NO. 04-1221

IN THE
Supreme Court of the United States

CIM INSURANCE CORPORATION,
Petitioner,

v.

ARMETTIA PEACH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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May 2005

QUESTION PRESENTED

Whether a non-signatory to a contract that provides for arbitration, when sued by a signatory for conduct related to the subject matter of the contract, can compel arbitration on an agency or equitable estoppel theory.

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TREATISES

CIM Insurance Corporation ("CIM") premises its petition on the notion that the Fifth District Appellate Court of Illinois held that "a non-signatory cannot invoke equitable estoppel to compel arbitration under the [Federal Arbitration Act]." Pet. 2, 12. This holding, CIM argues, conflicts with the holdings of several federal circuit courts of appeal. However, the appellate court decided the issue on state-law grounds, and CIM did not preserve its current position that the question is one of federal law. Even more importantly, the court below did not hold that, as a general matter, *a* non-signatory cannot compel arbitration on an equitable estoppel theory. It held that, on the facts of the case, *this* non-signatory cannot compel arbitration on that theory. Because there is no conflict on the question presented, the petition should be denied.

STATEMENT OF THE CASE

In August 2002, respondent Armettia Peach bought a car from Enterprise Car Sales. At the same time, she signed a contract, called a Vehicle Buyer(s)' Order, with Enterprise for purchase of an "extended protection plan." The contract represented that the amount paid for the extended protection plan would be passed through to petitioner CIM, the entity that actually provides such plans to purchasers of automobiles. In fact, only a portion of the price of the plan was passed through to CIM, and the remainder was retained by Enterprise.

Ms. Peach later sued CIM, alleging violations of the state consumer fraud and deceptive business practices statute, common law misrepresentation, fraud, conspiracy to commit consumer fraud, and breach of contract. She alleges that the purchase contract for the extended protection plan was a CIM form contract that misrepresented that the entire price of the plan would be passed through to CIM, and thereby diminished her ability to negotiate the price of the plan.

CIM moved to compel arbitration, relying on the arbitration provision of Ms. Peach's contract with Enterprise. That provision provided, in relevant part:

> [A]ny controversy or claim *by or between me and you* of any kind or nature whatsoever relating to or arising out of or in connection with this Order . . . shall, to the extent not prohibited by applicable law, *upon the election of either party*, be settled by arbitration . . . .

Pet. App. 43a (emphasis added). The contract reiterated the narrow scope of the arbitration provision in a boxed section entitled "Notice of Arbitration Agreement": "THIS AGREEMENT PROVIDES THAT UPON ELECTION *BY YOU OR THE DEALER*, ALL DISPUTES *BETWEEN YOU AND DEALER* WILL BE RESOLVED BY BINDING ARBITRATION," and "*IF EITHER YOU OR THE DEALER ELECTS TO ARBITRATE A DISPUTE*, YOU GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT OR DEFEND YOUR RIGHTS UNDER THIS CONTRACT . . . ." Sep. App. of Def. A47 (emphasis added). The contract specified that the word "Dealer" referred to Enterprise Car Sales. *Id*. at A46.

Notwithstanding that the right to compel arbitration was expressly limited to "you" (Ms. Peach) and the "Dealer" (Enterprise), CIM sought to compel arbitration on the ground that Enterprise was alleged to be CIM's agent. At the same time, CIM refused to acknowledge that Enterprise was acting as its agent. The trial court denied the motion, and CIM appealed.

The Fifth District Appellate Court affirmed. First, the court recognized the federal policy favoring arbitration agreements embodied in the Federal Arbitration Act. Pet. App.

3a. The court then considered whether a non-signatory to a contract can compel arbitration on the theory that one of the contract signatories was its agent. Reviewing its precedent, the court agreed with CIM that non-signatories can compel arbitration on an agency theory. As in the trial court, however, CIM refused to admit that Enterprise was acting as its agent. The court assumed that CIM had made "a tactical decision that will allow CIM, once it reaches arbitration, to deny that Enterprise was its agent, thereby refuting the exact allegation that allowed it to go to arbitration in the first place." Pet App. 6a. In light of CIM's refusal to state whether Enterprise was its agent, the court held that CIM could not compel arbitration on an agency theory.

Next, the court considered CIM's argument that Ms. Peach was equitably estopped from claiming that CIM could not enforce the arbitration clause because of her allegation of agency. Looking to state law, the court stated that equitable estoppel required a showing of reliance by the party seeking to invoke the doctrine. Pet. App. 9a. Here, Ms. Peach had taken no action on which CIM could have reasonably relied, to its detriment, to assume that she would arbitrate any claim she had against CIM. Accordingly, on "the record in this case," the court found no equitable estoppel. *Id*. 10a.

CIM sought leave to appeal to the Illinois Supreme Court, which that court denied. *Id*. 11a.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Between The Federal Courts Of Appeal And The Decision Below And No Conflict Among The Circuits On The Question Presented.

Every federal circuit to have reached the issue has found that, in certain circumstances, non-signatories to a contract that provides for arbitration can compel arbitration when sued by a signatory. *See* Pet. 1 (citing cases). The appellate courts of Illinois agree. Accordingly, there is no conflict at all on the core question raised in the petition.

As in the federal cases that CIM contends conflict with the decision below, Illinois courts have recognized that non-signatories may enforce arbitration provisions where the non-signatory is an agent of a signatory or where the requirements of equitable estoppel are met. *See Ervin v. Nokia, Inc*., 812 N.E.2d 534 (1st Dist. Ill. App. 2004); *Howells v. Hoffman*, 568 N.E.2d 934, 936-37 (3d Dist. Ill. App. 1991) (allowing non-signatory to compel arbitration). The decision below did not hold to the contrary. Rather, it held that none of the bases for allowing a non-signatory to compel arbitration was satisfied on the facts of this case. CIM's statements (Pet. 2, 11, 12) that the court held that a non-signatory cannot compel arbitration based on equitable estoppel are simply wrong.

Moreover, as CIM itself pointed out below, the First District Appellate Court of Illinois has "recognized [that] . . . a nonsignatory to an arbitration contract can invoke arbitration under an estoppel theory." CIM App. Reply 6 (citing *Caligiuri v. First Colony Life Ins. Co.* , 742 N.E.2d 750, 756 (1st Dist. Ill. App. 2000)). Illinois has five appellate districts, and the

decisions of one district are not binding on the others. *Chapman v. Anchor Lumber*, 823 N.E.2d 594, 596 (3d Dist. Ill. App. 2005). Accordingly, even if CIM were correct that the decision below rejected the notion that equitable estoppel could provide a basis for a nonsignatory to compel an arbitration agreement, its complaint would be with only one of five intermediate state appellate courts. This Court does not sit to resolve conflicts among intermediate state appellate courts.

Stretching to present a conflict, CIM incorrectly states that the D.C. Circuit's decision in *DSMC Inc. v. Convera Corp*., 349 F.3d 679 (D.C. Cir. 2003), conflicts with other federal appellate court decisions holding that non-signatories can compel arbitration in some circumstances. In fact, as CIM explained below, Pet. to Ill. S. Ct. at 10-11, *DSMC* did not even reach that question. Rather, the D.C. Circuit held that the court lacked jurisdiction under section 16 of the Federal Arbitration Act—the purported basis for appellate jurisdiction—to consider an interlocutory appeal from denial of a motion by a non-signatory to compel arbitration on equitable estoppel grounds. The court expressly noted that it was taking no position on whether a non-signatory can compel arbitration on the basis of equitable estoppel. *Id.* at 683. Thus, the D.C. Circuit decision does not conflict with decisions of other federal courts of appeal on the question presented. And the jurisdictional point on which the D.C. Circuit decided *DSMC* was not raised or decided in this case.

B. The Decision Below Rests On Factual Determinations And The Application Of State Law.

Consistent with the decisions of the federal courts of appeals, the court below recognized that a non-signatory can

compel arbitration under principles of agency or estoppel. The court held, however, that CIM could not compel arbitration on the facts of this case, applying state-law contract principles.[1]

First, with respect to agency, the court expressly agreed that "a nonsignatory to an arbitration clause can invoke an arbitration agreement under an agency theory." Pet. App. 4a. The court noted, however, that CIM did not ask the trial court to find that Enterprise was its agent and that it "actually refused to take any position in the trial court or [the appellate] court regarding its relationship to Enterprise." *Id*. 6a. Based on this fact, the court held that the agency theory did not apply here. *See also Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 850 (7th Cir. 2002) (questions of agency are fact questions). CIM quarrels with the court for not basing its decision on the agency allegations in the complaint, as it says Illinois law directs the court to do. Pet. 16. This quarrel over state law, however, does not raise a federal question appropriate for Supreme Court review and is not fairly comprised by the question presented.

Second, with respect to equitable estoppel, the appellate court looked to Illinois law, which requires the party asserting estoppel to show detrimental reliance on the acts or representations of the other party. Pet. App. 9a (citing cases). Because CIM could not have reasonably relied to its detriment—and offered no evidence that it did rely—on Ms.

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[1]Under the Federal Arbitration Act, state-law contract principles generally govern the enforceability of arbitration clauses. *Doctor's Assocs., Inc. v. Casarotto*, 518 U.S. 681, 686-87 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Peach's actions with respect to arbitration of any claim against it, equitable estoppel was not satisfied. *Id*. 10a. Again, the court's fact-bound decision on the point was specific to "the record in this case." Pet. App. 10a.[2]

As CIM points out, the appellate court followed a prior decision rejecting, as a matter of state law, an expanded definition of equitable estoppel adopted by some federal courts. *See*, *e.g.*, *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999). The court's reliance on state equitable estoppel law was proper because, when deciding whether the parties to a dispute agreed to arbitrate a certain matter, courts generally should apply ordinary state-law contract principles. *See supra* n.1.

Nonetheless, CIM faults the court for relying on state law. Pet. 13-15. CIM's argument on this point provides further reason to deny the petition. The question whether state or federal equitable estoppel law should apply to the determination whether a non-signatory can compel arbitration is not the question presented and is not fairly comprised within it. Moreover, the shallow conflict identified by Petitioner does not warrant review of the decision of the regional intermediate level state court below.

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[2]The court's conclusion was also correct. The arbitration provision in Ms. Peach's contract with Enterprise explicitly applies only to disputes between Ms. Peach and Enterprise. *See supra* p. 2. Not only did CIM never argue that it reasonably relied on any action of Ms. Peach on which equitable estoppel could be based, but the arbitration provision's language would belie any claim of reasonable reliance.

More importantly, the question whether state or federal estoppel law applies was not preserved below, and thus the Court does not have jurisdiction to decide it. *See* Stern & Gressman, *Supreme Court Practice* 181 (8th ed. 2002) (citing *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945)). CIM's initial memorandum in support of its motion to compel arbitration did not mention equitable estoppel, much less argue about the applicable law; and its reply relegated mention of the federal circuit court cases on which it focuses so heavily now to a "see also" footnote. Def. Mot. Reply 1 n.1. The trial court's brief discussion of equitable estoppel relies almost exclusively on Illinois cases, Pet. App. 16a-17a, yet CIM's briefs on appeal did not argue that the court erred in doing so. Indeed, its opening brief again only mentioned the federal cases in a footnote, Def. Apl. Br. 14 n.6, and not until its reply brief on appeal did CIM even brief the equitable estoppel argument adopted in federal court cases such as *MS Dealer*. Def. Apl. Reply 4-6. Even then, although Ms. Peach's brief plainly assumed that Illinois law applied, Pltf. Apl. Br. 8-9, CIM did not address the choice of law issue. Instead, it argued that its theory was in line with both federal and Illinois law.

Not until a supplemental brief filed after oral argument to address a recent decision of the Illinois Supreme Court did CIM directly argue that federal estoppel law should apply. Def. Supp. Br. 3-4. However, under Illinois law, a question presented for the first time on appeal, which was not argued to the trial court, is not preserved for review. *Haudrich v. Howmedica, Inc*., 662 N.E.2d 1248, 1253 (Ill. 1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Not surprisingly then, the intermediate appellate court applied Illinois law, but did not address the choice of law question.

Accordingly, in this Court, the issue whether state or federal estoppel law should apply is not presented.

Moreover, in many cases, the choice of state or federal estoppel law will not alter the result. *See*, *e.g.*, *Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (applying federal law but noting that result would likely be same under Mississippi law). Indeed, regardless of whether state or federal estoppel law applies, the outcome should be the same here. As this Court has explained, "[a]n essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations." *See Lyng v. Payne*, 476 U.S. 926, 935 (1986).[3] It was this "essential element" that the court below found, as a matter of fact, was lacking here. Pet. App. 10a; *see also supra* n.2. This factual matter is not worthy of certiorari.

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[3]"Thus, the party claiming an estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 59 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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