, in all cases.
>
> Third. In the District Court for the District of Alaska, or any division thereof, and in the District Court of the Virgin Islands, in all cases; and in the United States District Court for the District of the Canal Zone in the cases and modes prescribed in sections 61 and 62, title 7, Canal Zone Code (48 Stat. 1122).
>
> Fourth. In the Supreme Courts of the Territory of Hawaii and of Puerto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interests and costs, exceeds $5,000, and in all habeas corpus proceedings.
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> Fifth. In the United States Court for China, in all cases.

17. 293 U.S. at 383. In so holding the Court inferentially rejected any argument to the effect that both legal and equitable proceedings were pending in the same court and therefore the district court order was merely controlling the progress of the litigation before it, but was not "staying" the proceedings at law.

Decided on the same day as *Enelow* was *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*,[18] which further clarified the scope of the appealability rule. In *Shanferoke* plaintiff sued for damages owing for a breach of contract. The defendant set up the contract's arbitration clause as an affirmative defense and requested that the district court action be stayed until arbitration was entered into and completed. The district court construed the arbitration clause as being enforceable only in New York state courts[19] and therefore denied the stay. The Second Circuit Court of Appeals reversed on the ground that even if the district court had properly construed the arbitration clause, the United States Arbitration Act authorized the stay.[20] The Supreme Court granted certiorari and affirmed. The Court concluded that the district court order denying the stay was not appealable as a final order pursuant to section 227, the predecessor to section 1291.[21] However, the Court cited *Enelow* in support of its conclusion that the order denying the stay based on an equitable defense interposed in an action at law was appealable as an "injunction" pursuant to section 227, the predecessor to section 1292(a).[22] The Court concluded that the equitable defense asserted in this case was "the special defense setting up the arbitration agreement" itself.[23] The Court noted that so long as the terms of the arbitration agreement do not clearly prohibit proceedings in the federal court, "it is immaterial whether or not the terms of the contract sued on would preclude entry in federal court of a decree for specific performance of the arbitration."[24] In sum, the law of appealability of stay orders under *Enelow* and

18. 293 U.S. 449 (1935).

19. The clause is reproduced in its entirety at 293 U.S. 450-51.

20. Section 3 of the United States Arbitration Act provided in its entirety:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1925).

21. 293 U.S. at 451. *See* note 16 *supra* and accompanying text.

22. 293 U.S. at 452. *See* note 16 *supra* and accompanying text.

23. 293 U.S. at 452.

24. *Id.* The significance of this point is best explained in a discussion of the circuit courts of appeals' interpretations of the *Enelow* case discussed in part B *infra*.

Shanferoke is that an order granting or denying a stay of common-law proceedings pending arbitration is appealable if the stay permitted the prior determination of an equitable defense.

2. *Ettelson*

Ettelson v. Metropolitan Life Insurance Co.,[25] contains the first Supreme Court consideration of the appealability of stay orders since the enactment of the Federal Rules of Civil Procedure. The underlying facts and procedural history are substantially identical to those in *Enelow*. Plaintiff sued defendant to recover amounts allegedly due under life insurance policies issued on the life of plaintiff's deceased spouse. Plaintiff demanded a jury trial. The defendant set up a defense that the policies were obtained by fraudulent statements made by the insured in his application for the policies. Defendant also interposed a counterclaim for cancellation of the policies upon return by defendant of the premiums paid and for an injunction prohibiting plaintiffs from prosecuting their action at law. The district court ruled that the counterclaim for cancellation and injunction should be disposed of by the court sitting in equity before trial by jury on the claims at law. The Third Circuit Court of Appeals dismissed the appeal on the ground of lack of jurisdiction but certified the issue to the Supreme Court. The precise question presented on certification was whether an order which requires a counterclaim formerly sounding in equity to be heard by the court prior to the jury's disposition of a claim of a character formerly cognizable at law is an appealable injunction within the meaning of section 227.[26]

The Supreme Court in a two-step reasoning process unanimously concluded that it was an appealable order. First, the Court concluded that the newly adopted Federal Rules of Civil Procedure did not necessarily change the application of the rule established in *Enelow*.[27] Defendant had argued that the effect of the enactment of the rules was to destroy the statutory basis

25. 317 U.S. 188 (1942).

26. *See* note 16 *supra* and accompanying text.

27. Rule 1 states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 2, in its entirety provides that "[t]here shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 1; 2.

for holding that the order appealed from was an appealable "injunction" of a separate proceeding, but rather that the order was an interlocutory stay of one phase of a single court proceeding entered to effectuate the Court's inherent power to control the progress of the litigation before it.[28] The Court also noted that the determinative factor in deciding whether an order has an injunctive effect, and thus, whether the order is appealable is not the label given to the district court action but whether the order "may, in practical effect, terminate that action."[29] Because the *Ettelson* Court explicitly relied upon *Enelow* in coming to this result, there is an uncertainty over whether the Court was merely amplifying in dictum the reasons behind the rule in *Enelow* or whether the Court was shifting the emphasis of the rule from a ritualistic determination of claims and defenses at law or in equity to a case-by-case determination of the injunctive effect of the order.[30] This uncertainty was removed in the two remaining Supreme Court cases addressing the issue.[31]

3. The Synthesis

With *Enelow* and *Shanferoke* the Supreme Court adopted a two-pronged test for appealability of stay orders: (1) Is the action in which the order was made an action which before the fusion of law and equity was "at common law"? (2) Was the stay of the common-law claims sought to permit the prior deter-

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28. Significantly enough, the Court did not expressly adopt the argument of plaintiff that the distinction between law and equity, with respect to the right of appeal, must persist as a constitutional requirement. 317 U.S. at 189.

29. *Id.* at 191-92. The Court went on to note that the order under review

> is as effective in these respects as an injunction issued by a chancellor. If the order be found to be erroneous, it will have to be set aside and the plaintiffs permitted to pursue their action to judgment. The plaintiffs are, therefore, in the present instance, in no different position than if a state equity court had restrained them from proceeding in the law action. Nor are they differently circumstanced than was the plaintiff in the *Enelow* case. The relief afforded by § 129 is not restricted by the terminology used. The statute looks to the substantial effect of the order made.

Id. (citations omitted).

30. An alternate ground for decision, unnecessary though it may be, is to be treated as a necessary part of the holding for "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum.*" Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

31. For a discussion of the parallel development in the law of the right to trial by jury, *see* text accompanying notes 162-170 *infra.*

mination of an equitable defense or counterclaim? In *Ettelson* the Court gave the test a new gloss when it held that the test of the appealability of a stay order is not whether the action was commenced "at common law" rather than "in equity" but whether the order has an injunctive effect or whether its entry invokes the normal equitable principles underlying an injunction. Whether the *Ettelson* holding was intended to mark an abandonment of the first prong of the *Enelow* test was settled by the Supreme Court in *City of Morgantown v. Royal Insurance Co.*,[32] and *Baltimore Contractors, Inc. v. Bodinger.*[33]

In *Morgantown* the insurance company sought reformation of a policy covering property loss contending that a claim for damage caused by fire and lightning was not covered since the parties intended that the contract cover only windstorm damage. The insured answered denying mutual mistake and counterclaimed seeking recovery on the policy as written and demanded a jury trial. The district court granted the insurance company's motion to strike the demand. The court of appeals dismissed an appeal of this order on the ground of lack of jurisdiction. The Supreme Court refused to hold that the motion to strike was in effect a bill in equity to enjoin the prosecution of the insured's claim at law. In the Court's view, the policy against piecemeal litigation reflected in the Rules of Civil Procedure and the concomitant adoption of a single unified practice necessitated the conclusion that the district court judge had only made "a ruling as to the manner in which he will try one issue in a civil action pending before himself."[34] Since this was arguably all that the district court had done in *Enelow* or *Ettelson, Morgantown* seemed to be a repudiation of those cases.[35] However, five years later the Supreme Court

32. 337 U.S. 254 (1949).

33. 348 U.S. 176 (1955).

34. 337 U.S. at 257.

35. The majority perhaps tried to mitigate its implicit rejection of *Enelow-Ettelson* by noting that

> [w]hatever the present validity of the analogy to common-law practice which supported those cases, it is of no help here. This is not a situation where a "chancellor" in denying a demand for a jury trial can be said to be enjoining a "judge" who has cognizance of a pending action at law.

Id.

Justice Frankfurter filed a concurring opinion which carefully noted that while the majority did not base its decision on the rubric adopted in *Enelow-Ettelson,* the rule of decision adopted therein adequately supports the holding. The concurrence noted

again fine-tuned the appealability rule in *Baltimore Contractors, Inc. v. Bodinger* and made it clear that the holding of *Enelow* remained the preferred rule.

In *Baltimore Contractors,* plaintiff Bodinger brought an equitable action for an accounting of the profits of a joint venture. Defendant moved to stay the action citing section 3 of the United States Arbitration Act[36] which authorizes a stay by a federal court when an issue is "referable to arbitration under an agreement in writing for such arbitration."[37] The district court denied the stay on the ground that the agreement to arbitrate did not apply to the dispute in question. The Second Circuit Court of Appeals dismissed the appeal for lack of subject matter jurisdiction. On certiorari, the Supreme Court concluded that the trial court order was neither a final decision under section 1291,[38] nor an interlocutory order appealable under section 1292.[39] In so holding the Court made it clear that it had not abandoned either portion of the two-step process outlined in *Enelow* or *Ettelson.* Noting that "it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper,"[40] the Court concluded that the *Enelow* rule did not require an immediate appeal. The *Baltimore Contractors* Court held that the *Enelow* rule gov-

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that the facts in *Morgantown* are exactly the converse of those involved in *Enelow* and while the "layman may see no difference between the postponement by a trial judge of an action at law, and the postponement of such action by an equitable proceeding . . . the Congress has seen fit to allow an appeal from one result and not from the other." 337 U.S. at 261.

Justices Black and Rutledge filed a dissent concluding that the effect of the majority is to reinterpret § 129 of the Judicial Code [now 28 U.S.C. § 1292(a)(1)] and to overrule *Enelow-Ettelson.* The dissent applied the two-pronged test of *Enelow-Ettelson* (inferentially concluding that *Ettelson* did not depart from *Enelow*), determined that the underlying case for reformation was in equity, and that the granting of the motion to strike the jury demand was "in effect" a denial of a stay of the *equitable* claims pending disposition of a defense *at law.* The dissenting justices emphasized the importance of the right to trial by jury and concluded that the anomaly of denying appeal here but permitting appeal if the defendant had sued at common law in state court and if the plaintiff in federal court had secured a stay of that suit, could not be permitted to stand. 337 U.S. at 264.

36. *See* note 20 *supra.*

37. The arbitration clause is reproduced at 348 U.S. at 177.

38. *Id.* at 179.

39. *Id.* at 185.

40. *Id.* The majority thus adopts the reasoning of Justice Frankfurter's concurring opinion in *Morgantown.*

erned the appeal of orders determining equitable defenses or counterclaims interposed into a legal proceeding. But, because the procedural setting of *Baltimore Contractors* concerned an equitable proceeding for reformation with a counterclaim at law, "the decision to hear the reformation issue first without a jury was only a decision as to how to try the case, and therefore was not an interlocutory order in the nature of an injunction."[41]

In sum, since it is clear that a literal reading of *Ettelson* expands the scope of appealable interlocutory orders to include those stay orders which possess an injunctive effect regardless of the formal characterization of the proceedings in which they have been entered, *Baltimore Contractors,* by reasserting the need for an underlying common-law claim, is a retreat, however carefully masked. The Court in *Baltimore Contractors* acknowledged the "incongruity" of taking jurisdiction in a legal proceeding and denying jurisdiction in an equitable proceeding, but refused to fashion a simpler rule in deference to congressional prerogatives.[42] The deficiencies of this approach were adequately voiced in the dissenting opinion entered by Justices Black and Douglas. The dissent cites the anomaly of refusing appeal of a stay order entered in an equity proceeding but permitting appeal if the same order were entered by a judge in another case.[43] The dissent concludes that "the Court's obeisance to these incongruous fictions"[44] of "law" and "equity" is not required by congressional enactments. Rather, the dissent further concludes that the policy against piecemeal appeals requires the courts to define the requirements of section 1292 flexibly in order to avoid useless delays and expenses.[45]

Notwithstanding the deficiencies of the *Enelow-Ettelson* rule, the Supreme Court has declined to consider the issue since the 1955 *Baltimore Contractors* case. While the Court in *Baltimore Contractors* used a separation of powers argument to commit itself to the *Enelow* and *Morgantown* precedents limit-

41. *Id.* at 183. The Supreme Court said that this result was controlled by its decision in City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949).

42. 348 U.S. at 184-85.

43. *Id.* at 186. This is precisely the rationale used by the Court in *Enelow* to permit appeal under § 1292(a)(1). *See* note 3 *supra.*

44. *Id.*

45. Additionally, the dissenters held that the district court order was a final "collateral" order appealable under 28 U.S.C. § 1291 (1954). 384 U.S. at 185. *See* text accompanying note 8 *supra.*

ing appeal, rather than the expansive *Ettelson* approach, *Baltimore Contractors* has been read by the courts of appeals as following and keeping alive both lines of cases subsumed in the *Enelow-Ettelson* rule. With *Baltimore Contractors* it is clear that despite the counsel of the dissent in that case, the central thesis of *Ettelson* has been redefined to comply fully with the more limited dictates of *Enelow.* Notwithstanding certain flashes of independence the courts of appeals have followed the Supreme Court formulation of the *Enelow-Ettelson* rule.

B. Application of the Enelow-Ettelson *Rule by Circuit Courts of Appeals*

The appealability of an order staying or refusing to stay a court action pending completion of arbitration depends on the type of proceeding in which the order is entered. There are basically two broad classifications of proceedings where the question of appealability has arisen in the courts of appeals: (1) a motion to compel or to prevent arbitration; and (2) an action for an injunction to compel or to prevent arbitration. Each will be discussed seriatim.

1. Motions to Compel and to Prevent Arbitration in a Pending Suit

a. Motions to Compel Arbitration

A party may make a motion to refer issues to arbitration in one of two ways. If the underlying federal claim does not concern maritime aspects or commerce the motion is made pursuant to the Federal Rules of Civil Procedure and must make reference to the terms of an arbitration agreement which allegedly govern the resolution of the issues. If the underlying federal claim involves a maritime or commercial transaction, section 3 of the United States Arbitration Act may apply. Section 3 of the Arbitration Act permits a party to a pending federal action to move for a stay to permit issues to be referred to and resolved by an arbitrator.[46] The district court must determine that there is a written agreement to arbitrate[47] and that the issues are subject to arbitration under the terms of the agree-

46. The present text of § 3 is identical to the version existing in 1925. *See* note 20 *supra.*

47. Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854 (4th Cir. 1944).

ment.[48] Once it makes these two findings it permissibly may stay the court action pending arbitration.

The appealability of a district court order granting or denying a stay pending arbitration, whether or not it was entered pursuant to the Arbitration Act or in response to a motion to compel arbitration, is determined by application of the *Enelow-Ettelson* rule. There is an abundance of case law at the courts of appeals level which concerns the scope of the *Enelow-Ettelson* rule.[49] For purposes of this discussion, those cases which scrupulously apply the two-pronged test may be ignored.[50] Rather, it is more instructive to examine several cases which demonstrate the difficulties in the application of the rule and the ingenuity by which some courts have circumvented its mandate. These "exceptions" to the rule can be grouped into four categories.

i. Is the Underlying Claim at Common Law?

The major crisis of conscience facing reviewing courts on the application of the first prong of the *Enelow-Ettelson* test has been raised on appeals from orders denying stays of declaratory judgment actions in order to permit the determination of an equitable defense. Of the four courts of appeals which have addressed this issue, one has flatly declined to hold that a declaratory judgment is "at common law,"[51] one has held, inferentially, that it is,[52] and the remaining two have adopted a

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48. Despite the broad language of the statute, its compulsory effect is applicable only to arbitration of contracts evidencing commercial or maritime transactions. Miletic v. Holm & Wonsild, 294 F. Supp. 772 (S.D.N.Y. 1968); Kirschner v. West Co., 185 F. Supp. 317 (E.D. Pa. 1960), *appeal dismissed,* 300 F.2d 133 (3d Cir. 1962).

Whether the issues allegedly subject to arbitration under a written agreement are indeed arbitrable is determined by the same criteria used in a § 4 proceeding discussed in the text at notes 142-44 *infra.*

49. *See* note 9 *supra.*

50. No circuit court of appeals has expressly repudiated the *Enelow-Ettelson* rule. There are some cases in some circuits which strictly follow the parameters of the rule while there are other cases which follow the rule in most respects and deviate from its policies where the rule is not clear. The latter types of cases will be discussed in the text. Examples of routine application of the *Enelow-Ettelson* rule are: United Transp. Union v. Illinois Cent. R.R., 433 F.2d 566 (7th Cir. 1970), *cert. denied,* 402 U.S. 915 (1971); Kirschner v. West Co., 300 F.2d 133 (3d Cir. 1962); United States v. Baker-Lockwood Mfg. Co., 138 F.2d 48 (8th Cir. 1943) (decided before *Baltimore Contractors*).

51. Wesley-Jessen, Inc. v. Arias, No. 78-1465 (7th Cir. Sept. 7, 1978). *See* text accompanying notes 54-59 *infra.*

52. Hudson Lumber Co. v. United States Plywood Corp., 181 F.2d 929 (9th Cir.

case-by-case approach.[53]

The Seventh Circuit Court of Appeals addressed the problem in *Wesley-Jessen, Inc. v. Arias.*[54] Plaintiff corporation[55] entered into an agreement with defendant, Marcelo Chiquar Arias, a citizen of the Republic of Mexico, to form a company known as Plastic Contact Lens de Mexico, S.A., as a joint venture. The agreement provided, *inter alia,* that the defendant would transmit to plaintiffs all "experience, information, knowledge, skill and know-how" which the defendant had or might have acquired regarding the use or manufacture of contact lenses and related supplies and equipment. Further, the agreement provided that the plaintiff could use any such disclosures without charge.

Plaintiff filed a complaint seeking a declaration of the rights and obligations of the respective parties with regard to certain alleged disclosures made by defendant which related to the manufacture and use of contact lenses. In sum, the complaint requested the court to enter judgment declaring that defendant, despite his demands, had no right to any royalties in connection with the products produced and manufactured by the plaintiffs.[56] Defendant filed a motion in the district court to stay proceedings pursuant to the contract between the parties which allegedly required arbitration of unresolved dis-

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1950). *See* text accompanying notes 59-62 *infra.*

53. American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 82 (2d Cir. 1968); Wallace v. Norman Indus. Inc., 467 F.2d 824 (5th Cir. 1972). *See* text accompanying notes 63-75 *infra.* 5 MOORE'S FEDERAL PRACTICE ¶ 38.29, at 214.5-.10 (2d ed. 1978).

54. No. 78-1465 (7th Cir. Sept. 7, 1978).

55. Plaintiff Wesley-Jessen, Inc. was a business corporation engaged in the development, manufacture, licensing and sales of contact lenses, and existed pursuant to the laws of the State of Illinois. Plaintiff Dr. Newton K. Wesley was the chairman of the board of directors of Wesley-Jessen, Inc.

56. Count I of the two-count complaint charged that the written agreement of March 24, 1960, provided that the defendant was required to disclose and plaintiff was permitted to use the information which defendant had acquired regarding contact lenses. Count II charged that the alleged disclosures of the defendant were not novel and were never used.

Paragraph 12 of the complaint stated:

> There exists an actual and bona fide controversy between the Plaintiffs and Defendant as to their legal relations in respect to the aforesaid agreement, the rights and obligations of the respective parties under said agreement, the right of the Plaintiff Corporation to manufacture, use, license and sell the Plaintiff Corporation's contact lenses without interference from the Defendant and as to Defendant's claim for monies and royalties in connection with his alleged disclosures to the Plaintiffs.

putes.[57] The court determined that the arbitration clause was binding upon the parties and stayed the proceeding pending completion of arbitration. Plaintiff's appeal to the Seventh Circuit Court of Appeals was dismissed by an unpublished order for want of subject matter jurisdiction.[58] Since the disputes referred to arbitration included issues in equity, the deficiency in appellate jurisdiction necessarily must have resided in the inability of a declaratory judgment action to satisfy the first prong of *Enelow-Ettelson.* The Supreme Court denied certiorari.[59]

On the other hand the Ninth Circuit, in *Hudson Lumber Co. v. United States Plywood Corp.*, held that an order granting defendants a stay pending arbitration was appealable in an action which sought both a declaratory judgment and an injunction against arbitration.[60] The court reasoned that the plaintiff had "no right"[61] to file for an injunction against arbitration when there had been no showing of a breach of the agreement.[62] Thus in eliminating the injunctive relief portion of the underlying claim, the court necessarily must have assumed that the surviving action for declaration of rights was "at common law" since it concluded that the order was appealable under *Enelow-Ettelson.*

The Second Circuit Court of Appeals in *American Safety Equipment Corp. v. J.P. Maguire & Co.* adopted a case-by-case approach to the appealability of orders granting or denying a stay of a declaratory judgment action pending arbitration.[63]

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57. Paragraph 12 of the contract dated March 24, 1960, provided the following regarding arbitration:

> In the event a dispute shall arise between the shareholders or the directors which is not capable of being resolved under the provisions of this agreement then before any party hereto shall have the right to submit the matter involved to litigation in the courts of law, the matter shall be submitted to the American Arbitration Association and settled in accordance with the rules of the Association.

58. No. 78-1465 (7th Cir. Sept. 7, 1978). A petition for rehearing en banc was denied on October 17, 1978.

59. 440 U.S. 911 (1979).

60. 181 F.2d 929 (9th Cir. 1950).

61. *Id.* at 930.

62. *Id.*

63. 391 F.2d 821 (2d Cir. 1968). American Safety Equipment filed a complaint in the district court seeking a declaration that a licensing agreement entered into between it and Hickok was void *ab initio* and that no royalty obligations would accrue under it. J.P. Maguire & Co., as assignee of Hickok's interests, invoked the arbitration clause in the licensing contract. *Id.* at 823. American Safety Equipment filed a second decla-

The district court, in brief, stayed the two declaratory judgment actions filed by American Safety Equipment pending arbitration of the licensing contract. The Second Circuit Court of Appeals held that the order was final and appealable reasoning that although a declaratory judgment action is statutory, "[w]here, as here, such an action has required classification [as legal or equitable], the courts have looked to the basic nature of the suit in which the issues involved would have arisen if Congress has not created the Declaratory Judgment Act."[64] Since the dispute between American Safety Equipment and the licensor would have arisen as a dispute at law, were it not for the Declaratory Judgment Act, the underlying action was determined to be "at common law."[65] Further, since the dispute between American Safety Equipment and Maguire, the assignee, was "not [filed] in a vacuum"[66] but was an "adjunct" to the dispute between American Safety Equipment and the assignor, the court held that the order staying the second declaratory action was also appealable.[67] To reach this result the court necessarily must have concluded that the underlying issues were at common law and that the first prong of the *Enelow-Ettelson* test was satisfied.[68]

Four years later the Fifth Circuit Court of Appeals adopted the same method of analysis. In *Wallace v. Norman Industries, Inc.*, Norman originally sued in the District Court for the Northern District of Illinois requesting a determination that it was not liable to Wallace for alleged violations of the antitrust laws, breach of warranty and fraudulent misrepresentation.[69] Thereafter, Wallace sued in the District Court for the Southern District of Alabama for damages and injunctive relief based on the same underlying franchise contract. The Illinois action was dismissed on Wallace's motion and Norman filed a motion in

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ratory judgment action against Maguire substantially identical in content to the one filed against Hickok and in addition sought an injunction against arbitration on the ground that both the license agreement and the assignment were invalid. *Id.*

64. *Id.* at 824 (citations omitted). *See* text at note 73 *supra,* for a discussion of a similar balancing approach adopted by the Fifth Circuit Court of Appeals.

65. 391 F.2d at 824. The approach adopted by the American Safety Equipment Corp. court is parallel to the one used in ascertainment of the right to trial by jury. *See* note 31 *supra,* and text accompanying notes 16-64 *supra* and 66-70 *infra.*

66. 391 F.2d at 824.

67. *Id.* at 824-25.

68. *See* text accompanying notes 72-75 *infra.*

69. 467 F.2d 824, 826 (5th Cir. 1972).

the Alabama action to stay its prosecution[70] pending disposition of an appeal which Norman intended to file in the Seventh Circuit Court of Appeals for the order dismissing its suit. The district court denied the motion and appeal was taken to the Fifth Circuit Court of Appeals which dismissed the suit for want of jurisdiction.[71]

The Fifth Circuit Court of Appeals reasoned that the first prong of *Enelow-Ettelson* was satisfied since the Alabama action for damages was at common law.[72] However, the court held that the second prong of the test was not met since the stay was entered to permit the prosecution of a declaratory judgment action which cannot "be termed as either inherently at law or in equity."[73] Thus, the court examined the nature of the issues involved in the Illinois suit, concluded that they were essentially legal and not equitable, and therefore, that there was no appealable order.[74] The court expressed dissatisfaction with having jurisdiction pivot on "an outmoded historical distinction," but determined that it was bound by Supreme Court precedent.[75]

In sum, the attempt to accommodate *Enelow-Ettelson* with the statutory creation of a declaratory judgment has produced various results depending on how strictly the reviewing court adheres to the literal requirement of the Supreme Court law. Literally, since an action for declaratory judgment is statutory, it cannot be at common law and therefore the first prong of *Enelow-Ettelson* can never be satisfied. Some circuit courts of appeals have been uncomfortable with the mechanism of the rule and have taken it upon themselves to weigh the essential nature of the issues underlying the prayer for declaratory relief in deciding the issue of appealability. This way of proceeding, however, disturbs the original balance drawn by the United States Supreme Court from *Enelow* through *Baltimore Contractors*. To the extent that the virtue of the *Enelow-*

70. The motion was phrased in the alternative requesting the court to stay, to transfer, or to dismiss the action. *Id.* at 826.

71. *Id.* at 827.

72. *Id.*

73. *Id.*

74. *Id.* A similar willingness to look beyond formal denominations was adopted in reference to actions for accounting in Zell v. Jacoby-Bender, Inc., 542 F.2d 34 (7th Cir. 1976); Kirschner v. West Co., 300 F.2d 133 (3d Cir. 1962).

75. 47 F.2d at 827.

Ettelson rule lies in ease of applicaton and predictability of results, the judicial review of orders affecting declaratory relief has shown that the virtues may be more evident in theory than in practice. Since the main thesis of this article urges the abandonment of the law-equity distinction as the pivot on which to determine appealability, consistency demands a similar abandonment of that distinction in the interpretation of *Enelow-Ettelson's* first prong. In addition, since it will be easier for a court to circumvent the *Enelow-Ettelson* rule through a redefinition of what is required to satisfy the "at common law" requirement than it is for a court to refuse to follow the rule entirely, it can be expected that litigants will urge and courts will be aware of the benefits of adopting the approach of the Second and Fifth Circuit Courts of Appeals. Acquiesence by the courts to this approach, however, will have the undesirable effect of increasing the number of appeals available under *Enelow-Ettelson*[76] without accomplishing the necessary refinement in the criteria used to ascertain the need for an immediate appeal.

ii. Is There an Equitable Defense or Counterclaim?

In *Shanferoke Coal & Supply Corp.*, the Supreme Court held that a special defense setting up an arbitration agreement contained in the contract sued upon is an equitable defense within the meaning of *Enelow-Ettelson* so that the order denying a motion for stay of proceedings at law pending arbitration is appealable.[77] The Court did not state any reasons for this innovative conclusion[78] although it most certainly increases the number of defenses which can be considerd equitable, and thus increases the number of appealable interlocutory injunctions. While several circuit courts of appeals have chosen to follow the

76. Because the spirit of *Enelow-Ettelson* would seem to require a strict application of the requirements of the test and treating all statutory causes of action as sui generis, and not as arising under the common law, any tampering with the rule could not decrease the number of appeals available under *Enelow-Ettelson.*

77. 293 U.S. 449, 452 (1935). *See also* text accompanying note 23 *supra.* The Court's holding, however, expands the number of defenses which can be called equitable, increases the number of appealable injunctions, and therefore, goes against the stated intention to narrowly construe the interlocutory appeals statutes. *See* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 185 (1955).

78. The Court did not indicate reasons for its conclusion that a defense setting up an arbitration clause is in equity but it did cite Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924), as a case for comparison.

holding of *Shanferoke*[79] the court for the Tenth Circuit found that the narrowing trend of the post-*Shanferoke* cases warrants departure from the holding.

In *Hart v. Orion Insurance Co.*, plaintiff Hart, an airline pilot, instituted an action to recover under a policy insuring him against occupational disability.[80] The district court, sua sponte, stayed the court proceedings until completion of an arbitration process instituted pursuant to a clause in the policy. The clause provided that examination by appointed medical experts would determine whether disability had occurred.[81] The Tenth Circuit Court of Appeals concluded that the order granting the stay was not an appealable final order.[82] Addressing the requirements for appeal under section 1292(a)(1) the court apparently considered the first prong of *Enelow-Ettelson* to be satisfied, but held that the defense of the arbitration clause was not equitable.[83] The court reasoned first that the agreement on its face made arbitration a condition precedent to the payment of the contract amount.[84] Second, the court recited that a condition precedent defense is traditionally considered to be in the field of contract law.[85] Thus, the court held that the defense was "at common law" and not "in equity" for the purposes of *Enelow-Ettelson.*[86]

The Tenth Circuit Court did not address the impact of *Shanferoke* on its holding, nor the impact of *Ettelson, Morgantown,* and *Baltimore Contractors* on *Shanferoke.* Since there are few objective criteria which can be used to inform the discretion of the reviewing court in its decision to consider an arbitration clause in a contract to be a condition precedent or an equitable defense, one of the strongest policy reasons for

79. *See, e.g.*, Zell v. Jacoby-Bender, Inc., 542 F.2d 34, 35 (7th Cir. 1976); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 824 (2d Cir. 1968); Cuneo Press, Inc. v. Kokomo Paper Handlers' Union No. 34, 235 F.2d 108, 110 (7th Cir. 1956);Hudson Lumber Co. v. United States Plywood Corp., 181 F.2d 929, 930 (9th Cir. 1950).

80. 427 F.2d 528, 529 (10th Cir. 1970).

81. *Id.*

82. "The granting of a stay of an action pending arbitration must be distinguished from a final judgment dismissing an action because arbitration must still be pursued and it differs from an order compelling arbitration . . . solely for that purpose . . . ." *Id.* (quoting from Standard Chlorine, Inc. v. Leonard, 384 F.2d 304, 306 (2d Cir. 1967)).

83. 427 F.2d at 530.

84. *Id.*

85. *Id.*

86. *Id.*

upholding *Enelow-Ettelson* in its present form as a litmus paper test is undermined.[87]

iii. Extraordinary Writs as Alternatives to the Appeal of Interlocutory Orders

A petition for issuance of a writ of mandamus or prohibition is an alternative means to secure appellate review of an otherwise nonappealable order.[88] These powerful and unusual remedies are limited to carefully circumscribed instances where the court is able to conclude that issuance "is in aid of [the court's] respective jurisdiction" and is "agreeable to the usages and principles of law."[89]

The jurisdictional prerequisite for invocation of mandamus or prohibition traditionally has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[90] Mandamus is used in those situations in which a court has acted beyond its jurisdiction, taking action which it simply has no power to take, or when a court action is erroneous and the error complained of may be repeated before the case is reviewed subject to final judgment.[91] Where mandamus commands performance, prohibition orders a court not to act in such a way as to exceed its jurisdiction.[92] Neither writ will correct reversi-

87. Examples of objective criteria are, of course, a provision in the arbitration agreement which embodies the agreement of the parties on the issue, or case law forming binding precedent. *See* text accompanying notes 70-75 *supra* for a discussion of the Fifth Circuit's rule that a suit for declaratory relief can be "in equity."

88. Mandamus is common-law writ which issues at the appellate court level pursuant to the All Writs Act, 28 U.S.C. § 1651 (1976) or FED. R. APP. P. 21. For the view that courts should give greater application to writs of mandamus, *see* Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule,* 50 COLUM. L. REV. 1102, 1112-13 (1950). Two circuit courts of appeals have discussed the role of mandamus as a method of securings appellate review of orders otherwise not appealable under *Enelow-Ettelson.* Standard Chlorine, Inc. v. Leonard, 384 F.2d 304, 309 n.14 (2d Cir. 1967); Chronicle Publishing Co. v. National Broadcasting Co., 294 F.2d 744 (9th Cir. 1961).

89. The All Writs Act, 28 U.S.C. § 1651(a) (1976).

90. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

91. *See, e.g.,* Sclagenhauf v. Holder, 379 U.S. 104, 111 (1964); Labuy v. Howes Leather Co., 352 U.S. 249, 256-58 (1957); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd by an equally divided court,* 400 U.S. 348 (1971).

92. *Ex parte* Chicago, R.I. & Pac. Ry., 255 U.S. 273, 275-76 (1921); Alexander v. Crollott, 199 U.S. 580 (1905).

ble error nor may it be used to "thwart the congressional policy against piecemeal appeals."[93]

There is apparently only one circuit court of appeals case in which appellant sought a writ of mandamus to compel the district court to reverse its earlier ruling and deny a stay of trial court proceedings pending arbitration. The Ninth Circuit Court of Appeals in *Chronicle Publishing Co. v. National Broadcasting Co.*,[94] declined to hold that the district court judge abused his discretion[95] in granting the stay and thus denied the petition for mandamus.[96] For the purposes of the present discussion it is not necessary to reconstruct the Ninth Circuit's dissection of the case law relating to private antitrust litigation and the peculiar constellation of facts there presented. It is sufficient to note that the application of established legal principles regarding the high standards which must be met before mandamus will issue means that mandamus will seldom offer an escape hatch from the narrow scope of *Enelow-Ettelson*.

iv. Other Procedural Alternatives

Finally, there are several other techniques which reviewing courts have used to manipulate the literal requirements of the *Enelow-Ettelson* rule in order to permit or deny appeal of a given stay order. In *Enelow*, the Supreme Court in dictum noted that "the special defense setting up the arbitration agreement" need not ultimately be a viable defense, (that is, a defense which successfully defeats a claim) but must not be a defense which is utterly foreclosed on the facts.[97] In *Cuneo Press, Inc. v. Kokomo Paper Handlers' Union*, the Seventh Circuit Court of Appeals, without reference to the *Enelow* dictum, assumed the distinction between viable and unsuccessful defenses, amplified upon it, and in so doing clarified it and its relevance to the *Enelow-Ettelson* rule.[98] The *Cuneo* court held that it had the jurisdiction to review a district court order

93. *See, e.g.*, Parr v. United States, 351 U.S. 513, 521 (1956); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382 (1953).

94. 294 F.2d 744 (9th Cir. 1961).

95. The petitioner conceded that the district court had the jurisdiction to enter the stay order in question. *Id.* at 746.

96. *Id.* at 749.

97. *See* text accompanying note 17 *supra*.

98. Cuneo Press, Inc. v. Kokomo Paper Handlers' Union, 235 F.2d 108 (7th Cir. 1956).

which denied defendant union's motion to stay the employer's action against it until the arbitration provided for under the bargaining agreement had been completed.[99] The employer's complaint prayed for damages and an injunction from further violations of the contract.[100] The court of appeals distinguished *Baltimore Contractors,*[101] noted that *Shanferoke* was controlling,[102] and held that "the motion for a stay in this case was an application for an interlocutory injunction based upon the motion setting up the special defense of a duty to arbitrate."[103]

While the explanation of why *Enelow-Ettelson* supports the result in *Cuneo* is less than satisfactory, the court of appeals did have jurisdiction to review the order.[104] Further, in the exercise of its jurisdiction the court properly affirmed the district court order on the ground that the union did not demonstrate that there were any remaining issues referable to arbitration.[105] Thus, *Cuneo* reinforces a distinction between a determination of jurisdiction and an exercise of that jurisdiction. While it is permissible for a reviewing court to evaluate a claim or defense, conclude that it is frivolous and, therefore, that it has no jurisdiction over it,[106] adherence to a strict separation between the two steps of the analysis as adopted in *Cuneo* may simplify the judicial task[107] and certainly limit the number of orders appealable under the *Enelow-Ettelson* rule. *Cuneo* refines the second prong of the rule to require that the stay be sought to permit the prior determination of an equitable claim or defense *and* that the movant for stay bear the burden of proving that the arbitration clause on its terms applies to the issues raised by claim or defense.

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99. *Id.* at 110.

100. *Id.* at 109.

101. *Id.* at 110.

102. *Id.*

103. *Id.*

104. *See* text accompanying notes 31-45 *supra.*

105. 235 F.2d at 111-12. *See also* Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2d Cir. 1968).

106. For example, the procedure used by circuit courts of appeals on the review of *Anders* motions and briefs blurs the dichotomy between ascertainment of jurisdiction and assessment of the merits. Anders v. California, 386 U.S. 738 (1967). *See* 7TH CIR. R. 7(a).

107. A similar strict analysis is used by the courts in determining whether a claim "arises under" the federal constitution, statutes or common law. 28 U.S.C. § 1331 (1976). To invoke federal question jurisdiction the plaintiff must assert a "substantial" claim based on federal law. Bell v. Hood, 327 U.S. 678 (1946).

A second and final example of interpretation by a court of appeals which alters the requirement of *Enelow-Ettelson* is presented by *Chronicle Publishing Co. v. National Broadcasting Co.*[108] In *Chronicle Publishing*, the Ninth Circuit Court of Appeals dismissed an appeal[109] from a district court order staying a private antitrust action[110] until final determination by the Federal Communications Commission of proceedings before it based on NBC's application to acquire KTVU, a San Francisco-Oakland television station.[111] The appellate court noted *Shanferoke* wherein the Supreme Court concluded that a defense based on an arbitration agreement that governed the initial resolution of the dispute was an equitable defense for the purposes of *Enelow-Ettelson,*[112] but it concluded that the holding had been "narrowly construed by the supreme court" to confine appeal to those orders "in which a defense equitable in its nature has been made the basis of a stay . . . ."[113] Since the stay order challenged in *Chronicle Publishing* was not granted pursuant to any equitable defense literally, the Ninth Circuit held that the order was nonappealable.[114] In so holding, the court necessarily concluded that the narrow construction of *Enelow* and *Shanferoke*[115] adopted in *Baltimore Contractors* overruled this aspect of the holding in *Shanferoke.*[116]

Similarly, the *Chronicle Publishing* court held that the subsequent narrow construction of *Enelow* by the Supreme Court also negated the dictum in *Enelow* that the power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of section 1292.[117] While the analysis undertaken here shows that *Baltimore Contractors* does represent a narrowing of the scope

108. 294 F.2d 744 (9th Cir. 1961).

109. The court also denied issuance of a writ of mandamus. *See* text accompanying notes 88-96 *supra.*

110. Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976); Section 7 of the Clayton Act, 15 U.S.C. § 18 (1976).

111. 294 F.2d at 745.

112. *Id.* at 746.

113. *Id.*

114. *Id.*

115. *See* text accompanying notes 31-34 *supra.*

116. 294 F.2d at 746.

117. *Id.* (quoting Enelow v. New York Life Ins. Co., 293 U.S. 379, 382 (1935)).

of orders falling under the *Enelow-Ettelson* rule, *Ettelson* not *Enelow* is the high water mark of liberality. It has been *Ettelson* and not *Enelow* that has been limited in scope in the case law.[118] Further, the rejection in *Chronicle Publishing* of the above-quoted language in *Enelow* shows an insensitivity to the basic rationale for establishing the *Enelow-Ettelson* rule of appealability in the first instance. The *Enelow* Court focused on the dichotomy between law and equity and concluded that, with respect to stay orders, the distinction would remain crucial. Just as an order entered by an equity court which stays prosecution of claims at law is appealable, a district court order staying prosecution of claims at law pending determination of an equitable claim or defense pending before it is appealable.[119]

At the minimum, the difficulty the Ninth Circuit Court of Appeals experienced in ascertaining the limits of the *Enelow-Ettelson* rule and applying it demonstrates that the rule is not intuitive.[120] Many years after the adoption of the Federal Rules of Civil Procedure and the concomitant fusion of law and equity it is difficult to appreciate the continued logic of permitting this historical distinction to decide a problem of jurisdiction.

b. Motions to Prevent Arbitration

The second way in which litigants procedurally raise the issue of the appealability of stay orders entered in pending cases is by means of a motion to stay arbitration proceedings in order to permit the prosecution of the court action. The three circuit courts of appeals which have directly addressed the issue of whether a district court's refusal to stay arbitration is an appealable interlocutory order under section 1292(a)(1) have reached contrary results. The First[121] and Second[122] Cir-

118. *See* text accompanying notes 25-31 *supra.*

119. 293 U.S. at 382.

120. For an illustration of the same point of difficulty in achieving a consistent application of the rule, *compare* Blount Bros. Constr. Co. v. Troitino, 381 F.2d 267 (D.C. Cir. 1967) *with* Travel Consultants, Inc. v. Travel Management Corp., 367 F.2d 334 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 912 (1967).

121. New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 (1st Cir. 1972).

122. Greater Continental Corp. v. Schechter, 422 F.2d 1100, 1102 (2d Cir. 1970); Greenstein v. National Skirt & Sportswear Ass'n, 274 F.2d 430, 431 (2d Cir. 1960); Armstrong-Norwalk Rubber Corp. v. Local 283, 269 F.2d 618, 620-21 (2d Cir. 1959);

cuits have held that an order denying a stay of arbitration is not appealable. On the other hand, the Ninth Circuit has held that a motion to stay a proceeding in another forum involves the "classic form of injunction," and the order denying the motion is appealable.[123]

The Second Circuit Court of Appeals was the first circuit to address the issue of appealability in *Wilson Brothers v. Textile Workers Union of America.* The court concluded that the underlying action of the employer for declaratory judgment raised essentially equitable issues and thus was not "at common law" for the purposes of *Enelow-Ettelson.*[124] Therefore, an order granting a stay pending arbitration was merely a procedural step in the litigation and was not appealable.[125] The Second Circuit subsequently reaffirmed the reasoning of *Wilson Brothers* in two cases, one reviewing a district court order granting a stay pending arbitration[126] and another reviewing an order denying a stay pending arbitration.[127] In its latest interpretation of the appealability of a denial of a stay of arbitration, however, the court held the order nonappealable but also limited the applicability of *Enelow-Ettelson.* In this respect the course of second circuit law interpreting *Enelow-Ettelson* and the appealability of stay orders provides a model for principled exception to the Supreme Court rule.

In *Greater Continental Corp. v. Schechter* the Second Circuit dismissed for want of jurisdiction an appeal taken from an order denying a "stay" of the arbitration proceedings which

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Wilson Bros. v. Textile Workers Union, 224 F.2d 176, 177 (2d Cir.), *cert. denied,* 350 U.S. 834 (1955).

123. A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 713 (9th Cir. 1968); *see also* Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970).

124. 224 F.2d at 177. The court went on the state:

> It is perhaps regrettable that the Court did not feel prepared to follow the lead, rather suggested in *City of Morgantown* . . . of recognizing the union of law and equity into the one civil action where the procedural character of these orders would be realistically viewed in terms of modern trials. As it is, some confusion must remain; and our decisions permitting appeals from denial of a stay of action pending arbitration can be upheld only where they are actions "at law," i.e., for damages.

Id. (citations omitted).

125. *Id.*

126. Armstrong-Norwalk Rubber Corp. v. Local 283, 269 F.2d 618, 620-21 (2d Cir. 1959).

127. Greenstein v. National Skirt & Sportswear Ass'n, 274 F.2d 430, 431 (2d Cir. 1960).

had been initiated by the defendant-appellee under an applicable employment contract.[128] Instead of applying the two-pronged test of *Enelow-Ettelson,* which it conceded that it had followed in the past, the court rejected the applicability of the underlying historical distinction between law and equity to orders respecting arbitration and distinguished the triggering facts of *Enelow-Ettelson* from the case under review.[129]

> Where the order concerns granting or refusing a stay of arbitration proceedings, however, it is not a grant or denial of an "injunction" within section 1292(a)(1); the nonappealability of orders granting or denying a stay of arbitration does not depend upon the old distinction between law and equity, and the order is not appealable even where the arbitration claim, as here, is a legal claim for damages. The reason for the different approach to stay of arbitration as compared to stays of other court proceedings is two-fold: (1) appealability of a denial to stay arbitration would further delay the arbitration proceedings and thereby eliminate one of the primary purposes of arbitration, *i.e.,* the speed of the proceedings; (2) arbitration differs from another court proceeding in the essential respect that arbitration would not produce an enforceable result without further judicial action.[130]

This radical departure from the scope of *Enelow-Ettelson* was accomplished, then, by judicial construction of the term which presented the greatest degree of elasticity in meaning, that is, by interpretation of the meaning of "injunction." The court concluded that the denial of the motion for a preliminary injunction against arbitration was not a "stay" of arbitration, and therefore *Enelow-Ettelson* did not apply. The court also held that the district court order did not amount to an injunction within the meaning of section 1292(a)(1), and therefore was not directly appealable under that statute. The Second Circuit Court of Appeals, at least in *Greater Continental Corp.,* expressed a desire to look beyond labels and to analyze the injunctive effect of the order. Thus, the concerns of the dissenting justices in *Baltimore Contractors* and the majority in *Ettelson* have found light in the Second Circuit's distinguishing of *Enelow-Ettelson* from a large group of recurring fact

128. 422 F.2d 1100, 1101-02 (2d Cir. 1970).
129. *Id.* at 1102.
130. *Id.* at 1102-03 (citations omitted).

situations, namely, appeals taken from orders granting or denying stays pending arbitration when the facts do not support a conclusion that the stay has had an injunctive effect.

The First Circuit Court of Appeals has also concluded that the same policy reasons which disfavor immediate review of referrals to arbitration warrant a narrow judicial interpretation of "injunction" in order to avoid appeal under *Enelow-Ettelson*. In *New England Power Co. v. Asiatic Petroleum Corp.*,[131] the court declined to adopt a " 'broad literal interpretation of "injunction" ' "[132] and held that a district court order denying a stay of arbitration was not an appealable "injunction" pursuant to section 1292(a)(1)[133] nor was it an appealable interlocutory order under *Enelow-Ettelson* since the claim was in equity.[134]

On the other hand, the Ninth Circuit has adhered to the view that a district court order refusing to stay arbitration is an application for an injunction and as such falls within the grant of jurisdiction conferred by section 1292(a)(1). In *A. & E. Plastik Pak Co. v. Monsanto Co.*,[135] the court held that the request for a preliminary injunction against the arbitration was not a "mere step in the controlling of litigation before the court," that is, a motion for "stay" of arbitration, but rather the order denying a preliminary injunction was a "classic form of injunction"[136] and was appealable without recourse to the *Enelow-Ettelson* rule.[137] The *Plastik Pak* case is interesting in two respects. First, the court's analysis seemingly reflects a willingness to look beyond the formal denomination given to

131. 456 F.2d 183 (1st Cir. 1972).

132. *Id.* at 186 (citations omitted).

133. *Id.* at 186-87.

134. *Id.* at 186. The policy-judgment nature of the court's decison is emphasized in the following language:

> New England has simply failed to convince us that our refusal to accept an interlocutory appeal from the district court's order declining to stay arbitration would on balance have such "serious, perhaps irreparable, consequences," especially in the light of the effect of such "preliminary skirmishing" on the congressional policies embodied in the Arbitration Act.

Id. at 187 (citation omitted).

It is an established rule that arbitration is not an extension of court proceedings but involves a separate tribunal. Bernhardt v. Polygraph Co. of America, 350 U.S. 198, 202-03 (1956).

135. 396 F.2d 710 (9th Cir. 1968).

136. *Id.* at 713.

137. *Id.*

the relief requested by the parties to decide whether a motion to stay or a prayer for a preliminary injunction possesses, in essence, an injunctive effect.[138] The court concluded that when "the [district] court was asked (and declined) affirmatively to interfere with proceedings in another forum," the order disposing of the request was an interlocutory injunction appealable on the terms of section 1292(a)(1).[139] Second, the only logical way to reconcile *Plastik Pak* with the Supreme Court law on section 1292(a)(1), however, is to ground the holding on the very fortuity of how the party himself characterized the requested relief. An injunction is automatically appealable regardless of the severity of its injunctive effect; a stay may or may not be appealable depending on the dictates of *Enelow-Ettelson.*

Subsequently, the Ninth Circuit reaffirmed *Plastik Pak* in *Power Replacements, Inc. v. Air Preheater Co.,* where it held that a district court order granting a stay of the court's own proceedings pending arbitration which had not yet commenced and a denial of a preliminary injunction against that arbitration was an appealable injunction,[140] and therefore, there was no need to apply the criteria of *Enelow-Ettelson.*

In sum, the Ninth Circuit's rule that an order disposing of a request for a stay of arbitration is directly appealable under section 1292(a)(1) is a straightforward and logically correct rule. Absent recourse to the "injunctive effect" test, the rule is easy to apply and it properly circumvents the disfavored *Enelow-Ettelson* rule. An order disposing of an injunction remains directly appealable under section 1292(a)(1). Unfortunately, the Ninth Circuit rule also permits the parties to force an appeal from an order even when there is no exigency, threat of irreparable harm, or other factor typically involved in requests for injunctive relief. For this reason, the Second Circuit's position embodied in *Greater Continental Corp. v. Schechter* may prove to be the better-reasoned approach to the appealability of injunctions against arbitration even though its rule is without precedent in the case law.[141] *Greater Continental*

138. *Id. See* text accompanying notes 25-31, 41-45 *supra* for a discussion of the Supreme Court flirtation with an injunctive effect test of appealability.

139. 396 F.2d at 713. The court noted that the appeal from a grant or denial of a stay by a court of its own proceedings was subject to *Enelow-Ettelson. Id.* at n.2.

140. 426 F.2d 980, 983 (9th Cir. 1970).

141. *See* text accompanying notes 128-30 *supra* and part III *infra.*

Corp. authorized the reviewing court to look beyond the label given by the party to the relief requested and to weigh instead the injunctive effect of the order disposing of the request. However, complications are raised by the Second Circuit's failure either to reaffirm a role for *Enelow-Ettelson,* albeit a limited one, or to expressly decline to follow the rule. In addition, neither the Second nor the Ninth Circuit Courts noted that *Enelow-Ettelson* does not contemplate a different treatment of orders disposing of motions to compel arbitration versus motions to prevent arbitration, nor does it contemplate a differentiation between the broad category of orders which stay legal proceedings pending disposition of an equitable defense from the category of orders staying arbitration. Rather, *Enelow-Ettelson* turns solely on the substantive distinction between law and equity in the belief that the lines drawn therein are alone sufficient to comport with established precedent and discourage piecemeal appeals. An alternative rule then, must address this central concern of the *Enelow-Ettelson* rule.

2. Independent Actions for Injunctions to Compel or to Prevent Arbitration

a. Mandatory Injunctions

Under section 4 of the United States Arbitration Act a party aggrieved by the refusal of another to arbitrate pursuant to a written agreement may file a petition for an order directing that arbitration proceed.[142] An order directing arbitration or dismissing the petition or vacating an award made in a section 4 proceeding following a prior order directing arbitration is outside the scope of the *Enelow-Ettelson* rule because courts have held consistently that such an order is final within the meaning of section 1291.[143] The appealability of a district court order granting or denying an injunction to compel arbitration entered in a proceeding not falling under section 4 of the Arbi-

142. 9 U.S.C. § 4 (1947).

143. Rogers v. Schering Corp., 262 F.2d 180 (3d Cir.), *cert. denied, sub nom.* Hexagon Labs., Inc. v. Rogers, 359 U.S. 991 (1959); Farr & Co. v. Cia Intercontinental De Navegacion De Cuba, S.A., 243 F.2d 342 (2d Cir. 1957); John Thompson Beacon Windows, Ltd. v. Ferro, Inc., 232 F.2d 366 (D.C. Cir. 1956).

A proceeding under § 4 had not been considered to be a proceeding for a mandatory injunction and as a result an order staying the § 4 arbitration proceeding is not appealable under *Enelow-Ettelson,* and § 1292(a)(1).

tration Act is determined by a direct application of section 1292(a)(1) without recourse to the *Enelow-Ettelson* rule:[144]

b. *Prohibitory Injunctions*

If no action is pending a party to an arbitration agreement may bring an action expressly to enjoin arbitration. While the Arbitration Act does not specifically provide for such an action, such an action is not prohibited under general equity jurisdiction.

The appealability of an order granting or denying an injunction against arbitration is not settled. As discussed, the Second Circuit in *Greater Continental Corp.* has concluded that a denial of an injunction against arbitration is not appealable either under section 1291 or under section 1292(a)(1) as an order refusing an injunction.[145] Without citing any precedent, the Second Circuit carved out an exception for stays of arbitration from the general rule of interlocutory appeal of injunctions.[146] On the other hand, the Ninth Circuit Court of Appeals held in *Plastik Pak* that a request for an injunction to halt arbitration was an appealable interlocutory order within the meaning of section 1292(a)(1).[147] An examination of the policy reasons which favor a fostering of arbitration will show that the Second Circuit's approach which weighs the effects of the stay order in determining appealability is the better method of analysis.

III. Policies Governing the Appealability of Stay Orders

A. *A Proposed Rule of Decision*

The basic rule governing the appealability of district court orders is that an appeal can only be taken from a final judgment,[148] that is, a judgment which disposes of a whole case on the merits.[149] The basic rationale of the finality rule is the conservation of judicial resources through the prevention of piecemeal litigation.[150] A secondary benefit of the rule is that the appellate court is more likely to correctly assess the arguments

144. 28 U.S.C. § 1292(a)(1) (1976); *see* text accompanying notes 136-41 *supra.*
145. *See* text accompanying notes 128-30 *supra.*
146. Greater Continental Corp. v. Schechter, 422 F.2d 1100, 1102-03 (2d Cir. 1970).
147. *See* text accompanying notes 136-39 *supra.*
148. 28 U.S.C. § 1291 (1958).
149. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).
150. Cobbledick v. United States, 309 U.S. 323, 325-26 (1940).

on appeal if all alleged errors are raised on the basis of one complete record. Nonetheless, both Congress and the courts increasingly have recognized that there are some situations in which the benefits of the final order rule are outweighed by the harm incurred by the postponement of judicial review. For example, reversal of orders entered in actions commenced to stop arbitration will terminate litigation; reversal of other orders which stay court proceedings pending arbitration will obviate the need for retrial. In addition, fairness may demand immediate review when postponement would deprive the litigant of ultimate relief.

When the *Enelow-Ettelson* rule was fashioned, finality was a fairly inflexible prerequisite to review for the policy reasons noted above. The major exception to the requirement of finality was embodied in the predecessor to section 1292(a) which permitted the interlocutory appeal of injunctions.[151] One extensive exception to the finality rule which bears particular relevance to the *Enelow-Ettelson* rule and the operative effect of the law-equity distinction has more recently been fashioned.[152] Collectively, the exceptions illustrate an increasing willingness of Congress to delegate more discretion to the courts to determine jurisdiction and the increasing willingness of the courts to interpret the jurisdictional statutes within the congressional guidelines.

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151. 28 U.S.C. § 227 (1940). *See* note 16 *supra.*

152. One exception which is only tangentially related to the present question is embodied in the Interlocutory Appeals Act of 1958 and provides a way to review both jury trial and arbitration orders regardless of the procedural context in which they are presented to the court.

28 U.S.C. § 1292(b)(1958) provides in its entirety:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

It is important to note that appeals under § 1292(b) are subject to the discretion of both the trial court and the court of appeals. An examination of the case law has disclosed no reported cases where a court of appeals has reviewed an *Enelow-Ettelson* stay order under § 1292(b). Nonetheless, § 1292(b) would enable a court of appeals to review a stay order not appealable under §§ 1291 or 1292(a), assuming that a party had filed the requisite petitions and the district court had entered the needed findings.

The first major exception to the finality rule and the first major departure from strict adherence to the law-equity distinction is embodied in the law of abstention. This exception is of particular relevance to an analysis of the *Enelow-Ettelson* rule since the development of the case law on abstention also evidences an abandonment of an historical technical rule based on the distinction between law and equity. The general rule on abstention was fashioned in *Railroad Commission of Texas v. Pullman.*[153] In sum, the *Pullman* abstention doctrine authorizes a federal court to stay or dismiss a federal action pending resolution of a state court case when the decision of an uncertain or unclear issue of state law[154] may obviate the need to consider a federal constitutional question.[155] Such a stay order is appealable as a final order under section 1291.[156] If injunctive relief is sought in the district court, the stay is also appealable as the denial of an injunction under section 1292(a)(1).[157] If the district court dismisses the action the dismissal order is appealable as a final order.[158] In sum, *Enelow-Ettelson* has not been extended to stays of federal proceedings entered on grounds of abstention.[159]

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153. 312 U.S. 496 (1941).

154. There has been some variation in the degree of uncertainty in the state law which must be evidenced in order to justify abstention. Brown v. First Nat'l City Bank, 503 F.2d 114, 118 (2d Cir. 1974); Gray Line Motor Tours, Inc. v. City of New Orleans, 498 F.2d 293, 298 (5th Cir. 1974); Fralin & Waldron, Inc. v. City of Martinsville, 493 F.2d 481, 483 (4th Cir. 1974). In a diversity action the Supreme Court has stated that abstention is proper when it is "conceivable" that the state court decision might obviate the need to consider the constitutional issue. Fornaris v. Ridge Tool Co., 400 U.S. 41, 43 (1970).

155. Cases decided since *Pullman* have made it clear that federal courts will also refuse to determine unsettled issues of state law even when a constitutional issue has not been presented. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1975); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); County of Allegheny v. Frank Masuda Co., 360 U.S. 185 (1959). If no federal constitutional question has been presented, however, the unsettled issue of state law must bear "on policy problems of substantial public import whose importance transcends the result in the case then at bar." 424 U.S. at 814. *See* City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 171-72 (1941).

156. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962).

157. *Id.*

158. Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962); Frank Masuda Co. v. County of Allegheny, 256 F.2d 241 (3d Cir. 1958), *aff'd,* 360 U.S. 185 (1959).

159. Appellate review of stay orders which have been entered on abstention grounds forms an exception to the general rule that there is broad discretion given to the district court to dispose of stay orders pending before them. Stays of federal actions

In *Pullman,* an equitable proceeding in federal court was stayed pending the completion of the state court proceedings. Subsequent courts narrowly construed *Pullman* to restrict abstention to cases in equity. The Supreme Court rejected this interpretation in *Louisiana Power & Light Co. v. City of Thibodaux*[160] reasoning that the operation of a stay order is the same in a legal action as in the equitable. A similar focus upon the effect of entry of an order rather than on the terminology used to describe the procedural maneuver would justify an elimination of the historical technical rule as it applies to stay orders presently falling under the *Enelow-Ettelson* rule.[161]

A second example of the departure from a rigid adherence to the law-equity distinction is contained in the law on the right to trial by jury.[162] In *Beacon Theatres, Inc. v. Westover,* the Supreme Court adopted what has come to be known as the "nature of the issue" test for determining whether a complaint seeks relief which could have been provided historically at law

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entered to await decision in similar federal or state cases are not appealable under §§ 1291 or 1292(a) and *Enelow-Ettelson* does not apply. These stays have been considered to be "incidental to the power inherent in every court to control the disposition of the causes on its docket." Landis v. North Am. Co., 299 U.S. 248, 254 (1936). *See also* Morales Serrano v. Playa Assocs., Inc., 390 F.2d 593 (1st Cir. 1968); Arny v. Philadelphia Transp. Co., 266 F.2d 869 (3d Cir. 1959); Mottolese v. Preston, 172 F.2d 308 (2d Cir. 1949).

160. 360 U.S. 25 (1959).

161. *See* Glen Oaks Utils., Inc. v. City of Houston, 280 F.2d 330 (5th Cir. 1960).

There is another way in which the Supreme Court's decision in *Louisiana Power & Light Co. v. City of Thibodaux* would seem to indicate that the Court is willing to reject the *Enelow-Ettelson* doctrine. *Thibodaux* involved a condemnation suit in which the district court granted a stay order in furtherance of the policies favoring abstention. The circuit court reversed. On certiorari, the Supreme Court accepted jurisdiction without discussing the fact that the stay order was not an appealable interlocutory order under *Enelow-Ettelson.* Nonetheless, *Thibodaux* can be distinguished from the average case of the appeal of stay orders since powerful constitutional policies are involved in the area of abstention.

162. Any litigant has a right to trial by jury in federal court on all claims arising at law but not on equitable claims. Following the adoption of the Federal Rules of Civil Procedure, legal and equitable claims are to be joined in a single action. FED. R. CIV. P. 1; 13. The objective of the unification was not intended to alter the parameters of the right to trial by jury. Beacon Theatres v. Westover, 359 U.S. 500 (1959). Thus, joinder of legal and equitable claims alone does not amount to a waiver of the right to a jury trial. McComb v. Frank Scerbo & Sons, Inc., 177 F.2d 137 (2d Cir. 1949); Bruckman v. Hollzer, 152 F.2d 730 (9th Cir. 1946). The preservation of the right to trial by jury required that the courts formulate a test for the determination of a "legal" versus an "equitable" claim. If a complaint seeks relief which could have been afforded in equity prior to the adoption of the rules then there is no right to trial by jury.

and thus whether a right to trial by jury exists.[163] Prior to *Beacon Theatres* the order of prosecution of claims in the district court was governed by a determination of whether the legal or equitable claim was the most "basic" to the action.[164] If the legal claims were more "basic" to the action then the claims at law would be tried to a jury prior to the determination of the equitable claims. With *Beacon Theatres,* however, the Court made it clear that the question was whether there is an overlap in legal and equitable issues such that the prior trial and determination of the equitable claims would foreclose de novo determination of the legal claims for which a jury had been demanded.[165]

While it is not necessary to the scope of the present discussion to describe the case law interpretations of the *Beacon Theatres* "nature of the issue" test, it is instructive to underline the similarity between the "injunctive effect" dictum of *Ettelson* and the concept of practical or legal foreclosure implicit in the *Beacon Theatres* test. In fact, in determining the right to trial by jury the Supreme Court has eroded the validity of the historical test in characterizing actions as legal or equitable.[166] The courts have been aided in their task by focusing on the very concept of foreclosure contained in *Beacon Theatres.*[167] It is not overly speculative to suggest that *Ettelson* was itself or could have provided a springboard into a parallel undermining of the historical test in the determination of appealable stay orders. The effect of such a trend, had it not been emphatically halted in *Baltimore Contractors,*[168] would have been to increase the number of actions that must be characterized as legal and thus to increase the number of orders that are appealable. Finally, if the law-equity distinction is no longer central to the analysis which determines when a right to trial by jury is preserved, there is little cogency to adhering to the distinction in

163. *E.g.,* 5 MOORE'S FEDERAL PRACTICE ¶ 38.14, at 151 (3d ed. 1978).

164. Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235 (1922); Van Alen v. Aluminum Co. of America, 43 F. Supp. 833 (S.D.N.Y. 1942).

165. *See* Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961). For a general discussion of the nature of the issue test, *see* 5 MOORE'S FEDERAL PRACTICE ¶ 38.14[4], at 162.6-.9 (2d ed. 1978).

166. *See* Ross v. Bernhard, 396 U.S. 531 (1970).

167. 396 U.S. at 540-43.

168. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955). *See* text accompanying notes 19-29, 38-41 *supra.*

determining the appealability of stay orders since the stated objective of preserving the right to trial by jury will not necessarily be advanced, nor will it be undermined.

In the context of the principled departure from the rule of finality and the similar abandonment of the law-equity distinction, continued adherence to the *Enelow-Ettelson* rule is anomalous. First, the Supreme Court's refusal to modify its rule of jurisdiction following the merger of law and equity may have been justified at the time of *Ettelson, Morgantown* and *Baltimore Contractors,* but the considerations that prompted the Court to depart from the law-equity distinction in cases involving abstention[169] and trial by jury[170] also warrant the abandonment of the distinction here.

The much maligned dichotomy appears to have been preserved by the Supreme Court because of deference to perceived congressional intent.[171] However, the law-equity distinction which is fundamental to the *Enelow-Ettelson* rule is unrelated to the policy reasons which justify immediate review of an interlocutory order. Irreparable hardship is the main criterion which courts have used in interpreting section 1292(a).[172] But rarely is irreparable harm caused by the denial of immediate review of a stay order. To deny appeal from an order which stays the trial of issues pending arbitration postpones the district court resolution of the issues which, without more, is not irreparable hardship.[173] The severity of the delay which might be caused by complete retrial is something which can be weighed in each case as it arises. Similarly, denial of an appeal from a court order staying arbitration pending trial postpones arbitration and the ultimate judicial review of the arbitral settlement. This delay does not necessarily amount to irreparable

169. *See* text accompanying notes 154-62 *supra.*

170. *See* note 31 *supra; see also* text accompanying notes 162-70 *supra.* The Supreme Court has also ignored the law-equity dichotomy in applying the direct appeal provisions of 28 U.S.C. § 1253 (1976). Bryan v. Austin, 354 U.S. 933 (1957).

171. City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 261 (1949) (Frankfurter, J., concurring); *see* text accompanying notes 32-35 *supra.*

172. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955). *See also* Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897); Chicago Dollar Directory Co. v. Chicago Directory Co., 65 F. 463, 465 (7th Cir. 1895).

173. *See* text accompanying notes 46-120 *supra.* To deny appeal from an order staying court proceedings where the plaintiff seeks an injunction is more likely to involve irreparable harm.

harm.[174] To deny appeal from an order entered in a separate case denying an injunction against arbitration or denying an injunction to compel the submission of additional issues to pending arbitration also does not automatically result in extreme hardship.[175]

On the other hand, immediate appeal of stay orders does interrupt the proceedings and add to the expense of litigation. While the virtue of the rigidly defined rule of decision promulgated in *Enelow-Ettelson* is that theoretically it obviates the need for preliminary judicial determination of the right to appeal, the rule has, in fact, caused lower courts and litigants alike a great deal of uncertainty as to when a stay order pending arbitration can be appealed.[176] An alternate approach is to make stay orders not appealable unless the litigant can demonstrate irreparable harm because of a delayed appeal.[177] This more flexible rule is indifferent to the distinction between law and equity unless the distinction relates to the need for imme-

174. *See* text accompanying notes 121-41 *supra.*

175. *See* text accompanying notes 142-47 *supra.*

176. Among the preliminary problems causing the uncertainty are: deciding whether a complaint which is an homogenization of legal and equitable and statutory claims is at law or in equity; deciding whether a defense is equitable; and deciding whether and when to look beyond the parties' characterization of claims and of relief demanded in order to ascertain their "essential nature." *See* text accompanying notes 52-120 *supra.*

177. *But see* FED. R. CIV. P. 54(b); 28 U.S.C. § 1292(b) (1976). It is to be expected that standards applicable to the appeal of stay orders will develop following the model of standards which exist with respect to securing injunctive relief in federal courts. The basis for injunctive relief in federal courts has been the likelihood of success on the merits, irreparable injury, burden on other interests, and the public interest. United States v. American Friends Serv. Comm., 419 U.S. 7 (1974); Beacon Theatres v. Westover, 359 U.S. 500 (1959); Jacksonville Port Auth. v. Adams, 556 F.2d 52 (D.C. Cir. 1977). The balancing of competing claims of irreparable hardship is the traditional function of an equity court, the exercise of which is reviewable only for abuse of discretion. Brotherhood of Locomotive Eng'rs v. Missouri-Kan. Tex. R.R., 363 U.S. 528 (1960); Adney v. Mississippi Lime Co., 241 F.2d 43 (7th Cir. 1957). While what constitutes an irreparable injury which will justify injunctive relief depends upon the facts of the particular case, general principles have developed. Courts seem to consider most carefully the nature of the right which will be injuriously affected. However, the pecuniary measure of the loss to be suffered can also be of importance. In first amendment cases even a temporary deprivation of rights has repeatedly been held to constitute irreparable harm. Citizens for a Better Environment v. City of Park Ridge, 567 F.2d 689 (7th Cir. 1975). In any case, the irreparable injury cannot be speculative and must amount to more than mere litigation expense. Frey v. Commodity Exch. Auth., 547 F.2d 46 (7th Cir. 1976). In general, irreparable harm amounts to a showing that the right itself may be defeated unless the injunction is issued. Selchow & Righter Co. v. Western Printing & Lithographing Co., 112 F.2d 430 (7th Cir. 1940).

diate appeal of a given stay order. Irreparable injury will almost always be present when a trial court has issued an improper injunction; it will seldom be present when a court has stayed or refused to stay court action pending arbitration. While application of this rule may give rise to substantial preliminary consideration by appellate courts, the rule confines appeal to appropriate cases of demonstrated harm, likelihood of error, or importance of immediate review and avoids uncertainty as to the right to appeal.

Finally, postponement of appellate review in all cases except those in which irreparable harm is demonstrated, or in which it can be shown that the arbitration agreement does not cover the resolution of the disputed issues or is otherwise unenforceable assures that arbitration agreements are favored under the law.[178] By entering into an arbitration agreement the parties have demonstrated their desire to pre-empt or to postpone judicial determination of the issues. Courts should be wary of countermanding the directions contained in arbitration agreements in recognition that some claimants are not served by slow, costly litigation, even if arbitration only postpones recourse to the courts. In addition, the proposed rule preserves the general policy behind the *Enelow-Ettelson* rule to prevent piecemeal appeals and effectuates that policy by explicitly giving the courts the responsibility for applying well-recognized principles of law in order to ascertain those cases where immediate appeal is both efficient and just.

B. Guidelines for Litigants and the Courts

The objective of this article is to examine the present Supreme Court rule on the appeal of stay orders, to set out the circuit courts' application of that rule, and to measure the doctrine against the policy reasons favoring interlocutory appeal in order to point the way toward an alternate, more reasonable rule. It should not be surprising that the major conclusion of this analysis is that the Supreme Court should take the first opportunity to decide that the reasons for the *Enelow-Ettelson* rule no longer exist and that a new rule should be fashioned. Until the Supreme Court formally abandons the rule the task remaining to the courts of appeals and litigants is difficult.

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178. *See* Comment, *Judicial Control of the Arbitrator's Jurisdiction: A Changing Attitude*, 58 NW. U.L. REV. 521 (1964).

Absent Supreme Court alteration of the rule, the litigant can so shape his action so that it places him in the most favorable position depending on the results he desires. The mechanical nature of the *Enelow-Ettelson* rule is absurd not only because it does not mirror the policy reasons for permitting or denying appellate review but because litigants can manipulate it for purposes of delay, or for "sabotage" of an otherwise justifiable appeal. Litigants in the Second, Fifth, Seventh, and Tenth Circuits can urge adherence to the particular modifications to the *Enelow-Ettelson* rule fashioned in those courts. Principled advocacy will include encouraging the courts to modify or replace *Enelow-Ettelson.*

Courts of appeals should practice a jurisprudential civil disobedience. Although adjusting the components of the *Enelow-Ettelson* rule may accomplish the desired effects on the basis of the facts under review, such alterations are often not made in faithful adherence to the policy reasons which underlie interlocutory appeal of stay orders. Abandonment of the rule altogether is made easier by the fact that the Supreme Court has not addressed the issue since 1954. The continued viability of *Enelow-Ettelson* has not been reassessed in light of changes in the law of the right to trial by jury, abstention, or the efficacy of encouraging arbitration.

Both litigants and the courts can resort to section 1292(b) discretionary appeal and extraordinary writs as means to avoid coming under the *Enelow-Ettelson* rule when the latter would prohibit appellate review. However, since an order staying court proceedings pending arbitration will only rarely be a "controlling question of law" which warrants immediate review,[179] and since the high standards of proof applicable to extraordinary writs will rarely be satisfied,[180] sorting out the skeins of the law applicable to the appeal of stay orders and confrontation with the *Enelow-Ettelson* rule is inevitable.

IV. CONCLUSION

The courts must insure that the right to appeal may be exercised before it is too late for judicial review to be effective. At the same time, the rules on appealability must be discerning

179. *See* text accompanying note 153 *supra.*

180. *See* text accompanying notes 88-96 *supra.*

enough to minimize uncertainty as to the right to appeal and to promote the efficient disposition of judicial business. Piecemeal appeals are to be discouraged. The *Enelow-Ettelson* rule was fashioned by the Supreme Court in an attempt to preserve the right to appeal when the right to trial by jury required immediate judicial determination of the issues or when Congress had already clearly expressed its desire to permit interlocutory appeal.[181]

The circuit courts of appeals have experienced difficulty in applying the *Enelow-Ettelson* rule. *Enelow-Ettelson* is virtually impossible to apply to complaints involving a mixture of legal and equitable relief.[182] Statutory causes of action also defy easy classification into those two categories.[183] Since, as *Hudson Lumber* demonstrates, counsel can circumvent the literal confines of *Enelow-Ettelson* by moving for a preliminary injunction instead of a stay, or by filing a separate suit seeking an injunction against arbitration, many courts sought to fashion a flexible rule which looks at the "injunctive effect" of the district court order rather than just the historical origin of and the technical labels given to the claims and defenses asserted and the relief requested.[184] The result of the circuit courts' application of *Enelow-Ettelson* is that the appellant is seldom able to predict whether or not his appeal will withstand a motion to dismiss.

The difficulty circuit courts of appeals experience in interpreting *Enelow-Ettelson* is understandable given the basic illogic of the rule. The right to trial by jury is seldom affected by stay orders. In addition, the historical distinction between law and equity, standing alone, has little relation to the need for immediate appellate review of an interlocutory order.[185]

The alternative to the *Enelow-Ettelson* rule discussed in this article is a rule which permits preliminary appellate consideration of the right to appeal, but makes the right to appeal under section 1292(a)(1) hinge on the ability of the appellant to demonstrate irreparable harm if the appeal were to be postponed until the termination of the proceedings in arbitration

181. *See* text accompanying note 165 *supra.*
182. *See* text accompanying notes 52-87 *supra.*
183. *See* note 170 *supra; see also* text accompanying notes 52-76 *supra.*
184. *See* text accompanying notes 61 and 121-44 *supra.*
185. *See* text accompanying notes 165-69 *supra.*

or in the trial court.[186] Criteria should develop, as they have in reference to the grant or denial of stays pending appeal pursuant to Federal Rule of Appellate Procedure 8, or to appeals under section 1292(b), which ultimately would provide more guidance to both courts and litigants in delineating cases where immediate appeal is warranted. In addition, this new rule of decision has the benefit of favoring arbitration and thereby lightening court dockets when it is possible to do so.

186. *See* text accompanying notes 166-69 *supra.*