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Bringing the Background Into the Foreground: Changes in the Rules on Stays Pending Appeal of Orders Denying Arbitration in Federal, New Jersey, and New York Courts

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Crypto fans may be disappointed that the first cryptocurrency-related case to reach the U.S. Supreme Court involved a “fairly esoteric, procedural argument” related to arbitration.[1] Predictability and uniformity in enforcement of arbitration agreements, however, is important to businesses and entrepreneurs seeking to manage legal risks. The question whether a party appealing a trial court’s refusal to compel arbitration gets an automatic stay of the lawsuit or risks potentially protracted litigation while the appeal is in queue had long split the federal appellate courts. Thus, the Supreme Court’s intervention to resolve the considerable uncertainty on the subject was noteworthy—well beyond the crypto space.

The plaintiff in the case, Coinbase, Inc. v. Bielski,[2] had an account with Coinbase, a cryptocurrency exchange. After he was defrauded by a scammer and the exchange would not replace his stolen assets, he sued. The district judge denied Coinbase’s motion to send the case to arbitration and then refused to stay the case pending appeal. As many had predicted, the Supreme Court held that, in such circumstances, cases must be automatically stayed until the appeal is decided. According to the Bielski majority, this outcome was guided by the “clear background principle,” enshrined in prior Supreme Court precedent, that an appeal “divests the district court of its control over those aspects of the case involved in the appeal.”[3] Thus, in amending the Federal Arbitration Act in 1988 to allow immediate appeal of orders denying arbitration, Congress understood that this would halt litigation of the subject dispute until the appeal concluded. In the majority’s view, Congress had no need to provide for the stay expressly, since it is the default rule; in like situations, Congress only addresses stay when it wants to preclude it. The majority opinion of Justice Kavanaugh noted that the automatic imposition of a stay in these circumstances has been a “common practice” — endorsed by most of the Circuit Courts of Appeals and the leading federal practice treatises — and contended that it “reflects common sense.”[4]

In dissent, Justice Jackson, joined by three other justices, emphasized that Congress had not expressly authorized a stay here while doing so in two other arbitration-related provisions,

though the majority contended those provisions were distinguishable. The dissent also cited a long line of authority that stays pending interlocutory appeal are generally a matter of the trial court's discretion, guided by the traditional factors of irreparable harm, likelihood of success on the merits, balance of equities, and public interest. It pointed to decisions on jurisdiction, venue, and preliminary injunctions, whose appeals, it said, did not automatically stay litigation (while the majority analogized with decisions on double jeopardy and qualified immunity, where it said any appeal triggers an automatic stay). This brought the dissent to the "background principle" of automatic divestment, which it contended was narrower than the majority claimed. In the dissent's telling, the only aspect of the case that should have been automatically stayed on appeal under that principle was the denial of arbitration itself, meaning the trial court could not revisit it during appeal. On the other hand, the merits case was "severable" from that question and could have proceeded to trial, unless the trial court granted a discretionary stay.

Perhaps the most important "background" to Bielski is the somewhat unusual, circumscribed role that federal courts have long assigned themselves under the Federal Arbitration Act. Recognizing the favorable treatment that law accords to arbitration, the Supreme Court has described the trial court's arbitrability determination as deciding as a narrow "gateway" question,[5] as to which it conducts a "restricted inquiry," with the goal of "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."[6] The Court has called forcing a party to spend any more time in court than necessary before resort to the agreed-upon arbitration remedy a "pointless and wasteful burden."[7] Congress certainly seemed to agree in enacting the 1988 amendment, which not only authorized immediate appeals from orders denying arbitration but specifically barred such appeals from orders directing the parties to arbitrate. Given the lengths it has gone to protect the right to arbitrate, it seems strange to think that Congress would intend that, while the "gateway" question of arbitrability is up on appeal, the trial court should feel free to move beyond its "restricted" remit, "sever" the merits of the case, and have them adjudicated at trial.

An insight into the practical impact of Bielski may be gleaned from the contrast between New Jersey and New York's current approaches to appeal stays. Like the federal system, New Jersey disfavors mid-case appeals, allowing them as of right only from a few categories of orders.[8] Since 2012, one such type of order was the denial of arbitration.[9] On the other hand, the principle of trial court divestment during appeal (the contested "background" of Bielski), is codified in the New Jersey Rules of Court.[10] One relevant exception, however, is that when a court denies arbitration, it "retains jurisdiction over remaining claims or parties" but may stay the case as to them in its discretion.[11] This is generally understood to mean that the claims the appellant wishes to arbitrate are automatically stayed as to the appellant, but whether to stay the other aspects of the case is up to the court.[12] Thus, since well before Bielski, a party that chooses or finds itself in a New Jersey court and is denied in its attempt to compel arbitration has had an immediate right of appeal and has likely been protected from having to litigate until its resolution. Bielski aligns with, and as persuasive authority, reinforces, this practice.

By comparison, New York courts are friendly to interlocutory appeals as of right[13] but stingy with automatic stays.[14] When appellate dockets get backlogged, without a stay, the case may be

fully adjudicated while the interlocutory appeal is pending before any arbitration takes place.[15] This illustrates the Bielski majority's point, quoting Judge Easterbrook, that "continuation of proceedings" in court while a party appeals its denial of arbitration can "largely defeat[] the point of the appeal."[16]

While the promise of greater uniformity in federal jurisprudence on this question is welcome, the continuing variance in state practice makes it all the more important for parties contemplating entry into or enforcement of arbitration agreements to pay attention to issues of jurisdiction and forum selection, and, needless to say, seek the advice of competent counsel.

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[1] Cheyenne Ligon, "U.S. Supreme Court to Hear First Crypto Case Tuesday," Yahoo! News, Mar. 20, 2023, available at https://www.yahoo.com/entertainment/u-supreme-court-hear-first-202240753.html (last seen June 30, 2023).

[2] No. 22-105, 599 U.S. ---, 2023 WL 4138983 (June 23, 2023).

[3]Id. at *3 (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)).

[4]Id. at *4.

[5]Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (Breyer, J.).

[6]Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983) (Brennan, J.).

[7]Id.

[8]See Brundage v. Estate of Carambio, 195 N.J. 575, 579 (2008).

[9]R. 2:2-3(b)(8).

[10]R. 2:9-1(a); see Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 376 (1995) (the "ordinary effect" of the taking of an appeal "is to deprive the trial court of jurisdiction to act further in the matter"); Waste Mgt. of NJ, Inc. v. Morris Cnty. Mun. Utilities Auth., 433 N.J. Super. 445, 450 (App. Div. 2013).

[11]R. 2:9-5(c); see also R. 2:9-1(a)(8).

[12]See Bender Enterprises, Inc. v. W. Rac Contracting Corp., No. A-0948-21, 2022 WL 1052215, at *2 n.3-4 (App. Div. Apr. 8, 2022); Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2 on R. 2:2-3 (2023).

[13]See CPLR 5701(a)(iv)-(v).

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[14]See CPLR 5519(a).

[15]See e.g. State Farm Mut. Auto. Ins. Co. v. Pridhodko, 818 N.Y.S.2d 777 (N.Y. App. Div. 2d Dep't 2006).

[16]Bielski, at *4 (quoting Bradford-Scott Data Corp. v. Physician Computer Network, Inc., 128 F.3d 504, 505 (7th Cir. 1997).