APPEALING ORDERS COMPELLING ARBITRATION UNDER THE FAA

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Can an immediate appeal be taken from a federal court's determination on whether parties must arbitrate their dispute? The answer is it depends. The Federal Arbitration Act ("FAA") allows parties to appeal orders *denying* arbitration. But appealing an order that *compels* arbitration depends on whether the district court dismisses the civil action and the law of the appellate circuit with jurisdiction over the appeal.

BACKGROUND

Courts have recognized that in enacting the FAA, Congress intended that disputes proceed quickly to arbitration without being stalled by appeals upfront. As a result, the FAA is designed to facilitate appeals from a court's *denial* of a party's right to arbitration and to limit appeals when arbitration is ordered. Thus, the FAA specifically provides that a district court's denial of a motion or petition to compel arbitration is appealable. 9 U.S.C. § 16(a)(1)(A).

But what about an order *compelling* arbitration? The answer is more complicated. First, the FAA explicitly prohibits appeals from interlocutory orders staying the action. 9 U.S.C. § 16(b)(1). Separately, the FAA allows for an appeal of any "final decision with respect to an arbitration that is subject to" the FAA. 9 U.S.C. § 16(a)(3). The phrase "final decision" is similar to language used in another federal statute for the general rule that the Court of Appeals has jurisdiction over "final decisions" of the

district courts. 28 U.S.C. § 1291.

But what does "final decision" mean, exactly, within the context of an FAA order compelling arbitration and *dismissing* the action? The United States Supreme Court has answered that question and determined that a district court's order compelling arbitration and dismissing the action is appealable as a "final decision with respect to arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000). So, it all turns on whether there is a dismissal, right? In theory, perhaps, but in the circuit courts, it's not quite that simple.

THE COURT OF APPEALS SPLIT

Must the district court avoid dismissing the action and issue a stay after it orders the parties to arbitration? The Supreme Court has not answered that question, and the circuit courts have split on whether a district court is required to enter a stay or may dismiss the action pending arbitration of all claims. The divide among lower courts revolves around the text of the FAA, which elsewhere provides that a district court ordering arbitration "*shall* on application of one of the parties *stay* the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added).

The Second, Third, Seventh, and Tenth Circuits have interpreted the FAA's language as mandating a stay of proceedings when arbitration is compelled on all of the claims. *See, e.g., Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269 (3d Cir. 2004). According to these circuits, the plain language of the FAA affords them "no discretion to dismiss a case" as long as a party applies for a stay. As one court put it: "It is axiomatic that the mandatory term 'shall' typically creates an obligation impervious to judicial discretion." *Katz v. Cellco P'ship*, 794 F.3d 341, 345-46 (2d Cir. 2015). Requiring a stay and thereby avoiding an appealable "final decision," is also consistent with the FAA's purpose of promoting immediate arbitration of disputes.

However, the First, Fourth, Fifth, Sixth, Eighth and Ninth Circuits have adopted a more flexible rule that allows the district court to manage its docket by dismissing an action when all claims in the civil action are compelled to arbitration. *See, e.g., Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). In these circuits, if the district court dismisses the action, the Court of Appeals has jurisdiction under the FAA's provision for appeals from final decisions. The rationale of these circuit courts is that the FAA rule prohibiting appeals of orders staying claims "was not intended to limit dismissal of a case in the proper circumstances." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

VOLUNTARY DISMISSALS

If the district court compels arbitration and invokes a stay, can a plaintiff voluntarily dismiss an action to sidestep FAA section 16(b)'s prohibition of appealing orders staying the action? In a pair of recent decisions, the Ninth Circuit said "no." *Langere v. Verizon Wireless Servs. LLC*, 983 F.3d 1115, 1124 (9th Cir. 2020); *Sperring v. LLR, Inc.*, 995 F.3d 680, 682 (9th Cir. 2021).

In *Langere*, after the court ordered a stay pending arbitration, the plaintiff dismissed the action without court approval under Federal Rule of Civil Procedure 41(a)(1). The plaintiff argued that under 12 U.S.C. § 1291 and FAA section 16(a)(3), the court had jurisdiction because the dismissal was a "final decision." Under prior Ninth Circuit authority, the plaintiff would then have been permitted to appeal the order compelling arbitration. But in *Langere*, the Ninth Circuit concluded that under superseding Supreme Court precedent a party can no longer "create appellate jurisdiction" by voluntarily dismissing claims. Thus, the voluntary dismissal was not a "final decision" under either 28 U.S.C. § 1291 or FAA Section 16(a).

In *Sperring*, after the district court approved plaintiffs' request to dismiss the action, plaintiff attempted to appeal the order compelling arbitration. The plaintiff argued that because the court approved the dismissal under Federal Rule of Civil Procedure 41(a)(2), it should have the right to an appeal from an FAA "final decision." But the panel in *Sperring* rejected the argument, reasoning that the permissive voluntary dismissal was still an *impermissible* attempt to create appellate jurisdiction.

The Fourth Circuit has issued a similar decision refusing to allow an appeal from a voluntary dismissal following a district court's order to arbitrate all claims, reasoning that a plaintiff may not "transform" an interlocutory order into a "final decision." *Keena v. Groupon, Inc.*, 886 F.3d 360, 364 (4th Cir. 2018).

ANALYSIS

What will the Supreme Court do if it grants certiorari to resolve the circuit split? Given its pro-arbitration outlook, it is likely to side with the circuits that require district courts to issue a stay. After all, the FAA is clear that upon application of a party, a court "shall" stay the claims until the arbitration proceedings are complete. Such an interpretation is more consistent with the pro-arbitration policy goals of Congress in enacting the FAA. And since the parties will likely return to court seeking to modify, vacate, or confirm the award, is it so unreasonable to require a district court to stay the action, especially when the FAA language appears to require it?

Moreover, what fairness is gained from a legal landscape where some parties have to proceed to arbitration without being permitted to appeal, and yet some parties may appeal because the district court dismissed the action? Does it make any sense for a party to *commence* arbitration while an appeal from the order requiring arbitration is underway?

What is the takeaway for parties litigating whether a dispute must proceed to arbitration? Determine the current circuit law applicable to appellate jurisdiction if arbitration is compelled: Does the circuit follow the rule requiring the district court to enter a stay, or has it adopted the rule that allows the court discretion to dismiss the action? When seeking arbitration, it would be wise to seek a stay as well, citing to the FAA language that courts "shall" stay cases pending arbitration. For parties seeking to avoid arbitration, if opposing arbitration is unsuccessful then (in those circuits countenancing such requests), seek dismissal of the action in order to appeal a "final decision" under the FAA.

All of which begs the question that whatever Congress thought the FAA would mean, could it have intended the statute to operate so differently in different federal circuits? And for businesses capable of bringing an action in more than one jurisdiction, wouldn't it be helpful to know what side of the split the particular circuits come down on?

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