Kilpatrick

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SCOTUS grants cert. to determine whether an appeal of an order denying a motion to compel arbitration automatically stays district court litigation, but will cert. review be mooted?

by James F. Bogan III

Takeaway: To control litigation risk, a business might include an arbitration clause and class action waiver in its consumer-facing terms and conditions. When a consumer files a putative class action against that business, and the business can prove that the consumer has in fact assented to the clause, the clause should be enforced by a trial court, effectively terminating the litigation and forcing the consumer to arbitrate his or her claims on an individual basis. But what becomes of the litigation in the event the trial court *denies* the motion to compel arbitration? The U.S. Supreme Court recently decided to resolve that issue, in a petition arising out of two separate cases filed in the Northern District of California where the Ninth Circuit Court of Appeals refused to stay the underlying litigation pending appeals of the denials of the motions to compel arbitration. But, as detailed below, the progress of the merits proceedings in the Ninth Circuit could moot the controversy.

Coinbase, Inc. (Coinbase), operates a cryptocurrency exchange. Coinbase users can buy and sell cryptocurrency assets on that exchange, including bitcoin and dogecoin. But when a user opens a Coinbase account, he or she is required to agree to Coinbase's User Agreement, which not only requires the arbitration of any dispute on an individual basis, but also delegates any questions about arbitrability (i.e., issues regarding the enforceability or scope of the arbitration clause) to an arbitrator.

Coinbase users filed two separate putative class actions against Coinbase. One user alleged that more than $31,000 was stolen from his Coinbase account, further contending that Coinbase was required under the Electronic Funds Transfer Act to recredit his pilfered cryptocurrency. In the other action, a number of users alleged that Coinbase's promotion of a dogecoin sweepstakes violated California law. In both cases, Coinbase moved to compel arbitration, but the district court denied the motions and Coinbase exercised its statutory right directly to appeal the orders under 9 U.S.C. § 16(a). Both the district court *and* the Ninth Circuit denied Coinbase's motions to stay the underlying litigation pending the resolution of its appeals. *See Suski v. Coinbase, Inc.,* No. 22-15209, 2022 WL 3099846 (9th Cir. May 27, 2022) (order denying stay); *Bielski v. Coinbase, Inc*., No. 22-15566, 2022 WL 3095991 (9th Cir. July 11, 2022) (order denying stay).

Coinbase filed a joint petition for certiorari review of both cases on July 29, 2022, presenting the following question:

> Under § 16(a) of the Federal Arbitration Act, when a district court denies a motion to compel arbitration, the party seeking arbitration may file an immediate interlocutory appeal. This Court has held that an appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58 (1982) (per curiam).
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> The question presented is: Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court's jurisdiction to proceed with litigation pending appeal, as the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits have held, or does the district court retain discretion to proceed with litigation while the appeal is pending, as the Second, Fifth, and Ninth Circuits have held?

Coinbase, Inc. v. Bielski, No. 22-105, Joint Pet. for Writ of Cert., 2022 WL 3107684, at *i (U.S. filed July 29, 2022). Coinbase also (a) filed separate applications for stays of both *Bielski* and *Suski* and (b) requested expedited consideration of the petition for certiorari as to *Bielski*, but the Supreme Court denied those requests on August 10, 2022. See 143 S. Ct. 58 (Mem.).

The Supreme Court granted Coinbase's joint petition for certiorari on December 9, 2022. *Coinbase, Inc. v. Bielski*, --- S. Ct. ----, No. 22-105, 2022 WL 17544994 (U.S. Dec. 9, 2022). But in the absence of a stay, the Ninth Circuit issued its decision in the *Susk*i appeal a week later, affirming the district court's denial of Coinbase's motion to compel arbitration, thereby likely mooting the question presented as it pertains to *Suski*. *Suski v. Coinbase, Inc.*, --- F.4th ----, No. 22-15209, 2022 WL 17726673 (9th Cir. Dec. 16, 2022). And the Ninth Circuit has scheduled oral argument in the *Bielski* appeal for February 14, 2023. *See Coinbase, Inc. v. Bielski*, No. 22-105, Letter from Pet'r (U.S. filed Dec. 8, 2022).

It remains to be seen whether Coinbase can persuade the Ninth Circuit to hold *Bielski* in abeyance pending the Supreme Court's resolution of the granted petition for certiorari. If the Ninth Circuit moves forward and decides the merits of the *Bielski* appeal (as it did in *Suski*), there is a real possibility that the Supreme Court will find that the issues presented in Coinbase's petition for certiorari have become moot.