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Struggle over Consolidation of Arbitration Proceedings Continues: The Eighth Circuit Chooses Sides, The

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I. INTRODUCTION

In response to rising litigation costs and overburdened court dockets, parties are realizing the opportunity to resolve disputes more efficiently through the use of arbitration. To ensure access to arbitration, parties are including provisions in contracts requiring arbitration of future disputes. Courts enforce these agreements pursuant to the Federal Arbitration Act (FAA), originally adopted by Congress in 1925, which officially acknowledged the validity of private agreements to arbitrate. As a result, courts are faced with procedural issues, such as consolidation of separate arbitration proceedings, in their attempt to enforce the contracts in accordance with the parties’ agreement.

The Baesler decision represents the Eighth Circuit entrant into the collection of federal court decisions dealing specifically with the consolidation of separate arbitration proceedings.
II. FACTS AND HOLDING

LeRoy Baesler and other safflower producers entered into standard safflower contracts with Continental Grain Company. Each contract between Continental and the producers contained a clause requiring arbitration of controversies and claims arising out of the agreement; however, the contracts were silent on the issue of consolidation. The producers purchased safflower seed from Continental, cultivated the safflower, and offered Continental the resulting crop. On the basis of alleged sprout damage, Continental discounted the price and refused acceptance of some of the safflower. The producers, individually, entered into separate arbitration proceedings with Continental.

Baesler brought action against Continental in North Dakota state court requesting consolidation of the separate arbitration proceedings. Continental removed the action to the United States district court, and Baesler moved for summary judgment asking the court to consolidate the proceedings. The federal court granted Continental's summary judgment motion, concluding that it lacked authority to order consolidation of arbitration hearings.

Baesler appealed the lower court decision to the Eighth Circuit Court of Appeals. The appellate court, in interpreting the Federal Arbitration Act as requiring federal courts to enforce arbitration agreements as they are written, sided with the previous holdings of the Fifth, Ninth, and Eleventh Circuits in denying the district court authority to consolidate the arbitration proceedings absent a provision in the agreements.

The Eighth Circuit held that the Federal Arbitration Act (FAA) requires federal courts to enforce arbitration agreements as they are written, and where the arbitration agreement does not provide for consolidation, a district court is without the power to consolidate the proceedings.

8. Baesler, 900 F.2d at 1194.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
20. Baesler, 900 F.2d at 1195.
21. Id.
CONSOLIDATING ARBITRATION PROCEEDINGS

III. LEGAL BACKGROUND

The issue of consolidation of arbitration proceedings is not a novel problem. Several of the federal courts of appeal have addressed the issue with differing conclusions;22 these decisions were explicitly addressed in Baesler.23 Three of the circuits that have addressed the issue of consolidation, the Fifth, Ninth, and Eleventh Circuits, have denied the courts the right to consolidate.24

The Ninth Circuit dealt with a maritime contract arbitration issue in Weyerhaeuser Co. v. Western Seas Shipping Co.25 In Weyerhaeuser, the charterer sought to compel arbitration between it and the subcharterer and between it and the shipowner.26 The agreements at issue contained arbitration clauses that required only arbitration between the parties to the agreement.27 In addition, the agreement between the charterer and the owner contained an addendum insulating the owner from any increase in its obligations by reason of any executed subcharters.28

The Weyerhaeuser court found its authority under the FAA to be narrowly circumscribed; that is, the court may "only determine whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms."29 In Weyerhaeuser, the court of appeals affirmed the district court's conclusion that the parties were not parties to a written arbitration agreement providing for consolidation.30

The Eleventh Circuit reached a similar conclusion in an insurance dispute in Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.31 The district court ordered consolidation of arbitration proceedings between Lincoln and Protective and between Protective and a third party.32 The Eleventh Circuit, however, agreed with the previous Ninth Circuit decision in Weyerhaeuser, in concluding that the power of federal courts, under the FAA, is "narrowly circumscribed."33 The Eleventh Circuit similarly held, "[p]arties may negotiate for and include provisions for consolidation of arbitration proceedings in their

23. Baesler, 900 F.2d at 1194-95.
24. See Weyerhaeuser, 743 F.2d 635; Webb, 823 F.2d 145; Protective Life, 873 F.2d 281.
25. 743 F.2d 635 (9th Cir. 1984), cert. denied, 469 U.S. 1061 (1984).
26. Id. at 636.
27. Id. at 637.
28. Id.
29. Id.
30. Id.
31. 873 F.2d 281 (11th Cir. 1989).
32. Id. at 282.
33. Id.
The standard arbitration agreements required arbitration only between those that were parties to each individual contract. Therefore, because the three parties involved in this case were not parties to one individual agreement, they never agreed to consolidation, and the court would not create an agreement for them.

Del E. Webb Construction v. Richardson Hospital Authority represents the Fifth Circuit’s approach to addressing the consolidation issue in the context of a construction contract. Webb, the general contractor, sought to consolidate the arbitration proceedings with Richardson Hospital Authority (RHA), the owner, and L.D.W.A., the architect. Subsequently, Boyd, a subcontractor, sued Webb. The contract between owner and architect were standard American Institute of Architects contracts containing a standard arbitration clause. The contract also contained language that precluded consolidation of the architect without written consent. The owner and general contractor entered a contract that also contained a standard arbitration clause. The court found that the owner could compel arbitration with the architect, and the general contractor could compel arbitration with the owner.

The court was faced with the standard arbitration clause in both contracts providing that "... an arbitration action shall include the owner and the contractor, 'and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration.'" The court concluded that the decision to consolidate rests with the district court; however, pursuant to section 4 of the FAA, the court may only determine whether there is a written agreement among the parties providing for consolidated arbitration, and if so, to enforce it.

In the situation before the court in Webb, the architect-owner contract contained a disclaimer excluding the architect from consolidation. The court found that the architect had not given specific consent, and the provision in the
contract requiring specific consent, in order to have meaning, was to be given effect over the standard arbitration clause.48

While the Fifth, Ninth, and Eleventh Circuits interpret the court's powers under the FAA as very narrow,49 other circuits have interpreted the same Act with different results.50

The Second Circuit decision in Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.51 is a frequently cited case supporting consolidation of arbitration proceedings.52 In the context of a maritime contract, Compania agreed to "perform the balance of the contract" and "assume the rights and obligations of" the charterer under a contract with Nereus, the agent for the owner.53 The district court held that the duty to arbitrate was one of the rights and obligations assumed by Compania.54 The Second Circuit agreed with the district court's ruling consolidating the arbitration between Nereus and Compania and between Nereus and the charterer.55 The Second Circuit relied on its interpretation that the "liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases . . . ."56 The court emphasized "[t]here were not only common questions of law and fact in the two arbitrations but there was danger of conflicting findings . . . ."57

The First Circuit addressed the consolidation issue in another maritime context in New England Energy Inc. v. Keystone Shipping Co.58 In this case, New England and Keystone entered a joint venture that provided for arbitration pursuant to Massachusetts arbitration laws.59 The joint venture of New England and Keystone then contracted with a ship operator, which contract also included a provision to arbitrate subject to Massachusetts law.60 The district court ruled that the facts were appropriate for consolidation, but declined to order consolidation on the grounds it lacked the power to do so.61 The district court found that the FAA preempted Massachusetts law providing for consolidation and therefore deprived the court of the power to consolidate under rule 42(a) of the Federal

48. Id.
49. See Weyerhaeuser, 743 F.2d 635; Webb, 823 F.2d 145; Protective Life, 873 F.2d 281.
52. See Baesler, 900 F.2d at 1194-95; Weyerhaeuser, 743 F.2d at 636; Webb, 823 F.2d at 149; New England Energy, 855 F.2d at 4.
53. Compania, 527 F.2d at 969-70.
54. Id. at 974.
55. Id. at 975.
56. Id.
57. Id. at 974.
58. 855 F.2d 1 (1st Cir. 1988).
59. Id. at 3.
60. Id.
61. Id.
Rules of Civil Procedure. The First Circuit reversed, concluding that under the Massachusetts statute consolidation was proper. However, the court declined to determine "whether a federal court also has the power, under Federal Rule of Civil Procedure 42(a), to order consolidation in the absence of a state law providing for it." The majority expressly rejected the narrow role of the courts, that was expressed in Fifth and Ninth Circuit decisions, with regard to resolving arbitration disputes. The court concluded that, while private arbitration agreements should be enforced (even if resulting in piecemeal litigation), the court failed "to see why a state should be prevented from enhancing the efficiency of the arbitral process, so long as the state procedure does not directly conflict with a contractual provision." Because the parties' agreements contained language that called for arbitration of "[a]ny and all differences and disputes of whatsoever nature," and further, "in the city of Boston pursuant to the laws relating to arbitration there in force," the parties therefore affirmatively agreed to the possibility of consolidation by invoking applicable Massachusetts law as well as the FAA.

The dissenting opinion in *New England Energy* focuses on the concern that by ordering consolidation, something the parties did not specifically agree to, the court is substituting "our judgment for that of the parties," and not proceeding "in accordance with the terms [of the agreement.]"

These courts were each faced with different fact patterns, different arbitration agreements, and different parties. Central to each dispute, however, was the FAA and the Federal Rules of Civil Procedure. Each court received the authority to enforce the privately negotiated arbitration agreements from the FAA. Section 2, Title 9, provides for the validity and enforceability of agreements to arbitrate:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a
contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 73

Section 4, Title 9, further provides the court with the authority to compel arbitration:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. 74

It is this emphasized language that the courts struggle to interpret. At one extreme, courts interpret this language narrowly ordering consolidation only if the parties explicitly agree to it in the terms of the agreement. 75 Other courts will work to find that the parties implicitly provided for consolidation based on the language in the agreement and the circumstances. 76

When the Federal Rules of Civil Procedure are used in the analysis, there is even greater room for the courts to create the desired result. 77 With respect to the applicability of the Federal Rules to arbitration proceedings, Rule 81(a)(3) provides:

In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, 9 (44 Stat. 585), U.S.C., Title 45, 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. 78

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75. See Weyerhaeuser, 743 F.2d at 637; Webb, 823 F.2d at 150; Protective Life, 873 F.2d at 282.
76. See New England Energy, 855 F.2d at 7.
77. See generally MacKellar, supra note 6.
Because it seems that the Federal Rules will apply to arbitration proceedings where Title 9 does not provide otherwise, some courts may make use of Federal Rules of Civil Procedure 42(a), which 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.

Rule 42 gives courts the authority to consolidate "actions," which arguably may be interpreted in light of Rule 81(a)(3) to include arbitration proceedings.

IV. THE INSTANT DECISION

The Eighth Circuit faced a situation where the parties agreed to arbitrate, and the agreements were silent as to consolidation. The court acknowledged previous decisions of other federal circuit courts regarding the issue of consolidation.

With regard to the Second Circuit decision in *Compania*, the Eighth Circuit summarized the theory justifying consolidation whereby district courts have the power to consolidate based on the liberal purpose of the FAA's fostering dispute resolution and based on the Federal Rules of Civil Procedure 81(a)(3) and 42(a).

The *Baesler* Court dismissed the First Circuit decision, finding that the district court had the power to consolidate, because the First Circuit was faced with a state statute specifically authorizing consolidation. There was no such statute before the Eighth Circuit.

The Eighth Circuit agreed with the decisions of the Fifth, Ninth, and Eleventh Circuits in finding the narrow construction of section 4 of the FAA requiring courts to enforce privately made arbitration agreements as written. The majority cited to a Supreme Court decision regarding the guiding purpose of the FAA which had "explicitly rejected the assertion that the overriding goal of..."
the Act is to promote the expeditious resolution of claims." 90 The Eighth Circuit recognized the Supreme Court's general interpretation in Dean Witter Reynolds, Inc. v. Byrd, 91 which held that the Act "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." 92 Accordingly, the Baesler court, echoing the sentiments of the Fifth, Ninth, and Eleventh Circuits, concluded that, "we read the Federal Arbitration Act as requiring federal courts to enforce arbitration agreements as they are written. Accordingly, we hold that absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings." 93 Interestingly, Circuit Judge Brown, sitting by designation from the Fifth Circuit, disagreed with the Eighth Circuit majority, and filed a dissenting opinion. 94 Judge Brown disagreed with the position of the Fifth, Ninth, and Eleventh Circuits, and recognized that the First Circuit holding was distinguishable because of the presence of a specific state statute. 95 Judge Brown advocates the Second Circuit position, "permit[ting] and encourag[ing]" consolidation in proper proceedings.96

Judge Brown refers to an earlier Supreme Court case, Textile Workers Union of America v. Lincoln Mills, 97 which began a trend toward "expanding the use and scope of the arbitration process." 98 Consolidation in Baesler, Judge Brown argues, would support the arbitration process resulting in economic feasibility and efficiency.99 Judge Brown recognized the opportunity for the courts to play a significant role in encouraging and expanding the arbitration process and believed that the courts should indeed play such a role.100

As each case before the federal circuit courts has unique facts, an important point to make may be what Judge Brown alluded to in his dissent. That is, the facts in Baesler are different from the other mentioned decisions in that, rather than having the traditional vertical consolidation where A contracts with B and B contracts with C, Continental had many agreements with similarly situated third parties.101 Judge Brown concluded that in this somewhat different contract pattern, the Second Circuit rationale promoting use of consolidation is even more powerful.102

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90. Baesler, 900 F.2d at 1195.
91. 470 U.S. 213.
92. Baesler, 900 F.2d at 1195 (quoting Dean Witter, 470 U.S. at 220).
93. Id.
94. Id.
95. Id. at 1195-96.
96. Id. at 1196.
98. Baesler, 900 F.2d at 1196.
99. Id.
100. Id.
101. Id.
102. Id.
V. COMMENT

Based on the smorgasbord of circuit court decisions, the issue of consolidation appears ripe for a writ of certiorari from the Supreme Court. However, in several cases, the parties applied for writ and the Supreme Court denied it.\textsuperscript{103} Such action by the Supreme Court seems to encourage the district courts to continue to exercise discretionary interpretation and use of privately negotiated arbitration agreements.\textsuperscript{104}

The Supreme Court has made it clear that arbitration should remain a viable alternative method for resolving disputes,\textsuperscript{105} and apparently is content to leave the predominately procedural issues, such as consolidation, up to the individual district courts to be decided on a case by case basis.\textsuperscript{106}

If it is not an impossible task, to extract some rhyme or reason out of seemingly conflicting decisions, it appears that agreements to arbitrate are to be enforced, pursuant to section 4 of the FAA.\textsuperscript{107} If the parties specifically provide for the manner of enforcement then these instructions are to be followed;\textsuperscript{108} if the parties do not specifically address issues such as consolidation, the courts will look at factors such as the nature of the agreement, the relationship between the parties, whether an implied agreement may be garnered either from the language in the agreement or the applicable state laws, and finally, the equitable concerns of the court regarding what each party has at stake in the enforcement or denial of consolidation.\textsuperscript{109}

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\textsuperscript{103} See Weyerhaeuser, 743 F.2d 635.
\textsuperscript{104} MacKellar, supra note 6, at 30.
\textsuperscript{105} See Dean Witler, 470 U.S. 213.
\textsuperscript{106} See Weyerhaeuser, 743 F.2d 635; Compania, 527 F.2d 966. The Supreme Court denied writs of certiorari in each case.
\textsuperscript{108} Baesler, 900 F.2d at 1195.
\textsuperscript{109} See Compania, 527 F.2d at 972-75; New England Energy, 855 F.2d at 2-3; Webb, 823 F.2d at 149-50.