

## Evaluating Calif. Law On Litigation During Arbitration Appeals

By **Benny Osorio** (November 1, 2023, 5:23 PM EDT)

When the U.S. Supreme Court ruled this June that litigation in federal district court must stop until an appeals court has — in response to an interlocutory appeal — decided the question of arbitrability, it resolved a split among the circuits. It also may have given succor to employers and other defendants hoping to see more cases channeled into arbitration.

In the case of *Coinbase Inc. v Bielski*,<sup>[1]</sup> the majority decided that when a district court denies a motion to compel arbitration under the Federal Arbitration Act,<sup>[2]</sup> the court must stay its proceedings while an interlocutory appeal of that denial is pending. Until the higher court has decided for or against arbitration, plaintiffs are required to cool their heels.

This did not sit well with California lawmakers. In what appears to be the first formal opposition to the Coinbase ruling, California says that plaintiffs should have their day in court while waiting for a decision on arbitration. On Oct. 10, Gov. Gavin Newsom signed into law S.B. 365,<sup>[3]</sup> which will make it possible for cases to proceed to trial even while appeal of an arbitration denial is pending.

It is probably the last thing defendants want. The measure has, unsurprisingly, been labeled a "job killer" by the California Chamber of Commerce, which predicts that it will ultimately be invalidated.<sup>[4]</sup> The law, it says, is preempted by the FAA and will join the ranks of prior unsuccessful state efforts to bypass arbitration.

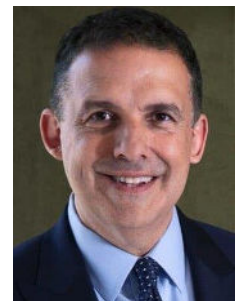
How does the state justify this departure from *Coinbase*, and how likely will the law's survival be?

### Federal Law

Even though the FAA authorizes interlocutory appeals from denials of motions to compel arbitration, it is silent on what district courts should do when an interlocutory appeal is filed.<sup>[5]</sup>

Most federal circuits that have considered the issue — namely, the U.S. Courts of Appeals for the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits — have instructed district courts to stay pretrial and trial proceedings while the appeal was pending.

A smaller number — namely, the U.S. Courts of Appeals for the Second, Fifth and Ninth Circuits — have ruled that district courts could decide whether to grant a stay or proceed with the litigation.



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The 5-4 Coinbase decision essentially took away the district court's discretion. Now a stay of proceedings is mandatory when an interlocutory appeal of the denial of a motion to compel arbitration is filed.

The majority opinion, by Justice Brett Kavanaugh, reasoned that when the issue to be resolved on appeal is whether the case belongs in the court or in arbitration, "the entire case is essentially 'involved in the appeal.'"

Without an automatic stay of the trial court proceedings, the opinion said, the right to appeal denial of a motion to compel arbitration is essentially nullified, and potential benefits of arbitration — "efficiency, less expense, [and] less intrusive discovery" — are lost. Without a stay, parties could also be forced to settle to avoid the costs of discovery and trial that they originally sought to avoid through arbitration.

The concerns are not baseless. According to an amicus brief filed by the U.S. Chamber of Commerce, in the decade between 2012 and 2022, federal appellate courts reversed denials of motions to compel arbitration in approximately 44% of decisions.[6] That's a significant number of cases for which a trial may not have been required.

By the same token, there is a significant cost to delaying trial for matters that call for timely relief. The California law was enacted to address those costs.

### **California's Position**

The state has a notable track record with respect to arbitration.

In 2019, lawmakers enacted A.B. 51, which would have barred employers from requiring workers to sign arbitration agreements as a condition of employment.[7] Before the law could even take effect, the U.S. District Court for the Eastern District of California issued a temporary restraining order and then issued a preliminary injunction enjoining its enforcement.

In 2021, the Ninth Circuit partially lifted the injunction, stating that the FAA did not preempt A.B. 51's regulation of an employer's conduct before executing an arbitration agreement. In 2022, the court withdrew its decision and on Feb. 15, 2023, it ruled that the FAA preempted A.B. 51 and enjoined its enforcement.[8]

The FAA, according to the Ninth Circuit, preempts state laws that affect the enforceability of arbitration agreements and laws that discriminate against the formation of arbitration agreements.

Such setbacks apparently did little to change lawmakers' views on arbitration.

S.B. 365 was introduced in February, on the heels of the Ninth Circuit's decision and well before the Coinbase ruling. Authored by state Sen. Scott Weiner and co-sponsored by California Attorney General Rob Bonta, the bill was targeted at corporations' ability "to abuse arbitration provisions to delay court actions by workers and consumers for years through the appeals process."

Such delays, said the bill's sponsors, seriously undermine cases brought against corporations. Over time, the plaintiffs — who generally lack resources — can lose critical documents and witnesses. Companies, in contrast, can afford to wait months or years for proceedings to conclude. "Meanwhile," according to

the release from Bonta's office,[9] "workers and consumers are forced to wait as the harms they face go unaddressed."

S.B. 365 was designed to address this perceived injustice by providing courts with discretion to decide whether a case could proceed in trial court while an appeal was heard. Thus — unlike the Coinbase holding — an appeal of a trial court's decision denying a corporation's motion to compel arbitration would not automatically stay the plaintiff's proceedings in the trial court while the appeal was pending.

### **What It All Means**

So how to reconcile such diametrically opposed positions? The Supreme Court's Coinbase decision specifically deals with cases brought in federal court, and it would therefore affect all federal proceedings, even those brought in federal courts in California. The decision leaves open the possibility that actions brought in state courts might be treated differently, and it is through this opening that S.B. 365 has been created.

Presently, actions brought in California state courts by employees and consumers against corporations would be subject to the new law. Trial judges would have the discretion to allow these actions to continue to trial even while a denial of arbitration was under appeal. Given the statistics cited in the Chamber's Coinbase brief, this would result in a majority of cases — as much as 66% — being fully resolved in a timely manner without any undue delay.

For cases in which the denial of arbitration was overturned, there is a good possibility that the trial judge would already have identified potential grounds for a reversal and opted to stay the proceeding. Unless or until the new law goes into effect, it will be hard to know how many trials will be held unnecessarily.

More importantly, there is a good chance that A.B. 365 will meet the same fate as A.B. 51. The Ninth Circuit has already ruled that the FAA preempts state laws that affect the enforceability of arbitration agreements.

Although the new law does not expressly discriminate against arbitration, its impact could still be held to have a discriminatory effect. Corporations forced to endure the costs of trial pending a decision on arbitration may feel compelled to settle cases rather than await the conclusion of the appeal process.

In light of the Supreme Court's strong pro-arbitration leanings, we can expect that — if it has the final say on the matter — it will strike California's law down and make Coinbase the only law of the land.

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[1] Coinbase, Inc. v Bielski, 143 S.Ct. 1915 (2023); [https://www.supremecourt.gov/opinions/22pdf/22-105\\_5536.pdf](https://www.supremecourt.gov/opinions/22pdf/22-105_5536.pdf).

[2] U.S. Code Title 9; <https://www.law.cornell.edu/uscode/text/9>.

[3] <https://legiscan.com/CA/text/SB365/id/2840583>.

[4] <https://advocacy.calchamber.com/2023/10/12/governor-signs-job-killer-bill-that-undermines-arbitration/>.

[5] 9 U.S.C. §16(a).

[6] [https://www.supremecourt.gov/DocketPDF/22/22-105/253316/20230127143628335\\_Chamber%20of%20Commerce%20-%20Coinbase%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/22/22-105/253316/20230127143628335_Chamber%20of%20Commerce%20-%20Coinbase%20Amicus%20Brief.pdf).

[7] [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB51](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51).

[8] Chamber of Commerce v. Bonta, No. 20-15291 D.C. No. 2:19-cv-02456- KJM-DB (2023); <https://cdn.ca9.uscourts.gov/datastore/opinions/2023/02/15/20-15291.pdf>.

[9] <https://oag.ca.gov/news/press-releases/attorney-general-bonta-signs-co-sponsor-senator-wiener%E2%80%99s-legislation-end-harmful>.