

2009 PRIVATE ARBITRATION UPDATE

CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS

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Shawn K. Aiken
AIKEN SCHENK HAWKINS & RICCIARDI P.C.
4742 North 24th Street, Suite 100
Phoenix, Arizona 85016

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by
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A. The Problem and Three Scenarios.

1. How should arbitration panels treat separate arbitration proceedings involving related parties and facts where the governing arbitration clause is silent on the question?

2. Three scenarios illustrate the problem. In each case, the agreements at issue contain an arbitration clause that provides for arbitration of “all disputes arising out of” the agreement, but is silent on the power of the arbitrator (or court) to consolidate arbitration proceedings. In the first case, the four shareholders of Noodles Corporation have separate employment contracts with the company. The manager of the company terminates the other three members, all of whom file separate arbitration demands under their respective agreements, which raise similar claims and turn on the same operative facts. One member moves to consolidate all three proceedings on grounds of economy. Noodles resists the motion and points to the separate arbitration provisions. In the second case, 40 homeowners, all of whom bought homes in the same subdivision, file separate arbitration demands against the builder, Stavanger Homes, claiming similar construction defects. Several homeowners move to consolidate the cases. Stavanger opposes the motion because the home models and issues differ. Finally, all 15 customers of Felsenheimer Bank file separate arbitration demands seeking \$14.50, the sum of unauthorized fees charged to their accounts. Two customers move to consolidate the cases, but the Bank opposes the motions.

B. Who Decides the Question of Consolidation: Court or Arbitrator?

1. Before the Supreme Court decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), most courts determined that courts, not arbitrators, decided the question of consolidation (or joinder). And, unless the parties clearly consented to consolidation, the court lacked authority to order consolidation. Several years ago, in cases governed by the Federal Arbitration Act (FAA), the question of consolidation (or joinder) was presented to the district court under section 4 of the FAA (9 U.S.C.A. §4), which provides that “[a] party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United State district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” Early interpretations of section 4 held that an arbitration panel lacked the authority to order consolidation. *See, e.g., Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145, 150 (5th Cir. 1987). Other courts held that consolidation was only appropriate with the parties’ consent or if the contract expressly provided for consolidation. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 476 (1989)(district courts do not have the power under the FAA to consolidate arbitrations absent the parties’ consent).

2. In *First Options v. Kaplan*, the Supreme Court took up the question of who should determine whether a given dispute is arbitrable – the court or the arbitrator. The Court held that,

unless the arbitration agreement clearly leaves the issue of arbitrability for the arbitrator, the court should resolve the issue.

3. The question since *First Options* has been what qualifies as a question of “arbitrability.” A new line of cases on consolidation grew out of two Supreme Court decisions, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The *Howsam* Court gave two examples of a so-called “gate-way dispute” that would raise a question of arbitrability and thus should be decided by a court: (1) a dispute regarding “whether the parties are bound by a given arbitration clause”; and (2) “a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” *Id.* at 84. The *Howsam* Court decided that the applicability of a National Association of Securities Dealers time-limit rule was presumptively for the arbitrator.

4. The *Green Tree* Court considered whether a court or an arbitrator should determine if the parties’ arbitration agreements allowed for class arbitration. *Id.* at 447. The *Green Tree* case concerned contracts between Green Tree, a commercial lender, and its customers. 539 U.S. at 447. Each customer contract contained an arbitration clause governed by the Federal Arbitration Act. *Id.* Customers of Green Tree filed two separate suits against the company in South Carolina state court. *Id.* In both cases, plaintiffs sought, and eventually were granted, class certification. *Id.* at 449. On appeal from the class arbitration awards, which the trial court had confirmed, the South Carolina Supreme Court found that the parties’ arbitration agreements were silent on class arbitration, that class arbitration was therefore authorized, and that the arbitration had properly taken that form. A plurality of the Supreme Court decided that the issue was for the arbitrator. *Id.* at 452-53. The plurality recognized that “[i]n certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter.” *Id.* at 452. However, the plurality explained: “The question here – whether the contracts forbid class arbitration – does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide whether they agreed to arbitrate a matter. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question . . . concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.” *Id.* at 452-53 (emphasis in original).

5. Without pausing to consider in detail the opinion and concurrence of the *Green Tree* Court, the teaching point from *Green Tree* and certainly *Howsam* is that procedural issues are presumptively for the arbitrator to decide. With that in mind, and especially over the past two to three years, most post-*Howsam* courts have determined that the arbitrator should resolve the question of consolidation. In a case of first impression, for example, the Seventh Circuit decided the question in *Employers Insurance Company of Wausua v. Century Indemnity Co.*, 443 F.3d 573, 577 (7th Cir. 2006)(“question whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve[.]”; agreements there did not discuss who decides disputes regarding consolidation, “so we presume the arbitrator decides[.]”). Other Courts have so held. See *Certain Underwriters at Lloyd’s London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3d Cir. 2007)(Petitioner sought stay of arbitration against it because six separate contracts, with separate arbitration provisions, did not provide for consolidation of

arbitration proceedings or consolidation with proceedings under other contracts. Court held that given the parties' agreement to arbitrate their disputes, together with the contractual silence on the consolidation issue, the longstanding federal policy favoring arbitration meant that the decision whether to consolidate was a procedural issue for the arbitrator to resolve, citing *Green Tree Financial Corp.*; *Certain Underwriters at Lloyd's v. Cravens Dargan & Co.*, 197 Fed.Appx. 645, 647 (9th Cir. 2006)(Gould, J. concurring); and, *Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791*, 321 F.3d 251 (1st Cir. 2003)(in case involving collective bargaining agreements, court concluded that putting the decision whether to consolidate the three proceedings in the hands of the arbitrator comported with long-standing precedent resolving ambiguities regarding the scope of arbitration in favor of arbitrability). Overall, at this date, the First, Third, Fourth, Seventh, and Ninth Circuits, and a district court in the Second Circuit have held that the issue of consolidation is properly left for the arbitrator to decide. See Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: the Power of Arbitrators*, 35 Fordham Urb. L.J. 83, 88 n. 32 (Jan. 2008) (surveying federal circuits on the question).

6. Joinder. Let me take a brief excursion on the related topic of joinder, i.e., whether and under what circumstances an arbitrator may join non-parties to the arbitration agreement. The same theme underlying these decisions on consolidation – the courts' desire to allow arbitrators to decide how to efficiently proceed (provided that the process comports with the parties' express agreement) – should support the same approach to the question of joinder.

7. Normally, non-signatories may not be bound by arbitration agreements. So, the first issue is whether the parties sought to be joined are governed by an arbitration agreement. If not, then the arbitrator cannot join the non-party unless there is some exception to the general rule. Most courts recognize five or six exceptions to the general rule. For example, a non-signatory may be able to enforce an arbitration agreement against a signatory where the non-signatory has a close legal relationship with a signatory of the agreement. Also, a signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of equitable estoppel applies. See *Bridas S.A.P.P.I.C. v. Turkmenistan*, 345 F.3d 347, 356 (5th Cir. 2003)(describing the traditional six theories for binding a nonsignatory to an arbitration agreement). A few courts have described an exception under the successor liability doctrine, but those appear to have been in asset purchase cases, rather than, say, for example, stock purchases. E.g., *Freeman v. Complex Computing Company, Inc.*, 119 F.3d 1044, 1048 (2d Cir. 1997)(Second Circuit affirmed the district court's denial of a motion to compel arbitration with the nonsignatory purchaser of the signatory's assets because the claimed successor liability of the nonsignatory had not been established). But, assuming that the party sought to be joined has signed an agreement to arbitrate, then the arbitrator should decide the question of joinder for the same reasons that the arbitrator should decide the question of consolidation.

8. Language in the Arbitration Clause Addressing Consolidation. Let me take one more detour before turning to the considerations governing consolidation. Your clients may wish to resolve the consolidation issue with express language in the agreement such as, for example, a provision like the one found in many reinsurance contracts: "If more than one reinsurer is involved in an arbitration where there are common questions of law or fact and a

possibility of conflicting awards or inconsistent results, all such reinsurers will constitute and act as one party for purpose of this clause.” See Robert M. Hall, *Consolidation of Arbitrations – A New Rule Emerging?*, 15-12 Mealey’s Litig. Rep. Reinsurance 13 (2004). If the parties prefer to leave the question up to the arbitrator, then Mark Lassiter has formulated the following language:

Consolidation of Separate Disputes. If more than one Party (including any Related Person) is involved in or with any related Dispute then:

- a. All Parties and Related Persons involved will endeavor to agree on a process to effectuate any consolidation or joinder of any separate Conciliation proceedings between the Parties. If they are unable to agree, the AAA shall directly appoint a single Arbitrator for the sole and limited purpose of deciding whether separate Arbitration proceedings between the Parties should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder. The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the Arbitrator appointed to determine consolidation.
- b. The Arbitrator appointed in the immediately preceding subparagraph may order consolidation of separate Conciliation proceedings between the Parties as to all or some of their claims if:
 - i. there are separate Conciliation proceedings between the Parties;
 - ii. the claims subject to the separate Conciliation proceedings arise in substantial part from the same transaction, events or occurrences, or series of related transactions, events or occurrences;
 - iii. the existence of a common issue of law or fact creates the possibility of conflicting decisions in any separate Arbitration proceedings; and
 - iv. prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to Parties opposing consolidation.

The Arbitrator appointed in subparagraph (i) may order consolidation of separate Conciliation proceedings as to some claims and allow other claims to be resolved in separate Conciliation proceedings, and may also order consolidation of separate Conciliation proceedings for some purposes, but not for others (e.g., consolidation for discovery purposes only, but not for the conduct of any arbitration hearings).

C. So, How Does the Arbitrator Decide? The (Few) Rules Governing Consolidation of Different But Related Cases.

1. The federal and state rules of civil procedure cover joinder (rules 19 (mandatory) and 20 (permissive)) and consolidation (rule 42(a)), but no arbitral rule directly addresses either question. The American Arbitration Association has adopted Supplementary Rules for Class Arbitration (eff. October 8, 2003) under which the AAA has agreed to administer demands for class arbitration where “(1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Associations’ rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.” (<http://www.adr.org>, *Supplementary Rules for Class Arbitration*, <http://www.adr.org/sp.asp?id=21936>). Those rules address class arbitrations rather than a request for consolidation or joinder. Still, the considerations and mechanism outlined in Rules 4, 5, and 6 provide one framework for resolution. Those rules are as follows:

* * *

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

- (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class;
- (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

(6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

(b) **Class Arbitrations Maintainable**

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

(2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

(b) A Class Determination Award certifying a class arbitration shall define the class, identify the class representative(s) and counsel, and shall set forth the class claims, issues, or defenses. A copy of the proposed Notice of Class Determination (see Rule 6), specifying the intended mode of delivery of the Notice to the class members, shall be attached to the award.

(c) The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief or claims to a limited fund, makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion.

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a

court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

6. Notice of Class Determination

(a) In any arbitration administered under these Supplementary Rules, the arbitrator shall, after expiration of the stay following the Class Determination Award, direct that class members be provided the best notice practicable under the circumstances (the “Notice of Class Determination”). The Notice of Class Determination shall be given to all members who can be identified through reasonable effort.

(b) The Notice of Class Determination must concisely and clearly state in plain, easily understood language:

- (1) the nature of the action;
- (2) the definition of the class certified;
- (3) the class claims, issues, or defenses;
- (4) that a class member may enter an appearance through counsel if the member so desires, and that any class member may attend the hearings;
- (5) that the arbitrator will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded;
- (6) the binding effect of a class judgment on class members;
- (7) the identity and biographical information about the arbitrator, the class representative(s) and class counsel that have been approved by the arbitrator to represent the class; and
- (8) how and to whom a class member may communicate about the class arbitration, including information about the AAA Class Arbitration Docket (see Rule 9).

* * *

2. Neither the Federal Arbitration Act nor the Uniform Arbitration Act directly addresses the questions of consolidation or joinder. On a related issue, few legislatures have dealt with the problem of multiparty disputes where some or all of the parties face simultaneous litigation and arbitration. In 1978, the California legislature led the way in fashioning some response to at least that problem. Under Cal.C.C.P. §1281.2, the court may stay litigation, refuse to enforce the arbitration agreement, or order consolidation or joinder “of all parties in a single action or special proceeding[.]”

3. In Arizona, the legislature has taken up but not passed the Revised Uniform Arbitration Act. That Act contains the only statutory provision that directly addresses consolidation of separate arbitration proceedings:

SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

- (a) Except as otherwise provided in subsection (c), upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:
 - (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 subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
 - (3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
 - (4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.
- (b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.
- (c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

D. The Classic Case: Individual Homeowners in the Same Housing Development with Construction Defect Claims Against the Same Developer (but Separate Arbitration Agreements); Ruling on Motion to Amend Claim and Motion to Reassert Class Claims.

About 18 months ago, certain (unnamed) parties briefed the question of consolidation in a putative class-action construction defect case in the context of a motion to amend. I offer the ruling (below) to illustrate how one arbitrator faced the question.

This construction defect case concerns the YYYYYY residential development in Chandler, Arizona. In June 2006, plaintiffs filed their complaint in superior court. In November 2006, following motion practice, the parties agreed to refer the putative class action to arbitration. In their written agreement following that referral, the parties “agreed to submit the dispute to the Arbitrator for his decision and otherwise participate in an arbitration proceeding[.]”

In September 2007, following referral of the case to this tribunal, claimants withdrew their request for certification of the putative class. On September 6, 2007, claimants’ counsel wrote to the tribunal in part as follows: “After consulting with various statistical experts regarding the development of a sampling protocol, I have come to the conclusion that this is not an appropriate case for class certification.” In early October 2007, the tribunal set a deadline for proposed, amended claims. In late October, claimants timely filed the motion to amend the claim.

Currently, 42 homeowners bring claims against XXXX. In the proposed, amended claim, claimants drop several legal claims (e.g., negligence) and state claims for only breach of implied warranty and equitable tolling or equitable estoppel. At argument, XXXX agreed that those substantive changes to the claim should be allowed.

The question raised in the motion to amend is whether an additional 43 homeowners may bring those revised, substantive claims for breach of implied warranty against XXXX. In response, XXXX objects that the additional homeowners should not be allowed because neither the referral to arbitration nor the arbitration agreement allows for joinder. XXXXX also argues that the controlling federal law does not allow for joinder in these circumstances. In reply, claimants argue that the governing rules and most recent federal law provide for joinder.

The Purchase Agreement, Rules, and Law on Joinder. We start with the controlling arbitration agreement. Each agreement between the homeowner and XXXXX provides in part as follows:

Any controversy, claim or dispute arising out of or relating to this Agreement or Your Purchase of the Home (other than claims under the Limited Warranty) shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (“AAA”) and the Federal Arbitration Act (Title 9 of the United States Code) and judgment rendered by the arbitrator(s) may be confirmed, entered and enforced in any court having

jurisdiction. As a condition precedent to arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of the AAA, or such other mediation services selected by Us. Claims under the Limited Warranty will be arbitrated in accordance with the arbitration provision set forth in the Limited Warranty.

Plaintiff's Response to Defendants' Motion to Sever (Exh. A, at 4). In turn, the Construction Industry Arbitration Rules (CIAR) of the American Arbitration Association (AAA) provide as follows on this issue:

If the parties' agreement or the law provides for consolidation or joinder of related arbitrations, all involved parties will endeavor to agree on a process to effectuate the consolidation or joinder. If they are unable to agree, the Association shall directly appoint a single arbitrator for the limited purpose of deciding whether related arbitrations should be consolidated or joined and, if so, establishing a fair and appropriate process for consolidation or joinder. The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator.

The Commercial Arbitration Rules of the AAA have no similar rule. Under R-6 of the CIAR, no new or different claim may be submitted to the arbitrator except with the arbitrator's consent.

Here, the question is joinder rather than consolidation because the claims of the additional homeowners were pending neither in the superior court (except as proposed members of the putative class) nor in this proceeding.¹ In any event, the purchase agreements do not speak to the issue of consolidation or joinder. Instead, under the purchase agreements, the parties, including the proposed additional claimants, agreed that the CIAR and the Federal Arbitration Act (FAA) would govern this proceeding and, by extension, this issue.

We turn next to the governing rules. The CIAR at R-7 provides that the parties shall attempt to agree on a process to effectuate the joinder "[i]f the parties' agreement or the law provides for consolidation or joinder of related arbitrations[.]" The rule then confirms that the arbitrator shall decide whether "related arbitrations should be consolidated or joined[.]" The parties' agreement does not address this question directly, so the issue becomes whether the law permits joinder under these circumstances. More precisely, the question here is whether the tribunal may or should order the *joinder* of the additional claimants with the currently pending arbitration. The tribunal defers the separate question whether any of the pending, individual arbitration cases should be *consolidated* with one another.

Current Federal Law Regarding the Scope of Arbitral Authority on the Issue of Joinder. These two motions raise one of the leading issues in arbitration law and on which the U.S. Supreme Court has spoken on at least two occasions in the last five years. Both sides agree that after referral the arbitrator decides "what *kind of arbitration proceeding* the parties agreed to." *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)(arbitrator should determine whether

¹ A consolidation involves more than one pending arbitration proceeding.

an arbitration agreement subject to the FAA permitted or precluded class arbitration (emphasis in original)).

XXXXX argues that federal law requires the express agreement of the parties before an arbitrator may order joinder. Without that agreement, XXXXX contends, the tribunal may not order joinder here. XXXXX cites several federal court decisions for that proposition. Those cases hold that courts should not consolidate or join the claims of different parties before referring those cases to arbitration without the express contractual agreement of the parties. XXXXX cites, for example, the decision in *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 637 (9th Cir. 1984).

Claimants cite later federal court decisions for the proposition that the tribunal may order joinder absent the express agreement of the parties. For example, in a case construing a state statute, the First Circuit rejected the rule against joinder. *See New Eng. Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988)(silence of arbitration provision on consolidation would not trump state arbitration statute allowing court to consolidate individual claims for arbitral resolution). The Seventh Circuit rejected the rule against consolidation of arbitration claims in *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada*, 210 F.3d 771, 7765 (7th Cir. 2000). The court in *Connecticut General Life* faced the question of consolidation in the context of a class action. In that case, the court permitted the certification of classes in arbitration:

[T]he same considerations of adjudicative economy that argue in favor of consolidating closely related court cases argue for consolidating closely related arbitrations [P]arties to a contract generally aim at obtaining sensible results in a sensible way To have the identical dispute litigated before different arbitration panels is a formula for duplication of effort and fertile source, in this case, of disputes over esoteric issues in the law of *res judicata*.

210 F.3d at 774-776.

There is no Arizona law directly on point. Certainly the contours of the law have changed since the federal cases cited by XXXXX were decided. Now, after *Howsam*, *Green Tree*, and other federal decisions, the questions of class claims, consolidation, and joinder are procedural matters for the arbitrator. That is, the rationale in *Green Tree* allows the tribunal to decide whether joinder should be ordered here. The current and proposed claimants have 85 disputes that are undoubtedly arbitrable; over 40 of those disputes are now before the tribunal. The question whether the proposed claims should be joined and, later, then consolidated is for my decision. This is, in other words, one of the procedural ‘gateway’ matters that the *Green Tree* court referred to. *Id.*, at 453 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)).

The Tribunal Should Exercise its Authority to Order Joinder. The next question is whether the tribunal should order joinder of the proposed additional claimants even if the tribunal has the authority to do so. We again start with the agreement. The intent of the parties in entering into the arbitration agreement presumably included the efficient, economical

resolution of their disputes. Joinder of arguably related cases before the same arbitrator (even if those cases are not consolidated (a question for another day, as I noted above)) offers both efficiency and economy. There should be and I determine that there is no need for the additional claimants to file their own separate cases with the AAA. In other settings, third parties may be joined (even against their will) or may move to join pending litigation. *See, e.g.*, Fed.R.Civ.P. 19(a). The result should be no different here. Counsel confirm that the very same arbitration agreements control all of the pending and proposed cases. The same lawyers would be involved in the pending and new claims. Moreover, the parties have agreed to share fees, and the AAA does not receive administrative fees in this ad hoc proceeding, so there seems no practical let alone legal or other reason to require that the additional claimants first file new cases with the AAA before the tribunal allows joinder in this proceeding.

The Question of Futility. Finally, XXXXX argues that the proposed amendment is futile because some claims are barred by the statute of limitations or statute of repose. In the complaint, claimants allege that escrow closed on the homes at issue between July 25, 1997 and June 28, 2001. *See* Complaint, ¶19. On February 9, 2005, plaintiffs first discovered the defects. *Id.*, at ¶20. On November 4, 2005, the first PDA letter “relevant to for [sic] the entire YYYYY community and most of the claims at the subject homes was sent to Defendant.” *Id.*, at ¶21. Five letters followed in 2005, 2006, and 2007 “as to all of the represented homes[.]” *Id.*, at ¶22. I accept those allegations as true for these purposes.

Plaintiffs filed their class action complaint in the superior court on June 2, 2006. For these purposes, I will assume that, under the controlling law, the filing of the class action complaint tolled the statutes of limitations and repose for all putative class members. It appears that the proposed, additional claimants qualify as putative class members. So, even though claimants have now withdrawn their request for class certification, the statute of limitations was tolled until at least the date of withdrawal. As a result, and as matters stand now, the relevant statutes would not bar the claims of those owners who purchased from XXXXX on or after November 4, 1996. XXXXX may of course raise the statutes of limitations and repose at any time, but there does not appear to be any basis for denying the entire motion to amend as futile at this stage.

For all of these reasons, the tribunal GRANTS the motion to amend. The tribunal DENIES the motion to reassert class claims as moot.

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