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IX. REMEDIES

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley: *Status Quo Injunctions Under the Federal Arbitration Act*

Arbitration is a contractual proceeding in which parties agree to submit disputes to one or more persons for a quick, inexpensive, and binding determination.[1] Under the common law, either party to a private arbitration agreement could revoke the agreement at any time before the arbitrators rendered an award.[2] The courts, fearing erosion of their jurisdiction, refused to enforce agreements to arbitrate.[3] By enacting the Federal Arbitration Act (Arbitration Act),[4] Congress made private agreements to arbitrate enforceable in federal courts.[5] Congress enacted the Arbitration Act to avoid expensive

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1. *See* Alderman v. Alderman, 296 S.W.2d 312, 315 (Tex. Civ. App. 1956) (arbitration is contractual proceeding by which parties voluntarily select arbitrators to obtain speedy, binding and inexpensive resolution); H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924) (arbitration agreements are matters of contract and Arbitration Act will make agreements to arbitrate enforceable like other contracts); Carlston, *Theory of the Arbitration Process,* 17 LAW & CONTEMP. PROBS. 631, 631 (1952) (Carlston defines arbitration as process in which parties agree to refer controversies to one or more persons for final resolution).

2. *See* Standard Magnesium Corp. v. Fuchs, 251 F.2d 455, 457 (10th Cir. 1957) (courts historically disliked compelled arbitration, and either party to arbitration agreement could withdraw from arbitration any time prior to award) (citing Boston & L.R. Corp. v. Nashua & L.R. Corp., 139 Mass. 463, ____, 31 N.E. 751, 752 (1885)).

3. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1, 2 (1924). The English courts refused to enforce arbitration agreements because the English courts feared that arbitration tribunals did not have the ability to give or enforce proper remedies and that the arbitration tribunals infringed on the English courts' jurisdiction to hear disputes between parties. *Id.* The English courts' fear became engrained in American common law. *Id.; see* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1973). In *Scherk v. Alberto-Culver Co.,* the United States Supreme Court noted that the Federal Arbitration Act reversed centuries of judicial hostility to arbitration agreements. *Scherk,* 417 U.S. at 510-11.

4. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982).

5. *See* Federal Arbitration Act § 3, 9 U.S.C. § 3 (1982). Section 3 of the Arbitration Act states in pertinent part:

> 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.

Id.

The Supreme Court of the United States recently held in *Southland Corp. v. Keating* that § 2 of the Arbitration Act creates federal substantive law to be applied equally in state and federal courts. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). Although the Fourth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley* involves the application of § 3 of the

litigation and costly delays in reaching a final resolution of contract disputes.[6] To prevent one party from pursuing costly litigation in addition to arbitration, section 3 of the Arbitration Act states that upon application of either party, a federal court must stay the trial while the parties proceed to arbitration.[7] Sections 2 and 3 of the Arbitration Act establish four prerequisites, which a party must satisfy to obtain a stay of the trial.[8] The prerequisites for a stay of the trial consist of a contract involving a transaction in interstate commerce, a written provision to arbitrate disputes in the contract, a dispute that is arbitrable under the terms of the contract, and an applicant for the stay of the trial who has not acted inconsistently with the applicant's right to arbitrate.[9] Federal circuit courts of appeal disagree

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Arbitration Act to federal district courts, the issues discussed in *Bradley* involving the Arbitration Act appear to be applicable to state courts. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollom, 105 S. Ct. 811, 811-12 (1985). In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollom,* the United States Supreme Court denied certiorari to a petitioner whose case was on appeal from the Texas state courts. *Id.* In *McCollum,* McCollum signed an account agreement, which provided that McCollum would not take client lists from Merrill Lynch nor solicit Merrill Lynch clients for one year after McCollum's termination of employment. *Id.* at 812. Furthermore, McCollum agreed to settle all disputes arising out of McCollum's employment through arbitration. *Id.* McCollum left Merrill Lynch to work with a competitor of Merrill Lynch, and Merrill Lynch sued for damages and injunctive relief in the District Court for Harris County, Texas, alleging that McCollum had violated the account agreement by taking Merrill Lynch's client list and soliciting Merrill Lynch clients. *Id.* The District Court for Harris County denied injunctive relief, the Texas Court of Appeals affirmed, and the Texas Supreme Court denied Merrill Lynch's petition for a Writ of Error. *Id.* Although the Supreme Court of the United States denied certiorari, Justice White, joined by Justice Blackmun, dissented from the denial of certiorari. *Id.* Justice White noted that the issue presented in the *McCollum* case of whether § 3 of the Arbitration Act bars a court from issuing a status quo injunction in disputes subject to arbitration is a divisive issue in both state and federal courts. *Id.* at 812. Justice White also noted that although the Supreme Court in *Southland* reserved the question of whether § 3 of the Arbitration Act should be applied by the state courts, the state courts appear to accept that they should apply § 3. *Id.* at 812 n.2. *See* Southland Corp. v. Keating, 465 U.S. at 16 n.10 (Supreme Court noted that in holding Arbitration Act preempts any state law that removes power to enforce arbitration agreements, Supreme Court was not holding that § 3 applied to state court proceedings).

6. *See* Moses H. Cone Memorial Hosp.v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983) (Congress' intent in Arbitration Act was to move parties into arbitration as quickly as possible); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (once parties agreed to arbitrate disputes, Congress intended that arbitration should be expeditious, without delay or expense in courts); H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924) (intent of Arbitration Act is to make arbitration agreements enforceable in federal courts); S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924) (Congress recognized growing public desire to avoid rising cost and delay of litigation); 2569 CONG. REC. 3004 (1925) (statement of Rep. Graham) (result of Arbitration Act will be to enforce agreements to arbitrate); 2569 CONG. REC. 11081 (1924) (statement of Rep. Dyer) (Arbitration Act would eliminate much expensive litigation).

7. *See* Federal Arbitration Act § 3, 9 U.S.C. § 3 (1982); *supra* note 5 and accompanying text (quoting § 3 of the Arbitration Act).

8. *See infra* note 9 and accompanying text (discussing requirements that party applying for stay of trial must meet under Arbitration Act).

9. Federal Arbitration Act § 2, 9 U.S.C. § 2 (1982); Federal Arbitration Act § 3, 9 U.S.C. § 3 (1982). *See* C.P. Robinson Constr. Co. v. National Corp. for Housing Partnerships,

concerning whether the language in the Arbitration Act requiring a court to stay the trial bars a federal district court from entering a preliminary injunction to maintain the status quo pending arbitration.[10] The Eighth and Tenth Circuits have held that section 3 of the Arbitration Act prohibits federal district courts from entering preliminary injunctions pending arbitration.[11] The Second and Seventh Circuits have held that when the parties have agreed to maintain the status quo in the arbitration agreement, section 3 does not bar a federal district court from entering a status quo injunction.[12] The Fourth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*[13] recently addressed the question of whether a district court can enter a preliminary injunction to maintain the status quo pending arbitration when the parties to the arbitration agreement did not agree specifically to maintain the status quo pending arbitration.[14]

In *Bradley,* Merrill Lynch hired the defendant, Kenneth Dale Bradley, to serve as an account executive.[15] In consideration for his employment, Bradley signed an account executive agreement in which he agreed that, upon termination of his employment with Merrill Lynch, he would not solicit for one year any clients he had served while employed at Merrill Lynch.[16] The

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375 F. Supp. 446, 450 (M.D.N.C. 1974) (discussing four prerequisites in §§ 2 and 3 of Arbitration Act that party applying for stay of trial under Arbitration Act must satisfy); N & D Fashions, Inc. v. DHJ Industr. Inc., C.A., 548 F.2d 722, 728 (8th Cir. 1976) (defining "default in proceeding with arbitration" in § 3 of Arbitration Act as actively participating in lawsuit or any action inconsistent with right to arbitrate); *supra* note 5 and accompanying text (quoting § 3 of Arbitration Act); *see also* Federal Arbitration Act § 2, 9 U.S.C. § 2 (1982). Section 2 of the Federal Arbitration Act states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982).

10. *See infra* note 70 and accompanying text (discussing Eighth Circuit and Tenth Circuit cases holding that § 3 of Arbitration Act bars federal district courts from granting injunctive relief). *But see infra* notes 34, 69 and accompanying text (discussing Second and Seventh Circuit cases holding that courts can enter status quo injunctions in disputes subject to § 3's command that courts must stay trial pending arbitration). *See supra* note 5 and accompanying text (quoting § 3 of the Arbitration Act).

11. *See infra* note 70 and accompanying text (discussing Eighth and Tenth Circuit's holdings concerning whether federal district courts can grant preliminary injunctions in cases subject to Arbitration Act).

12. *See infra* notes 34, 69 and accompanying text (discussing Second and Seventh Circuit's holdings concerning whether federal district courts can grant preliminary injunctions in cases subject to to Arbitration Act).

13. 756 F.2d 1048 (4th Cir. 1985).

14. *Id.* at 1052.

15. *Id.* at 1050. In *Bradley,* Merrill Lynch hired Bradley on December 16, 1981, to serve as an account executive in its office in Newport News, Virginia. *Id.*

16. *Id.* In *Bradley,* Bradley signed an account executive agreement not to compete with

agreement provided that Merrill Lynch and Bradley would settle by arbitration any controversy arising out of Bradley's employment or termination of employment.[17] The agreement, however, did not include a provision for maintaining the status quo pending arbitration in the event of a breach of the agreement.[18] On Friday, July 20, 1984, Bradley submitted his resignation to Merrill Lynch and informed Merrill Lynch that he had accepted a position with Prudential-Bache Securities, Inc.[19] Shortly thereafter, Bradley solicited many of his former Merrill Lynch customers.[20] Merrill Lynch filed suit against Bradley in the United States District Court for the Eastern District of Virginia, alleging breach of fiduciary duty, breach of contract, and conspiracy to injure trade in violation of Virginia law.[21] In addition, Merrill Lynch moved for a temporary restraining order and a preliminary injunction to maintain the status quo pending arbitration.[22] The district court granted Merrill Lynch's motion and enjoined Bradley from soliciting or serving any of his former clients, ordered expedited arbitration, and denied Bradley's motion to stay the injunction.[23] Appealing to the United States Court of Appeals for the Fourth Circuit, Bradley asserted that the district court had abused its discretion by granting a preliminary injunction.[24] Because the parties had agreed that the dispute was subject to arbitration under the Arbitration Act,[25] the principal issue before the Fourth Circuit was whether section 3 of the Act precludes a federal district court from granting injunctive relief to maintain the status quo pending arbitration.[26]

The *Bradley* court first examined the language of section 3, which provides that if the parties have agreed to arbitrate the dispute, then a court

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Merrill Lynch. *Id.* The agreement provided that all the names and addresses of Bradley's clients were the property of Merrill Lynch, and that upon termination of his employment, Bradley would not remove the client lists or any copies of the lists from Merrill Lynch's offices. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1051.

21. *See id.* In *Bradley,* Merrill Lynch alleged that certain executives in Prudential-Bache's Virginia Beach office conspired to injure Merrill Lynch's business. *Id.* Bradley was the third Merrill Lynch account executive in ten months to leave the Merrill Lynch office in Hampton Roads, Virginia, to begin work for Prudential-Bache's Virginia Beach office, and immediately to breach the agreement not to compete with Merrill Lynch. *Id.; see* VA. CODE § 18.2-499 (Supp. 1985). Virginia law declares that a conspiracy by two or more persons to injure another person's business is unlawful. VA. CODE 18.2-499 (Supp. 1985).

22. *Bradley,* 756 F.2d at 1050.

23. *See id.* at 1050-51.

24. *Id.* In *Bradley,* Bradley argued that because the dispute concerning Bradley's breach of contract was subject to mandatory arbitration, § 3 of the Arbitration Act proscribed any further action by the district court. *Id.; see supra* note 5 and accompanying text (quoting § 3 of Arbitration Act).

25. *See Bradley,* 756 F.2d at 1051. In addition to agreeing that the dispute in *Bradley* was subject to arbitration, Merrill Lynch and Bradley agreed that Bradley was not in default in proceeding with arbitration. *Id.; see supra* note 9 and accompanying text (discussing prerequisites for stay of trial pending outcome of arbitration).

26. *Bradley,* 756 F.2d at 1051.

must stay the trial.[27] After noting that the language of the statute specifically did not preclude preliminary injunctions,[28] the Fourth Circuit noted that if Congress intended to divest the federal district courts of equitable remedies, Congress knew how to draft a statute that would limit the federal district courts' equitable powers.[29] Section 3 of the Arbitration Act, however, requires a court to stay the "trial."[30] The Fourth Circuit noted that the Arbitration Act's legislative history does not support an interpretation of the term "trial" beyond its ordinary meaning—a final resolution of the controversy on the merits of the case.[31] The *Bradley* court concluded that Congress would not have stripped the federal courts of their equitable powers without greater discussion of the statute's intended impact on the judiciary.[32]

The *Bradley* court found support for the conclusion that the language in section 3 does not deprive district courts of the power to enter injunctions in *Erving v. Virginia Squires Basketball Club.*[33] In *Erving,* the Second Circuit affirmed an injunction prohibiting a professional basketball player from joining another team.[34] Although the parties had entered a written agreement

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27. *Id.; see supra* note 5 and accompanying text (quoting § 3 of Arbitration Act).

28. *See Bradley,* 756 F.2d at 1052 (noting that § 3 of Arbitration Act does not expressly prohibit federal courts from granting injunctions).

29. *Id.; see infra* note 80 and accompanying text (examples of Congress addressing equitable powers of federal judiciary).

30. *See supra* note 5 and accompanying text (quoting § 3 of Arbitration Act).

31. *Bradley,* 756 F.2d at 1052. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 1-2 (1924) (House Report No. 96 does not indicate that courts should interpret term "trial" beyond its ordinary meaning); S. REP. No. 536, 68th Cong., 1st Sess. 1-4 (1924) (Senate Report No. 536 gives no indication that term "trial" should be interpreted beyond its ordinary meaning).

32. *See Bradley,* 756 F.2d at 1052. The Fourth Circuit in *Bradley* noted that if Congress intended to deprive the federal judiciary of all the judiciary's equitable powers, Congress would have explained comprehensively the statute's intended effect. *Id.* The *Bradley* court pointed out that the Eighth Circuit, which held in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey* that § 3 of the Arbitration Act precludes a federal district court from granting a preliminary injunction to maintain the status quo in disputes subject to mandatory arbitration, never examined the language in § 3 of the Arbitration Act. *Id.* at 1052 n.4; *infra* note 70 and accompanying text (discussing Eighth Circuit's holding in *Hovey).*

33. *Bradley,* 756 F.2d at 1052-53; *see* Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972) (stating that parties have extra-contractual right to status quo injunction); *infra* note 34 and accompanying text (discussing Second Circuit's decision in *Erving).*

34. *See* Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067 (2d Cir. 1972). In *Erving v. Virginia Squires Basketball Club,* Julius Erving signed a contract during his junior year at the University of Massachusetts to play basketball with the Virginia Squires Basketball Club. *Id.* at 1066. After his first year with the Virginia Squires, the Atlanta Hawks offered Erving a contract for approximately $1,500,000. *Id.* Erving entered into the contract with the Atlanta Hawks and brought suit against the Virginia Squires to rescind the contract, alleging that concealment and false misrepresentations by the Virginia Squires induced him to sign the Virginia Squires' contract. *Id.* Virginia Squires counterclaimed, seeking injunctive protection to prevent Erving from playing with the Atlanta Hawks and seeking enforcement of Virginia Squires' right to arbitrate under the contract. *Id.* The District Court for the Eastern District of New York entered an order in favor of Virginia Squires, granting a stay of the trial and an injunction pending arbitration. *Id.* at 1064. On appeal, the Second Circuit affirmed the district

explicitly authorizing injunctive relief to maintain the status quo pending arbitration, the *Erving* court declared that the agreement only stated the parties' existing right to obtain a status quo injunction pending arbitration.[35] The Fourth Circuit in *Bradley* relied on the statement by the Second Circuit that the agreement to maintain the status quo was merely a declaration of the parties' existing rights to obtain a status quo injunction.[36] Consequently, the *Bradley* court found that the Second Circuit's decision in *Erving* supports the proposition that a specific agreement to maintain the status quo is not necessary for a district court to grant a status quo injunction under the Arbitration Act.[37]

The Fourth Circuit had faced a similar issue under the Norris-LaGuardia Act[38] of whether injunctive relief is proper when the parties to a labor dispute have agreed to arbitrate.[39] The Norris-LaGuardia Act, unlike the Arbitration Act, contains specific language prohibiting injunctions.[40] The

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court's orders. *Id.* The Second Circuit noted that the parties had an explicit contractual provision to maintain the status quo pending arbitration, but found that the provision to maintain the status quo merely stated the parties' existing right to preserve the status quo. *Id.* at 1067.

35. *See Erving,* 468 F.2d at 1067.

36. *Bradley,* 756 F.2d at 1052-53; *see supra* note 34 and accompanying text (discussing *Erving* court's statement that explicit agreement between parties to maintain status quo merely stated existing legal rights to status quo injunction). *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1291 n.10 (8th Cir. 1984). In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey,* the court refused to acknowledge a district court's independent right to maintain the status quo pending arbitration. *Id.* The Eighth Circuit distinguished the arbitration agreement in the *Erving* case from the arbitration agreement in the *Hovey* case because in *Erving* the parties explicitly had agreed to maintain the status quo pending arbitration. *Id.* Erving's contract had stipulated that Erving's services were exceptional and unique and that the loss of Erving's services would cause irreparable damage to the Virginia Squires. Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1066 n.1 (2d Cir. 1972). As a result, the contract in *Erving* explicitly had provided for an injunction to maintain the status quo pending completion of arbitration). *Id.*

37. *Bradley,* 756 F.2d at 1053.

38. Norris-LaGuardia Act, 29 U.S.C. §§ 1-1801 (1982).

39. *See* Lever Bros. Co. v. International Chem. Workers Union, Local 217, 554 F.2d 115, 117 (4th Cir. 1976) (involving question of whether district court abused its discretion by granting preliminary injunction preserving status quo pending arbitration of dispute under labor agreement); Drivers, Chauffeurs, Warehousemen, and Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc., 582 F.2d 1336, 1338 (4th Cir. 1978) (same), *cert. denied,* 440 U.S. 929 (1979); *infra* note 45 and accompanying text (discussing *Lever Bros.* and *Akers Motor Lines* cases).

40. Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1982). Section 4 of the Norris-LaGuardia Act provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating in or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment.

Id.

Bradley court maintained, however, that several cases involving the more explicit anti-injunctive language of the Norris-LaGuardia Act lent support for the Fourth Circuit's conclusion that the Arbitration Act's command that a court must stay a trial pending the outcome of arbitration does not preclude injunctive relief.[41] In two Fourth Circuit cases, *Lever Brothers Co. v. International Chemical Workers Union, Local 217*[42] and *Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc.*,[43] the Fourth Circuit affirmed the district courts' orders granting status quo injunctions pending the arbitration of labor disputes.[44] Both cases involved situations in which the employers were permanently relocating or liquidating an existing facility.[45] The unions filed suit seeking injunctions, claiming that the companies' respective decisions to relocate or liquidate existing facilities turned on arbitrable issues under their collective bargaining

41. *Bradley*, 756 F.2d at 1053; *see infra* note 45 and accompanying text (discussing Fourth Circuit decisions addressing whether Norris-LaGuardia Act's language prohibiting injunctions includes injunctions to maintain status quo pending arbitration).

42. 554 F.2d 115 (4th Cir. 1976).

43. 582 F.2d 1336 (4th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

44. *See* Lever Bros. Co. v. International Chem. Workers Union, Local 217, 554 F.2d 115, 120 (4th Cir. 1976) (affirming district court's order issuing preliminary injunction preserving status quo until completion of pending arbitration involving dispute under labor agreement); Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc., 582 F.2d 1336, 1341 (4th Cir. 1978) (same); *infra* note 45 and accompanying text (discussing the Fourth Circuit's holdings in *Lever Bros.* and *Akers Motor Lines).*

45. *See Akers Motor Lines*, 582 F.2d at 1341; *Lever Bros.*, 554 F.2d at 117-18. In *Lever Bros. Co. v. International Chem. Workers Union, Local 217*, the district court in *Lever Brothers* had issued an injunction preventing the Lever Brothers Company (Company) from permanently transferring its Baltimore, Maryland plant to Hammond, Indiana, until the International Chemical Workers Union (Union) had arbitrated the Union's grievances. *Id.* In *Lever Brothers*, the Company and Union had entered into a collective bargaining agreement regarding the employees at the Company's Baltimore plant. *Id.* In October 1975 the Company advised the Union that the Company was closing the Baltimore plant and moving production to the Company's Hammond, Indiana facility. *Id.* The Union filed a grievance, claiming that the Company's activities constituted "contracting out" rather than "elimination" of work under the collective bargaining agreement. *Id.* The collective bargaining agreement required the arbitration of all grievances. *Id.* The Fourth Circuit held that the United States District Court for the District of Maryland properly determined that the disagreement was a grievance subject to arbitration. *Id.* Affirming the district court's decision to grant an injunction, the Fourth Circuit held that an injunction is appropriate to preserve the status quo pending arbitration when in the absence of an injunction, the arbitration becomes a "hollow formality." *Id.*

In *Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc.*, the Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71 (Union) was faced with the similar prospect of their employer, Akers Motor Lines (Employer), liquidating the Employer's business. *Akers Motor Lines*, 582 F.2d at 1338-39. The Fourth Circuit affirmed the United States District Court for the Western District of North Carolina's action to grant injunctive relief to prevent the Employer from continuing to liquidate the Employer's assets pending resolution of the arbitration. *Id.* The *Akers Motor Lines* court reasoned that if the Employer continued to liquidate the Employer's assets, the Union's arbitral victory would be meaningless for the Union because the Employer would not have jobs available for reassignment to Union workers. *Id.*

agreements.[46] Accordingly, the unions argued that without an injunction, arbitration would be a futile endeavor because the companies would relocate or liquidate before the arbitration.[47] The Fourth Circuit held in both cases that despite the explicit anti-injunctive language of the Norris-LaGuardia Act, a district court has the discretion to enter an injunction when without an injunction, the arbitral process would become a "hollow formality" wholly incapable of returning the parties to the *status quo ante.*[48] In both *Lever Brothers*[49] and *Akers Motor Lines,*[50] the Fourth Circuit relied on the United States Supreme Court decision in *Boys Markets, Inc. v. Retail Clerks Union, Local 770,*[51] in which the Supreme Court held that in cases involving parties who have agreed to arbitrate a dispute, a narrow reading of the Norris-LaGuardia Act's anti-injunctive language to prohibit all injunctions is contrary to the legislative policy of promoting the arbitration of labor disputes.[52]

Adopting the hollow formality standard established under the Norris-LaGuardia Act in *Lever Brothers* and *Akers Motor Lines,* the Fourth Circuit in *Bradley* stated that the hollow formality test represents the best approach to determine whether a district court has the power to grant a preliminary injunction under the Arbitration Act.[53] The Fourth Circuit noted that the hollow formality test promotes the congressional policy favoring arbitration by insuring that the arbitral process will continue to be an alternative method for resolving disputes.[54] The *Bradley* court doubted that Congress intended to deprive federal courts of equitable remedies to prevent one party from irreparably harming the other party.[55] The *Bradley* court determined that

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46. *Akers Motors Lines,* 582 F.2d at 1341; *Lever Bros.,* 554 F.2d at 118-19.

47. *Akers Motors Lines,* 582 F.2d at 1341; *Lever Bros.,* 554 F.2d at 118-19.

48. *Akers Motors Lines,* 582 F.2d at 1341; *Lever Bros.,* 554 F.2d at 123.

49. *Lever Bros.,* 554 F.2d at 123.

50. *Akers Motor Lines,* 582 F.2d at 1341.

51. 398 U.S. 235 (1970).

52. *Boys Markets Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235, 252 (1970); *see infra* note 83 and accompanying text (discussing United States Supreme Court's holding in *Boys Markets).*

53. *See Bradley,* 756 F.2d at 1053-54. The Fourth Circuit in *Bradley* stated that the hollow formality standard, which allows a district court to grant a status quo injunction when necessary to prevent the arbitration from becoming a hollow formality, represented a sound approach for determining when a district court can properly grant a preliminary injunction under the Arbitration Act. *Id.* The Fourth Circuit defined hollow formality as a situation in which an arbitration would be unable to return the parties to the *status quo ante. Id.* Under the hollow formality standard courts can ensure that arbitration will remain a meaningful process for dispute resolution. *Id.; supra* note 45 and accompanying text (discussing Fourth Circuit's holding in *Lever Brothers* and *Akers Motor Lines).*

54. *Bradley,* 756 F.2d at 1054; *see supra* note 6 and accompanying text (discussing congressional policy of Arbitration Act).

55. *Bradley,* 756 F.2d at 1054. The *Bradley* court noted that when account executives breach nonsolicitation agreements, absent immediate injunctive enforcement, arbitration agreements are ineffective because the damage is complete and irreparable before arbitration begins. *Id.; see supra* note 6 and accompanying text (discussing policy of Arbitration Act).

arbitration is a hollow formality when arbitration would be unable to return the parties to the *status quo ante.*[56] The Fourth Circuit held that when an arbitrable dispute lies within the ambit of the Arbitration Act, a district court has the discretion to enter an injunction to maintain the status quo pending arbitration when, without an injunction, the arbitral process would become a hollow formality.[57] In light of its holding, the Fourth Circuit also specifically rejected Bradley's distinction that preliminary injunctions are necessary to effectuate congressional policy favoring arbitration in labor cases but not in commercial cases.[58]

After deciding that the Arbitration Act does not bar a federal district court from entering a preliminary injunction, the Fourth Circuit examined whether the district court had abused its discretion by granting a preliminary injunction.[59] To determine whether a district court has abused its discretion by granting a temporary injunction in cases under the Arbitration Act, the Fourth Circuit applies a balance of hardship test.[60] Under the balance of hardship test, a court must first determine whether the potential harm to the plaintiff absent an injunction outweighs the potential harm to the defendant stemming from the issuance of an injunction.[61] Next, a court must ascertain

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56. *Bradley,* 756 F.2d at 1054.

57. *Id.* In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley,* the Fourth Circuit adopted the hollow formality test used by the Fourth Circuit in labor cases involving § 4 of the Norris-LaGuardia Act to determine when a federal district court may enter an injunction maintaining the status quo under § 3 of the Arbitration Act. *Id.* The hollow formality test provides that a federal district court may enter a preliminary injunction to preserve the status quo pending arbitration when, absent an injunction, the arbitral process could not return the parties substantially to the *status quo ante. Id.* (citing Lever Bros. Co. v. International Chem. Workers Union, Local 217, 554 F.2d 115, 123 (4th Cir. 1976)). To grant an injunction properly a court must still apply the balance of hardship test. *See infra* note 61 and accompanying text (discussing balance of hardship test). When an arbitral award cannot return the parties to the *status quo ante,* the Fourth Circuit in *Bradley* defined the arbitration as a "hollow formality." *Bradley,* 756 F.2d at 1053-54. Implicit in the Fourth Circuit's hollow formality test is that cases under the Arbitration Act will satisfy the hollow formality test whenever a plaintiff faces irreparable harm because arbitration can never return an irreparably harmed plaintiff to the *status quo ante. See id.* at 1053-54 (defining arbitration as hollow formality when arbitral award cannot return parties substantially to *status quo ante).*

58. *Bradley,* 756 F.2d at 1053.

59. *Id.* at 1054.

60. *Id.; see infra* note 61 (discussing balance of hardship test to determine when district courts abuse discretion by granting temporary injunction in cases subject to Arbitration Act).

61. *Bradley,* 756 F.2d at 1054-55; *see* Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193-96 (4th Cir. 1977). The Fourth Circuit in *Blackwelder Furniture Co. v. Seilig Mfg. Co.* defined the balance of hardship test to determine when a court can properly issue a preliminary injunction under FED. R. CIV. P. 65(a). *Id.* Under the balance of hardship test, a district court must consider the following four elements: 1) likelihood of irreparable harm to plaintiff in absence of an injunction; 2) likelihood of harm to defendant caused by an injunction; 3) likelihood of plaintiff's success on the merits; and 4) public interest in granting an injunction. *Id.* The most important elements, according to the *Blackwelder* court, are the probability of irreparable harm to the plaintiff in the absence of an injunction and the potential for harm to the defendant by granting the injunction. *Id.* If a court finds that the probability of irreparable harm to the plaintiff outweighs the potential harm to the defendant, then the court need not

whether the plaintiff is likely to succeed on the merits of his case and whether an injunction will serve the public interest.[62] The Fourth Circuit stated that when the danger of irreparable harm to the plaintiff in the absence of an injunction is greater than the potential harm to the defendant, a district court implicitly determines that the arbitral process will be a "hollow formality" without an injunction.[63]

When the Fourth Circuit applied the balance of hardship test to the district court's decision to grant Merrill Lynch a preliminary injunction, the Fourth Circuit held that the district court did not abuse its discretion.[64] The *Bradley* court found that the potential harm to Merrill Lynch outweighed any potential harm to Bradley because after Merrill Lynch's clients have transferred their accounts to Prudential-Bache, the extent of Merrill Lynch's damages would be indeterminable.[65] Recognizing the inability to assess damages as a form of irreparable harm, the *Bradley* court determined that the failure to grant an injunction would render the arbitral process a hollow formality.[66] Furthermore, the Fourth Circuit found that Bradley had failed to show that a preliminary injunction, pending expedited arbitration, would cause Bradley any harm.[67]

Whether the Arbitration Act divests the federal district courts of the power to grant a temporary injunction pending arbitration has divided the federal circuit courts.[68] The Second and Seventh Circuits have decided that

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find a probability of success on the merits, but may enter an injunction on a finding that the case presents grave and serious issues for litigation. *Id. Accord* North Carolina State Ports Auth. v. Dart Containerline Co., 592 F.2d 749, 750 (4th Cir. 1979) (most important elements of balance of hardship test are probability of irreparable injury to plaintiff in absence of injunction and potential harm to defendant by issuing injunction).

62. *Bradley*, 756 F.2d at 1054-55; *see supra* note 61 (discussing elements of balance of hardship test for determining when federal district court abused its discretion by granting a preliminary injunction).

63. *See Bradley*, 756 F.2d at 1054-55. In *Bradley*, the Fourth Circuit held that the district court did not abuse its discretion by granting a temporary injunction to preserve the status quo because the district court found that Merrill Lynch faced irreparable harm through the noncompensable loss of customers. *Id.* Consequently, the Fourth Circuit found that the district court had determined implicitly that arbitration of the dispute in *Bradley* would be a "hollow formality" absent an injunction. *Id. See also supra* note 61 and accompanying text (discussing elements of balance of hardship test for determining when federal district court abused its discretion by granting preliminary injunction).

64. *See Bradley*, 756 F.2d at 1055. The Fourth Circuit in *Bradley* held that the United States District Court for the Eastern District of Virginia properly had found that the balance of hardship favored Merrill Lynch. *Id.* Therefore, the Fourth Circuit concluded that the district court implicitly had found that the arbitration would have been a hollow formality in the absence of a preliminary injunction. *Id.* The Fourth Circuit determined that the district court properly had granted Merrill Lynch's request for a preliminary injunction. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 105 S. Ct. 811, 813 (1985) (question of whether Arbitration Act bars courts from issuing temporary injunction pending arbitration is causing split in federal courts); *infra* note 71 and accompanying text

federal district courts may enter temporary injunctions to maintain the status quo when the parties have agreed to arbitrate disputes.[69] The Eighth and

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(examples of federal courts' division concerning question of whether Arbitration Act allows courts to grant status quo injunctions).

69. *See* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 350 (7th Cir. 1983), *cert. denied,* 464 U.S. 1070 (1984); Connecticut Res. Recovery Auth. v. Occidental Petroleum Corp., 705 F.2d 31, 35 (2d Cir. 1983); Guinness-Harp Corp. v. Joseph Schlitz Brewing Co., 613 F.2d 468, 470-71 (2d Cir. 1980). In *Sauer-Getriebe KG v. White Hydraulics, Inc.,* the White Hydraulics, Inc. (White), entered into a contract with Sauer-Getriebe KG (Sauer) to give Sauer the exclusive right to sell motors manufactured by White. *Sauer-Getriebe,* 715 F.2d at 349. White also agreed to give Sauer certain trade secrets, patents and other rights necessary for the manufacturing of motors. *Id.* The parties agreed to settle all disputes arising out of the contract by arbitration. *Id.* Sauer filed suit in the United States District Court for the Northern District of Indiana, alleging that White had repudiated the contract. *Id.* Sauer sought injunctive relief to bar White from selling any manufacturing rights until the parties completed arbitration. *Id.* at 348. The district court denied Sauer's motion for preliminary injunctive relief. *Id.* On appeal, the Seventh Circuit remanded the case with instructions for the district court to enjoin White from transferring any of Sauer's alleged contractual rights. *Id.* at 352. The Seventh Circuit held that although a court cannot decide a contractual dispute relegated to arbitration, Sauer had demonstrated a probable success on the merits, and, therefore, was entitled to injunctive relief to maintain the status quo pending arbitration. *Id.* The Seventh Circuit noted that the injunction served the public interest because the injunction promoted the strong policy favoring the arbitration of contractual disputes when the parties contractually agree to arbitrate disputes. *Id.*

In *Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp.,* the Second Circuit held that in a case under the Arbitration Act, a court issuing a status quo injunction must find the danger of irreparable harm or an inadequate remedy at law to grant properly an injunction. Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp., 705 F.2d 31, 35 (2d Cir. 1983).

In *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.,* Guinness-Harp Corporation (Guinness) sought an injunction in the United States District Court for the Eastern District of New York to enjoin Joseph Schlitz Brewing Company (Schlitz) from terminating Guinness' distributorship. Guinness-Harp Corp. v. Joseph Schlitz Brewing Co., 613 F.2d 468, 470-71 (2d Cir. 1980). Guinness argued that pursuant to the distributorship agreement, Schlitz could not terminate the distributorship until Schlitz completed certain procedures, which included arbitration. *Id.* at 470. The agreement also provided for maintaining the status quo pending the outcome of the arbitration. *Id.* Affirming the district court's decision to grant an injunction enforcing the status quo provision pending arbitration, the Second Circuit held the injunction was proper under two theories. *Id.* at 472. First, under the Arbitration Act, a court can decide issues related to the making and performance of an agreement to arbitrate, and a court can grant specific performance of the agreement to arbitrate. *Id.* The Second Circuit reasoned that the agreement to maintain the status quo substantially related to the performance of the agreement to arbitrate because presumably Guinness agreed to arbitrate disputes on the condition that the parties would maintain the status quo pending arbitration. *Id.*

Under its second theory, the *Guinness-Harp* court noted that whether the promise to maintain the status quo was merely a condition precedent or consideration for the arbitration agreement, the status quo injunction was still proper. *Id.* The Second Circuit held that the "plain meaning" of the contract provided that the status quo should continue pending arbitration and that the arbitration provision did not bar the district court from enforcing the plain meaning of a contract. *Id.* Circuits other than the Second, Fourth, Seventh, Eighth, and Tenth Circuits do not appear to have addressed the issue of whether § 3 of the Arbitration Act, requiring a court to stay a trial, absolutely precludes a district court from entering a status quo injunction pending arbitration.

Tenth Circuits, however, have held that section 3 of the Arbitration Act, commanding a court to stay the trial, requires a stay of all judicial action and therefore divests federal district courts of the power to grant temporary injunctions.[70] Furthermore, the issue of whether section 3 of the Arbitration

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70. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1291 (8th Cir. 1984); *Bradley,* 756 F.2d at 1051 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott, No. 83-1480 (10th Cir. May 12, 1983) (unpublished opinion)). In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey,* Ivan Hovey was an account executive with Merrill Lynch and signed an agreement providing that upon termination of Hovey's employment with Merrill Lynch, all client lists would remain the property of Merrill Lynch and that Hovey would not solicit any of Merrill Lynch's customers. *Hovey,* 726 F.2d at 1287. Hovey left Merrill Lynch to work for E.F. Hutton. *Id.* Hovey admitted retaining information concerning certain Merrill Lynch clients and soliciting Merrill Lynch customers while at E.F. Hutton. *Id.* at 1287-88. The Eighth Circuit reversed the United States District Court for the District of North Dakota's decision to grant Merrill Lynch injunctive relief. *Id.* at 1292. The *Hovey* court held that when the Arbitration Act applies to a dispute, the language of § 3 directs that a court must stay any judicial action. *Id.* at 1291.

The *Hovey* court's reasoning to support its refusal to grant injunctive relief consisted of two elements. *Id.* at 1292. First, the *Hovey* court reasoned that to issue an injunction a court must examine the merits of a dispute, and according to the *Hovey* court an inquiry into the plaintiff's likelihood of success on the merits of the case unnecessarily injects a court into the merits of the dispute. *Id.* The *Hovey* court noted that the arbitrators should examine the merits of the case. *Id.*

The *Hovey* court relied on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* for the proposition that the merits of a case are better left to the arbitrators. *Id.; see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967). In *Prima Paint,* however, the United States Supreme Court held that the question of fraud in the inducement of a contract containing an arbitration clause is an arbitrable issue under the agreement which the arbitrators should decide, and the *Prima Paint* Court never addressed the issue of whether § 3 of the Arbitration Act, mandating that courts must stay a trial pending arbitration, absolutely precludes a federal district court from examining the merits of a case to grant a status quo injunction pending arbitration. *Prima Paint,* 388 U.S. at 403-04. Second, the *Hovey* court relied on *Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO* in which the United States Supreme Court refused to enjoin a strike pending arbitration. *Hovey,* 726 F.2d at 1292; *see* Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO, 428 U.S. 397, 412 (1976). In *Buffalo Forge,* the United States Supreme Court held that judicial interference at the preliminary stages of a dispute would eviscerate the intent of arbitration agreements. *Buffalo Forge,* 428 U.S. at 412. The Eighth Circuit's reliance on *Buffalo Forge,* however, was misplaced because the *Buffalo Forge* case dealt with a strike that did not arise in response to an arbitrable dispute. *Id.*

Because the Eighth Circuit in *Hovey* found that the dispute between Merrill Lynch and Hovey was arbitrable, the Eight Circuit should have relied on *Boys Markets v. Retail Clerks Union* in which the United States Supreme Court dealt with a strike arising out of an arbitrable dispute under a collective bargaining agreement. *See* Boys Markets v. Retail Clerks Union, 398 U.S. 235, 254 (1970); *Hovey,* 726 F.2d at 1291-92. In the *Boys Markets* case, the Supreme Court held that § 4 of the Norris-LaGuardia Act, which limits the jurisdiction of federal district courts to enjoin striking unions, is not a bar to preliminary injunctive relief when a union voluntarily undertakes a contractual agreement not to strike in return for an employer's agreement to arbitrate disputes. *Boys Markets,* 398 U.S. at 254. The *Boys Markets* Court held that when a court finds that both parties are contractually bound to arbitrate a dispute, the court may issue an injunction if the court also requires an employer to arbitrate the dispute as a condition of receiving injunctive relief. *Id.*; *see infra* note 83 and accompanying text (discussing holding in *Boys Markets).*

Act bars a court from issuing an injunction has divided federal district courts.[71] The *Bradley* court's decision to permit status quo injunctions when necessary to sustain arbitration as a meaningful alternative to litigation represents a sound construction of the Arbitration Act and properly reflects the use of federal courts to promote the strong congressional policy in favor of arbitration expressed in the Arbitration Act.[72]

Because section 3 of the Arbitration Act does not prohibit expressly temporary injunctions,[73] the question of whether courts can enter injunctions pending arbitration ultimately turns on whether Congress intended to deprive the federal courts of their equitable jurisdiction.[74] The United States Supreme

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Finally, the *Hovey* court stated that the congressional intent underlying the Arbitration Act to provide parties to an arbitration agreement with prompt arbitration compels the denial of preliminary injunctive relief by federal district courts. *Hovey*, 726 F.2d at 1292. The Eighth Circuit's reasoning, however, overlooks the more important policy of the Arbitration Act—to enforce arbitration as an alternative to expensive litigation. *See* H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924) (congressional intent underlying Arbitration Act is to make arbitration agreements enforceable in federal courts). The Eighth Circuit's reasoning is absurd in situations like *Hovey* and *Bradley*, when absent an injunction, arbitration would become a meaningless formality. *See supra* note 57 and accompanying text (discussing when arbitration becomes hollow formality). The congressional intent in enacting the Arbitration Act was to promote arbitration as an alternative to expensive litigation, not to speed the parties into meaningless arbitration. *See supra* note 6 and accompanying text (discussing policy of Arbitration Act).

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott*, the Tenth Circuit vacated in an unpublished order a preliminary injunction pending arbitration of a breach of an arbitration agreement. *Bradley*, 756 F.2d at 1051 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott, No. 83-1480 (10th Cir. May 12, 1983) (unpublished opinion)).

71. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro, 577 F. Supp. 616, 624 (W.D. Mo. 1983) (court declined to grant status quo injunctions because allowing court to consider merits as court must to decide whether to grant injunction is inconsistent with narrow role assigned to courts under Arbitration Act and could improperly influence arbitrator's decision); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert, 577 F. Supp. 406, 407 (M.D. Fla. 1983) (same); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson, 575 F. Supp. 978, 979 (N.D. Fla. 1983) (finding that language of § 3 of Arbitration Act prohibits any evidentiary proceedings required to issue status quo injunction because hearing detailed factual issues would frustrate statutory policy of moving parties into arbitration as quickly as possible). *But see* Janmort Leasing, Inc. v. Econo-Car Int'l, Inc., 475 F. Supp. 1282, 1294 (E.D.N.Y. 1979) (§ 3 of Arbitration Act does not deprive court of power to enter status quo injunction; rather, preliminary relief is particularly appropriate when in absence of preliminary relief arbitration will be futile); Albatross S.S. Co. v. Manning Bros., Inc., 95 F. Supp. 459, 463 (S.D.N.Y. 1951) (power to issue injunction pending arbitration follows from power to compel arbitration); *cf.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. de Liniere, 572 F. Supp. 246, 247-49 (N.D. Ga. 1983) (although court did not address issue of whether language of § 3 of Arbitration Act bars federal district court from entering an injunction, court apparently assumed court had power but denied injunction based on merits of case).

72. *See Bradley*, 756 F.2d at 1054; *supra* note 6 and accompanying text (discussing policy of Arbitration Act).

73. *See* Federal Arbitration Act § 3, 9 U.S.C. § 3 (1982); *supra* note 5 and accompanying text (quoting § 3 of Arbitration Act).

74. *See* Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288-291 (1960). The United States Supreme Court noted in *Mitchell v. DeMario Jewelry, Inc.*, that only "a clear and valid legislative command" can limit the equitable jurisdiction of courts to secure complete justice. *Id.* The

Court has held in *Mitchell v. DeMario Jewelry, Inc.*[25] that unless a statute demonstrates clear legislative intent to limit the courts' equitable powers, federal district courts retain their equitable jurisdiction to procure justice.[76] The *Mitchell* Court held that the federal courts retain their inherent equitable powers unless a statute creates the inescapable inference that Congress intended to limit the federal courts' jurisdiction.[77] The *Mitchell* court also noted that doubtful statutory constructions should not limit the federal district courts' inherent equitable powers.[78] The language of section 3 of the Arbitration Act, requiring a stay of trial, does not indicate necessarily that Congress meant to limit the courts' equitable power to grant preliminary injunctive relief.[79] In contrast to section 3's ambiguous command to stay a "trial," Congress has demonstrated its clear intent to deprive federal district courts of equitable jurisdiction in other circumstances.[80] Because Congress did not limit expressly the judiciary's equitable powers in section 3 of the Arbitration Act, courts must assume that Congress did not intend to divest federal courts of the power to grant temporary injunctions pending arbitration.[81]

Supreme Court has recognized that federal district courts have inherent jurisdiction to carry out the legislative policy underlying federal statutes. *Id.* Congress can limit the federal courts' power to hear certain cases or to grant certain equitable remedies. *Id.* A federal district court presumably has the equitable power to secure justice, unless a statute evinces an unmistakable congressional intent to limit the federal district court's equitable jurisdiction. *Id.* The Federal Arbitration Act, however, does not provide special jurisdictional prerequisites to satisfy the federal courts' jurisdictional requirements. *Id.* Therefore, parties ordinarily must satisfy the jurisdictional requirements of 15 U.S.C. 1332. 3 FEDERAL PROCEDURE § 4:3, at 10 (Law ed. 1981); *see* 15 U.S.C. § 1332 (1982) (to meet requirements of § 1332, party must show actual controversy between citizens of different states and amount in controversy exceeding $10,000).

75. 361 U.S. 288 (1960).

76. *Id.* at 291 (citing Porter v. Warner Co., 328 U.S. 395, 397-98 (1946)). In *Mitchell v. DeMario Jewelry, Inc.*, the United States Supreme Court considered whether in a suit brought by the Secretary of Labor to enjoin violations of § 15(a)(3) of the Fair Labor Standards Act for discriminatory discharge, § 17 of the Fair Labor Standards Act restricts a district court from ordering reimbursement for lost wages caused by a discriminatory discharge. *Id.* at 289. Section 17 of the Fair Labor Standards Act provides that no court has the jurisdiction to order payment of unpaid minimum wages to employees in an action brought by the Secretary of Labor. Fair Labor Standards Act § 17, 29 U.S.C. § 217 (1982). After examining the language of § 17 and the legislative history of the Fair Labor Standards Act, the United States Supreme Court held that Congress did not intend that § 17 apply in discriminatory discharge cases. *Mitchell*, 361 U.S. at 294-95. Rather, Congress enacted § 17 to restrict backpay in minimum wage cases. *Id.* As a result, the Supreme Court held that a district court has the jurisdiction to order an employer to reimburse employees for losses caused by unlawful discharge. *Id.* at 296.

77. *Mitchell*, 361 U.S. at 291.

78. *Id.*

79. *See supra* note 5 and accompanying text (quoting § 3 of the Arbitration Act).

80. *See* 28 U.S.C. § 2283 (1982) (providing that federal courts cannot grant injunctions to stay state court proceedings unless act of Congress specifically grants such authority); 11 U.S.C. § 362(a) (1982) (protecting debtors who file in bankruptcy by proscribing all proceedings -judicial, administrative, or otherwise-against debtors, consequently limiting courts' jurisdiction to fashion equitable remedies against debtor).

81. *See Bradley*, 756 F.2d at 1054; *supra* notes 74-78 and accompanying text (discussing construction of statutes that limit equitable powers of federal district courts).

Furthermore, the United States Supreme Court's statutory interpretation of the anti-injunctive language in the Norris-LaGuardia Act in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*[82] is instructive in construing section 3 of the Arbitration Act.[83] In *Boys Markets,* the employer and the union entered into a written no-strike agreement, which provided that the parties would decide all disputes by binding arbitration and that the union would not engage in any work stoppages because of disagreements concerning the contract.[84] The union, however, called a strike in violation of the agreement, and the United States District Court for the Central District of California granted the employer's motion for a temporary injunction.[85] In reversing the Ninth Circuit's subsequent order vacating injunctive relief,[86] the United States Supreme Court reasoned that the Supreme Court's earlier decision in *Sinclair Refining Co. v. Atkinson,*[87] prohibiting courts from granting injunctions under the Norris-LaGuardia Act, frustrated the congressional policy favoring arbitration of labor disputes.[88] Therefore, in the Court's view, a strict

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82. 398 U.S. 235 (1970).

83. *See* Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 252 (1970). In *Boys Markets, Inc. v. Retail Clerks Union,* the United States Supreme Court held that an interpretation of the Norris-LaGuardia is anti-injunction language, which prohibits enjoining strikes arising from disputes that the parties have agreed to arbitrate, undermines the federal policy favoring arbitration of labor disputes. *Id.* The Supreme Court recognized that Congress enacted the Norris-LaGuardia Act in part to correct a problem perceived by Congress that judges were enjoining strikes according to the social views of the particular judge hearing the case. *Id.* at 253 n.22. The Supreme Court noted that a primary goal of the Norris-LaGuardia Act was to promote the growth of labor organizations. *Id.* Absent a contractual agreement not to strike, Congress intended to protect the union's freedom to strike to gain a better position in collective bargaining. *Id.* The Supreme Court found that enforcing contractual agreements not to strike, freely undertaken by the unions in collective bargaining, differed from enjoining strikes in labor disputes absent the contractual agreement not to strike. *Id.* The Supreme Court held that enforcing contractual agreements not to strike does not injure labor organizations, but enhances the goal of promoting labor organizations by enforcing the obligations of the parties. *Id.; see also* Drivers, Chauffeurs, Warehousemen and Helpers Teamsters Local Union No. 71 v. Akers Motor Lines, Inc., 582 F.2d 1336, 1341 (4th Cir. 1978) (language of § 4 of Norris-LaGuardia Act prohibiting injunctions must yield to congressional policy favoring arbitration of labor disputes when in absence of injunction arbitration is *pro forma*); Lever Bros. Co. v. International Chem. Workers Union, 554 F.2d 115, 123 (4th Cir. 1976) (preliminary injunction proper to prevent arbitration from becoming meaningless formality).

84. *Boys Markets,* 398 U.S. at 238-39.

85. *Id.*

86. Boys Markets v. Retail Clerks Union, 416 F.2d 368, 370 (9th Cir. 1969).

87. 370 U.S. 195 (1962).

88. *Boys Markets,* 398 U.S. at 252; *see* Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 203 (1962), *overruled by,* Boys Markets Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970). In *Sinclair Refining Co. v. Atkinson,* the Sinclair Refining Company (Company) filed suit, seeking an injunction to prevent the Oil, Chemical, and Atomic Workers International Union (Union) from striking or engaging in work slowdowns. *Sinclair,* 370 U.S. at 198. The Union filed a motion to dismiss, arguing that because the dispute grew out of a "labor dispute" as defined in the Norris-LaGuardia Act, the district court did not have jurisdiction to enter an injunction under § 4(a) of the Norris-LaGuardia Act. *Id.* at 198. *See* Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (1982). The United States Supreme Court held that § 4(a) deprives federal courts of jurisdiction to enter injunctions, regardless of whether the strike was in violation of a contractual agreement. *Sinclair,* 370 U.S. at 198.

interpretation of the anti-injunctive language in section 4 of the Norris-LaGuardia Act, that no court has the jurisdiction to enter an injunction, must yield to the important congressional policy favoring arbitration of labor disputes.[89] The Supreme Court decided in *Boys Markets* that if injunctive protection is not available to employers, employers would not agree to arbitrate disputes when such employers would be unable to enforce the unions' agreements not to strike through injunctive relief.[90] Similarly, if by entering arbitration agreements brokerage firms lose the right to enforce the status quo pending arbitration, brokerage firms will lose the incentive to enter arbitration agreements. Therefore, a narrow reading of the Arbitration Act, limiting a court's power to enter status quo injunctions pending arbitration, offends the strong congressional policy favoring arbitration.[91]

The Fourth Circuit's hollow formality test reflects a sound procedure to effectuate the Arbitration Act's congressional policy to promote arbitration and to move the parties to an arbitrable dispute into arbitration as quickly as possible.[92] The hollow formality test allows federal district courts to enter preliminary injunctions, regardless of whether the parties specifically have agreed in the contract to maintain the status quo, when arbitration would be unable to return the parties to the *status quo ante*.[93] Accordingly, the Fourth Circuit's approach promotes arbitration by preserving the status quo to ensure that arbitration remains an effective alternative for dispute resolution. The Fourth Circuit has recognized in *Bradley* that the congressional intent underlying the Arbitration Act was not to allow one party to abuse arbitration agreements by causing irreparable damage to the other party pending arbitration.[94] When Congress announced a strong policy favoring arbitration, Congress did not intend the Arbitration Act to promote such abuses without recourse to the courts.[95] Rather, when parties agree to submit disputes to arbitration, courts should be able to preserve the parties' rights pending arbitration to allow arbitrators ultimately to decide the parties' disputes on the merits.

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89. *See Boys Markets*, 398 U.S. at 235. In *Boys Markets*, the Supreme Court found that unavailability of equitable relief was a serious impediment toward implementing the congressional policy favoring arbitration of labor disputes. *Id.*

90. *See Boys Markets*, 398 U.S. at 254. The *Boys Markets* Court reasoned that, without injunctive relief, employers would lose the principle and most expeditious method to enforce no-strike agreements. *Id.*

91. *See supra* note 6 and accompanying text (discussing policy of Arbitration Act).

92. *See supra* note 6 and accompanying text (discussing policy of Arbitration Act).

93. *See Bradley*, 756 F.2d at 1053-54; *supra* note 57 (discussing Fourth Circuit's adoption of hollow formality test in labor cases).

94. *See* Brief for Appellee at 12-13, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985) (noting that congressional intent of Arbitration Act was not to allow one party to irreparably harm another party pending arbitration).

95. *See supra* note 6 and accompanying text (discussing policy of Arbitration Act to enforce arbitration agreements and promote quick arbitration of disputes).