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Should It Stay or Should It Go?: The Fourth Circuit and 3 of the Federal Arbitration Act

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NOTE

SHOULD IT STAY OR SHOULD IT GO?: THE FOURTH CIRCUIT AND § 3 OF THE FEDERAL ARBITRATION ACT

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ABSTRACT

Since its creation in 1925, the Federal Arbitration Act (FAA) has effectively provided a body of federal substantive law that controls the judicially enforceable arbitrability of interstate and foreign arbitration agreements in the United States. Section 3 of the FAA states that if a party to an agreement containing an arbitration clause initiates litigation relating to that agreement, the other party may request that the court stay the litigation pending an arbitration proceeding. There is currently a split among the United States Circuit Courts of Appeals regarding whether § 3 of the FAA requires a court under these circumstances to stay an action pending arbitration or whether the court is given discretion to dismiss the action.

The United States Court of Appeals for the Fourth Circuit is the final circuit left to determine whether § 3 requires a court to stay actions pending arbitration. In its 2012 decision Aggarao v. MOL Ship Management Co., the Fourth Circuit held that a stay pending arbitration was statutorily required under § 3 because not all of the claims were arbitrable. The court's opinion in Aggarao addressed the current disagreement among its sister circuits regarding whether § 3 requires a stay or permits dismissal, but it did not attempt to resolve the disagreement within the Fourth Circuit. Also cited in the court's opinion was the tension between two of its previous decisions regarding § 3—one holding that dismissal is permitted when all claims are arbitrable, the other holding that stay is required regardless of arbitrability of all claims. Because the Fourth Circuit has not officially addressed the issue, district courts have justified their differing holdings by citing to either decision for support.

This Note proposes that the Fourth Circuit should address the circuit split and hold that § 3 of the FAA requires a stay pending arbitration. Further, this Note provides an analysis regarding the tension between the two holdings

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addressed by the Fourth Circuit in Aggarao, and how they have resulted in inconsistency and confusion within Fourth Circuit district courts. Finally, this Note offers that requiring stay comports with the plain statutory interpretation of § 3 and will effectively preclude interlocutory appeals, creating uniformity and efficiency within the Fourth Circuit.

I. INTRODUCTION

The Clash's famous lyric said it best: "You got to let me know, should I stay or should I go?"[1] This Note addresses the disagreement regarding the proper interpretation of § 3 of the Federal Arbitration Act (FAA).[2] The United States Courts of Appeals are currently split as to whether § 3 requires a district court to stay an action, upon request of one of the parties, when all the issues are subject to arbitration. The First, Fifth, and Ninth Circuits have held that courts are permitted to dismiss the action altogether if all claims are referable to arbitration.[3] Conversely, the Second, Third, Seventh, Tenth, and Eleventh Circuits have held that a stay is always mandated, even when all claims in an action are arbitrable.[4] This Note provides an overview of the circuit split and focuses on the Fourth Circuit, which has yet to determine its stance on the issue. This Note explores the tension between two prior Fourth Circuit holdings, providing a closer look at the circuit's conflicting statutory interpretation of § 3 and how Fourth Circuit district courts have been impacted. Ultimately, this Note proposes that the Fourth Circuit should hold that a stay under § 3 of the FAA is required in *any* circumstances, even when all claims in an action are arbitrable.

Part II of this Note provides an understanding of arbitration and the history of the FAA, as well as the significance of this issue in light of the Fourth Circuit's recent decision of *Aggarao v. MOL Ship Management Co.*[5]

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1. "Should I Stay or Should I Go?" is one of the more popular songs by British punk rock band The Clash. See information about "Should I Stay or Should I Go?" at SONGFACTS, http://www.songfacts.com/detail.php?id=1550 (last visited Feb. 13, 2017).

2. 9 U.S.C. § 3 (2012).

3. Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 144 (1st Cir. 1998); Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105 (5th Cir. 1990); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 641 (9th Cir. 1988).

4. Katz v. Cellco P'ship, 794 F.3d 341, 343 (2d Cir. 2015); Lloyd v. Hovensa, LLC, 369 F.3d 263, 271 (3d Cir. 2004); Tice v. Am. Airlines, Inc., 288 F.3d 313, 318-19 (7th Cir. 2002); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992); Quinn v. CGR, 828 F.2d 1463, 1495 (10th Cir. 1987).

5. Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 380 (4th Cir. 2012).

Part III discusses the circuit split and illustrates both sides of the circuit split through opinions from two circuits in closest geographical location to the Fourth Circuit. Part IV analyzes the tension between prior Fourth Circuit holdings referenced in *Aggarao* and how they have impacted district court decisions. Part V illustrates the inconsistency and confusion among its district courts regarding § 3 resulting from the two conflicting holdings discussed in Part IV. Finally, Part VI addresses the various reasons why the Fourth Circuit should require a stay under § 3 on principle. The justifications for requiring a stay are largely based on the principles of stare decisis and modern "law of the circuit" rules, as well as the plain meaning of the provision itself. Further benefits of requiring a stay under § 3 include the creation of uniformity within the circuit and increased overall efficiency.

II. UNDERSTANDING HISTORY: ARBITRATION, THE FAA, AND AN ILLUSTRATION OF THE FOURTH CIRCUIT'S APPROACH TO THE CIRCUIT SPLIT THROUGH THE LENS OF *AGGARAO*

Congress's enactment of the FAA in 1925[6] aimed to alleviate the resentment towards arbitration within the courts that stemmed from English common law and promulgated itself within the American judicial system.[7] The impact of the FAA has shaped the modern transition to judicial pro-arbitration views, leading courts to construe arbitration provisions to their most liberal extent.[8] A circuit split currently exists concerning the statutory interpretation of § 3 of the FAA and whether it requires courts to mandate a stay[9] of an action if the parties have agreed to arbitrate a claim and the claim is actually arbitrable.[10] When a court decides to stay under § 3, no other court proceedings on matters subject to the agreed upon arbitration are permitted until the arbitration is complete.[11]

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6. United States Arbitration Act, Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 1).

7. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

8. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) ("[I]t is the congressional policy manifested in the [FAA] that requires courts liberally to construe the scope of arbitration agreements covered by that Act . . . .").

9. A stay is "[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." *Stay*, BLACK'S LAW DICTIONARY (10th ed. 2014).

10. *See* Williams v. Imhoff, 203 F.3d 758, 764 (10th Cir. 2000).

11. Alessandra Rose Johnson, *Oh, Won't You Stay with Me?: Determining Whether § 3 of the FAA Requires A Stay in Light of* Katz v. Cellco Partnership, Note, 84 FORDHAM L. REV.

While the United States Supreme Court has not resolved this split in the circuits, several circuit courts have interpreted § 3 as permitting court discretion in dismissing actions if all claims are found to be subject to arbitration under Rule 12(b)(6).[12] Still, other courts have dismissed such actions under Rules 12(b)(1) or 12(b)(3).[13] The Fourth Circuit is the only circuit that has yet to rule on the issue. In its recent case of *Aggarao*, the Fourth Circuit did note the disagreement among the other circuit courts and within its own circuit as to whether § 3 requires courts to stay or permits dismissal of actions subject to arbitration.[14] However, the Fourth Circuit's opinion declined to resolve the scope of § 3 within its circuit because the issue was "not squarely" presented before the court in that situation.[15] This part of the Note discusses arbitration, the FAA, and its importance in modern day jurisprudence. This Note also discusses how *Aggarao* was a missed opportunity for the Fourth Circuit to hold that the proper statutory interpretation of § 3 requires a stay.

A. Overview of Arbitration

"Arbitration is a private, informal process by which the parties to a contract agree to submit their disputes to one or more neutral third parties authorized to resolve the disputes by delivering a final and binding decision called an award."[16] Arbitration is a common form of alternative dispute resolution[17] (ADR), and arbitration clauses are preferred in many commercial transactions that do not permit contractual pre-dispute waivers or jury trials.[18] Parties favor arbitration for many reasons, including the expediency and reduced cost that results from avoiding litigation.[19] Because

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2261, 2264 (2016) (quoting USM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17, 20 (1st Cir. 1978)).

12. *See, e.g.*, Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004) (dismissing under FED. R. CIV. P. 12(b)(6) for failure to state a claim).

13. Atkins v. Louisville & Nashville R.R., 819 F.2d 644, 647 (6th Cir. 1987) (dismissing under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction); Cedars-Sinai Med. Ctr. v. Glob. Excel Mgmt., Inc., No. CV 09-3627, 2010 WL 5572079, at *9 (C.D. Cal. Mar. 19, 2010) (dismissing under FED. R. CIV. P. 12(b)(3) for improper venue).

14. Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 376 n.18 (4th Cir. 2012).

15. Johnson, *supra* note 11, at 2282-83 (quoting *Aggarao*, 675 F.3d at 376 n.18) (reasoning "[w]e need not resolve this disagreement because, even under *Choice Hotels*, dismissal is not appropriate where, as here, the issues are not all subject to arbitration.").

16. LEXIS PRACTICE ADVISOR ATTORNEY TEAM, *supra* note 6.

17. *See* Lloyd N. Shields, *Arbitration As ADR*, 41 LA. B.J. 222, 225 (1993).

18. LEXIS PRACTICE ADVISOR ATTORNEY TEAM, *supra* note 6.

19. Johnson, *supra* note 11, at 2264-65.

modern public policy understands the benefits of and favors arbitration, courts tend to construe the scope of arbitration agreements liberally.[20]

B. Understanding the FAA

The Federal Arbitration Act was first enacted by Congress in 1925 and subsequently reenacted and codified in 1947.[21] The FAA governs arbitration agreements involving maritime disputes and contracts involving interstate and foreign commerce.[22] The FAA was a congressional response to judicial hostility to arbitration agreements,[23] and the Supreme Court stated that the overarching purpose of the FAA is to encourage efficient dispute resolution.[24] The Act serves "'to make valid and enforcible [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts.'"[25] The FAA is viewed as providing a body of federal substantive law that controls all of the issues regarding the validity and enforcement of covered arbitration agreements.[26] In applying the FAA, courts initially look at whether the parties agreed to arbitrate a dispute.[27] If language in the parties' agreement is ambiguous, courts favor arbitration except in cases in which agreements clearly did not intend to allow arbitration.[28] Concisely put, the FAA "'simply . . . make[s] the contracting party live up to his agreement.'"[29]

Section 3 of the FAA is integral in providing that if a party to an agreement, containing an arbitration clause initiates litigation regarding that agreement, the other party may request that the court stay the litigation and compel the litigating party to resolve the dispute through arbitration.[30] Section 3 states in pertinent part,

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20. *Id.* at 2265.

21. *Id.*

22. *See* 9 U.S.C. § 2 (2012).

23. Johnson, *supra* note 11, at 2265.

24. *Id.*

25. *Id.* (quoting H.R. REP. NO. 68-96, at 1 (1924)).

26. LEXIS PRACTICE ADVISOR ATTORNEY TEAM, *supra* note 6.

27. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

28. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 475–76 (1989).

29. Johnson, *supra* note 11, at 2265 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

30. LEXIS PRACTICE ADVISOR ATTORNEY TEAM, *supra* note 6.

> 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.[31]

The language of § 3 is unambiguous: when *any* validly arbitrable claims come before the court, the court shall stay the action pending arbitration of the parties.[32] The plain text of § 3 explicitly requires that courts must stay any action,[33] a clear mandate to courts, regardless of whether all claims are arbitrable. While the Fourth Circuit has not addressed the issue of whether to stay an action when all claims are subject to arbitration, it noted tension between two of its prior holdings in its recent decision of *Aggarao*.[34]

C. *Painting a Backstory:* Aggarao v. MOL Ship Management Co.

In *Aggarao v. MOL Ship Management Co.*, the Fourth Circuit grappled with § 3 of the FAA and whether it requires a district court to stay proceedings upon request of one of the parties.[35] *Aggarao* involved a seaman and citizen of the Philippines who brought a suit against his employer, a ship owner, and several others for damages arising from severe injuries he sustained aboard a vessel in the Chesapeake Bay near Baltimore.[36] Aggarao alleged claims of "unseaworthiness, maintenance and cure, breach of contract, violation of the Seaman's Wage Act, and negligence under general maritime law and the Jones Act."[37] The District Court for the District of Maryland dismissed his complaint for improper venue after determining that all claims were subject to arbitration in the Philippines.[38] On appeal, the Fourth Circuit concluded its analysis of

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31. 9 U.S.C. § 3 (2012) (emphasis added).
32. *Id.*
33. *Id.*
34. Green v. Zachry Indus., Inc., 36 F. Supp. 3d 669 (W.D. Va. 2014).
35. Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 375 (4th Cir. 2012).
36. *Id.* at 360.
37. *Id.*
38. *See* Aggarao v. Mitsui O.S.K. Lines, Ltd., 741 F. Supp. 2d 733, 743 (D. Md. 2010).

Aggarao's claims by determining that the arbitration clause in the contract was, in fact, enforceable.[39] However, it reversed the lower court's dismissal and held that under § 3 of the FAA, a stay pending arbitration was statutorily required because not all of the claims were arbitrable.[40] While the court addressed the inconsistencies between previous Fourth Circuit holdings involving § 3, it only dealt with the present case,[41] foregoing the opportunity to hold that courts are required to stay any claims pending arbitration under § 3, even when the all claims presented are arbitrable.

III. TO STAY OR NOT TO STAY: THE CIRCUIT SPLIT REGARDING THE STATUTORY INTERPRETATION OF § 3

The circuit split involving § 3 of the FAA and whether it requires stay of any arbitrable claim or grants courts the discretion to dismiss based on arbitrability of all claims turns on statutory interpretation. The recent Second Circuit decision in *Katz v. Cellco Partnership* focused on the language of § 3 that "specifies that the court 'shall' stay proceedings pending arbitration, provided an application is made and certain conditions are met."[42] Ultimately, the Fourth Circuit's statutory interpretation of § 3 will affect the current split. The majority of circuits hold that proper interpretation mandates stay, while only three circuits maintain that § 3 permits dismissal of arbitrable claims. The Fourth Circuit's decision to side with the majority would follow closely behind the Second Circuit decision in *Katz*, which analyzed the structure and overarching purpose of the FAA.[43] This part of the Note provides an overview of the circuit split, highlighting decisions of two circuits on opposite sides of the split—the Third and the First—that, for illustrative purposes, are in closest geographical proximity to the Fourth Circuit.

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39. *Aggarao*, 675 F.3d at 380.

40. *Id.*

41. *Id.* at 376 n.18.

42. Katz v. Cellco P'ship, 794 F.3d 341, 345-47 (2d Cir. 2015).

43. Although this Note does not specifically address how the Supreme Court should rule regarding § 3 of the FAA, it is important to note the analysis laid out in the Second Circuit's *Katz* decision that could also be applied by the Fourth Circuit. In applying the same analysis, the Fourth Circuit would not only be the final circuit to resolve the issue, but it would also strengthen the position held by the majority of circuits. For a closer look at the Second Circuit's analysis of the FAA, see *Katz*, 794 F.3d at 345-47.

A. *The Statutory Interpretation of § 3 Mandates Stay of Arbitral Claims*

Currently, five circuits have held that stay is required under statutory interpretation of § 3 and that district courts lack the discretion to dismiss in any circumstance: the Second, Third, Seventh, Tenth, and Eleventh.[44] These circuits have recognized the various benefits that issuing a stay pending arbitration provides.[45] The Third Circuit's decision in *Evans v. Hudson Coal Company*[46] relied on the United States Arbitration Act (USAA),[47] the precursor to § 3 of the FAA. The statutory language of § 3 of the USAA is identical to § 3 of the FAA,[48] and the court in *Evans* interpreted it as mandating stay of *any* arbitrable claim under the plain language of the provision, even if all claims are arbitrable.[49] In one of its most recent decisions involving § 3 of the FAA, the Third Circuit reversed the decision of the District Court of the Virgin Islands, which denied a motion to stay proceedings pending arbitration and dismissed the case with prejudice.[50] In analyzing its jurisdiction to compel arbitration of Lloyd's claims and to stay the proceeding pending arbitration, the Third Circuit noted the split among the circuits regarding § 3 and that the present case was an issue of first impression before the circuit.[51]

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44. *See* Katz v. Cellco P'ship, 794 F.3d 341 (2d Cir. 2015); Lloyd v. Hovensa, LLC, 369 F.3d 263 (3d Cir. 2004); Tice v. Am. Airlines, Inc., 288 F.3d 313 (7th Cir. 2002); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Quinn v. CGR, 828 F.2d 1463 (10th Cir. 1987).

45. *Id.*

46. Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948).

47. 9 U.S.C. § 3 (2012).

48. The language of § 3 of the United States 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.

49. *Evans*, 165 F.2d at 972.

50. *See* Lloyd v. Hovensa, LLC, 369 F.3d 263 (3d Cir. 2004); *see also* Lloyd v. Hovensa LLC, 243 F. Supp. 2d 346 (V.I. 2003).

51. *See Lloyd*, 369 F.3d at 268-69 (citing decisions from the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits addressing this issue).

The Third Circuit stated that it sided[52] with those courts that take the Congressional text at face value, applying "the plain language of the statutory text" in interpreting the FAA.[53] The *Lloyd* court relied on *Green Tree Financial Corp.-Alabama v. Randolph*,[54] which held that the plain meaning of the term "final decision" must be applied to § 16I(3) of the FAA.[55] Applying that plain language interpretation to § 3, the court held that § 3's directive that courts "shall" stay effectively mandates that when suit is brought on arbitrable claims and stay is requested by one of the parties, it is required.[56] The court went as far as to explain § 3 and its relation to the FAA as a whole, stating that district courts have significant roles under the FAA, even in instances in which they require arbitration of all claims.[57] The court illustrated this relation by explaining that the FAA allows arbitrating parties to return to court for resolution of disputes regarding arbitrator appointments and vacancies under § 5.[58] This is so that after arbitration awards are rendered, a party is entitled to seek relief in district courts in the form of a judgment on the award or an order to vacate or modify under § 9.[59] The Third Circuit also explained the twofold effect of stay:

> [I]t relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is on-going, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court's order to arbitrate.[60]

In its analysis, the Third Circuit further assessed the various benefits of mandating a stay under § 3 and stated that the legislative scheme of the FAA reflects a policy decision that seeks to eliminate judicial interference with the arbitral process until there is a final award.[61] Thus, the Third

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52. *Id.* at 269 ("Today, we side with those courts that take the Congressional text at face value.").

53. *Id.*

54. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

55. *Id.* at 88.

56. Lloyd v. Hovensa, LLC, 369 F.3d 263, 269 (3d Cir. 2004) ("On the contrary, the statute clearly states, without exception, that whenever suit is brought on an arbitrable claim, the Court 'shall' upon application stay the litigation until arbitration has been concluded.").

57. *Id.* at 270.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Circuit held that its reasoning that § 3 requires a stay is the only reasoning that is consistent with the plain statutory interpretation structure of § 3 in relation to the FAA as a whole and its legislative scheme promoting arbitration.[62]

B. The Statutory Interpretation of § 3 Permits Dismissal of Arbitrable Claims

The First, Fifth, and Ninth Circuits have held that district courts possess the requisite discretion to dismiss cases under § 3 of the FAA.[63] However, there is disagreement among these circuits regarding the authority under which the courts may dismiss the action.[64] Although the benefits of mandating stay under § 3 of the FAA are numerous,[65] the circuits that hold that dismissal is permissive justify their reasoning primarily on the benefit of effective docket management for overburdened courts.[66] Despite this concern that is outside the scope of the Act, district court dismissals under § 3 merely transfer responsibility to the appellate courts, shifting the burden rather than eliminating it.[67] The First Circuit interpreted § 3 as permitting dismissal in *Bercovitch v. Baldwin School, Inc.*,[68] a case involving a suspended student who alleged various claims against his private school under the Rehabilitation Act, the Americans with Disabilities Act (ADA)

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62. *Lloyd*, 369 F.3d at 271.

63. Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990); Sparling v. Hoffman Constr. Co., 864 F.2d 635 (9th Cir. 1988).

64. *See* Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004); Atkins v. Louisville & Nashville R.R., 819 F.2d 644, 647 (6th Cir. 1987) (dismissing under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction); Cedars-Sinai Med. Ctr. V. Glob. Excel Mgmt., Inc., No. CV 09-3627, 2010 WL 5572079, at *9 (C.D. Cal. Mar. 19, 2010) (dismissing under FED. R. CIV. P. 12(b)(3) for improper venue); Johnson, *supra* note 11, at 2264.

65. *See* Johnson, *supra* note 11, at 2272 ("One of the [most] practical benefits of issuing a stay is that it prevents a court from having to reestablish subject matter jurisdiction at the enforcement stage following an arbitration award.") (explaining that issuing a stay under § 3 following an arbitration award allows parties seeking to confirm, vacate, or modify the award to return to the federal court where the stayed action is pending).

66. *See, e.g.*, Reynolds v. De Silva, No. 09 Civ. 9218(CM), 2010 WL 743510, at *9 (S.D.N.Y. Feb. 24, 2010) (stating, "It would be an inefficient use of the Court's docket to stay the action.").

67. *See* KIMM LAW FIRM, *Second Circuit Joins the Circuit-Split, Holding an Arbitration Clause Requires Courts to Stay, Not Dismiss, Actions*, KIMM NOTES, COMMENT & ANALYSIS ON LEGAL DEV. (July 28, 2015), https://perma.cc/P5U3-R7VC.

68. Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 144 (1st Cir. 1998).

and local law.[69] The District Court for the District of Puerto Rico denied the school's request for arbitration and issued a preliminary injunction, requiring the private school to reenroll the suspended student.[70] The school subsequently appealed to the First Circuit.[71]

Upon review, the First Circuit recognized the strong federal policy favoring arbitration under the FAA and arbitrability of Bercovitch's claims under the ADA.[72] The court then addressed the specific question of whether district courts must stay claims subject to arbitration or possess discretion to dismiss.[73] The court in *Bercovitch* concluded that district courts "shall consider whether cases should be dismissed or stayed,"[74] and held that "a court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable."[75] Thus, the First Circuit held that the decision of the district court to dismiss the action altogether was within its discretion since Bercovitch's claims were all arbitrable.[76]

IV. CONFLICT BETWEEN THE FOURTH CIRCUIT'S PREVIOUS HOLDINGS UNDER § 3

In *Aggarao*, the Fourth Circuit acknowledged the clear conflict between two of its previous holdings dealing with the issue of arbitrable claims under § 3—*Hooters of America, Inc. v Phillips*[77] and *Choice Hotels International, Inc. v. BSR Tropicana Resort, Inc.*[78] The holding in *Hooters* was decided based on the interpretation that the FAA plainly mandates that district courts must always stay proceedings pending arbitration under § 3,[79] while *Choice Hotels* reasoned that dismissal is proper when all issues presented before district courts are arbitrable.[80] The *Aggarao* court

69. *See id.* at 143.

70. *See* Bercovitch v. Baldwin Sch., Inc., 964 F. Supp. 597, 605-07 (D. P.R. 1997).

71. Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 147-51 (1st Cir. 1998).

72. *Id.* at 147-51.

73. *Id.* at 156.

74. *Id.*

75. *Id.* at 156 n.21.

76. *Id.* at 156 (holding that because the two federal claims which were the basis for jurisdiction are to be sent to arbitration, the district court shall consider whether the case should be dismissed or stayed).

77. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999).

78. Choice Hotels Intern., Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001).

79. *Hooters of Am., Inc.*, 173 F.3d at 933, 940.

80. *Choice Hotels Intern., Inc.*, 252 F.3d at 712.

acknowledged the Fourth Circuit's disparate treatment of the issue in stating:

> There may be some tension between our decision in *Hooters*—indicating that a stay is required when the arbitration agreement "covers the matter in dispute"—and *Choice Hotels*—sanctioning dismissal "when all of the issues presented . . . are arbitrable." Our sister circuits are divided on whether a district court has discretion to dismiss rather than stay an action subject to arbitration . . . . We need not resolve this disagreement because, even under *Choice Hotels*, dismissal is not appropriate where, as here, the issues are not all subject to arbitration.[81]

This part of the Note discusses in detail the Fourth Circuit's conflicting holdings regarding whether § 3 requires stay pending arbitration.

A. Section 3 Permits Dismissal When All Claims Are Arbitrable

In *Choice Hotels*, a hotel franchiser brought an action against a proposed franchisee and affiliate individuals, alleging that they failed to pay the agreed-upon affiliation fee and thus breached their franchise agreement.[82] The defendants appealed the district court's denial of their motion to dismiss a lawsuit against them in favor of arbitration, asserting that their franchise agreement required arbitration of both of Choice Hotel's claims.[83] After analyzing the three arbitration claim exceptions listed in the agreement,[84] the court found that Choice's complaint was not subject to dismissal because it contained at least one non-arbitrable claim.[85] In reviewing the district court's denial to dismiss, the Fourth Circuit stated that "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."[86] Thus, the Fourth Circuit held that § 3 of the FAA

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81. Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 376 n.18 (4th Cir. 2012).

82. *Choice Hotels Intern., Inc.*, 252 F.3d at 709.

83. *Id.*

84. *Id.* The court looked at the franchise agreement which was subject to three exceptions to arbitrable claims, one of which was "actions for collection of moneys owed [to Choice] under this Agreement." *Id.*

85. *Id.* at 712. Since the court found that Choice's effort to recover the affiliation fee was a collection action subject to the collection exemption, Choice's breach of contract claim was the only arbitrable claim. *Id.*

86. *Id.* at 709-10.

did not permit dismissal solely because one of Choice Hotel's claims was not arbitrable.[87]

B. Section 3 Still Mandates Stay When All Claims Are Arbitrable

In *Hooters of America, Inc. v. Phillips*, the court recognized that "[w]hen a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings and to compel arbitration."[88] When Hooters brought an action to compel arbitration of an employee's Title VII sexual harassment claims under the FAA, the United States District Court for the District of South Carolina denied Hooter's motions to compel arbitration and stay proceedings on the counterclaims.[89] "Annette R. Phillips allege[d] that she was sexually harassed while working at a Hooters restaurant" in Myrtle Beach, South Carolina, and "[a]fter quitting her job, Phillips threatened to sue Hooters in court."[90] However, Hooters informed Phillips that she was required to submit her claims to arbitration according to a binding agreement to arbitrate between the parties.[91]

Upon review, the Fourth Circuit held that Hooters "so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word."[92] Accordingly, the Fourth Circuit held that Hooters breached its agreement to arbitrate because it "set up a dispute resolution process utterly lacking in the rudiments of even-handedness,"[93] making the agreement invalid.[94] The court affirmed the district court's refusal to compel arbitration.[95] It is important to note that in *Hooters*, the court dismissed the claims solely because the arbitration agreement between the parties was not valid, not because both claims were held to be

87. *Id.* at 712.

88. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999).

89. *Id.* at 936.

90. *Id.* at 935.

91. *Id.* at 935-36 ("This agreement arose in 1994 during the implementation of Hooters' alternative dispute resolution program. As part of that program, the company conditioned eligibility for raises, transfers, and promotions upon an employee signing an 'Agreement to arbitrate employment-related disputes.' . . . [I]ncluding 'any claim of discrimination, sexual harassment, retaliation, or wrongful discharge, whether arising under federal or state law.'").

92. *Id.* at 941.

93. *Id.* at 935.

94. *Hooters of Am., Inc.*, 173 F.3d at 935.

95. *Id.*

arbitrable.[96] Had there been a valid agreement between the parties, the *Hooters* court arguably would have held that stay was *still* required under § 3, despite the fact that of all of Phillips's claims were arbitrable under the voided arbitration agreement.[97]

V. DISTRICT COURT DECISIONS IN THE FOURTH CIRCUIT DEMONSTRATE INCONSISTENCY AND CONFUSION REGARDING THE STATUTORY INTERPRETATION OF § 3

Statutory interpretation of § 3 amongst Fourth Circuit district court judges has been and continues to be inconsistent, and the conflicting precedent has led to unpredictable outcomes.[98] Even prior to the Fourth Circuit's acknowledging the tension between *Choice Hotels* and *Hooters* in *Aggarao*,[99] district court judges have relied on *Choice Hotels* in their justifications for dismissal under § 3 based on arbitrability of all claims.[100] Conversely, they have relied on the *Hooters* decision to justify that despite arbitrability of all claims, a stay under § 3 is still required.[101] This part of the Note illustrates the conflicting holdings arising out of Fourth Circuit district courts.

A. *Stay Is Mandatory When All Claims Are Arbitrable: The Hooters Standard*

In *Bayer CropScience AG v. Dow AgroSciences, LLC*,[102] the District Court for the Eastern District of Virginia held that § 3 of the FAA required a stay pending arbitration, despite its conclusion that all of Bayer's claims were arbitrable.[103] The dispute arose out of a patent license agreement between

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96. *See id.*

97. *Id.* at 937.

98. *See, e.g.*, Jarry v. Allied Cash Advance Va., LLC, 175 F. Supp. 3d 622 (W.D. Va. 2016); Green v. Zachry Indus., 36 F. Supp. 3d 669 (W.D. Va. 2014); Bayer Cropscience AG v. Dow Agrosciences LLC, No. 2:12cv47, 2012 WL 2878495 at *2 (E.D. Va. July 13, 2012); Woolridge v. Securitas Sec. Servs. USA, Inc., No. 3:06cv573, 2006 WL 3424469 at *2 (Nov. 21, 2006).

99. Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 376 n.18 (4th Cir. 2012).

100. *See, e.g.*, Jarry v. Allied Cash Advance Va., LLC, 175 F. Supp. 3d 622 (W.D. Va. 2016).

101. *See, e.g.*, Green v. Zachry Indus., 36 F. Supp. 3d 669 (W.D. Va. 2014); *see also* Bayer Cropscience AG v. Dow Agrosciences LLC, No. 2:12cv47, 2012 WL 2878495 at *7 (E.D. Va. July 13, 2012).

102. *Bayer Cropscience AG*, 2012 WL 2878495 at *7.

103. *Id.* at *13.

the parties for certain plant biotechnology.[104] Bayer alleged that the defendants[105] violated the License Agreement, causing Bayer to terminate the Agreement and sue for patent infringement.[106] The License Agreement and patents-in-suit pertaining to the use of recombinant DNA to create crops "resistant" to herbicides contained a mandatory arbitration clause (the "Arbitration Clause") that provided for final, binding arbitration.[107] Also in the License Agreement were the terms by which the parties should resolve alleged breaches.[108] The third in a series of related lawsuits that Bayer had brought against the defendants in regards to manufacture of seeds and plants that are herbicide resistant,[109] Bayer's instant suit alleged patent infringement.[110] The defendants claimed that Bayer's infringement claims were subject to mandatory arbitration via the language of the Licensing Agreement.[111]

After moving to dismiss Bayer's patent infringement claims under Federal Rule of Civil Procedure 12(b)(1)[112] and Rule 12(b)(6),[113] the defendants alternatively moved to stay the proceeding pending arbitration of the issues, pursuant to § 3 of the FAA.[114] In discussing the defendants'

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104. *Id.* at *1.

105. The defendants were Dow AgroSciences LLC, Mycogen Plant Science, Inc., and Agrigenetics LLC d/b/a Mycogen Seeds, LLC. *Id.* All defendants were Delaware companies with their principal places of business in Indianapolis, Indiana. *Id.*

106. *Id.*

107. *Id.* at *2.

108. *Bayer Cropscience AG*, 2012 WL 2878495 at *2.

109. In total, Bayer brought three related lawsuits against the defendants in connection with their development of said herbicide resistant seeds and plants: *Bayer I*, *Bayer II*, and *Bayer III*. *Id.* at *3.

110. *Id.*

111. *Id.* ("Defendants' counsel sent a letter to Plaintiffs' counsel objecting to Plaintiffs' allegedly improper termination of the License Agreement, and stating, *inter alia*, that its infringement claims in this action are subject to mandatory arbitration under Article 12 of the License Agreement.").

112. Defendants moved to dismiss Bayer's patent infringement claims principally under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction, based upon the arbitration clause contained within said Licensing Agreement between the parties. FED. R. CIV. P. 12(b)(1); *Bayer Cropscience AG*, 2012 WL 2878495 at *4.

113. Defendants also moved to dismiss the claims under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief based upon the defendants' alleged license to use Bayer's patent without restriction. In this way, the defendants contended that Bayer's purported termination of the License Agreement was without effect. FED. R. CIV. P. 12(b)(6); *Bayer Cropscience AG*, 2012 WL 2878495 at *4.

114. *Bayer Cropscience AG*, 2012 WL 2878495 at *4.

motion to stay pending arbitration, the *Bayer* court recognized a previous district court's ruling that "[t]he FAA requires that a district court, upon motion by any party, 'stay judicial proceedings involving issues covered by written arbitration agreements.'"[115] Further, the *Bayer* court reasoned:

> The Fourth Circuit has not resolved the question of whether a stay or dismissal is warranted when a matter is subject to arbitration. On this issue, the Fourth Circuit has stated, "When a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings . . . and to compel arbitration . . . ." Two years later, the Fourth Circuit then asserted that "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."[116]

The court then referred to the similar acknowledgement regarding the "disparate approaches it has taken on this issue"[117] in *Aggarao*, which was decided only several months prior.[118] The court then looked to the language of the Arbitration Clause within the Licensing Agreement, noting that the plain language called for arbitration of "[a]ny controversies or disputes in connection with this Agreement."[119] The court also recognized that the "broad federal policy favoring arbitration, especially in international disputes" led to its conclusion that arbitration of all claims was proper.[120] Accordingly, the court held that all issues, including alleged breach and termination of the License Agreement as well as Bayer's patent infringement claims, were to be submitted to arbitration and that stay was mandatory pending arbitration, pursuant to § 3 of the FAA.[121]

Green v. Zachry Industrial, Inc.[122] was filed in the District Court for the Western District of Virginia two years after the Eastern District of Virginia's decision in *Bayer CropScience AG v. Dow AgroSciences, LLC*. The

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115. Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc., 683 F.3d 577, 583 (4th Cir. 2012).

116. *Bayer Cropscience AG*, 2012 WL 2878495 at *7 (internal citations omitted).

117. *Id.*

118. *Id.* at *8.

119. *Id.* at *2.

120. *Id.* at *12; *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (holding that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability").

121. *Bayer Cropscience AG*, 2012 WL 2878495 at *12.

122. Green v. Zachry Indus., 36 F. Supp. 3d 669 (W.D. Va. 2014).

plaintiff, Teddy Green, along with other terminated former employees of Zachry Industrial, Inc., (Zachry), brought a class action suit.[123] The terminated employees alleged that Zachry violated several federal statutes in connection with mass layoffs occurring at a plant where it had contracted to perform paper mill maintenance work.[124] Green's first claim alleged that Zachry did not provide the terminated employees with sixty days advanced written notice of their termination and failed to pay the employees sixty days wages and benefits, as required by the Workers Adjustment and Retraining Notification Act.[125] Green further alleged that Zachry violated several additional federal statutes in its failure to take certain required steps following the mass layoffs of the employees.[126] In response to the class action suit, Zachry filed a motion to dismiss or, in the alternative, to stay litigation and compel arbitration under the FAA.[127] This was on the basis that the employees had all agreed in writing to adhere to the Zachry Dispute Resolution Process ("DRP"), which included binding arbitration as its final step.[128]

The court cited to *Bayer CropScience AG v. Dow AgroSciences, LLC* and stated, "[w]hile the Federal Arbitration Act ('FAA') requires a district court to stay the trial of any action referable to arbitration under a written agreement, the FAA also allows the court some authority over a matter that is subject to arbitration."[129] The court then recognized that the FAA reflects "a liberal federal policy favoring arbitration agreements."[130] After determining that Zachry's Dispute Resolution Process was valid and

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123. *Id.* at 671.

124. *Id.*

125. *Id.*

126. The other statutes that Green alleged Zachry violated were the Consolidated Omnibus Budget Reconciliation Act of 1985, the American Recovery and Reinvestment Act, and the Employment Retirement Income Security Act of 1974. *Id.*

127. *Id.* at 672.

127. *Green*, 36 F. Supp. 3d at 669.

128. *Id.* at 672.

129. *Id.* (noting that the FAA requires a court to stay, rather than dismiss outright, an action subject to arbitration, and further permits a district court to compel arbitration by court order).

130. *Id.*; *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (holding that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

enforceable,[131] the court looked to the language of the Dispute Resolution Process (DRP) agreement:

> Both Zachry and the employee agree to resolve any and all claims, disputes or controversies arising out of or relating to any application for employment, to the terms and conditions of employment and/or to the cessation of employment exclusively by final and binding arbitration administered by the AAA under its AAA rules.[132]

The court recognized that the DRP agreement was broad, encompassing "any and all claims . . . arising out of or relating to . . . the terms and conditions of employment, and/or to the cessation of employment."[133] It reasoned that since the plaintiffs' federal statutory claims all stemmed from requirements triggered by the cessation of employment, the claims fell well within the scope of the DRP agreement and were subject to arbitration.[134] In the same manner as *Bayer*, the district court addressed the fact that the Fourth Circuit has not resolved the question of whether a stay is required or dismissal is permitted when all issues presented in a lawsuit are subject to arbitration.[135] The district court then held that "in light of this uncertainty, the case will be stayed pending arbitration pursuant to the express requirement of the Federal Arbitration Act."[136]

B. *Dismissal is Permitted When All Claims Are Arbitrable: The Choice Hotels Standard*

On the opposite end of the spectrum lie the district court cases that apply the reasoning set out in *Choice Hotels*: dismissal is permitted under § 3 when all claims before the court are arbitrable.[137] In *Woolridge v. Securitas Security Services USA, Inc.*,[138] Joyce Joanne Woolridge was hired as an employee of Securitas and was given a copy of the Securitas Arbitration Program ("Program") brochure, upon which she signed a form stating that

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131. *Green*, 36 F. Supp. 3d at 673-77.

132. *Id.* at 677.

133. *Id.* at 677.

134. *Id.* at 678.

135. *Id.*

136. 9 U.S.C. § 3 (2012); *Green*, 36 F. Supp. 3d at 678.

137. *See, e.g.*, Jarry v. Allied Cash Advance Va., LLC, 175 F. Supp. 3d 622 (2016); *see also* Woolridge v. Securitas Sec. Servs. USA, Inc., No. 3:06cv573, 2006 WL 3424469 at *2 (Nov. 21, 2006).

138. *Woolridge*, 2006 WL 3424469 at *1-*2.

she understood that compliance with the Program was a condition of her employment.[139] The Program stated that all claims made by current or past employees against Securitas, regardless of whether the claims arose out of employee's employment or termination, must be resolved through arbitration.[140] Several years after her initial hiring date, Woolridge was a full-time security officer, and because of health issues, Woolridge took a leave of absence for surgery in compliance with the Family and Medical Leave Act ("FMLA").[141] Following her recovery, Woolridge returned to work at Securitas where she was only offered part-time placement.[142]

Woolridge subsequently filed an action in the District Court for the Western District of Virginia, alleging violations of Title VII of the Civil Rights Act of 1964 and the FMLA act of 1993.[143] In response, Securitas filed a motion to compel arbitration and dismiss so that Woolridge could pursue her claims in the forum agreed to by both parties pursuant to the Program.[144] The court held that the agreement to arbitrate between the parties was valid because Wooldridge signed a form acknowledging that she understood that compliance with the program was conditioned on her employment.[145] The court additionally recognized that there was no dispute concerning the arbitrability of Title VII and FMLA claims[146] and stated: "Nevertheless, this Court has held that 'decisional law supports the plain meaning of the FAA that it is within the district court's discretion whether to dismiss or stay an action after referring it to arbitration.'"[147] The court then reasoned that since Woolridge's claims were clearly all subject to arbitration, dismissal under § 3 was the proper approach.[148]

In the recent decision of *Jarry v. Allied Cash Advance Virginia, LLC*,[149] the District Court for the Western District of Virginia relied on the Fourth Circuit's reasoning in *Choice Hotels* when it ruled that dismissal was permitted under the FAA because all of the plaintiff's claims were

139. *Id.* at *1.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Woolridge*, 2006 WL 3424469 at *1.
145. *Id.* at *2.
146. *Id.*
147. *Id.*
148. *Id.*
149. Jarry v. Allied Cash Advance Va., LLC, 175 F. Supp. 3d 622 (2016).

arbitrable.[150] Tammy Jarry submitted an application, received approval, and signed a contract[151] in the furtherance of obtaining a loan.[152] Jarry borrowed 300 dollars via the contract, but paid an estimated 500 dollars in payments, at an interest rate of 273.75 percent.[153] The contract included an arbitration agreement, providing that either party may elect arbitration regarding "any claim, dispute, or controversy arising from or relating to this Agreement, this Transaction, or any other agreement or transaction that we have ever entered into or completed, or any other conduct or dealing between you and us."[154] Jarry subsequently filed an action against Allied Cash Advance Virginia, LLC ("Allied"), alleging violations of the Truth in Lending Act, Virginia Consumer Finance Act, and Virginia's usury law.[155] Jarry sought to recover statutory damages regarding the signed contract.[156] Allied contended that the contract at issue contained a valid arbitration agreement and that the action should thus proceed to arbitration.[157]

After determining that the arbitration agreement between Jarry and Allied was valid and enforceable,[158] the court turned to the question of whether to dismiss or stay the proceeding. The court recognized that the Fourth Circuit had not resolved that issue and held that dismissal was appropriate since the case was directly analogous to the reasoning set forth in *Choice Hotels*, as all of the issues presented in *Jarry* were arbitrable.[159]

The two diverging precedents set by the Fourth Circuit have created uncertainty within district courts regarding which way they will rule in disputes falling under the purview of § 3. Judges cite to *Hooters* or *Choice Hotels* for support, with little justification as to why one precedent is more convincing than the other.[160] Thus, always requiring a stay under § 3 will

150. *Id.* at 627.

151. Jarry signed the Line of Credit Agreement and Plan which contained the arbitration provision. *Id.* at 623.

152. *Id.*

153. *Id.*

154. *Id.* at 623.

155. *Jarry*, 175 F. Supp. 3d at 623.

156. *Id.*

157. *Id.* at 623.

158. *Id.*

159. *Id.* at 627.

160. *See, e.g.*, Woolridge v. Securitas Sec. Servs. USA, Inc., No. 3:06cv5732006, 2006 WL 3424469 (Nov. 21, 2006); *see also* Jarry v. Allied Cash Advance Va., LLC, 175 F. Supp. 3d 622 (2016); Green v. Zachry Indus., Inc., 36 F. Supp. 3d 669, 678 (W.D. Va. 2014); Bayer Cropscience AG v. Dow Agrosciences LLC, No. 2:12cv47, 2012 WL 2878495 at *4 (E.D. Va. July 13, 2012).

eliminate this issue and provide both the plaintiff and defendant with a clearer expectation of the outcome of such claims.

VI. THE FOURTH CIRCUIT SHOULD REQUIRE A STAY UNDER § 3 OF THE FAA

The Fourth Circuit should require a stay under § 3 of the FAA largely because stare decisis[161] does not preclude it. Courts apply stare decisis in one of two ways: horizontally or vertically.[162] Horizontal stare decisis refers to courts applying governing precedent by adopting the same legal position as the court previously adopted in an earlier case.[163] Alternatively, vertical stare decisis involves court application of higher court decisions with supervisory jurisdiction.[164] Utilizing horizontal stare decisis, the circuit courts have chosen to adopt "law of the circuit" rules, in which a previously reported decision of a three-judge panel of a court of appeals is binding on subsequent panels of that specific court.[165] In order to determine whether horizontal stare decisis applies, it must be determined how much weight stare decisis gives a prior precedent.[166] Courts have adopted stronger or weaker stare decisis at different times based on factors such as time, circumstance, and judicial hierarchy.[167] The strongest precedent is absolutely binding, while the weaker forms of stare decisis only requires deference as long as that precedent offers reasonable interpretation.[168] At its very weakest, stare decisis is *persuasive* only.[169]

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161. "Stare decisis" is a Latin term for "let the decision stand" which refers to affirming precedent unless there is a reason to reverse it. It is a doctrine that counsels judges to abide by the prior decisions on the same issues (usually only referring to courts in the same jurisdiction and of equal or higher level). *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

162. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 788, 790 (2012).

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*

167. *Id.* at 792.

168. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 52-54 (2001).

169. If the court does not defer to the prior controlling decision at all, this is not an application of "stare decisis," but rather a rejection of stare decisis. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 187 (2006) (noting that stare decisis without a presumption of validity is "virtually meaningless").

"The 'law of the circuit' is a subset of stare decisis."[170] Utilizing the traditional "law of the circuit" rules, panels in a particular circuit were required to follow the decisions of previous panels in the same circuit, but modern "law of the circuit" rules have proven to be more flexible.[171] The majority of circuits allow later panels to overturn earlier decisions if rejected by an intervening decision of a higher authority,[172] while some circuits further extend this power to situations involving new developments of law.[173] Apart from these exceptions to modern law of the circuit rules, the Fourth Circuit has not explicitly ruled regarding § 3 of the FAA and whether stay is required in all circumstances.[174] In recent years, the Fourth Circuit has only gone so far as to address its prior conflicting holdings of *Hooters* and *Choice Hotels* in its 2012 decision of *Aggarao.* Because of the flexibility provided in modern "law of the circuit" rules, the Fourth Circuit enjoys the freedom to hold that a stay is required in all cases, without having to go back to its prior conflicting holdings. Accordingly, precedent set by the Fourth Circuit regarding §3 of the FAA would not be overturned, and stare decisis does not preclude the Fourth Circuit from holding that a stay is required pending arbitration upon request of one of the parties, regardless of the arbitrability of the claims involved.

This part of the Note contends that the Fourth Circuit should adopt the reasoning that district courts are required to mandate a stay under § 3 because of the obligatory language found in the provision.[175] Apart from

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170. San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010); Dep't of the Treasury v. Fed. Labor Relations Auth., 862 F.2d 880, 882 (D.C. Cir. 1988) (quoting Brewter v. Comm'r of Internal Revenue, 607 F.2d 1369, 1373 (D.C. Cir. 1979) ("The doctrine of *stare decisis* 'demands that we abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court en banc has overruled it.'").

171. *See* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 545 (1989) ("[E]xperience tells us that the formal rule of stare decisis does not necessarily guarantee consistency within a jurisdiction.").

172. *See* United States v. Villareal-Amarillas, 562 F.3d 892, 898 n.4 (8th Cir. 2009) (quoting K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009, 1022 (8th Cir. 2007)) ("In the Ninth Circuit, a three-judge panel may reexamine a prior panel decision only if a supervening Supreme Court decision is 'clearly irreconcilable.' By contrast, we may reconsider a prior panel's decision if a supervening Supreme Court decision 'undermines or casts doubt on the earlier panel decision.'").

173. *See* San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010).

174. *See* Choice Hotels Intern., Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001); *see also* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 936-37 (4th Cir. 1999).

175. *See* 9 U.S.C. § 3 (2012).

§ 3's unambiguity, there are many recognized benefits of requiring a stay.[176] Two primary benefits of requiring a stay are uniformity and efficiency within circuits.

A. *Requiring a Stay Comports with the Plain Meaning of § 3*

The statutory language of § 3 uses the key phrase "shall . . . stay,"[177] meaning that district courts are mandated to require stay upon request by one of the parties. This statutory language "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."[178] Congress's explicit wording essentially takes any decision allowing dismissal out of the court's hands.[179] The plain meaning of § 3 provides further evidence that courts should not have to look to the intent of Congress in making any determination regarding the provision.[180] Looking outside of § 3, the FAA as a whole is void of any indicative language that would permit courts to act in opposition of § 3's clear directive. A court may look outside the plain wording of a statute for understanding and interpreting the language in three primary instances: first, if the statutory language is unclear or ambiguous;[181] second, if following the language would lead to an absurd or

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176. One of the other major benefits of requiring a stay is effectively avoiding the possibility of interlocutory appeals. *See* Pierre H. Bergeron, *District Courts As Gatekeepers?: A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration*, 51 EMORY L.J. 1365, 1378 (2002).

177. 9 U.S.C. § 3 (2012).

178. Alford v. Dean Witter Reynolds, Inc., 470 U.S. 213, 218 (1985).

179. Volkswagen of Am., Inc. v. Sud's of Peoria, Inc., 474 F.3d 966, 971 (7th Cir. 2007) (reasoning that the plain meaning of § 3 suggests that courts must stay the entire case—not just a part of it whether there is an arbitrable issue).

180. Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 770 (8th Cir. 2011) (Shepherd, J., concurring) (citations omitted) ("Nothing in the statute gives the court discretion to dismiss the action when all of the issues in the case are arbitrable. Moreover, when Congress uses the word 'shall,' it 'normally creates an obligation impervious to judicial discretion.' Although this rule of statutory construction is not absolute, no language in § 3 indicates a contrary legislative intent.").

181. *See* United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 278 (1929) (arguing against using certain legislative history that would have benefitted one of the parties, the court holding that "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended").

unreasonable result if applied;[182] and third, if following the statute would "bring about an end completely at variance with the statute . . . ."[183] The language of § 3 is clear and unambiguous and does not fall within any of the three exceptions.

The Fourth Circuit's reasoning in *Choice Hotels*, that courts are permitted to dismiss cases when all claims presented are arbitrable,[184] is based on concerns that are not within the scope of the FAA.[185] It follows that the circuits which hold that dismissal is permissible when all claims are subject to arbitration[186] misinterpret the plain meaning of § 3. Section 3 requires courts to require stay in circumstances when "any issue [is] referable to arbitration."[187] The statutory language of "any" effectively eliminates the possibility that courts are permitted to dismiss cases simply because all the claims presented are referable to arbitration. Thus, the proper interpretation of § 3 requires that disputes containing *any* arbitrable claims be stayed upon the request of one of the parties.

Circuits that permit dismissal under § 3 ignore its plain meaning and rely on concerns outside of statutory interpretation to bolster their position. In the Ninth Circuit's decision of *Sparling v. Hoffman Construction Co.*,[188] a subcontractor and its shareholders alleged fraudulent inducement among other claims against the general contractor.[189] After the trial judge dismissed the complaint based on arbitrability of all of the claims, the plaintiff argued that under § 3 dismissal was not proper.[190] The Ninth Circuit held that a court has authority under § 3 of the FAA to grant a stay pending arbitration

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182. Katz. v. Cellco P'ship, 794 F.3d 341, 345 (2d Cir. 2015) (stating that "courts may disregard a statute's plain meaning [only] where it begets absurdity").

183. United Steel Workers v. Weber, 443 U.S. 193, 201-02 (1979) (holding that parts of a statute regarding affirmative action that would bring about an end completely at variance to the purpose of the statute "must be rejected").

184. Choice Hotels Intern., Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001).

185. Docket management is one concern used by circuits to justify dismissals, but this concern is not contemplated by the FAA and falls outside the scope of the Act. *See* Reynolds v. De Silva, No. 09 Civ. 9218(CM), 2010 WL 743510, at *9 (S.D.N.Y. Feb. 24, 2010) ("It would be an inefficient use of the Court's docket to stay the action.").

186. *See, e.g.*, Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161 (5th Cir. 1992); Sparling v. Hoffman Constr. Co., 864 F.2d 635 (9th Cir. 1988).

187. 9 U.S.C. § 3 (2012).

188. Sparling v. Hoffman Constr. Co., 864 F.2d 635 (9th Cir. 1988).

189. *See id.* at 636.

190. *Id.* at 637-38.

"but [that authority] does not preclude summary judgment when all claims are barred by an arbitration clause."[191] In the same way, the Fifth Circuit interpreted § 3 to permit dismissal in *Alford v. Dean Witter Reynolds, Inc.*[192] This case made its way to the Supreme Court, only to be vacated and remanded.[193] Ultimately, the Fifth Circuit held that "a stay is mandatory upon a showing that the opposing party has commenced suit 'upon any issue referable to arbitration under an agreement in writing for such arbitration.'"[194]

Notwithstanding its stance, the court distinguished the situation, stating that the rule was not intended to preclude dismissal in "the proper circumstances."[195] The court cited to district court decisions and the Ninth Circuit's decision in *Sparling*,[196] stating that as long as all issues are subject to arbitration, dismissal is not precluded.[197] Although touching on the practical benefits of granting a stay,[198] the *Alford* court found that when a case concerns claims that are all subject to arbitration, the proper action is dismissal.[199] The court reasoned that in these cases, staying the action would serve no purpose.[200] The justifications for dismissal promulgated by these circuits contain no merit because, while they acknowledge that § 3 requires a stay, they make exceptions for cases containing claims that are all arbitrable. These exceptions are not contemplated anywhere within the FAA, let alone § 3.

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191. *Id.*

192. Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 107-08 (5th Cir. 1991).

193. Dean Witter Reynolds, Inc., v. Alford, 500 U.S. 930, 930 (1991). This case involved a discrimination action brought by a former employee of a brokerage firm against the employer. *See generally* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990). It distinguished the difference between suits commenced upon any issue referable to arbitration from those containing issues that all must be submitted to arbitration. *See id.*

194. *Alford*, 975 F.2d at 1164 (quoting Campeau Corp. v. May Dep't Stores Co., 723 F. Supp. 224, 226-27 (S.D.N.Y. 1989)).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 1162.

200. *Alford*, 975 F.2d at 1164 (quoting Sea-Land Serv., Inc. v. Sea-Land of P.R., Inc., 636 F. Supp. 750, 757 (D.P.R. 1986)) (holding "[a]ny post-arbitration remedies sought by the parties will not entail renewed consideration and adjudication of the merits of the controversy but would be circumscribed to a judicial review of the arbitrator's award in the limited manner prescribed by law.").

B. Requiring a Stay Will Create Uniformity Within the Fourth Circuit

As illustrated, the Fourth Circuit's failure to address whether § 3 requires courts to stay proceedings pending arbitration has resulted in inconsistent decisions within its district courts.[201] A key drawback for the circuits which have held that dismissal is permitted under § 3 is that no clear standard exists in determining appropriate dismissal. Some courts base dismissal on 12(b)(6) grounds,[202] while others base dismissal on 12(b)(1) or 12(b)(3).[203] Specific to the Fourth Circuit, district courts have based dismissal on the reasoning of *Choice Hotels*: that dismissal is permitted under § 3 when all claims are arbitrable.[204] However, other district courts have relied on the reasoning provided in *Hooters*,[205] that "[w]hen a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings and to compel arbitration."[206]

The court's reasoning in *Hooters* illustrates a proper textual interpretation of § 3. It provides a clear standard that courts are required to stay "any ongoing judicial proceeding,"[207] not just proceedings that contain at least one non-arbitrable claim. Although *Aggarao* briefly addressed the lack of uniformity within the Fourth Circuit regarding interpretation of § 3, the court could have taken the opportunity to take the first step in fixing the problem. Parties who bring arbitrable claims to Fourth Circuit district courts are left to whichever decision—*Choice Hotels* or *Hooters*—the

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201. *See, e.g.*, Jarry v. Allied Cash Advance Va., LLC, 175 F. Supp. 3d 622 (W. D. Va. 2016); Green v. Zachry Indus., 36 F. Supp 3d 669 (W.D. Va. 2014); Bayer Cropscience AG v. Dow Agrosciences LLC, No. 2:12cv47, 2012 WL 2878495 at *2 (E.D. Va. July 13, 2012); Woolridge v. Securitas Sec. Servs. USA, Inc., No. 3:06cv573, 2006 WL 3424469 (Nov. 21, 2006).

202. *See, e.g.*, Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004) (dismissing under FED. R. CIV. P. 12(b)(6) for failure to state a claim).

203. Atkins v. Louisville & Nashville R.R., Co., 819 F.2d 644, 647 (6th Cir. 1987) (dismissing under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction); Cedars-Sinai Med. Ctr. V. Glob. Excel Mgmt., Inc., No. CV 09-3627, 2010 WL 5572079, at *9 (C.D. Cal. Mar. 19, 2010) (dismissing under FED. R. CIV. P. 12(b)(3) for improper venue).

204. Choice Hotels Intern., Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001).

205. *See, e.g.*, Green v. Zachry Indus., 36 F. Supp. 3d 669, 678 (W.D. Va. 2014); Bayer Cropscience AG v. Dow Agrosciences LLC, No. 2:12cv47, 2012 WL 2878495 (E.D. Va. July 13, 2012).

206. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999) (internal citations omitted).

207. 9 U.S.C. § 3 (2012); *Hooters of Am., Inc.*, 173 F.3d at 937.

respective judge finds as a more compelling argument. Until the Fourth Circuit resolves this issue, plaintiffs and defendants alike are at the mercy of a divided circuit. The court's reasoning in *Hooters* illustrates a proper textual interpretation of § 3, because it provides a clear standard that courts are required to stay "any ongoing judicial proceeding,"[208] not just cases that contain at least one non-arbitrable claim.

C. *Requiring a Stay Will Preclude Interlocutory Appeals and Increase Efficiency Within the Fourth Circuit*

Sections 3 and 16 of the FAA were created to work together to avoid the lengthy appeals process that results in dismissals, effectively allowing parties to resolve their disputes through arbitration.[209] In *Green Tree Financial Corp. v. Randolph*,[210] the Supreme Court held that when a court dismisses all claims before it, nothing is left for the court to do but execute the ruling, so that the decision is "final" within the meaning of § 16(a)(3) and thus immediately appealable.[211] When a party's motion to stay is rejected and the case is dismissed, they must either continue to proceed with the litigation or file an appeal to have the dismissal overturned, resulting in a loss of time and money.[212] Dismissal creates problems such as interlocutory appeals, problems that the drafters clearly contemplated and intended to avoid through the explicit statutory construction of the Act, and specifically § 3.[213] Based on the overarching structure of the FAA, a stay is considered an interlocutory order that is not appealable under § 16.[214] Dismissal triggers appellate jurisdiction and allows for immediate appeal, but granting a stay precludes that possibility of an immediate appeal.[215] Thus, a district court's decision to stay or dismiss under § 3 results in one of two situations contemplated by § 16: § 16(a) contemplates situations in which "final decision[s]" result from court dismissals under § 3, allowing for immediate

208. 9 U.S.C. § 3 (2012); *Hooters of Am., Inc.*, 173 F.3d at 937.

209. *See generally* 9 U.S.C. §§ 3, 16 (2012).

210. Green Tree Fin. Grp. v. Randolph, 531 U.S. 79 (2000).

211. *Id.* at 89.

212. Jesse Ransom, *The United States Federal Circuit Court Practice: Stay versus Dismissal on Motions to Dismiss and Compel Arbitration*, 2 THE ARBITRATION BRIEF 76, 88 (2012).

213. *See generally* 9 U.S.C. § 3 (2012).

214. 9 U.S.C. § 16(b) (2012).

215. Bergeron, *supra* note 176, at 1378.

appellate review,[216] while § 16(b) prohibits appeals from interlocutory orders granting a stay of an action pending arbitration under § 3.[217]

The Third Circuit has stated that a dismissal under § 3 causes undue delay by depriving a party entitled to arbitration of "the right to proceed with arbitration without a substantial delay arising from an appeal."[218] The court also contrasted the effects of granting motions to stay litigation: "[I]t relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is ongoing, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court's order to arbitrate."[219] In *Aggarao*, the Fourth Circuit recognized the efficiency that resulted from their decision to grant the motion to stay the proceeding.[220] The court stated: "Although Aggarao could conceivably initiate a new court proceeding following arbitration, staying this action removes any doubt that, if necessary, he will have a full opportunity for judicial review of his public policy defense."[221] By requiring a stay of Aggarao's claims, the court furthered the purpose of § 3: promoting efficiency by precluding interlocutory appeals and preventing undue delay and unnecessary litigation.

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216. 9 U.S.C. § 16(a)(1)-(3) (2012).

> An appeal may be taken from . . . (1) an order . . . (A) refusing a stay of any action under section 3 of this title, (B) denying a petition under section 4 of this title to order arbitration to proceed, (C) denying an application under section 206 of this title to compel arbitration, (D) confirming or denying confirmation of an award or partial award, or (E) modifying, correcting, or vacating an award; (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or (3) a final decision with respect to an arbitration that is subject to this title.

Id.

217. 9 U.S.C. § 16(b) (2012).

> [A]n appeal may not be taken from an interlocutory order . . . (1) granting a stay of any action under section 3 of this title; (2) directing arbitration to proceed under section 4 of this title; (3) compelling arbitration under section 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title.

Id.

218. Lloyd v. Hovensa, LLC, 369 F.3d 263, 271 (3d Cir. 2004).

219. *Id.* at 270.

220. *See* Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 379-80 (4th Cir. 2012).

221. *Id.* at 380 (citing Vimar Seguros v. M/V Sky Reefer, 515 U.S. 528, 540-41 (1995)).

VII. CONCLUSION

The decision of a district court to grant a stay or to dismiss at its discretion under § 3 of the FAA ultimately determines the outcome of disputes between parties that involve arbitration, as well as affects the validity of the arbitral process as a whole. While the divide has arguably deepened with the Second Circuit's recent holding that § 3 requires a stay, the Fourth Circuit is the last circuit to attempt resolution of the issue. The Fourth Circuit's conflicting holdings surrounding interpretation of § 3 have led to confusion and inconsistency among the district courts due to the tension between two of its prior holdings.[222] In its recent decision of *Aggarao v. MOL Ship Co.*, the Fourth Circuit missed an opportunity to fully address whether § 3 required a stay upon request of one of the parties even if all claims are arbitrable. In *Aggarao*, the Fourth Circuit held that a stay pending arbitration was statutorily required under § 3 because not all of the claims were arbitrable.[223] The court's opinion in *Aggarao* addressed the tension between *Choice Hotels* and *Hooters*—one holding that dismissal is permitted when all claims are arbitrable,[224] the other holding that stay is required regardless of arbitrability of all claims.[225]

Because the Fourth Circuit has not yet established its position on § 3, district courts are faced with the task of looking to the *Choice Hotels* standard or to the *Hooters* standard in justifying a stay or dismissal of arbitrable claims. This pattern has led to inconsistency amongst the district courts, resulting in unpredictable outcomes for both plaintiffs and defendants. Additionally, requiring a stay effectively prevents the possibility of interlocutory appeals, and ensures uniformity and judicial efficiency within the circuit. For these reasons, the Fourth Circuit should adopt the holding that, under § 3, district courts must grant a stay upon request of one of the parties and that the district courts do not possess the discretion to completely dismiss such actions.

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222. *See* Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707 (4th Cir. 2001); *see also* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999).

223. *See* Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 376 n.18 (4th Cir. 2012).

224. Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707 (4th Cir. 2001).

225. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 937 (4th Cir. 1999).