

## **Second Circuit Closes An Open Question: Grant Of Motion To Compel Arbitration Requires Stay Not Dismissal**

Article By:

Larry P. Schiffer

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Sometimes when a reinsurance dispute arises one of the parties may decide to file a complaint in court rather than demand arbitration. This may happen in spite of an arbitration clause in the reinsurance contract. Perhaps one of the parties was not a signatory to the arbitration agreement. Or perhaps one or more of the issues in dispute involves a subject that the party does not believe comes within the scope of the arbitration clause. Or perhaps one of the parties just does not like the idea of arbitration.

What's a counterparty to do? Move to compel arbitration is the typical response. This is true in reinsurance arbitration and in all other types of commercial arbitration when litigation is brought in the face of an applicable arbitration agreement or clause.

Motions to compel arbitration often are accompanied by either a request to dismiss the complaint or a request to stay the litigation in favor of arbitration. The United States Supreme Court has yet to rule on whether when faced with a request to compel arbitration and stay litigation the district court can nevertheless dismiss the complaint. The federal Circuit Courts are split on this issue.

The [Second Circuit Court of Appeals](#) has now closed what had been an open question in the Second Circuit. In a non-reinsurance case, the court ruled that the Federal Arbitration Act requires a stay of proceedings when all claims are referred to arbitration and a stay is requested. [Katz v. Cello Partnership](#), No. 14-138 (2d Cir. July 28, 2015). While not an insurance or reinsurance case, this ruling will affect all future proceedings to compel arbitration accompanied by a request for a litigation stay.

The ruling is far from controversial and remarkable that it has not happened sooner. The case arose when a putative class action was brought by local wireless subscribers against a network. The plaintiff moved for summary judgment and the network moved to compel arbitration and to stay proceedings based on the arbitration clause contained in the customer service agreement. The district court granted the motion to compel arbitration and dismissed the complaint.

On appeal, the circuit court recognized that the district court's ability to dismiss was an open question in the Second Circuit. The court, which only addressed the dismissal issue, outlined the split of authority among the circuit courts. The court recognized the advantages of dismissing the

complaint, but nevertheless came down on the side of the stay rather than dismissal.

The court's rationale centered on the plain and unambiguous language of [Section 3 of the FAA](#):

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). The court held that this was a mandatory provision consistent with the FAA's statutory scheme and pro-arbitration policy. It allows the parties to proceed directly to arbitration and avoids unnecessary interlocutory appeals.

You might think, as many other courts have, that it is more efficient to dismiss the action considering that the stay will most likely result in dismissal once the arbitration is concluded. The court recognized that efficient docket management is often the basis for dismissal of the complaint. But the court held that efficiency is not reason enough to trump a statutory mandate. Besides, following an arbitration award parties frequently engage in post-award court proceedings and those would occur in the stayed action without the need to restart a new case.

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