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Automatic Arbitration Win For Cos. May Come With Pitfalls

By **Marianne Spencer and Sonya Winner** (July 5, 2023, 4:23 PM EDT)

Marianne Spencer

Sonya Winner

Companies seeking to enforce arbitration agreements have reason to celebrate the U.S. Supreme Court's recent resolution of a circuit split governing arbitration stays in Coinbase Inc. v. Bielski.

The decision means companies appealing adverse arbitration decisions will no longer run the risk of engaging in burdensome and costly discovery while their appeals are pending.

But there may be other consequences that companies should keep in mind when considering whether to appeal a denial of a motion to compel arbitration.

The FAA and Right to Interlocutory Appeal of Arbitrability

The Federal Arbitration Act, or FAA, was enacted to empower federal and state courts to facilitate private dispute resolution.[1] Congress amended the FAA in 1988, adding a provision that allows a party to file an interlocutory appeal if a district court denies that party's motion to compel arbitration.[2]

The FAA does not explicitly address whether litigation must be stayed while the guaranteed interlocutory appeal is ongoing, but nine courts of appeals had decided the issue before the Supreme Court weighed in.

The Ninth Circuit was the first to address the issue in 1990, two years after the FAA was amended, when it held a stay is not required in Britton v. Co-op Banking Group. The U.S. Court of Appeals for the Second Circuit followed its lead in Motorola Credit Corp. v. Uzan in 2004, and the U.S. Court of Appeals for the Fifth Circuit did the same in Weingarten Realty Investors v. Miller Sheridan LLC in 2011.[3]

Six other circuits — the U.S. Courts of Appeals for the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits — all came to the opposite conclusion, holding that an appeal strips the district court of jurisdiction, and the litigation must be stayed until the appeal is resolved.[4]

The Supreme Court Adopts the Majority Rule

The Supreme Court took the opportunity in Coinbase v. Bielski to resolve the split after the U.S. District Court for the Northern District of California denied motions to compel arbitration in two putative class

actions.[5]

The defendant appealed pursuant to Section 16(a) of the FAA, and sought stays while it appealed the denials.[6] The district court denied both motions to stay the appeals, and the Ninth Circuit affirmed the stay denial, following its circuit precedent.[7]

In a 5-4 decision authored by Justice Brett Kavanaugh, the court reversed the Ninth Circuit, holding that the FAA does require a district court to stay proceedings while an interlocutory appeal on arbitrability is decided.

The court wrote that even though Section 16(a) of the FAA does not explicitly state that a stay is required:

> Congress enacted §16(a) against a clear background principle prescribed by this Court's precedents: An appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case involved in the appeal.' Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982).[8]

"Because the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially 'involved in the appeal,'" and the district court should not exercise jurisdiction while the appeal is ongoing.[9]

According to the court, this reflects "common sense" because "[a]bsent an automatic stay of district court proceedings, Congress's decision in §16(a) to afford a right to an interlocutory appeal would be largely nullified."[10] In other words, the right to appeal an adverse arbitration decision is meaningless if the party is forced to litigate a case it believes is subject to mandatory arbitration.

The decision was a close one: Justice Ketanji Brown Jackson authored a dissent, joined by Justices Sonia Sotomayor and Elena Kagan, as well as Justice Clarence Thomas in part.[11]

The dissent criticized the majority for — among other things — reading a stay requirement into Section 16 even though the section "never even mentions a stay pending appeal."[12]

The dissent also disputed that a background mandatory-general-stay rule exists, noting that the general power to stay proceedings is discretionary,[13] and further criticized the majority for "spinning [a] rule from a single sentence in Griggs."[14]

Potential Consequences of the Ruling

There is no question that this decision is a win for companies wishing to enforce arbitration agreements. Defendants seeking to compel arbitration of complex, putative class actions will no longer risk having to engage in protracted discovery while simultaneously appealing an adverse arbitration decision.

This means that companies will have less pressure to pursue settlement while an interlocutory appeal of an arbitration denial is pending, and appeals of adverse arbitration decisions are likely to increase.

A successful appeal allows the company to avoid the burden of discovery altogether, and even an unsuccessful appeal could delay discovery many months until the arbitration question is conclusively resolved.

Although most jurisdictions already followed the rule chosen by the court — only the Second, Fifth and Ninth Circuits left arbitration stays to the discretion of the district court — this decision will have a significant impact on putative class actions where potential class representatives may have consented to arbitration through user agreements.

A disproportionate number of consumer class actions are brought in California, and the reversal of the rule in the Ninth Circuit will likely affect litigation strategy for a substantial number of those cases.

There are, however, potential pitfalls that could come from this decision that companies should consider before appealing an adverse decision and staying the underlying litigation.

The court suggested that where the party opposing arbitration wants to avoid significant litigation delay, that party "can ask the court of appeals to summarily affirm, to expedite an interlocutory appeal, or to dismiss the interlocutory appeal as frivolous."[15]

Parties appealing an adverse decision should be prepared for the opposing party to request a quick decision, and the courts of appeals may now be inclined to consider such requests more seriously than they might have previously.

Another possible consequence of this decision is that motions challenging arbitrability appeals as frivolous may increase. The court rejected Bielski's argument that parties would use the stay to delay litigation to pursue unfounded appeals, writing that "a court of appeals may impose sanctions where appropriate; the possibility of sanctions also helps deter frivolous appeals."[16]

There could be an uptick in sanctions motions citing this language to argue that a party has filed a frivolous arbitration appeal to delay a case inappropriately.

Companies contemplating arbitration appeals should always apply appropriate judgment to ensure that those appeals are not frivolous, but this language reinforces the importance of this precaution.

Marianne Spencer is an associate and Sonya Winner is a partner at Covington & Burling LLP.

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[1] 9 U.S.C. § 1, et seq.

[2] 9 U.S.C. § 16(a).

[3] See Weingarten Realty Invs. v. Miller, 661 F.3d 904 (5th Cir. 2011); Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004); Britton v. Co-op Banking Grp., 916 F.2d 1405 (9th Cir. 1990).

[4] Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207 (3d Cir. 2007); Levin v. Alms & Assocs., Inc., 634 F.3d 260 (4th Cir. 2011); McCauley v. Haliburton Energy Servs., Inc., 413 F.3d 1158 (10th Cir. 2005); Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249 (11th Cir. 2004) (per curiam); Bradford-Scott Data Corp. v. Physician Comput. Network, Inc., 128 F.3d 504, 506 (7th Cir. 1997).

[5] Coinbase, Inc. v. Bielski, No. 22–105, Slip Op. at 1 (U.S. 2023).

[6] Id. at 2.

[7] Id.

[8] Id. at 3.

[9] Id.

[10] Id. at 5.

[11] Justice Thomas joined Parts II, III, and IV of the dissenting opinion.

[12] Dissent at 2.

[13] Id. at 3.

[14] Id. at 8.

[15] Coinbase, No. 22–105, Slip Op. at 8.

[16] Id.