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Arbitration Alert

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Coinbase v. Bielski—The Supreme Court extends the stay protections of the Federal Arbitration Act to proceedings pending appeal

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The Federal Arbitration Act requires a stay pending appeal of a denial of arbitration because otherwise "many of the asserted benefits of arbitration . . . would be irretrievably lost."

What is the Impact?

- The decision helps businesses with contracts containing arbitration clauses avoid unnecessary expense if there is a dispute over whether a matter has to be litigated instead of arbitrated.
- While the Court continued its long-standing protection of arbitration, the 5–4 decision was not a perfect split along "liberal" and "conservative" lines, indicating that the Court is willing to continue to define carefully the edges of that protection.

The United States Supreme Court, continuing its long-standing protection of arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the FAA), held on Friday that Coinbase, Inc. was entitled to a stay of litigation proceedings (such as discovery in the trial court) pending an appeal

of that court's denial of a motion to compel arbitration. The decision in *Coinbase, Inc. v. Bielski*, No. 22-15566, 2023 U.S. LEXIS 2636 (June 23, 2023), further strengthens the application of the FAA to typical pre-dispute arbitration clauses found in many modern consumer, employment, and business-to-business contracts.

Background

Abraham Bielski had a cryptocurrency account at Coinbase. He authorized a third party to have access to that account. When the third party stole $31,000 from the account, Mr. Bielski sued Coinbase, on behalf of himself and others similarly situated, for failing to prevent the loss. His User Agreement with Coinbase contained an arbitration provision.

Coinbase timely moved in the United States District Court for the Northern District of California to compel arbitration under the User Agreement, but the court denied that motion. *Bielski v. Coinbase, Inc.*, No. C 21-07478 WHA, 2022 U.S. Dist. LEXIS 65689 (N.D. Cal. April 8, 2022) (subsequent history omitted). Coinbase then filed an appeal to the Ninth Circuit under 9 U.S.C.A. §16(a) (West 2022), which authorizes interlocutory appeals from denials of motions to compel arbitration. Coinbase also moved in the District Court to stay further substantive litigation proceedings there pending the appeal.[1] The District Court denied that motion, *see Bielski v. Coinbase, Inc.*, No. C 21-07478 WHA, 2022 U.S. Dist. LEXIS 101748 (N.D. Cal. June 7, 2022), so Coinbase sought a stay from the Ninth Circuit—which also denied the request, *see Bielski v. Coinbase, Inc.*, No. 22-15566, 2022 U.S. App. LEXIS 19052 (9th Cir. July 11, 2022) (subsequent history omitted).

In denying a stay, the Ninth Circuit was following its own precedent from *Britton v. Co-op Banking Grp.*, 916 F. 2d 1405, 1412 (1990), where it had held that an appeal from the denial of a motion to compel arbitration does not automatically stay trial court proceedings. Apart from the Fifth Circuit, *see Weingarten Realty Investors v. Miller*, 661 F. 3d 904, 907-10 (5th Cir. 2011) (stay properly denied pending appeal of denial of arbitration because movant failed to show a likelihood of success on the merits as to whether arbitration required and balance of equities did not favor movant), other Courts of Appeals addressing the issue had long held that a stay is effectively mandatory, *see*, *e.g.*, *Levin v. Alms & Assocs.*, 634 F.3d 260, 266 (4th Cir. 2011); *Ehleiter v. Grapetree Shores, Inc.*, 482 F. 3d 207, 215 n. 6 (3d Cir. 2007); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F. 3d 1158, 1162-63 (10th Cir. 2005); *Blinco v. Green Tree Servicing, LLC*, 366 F. 3d 1249, 1253 (11th Cir. 2004); *Bombardier Corp. v. AMTRAK*, 333 F. 3d 250, 252 (D.C. Cir. 2003); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F. 3d 504, 506 (7th Cir. 1997). "To resolve that disagreement among the Courts of Appeals", *Bielski*, 2023 U.S. LEXIS 2636, at *6,

1 Coinbase did not argue that the District Court could not "proceed with matters that are not involved in the appeal, such as the awarding of costs and attorney's fees." Bielski, 2023 U.S. LEXIS 2636, at *8 n.2.

the Supreme Court granted a petition for certiorari from Coinbase, *see Bielski*, 143 S. Ct. 521 (2022).[2]

The Supreme Court's decision

Section 16(a) of the FAA, authorizing immediate interlocutory appeals of orders denying—but not of orders granting—motions to compel arbitration creates a rare statutory exception to the usual rule that parties may not appeal before a final judgment. But because Section 16(a) does not on its face say whether such interlocutory proceedings include a stay pending appeal, there was room for dispute in *Bielski* as to whether some sort of stay must issue, or not, under those circumstances, or whether a decision to issue a stay is subject to a discretionary analysis. As Justice Kavanaugh framed it, "[t]he sole question before this Court is whether a district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing." *Bielski*, 2023 U.S. LEXIS 2636, at *6.

The five member majority for which Justice Kavanaugh wrote had little trouble concluding that a District Court must issue such a stay. According to his opinion, both precedent and common sense require such a result.

As to precedent, while section 16 of the FAA says nothing about a stay, the Supreme Court had held in *Griggs v. Provident Consumer Discount Co.* that an appeal, including an interlocutory appeal, "divests the district court of its control over those aspects of the case involved in the appeal." 459 U. S. 56, 58 (1982). Because the question on an appeal from a denial of a motion to stay arbitration is whether the case belongs in arbitration or in court, the entire case is essentially "involved in the appeal." *Bielski*, 2023 U.S. LEXIS 2636, at *8 (quoting *Griggs*, 459 U. S. at 58). This is so because, when a party appeals the denial of a motion to compel arbitration, whether "the litigation may go forward in the district court is precisely what the court of appeals must decide." *Id*. (quoting *Bradford-Scott Data Corp.*, 128 F. 3d at 506). It therefore does not matter that Congress did not provide expressly for a stay in Section 16 of the FAA because the jurisdictional principles of *Griggs* require an automatic stay of district court proceedings that relate to any substantive aspect of the case involved in the appeal anyway. *Id.*

Indeed, because *Griggs* preceded the enactment of Section 16 of the FAA, Justice Kavanaugh asserts that Congress would have included a provision *rejecting* any stay pending appeal if it had wanted there not to be an automatic stay under the "background principle" established by *Griggs. See Bielski*, 2023 U.S. LEXIS 2636, at *12 (noting that Congress has over the years "enacted multiple statutory 'non-stay' provisions", including one just the day before it enacted

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[2] The Supreme Court had granted a joint petition for certiorari with respect to *Bielski* and a second case, *Suski v. Coinbase, Inc.* 143 S. Ct. 521 (Dec. 9, 2022). Based on procedural developments in the *Suski* case, the Supreme Court chose, when it decided *Bielski*, to dismiss the petition in *Suski* as improvidently granted. *Bielski*, 2023 U.S. LEXIS 2636 at *17 n.7.

Section 16 of the FAA). This also undermines arguments based on various statutes that have express stay provisions, as well as arguments that a discretionary stay would be sufficient. *See id.* at *13-15.[3]

The ultimate result—a mandatory stay pending appeal—comports with the position taken in most decisions on the subject by the Courts of Appeals. *See*, *e.g.*, *id.* at *8 & n.3. It is also consistent with the views of the leading learned treatises on federal procedure. *See*, *e.g.*, *id.* at *9 (quoting 19 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, J. Moore's Federal Practice § 203.12[3][a] (3d ed. 2022), for the proposition that a "stay in these circumstances" is "the sounder approach" and "is consistent with the general [*Griggs*] principle that a district court should not exercise jurisdiction over those aspects of the case that are involved in the appeal."); *see also id.* (citing 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.17, p. 7 (2d ed., Supp. 2022)).

But as important as any of these purely legal arguments, Justice Kavanaugh seems to say, is that the "common practice" of a mandatory stay "reflects common sense." *Id.* at *9. "If the district court could move forward with pre-trial and trial proceedings while the appeal on arbitrability was ongoing, then many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost—even if the court of appeals later concluded that the case actually had belonged in arbitration all along." *Id.* at *10. Without a mandatory stay, "parties also could be forced to settle to avoid the district court proceedings (including discovery and trial) that they contracted to avoid through arbitration." *Id*.[4] A "right to interlocutory appeal of the arbitrability issue without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Id.* at *11. The possibility of a "waste [of] scarce judicial resources", if matters proceed in the trial court and the appellate court ultimately reverses and compels arbitration, only reinforces this conclusion. *Id*.

Having concluded in relatively short order that mandatory stays are required in Section 16(a) interlocutory appeals, the majority reversed and remanded. In optimistic dicta, it also "anticipate[s]" that the Ninth Circuit, and other courts "more generally", will "proceed with appropriate expedition" when considering such interlocutory appeals in the future. *Id.* at *16.

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[3] The majority notes that most courts that have applied the traditional four-factor test for a discretionary stay pending appeal to the issue of a stay following the denial of a motion to compel arbitration have—just as the District Court did in *Bielski*—denied such a stay because the expenses of continuing to litigate do not appear to be irreparable harm. *Id.* at *15-16.

[4] While not logically essential to the majority's decision, Justice Kavanaugh also observed an "especially pronounced" risk of coercion in the absence of such a stay "in class actions, where the possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" *Bielski*, 2023 U.S. LEXIS 2636, at *10 (quoting *H*. Friendly, Federal Jurisdiction: A General View 120 (1973)).

Somewhat surprisingly, Justice Kavanaugh's opinion, despite reflecting the strong majority view of those outside the Supreme Court on the issue, garnered only a narrow majority on the Court itself. Justice Jackson's much longer dissent captured support not only from Justices Sotomayor and Kagan, but (as to three of its five sections) Justice Thomas as well. The sections joined by only three Justices rest heavily on arguments invoking a slippery slope or parade of horribles that seem highly unlikely to occur. *See*, *e.g.*, *id.* at *17-18 (bemoaning "the Pandora's box" the majority "may have opened"); *id.* at *35 ("The Court today ventures down an uncharted path—and that way lies madness" because a broad view of the majority's rule "would upend federal litigation as we know it").

But in the three sections joined by Justice Thomas as well, the arguments are somewhat stronger. First, contrary to Justice Kavanaugh's view that a mandatory stay is, under *Griggs*, the "background rule", the dissent argues, with some merit, that "discretionary stays are the default for interlocutory appeals" and have been since 1891. *Id.* at *23. So silence by Congress, even after *Griggs,* should not serve to support an opposite result. Second, *Griggs* only divested a District Court of jurisdiction over the precise judgment or order at issue—which here is arbitrability, not the other proceedings to which a stay would be aimed. *Id.* at *26-29. The majority, the dissent says, is expanding *Griggs* beyond that "narrow slice." *Id.* at *27. This is at the heart of the differing views of the majority and the dissent—the dissent would divorce the question of arbitrability from the merits while the majority's is that the "entire case" must necessarily be involved in an appeal of arbitrability to avert a loss of the benefits of arbitration. Finally, rather than being "sensible", the majority's rule fails to account for foreseeable harms such as loss of evidence and the delay that will naturally occur if the decision denying arbitration is *not* reversed. *Id.* at *31-32.[5] In the end, these arguments are likely helpful to litigants in cases other than those involving interlocutory appeals under Section 16 defend against expansion of the majority's decision beyond the realm of arbitration.

Consequences of the decision

The *Coinbase* decision continues the Supreme Court majority's support and protection of contractual arbitration rights through the FAA. While the more liberal minority of the Court was able to attract a fourth vote from Justice Thomas, it does not seem likely that the Court's overall pro-arbitration trajectory will end soon. *See*, *e.g.*, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (Alito, J., for the majority, holding that the FAA preempts the California Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq*. (West 2022), to the extent the Act would defeat class waivers and require all disputes arising out of a particular "transaction" or "common nucleus of facts" to be arbitrated together). The split of votes in *Coinbase* does,

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[5] The effect of this argument is perhaps not helped by citation to the beloved children's book If You Give a Mouse a Cookie. *See id.* at *32 (citing L. Numeroff, If You Give a Mouse a Cookie (1985)). The temptation for Justice Kavanaugh to cite something in response—perhaps some version of The Little Red Hen story—must have been enormous. *See*, *e.g.*, Mary Mapes Dodge, *The Story of the Little Red Hen*, St. Nicholas Magazine, 680-81 (1874).

however, perhaps indicate that the Court's recent willingness to more precisely define the edges of that trajectory will continue. *See*, *e.g.*, *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022) (Thomas, J., for a unanimous Court, holding that "any class of workers directly involved in transporting goods across state or international boarders," including airplane cargo loaders, fall within the exception in Section 1 of the FAA for transportation workers not subject to the pro-arbitration provisions of the Act; federal courts are "free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal."); *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022) (Kagan, J., for the majority, holding that there is no requirement under federal law that a party demonstrate prejudice to prove that a counterparty waived its right to arbitration); *Badgerow v. Walters*, 142 S. Ct. 1310 (2022) (Kagan, J., for the majority, holding that an independent jurisdictional basis is required for federal courts to hear motions to confirm or vacate arbitration awards). For arbitration providers and the typical business preferring to have the option of mandatory pre-dispute arbitration in its contracts, *Coinbase* is, overall, a continuation of good news.

For more information on the content of this alert, including issues of drafting or enforcement of arbitration clauses, please contact your Nixon Peabody attorney or:

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