

# The Burger Court Opinion Writing Database

## *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*

460 U.S. 1 (1983)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 13, 1983

Re: No. 81-1203, Moses Cone Memorial Hospital v. Mercury

Dear Bill:

I join your dissent.

Regards,

A handwritten signature in black ink, appearing to be 'WRB', written in a cursive style.

Justice Rehnquist

Copies to the Conference

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: 12/28/82

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u B  
me  
Please join  
[Signature]

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1203

MOSES H. CONE MEMORIAL HOSPITAL, PETI-  
TIONER *v.* MERCURY CONSTRUCTION  
CORPORATION

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

[January —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This case, commenced as a petition for an order to compel arbitration under § 4 of the United States Arbitration Act of 1925 (Arbitration Act or Act), 9 U. S. C. § 4, presents the question whether, in light of the policies of the Act and of our decisions in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976) and *Will v. Calvert Fire Insurance Co.*, 437 U. S. 655 (1978), the District Court for the Middle District of North Carolina properly stayed this diversity action pending resolution of a concurrent state-court suit. The Court of Appeals for the Fourth Circuit reversed the stay. 656 F. 2d 933, rehearing denied, 664 F. 2d 936 (1981). We granted certiorari. 455 U. S. 237 (1982). We affirm.

I

Petitioner Moses H. Cone Memorial Hospital ("Hospital") is located in Greensboro, North Carolina. Respondent Mercury Construction Corp. ("Mercury"), a construction contractor, has its principal place of business in Alabama. In July 1975, Mercury and the Hospital entered into a contract for the construction of additions to the Hospital building. The contract, drafted by representatives of the Hospital, included

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 5, 1983

Re: Moses Cone Hospital v. Mercury, No. 81-1203

Dear Lewis:

Thank you for your helpful letter concerning my first draft in the above case. While I am not yet settled whether I agree with all of your proposed changes, I may well decide to do as you suggest. For now, however, let me share with you my reservations about some of them.

It is probably true, as you say, that Idlewild dealt with finality offhandedly. Nonetheless, several Circuits have accepted Idlewild as authority for a per se rule that abstention orders and similar stays (such as exhaustion and Colorado River stays) are final. Offhanded or not, I think Idlewild's rule is sound and ought to be non-offhandedly reaffirmed by us. Perhaps your concerns about future litigation can be allayed by including language limiting our Idlewild discussion to abstention and close analogs thereof. Indeed, such a bright-line rule seems less likely to foster future litigation than reliance on the Cohen doctrine, muddled as the latter is by Coopers & Lybrand.

Turning to that case, and to footnote 14 on pp. 8-9: I am nearly as reluctant to expand Coopers & Lybrand as you are to limit it. I agree that the reasoning of Coopers might well be applied outside the narrow Rule 23 context--to many discovery orders, for example. Yet I have some difficulty in seeing how best to do so without consuming the entire Cohen doctrine in the process. Would it meet your objections to substitute the following for the final sentence? "The reasoning of Coopers & Lybrand does not reach all pretrial orders that are formally subject to revision, but only those as to which some revision might reasonably be expected in the ordinary course of litigation."

Concerning the discussion on page 20: It is true that interpretation of contracts is ordinarily a matter of state law. But that is not always so--the best counterexample being <sup>those contractual matters now decided as</sup> collective bargaining agreements, which are interpreted as a matter of federal labor law. My understanding is that, at least to some limited extent, the same is true of arbitration clauses in contracts that are within the coverage of the Arbitration Act. Several of the cases cited in my footnote 30 say so explicitly. Indeed, I think the remainder of the paragraph in question makes that clear. To hold, as we did in Prima Paint, that "the language and policies of the Act required the conclusion that the fraud issue is

arbitrable" (p. 20) is necessarily to hold that the arbitrability issue is governed by federal law; we did indeed reject the contrary 1st Circuit rule that state law governed the point. See Prima Paint, 388 U.S. 395, 402-03. The rest of the paragraph in my draft (pp. 20-21) goes on to describe the rule governing such questions generally:

"[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

That is itself the statement of a federal substantive rule; I am not sure why we should not say so directly.

In Part V, I think you and I may have understood CA4's disposition differently. Certainly it was not my intention that we should decide the substantive issue of arbitrability; indeed, I made a point of saying that arbitrability itself was not an issue properly before us. My understanding was that the CA4 has already decided that issue definitively, see App. to Pet. for Cert. at A6-A13, and I think that its decision should stand, absent some procedural impropriety. However, I think something along the lines of your suggested addition would add clarity. Would you agree to the following

sentences in place of the present third sentence of the second paragraph?

"In particular, it points out that the only issue formally appealed to the Court of Appeals was the propriety of the District Court's stay order. Ordinarily, we would not expect the Court of Appeals to pass on issues not decided in the District Court. In the present case, however, we are not disposed to disturb the Court's discretion in its handling of the case in view of the special interests at stake and the apparent lack of any prejudice to the parties."

Again, I appreciate your comments, and I look forward to your reaction.

Sincerely,

  
WJB, Jr.

Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 7, 1983

Re: Moses Cone Hospital v. Mercury, No. 81-1203

Dear Lewis:

Thank you once again for your letter and your join. On reflection, I have decided to adopt your suggested change to my discussion of Prima Paint. A circulation incorporating these and other changes will be around shortly.

Sincerely,



WJB, Jr.

Justice Powell

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 7-9, 13-14, 18, 21-22, 24-26

AND FOOTNOTES RENUMBERED

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-1203

MOSES H. CONE MEMORIAL HOSPITAL, PETITIONER *v.* MERCURY CONSTRUCTION CORPORATION

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

[January —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This case, commenced as a petition for an order to compel arbitration under § 4 of the United States Arbitration Act of 1925 (Arbitration Act or Act), 9 U. S. C. § 4, presents the question whether, in light of the policies of the Act and of our decisions in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), and *Will v. Calvert Fire Insurance Co.*, 437 U. S. 655 (1978), the District Court for the Middle District of North Carolina properly stayed this diversity action pending resolution of a concurrent state-court suit. The Court of Appeals for the Fourth Circuit reversed the stay. 656 F. 2d 933, rehearing denied, 664 F. 2d 936 (1981). We granted certiorari. 455 U. S. 937 (1982). We affirm.

### I

Petitioner Moses H. Cone Memorial Hospital ("Hospital") is located in Greensboro, North Carolina. Respondent Mercury Construction Corp. ("Mercury"), a construction contractor, has its principal place of business in Alabama. In July 1975, Mercury and the Hospital entered into a contract for the construction of additions to the Hospital building. The contract, drafted by representatives of the Hospital, included

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 6-9, 18

To: The Chief Justice  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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Recirculated: JAN 14 1983

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1203

MOSES H. CONE MEMORIAL HOSPITAL, PETITIONER *v.* MERCURY CONSTRUCTION CORPORATION

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

[January —, 1983]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 24, 1983

Re: Moses Cone Hospital v. Mercury Constr., No. 81-1203

Dear Harry:

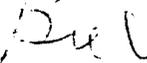
Thank you for your letter concerning the above case. Your suggestions are most helpful, and I expect to adopt all but one of them directly.

I am reluctant to eliminate the last paragraph of Part IV C, on pages 22-23. I think it is important to lay out the relevance of the source-of-law point as it may arise in various contexts under Colorado River. I recognize, however, that the last sentence of the paragraph in particular may actually concede more than I had intended. Perhaps it would meet your objections to modify that sentence as follows:

"Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, see n. 29, supra, the presence of federal-law issues must always be a major consideration militating against surrender."

I look forward to your response to this proposal.

Sincerely,

  
WJB, Jr.

Justice Blackmun

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 8, 18, 21-23

To: The Chief Justice  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1203

MOSES H. CONE MEMORIAL HOSPITAL, PETITIONER *v.* MERCURY CONSTRUCTION CORPORATION

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

[February 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This case, commenced as a petition for an order to compel arbitration under § 4 of the United States Arbitration Act of 1925 (Arbitration Act or Act), 9 U. S. C. § 4, presents the question whether, in light of the policies of the Act and of our decisions in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), and *Will v. Calvert Fire Insurance Co.*, 437 U. S. 655 (1978), the District Court for the Middle District of North Carolina properly stayed this diversity action pending resolution of a concurrent state-court suit. The Court of Appeals for the Fourth Circuit reversed the stay. 656 F. 2d 933, rehearing denied, 664 F. 2d 936 (1981). We granted certiorari. 455 U. S. 937 (1982). We affirm.

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STYLISTIC CHANGES

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1203

**MOSES H. CONE MEMORIAL HOSPITAL, PETITIONER v. MERCURY CONSTRUCTION CORPORATION**

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

[February —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This case, commenced as a petition for an order to compel arbitration under § 4 of the United States Arbitration Act of 1925 (Arbitration Act or Act), 9 U. S. C. § 4, presents the question whether, in light of the policies of the Act and of our decisions in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), and *Will v. Calvert Fire Insurance Co.*, 437 U. S. 655 (1978), the District Court for the Middle District of North Carolina properly stayed this diversity action pending resolution of a concurrent state-court suit. The Court of Appeals for the Fourth Circuit reversed the stay. 656 F. 2d 933, rehearing denied, 664 F. 2d 936 (1981). We granted certiorari. 455 U. S. 937 (1982). We affirm.

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STYLISTIC CHANGES

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

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6th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-1203

MOSES H. CONE MEMORIAL HOSPITAL, PETITIONER *v.* MERCURY CONSTRUCTION CORPORATION

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

[February —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This case, commenced as a petition for an order to compel arbitration under § 4 of the United States Arbitration Act of 1925 (Arbitration Act or Act), 9 U. S. C. § 4, presents the question whether, in light of the policies of the Act and of our decisions in *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), and *Will v. Calvert Fire Insurance Co.*, 437 U. S. 655 (1978), the District Court for the Middle District of North Carolina properly stayed this diversity action pending resolution of a concurrent state-court suit. The Court of Appeals for the Fourth Circuit reversed the stay. 656 F. 2d 933, rehearing denied, 664 F. 2d 936 (1981). We granted certiorari. 455 U. S. 937 (1982). We affirm.

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SUPREME COURT, U.S. Washington, D. C. 20543  
JUSTICE MARSHALL

CHAMBERS OF '82 DEC 35 P1:35  
JUSTICE BYRON R. WHITE

January 4, 1983

Re: 81-1203 - Moses H. Cone Memorial  
Hospital v. Mercury Construction Corporation

---

Dear Bill,

I agree.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 29, 1982

Re: No. 81-1203 - Moses H. Cone Memorial  
Hospital v. Mercury Construction Corp.

Dear Bill:

Please join me.

Sincerely,

*T.M.*  
TM.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 24, 1983

Re: No. 81-1203 - Moses H. Cone Memorial Hospital  
Mercury Construction Corporation

Dear Bill:

I am grateful for the amount of work you have done on this case, and I regret my delay in getting to you on it.

I still wish to affirm the judgment of the Court of Appeals. I have two suggestions, however, for your consideration:

1. The last sentence of part IVA, on page 18 of the third draft, gives me some pause. Would you be willing to replace it with something like the following:

"Hence, a decision to allow that issue to be decided in federal rather than state court does not lead to piecemeal resolution of the parties' underlying disputes. Although the Hospital will have to litigate the arbitrability issue in federal rather than state court, that issue is easily separable from the merits of the underlying disputes."

2. I also have difficulty with part IVC and would feel better if it could be replaced with the following:

"In Calvert, both the four-vote dissenting opinion and JUSTICE BLACKMUN's opinion concurring in the judgment pointed out that that case involved issues of federal law. 437 U.S., at 667 (BLACKMUN, J., concurring in the judgment); id., at 668-677 (BRENNAN, J., dissenting). See also Colorado River, 424 U.S., at 815, n. 21. It is equally apparent that this case involves federal issues."

Here, then, would follow your second paragraph of part IVC beginning with "The basic issue" and continuing through "We agree" near the end of the paragraph on page 22.

The last sentence of that paragraph would then be replaced with the following:

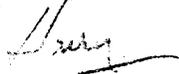
"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitration should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

I would then eliminate the last paragraph beginning with "To be sure."

If you could see your way clear to reconstruct part IVC along these lines, you have my joinder.

Sincerely,

Justice Brennan



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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 25, 1983

Re: No. 81-1203 - Moses H. Cone Memorial Hospital  
v. Mercury Construction Corporation

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry", with a horizontal line underneath.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 4, 1983

81-1203 Moses H. Cone Memorial Hospital v. Mercury

Dear Bill:

I agree with your holding and most of your opinion.

I do have a couple of concerns. On the finality issue, I have thought that the collateral order doctrine announced in Cohen was all we need rely on. I am inclined to agree in this case that under the state court's order, Mercury was "effectively out of court". But expressing this view may invite future litigation as to whether particular orders were final. Idlewild Liquor Corp. really did not focus on this question except offhandedly in a single footnote.

In Part II, you conclude in n. 14 with a discussion of Coopers & Lybrand. The final sentence in the footnote can be read as limiting the reasoning of that case to class decertification orders. I would think that it is unwise - certainly it is unnecessary - to limit Coopers' reasoning to class decertification orders. Putting it differently, I would not like to say in this case that Coopers created an exception to the rule of finality. Indeed, one could view this case as an exception to Coopers. Perhaps you could omit the final sentence or have it say: "Accordingly, the reasoning of Coopers & Lybrand is inapplicable".

In Part II-C (p. 20) the sentence beginning seven lines from the bottom of the page ("We held that . . .") may be read more broadly than perhaps we would intend. It suggests that all matters pertaining to arbitrability under the federal Act are governed by a federal law of contracts. Since normally interpretation of contracts remains a state law matter, it would help me if you simply omitted the portion of the sentence following the semicolon. This is all we really need say here.

Finally, Bill, Part V decides here the substantive issue of arbitrability. As the only issue appealed to CA4 was whether the DC abused its discretion, I suppose that normally we would simply remand on the merits of the controversy. For the reasons you state, however, I agree that we are justified in disposing of the merits. What would you think of adding, however, the following at the end of the second sentence in the second paragraph on page 25:

"The only issue appealed to CA4 was whether the DC abused its discretion in staying Mercury's suit to compel arbitration. As we affirm on this issue, normally we would remand on the merits of availability. But we are not disposed to disturb the discretion of the Court of Appeals in its disposition of this case."

I do not think the foregoing suggestions, if acceptable, would affect in any way the excellence of your opinion that I expect to join.

Sincerely,



Justice Brennan

lfp/ss

January 6, 1983

81-1203 Moses Cone Hospital v. Mercury

Dear Bill:

I appreciate your willingness to make the changes indicated in your letter of January 5.

Your proposed changes in fn. 14 and in Part V are satisfactory. The same is true with respect to your suggestion of limiting the discussion of Idlewild to abstention and analogous cases to create a "bright line rule".

I still hope you will consider omitting the phrase I mentioned in your discussion of the Arbitration Act. It seems unnecessary, as the remainder of the paragraph (as you note) makes clear that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration".

Having stated this general principle, there is no need to state a broad rule "that arbitrability is [not] governed by state law rules of contract interpretation". Would it not be well to allow the courts to apply the general principle on a case-by-case basis.

I nevertheless think you have a fine opinion, and have sent you separately a join note.

Sincerely,

Justice Brennan

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 6, 1983

81-1203 Moses Cone Hospital v. Mercury

Bill:

Please join me.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 29, 1982

Re: No. 81-1203 Moses H. Cone Memorial Hospital  
v. Mercury Construction Corporation

Dear Bill:

In due course I will circulate a dissent in this case.

Sincerely,



Justice Brennan

cc: The Conference

Q.3

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: **Justice Rehnquist**

Circulated: \_\_\_\_\_

Recirculated: JAN 12 1983

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-1203

MOSES H. CONE MEMORIAL HOSPITAL, PETITIONER *v.* MERCURY CONSTRUCTION CORPORATION

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

[January —, 1983]

JUSTICE REHNQUIST, dissenting.

In its zeal to provide arbitration for a party it thinks deserving, the Court has made an exception to established rules of procedure. The Court's attempt to cast the District Court's decision as a final judgment fails to do justice to the meaning of the word "final", to the Act of Congress that limits the jurisdiction of the courts of appeals, or to the district judges who administer the laws in the first instance.

If the District Court had not stayed the proceeding, but had set a trial date two months away, there would be no doubt that its order was interlocutory, subject to review only by mandamus or pursuant to 28 U. S. C. §1292(b). This would be true even though §4 of the Arbitration Act provides that "the court shall proceed summarily" to trial, because an order setting a trial date only guides the course of litigation, and does not, of its own force, dispose of it on the merits. Such an order is tentative; that is, it is subject to change at any time on the motion of a party or by the court, *sua sponte*.

The order the District Court actually entered is no more final. It delayed further proceedings until the completion of pending litigation in the state courts. This order was also tentative; it was subject to change on a showing that the state proceedings were being delayed, either by the Hospital

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STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: **Justice Rehnquist**

Circulated: \_\_\_\_\_

JAN 19 1983

Recirculated: \_\_\_\_\_

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 81-1203

MOSES H. CONE MEMORIAL HOSPITAL, PETITIONER *v.* MERCURY CONSTRUCTION CORPORATION

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

[January —, 1983]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

In its zeal to provide arbitration for a party it thinks deserving, the Court has made an exception to established rules of procedure. The Court's attempt to cast the District Court's decision as a final judgment fails to do justice to the meaning of the word "final", to the Act of Congress that limits the jurisdiction of the courts of appeals, or to the district judges who administer the laws in the first instance.

If the District Court had not stayed the proceeding, but had set a trial date two months away, there would be no doubt that its order was interlocutory, subject to review only by mandamus or pursuant to 28 U. S. C. § 1292(b). This would be true even though § 4 of the Arbitration Act provides that "the court shall proceed summarily" to trial, because an order setting a trial date only guides the course of litigation, and does not, of its own force, dispose of it on the merits. Such an order is tentative; that is, it is subject to change at any time on the motion of a party or by the court, *sua sponte*.

The order the District Court actually entered is no more final. It delayed further proceedings until the completion of pending litigation in the state courts. This order was also tentative; it was subject to change on a showing that the

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 3, 1983

Re: 81-1203 - Moses Cone Hospital v.  
Mercury Construction Corp.

Dear Bill:

In this case I have no doubt whatsoever about the bottom line. For the reasons stated in your opinion and that of the Court of Appeals, the District Court plainly abused its discretion in refusing to order arbitration promptly. But I have some misgivings about your treatment of our prior opinions.

I agree with your basic position that there is a strong presumption that federal courts should exercise their jurisdiction over cases properly before them; it requires a good, solid reason for a district court to do otherwise. In general I have no objection to the use of the factors set forth in Colorado River, precisely because they are sufficiently flexible to make different results appropriate in different situations. Our precedents indicate that the area of discretion is wide enough to permit district courts to stay or dismiss proceedings in deference to parallel state proceedings in cases like Colorado River itself and Calvert Fire Insurance.

I am, however, troubled by the implication in your opinion in this case that your dissent in Calvert Fire Insurance is an accurate statement of the law. In Calvert the substantial issues in the lawsuit were state-law questions that had proceeded for several months in state court; in my view it was entirely appropriate for Judge Will to stay the federal-court proceedings, and the Seventh Circuit was incorrect in reversing on the ground that there was an absolute duty to exercise federal jurisdiction. I would therefore have voted to reverse even if the case had arisen on appeal rather than on mandamus. I would not expect you to endorse every word of the plurality opinion in that case, but it is clear that the holding of the Court was inconsistent with the reasoning of your dissent, which would

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simply have upheld the court of appeals. As I read it, your Calvert dissent requires the conclusion that Judge Will abused his discretion--on remand as well as in the first instance--by postponing the decision of the federal securities law issue until the Illinois litigation was over. I cannot agree. Unless you can modify your opinion to endorse the holding in Calvert, I do not believe that I will be able to join you.

Respectfully,



Justice Brennan

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

Re: 81-1203 - Moses Cone v. Mercury Const.

Dear Bill:

Please join me.

Respectfully,

A handwritten signature in dark ink, appearing to be 'J.B.', written in a cursive style.

Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 4, 1983

No. 81-1203 Moses H. Cone Memorial Hospital  
v. Mercury Construction Corp.

Dear Bill,

I will await the dissent in this case.

Sincerely,



Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 17, 1983

No. 81-1203 Moses H. Cone Memorial Hospital  
v. Mercury Construction Corp.

Dear Bill,

Please join me in your dissent.

Sincerely,



Justice Rehnquist

Copies to the Conference