RECENT DEVELOPMENTS

Arthur Andersen LLP v. Carlisle

I. INTRODUCTION

Section 3 of the Federal Arbitration Act (FAA) provides for a mandatory stay of federal court litigation on an issue referable to arbitration under a written arbitration agreement.[1] By so providing, § 3 serves as a remedy for a defendant seeking to compel a plaintiff to arbitrate, and thereby facilitates the enforcement of arbitration agreements that fall within the scope of the FAA.[2] The FAA further promotes a pro-arbitration policy in § 16, by providing an automatic right of appeal whenever a decision disfavors arbitration.[3] Section 16 of the FAA thus allows immediate appeals from judgments denying a stay of litigation under § 3.[4] Taken together, these provisions enhance the enforceability of arbitration agreements and uphold the strong national policy in favor of arbitration that the FAA was intended to produce.[5]

In *Arthur Andersen LLP v. Carlisle*, Arthur Andersen asked the United States Supreme Court to determine the applicability of the FAA to those who had not signed the relevant arbitration agreement.[6] Specifically, the Court was asked to decide whether appellate courts had jurisdiction under § 16(a) to review denials of litigation stays requested by nonsignatory litigants, and whether a stay could be mandatory under § 3 within such circumstances.[7] Arthur Andersen argued that the principles of equitable estoppel required Carlisle to arbitrate pending claims according to its arbitration agreement with third party Bricolage, despite the fact that Arthur Andersen was not party to and had not signed the agreement.[8] The circuit courts were split as to whether nonsignatories to a written arbitration agreement could move for a stay under § 3, and whether appellate courts had jurisdiction over appeals

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[1] 9 U.S.C. § 3 (2006).

[2] *See* Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1901–02 (2009).

[3] *See* 9 U.S.C. § 16(a) (2006). Conversely, the right to an immediate appeal is denied whenever the court's decision is in favor of arbitration. *See* 9 U.S.C. § 16(b) (2006).

[4] 9 U.S.C. § 16(a)(1)(A).

[5] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

[6] *Arthur Andersen*, 129 S. Ct. at 1899.

[7] *Id.*

[8] *Id.* at 1900.

arising from the denial of such motions.[9] The Court granted certiorari to resolve the disagreement.[10]

The Supreme Court held that § 16(a) entitled any litigant asking for a § 3 stay to appeal the denial of that motion, regardless of whether the litigant was actually eligible for a stay.[11] Hence, the underlying merits of the requested stay were irrelevant.[12] The Court further held that a nonsignatory to an arbitration agreement was permitted to invoke § 3 if the relevant state contract law granted him the ability to enforce the agreement.[13] Instead of determining what the relevant state law would permit under the circumstances before it, the Court remanded the case to determine the applicability of equitable estoppel as grounds for enforcing contracts against third parties under state contract law, what standard would apply, and whether Arthur Andersen would be entitled to relief under that law.[14]

II. FACTS AND PROCEDURAL HISTORY

Respondents Wayne Carlisle, James Bushman, and Gary Strassel sought to minimize the tax liability associated with the sale of their construction equipment company.[15] The respondents sought and solicited advice from Arthur Andersen LLP (Arthur Andersen), which had long served as the

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[9] *Id.* A five circuit majority held that § 3 permits nonsignatories to move for a stay if the nonsignatories can enforce the written agreement under principles of contract law. *See generally* Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP., 521 F.3d 597 (6th Cir. 2008); Comer v. Micor, Inc., 436 F.3d 1098 (9th Cir. 2006); Blinco v. Green Tree Servicing, LLC., 366 F.3d 1249 (11th Cir. 2004); AgGrow Oils, LLC. v. Nat'l Union Fire Ins. Co., 242 F.3d 777 (8th Cir. 2001); Long v. Silver, 248 F.3d 309 (4th Cir. 2001); McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994). Out of the six circuits that had decided whether § 16(a)(1)(A) provides appellate jurisdiction over appeals from denials of § 3 motions involving nonsignatories, three held that § 16(a)(1)(A) does not confer appellate jurisdiction under those circumstances. *See generally In re* Universal Serv. Fund Tel. Billing Practice Litig., 428 F.3d 940 (10th Cir. 2005); DSMC, Inc. v. Convera Corp., 349 F.3d 679 (D.C. Cir. 2003). Although the Second and Fifth Circuits maintained some degree of intra-circuit conflict, they nonetheless, along with the Third Circuit, held that appellate jurisdiction exists. *See generally* Ross v. Am. Express Co., 478 F.3d 96 (2d Cir. 2007); Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207 (3d Cir. 2007); Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A., 372 F.3d 339 (5th Cir. 2004).

[10] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1900 (2009).

[11] *See id.* at 1900–02.

[12] *Id.*

[13] *Id.* at 1903.

[14] *Id.*

[15] *Id.* at 1899.

company's accountant, auditor, and tax advisor.[16] Arthur Andersen subsequently introduced respondents to Bricolage Capital, L.L.C. (Bricolage), who thereafter referred respondents to Curtis, Mallet-Prevost, Colt & Mosle LLP (Curtis Mallet) for legal advice.[17]

The Bricolage advisors recommended the respondents use a "leveraged option strategy" tax shelter to create the illusion that respondents were incurring financial losses.[18] In order to implement the tax shelter, respondents created separate business entities in the form of limited liability companies (LLCs) that would then be used to invest in various stock warrants.[19] In conjunction with the stock warrant investments, the respondent LLCs entered into investment-management agreements with Bricolage.[20] The investment-management agreements contained arbitration clauses specifying that "[a]ny controversy arising out of or relating to this Agreement or the br[ea]ch thereof, shall be settled by arbitration conducted in New York, New York, in accordance with the Commercial Arbitration Rules of the American Arbitration Association."[21] Neither Arthur Andersen nor Curtis Mallet was party to any of the investment agreements, and no other arbitration agreement existed between any of the parties.[22]

The advice respondents received proved to be less beneficial than expected. Not only were the stock warrants that respondents purchased almost entirely worthless, but the Internal Revenue Service (IRS) also determined that tax shelters structured as a "leveraged option strategy" were illegal.[23] While conditional amnesty was initially offered to taxpayers who had been executing such arrangements, respondents were not apprised of the option, and were thus unable to capitalize on the available immunity.[24] A settlement was reached between respondents and the IRS, whereby respondents agreed to pay the IRS all taxes, penalties, and interest that were owed.[25]

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[16] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1899 (2009).

[17] *Id.*

[18] *Id.* (citation omitted) (stating these tax shelters attempt to decrease tax liability through the use of foreign-currency-exchange investment options).

[19] *Id.* The newly created LLCs were also respondents in the case. *Id.*

[20] *Id.*

[21] *Id.* (alteration in original).

[22] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1899–1900 (2009).

[23] *Id.* at 1899.

[24] *Id.*

[25] *Id.*

Respondents, along with their various business entities, filed a diversity suit in the Eastern District of Kentucky against Bricolage, Arthur Andersen, and others.[26] The suit alleged fraud, civil conspiracy, malpractice, breach of fiduciary duty, and negligence.[27] Premised on its investment agreements with respondents, Bricolage filed a motion to stay the proceedings in order to permit arbitration of the disputes that arose between Bricolage and respondents under the signed arbitration agreements.[28] While that motion was pending, however, Bricolage filed for bankruptcy and the district court entered an automatic stay.[29] Recognizing that Bricolage's motion had become moot, the district court dismissed the pending motion to stay the proceedings.[30]

Petitioners nonetheless endeavored to take the place of Bricolage in the pending action, and filed a motion to stay court proceedings on their own behalf.[31] The motion was based on the theory of equitable estoppel; namely, that respondents should not have been permitted to avoid arbitrating issues that had been agreed upon under their contracts with Bricolage.[32] As such, petitioners argued that the arbitration clauses in the investment agreements should be binding on respondents with respect to, and against, the remaining petitioners.[33] The district court rejected petitioner's equitable estoppel argument and denied the motion to stay the proceedings.[34]

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[26] *Id.* There were nine named defendants in total. *See* Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP., 521 F.3d 597, 599 (6th Cir. 2008). The named defendants, in addition to Bricolage and Arthur Andersen, consisted of the following: two employees of Bricolage (Andrew Beer and Samyak Veera); Curtis, Mallett-Prevost, Colt & Mosle, LLP; William Bricker (the lawyer that respondents worked with at the law firm); Prism Connectivity Ventures, L.L.C. (the entity from whom the worthless warrants were purchased); Integrated Capital Associates, Inc. (a prior owner of the worthless warrants who had also been a client of the law firm); and Intercontinental Pacific Group, Inc. (a firm with the same principals as Integrated Capital Associates). *Arthur Andersen*, 129 S. Ct. at 1899 n.1. All of the defendants, except Bricolage and its employees, were petitioners before the United States Supreme Court, and are hereinafter referred to as such. *Id.* at 1899–1900.

[27] *See Arthur Andersen*, 129 S. Ct. at 1899–1900.

[28] *See Carlisle*, 521 F.3d at 599.

[29] Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP., 521 F.3d 597, 599 (6th Cir. 2008).

[30] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1900 n.2 (2009).

[31] *Carlisle*, 521 F.3d at 599.

[32] *Id.*

[33] *See id.*

[34] *See Arthur Andersen*, 129 S. Ct. at 1900.

Petitioners subsequently filed an interlocutory appeal in the Court of Appeals for the Sixth Circuit, pursuant to § 16 of the FAA, seeking appellate review of the district court's denial of the motion to stay.[35] Because none of the petitioners involved at that stage in the litigation had been a signatory to the relevant written arbitration agreement, the Sixth Circuit held that it was without appellate jurisdiction, and accordingly dismissed the appeal.[36] The United States Supreme Court granted certiorari.[37]

III. THE COURT'S HOLDING AND REASONING

The Supreme Court held that the jurisdiction of an appellate court over an appeal from a district court's denial of a motion to stay was to be determined without reference to the underlying merits of that appeal.[38] According to the Court, § 16(a)(1)(A) unequivocally makes the underlying merits of the appeal irrelevant.[39] In order to ensure that petitioners were not awarded a "remarkably hollow victory," the Court also addressed the merits of petitioner's appeal and the grounds on which the appellate court found the appeal to be meritless.[40] On that issue, the Court held that nonsignatories to an arbitration agreement were not categorically barred from relief under § 3 of the FAA; rather, state contract law governs whether a nonsignatory may enforce the arbitration agreement.[41] As such, § 3 relief was available to a nonsignatory if the relevant state contract law would permit him or her to enforce the agreement.[42] Five justices joined Justice Scalia's majority opinion, and Justice Souter wrote a dissenting opinion in which Chief Justice Roberts and Justice Stevens joined.[43]

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[35] Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP., 521 F.3d 597, 599 (6th Cir. 2008).

[36] *Id.* at 598.

[37] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1900 (2009).

[38] *Id.* at 1900–01.

[39] *Id.* at 1901.

[40] *Id.*

[41] *Id.* at 1902.

[42] *Id.*

[43] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1903 (2009).

A. *Appellate Jurisdiction Under § 16(a)*

The general rule of appellate jurisdiction states that courts of appeals have jurisdiction over the "final decisions" of district courts.[44] However, the mandate of finality has certain applicable exceptions. One exception is set forth in § 16(a) of the FAA, which provides that "an appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title."[45] The terms of that provision, according to the Court, clearly and unambiguously entitle any litigant who moves for a stay under § 3 to an immediate appeal from the district court's denial of the motion.[46] Most importantly, an immediate appeal is available regardless whether the underlying merits of the motion actually entitle the litigants to a stay.[47]

The Court recognized that a number of appellate courts had declined jurisdiction over § 3 appeals in circumstances similar to those presented in *Arthur Andersen*, but concluded that those courts had done so by "conflating the jurisdictional question with the merits of the appeal."[48] The courts that declined jurisdiction reasoned that because stay motions premised on equitable estoppel sought to expand arbitration agreements, the motions were not cognizable, and thus not "under" §§ 3 and 4 of the FAA.[49] According to the Court, however, this was an inappropriate basis for the jurisdictional determination.[50] The Court found that jurisdiction over an appeal must instead be determined by focusing on the category of order being appealed.[51] With regard to a motion to stay the proceedings, the unambiguous terms of § 16(a) make the merits of the stay irrelevant, as "even utter frivolousness of

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[44] 28 U.S.C. § 1291 (2006); *see also Arthur Andersen*, 129 S. Ct. at 1900. A final decision has been defined as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP., 521 F.3d 597, 600 (6th Cir. 2008).

[45] 9 U.S.C. § 16(a)(1)(A); *see also Arthur Andersen*, 129 S. Ct. at 1900. The finality requirement of § 1291 is inapplicable in this situation because the district court's denial of a motion to stay proceedings pending arbitration does not fit within the definition of a final decision. *Carlisle*, 521 F.3d at 600.

[46] *See Arthur Andersen*, 129 S. Ct. at 1901.

[47] *Id.* at 1900–01.

[48] *Id.* at 1900.

[49] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1900 (2009). For examples of cases that employed this reasoning, see *Carlisle*, 521 F.3d at 602; Universal Serv. Fund Tel. Billing Practice Litig. v. Sprint Commc'ns Co., 428 F.3d 940, 944–45 (10th Cir. 2005); DSMC Inc. v. Convera Corp., 349 F.3d 679, 682–85 (D.C. Cir. 2003).

[50] *See Arthur Andersen*, 129 S. Ct. at 1900.

[51] *Id.*

the underlying request for a § 3 stay cannot turn a denial into something other than 'an order . . . refusing a stay of any action under section 3.'"[52] Therefore, the fact that each petitioner had explicitly moved for a stay pursuant to § 3 signified that the Sixth Circuit had jurisdiction to review the district court's denial of the motion.[53]

Respondents argued that the Court's interpretation of § 16(a) would not only result in future difficulties for lower courts forced to engage in "fact-intensive jurisdictional inquiries," but would also provide greater opportunities for parties to file frivolous interlocutory appeals.[54] As an alternative to the fact-sensitive threshold determination proffered by the Court, respondents would have preferred that the initial jurisdictional inquiry be "whether the litigant was a party to the contract."[55] A majority of the Court was not persuaded. For Justice Scalia, making the determination as to whether § 3 was invoked in the denial of a stay request was more simple and less fact-sensitive than determining the identity of the relevant parties to a given contract, especially in circumstances where the written agreement had not been signed.[56] The type of merit-based inquiry associated with determining the parties to a contract was more appropriately decided after the court secured jurisdiction over the case.[57]

The Court was similarly unwilling to accept respondent's argument that the Court's interpretation of the FAA would result in a greater number of frivolous interlocutory appeals.[58] Alternate means of deterring abusive appeals did exist, and continued to adequately serve this purpose.[59] Hence, it was unnecessary for the Court's interpretation of § 16(a) to address or protect against the possible frivolity of future interlocutory appeals.[60]

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[52] *Id.* at 1901 (citing 9 U.S.C. § 16(a)).

[53] *Id.* at 1900.

[54] *Id.* at 1901.

[55] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1901 (2009).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* Appellate courts, for example, are able to consolidate the disposal of meritless claims or authorize the district court's retention of jurisdiction when an appeal is certified as frivolous. *Id.* (citation omitted) Alternatively, those inclined to file such frivolous appeals should be at least somewhat deterred by courts' authority to "award just damages and single or double costs to the appellee" for an appeal found to be "frivolous." *Id.* (citation omitted).

[60] *Id.*

B. *Motions to Stay by Nonsignatories to an Arbitration Agreement*

Section 2 of the FAA makes written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract."[61] That section creates substantive federal law regarding the enforceability of arbitration agreements by requiring courts "to place such agreements upon the same footing as other contracts."[62] Litigants in federal court are then granted the opportunity to invoke such agreements by § 3, which requires the court, "'on application of one of the parties,' to stay the action if it involves an 'issue referable to arbitration under an agreement in writing.'"[63] These provisions work in tandem to ensure that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration."[64]

Although §§ 2 and 3 set forth both substantive and procedural standards pertaining to federal arbitration, the Court found that neither provision purported to alter the background principles of state contract law governing the scope of, or who was bound by, arbitration agreements.[65] To be sure, § 2 is interpreted as having expressly retained an external body of law governing revocation—referring to "such grounds as exist at law or in equity."[66] Similarly, § 3 is construed as being void of any substantive restrictions to the enforceability mandate of § 2, and thus does not affect the enforceability of arbitration agreements pursuant to state contract law.[67] By interpreting §§ 2 and 3 in this way, the Court bolstered the strong national policy in favor of arbitration. Conversely, an interpretation that mandated the disregard of state law favorable to arbitration would have run contrary to the goals of the FAA.[68]

Based upon its interpretation of the interplay between §§ 2 and 3, the Court held that state contract law was applicable to arbitration agreements

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[61] 9 U.S.C. § 2 (2006).

[62] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1900 (2009) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

[63] 9 U.S.C. § 3 (2006).

[64] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

[65] *See Arthur Andersen*, 129 S. Ct. at 1902.

[66] *Id.* at 1901; 9 U.S.C. § 2.

[67] *See Arthur Andersen*, 129 S. Ct. at 1902.

[68] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1902 n.5 (2009).

arising under the FAA.[69] Specifically, state law is pertinent to the determination as to "which contracts are binding under § 2 and enforceable under § 3, *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[70] This application of state law permitting a contract to be enforced by or against third parties to the contract through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," signifies that nonsignatories to an arbitration agreement are not categorically barred from § 3 relief.[71]

Carlisle offered two main arguments why nonsignatories should not be permitted to move to stay proceedings under the FAA. First, Carlisle asserted that as a matter of federal law, nonsignatory claims to arbitration were not "referable to arbitration *under* an agreement in writing," as required by § 3, because such claims "seek to bind a signatory to an arbitral obligation *beyond* that signatory's strictly contractual obligation to arbitrate."[72] Although this interpretation may have been correct if § 3 mandated a stay solely for disputes between parties to a written arbitration agreement, the Court found that the statute made no such mandate.[73] Instead, § 3 requires a stay based merely on the fact that the claims are "referable to arbitration under an agreement in writing."[74] Therefore, the statute's terms are sufficiently fulfilled if a written arbitration provision is enforceable either against, or for the benefit of, a third party under state contract law, even when that third party is not a "party" to the written agreement.[75]

Carlisle's second argument relied on prior Supreme Court decisions in an attempt to illustrate the Court's unwillingness to force non-consenting parties to arbitrate their disputes.[76] The Court, however, recognized that the cases respondents relied upon dealt with issues that were not present in *Arthur Andersen*. In fact, none of the issues that were before the Court had

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[69] *Id.* at 1902.

[70] *Id.* (citing Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).

[71] *Id.* (citing 21 RICHARD LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)).

[72] *Id.*

[73] *Id.*

[74] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1902 (2009) (citing 9 U.S.C. § 3).

[75] *Id.*

[76] *Id.*

previously been decided.[77] Therefore, the Court rejected respondent's argument, as it was misplaced.

Justice Scalia was willing to concede that courts had thus far applied equitable estoppel principles to the imposition of an arbitration agreement upon nonsignatories in a non-uniform manner.[78] Yet, because such issues had not been briefed before the Court, the Court did not decide "whether the relevant state contract law recognizes equitable estoppel as a ground for enforcing contracts against third parties, what standard it would apply, and whether petitioners would be entitled to relief under it."[79] The lower court was instead appropriately suited to address those issues on remand.[80] Even though such specifics had yet to be determined, the Court found it sufficient to conclude that no federal law barred the State from permitting petitioners to enforce the arbitration agreement against respondents, and further, that § 3 required a stay in this case if the arbitration agreement were in fact enforceable.[81]

C. *The Dissent*

Contrary to the majority's interpretation of the FAA, the dissent did not read the relevant statutory provisions as allowing an appeal by a party who had not signed the relevant arbitration agreement.[82] The dissent was thus unable to accept the proposition that any litigant who asked for and was subsequently denied a § 3 stay was entitled to an immediate appeal from that denial.[83] The majority was willing to permit such an immediate appeal by assuming that "under section 3," as used in § 16(a), was merely a labeling

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[77] *Id.* at 1902–03. Respondents relied on the Court's statement that "arbitration . . . is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration," First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995), as well as the statement that "[i]t goes without saying that a contract cannot bind a nonparty." EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (alteration in original). *Arthur Andersen*, 129 S. Ct. at 1902–03. The former statement dealt with "issues parties agreed to arbitrate," while the latter pertained to "an entity (the Equal Employment Opportunity Commission), which obviously had no third-party obligations under the contract in question." *Id.* at 1903 (emphasis omitted).

[78] *Arthur Andersen*, 129 S. Ct. at 1903.

[79] *Id.*

[80] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1903 (2009).

[81] *Id.*

[82] *Id.* (Souter, J., dissenting).

[83] *Id.*

requirement that lacks any substantive import.[84] Yet, according to the dissent, proceeding under such an assumption fails to take into account the "firm congressional policy against interlocutory or 'piecemeal' appeals."[85]

The dissent argued that Congress' insistence on finality, coupled with its general prohibition against piecemeal review, serves to discourage "undue litigiousness and leaden-footed administration of justice."[86] Although § 16(a) is an exception to the ordinary requirement of finality, departures from the dominant rule in federal appellate practice are extraordinary interruptions to the normal process of litigation and ought to be limited carefully.[87] The dissent opined that one way to impose such a limit would be to interpret the § 16 requirement that there be a denial of a stay under § 3 "as calling for a look-through to the provisions of § 3, and to read § 3 itself as offering a stay only to signatories of an arbitration agreement."[88] A bright-line rule to appropriately assist courts in making the jurisdictional determination over § 16 interlocutory appeals would involve the question of whether a § 3 movant is a signatory to the arbitration agreement.[89] The adoption of such a rule would further mitigate the risk of intentional delay by those parties seeking to exploit the judicial system as a means of frustrating litigation.[90]

For the foregoing reasons, and because petitioners were not parties to the written arbitration agreement, the dissent would have held that petitioners could not move to stay the district court proceedings under § 3, which would have left the court of appeals without jurisdiction under § 16 to entertain the appeal.[91]

IV. CONCLUSION: THE EFFECT OF THE *ARTHUR ANDERSEN* DECISION

The Supreme Court's decision in *Arthur Andersen LLP v. Carlisle* clarifies the extent to which nonsignatories to an arbitration agreement may invoke the pro-arbitration provisions of the FAA. The Court's holding furthered the strong national policy in favor of arbitration by promoting the enforceability of arbitration agreements. The holding also reaffirmed that

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[84] *Id.*

[85] *Id.* (citing Abney v. United States, 431 U.S. 651, 656 (1977)).

[86] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1903 (2009) (Souter, J., dissenting) *(citing* DiBella v. United States, 369 U.S. 121, 124 (1962)).

[87] *Id.* at 1904.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

state law generally applicable to contracts would likewise govern questions concerning the validity, scope, and enforceability of an agreement to arbitrate.[92] The latter aspect of the Court's decision has opened the door for nonsignatories to use such theories as assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary, waiver, or estoppel as a means through which to enforce arbitration agreements.[93] Going forward, a party to a federal lawsuit that has not signed an arbitration agreement is not necessarily protected from a court order staying litigation and requiring the parties to arbitrate.[94] Therefore, the fact that a party is not an actual signatory to a written arbitration agreement does not impede that party's ability to move a court for, and possibly participate in, an arbitration of any issues that arose under the written agreement.

Samantha R. Cooper

[92] Arthur Andersen LLP v. Carlisle, 556 U.S. ___, 129 S. Ct. 1896, 1902–03 (2009).

[93] *Id.* at 1902.

[94] *Id.*