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Extending Arbitration Agreements to Bind Non-Signatories

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The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, codifies a federal policy in favor of arbitration over litigation.¹ “The [FAA] provides that if a party petitions to enforce an arbitration agreement, ‘[t]he court shall hear the parties, and upon being satisfied of the making of an agreement for arbitration . . . shall make an order directing the parties to proceed to arbitration [.]’”² Similarly, Michigan state policy

favors arbitration of claims.³ The Michigan Court of Appeals has recognized a presumption of arbitrability “unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”⁴

Nevertheless, arbitration is a matter of contract,⁵ and an arbitration agreement “cannot be imposed on a party which was not legally or factually a party to the agreement wherein an arbitration provision is contained.”⁶ However, both state and federal courts have identified circumstances in which a non-signatory will be forced to arbitrate his claims.⁷ While it is true that the FAA preempts state law that invalidates agreements to arbitrate, 9 U.S.C. § 2 recognizes that enforceability of an agreement to arbitrate may be decided on the basis of state contract law.⁸ Michigan courts thus recognize five traditional principles of contract law that allow for an arbitration agreement to be enforced against a non-signatory: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel.⁹

¹ E.I. DuPont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3d Cir. 2001) (quoting Sandik AB v. Advent International Corp., 220 F.3d 99 104-05 (3d Cir. 2000)).

² *Id.* (quoting 9 U.S.C. § 4).

³ Detroit v. A W Kutsche, 309 Mich. 700, 703; 16 N.W.2d 128 (1944).

⁴ Amtower v William C Roney & Co (On Remand), 232 Mich.App. 226, 235; 590 N.W.2d 580 (1998) (quoting AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 650 (1986)).

⁵ See United Am. Healthcare Corp. v. Backs, 997 F.Supp.2d 741, 745-46 (E.D. Mich. 2014) (“An arbitration is, quite simply, a contract.”); Beck v. Park West Galleries, 499 Mich. 40, 45; 787 N.W.2d 804 (2016).

⁶ St. Clair Prosecutor v. AFSCME, 425 Mich. 204, 223, 388 N.W.2d 231 (1986); see AT&T Technologies v. Comm. Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415 (1986) (“Generally, a party cannot be forced to arbitrate any dispute unless he or she has expressly agreed to do so.”); Thomson-CSF, S.A. v. American Arbitration Assoc., 64 F.3d 773, 776 (2d Cir. 1995) (“[W]hile there is a strong . . . policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.”).

⁷ Javitch v. First Union Securities, Inc., 315 F.3d 619 (6th Cir. 2003).

⁸ Tobel v. AXA Equitable Live Ins. Co., No. 298129, 2012 WL 555801, at *2-3 (Mich. Ct. App. Feb. 21, 2012); see DeCaminada v. Coopers & Lybrand, LLC, 232 Mich.App. 492, 502 n 7; 591 N.W.2d 356 (1998) (“State laws governing contracts in general do not conflict with the FAA simply because they also affect arbitration contracts.”).

⁹ AFSCME Council 25 v. Wayne Cty., 292 Mich.App. 68, 81; 811 N.W.2d 4, 12 (2011). The Fifth Circuit in *Sapic v. Gov’t of Turkmenistan*, 345 F.3d

1. Incorporation by Reference

A non-signatory may be required to arbitrate against a signatory to an arbitration agreement if the non-signatory executes a contract that incorporates the arbitration agreement by reference.

The Sixth Circuit recognized this principle in *Exchange Mut. Ins. Co. v. Haskell Co.*¹⁰ Haskell and Mitchell Homes entered into an agreement containing a clause requiring all disputes relating to the agreement to be submitted to arbitration (the Primary Contract).¹¹ Haskell then executed a second contract with Rogersville Company whereby Rogersville would assume all obligations with respect to the Primary Contract (the Subcontract).¹² Rogersville then obtained a performance bond through Exchange Mutual Insurance Company, conditioned upon Rogersville performing its obligations under the Subcontract (the Bond).¹³ The Subcontract was “referred to and made part of” the Bond.¹⁴

After a dispute arose, Haskell initiated arbitration proceedings against Exchange Mutual.¹⁵ Exchange Mutual filed a motion in response, arguing that it was a non-signatory to the Primary Contract containing the arbitration clause.¹⁶ The Sixth Circuit held that, although Exchange Mutual was a non-signatory to the Primary Contract, the Bond incorporated by reference the terms of the underlying Subcontract.¹⁷ “The subcontract, in turn, incorporated by reference the terms of the primary contract which imposed an obligation to submit all unresolved disputes to arbitration.”¹⁸ Thus, incorporation by reference of a contract containing an arbitration provision incorporates the right and obligation to arbitrate, and a non-party to the agreement may be compelled to arbitrate claims arising out of the primary contract which contained the agreement to arbitrate when the primary contract has been incorporated by reference into the secondary contract.

2. Assumption

If a non-signatory’s conduct indicates an intent to be bound by an arbitration award, or an intent to assume the responsibilities and interests of an arbitration agreement, the non-signatory will be bound under assumption.

In *Gvozdenovic v. United Air Lines*, United Air Lines (United) contracted to hire 1,202 flight attendants from Pan American World Airways, Inc. (Pan Am) Pacific Division.¹⁹ The Association of Flight Attendants (AFA) entered into a Letter of Agreement with United which stated that the incoming attendants would become members of the AFA upon commencing employment with United.²⁰ Further, the Letter acknowledged that the employees’ seniority status would be determined in arbitration between the incoming and incumbent flight attendants.²¹ The incoming attendants were subsequently presented offers of employment conditioned on the terms stated in the Letter of Agreement.²² United then deposited \$132,700.00 into bank accounts it had

opened to assist the attendants in covering the cost of arbitration.²³ The flight attendants drew from these accounts for this purpose.²⁴ At the first arbitration hearing, the incoming attendants argued that they should receive full credit for their term with Pan Am when determining seniority.²⁵

Dissatisfied with the arbitrator’s ultimate determination, the incoming attendants sued, contending that they were neither employees of United nor members of the AFA at the time the Letter of Agreement was executed, and thus were not bound to the

347 (5th Cir. 2003), recited another commonly used list: “Six theories for binding a non-signatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary.”

¹⁰ 742 F.2d 274 (6th Cir. 1984).

¹¹ *Id.* at 274.

¹² *Id.* at 275.

¹³ *Id.*

¹⁴ *Id.* at 276.

¹⁵ *Id.* at 275.

¹⁶ *Exchange Mut. Ins. Co.*, 742 F.2d at 275.

¹⁷ *Id.* at 276.

¹⁸ *Id.*

¹⁹ 933 F.2d 1100, 1103 (2d Cir. 1991).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1104.

²⁴ *Id.*

²⁵ *Gvozdenovic*, 933 F.2d at 1104.

arbitration award.²⁶ The court noted that the record demonstrated an “active and voluntary participation in the arbitration” on the part of the flight attendants.²⁷ Accordingly, the attendants’ conduct manifested a clear intent to arbitrate the dispute, and thus they were bound by the arbitration award even though they were neither employees of United nor members of the AFA at the time the Letter of Agreement was entered into containing the agreement to arbitrate.²⁸

3. Agency

Under traditional principles of agency, a principal is bound by the acts of its agent where such agreement is undertaken within the scope of the agent’s duties.²⁹ Similarly, a non-signatory principal may be bound to arbitrate via the acts of its signatory agent.

In *Altobelli v. Hartmann*, the Michigan Supreme Court addressed whether plaintiff’s tort claims against individual principals of a law firm fell within the scope of an arbitration clause that mandated arbitration between the firm and a former principal.³⁰ Plaintiff Altobelli worked as an attorney in defendant law firm.³¹ Upon joining the firm, plaintiff signed an operating agreement which required mandatory arbitration of any dispute between “the firm and any current or former partner.”³² Following the termination of plaintiff’s equity ownership, plaintiff sued, naming seven individual partners of the firm.³³ However, plaintiff did not name the firm as a defendant.³⁴ Defendants filed a motion for summary disposition arguing that plaintiff’s claims fell within the scope of the arbitration clause as a dispute between “the firm” and any current or former partner.³⁵

In binding plaintiff to the agreement, the *Altobelli* court considered the concept of agency, noting that “corporations can only act through officers and agents.”³⁶ Therefore, “the acts of the officers and agents of a corporation, within the scope of their employment, are the acts of the corporation[.]”³⁷ In terminating plaintiff’s equity interest, the individual partners acted within the scope of their employment, and therefore, on behalf of the firm.³⁸ Consequently, any tort claims that plaintiff possessed against the individual partners constituted a dispute between a former partner and the firm and therefore fell within the scope of the arbitration clause. The court concluded that Altobelli could not circumvent the agreement to arbitrate by naming individual officers of the firm instead of the firm itself in order to bring a court action outside of the agreement to arbitrate.

4. Piercing the Corporate Veil

A non-signatory may also be bound to arbitrate where it is found by the arbitrator to be the alter ego of the signatory, allowing opposing parties to “pierce the corporate veil.”

In *Mobius Management Systems Inc. v. Technologic Software Concepts, Inc.*, petitioner, Mobius Management Systems (Mobius), sought to confirm an arbitration award against Technologic Software Concepts, Inc. (Technologic), and its president, Thomas Politowski (Politowski).³⁹ The parties, Mobius and Technologic had entered into an Asset Purchase Agreement under which

Technologic purchased a software product from Mobius.⁴⁰ The agreement contained an arbitration provision, pursuant to which Mobius initiated an arbitration claim when Technologic failed to make payments due to Mobius.⁴¹ In its demand, Mobius named Technologic and Politowski as jointly liable.⁴² Politowski appeared specially to contest the arbitrator’s

²⁶ *Id.* at 1105.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Restatement (Second) of Agency §219(1) (1958).

³⁰ 499 Mich. 284, 287 (2016).

³¹ *Id.* at 288.

³² *Id.*

³³ *Id.* at 291-92.

³⁴ *Id.* at 292.

³⁵ *Id.*

³⁶ *Altobelli*, 499 Mich. at 297 (quoting *Attorney General v. Nat’l Cash Register Co.*, 182 Mich. 99, 111; 148 N.W. 420 (1914)).

³⁷ *Id.* (quoting *Nat’l Cash Register*, 182 Mich. At 111).

³⁸ *Id.* at 302.

³⁹ *Mobius Management Systems, Inc. v. Technologic Software Concepts, Inc.*, No. 02 Civ. 2820(RWS), 2002 WL 31106409, at *1 (S.D.N.Y. Sept. 20, 2002).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

jurisdiction over him, asserting that he was not a party to the agreement, and therefore could not be compelled to arbitrate claims against him.⁴³ Over Politowski's objections, the arbitrator determined that Technologic and Politowski were jointly liable to Mobius, as Technologic was the alter ego of Politowski.⁴⁴ Technologic appealed.⁴⁵

The district court recognized that "piercing the corporate veil between a signatory and [non-signatory] party may bind the [non-signatory] party to an arbitration agreement of its alter ego."⁴⁶ The court noted that "where an [arbitration] agreement include[s] a 'broad provision for arbitration of all disputes arising thereunder or related thereto,' . . . deciding which issues pertaining to the relationship of the parties are arbitrable should be left to the arbitrators."⁴⁷ In the case of Politowski, Mobius submitted evidence to the arbitrator that Politowski was the president and majority shareholder of Technologic, and that, upon defaulting, Technologic sold its assets with Politowski receiving a portion of the invested proceeds.⁴⁸ Thus, the arbitrator concluded that the elements for piercing the corporate veil were satisfied.⁴⁹ On appeal, the district court held that the arbitration agreement's broad language awarded the arbitrator control over the relationships of the parties, and consequently, their liability.⁵⁰ Thus, the issue of whether Technologic was the alter ego of Politowski was properly before the arbitrator, and even though Politowski was not a party to the agreement to arbitrate, his defense to the claim that he and Technologic were not alter egos could be decided by the arbitrator, and Politowski held legally bound by that decision.⁵¹

5. Estoppel

Under an estoppel theory, a signatory may be compelled to arbitrate his claims against a non-signatory when: (1) the signatory to an arbitration agreement must rely on the terms of the agreement in asserting his claims against the non-signatory; or (2) when the signatory raises allegations of "substantially interdependent and concerted misconduct" by both the non-signatory and a signatory of the contract.⁵²

In *City of Detroit Police and Fire Retirement System v. GSVVDO Fund Ltd.*, plaintiff entered into a consulting agreement with Smith Barney Shearson, Inc. (Smith Barney), in which the retirement system would rely on Smith Barney to act as an investment fiduciary.⁵³ In the course of this relationship, Smith Barney, through its employees Murray and Giampetroni, recommended plaintiff invest in funds managed by GSC.⁵⁴ However, Murray and Giampetroni failed to disclose to the City that GSC operated as a private equity arm of Smith Barney.⁵⁵ After the investment went bad, plaintiff sued and defendants moved for summary disposition, arguing that plaintiff was bound by an arbitration provision in the consulting agreement.⁵⁶ Plaintiff opposed the motion to compel it to arbitration on the basis that it never entered into an arbitration agreement with defendants Murray or Giampetroni personally, or with GSC, and therefore it could not be compelled to arbitrate its claims against those defendants.⁵⁷

The Michigan Court of Appeals held that, under the second prong of the *Grigson* test,⁵⁸ plaintiff was required to arbitrate all of his claims, even those claims against non-signatories Murray, Giampetroni, and GSC, as "equity does not allow a party to 'seek to hold the non-signatory liable pursuant to duties imposed by the agreement . . . but, on the other hand, deny

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Mobius, 2002 WL 31106409, at *2.

⁴⁷ *Id.*

⁴⁸ *Id.* at *1.

⁴⁹ In order to pierce the corporate veil, "the corporate entity must [first] be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." *Foodland Distributors v. Al-Naimi*, 220 Mich. App. 453, 457, 559 N.W.2d 379, 381 (1996) (quoting *SCD Chemical Distributors, Inc. v. Medley*, 203 Mich.App. 374, 381, 512 N.W.2d 86 (1994)).

⁵⁰ Mobius, 2002 WL 31106409, at *2.

⁵¹ *Id.*

⁵² *City of Detroit Police & Fire Retirement Syst. v. GSC CDO Fund Ltd.*, No. 289185, 2010 WL 1875758, at *6 (Mich. Ct. App. May 11, 2010) (quoting *Grigson v. Creative Artists, LLC*, 210 F.3d 524, 528 (5th Cir. 2000)).

⁵³ *Id.* at *1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at *4.

⁵⁸ *Grigson*, 2010 F.3d 524 at 528 (5th Cir. 2000) ("[A] non-signatory to an arbitration agreement can compel arbitration . . . (2) when the signatory raises allegations of substantially interdependent or concerted misconduct by both the non-signatory and one or more signatories to the contract.").

arbitration's applicability because the defendant is a non-signatory.”⁵⁹ According to the court, plaintiff's claims against defendants were “substantially interdependent” because the underlying basis of all claims emanated from the relationship with Smith Barney, a signatory to the agreement.⁶⁰ Because plaintiff, a signatory, sought to base his claims on the agreement with Smith Barney, he was estopped from avoiding enforcement of the arbitration agreement, even as to non-signatories.⁶¹ Thus, the City was ordered to have its claims against Murray, Giampetroni and GSC heard in arbitration, even though none of them was party to the agreement to arbitrate.

When analyzing the scope and enforceability of an agreement to arbitrate, counsel needs to give careful consideration to the policies embodied in state and federal law favoring arbitration and the bias of courts to include parties and claims not expressly within the agreement to arbitrate when well-settled legal principals suggest a basis to include such matters within the parties' arbitration proceeding.

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⁵⁹ City of Detroit Police & Fire Retirement Syst., 2010 WL 1875758, at *6.

⁶⁰ *Id.* at *7.

⁶¹ *Id.*