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Appealability of Stay Orders in the Federal Courts

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The federal courts have been making widespread use of stay orders in segregation cases and in contract disputes involving arbitration clauses. Consequently, the requisites for appealability of these orders under section 1292(a)(1) of the United States Judicial Code, which make interlocutory injunctions appealable, has become an increasingly important question. The author of this Note examines the requirements that the Supreme Court has placed on interlocutory appeal of stay orders. He suggests that instead of determining their appealability on a technical arrangement of claims, federal courts should decide this question in light of the policies underlying the enactment of section 1292(a)(1).

Since the first Judiciary Act of 1789, a historic condition of review in federal appellate procedure has been the requirement that an appeal can only be taken from a final judgment.[1] A final judgment is one that disposes of a whole case on its merits, leaving nothing for the court to do but execute the judgment.[2] The purpose underlying the rule limiting review to final decisions is to prevent piecemeal litigation. A multiplicity of interlocutory appeals could hinder the orderly administration of a trial, result in vexatious delay and oppressive costs that might be ruinous to a party, and seriously burden the appellate courts.[3]

Despite this strong policy underlying the rule of finality, a party may suffer irreparable injury if he cannot appeal the denial of an interlocutory order until a final judgment has been entered. For example, an improvidently issued injunction may deprive him of the possession and control of his property or business for the duration of the suit. Consequently, interlocutory injunctions have been made appealable under section 1292(a)(1) of the Judicial

1. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.
28 U.S.C. § 1291 (1958).

2. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949); Arnold v. W. B. Guimarin & Co., 263 U.S. 427, 434 (1923); Bostwick v. Brinkerhoff, 106 U.S. 3–4 (1882). *But cf.* Note, 75 HARV. L. REV. 351, 353 (1961), which states that "no single definition will suffice."

3. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 550–51 (1932).

Code.[4] Subsequent to the enactment of this section, it was made clear that interlocutory orders granting or denying injunctions were subject to appeal.[5] It is not clear, however, whether an important type of interlocutory order, the stay order in a federal proceeding, is appealable under section 1292(a)(1).[6] These orders may be granted, for example, to determine the order of trial,[7] to allow a state court to interpret a state statute,[8] or to allow a dispute to be submitted to arbitration.[9] The importance of these orders may be illustrated by the segregation cases, in which litigants will often seek stay orders so that a sympathetic state tribunal may construe a state statute under question.[10] Also, the United States Arbitration Act authorizes a federal court to issue a stay order where there is a written agreement in a contract to submit disputes arising under it to arbitration.[11] It is the purpose of this Note to examine the extent to which stay orders constitute interlocutory injunctions appealable under section 1292(a)(1).

The issue of stay order appealability was first raised in *Enelow v. New York Life Ins. Co.*,[12] a case arising before the merger of law and equity. The plaintiff had brought an action at law upon a

4. Statutory provision for interlocutory appeals was first introduced in 1891 when the courts of appeals were established as intermediate courts. 26 Stat. 826, 828 (1891). Amendments have been made periodically, and at the present time, § 1292(a)(1) of the Judicial Code grants appellate jurisdiction to courts of appeals from:

> Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

28 U.S.C. § 1292(a)(1) (1958).

Although there is no legislative history regarding the policy considerations underlying § 1292(a)(1), there can be little doubt but that Congress wanted to prevent the "serious, perhaps irreparable" injury that might result by adherence to the final judgment rule in cases where an injunction has been improvidently granted. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955); see Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897); Maxwell v. Enterprise Wall Paper Mfg. Co., 131 F.2d 400, 402 (3d Cir. 1942); Chicago Dollar Directory Co. v. Chicago Directory Co., 65 Fed. 463, 465 (7th Cir. 1895); Richmond v. Atwood, 52 Fed. 10, 15–16 (1st Cir. 1892). See generally Porter, *Appeals From Interlocutory and Final Decrees in the United States Circuit Courts of Appeal*, 19 B.U.L. REV. 377 (1939).

5. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 182 (1955).

6. *Ibid.*; *accord*, Council of W. Elec. Technical Employees v. Western Elec. Co., 238 F.2d 892, 894 (2d Cir. 1956).

7. *E.g.*, Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935).

8. *E.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

9. *E.g.*, Shanferoke Co. v. Westchester Co., 293 U.S. 449 (1935).

10. See, *e.g.*, Bailey v. Patterson, 369 U.S. 31 (1962); Harrison v. NAACP, 360 U.S. 167 (1959).

11. 9 U.S.C. § 3 (1958).

12. 293 U.S. 379 (1935).

life insurance policy, and the insurer had raised the equitable defense that the policy had been procured by fraud. The insurer subsequently sought to have the plaintiff's claim stayed pending the disposition of the equitable issue of fraud raised by his defense. The trial court granted the petition, and the plaintiff, relying upon the forerunner of section 1292(a)(1), appealed the ruling to the court of appeals. The court of appeals accepted jurisdiction without questioning its power to review this interlocutory order and affirmed the district court.[13] The plaintiff then appealed to the Supreme Court, which granted certiorari and declared as a preliminary matter that the court of appeals did have jurisdiction to review the interlocutory order because that order constituted an interlocutory injunction within the meaning of section 1292(a)(1). The Court said that this section contemplated that those nonfinal orders granting or denying injunctive relief under the principles of equity jurisdiction were interlocutory injunctions.[14] At common law, a defendant in an action at law who had an inadequate remedy because his only defense was equitable could go into equity and seek a temporary injunction to stay the action at law pending disposition of his defense in an equitable proceeding.[15] Therefore, since the stay order in *Enelow* was issued in a proceeding at law in order that an equitable defense could first be heard, the order was considered an interlocutory injunction for purposes of a section 1292(a)(1) appeal.[16]

The Court's reference to the equity practice of staying the proceedings was a seemingly indefensible analogy in light of the civil procedure then in effect. When *Enelow* was decided, a partial merger of law and equity had already taken place,[17] and therefore, any reference to the common-law power of equity "to stay proceedings in another court . . . in the enforcement of equitable principles"[18] was fictitious since both the action at law and the equitable defense were pending in the same court. However, even if this reference to the historical practice is acceptable in the *Enelow* case because it was consistent with the separation of the law and equity sides of the same court, it would seem indefensible today. Since the Federal Rules adopted the unitary form of action

13. 70 F.2d 728 (3d Cir. 1934).
14. 293 U.S. at 381.
15. See 1 SMITH, PRACTICE OF CHANCERY 2, n.a (2d ed. 1842); Note, 75 HARV. L. REV. 351, 372 n.185 (1961).
16. 293 U.S. at 383.
17. City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 256–57 (1949).
18. 293 U.S. at 382.

and thereby merged actions at law and equity,[19] to preserve the *Enelow* doctrine is to preserve the fiction of a court with two sides, one of which could stay proceedings in the other.

Nevertheless, in *Ettelson v. Metropolitan Life Ins. Co.*,[20] a case decided after the fusion of law and equity, the Court adhered to the reasoning underlying the *Enelow* doctrine.[21] The Court held that the relief afforded by section 1292(a)(1) was not restricted to injunctions as such, but applied as well to those orders that have the effect of injunctions.[22] The trial court's order in *Ettelson* postponed a jury trial of plaintiff's action at law on certain insurance policies pending a determination of a counterclaim raising the equitable defense of fraud. The Supreme Court said that this order was effective as an injunction and was appealable. Thus, although the Federal Rules had brought about a merger of law and equity, the historical differences between those actions were still the basis for the appealability of the stay order in *Ettelson*.

Notwithstanding the failure of the Court in *Enelow* and *Ettelson* to consider the effect of the merger of law and equity on the appealability of stay orders, the result reached in those cases seems improper. To allow the appealability of those orders under section 1292(a)(1) does not accord with the policy underlying that statute—to alleviate the "serious, perhaps irreparable" consequences of an erroneously issued injunction.[23] The interim harm resulting from the stay orders in *Enelow* and *Ettelson* was not serious and irreparable. If, for example, the plaintiff in each of those cases had been denied review of an erroneous order subjecting him to a nonjury trial until there had been a final decision, he would only have suffered the expense and delay of a needless court trial. This is the usual result in any case that is reversed because a trial court issued an improper interlocutory order. It does not, however, in any way affect the party's conduct outside the courtroom as an interlocutory injunction would.

19. FED. R. CIV. P. 2.

20. 317 U.S. 188 (1942).

21. The defendant in *Ettelson* argued that *Enelow* was indefensible since it was decided before the complete fusion of law and equity.

> [T]his distinction has now been abolished; that equitable defenses, whether a bar to plaintiff's recovery at law or the basis of affirmative relief against the plaintiffs, are part and parcel of the single action initiated by the plaintiffs and that any direction by the court respecting the order in which the claim and counterclaim are to be heard is interlocutory, amounting, at most, to a stay of the trial of one branch of the litigation, and in no sense an injunction against the plaintiffs.

317 U.S. at 191.

22. *Id.* at 192.

23. See cases and secondary authority cited note 4 *supra* and accompanying text.

Cases decided subsequent to *Enelow* and *Ettelson* make clear that appealability of stay orders is restricted to cases involving an action at law and an order staying the proceedings pending the determination of an equitable defense. In *City of Morgantown v. Royal Ins. Co.*,[24] an equitable proceeding, the defendant sought a stay order to permit the prior determination of a legal counterclaim. This order was denied and held not to be appealable. Since it did not enjoin any proceeding, real or fictitious, it did not constitute an interlocutory injunction under section 1292(a)(1). The Court said that this order merely controlled the order of trial and was an exercise of the inherent power of the court to maintain the orderly processes of justice.[25]

The *Morgantown* decision resulted in confusion over whether the *Enelow* doctrine was still applicable to the question of stay order appealability.[26] For example, some appellate courts interpreted *Morgantown* to mean that appealability of stay orders existed only in cases where a common-law action was stayed because of an equitable defense;[27] another court of appeals granted interlocutory appeal if the order stayed a proceeding in equity pending arbitration.[28] The Court's opinion in *Baltimore Contractors, Inc. v. Bodinger*,[29] however, made clear that the *Enelow* doctrine was still in force. *Baltimore Contractors* was an equitable proceeding in which the defendant petitioned for a stay order

24. 337 U.S. 254 (1949).

25. *Id.* at 257–58.

26. The dissenting Justices in *Morgantown* regarded the majority's decision as rejecting the *Enelow* doctrine. According to them, the majority recognized the Federal Rules as having displaced the analogy made under the *Enelow* doctrine to common-law practice. On the other hand, Mr. Justice Frankfurter, who concurred in the result, argued that the decision did not destroy the *Enelow* doctrine because *Enelow* was distinguishable since it involved an action at law interposed with an equitable defense that was made the basis of the stay order. As a result, he believed that "there was no intervention by a court of equity in proceedings at law, but 'a mere stay of a proceeding which a court of law, as well as a court of equity, may grant' " in determining the sequence of the trial. 337 U.S. at 261.

Others have construed the majority opinion as rejecting the fiction upon which *Enelow* rested. See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE ¶ 0.03(52), at 493 (1949), where the author points out that since the Court in *Morgantown* could have applied the "historical analogies and reached the same result" as *Enelow*, the mode and sequence of trial should no longer be considered as an injunction under § 1292(a)(1) and thus appealable in light of the Federal Rules of Civil Procedure.

27. *E.g.*, American Airlines, Inc. v. Forman, 204 F.2d 230 (3d Cir. 1953).

28. Hudson Lumber Co. v. United States Plywood Corp., 181 F.2d 929 (9th Cir. 1950).

29. 348 U.S. 176 (1955).

pending arbitration of the dispute. The stay order was denied, and the denial was held not appealable. The Court denied appealability of this interlocutory order because the technical arrangement of claims required by *Enelow*—a legal action and an equitable defense asserted as the basis for a stay order—was not present.[30]

The Court's adherence to this distinction based upon the arrangement of legal and equitable claims seems particularly inappropriate today.[31] With the merger of law and equity, there has been an increase in the number of complex cases "in which issues appear in new combinations extremely difficult to fit wholly into one category or the other."[32] Moreover, recent Supreme Court decisions have ignored the law-equity dichotomy. The doctrine of

30. Cases decided by federal courts subsequent to *Baltimore Contractors* are generally in accord with this interpretation of the case. For example, in Kirschner v. West Co., 300 F.2d 133 (3d Cir. 1962), plaintiff sought an accounting of royalties due. The defendant was granted a stay in the proceeding pending arbitration. The court of appeals interpreted the *Enelow-Baltimore Contractors* line of decisions as holding that where such a stay is granted or denied in an action at law, the order is appealable although it would not be appealable in a suit in equity. The court went on to say that since plaintiff's claim sounded in equity, the stay of the proceeding was not appealable under § 1292(a)(1). See Korody Marine Corp. v. Minerals & Chems. Philipp Corp., 300 F.2d 124 (2d Cir. 1962); Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80 (2d Cir. 1961). The court in Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir. 1962), declared that orders staying an action at law to await the determination of matters pending in state courts are not appealable under § 1292(a)(1). According to the court, the rule that has emerged from the various decisions is:

> An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; *and* (B) the stay is sought to permit the prior determination of some *equitable* defense or counterclaim.

Id. at 845. See Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir. 1955). Orders staying proceedings pending the determination of an administrative agency decision have also been held to be not appealable. See Chronicle Publishing Co. v. National Broadcasting Co., 294 F.2d 744 (9th Cir. 1961); New York N.H. & H.R.R. v. Lehigh & N.E.R.R., 287 F.2d 678 (2d Cir. 1961); United Gas Pipe Line Co. v. Tyler Gas Serv. Co., 247 F.2d 681 (5th Cir. 1957); Day v. Pennsylvania R.R., 243 F.2d 485 (3d Cir. 1957).

On the other hand, the court in Glen Oaks Util., Inc. v. City of Houston, 280 F.2d 330, 333 (5th Cir. 1960), suggested by way of dicta that the distinction made in *Baltimore Contractors* was intended to be abolished by the Federal Rules, and therefore, a court could adopt a rule that "no distinction existed as to appealability, between stay orders in law actions and such orders in equity cases." *Id.* at 333. Subsequent Fifth Circuit cases, however, did not adopt such a rule. See, *e.g.*, Jackson Brewing Co. v. Clarke, *supra.*

31. See 41 VA. L. REV. 533, 535 (1955).

32. Note, 65 HARV. L. REV. 453, 456 (1952).

abstention, under which a proceeding in a federal court is stayed pending the interpretation of a state statute by a state court, originated in an equitable proceeding, yet recently this doctrine has been applied in legal actions.[33] The decision in *Beacon Theatres, Inc. v. Westover*[34] demonstrates that the Court has also departed from the law-equity dichotomy as a basis for determining the right to a jury trial.[35] Consistency would dictate that the Court should also ignore the law-equity dichotomy when considering the appealability of stay orders.[36]

The Supreme Court has ignored the law-equity dichotomy in applying the direct appeal provisions of section 1253 of the Judicial Code, which provides for direct appeal to the Supreme Court "from an order granting or denying . . . an interlocutory or permanent injunction" in actions before three-judge

33. The doctrine of abstention originated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), where the plaintiff brought an action to enjoin an order of the Texas Railroad Commission. The Commission sought to justify its order under a Texas statute, but when the suit was appealed, the Supreme Court found it "far from clear" whether the order was covered by Texas law. *Id.* at 499. It then remanded the case to the district court with instructions to retain jurisdiction of the suit, but to stay its proceedings until there had been a determination of the statutory meaning in the state court. The Court justified this procedure by relying upon the "resources of equity," which include the power to restrain its jurisdiction in order to promote harmony between the federal and state governments as well as to avoid considering constitutional questions. *Id.* at 500.

In Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), however, the Court affirmed a district court's staying its own proceedings in an eminent domain proceeding to allow the state court to ascertain the meaning of a disputed state statute, notwithstanding the fact that the doctrine of abstention was originated in an equitable action. In effect, the Court in *Thibodaux* rejected any notion that the abstention doctrine is confined to proceedings equitable in nature. See Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960), where the Court applied the abstention doctrine in a legal action.

34. 359 U.S. 500 (1959).

35. Since Rule 38(a) of the Federal Rules preserved the status quo of the right to a jury trial in the federal courts, the tendency has been to decide jury trial questions by considering whether the alleged claims are essentially legal or equitable in nature. See McCoid, *Right to Jury Trial in the Federal Courts,* 45 IOWA L. REV. 726 (1960); Note, 65 HARV. L. REV. 453 (1952). However, in *Beacon Theatres,* where plaintiff sought declaratory relief plus an injunction and the defendant counterclaimed for damages and petitioned for a jury trial, the Court did not consider the nature of the relief sought in ruling upon the validity of the trial court's order denying defendant a jury trial. Instead, the Court simply held that the right to a jury trial is not destroyed by plaintiff's claim for equitable relief because recognition must be given to the fact that (1) the flexible rules of civil procedure provide an adequate remedy at law to the plaintiff if there is a prior determination of defendant's legal counterclaim, and (2) the right to a jury trial is a constitutional right.

36. See Glen Oaks Util., Inc. v. City of Houston, 280 F.2d 330, 333 (5th Cir. 1960); Note, 75 HARV. L. REV. 351, 374 (1961).

district courts.[37] In *Bryan v. Austin*,[38] the plaintiff sought a declaratory judgment before a three-judge court to invalidate as unconstitutional and to enjoin the enforcement of a state statute prohibiting the employment by the state of members of the NAACP. The court stayed the proceedings before it in order that the meaning of the state statute could be ascertained by the state court. There was a direct appeal of this ruling to the Supreme Court pursuant to the provisions of section 1253. The Court accepted jurisdiction, but remanded the case to the district court.[39] The decision in *Bryan* was silent regarding the problem of whether a stay order issued by a three-judge district court applying the doctrine of abstention may be appealed directly to the Supreme Court under section 1253, which, like section 1292(a)(1), permits appeal of orders granting or denying interlocutory injunctions. Under the *Enelow* doctrine, section 1292(a)(1) applies to stay orders only if they are based upon equitable defenses or counterclaims in actions at law.[40] Thus, orders staying proceedings in federal courts pending the determination of suits before state courts or administrative agencies have not been considered to be interlocutory injunctions within the meaning of that section.[41] The Court in *Bryan* in an essentially equitable proceeding, however, applied a jurisdictional statute containing language similar to that used in section 1292(a)(1) and accepted without question jurisdiction of an appeal from an interlocutory order staying the proceedings in a federal court pending the construction of a state statute in the state court. The Court probably regarded the stay order as having the effect of an injunction because it temporarily stopped the proceeding in the federal court.

Although the appeal in *Bryan* arose under section 1253, the Court's disregard for the technical arrangement of claims should be equally applicable to section 1292(a)(1). Both sections are similar, for they both permit appellate review of orders granting or denying interlocutory injunctions. Logically, the same result as to the appealability of stay orders should be reached under both

37. 28 U.S.C. § 1253 (1958).

38. 354 U.S. 933 (1957).

39. The state had by this time repealed the statute, and thus, the issue of whether *Bryan* was an appropriate case for application of the abstention doctrine had become moot. *Ibid.*

40. See cases cited note 30 *supra* and accompanying text.

41. Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir. 1962); Chronicle Publishing Co. v. National Broadcasting Co., 294 F.2d 744 (9th Cir. 1961); New York, N.H. & H.R.R. v. Lehigh & N.E.R.R., 287 F.2d 678 (2d Cir. 1961); United Gas Pipe Line Co. v. Tyler Gas Serv. Co., 247 F.2d 681 (5th Cir. 1957); Day v. Pennsylvania R.R., 243 F.2d 485 (3d Cir. 1957).

statutes. The result in *Bryan* seems preferable since it is in accord with the Court's departure from the law-equity dichotomy in other areas.[42]

Arguably, the considerations that prompted the Supreme Court to depart from the law-equity distinction in cases involving abstention and the right to trial by jury and under section 1253 will similarly prompt the Court to disregard the dichotomy as a basis for determining the appealability of stay orders. In fact, the Supreme Court's decision in *Louisiana Power & Light Co. v. City of Thibodaux*[43] would seem to indicate that the Court is willing to reject the *Enelow* doctrine. *Thibodaux* involved a condemnation proceeding, a legal action, in which the district court granted a stay order in applying the abstention doctrine. The plaintiff appealed the grant of this order, and the circuit court reversed. On petition for writ of certiorari, the defendant argued that this stay order was not an interlocutory injunction under the *Enelow* doctrine.[44] The Supreme Court, however, accepted jurisdiction without discussing the implications of the *Enelow* doctrine. Since in *Thibodaux* there was a legal action, but the stay order was not based on an equitable defense, the order should not have been appealable under *Enelow*.

This interpretation of *Thibodaux* is supported by the recent decision in *Turner v. City of Memphis*,[45] in which the plaintiff sought to enjoin the discrimination practiced by the defendant. The defendant responded by asserting that the establishment involved was a private business, not subject to the fourteenth amendment and that he would violate a Tennessee statute if he did not segregate his eating facilities. The plaintiff then moved, before a single district judge, for summary judgment. The defendant countered by alleging that this was an appropriate suit for a three-judge district court; the district court agreed and convened a three-judge court. Subsequently, the defendant petitioned for and received a stay of the proceeding in order that the state court could interpret the state statute. The plaintiff appealed this stay order and the order establishing a three-judge court to both the Supreme Court and the court of appeals.[46] The Supreme Court

42. See text accompanying notes 33 & 35 *supra*.
43. 360 U.S. 25 (1959).
44. Brief for Petitioner, Application for Writ of Certiorari, pp. 10–18.
45. 369 U.S. 350 (1962).
46. The plaintiff appealed the orders to both appellate courts to protect himself from not making a timely appeal in either court. If, for example, the plaintiff would have only filed an appeal in the Supreme Court and the Court held that it did not have jurisdiction to hear the appeal under the direct appeals statute because *Turner* was not an appropriate case for

declared that "a three-judge court was not required, and that jurisdiction of this appeal is vested in the Court of Appeals."[47]

The Court did not explain the grounds upon which the court of appeals had jurisdiction to hear this interlocutory appeal although it would seem that the Court had to face this problem if the *Enelow* doctrine has any vitality. *Turner* did not involve a legal action and a stay order based on an equitable defense, for the district court merely granted the stay to permit the state court to ascertain the meaning of a state statute. Therefore, it would seem that the effect of the Supreme Court's declaring that the court of appeals had jurisdiction to hear this appeal is that the Court has rejected the interpretation given to section 1292(a)(1) in *Enelow*.

If the Supreme Court has in fact rejected the *Enelow* doctrine, it is then necessary to formulate a new standard governing the appealability of stay orders under section 1292(a)(1). The first requirement for appealability is that there be an order granting or denying an injunction. In *Ettelson v. Metropolitan Life Ins. Co.*,[48] the Court stated that section 1292(a)(1) is not restricted in scope to those orders that are literally "injunctions." Rather, it is necessary in deciding what orders grant or deny injunctions to look to the substantial effect of the orders. Although the Court in *Morgantown* and *Baltimore Contractors* construed this language in *Ettelson* to mean that only equitably-based stay orders granted in actions at law are effective as injunctions, a more logical test, in light of the merger of law and equity, is to consider stay orders to be in the nature of injunctions where that is their operative effect.[49] Because any stay order, by stopping the proceedings, has the effect of an injunction, any order granting or denying the stay of proceedings should meet this requirement.[50]

a three-judge court, the plaintiff would then have to appeal the orders to the court of appeals. At that time, however, the time for appeal might have expired.

47. 369 U.S. at 353. The Court, nonetheless, went on to decide the case by treating defendant's "jurisdictional statement as a petition for writ of certiorari prior to judgment in the Court of Appeals." *Id.* at 353–54.

48. 317 U.S. 188 (1942).

49. The dissenting justices in *Morgantown* and *Baltimore Contractors* regarded § 1292(a)(1) as making "all stay orders appealable that have the substantive effect of interlocutory injunction orders." Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 185 (1955).

50. This construction of what constitutes an order granting or denying an injunction for purposes of a § 1292(a)(1) appeal seems to be in accordance with the interpretation the Court has given that same language in § 1253. When the Court in Bryan v. Austin, 354 U.S. 933 (1957), accepted jurisdiction of a direct appeal from a stay order issued by a three-judge district court applying the abstention doctrine, the Court appeared to determine whether the effect of the order was to grant an injunction.

This is not to suggest, however, that the appeal of stay orders should be allowed in all cases where such orders have the effect of injunctions. Since section 1292(a)(1) was enacted to prevent "serious, perhaps irreparable" injury that could result from orders granting or denying injunctions, a stay order must also produce that degree of injury to be appealable under this section.[51] Under this standard, few if any stay orders would ever be appealable under section 1292(a)(1) since such orders do not enjoin a litigant's conduct outside of the proceedings. In the *Enelow-Baltimore Contractors* line of cases, the stay orders would not be appealable; the interim harm of delay and additional expense resulting from having to await a final judgment before a question as to the availability of a jury trial or arbitration may be reviewed does not amount to the kind of harm that section 1292(a)(1) was intended to prevent. Injury of this sort will always be present when a trial court has issued an improper interlocutory order. The concern that the courts have to safeguard the right of trial by jury should not justify interrupting the progress of a trial where there has been an erroneous denial of a jury trial. This right can always be asserted after there has been a final decision. Stay orders issued under the abstention doctrine will similarly not satisfy the requirements imposed by this test even though they are likely to come within the literal language of section 1292(a)(1). They have the effect of injunctions because they do temporarily "enjoin" proceedings in the federal courts. Nevertheless, if such orders are erroneously issued, there will not be irreparable injury, but rather the ordinary delays and expenses that result from reversible interlocutory orders.[52]

51. See cases and secondary authority cited note 4 *supra* and accompanying text for an insight into what Congress endeavored to remedy by enacting § 1292(a)(1).

52. It may not always be necessary to resort to § 1292(a)(1) to obtain review of orders granting or denying a stay if § 1292(b), which was added by amendment in 1958 to provide for discretionary appeal of interlocutory orders, is applicable. See Note, 69 YALE L.J. 333, 352, 357 (1959), which suggests that orders "staying the action" and governing the order of trial satisfy the requirements of appealability under § 1292(b).

The writ of mandamus may also provide litigants with supplementary means for appellate review of orders granting or denying a stay. Application of the writ of mandamus has been considered appropriate in cases where there has been a disregard by a district judge of the constitutionally protected right to a jury trial. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Black v. Boyd, 248 F.2d 156 (6th Cir. 1957); Bereslavsky v. Kloeb, 162 F.2d 862 (6th Cir. 1947); Bereslavsky v. Caffey, 161 F.2d 499 (2nd Cir. 1947). It has been suggested that the courts should also give greater application of the writ of mandamus to review interlocutory orders. See 6 MOORE, FEDERAL PRACTICE ¶ 54.10[6] (2d ed. 1953); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102, 1112–13 (1950).