Journal of Dispute Resolution

Volume 2005 | Issue 1 Article 12

2005

Resolving a Split: May Courts Order Consolidation of Arbitration Proceedings Absent Express Agreement by the Parties

Jonathan R. Waldron

Resolving a Split: May Courts Order Consolidation of Arbitration Proceedings Absent Express Agreement by the Parties?

Illinois Farmers Insurance Co. v. Glass Service Co.[1]

I. INTRODUCTION

Court-ordered consolidation of arbitration proceedings has sparked controversy and conflict where the agreement to arbitrate and relevant law are silent regarding consolidation.[2] Parties to arbitration agreements rarely include language that addresses whether related arbitration claims may be consolidated.[3] In addition, nearly every state has statutes dealing with the enforcement of agreements to arbitrate, but most statutes are silent regarding consolidation of arbitrable claims.[4]

Where both the arbitration agreements and federal and state arbitration statutes are silent regarding consolidation, courts have split as to whether courts have authority to order parties to consolidate their claims in the absence of complete agreement among party members.[5] While the United States Supreme Court has sidestepped the opportunity to give guidance in this area,[6] many states are beginning to resolve this longstanding issue through adoption of the Revised Uniform Arbitration Act (RUAA).[7]

In *Illinois Farmers Insurance Co. v. Glass Service Co.*,[8] the Minnesota Supreme Court had the opportunity to revisit its 1973 decision in *Grover-Dimond Associates v. American Arbitration Ass'n*[9] in light of conflicting case law developed since that time.[10] This Note will address the current split in state and federal

1. 683 N.W.2d 792 (Minn. 2004).
2. Carl H. Johnson & Pete D.A. Petersen, *Is the Revised Uniform Arbitration Act a Good Fit for Alaska?*, 19 ALASKA L. REV. 339, 359 (2002).
3. *Id.*
4. *Id.* at 346 (noting that the Uniform Arbitration Act, the Federal Arbitration Act, and a majority of states lack statutes that address the issue of consolidation).
5. *Id.*
6. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003) (refusing to address a similar issue involving class-wide arbitration). *See also* Jonathan R. Bunch, Note, *To Be Announced: Silence From the United States Supreme Court and Disagreement Among Lower Courts Suggest An Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 266 (2004).
7. *Alaska Becomes Tenth State to Adopt Revised Arbitration Act*, ADR WORLD, July 30, 2004, *at* http://www.adrworld.com/opendocument.asp?Doc=eWuRIhuYIi&printerfriendly=1&limit=300&code=JrSxcOQA [hereinafter *Alaska Adopts RUAA*].
8. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792 (Minn. 2004).
9. Grover-Dimond Assocs. v. Am. Arbitration Ass'n, 211 N.W.2d 787 (Minn. 1973).
10. *Farmers*, 683 N.W.2d at 805.

courts, and suggest that the best way to resolve this issue is through state adoption of the RUAA.[11]

II. FACTS & HOLDING

From August 1997 to April 2002, Auto Glass Service Center (Glass Service) performed auto glass repair work for individuals insured by Illinois Farmers Insurance Company and Mid-Century Insurance Company (collectively Farmers).[12] As is routine in Minnesota, Glass Service directly billed their customers' insurance company for the cost of services they performed.[13] In addition to this practice, Glass Service also had each customer assign to Glass Service the right to bring claims against Farmers in any dispute over the installation.[14] Glass Service alleged that Farmers underpaid Glass Service for work that Glass Service performed for Farmers' customers on more than 5700 occasions and demanded compensation in the amount of $1,138,229.52.[15]

In Minnesota's Ramsey County District Court, Glass Service sought to recover for the alleged underpayments in a breach of contract action.[16] Farmers responded by seeking summary judgment, declaring that Glass Service was required to arbitrate each claim individually because Farmers' policy contained a mandatory arbitration clause.[17] The trial court granted summary judgment and

11. *See* National Conference of Commissioners on Uniform State Laws, *Uniform Arbitration Act 2000*, 3 PEPP. DISP. RESOL. L.J. 323 (2003) [hereinafter *RUAA*]. Final drafting of revisions to the approximately forty year old Uniform Arbitration Act (UAA) were completed during the annual meeting of the National Conference of Commissioners on Uniform State Laws (NCCUSL) in the summer of 2000; these revisions are called the Revised Uniform Arbitration Act (RUAA). Johnson & Petersen, *supra* note 2, at 349. *See also* John M. McCabe, *Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act*, 3 PEPP. DISP. RESOL. L.J. 317 (2003).

12. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 796 (Minn. 2004). Auto Glass Service Center is a wholly-owned subsidiary of Glass Service Company. *Id.*

13. *Id.* The court noted that the Minnesota statute mandates that "any policy of automobile insurance . . . providing comprehensive coverage . . . must provide at the option of the insured complete coverage for repair or replacement of all damaged safety glass without regard to any deductible or minimum amount." *Id.* (quoting MINN. STAT. § 65B.134 (2002)). The insurers are required to pay "a competitive price that is fair and reasonable within the local industry at large." *Id.* (citing MINN. STAT. § 72A.201, subd. 6(14) (2002)).

14. *Id.* Glass Service included language on its invoice that its customer "assigns any and all claims in connection with this installation against my insurance company to Glass Service Company, Inc." *Id.* The assignment of these rights is not in dispute on appeal. *Id.*

15. *Id.* at 796-97. In determining what price is "fair and reasonable within the local industry at large" both parties looked to the national price list publication from National Auto Glass Specifications (NAGS). *Id.* at 797 (citing MINN. STAT. § 72A.201, subd. 6(14)). However, the percentages used by each party differed as to the allocation among costs for glass, adhesives, and labor. *Id.*

16. *Id.* at 798.

17. *Id.* The policy provided that "submission to binding arbitration is mandatory in all cases where a claim made by an insured person is $5,000 or less." *Id.* at 799. Initially, Glass Service demanded the issue be decided in arbitration in 2002, but Farmers responded by filing suit in Minnesota's Ramsey County District Court seeking to preclude arbitration. *Id.* at 798. Farmers argued that any assignment of claims to Glass Service did not include the right to arbitrate and, in the alternative, that "any right to arbitration did not include the right to arbitrate claims collectively." *Id.* However, when Glass Service responded by bringing a counterclaim for breach of contract, Farmers reversed its earlier contention and argued that Glass Service "was required to arbitrate each claim individually." *Id.*

ordered each of the disputes to be tried separately before the same arbitration panel.[18]

On appeal, the Minnesota Court of Appeals affirmed the trial court's order of summary judgment, in part, by finding that arbitration was required.[19] The appellate court also affirmed the trial court's determination that the district court lacked authority to combine each of the 5700 claims into a single claim that would then exceed the mandatory arbitration clause, which required that all claims under $5,000 be subject to binding arbitration.[20] However, the appellate court reversed the trial court's determination that each claim must be tried before the same arbitration panel.[21] The appellate court instead found that the trial court erred in concluding that it possessed the power to order consolidation of the claims to be tried by the same arbitration panel since this was not provided for in the policies issued by Farmers.[22] Glass Service appealed to the Minnesota Supreme Court.[23]

The Minnesota Supreme Court granted review of the case to consider whether the claims had to be arbitrated and,[24] if so, whether the trial court had the power to order consolidation of some or all of the claims.[25] After an en banc hearing, the Minnesota Supreme Court affirmed the determination of the lower courts that each of the 5700 claims was subject to arbitration.[26] However, after noting that there were competing views in federal and state courts the supreme court reversed the court of appeals on the consolidation issue,[27] holding that the consolidation of arbitration claims is a fact-intensive issue to be made by the trial court after considering "the efficiencies of consolidation, the danger of inconsistent judgments if disputes are arbitrated separately, and the prejudice that parties may suffer as a result of consolidation."[28]

Having held that whether a trial court may order consolidation is an issue of fact to be determined by the trial court, the Minnesota Supreme Court remanded the case to the trial court to determine whether some or all of the claims may be consolidated into one or more proceedings.[29] Having found that the trial court possesses the authority to order consolidation absent party agreement, the Minnesota Supreme Court upheld its 1973 *Grover-Dimond* decision in light of changes in statutory and common law that had since developed.[30]

---

18. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 798 (Minn. 2004).

19. Ill. Farmers Ins. Co. v. Glass Serv. Co., 669 N.W.2d 420, 422 (Minn. Ct. App. 2003), *aff'd in part, rev'd in part*, 683 N.W.2d 792 (Minn. 2004). The appellate court held that since each of the 5700 claims did not exceed $5,000, each claim was subject to the mandatory arbitration clause included in the policy issued by Farmers. *Id.* at 427.

20. *Id.* at 427. The appellate court also noted that under Minnesota's No-Fault Act, arbitration is required for claims of $10,000 or less for comprehensive or collision damage coverage. *Id.* at 424.

21. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 798 (Minn. 2004).

22. *Id.*

23. *Id.* at 796.

24. *Id.* at 803.

25. *Id.* at 805.

26. *Id.* at 804. The Minnesota Supreme Court affirmed the appellate court's rejection of Glass Service's argument that Farmers had waived its right to, or was judicially estopped from, demanding arbitration because Farmers initially sought to preclude arbitration. *Id.* at 798-801.

27. *Id.* at 806-07.

28. *Id.*

29. *Id.* at 807.

30. *Id.* at 806. *See also* Grover-Dimond Assocs. v. Am. Arbitration Ass'n, 211 N.W.2d 787, 806 (Minn. 1973).

III. LEGAL BACKGROUND

A split among the state courts and between the state and federal courts has developed concerning whether arbitration cases may be consolidated when an arbitration agreement is silent regarding consolidation.[31] Since the issue was first raised in 1954 in the state courts of New York,[32] both state and federal courts have looked to different law to determine whether arbitration cases may be consolidated.[33]

In 1925, Congress enacted the Federal Arbitration Act (FAA) to standardize and clarify arbitration law in the federal courts.[34] While the FAA has largely satisfied this purpose by remaining a consistent source of law in federal court,[35] the FAA only applies in state courts to those transactions that affect interstate commerce, and applies to limit state law that interferes with the FAA's federal pro-arbitration policy.[36] Since the FAA only applies to the states in specific circumstances, there was a lack of uniformity among the states regarding arbitration law and issues addressed in the FAA.[37]

In an effort to standardize the enforceability of agreements to arbitrate in the face of often disparate state laws, in 1955, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Arbitration Act (UAA) and encouraged its adoption by the states.[38] While this effort was remarkably successful in standardizing state arbitration laws,[39] both the UAA and the FAA failed to address the issue of consolidation of arbitration disputes.[40] As a result, the law governing the issue of consolidation is not uniform among federal and state courts, and each must be considered separately to answer the question of who decides when arbitration cases may be consolidated.

A. Arbitration Consolidation in Federal Courts

The FAA does not speak directly to the issue of whether consolidation of arbitration claims may be ordered by a federal court where the arbitration agreement is silent regarding consolidation,[41] and the United States Supreme Court has yet to address the issue.[42] Section 4 of the FAA gives United States district courts the

31. Okuma Kazutake, *Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration*, 9 ANN. SURV. INT'L & COMP. L. 189, 191 (2003).

32. *See In re* Franc, Strohmenger & Cowan Co., 135 N.Y.S.2d 842 (N.Y. Sup. Ct. 1954).

33. *See* Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, 56 DISP. RESOL. J. 28, 33 (2001).

34. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2004).

35. Congress has not amended the FAA in any substantial way since its enactment in 1925. Heinsz, *supra* note 33, at 28.

36. *Id.*

37. *See infra* Part III.B.

38. *RUAA, supra* note 11.

39. The UAA was adopted in whole or in part in forty-nine jurisdictions of which thirty-five have adopted the UAA in whole and fourteen have adopted substantially similar legislation. *RUAA, supra* note 11.

40. Johnson & Petersen, *supra* note 2, at 346.

41. 9 U.S.C. §§ 1-14 (2004).

42. While the Supreme Court did have the opportunity to decide the issue as it relates to class certifications in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003), the Court left the issue unre-

authority to hear a petition for an order directing that arbitration proceed in the manner provided for in a written arbitration agreement.[43] In addition, Section 4 states that upon determining that the arbitration agreement is valid and has not been complied with, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[44] Whether the FAA permits or restricts a district court from ordering consolidation where the arbitration agreement is silent regarding consolidation is an issue that has not been uniformly resolved among the circuits that have considered the issue.[45]

The vast majority of federal circuits now take the position that federal courts are without authority to consolidate arbitration cases where the parties have not expressly allowed for consolidation in their arbitration agreement.[46] These circuits reason that since the FAA orders courts to "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement,"[47] then when no terms of the agreement speak to consolidation, the courts lack power to read consolidation into the agreement.[48] This approach closely follows traditional contract law principles which hold that courts should interpret contracts so as to "carry out the understanding of the parties rather than to impose obligations on them contrary to their [own] understanding"[49]—that is to say, "the courts do not make a contract for the parties."[50]

Expressing the minority view, the district court in *Robinson v. Warner*, held that the FAA authorizes courts to compel consolidation of arbitration where the arbitration agreement is silent as to consolidation.[51] The court reasoned that the issue was one of procedure, under which the Federal Rules of Civil Procedure apply.[52] Since Federal Rule of Civil Procedure Rule 81(a)(3) expressly states that

---

solved by holding that the parties had agreed to only submit to an arbitrator the issue of class-wide arbitration. *See* Bunch, *supra* note 6, at 266.

43. 9 U.S.C. § 4.

44. *Id.*

45. Kazutake, *supra* note 31, at 192.

46. *See* Philadelphia Reinsurance Corp. v. Employers Ins. of Wausau, 61 Fed. Appx. 816, 820 (3d Cir. 2003) (holding district court lacks authority to order arbitration consolidation where arbitration agreement does not provide for such consolidation); Gov't of United Kingdom of Great Britain v. Boeing Co., 998 F.2d 68 (2d Cir. 1993); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107 (6th Cir. 1991); Baesler v. Cont'l Grain Co., 900 F.2d 1193 (8th Cir. 1990); Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984). While the Seventh Circuit initially held in *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995), that "the FAA forbids federal judges from ordering class arbitration where the parties' agreement is silent on the matter," Chief Judge Posner later clarified the *Champ* holding as only prohibiting consolidation by a district court where the contract does not provide for consolidation so that the court may resort to the usual methods of contract interpretation to find authorization even when not expressly stated by the parties in the arbitration agreement. *Connecticut Gen. Life Ins. Co. v. Sun Life Assurance Co. of Canada*, 210 F.3d 771, 773-74 (7th Cir. 2000).

47. 9 U.S.C. § 4 (2004).

48. *See Champ*, 55 F.3d at 275. The court asserted, "For a federal court to read such a term into the parties' agreement would 'disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration." *Id.* (quoting New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 10 (1st Cir. 1988) (Selya, J., dissenting)).

49. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (2004).

50. *Id.*

51. 370 F. Supp. 828, 830-31 (D. R.I. 1974).

52. *Id.* at 830.

the rules apply to matters of procedure not provided for in the FAA,[53] the court reasoned that Rule 42(a),[54] which authorizes consolidation of actions involving a common question of law or fact, explicitly allows a federal district court to consolidate arbitration actions.[55]

Even though the First Circuit has not yet made a decision on the issue raised at the district level in *Robinson*, it has held that the FAA does not preclude a federal district court from compelling arbitration consolidation where the arbitration agreements are silent regarding consolidation but where state law specifically provided for consolidation in the absence of an express agreement authorizing consolidation among the parties.[56] Considering the age of the *Robinson* case however, it is unclear, in light of recent case law, whether the issue would be resolved the same way today.[57]

While most federal courts do not interpret the FAA to allow consolidation absent an express agreement between the parties, at least one scholar has called for a revision of the FAA which would answer this question definitively by statutorily allowing district courts to order consolidation even where the arbitration agreement is silent.[58]

B. Arbitration Consolidation in State Courts

The FAA generally does not preempt state law unless the transaction involves interstate commerce or the state law "interfere[s] with the [FAA's] federal pro-arbitration policy."[59] While forty-nine of the fifty states have enacted the UAA, which operates as the state equivalent of the FAA, the UAA does not address the issue of arbitration consolidation.[60] However, the Revised Uniform Arbitration Act (RUAA), promulgated by the NCCUSL in 2000 and adopted in whole or in part by ten states as of July 2004,[61] revises the UAA to permit state courts to order

53. FED. R. CIV. P. 81(a)(3). The rule provides in part: In proceedings under Title 9, U.S.C., relating to arbitration . . . these rules apply only to the extent that matters of procedure are not provided for in [Title 9]. *Id.*

54. FED. R. CIV. P. 42(a). The rule provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Id.

55. Robinson v. Warner, 370 F. Supp. 828, 830 (D. R.I. 1974). The district court noted, "[T]he Federal Rules generally are made applicable to the [FAA] as to matters of procedure not covered by the latter (rule 81 subd. (a), par. (3)) and the [FAA] is silent as to the question of consolidating arbitration proceedings. There is thus explicit authority for such consolidation." *Id.* (quoting Vigo Steamship Corp. v. Marship Corp., 257 N.E.2d 624 (N.Y. 1970)).

56. New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 6-7 (1st Cir. 1988).

57. *See* Gov't of United Kingdom of Great Britain v. Boeing Co., 998 F.2d 68, 71-72 (2d Cir. 1993) (overruling, in light of recent Supreme Court case law, prior precedent that allowed district courts to compel consolidation of arbitration based upon Federal Rules of Civil Procedure 81(a)(3) and 42(a)).

58. Heinsz, *supra* note 33, at 28.

59. *Id.*

60. *RUAA*, *supra* note 11.

61. *Alaska Adopts RUAA*, *supra* note 7. The states that have thus far adopted the RUAA are: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon and Utah. *Id.* Bills to adopt the act also are under consideration in Arizona, District of Columbia,

arbitration consolidation where the party agreements are silent regarding consolidation and certain conditions are met.[62] Section 10 of the RUAA allows a court to order consolidation if:

> (1) the claims arise from the same [or related series of] transactions; (2) a common issue of law or fact creates the possibility of conflicting decisions [in separate arbitration proceedings]; and (3) the "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."[63]

Thus, in those state jurisdictions that have adopted the RUAA, the controversy over whether a state court can order consolidation of arbitration claims has been resolved.

The majority of states, however, have not yet adopted the RUAA or similar legislation.[64] As a result, a majority of state statutes are silent as to whether a state court has the authority to compel consolidation of arbitration cases absent an express agreement by the parties.[65] Unlike in federal court, there is no clear majority view among the non-RUAA state courts that have considered the consolidation issue; in fact, the state courts are about evenly split on the issue.[66]

New York, Maryland, Minnesota, Nevada, South Carolina, and California have held that their state courts may compel consolidation of arbitration over one party's protest where the arbitration agreement is silent regarding consolidation, there are common issues of fact, and the opposing party will not be prejudiced by consolidation.[67] Sometimes referred to as the New York Rule,[68] these courts have held that prejudice requires a showing of more than simply a desire to have one's action heard separately.[69]

The courts following the New York Rule primarily base their authority to compel arbitration consolidation on state arbitration statutes that, while silent regarding consolidation, give state courts power to enforce contracts to arbitrate.[70] It is argued that each statute, by giving jurisdiction to enforce contracts to arbi-

---

Connecticut, Indiana, Iowa, Maryland, Massachusetts, Oklahoma, Vermont, Washington, and West Virginia. *Id.*

62. Heinsz, *supra* note 33, at 33.

63. *Id.* (quoting *RUAA*, *supra* note 11, at 360).

64. *Alaska Adopts RUAA*, *supra* note 7.

65. Johnson & Petersen, *supra* note 2, at 346. Minnesota is one jurisdiction whose legislation is silent regarding the ability of courts to consolidate arbitration proceedings. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 805 (Minn. 2004).

66. *See* Daniel E. Feld, Annotation, *State Court's Power to Consolidate Arbitration Proceedings*, 64 A.L.R.3d 528 (2004).

67. Garden Grove Cmty. Church v. Pittsburgh-Des Moines Steel Co., 140 Cal. App. 3d 251 (Cal. Ct. App. 1983); Litton Bionetics, Inc. v. Glen Constr. Co., 437 A.2d 208 (Md. 1981); Grover-Dimond Assocs. v. Am. Arbitration Ass'n, 211 N.W.2d 787 (Minn. 1973); Exber, Inc. v. Sletten Constr. Co., 558 P.2d 517 (Nev. 1976); Symphony Fabrics Corp. v. Bernson Silk Mills, Inc., 190 N.E.2d 418 (N.Y. 1963); Plaza Dev. Serv. v. Joe Harden Builder, Inc., 365 S.E.2d 231 (S.C. Ct. App. 1988). It should be noted that Nevada has recently adopted the RUAA and therefore codified the court decision in *Exber, Inc.*, 558 P.2d 517. *See Alaska Adopts RUAA*, *supra* note 7.

68. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 805 (Minn. 2004).

69. *See Symphony Fabrics*, 190 N.E.2d at 420.

70. *Litton Bionetics*, 437 A.2d at 214.

trate, "imports power to regulate the method of enforcement," including consolidation.[71] Such a view supports the policy of avoiding the danger of inconsistent results that could arise if substantially similar issues arising from common facts are "arbitrated sequentially before different arbitrators."[72] In addition, this view promotes convenience and economy to parties and witnesses involved in such disputes who might otherwise be required to repeatedly testify or present argument over the exact same issues and circumstances.[73]

Alaska, Connecticut, Louisiana, Massachusetts, Michigan, New Jersey, New Mexico, and Ohio have held that their respective state courts lack authority to order consolidation of arbitration proceedings involving substantially similar issues and facts where the parties failed to expressly allow for consolidation in an arbitration agreement.[74] Of these, New Jersey and New Mexico have recently adopted the RUAA which expressly permits state courts to compel consolidation of arbitration proceedings.[75] Prior to adoption of the RUAA, all of these courts, like most federal courts, treated the issue as a matter of contract interpretation and reasoned that the courts only have authority to enforce what the parties agreed to in their arbitration agreement.[76] Therefore, if the agreement is silent as to consolidation, likely because the parties did not consider the issue, then there is no agreement as to consolidation for the courts to enforce.[77] This view further rejects the holding of those states adopting the New York Rule because it finds no inherent power to order consolidation to have been conferred by state arbitration statutes from the mere fact that the statutes allow a court to enforce an agreement to arbitrate.[78]

While other states have avoided giving a definitive answer to the consolidation question when the issue presented itself, more and more jurisdictions are resolving the question through legislative adoption of the RUAA.[79] Adoption of

71. *Id.*

72. *Id.* at 213.

73. *Id.*

74. Consol. Pac. Eng'g, Inc. v. Greater Anchorage Area Borough, 563 P.2d 252 (Alaska 1977); W. J. Megin, Inc. v. State, 434 A.2d 306 (Conn. 1980); La. Stadium & Exposition Dist. v. Huber, Hunt & Nichols, Inc., 349 So. 2d 491 (La. Ct. App. 1977); Stop & Shop Cos. v. Gilbane Bldg. Co., 304 N.E.2d 429 (Mass. 1973); Bay County Bldg. Auth. v. Spence Bros., 362 N.W.2d 739 (Mich. Ct. App. 1984); Wm. C. Blanchard Co. v. Beach Concrete Co., 297 A.2d 587 (N.J. Super. Ct. Ch. Div. 1972); Pueblo of Laguna v. Cillessen & Son, Inc., 682 P.2d 197 (N.M. 1984); Bd. of Educ. v. Midwest Elec. Co., 439 N.E.2d 425 (Ohio Ct. App. 1980).

75. *See Alaska Adopts RUAA*, *supra* note 7.

76. *Pueblo of Laguna*, 682 P.2d at 200.

77. *Id.*

78. *Id.* at 199-200. Courts adopting this view also reason that when arbitration agreements are silent as to consolidation, yet reference some association's rules (such as the American Arbitration Association), that association's policy of allowing consolidation only with express agreement between the parties should be considered as indicating an agreement not to consolidate absent agreement among parties. *Id.*

79. *See Alaska Adopts RUAA*, *supra* note 7. Washington and North Dakota have addressed the issue but have decided the cases on narrower grounds that do not answer the question of whether courts may or may not order consolidation of arbitration proceedings in the absence of express agreement between the parties in an arbitration agreement. *See* Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co., 607 P.2d 856 (Wash. 1980) (holding trial court lacked authority to order consolidation of arbitration proceedings where the parties arbitration agreement provided that arbitration would be conducted under the rules of the American Arbitration Association where that association "had a long-established policy of not approving consolidation without the written consent of all parties" involved); Hjelle v.

the RUAA by all fifty states will likely be a difficult endeavor that will take many years,[80] and whether specific adoption of the RUAA's position regarding consolidation will ultimately take place in each jurisdiction may depend on the rationale of the state's case law surrounding the issue.

IV. INSTANT DECISION

In *Illinois Farmers Insurance Co. v. Glass Service Co.*,[81] the Supreme Court of Minnesota was asked to reexamine, in light of the case law that had developed since it first adopted the New York Rule in 1973,[82] whether Minnesota courts possessed the authority to compel consolidation of arbitration proceedings where the arbitration agreement and state law are silent regarding arbitration consolidation.[83] The court's stated reasoning as to the consolidation issue was less than satisfying. As if to beg the question, the court noted contrary federal case law that had developed since 1973, but then summarily affirmed its prior decision on the stated basis that the prior decision had not been overruled.[84] Before addressing this issue however, the court responded to three additional arguments raised by Glass Service seeking to avoid arbitration.[85]

First, Glass Service argued that Farmers waived its contractual right to mandatory arbitration because Farmers failed to give the required notice under the policy terms of Glass Service's right to arbitrate,[86] and furthermore, because Farmers initially opposed Glass Service's demand for arbitration and sought to pursue litigation instead.[87] The Minnesota Supreme Court rejected both waiver arguments by reasoning first, that since arbitration was mandatory under the policy, arbitration did not depend upon notification by Farmers,[88] and second, that since the litigation instituted by Farmers did not reach the merits, no prejudice justifying a waiver occurred.[89]

Second, Glass Service argued that since Farmers had taken inconsistent positions regarding whether mandatory arbitration was required, the doctrine of judicial estoppel precluded Farmer's demand for arbitration.[90] The Minnesota Supreme Court rejected this argument, by noting that it had not previously adopted

---

Sornsin Constr. Co., 173 N.W.2d 431 (N.D. 1969). However, North Dakota recently adopted the RUAA which expressly permits state courts to compel consolidation of arbitration proceedings. *See Alaska Adopts RUAA*, *supra* note 7.

80. Heinsz, *supra* note 33, at 37.

81. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792 (Minn. 2004).

82. Grover-Dimond Assocs. v. Am. Arbitration Ass'n, 211 N.W.2d 787 (Minn. 1973).

83. *Farmers*, 683 N.W.2d at 805.

84. *Id.* at 806.

85. *Id.* at 798-805.

86. *Id.* at 799.

87. *Id.* at 798. While Farmers initially sought an order to deny arbitration, it reversed this position once Glass Service counterclaimed for breach of contract. *Id.* The court also refused to adopt or reject the doctrine of judicial estoppel reasoning that this was not a compelling case to apply the doctrine. *Id.* at 800-01.

88. *Id.* at 799. The court reasoned that no waiver occurred because the unambiguous language of the agreement made arbitration mandatory for claims under $5,000 and therefore required no notice of the right to arbitrate. *Id.*

89. *Id.* at 800.

90. *Id.*

the doctrine of judicial estoppel, and that this case did not present a compelling reason to do so.[91]

Third, Glass Service argued that arbitration was not required because it was seeking a single "claim" for more than $1 million from Farmers, and that this solitary "claim" exceeds the amount below which mandatory arbitration is required.[92] The Minnesota Supreme Court also rejected this argument and held that Glass Service could not defeat the arbitration mandate by consolidating the claim amounts of Farmers' individual policy holders.[93] The court reasoned that Glass Service, as assignee, stepped into the shoes of each individual policy holder and acquired no greater rights than each individual policy holder possessed.[94] The court held, therefore, that Glass Service could not "transform [its] status as assignee of 5700 plus individual claims into a [single] claimant" who presented a claim worth more than $1 million in damages;[95] rather, the court held that the arbitration clause found in each of the 5700 claims required that each alleged underpayment by Farmers be resolved in arbitration.[96]

Finally, the Minnesota Supreme Court addressed whether the Minnesota Court of Appeals erred by holding that consolidation was not a remedy the trial court could award.[97] The court noted that, while the Minnesota No-Fault Automobile Insurance Act (No-Fault Act) applied to these arbitration disputes in Minnesota, neither it nor the court's Rules of No-Fault Arbitration addressed the "ability of courts to consolidate arbitration proceedings."[98] With regard to the issue of consolidation, the court conceded that a majority of federal courts do not recognize authority to compel consolidation of arbitration disputes absent an explicit contractual or statutory mandate.[99] The court mentioned that these courts have taken the view that the FAA limits their authority to "ensure that agreements are enforced in accordance with their terms."[100] The court also acknowledged that

---

91. *Id.* at 800-01.

92. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 804 (Minn. 2004). The policy assigned to Glass Service required arbitration for claims under $5,000. *Id.* at 801. While both parties agreed that since none of the individual claims exceeded the $5,000, each individual claim, standing alone, would be subject to arbitration, the parties disagreed as to whether the individual claims assigned to Glass Service could be consolidated to exceed the claim limit for mandatory arbitration. *Id.* at 798. The court then determined that Minnesota's No-Fault Automobile Insurance Act, which mandates that such a dispute involving comprehensive coverage "in an amount of $10,000 or less" be subject to binding arbitration, was applicable to this case. *Id.* at 800 (citing MINN. STAT. § 65B.525, subd. 1 (2002)). Therefore, the court ruled that arbitration is required in this case unless the claim amount is consolidated to exceed the $10,000 statutory limit. *Id.* at 805.

93. *Id.* at 804. The court disagreed with Glass Service's argument that it was a single claimant with a single claim against Farmers involving only one issue—the systematic policy of short paying Glass Service invoices; however, the court did indicate that this "formulaic" policy of short paying could provide the facts necessary to order consolidation of some or all of the 5700 individual claims. *Id.* at 806.

94. *Id.* at 803.

95. *Id.* at 804. The court sided with Farmers' argument which was that Glass Service, as assignee, only acquired the rights of the individual policy holders and, just as the individual policy holders could not avoid arbitration by consolidating their claims with other policy holders, Glass Service could not combine the individual claims to exceed the claim amount to avoid arbitration. *Id.* at 805.

96. *Id.* at 805.

97. *Id.*

98. *Id.*

99. *Id.* at 806.

100. *Id.*

this view seeks to protect freedom of contract by allowing the parties to receive their bargained-for dispute resolution mechanism regardless of how inefficient the process becomes.[101]

Upon acknowledgment of the rationale behind the approach used by a majority of federal courts, the Minnesota Supreme Court tacitly assumed that *Grover-Dimond*,[102] the 1973 case in which the court adopted the New York Rule, supplied the authority to allow court-ordered consolidation of arbitration disputes.[103] Stating that *Grover-Dimond* was based in part on Minnesota's UAA policy of promoting arbitration as an efficient, simple, inexpensive, and informal alternative to litigation,[104] the court reasoned that although the instant case was subject to Minnesota's No-Fault Act,[105] the purpose of the act is essentially identical to that of the UAA.[106]

Without explaining why a policy of promoting efficient, simple, and informal alternatives to litigation gives a court authority to order consolidation, the Minnesota Supreme Court affirmed the *Grover-Dimond* fact-sensitive test for determining when consolidation is warranted.[107] That test, which closely mirrors the current RUAA requirements,[108] states that determining whether consolidation is proper involves considering the efficiencies of consolidation, the danger of inconsistent judgments if each claim is arbitrated separately, and possible prejudice parties may suffer if consolidation is ordered.[109] Since this is necessarily a fact-sensitive question, the court held this determination should be made by the trial court on remand and, therefore, reversed the court of appeals on this issue.[110]

While not applying its own balancing test in this case, the Minnesota Supreme Court did suggest that if Glass Service correctly characterizes the 5700 individual claims as a dispute over the formulaic computation of reimbursements used by Farmers, then this case "may well justify consolidation."[111] In so holding, the court affirmed its 1973 adoption of the New York Rule in light of current state law.[112]

V. COMMENT

A. Relationship of Farmers to Precedent

In *Farmers*, the Minnesota Supreme Court had the opportunity to reevaluate its 1973 *Grover-Dimond* decision, which adopted the New York Rule, in light of a majority opposition to applying the rule in federal courts. At the time of *Grover-*

101. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 806 (Minn. 2004).
102. Grover-Dimond Assocs. v. Am. Arbitration Ass'n, 211 N.W.2d 787 (Minn. 1973).
103. *Farmers*, 683 N.W.2d. at 806.
104. *Id.* at 805-06.
105. MINNESOTA NO-FAULT AUTOMOBILE INSURANCE ACT, MINN. STAT. §§ 65B.41-65B.71 (2002).
106. *Farmers*, 683 N.W.2d at 806.
107. *Id.* at 806-07.
108. *RUAA*, *supra* note 11, at 360 (specifically consider section 10 of the Revised Uniform Arbitration Act).
109. *Farmers*, 683 N.W.2d at 806-07.
110. *Id.* at 807.
111. *Id.* at 806.
112. *Id.*

Dimond, most federal courts had not yet considered whether a court has the authority to order consolidation of arbitration claims, absent express authority by statute or party agreement. Since neither the FAA nor the UAA addressed consolidation, it was left to each court to decide whether it possessed the authority to order consolidation of like claims, or whether this was a decision to be left solely to the arbitrator.

Since the time of *Grover-Dimond*, state courts have split fairly evenly on the consolidation question, while federal courts are strongly opposed to court interference absent express agreement between the parties. Given that Minnesota has not adopted the RUAA, which would codify the position taken in *Grover-Dimond*, the Minnesota Supreme Court, in the instant case, was given the opportunity not only to reevaluate its reasoning in *Grover-Dimond*, but perhaps encourage the adoption of the RUAA so as to resolve the question of court authority to order consolidation of arbitration disputes once and for all.[113]

B. Missed Opportunity

Unfortunately, the Minnesota Supreme Court failed to either meaningfully reevaluate its rationale or encourage resolution of the issue through legislative enactment of the RUAA in *Farmers*. The court merely held that *Grover-Dimond*[114] had not been overruled, and therefore, would be applied.[115] While the court does mention that it values efficiency,[116] the court failed to enunciate where a trial court derives the authority to order consolidation of arbitration claims when the party's agreement is silent.

Looking back to *Grover-Dimond*, it appears that the decision to adopt the New York Rule was based on the view that when an "arbitration statute provides that an agreement to arbitrate confers jurisdiction on the courts to enforce it, [then] such jurisdiction 'imports power to regulate the method of enforcement.'"[117] While this proposition might have seemed obvious at the time of *Grover-Dimond*, the federal courts by and large have rejected this view as erroneous because it would not simply enforce a party agreement consistent with its terms and would be a violation of common law contract interpretation.[118] In an attempt to remain consistent with traditional principles of contract interpretation, some other courts since *Grover-Dimond* have used the Federal Rules of Civil Procedure to justify

113. The Minnesota Court of Appeals, after concluding that it lacked to authority to order consolidation in this case in light of recent federal case law, overtly stated, "If the legislature wishes to amend the act or if the supreme court wishes to amend the rules to specifically provide for consolidation, either may do so." Ill. Farmers Ins. Co. v. Glass Serv. Co., 669 N.W.2d 420, 427 (Minn. Ct. App. 2003).

114. Grover-Dimond Assocs. v. Am. Arbitration Ass'n, 211 N.W.2d 787 (Minn. 1973).

115. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 806 (Minn. 2004).

116. *Id.*

117. *Grover-Dimond*, 211 N.W.2d at 789 (quoting Matter of Chariot Textiles Corp., 21 App. Div. 2d 762, 764 (N.Y. 1964)).

118. *Farmers*, 683 N.W.2d at 806.

the result reached in *Grover-Dimond*, but this issue was not even addressed by the court in *Farmers*.[119]

Rather, in *Farmers*, the Minnesota Supreme Court, seemed to indicate that all that is necessary to impart power to the courts to consolidate arbitration cases is a legislative purpose to promote arbitration as an efficient alternative to litigation, even in absence of specific statutory language mentioning consolidation.[120] This conclusion, attenuated at best, is not an adequate explanation for a court to override traditional contract principles that prevent courts from imposing obligations on the parties contrary to the parties' own understanding—or lack thereof.[121]

To be sure, it would be more efficient to allow courts to order consolidation in cases such as the instant decision; but efficiency is not itself a rule of law. While consolidation might be more desirable from an economic standpoint, from a freedom of contract standpoint the traditional rules of contract interpretation should apply to decide who has the authority to order consolidation—regardless of the inefficiencies that might result.[122] Under traditional contract principles, what matters most is the intention of the parties to the contract.[123] Therefore, the Minnesota Supreme Court has "no authority to write exceptions into the mandatory arbitration provisions of the No-Fault Act or [to] consolidate arbitration proceedings absent express language in the policies' arbitration provisions authorizing [the court] to do so."[124]

C. Resolution Through Non-Judicial Means

The Minnesota Supreme Court, in *Farmers*, failed to adequately explain why a legislative purpose to resolve disputes in a speedy and efficient manner through arbitration should "import" to a court the authority to determine if consolidation of like claims is warranted absent express agreement by the parties. Further, the court missed an opportunity to meaningfully evaluate its *Grover-Dimond* decision in light of since developed case law, or at the very least, to encourage the legislature to directly address the issue.

The majority of federal court decisions since *Grover-Dimond* have held that courts lack authority to order consolidation in arbitration disputes absent authority expressly conferred by party consent or statute. These courts would leave to the legislative branch the discretion of allocating such authority.[125] As a policy matter, without express legislative authority, parties forming arbitration agreements may have no way of knowing that their arbitration agreement, without specifically

119. *See* New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 7 (1st Cir. 1988) (applying Rule 42 of the Massachusetts Rules of Civil Procedure, which closely follows Federal Rule of Civil Procedure Rule 42).

120. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 806 (Minn. 2004).

121. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (2003).

122. Johnson & Petersen, *supra* note 2, at 386-87 (recognizing that allowing courts to order consolidation in absence of party agreement conflicts with the concept of party autonomy).

123. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 201 (2003).

124. Ill. Farmers Ins. Co. v. Glass Serv. Co., 669 N.W.2d 420, 427 (Minn. Ct. App. 2003).

125. Pueblo of Laguna v. Cillessen & Son, Inc., 682 P.2d 197, 200 (N.M. 1984) (stating "[i]t is solely within the province of the Legislature to provide for consolidated arbitration of disputes . . . [o]nly upon enactment of a statute providing for consolidation . . . may a court order consolidation without specific agreement of the parties to this effect").

forbidding consolidation, would be deferring this determination to the courts—the exact arena arbitration agreements are created to avoid. This criticism was not adequately addressed by the Minnesota Supreme Court in *Farmers*, but would be adequately resolved by the state's adoption of the RUAA.

Section 10 of the RUAA would expressly allow trial courts, absent party agreement to the contrary, to decide the issue of arbitration consolidation.[126] Adoption of the RUAA would give explicit notice to contracting parties of the court's authority to order consolidation, while allowing the parties to alter this result explicitly in their agreement.[127] As each state considers whether to adopt section 10 of the RUAA, legislatures will likely look to the opinions of the state's highest court considering the consolidation issue as applied to arbitration. Had the Minnesota Supreme Court in *Farmers* urged the legislature to amend its arbitration act, it would have likely been a powerful encouragement for the legislature to resolve the issue.[128]

At least one empirical study has concluded that multiple parties involved in an arbitrable dispute favor affording courts the power to order consolidation.[129] Providing such authority to courts through explicit legislative means is a legally uncontroversial way to resolve a split of authority that has produced controversy and contention in many state courts. Hopefully, by understanding the intellectual difficulties of the *Farmers* decision, Minnesota and other states will recognize the need to resolve the question of arbitration consolidation through state adoption of the RUAA.

VI. CONCLUSION

In light of the failure of state and federal courts to form a unified body of law with regard to consolidation of arbitrable disputes, it is likely that the issue will only be fully resolved by adoption of section 10 of the RUAA, and perhaps an eventual revision of the FAA. With the policy of efficiency and speedy resolution of disputes in mind, many state courts have interpreted statutes to impliedly grant the courts authority to order consolidation of disputes when express agreement between the parties is absent.

Implying such authority from legislative enactments that do not even mention arbitration consolidation fails to give contracting parties adequate notice that, unless they specify otherwise in their agreement, courts will assume authority to order consolidation. In addition, this implied authority often conflicts with party autonomy and the principles of contract interpretation because, despite lack of such concurrence by the parties in their agreement, courts have created a bargain that the parties did not intend to create.

The Minnesota Supreme Court, in *Farmers*, while recognizing contrary positions held by federal courts, did little to address this consolidation issue and sum-

126. *RUAA*, *supra* note 11, at 360.

127. Johnson & Petersen, *supra* note 2, at 391.

128. *See generally* Johnson & Petersen, *supra* note 2, at 385-90 (discussing how state common law may be considered in adoption of the RUAA in Alaska).

129. Johnson & Petersen, *supra* note 2, at 386 (citing Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 13 (2001)).

marily affirmed its 1973 decision adopting the New York Rule. The court missed an opportunity to address these issues in light of opposing case law developed since its 1973 decision, and also missed an opportunity to call for the legislative adoption of the RUAA, which would ultimately resolve the issue in a way that provides clear direction and notice to contracting parties.

JONATHAN R. WALDRON