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Arbitrating Estoppel: Equitable Estoppel in Arbitration Contracts

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ARBITRATING ESTOPPEL: EQUITABLE ESTOPPEL IN ARBITRATION CONTRACTS

NICHOLAS OLESKI*

ABSTRACT

The Sixth Circuit and the district courts within the circuit have held that non-signatories to arbitration contracts may be compelled to arbitrate under the Federal Arbitration Act—even though they are not signatories to the arbitration contract. These courts reason that the non-signatories must arbitrate their claims because of an equitable estoppel theory. Although the Federal Arbitration Act displaces most state law regarding arbitration, the Supreme Court has held that federal courts must use state contract law to determine who is bound by an arbitration contract. This Note examines state contract law in the Sixth Circuit on equitable estoppel and concludes that the Sixth Circuit’s equitable estoppel theory is not based on state law.

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INTRODUCTION

The primary advantage of arbitration,¹ or any form of alternative dispute resolution, is that it allows willing parties to settle disputes without resorting to the

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¹ Defined as a “term for a range of dispute resolution processes involving the referral of a dispute to an impartial third party who, after giving the parties an opportunity to present their evidence and arguments renders a determination in settlement of the dispute.” Kevin A.

courts. But imagine being subjected to arbitration by a party with whom you never agreed to arbitrate. It would mean, in essence, involuntarily waiving your Seventh Amendment right to a jury trial;² it would mean subjecting yourself to a closeted and closed quasi-judicial practice with little chance of appeal, all of which tend to favor business organizations—not the individual.³ Under an equitable estoppel theory promulgated by several circuits⁴ and adopted by courts in the Sixth Circuit,⁵ you could be forced to arbitrate against your will.

Consider the following hypothetical of Pat, Dan, and Tim. Pat and Dan enter into an employment contract containing an arbitration clause. Tim, Pat's archenemy, convinces Dan that Pat will not be as good an employee and that Dan should hire him instead. Dan then breaches his contract with Pat by firing him and hiring Tim. Subsequently, Pat files a tort action against Tim alleging contractual interference. In the ensuing litigation, Tim seeks to use the arbitration clause in Pat's employment contract to compel arbitration.

Under the equitable estoppel doctrine adopted by the Eleventh Circuit in *MS Dealer v. Franklin*,⁶ Tim would probably be successful in obtaining a stay of the litigation and compelling arbitration. In the hypothetical, Pat is a signatory⁷ litigant, Tim is a non-signatory litigant, and Dan is a signatory non-litigant. Pat's complaint is based on a contract containing an arbitration clause, and he is alleging interdependent and concerted misconduct between Tim and Dan (i.e., they conspired together to breach Pat's employment contract). Thus, although Tim was not a party

Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509 (2002) (quoting DICTIONARY OF CONFLICT RESOLUTION 28, 33 (Douglas H. Yarn ed., 1999)).

² See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 10 (1997); see also Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996) [hereinafter Sternlight, *Panacea*]; Nima H. Mohebbi, Note, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. 555, 557 (2010).

³ See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1241-42 (2001).

⁴ See, e.g., *Grigson v. Creative Artists Agency LLC*, 210 F.3d 524 (5th Cir. 2000); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999).

⁵ See, e.g., *Liedtke v. Frank*, 437 F. Supp. 2d 696 (N.D. Ohio 2006); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003).

⁶ *MS Dealer*, 177 F.3d at 947 (noting that equitable estoppel allowing a non-signatory to compel arbitration arises when: (1) the signatory to a written agreement must rely on the terms of the agreement in asserting her claims; and (2) when the signatory alleges substantially interdependent and concerted misconduct between both the non-signatory and another of the signatories).

⁷ This Note uses the term "signatory" to refer to a person who was an explicit party to a contract containing an arbitration clause. In contrast, "non-signatory" will refer to a person who was not a party to a contract containing an arbitration clause.

to the original contract, he could still enforce the arbitration clause and compel arbitration.

Of course, there is nothing especially unusual about allowing a third party to enforce a contract.⁸ What is unusual about *MS Dealer* is that its equitable estoppel analysis is not based on any traditional estoppel or contract theories.⁹ Nonetheless, as the Supreme Court has noted with some frequency, arbitration is a matter of state contract law.¹⁰ Further, the Court has provided some guidance on how courts should analyze such situations when it held that a non-party to an arbitration agreement has standing to compel arbitration “if the relevant state contract law allows him to enforce the agreement.”¹¹

This Note will argue that the Sixth Circuit should overrule its decision in *Javitch v. First Union* and only allow a non-signatory to compel arbitration under an equitable estoppel theory when the relevant state estoppel law is satisfied. As such, Part I will provide an historical overview of arbitration law. Part II will survey the case law that developed around *MS Dealer* and the equitable estoppel doctrine in general. Part III will study the Sixth Circuit states’ application of equitable estoppel. And Part IV will examine how *MS Dealer* and *Javitch*’s equitable estoppel doctrine does not satisfy state estoppel laws.

I. THE ORIGINS OF ARBITRATION LAW IN AMERICA

Prior to the passage of the Federal Arbitration Act (“FAA”) in 1925,¹² American courts, following English jurisprudence, refused to enforce arbitration agreements.¹³ Judicial hostility to arbitration agreements ultimately gave rise to the passage of the FAA.¹⁴ This fact is crucial to understanding both the federal pro-arbitration policy and the current preference of many courts for arbitration instead of litigation—even when maintaining that preference may be inequitable.

⁸ The most common methods for allowing a non-party to enforce a contract include agency law, third-party-beneficiary principles, and equitable estoppel. *MS Dealer*, 177 F. 3d at 947; see also Frank Z. LaForge, Note, *Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists*, 84 TEX. L. REV. 225, 230 (2005) (discussing these principles).

⁹ See *infra* Part III & IV; see also LaForge, *supra* note 8, at 240.

¹⁰ See, e.g., *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

¹¹ *Arthur Andersen*, 556 U.S. at 632.

¹² 9 U.S.C. §§ 1-16 (2012).

¹³ Sternlight, *Panacea*, *supra* note 2, at 644 (noting that parties could agree to arbitrate only after a dispute arose—not before).

¹⁴ *Id.* at 645-46.

A. Brief History of European and English Arbitration

The collapse of the Roman Empire completely halted commercial activity in Europe.¹⁵ Subsequently, a decentralized system of regional interaction, particularly with respect to trade, developed.¹⁶ Agricultural improvements in the eleventh century, however, enabled societies to sustain growing populations.¹⁷ As a result, population boomed and people began migrating to urban areas, where a new class of merchants emerged.¹⁸ In order to facilitate trade, these merchants, who traded with other merchants living in distant cities,¹⁹ developed the law merchant, an informal body of law that reflected the merchants' customs and shared legal notions.²⁰ When disputes arose, merchants utilized private arbitrators rather than common-law judges because "arbitrators were merchants who had expertise in the relevant trade and were familiar with business norms and industry practices."²¹

For centuries, arbitration remained the primary method for resolving commercial disputes.²² Common-law judges in England, however, eventually became concerned that arbitration served as an end run around the legal system and that arbitration would weaken the English courts.²³ Accordingly, English judges became hostile to arbitration clauses and refused to enforce them in contracts.²⁴ This policy enabled a party to revoke, up until the arbitrator made her decision, her agreement to submit

¹⁵ See JAMES W. ERMATINGER, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 68 (2004) (chronicling the history of the Roman Empire's collapse and its effect on increased regional interaction).

¹⁶ *Id.*

¹⁷ See Peter T. Leeson, *One More Time With Feeling: The Law Merchant, Arbitration, and International Trade*, 2007 INDIAN J. OF ECON. & BUS. (SPECIAL ISSUE) 29, 30 (discussing development of merchant classes that followed from increased agricultural production and urban migration).

¹⁸ *Id.*

¹⁹ Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 460 (1996). Instead of becoming traveling salespersons, though, merchants organized "fairs" where they met and engaged in trade with one another. *Id.*

²⁰ Leeson, *supra* note 17, at 30.

²¹ Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and A Proposal for Change*, 53 ALA. L. REV. 789, 793 (2002); see also Cole, *supra* note 19, at 459 (examining a merchant's understanding of the common-law system).

²² Cole, *supra* note 19, at 461.

²³ *Id.* ("Eventually, however, common law judges became concerned that the merchants' ability to systematically circumvent common law court procedures by agreeing to submit their disputes to arbitration had resulted in a reduction of the judges' salaries.") (citing Kill v. Hollister, 95 Eng. Rep. 352, 1 Wils. 129 (1746)).

²⁴ *Id.* at 462. Professor Cole suggests that the judges' self-interested rationale "was that the increased use of arbitration had diminished judges' salaries because the amount a judge was paid depended on the number of cases he heard." *Id.* at 461-62 (citing Scott v. Avery, 25 L.J. Ex. 308, 313, 111 Rev. Rep. 392 (H.L. 1856)).

the controversy to arbitration.²⁵ This became known as the doctrine of revocability²⁶ and remained the law in England for nearly 300 years.²⁷ Finally, in 1889, the English Parliament sounded the death knell for the revocability doctrine with the enactment of the Arbitration Act.²⁸ This change in English law is said to have prompted the movement in the United States to reform arbitration law.²⁹ Whatever ultimately prompted the change in American arbitration law, it was clear that change would have to come via the legislature, as in England, because the American judiciary proved unwilling to make such a dramatic change in the law.³⁰

B. A Brief Overview of American Arbitration Prior to the FAA

For the most part, the development of arbitration in America was influenced by the English common-law tradition.³¹ Indeed, American courts used a variety of rationales, some borrowed from the English common law, to refuse to enforce arbitration agreements.³² Even in the early part of the twentieth century, many states

²⁵ Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As A Dispute Resolution Process*, 77 NEB. L. REV. 397, 426 (1998). This, of course, led to abuse; a party would revoke her submission to arbitrate if she believed the arbitrator was going to rule against her. *Id.* at 426 n.188 (citing Bills to Make Valid and Enforceable Written Provisions or Agreements For Arbitration of Disputes Arising Out of Contracts, Maritime Transactions or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. 14-15 (1924) (statement of Julius Henry Cohen, Member of the Committee on Commerce, Trade and Commercial Law of the American Bar Association and General Counsel for the New York State Chamber of Commerce)).

²⁶ See *Vynior's Case*, 8 Co. Rep. 80a, 81b (1609) (establishing the doctrine).

²⁷ Harding, *supra* note 25, at 429.

²⁸ IAN R. MACNEIL, AMERICAN ARBITRATION LAW 27 (1992); Arbitration Act, 1996, c. 23, §§ 1-110 (Eng.).

²⁹ MACNEIL, *supra* note 28, at 27.

³⁰ See, e.g., H.R. Rep. No. 68-96, at 2 (1924) (“The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.”); see also *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915) (criticizing the doctrine of revocability, but nonetheless declining to enforce an arbitration agreement).

³¹ See Pittman, *supra* note 21, at 797; see also Harding, *supra* note 25, at 426 (1998). At least one commentator, however, notes that American courts were even more hostile toward arbitration than their English counterparts. Cole, *supra* note 19, at 464 n.68.

³² See *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (“agreements [made] in advance to oust the courts of the jurisdiction conferred by law are illegal and void”); *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (“[Arbitrators] are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum iudicium”); *Wood v. Humphrey*, 114 Mass. 185, 186 (1873) (“It has been long settled that agreements to arbitrate which entirely oust the courts of jurisdiction will not be supported at law or in equity”).

continued to pass laws that limited the scope of arbitration agreements—in spite of the commercial desire and need for laws enforcing arbitration agreements.³³

Nevertheless, businessmen increasingly turned to arbitration as government regulation of the economy increased during the Progressive Era.³⁴ These businessmen found respite from government regulation by arbitrating their disputes to solve their own problems “without resort to the clumsy and heavy hand of [g]overnment.”³⁵ Unlike judges or juries, “arbitrators confine themselves to their specialty, that of passing on technical questions of fact in modern business.”³⁶ This proved crucial in increasing the desirability of arbitration as the complexities of new business disputes led to an overtaxed judiciary whose procedures were inflexible and whose laws tended to be obsolete.³⁷

Lobbying efforts ramped up during the 1910s to change American arbitration law and ensure that arbitration agreements would be enforced.³⁸ New York became the first state to codify a statute guaranteeing that courts would specifically enforce arbitration agreements.³⁹ Julius Henry Cohen, a leading proponent of the New York law, argued that a legally enforceable arbitration clause demonstrated New York’s public policy “toward adjusting trade difficulties out of court and thus preserving the good relations between the parties, while securing a fair and reasonable adjustment of the controversy in hand.”⁴⁰ With businessmen and lawyers side by side, the effort to end judicial hostility to arbitration and place such agreements on the “same footing as other contracts”⁴¹ could not fail. In 1925, Congress passed the FAA, which made arbitration agreements irrevocable and enforceable.⁴²

C. The FAA and the Federal Presumption Toward Arbitration

The background provided above is critical to understanding the climate in which the FAA was passed and how courts interpreted and understood the FAA subsequently.⁴³ After espousing such hostility toward arbitration agreements, courts,

³³ Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 595 (1928). Sayre’s article, somewhat ironically, pleads that Congress should look to English law and its arbitration reforms to address commercial concerns. *See id.* at 596.

³⁴ JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 101 (1983).

³⁵ *Id.*

³⁶ Sayre, *supra* note 33, at 615.

³⁷ Cole, *supra* note 19, at 465.

³⁸ MACNEIL, *supra* note 28, at 28-29.

³⁹ FRANCES A. KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 10 (1948).

⁴⁰ Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 152 (1921) (noting as well the statute’s “efficacy as a preventive of unnecessary and burdensome litigation is as demonstrable as that sanitation is a preventive of disease.”).

⁴¹ H.R. Rep. No. 68-96, at 1 (1924).

⁴² Cole, *supra* note 19, at 466.

⁴³ Another point of emphasis is that the FAA was passed when *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), was still good law. Because the rules governing arbitration were considered

in the wake of the FAA, found that it “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.”⁴⁴

1. Current Law Regarding Arbitration Agreements

Today, whether or not a particular matter is subject to arbitration is a matter of contract law.⁴⁵ Thus, the key question in determining the enforceability of an arbitration clause is whether the parties actually agreed to arbitrate the issue or dispute.⁴⁶ Even in light of the federal presumption to arbitrate, courts will not enforce an arbitration clause that goes beyond the plain meaning or intent of the parties just to satisfy the policy of favoring arbitration.⁴⁷ “Arbitration under the [FAA] is a matter of consent, not coercion.”⁴⁸

The federal presumption favoring arbitration continued to expand as the Supreme Court interpreted the FAA to preempt state laws at variance with the FAA.⁴⁹ Thus, even if the parties file an action in state court to enforce an arbitration agreement, the state court must apply the FAA if it is implicated.⁵⁰ Still, ordinary state-law

procedural rather than substantive, federal courts sitting in diversity would not apply state arbitration statutes, thus creating an additional need for a federal statute. Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 126 (2002).

⁴⁴ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986) (“it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability”); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960) (“Doubts should be resolved in favor of [arbitration].”).

⁴⁵ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

⁴⁶ *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (“the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so”).

⁴⁷ *Waffle House*, 534 U.S. at 294.

⁴⁸ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

⁴⁹ *See Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984); *cf. Kenneth F. Dunham, Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 199 (2006) (discussing the alternative interpretations offered by *Southland*’s critics as well as its supporters). Although state law is utilized to determine whether the parties actually agreed to arbitrate, there is now a body of federal substantive law regarding almost every other aspect of arbitration. *Id.* at 202 (citing *Hatzlachh Supply Inc. v. Moishe’s Elecs., Inc.*, 828 F. Supp. 178 (S.D.N.Y. 1993)). As one commenter notes, “for all practical purposes, state law has been ousted from the arbitration arena by coupling the FAA with the Commerce Clause.” *Id.* at 202.

⁵⁰ *Southland Corp.*, 465 U.S. at 15. *But see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-88 (1995) (Thomas, J., dissenting) (arguing that Congress, when it passed the FAA, did not consider it to be applicable in state courts due to the fact that *Swift v. Tyson* was still good law); *see also Thomas E. Carbonneau, The Revolution in Law Through Arbitration*,

principles regarding contract formation are used to decide whether the parties agreed to arbitrate a given issue.⁵¹ Indeed, section 2 of the FAA prescribes that written arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.”⁵² Thus, the FAA does not displace state law—either common law or statutory law—that applies to all contracts; rather, the FAA precludes “the States from singling out arbitration provisions for suspect status.”⁵³

2. The Supreme Court and Equitable Estoppel

In 2009, the Supreme Court issued an opinion captioned *Arthur Andersen LLP v. Carlisle*, which confirmed the primacy of state contract law in assessing agreements to arbitrate.⁵⁴ After they sold their construction-equipment company, Wayne Carlisle, James Bushman, and Gary Strassel (“plaintiffs”) were introduced to Bricolage Capital as well as several law firms by their auditor Arthur Andersen.⁵⁵ On the advice of these advisors, the plaintiffs engaged in a complicated tax shelter plan designed to create illusory losses.⁵⁶ As part of this plan, plaintiffs formed several limited liability companies, which subsequently entered into investment management agreements with Bricolage.⁵⁷ These agreements contained an arbitration clause.⁵⁸

“As with all that seems too good to be true, a controversy did indeed arise.”⁵⁹ The investments the plaintiffs made were worthless, and the IRS found the tax shelter to be illegal.⁶⁰ The plaintiffs filed suit in federal court against the defendants, Bricolage Capital and Arthur Anderson, alleging fraud (among other claims).⁶¹ The defendants⁶² moved to stay the litigation and compel arbitration under an equitable

56 CLEV. ST. L. REV. 233, 249 (2008) (arguing that the FAA “was meant to merely serve as a gap-filler in a system in which the assertion of judicial jurisdiction was controlled by *Swift v. Tyson*”).

⁵¹ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63, n.9 (1995), *Volt Info.*, 489 U.S. at 475-76, and *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987)).

⁵² 9 U.S.C. § 2 (2012) (emphasis added).

⁵³ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (noting that arbitration clauses are indistinguishable from contracts).

⁵⁴ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

⁵⁵ *Id.* at 626.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 627.

⁶² *Barring Bricolage*, which filed for bankruptcy. *Id.* at 627 n.2.

estoppel argument.⁶³ The district court rejected this argument and denied their stay.⁶⁴ Subsequently, the defendants appealed to the Sixth Circuit, which held that because the arbitration agreement was not in writing, it did not have jurisdiction to hear the appeal.⁶⁵

Although the Supreme Court did not directly address how federal courts should interpret equitable estoppel in the context of an agreement to arbitrate,⁶⁶ it confirmed some background principles, and its dicta suggests that federal courts turn to state law when confronted with a non-signatory seeking to compel arbitration.⁶⁷ Indeed, the Court was quite explicit that the FAA does not alter any state contract laws regarding the scope of agreements, “including the question of who is bound by them.”⁶⁸ Thus, it was error for the Sixth Circuit to hold that non-signatories are, by definition, barred from § 3 relief; that question must be answered with reference to state law.⁶⁹ The Court was explicit that when the lower courts are confronted with a non-signatory seeking to enforce an arbitration clause, the courts must look to state contract law to determine if the non-signatory can compel arbitration.⁷⁰

⁶³ *Id.* at 627.

⁶⁴ *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597, 598 (6th Cir. 2008), *rev'd sub nom.* *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

⁶⁵ *Id.* Section 16(a)(1) of the FAA permits that, “[a]n appeal may be taken from an order refusing a stay of any action under section 3.” 9 U.S.C. § 16(a)(1) (2012). Section 3 prescribes that a federal court shall issue a stay of the litigation if the issue is “referable to arbitration under an agreement made in *writing* for such arbitration.” *Id.* § 3 (emphasis added). The Sixth Circuit “read the plain language” of the FAA to “preclude appellate jurisdiction” because there was not an agreement in writing between the parties; there were agreements in writing between defendants and the limited liability companies, but not between the plaintiffs or defendants. *Carlisle*, 521 F.3d at 602; *see also In re Universal Serv. Fund Tel. Billing Practice Litig. v. Sprint Commc’ns Co., L.P.*, 428 F.3d 940, 944-45 (10th Cir. 2005); *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003) (both agreeing with the reasoning of the Sixth Circuit). *But see Ross v. Am. Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007) (disagreeing with the Sixth Circuit and holding that the claims were “inextricably intertwined” with the arbitration clause, which meets the writing requirement of the FAA).

⁶⁶ The issues before the Court were “whether appellate courts have jurisdiction under § 16(a) [of the FAA] to review denials of stays requested by litigants who were not parties to the relevant arbitration agreement, and whether § 3 can ever mandate a stay in such circumstances.” *Arthur Andersen*, 556 U.S. at 625-26. The Court held that a non-signatory could invoke § 3 “if the relevant state contract law allows him to enforce the agreement.” *Id.* at 632.

⁶⁷ *See id.* *But see* Mohebbi, *supra* note 2, at 568 (arguing that Justice Scalia’s majority opinion vastly expands the scope of the FAA).

⁶⁸ *Arthur Andersen*, 556 U.S. at 630.

⁶⁹ *Id.* at 631 (citing 21 R. LORD, WILLISTON ON CONTRACT § 57:19, p. 183 (4th ed. 2001)).

⁷⁰ *Id.* *But see id.* at 633 (Souter, J., dissenting) (arguing that FAA should be read to offer a § 3 stay only to signatories of the contract); *see also* Mohebbi, *supra* note 2, at 568.

II. EQUITABLE ESTOPPEL

Given that a valid contract requires mutual consent, a non-signatory cannot, as a general rule, compel a signatory to arbitrate.⁷¹ Nevertheless, courts have recognized that non-signatories may be bound to an arbitration agreement under ordinary contract and agency law principles.⁷² The Sixth Circuit has recognized five theories for binding the non-signatory: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) equitable estoppel.⁷³ This article will focus on the equitable estoppel theory and examine how courts have used this theory to compel arbitration between parties who never actually agreed to arbitrate.

A. MS Dealer v. Franklin

In *MS Dealer v. Franklin*, the plaintiff, Sharon Franklin, entered into a contract to purchase a car from the defendant-car dealership.⁷⁴ The contract also included a third-party service contract with MS Dealer, a non-signatory to the underlying agreement.⁷⁵ The plaintiff sued both MS Dealer and the auto dealership after she discovered several defects in the car; she alleged fraud, breach of contract, conspiracy, and breach of warranty.⁷⁶ MS Dealer sought to use the arbitration clause contained in the contract⁷⁷ to compel arbitration. Even though MS Dealer was not a signatory to the contract containing the arbitration clause, the Eleventh Circuit held that MS Dealer could compel arbitration under an equitable estoppel theory.⁷⁸ In

⁷¹ See *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (“[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”) (quoting *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

⁷² See *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990).

⁷³ *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003) (citing *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)).

⁷⁴ *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 944 (11th Cir. 1999).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The arbitration provision provided: “BUYER HEREBY ACKNOWLEDGES AND AGREES THAT ALL DISPUTES AND CONTROVERSIES OF EVERY KIND AND NATURE BETWEEN BUYER AND JIM BURKE MOTORS, INC. ARISING OUT OF OR IN CONNECTION WITH THE PURCHASE OF THIS VEHICLE WILL BE RESOLVED BY ARBITRATION.” *Id.*

⁷⁸ *Id.* Courts often note a distinction between a non-signatory seeking to compel arbitration against a signatory and a signatory seeking to compel arbitration against a non-signatory. See *Thomson-CSF*, 64 F.3d at 779 (noting that courts will estop a signatory from avoiding arbitration but will not estop a non-signatory from avoiding arbitration when the benefit being sought on the contract is only indirect). The *Thomson* court justified the distinction by arguing that when a non-signatory compels a signatory, the signatory has indicated a willingness to arbitrate—albeit not with the party compelling arbitration. *Id.* Since arbitration, however, is based on the consent of the parties—something the *Thomson* court concedes—the distinction is meaningless; if the parties did not agree to arbitrate with one another, then arbitration can never be compelled—unless some other contract theory demands it.

doing so, the court delineated two different circumstances where existing case law allowed a non-signatory to compel arbitration using equitable estoppel: (1) when the signatory to a written contract with an arbitration clause must rely on the terms of contract in asserting her claims against the non-signatory,⁷⁹ and (2) when the signatory raises allegations of “substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories.”⁸⁰

The *MS Dealer* court held that both circumstances applied and compelled arbitration.⁸¹ Although the plaintiff did not allege that the service contract had been violated in any way, each of her fraud and conspiracy claims depended entirely on her contractual obligations.⁸² The second circumstance was met because the plaintiff alleged that MS Dealer and the auto dealership engaged in a fraudulent scheme together.⁸³ After holding the plaintiff equitably estopped from avoiding arbitration, the court did not determine whether MS Dealer could compel arbitration under either an agency or third-party beneficiary theory.⁸⁴

The Eleventh Circuit later recognized that *MS Dealer* was abrogated by *Arthur Andersen LLP v. Carlisle* by noting that, “state law governs whether an arbitration clause is enforceable against a nonsignatory under the FAA.”⁸⁵ Nevertheless, the court compelled arbitration against a non-signatory because the non-signatory’s claim was “inextricably intertwined” with his claims against the signatory.⁸⁶ Although this analysis is probably insufficient under most state estoppel laws,⁸⁷ the court justified its holding by citing to a Florida state court that adopted *MS Dealer*’s equitable estoppel analysis.⁸⁸ Thus, the court recognized the abrogation yet still

⁷⁹ *MS Dealer*, 177 F.3d at 947 (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)).

⁸⁰ *Id.* (quoting *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1433 (M.D. Ala. 1997)). These two “circumstances” eventually became two prongs of one test. *See, e.g., In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 975 (11th Cir. 2002), *rev’d on other grounds sub nom., PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

⁸¹ *MS Dealer*, 177 F.3d at 947.

⁸² *Id.* at 948. The court noted that although the plaintiff attempted to sound her complaint against MS Dealer in tort (i.e., fraud and conspiracy), those claims depended entirely upon her contractual obligation to pay for the service contract. *Id.* at 948 n.4.

⁸³ *Id. But cf. Grigson v. Creative Artists Agency LLC*, 210 F.3d 524, 535 (5th Cir. 2000) (Dennis, dissenting) (arguing that the contract was ambiguous and it would not be unreasonable to construe it to include MS Dealer as one of the parties to it, thus obviating the need to resort to an equitable estoppel theory to compel arbitration).

⁸⁴ *MS Dealer*, 177 F.3d at 948.

⁸⁵ *Escobal v. Celebration Cruise Operator, Inc.*, 482 F. App’x 475, 476 (11th Cir. 2012).

⁸⁶ *Id.*

⁸⁷ *See infra* Parts III & IV; *see also In re Standard Jury Instructions—Contract & Bus. Cases*, 116 So. 3d 284, 328 (Fla. 2013) (providing that equitable estoppel is established when a party took action, which another party relied on in good faith to her detriment); *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001) (an estoppel arises where a party “willfully cause[s] another to believe in the existence of a certain state of things, and thereby induces him to act on this belief injuriously to himself.”).

followed *MS Dealer*'s reasoning because it found that *MS Dealer* was incorporated into Florida's contract law.⁸⁹

B. Javitch v. First Union Securities, Inc.

The Sixth Circuit continued to demonstrate the federal policy favoring arbitration when it vacated the district court's denial of a signatory's motion to compel arbitration against a non-signatory in *Javitch v. First Union Securities, Inc.*⁹⁰ The plaintiff, Victor Javitch, was appointed as receiver for VES and CFL⁹¹ to oversee and administer their business and assets for the benefit of all their creditors, investors, and owners.⁹² Under this authority, Javitch brought claims against First Union Securities, Charles Schwab, Fifth Third, and several of each firm's individual brokers.⁹³ Each complaint averred negligence, negligent supervision, breach of fiduciary duty, fraud, conspiracy to defraud, RICO violations, aiding and abetting violations of federal securities laws, and conversion.⁹⁴ Each defendant sought to compel arbitration because VES and CFL, when they opened brokerage accounts at the defendant-firms, entered into binding arbitration agreements as part of the customary consumer contract.⁹⁵

The defendants argued that even though Javitch, as the receiver, did not enter into an arbitration agreement, he should nevertheless be compelled to arbitrate because the broker-customer relationship on which he based his claims would not exist but for the agreements containing the arbitration clause.⁹⁶ This is thus an inverse of the *MS Dealer* scenario, where a non-signatory defendant attempts to compel a signatory plaintiff to arbitrate; in *Javitch*, signatory defendants sought to compel a non-signatory plaintiff to arbitrate. As such, the court used the Second Circuit's equitable estoppel analysis in *Thomson-CSF v. American Arbitration Association*, which held that a non-signatory could only be compelled to arbitrate when she "seeks a direct benefit from the contract while disavowing the arbitration

⁸⁸ *Escobal*, 482 F. App'x at 476 n.3 (citing *Kolsky v. Jackson Square, LLC*, 28 So. 3d 965, 969 (Fla. Dist. Ct. App. 2010)).

⁸⁹ However, this is circular logic. The Eleventh Circuit realized that Supreme Court precedent foreclosed complete reliance on *MS Dealer*, unless it was based on state contract law. But the Eleventh Circuit still applied *MS Dealer* because a Florida state court relied on its reasoning before the Eleventh Circuit realized that *MS Dealer* was abrogated.

⁹⁰ 315 F.3d 619, 622 (6th Cir. 2003).

⁹¹ Javitch was judicially appointed after it was alleged, in a separate case, that James Capwill and entities he controlled, including VES and CFL, defrauded funding companies and investors. *Id.* at 621.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 622.

⁹⁵ *Id.* at 623.

⁹⁶ *Id.* at 628-29. The court noted that each claim rested on the duties defendants owed VES and CFL. *Id.* at 622.

provision.”⁹⁷ Ultimately, the Sixth Circuit remanded the case to the district court for further fact finding on whether Javitch sought a direct benefit from the customer agreements.⁹⁸

On remand, the district court stayed the litigation in favor of arbitration under an equitable estoppel theory.⁹⁹ The district court specifically noted that Javitch “cannot both seek to benefit in this suit from the relationships created by those agreements, while disavowing the arbitration provisions.”¹⁰⁰

The Sixth Circuit has yet to address the equitable estoppel scenario raised in *MS Dealer* and several other prominent cases,¹⁰¹ but the district courts within the circuit have seen and decided these issues. For example, in *Cox v. ScreeningOne, Inc.*,¹⁰² *Wise v. Zwicker & Associates, PC*,¹⁰³ *Villanueva v. Barcroft*,¹⁰⁴ *Simpson v. LifeNet, Inc.*,¹⁰⁵ *Eaves-Leanos v. Assurant, Inc.*,¹⁰⁶ and *Liedtke v. Frank*,¹⁰⁷ the district courts adopted the equitable estoppel analysis of *MS Dealer*. Thus, a question arises as to whether *MS Dealer*’s equitable estoppel is recognized by state contract laws within the Sixth Circuit.

III. SIXTH CIRCUIT STATE LAW ON EQUITABLE ESTOPPEL

As seen above, agreements to arbitrate are interpreted in light of state-law contract principles.¹⁰⁸ Although the FAA and its subsequent case law created a body of federal substantive law governing arbitrability (i.e., whether a given dispute or

⁹⁷ *Id.* at 778-79. When only an indirect benefit is sought, the non-signatory may not be compelled to arbitrate; if a signatory sought only an indirect benefit, she, of course, could be compelled to arbitrate (assuming the requirements of *MS Dealer* are met). *Id.*

⁹⁸ *Javitch*, 315 F.3d at 629. This direct versus indirect benefit analysis seems similar to the first prong of *MS Dealer*, requiring that signatory rely on the terms of a written contract when asserting her claims. *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); see also *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000) (“[A] party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him”).

⁹⁹ *Javitch v. First Union Sec.*, No. 3:01 CV 780, 2011 WL 665727, at *4 (N.D. Ohio Feb. 15, 2011).

¹⁰⁰ *Id.*

¹⁰¹ For a detailed analysis of one particularly eccentric case, which has, as its author notes, “it all: rags-to-riches Hollywood success stories, celebrity superstars, chainsaw massacres, duplicitous movie executives,” and equitable estoppel, see LaForge, *supra* note 8, at 233.

¹⁰² No. 4:14-CV-229, 2015 WL 413812, at *3 (N.D. Ohio Jan. 30, 2015).

¹⁰³ No. 5:12-CV-01653, 2013 WL 1195555, at *7 (N.D. Ohio Mar. 22, 2013).

¹⁰⁴ 822 F. Supp. 2d 726, 739 (N.D. Ohio 2011) (applying *MS Dealer* in the context of a forum selection clause).

¹⁰⁵ No. 09-12228-BC, 2010 WL 86328, at *2 (E.D. Mich. Jan. 5, 2010).

¹⁰⁶ No. 3:07-CV-18-S, 2008 WL 1805394, at *2-3 (W.D. Ky. Apr. 21, 2008).

¹⁰⁷ 437 F. Supp. 2d 696, 699 (N.D. Ohio 2006).

¹⁰⁸ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

contract is subject to arbitration), state law is used to determine whether or not the parties agreed to arbitrate.¹⁰⁹ The following section examines the state of equitable estoppel in each state within the Sixth Circuit and analyzes whether such laws are consistent with the approach adopted by courts within the Sixth Circuit.

A. Kentucky

In Kentucky,

The essential elements of equitable estoppel are[:] (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.¹¹⁰

In *Sebastian*, the Kentucky Supreme Court held that the plaintiff could not equitably estop a zoning board from denying his zoning plan—even though it had a long history of prior approvals.¹¹¹ Indeed, the slow pace of development, over a four-decade stretch, showed that the plaintiff's actions (or inactions) were directly related to the slow pace of development—not the actions of the board; his actions were not induced by any reliance on a representation made by the zoning board.¹¹² Further, the long delay created a foreseeable possibility that not only zoning regulations might change, but also the attitude of the zoning board.¹¹³ The crux of this holding is that a plaintiff must innocently rely to her detriment on some false representation.

B. Michigan

Michigan requires that one who seeks to invoke equitable estoppel must establish that there has been: “(1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of

¹⁰⁹ *Hatzlachh Supply Inc. v. Moishe's Elecs., Inc.* 828 F. Supp. 178 (S.D.N.Y. 1993). The notion that there is a body of federal common law regarding arbitration is highly controversial, with critics claiming that this violates the *Erie* Doctrine. Dunham, *supra* note 49, at 199 (summarizing the arguments of both critics and supporters).

¹¹⁰ *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban Cnty. Gov't*, 265 S.W.3d 190, 194-95 (Ky. 2008); *see also* *Weiland v. Bd. of Trs. of Ky. Ret. Sys.*, 25 S.W.3d 88, 91 (Ky. 2000); *Elec. & Water Plant Bd. of Frankfort v. Suburban Acres Dev., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974).

¹¹¹ *Sebastian*, 265 S.W.3d at 194.

¹¹² *Id.*

¹¹³ *Id.*

the actual facts on the part of the representing or concealing party.”¹¹⁴ Although Michigan courts utilize their equitable powers, such powers are reserved for extraordinary circumstances.¹¹⁵ Indeed, Michigan’s Supreme Court has been unwilling to find an estoppel unless there has been intentional or negligent conduct.¹¹⁶

In *Cincinnati Insurance*, Michigan’s Supreme Court allowed the plaintiff to estop the defendant from asserting the statute of limitations as a defense.¹¹⁷ In a subrogation dispute between two insurance agencies, the court found that the plaintiff delayed bringing litigation “at the request of [the defendant].”¹¹⁸ This fact, coupled with ample evidence showing that the defendant represented that the subrogation claim would be processed quickly, justified the plaintiff in relying on the defendant’s representations.¹¹⁹ Similar to Kentucky’s equitable estoppel, Michigan essentially requires that a party make a misrepresentation, on which the other party detrimentally relies.

C. Ohio

The principle that underscores Ohio’s gloss on equitable estoppel “is to prevent actual or constructive fraud and to promote the ends of justice.”¹²⁰ Similar to Kentucky and Michigan, Ohio bases its doctrine on detrimental reliance.¹²¹ An estoppel arises where one has been innocently misled into an injurious position,¹²² or where one party induces another to believe certain things and the other party reasonably relies on the misrepresentation to her detriment.¹²³

In *Doe v. Archdiocese of Cincinnati*, the court found that the defendants could not be equitably estopped from asserting the statute of limitations as a defense to the plaintiff’s claims of negligent infliction of emotional distress and breach of fiduciary duty (among others).¹²⁴ The plaintiff alleged that she had a sexual relationship,

¹¹⁴ *Cincinnati Ins. Co. v. Citizens Ins. Co.*, 562 N.W.2d 648, 651 (Mich. 1997).

¹¹⁵ *Flynn v. Korneffel*, 547 N.W.2d 249 (Mich. 1996).

¹¹⁶ *Cincinnati Ins.*, 562 N.W.2d at 651 (citing *Lothian v. Detroit*, 324 N.W.2d 9 (Mich. 1982)); see also *Devillers v. Auto Club Ins. Ass’n*, 702 N.W.2d 539, n.64 (Mich. 2005); *Solo v. Chrysler Corp.*, 292 N.W.2d 438 (Mich. 1980).

¹¹⁷ *Cincinnati Ins.*, 562 N.W.2d at 652.

¹¹⁸ *Id.* at 651.

¹¹⁹ *Id.* at 652. The court further notes, ipso facto, the fact that the defendant “did not intend to honor its representations is demonstrated by the fact that it *did not* honor them.” *Id.*

¹²⁰ *Ohio State Bd. of Pharmacy v. Frantz*, 555 N.E.2d 630, 633 (Ohio 1990).

¹²¹ *Doe v. Archdiocese of Cincinnati*, 880 N.E.2d 892, 894 (Ohio 2008) (quoting *McAfferty v. Conover’s Lessee*, 7 Ohio St. 99, 105 (1857) (“[A] party will be concluded from denying his own acts or admissions, which were designed to influence the conduct of another, and did so influence, and when such denial will operate to the injury of the latter”)).

¹²² *Russell v. Fourth Nat’l Bank*, 131 N.E. 726, 733 (Ohio 1921).

¹²³ *State ex rel. Chavis v. Sycamore City Sch. Dist. Bd. of Educ.* 641 N.E.2d 188, 193 (Ohio 1994).

¹²⁴ *Doe*, 880 N.E.2d at 893.

which gave rise to her claims, with a priest some forty years prior to the litigation.¹²⁵ She further alleged that the priest and a nurse persuaded her that she must “suffer in silence.”¹²⁶ Nevertheless, the court held that the only facts relevant to her equitable estoppel argument would be any allegations that the Archdiocese tried to prevent her from timely filing suit.¹²⁷ Indeed, the court reaffirmed that the purpose of equitable estoppel is to prevent fraud, and here, none of the plaintiff’s allegations provided any indication that the plaintiff was duped into not filing suit.¹²⁸ A common thread linking these states together is the requirement that the party seeking an estoppel must detrimentally rely on a statement or misrepresentation of the other party.

D. Tennessee

According to Tennessee, equitable estoppel arose from the maxim that no person may take advantage of her own wrong.¹²⁹ To assert a viable equitable estoppel argument, a party must establish that she was induced to follow an injurious course by her opponent, who knew, or reasonably should have known, that such inducements would cause injury.¹³⁰ Importantly, this doctrine only applies where “the opposing party ha[s] engaged in misconduct.”¹³¹ Accordingly, each Sixth Circuit state requires some form of misconduct and detrimental reliance on that misconduct. The next section examines whether the equitable estoppel theories espoused by *MS Dealer* and *Javitch* have any root in the traditional state-law estoppel doctrines.

IV. INEQUITABLE ESTOPPEL

A. The Inequities of *MS Dealer*

The most obvious problem with *MS Dealer*’s equitable estoppel argument is that the parties never agreed to arbitrate their dispute. Indeed, the focus is on esoteric interpretations of the signatory’s claims—rather than any theory of contractual consent.¹³² Moreover, as discussed below, equity is not offended if a court refuses to compel arbitration on behalf of a non-signatory against a signatory. Instead, it would

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 895.

¹²⁸ *Id.*

¹²⁹ *Richardson v. Snipes*, 330 S.W.2d 381, 390 (Tenn. Ct. App. 1959) (quoting 1 HENRY R. GIBSON, GIBSON’S SUITS IN CHANCERY § 60 pg. 74 (5th ed. 1955)).

¹³⁰ *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 460 (Tenn. 2012); *see also Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 315-16 (Tenn. 2009) (listing the elements of equitable estoppel: (1) conduct that amounts to a false representation, (2) intention that such conduct will be acted upon, and (3) knowledge of the real facts).

¹³¹ *Norton v. Everhart*, 895 S.W.2d 317, 321 (Tenn. 1995).

¹³² Again this consent does not have to be explicit. There are many vehicles, such as agency law and third-party beneficiary principles, that are firmly footed in contract law that may provide a method for compelling arbitration in the *MS Dealer* scenario. *MS Dealer*’s equitable estoppel theory is not one of those vehicles.

seem that equity would in fact demand the non-enforcement of the arbitration clause because enforcing it effectively nullifies the signatory's constitutional right to civil court.¹³³

As an initial matter, it is possible that *MS Dealer's* first prong, requiring that signatory must rely on the terms of the contract in asserting her claims against the non-signatory,¹³⁴ could comply with traditional estoppel theories in that by asserting a claim against a non-signatory, the signatory is making an implicit misrepresentation.¹³⁵ In essence, the first prong requires the signatory to make contradictory statements/claims; she is attempting to hold the non-signatory liable based on the terms of the contract while denying or ignoring the arbitration clause contained therein.¹³⁶ This, however, seems to misunderstand the purpose behind equitable estoppel: preventing wrongdoers from profiting from their wrongdoing.¹³⁷ The focus should be on the wrongful or fraudulent conduct of a party, upon which equity prevents that party from profiting;¹³⁸ under *MS Dealer*, the focus is on the abstract interpretations of the signatory's claims (i.e., whether or not the claims are inextricably intertwined with the contract)—not the signatory's conduct toward the non-signatory.¹³⁹

The crux of this is that *MS Dealer's* first prong requires a court to focus on the *claims* of the signatory—not her *conduct*. As an example, consider the facts of *MS Dealer* itself.¹⁴⁰ Recall that the first prong was met because the plaintiff's claims made reference to and assumed the existence of a written contract.¹⁴¹ But there is nothing about her conduct that might give rise to an estoppel. Indeed, courts generally require that some representation be made.¹⁴² Almost by definition, then, there must be some contact or conduct between the parties. *MS Dealer*, however, focuses solely upon claim construction and interpretation—not the conduct of the

¹³³ See sources cited *supra* note 2. Professor Sternlight has been one the chief critics against binding arbitration—especially in so far as it infringes on a litigant's Seventh Amendment right to a jury trial.

¹³⁴ *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

¹³⁵ See Mohebbi, *supra* note 2, at 574.

¹³⁶ See LaForge, *supra* note 8, at 244.

¹³⁷ See, e.g., *Ohio State Bd. of Pharmacy v. Frantz*, 555 N.E.2d 630, 633 (Ohio 1990); *Richardson v. Snipes*, 330 S.W.2d 381, 390 (Tenn. Ct. App. 1959) (quoting GIBSON, *supra* note 129, at § 60 pg. 74).

¹³⁸ See David K. Thompson, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551, 551 (1979).

¹³⁹ LaForge, *supra* note 8, at 241.

¹⁴⁰ See *supra* Part II.A.

¹⁴¹ *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

¹⁴² See, e.g., *Lyng v. Payne*, 476 U.S. 926, 935 (1986) (“An essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations”); WILLISTON ON CONTRACTS § 8:3 (4th ed.) (“[I]t is generally held that a representation of past or existing fact made to a party who relies upon it reasonably may not thereafter be denied by the party making the representation if permitting the denial would result in injury or damage to the party who so relies.”).

parties. Indeed, the facts of *MS Dealer* are unclear as to what, if any, relationship the parties had with one another because the court was not concerned with any contact the two may have had prior to the filing of the claim.¹⁴³ But surely there cannot be a contractual relationship absent any interaction.

The second prong of *MS Dealer*, which requires a signatory's claims raise allegations of "substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract"),¹⁴⁴ is equally problematic in its distortion of equitable estoppel. As one commentator argues, the second prong "contains no requirement that the action against the nonsignatory relate in any way to the agreement containing the arbitration provision, instead allowing the nonsignatory to take advantage of the provision if it makes allegations of 'substantially interdependent and concerted misconduct.'"¹⁴⁵ Indeed, the second prong is problematic for the opposite reason the first is problematic: this prong is all about misconduct—but not the kind state law requires in equitable estoppel.¹⁴⁶ In this scenario, a court is rewarding the non-signatory wrongdoer who conspired with a signatory to injure the putative plaintiff. Equity should, in fact, demand that the opposite result be reached.

Although there are some nuances and differences between them, Sixth Circuit states generally require two elements for the doctrine of equitable estoppel to apply: (1) the estopped party makes some kind of misrepresentation; and (2) the other party to have detrimentally relied on that misrepresentation.¹⁴⁷ Even if both prongs of *MS Dealer* are satisfied, there still would no estoppel because there is no relationship between the parties that evinces any kind of detrimental reliance.¹⁴⁸ If the parties never interact, there can never be any misrepresentation on which the other party can rely. Any interaction between the parties in these arbitration scenarios occurs only

¹⁴³ It may well be true that compelling arbitration was the correct decision in *MS Dealer*. But not on estoppel grounds. Indeed, one judge even argued that *MS Dealer* and the plaintiff "actually manifested their mutual assent to a bargain in which they exchanged promises of performance with each other." *Grigson v. Creative Artists Agency LLC*, 210 F.3d 524, 536 (5th Cir. 2000) (Dennis, dissenting). However, the Eleventh Circuit, by holding that the plaintiff was equitably estopped from avoiding arbitration, refused to consider any other theory of enforcing the arbitration clause. *MS Dealer*, 177 F.3d at 948 ("[W]e need not determine whether *MS Dealer* could enforce arbitration under an agency theory or a third-party-beneficiary theory.").

¹⁴⁴ *MS Dealer*, 177 F.3d at 947.

¹⁴⁵ Christopher Driskill, Note, *A Dangerous Doctrine: The Case Against Using Concerted-Misconduct Estoppel to Compel Arbitration*, 60 ALA. L. REV. 443, 453 (2009).

¹⁴⁶ Eventually the Eleventh Circuit required a party to satisfy both parts of the *MS Dealer* test to permit a non-signatory from compelling arbitration, *id.* at 455 (discussing *In re Humana, Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002)), but many courts have neglected to impose such a restraint, *see Mohebbi, supra* note 2, at 575 n.136 (discussing those cases).

¹⁴⁷ *See supra* Part III.

¹⁴⁸ *See, e.g., Doe v. Archdiocese of Cincinnati*, 880 N.E.2d 892, 894 (Ohio 2008) (noting that plaintiff never alleged to be in contact or to have been contacted by the defendants; thus her equitable estoppel claim must fail because she failed to allege any misrepresentation).

when the plaintiff files her claims. For example, in *Liedtke v. Frank*,¹⁴⁹ the plaintiff received a credit card from Household Bank; after she amassed debt on the card, the bank hired a law firm to run a credit inquiry and collect the debt.¹⁵⁰ The plaintiff filed suit alleging violations of the Fair Credit Reporting Act,¹⁵¹ and the defendant law firm sought to compel arbitration under the plaintiff's contract with the bank.¹⁵² The only interaction between the parties, and thus the only possible misrepresentation, was when the plaintiff filed her claim in court. As a result, the misrepresentation and the reliance occurred simultaneously, whereas traditional estoppel law presumes a temporal element.¹⁵³ This temporal element is essential because without it there is no detrimental reliance.¹⁵⁴

At its most basic level, equitable estoppel is about equity and fairness.¹⁵⁵ The crux of the argument against *MS Dealer*'s equitable estoppel is that it is inequitable. The Eleventh Circuit focuses its analysis on only one of the parties' claims or conduct—rather than the traditional considerations of the conduct of both parties.¹⁵⁶ Absent this kind of reciprocal relationship (of a misrepresentation followed by detrimental reliance), it cannot be said that parties ever, either expressly or impliedly, had an agreement to arbitrate.¹⁵⁷ Without such an agreement, a court cannot compel arbitration in light of Supreme Court precedent.¹⁵⁸

Accordingly, the Sixth Circuit and its courts should abandon any of their equitable estoppel precedents that rely on *MS Dealer* because, in contravention of Supreme Court precedent, these cases are not founded on or based on state law. Only where a party can show, at a minimum, a misrepresentation followed by detrimental reliance will an equitable estoppel arise.

B. *The Inequities of Javitch*

Similarly, the Sixth Circuit should apply the same equitable estoppel standard when reviewing motions to compel arbitration under *Javitch v. First Union*. Even though *Javitch* presents the inverse of *MS Dealer* (i.e., a signatory is attempting to

¹⁴⁹ 437 F. Supp. 2d 696 (N.D. Ohio 2006).

¹⁵⁰ *Id.* at 697.

¹⁵¹ 15 U.S.C. §§ 1681-1681x (2012).

¹⁵² *Liedtke*, 437 F. Supp. 2d at 698.

¹⁵³ LaForge, *supra* note 8, at 249.

¹⁵⁴ Indeed, a party cannot assert that she detrimentally relied on another party's misrepresentation *before* the misrepresentation was made.

¹⁵⁵ *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir. 2000).

¹⁵⁶ If A represented to B that she would be getting the same contract as C, whose contract contained an arbitration clause, it is only equitable that A be estopped from denying the arbitration clause. B relied to her detriment on A's representation that the contract would be identical to C's.

¹⁵⁷ One of the frustrating things about the case law is that the courts never analyze how a non-signatory could be held liable under the terms of the contract. *See Grigson*, 210 F.3d at 533 (Dennis, dissenting) (suggesting that in *MS Dealer* both the signatory and the non-signatory actually manifested consent to arbitration); *see also* LaForge, *supra* note 8, at 252.

¹⁵⁸ *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 280 (2002).

compel arbitration against a non-signatory),¹⁵⁹ the same considerations apply: only where there has been misrepresentation followed by detrimental reliance will equitable estoppel apply. The court's distinction¹⁶⁰ between a non-signatory seeking a direct benefit from a contract containing an arbitration clause and the same non-signatory seeking an indirect benefit is inapposite to state estoppel laws. Once more, the court is only addressing the conduct of one of the parties, ignoring state law requiring a relationship between the conduct and the resulting harm.

As explained above, this focus on a party's claims rather than her conduct completely confuses the issues at hand. Indeed, this approach effectively confuses the actual parties to the controversy by treating the case as one between two signatories to the arbitration contract.¹⁶¹ By requiring that the non-signatory seek a direct benefit from the contract, the court is, in essence, attempting to ascertain whether the contract is implicated; the logic of this being the two signatories who actually made the contract agreed to arbitrate all claims the arose under the contract—regardless of whether the claims were being litigated by a signatory or a non-signatory.¹⁶² The inevitable consequence of this logic would be to “bind both parties to arbitrate their contract-related claims against the world-at-large, not just each other.”¹⁶³ Of course, as discussed above, arbitration is a matter of contract and consent;¹⁶⁴ two parties are free to contract away their right to civil court, but such an agreement cannot, as a basic tenant of contract law, bind anyone outside of that agreement.

Thus it is immaterial, as a matter of contract law, whether the benefit being sought by the non-signatory plaintiff in regards to the contract is direct or indirect. What matters is consent. Similarly, there is no indication in *Javitch* that the parties ever interacted prior to the commencement of the lawsuit.¹⁶⁵ As a result, there cannot have been any sort of misrepresentation that might have given rise to an estoppel; without a misrepresentation, it is impossible to have detrimental reliance.¹⁶⁶ Even though, the signatory defendants did agree to arbitrate issues that arose under the contract, they did not agree with the non-signatory plaintiff.

To examine these principles, let us return to our hypothetical of Pat, Dan, and Tim. Now, Dan sells a car to Tim; the sales contract contains an arbitration clause.

¹⁵⁹ *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003).

¹⁶⁰ This distinction is drawn from *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).

¹⁶¹ *LaForge*, *supra* note 8, at 242-43.

¹⁶² This type of circular logic is most likely a result of the pro-arbitration dogma that pervades federal courts.

¹⁶³ *Id.* at 245.

¹⁶⁴ *See, e.g.*, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

¹⁶⁵ *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 628 (6th Cir. 2003). The defendants all had contact or a relationship with the entities placed in receivership, but they did not have any interaction with the receiver, Victor Javitch. *Id.* Again, there may be some other contractual theory that might compel arbitration, but not equitable estoppel.

¹⁶⁶ Or, at least, reasonable detrimental reliance.

Subsequently, Dan sells another car to Pat and knowingly misleads Pat that his contract contains an arbitration clause like Tim's. If Dan subsequently instigates litigation against Pat alleging breach of contract, Pat, under the state law estoppel theories discussed above, may be successful in staying the litigation and compelling arbitration—even though the parties did not mutually agree to arbitrate. But here, equity would demand arbitration. Dan made a material misrepresentation that Pat relied on to his detriment;¹⁶⁷ Dan would thus be estopped from denying he represented to Pat that Pat's contract would have an arbitration clause.¹⁶⁸

Importantly, the inverse of this hypothetical would not justify an estoppel; that is, if Dan attempted to compel arbitration. After all, it was Dan who made the material misrepresentation, and he should not be permitted to profit from his malfeasance. It is only the party that detrimentally relied on the misrepresentation who can be granted an estoppel. Thus it is immaterial what Dan's claims are,¹⁶⁹ all that matters is that Dan made a misrepresentation upon which Pat detrimentally relied.

As such, the Sixth Circuit should overturn its decision in *Javitch* and treat the inverse *MS Dealer* situation the same as any other equitable estoppel claim.

CONCLUSION

The federal policy favoring arbitration is strong, but even that strong policy does not force parties to arbitrate when they have not agreed to arbitrate.¹⁷⁰ In order to determine whether the parties have agreed to arbitrate, courts turn to ordinary state contract law.¹⁷¹ State laws within the Sixth Circuit require, at a minimum, both a misrepresentation and detrimental reliance for a party to assert an equitable estoppel argument.¹⁷² Thus, Sixth Circuit case law at variance with this equitable estoppel definition is both inequitable and at odds with Supreme Court precedent.

¹⁶⁷ Note that this is a simplified hypothetical and that each state's estoppel laws are more nuanced and would need to be explored in greater depth to determine precisely when an estoppel would lie.

¹⁶⁸ As the Supreme Court has noted, "he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879).

¹⁶⁹ Not entirely, to be fair. Pat would only be entitled to an estoppel based upon the misrepresentation. Thus he could not compel arbitration against any and all of Dan's claims—just the ones that would have been subject to arbitration if Dan had been truthful.

¹⁷⁰ See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002).

¹⁷¹ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).

¹⁷² See *supra* Part III.

