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Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration

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I. INTRODUCTION

A consumer purchases a manufactured home from a commercial vendor.[1] As part of the commercial transaction, the consumer and vendor execute a sales agreement containing the following arbitration clause: "All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract . . . shall be resolved by binding arbitration . . . ."[2] The manufacturer of the home is not a party to the sales contract. Rather, the manufacturer issues a separate warranty agreement in connection with the consumer's purchase.

When the consumer discovers defects in the home, the consumer sues both the commercial vendor and the manufacturer. The consumer and vendor arbitrate their dispute according to the terms of the sales contract. The manufacturer, however, did not execute an arbitration agreement with the consumer and was not a party to the original sales contract. Nevertheless, the nonsignatory manufacturer of the home attempts to compel arbitration of the consumer's claims pursuant to the underlying sales agreement. Alabama courts have repeatedly confronted this fact pattern.[3] On such facts, both Alabama and federal courts have struggled to determine whether the nonsignatory may compel arbitration of the signatory's claims pursuant to an underlying agreement containing an arbitration clause.[4]

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1. The following hypothetical arises from the facts of *Ex parte Isbell*, No. CV-95-8362, 1997 WL 679418, at *1-*2 (Ala. Oct. 31, 1997).

2. This arbitration provision duplicates the provision at issue in *Ex parte Isbell*. *See id.* at *1.

3. *See, e.g.*, Wilson v. Waverlee Homes, Inc., 954 F. Supp. 1530, 1532 (M.D. Ala.) (holding that a nonsignatory mobile home manufacturer could not compel the plaintiff-signatory to arbitrate claims pursuant to an arbitration agreement between the plaintiff and a commercial vendor), *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997); *Ex parte* Martin, 703 So. 2d 883, 884-87 (Ala. 1996) (same); *Ex parte* Gates, 675 So. 2d 371, 373 (Ala. 1996) (holding that a nonsignatory mobile home manufacturer could compel arbitration of a plaintiff-purchaser's claims pursuant to a purchaser-vendor contract).

4. *See infra* Part II.B.4 and notes 205-17 and accompanying text.

Part II of this Note analyzes the federal courts' use of equitable estoppel to force signatories to arbitrate claims against nonsignatories despite the lack of a written arbitration agreement between the parties.[5] Part III of this Note examines the Alabama Supreme Court's hostility towards arbitration. Alabama courts have resisted a full-scale adoption of federal arbitration policy. Indeed, Alabama courts have traditionally refused to apply the federal doctrine of equitable estoppel to compel arbitration with nonsignatories.[6] Part III documents the clash between the federal doctrine of equitable estoppel and Alabama's inveterate hostility to arbitration agreements. After longstanding resistance to federal principles, the Alabama Supreme Court recently acknowledged the viability of equitable estoppel in the case of *Ex parte Isbell*.[7] But in *Isbell*, the Alabama Supreme Court acknowledged a version of equitable estoppel which is potentially narrower than the scope of the federal doctrine.[8] Part III also examines the Alabama Supreme Court's derivative version of equitable estoppel. The conclusion of this Note argnes in favor of the Alabama court's estoppel analysis as an appropriate retrenchment of an expansive federal policy favoring arbitration.

II. FEDERAL ARBITRATION POLICY

A. Presumption in Favor of Arbitration

In 1925 Congress enacted the Federal Arbitration Act ("FAA")[9] to provide a statutory mechamism for the enforcement of private arbitration agreements.[10] The statute reversed an entrenched common law hostility towards arbitration.[11] Both the Englisli and American

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5. *See infra* Part II.B.4.
6. *See infra* notes 160-64 and accompanying text.
7. No. CV-95-8362, 1997 WL 679418, at *7-*10 (Ala. Oct. 31, 1997).
8. *See infra* Part III.E.
9. *See* ch. 213, 43 Stat. 888 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (1994)).
10. *See* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1312 (1985) (stating that Congress enacted the legislation based on a New York statute to provide an alternative to litigation).
11. *See* Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 474 (1989) (stating that the FAA was "designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate' ") (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985)); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974) (stating that the "Unitod States Arbitration Act . . . revers[ed] centuries of judicial hostility to arbitration agreements"); *see also infra* noto 12.

judiciary traditionally protected jurisdiction of the courts by refusing to enforce private arbitration agreements.[12] The increasing volume and cost of litigation, however, motivated Congress to override judicial resistance to arbitration by enacting the FAA.[13]

Section 2 of the FAA specifically provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable."[14] Under section 3 of the statute, a court may stay proceedings if the court determines the issue is arbitrable under the terms of a valid arbitration agreement.[15] Pursuant to section 4 of the FAA, a court may compel arbitration of a dispute if a party alleges "failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration."[16]

The Supreme Court interpreted section 2 of the FAA as creating a federal substantive body of arbitration law.[17] The Court simul-

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12. *See* H.R. REP. NO. 68-96, at 1-2 (1924) ("The need for the [FAA] arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction."); *see also* Hirsham, *supra* note 10, at 1309-12 (discussing the common law hostility towards arbitration).

13. *See Scherk*, 417 U.S at 510-11; Hirshman, *supra* note 10, at 1310-11; *see also* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 269 (1926) (arguing that "[t]he evils which arbitration is intended to correct are three in number: (1) The long delay usually incident to a proceeding at law.... (2) The expense of litigation.... (3) The failure through litigation, to reach a decision regarded as just when measured by the standards of the business world").

14. 9 U.S.C. § 2 (1994).

15. *See id.* § 3. In relevant part, section 3 states that a court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration [under a written arbitration] agreement shall... stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *Id.*

16. *Id.* § 4. In practice, a party invokes sections 3 and 4 simultaneously: "[A] party involved in litigation... may move the court for an order compelling arbitration under § 4 and for a stay of proceedings pending arbitration under § 3." Allied-Bruce Terminix, Inc. v. Dobson, 684 So. 2d 102, 106 (Ala. 1996).

17. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967). *But see* H.R. REP. NO. 68-96, at 1 (citing Congress's Commerce Clause powers as one source of the FAA's validity, but stating that "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought"); Cohen & Dayton, *supra* note 13, at 275 (arguing that the validity of the FAA "rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts"); Michael R. Holden, Note, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1707-12 (1995) (tracing the Supreme Court's development of federal substantive law under the FAA and arguing that Congress never intended the FAA to create broad substantive rules); Scott R. Swier, Note, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Possible Manner:* Allied Bruce Terminix Companies, Inc. v. Dobson, 41 S.D. L. REV. 131, 142-46 (1996) (discussing the source of congressional authority

taneously construed the FAA as a declaration of federal policy in favor of arbitration.[18] This new federal policy countered the long-standing common law hostility towards arbitration by subjecting arbitration agreements to judicial enforcement.[19] Therefore, agreements to arbitrate *are* contracts subject to enforcement under general principles of contract law. Moreover, the Supreme Court has stated that the presence of an arbitration provision in a contract creates a *presumption* that grievances asserted in connection with that contract fall within the scope of the underlying arbitration provision.[20]

But as a countervailing principle of contract law, a party is not bound to the terms of an arbitration provision in the absence of assent.[21] Indeed, the FAA conditions the validity of an arbitration agreement upon the existence of a writing between parties.[22] Courts, however, have refused to interpret the writing requirement as a statute of frauds provision limiting the range of enforceability to signato-

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underlying the enactment of the FAA and examining the Supreme Court's questionable determination that Congress passed the FAA under its Commerce Clause powers, thereby establishing federal substantive law).

18. *See* AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 650 (1986) (holding, in the context of collective bargaining agreements, that the appearance of an arbitration provision in a contract creates a presumption of arbitrabililty); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration . . . ."); *Cone Mem'l Hosp.*, 460 U.S. at 24 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ."). *But see* Rita M. Cain, *Preemption of State Arbitration Statutes: The Exaggerated Federal Policy Favoring Arbitration*, 19 J. CONTEMP. L. 1, 11-13 (1993) (arguing that Congress never intended the FAA to create an expansive federal policy favoring arbitration, but rather intended the FAA to enforce arbitration agreements between business entities); 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, 29-47 (1997) (tracing the Supreme Court's development of an expansive federal policy favoring arbitration and arguing that this expansive policy violates the Constitution).

19. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (observing that the United States Arbitration Act was designed to place arbitration agreements "upon the same footing as other contracts") (quoting H.R. REP. NO. 68-96, at 1); H.R. REP. NO. 68-96, at 1 ("Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up te his agreement.").

20. *See AT&T Teche.*, 475 U.S. at 650 (observing, in the collective bargaining agreement context, that "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the 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' ") (quoting United Stoelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

21. *See id.* at 648 (conditioning arbitration upon the consent of contracting parties); *see also* Roberson v. Money Tree, 954 F. Supp 1519, 1528 (M.D. Ala. 1997) ("It is almost axiomatic, as a first rule of contract law, that parties must manifest assent te a bargain in order to be beund under it. . . . Hence . . . a party who has not agreed to do so may not be required to submit to arbitration.") (citation omitted).

22. *See* 9 U.S.C. § 2 (1994); *see also* Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960) (stating that a written agreement is the "*sine qua non* of an enforceable arbitration agreement").

ries.[23] Rather, courts have used ordinary contract principles of assent to extend the provisions of a written instrument to include nonsignatories.[24] Federal policy compels the use of such principles to effect the broadest reading of an arbitration provision to include the broadest range of parties.[25] The Supreme Court clearly expressed its support of arbitration by specifically instructing lower courts to resolve contractual ambiguities concerning the scope of an arbitration provision in favor of enforcement.[26]

Nevertheless, contract law limits enforcement of arbitration provisions to those parties who have agreed to submit their claims to the forum.[27] Therefore, the expansive enforcement policy of federal law conflicts with the limitations of contract law.[28] To resolve this conflict, federal courts have applied theories such as estoppel and equitable estoppel to attempt to strike an appropriate balance.[29]

B. Development of Equitable Estoppel

1. Traditional Doctrine of Estoppel

In *Deloitte Noraudit, A/S v. Deloitte Haskins & Sells, U.S.*, an international accounting firm executed a contract with its regional

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23. *See Fisser*, 282 F.2d at 233.

24. *See* Frederick E. Sherman & Steven C. Bennett, *Although Obligations to Arbitrate Generally Are Viewed as Requiring Consent, in a Variety of Instances Courts Have Held that Non-Signatories are Similarly Bound*, NAT'L L.J., Dec. 11, 1995, at B4 ("Courts have recognized at least five theories by which a non-signatory may be bound te arbitrate: incorporation by reference, assumption, agency, veil piercing and estoppel.").

25. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (noting that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

26. *See id.* at 24-25.

27. *See* AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986) (noting that a party who did not agree to arbitration cannot be required to arbitrate any claim); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (stating that a "party cannot be required te submit te arbitration any dispute which he has not agreed so to submit"); Southern Cal. Dist. Council of Laborers v. Berry Constr., Inc., 984 F.2d 340, 343 (9th Cir. 1993) (stating that enforcement of arbitration is predicated on agreement to arbitrate disputes); Goldberg v. Bear, Stearns & Co., 912 F.2d 1418, 1419 (11th Cir. 1990) ("Although there is a presumption in favor of arbitration, . . . the parties will not be required to arbitrate when they have not agreed to do so.").

28. *See* Alison Brooke Overby, Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1154-55 (1986) ("The federal courts face the problem of implementing the federal policy favoring arbitration while at the same time trying to effectuate the parties' intent toward arbitration."); Sherman & Bennett, *supra* note 24, at B4 (arguing that "[t]he liberal policy favoring enforcement of arbitration agreements cannot serve as a substitute for the consent of the parties").

29. *See infra* Part II.B.1.-II.B.4.

affiliates.[30] The contract conditioned an affiliate's use of the international firm's trade name upon acceptance of the agreement.[31] The plaintiff-affiliate never signed the instrument but continued to use the firm's trade name.[32] When the plaintiff-affiliate sought judicial declaration of its right to use the trade name, the accounting firm asked the court to compel arbitration pursuant to the terms of the agreement.[33]

The plaintiff argued that since it had never signed the agreement, it was not obligated to arbitrate the dispute.[34] The court prevented the affiliate from avoiding arbitration because the affiliate never objected to the agreement's terms and knowingly derived a benefit by using the firm's trade name.[35] The court held that when a nonsignatory knowingly derives benefit from a written agreement containing an arbitration provision, that party is estopped from circumventing contractual obligations by asserting lack of assent.[36]

In applying the traditional doctrine of estoppel, courts consider general principles of equity and the FAA's underlying policy of promoting arbitration. The extension of an arbitration agreement to a nonassenting party clearly violates principles of equity.[37] Equity favors enforcement of arbitration, however, when a party exploits the advantageous provisions of a contract while refusing to recognize the validity of an accompanying arbitration clause.[38] On the *Deloitte* facts, considerations of equity perfectly coincide with considerations of assent. The affirmative derivation of a benefit from a contract establishes assent to the terms of that contract. Under an estoppel theory,

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30. *See* 9 F.3d 1060, 1061 (2d Cir. 1993).
31. *See id.*
32. *See id.* at 1061-62.
33. *See id* at 1062.
34. *See id.*
35. *See id.* at 1064.
36. *See id.* The Second Circuit, in *Thomson-CSF, S.A. v. American Arbitration Ass'n*, labeled the reasoning in *Deloitte* as an estoppel argument even though the *Deloitte* court did not specifically use this language. *See* 64 F.3d 773, 778 (2d Cir. 1995).
37. *See* Tepper Realty Co. v. Mosaic Tile Co., 259 F. Supp. 688, 692 (S.D.N.Y. 1966) (stating that equity will not permit a party to rely on an agreement when it works to their advantage and repudiate it when it works to their disadvantage).
38. *See id.*; *see also In re* Oil Spill by the Amoco Cadiz, 659 F.2d 789, 796 (7th Cir. 1981) (holding that a party may not allege a contractual agency relationship for purposes of standing and deny that relationship for purposes of arbitration); Avila Group, Inc. v. Norma J., 426 F. Supp. 537, 542 (S.D.N.Y. 1977) ("To allow [a party] te claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."); Sherman & Bennett, *supra* note 24, at B4 n.38 ("Courts have compelled arbitration in cases when a non-siguatory sought to 'have it both ways' by relying on the contract when it worked to its advantage and repudiating the contract when the matter came to arbitration.").

the federal courts may promote public policy favoring arbitration by enforcing the actual intent of the contracting parties.[39]

2. Scope of the Arbitration Clause

In *Deloitte*, the nonsignatory argned that it never entered into an agreement with the international firm and therefore did not express an intent to arbitrate with the firm.[40] But often it is a signatory party that attempts to avoid arbitration. Signatory parties frequently assault the efficacy of an arbitration clause by pleading claims which allegedly lie outside the scope of the clause. Federal courts, however, have severely limited the signatory's ability to circumvent an arbitration clause through artful pleading.

In *Tac Travel America Corp. v. World Airways, Inc.*, the plaintiff executed an agreement with an airline for the use of chartered flights.[41] The contract assigned all contractual disputes to arbitration[42] with a general exception for personal injury claims.[43] The plaintiff brought an action in federal court against the airline alleging slander when the airline informed passengers that late flights resulted from the plaintiff's mismanagement.[44] The airline sought to compel arbitration of the claim pursuant to the charter contract.[45] The plaintiff argned that the slander claim fell under a contractual exception for personal injury claims and, therefore, was not arbitrable.[46]

The court refused to adopt a broad reading of the personal injury exception to include general tort claims such as slander.[47] Instead, the court found that the plaintiff's allegations of slander invoked factual issues inherent to a breach of contract claim, not a tort claim.[48] According to the court, the airline's alleged slanderous communication breached contractual provisious concerning the notifi-

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39. *See Tepper Realty*, 259 F. Supp. at 692. The *Tepper Realty* court noted: " 'Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him.' " *Id.* (quoting H.R. REP. NO. 68-96, at 1 (1924)).

40. *See Deloitte Noraudit*, 9 F.3d at 1064.

41. *See* 443 F. Supp. 825, 826 (S.D.N.Y. 1978).

42. The contract between the parties provided that " '[a]ny dispute between the parties hereto with respect to this agreement . . . shall be determined by arbitration.' " *Id.* at 827.

43. *See id.*

44. *See id.* at 826.

45. *See id.*

46. *See id.* at 827.

47. *See id.* at 827-28.

48. *See id.* at 828.

cation of delays to passengers.[49] The court held that a party may not avoid arbitration by casting its claim in tort when the tort claim rests upon factual circumstances which would give rise to a breach of contract claim.[50]

A court, therefore, will examine the relationship between the factual allegations of the claim and the underlying contract to determine whether a claim falls within the scope of an arbitration agreement. When the factual allegations of the claim generally relate to the contract, such claims "arise out of" or "arise in connection with" the contract and are subject to an arbitration provision.[51]

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49. *See id.* at 828-29.

50. *See id.* at 828.

51. *See* Gregory v. Electro-Mechanical Corp., 83 F.3d 382, 384-86 (11th Cir. 1996). A minority of circuits have narrowed the scope of arbitration to matters of contract interpretation and performance when the agreement relegates disputes "arising out of" or "arising under" the contract to arbitration. *See In re* Kinoshita & Co., 287 F.2d 951, 953 (2d Cir. 1961) ("The agreement te arbitrate is limited te such matters [relating to interpretation of the contract and performance] when it refers to disputos or controversies 'under' or 'arising out of' the contract."). The Ninth Circuit adopted the reasoning of *In re Kinoshita* in *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, and interpretod the language "arising hereunder" to limit the scope of an arbitration clause to disputes relating te the interpretation and performance of a contract. *See* 708 F.2d 1458, 1464 (9th Cir. 1983), *overruled in part by Gregory*, 83 F.2d at 382. In *Gregory*, the Eleventh Circuit noted that only the Ninth Circuit has followed the *Kinoshita* opinion. *See* 83 F.3d at 385. The *Gregory* court also noted that the Second Circuit itself expressed disapproval with its own reasoning in *Kinoshita* but failed to overrule on grounds of reliance. *See id.* The *Gregory* court adopted a broad reading of "arising under," "arising out of," and "arising in connection with" to include disputos relating to a breach of the underlying contract, even if the disputes are brought as claims other than breach of contract. *See id.* at 386; *see also* Unitod Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 584-85 (1960) ("In the absence of any express provision excluding a particnlar grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . ."); Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co., 706 F.2d 155, 160 (6th Cir. 1983) ("Where a commercial contract contains a broad arbitration provision covering all controversies arising under the agreement, arbitration is ordered unless the person seeking to avoid it can show that the particular dispute is expressly excluded."); Sternlight, *supra* note 18, at 29 (discussing federal courts' tendency to intorpret arbitration provisions broadly); Philip A. Langford, Recent Decision, *Alabama Supreme Court Contravenes the Policy of the Federal Arbitration Act:* Old Republic Insurance Co. v. Lanier, 47 ALA. L. REV. 615, 624-32 (1996) (discussing federal courts' intorpretation of such language in arbitration provisions); Scott M. McKinnis, Note, *Enforcing Arbitration with a Nonsignatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil*, 1995 J. DISP. RESOL. 197, 201 (discussing key cases in which courts have prevented plaintiffs from recasting their claims in tort to avoid arbitration); Overby, *supra* note 28, at 1144-56 (analyzing federal courts' methodologies in determining the scope of arbitration clauses).

When parties adopt the standard American Arbitration Association provision submitting "[a]ny controversy or claim arising out of or relating to [a] contract, or the breach thereof," te arbitration, those parties have agreed to arbitrate a broad range of disputes. *See In re Kinoshita*, 287 F.2d at 953. Even the *Kinoshita* court, which narrowly construed "arising under," would attach broad meaning to the standard arbitration clause. *See id.*; *see also* Acevedo Maldonado v. PPG Indus., Inc., 514 F.2d 614, 616 (1st Cir. 1975) (holding that an arbitration provision covering "any controversy or claim arising out of or relating to this

This analysis appears to favor a party's assent to arbitrate a broad range of disputes as opposed to a particular set of conflicts specifically contemplated by the parties when executing the agreement.[52] Assent to arbitrate a broad range of disputes, however, does not necessarily signify assent to arbitrate those disputes with nonsignatories. Even if a party agreed to arbitrate a range of disputes arising under a contract, that party might reasonably argue that it specifically agreed to arbitrate those disputes only with other contracting parties.

In *Lawson Fabrics, Inc. v. Akzona, Inc.*, the plaintiff sued the defendant yarn company for delivery of mislabeled and defective textiles.[53] The plaintiff's claims against the textile company were clearly arbitrable under the sales agreement between the parties,[54] but the plaintiff also brought an action against the textile company's parent corporation for inducement of fraud and conspiracy to commit fraud.[55] The parent company was not a party to the sales agreement but nevertheless sought to compel arbitration of the plaintiff's claims under the contract. The plaintiff, of course, argued that it was under no obligation to arbitrate with a nonparty.[56]

In compelling arbitration of the claims, the court focused on the plaintiff's intent to arbitrate claims arising out of the underlying contract.[57] The court noted the plaintiff's general agreement to arbitrate all contractual disputes.[58] The court, however, did not address the plaintiff's intent, or lack thereof, to arbitrate with nonparties. Instead, the court perceived the nonsignatory defendant as a threat to federal policy in favor of arbitration. In essence, the plaintiff at-

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Agreement or the breach thereof . . . cover[ed] contract-generated or contract-related disputes between the parties however labeled").

The standard arbitration provision recommended by the American Arbitration Association states that: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association." AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES, A PRACTICAL GUIDE 5 (1996).

52. *See* Langford, *supra* note 51, at 641-42 (arguing that when parties have drafted a general arbitration provision, assent should attach te disputes arising out of the container agreement and that parties should bear the burden of explicitly removing disputes from the scope of arbitration); Overby, *supra* note 28, at 1152 (noting that the "current federal approaches to arbitrability require careful drafting" and that "[u]se of a broad arbitration clause will usually prompt a court te compel arbitration when a dispute arises, if that dispute has any relationship with the subject matter of the arbitration clause").

53. 355 F. Supp. 1146, 1148 (S.D.N.Y.), *aff'd without opinion*, 486 F.2d 1394 (2d Cir. 1973).

54. *See id.* at 1149.

55. *See id.* at 1148.

56. *See id.* at 1151.

57. *See id.* at 1148-49.

58. *See id.* at 1148.

tempted to litigate issues against the defendant's owner while the plaintiff simultaneously arbitrated those same issues against the defendant. The court stated that a resolution of the claims against the defendant in arbitration necessitatod at least partial resolution of the judicial claims against the defendant's corporate owner.[59] The court recognized that allowing the plaintiff to file its claims against the nonsignatory parent would in essence rejuvenato the judicial forum for those claims originally subject to arbitration with the signatory textile company.[60] The court simply refused to defeat an arbitration clause upon the appearance of a nonsignatory defendant.[61] Artful circumnavigation of arbitration through the addition of a new defendant would undermine federal policy.[62]

The *Lawson* court prevented the plaintiff from filing otherwise arbitrable claims in court against a nonsignatory defendant.[63] The court justified the decision as a means of protecting a federal policy in favor of arbitration.[64] The court thereby thwarted an attack on the underlying policy of the FAA by refusing to allow a plaintiff with unacceptable motives to avoid an arbitration provision. Intuition supports the *Lawson* court's argument that the plaintiff cannot dodge arbitration by adding a nonsignatory defendant to the complaint. But the court never squarely addressed the fact that the plaintiff had not entered into an arbitration with the parent company. In essence, the court deflected an assault on the FAA but failed to develop a theory to deal consistontly with nonsignatories in the future.

3. The Transactional Test: Precursor to Equitable Estoppel

Other courts have defended the FAA and federal policy against similar attacks by formulating specific tests applicable to nonsignatories. In *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, an import company acted as sales representative for the subsidiary of a Belgian corporation.[65] When the subsidiary terminated the sales agreement,

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59. *See id.*
60. *See id.* at 1151.
61. *See id.*
62. *See id.*; *see also* Kroll v. Doctor's Assocs., Inc., 3 F.3d 1167, 1171 (7th Cir. 1993) (holding that a plaintiff may be forced to arbitrate with a nonparty when the plaintiff files a claim originally subject to arbitration against a nonparty liable for the arbitrating party's acts); Hilti, Inc. v. Oldach, 392 F.2d 368, 369 n.2 (1st Cir. 1968) ("If arbitration defenses could be foreclosed simply by adding as a defendant a person not a party to an arbitration agreement, the utility of such agreements would be seriously compromised.").
63. *See Lawson Fabrics*, 355 F. Supp. at 1151.
64. *See id.*
65. *See* 530 F.2d 679, 680 (5th Cir. 1976).

the import company brought an action against both the subsidiary and the nonsignatory parent corporation.[66] The district court stayed the import company's claims (except the alleged antitrust violations) against both the parent and subsidiary pending arbitration, pursuant to the underlying agreement.[67] The Fifth Circuit affirmed the decision as a proper use of the lower court's discretion and held that a plaintiff's claims against a parent nonsignatory are arbitrable when the claims against the parent and subsidiary arise from the same operative facts and when the claims are inherently inseparable.[68]

The "transactional" test adopted by the Fifth Circuit identifies a claim against a nonsignatory that is constructively identical to a claim against the signatory. The test identifies attempts to avoid arbitration through the addition of a nonsignatory to the litigation. In essence, the test formalizes the *Lawson* court's concern with the artful circumnavigation of arbitration agreements, but, at its core, the test preserves the idea that a party is not subject to arbitration when that party has not assented to arbitration as the forum for the resolution of the dispute.[69] When the claim against the signatory (subsidiary) is identical to the claim against the nonsignatory (parent), the intent to arbitrate the first claim clearly transfers to the second party. The parent and the subsidiary, therefore, are the same party for purposes of arbitration.

4. The Doctrine of Equitable Estoppel

a. Equitable Estoppel as Proxy of Signatory's Intent to Arbitrate: An Examination of the Signatory's Claims Against the Nonsignatory

The transactional test alone cannot adapt to varied fact patterns featuring a more generic nonsignatory. The test is limited to fact patterns involving a plaintiff suing the nonsignatory parent of a

66. *See id.*
67. *See id.*
68. *See id.*; *see also* J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988) ("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement.").
69. *See* AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986) (stating, in the context of collective bargaining agreements, that a party will not be compelled to arbitrate any dispute which he has not agreed to submit to arbitration).

signatory subsidiary.[70] The doctrine of equitable estoppel, however, can extend beyond the parent/subsidiary context to address more general relationships between signatories and nonsignatories.[71]

In *Hughes Masonry Co. v. Greater Clark County School Building Corp.*, the court applied the doctrine of equitable estoppel to circumstances distinct from the parent/subsidiary context.[72] The plaintiff ("Hughes") contracted with the defendant school system ("Clark") to provide masonry services for the construction of school facilities.[73] The contract between the plaintiff and the school system designated a third party ("J.A.") as construction manager for the project.[74] J.A., however, provided management services under a separate contractual relationship with the Clark County school system.[75] In addition, Hughes never entered into an independent agreement with J.A.[76]

The Clark County school system later terminated Hughes's services and commenced arbitration pursuant to the contract to recover the expense of securing replacement masonry services.[77] In response, Hughes filed claims against both the Clark County school system and J.A. in federal court.[78] J.A. moved to compel arbitration between all parties despite the lack of an agreement between itself and Hughes.[79] The district court denied the motion, and J.A. appealed.[80]

On appeal, Hughes disputed J.A.'s standing to invoke the arbitration clause in the agreement between itself and the school system because J.A., as construction manager, was never a party to that agreement.[81] Nevertheless, the Seventh Circuit Court of Appeals held that Hughes was equitably estopped from contesting the nonsigna-

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70. *See supra* notes 65-68 and accompanying text.

71. Of course, equitable estoppel itself can also be applied to the parent/subsidiary context. *See infra* notes 118-35 and accompanying text.

72. *See* 659 F.2d 836, 841 (7th Cir. 1981).

73. *See id.* at 837.

74. *See id.* Clark County contracted directly with James Associates, who then had authority to assign project managers. James Associates designated J.A. (a separate entity) as project manager. *See id.*

75. *See id.*

76. *See id.* at 837-41. Hughes and J.A. operated under separate contracts with Clark. *See id.* at 837.

77. *See id.* at 837-38.

78. Hughes first filed an action against the manager in state court and later amended the federal claim to add J.A. as a defendant. *See id.* at 838.

79. *See id.*

80. *See id.*

81. *See id.*

tory's standing to invoke the arbitration provision.[82] The court first analyzed the relationship between Hughes's complaint against J.A. (for intentional and negligent interference with contract) and the underlying contract between Hughes and the school system containing the arbitration provision.[83] The court found that Hughes's complaint essentially alleged the construction manager's failure to perform certain obligations assigned it by the underlying agreement between Hughes and the school system.[84] The court reasoned that the complaint relied upon the existence of that agreement.[85]

According to the Seventh Circuit's reasoning, equitable estoppel essentially assesses the proximity between a signatory's claims and a contract containing the arbitration provision.[86] Sufficient proximity triggers a finding that such claim is "intimately founded in and intertwined with the underlying contract."[87] This finding requires that the claims arise from the contract and fall within the scope of the arbitration provision.[88]

Because Hughes, the plaintiff-signatory, assented to the original arbitration provision, Hughes constructively assented to arbitrate the full range of disputes arising under the contract.[89] The court

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82. *See id.* at 838-40.

83. *See id.* at 838-39.

84. *See id.* The Hughes-Clark contract provided that J.A. was to handle the following:

> [T]he scheduling and coordination of Hughes' work on the project, the processing of Hughes' payment applications and the certification of Hughes' work for payment by Clark. The Hughes-Clark agreement also [gave] J.A. the authority to approve original and revised work progress schedules prepared by Hughes, to approve Hughes' operations on the project sites and te determine whether materials and equipment used by Hughes [were] defective.

Id. at 839.

85. *See id.* at 840-41. The court ultimately found that the plaintiff's claims were "intimately founded in and intertwined with the underlying contract obligations" set forth in that agreement. *Id.* at 841 n.9.

86. *See id.* at 838 (stating that Hughes was equitably estepped from asserting a claim because the basis of his claim against J.A. was that J.A. breached the duties assigned to J.A. by the agreement between Clark and Hughes).

87. *Id.* at 841 n.9.

88. In *Carlin v. 3V Inc.*, the Texas Court of Appeals analyzed federal equitable estoppel cases and concluded that the "focus of the inquiry in each of these cases was on the nature of the underlying claims asserted by the party resisting arbitration and to determine whether these claims were within the scope of the arbitration clause contained in the agreement." 928 S.W.2d 291, 296 (Tex. App. 1996).

89. The *Hughes* court invoked the traditional estoppel doctrine to achieve the same result. The plaintiff implicitly conceded that the contract containing the arbitration provision governed the relationship between itself and the coustruction manager because the plaintiff derived a benefit from the contract in suing the construction manager. *See Hughes Masonry*, 659 F.2d at 839. The court stated that:

> [I]t would be manifestly inequitable to permit [the plaintiff] to both claim that [the construction manager] is liable to [the plaintiff] for its failure to perform the contractual duties described in the [underlying] agreement and at the same time deny that [the

implied that once the assent of a party attaches to a range of disputes, whether the plaintiff-signatory intended to arbitrate a dispute with a particular party is irrelevant.[90] Equitable estoppel constructively establishes an intent to arbitrate with nonsignatories.

The Second Circuit's analysis of equitable estoppel in *Thomson-CSF, S.A. v. American Arbitration Association* emphasized the analytical importance of assent in determining the proper application of the federal doctrine.[91] In *Thomson-CSF*, the Thomson corporation acquired a flight simulator company as a subsidiary.[92] The subsidiary had agreed previously to buy its computer equipment from Evans and Sutherland Computer Corporation ("E & S").[93] The working agreement between the subsidiary and E & S contained an arbitration clause.[94] When the subsidiary's purchases dropped due to a decrease in Thomson's flight simulator market share, E & S commenced arbitration proceedings against both the subsidiary and Thomson for breach of the working agreement.[95] Thomson, however, never adopted or became a party to the original working agreement.[96]

The court implicitly conceded that a literal application of equitable estoppel could potentially force Thomson to arbitrate the dispute with E & S.[97] The court noted that E & S's claims arguably arose under the working agreement.[98] The court, however, held that applying equitable estoppel on these facts would completely undermine the use of the doctrine as a proxy for assent: The nonsignatory Thomson cor-

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construction manager] is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause.

Id. at 838-39.

90. The plaintiff's attempt to recast the claim in tort was ineffectual because artful pleading will not change the fundamental relationship between a claim and the underlying contract. *See id.* at 840-41 & n.9.

91. *See* 64 F.3d 773, 778-80 (2d Cir. 1995).

92. *See id.* at 775.

93. *See id.*

94. *See id.* at 776.

95. *See id.*

96. *See id.* at 775.

97. *See id.* at 778-79.

98. *See id.* The court noted E & S's argument that its claims against Thomson were closely associated with the working agreement. *See id.* (The court, however, later found that E & S's claims against Thomson were not integrally related to the underlying contract. *See id.* at 779-80.) In addition, Thomson and its subsidiary clearly existed as a part of the same management structure and in effect constituted a single party. *See id.* (stating that the "district court . . . found that the management of [Thomson's subsidiary] and Thomson were closely related"). Part II.B.4.b of this Note discusses the importance of a close relationship between signatory and nonsignatory parties and will argue that such relationships favor arbitration.

poration never demonstrated a willingness to arbitrate anything with anyone.[99]

Hughes and *Thomson-CSF* differ in one crucial aspect. In *Hughes*, the plaintiff was a party to the underlying contract and sought to avoid operation of the applicable arbitration provision. *Thomson-CSF*, however, demonstrated the reverse paradigm. In *Thomson-CSF*, the plaintiff (an original signatory) sought to expand the scope of the arbitration agreement to include a nonsignatory (Thomson) who had never attached its assent to an arbitration provision.

Equitable estoppel proceeds from the starting point of assent.[100] In *Hughes*, the signatory plaintiff brought an action against a nonsignatory construction manager. Those claims arose from and depended on the contract containing the arbitration agreement.[101] The doctrine of equitable estoppel established the plaintiff's assent to a range of disputes arising out of that contract. Equitable estoppel, however, may not operate to define the parameters of Thomson's assent because Thomson never assented to arbitration.[102] Because Thomson never assented to arbitration, equitable estoppel cannot function to construct the range of that assent.[103]

When a nonsignatory resists arbitration, courts may not use contract principles to infer intent when none existed in the first place.[104] But when a signatory resists arbitration, courts may use equitable estoppel to join a "willing" nonsignatory to a proceeding where arbitration between the underlying signatory participants is appropriate.[105] Some courts, however, have stretched the boundaries

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99. *See id.* at 779 ("At no point did Thomson indicate a willingness to arbitrate with E & S.").

100. But see *infra* note 106 for a discussion of *Dunn Construction Co. v. Sugar Beach Condominium Ass'n*, 760 F. Supp. 1479 (S.D. Ala. 1991), in which the court seemingly contravened this principle.

101. *See* Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 839-41 (7th Cir. 1981).

102. *See Thomson-CSF*, 64 F.3d at 779; *see also* Sherman & Bennett, *supra* note 24, at B4 (discussing the importance of assent to the equitable estoppel analysis in *Thomson-CSF*).

103. "Thomson . . . cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson indicate a willingness to arbitrate with E & S." *Thomson-CSF*, 64 F.3d at 779.

104. *See Ex parte* Isbell, No. CV-95-8362, 1997 WL 679418, at *15 (Ala. Oct. 31, 1997) (Hooper, C.J., dissenting) ("If the case involved a signatory's attempting to compel a nonsignatory to arbitrate, it would be clear that the nonsignatory did not agree to the arbitration."); Sherman & Bennett, *supra* note 24, at B4 (arguing that a "liberal policy favoring enforcement of arbitration agreements cannot serve as a substitute for the consent of the parties").

105. *See* Sherman & Bennett, *supra* note 24, at B4 ("Recent extensions of the conventional theories recognize that when arbitration between signatories is appropriate and a non-signatory seeks to join the arbitration, consent may be more easily found.").

of federal principles.[106] In adopting the theory of equitable estoppel in *McBro Planning & Development Co. v. Triangle Electrical Construction Co.*, the Eleventh Circuit applied the doctrine in contravention of the express intent of the contracting parties.[107] The expansion of equitable estoppel in *McBro* corresponds with the *McBro* court's expansion of the test itself.

The next section explicates *McBro*'s analysis and its transformation of equitable estoppel into a two-pronged test. The preceding discussion has defined the first prong of equitable estoppel as a comparison between signatory's complaint and the underlying contract containing the arbitration provision. The *McBro* court initiates the development of a second prong[108] by examining the specific relationships between signatory and nonsignatory parties. The following discussion elucidates this nexus prong and argnes that a close relationship between signatory and nonsignatory entities favors arbitration.

b. The Nexus Prong: Examination of the Relationship Between Signatory and Nonsignatory Entities

In *McBro*, the plaintiff-electrical contractor ("Triangle") agreed to perform work for St. Margaret's Hospital.[109] A development company ("McBro") entered into a separate contract with St. Margaret's Hospital to serve as construction manager for the hospital building

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106. It appears that some courts simply misapply the doctrine of equitable estoppel. In *Dunn Construction Co. v. Sugar Beach Condominium Ass'n*, a developer contracted with a construction company to build condominiums. *See* 760 F. Supp. 1479, 1480 (S.D. Ala. 1991). The contract between the developer and the construction company contained an arbitration provision. As part of the transaction, a separate insurance company issued a completion bond incorporating the original contract by reference. A bank financed the construction project and received a mortgage on the property. The bank eventually foreclosed on a part of the property, expended two million dollars to make repairs, and sued the construction company for breach of contract and negligence. *See id.* at 1481. The construction company sought to compel arbitration of the dispute according to the torms of the contract between the construction company and the developer. *See id.* at 1483. Because the bank's claims were founded on the contract and because of the bank's close relationship with signatory parties, the court held that the bank was equitably estopped from asserting the lack of a written arbitration agreement as a defense to arbitration. *See id.* at 1484. Therefore, a signatory was able to expand the scope of an arbitration agreement to include a nonsignatory when the nonsignatory *never* agreed to arbitrate its disputes with the construction company.

107. *See* 741 F.2d 342, 343-44 (11th Cir. 1984).

108. The following section examines the Eleventh Circuit's development of the nexus prong as an implicit element of equitable estoppel emerging in *McBro* and subsequently in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993). The Eleventh Circuit does not use the dual prong terminology. This Noto uses first and second prong as convenient references to this Author's perception of discrete elements of equitable estoppel.

109. *See McBro*, 741 F.2d at 342-43.

project.[110] Triangle and McBro entered into *separate and independent* contracts with St. Margaret's. Both contracts with the hospital contained arbitration provisions.[111] Although the agreement between Triangle and St. Margaret's acknowledged McBro as construction manager,[112] the agreement expressly disavowed " 'any contractual relationship between . . . the Construction Manager and the [plaintiff] Contractor.' "[113]

Despite its overt waiver of a contractual relationship with McBro, the district court compelled Triangle to arbitrate its claims with the construction manager.[114] The Eleventh Circuit Court of Appeals invoked the doctrine of equitable estoppel to affirm the district court's decision.[115] The court found that Triangle's complaint essentially alleged that McBro breached the duties assigned it by the underlying agreement between Triangle and St. Margaret's Hospital.[116]

The court did not stop with this first prong of the equitable estoppel test. The court proceeded beyond an analysis of the complaint and underlying contract to examine the nexus between the parties. The court found that the close relationship between the three entities favored arbitration.[117]

In *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, the Eleventh Circuit solidified the second prong of its test.[118] In this case, Sunkist Growers owned a soft drink label and granted Sunkist Soft Drinks ("SSD") a license to market the brand name.[119] The licensing arrangement contained a provision submitting " 'controvers[ies] or claim[s] arising out of or relating to this Agreement or the breach thereof . . . [to] arbitration.' "[120]

The Del Monte corporation later acquired SSD as a new subsidiary and eliminated SSD as an independent operating entity.[121] Subsequently, a dispute arose between Sunkist Growers and Del

110. *See id.*
111. *See id.*
112. *See id.*
113. *Id.* at 343 (quoting the agreement).
114. *See id.*
115. *See id.* at 344.
116. *See id.*
117. *See id.* at 343.
118. *See* 10 F.3d 753, 758 (11th Cir. 1993) (examining the nexus between the parties and concluding that the claims were "intimately founded in and intertwined with the agreement at issue, such that Sunkist was equitably estopped from avoiding arbitration of the claims").
119. *See id.* at 755.
120. *Id.*
121. *See id.*

Monte relating to the subsidiary's performance of the licensing agreement.[122] Sunkist Growers alleged that Del Monte's management caused the subsidiary to breach the licensing agreement.[123] Del Monte filed an action against Sunkist Growers seeking judicial declaration that Sunkist Growers' claims against Del Monte were subject to arbitration under the terms of the licensing agreement.[124]

Sunkist Growers argued that the absence of a written agreement between itself and Del Monte precluded arbitration of its claims against the parent corporation.[125] The court held that Sunkist Growers was equitably estopped from asserting the lack of a written agreement with nonsignatory Del Monte as a bar to arbitration.[126] In applying the first prong of the equitable estoppel test, the court found that Sunkist Growers' claim essentially alleged that Del Monte's management and reorganization of the new subsidiary resulted in the subsidiary's failure to perform under the licensing agreement.[127] The factual allegations of the complaint depended upon the existence of the licensing agreement that contained the arbitration clause.[128]

But the complaint's reliance solely upon the existence of the licensing agreement does not necessarily mean that the complaint itself arises from that agreement. Indeed, the *Sunkist* court stated that the licensing agreement did not assign the nonsignatory Del Monte specific duties and obligations.[129] Rather, Del Monte suffered potential liability because it merely interfered with the licensing agreement containing the arbitration provision.[130] The dispute between Sunkist Growers and Del Monte, therefore, arose from the licensing agreement in the sense that the dispute simply could not exist without the agreement itself.[131]

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122. *See id.* at 755, 758.
123. *See id.* at 758.
124. *See id.* at 755.
125. *See id.* at 757-58.
126. *See id.* at 758.
127. *See id.*
128. *See id.*
129. *See id.* at 757 ("The license agreement at issue here does not specify or make mention of any duties or obligations that Del Monte owes to Sunkist.").
130. *See id.* at 758 ("Essentially, Sunkist contends that Del Monte, through its management and operation of SSD, caused SSD to violate various terms and provisions of the license agreement.").
131. *See id.* ("Although Sunkist does not rely exclusively on the license agreement te support its claims, each claim presumes the existence of such an agreement.").

But in *McBro*, the underlying contract specifically referenced the nonsignatory's duties and obligations.[132] The nonsignatory suffered potential liability when it allegedly breached the obligations set forth in the contract containing the arbitration provision.[133] The connection between complaint and contract in *Sunkist* was much weaker than in *McBro*.

For this reason the nexus prong of the equitable estoppel analysis became crucial in *Sunkist*. In applying the second prong, the *Sunkist* court examined the close relationship between Del Monte and its subsidiary and concluded that the subsidiary had for all practical purposes ceased to exist within Del Monte's management structure.[134] Therefore, the tight relationship between Del Monte and its subsidiary favored arbitration of Sunkist Growers' claims against Del Monte, the nonsignatory parent corporation.[135]

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132. *See* McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1994).

133. *See id.*

134. *See Sunkist*, 10 F.3d at 758.

135. *See id.* The court's application of the nexus test resembles the traditional analysis of corporate veil piercing. In the context of arbitration, plaintiffs will often attempt te pierce the veil of a signatory subsidiary to reach and enforce arbitration against a parent nonsignatory corporation. *See* McKinnis, *supra* noto 51, at 205. Traditionally, courts will only pierce the corporate veil when the parent dominatos the subsidiary to the extent of eliminating the subsidiary's separate existence. *See id.* ("The level of parental control necessary to invoke the instrumentality rule does not require completo stock control, but rather such domination as to effectively leave the subsidiary corporation with no mind of its own . . . ."); *see also* Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 777 (2d Cir. 1995) ("[A] parent company and its subsidiary lose their distinct corporato identities when their conduct demonstrates a virtual abandonment of separatoness.").

Some courts refuse to pierce the corporate veil on the basis of control alone. Rather, the court must find the use of control and domination to perpetuate fraud. *See* Fisser v. International Bank, 282 F.2d 231, 239 (2d Cir. 1960) (holding that fraud must accompany a finding of control to justify piercing the corporate veil); Keystone Shipping Co. v. Texport Oil Co., 782 F. Supp. 28, 30 (S.D.N.Y. 1992) (establishing a presumption of separateness in the absence of fraud). However, one commentator has notod that some courts do not impose the fraud requirement. *See* McKinnis, *supra* note 51, at 205; *see also* Farkar Co. v. R.A. Hanson DISC., Ltd., 441 F. Supp. 841, 846 (S.D.N.Y. 1977) (suggesting that abandonment of separate identities results in probable fraud), *modified*, 583 F.2d 68 (2d Cir. 1978).

Under a veil-piercing analysis, the relationship between parent and subsidiary is so close tbat the two entities become one for the purpose of arbitration. *See* McKinnis, *supra* note 51, at 205 (stating that piercing the corporate veil is appropriate if the level of parental control has risen to such a point that the "subsidiary corporation [has] no mind of its own, thereby merely acting as a conduit for its parent company"). Therefore, a party may be forced te arbitrate a claim against a parent corporation despite the lack of any agreement when that party has entered inte a contract with the subsidiary containing an arbitration provision. The party has thereby agreed to arbitrate with an "entity," which includes both parent and subsidiary. In essence, the party's intent to arbitrato with a subsidiary functions as an intent to arbitrate with the parent.

If the nexus test were merely a renmant of veil piercing, the test would potentially serve to protect the "intont" of contracting parties in a parent-subsidiary contoxt or in appropriate piercing scenarios. But the *McBro* case demonstratod that the nexus test extends beyond a

5. Nexus Prong Threatens to Subvert Intent of the Contracting Parties

The nexus prong of equitable estoppel threatens to privilege transactional relationships over contractual manifestations of assent. To equitably estop a party from resisting arbitration with a nonsignatory, a court must initially find a close connection between a party's claims against the nonsignatory and the underlying contract containing an arbitration provision.[136] A party that assents to arbitrate claims arising out of a contract also assents to arbitrate those claims against a nonsignatory when the fundamental dispute is "intimately founded in and intertwined with the nnderlying contract obligations."[137] However, *Sunkist* and *McBro* together suggest that equitable estoppel will not automatically fail when the relationship between a party's claims and the underlying contract grows thin. Indeed, a close nexus between all of the relevant parties may support arbitration even when the connection between the claim and the complaint is weak.[138] Therefore, the doctrine of equitable estoppel threatens to enforce arbitration against the intent of contracting parties.

III. EQUITABLE ESTOPPEL AND THE ALABAMA COURTS

A. Alabama's Hostility to Arbitration

Traditionally, Alabama courts have adhered to a public policy against arbitration and have prohibited the enforcement of predispute arbitration agreements.[139] The Alabama Supreme Court has

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piercing analysis. In *McBro*, the court turned the nexus tost into a broader transactional test. *See McBro*, 741 F.2d at 343-44 (finding that the "close relationship of the . . . entities" involved and the "close relationship of the alleged wrongs" to the nonsignatory's duties compelled arbitration of the plaintiff's claims). The participation of several parties in one transaction favored the arbitration of all claims. *See supra* notes 108-17 and accompanying text.

136. *See supra* Part II.B.4.a.

137. *See* Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 841 n.9 (7th Cir. 1981).

138. *See supra* notes 117, 132-35 and accompanying text.

139. *See* H.L. Fuller Constr. Co. v. Industrial Dev. Bd., 590 So. 2d 218, 221 (Ala. 1991); Stanley D. Bynum & J. David Pugh, *Enforcing Arbitration Agreements in Alabama: A Double Standard Dilemma*, 54 ALA. LAW. 38, 39-40 (1993); Henry C. Strickland, Allied-Bruce Terminix, Inc. v. Dobson*: Widespread Enforcement of Arbitration Agreements Arrives in Alabama*, 56 ALA. LAW. 238, 238-39 (1995); Henry C. Strickland et al., *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 CUMB. L. REV. 59, 60-63 (1994); Donald E. Johnson, Recent Decision, *Has* Allied-Bruce Terminix Cos. v. Dobson *Exterminated Alabama's Anti-Arbitration Rule?*, 47

explained the hostility as deference to judicial sovereignty: Individual parties should not be able to displace the jurisdiction of the courts through private agreements.[140] At the same time, the United States Supreme Court has interpreted the FAA as a congressional effort to overturn common law hostility to arbitration.[141] Nevertheless, the Alabama Supreme Court initially preserved state policy against arbitration agreements by holding the FAA inapplicable in state courts.[142] The court reasoned that Congress had passed the FAA to enforce arbitration provisions in federal, not state, courts.[143]

Shortly thereafter, in *Southland Corp. v. Keating*, the Supreme Court held that the FAA was applicable in state as well as federal courts.[144] This decision prevented the Alabama judiciary from prohibiting the enforcement of the FAA in state courts,[145] but the decision did not immediately reverse Alabama's anti-arbitration policy.

A contract containing an arbitration provision must still involve interstate commerce to fall within the scope of the FAA.[146] The Alabama Supreme Court originally limited the applicability of the FAA in state court by holding that a contract involves interstate commerce only when the contracting parties substantially contemplated interstate commerce at the time of execution.[147] The test

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ALA. L. REV. 577, 579-82 (1996); Langford, *supra* noto 51, at 615-16. In addition to common law hostility, Alabama statutory law impedes the enforcement of arbitration provisions: "The following obligations cannot be specifically enforced: . . . (3) An agreement to submit a controversy to arbitration . . . ." ALA. CODE § 8-1-41 (1975). The Alabama Supreme Court has enforced Alabama code section 8-1-41(3) to prohibit judicial enforcement of a predispute arbitration agreement. *See H.L. Fuller*, 590 So.2d at 221.

140. *See H.L. Fuller*, 590 So. 2d at 221; Wells v. Mobile County Bd. of Realtors, 387 So. 2d 140, 144 (Ala. 1980).

141. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) ("The House Report accompanying the Act makes clear that its purpose was . . . to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate."); Southland Corp. v. Keating, 465 U.S. 1, 13-14 (1984); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974) (finding that the FAA was designed to "revers[e] . . . centuries of judicial hostility to arbitration agreements"); *see also supra* notes 11-12 and accompanying toxt.

142. *See Ex parte* Alabama Oxygen Co., 433 So. 2d 1158, 1162 (Ala. 1983), *vacated and remanded for further consideration*, 465 U.S. 1016, 1016 (1984).

143. *See id.* at 1161-62.

144. 465 U.S. at 16; Johnson, *supra* note 139, at 586-87.

145. *See* Johnson, *supra* note 139, at 586.

146. *See* 9 U.S.C. § 2 (1994); *see also Southland Corp.*, 465 U.S. at 10-11 (stating that arbitration provisions must be part of a contract "evidencing a transaction involving commerce" to be enforceable under the FAA).

147. *See Ex parte* Jones, 628 So. 2d 316, 318 (Ala. 1993) (holding that a contract involves interstate commerce when " 'at the time [tlie parties] entered into [tlie contract] and accepted the arbitration clause, they contemplated substantial interstate activity' ") (quoting *Ex parte* Warren, 548 So. 2d 157, 160 (Ala. 1989)). See Strickland et al., *supra* note 139, at 66-73, for a detailed history of the Alabama Supreme Court's development of the substantial contemplation of interstate commerce test.

essentially presumed that a contract fell outside the scope of the FAA.[148] The United States Supreme Court, however, reversed the "substantial contemplation" test in *Allied-Bruce Terminix Cos. v. Dobson* and held that the FAA was enforceable to the full extent of Congress's commerce clause powers.[149]

The *Allied-Bruce* decision did not completely eliminate the Alabama courts' ability to resist arbitration. To compel arbitration of a dispute, a court must still find the dispute arbitrable under the terms of the relevant agreement. An aversion to arbitration compels a narrow reading of arbitration provisions. A refusal to extend the scope of arbitration provisions beyond signatory parties reduces the breadth and efficacy of arbitration agreements. A nonsignatory's attempt to compel arbitration is in essence an attempt to stretch the scope of such agreements. A court's acceptance of the nonsignatory corresponds with that court's willingness to expand the parameters of the arbitration clause.[150]

B. Scope of the Arbitration Clause

Federal law prohibits enforcement of an arbitration clause against one who has not agreed to arbitrate.[151] Federal policy, however, favors an expansive reading of arbitration provisions.[152] Accordingly, in interpreting a contract provision which submits all disputes "arising out of" the contract to arbitration, a majority of federal circuits have found that such langnage covers nearly every dispute relating to a breach of the underlying contract.[153] The Supreme Court, in fact, has directed lower courts to resolve ambiguities concerning the scope of an arbitration provision in favor of enforcement of the clause.[154] Therefore, the contracting parties' intent to arbitrate attaches to a broad range of disputes arising out of the contract containing the provision.

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148. *See* Johnson, *supra* note 139, at 592.

149. *See* 513 U.S. 265, 281-82 (1995); Johnson, *supra* note 139, at 595-96.

150. *See* Patricia J. Ponder, *Alabama's Arbitration Cases: Where Does the Non-Signatory Stand?*, 58 ALA. LAW. 246, 246 (1997). Ponder notes that: "[Q]uestions still remain regarding how broadly an Alabama court will construe an arbitration provision. The particular imbroglio engaging the Alabama Supreme Court at this moment is whether a non-signatory to a contract containing an arbitration provision may compel arbitration pursuant to that clause." *Id.*

151. *See supra* notes 21, 27 and accompanying text.

152. *See supra* notes 17-20 and accompanying text; *see also* McKinnis, *supra* note 51, at 200 (discussing the federal policy in support of a broad reading of arbitration provisions).

153. *See supra* note 51 and accompanying text.

154. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983).

The Alabama Supreme Court, however, constructs the range of arbitrable disputes "arising out of a contract" according to a narrow vision of intent. In *Old Republic Insurance Co. v. Lanier*, an insurance agent brought claims against an insurance company alleging breach of contract, fraud in the inducement, conversion, and interference with business relations.[155] Three separate contracts between the parties contained provisions calling for the arbitration of any disputes "arising out of" the agreements.[156] Although the court acknowledged the strong federal policy in favor of arbitration,[157] it narrowed the scope of "arising out of" to matters of contract interpretation and performance.[158] Applying the narrow reading of the provisions, the court held that the conversion and interference with business relationships claims fell outside the scope of the arbitration provisions.[159] The Alabama Supreme Court's resistance to the doctrine of equitable estoppel arises from its analytical focus on the intent of contracting parties to arbitrate.

C. The Alabama Supreme Court's Approach to Nonsignatories

1. Analytical Focus on Intent

The Alabama Supreme Court has on rare occasion allowed a nonsignatory to enforce an arbitration agreement.[160] The court, however, has traditionally refused to apply equitable estoppel in doing so.[161] Instead, the court attempts to determine whether the arbitra-

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155. *See* 644 So. 2d 1258, 1259 (Ala. 1994).

156. *See id.* at 1260.

157. *See id.*

158. *See id.* at 1261-62; *see also* Langford, *supra* note 51, at 638-39 (discussing the inconsistency between the Alabama Supreme Court's citation of the strong federal policy in favor of arbitration and the court's narrow reading of the arbitration provisions). In *Lanier*, the Alabama Supreme Court followed the Ninth Circuit's reasoning in *Mediterranean Enterprises v. Ssangyong Corp.*, whereby the Ninth Circuit found that terminology such as "arising out of" and "arising hereunder" merely qualified disputes involving contract performance and interpretation. *See id.* at 1261-62 (citing Mediterranean Enters. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983)); *see also supra* note 51 and accompanying text.

159. *See Lanier*, 644 So. 2d at 1263; *see also* Michael L. Bell, *Fraud aud Insurance Companies in Alabama, in* AMERICAN LAW INSTITUTE & AMERICAN BAR ASSOCIATION, ALI-ABA COURSE OF STUDY: CONFERENCE ON LIFE INSURANCE LITIGATION 267, 278 (1997) (listing cases, including *Lanier*, which have narrowly construed the scope of similar arbitration provisions).

160. *See, e.g., Ex parte* Gates, 675 So. 2d 371, 374-75 (Ala. 1996) (allowing a nonsignatory manufacturer te compel arbitration of purchaser's claims pursuant to buyer-vendor agreement).

161. *See id.* at 373-75 (failing to invoke equitable estoppel in allowing a nonsignatory manufacturer to compel arbitration); Bell, *supra* note 159, at 279 ("The Alabama Supreme Court has declined to follow the body of substantive law [i.e., equitable estoppel] applied in the Eleventh Circuit.").

tion provision is broad enough to include plaintiff's claims against the nonsignatory.[162] The breadth of the arbitration provision corresponds to the court's determination of the contracting parties' subjective intent to arbitrate.[163] The court determines intent by interpreting the language of the relevant arbitration provision itself.[164]

In *Ex parte Jones*, the plaintiff entered into an agreement with a lender to borrow money for the purchase of an automobile.[165] As part of the loan, the lender financed a collateral insurance policy issued by a separate insurance carrier to cover the automobile.[166] Although the loans provided funds for the policy, the policy represented an independent and separate agreement between the plaintiff and the insurance company.[167] When the car was destroyed and the plaintiff attempted to recover on the policy, the insurance company did not pay the entire amount of the plaintiff's claim.[168] Thereafter, the plaintiff brought an action against both the insurance company and the lender alleging fraud and bad faith.[169]

The loan arrangement between the plaintiff and the lender contained an arbitration clause, while the separate insurance contract between plaintiff and carrier did not.[170] Nevertheless, the trial court compelled arbitration of the plaintiff's claims against both the lender and the nonsignatory insurance carrier pursuant to the terms of the loan contract.[171] On appeal, the plaintiff conceded the appropriateness of arbitration with the lender but cited an absence of any agreement to arbitrate disputes with the nonsignatory insurance company.[172]

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162. *See* Bell, *supra* note 159, at 279 ("[T]he Court has permitted nonsignatories to compel arbitration when it has determined that the scope of the arbitration provision at issue is broad enough to include the claims asserted against the nonsignatory.").

163. *See Ex parte* Jones, 686 So. 2d 1166, 1167 (Ala. 1996) (asking whether the trial court properly compelled arbitration and finding that the instant court "must use general principles of contract interpretation to answer this question" and that "[i]n interpreting the arbitration clause found in the loan contract, [the court] must consider the intent of the parties to that contract"); *Gates*, 675 So. 2d at 374 (asking whether the trial court properly compelled arbitration and finding that the "answer to that question is a matter of contract interpretation, which is guided by considering the intent of the parties to the . . . contract").

164. *See supra* note 163.

165. *See Jones*, 686 So. 2d at 1166-67.

166. *See id.* at 1167.

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

The Alabama Supreme Court sought to determine whether the arbitration agreement between the plaintiff and the lender was broad enough to include the plaintiff's claims against the nonsignatory insurance carrier.[173] The court recited the familiar federal policy in favor of arbitration, but simultaneously noted the importance of determining the actual intent of the contracting parties.[174]

The court struck the balance between the expansive federal arbitration policy and the apparent intent of the plaintiff not to arbitrate with the nonsignatory insurance carrier by engaging in a narrow analysis of intent. The court essentially asked whether the plaintiff intended to arbitrate its current claims against the insurance carrier when it entered into the loan agreement.[175] The court found that the loan arrangement demonstrated a specific intent by the plaintiff to enter into a creditor-debtor relationship, and therefore the arbitration provision extended only to disputes between the lender and the plaintiff.[176] The court held that the plaintiff's claims against the insurance carrier were not subject to arbitration.[177]

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173. *See id.* at 1167-68; *see also supra* notes 161-63 and accompanying text.

174. *See Jones*, 686 So. 2d at 1167. The court stated: "In interpreting the arbitration clause found in the loan contract, we must consider the *intent* of the parties to that contract. . . ." *Id.* (emphasis added).

175. *See id.* at 1167-68. The court adopted a similar approach in *Prudential Securities, Inc. v. Micro-Fab, Inc.*, 689 So. 2d 829 (Ala. 1997). In that case, an individual opened an account with Prudential Securities and purchased certain Prudential investment products. *See id.* at 830. The individual entered into a client agreement containing an arbitration provision. The individual, who was also the sole shareholder and president of Micro-Fab, caused the corporation to open a separate investment account with Prudential and buy the same investment products. However, Micro-Fab never agreed te arbitrate future disputes with Prudential Securities. When Micro-Fab later sued Prudential, alleging fraud in connection with the sale of securities, Prudential sought to compel Micro-Fab to arbitrate its claims pursuant to the original client agreement. *See id.* The court held that the language of the client agreement did not manifest an intent to encompass a future relationship between Micro-Fab and Prudential. *See id.* at 831. Therefore, Micro-Fab's claims against Prudential were not subject to arbitration. *See id.* at 831-32.

176. *See Jones*, 686 So. 2d at 1167-68. The court engaged in an analysis of the plaintiff's intentions and found "no mutual agreement to submit to arbitration the issues between the [plaintiff] and [the insurance company]." *Id.* at 1168.

177. *See id.* at 1168. Justice Maddox dissented from the majority opinion and applied the doctrine of equitable estoppel to produce a different result. *See id.* at 1168-71 (Maddox, J., dissenting). Justice Maddox recited the two elements of the equitable estoppel doctrine. First, the court should evaluate the interrelatedness between the plaintiff's claims against the nonsignatory (the insurance carrier) and the underlying contract containing the arbitration provisions (the loan contract). *See id.* at 1169 (Maddox, J., dissenting). Second, the court should also analyze the relationship between all of the contracting parties. *See id.* (Maddox, J., dissenting). Indeed, Justice Maddox found that the plaintiff's claims against the insurance carrier were substantially related to the underlying loan agreement. *See id.* (Maddox, J., dissenting). Justice Maddox also found a close relationship between the plaintiff, the insurance carrier, and the lender because the loan financed the premiums for the insurance policy. *See id.* (Maddox, J., dissenting). Therefore, Justice Maddox reasoned that the plaintiff should be equitably

2. Analytical Focus on Intent Produces Contrary Results

Interestingly, the Alabama Supreme Court has applied its intent analysis and reached varying results when faced with nearly identical sets of facts. For example, *Ex parte Gates*[178] and *Ex parte Martin*[179] featured identically situated litigants, but the court reached contrary results.

In *Gates*, the plaintiff entered into a Manufactured Home Retail Installment contract with defendant vendor for the purchase of a mobile home.[180] The sales agreement contained a provision submitting disputes " 'arising from or relating to this Contract or the relationships which result from this Contract' " to arbitration.[181] The manufacturer of the home never signed the underlying sales contract.[182] When a dispute arose over construction of the home, the plaintiff sued both the vendor and the manufacturer.[183] At trial, the nonsignatory manufacturer successfully moved to compel arbitration of the plaintiff's claims.[184] The plaintiff petitioned the Alabama Supreme Court for a writ of mandamus vacating the trial court's decision.[185]

As in *Ex parte Jones*,[186] the court sought to determine whether the plaintiff, by entering into a mobile home sales contract with the vendor, thereby intended to arbitrate its current dispute with the manufacturer.[187] The court interpreted the language of the arbitration clause, which specifically covered " 'disputes . . . arising from or relating to [the] Contract or the relationships . . . result[ing] from [the] Contract.' "[188] The court considered such language to be broad in scope and indicative of the contracting parties' intent to arbitrate a broad range of disputes.[189] Therefore, the court found the plaintiff-

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estopped from circumventing arbitration by arguing the absence of an agreement with the insurance company. *See id.* at 1169-70 (Maddox, J., dissenting).

178. 675 So. 2d 371 (Ala. 1996).

179. 703 So. 2d 883 (Ala. 1996).

180. *See Gates*, 675 So. 2d at 373.

181. *Id.* (quoting from the sales agreement).

182. *See id.*

183. *See id.* The plaintiff alleged "breach of express and implied warranties, fraud, negligent or wanton installation, and violation of the Magnuson-Moss Warranty Act." *Id.*

184. *See id.*

185. *See id.* at 372.

186. 686 So. 2d 1166, 1167-68 (Ala. 1996).

187. *See Gates*, 675 So. 2d at 373-74 (remarking that the arbitration issue is "guided by considering the intent of the parties").

188. *See id.* at 373 (quoting from the sales agreement).

189. *See id.* at 374. The court did state that the plaintiff's claims relied upon the terms of the installment contract. *See id.* at 374-75. But the court was not applying an equitable

signatory's intent to arbitrate extended to claims against the nonsignatory manufacturer.[190]

The court appeared to reverse itself in *Ex parte Martin*, however, when faced with a nearly identical set of facts.[191] In *Martin*, the plaintiff also purchased a mobile home and thereafter entered into a sales contract with defendant vendor.[192] The sales contract contained an arbitration clause.[193] As in *Gates*, the manufacturer of the home was not a party to the underlying buyer-vendor agreement.[194] The plaintiff later sued the vendor for fraud, negligence, and breach of warranty, and the manufacturer for breach of warranty.[195] Contrary to *Gates*, the court held that the manufacturer as nonsignatory *could not* compel arbitration with the signatory plaintiff.[196]

The court distinguished *Martin* from *Gates* on the basis of contract interpretation.[197] The court argued that the language of the arbitration provision in *Gates* "was particularly broad, encompassing not only the 'disputes, claims, or controversies arising from' the contract, but also 'the relationships' that resulted from it."[198] But in a return to the reasoning of *Jones*, the court found the relevant arbitration clause in *Martin* to be narrow.[199] The court emphasized the fact that the arbitration language referred only to the plaintiff and the vendor.[200] Therefore, the arbitration provision contemplated disputes between only those specific parties.[201] Disputes with the nonsignatory

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estoppel analysis. Under the federal doctrine, the court would first analyze the relationship between the plaintiff's claims and the underlying contract containing the arbitration provision. *See id.* at 373-74. The court began its analysis with the intent of the parties and examined the breadth of the arbitration provision as a means of determining intent. *See supra* notes 162-64 and accompanying text.

190. *See Gates*, 675 So. 2d at 374-75; *see also Ex parte* Gray, 686 So. 2d 250, 251 (Ala. 1996) (finding that a "Retail Buyer's Order" signed by the plaintiff and the defendant automobile dealership, which contained an arbitration agreement, was indeed broad enough to include the plaintiff's claims against the dealership's salesman, who never signed the underlying contract).

191. *See* 703 So. 2d 883, 888 (Ala. 1996).

192. *See id.*

193. *See id.*

194. *See id.*; *see also Gates*, 675 So. 2d at 373.

195. *See Martin*, 703 So. 2d at 884.

196. *See id.* at 886-87.

197. *See id.* at 886.

198. *Id.* (quoting *Gates*, 675 So. 2d at 374).

199. *See id.*

200. *See id.*

201. *See id.* at 886-87. The dissent argued for the application of equitable estoppel to allow "nonsignatories to compel arbitration where there is a close relationship between a signatory and the nonsignatory and a close connection between the claims subject to the arbitration clause and the nonsignatory's obligations and duties under the contract." *Id.* at 888 (Hooper, C.J., dissenting).

manufacturer consequently fell outside the provision and were not arbitrable.[202]

Jones and *Martin* appear radically divergent from *Gates*.[203] But an understanding of the court's methodological approach reconciles the disparity. The Alabama Supreme Court scrutinizes the language of the relevant arbitration provision to ascertain the scope of the parties' intent to arbitrate. This approach narrowly constructs intent from the language of the agreement. The approach unfortunately produces uncertainty as the court interprets on a case-by-case basis the variations in the contractual wording of arbitration clauses. As seen, a slight alteration in language may substantially alter the "intent" of the parties.[204]

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202. *See id.* at 887.

203. See Ponder, *supra* note 150, at 247-48, for a thorough discussion of the inconsistent Alahama Supreme Court decisions concerning nonsignatories and arbitration. Ponder explains the disparities in this line of cases as the result of a slow move towards federal policy. *See id.* at 249-50. She suggests that the Alabama Supreme Court shifts toward federal principles when the court perceives what Ponder refers to as "agency relationships" between signatories and nonsignatories. *Id.* at 250. For example, Ponder remarks that in *Gates*, a nonsignatory manufacturer was closely related to a vendor in a single transaction of selling a home to the plaintiff. *See id.* In contrast, Ponder suggests that in *Jones*, the court denied a nonsignatory the right to compel arbitration because the parties were not overtly engaged in a single transaction (at least not from the perspective of the plaintiff). *See id.* She writes that in *Jones* "the defendants were a loan agency and the issuer of a collatoral insurance policy. The plaintiffs did not even know that there was a separato insurance company involved until after their car was destroyed." *Id.*

This Note interprets the Alabama Supreme Court's seemingly sporadic decisions in cases like *Gates* and *Jones* as a function of the court's case-by-case determination of intont based on language of the underlying contract. *See supra* notes 180-202 and accompanying toxt. Also, at the time Ponder's article appeared, the Supreme Court of Alabama had yet to withdraw its first *Isbell* opinion. As Ponder notes, the court's first decision in *Ex parte Isbell*, No. 1951384, 1997 WL 99725 (Ala. March 7, 1997), *withdrawn and replaced*, *Ex parte* Isbell, No. CV-95-8362, 1997 WL 679418 (Ala. Oct. 31, 1997), acknowledged the federal trend toward euforcement of arbitration provisions by nonsignatories. *See* Ponder, *supra* note 150, at 248. Ponder notes the court's emphasis in the first *Isbell* opinion on the fact that all of the defendants participated in a single business relationship in the sale of a mobile home. *See id.* at 250. Indeed, the court, in the first *Isbell* opinion, allowed the nonsignatory to enforce arbitration, thereby supporting Ponder's argument tbat the court's perception of such transactional relationships favors adherence to federal principles. *See id.* at 248. But this Note contends that the court's final *Isbell* decision downplays any emphasis on transactional relationships. The final *Isbell* opinion ultimately limits the federal principle of equitable estoppel to a comparison between plaintiff's claims and the underlying contract containing the arbitration provision and dismisses what this Note labels the nexus, or second, prong of equitable estoppel.

204. *See supra* notes 197-202 and accompanying text. *Ex parte Stallings & Sons, Inc.*, 670 So. 2d 861, 862-63 (Ala. 1995), demonstrates the Alabama Supreme Court's divergence from federal authority in its analytical focus on intent. In *Stallings*, a hospital board hired the plaintiff to assist in the construction of a building addition. *See id.* at 861-62. The hospital board also hired an architectural firm to design and supervise the project. *See id.* The plaintiff's contract with the board contained a provision submitting " '[a]ny controversy or claim arising out of or related to the Contract . . . [to] arbitration.' " *Id.* at 862 (quoting this contract). The agreement between the board and the firm lacked a similar provision. *See id.*

D. The Alabama Supreme Court's Movement Towards Equitable Estoppel

The Alabama Supreme Court recently announced its position towards equitable estoppel in *Ex parte Isbell.*[205] This case represents the court's most complete analysis of federal arbitration principles to date. *Isbell* charts the court's trajectory towards acceptance of federal principles while simultaneously reaffirming "intent" as the core of enforceable arbitration agreements.

In *Isbell*, the plaintiff once again bought a mobile home.[206] The plaintiff and vendor executed a "Manufactured Home Retail Installment Contract and Security Agreement" containing an arbitration provision.[207] Although the plaintiff did receive a separate warranty agreement from the manufacturer of the mobile home as a part of the original purchase, the manufacturer was not a party to the sales contract containing the arbitration clause.[208]

The plaintiff brought suit against the vendor, the vendor's agent, and the manufacturer after allegedly discovering defects in the

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The plaintiff later sued the architectural firm for alleged suppression of information and negligent performance of its duties, which resulted in economic harm to the plaintiff. The firm sought to compel arbitration with the plaintiff pursuant to the agreement between the plaintiff and the hospital board. *See id.* The court denied arbitration, looking to the specific language of the contract, which stated that " '[n]o arbitration arising out of or relating te [the contract] shall include . . . the Architect . . . , except by written consent containing specific reference to the Agreement [between plaintiff and board] and signed by the Architect.' " *Id.* at 863 (quoting this contract).

Although the language of the provision clearly appeared to foreclose arbitration, federal authority might have provided a different result. Indeed, the court noted the factual similarity of the *Stallings* case to *McBro Planning & Development Co. v. Triangle Electrical Construction Co.*, where a plaintiff contractor brought an action against a construction manager for intentional interference with contract and negligence. *See* 741 F.2d 342, 343 (11th Cir. 1984). In *McBro*, the construction manager sought to compel arbitration of the claim pursuant to an arbitration provision in the contract between the plaintiff and the hospital funding the project (and pursuant to the terms of a similar contract between the manager and the hospital). *See id.* The court specifically noted that the contract between the plaintiff and the hospital refuted any contractual relationship between the plaintiff and the construction manager. *See id.* Although this contractual waiver might theoretically foreclose arbitration between the plaintiff and the manager, the court held that the plaintiff was equitably estopped from asserting the lack of an agreement with the manager as a bar to arbitration because of "the close relationship of the three entities here involved . . . and the close relationship of the alleged wrongs to [the manager's] contractual duties to perform as construction manager." *Id.* In contrast, the *Stallings* court privileged contractual langnage as manifesting intont over an estoppel analysis. *See Stallings*, 670 So. 2d at 863.

205. No. CV-95-8362, 1997 WL 679418 (Ala. Oct. 31, 1997).

206. *See id.* at *1.

207. *See id.*

208. *See id.* at *2 (noting that the manufacturer disclaimed liability for agreements other than the warranty).

product.[209] All of the defendants, including the nonsignatory manufacturer, moved to compel arbitration pursuant to the terms of the installment contract.[210] In determining whether the nonsignatory manufacturer could enforce the arbitration clause against the plaintiff-buyer pursuant to the underlying installment contract, the court discussed the applicability of equitable estoppel to the facts of the case.[211] The court reviewed the key federal decisions of *Sunkist*[212] and *McBro*,[213] but ultimately relied on the Middle District of Alabama case, *Wilson v. Waverlee Homes, Inc.*,[214] because of its factual similarities to the instant case.[215] As in *Isbell*, the *Wilson* case addressed a mobile home purchaser seeking to establish the nonsignatory manufacturer's liability for breach of warranty while avoiding the manufacturer's attempt to compel arbitration pursuant to an underlying sales contract with the vendor.[216] The Alabama Supreme Court held that under *Wilson*, a nonsignatory defendant must establish its right to enforce an arbitration provision against a plaintiff-signatory by demonstrating that the plaintiff's claim alleges the defendant's breach of duties generated by the underlying contract itself.[217]

Under the *Wilson* formulation, the *Isbell* court held that equitable estoppel was inapplicable to the facts at issue.[218] The court found that the plaintiff's warranty claims against the manufacturer had nothing to do with the underlying sales contract with the vendor and therefore did not meet the first prong of the equitable estoppel test.[219] Therefore, the court held that the warranty claim against the manufacturer was not arbitrable.[220]

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209. *See id.*

210. *See id.*

211. *See id.* at *4-*8.

212. *See* Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993).

213. *See* McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342 (11th Cir. 1984).

214. 954 F. Supp 1530 (M.D. Ala. 1997), *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997).

215. *See Isbell*, 1997 WL 679418, at *4-*6.

216. *See Wilson*, 954 F. Supp. at 1532.

217. *See Isbell*, 1997 WL 679418, at *8.

218. *See id.* at *12; *see also Ex parte* Grant, No. CV-95-240, 1997 WL 707055, at *1-2 (Ala. Nov. 14, 1997) (refusing to enforce arbitration when finding that no contract existed, hut nevertheless citing *Isbell*, 1997 WL 679418, at *1, as authority in stating that the defendant manufacturer of a mobile home may not compel arbitration of the plaintiff-huyer's complaint against it when the manufacturer was not a party to the underlying contract between the buyer and the vendor).

219. *See Isbell*, 1997 WL 679418, at *10.

220. *See id.* at *12-*13. The court ultimately returned to an intont-based anaysis and held "that the arbitration provisions in this case [were] not broad enough to include the claims against [the nonsignatory]." *See id.* at *12.

The dissent in *Isbell* questioned the majority's wisdom in relying on a federal district court's decision as opposed to established authority from the Eleventh Circuit.[221] The dissent further remarked that "[t]he FAA favors arbitration, and the federal courts have allowed nonsignatories to an arbitration agreement to compel arbitration with signatories."[222] The dissent clearly argued for the application of federal arbitration law to enforce arbitration,[223] while the majority held that equitable estoppel was inapplicable on these facts.[224] The majority was operating under a narrower interpretation of federal policy than the dissent. Upon further examination of *Isbell*, it becomes clear that the majority narrowed the breadth of federal arbitration law by altering the elements of equitable estoppel itself.

E. The Alabama Supreme Court's Derivative Version of Equitable Estoppel

1. The First Prong: The Relationship Between Signatory's Claims and Underlying Contract

Equitable estoppel always begins with an initial determination of the interrelatedness between the plaintiff's claims and the underlying contract containing the arbitration provision.[225] A court's definition of interrelatedness is crucial. The applicability of equitable estoppel to a set of facts depends upon the type of relationship a court requires between the plaintiff's claims and the contract providing for arbitration. According to the majority in *Isbell*, the plaintiff's claims sufficiently correspond to the underlying contract when the nonsignatory's potential liability derives from the terms of the contract.[226]

Indeed, federal authority supports this position. In *McBro*, the Eleventh Circuit applied equitable estoppel when it specifically found that the nonsignatory "breached the duties and responsibilities assigned it by the [underlying] agreement" containing the arbitration provision.[227] In *Hughes Masonry*, the Seventh Circuit applied equita-

221. *See id.* at *16 (Hooper, C.J., dissenting).
222. *Id.* (Hooper, C.J., dissenting).
223. *See id.* (Hooper, C.J., dissenting).
224. *See id.* at *8-*10.
225. *See supra* Part II.B.4.a.
226. *See Isbell*, 1997 WL 679418, at *8.
227. McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co, 741 F.2d 342, 344 (11th Cir. 1984); *see also supra* notes 109-17 and accompanying text.

ble estoppel when the plaintiff's claims "alleged [the nonsignatory's] breach of the obligations assigned to it in the [underlying] agreement."[228]

In contrast to the *Isbell* majority, Alabama Supreme Court Justices Maddox and Hooper have continuously lobbied for a broader interpretation of federal principles and have repeatedly dissented to the court's limited enforcement of arbitration with nonsignatories.[229] An examination of Justice Maddox's dissent in *Ex parte Jones* illustrates these arguments.[230] When the plaintiff in *Jones* sued the insurance company for fraud and bad faith failure to pay, the court denied the nonsignatory insurance company's motion to compel arbitration of plaintiff's suit pursuant to the terms of the loan contract.[231] Justice Maddox dissented and argued for the application of equitable estoppel.[232]

Justice Maddox argued that the plaintiff's claims against the nonsignatory insurance company were " 'founded on and are intertwined with the *facts surrounding the underlying contract* that contains the arbitration clause.' "[233] Justice Maddox noted a transactional connection between the plaintiff's claims and the underlying contract.[234] In other words, the plaintiff's claims must arise out of the "*facts* surrounding the underlying contract," but not the contract itself.[235] Even a collateral relationship between the plaintiff's claims and the underlying agreement would satisfy this test.

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228. Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 838 (7th Cir. 1981); *see also supra* notes 72-88 and accompanying text.

229. *See Isbell*, 1997 WL 679418, at *14-*15 (Hooper, C.J., dissenting) (arguing for the application of federal arbitration principles); *Ex parte* Martin, 703 So. 2d 883, 887-89 (Ala. 1997) (Hooper, C.J., dissenting) (same); *id.* at 889-90 (Maddox, J., dissenting) (same); *Ex Parte* Stripling, 694 So. 2d 1281, 1284 (Ala. 1997) (Maddox, J., dissenting) (same); *Ex parte* Jones, 686 So. 2d 1166, 1168-70 (Ala. 1996) (Maddox, J., dissenting) (same).

230. *See* 686 So. 2d at 1168-71 (Maddox, J., dissenting). In *Jones*, the plaintiff entered into a loan arrangement with the defendant lender and simultaneously acquired a separate insurance policy as part of the same financing package. The issuing insurance company, however, was not a party to the loan contract containing the arbitration provision. *See id.* at 1167; *see also supra* notes 165-69 and accompanying text.

231. *See Jones*, 686 So. 2d at 1167-68.

232. *See id.* at 1168-70 (Maddox, J., dissenting).

233. *Id.* at 1168 (Maddox, J., dissenting) (quoting *Ex parte* Jones, No. 1950117, 1996 WL 292060, at *2 (Ala. May 31, 1996), *withdrawn and replaced*, 686 So. 2d 1166 (Ala. 1996)) (emphasis added). Justice Maddox was actually quoting from the original *Jones* opinion, which the court withdrew and replaced with the current opinion. Therefore, the reasoning of the first withdrawn opinion (with which Justice Maddox concurred) became the heart of Justice Maddox's dissent to the new majority opinion.

234. *See id.* (Maddox, J., dissenting).

235. *Id.* (Maddox, J., dissenting) (emphasis added).

In *Jones*, the plaintiff's claims against the nonsignatory insurance company directly evolved from the financing transaction between the plaintiff and the lender.[236] Based on this fact, Justice Maddox favored arbitration, arguing that " 'if the [loan] contract containing the arbitration provision did not exist, neither would the . . . insurance contract.' "[237]

Under this analysis, arbitration would be entirely appropriate on the facts of *Isbell*. In *Isbell*, the plaintiffs sued the manufacturer of a mobile home alleging breach of a warranty agreement received by plaintiff in connection with the buyer-vendor sales contract.[238] The purchase of the mobile home is factually related to the warranty: " '[I]f the plaintiffs had never purchased their mobile homes, they would not have been protected by the warranties that came with them.' "[239] The plaintiff's claims would clearly arise out of the " '*facts* surrounding the underlying contract [containing] the arbitration clause.' "[240]

Justice Maddox's position also finds support in federal authority. In *Sunkist*, Sunkist Growers alleged that Del Monte corporation caused its newly acquired subsidiary (SSD) to breach the terms of a licensing agreement.[241] The *Sunkist* court found that Sunkist Growers' claims arose from the licensing agreement because the claims presumed the existence of the licensing agreement.[242] Sunkist Growers merely alleged that Del Monte's improper conduct caused its subsidiary to abandon the licensing agreement.[243] The Eleventh Circuit noted that the licensing agreement did not assign Del Monte specific duties and obligations towards Sunkist Growers.[244] Del Monte's wrongs were merely related to the licensing agreement in that Del Monte's management of its subsidiary interfered with the agreement. The *Sunkist* court fonnd that Sunkist Growers' claims arose out of the licensing agreement because the claim presumed the

236. *See id.* at 1167.

237. *Id.* at 1168 (Maddox, J., dissenting) (quoting from the original *Jones* majority opinion).

238. *See Ex parte* Isbell, No. CV-95-8362, 1997 WL 679418, at *8 (Ala. Oct. 31, 1997).

239. *Id.* (quoting Wilson v. Waverlee, 954 F. Supp. 1530, 1536-37 (M.D. Ala. 1997), *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997)).

240. *See Jones*, 686 So. 2d at 1168 (Maddox, J., dissenting) (quoting from the original *Jones* majority opinion) (emphasis added). Justice Maddox used this language in his dissent in *Jones*. See *supra* notes 230, 165-69 and accompanying text for a summary of the facts of *Jones*.

241. *See* Sunkist Soft Drinks v. Sunkist Growers, Inc., 10 F.3d 753, 758 (11th Cir. 1993); *see also supra* notes 118-31 and accompanying text.

242. *See Sunkist*, 10 F.3d at 758.

243. *See id.*

244. *See id.* at 757.

existence of the licensing agreement.[245] Del Monte's indirect interference with the licensing agreement could not have existed without the agreement itself.[246] In other words, the claim arose out of a *transaction* involving the underlying contrast.

2. The Nexus Prong: Relationship Between Signatory and Nonsignatory Entities

The dissent in *Isbell* clearly contemplated the federal tendency to examine the relationship between signatories and nonsignatories in determining the latter's right to compel arbitration. Indeed, the dissent notod that "the weiglit of authority from the federal circuit courts of appeals favor[s] a nonsignatory in close relationship with the signatories to an arbitration agreement."[247] As discussed previously, a tight relationship between signatory and nonsignatory bolsters the argnment for application of equitable estoppel.[248]

But in *Isbell*, the court did not consider the general relationship between the parties as an element of the estoppel analysis. Rather, the court initially identified the plaintiff's warranty claims against the manufacturer as collateral to the underlying buyer-vendor sales contract and consequently held that the claims did not arise out of that sales contract for the purposes of arbitration.[249] The court never entertained the possibility that a close relationship between

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245. *See id.*

246. *See id.* ("Although Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement."). *But see* McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984) (noting that the "contractor's claim against the construction manager was that the manager breached the duties and responsibilities assigned it by the owner-contractor agreement"); Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 840 (7th Cir. 1981) ("[Plaintiff] alleged, as basis for its claims against [nonsignatory defendant], that [the defendant] . . . failed to carry out various duties and responsibilities specified in the [underlying] agreement.").

247. *Ex parte* Isbell, No. CV-95-8362, 1997 WL 679418, at *16 (Ala. Oct. 31, 1997). On October 3, 1997, the Alabama Supreme Court denied an application to rehear *Ex parte Martin*, 703 So. 2d 883 (Ala. 1997). In the original opinion, the court refused to apply equitable estoppel to force the plaintiff-buyer of a mobile home to arbitrate its claims against the nonsignatory manufacturer. *See supra* notes 191-202 and accompanying text. Justice Maddox dissented to the court's denial of the application for rehearing and reiterated the importance of examining the relationship between signatory and nonsignatory parties. *See Martin*, 703 So. 2d at 890-91 (Maddox, J., dissenting from denial of rehearing). Justice Maddox stated that an estoppel analysis "requires a determination of the closeness of the relationship (i.e., the application of a "close relationship" test) between the signatories and the nonsignatories in regard to the underlying contract obligation." *Id.* at 891 (Maddox, J., dissenting from denial of rehearing).

248. *See supra* notes 108-35 and accompanying text.

249. *See Isbell*, 1997 WL 679418, at *10.

signatory and nonsignatory parties might support an estoppel analysis.

The court's reluctance to apply the nexus prong of the test stems from a reluctance to expand the scope of equitable estoppel itself. The first element of equitable estoppel honors the intent of contracting parties by specifically attaching the litigant's claims to a contract containing an arbitration provision. Substantial interrelatedness compels a finding that the claims arise from the contact.[250] A court must simply find that the dispute itself is "intimately founded in and intertwined with the underlying contract obligations."[251]

But federal authority suggests that when a party's claims bear a weak or collateral relationship to the underlying contract containing the arbitration provision, a close relationship between contesting parties might compensate for this deficiency.[252] Therefore, equitable estoppel may force a party to arbitrate disputes with a nonsignatory when the fundamental dispute itself does not directly arise out of a contract containing an arbitration provision but when all parties are engaged in a single transaction.[253] In other words, equitable estoppel may privilege arbitration itself over the assent of the contracting parties. Therefore, the Alabama Supreme Court's dismissal of the nexus prong of equitable estoppel functions to protect the intent of contracting parties.

F. A Return to Traditional Principles of Estoppel

The Alabama Supreme Court's disregard of the nexus prong merges the doctrine of equitable estoppel with more traditional estoppel analysis. Under traditional estoppel, a *nonsignatory* that affirmatively derives a benefit from a contract is estopped from refusing to submit to the contract's arbitration provision.[254] Under the Alabama Supreme Court's vision of equitable estoppel, a *signatory* who uses a contract to assign duties and obligations to a nonsignatory likewise benefits from the contract and is estopped from denying operation of the arbitration provision within that same contract.[255]

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250. *See supra* Part II.B.4.a.

251. *Hughes Masonry*, 659 F.2d at 841 n.9.

252. *See supra* notes 108-35 and accompanying text.

253. *See supra* notes 108-35 and accompanying text.

254. *See supra* notes 30-36 and accompanying text.

255. *See* Wilson v. Waverlee Homes, Inc., 954 F. Supp 1530, 1536 (M.D. Ala.), *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997). Traditional notions of estoppel were always at the heart of the alternative theory of equitable estoppel. In *Hughes Masonry*, the court stated that the signatory plaintiff could not use a contract te establish its case against a nonsignatory and then

This version of equitable estoppel comports exactly with the Alabama Supreme Court's analytical focus on intent. A signatory deriving a benefit from a contract by using it as a basis for liability clearly assents to those terms of the contract governing the dispute. The signatory's claim itself manifests an intent to arbitrate.

IV. CONCLUSION

The Alabama Supreme Court's vision of equitable estoppel appropriately privileges intent. Following the Alabama Supreme Court's approach, when a party to a contract containing an arbitration agreement specifically attempts to derive a nonsignatory's duties from the terms of that contract, the provisions of the agreement regulate the dispute and establish arbitration as the governing resolution forum.[256] Under these circumstances, equitable estoppel is a legitimate proxy of a party's intent to arbitrate. A signatory's assent to a contract containing a broad arbitration provision signifies assent to the arbitration of an expansive range of disputes arising out of the agreement.[257] When a signatory uses the terms of that contract to extend liability to a nonsignatory, the signatory's cause of action bears intimate association with the underlying contract.[258] Indeed, the signatory's claims literally arise out of the underlying contract.[259] The cause of action itself constructively renders the nonsignatory a party to the contract.

The absence of the nonsignatory's assent to the contract and the accompanying arbitration provision is irrelevant. The signatory

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avoid the contract's arbitration provisions. *See* 659 F.2d at 839; *see also* American Ins. Co. v. Cazort, 871 S.W.2d 575, 579 (Ark. 1994) (allowing a nonsignatory to compel arbitration and stating that "since the signatory was suing the nonsignatory for breach of the contract which contained the arbitration agreement, it should not be able to turn around and deny that the nonsignatory was a party to the agreement in order to avoid arbitration"). This Note, however, argues that the doctrine of equitable estoppel has grown into a two-fold examination: (1) an examination of the relationship between a signatory's claim and the contract containing the arbitration provision; and (2) an examination of the nexus between signatory and nonsignatory entities. In *Sunkist*, for example, Sunkist Growers sued the nonsignatory Del Monte for allegedly causing its subsidiary to breach a licensing agreement. *See* Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 758 (11th Cir. 1993). Sunkist Growers did not derive a benefit from the contract in the sense that it used the contract itself te generate Del Monte's duties and obligations. Del Monte's liability to plaintiff flowed from Del Monte's alleged interference with the contract, as opposed to Del Monte's breach of terms assigned it in the contract.

256. *See supra* notes 217 & 226 and accompanying toxt.

257. *See supra* noto 51 and accompanying text.

258. *See supra* notes 70-90, 205-17, & 225-26 and accompanying text.

259. *See supra* notes 69-102 & 200-19 and accompanying text.

party's claims essentially force the nonsignatory's unwilling "assent" to the terms of the contract through an attempted imposition of liability. Because the claim itself forces assent upon the nonsignatory, the signatory party may not excise the arbitration provision from the contract by asserting the absence of an arbitration agreement between itself and the nonsignatory.[260]

An estoppel analysis should not extend beyond this focus on intent. The proximity of signatory and nonsignatory entities in a single transaction should not generate an intent to arbitrate when none exists in the first place.[261] The Alabama Supreme Court appropriately limits equitable estoppel to the examination of the signatory's claims in relation to the underlying contract containing an arbitration provision.[262] Under the Alabama Supreme Court's analysis, intent constitutes the center of the enforceable arbitration agreement.

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260. *See supra* note 255 and accompanying text for a discussion of the proximity between traditional esteppel and equitable estoppel.

261. *See supra* Parts II.B.5, III.E.2, III.F.

262. *See supra* Part III.E.

* For my parents.