STAYING PUT: HALTING LITIGATION DURING AN APPEAL FROM AN ORDER DENYING ARBITRATION

By: R. Aaron Chastain, *Bradley Arant Boult Cummings LLP*, 1819 5th Ave N, Birmingham, AL 35203-2120, (205) 521-8771, Fax: (205) 488-6771, achastain@babc.com

Seeking to take advantage of the prevailing wisdom that arbitration "is usually cheaper and faster than litigation," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995), litigants who believe that they have an enforceable arbitration agreement often move early in the litigation to compel arbitration under section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2. But when a motion to compel arbitration is denied and litigation goes forward in the district court, the cost- and time-saving benefits of arbitration are irretrievably lost and cannot be salvaged by a reversal on appeal after the parties have participated in time-consuming and expensive motion practice, discovery, and trial. Recognizing this issue, Congress amended the FAA in 1988 to allow for interlocutory appellate review of a district court's order denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(c).

But the availability of an interlocutory appeal is not always enough to maintain the potential benefits of arbitration. Although the FAA allows a party to appeal immediately from an order denying a motion to compel arbitration, it does not provide an automatic stay of the litigation pending the outcome of that appeal. Without a stay, district courts can push the litigation forward, requiring the parties to incur costs that are not only burdensome, but may also prove to be unnecessary if the order denying arbitration is ultimately reversed.

This article discusses a way that parties can secure a stay of district court proceedings pending an interlocutory appeal from an order denying a motion to compel arbitration: jurisdictional divestiture. Relying on the principle that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and 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, 58–59 (1982), parties can argue that an appeal from a district court's order denying a motion to compel arbitration divests the district court of jurisdiction to continue to consider the merits of the underlying case. The federal courts of appeals are divided, however, over whether filing a notice of appeal of an order denying a motion to compel arbitration divests the district court of jurisdiction and thus effectively stays the underlying case.

The Circuit Split

The majority view—adopted by the Third, Fourth, Seventh, Tenth, and Eleventh Circuits—is that the filing of a notice of an FAA interlocutory appeal is an event of jurisdictional significance that divests the district court of jurisdiction (so long as the appeal is not frivolous). *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 262 (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); *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 507 (7th Cir. 1997); *see also Bombadier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002) (unpublished per curiam decision adopting the majority view). The Fourth Circuit's recent decision is illustrative. In *Levin*, a group of investors sued their financial services advisor for negligence and negligent misrepresentation. 634 F.3d at 262. After the district court denied the defendant's motion to dismiss or stay the suit pending arbitration, the defendant filed a notice of appeal and moved the district court to stay all proceedings pending appeal. The district court noted that the appeal was not frivolous, but it nonetheless denied the motion to stay and permitted the plaintiffs to commence discovery. The defendant then moved the Fourth Circuit for a stay of the district court proceedings pursuant to Fed. R. App. P. 8.

The Fourth Circuit granted the stay, holding that the pending appeal of an order denying a motion to compel arbitration divested the district court of jurisdiction over the merits of the underlying dispute, including the power to direct the parties to commence or continue discovery. 634 F.3d at 264. The court reasoned that the appeal necessarily involved the same issues as those pending in the district court because "[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims." *Id.* The court also noted that "allowing discovery to proceed would cut against the

Continued on page 23

a voter initiative adding a ban on gay marriage to the State Constitution and effectively overturning an earlier California Supreme Court decision under which thousands of gay couples had married– was unconstitutional under the Equal Protection and Due Process Clauses of the Federal Constitution, and enjoined state officials from enforcing the ban.

State officials declined to defend the ban at trial or to appeal the judgment. Proponents of Proposition 8, whom the district court had permitted to intervene to defend their Proposition at trial, appealed from the judgment.

On appeal, the challengers to Proposition 8 argued that the intervening proponents of Proposition 8 lacked standing to assert the state's interest in the Proposition's validity when the State declined to do so. The Ninth Circuit disagreed, holding that the proponents did not have to establish they were personally injured by the district court's ruling. Because the State would have had Article III standing, and because the proponents had the right to defend the Proposition when the State declined to do so, that was sufficient for Article III standing. After determining that the proponents had standing to appeal, the Ninth Circuit affirmed the injunction against the gay marriage ban on its merits.

In December 2012, the Supreme Court granted the gay marriage ban's proponents' petition for certiorari. On its own motion, the Supreme Court directed the parties to brief the question of whether the proponents have Article III standing.

RAISING NEW ISSUES ON APPEAL: YOU CAN, SOMETIMES

In *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318 (9th Cir. 2012), the defendant contended the plaintiffs had waived any objection to the district court's decision to apply Georgia law because the plaintiffs had failed to raise the issue in district court. The Ninth Circuit rejected that contention. The Court explained that an appellate court may, in its discretion, consider an issue for the first time on appeal whenever (1) an extraordinary case review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) the law has changed while the appeal is pending, or (3) the issue is purely one of law and either does not depend on the factual record or the pertinent record has been fully developed. Here, the Court found the choice of law issue had been adequately raised below, but even if it had not been raised below, it would exercise its discretion to do so because the issue was one of law and the factual record was fully developed.

SEPARATE NOTICE OF APPEAL FROM FEE AWARD MUST BE TIMELY UNDER RULES OF APPELLATE PROCEDURE 3 AND 4

In *Cruz v. International Collection Corp.*, 673 F.3d 991 (9th Cir. 2012), the district court granted summary judgment to the plaintiff on his claim for violation of the Federal Fair Debt Collection Practices Act. Within 30 days, the defendants filed notice of appeal from the judgment. The court later amended the judgment to award attorney's fees and costs to the plaintiff. Several months later, the defendants filed an "amended" notice of appeal to include appeals from the post-judgment orders awarding damages and fees and substituting the plaintiff.

The Ninth Circuit affirmed the judgment on the merits and dismissed the defendants' appeals from the post-judgment orders as untimely: "FRAP 3 and 4 establish a hard rule based on the number of days that pass: a prospective appellant has 30 days to file a notice of appeal." The defendants' amended notice of appeal was untimely because it was filed 461 days, 280 days, and 34 days, respectively, after the post-judgment orders from which it purported to appeal. According to the court, "[n]othing in the rule allows one party to file a second notice of appeal late merely because that party had previously filed a first notice of appeal."

COURT DEEMS NOTICE OF APPEAL FROM NON-FINAL MINUTE ORDER "OF NO OPERATIVE EFFECT"

In *Meyer v. Portfolio Recovery Associates, LLC*, 696 F.3d 943 (9th Cir. 2012), the district court entered a minute order indicating that the plaintiff's motions for a preliminary injunction and provisional class certification would be *denied* and that the court would prepare a written order. Plaintiff appealed from the minute order. The court then flip-flopped and entered a written order *granting* the injunction and class certification. The defendant appealed the written order.

In the defendant's appeal, the defendant contended that plaintiff's earlier appeal from the earlier minute order deprived the court of jurisdiction to issue its subsequent written order. The Ninth Circuit disagreed, holding that the minute order was not a final appealable order because it did not clearly evidence the court's intention that it would be its final act on the matter, especially since the court stated a written order was to follow. Plaintiff's notice of appeal was therefore "premature and had no operative effect," and the district court had jurisdiction to issue its subsequent written order.

STAYING PUT: HALTING…

Continued from page 3

efficiency and cost-saving purposes of arbitration" and "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter"—a bell that could not be un-rung by a later ruling that the dispute should have been sent to arbitration. *Id.* at 265.

The Fourth Circuit also addressed the concern that applying the doctrine of jurisdictional divestiture to interlocutory appeals under the FAA creates an incentive for parties to bring frivolous appeals to stall the litigation. *Id.* The court noted, however, that if a party files a frivolous appeal, "'the district court may frustrate any litigant's attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited,' which 'will prevent the divestiture of district court jurisdiction.'" *Id.* (quoting *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005)).

In contrast to *Levin*, the Fifth Circuit recently joined the Second and Ninth Circuits in adopting the minority view that filing an FAA interlocutory appeal does not prevent a district court from proceeding with the merits of the case pending the outcome of the appeal. *See Weingarten Realty Investors v. Miller*, 661 F.3d 904, 909 (5th Cir. 2011); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004); *Britton v. Co-Op Banking Grp.*, 916 F.2d 1405, 1411–12 (9th Cir. 1990). In *Weingarten*, the Fifth Circuit narrowly construed the Supreme Court's statement in *Griggs* that the filing of a notice of appeal transfers jurisdiction from the district court to the appellate court concerning "those aspects of the case involved in the appeal," concluding that "[a]n appeal of a denial of a motion to compel arbitration does not involve the merits of the claims pending in the district court." 661 F.3d at 909.

Making the Argument

To use jurisdictional divestiture in the First, Sixth, Eighth, Federal, and D.C. Circuits, where there is no circuit-level, published precedent adopting either the majority or minority rule, litigants who have unsuccessfully moved to compel arbitration should move for a stay in the district court under Federal Rule of Civil Procedure 62(c). In addition to asserting the typical grounds for a stay—the likelihood of success on appeal, the probability of irreparable harm by proceeding with litigation, the lack of harm to other parties, and the public interest of avoiding dual tracks of litigation—the appellant should raise jurisdictional divestiture as a separate ground for a stay. *See, e.g.*, *Baron v. Best Buy Co.*, 79 F. Supp. 2d 1350, 1354 (S.D. Fla. 1999) (granting motion for stay).

If the motion for a stay is denied, the appellant, like the appellants in *Levin*, should move the court of appeals for a stay under Federal Rule of Appellate Procedure 8. In seeking such a stay, appellants should emphasize both the practicality of a jurisdictional divestiture rule and its conformity with congressional intent in amending the FAA to allow interlocutory appeals. Appellants should contend that the underlying merits of the case are "necessarily 'involved in the appeal'" under *Griggs* because "'[w]hether the case should be litigated in the district court . . . is the mirror image of the question presented on appeal.'" *Levin*, 634 F.3d at 263 (quoting *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997)). Furthermore, appellants should argue that allowing the district court to compel discovery destroys much of 9 U.S.C. § 16's rationale in allowing appeals of orders denying motions to compel arbitration in the first place. *Levin*, 634 F.3d at 264.

In the Second, Fifth, and Ninth Circuits, which have rejected the jurisdictional divestiture argument, an appellant still should advance the same reasoning underlying the jurisdictional divestiture rule in support a motion for a discretionary stay pending appeal made either in the district court or in the court of appeals. For instance, even if an appeal does not trigger jurisdictional divestiture, the inefficiencies of parallel litigation nonetheless may conflict with the public interest. *See, e.g.*, *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 644 (S.D.N.Y. 2012) (noting that "considerations of judicial economy counsel, as a general matter, against investment of court resources in proceedings that may prove to have been unnecessary" and partially granting discretionary stay pending appeal of an order denying motion to compel arbitration). Furthermore, courts have recognized that the costs of discovery pose a threat of irreparable harm if an order denying a motion to compel arbitration is reversed on appeal. *See, e.g.*, *Rajagopalan v. Noteworld, LLC*, No. C11-5574, 2012 WL 2115482, at *3 (W.D. Wash. June 11, 2012) (granting a stay pending an appeal of an order denying a motion to compel arbitration due to the possibility of irreparable harm caused by proceeding with the merits of the case, thus "defeat[ing] the important, cost-limiting purpose of arbitration agreements" (internal quotation marks omitted)). Thus, even in circuits that have rejected the jurisdictional divestiture argument, appellants can advance similar arguments in seeking to obtain a stay. ⚖