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ARBITRATION, EQUITABLE ESTOPPEL, AND THE RIGHT TO INTERLOCUTORY APPELLATE REVIEW

THEODORE J. HAWKINS[†]

INTRODUCTION

Based upon an arbitration clause, a nonsignatory to a contract wants to compel a signatory to arbitrate a dispute. The nonsignatory claims to be in privity with a party who did sign the agreement. Can the nonsignatory immediately appeal a decision by a federal district court refusing to compel arbitration and ordering the parties to litigate their dispute?

Consider the facts of *Carlisle v. Curtis, Mallet-Provost, Colt & Mosle, LLP*: In that case, a large prosperous construction corporation wanted to sell a small industrial equipment company it owned.¹ The corporation sought to make the highest possible profit but pay the lowest possible taxes on the sale. To this end, it consulted with a highly regarded accounting firm that advised the corporation to invest in a tax shelter to minimize its exposure following the sale.² To help the construction corporation properly execute the complicated tax shelter, the accounting firm enlisted the help of a law firm and a financial services boutique.³ Although the financial services boutique signed an agreement to arbitrate any disputes that might arise concerning its services, the law firm and accounting firm signed no such agreement.⁴ Everything was going according to plan until the construction corporation received a letter from the IRS explaining that the tax shelter it invested in was “abusive” and illegal. Consequently,

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¹ See *Carlisle v. Curtis, Mallet-Provost, Colt & Mosle, LLP*, 521 F.3d 597, 599 (6th Cir. 2008).

² See *id.*

³ See *id.*

⁴ See *id.*

the corporation had to pay \$25 million in penalties to the IRS.⁵ The head of the construction company was furious and directed his attorneys to sue the law firm and accounting firm in federal court.⁶ Both defendants, wary of a large jury verdict, attempted to have the case dismissed in favor of arbitration based upon the construction company's agreement with the financial boutique.⁷ The district court refused to allow the law firm and the accounting firm to arbitrate the dispute and both firms sought an immediate appeal.⁸ Does the law firm and accounting firm have a right to an interlocutory appeal on the issue of arbitrability? How should an appellate court handle such a complicated question? For a long time circuit courts disagreed about whether a nonsignatory had jurisdiction to appeal in this situation.⁹ This narrow issue, however, was recently taken up and resolved by the Supreme Court in *Arthur Anderson LLP v. Carlisle*.¹⁰

Conflicts similar to the one described above arise as a result of a steady increase in the use of commercial arbitration in America over the last thirty years.¹¹ Today, arbitration is a popular alternative dispute resolution ("ADR") mechanism that many companies, industries, and nations recognize as superior to litigation. In 1976 at the "Pound Conference," Chief Justice Warren Burger gave his now famous speech advocating the proliferation of arbitration and other ADR techniques in an effort to upgrade an outdated legal system strained by litigation.¹² Appealing to the legal community, Justice Burger praised arbitration as a more efficient and fair conflict resolution mechanism, that could be used to solve the problems of the twenty-first century.¹³ "There is nothing incompatible[, he said,]

⁵ *See id.*

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 (1st Cir. 2008) (acknowledging the "circuit split on [the] question of [interlocutory] appellate jurisdiction").

¹⁰ 129 S. Ct. 1896, 1903 (2009).

¹¹ *See* Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 105 n.2 (1997).

¹² *See* Hon. Warren E. Burger, C.J. of the U.S. Sup. Ct., *Need of Systematic Anticipation, Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (Apr. 7, 1976), in 70 FED. RULES DECISIONS 79, 92-94 (1976).

¹³ *See id.*

between efficiency and justice.”¹⁴ Many corporations favor arbitration, not only because it is efficient and inexpensive, but also because arbitration decisions are confidential,¹⁵ and the parties have the ability to appoint an arbitrator who is an expert in the subject matter of a contract.¹⁶

Just as Justice Burger advocated, the use of arbitration has steadily expanded since 1976.¹⁷ Today, it has become a dominant mechanism through which international commercial disputes are resolved,¹⁸ as well as the chosen method used to resolve consumer¹⁹ and securities disputes.²⁰ Despite proliferation in some areas, there is still widespread resistance to the use of arbitration by “large sophisticated actors” in the United States.²¹ In a study of 2,800 contracts executed by publicly held companies in 2002, it was determined that only eleven percent of the agreements contained arbitration clauses.²² The authors of the study reasoned that “[t]he paucity of such clauses may partially reflect the view of corporate counsel that the decision . . . to include binding arbitration in an agreement is not one that can be made across the board, but rather depends on the needs and circumstances of the parties.”²³

One of the least attractive aspects of an arbitration proceeding is the lack of appellate review.²⁴ Although this negative attribute can be offset by both parties’ ability to choose

¹⁴ *Id.* at 92.

¹⁵ William F. Fox, *How To Think About International Commercial Dispute Resolution*, SN056 A.L.I.-A.B.A. 455, § 2.02(a)(4) (2008).

¹⁶ Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 259 (2005).

¹⁷ *See* Levin, *supra* note 11.

¹⁸ Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT’L L. REV. 289, 300 (2005) (“By 2005, the American business and legal communities accepted arbitration as the preferred method of settlement of international commercial disputes.”). *Contra* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 350, 351 (2007) (finding that only twenty percent of international contracts contain arbitration clauses).

¹⁹ *See* Eisenberg & Miller, *supra* note 18, at 373.

²⁰ *See* Peter B. Rutledge, *Market Solutions to Market Problems: Re-Examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration*, 26 PACE L. REV. 113, 113 (2005).

²¹ Eisenberg & Miller, *supra* note 18, at 335.

²² *Id.*

²³ *Id.* at 368.

²⁴ *See id.* at 340.

an arbitrator with expertise in the subject matter of the contract, the lack of appellate review could be a deal breaker for corporations that frequently enter into complicated commercial deals where large sums of money are at stake. Even if litigation costs substantially more than arbitration, companies that have deep pockets may simply be unwilling to forgo the opportunity to overturn an unfavorable verdict.²⁵ In addition, a related difference between arbitration and litigation is the perception that jury verdicts are statistically higher than arbitration awards.²⁶ Given the potential drawbacks to arbitration, it is easy to see why the threshold issue of arbitrability can turn into a contentious dispute if it is unclear whether the parties entered into an agreement to arbitrate.

One type of dispute that has emerged in the last decade involves the issue of arbitrability interwoven with the concept of equitable estoppel. This category is primarily made up of contract disputes between corporations in which a nonsignatory to the contract is either attempting to compel arbitration or being compelled to arbitrate.²⁷ Such controversies exist because of the increasing complexity of business organizations in our time.²⁸ For example, attached to many multinational parent corporations are labyrinths of corporate entities that are wholly owned, partly owned, or merely weakly associated with the parent company. This organizational structure can lead to uncertainty as to who is bound by an arbitration agreement signed by a particular corporate entity.²⁹

²⁵ See Charles E. Buffon & Joshua D. Wolson, *Antitrust Arbitration Counseling*, 19 ANTITRUST 31, 33 (2004) (discussing why the inability to appeal an arbitration decision might discourage arbitration of a large antitrust claim).

²⁶ See Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 198 (2005).

²⁷ See, e.g., *Waste Mgmt., Inc., v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 340 (5th Cir. 2004).

²⁸ See *id.* A nonsignatory sought to stay the litigation of a dispute pending the outcome of an arbitration proceeding involving the same issue. See *id.* The controversy arose because it was unclear whether the former parent company or the purchaser of smaller company was responsible for a debt resulting from the breach of an equipment lease. See *id.*

²⁹ See, e.g., *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 43 (1st Cir. 2008) (discussing the arbitrability of claims against a nonsignatory subsidiary and corporate officers).

In general, arbitration agreements are enforceable only if they are in writing.³⁰ However, arbitration can also be compelled through the concept of equitable estoppel. An equitable estoppel issue can arise when only one of the parties to a dispute signed a written arbitration agreement and, based upon that agreement, either the signatory or the nonsignatory seeks to compel the other party to arbitrate.³¹ In this situation the party seeking to compel arbitration asserts that it is unfair for its adversary to deny the existence a written agreement. The standard for determining whether equitable estoppel applies differs depending upon which party is attempting to compel arbitration.³² Although it is commonly accepted that a signatory can compel a nonsignatory to arbitrate a dispute, only recently has law developed that permits a nonsignatory to compel a signatory to arbitrate a dispute.³³ This Note will focus only on situations in which a nonsignatory seeks to compel a signatory to arbitrate.

Recently, in *Arthur Anderson LLP v. Carlisle*, the Supreme Court resolved a split between the circuits dealing with this very issue.³⁴ The court decided that § 16 of the FAA gives federal appellate courts jurisdiction to review an interlocutory appeal when a litigant appeals from an order denying a stay in litigation in favor of an arbitration, regardless of whether the litigant signed a written arbitration agreement or not.³⁵ Before the decision, federal circuit courts disagreed whether a nonsignatory had the right to appeal an order by the district court refusing to compel arbitration. One group of circuits held that a nonsignatory could not appeal such a decision because the Federal Arbitration (FAA) required a written arbitration agreement as a prerequisite to the appeal. These courts reasoned that because the nonsignatory did not sign a written

³⁰ *Rojas v. TK Commc'n, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (“The FAA requires that the arbitration clause being enforced be in writing.” (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 n.1 (1991)) (internal quotation marks omitted)).

³¹ *See, e.g., Carlisle v. Curtis, Mallet-Provost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008).

³² *See Thompson-CSF v. AAA*, 64 F.3d 773, 776–79 (2d Cir. 1995).

³³ *See Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000) (“Other circuits have, in a few instances, allowed a non-signatory to a contract with an arbitration clause to compel arbitration under an equitable estoppel theory, including when the action is intertwined with, and dependent upon, that contract.”).

³⁴ 129 S. Ct. 1896, 1903 (2009).

³⁵ *See id.*

arbitration agreement, it was precluded from asserting that such an agreement existed and therefore could not appeal. Holding to the contrary, the Second and Fifth Circuits decided cases that allowed nonsignatories to appeal. These circuits based appellate jurisdiction on the strength of the nonsignatories' equitable estoppel claim. Justice Scalia, writing for the majority in *Arthur Anderson*, explained that under the "clear and unambiguous" language of § 16 of the FAA, any litigant who asks the court to compel arbitration and is denied is entitled to an immediate appeal.³⁶

This Note will examine the controversy between the circuits and discuss how the Supreme Court reconciled the competing viewpoints with the plain language of the FAA. Part I will discuss the law of equitable estoppel and how it is applied when arbitration is at issue. Part II will address the cases leading up to the Supreme Court decision. Finally, Part III will analyze the Supreme Court's decision in *Arthur Anderson* and recommend that both the policy and the law favor a bright-line rule allowing interlocutory appeals by parties seeking to arbitrate through equitable estoppel.

I. THE USE OF EQUITABLE ESTOPPEL TO COMPEL PARTIES TO ARBITRATE

Traditionally, equitable estoppel is a defense available to a promisee when the promisor wrongfully denies the existence of a contract that the promisee relied upon. Equitable estoppel is a principle firmly grounded in fairness, which has evolved from humble beginnings.³⁷ In the the Supreme Court's decision in *Carlisle*, equitable estoppel was used as a mechanism to resolve a dispute in which one party did not sign a written agreement to arbitrate. There, notwithstanding that fact that none of the defendants signed an agreement, they claimed that it was

³⁶ *Id.* at 1898.

³⁷ ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 8.11, at 39 (Joseph M. Perillo ed., Matthew Bender & Co. 2010) (1981) ("[M]ore and more we are seeing these equitable doctrines come forward to achieve justice and fair dealing between [individuals]. The literal constructionists live by the letter of the contract—they recognize nothing which is not expressed. Estoppel did not arise, like the mists of creation; it was born out of conscience and embodied in the law to right wrongs." (quoting *Roseth v. St. Paul Prop. & Liab. Ins. Co.*, 374 N.W.2d 105, 110–11 (S.D. 1985)) (internal quotation marks omitted)).

unjust not to allow them to arbitrate their claims.³⁸ Equitable estoppel “is designed to prevent injustice by barring a party . . . from taking a position contrary to his prior acts, admissions, representations, or silence.”³⁹ In essence, equitable estoppel exists to prevent a party from “trying to have his cake and eat it too; that is, from ‘rely[ing] on the contract when it works to [his] advantage [by establishing the claim], and repudiat[ing] it when it works to [his] disadvantage [by requiring arbitration].’ ”⁴⁰ Put another way, in some circumstances, fairness dictates that a party can be precluded from asserting the lack of a written agreement as a defense against a motion to compel arbitration.

It is “generally accepted that in the context of a motion to compel arbitration, federal law controls the issue of equitable estoppel.”⁴¹ Although the FAA requires that an arbitration agreement be in writing,⁴² the Supreme Court has held that an arbitration clause is no different than any other contract

³⁸ MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 13:8 (2010) (“Equitable estoppel allows a party to be estopped from repudiating a contract on which the other party has relied and as a result of which the other party has changed its position so that it will suffer an injury if the contract is repudiated.”). Equitable estoppel differs from the concept of promissory estoppel. *See* *Tiffany Inc. v. W. M. K. Transit Mix*, 493 P.2d 1220, 1224 (Ariz. 1972) (“[T]he major distinction between equitable estoppel and promissory estoppel is that equitable estoppel is available only as a defense, while promissory estoppel can be used as a cause of action for damages [E]stoppel is a shield, not a sword, hence it forms no basis for a cause of action for damages in contrast to promissory estoppel which gives rise to a cause of action for damages.”); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

³⁹ *Am. Bank & Trust Co. v. Trinity Universal Ins. Co.*, 205 So. 2d 35, 40 (La. 1967).

⁴⁰ *Denney v. Jenkins & Gilchrist P.C.*, 412 F. Supp. 2d 293, 298 (S.D.N.Y. 2005) (quoting *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002)).

⁴¹ Michael A. Rosenhouse, Annotation, *Application of Equitable Estoppel Against Nonsignatory To Compel Arbitration Under Federal Law*, 43 A.L.R. FED. 2d 275 § 3 (2010). Moreover, issues of arbitrability should always be decided by a court rather than an arbitrator. *See id.* Equitable estoppel can be either a question of law, a question of fact, or a mixed question of law and fact, depending on the circumstances. *See* 31 C.J.S. ESTOPPEL AND WAIVER § 291 (2010). In general, “where the facts are undisputed and only one inference may be drawn . . . the question of estoppel is one of law, but otherwise it is one of fact.” *Id.*

⁴² *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (“The FAA requires that the arbitration clause being enforced be in writing.”).

language.⁴³ Thus, the same common law equitable defenses developed in contract law are available to parties seeking to enforce an arbitration clause.⁴⁴

The application of equitable estoppel to arbitration agreements initially led to the “development of legal and equitable principles whereby a nonsignatory to an arbitration agreement [could] be compelled to arbitrate based upon implied consent.”⁴⁵ Such situations arose when a party that signed an arbitration agreement sought to compel arbitration against a party that did not signed the agreement. Subsequently, an alternative doctrine emerged permitting nonsignatories to compel signatories to arbitrate based upon equitable estoppel in limited situations.⁴⁶ Although a signatory almost always has standing to bring a suit compelling a nonsignatory to arbitrate, it is much less certain whether a nonsignatory has standing since its connection to the contract is much less certain. Nevertheless, courts have found that a nonsignatory may compel a signatory to arbitrate when there is a “close relationship between the entities

⁴³ See 9 U.S.C. § 2 (2006); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (finding that general contract law defenses may be applied to invalidate an arbitration agreement); J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories To Arbitrate—A Bridge Too Far?*, 21 REV. LITIG. 593, 594 (2002).

⁴⁴ See *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 776–79 (2d Cir. 1995).

⁴⁵ Uloth & Rial, *supra* note 43, at 594; see also *Thomson-CSF*, 64 F.3d at 776–79. These traditional theories originated from prior Second Circuit Decisions. See, e.g., *Fisser v. Int'l Bank*, 282 F.2d 231, 241 n.6 (2d Cir. 1960). In *Thomson-CSF*, the Second Circuit Court of Appeals summarized five “traditional” contract theories through which a signatory could compel a nonsignatory to arbitrate: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel. See *Thomson-CSF*, 64 F.3d at 776–79. According to the Second Circuit, a signatory can compel a nonsignatory to arbitrate based upon an “incorporation by reference” theory when the two parties “entered into a separate contractual relationship . . . which incorporates the existing arbitration clause.” *Id.* at 777. Similarly, a signatory can compel arbitration under an “assumption” theory when a nonsignatory “manifest[s] a clear intention to arbitrate” by, for example, sending a representative to the arbitration proceeding. *Id.* In addition, arbitration can be compelled under a “veil-piercing/alter-ego” theory when “a parent corporation and its subsidiary . . . demonstrate[] a virtual abandonment of separateness.” *Id.* at 777–78. Moreover, “[t]raditional principles of agency law may bind a nonsignatory to an arbitration agreement.” *Id.* at 777. Finally, principles of equitable estoppel can be used to compel a nonsignatory to arbitrate when it is clear that the nonsignatory had an agreement in fact to accept arbitration as a dispute resolution mechanism. *Id.* at 778.

⁴⁶ Rosenhouse, *supra* note 41, § 4.

involved” and the claims are “intimately founded and intertwined” with the terms of the contract.⁴⁷ Since the right to compel arbitration is contractual in nature, a nonsignatory agent, successor, or third party beneficiary may have standing to compel arbitration based upon equitable estoppel.⁴⁸ Generally, in cases decided in favor of allowing a nonsignatory to compel arbitration, the nonsignatory “has a contractual or other business relationship with [a] nonadverse party to the arbitration agreement, giving the non-signatory an obvious interest in the success of the agreement between the two signatories.”⁴⁹ The limited situations in which a nonsignatory can estop a signatory from denying the existence of an obligation to arbitrate can be broken down into three broad relational categories: (1) when the nonsignatory has a financial stake in a nonadverse signatory; (2) when a nonsignatory is the purchaser of goods from a signatory; and (3) when a nonsignatory provides goods and services to a signatory.⁵⁰ Examples of each of these situations are discussed below. These examples are illustrative of the types of controversies and parties that were affected by the Supreme Court’s decision.

*Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*⁵¹ is a case that falls into the first relational category—it involves claims by a nonsignatory that had a financial stake in a signatory. In that case, a soft drink producer entered into a licensing agreement with a subsidiary of another soda producer to “market and sell an orange soda under the ‘Sunkist’ brand name.”⁵² The licensing agreement contained a broadly worded arbitration clause.⁵³ Following the execution of the licensing agreement, the

⁴⁷ *Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc.*, 10 F.3d 753, 757–58 (11th Cir. 1993); *see also* *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 70 (2d Cir. 2005).

⁴⁸ *See* *Rosenhouse*, *supra* note 41, § 2.

⁴⁹ *Id.*

⁵⁰ *See generally id.* (outlining the rights of particular nonsignatories to compel arbitration of a signatory’s claim under a theory of equitable estoppel).

⁵¹ *Sunkist Soft Drinks*, 10 F.3d at 756–57.

⁵² *Id.* at 755.

⁵³ *Id.* The license agreement stated:

[A]ny controversy or claim arising out of or relating to this Agreement or the breach thereof, including those regarding termination or failure to renew this Agreement, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

Id.

subsidiary was acquired by Del Monte, a second beverage company, and stripped of its employees and management.⁵⁴ Sunkist promptly sued Del Monte alleging tortious interference with the licensing agreement and Del Monte, although a nonsignatory to the licensing agreement, sought to stay the suit and compel arbitration based on the same agreement.⁵⁵ Del Monte successfully argued that because Sunkist's claims were essentially contractual in nature, it was "fundamentally unfair" to allow the beverage company to frame its causes of action as sounding in tort and thus avoid its contractual obligation to submit its claims to arbitration.⁵⁶ The district court was convinced that Sunkist was "actually suing to enforce provisions of the licensing agreement" and consequently referred the claims to arbitration.⁵⁷ Sunkist attempted an interlocutory appeal, which was denied for lack of jurisdiction under § 16 of the FAA.⁵⁸ After the arbitration proceeding, Sunkist again sought to appeal, and this time the court upheld jurisdiction.⁵⁹ The Eleventh Circuit found that Del Monte could compel Sunkist to arbitrate its claims because the claims were "intimately founded in and intertwined with the underlying contract obligation."⁶⁰ The court reasoned that arbitration was proper because Sunkist's claims, although sounding in tort, alleged that the nonsignatory beverage company violated the license agreement.⁶¹ And, since the subsidiary "ceased operating" and was absorbed into the beverage company upon its purchase, the beverage company was bound by the subsidiary's agreement as a matter of law.⁶²

Like *Sunkist*, *Thixomat v. Takata Physics International Co.*⁶³ also involved a subsidiary. However, *Thixomat* falls within the second relational category because the dispute in that case arose from an agreement made concurrently with the sale of goods.

⁵⁴ *Id.*

⁵⁵ *Id.* at 755–56.

⁵⁶ *Del Monte Corp. v. Sunkist Growers, Inc.*, Civ. A. No. 1:186-cv-1583-RLV, 1988 WL 415059, at *1 (N.D. Ga. June 2, 1988).

⁵⁷ *Id.* at *2.

⁵⁸ *Sunkist Soft Drinks*, 10 F.3d at 756. The court did not discuss the reason for the denial of appellate jurisdiction, and there is no written opinion concerning the issue. *See id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 757–58 (internal quotation marks omitted).

⁶¹ *See id.* at 758.

⁶² *Id.*

⁶³ No. 01 Civ. 5449(RO), 2001 WL 863566 (S.D.N.Y. July 30, 2001).

There, a company that owned a patent for metal molding technology and sold machines utilizing the technology entered into a sales agreement with Takata, a Japanese corporation.⁶⁴ The contract provided for the purchase of several of the molding machines.⁶⁵ It included both an arbitration clause and a clause stating that the molding technology was confidential.⁶⁶ When Takata leased the molding machines to Takata Physics, a wholly owned subsidiary, a dispute arose about whether the confidentiality provision in the original licensing agreement had been breached.⁶⁷ An arbitration proceeding was initiated, but Thixomat, the signatory, moved to stay the arbitration, arguing that it had not agreed to arbitrate with the subsidiary.⁶⁸ The district court held that Thixomat could be compelled to arbitrate the dispute with the nonsignatory subsidiary.⁶⁹ It reasoned that because of the close relationship between the subsidiary and the parent company, the fact that both entities sought an identical remedy and because the claims arose “from one common nucleus of operative facts,” they were “intimately founded in and intertwined with the underlying contract obligations” and had to be referred to arbitration.⁷⁰

*Palmer v. Conseco Finance Servicing Corp.*⁷¹ is a case that falls into the third relational category because it involves claims by a nonsignatory that provided goods and services to a signatory. There, mortgagors brought an action against both a bank that refinanced their home and a life insurer that denied their life insurance claim.⁷² The suit was the result of a joint mortgage and life insurance deal gone awry.⁷³ Before they brought the lawsuit, the mortgagors executed a promissory note to refinance their home and used some of the money to take out a life insurance policy with a life insurance company owned by the

⁶⁴ See *id.* at *1–2.

⁶⁵ *Id.* at *1.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at *3.

⁷⁰ *Id.* The court also noted that the fact that an arbitration proceeding had already been initiated and the fact that the conflict was international in nature were additional factors that moved the court to rule in favor of arbitration. *Id.* at *4.

⁷¹ 198 F. Supp. 2d 822 (N.D. Miss. 2002).

⁷² *Id.* at 823.

⁷³ *Id.*

mortgagee bank.⁷⁴ Although the mortgagor paid the premiums to the mortgagee bank, the bank hired another company, American Bankers Life Insurance, to actually insure the life.⁷⁵ When one of the mortgagors died, American Bankers, the nonsignatory, refused to pay, claiming that the mortgagors made misrepresentations on their application.⁷⁶ The court granted American Banker's motion to compel arbitration pursuant to a clause in the promissory note even though American Bankers, the insurer, never signed that agreement.⁷⁷ The court stated that since the mortgagors alleged that the mortgagee bank acted as an agent for American Bankers and since the mortgagor plaintiff alleged "interdependent and concerted misconduct by both the nonsignatory Defendants and the signatory [lenders]," the claims were sufficiently intertwined to compel arbitration.⁷⁸

II. INTERLOCUTORY APPELLATE REVIEW OF ARBITRATION ORDERS

Section 16 of the FAA governs appellate review of all court orders concerning arbitration.⁷⁹ The framework of the statute reflects the strong federal policy favoring arbitration.⁸⁰ "Its inherent acknowledgment is that arbitration is a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the advantages of speed, simplicity, and economy associated with arbitration."⁸¹ In line with this goal, § 16 denies a litigant the ability to immediately appeal when the court compels arbitration⁸² but permits an

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 825–26.

⁷⁸ *Id.*

⁷⁹ William G. Phelps, Annotation, *Appealability of Order Staying, or Refusing To Stay, Proceeding in Federal District Court Pending Arbitration Procedure*, 110 A.L.R. FED. 148 (1992). Prior to the enactment of § 16 on November 16, 1988, courts applied the Enelow-Ettelson doctrine to appeals from orders concerning arbitration. See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284, 287 (1988) (overturning the Enelow-Ettelson doctrine in the wake of the merger between courts of law and equity).

⁸⁰ See 15B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.17 (2d ed. 2010); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

⁸¹ David D. Siegel, *Practice Commentary, Appeals from Arbitrability Determinations*, in 9 U.S.C.A. § 16 (West 2010).

⁸²

immediate appeal when the court refuses to compel arbitration.⁸³ Specifically, the statute provides that “[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 . . . [or] denying a petition under section 4 of this title.”⁸⁴ Thus, § 16 gives a party seeking to compel arbitration more avenues to seek appellate review than a party trying to avoid arbitration, reflecting the policy of the FAA to encourage arbitration.⁸⁵

Enacted as part of the Judicial Improvements and Access to Justice Act, § 16 was a small piece of a much larger effort by Congress to overhaul the federal court system and allow it to cope with the enormous caseload overflowing its dockets.⁸⁶ The only legislative history concerning § 16 is a brief summary of its purpose articulated by members of the House of Representatives: “[I]nterlocutory appeals are provided for when a trial court rejects a contention that a dispute is arbitrable,” however, “appeals are specifically prohibited . . . when the trial court finds that the parties have agreed to arbitrate [the dispute].”⁸⁷

Except as otherwise provided in § 1292(b) of title 28, an appeal may not be taken from an interlocutory order—(1) granting a stay of any action under § 3 of this title; (2) directing arbitration to proceed under § 4 of this title; (3) compelling arbitration under § 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16(b) (2006).

⁸³

An appeal may be taken from—(1) an order—(A) refusing a stay of any action under § 3 of this title, (B) denying a petition under § 4 of this title to order arbitration to proceed, (C) denying an application under § 206 of this title to compel arbitration, (D) confirming or denying confirmation of an award or partial award, or (E) modifying, correcting, or vacating an award.

Id. § 16(a).

⁸⁴ *Id.*

⁸⁵ See Siegel, *supra* note 81.

⁸⁶ See H.R. REP. NO. 100-889, pt. 1, at 22 (1988). In urging his fellow congressmen to vote for the bill, Representative Kastenmeier stated,

Enactment of court reform legislation is similar to creating a quilt. The entire fabric of our system of justice is woven piece by piece through the use of State and Federal courts, traditional litigation and alternative dispute resolution mechanisms. This bill solidifies the tapestry of American justice by strengthening the Federal and State court systems and by encouraging the use of alternative dispute resolution mechanisms. I urge my colleagues to support the bill.

134 CONG. REC. 31,871 (1988).

⁸⁷ H.R. REP. NO. 100-889, pt. 1, at 36–37.

Since its enactment, courts have applied § 16 in a variety of ways,⁸⁸ sometimes reaching “puzzling” conclusions.⁸⁹ Recently, a disagreement has arisen between the circuits over the grant of appellate jurisdiction when a nonsignatory seeks to compel arbitration based on equitable estoppel.⁹⁰

The disagreement involves the references made by § 16 to § 3 and § 4 of the FAA.⁹¹ Section 4, which gives the court the power to compel arbitration, contemplates a dispute involving “an agreement in writing for arbitration.”⁹² Similarly, § 3, which empowers the court to stay proceedings on application from one of the parties, requires an “issue referable to arbitration under an agreement in writing.”⁹³ Relying on these references to a written agreement, the D.C. Circuit and Sixth Circuit ruled that a nonsignatory seeking to compel a signatory to arbitrate a dispute could not appeal an order by a district court mandating litigation because there was no written agreement between the parties.⁹⁴ The Fifth and Second Circuit Courts of Appeals, however, took the opposite position, reasoning that the writing requirement was met when it appeared that the nonsignatory has a meritorious equitable estoppel claim.⁹⁵

At its core, the circuit split existed because courts were unclear how to reconcile the idea of equitable estoppel with the language in § 16 of the FAA that permits interlocutory appeals. In the cases that made up the circuit split, the nonsignatory used

⁸⁸ See, e.g., *Cerveceria Cuauhtemoc Moctezuma S.A. v. Mont. Beverage Co.*, 330 F.3d 284, 287 (5th Cir. 2003) (appellate jurisdiction was dependent upon the existence of an agreement to arbitrate).

⁸⁹ 15B WRIGHT ET AL., *supra* note 80, § 3914.17 (stating that the Fifth Circuit’s decision in *Cerveceria Cuauhtemoc Moctezuma S.A. v. Montana Beverage Co.* was “puzzling” because the court erroneously reasoned that the gateway jurisdictional question of arbitrability depended upon the merits of the case).

⁹⁰ See *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38, 44–45 (1st Cir. 2008) (acknowledging the “circuit split on [the] question of [interlocutory] appellate jurisdiction”).

⁹¹ “An appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 . . . [or] denying a petition under section 4 of this title . . .” 9 U.S.C. § 16 (2006).

⁹² *Id.* § 4.

⁹³ *Id.* § 3.

⁹⁴ See *Carlisle v. Curtis, Mallett-Prevost, Colt & Mosle, LLP*, 521 F.3d 597, 601–02 (6th Cir. 2008); *Universal Serv. Fund Tel. Billing Practice Litig. v. Sprint Comm’ns Co.*, 428 F.3d 940, 942–43, 945 (10th Cir. 2005); *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003).

⁹⁵ See *Ross v. Am. Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007); *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339, 344–45 (5th Cir. 2004).

equitable estoppel as an “offensive sword” rather than its traditional role as a “defensive shield” to assert that the signatory could not deny the existence of a written arbitration agreement.⁹⁶ Appellate courts found this use of equitable estoppel difficult to reconcile with the language of § 3 and § 4, which seem to require a “written agreement for arbitration” or an “issue referable to arbitration” as a prerequisite to interlocutory appellate jurisdiction. The circuits disagreed as to whether the writing requirement was met when a claim was based on equitable estoppel.

A. *The Circuit Split Leading up to Arthur Anderson*

The D.C. Circuit was one of the first courts to bar an interlocutory appeal by a nonsignatory seeking to compel arbitration through equitable estoppel.⁹⁷ In *DSMC Inc. v. Convera Corp.*,⁹⁸ Judge Roberts,⁹⁹ writing for the D.C. Circuit, applied § 4 of the FAA narrowly. According to Judge Roberts, § 4 “applies only to an ‘alleged failure . . . to arbitrate under a written agreement for arbitration’—not an alleged failure to arbitrate when principles of equitable estoppel indicate that you should.”¹⁰⁰

The facts of *DSMC* were complicated.¹⁰¹ The case involved a contract dispute that arose out of the alleged theft of trade secrets.¹⁰² Initially, NGTL, a division of National Geographic Magazine, contracted with DSMC, a company providing digital cataloging services, to create a digital database for thousands of hours of video.¹⁰³ The contract included a broadly worded arbitration clause and a provision protecting DSMC’s proprietary right to its software.¹⁰⁴ Dissatisfied with performance, NGTL fired DSMC and hired Convera Corporation, a competitor. “To

⁹⁶ Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 56 (1996).

⁹⁷ See generally *DSMC*, 349 F.3d 679.

⁹⁸ *Id.*

⁹⁹ Hon. John G. Roberts Jr. currently serves as Chief Justice of the United States Supreme Court. He was appointed to the D.C. Circuit Court of Appeals in 2003, the same year he authored the opinion in *DSMC*.

¹⁰⁰ *DSMC*, 349 F.3d at 683.

¹⁰¹ See *Carlisle v. Curtis, Mallett-Prevost, Colt & Mosle, LLP*, 521 F.3d 597, 600–01 (6th Cir. 2008).

¹⁰² *DSMC*, 349 F.3d at 681.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

facilitate the switch,” NGTL gave Convera a copy of the database created by DSMC.¹⁰⁵ Subsequently, DSMC initiated an arbitration proceeding against NGTL pursuant to their agreement and sued Convera in federal court, alleging copyright infringement and misappropriation of trade secrets.¹⁰⁶ Convera then sought to compel arbitration based on the agreement between NGTL and DSMC. However, the district court refused to grant Convera’s motion.¹⁰⁷ It reasoned that DSMC’s claims against Convera were not “inextricably intertwined with the contract” because regardless of NGTL’s breach of its “contractual obligation to maintain confidentially[.]. . . Convera’s obligation to DSMC . . . [did] not arise out of that contract, but rather from state and federal statutes and common law.”¹⁰⁸ The district court explained in dictum that if DSMC had alleged a more overt contract law claim—like tortious interference with the contract—the court would have been more willing to grant a motion to compel arbitration.¹⁰⁹ Since DSMC’s claims were for misappropriation of trade secrets and civil conspiracy, its motion to compel arbitration was denied.¹¹⁰ The district court also denied a motion made by NGTL to stay the litigation between DSMC and Convera.¹¹¹ It reasoned that a motion to stay should be granted according to the court’s discretion, and “the simple fact that [the same] issues may be resolved in both fora” is not a sufficient reason to stay litigation.¹¹²

The interlocutory appeal to the D.C. Circuit concerned two issues and involved all three parties. First, NGTL, which was a signatory to the agreement but not a party to the lawsuit, petitioned the court to stay litigation pending the outcome of the arbitration proceeding between itself and DSMC.¹¹³ In addition, Convera, the nonsignatory defendant, sought to compel DSMC to

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 681–82.

¹⁰⁸ *DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d 14, 29–30 (D.D.C. 2002).

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.* at 30–31.

¹¹² *Id.* at 30.

¹¹³ *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679, 681 (D.C. Cir. 2003), *abrogated* by *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

arbitrate its claims based on the agreement between DSMC and NGTL. The court held that it did not have jurisdiction to hear the issues raised on appeal by NGTL and Convera.¹¹⁴

Roberts based his decision primarily on the plain language in § 16 of the FAA. He first looked at § 16, which incorporates § 4 by reference. Section 16 specifically permits interlocutory appeals taken “from an order denying a petition under section 4” of the FAA.¹¹⁵ Roberts then examined § 4 of the FAA, which “applies only to an ‘alleged failure . . . to arbitrate under a written agreement for arbitration.’”¹¹⁶ Because DSMC never signed an arbitration agreement with Convera, and its appeal was based on “principles of equitable estoppel,” Roberts reasoned that the “written agreement” requirement was not met, and consequently, DSMC could not establish jurisdiction for its interlocutory appeal.¹¹⁷ The court similarly concluded that there was no jurisdiction to immediately appeal NGTL’s motion to stay litigation pending the outcome of an arbitration proceeding.¹¹⁸ Since the motion was based on equitable estoppel, the D.C. Circuit reasoned that there was no arbitration agreement and thus, no “issue referable to arbitration.”¹¹⁹

In support of his new rule concerning the application of equitable estoppel to interlocutory appellate jurisdiction, Roberts reasoned that it was best to have “bright-line” jurisdictional rules concerning the application of equitable estoppel rather than to engage in a “multifactor factual and legal inquiry to determine whether the issues to be litigated . . . are sufficiently intertwined with the issues subject to arbitration.”¹²⁰ Roberts also correctly stated that interlocutory appeals generally are infrequently granted.¹²¹

There are readily apparent holes in the D.C. Circuit’s reasoning in *DSMC*. It is quite unclear whether plain language of § 3 and § 4 of the FAA denies nonsignatories the right to stay litigation or compel arbitration. Language referencing a “written agreement” and an “issue referable to arbitration” is not ironclad

¹¹⁴ *Id.* at 681–82.

¹¹⁵ *Id.* at 682 (quoting 9 U.S.C. § 4 (2006)) (internal quotation marks omitted).

¹¹⁶ *Id.* at 683 (quoting 9 U.S.C. § 4).

¹¹⁷ *Id.* at 683–84.

¹¹⁸ *See id.* at 684–85.

¹¹⁹ *Id.* at 684.

¹²⁰ *See id.* at 683–84.

¹²¹ *See id.* at 683.

evidence that Congress intended to preclude nonsignatories from immediately appealing arbitrability questions. In addition, the court's policy argument that a bright line rule is preferable to a multifactor inquiry is misleading. Although bright line rules are preferable when jurisdiction is at issue, it does not directly follow that there should be a bright line rule preventing interlocutory appeals. Finally, although it is true that interlocutory appeals are infrequently granted, § 16 of the FAA explicitly permits a party to immediately appeal an order refusing to compel arbitration because of the the strong federal policy favoring arbitration.

In contrast to the approach taken in *DSMC*, the Fifth and Second Circuits decided that it is sometimes permissible for a nonsignatory to immediately appeal a refusal to compel arbitration.¹²² To come to this conclusion, both circuits looked to the merits of the nonsignatories' equitable estoppel claims to decide whether they were parties to an arbitration agreement. They reasoned that appellate jurisdiction should be granted when the facts of a case clearly demonstrate that the nonsignatories claims were in fact "inextricably intertwined" with the underlying contract obligation.¹²³ Although this approach allowed the appellate court to correct erroneous factual findings by the district court, it also blurred the line between the gateway jurisdictional question and the equitable estoppel issue.

Moreover, the issue of jurisdiction and the merits of the equitable estoppel claim can be difficult to separate in practice. It is hard to refuse interlocutory appellate jurisdiction when it is obvious that the district court committed a substantive error by refusing to acknowledge a nonsignatory's legitimate equitable estoppel claim. This was the problem faced by the Fifth Circuit in *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*¹²⁴ In that case, Waste Management ("WM") was the original parent company of a corporation called RIMSA.¹²⁵ To provide collateral for RIMSA to lease heavy equipment from The Bethlehem Corporation, WM provided Bethlehem with a letter of

¹²² See *Ross v. Am. Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007); *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 340 (5th Cir. 2004).

¹²³ See *Ross*, 478 F.3d at 99.

¹²⁴ 372 F.3d 339 (5th Cir. 2004).

¹²⁵ See *id.* at 340.

credit worth \$795,000.¹²⁶ After executing the letter, WM sold its majority stake in RIMSA to Onyx through a stock purchase agreement which included a “broad agreement to arbitrate.”¹²⁷ Unfortunately for WM, after the transfer, RIMSA defaulted on its obligation to pay for the equipment it leased from Bethlehem, and Bethlehem responded by exercising its right to collect on the letter of credit.¹²⁸ WM was forced to pay Bethlehem the \$795,000 allocated in the letter.¹²⁹ Not surprisingly, WM sued RIMSA for the balance.¹³⁰ Around the same time Onyx initiated an arbitration proceeding against WM on unrelated claims and WM’s claim for reimbursement of the \$795,000 became an issue in that matter.¹³¹ As soon as the issue of reimbursement became part of the arbitration proceeding, RIMSA, a nonsignatory to the arbitration agreement between WM and Onyx, sought to stay litigation with WM pending the arbitration outcome.¹³² The district court denied the stay and RIMSA appealed.¹³³

The Fifth Circuit found that RIMSA, a nonsignatory, had jurisdiction for its immediate appeal to enforce the stay.¹³⁴ To reach this conclusion, the court examined the question from an entirely different perspective than the D.C. Circuit used in *DSMC*.¹³⁵ The Fifth Circuit stated that the issue of appellate jurisdiction is essentially “identical to the substance of this interlocutory appeal.”¹³⁶ Thus, the court ruled that the language in article 3 requiring an “issue referable to arbitration under a written arbitration agreement” only required that the issues to be litigated were bound up with the issues to be arbitrated.¹³⁷ The court found that because WM’s claims against RIMSA were

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.* at 341.

¹³¹ *See id.* at 340–41.

¹³² *Id.*

¹³³ *Id.* at 340.

¹³⁴ *Id.*

¹³⁵ *See id.* at 342.

¹³⁶ *Id.* at 343.

¹³⁷ *See id.* (internal quotation marks omitted). The Fifth Circuit expresses three factors used to determine whether a nonsignatory can invoke § 3 and consequently have jurisdiction for an appeal: “(1) the arbitrated and litigated disputes must involve the same operative facts; (2) the claims asserted in the arbitration and litigation must be ‘inherently inseparable’; and (3) the litigation must have a ‘critical impact’ on the arbitration.” *Id.*

“identical” to WM’s claims against Onyx, interlocutory appellate jurisdiction was appropriate.¹³⁸ The Fifth Circuit remanded the case to the district court with instructions to stay litigation.¹³⁹

By completely ignoring even the possibility that § 16 imposed a writing requirement through § 3, the Fifth Circuit was able to reach a just result relying solely on the merits of the nonsignatories’ equitable estoppel claim. Although the outcome of the case was just, since the issues referred to arbitration were in fact “identical” to the issues to be litigated, the court’s reasoning was questionable. The Supreme Court has established that a party’s right to appeal “cannot depend upon the facts of a particular case.”¹⁴⁰ Rather, it is the role of an appellate court to address issues of law. The Fifth Circuit crossed the line by relying on the merits of the case to decide a jurisdictional issue. However, under the D.C. Circuit’s rule discussed above, DSMC, the nonsignatory in *Waste Management*, would have been categorically denied an appeal and forced to litigate while the exact same issues were decided in a parallel arbitration proceedings. This could force the nonsignatory to endure conflicting obligations if the arbitrator and jury reached opposite conclusions. Therefore, it is difficult to reconcile the Fifth Circuit’s problematic rule with the just result reached in *Waste Management*.

At its core, the circuit split boiled down to whether the goals of the FAA were best served by assigning a narrow meaning to § 16 that created a bright line rule barring appeals by nonsignatories or whether the FAA’s strong federal policy favoring arbitration supported a broader interpretation allowing appeals. This choice is especially difficult to make because ruling on the issue of equitable estoppel in the context of arbitration is a

¹³⁸ *Id.* at 344. The court examined the merits RIMSA’s application for a stay and reasoned that because there was “[f]undamentally . . . one dispute,” namely, “[w]ho . . . should reimburse WM for the \$795,000,” the litigation and arbitration were “inherently inseparable,” and thus, there was an issue “referable to arbitration” under § 3 of the FAA, and consequently interlocutory appellate jurisdiction under § 16. *Id.* at 345.

¹³⁹ *Id.* at 346.

¹⁴⁰ *See Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (“In any event, the question before us here—whether there is jurisdiction over the appeal, as opposed to whether the appeal is frivolous—must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order. ‘Appeal rights cannot depend upon facts of a particular case.’” (quoting *Carroll v. United States*, 354 U.S. 394, 405 (1957))).

decision that straddles the line between substance and procedure. Considered broadly, when an appellate court rules on the issue of equitable estoppel, it is simply deciding whether the parties agreed to submit to arbitration, a function over which appellate courts explicitly have jurisdiction.¹⁴¹ However, when considered in a different light, deciding the issue of equitable estoppel can be viewed as “delv[ing] deeply into the merits of [the] case,”¹⁴² which cannot be undertaken until after the threshold issue of arbitrability has been decided.¹⁴³

III. RESOLVING THE CIRCUIT SPLIT: THE SUPREME COURT’S DECISION IN *ARTHUR ANDERSON*

As briefly discussed above, *Arthur Anderson* was a case about abusive tax shelters.¹⁴⁴ The plaintiffs were three businessmen who wanted to sell their construction equipment businesses. They purchased advice from an accounting firm, a law firm, and a financial services boutique about how to minimize their taxes following the sale.¹⁴⁵ Collectively, the law firm, accounting firm, and financial services boutique advised the construction company to execute a tax shelter strategy that the Internal Revenue Service later found to be illegal. The tax shelter, called a “leveraged option strategy,” was “designed to create illusory losses” through investment in foreign-currency exchange options.¹⁴⁶ Although the IRS initially offered immunity for these kinds of tax shelters, none of the defendant advisors informed the businessmen of this option, and the plaintiffs were forced to pay \$25 million in penalties for using the shelter.¹⁴⁷ Although the financial services boutique was the only advisor that signed an arbitration agreement with the construction company, the law firm and accounting firm nevertheless sought to stay litigation and compel arbitration based upon that agreement.¹⁴⁸ The district court denied their motion and the defendants took an interlocutory appeal to the Sixth Circuit. The

¹⁴¹ *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986).

¹⁴² *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679, 684 (D.C. Cir. 2003).

¹⁴³ *AT&T*, 475 U.S. at 649–50.

¹⁴⁴ *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896, 1899 (2009).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (internal quotation marks omitted).

¹⁴⁷ *See Carlisle v. Curtis, Mallett-Provost, Colt & Mosle, LLP*, 521 F.3d 597, 599 (6th Cir. 2008), *rev’d sub nom. Arthur Anderson*, 129 S. Ct. 1896.

¹⁴⁸ *Id.*

circuit court denied jurisdiction and adopted the reasoning of the D.C. Circuit in *DSMC* that appellate jurisdiction should be denied unless a litigant has signed a written arbitration agreement.¹⁴⁹ The Sixth Circuit quoted Judge Roberts, who stated that, “to the extent possible, clear, predictable, bright-line rules . . . [should] be applied to determine jurisdiction with a fair degree of certainty from the outset.”¹⁵⁰ In fact, the vast majority of the Sixth Circuit’s opinion was borrowed from the D.C. Circuit’s reasoning in *DSMC*.¹⁵¹

In the Supreme Court’s decision, Justice Scalia began his analysis of the jurisdictional issue by explaining that the FAA provides an exception to the general rule that appellate courts only have jurisdiction over district courts’ “final decisions.”¹⁵² Scalia then goes on to decide the case in two sentences: under the “clear and unambiguous” language of § 16, “any litigant who asks for a stay under § 3 [of the FAA] is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stayBecause each [litigant] in this case explicitly asked for a stay[,] . . . the Sixth Circuit had jurisdiction to review the District Court’s denial.”¹⁵³ Thus, the Supreme Court resolved the circuit split by taking a middle ground; it created a bright-line rule allowing interlocutory appeals by litigants seeking to arbitrate claims based on equitable estoppel. The Court took issue with both sides of the circuit split. Scalia criticized the lower courts for “conflating the jurisdictional question with the merits of the appeal,”¹⁵⁴ the merits question, according to the Court, is irrelevant and should only be dealt with “after the court has accepted jurisdiction over the case.”¹⁵⁵ The Court went on to reject the Sixth Circuit’s rule that a litigant is “categorically ineligible for relief” by virtue of the fact that they did not sign a written arbitration agreement.¹⁵⁶ The court regarded the rule as an artificial statute of frauds that had no basis logical connection § 16 of the FAA. Section 16 states

¹⁴⁹ *See id.* at 600–01.

¹⁵⁰ *See id.* at 601 (quoting *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003) (internal quotation marks omitted)).

¹⁵¹ *See id.* at 600–01.

¹⁵² *Arthur Anderson*, 129 S. Ct. at 1900 (internal quotation marks omitted).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1901.

¹⁵⁶ *Id.* at 1902.

that “[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title.”¹⁵⁷ In turn, § 3 contemplates an issue that is “referable to arbitration *under* an agreement in writing.”¹⁵⁸ The Court explained that since § 2 of the FAA governs the enforceability of arbitration agreements, if an agreement is binding under § 2, it is enforceable under § 3.¹⁵⁹ To determine whether an agreement is enforceable under § 2, state contract law must be consulted.¹⁶⁰ And “[b]ecause traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through . . . estoppel,” a nonparty does not have to meet a writing requirement to appeal an order refusing to stay litigation under § 16.¹⁶¹ Finally, Scalia rejected the plaintiff’s argument that allowing these kinds of appeals will lead to frivolous appeals. According to Justice Scalia, sanctions are an appropriate remedy in those cases.¹⁶²

The dissenting option authored by Justice Souter and joined by Chief Justice Roberts and Justice Stevens is short but direct. Souter argued that the “firm congressional policy against interlocutory or piecemeal appeals” favors reading § 16 and § 3 together to create a writing requirement for litigants seeking an interlocutory appeal based upon estoppel.¹⁶³ According to Justice Souter, interlocutory appeals are “a matter of limited grace” and can be extraordinarily disruptive to the litigation process.¹⁶⁴ Therefore, it follows that a writing requirement should be implemented as a matter of policy to “limit the scope” of appeals by nonsignatories. Justice Souter contends that this measure is necessary to “mitigate[] the risk of intentional delay by savvy parties who seek to frustrate litigation by gaming the system.”¹⁶⁵

¹⁵⁷ 9 U.S.C. § 16(a)(1)(A) (2006).

¹⁵⁸ *Id.* § 3 (emphasis added).

¹⁵⁹ *See Arthur Anderson*, 129 S. Ct. at 1901–02.

¹⁶⁰ *See id.* at 1902.

¹⁶¹ *Id.* (internal quotation marks omitted).

¹⁶² *See id.* at 1901.

¹⁶³ *Id.* at 1903 (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977)) (internal quotation marks omitted).

¹⁶⁴ *Id.* at 1904.

¹⁶⁵ *Id.*

A. *Analysis*

The congressional intent of § 16 of the FAA is quite clear: “[I]nterlocutory appeals are provided for when a trial court rejects a contention that a dispute is arbitrable under an agreement of the parties and instead requires the parties to litigate.”¹⁶⁶ Contrary to the dissenting opinion’s assertion that § 16 is a limited grant of jurisdiction and should be narrowly construed, the statutory intent found in the congressional record suggests that Congress envisioned a much broader exception for interlocutory appellate jurisdiction when a district court refuses to compel arbitration.¹⁶⁷ A broad exception similarly comports with the liberal federal policy favoring arbitration.¹⁶⁸ Although Justice Scalia does not examine the legislative history, he reaches the same result by invoking the plain meaning of § 3 and through principles of contract law. Scalia is right on the law. It is an established principle of contract law that “an obligation to arbitrate” can still “attach” when a party has not “personally signed the written arbitration provision.”¹⁶⁹ If both a signatory and a nonsignatory should be bound by an arbitration agreement as a matter of law, it stands to reason that either party should be able to immediately appeal an incorrect district court decision holding otherwise.

However, as Scalia himself acknowledges, “[w]hen the reason for a rule ceases, so should the rule itself.”¹⁷⁰ The dissenting opinion in *Arthur Anderson* implies that taking an interlocutory appeal from an order refusing to compel arbitration is a delay tactic employed by defendants to “wear down the opponent” through a “lengthy” appeals process. No doubt that was the reason the rule was employed in the *Arthur Anderson* case. There, the two parties seeking the appeal were the law firm and

¹⁶⁶ H.R. REP. NO. 100-889, at 37 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5997.

¹⁶⁷ “By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principle benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums.” *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004).

¹⁶⁸ *See* 15B WRIGHT ET AL., *supra* note 80, § 3914.17; *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

¹⁶⁹ *Fisser v. Int’l Bank*, 282 F.2d 231, 233 (2d Cir. 1960).

¹⁷⁰ ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 30 (2008) (quoting CAL. CIV. CODE § 3510 (West 2010)) (internal quotation marks omitted).

accounting firm. Both businesses were being paid to provide tax advice, yet failed to discover that the tax scheme they recommended had become illegal. Even further, they failed to realize that the IRS was offering safe harbor for companies who embarked on the scheme.¹⁷¹ Therefore, the law firm and the accounting firm each had a motive to delay litigation in an effort to get the plaintiffs to settle. In this particular situation, a writing requirement makes sense—the district court should definitively decide which forum should be employed and the parties should move to the merits instead of squabbling over procedure.

Nevertheless, the dissenting opinion fails to grasp an important reason for allowing litigants to appeal the district court's decision to refuse to grant a stay—the possibility of inconsistent results. Besides the threshold decision concerning where the merits of a dispute should be vetted, § 3 of the FAA also deals with motions to stay litigation pending the outcome of arbitration proceeding already in progress. Most cases in which one litigant is seeking to compel arbitration through equitable estoppel also involve another party who *has* signed an arbitration agreement and will arbitrate the dispute. If the litigant seeking to arbitrate through equitable estoppel is denied a stay, it is possible that the results between the litigation and the arbitration proceeding will be inconsistent.¹⁷² This is the main reason why appellate courts tied the question of jurisdiction to the merits of the equitable estoppel claim. Therefore, both the policy and the law favor a bright-line rule allowing interlocutory appeals under § 16 of the FAA.

CONCLUSION

In the end, Justice Scalia resolved the circuit split by imposing a rule that categorically favors arbitration over litigation. Thus, a company that did not even sign an arbitration agreement with its adversary can now appeal an unfavorable decision by a trial judge to hear its lawsuit in court. Considering the purpose of the FAA, which is to reduce the size of the federal docket, this conclusion seems logical. Nevertheless, it is

¹⁷¹ See *Arthur Anderson LLP v. Carlisle*, 129 S. Ct. 1896, 1899 (2009).

¹⁷² See, e.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757–58 (11th Cir. 1993).

important to recognize that as the complexity of agreements subject to arbitration continues to grow, so will the intricacies of the disputes concerning who can enforce the clause. In light of the overarching goal of alternative dispute resolution mechanisms to promote efficiency, it is paramount that courts adopt the most simple and efficient means of resolving these fights.