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SB 365: Plaintiffs might get their day in court

By Benny C. Osorio

When Governor Gavin Newsom signed Senate Bill 365 into law on Oct. 10, he sent a strong message that California would not make plaintiffs wait for their cases to be heard in court while a denial of arbitration was appealed. The message directly contradicts a Supreme Court decision to the contrary.

The highest court ruled in June that litigation in federal district court must stop until an appeals court has decided the question of arbitrability. In *Coinbase, Inc. v. Bielski* (143 S.Ct. 1915 (2023)), the justices resolved a split among the circuits by holding that plaintiffs must wait out the interlocutory appeal process before their cases can be heard.

Even though the Federal Arbitration Act authorizes interlocutory appeals from denials of motions to compel arbitration, it does not say what district courts should do when an interlocutory appeal is filed. Most federal circuits that considered the issue had instructed district courts to stay pretrial and trial proceedings while the appeal was pending.

A smaller number – including the Ninth Circuit – had ruled that district courts could decide whether to grant a stay or proceed with the litigation. The Supreme Court majority essentially took away the district court's discretion, holding that when the court denies a motion to compel arbitration under the FAA, it must stay the proceeding pending interlocutory appeal of the denial.

California lawmakers did not like this ruling. They argued that there was a significant cost to delaying trial for matters that called for timely relief and enacted SB 365 to address those costs. Authored by State Senator 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."

Delays undermine cases brought against corporations, according to the bill's sponsors. Over time, 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, "workers and consumers are forced to wait as the harms they face go unaddressed."

SB 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. Unlike the Coinbase holding, it would not automatically stay plaintiffs' proceedings in trial court while appeals were pending.

The Supreme Court's decision specifically dealt with cases brought in federal court, but it leaves open the possibility that actions brought in state courts might be treated differently. It is through this opening that SB 365 was created.

The measure has been labeled a "job killer" by the California Chamber of Commerce, which says it is preempted by the FAA. The Chamber predicts that SB 365 will join the ranks of prior unsuccessful state efforts to bypass arbitration.

Unless or until the law is successfully challenged, actions brought in California state courts by employees and consumers against corporations are subject to the new law. Trial judges will have discretion to let these actions continue to trial even while a denial of arbitration is under appeal. Given statistics cited in the Chamber's Coinbase brief, this could result in as much as two-thirds of cases 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 will already have identified potential grounds for a reversal and opted to stay the proceeding. Until the new law takes effect, it is hard to know how many trials might be held unnecessarily.

But there is a good chance that SB 365 will meet the same fate as AB 51, which was struck down by a Ninth Circuit ruling that the FAA preempts state laws affecting the enforceability of arbitration agreements. The new law does not expressly discriminate against arbitration, but its impact could still be found to have a discriminatory effect.

In light of the Supreme Court's pro-arbitration leanings, there is a strong likelihood that, if asked to decide the issue, it would strike SB 365 and make Coinbase the only law of the land.

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