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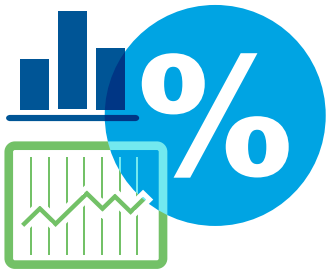

Financial Services Employment Law Alert

Should I Stay Or Should I Go?

Second Circuit Holds That FAA Requires a Stay, Not Dismissal, Upon Successful Motion to Compel Arbitration

By John T. DiNapoli

Many courts dismiss an action once they order the parties to arbitrate the dispute. And many of these courts do so even if one of the parties requests that the court stay the proceedings pending arbitration.

The Second Circuit recently held that this practice is improper. In *Katz v. Cellco Partnership* (available here), the court held that the Federal Arbitration Act ("FAA") requires a court to stay an action pending arbitration—not dismiss it— when "all of the claims in [that] action have been referred to arbitration and a stay [has been] requested."

Facts of the Case

In *Katz*, the plaintiff sued on behalf of a putative class, asserting breach of contract and consumer fraud claims. The defendant moved to compel arbitration based on the company's customer agreement and requested a stay of the proceedings. The plaintiff argued that the arbitration clause was unenforceable and opposed the defendant's request for a stay in the event that the court compelled arbitration.

The district court granted the defendant's motion to compel arbitration, but rejected its request to stay the action pending arbitration, and then dismissed the litigation. The Second Circuit held that the district court's decision to dismiss rather than stay ran counter to the FAA. In reaching this holding, it noted that the Supreme Court has not yet decided this issue, its sister circuits have reached different conclusions, and its own cases were less than clear on the proper approach.

The Second Circuit noted that the plain language, structure, and underlying policy of the FAA all require that a stay be issued, if requested, upon compelling the entire dispute to arbitration. First, the court held that the FAA's use of the word "shall" makes the issuance of a stay (if requested) mandatory, not discretionary. Second, the court said this reading is consistent with the FAA's structure because it allows orders hostile to arbitration to be immediately appealable (such as an order denying a motion to compel), while not providing the same immediate appeal option for pro-arbitration orders. And third, the court said this reading comports with the FAA's pro-arbitration policy because it allows the parties to arbitrate the dispute without the uncertainty and expense that would be caused by an immediate appeal of the dismissal.

While the *Katz* decision resolves the issue for now within the Second Circuit, the uncertain state of the law means that the subject may soon be ripe for Supreme Court review.

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