SUPREME COURT OF THE UNITED STATES

No. 08–146

ARTHUR ANDERSEN LLP, ET AL., PETITIONERS
v. WAYNE CARLISLE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 4, 2009]

JUSTICE SOUTER, with whom THE CHIEF JUSTICE and JUSTICE STEVENS join, dissenting.

Section 16 of the Federal Arbitration Act (FAA) authorizes an interlocutory appeal from the denial of a motion under §3 to stay a district court action pending arbitration. The question is whether it opens the door to such an appeal at the behest of one who has not signed a written arbitration agreement. Based on the longstanding congressional policy limiting interlocutory appeals, I think the better reading of the statutory provisions disallows such an appeal, and I therefore respectfully dissent.

Section 16(a) of the FAA provides that "[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title." 9 U. S. C. §16(a). The Court says that any litigant who asks for and is denied a §3 stay is entitled to an immediate appeal. *Ante*, at 3. The majority's assumption is that "under section 3" is merely a labeling requirement, without substantive import, but this fails to read §16 in light of the "firm congressional policy against interlocutory or 'piecemeal' appeals." *Abney* v. *United States*, 431 U. S. 651, 656 (1977).

The right of appeal is "a creature of statute," *ibid*., and Congress has granted the Federal Courts of Appeals jurisdiction to review "final decisions," 28 U. S. C. §1291. "This insistence on finality and prohibition of piecemeal review

discourage undue litigiousness and leaden-footed administration of justice." *DiBella* v. *United States*, 369 U. S. 121, 124 (1962). Congress has, however, "recognized the need of exceptions for interlocutory orders in certain types of proceedings where the damage of error unreviewed before the judgment is definitive and complete . . . has been deemed greater than the disruption caused by intermediate appeal." *Ibid.* Section 16 functions as one such exception, but departures from "the dominant rule in federal appellate practice," 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶110.06 (2d ed. 1996), are extraordinary interruptions to the normal process of litigation and ought to be limited carefully.

An obvious way to limit the scope of such an extraordinary interruption would be to read the §16 requirement that the stay have been denied "under section 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. It is perfectly true that in general a third-party beneficiary can enforce a contract, but this is a weak premise for inferring an intent to allow third parties to obtain a §3 stay and take a §16 appeal. While it is hornbook contract law that third parties may enforce contracts for their benefit as a matter of course, interlocutory appeals are a matter of limited grace. Because it would therefore seem strange to assume that Congress meant to grant the right to appeal a §3 stay denial to anyone as peripheral to the core agreement as a nonsignatory, it follows that Congress probably intended to limit those able to seek a §3 stay.

Asking whether a §3 movant is a signatory provides a bright-line rule with predictable results to aid courts in determining jurisdiction over §16 interlocutory appeals. And that rule has the further virtue of mitigating the risk of intentional delay by savvy parties who seek to frustrate litigation by gaming the system. Why not move for a §3

stay? If granted, arbitration will be mandated, and if denied, a lengthy appeal may wear down the opponent. The majority contends, *ante*, at 5, that "there are ways of minimizing the impact of abusive appeals." Yes, but the sanctions suggested apply to the frivolous, not to the far-fetched; and as the majority's opinion concludes, such an attenuated claim of equitable estoppel as petitioners raise here falls well short of the sanctionable.

Because petitioners were not parties to the written arbitration agreement, I would hold they could not move to stay the District Court proceedings under §3, with the consequence that the Court of Appeals would have no jurisdiction under §16 to entertain their appeal. I would accordingly affirm the judgment of the Sixth Circuit.