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MEMORANDUM

DATE: July 7, 2005

TO: RUAAs Subcommittee of the ADR Section of MSBA

FROM: David A. Allgeyer
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RE: Class Actions in Arbitration

This memorandum addresses the status of Minnesota law on the use of class actions in arbitration and the provisions of the Revised Uniform Arbitration Act's ("RUAAs") that relate to that issue.

1. Class Actions in Arbitration.

Before the decision of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402 (2003), there was disagreement among federal and state courts as to whether an arbitration proceeding could be consolidated. Compare *Compania Espanola de Petroleos S. A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), cert. denied, 426 U.S. 936 (1976) (district courts have the power to order consolidation of arbitration proceedings); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) cert. denied, 489 U.S. 1077 (1989) (district court may order consolidation of arbitration proceedings if a provision of state arbitration law specifically authorizes such action); with *Protective Life Ins. Corp. v. Lincoln National Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989) (district courts lack the authority to order consolidation); *Dell E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987) (same). Before *Green Tree*, the Eighth Circuit subscribed to the latter view. See *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990). Of course, if arbitration proceedings could not be consolidated, class action proceedings would not be permissible.

In *Green Tree*, a plurality of the United States Supreme Court held that the Federal Arbitration Act did not forbid class arbitration. Determination of whether the parties had agreed to class arbitration would be determined under state law. The arbitrator – not the court – is to determine whether the parties' arbitration contract forbids class arbitration. In the case before the Court,

RUAA Subcommittee of the ADR Section of MSBA
July 7, 2005
Page 2

the courts below had determined that, because the contract was silent to class arbitration, it did not forbid class arbitration. The Supreme Court remanded the case for initial determination by the arbitrator as to whether the parties' agreement allowed class arbitration.

Minnesota has not yet specifically ruled on the availability of class arbitration. Two Minnesota cases, however, strongly suggest that class action treatment is permissible under Minnesota state law. First, *Grover-Diamond Associates v. American Arbitration Association*, 297 Minn. 324, 211 N.W.2d 787 (Minn. 1973) specifically allowed consolidation of separate arbitration proceedings into one proceeding in the absence of language forbidding such proceedings, where there was no showing of prejudice and where a joint arbitration would "encourage arbitration as a speedy, informal and relatively inexpensive procedure for resolving controversies." *Id.* at 788, 790.

Following and expanding on this precedent, the court in *Illinois Farmers Insurance Company v. Glass Service Company, Inc.*, 683 N.W.2d 792 (Minn. 2004), allowed consolidation of over 5700 individual claims into one proceeding. In doing so, the court found that consolidation was proper because it furthered the purpose of the Minnesota Uniform Arbitration Act to "encourage arbitration as a speedy and formal and relatively inexpensive procedure for resolving controversies." *Id.* at 805. In so doing, the court declined to follow the earlier Eighth Circuit decision in *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990), that consolidation is not permitted where the arbitration clause is silent on the issue.

Following the decision of the United States Supreme Court in *Green Tree*, providers of arbitration services have adopted rules for class arbitrations. For example, the rules of the American Arbitration Association provide guidance as to the arbitrator's construction of the arbitration clause, prerequisites for class arbitration, the class arbitration award and notice of class determination. Further rules govern the settlement, voluntary dismissal or compromise of class arbitrations. Those rules may be viewed at www.adr.org.

2. RUAA Provisions Relating to Class Arbitrations.

The RUAA is silent concerning class arbitrations. It does, however, address consolidation of arbitration proceedings in Section 10. A court may consolidate arbitrations where (1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person, (2) the claims in arbitration arise in substantial part from the same transaction or series of related transactions, (3) the existence of common issues of law or fact create the possibility of conflicting decisions in separate arbitrations, and (4) and the prejudice resulting from failure to consolidate is not outweighed by the risk of undue delay of prejudice to the rights of or hardship to parties opposing consolidation. The court is not allowed to order consolidation of claims if the arbitration agreement prohibits consolidation. The arbitrator is to decide whether to consolidate grievances under a collective bargaining agreement.

RUAA Subcommittee of the ADR Section of MSBA
July 7, 2005
Page 3

Given the guidance of the Supreme Court in *Green Tree* and the Minnesota Supreme Court in *Illinois Farmers*, it appears that class arbitrations could proceed under the RUAA if the class members were all parties to contracts that require arbitration and that do not forbid class arbitration. Contrary to the Supreme Court's holding in *Green Tree*, however, the decision to consolidate arbitrations into a class action would be for the court and not the arbitrator. Given *Green Tree's* holding that determination of whether class arbitration is allowed under arbitration agreements is a matter of state law, it appears that the state of Minnesota would have the ability to require a decision by a court in the first instance rather than the arbitrator. Whether this is a matter that should be decided by a court or the arbitrator in the first instance is open for debate. Further consideration must also be given to the effect of the RUAA on class determination rules such as AAA's that assume determination of whether to allow class treatment is for the arbitrator.

While section 10 of the RUAA does provide some guidance as to the standard for consolidating arbitrations which would also be applicable to class actions, one might wonder whether it would be beneficial to provide more specific guidance for class actions. This is true particularly since there undoubtedly will be a number of arbitrations that are not under the auspices of organizations such as the American Arbitration Association which has specific rules guiding class action decisions. Thus, one might suppose that greater guidance on the issue of class arbitrations would be in order.

The availability of class arbitrations is, however, a controversial issue. There is presently a dispute as to whether clauses in consumer contracts that preclude class arbitration will be upheld by the courts or not. At one time JAMS, a private alternative dispute resolution provider, had a policy of refusing to enforce clauses in consumer contracts that preclude class arbitration, but has now overturned that policy. *See Class Action Litigation Report*, Vol. 6, No. 6, at 216 (BNA March 25, 2005). Given the current controversy as the issue of class arbitrations works its way through the courts, it would be unrealistic to suppose that the specifics of class arbitration procedures and availability could be added to the RUAA at this time. Indeed, the RUAA's provisions that allow parties to forbid consolidation of arbitrations — and therefore class treatment — by contract are likely to be controversial to consumer advocates and others who seek to disallow such provisions.

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