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The Enforceability of Arbitration Agreements by and Against Nonsignatories

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I. INTRODUCTION

As the scope and popularity of arbitration grows in tandem with the increasing complexity of business transactions, the question of who is bound by and who may demand arbitration agreements has become a common and important issue in arbitration law.[1] While arbitration has

1. *See* Noel C. Paul, *Got a Score to Settle? Consider Arbitration*, CHRISTIAN SCI. MONITOR, June 18, 2001, at 16 (discussing the growing popularity of arbitration by businesses as an alternative to litigation); *In re* Humana Inc. Managed Care Litig., 285 F.3d 971, 973 (11th Cir. 2002) ("The suit is made particularly complicated by the wide array of different relationships among the various parties in the action."); Norcom, Inc. v. CRG Int'l Inc., No. CIV.A.01-3571, 2002 WL 245984, at *1 (E.D. La. Feb. 20, 2002) (involving arbitration agreements among numerous interrelated parties to a dispute over telecommunications service to consumers);

numerous benefits in resolving disputes without the costs associated with litigation, there will be parties who seek to avoid arbitration for tactical reasons.[2] Unfortunately for the practitioner, the client, and the arbitrator, the jurisprudence on who is bound to arbitrate disputes and who may demand arbitration of disputes continues to evolve. This might appear to be an issue that rarely arises; but in the current legal environment, it is a common question raised frequently as the demand for arbitration of disputes grows. And important judicial opinions continue to add to the body of law on this question—so much so that a significant part of the case law addressing these questions has been decided in the past three years.

A signatory to an arbitration agreement is someone who has signed some form of an arbitration agreement; a nonsignatory is someone who has not. An arbitration agreement exists, but not one signed by all the parties to the dispute. This Article attempts to address questions presented to courts in recent years addressing the enforceability of arbitration agreements by and against nonsignatories to those agreements. Review of the current case law reveals a number of circumstances in which a nonsignatory may be bound to arbitrate and also a number of instances in which nonsignatories may compel signatories to arbitrate. The purpose of this review is to discern principles from a number of the key decisions addressing these issues under both federal and state law, and to distill rules of applicability so that practitioners can appropriately advise clients as to the drafting of agreements and pleadings. The enormous variety of the factual situations in which nonsignatory arbitration is now being reviewed by state and federal courts demonstrates that this is a key planning issue for business lawyers and litigators.

The jurisprudence of arbitration reveals a basic theme: that courts will bind nonsignatories to arbitration agreements where the facts indicate that it would be fair to bind them under traditional contract law. Typically, there are seven theories which can be used to bind nonsignatories to arbitration agreements: (1) alter ego/corporate veil piercing, (2) incorporation by reference, (3) assumption by conduct, (4) equitable estoppel, (5) agency, (6) successors in interest, and (7) third-

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Watkins Eng'rs & Constructors, Inc. v. Deutz A.G., No. CIV.A.30CV1147-M, 2001 WL 1545738, at *1 (N.D. Tex. Dec. 3, 2001) ("Several different agreements connect the various parties involved in the expansion.").

2. *See* Paul, *supra* note 1, at 16.

party beneficiary.[3] Courts may also allow a nonsignatory to enforce arbitration agreements where the facts indicate that it would be fair to do so under the quasi-contract theory of equitable estoppel.[4] While it might not be surprising that general rules of contract are applied in determining who is bound to arbitrate disputes, the relevant cases indicate that the nature of the claims asserted and the legal relationship of the parties are the most critical factors in a court's determination where nonsignatories are involved.

This Article aims to address several issues pertinent to litigators, businesspeople, business lawyers drafting agreements, and arbitrators alike. Part I addresses nonsignatory rights and describes situations in which a nonsignatory may be the active party seeking arbitration against a party who has signed an arbitration agreement. Part II outlines the principles and circumstances that allow signatories of arbitration agreements to enforce arbitration of disputes initiated by nonsignatories. Part III analyzes whether nonsignatory rights and liabilities are governed by the Federal Arbitration Act (FAA),[5] or state arbitration statutes. Finally, in Part IV, the Article outlines proactive steps by which arbitrators and practitioners can reduce the uncertainty in light of the current law. Specifically, the reader will see that the drafting of the arbitration agreement itself, or of subsequent pleadings, can enhance or reduce the possibility of nonsignatories being bound or being able to assert an arbitration clause themselves.

II. BACKGROUND PRINCIPLES

Courts must determine two basic issues when confronted with a motion to compel arbitration: (1) whether an agreement to arbitrate exists and (2) the scope of the agreement, that is which types of disputes the parties intended to arbitrate.[6] In addressing these issues, the courts are guided by the general contract principle that parties are not bound to arbitrate unless they are parties to the agreement.[7] The corollary to this is

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3. *See* Thomson-C.S.F., S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995); Bel-Ray Co. v. Chemrite Ltd., 181 F.3d 435, 440-43 (3d Cir. 1999); Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, 206 F.3d 411, 417 (4th Cir. 2000); Amoco Transp. Co. v. Bugsier Reederei & Bergungs, A.G., 659 F.2d 789, 795-96 (7th Cir. 1981); McCarthy v. Azure, 22 F.3d 351, 363 (1st Cir. 1994).

4. *See* Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524 (5th Cir. 2000).

5. 9 U.S.C. §§ 1-16 (2000).

6. *See* Web v. Investacorp, Inc., 89 F.3d 252, 257-58 (5th Cir. 1996).

7. First Options of Chi. v. Kaplan, 514 U.S. 938, 943 (1995).

that nonparties to arbitration agreements generally lack standing to enforce such agreements against any other parties.[8]

A. *The Federal Policy Favoring Arbitration of Disputes*

While the intent of the parties usually controls on the question of who is bound and who may enforce, the FAA establishes that, "as a matter of federal law, 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."[9] Courts adhere to this strong federal policy favoring arbitration and resolve any ambiguity as to the availability of arbitration in favor of arbitration.[10] While congressional intent in enacting the FAA may have been to place arbitration agreements on the same footing as other contracts, it has been established through federal jurisprudence that arbitration agreements may be more likely of enforcement than other kinds of contracts.[11] The United States Supreme Court and the federal circuit courts of appeal have adopted a set of rules that all courts are to apply broadly in construing arbitration agreements and in determining whether particular disputes are arbitrable. As the United States Court of Appeals for the Second Circuit has stated, "[T]o determine arbitrability, [a court] need only consider whether there exists an interpretation of the parties' agreement that covers the dispute at issue."[12] Indeed, "[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[13]

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8. Holly M. Roberts, Note, Grigson v. Creative Artists Agency*: Signatories "Can't have it Both Ways"—Non-signatories to a Contract Agreement Now Have Standing to Compel Arbitration*, 47 LOY. L. REV. 963 (2001).

9. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

10. *Id.*; *see, e.g.*, Fedmet Corp. v. M/V Buyalyk, 194 F.3d 674, 676 (5th Cir. 1999).

11. *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (1997).

12. *In re* Chung, 943 F.2d 225, 230 (2d Cir. 1991).

13. United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (holding that unless a provision expressly excludes a particular grievance or dispute, "only that most forceful evidence of a purpose to exclude the claim from arbitration can prevail"); David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 250-51 (2d Cir. 1991), *cert. dismissed*, 112 S. Ct. 17 (1991) (citations omitted).

B. What Is Arbitrable?

Needless to say, the cases are legion that confirm the broad federal and state law presumption favoring the enforceability of arbitration agreements and require ambiguities in those agreements will be resolved in favor of arbitration.[14] However, there are limits to this presumption.[15] The law of arbitration is essentially contractual, thus the presumption in favor of arbitration means that courts will analyze the scope of such agreements using state contract law principles to answer the question of who is bound.[16] In addressing these questions, Louisiana state courts, for example, follow federal arbitration jurisprudence because the FAA and Louisiana Arbitration Law are so similar, and because federal law preempts contrary state law in matters involving interstate commerce.[17] Federal supremacy in the law of arbitration was reemphasized and expanded by the United States Supreme Court in *Circuit City Stores, Inc. v. Adams*, a decision which this Article will touch on, leaving then the question of how much state arbitration law still applies.[18]

C. Who Is Bound? The Nonsignatory Issue

The principle that arbitration is a matter of contract between the parties is not particularly useful with nonsignatory issues. Neither is the corollary requiring a bilateral arbitration agreement before a court may require a party to participate.[19] If the analysis stopped there, however, there would be no need for this Article. "No contract, no arbitration" does not accurately reflect the present legal complexity of the subject. Many courts have recognized that the obligation to arbitrate a dispute is *not* limited to only those who have personally signed the written agreement.[20] Applying common law principles of contract and agency, courts have held that a nonsignatory can enforce, or even be bound by, an

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14. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (the first United States Supreme Court case to explicitly state this); *see, e.g.*, Thomas v. Desire Cmty. Hous. Corp., 773 So. 2d 755, 759 (La. Ct. App. 2000) (evidencing the acceptance by state courts of the presumption articulated by the federal courts).

15. *See* Doctor's Assocs., Inc. v. Cassarotto, 517 U.S. 681 (1996).

16. Woodrow Wilson Constr. Co. v. MMR-Radon Constr. Inc., 635 So. 2d 758, 759 (La. Ct. App. 1994).

17. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

18. 532 U.S. 105, 112 (2001) (holding that section 1 of the FAA's exclusion is to be interpreted narrowly).

19. *See* First Options of Chicago v. Kaplan, 514 U.S. 938, 947 (citing AT & T Techs., Inc. v. Communications Workers of Am., 474 U.S. 643, 648 (1986)).

20. *See* Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, 206 F.3d 411, 416 (4th Cir. 2000).

arbitration agreement in a written contract executed by third parties.[21] Additionally, courts have held arbitration agreements enforceable against both signatories and nonsignatories where "special relationships," e.g., employee-employer, lender-creditor, beneficiary, successor, spousal, and guarantor are present.[22]

On its face, a departure from "no contract, no arbitration" standard is not entirely unreasonable, where a signatory has expressly agreed to arbitrate *something* with *someone*—just not with the party seeking to compel arbitration. Once this concept has been adopted, some courts have gone a step further extending the theory to hold that under certain circumstances a signatory may even require a nonsignatory to arbitrate as well.

III. NONSIGNATORY RIGHTS: COMPELLING SIGNATORIES TO ARBITRATE

A. *The Fifth Circuit's Equitable Estoppel Ruling in* Grigson v. Creative Artists Agency, L.L.C.

In *Grigson*, the United States Court of Appeals for the Fifth Circuit held that a nonsignatory defendant may compel arbitration against a signatory plaintiff under the doctrine of equitable estoppel in two separate circumstances:

> (1) when the signatory, in asserting its claim against the nonsignatory, must rely on the terms of the same written agreement that contains the arbitration provision; or
> (2) when the signatory "raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."[23]

Importantly, when applying either of these tests in this case, it was the plaintiff in a law suit who is the signatory and it was the nonsignatory defendant who argued that the plaintiff must arbitrate and not litigate.[24] The Fifth Circuit panel indicated that the key in applying this doctrine is "fairness"—an inherently subjective concept.[25] Although the court noted that the doctrine is more applicable in cases involving *both* of the

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21. *Id.* at 416-17; *see also* Thomson-C.S.F., S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995).

22. Rushe v. NMTC, Inc., No. 01-3440, 2002 WL 575706, at *8 (E.D. La. Apr. 16, 2002).

23. Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000) (adopting the "intertwined-claims" theory announced by the United States Court of Appeals for the Eleventh Circuit in *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999)).

24. *Id.* at 528.

25. *Id.*

aforementioned circumstances, the test is disjunctive. More importantly, every determination of nonsignatory rights to compel arbitration must be based on the facts presented.[26]

1. The Facts

In *Grigson*, the signatory plaintiffs alleged that the nonsignatory defendants, actor Matthew McConaughey and his agent, Creative Artists Agency, had tortiously interfered with the plaintiffs' contract with TriStar Pictures for distribution of a film owned by the plaintiffs and entitled "Return of the Texas Chainsaw Massacre."[27] The film's owners claimed that the defendant nonsignatories had pressured TriStar to limit the distribution of the movie.[28]

2. The Arguments

Because only the plaintiffs and TriStar signed the distribution agreement that contained the arbitration clause, the plaintiffs argued that the nonsignatory defendants could not compel arbitration of the plaintiffs' claims against them.[29] The Fifth Circuit disagreed. In a divided opinion, the court held that because the plaintiffs' claim of tortious interference were based upon the distribution agreement which contained an arbitration clause. Also, because the claim included allegations of "interdependent and concerted misconduct" by both the nonsignatory defendants and signatory TriStar, the nonsignatory defendants could compel the plaintiffs to arbitrate their claims based upon the doctrine of equitable estoppel.[30] In a strong dissent by Judge Dennis, he argued, among other things, that "estoppel" is a catch-all term used to achieve a particular result when no other theory applies.[31]

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26. *Id.* at 527.

27. *Id.* at 526-27. The film, which also starred Renee Zellweger, was made before these actors became famous. Presumably the plaintiff film owners sought to benefit from the actors' recent stardom; and presumably the actors and their agent Michael Ovitz did not wish this. For a detailed discussion about this case, see R. Slater's book, OVITZ: THE INSIDE STORY OF HOLLYWOOD'S MOST CONTROVERSIAL POWER BROKER (McGraw Hill ed., 1997).

28. *Id.*

29. *Id.* at 526.

30. *Id.* at 531.

31. An eight-page dissent by Judge Dennis follows the seven-page majority opinion. The dissent begins, "Nearly anything can be called an estoppel. When a lawyer or a judge does not know what other name to give fore his decision to decide a case in a certain way, he says there is an estoppel." *Id.* at 532 (Dennis, J., dissenting).

B. *The Fifth Circuit After* Grigson*: "Intertwined Claims" Based Estoppel?*

In Fifth Circuit nonsignatory arbitration rulings post-*Grigson*, the reasoning seems consistent: the court's determination of whether to compel arbitration is dependent on the nature of the claims asserted and the relationship of the parties; however, the results of those cases differ from *Grigson*.

1. *Hill v. G.E. Power Systems, Inc.*

Some two years later in *Hill*, the Fifth Circuit declined an opportunity to expand on the limits of the *Grigson* analysis, reiterating that each case turns on its individual facts and that trial courts have great leeway in applying the *Grigson* tests.[32] *Hill* involved a complex business interaction between Canatxx and General Electric Power Systems, Inc. (GESPI) to build power plants and gas storage facilities in the United Kingdom.[33] A General Electric Capital Corporation (GECC) affiliate was appointed the financial advisor to the project. GESPI was to secure the financial arrangements for the project and to subsequently contract with Canatxx for these services.[34] None of the financial agreements between GECC and Canatxx contained arbitration clauses; however Canatxx and GESPI subsequently negotiated a Termination Agreement that contained an arbitration clause.[35] The Termination Agreement specified that it "'supersede[d] all prior agreements, discussions, and understandings' and also disallow[ed] any rights that might accrue to any third party beneficiary."[36] In a dispute that ultimately arose, Canatxx alleged that GECC and GESPI (the nonsignatory and signatory, respectively) had conspired to force Canatxx to use a prematurely designed turbine and to withhold payments, stall financing, and deny crucial information to Canatxx during the project.[37] The court held that Canatxx's claims against GECC and GESPI were identical; therefore, all claims against GECC, the nonsignatory, should be stayed pending

32. 282 F.3d 343, 349 (5th Cir. 2002); *see also* Primerica Fin. Servs., Inc. v. Coley, 192 F. Supp. 2d 655, 657 (N.D. Miss. 2002) (holding that the nonsignatory plaintiffs did not allege any sufficient misconduct between signatory and nonsignatory parties to compel arbitration under the *Grigson* equitable estoppel doctrine, nor was there evidence that the signatory must rely on terms of arbitration agreement in asserting claims against the nonsignatory).

33. *Id.* at 345-46.

34. *Id.* at 345.

35. *Id.*

36. *Id.* at 346.

37. *Id.*

arbitration of Canatxx's dispute with GESPI since resolution of those claims might prejudice the arbitration proceeding.[38] However, GECC also sought to compel Canatxx to arbitrate its disputes against GECC based on the equitable estoppel analysis outlined in *Grigson*.[39]

The Fifth Circuit noted that it could not find the district court's refusal to compel arbitration clearly erroneous for two reasons.[40] The reviewing court stated that "GECC stops short of asserting that Canatxx relies upon the express terms of the Termination Agreement in asserting its claims, and thus the first prong of the *Grigson* test is not met here."[41] The court then noted that while the second of the two disjunctive tests of *Grigson* was met, that is, allegations of substantially interdependent and concerted misconduct by both the nonsignatory and signatory defendants, it was properly within the district court's discretion to refuse to compel arbitration.[42] The Fifth Circuit reiterated that "this is not a rigid test, and . . . each case turns on its facts."[43] Relying on the fundamental principles of flexibility and fact-based analysis, the Fifth Circuit found no error in the district court's ruling because refusing to compel arbitration in this circumstance would not "fly in the face of fairness."[44]

2. *James H. Westmoreland v. Roland J. Sadoux et al.*[45]

Westmoreland involved the application of traditional agency theory to arbitrability concepts. Westmoreland, the signatory plaintiff, claimed he had been fraudulently induced by the other shareholders to sell his stock in a company with the lucrative Santa Domingo garbage hauling contract.[46] The defendants, who were fellow shareholders, sought to enforce an arbitration provision contained within Westmoreland's shareholder agreement with the company, though they were not directly parties to the agreement.[47] The defendants sought to require Westmoreland, the signatory, to arbitrate claims against Sadoux, the sole owner of the company that had been a co-stockholder with Westmoreland.[48] The court

38. *Id.*
39. *Id.*
40. *Id.* at 349.
41. *Id.*
42. *Id.*
43. *Id.* at 348.
44. *Id.* at 349.
45. 299 F.3d 462 (5th Cir. 2002).
46. *Id.* at 467.
47. *Id.*
48. *Id.*

held that Sadoux did not have the right to compel arbitration because (1) Westmoreland was not relying upon the terms of a written agreement in asserting his claims against the nonsignatories such as Sadoux, and (2) Westmoreland did not raise allegations of substantially interdependent and concerted misconduct by both a nonsignatory and a signatory.[49] The court distinguished *Grigson*, noting that in *Grigson*, the signatory had relied upon the terms of a written agreement, whereas in *Westmoreland*, the claim was for fraud.[50] In *Westmoreland*,[51] the Fifth Circuit declined to adopt the reasoning of the United States Court of Appeals for the Third Circuit in *Pritzker v. Merrill Lynch, Pierce, Fenner, & Smith*.[52] Diverging from the *Pritzker* rationale, the Fifth Circuit held that an agent of a signatory to an arbitration agreement could not invoke an arbitration clause under traditional agency theory.[53] In both *Pritzker* and *Westmoreland*, it was a nonsignatory agent seeking to compel arbitration. Given the opposite outcome from the Third Circuit in *Pritzker*, there exists a split in the circuits on this question of agency.[54]

C. *The United States District Courts Respond*

Since the Fifth Circuit's adoption of the equitable estoppel or intertwined-claims theory to compel arbitration, a number of federal trial courts within the circuit, i.e., Louisiana, Texas, and Mississippi, have applied the *Grigson* test. Various district courts have allowed nonsignatories to compel signatory plaintiffs to arbitrate their disputes based on one or both factors of the test.[55]

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49. *Id.*

50. This contrast is not complete: in *Grigson* one of the claims for was for tortious interference with contract, rather than breach or non-performance. Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 254, 257 (5th Cir. 2000).

51. *Westmoreland*, 299 F.3d at 466 (citing *Pritzker*, 7 F.3d 1110, 1121-22 (3d Cir. 1993)).

52. 7 F.3d 1110, 1121-22 (3d Cir. 1993) (holding in part that the employee-agent of a stock brokerage, though not a signatory, was bound by employer-principal's agreement to arbitrate statutory ERISA claims—including breach of fiduciary duties—against her, her employer and her employer's sister corporation brought by pension plan trustees). The court stated, "Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." *Id.* at 1122.

53. *Westmoreland*, 299 F.3d at 464.

54. The Fifth Circuit noted its opinion was consistent with the First and Ninth Circuits to the effect that an agent of a signatory cannot compel arbitration merely due to the status of an agent.

55. The following discussion only outlines cases from Louisiana. For cases in Mississippi and Texas, which have held similarly, see *Bank One AZ, NA v. Wilton Hurst G.P. Corp.*, No. 3:00-CV-2254-X, 2001 WL 276891, at *2 (N.D. Tex. Mar. 19, 2001); *Pediatric Physician Alliance, Inc. v. Boyd*, No. 3:01-CV-0877, 2002 WL 1315784, at *4 (N.D. Tex. June 11, 2002); *American Heritage Life Insurance Co. v. Harmon*, 147 F. Supp. 2d 511, 514-515 (N.D.

1. *Bellizan v. Easy Money of Louisiana*

In *Bellizan*, the plaintiff alleged that the defendant, Easy Money, charged usurious interest and that each of the nonsignatory codefendants conspired with each other and with Easy Money to charge usurious interest.[56] Although the plaintiff had only borrowed money from Easy Money, the plaintiff also sought to assert claims against a group of other individual defendants who controlled and operated Easy Money. However, the plaintiff borrower only had a contract and arbitration agreement with Easy Money.[57] Because the plaintiff alleged substantial cooperation and interdependent tortious conduct among the signatory and nonsignatory defendants—conduct related to the terms of the contract with the signatory—the court allowed the nonsignatory defendants to compel arbitration of the plaintiff's disputes against them.[58] Consequently, the court held that the motion of the nonsignatory defendants to compel arbitration against them would be granted pursuant to the "intertwined facts" test of *Grigson* and the principle of equitable estoppel.[59] In essence, the court held that both of the *Grigson* tests applied to these facts.

2. *Vigil v. Sears National Bank*

In *Vigil*, the plaintiff customer had executed an arbitration agreement with the Sears National Bank, but not with the retail company, Sears Roebuck & Co. (Sears). The two were both Sears, Inc. entities, but were separate companies.[60] A dispute arose wherein the plaintiff claimed he was charged improper late fees on his Sears credit card and account. The court held that the customer did not have the right to litigate the customer's claims against the Sears retail company if the customer had a duty to arbitrate with Sears National Bank.[61] The court noted that the arbitration clause broadly required arbitration of disputes arising out of "relationships *which result from this agreement*."[62] The court fairly held

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Miss. 2001); *Smith v. Equifirst Corp.*, 117 F. Supp. 2d 557, 566 (S.D. Miss. 2000); and *In re Koch Industries, Inc.*, 49 S.W.3d 439, 447 (Tex. App. 2001).

56. No. CIV.A.00-2949, 2002 WL 1066750, at *3 (E.D. La. May 29, 2002).
57. *Id.*
58. *Id.*
59. *Id.* at *5-*6.
60. 205 F. Supp. 2d 566, 568 (E.D. La. 2002).
61. *Id.* at 566.
62. *Id.* at 568 (emphasis added).

that this language was broad enough to include both of these relationships and that the agreement was broad enough to include any claims the customer made, whether against Sears National Bank or Sears, though Sears was not a formal party to the agreement.[63] This is a clear example where anticipating issues in drafting can resolve issues in favor of, or against, arbitration in later disputes.[64]

D. Implications for Fifth Circuit Practitioners

A review of the critical Fifth Circuit opinions—*Grigson*, *Hill*, and *Westmoreland*, as well as their district court progeny, is instructive to attorneys counseling clients who are considering the choice between litigation or arbitration. Drafting language that is more inclusive will tend to bind parties involved in the transaction. Likewise, how a claim is pled effects the question of arbitrability. This is because of the assertion of a claim under a contract containing an arbitration clause is more likely to require a signatory party to be compelled to arbitrate than litigate. Disputes involving assertions that a signatory and nonsignatory engaged in interdependent concerted misconduct are also more likely to result in arbitration under the two key tests presently prevailing in the Fifth Circuit. Thus lawyers seeking to litigate will strategically plead their cases in a manner that will not implicate the *Grigson* rule.

The lesson is clear: equitable factors and the nature of the complaint will be most important in the court's analysis. However, parties may be forced into complex "equitable factors" analysis to determine who is required to arbitrate disputes, conflicting with a basic purpose of arbitration, avoidance of costs and uncertainties that may accompany protracted litigation. Most courts will prefer that parties make their intent to include all parties and claims under the reach of arbitration agreements explicit. As the court reasonably noted in *Westmoreland*: "Categories of dispute that cannot exit the public court houses aside, it is well and good if the parties to a private agreement wish to choose an alternative dispute system, but we are wary of choices imposed after the dispute has arisen and the bargain has long since been struck."[65]

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63. *Id.*
64. *Id.*
65. Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002).

IV. BEYOND THE INTUITIVE: THEORIES FOR ENFORCING ARBITRATION AGREEMENTS AGAINST NONSIGNATORIES

An introductory framework for discussing this subject is useful. Because the question of who is bound by an arbitration agreement is a matter of ordinary contract law, the jurisprudence suggests that signatories may enforce arbitration agreements against nonsignatories under seven possible theories:[66]

(1) alter ego and corporate veil piercing,
(2) incorporation by reference,
(3) assumption by conduct,
(4) equitable estoppel,
(5) agency,
(6) successors in interest, and third-party beneficiary.

Although the following cases must be categorized for the sake of a coherent analysis, they often do not fit neatly into one particular category, and the facts of a case may suggest inclusion of that particular case in more than one of these categories. Nevertheless, each case is still instructive in deciphering the basic principles and hopefully discerning consistency of those principles.

A. Alter Ego/Veil Piercing

It is well established that corporations are typically regarded as distinct legal entities from their stockholders.[67] When a third party seeks to compel a nonsignatory to arbitrate in this context, courts must decide whether the signatory was the alter ego of the nonsignatory.[68] For example, in *Westmoreland*, a stockholder was not suing the purchaser of his stock, who was a signatory, but the sole shareholder of that buyer. Simply because the fact that Sadoux was sole shareholder alone did not allow him to compel Westmoreland to arbitrate.[69]

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66. *See* Thomson-C.S.F., S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995); Bel-Ray Co. v. Chemrite Ltd., 181 F.3d 435, 440-43 (3d Cir. 1999); Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen, 206 F.3d 411, 417 (4th Cir. 2000); Amoco Transp. Co. v. Bugsier Reederei & Bergungs, A.G., 659 F.2d 789, 795-96 (7th Cir. 1981); McCarthy v. Azure, 22 F.3d 351, 363 (1st Cir. 1994).

67. Pine Tree Assocs. v. Doctor's Assocs., Inc., 654 So. 2d 735 (La. Ct. App. 1995).

68. *See McCarthy*, 22 F.3d at 363.

69. *Westmoreland*, 299 F.3d at 462.

1. Louisiana State Cases

As the court in *Pine Tree Associates v. Doctor's Associates, Inc.* stated, "[t]he legal fiction of a distinct corporate entity may be disregarded when a corporation is so organized and controlled as to make it a mere instrumentality or adjunct of another corporation."[70]

In *Monumental Life Insurance*, the plaintiff insurance company, Monumental, and Syndicated Underwriters, Inc. (Syndicated) entered into a reinsurance contract.[71] Monumental became dissatisfied with Syndicated and demanded arbitration, which Syndicated refused.[72] Monumental became concerned that Syndicated was insolvent, so it sought to compel the owner of Syndicated, Ronald Jakelis, as an individual, and the Jakelis companies (R.A.J. Holdings, Inc.), as affiliates of Syndicated, to participate in arbitration.[73]

In *Monumental Life Insurance Co. v. R.A.J. Holdings, Inc.*, Judge Schwartz concluded that courts usually pierce the corporate veil in one of two situations: where one corporation is completely controlled by another or where it is necessary to reach the alter ego of a corporation to prevent fraud.[74] Under Louisiana law, a court will examine various factors to determine if a corporation is an agent, tool, instrumentality, or alter ego of other affiliated entities.[75] A number of these factors are relevant to whether the court should pierce the corporate veil to reach the alter ego, including: (1) commingling of corporate and shareholder funds, (2) failure to follow statutory formalities for incorporating and transacting corporate affairs, (3) under-capitalization, (4) failure to provide separate bank accounts and bookkeeping records, and (5) failure to hold regular shareholder and director meetings.[76] In *Monumental Life Insurance*, noting the lack of binding precedent regarding the issue of ordering arbitration against a nonsignatory,[77] the court turned to state law regarding alter ego doctrine to determine whether Monumental's allegations were sufficient to compel Jakelis and the Jakelis affiliates to arbitrate. The court concluded that arbitration could be enforced if certain facts were established.[78] These included whether the companies

70. 654 So. 2d at 737.
71. *Id.* at *1.
72. *Id.*
73. *Id.*
74. 1999 U.S. Dist. LEXIS 13035, at *2 (E.D. La. 1999).
75. *Pine Tree Assocs.*, 654 So. 2d at 737-38.
76. *Id.*
77. *Monumental Life Ins.*, 1999 U.S. Dist. LEXIS 13035, at *2.
78. *Id.* at *3.

were all owned by Jakelis, had a common director/officer, common employees, too little capital, a parent-subsidiary relationship, and common physical and accounting operations.[79]

The *Monumental Life Insurance* case preceded the Fifth Circuit's decision in *Grigson*. Thus in the absence of a controlling Fifth Circuit or United States Supreme Court opinion to serve as precedent on this issue, and therefore it ordered discovery into the eighteen factors to test Jakelis's alter ego status.[80] The United States Courts of Appeal for the First and Fourth Circuits, however, have discussed alter ego and corporate veil piercing doctrines, although the decisions were in the context of nonsignatory rights rather than nonsignatory liabilities.[81]

2. Federal Application of Alter Ego/Piercing the Corporate Veil Doctrine

Reflecting differing approaches to the doctrine, the following cases are illustrative of the lack of a consensus on current predictable standards by which nonsignatory arbitration will be required or be unenforceable.

In *McCarthy v. Azure*, the First Circuit decided that a nonsignatory sole shareholder's attempt to compel arbitration by enforcing an arbitration agreement between the corporation and the plaintiff was actually an attempt to evade litigation.[82] The defendant sole shareholder affirmatively asserted that he was the alter ego of the signatory corporation and thus had the right to compel arbitration.[83] The court rejected the argument and concluded that the defendant signed the arbitration agreement in his corporate capacity, not in his individual

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79. *Id.*

80. *Id.* at *3-*4.

81. McCarthy v. Azure, 22 F.3d 351 (1st Cir. 1994); J.J. Ryan & Sons v. Rhome Poulene Textile, S.A., 863 F.2d 315 (4th Cir. 1988).

82. *McCarthy*, 22 F.3d at 363. In *McCarthy*, the defendant breached a contract with plaintiff related to his purchase of plaintiff's company, in which he promised to engage plaintiff as president, chief engineer, and CEO, and offer plaintiff stock options. *Id.* at 354. After being informed by his "spiritual leader" that the business he had bought from plaintiff was "incompatible with his divine plan," and after firing all the employees including the plaintiff, the defendant formed another company which acquired the remnant of the one he had purchased from plaintiff, and began selling shares to the public. *Id.* The new company carried on the business of its predecessor in interest, underground storage and marketed tanks manufactured pursuant to technology patented by plaintiff. *Id.*

83. *Id.* at 354.

capacity.[84] The court stated that he was not entitled to enforce the arbitration provision that was included in the principal's agreement.[85]

The *McCarthy* court noted that the alter ego doctrine is equitable in nature and "[a]s such, the doctrine can be invoked only where equity requires the action to assist a third party."[86] The court further stated:

> In this case, the supposed wrongdoer seeks to invoke the alter ego doctrine in order to hide behind the corporate entity, that is, to avail himself of the corporation's right to repair to an arbitral forum and thereby avoid a jury trial. As appellant is not even arguably an innocent third party disadvantaged by someone else's blurring of the line between a corporation and the person who controls it but, rather, is himself the one who is claimed to have obscured the line, he cannot be permitted to use the alter ego designation to his own behoof.[87]

Further, the court trenchantly observed in a footnote that, in order to interpret the alter ego doctrine as defendants wanted, "would be strange if an equitable doctrine could be construed to allow a party, on one hand, to resist the characterization that he is a corporation's alter ego, and, on the second hand, to allow him simultaneously to use that characterization as a device to sidetrack the characterizer's suit."[88] Thus, the doctrine is meant only to allow aggrieved parties "to compel a person or entity thought to be a corporate signatory's alter ego to abide by the arbitration clause."[89]

In contrast to the First Circuit's holding that the defendant could not argue a type of veil piercing if he created the veil, the Fourth Circuit has held that the doctrine does apply to nonsignatory defendants who are parent companies or shareholders.[90] In *J.J. Ryan & Sons v. Rhome Poulenc Textile, S.A.*, the Fourth Circuit held that where a signatory makes allegations against both (1) a subsidiary, who is a signatory, and (2) the parent company, who is not a signatory, and those allegations are "based on the same facts and are inherently inseparable, a court may

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84. *Id.* at 357.

85. *Id.*; *see* Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110 (3d Cir. 1993) (holding that an employee is covered under the principal's arbitration agreement with customer for claim of cash mishandling); Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185 (9th Cir. 1986) (holding employee covered as a nonsignatory to principal's arbitration agreement for claims arising out of handling of a securities account).

86. *McCarthy*, 22 F.3d at 362-63 (internal quotations omitted).

87. *Id.* at 363.

88. *Id.* at 363 n.17.

89. *Id.* at 363.

90. J.J. Ryan & Sons v. Rhome Poulene Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988).

refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.'"[91] More recently, in *Long v. Silver*, the Fourth Circuit expanded the holding in *J.J. Ryan & Sons* to find that nonsignatory shareholders may invoke an arbitration clause executed between the corporation and a signatory shareholder.[92] In explaining its application of *J.J. Ryan & Sons* to the facts at issue, the Fourth Circuit concluded that it saw "little difference between a parent and its subsidiary and a corporation and its shareholders where, as here, the shareholders are all officers and members of the Board of Directors and, as the only shareholders, control all of the activities of the corporation.'"[93] Interestingly, the Fourth Circuit panel was particularly unpersuaded by the plaintiff's seeking "to claim the benefit of his shareholder status and right to continued employment by virtue of the . . . agreement against the nonsignatories to the agreement while simultaneously attempting to avoid the terms of an arbitration provision contained therein.'"[94]

Two federal circuits, then, in their rulings on the alter ego doctrine in the context of nonsignatory *rights*, seem to have been motivated chiefly by the desire to avoid the "inequity" of rewarding obviously inconsistent legal arguments of the party. The courts were less concerned with the whether the party was the plaintiff or the defendant, but more with the reason the party asserting the doctrine was trying to compel the nonsignatory to arbitrate.

B. Incorporation by Written Reference

1. Louisiana State Cases

A number of courts have concluded that arbitration is required where the contract between the parties does not contain an arbitration agreement, but includes by reference the terms of a separate agreement that contains an arbitration provision. For example, in *Bartley v. Jefferson Parish School Board*, a contractor sued one of its subcontractors and the school board building owner to compel arbitration of a dispute arising from the building contract.[95] The subcontractor maintained that he was not bound to arbitrate because his subcontract

91. *Id.*
92. Long v. Silver, 248 F.3d 309, 320 (4th Cir. 2001).
93. *Id.*
94. *Id.*
95. 302 So. 2d 280, 281 (La. 1974).

with the prime contractor did not expressly require arbitration of all disputes under the general contract between the prime contractor and the owner.[96] The Louisiana Supreme Court rejected this contention and compelled all three parties to arbitrate.[97] The court reasoned that although the subcontractor had not signed the arbitration provision in the primary contract, the subcontract specifically incorporated by reference the terms of the Bartley-School Board contract that had the arbitration clause.[98] The incorporation clause read, in pertinent part: "All of these Plans, Specifications, Addenda, Proposal [sic], and said Agreement are made part of this Agreement between American Equipment & Systems, Inc. [the subcontractor] and Bartley, Incorporated [the contractor] just as though all were annexed thereto."[99] Because of the written inclusion by reference of the arbitration provision, this case may not be seen as an example of a nonsignatory case. At the very least, it demonstrates the importance of thoughtful drafting.

2. Federal District Court Cases

In *Ventura Maritime Co. v. ADM Export Co.*, the United States District Court for the Eastern District of Louisiana bound a nonsignatory to an arbitration clause incorporated into a bill of lading.[100] The court found that because the arbitration clause stated that it "applies to all disputes arising out of this contract," it was broad enough to include claims by nonsignatories involved in services related to the contract.[101] In *Ventura*, the ship owner filed a petition for declaratory judgment regarding a dispute over a bill of lading and alleged infestation of a grain cargo against ADM Export, a nonsignatory to the charter.[102] ADM Export fumigated the cargo because of the infestation and Ventura refused to issue a "clean" mate's receipt.[103] ADM Export counter-sued, seeking damages because "a clean mate's receipt [was] a prerequisite for a clean bill of lading," which was itself a condition of ADM Export's grain sale; and, by Ventura putting on the bill of lading that the cargo was

96. *Id.* at 282.
97 *Id.*
98. *Id.*
99. *Id.* at 282 n.3.
100. 44 F. Supp. 2d 804, 807 (E.D. La. 1999). The FAA expressly provides for courts to enforce arbitration clauses in bill of lading. 9 U.S.C. §§ 1-2 (2000).
101. *Ventura*, 44 F. Supp. 2d at 807.
102. *Id.* at 805.
103. *Id.*

infested, it reduced the value of the grain for sale.[104] Ventura invoked the arbitration clause in the bill of lading it signed with ADM Shipping and the court ordered arbitration of the counter-claim even though it was ADM Shipping, not ADM Export, that had entered into the boat charter.[105] The court stated that "[a] 'broad' clause that provides, as does the clause here, that 'all disputes arising out of this contract' are to be submitted to arbitration covers a dispute involving nonsignatories to the charter party if the nonsignatories are 'linked to that bill through general principles of the contract or agency law.'"[106]

C. Assumption by Conduct

A nonsignatory may be bound by an arbitration agreement either by conduct or behavior indicating that it agrees to the arbitration or by taking actions, which indicate that it directly benefits from enforcement of the agreement. For instance, in *Gvodenovic v. United Airlines, Inc.*, the United States Court of Appeals for the Second Circuit concluded that a party who has not agreed explicitly to an arbitration instrument can still be bound by manifesting a clear intent to arbitrate the dispute through conduct.[107]

In *Gvodenovic*, Pan American (Pan Am) flight attendants sued United Airlines (United) in a class action seeking to vacate an arbitration award because, at the time they agreed to arbitrate, they were not employees of United and thus are not bound by the agreement and award.[108] Pursuant to a prior agreement with Pan Am, United acquired routes and assets of Pan Am's Pacific Division.[109] As part of the agreement, United hired about 1200 Pan Am flight attendants from that Division.[110] The transferred flight attendants would be subject to United's new collective bargaining agreement.[111] United brought in an arbitrator to decide what level of seniority status the former Pan Am flight attendants would be at when they began work at United.[112] United sent

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104. *Id.*
105. *Id.* at 807.
106. *Id.* (quoting Nissho Iwai Corp. v. M/V THALIA, 1996 WL 31894, at *3-*4 (E.D. La. 1998)).
107. 933 F.2d 1100, 1105 (2d Cir. 1991).
108. *Id.*
109. *Id.* at 1104.
110. *Id.*
111. *Id.*
112. *Id.*

the flight attendants the new agreement approximately a month before they were to begin work.[113]

The flight attendants, not happy with the arbitrator's decisions about their seniority status, filed a class action seeking to vacate the awards.[114] However, the class had previously hired representatives to participate in the arbitration, enlisted counsel, and petitioned the arbitrator on the merits. Based on these reasons, the court held that the class manifested consent to the arbitration agreement, regardless of whether the class members were employees of United at the time of arbitration.[115]

D. Equitable Estoppel

The equitable estoppel theory for enforcement of arbitration agreements against nonsignatories is similar to the assumption theory, and both state and federal courts apply the rationales underlying each in a similar manner. Under Louisiana law, equitable estoppel is a principle that prevents a party from asserting rights against another party who justifiably relied on the other party's conduct *and who has changed his/her position to their detriment as a result of such reliance.*[116] Additionally, as the United States Court of Appeals for the Third Circuit noted, "many of these cases resemble third party beneficiary cases."[117] However, "[u]nder third party beneficiary theory, a court must look at the intentions of the parties *at* the time the contract was executed;" but under estoppel, "a court looks to the parties' conduct *after* the contract was executed."[118]

1. Louisiana Cases

About one year ago, in *Lakeland Anesthesia v. CIGNA Healthcare of Louisiana, Inc.*, the Louisiana appellate court stated that Louisiana courts recognize that equitable estoppel may bind nonsignatories to an arbitration agreement, but declined to do so on the facts the instant

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113. *Id.*
114. *Id.*
115. *Id.* at 1105.
116. Schwegmann Bank & Trust Co. v. Dunne, 693 So. 2d 349, 355 (La. Ct. App. 1997); *see* Wilkinson v. Wilkinson, 323 So. 2d 120, 126 (La. 1935) (holding that the three specific elements to be proved are: (1) a representation by conduct or word, (2) justifiable reliance, and (3) a change in position to one's detriment because of the reliance).
117. E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediaries, S.A.S., 269 F.3d 187, 200 n.7 (3d Cir. 2001).
118. *Id.*

case.[119] Lakeland had no arbitration agreement with CIGNA, the defendant.[120] CIGNA argued Lakeland was bound to arbitrate because of an arbitration provision between CIGNA and HCA, but there was also no proof that Lakeland was intended to be a third-party beneficiary of that separate agreement.[121] Judge Plotkin writing for the court held that the party seeking to compel arbitration based on estoppel must allege detrimental reliance or change in position, and here there was none.[122]

Under Louisiana law, the concept of ratification may be relevant in estopping a party from claiming that it is not bound to arbitrate because it is a nonsignatory. In *Ridgelake Energy, Inc. v. Baker Hughes Oilfield Operations, Inc.*, the court applied the ratification analysis in this manner.[123] Ridgelake sued Baker for the sale of defective equipment based on contractual warranty claims.[124] Baker submitted bids to Ridgelake at Ridgelake's invitation.[125] Baker than submitted several sales and service contracts, each of which contained standard Terms and Conditions and an arbitration provision.[126] The court determined that the history of dealings was sufficient to prove that Ridgelake was bound to the contract by its performance even though it did not sign any of the agreements.[127] Also, its warranty claims for damages were based on the contracts containing the arbitration language; thus Ridgelake was estopped from asserting the nonsignatory defense, because it had ratified the contract.[128] In *Ridgelake*, District Judge Schwartz interpreted Louisiana law as recognizing equitable estoppel among at least five other theories under which nonsignatories may be compelled to arbitrate disputes when they seek to accept the benefits of a contract.[129]

2. Federal Cases: "Direct Benefit" Estoppel

The majority of federal circuit courts recognize two theories of estoppel when compelling nonsignatories to arbitrate with signatories. First, federal courts have held nonsignatories to an arbitration clause

119. 812 So. 2d 695, 702 (La. Ct. App. 2002).
120. *Id.* at 697.
121. *Id.* at 701-02.
122. *Id.* at 702.
123. 2000 WL 748108, at *4-*5 (E.D. La. June 8, 2000).
124. *Id.* at *2.
125. *Id.*
126. *Id.* at *3.
127. *Id.*
128. *Id.* at *4.
129. These included incorporation by reference, assumption, agency, alter ego/veil piercing, and estoppel.

when the nonsignatory exploits the agreement containing the clause, thus deriving a "direct benefit" from the contract. Additionally,

> several courts of appeal have recognized an alternative estoppel theory requiring arbitration between a signatory and nonsignatory. In these cases, a signatory was bound to arbitrate with a nonsignatory at the nonsignatory's insistence because of 'the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and the claims were intimately founded in and intertwined with the underlying contract obligations.'[130]

In *Deloitte Noraudit A/S v. Deloitte, Haskins & Sells, U.S.*, the accounting firm of Deloitte U.S. and its international affiliates formed an international association called Deloitte, Haskins & Sells, International (DHSI).[131] DHSI then decided to "merge with another international accounting organization—Touche Ross International (TRI)."[132] The two companies would merge globally by having their respective affiliates merge with each other.[133] Soon after this announcement, a dispute arose as to the right to use the name "Deloitte" between DHSI and DHSI-UK, which resulted in an agreement that all DHSI member firms limited use of the name Deloitte.[134] This agreement also contained an arbitration clause.[135] As the regional affiliate of DHSI in Norway, Noraudit had the opportunity to accept or reject the terms of the settlement agreement, but chose to do neither.[136] Several years later, Noraudit was "unable to negotiate an agreement" with TRI's Norwegian affiliate and TRI's affiliate merged with another entity.[137] Noraudit filed suit seeking, inter alia, a declaration of its right to use the name "Deloitte," and DHSI compelled arbitration pursuant to the settlement agreement.[138] Noraudit argued that because it was not a signatory to the settlement, it was not bound to arbitrate.[139]

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130 Thomson-C.S.F., S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995) (quoting Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1995) (internal quotations omitted)).

131. 9 F.3d 1060, 1061 (2d Cir. 1993).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1062.

139. *Id.*

The Second Circuit, in analyzing Noraudit's argument, noted that courts will generally not force parties to submit to arbitration if they had not agreed to it; however, parties may still be bound "in the absence of a signature," by applying the "ordinary principles of contract and agency [to] determine which parties are bound."[140] Deloitte Norway had manifested consent to the arbitration clause because it directly accepted benefits of the agreement when it continued to use the "Deloitte" trade name, an express condition to adherence to the terms of the settlement agreement.[141] The nonsignatory, Noraudit, which benefited from use of a trade name pursuant to the agreement, was therefore estopped from arguing that it was not bound by the arbitration clause in the agreement.[142]

In *American Bureau of Shipping v. Tencara Shipyard, S.P.A.*, Limouzan and a group of owners contracted with Tencara, an Italian shipyard, to build a racing yacht capable of circumnavigating the globe.[143] The construction contract, called the Request for Classification, between the owners and Tencara stipulated that "the ship would be 'classed' according '[t]o the quality standards ... [of] the American Bureau of Shipping (ABS).'"[144] In order to obtain an ABS classification, Tencara entered into an agreement with ABS that contained an arbitration clause.[145] The insurance that the owners obtained for the ship was premised on the existence of a valid classification from ABS once the ship was completed.[146] Tencara, not the owners, maintained contact with ABS throughout construction and, once the ship was completed, received the Interim Certification of Classification (ICC) and delivered it to the owners.[147] During a cruise to Venice, the ship sustained serious hull damage from what a survey indicated as defective design work.[148] Tencara filed suit in Italy against ABS, while the owners and underwriters filed in France.[149] ABS sought to compel Tencara, the owners, and underwriters to arbitrate pursuant to the arbitration

140. *Id.* at 1063.
141. *Id.* at 1063-64.
142. *Id.* at 1064.
143. 170 F.3d 349, 351 (2d Cir. 1999)
144. *Id.* "Classification" is a term of art in maritime contract law. It refers to the process by which a ship is inspected to make sure it is seaworthy and complies with various safety regulations. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

agreement contained in the Request for Classification and ICC.[150] Because Tencara was the only party who actually signed the arbitration agreement, the court had to determine whether the owners and underwriters could be bound as nonsignatories.[151]

The Second Circuit first determined that the owners were equitably estopped from asserting that they were not bound to the arbitration agreement because the registration of the boat in France and procurement of insurance were direct benefits from the ICC, which contained the arbitration clause by reference.[152] Under the theory of estoppel, "[a] party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause."[153] The court compelled the ship owners to arbitrate because they had received "direct benefits" such as ABS's insurance rates and the ability to fly under the French flag, as a result of the ICC, the contract that contained the arbitration agreement.[154] The court found that it would be inequitable to allow suit based on the direct benefits of the contract containing the arbitration clause while allowing the owners to avoid its standard terms.[155] Further, the court found that "ABS's motion to compel arbitration the . . . owners is equally valid against the insurer underwriters [because] 'an insurer subrogee stands in the shoes of its insured.'"[156]

In *International Paper Co. v. Schwabedissen Maschinen Anlagen*, the Fourth Circuit was presented with "whether an arbitration clause in the distributor-manufacturer contract requires the buyer, a nonsignatory to that contract, to arbitrate its claims against the manufacturer."[157] In *International Paper*, the buyer simultaneously wanted the court to reject the arbitration clause because he was not a signatory to it, but enforce the warranty and damage provisions of the same contract.[158] In rejecting the buyer's contention, the court noted that:

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract

150. *Id.* at 351-52.

151. *Id.* at 352.

152. *Id.* at 353. According to the court, "[t]he ICC explicitly incorporated by reference the terms and conditions of the Request for Classification agreement, including that agreement's arbitration clause." *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (quoting Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 106 (2d Cir. 1992)).

157. Int'l Paper Co. v. Schwabedissen Maschinen Anlagen, 206 F.3d 411, 413 (4th Cir. 2000).

158. *Id.*

> precludes enforcement of the contract's arbitration clause when he has consistently maintained that the other provisions of the same contract should be enforced to benefit him.[159]

Additionally, the court found that a nonsignatory would also be estopped from refusing to comply with an arbitration clause when he "receives a direct benefit from the contract."[160]

Although neither the Fifth Circuit nor Louisiana courts have directly addressed this direct benefit theory, this doctrine has been discussed by a federal bankruptcy court within the Fifth Circuit. In *In re Hydro-Action, Inc.*, the individual defendant Mr. Drewery, the president and majority shareholder of Hydro-Action, and the individual plaintiff Mr. Craig, the individual executed an agreement (MTA) under which Mr. Craig would work for Mr. Drewery.[161] Subsequently, one of Mr. Drewery's subsidiaries, Hydro-Action, filed for bankruptcy and asserted a claim against Mr. Craig.[162] Craig then filed a demand to compel Hydro-Action to arbitration; Hydro-Action asserted that Drewery executed the MTA in his individual capacity and it is not a signatory to the agreement.[163]

Although Craig argued that Hydro-Action was a third-party beneficiary to the MTA, the court held that "the obligation to arbitrate is more precisely characterized as estoppel."[164] The court reasoned that "[t]his presents an unusual circumstance since, in most arbitration jurisprudence reviewed by the Court, arbitration under third-party beneficiary theory is . . . advocated by the third party who is seeking to enforce the arbitration agreement."[165] Here Craig, a signatory to the agreement, sought to enforce the arbitration provision against a nonsignatory beneficiary.[166] The court held that instead, Hydro-Action would be estopped because "it would be manifestly unjust and inequitable" to allow the nonsignatory party to assert the benefits of the contract containing the arbitration agreement and enforcing the contractual duties upon the signatories while simultaneously denying the duty to arbitrate under the same agreement.[167] Therefore, the court held

159. *Id.* at 418.
160. *Id.*
161. 266 B.R. 638, 641 (Bankr. E.D. Tex. 2001).
162. *Id.*
163. *Id.* at 642, 645.
164. *Id.* at 647.
165. *Id.* at 646-47.
166. *Id.* at 647.
167. *Id.*; *see* Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 841 (7th Cir. 1981) (holding that a nonsignatory cannot simultaneously rely on a provision of a contract but deny the arbitration clause in the same contract under the doctrine of estoppel).

that the nonsignatory debtor could be compelled to arbitrate its disputes with Craig, the signatory defendant.[168]

3. Federal Cases: "Intertwined Claims" Estoppel

One district court has declined to extend *Grigson* so as to bind nonsignatories to an arbitration agreement on this theory of equitable estoppel. In *Evans v. IBM Co.*, the court declined to extend the holding in *Grigson* and refused to allow a signatory to an applicable arbitration agreement to compel arbitration against a nonsignatory using the intertwined claims test.[169]

This decision follows similar jurisprudence in other circuits, holding that estoppel requires a signatory to arbitrate with a nonsignatory at the nonsignatory's demand because the claims against the signatory are "intimately founded in and intertwined with the underlying contract obligations."[170] The following cases indicate that the federal circuits are "willing to estop a *signatory* from avoiding arbitration with a nonsignatory, [but] not a nonsignatory from avoiding arbitration with a signatory."[171]

In *McBro Planning & Development Co. v. Triangle Electronic Construction Co.*, both McBro (the construction manager) and Triangle (electric contractor) had contracts with St. Margaret's Hospital, which they were renovating, but McBro and Triangle had no contract with each other.[172] Triangle sued McBro for negligence and intentional interference with a contract.[173] The contract between Triangle and St. Margaret's listed McBro as the construction manager, but specifically stated, "in its general conditions section . . . that '[n]othing in the Contract Documents shall create any contractual relationship between . . . the Construction Manager [McBro] and the Contractor [Triangle].'"[174] As with the plaintiff in *In re Hydro-Action*, Triangle claimed that McBro should be compelled to arbitrate under the third-party beneficiary theory.[175] The

168. *In re Hydro-Action*, 266 B.R. at 648.

169. Evans v. IBM Co., No. 01-051, at *11 (E.D. La. Feb. 21, 2002). Even though there was an allegation of a joint venture between the nonsignatory and signatory in this case. *Id.*

170. Thomson-C.S.F, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995) (quoting Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1995) (internal quotations omitted)).

171. *Id.*

172. 741 F.2d 342, 343 (11th Cir. 1984).

173. *Id.*

174. *Id.* (quoting art. 1.2.6 of the Triangle-St. Margaret's Hospital contract).

175. *Id.* at 344.

United States Court of Appeals for the Eleventh Circuit referenced the United States Court of Appeals for the Seventh Circuit's reasoning in *Hughes Masonry Co. v. Greater Clark County School Building Corp.*, and found that because the contract between Triangle and St. Margaret's specifically referred to McBro's duties, "the contractor's claims are 'intimately founded in and intertwined with the underlying contract obligations.'"[176] Thus, McBro was compelled to arbitrate under the Triangle-St. Margaret's contract.[177]

In *Thomson C.S.F., S.A. v. American Arbitration Ass'n*, the Second Circuit refused to apply the intertwined claim theory of equitable estoppel to a signatory who contracted with a subsidiary and then sought to compel a nonsignatory parent corporation to arbitrate. However, the court expressly noted that estoppel will prevent one from claiming the benefits of a contract while seeking to avoid its obligation to arbitrate.[178] In *Thomson*, Rediffusion Simulation Limited (Rediffusion) entered into a contract with Evans & Sutherland Computer Corporation (E&S) in which Rediffusion agreed to purchase computer-generated imaging equipment exclusively from E&S.[179] In return, "E&S agreed to supply its imaging equipment only to Rediffusion."[180] After executing the contract, Rediffusion was sold to Hughes Aircraft Computers, which then Hughes sold it to Thomson.[181] Before Rediffusion was sold to Thomson, E&S notified Thomson that it would be enforcing the agreement as originally executed. Thomson responded that it was not adopting the agreement and did not consider itself bound to it.[182] E&S subsequently "filed a demand for arbitration ... against both Rediffusion and its parent company, Thomson."[183] The Second Circuit determined that it would not compel arbitration because the claims against the defendants, "alleged predatory business practices" did not arising from the underlying contract between E&S and Rediffusion.[184]

Similarly, the Third Circuit rejected the intertwined estoppel argument in *E.I Dupont de Nemours & Co. v. Rhone Poulenc & Resin*

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176. *Id.*
177. *Id.* (quoting Hughes Masonry Co. v. Greater Clark County Sch. Bldg., 659 F.2d 836, 841 n.9 (7th Cir. 1981)).
178. 64 F.3d 773, 778-79 (2d Cir. 1995).
179. *Id.* at 775.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 776.
184. *Id.* at 780.

Intermediaries. The court took the position that nonsignatories like the plaintiff cannot be bound to an arbitration agreement unless its conduct falls within one of the "traditional principles of contract and agency law."[185] The court indicated that compelling *nonsignatories* to arbitrate claims because of a close relationship between the entities involved, or to any alleged misconduct of the nonsignatory intertwined with the underlying contractual duties was not justifiable.[186] Therefore, the court declined to enforce the arbitration agreement against the nonsignatory plaintiff based on the doctrine of equitable estoppel, and specifically, the intertwined claims test.[187]

In *MAG Portfolio Consult v. Merlin Biomed Group, L.L.C.*, the Second Circuit recognized that where the nonsignatory directly benefited from the agreement, it could be compelled to arbitrate.[188] The court found that under "[o]rdinary principles of contract and agency," if a company "knowingly accepted the benefits" of an agreement which includes an arbitration clause, even where it was not a party to the agreement, that company may be bound by the arbitration clause.[189] The benefits, however, must flow directly from the agreement.[190] The Second Circuit panel cautioned that where the benefit to the nonsignatory stems from the contractual relationship of the parties, but not from the agreement itself, the benefit is indirect; therefore, the nonsignatory is not bound by the arbitration clause.[191] The court cited *Thomson-C.S.F.*, in which there was an exclusive dealing agreement, in support of its decision.[192]

The court also cited with approval an alternative estoppel theory espoused in *Thomson-C.S.F.* but rejected the converse situation. Thus, that a court will "estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed," and the parties share a close relationship.[193] Under this court's ruling, the reverse, however, is not true: a signatory may not estop a

185. 269 F.3d 187, 204 (3d Cir. 2000).
186. *Id.* at 202.
187. *Id.*
188. 268 F.3d 58, 61 (2d Cir. 2001).
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 62.
193. *Id.* (citing Thomson-C.S.F., S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995)).

nonsignatory from avoiding arbitration regardless of how closely affiliated are the parties.[194]

E. Agency

General agency principles are clearly implicated in the nonsignatory arbitration enforcement context. Where the principles of agency law bind nonsignatories to the *terms* of a contract, those same principles will bind a nonsignatory principal to an arbitration provision that an agent has executed on behalf of the principal. As the First Circuit stated in *McCarthy v. Azure*, "arbitration is almost invariably a creature of contract, and an agent is not ordinarily liable for his principal's breach of contract."[195] Further, "[i]t is common ground that '[s]igning an arbitration agreement as agent for a disclosed principal is not sufficient to bind the agent to arbitrate claims against him personally.'"[196]

1. State Court Decisions

In *Landis Construction Co. v. Health Education Authority of Louisiana*, the Louisiana Supreme Court declared that an arbitration clause contained in an agreement between a construction company and a city was binding on the city. The individual who signed the contract was an authorized agent of the city because a resolution authorizing the agent to sign the very contract containing the arbitration provision was adopted by the city.[197] Agency principles may also negate the enforceability of an arbitration clause. In *Ciaccio v. Cazayoux*, that declared a husband's and children's claims against the hospital and others for wrongful death did not have to be arbitrated because Mrs. Ciaccio did not sign as an agent or representative of any other family members.[198]

In *Merrill Lynch, Pierce, Fenner, & Smith v. Eddings*, a Texas appellate court held that the relationship between a trustee and the trust's beneficiaries and settlors is sufficient to bind a nonsignatory beneficiary and settlor to an arbitration clause executed between a trustee and a third-

194. *Id.*

195. McCarthy v. Azure, 22 F.3d 351, 360 (1st Cir. 1994).

196. *Id.* at 361 (quoting Flink v. Carlson, 856 F.2d 44, 46 (8th Cir. 1988)).

197. 367 So. 2d 330, 332 (La. 1979). In *Landis*, Landis Construction Company filed to compel arbitration against the Health Education Authority of Louisiana (HEAL) pursuant to the construction contract. *Id.* at 331. HEAL denied the existence of an arbitration agreement on the ground that the signatories to the contract were without authority to stipulate to arbitration. *Id.*

198. Ciaccio v. Cazayoux, 519 So. 2d 799, 804 (La. Ct. App. 1987).

party broker when the dispute arises from trust account transactions.[199] In *Eddings*, the settler opened a trust for his two daughters and named Payne as the trustee.[200] Payne, as trustee, signed an agreement with Merrill Lynch for a Cash Management Account Agreement (CMA).[201] However, a dispute arose between Eddings and Payne, and Eddings requested that Merrill Lynch liquidate the trust.[202] As a result of the liquidation, the Bank of Troy claimed that it had lost money and sued Payne, the trust, and Merrill Lynch.[203] Merrill Lynch and Payne, in turn, sued the Eddings and filed a motion to compel the beneficiaries to arbitrate pursuant to the CMA executed between Payne and Merrill Lynch.[204] Although the Eddings claimed that they were not signatories to the CMA, and thus should not be compelled to arbitrate, the court found that because the Eddings were using provisions of the CMA to defend themselves against liability to the Bank of Troy, the Eddings must submit to arbitration.[205]

2. Federal Court Cases

Federal jurisprudence also recognizes that agency law may form a basis for the enforcement of arbitration against nonsignatories. In *Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, the court held that an undisclosed principal may enforce a contract made for its benefit by an agent even though the signatory was unaware of the undisclosed principal.[206] Frota Oceanica Brasilera, S.A. (Frota) entered into charter for a vessel from Orient Victory Shipping Company.[207] The charter agreement contained a standard form arbitration clause.[208] That same day, Frota sub-chartered the vessel to Interbras Cayman Company (Interbras).[209] Interbras used the vessel to transport a shipment of pig iron, which was almost two hundred tons short of the order.[210] Interbras filed a demand for arbitration because of the $75,000 loss that it had

199. 838 S.W.2d 874, 879 (Tex. App. 1992).
200. *Id.* at 877.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 878.
205. *Id.* at 879.
206. 663 F.2d 4, 6 (2d Cir. 1981).
207. *Id.* at 5.
208. *Id.*
209. *Id.* at 5-6.
210. *Id.*

suffered as a result of the shortage against the ship's owner.[211] Under the theory that Frota was the agent of Interbras when it executed the charter agreement, Interbras, though not a signatory, could compel Orient to arbitration.[212] This case also supports the enforcement of arbitration against an assignee of a contract although not an actual signatory.[213]

The Third Circuit held in *E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber and Resin Intermediates, S.A.S.* that a parent corporation could not be bound to arbitrate where its subsidiary signed the arbitration agreement and the parent's claim was not based upon the agreement.[214] The Third Circuit distinguished *Pritzker v. Merrill Lynch, Pierce, Fenner, & Smith*, in which the court held that an agent was bound to the principal's arbitration agreement because the claim was based upon the alleged mismanagement of his trust.[215] In *Pritzker*, a trustee of a pension plan sued his broker, Merrill Lynch, and Merrill Lynch's sister corporation, and Merrill Lynch moved to compel arbitration.[216] The court concluded that where a principal is bound and complaint arises out of the agent's conduct, the agent as a codefendant could assert the arbitration agreement as well. In *Pritzker*, a principal as a signatory was bound which allowed an agent, a nonsignatory, to be able to then demand arbitration. *E.I. Dupont* was the reverse. An agent's signature as a subsidiary could not alone bind the principal, the parent corporation, to be required to arbitration.[217] However, unlike *Pritzker*, the defendants in *E.I. Dupont* were trying to bind the nonsignatory parent company for a claim that did not arise from the agreement executed with the agent.[218]

F. Special Relationships

In addition to the agency and contract law theories, Louisiana courts have also bound nonsignatories to arbitration clauses based upon the "special relationship" between the signatory and nonsignatory. In *Eureka Homestead Society v. Howard, Weil, Labouisse, Frederichs, Inc.*, the

211. *Id.* at 6.

212. *Id.*

213. Also, in *Carlin v. 3V Inc.*, an assignee was held bound to arbitrate due to an arbitration clause in an agreement originally signed by a signatory, that the assignee did not sign. The court stated, "We find that the public policy of this state favors arbitration and . . . 3V Inc. is equitably estopped from avoiding arbitration." 928 S.W.2d 291, 297 (Tex. App. 1996).

214. 269 F.3d 187, 198 (3d Cir. 2001).

215. *Id.* at 199.

216. *Id.* (quoting Pritzker v. Merrill Lynch, Pierce, Fenner, & Smith, 7 F.3d 1110, 1122 (3d Cir. 1993)).

217. *Id.*

218. *Id.*

court held that a nonsignatory employer, Eureka, could be compelled to arbitrate its claims against a brokerage where the President and CEO of the employer arguably signed the arbitration agreement without authority.[219] And in *Rushe v. NMTC, Inc.*, a nonsignatory employee was permitted to compel a signatory franchisee plaintiff to arbitrate claims which arise out of the nonsignatory's position as District Manager of a franchisor company that had entered into a franchise agreement with the plaintiff.[220] Therefore, the plaintiff, a purchaser, was compelled to arbitrate its claims against a franchisor *and as well* the District Manager of the franchisor, a nonsignatory.

G. Successors in Interest

When a contract states that it binds successors and assigns, or, when by operation of law, successors in interest are bound by the terms of a contract, arbitration clauses may also bind such nonsignatory successors in interest.

1. Louisiana Cases

In *Collins v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, the Collins, "as heirs and successors of their brother, Frank Collins," sued Merrill Lynch alleging that the company had made an unauthorized tender of debentures in Frank Collins' account.[221] The Cash Management Account Customer Agreement, signed by Frank Collins when he opened the account, contained an arbitration clause found to govern this type of dispute.[222] The Collins argued that they were nonsignatories to the agreement and so were not bound.[223] The Louisiana circuit court disagreed. The court noted that the contract containing the arbitration clause was expressly binding upon the successors and assigns. Accordingly, the agreement was held to be enforceable against nonsignatory successors in *Collins*.[224]

219. No. 94-0452, 1994 WL 583274, at *5 (E.D. La. 1994).
220. No. 01-3440, 2002 WL 575706, at *8 (E.D. La. Apr. 16, 2002).
221. 561 So. 2d 952, 953 (La. Ct. App. 1990).
222. *Id.* at 955.
223. *Id.*
224. *Id.*

2. Federal Cases

In *Dayhoff v. H.J. Heinz Co.*,[225] the Third Circuit ruled in a complex international case that the successor to a signatory to a candy distribution contract was bound by, and thus could enforce, arbitration and forum selection clauses against the plaintiff.[226] Interestingly, other than the successor in interest to the signatory, the Third Circuit refused to allow the nonsignatory defendants to rely on agency theory to compel the plaintiff to arbitrate its claims against them.[227] The court held that nonsignatories Heinz Italia and H.J. Heinz should not "by reason of their corporate relationship" with signatory Heinz Dolciaria be able to invoke the arbitration clause, for "there is no more reason to disregard the corporate structure with respect to such claims as there would be to disregard it with respect to other legal matters."[228] The court further noted that if the two nonsignatories wanted to be able to invoke the arbitration clause, they should have included such language in the contracts.[229]

H. Third-Party Beneficiary

Third-party beneficiary theory may be used to enforce an arbitration agreement against nonsignatories to such an agreement. Generally, there are two requirements to establish that a nonsignatory third party is bound by an arbitration agreement.[230] First, "the intent of the contracting parties to stipulate a benefit in favor of a third party must be manifestly clear" at the time of contracting.[231] Second, "the third party relationship must form the consideration of the contract," and this consideration cannot be merely incidental.[232]

1. Louisiana Cases

In Louisiana, courts have generally recognized the third-party beneficiary doctrine as it is contained within the Civil Code. Courts may

225. 86 F.3d 1287 (3d Cir. 1996).
226. *Id.* at 1298.
227. *Id.* at 1297-98.
228. *Id.* at 1297.
229. *Id.*
230. Stadtlander v. Ryan's Family Steakhouse, Inc., 794 So. 2d 881, 886 (La. Ct. App. 2001). Under Louisiana law, "a contract for the benefit of a third party is referred to as *stipulation pour autrui*." *Id.*
231. *Id.*
232. *Id.*; *see* DePaul Hosp. v. Mutual Life Ins. Co., 487 So. 2d 143, 146 (La. Ct. App. 1986).

require the contract must clearly state the third-party relationship.[233] In *Lakeland Anesthesia*, the court was unable to find any writing which clearly manifested an intention to make Lakeland Anesthesia a third-party beneficiary to any contract between CIGNA HealthCare and Columbia/HCA and therefore declined to order arbitration.[234] Though the court acknowledged the validity of the concept, stated it was not applicable in this case.[235]

In *Stadtlander v. Ryan's Family Steakhouse, Inc.*, the court found that both requirements were present and found that the doctrine of third-party beneficiary applied.[236] As a mandatory condition to employment, Ryan's Family Steakhouse (Ryan's) required potential employees to sign an arbitration agreement with the arbitration company that Ryan's used for resolving employment-related disputes called Employment Dispute Services, Inc., a company providing arbitration services.[237] The court noted that although Ryan's never signed an arbitration agreement with the employees, the employee-arbitrator agreement clearly manifested the intent that Ryan's be a third-party beneficiary by the express language of its terms.[238] The court recognized that, because the "agreement clearly binds both Ryan's and [the employee] to submit any applicable employment-related disputes to [the arbitration company]," this was consideration for the contract.[239]

2. A Texas State Case on Third-Party Beneficiary

A similar result was reached in *Southwest Health Plan, Inc. v. Sparkman*, where the court allowed a signatory to compel nonsignatory to arbitrate claim based on third-party beneficiary theory. The court found that because there is no "authority indicating that the presumption supporting arbitration is somehow weakened where the litigant is a third-party beneficiary of, rather than a party to, the contract containing such a clause,"[240] the nonsignatory must arbitrate. The court held that an employee was bound to arbitrate with an insurance company providing employee benefits by contract with the employer, even though the

233. Lakeland Anesthesia v. CIGNA Healthcare of La., Inc., 812 So. 2d 695, 702 (La. Ct. App. 2002).
234. *Id.*
235. *Id.*
236. *Stadtlander*, 794 So. 2d at 887.
237. *Id.*
238. *Id.*
239. *Id.*
240. 921 S.W.2d 355, 358 (Tex. App. 1992).

employee did not sign the arbitration agreement, because it was included in the contract between the employer and the insurance company, and the employee was a third-party beneficiary.[241]

3. The Federal Cases

In *Fleetwood Enterprises, Inc. v. Gaskamp*,[242] decided by the Fifth Circuit after *Grigson*, it concluded that Fleetwood, a mobile home manufacturer, could not compel the children of purchasers of a mobile home to arbitrate the children's tort claims against the manufacturer.[243] Initially, the parents and children together filed certain contractual and tort claims against Fleetwood alleging injuries from exposure to formaldehyde used in the construction of the mobile home in a Mississippi state court.[244] Pursuant to Fleetwood's motion to compel arbitration, the United States District Court for the Southern District of Texas ruled in favor of Fleetwood ordering all of the plaintiffs to arbitrate because of the arbitration provision in the purchase contract with Fleetwood.[245] The Fifth Circuit reversed only as to the children, holding that it would be unfair to require the children's tort claims against Fleetwood to be arbitrated because the children were not third-party beneficiaries.[246] The suggestion is present that a different result might have been reached if the children were asserting contractual claims because "a litigant who sues based on a contract subjects him or herself to the contract's terms."[247] However, the children's claims were for fraud and negligence, not breach of contract.[248] Additionally, the court mentioned that "there is no indication in the contract that it [was] designed to benefit the Gaskamp children" and no "intention to confer a benefit on the children" was shown.[249]

Grigson involved tortious interference with a contract and not breach of contract, however, in *Fleetwood*, the opinion conveyed that it is

241. *Id.*
242. 280 F.3d 1069 (5th Cir. 2002).
243. *Id.* at 1077.
244. *Id.* at 1071-72.
245. *Id.* at 1072.
246. *Id.* at 1075-77. Texas courts have found nonsignatories bound to arbitrate agreements only in two situations: first, where the nonsignatories sued on the contract, and second, where the nonsignatories was a third-party beneficiary of the contract. *Id.* at 1074. To qualify as a third-party beneficiary, "the intent to make someone a third-party beneficiary must be clearly written or evidenced in the contract." *Id.* at 1076.
247. *Id.* at 1074-75.
248. Noticeably, there is no mention of the *Grigson* decision in the *Fleetwood* opinion.
249. *Fleetwood*, 280 F.3d at 1076.

the contract-versus-tort distinction that made the difference and excused the nonsignatories from arbitration.[250] The critical inquiry was whether the claims asserted by the plaintiff were *qualitatively* of the type contemplated by the terms of the contract. In other words, that the parties in *Grigson* asserted claims fundamentally related to the *terms or duties* of the written contract which contained the arbitration agreement, may explain why the court found it equitable to bind the signatories to arbitration even though a nonsignatory sought to compel the arbitration. In contrast, in *Fleetwood*, the court seems to find it unjust to bind nonsignatory plaintiffs to arbitrate disputes because (1) they are not parties who manifested any intention to be bound by such an arbitration agreement and (2) in any event, the claims actually asserted were in no way contemplated by the signatories as being covered by the scope of the arbitration agreement anyway.[251]

In *Hill*, language existed in the contract that denied any rights or benefits contained in the contract, including arbitration, from accruing to third parties for any reason. As such, the third party nonsignatory could not compel arbitration of the signatory's claim against it, but the third party could secure a stay of litigation under section 3 of the FAA, pending arbitration between the two signatories. In other words, the language likely prevented the nonsignatory from asserting the right to have the plaintiff's claims against it subject to arbitration (even though the "substantial and interdependent misconduct test" of *Grigson* was met), while at the same time, federal law entitled the nonsignatory to a stay. Although one of the *Grigson* factors was met, the circuit court concluded that it was properly within the discretion of the trial court to deny the order to compel, probably because of the language limiting the parties able to claim the benefit of arbitration.

I. Spousal "Special Relationship"

In cases involving the spousal relationship, courts have held that a nonsignatory spouse can only be compelled to arbitrate a dispute against a signatory party when his or her spouse executed the underlying agreement on behalf of the marital community, and not as an individual.

250. *Id.* at 1075.
251. *Id.* at 1077.

1. Louisiana Cases

In *Ciaccio v. Cazayoux*, Mrs. Ciaccio signed an arbitration agreement pursuant to the retention of obstetrical services of Dr. Cazayoux on her own behalf; therefore, the court held that the husband's wrongful death claims were not affected by the agreement.[252] The principle of these cases may be that where an individual sues in tort and not on the contract and that party is not seeking to claim a benefit under the contract, the individual will not be bound to arbitrate. The court in *Ciaccio* declined to compel the nonsignor husband to arbitrate.[253] Mrs. Ciaccio arrived at the hospital suffering from premature birth of twins.[254] The hospital administered medication designed to delay labor.[255] Nonetheless, Mrs. Ciaccio gave birth and both children died a short time after being born.[256] The Ciaccios filed wrongful death claims as individuals and as parents of the children against the hospital, doctors, and nurses.[257] Only Mrs. Ciaccio had signed an agreement to arbitrate claims.[258] Mr. Ciaccio and the minor children had no contract with the defendant requiring arbitration of disputes between them, and his wife had not signed as an agent or on their behalf; thus the court held he was not bound.[259]

In contrast, in *Shroyer v. Foster*, a nonsignatory wife was compelled to arbitrate her claims against a vendor because when her husband executed an agreement containing the arbitration clause, he did so as the representative of the marital community and because the wife was seeking the benefit of the contract containing the arbitration agreement.[260] The Shroyers brought an action against the Fosters, who were the sellers of the home they purchased, to rescind the sale based on alleged structural defects that were latent at the time of purchase.[261] The Fosters filed a third-party demand naming the inspection company and its employee as third-party defendants.[262] However, only Mr. Foster had

252. 519 So. 2d 799, 804 (La. Ct. App. 1987). The arbitration agreement covered any claim based on negligence or medical malpractice. *Id.* at 800.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 804.
259. *Id.* at 804-05.
260. 814 So. 2d 83, 88 (La. Ct. App. 2002).
261. *Id.* at 85.
262. *Id.*

signed the contract with the Inspection Company, thus the wife argued that she was not bound.[263] The court noted that while nonsignatories are not usually bound by such arbitration agreements, individuals become bound by all of the terms of the agreement *when those individuals seek to enforce provisions of the same contract*.[264] In other words, the court found, reiterating the logic seen in many other cases, that: "it would contravene the purposes of the [Louisiana Arbitration Law] to allow Mrs. Foster to claim the benefits of the inspection agreement and simultaneously avoid its burdens."[265] The court specifically distinguished *Ciaccio* by stating that the husband was not bound because he "was advancing tort claims; he did not need to rely on the terms of the contract containing the arbitration provision to advance his claims."[266] In addition, the court separately determined that Mrs. Foster was bound to the contract her husband signed by virtue of the fact that the contract concerned a community property obligation under state law, which is binding on the nonsigning spouse because it is made on behalf of and for the direct benefit of the nonsigning spouse.[267]

In *Nationwide of Brian, Inc. v. Dyer*, a Texas appellate court ordered a wife to arbitrate, stating, "We find the absence of her signature has no legal significance due to her status as a third party beneficiary," and specifically noted that "because [the wife's] claims are *so closely connected to and intertwined with her husband's*, she is bound to [arbitrate] as a matter of contract law."[268]

V. WHAT LAW APPLIES: THE FAA OR STATE ARBITRATION LAW?

A. *The Commerce Power*

The United States Supreme Court in *Circuit City Stores, Inc. v. Adams* reaffirmed its decision in *Allied-Bruce Terminix Co. v. Dobson*, which had considered the significance of Congress's use of the words "involving commerce." In *Circuit City*, the Court held that "the Court interpreted [Section 2 of the Federal Arbitration Act] as implementing

263. *Id.* at 86.
264. *Id.* at 88.
265. *Id.* at 88-89.
266. *Id.* at 89 n.6.
267. *Id.* at 88.
268. 969 S.W.2d 518, 520 (Tex. App. 1998) (emphasis added).

Congress' intent 'to exercise [its] commerce power.'"[269] The Court confirmed that the Federal Arbitration Act (FAA):

> [W]as enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty . . . and that the Act was applicable in state courts and pre-emptive of state laws hostile to arbitration . . . . Relying upon these background principles and upon the evident reach of the words 'involving commerce,' the Court interpreted [section] 2 [of the Federal Arbitration Act] *as implementing Congress' intent 'to exercise [its] commerce power to the full.'* [270]

There could be no clearer statement than this of the very broad scope of the Federal Arbitration Act.[271]

The Fifth Circuit had concluded earlier, in *Del-Webb Construction v. Richardson Hospital Authority*, that the FAA applies to contracts which evidence a transaction involving interstate commerce and that "this is not a rigorous inquiry; *the contract need only be 'related to' commerce* to fall within the FAA."[272] District courts within the Fifth Circuit have similarly held that "[this provision] extends the reach of the FAA to all contractual activity which facilitates or affects commerce *even tangentially*."[273] There is little that would not fall within the scope of the Federal Arbitration Act under these tests.

B. State Court Application of the FAA

Importantly, this reaffirmance of the breadth of the FAA was also noted in a recent decision of the court of appeals of Texas, in the *In re Koch Industries, Inc.*[274] In *Koch*, the state court described at length the applicability of the FAA where a contract "evidence[s] a transaction involving commerce," "involves" commerce, or merely affects commerce.[275]

In *Koch*, Chief Justice Hardberger specifically noted that the federal courts have held "that affiliated companies, including parent and subsidiary corporations, and successor corporations can be forced to

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269. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112 (2001) (discussing Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 273-77 (1995)).

270. *Id.* (quoting *Allied-Bruce*, 513 U.S. at 277) (emphasis added)).

271. *See id.* at 111-13.

272. 823 F.2d 145, 147-48 (5th Cir. 1987)

273. *In re* Trans Kem Ltd., 978 F. Supp. 266, 300-01 n.145 (S.D. Tex. 1997) (emphasis added); Jones v. Tenet Health Network, No. 96-3107, 1997 WL 180384, at *6 (E.D. La. Apr. 7, 1997).

274. 49 S.W.3d 439 (Tex. App. 2001).

275. *Id.* at 443.

arbitrate [when] the claims against them arise out of the same operative facts and are inherently inseparable from the claims against the affiliate or predecessor corporation."[276] The *Koch* court cited two federal circuit court decisions, including one from the Fifth Circuit, as support for its conclusion.[277]

Moreover, the *Koch* decision also concluded that the "application of equitable estoppel is warranted when a signatory to a contract containing an arbitration clause raises [alleged actions] of substantially interdependent and concerted misconduct by both the nonsignatory and one or more signatories to the contract."[278] The *Koch* court noted that the Fifth Circuit has approved this equitable estoppel theory.[279]

In *Palm Harbor Homes, Inc. & Newco Homes, L.P. v. McCoy*, a Texas court concluded that an arbitration agreement in Texas was governed by the FAA and agreed with the argument that the phrase "involving commerce" should be "interpreted broadly to include any contract or transaction that affects interstate commerce."[280] The court discussed the *Allied-Bruce* decision in which the United States Supreme Court held that the word "involving" was to be interpreted in its broad meaning and the "functional equivalent of 'affecting' [thereby] *signaling Congress' intent to exercise its Commerce Clause power to the full*."[281] The court then decided that the arbitration agreement was governed by the FAA and cited other Texas state court decisions, including *Lost Creek Municipal Utility District v. Travis Industry Painters, Inc.*[282] In *Lost Creek*, the court held that an arbitration agreement between Texas residents concerning work performed in Texas related to interstate commerce because, among other things, the materials being used were manufactured outside of the state of Texas.[283] The court held in *Palm Harbor* that though the purchasers of the mobile home and Newco (the local seller of the mobile home) were the only parties to the arbitration agreement, the agreement "[was] intended to be for the benefit[] of the manufacturer of the home," Palm Harbor, as "a third party beneficiary of

276. *Id.* at 447.

277. *Id.* (citing Sam Reisfeld & Son Imp. Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976)).

278. *Id.* (quoting MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)).

279. *Id.*

280. 944 S.W.2d 716, 719 (Tex. App. 1997).

281. *Id.* (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272-74 (1995) (emphasis added)).

282 *Id.* at 720 (citing Lost Creek Mun. Util. Dist. v. Travis Indus. Painters, Inc., 827 S.W.2d 103, 105 (Tex. App. 1992)).

283. *Id.* (citing *Lost Creek*, 827 S.W.2d at 105).

the arbitration agreement," thereby holding that a nonsignatory was bound to arbitrate.[284]

VI. RECOMMENDATIONS AND PRACTICAL SUGGESTIONS

Guidance can be distilled from the analysis of cases outlined above. First, great attention should be paid in the drafting process to the possibility that if a dispute occurs it may involve the signatories to the contract and also nonsignatories. While there is a broad policy in support of arbitration, courts must "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals."[285] At the very least, such broad language might be found by a court to give notice to interested parties that disputes would be subject to arbitration. Such notice might prove a valuable argument in the "equitable factors" debate, because courts prefer that such questions of who is bound to arbitrate be resolved in the critical drafting phase.[286]

A. Drafting Arbitration Agreements

In careful drafting practitioners can seek to include or exclude other parties, contracts, and relationships arising out of, or related to, the contract or relationship immediately at hand. This would enhance the predictability of arbitration agreements and would preserve their benefits. For instance, one example of proposed language to assist parties in their gaining consolidated arbitration proceedings when disputes arise in complex financial transactions is:

> If any Dispute raises issues which are substantially the same as or connected with issues raised in a Dispute which has already been referred to arbitration under [any of the Project Documents], including this Agreement (an 'Existing Dispute'), or arises out of substantially the same facts as are the subject of an Existing Dispute . . . the Tribunal appointed or to be appointed in respect of any such Existing Dispute shall also be appointed as the Tribunal in respect of any Related Dispute.[287]

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284. *Id.* at 721-22 n.5; *see also* Warren-Guthrie v. Health Net, 101 Cal. Rptr. 2d 260 (Cal. Ct. App. 2000).

285. EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002).

286. Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2000) ("Categories of dispute that cannot exit the public court houses aside, it is well and good if the parties to a private agreement wish to choose an alternative dispute system, but we are wary of choices imposed after the dispute has arisen and the bargain has long since been struck.").

287. David M. Lindsey & James M. Hosking, *Consolidation of Arbitration Proceedings: It Takes Two to Tango*, METRO. CORP. COUNS., Sept. 2002, at 69.

One significant advantage of this language is that separate arbitrators would not be appointed to arbitrate sequential disputes between the same parties on the same contract. In the context of including nonsignatories, the language might even more broadly read as follows:

> If any Dispute raises issues which are substantially the same as or connected with issues raised in a Dispute subject to arbitration under [any of the Project Documents] executed between [the contracting parties], including this Agreement, or arises out of substantially the same facts as are the subject of an Existing Dispute, or from any relationships, documents, or instruments procured in furtherance of, pursuant to, or in connection with the relationship or agreement between [the contracting parties], the Tribunal appointed or to be appointed in respect of any such Existing Dispute shall also be appointed as the Tribunal in respect of any Related Dispute.[288]

Similarly, parties can assist their goal that all types of relationships, parties, and issues are included in the arbitration agreement's scope with the use of "any and all disputes" phraseology. In several cases, courts have held that the intention of parties with "a broad arbitration clause . . . covering 'any and all disputes,' [is that] they intended the clause to reach all aspects of the parties' relationship."[289] This type of clause, or a similarly drafted clause, has the potential to include by reference the peripheral and functional writings, relationships, and documents which characterize the complex transactions of business today. Consequently, a court will be more likely to hold that nonsignatories are bound to arbitrate disputes; and, signatory defendants litigating claims against nonsignatory plaintiffs will be more likely to have a basis for arguing that the nonsignatory's claims depend on the underlying contract agreement, thus possibly estopping the plaintiff from seeking to avoid arbitration.

Parties who wish to limit arbitration might also seek to do so in the drafting of arbitration agreements as well. Drafters can write arbitration agreements and associated language with a closer eye to the seven contractual relationships that exist to bind a nonsignatory to the terms of the agreement and focus on the claims may likely be asserted in the event that the deal becomes problematic. If there is one lesson to be gleaned from the case law, it is that boiler plate arbitration provisions are of limited use in today's highly complex legal and business world. Lawyers

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288. *Id.*

289. Morphis v. Fed. Home Loan Mortgage Corp., No. 3:02-CV-0210-P, 2002 WL 1461930, at *1 (N.D. Tex. July 3, 2002) (citing Neal v. Hardee's Food Sys., Inc., 918 F.2d 34 (5th Cir. 1990)).

and clients wishing to avoid protracted litigation and wishing to preserve the predictability associated with clarity of arbitration agreements would be well served to make reference to any possible relationships or claims that may arise throughout the transaction and whether or not arbitration is intended.

B. Litigation Involving Parties Who Signed an Arbitration Agreement

Decisions for litigators revolve around pleadings of claims and defenses. Within the Fifth Circuit, signatory defendants will be estopped from avoiding the arbitration agreement when a nonsignatory asserts either (1) substantially interrelated or interdependent misconduct by one or more signatories and one or more nonsignatories, or (2) inherently inseparable facts, issues, or terms arising out of or related to the contract. Stated another way, a nonsignatory will most likely be able to compel arbitration when one or both of the two above conditions is met. A party may not be able to assert the terms of the contract favorable to its position while seeking to avoid the operation of the arbitration agreement. However, even if one or both of these tests are met, the court has discretion to deny a motion to compel arbitration if other circumstances exist which make that decision not clearly erroneous. While it is not clear when it would be appropriate for the court to deny the equitable estoppel claim to compel arbitration, one factor may be language which prevents there being third-party beneficiaries under the contract.

Nonsignatory plaintiffs may be compelled to arbitrate disputes in any of the circumstances that would bind them to the other terms of the contract under ordinary contract law. The nonsignatory plaintiff is most likely to be compelled to arbitrate disputes when the underlying claims, allegations, or facts surrounding the complaint depend on the terms of the contract. Where the nonsignatory plaintiff's claims sound in tort rather than contract, the nonsignatory plaintiff's claims are less likely to be compelled to arbitration. Ultimately, while they may be similar, whether a court resolves that the nonsignatory's claims are tort or contract claims depends on where the particular facts and circumstances of the case lie on the converging continuum of tort and contract law.[290]

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290. *See generally* WILLIAM L. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 380 (1953) (discussing contemporary and historical developments in the "borderland" between tort and contract law); Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial*

The use of business, accounting, and financial experts in drafting contracts or as testimony can help lawyers and parties in crafting precise arbitration provisions to anticipate the types of disputes that may occur if there is a desire to make arbitration more inclusive of parties and issues.[291] Such expert analysis will assist parties in foreseeing potential complications, party involvement, and legal issues that may not appear to be obvious the practitioner or contracting parties during negotiations. Such guidance will also be useful in identifying and gathering useful equitable factors that may weigh in favor of or against arbitration if a complaint is eventually filed.

VII. CONCLUSION

Determining whether a nonsignatory may be bound by an arbitration agreement is principally governed by contract and agency law principles.[292] Nonsignatories to arbitration agreements may be bound by such agreements under one of possibly seven theories depending on the facts of the case: (1) alter ego/veil piercing, (2) incorporation by reference, (3) assumption, (4) equitable estoppel, (5) agency, (6) successors in interest, and (7) third-party beneficiary.

Broadly written arbitration clauses that reference other writings and other parties will have the greatest likelihood of binding a nonsignatory or giving a right to demand arbitration. The most likely scenario for enforcement of an arbitration agreement against a nonsignatory occurs when the nonsignatory raises claims in a forum that are related to the signatory's failure to live up to the terms of the contract which contains the arbitration agreement. When a nonsignatory asserts such a claim, the nonsignatory will likely be bound by the assumption or estoppel theory. In other situations, the factual circumstances of the case will determine if the nonsignatory is bound.

Importantly, because there is no state or federal code of civil procedure for arbitration, the law in this area is being developed by courts and by arbitrators into a type of common law of nonsignatories. These jurisprudential developments often proceed with the accretion and

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Realm, 86 COLUM. L. REV. 377 (1986) (discussing the blurring lines between tort and contract law in other practice areas).

291. Farley J. Cohen, *A Chartered Business Valuator Can Be a Good Choice for Mediator*, THE LAW. WKLY, Aug. 30, 2002, at 16.

292. Ciaccio v. Cazayoux, 519 So. 2d 799 (La. Ct. App. 1987); Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069 (5th Cir. 2002).

dereliction of specific applications with the passage of time. And, the primary lessons for us as lawyers is precision and planning in drafting and in pleading in both arbitration and litigation. Forethought on whether our clients are parties who prospectively, whether as nonsignatories or signatories, may seek to broaden or narrow the scope of the arbitration as the forum for dispute resolution.