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Consolidated Arbitration Proceedings:

A Michigan Federal Court Sets Forth A Framework For Determining Who Should Decide Whether A Consolidated Arbitration May Proceed

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Commentary

Consolidated Arbitration Proceedings: A Michigan Federal Court Sets Forth A Framework For Determining Who Should Decide Whether A Consolidated Arbitration May Proceed

By
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I. Introduction

When a ceding insurer seeks to institute a consolidated arbitration proceeding involving multiple reinsurers and/or multiple reinsurance agreements, who should decide whether a consolidated arbitration may proceed? The courts, a consolidated arbitration panel or separate arbitration panels for each reinsurer and/or reinsurance agreement?

In the recent unpublished decision of Dorinco Reinsurance Company v. ACE American Insurance Company, et al., No. 07-12622, 2008 U.S. Dist. LEXIS 4593 (E.D. Mich. Jan. 23, 2008), the U.S. District Court for the Eastern District of Michigan squarely addressed this question and set forth an analytical framework for determining *who* should decide whether a consolidated arbitration may proceed. Applying this framework, the court determined that two consolidated arbitration panels sought by the ceding insurer should decide the threshold question of consolidation, and hence directed the group of reinsurers to collectively appoint a single arbitrator to each of the two demanded panels to determine the sole issue of arbitration structure.

This article will explore the analytical framework applied by the district court to the consolidation question.[1]

II. The Nature Of The Dispute

In March 2007, Dorinco Reinsurance Company ("Dorinco"), a captive insurer of Dow Chemical Company ("Dow"), commenced two arbitration proceedings against a group of sixteen reinsurers to seek recovery of losses caused by Hurricane Katrina and Hurricane Rita to Dow's facilities located on the gulf coast of Texas and Louisiana.[2]

Dorinco served two arbitration demands — one for each hurricane — and alleged that the damage from each hurricane exceeded $50 million, the attachment point of reinsurance coverage provided by the group of reinsurers named in each of the two arbitration demands.[3] According to the district court's opinion, Dorinco settled the Hurricane Katrina claim for $157 million and the Hurricane Rita claim for $132.7 million.[4] The reinsurers disputed their obligation to reinsure the settlement amounts, causing Dorinco to demand arbitration.[5]

Previously, Dorinco had issued a policy that provided approximately $1.2 billion of coverage to Dow for its gulf coast facilities over the period from November 1, 2004 to November 1, 2005.[6] Subject to a $3 million policy deductible, Dorinco retained an initial layer of coverage up to $25 million and reinsured the next $25 million in coverage through a treaty reinsurance agreement with Swiss Re.[7]

As respects the remaining policy limits, Dorinco reinsured its liability through three layers of facultative reinsurance coverage secured by its broker, Marsh & McLennan Companies, Inc. ("Marsh").[8] The first

layer applied to losses between $50 and $150 million, the second layer covered losses between $150 and $800 million, and the third layer reinsured losses between $800 million and $1.2 billion.[9]

Within each layer of reinsurance, several different reinsurers agreed to reinsure a quota share percentage of the entire layer by executing separate Certificates of Facultative Reinsurance ("Certificate") or individual slip agreements prepared by Marsh.[10] Each of the Certificates annexed a "General Conditions" agreement, which included a common arbitration provision.[11] The arbitration provision stated in part:

> As a precedent to any right of action hereunder, if any dispute shall arise between the Company and the Reinsurer(s) with reference to the interpretation of this Certificate or their rights with respect to any transaction involved . . . , such dispute, upon the written request of either party, shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen. If either party refuses or neglects to appoint an arbitrator within thirty days after receipt of written notice from the other party requesting to do so, the requesting party may appoint two arbitrators.[12]

Relying upon the above arbitration provision, Dorinco served two arbitration demands on a group of sixteen reinsurers in the first layer of facultative coverage and requested that the reinsurers collectively appoint a single arbitrator as to each demand.[13]

In response, the reinsurers declined to appoint a single arbitrator.[14] Three of the named reinsurers — Allianz Insurance Company ("Allianz"), Swiss Re Frankona Reassurance Limited ("Swiss Re") and Scor Reinsurance Company ("Scor Re") — each demanded a separate arbitration proceeding.[15] Thirteen other reinsurers led by HDI Industrie Versicherung AG (collectively, "HDI") consolidated their efforts and sought single panels for the group.[16]

Thus, the reinsurers sought four panels for each dispute, or eight panels in total.[17] Unable to persuade the reinsurers to agree to two consolidated panels, Dorinco filed a petition to compel arbitration with the U.S. District Court for the Eastern District of Michigan.[18]

III. The Motions Before The Court

Within six weeks of commencing the federal court proceeding, Dorinco moved for summary judgment.[19] Through its motion, Dorinco sought an order determining that the arbitration provision unambiguously bound Dorinco and all reinsurers to resolve their disputes before two consolidated arbitration panels.[20] Alternatively, in the event the court found the arbitration provision to be ambiguous, Dorinco sought an order directing the parties to submit the consolidation issue to two panels, one for each hurricane.[21]

As support for its primary contentions, Dorinco submitted an affidavit from its in-house counsel, Gregory Smith, that affirmed "logistical complications" and "time constraints" required the parties to execute separate Certificates rather than a single Certificate.[22] Mr. Smith further affirmed that "industry custom and practice" supported Dorinco's interpretation of the arbitration provision.[23]

Shortly thereafter, several reinsurers filed motions with the court. First, Swiss Re filed a motion to hold Dorinco's motion for summary judgment in abeyance pending discovery of the contentions made in the Smith Affidavit.[24] Scor Re joined in this motion.[25] Second, Allianz moved to dismiss Dorinco's petition on grounds that Dorinco had not yet filed a proof of loss with Allianz, thus making Dorinco's petition unripe.[26]

On the same date as the Allianz filing, HDI filed its own motion for summary judgment.[27] The HDI motion sought the converse of the relief requested by Dorinco.[28] Specifically, HDI sought an order determining that the arbitration provision unambiguously mandated separate arbitration panels for each reinsurer.[29] Alternatively, HDI sought an order compelling the parties to appear before individual panels to decide the threshold issue of arbitration structure.[30]

In an unpublished opinion dated January 23, 2008, the court issued its ruling on the parties' motions.

IV. The Analytical Framework Applied By The Court

As discussed further below, an analysis of the district court's opinion reveals that the court applied the fol-

lowing five-step analytical framework to deciding the motions before it:[31]

1. Does the arbitration provision on its face *unambiguously* express the parties' intent with respect to the form of the arbitration, i.e., to have either a single arbitration panel or separate panels resolve a dispute?

2. If the answer to question 1 above is "yes," then, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), the court must enforce the terms of the parties' agreement and order the parties to submit to either a single arbitration panel or separate panels.

3. If the answer to question 1 above is "no," then, in accordance with the U.S. Supreme Court's plurality decision in Green Tree Financial Corp. v. Bazzle,[32] the court must yield to the arbitrators to decide the threshold question of consolidation.

4. If the answer to question 1 above is "no," in deciding whether to direct the parties to a single panel or separate panels to resolve the threshold question of consolidation, the court must craft an order that preserves the arbitrators' ability to actually decide the question.

5. Finally, whether the answer to question 1 above is "yes" or "no," assuming that a valid arbitration agreement exists and that it applies to the parties' dispute, discovery before the court should not occur, as the arbitrators, not the court, should resolve any questions concerning the interpretation of ambiguous terms.

Applying the above framework, the district court first concluded that the arbitration provision of the "General Conditions" agreement annexed to each individual Certificate did not unambiguously reflect the parties' intent to proceed to either a single arbitration panel or separate panels.[33] The court thus determined that Green Tree compelled the court to yield to the arbitrators on the threshold question of consolidation.[34]

Next, the court addressed whether to submit the consolidation issue to two consolidated panels or eight separate panels. Noting that the decision of a separate panel could necessarily preclude a consolidated panel, the court concluded that it must submit the arbitration structure question to two consolidated panels so as to preserve the arbitrators' ability to actually decide the question.[35]

Finally, as none of the parties contested the existence of a valid arbitration agreement or the applicability of such agreement to the disputes, the court determined that discovery before the court should not occur, as consideration by the court of matters outside the arbitration agreement would invade the arbitrators' authority.[36]

V. Discussion Of Framework Applied By The Court

In formulating the above analytical framework, several factors appear to have influenced the district court's approach. These factors include (1) the statutory directives of the FAA, (2) the application of the Supreme Court's plurality decision in Green Tree, and (3) the court's stated commitment to preserving the arbitrators' ability to actually decide the threshold issue of consolidation. A further discussion of the court's application of these factors follows.

A. The FAA

The district court began its analysis of the consolidation issue by reviewing the applicable section of the FAA. Section 4 of the FAA provides in relevant part:

> 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 . . . *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*.[37]

Section 4 of the FAA, the court explained, "empowers" the "court to order a party to an arbitration agreement to submit to the arbitration *in accordance*

with the terms of the agreement."[38] Citing the Supreme Court's decision in Volt Information Sciences, Inc. v. Board of Trustees,[39] the district court further noted that the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[40]

Applying the statutory directives of the FAA, the court concluded that it necessarily possessed the authority to decide the question of arbitration structure if the arbitration provision "unambiguously expresse[d] the parties' intent with respect to form."[41]

As noted above, however, the court did not find such an unambiguous expression of the parties' intent as to the form of the arbitration on the face of the arbitration provision agreed to by the parties. In view of this determination, the court concluded that Green Tree compelled the court to yield the question of arbitration structure to the arbitrators.[42] Green Tree, the court noted, "directs that the ambiguity be resolved in arbitration and not by this Court."[43]

B. Green Tree

In Green Tree v. Bazzle, a plurality of the U.S. Supreme Court held that an arbitrator, and not a court, should have decided whether an arbitration agreement between Green Tree Financial Corp. and a named customer precluded class arbitration.[44] Justice Breyer's plurality opinion explained in part:

> In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clear and unmistakable" evidence to the contrary). . . . They include certain gateway matters, such as [1] whether the parties have a valid arbitration agreement at all or [2] whether a concededly binding arbitration clause applies to a certain type of controversy.
>
> 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. . . . [T]he 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.[45]

In Dorinco, the district court applied Justice Breyer's opinion as controlling authority. Indeed, without acknowledging the plurality nature of the opinion, the court concluded:

> [T]he Green Tree decision makes clear that a court's primary purpose is to determine the [1] validity and [2] applicability of the arbitration provision. All other matters of interpretation are reserved for the arbitrators. Thus, where the parties dispute the provision's intent regarding the form of the arbitration, the Court may only determine whether the provision unambiguously expresses the parties' intent with respect to form. If the Court finds the parties' intent with respect to form ambiguous, then Green Tree compels the Court to yield to the arbitrators because such a determination stretches beyond the Court's authority in this context.[46]

The district court's application of Green Tree had at least a two-fold effect. First, because the question of arbitration structure did not involve either of the two "gateway matters" recognized in Green Tree, i.e., (1) the validity of the arbitration agreement, or (2) its applicability to the disputes, the court determined that the arbitrators, and not the court, must resolve any ambiguities as to arbitration structure.[47]

Second, because it was the function of the arbitrators to resolve any such ambiguities, the court determined that discovery need not proceed in the federal court action.[48] The court explained, "[a]ny questions concerning interpretation of ambiguous terms is an issue for the arbitrator. Court ordered discovery into the parties' intent or circumstances surrounding the agreement would intrude upon the arbitrators' domain."[49]

As evidenced above, the district court relied almost exclusively on Green Tree in support of its holding

that the arbitrators, and not the court, should resolve questions of arbitration structure where the arbitration provision does not unambiguously reflect the parties' intent as to form. Because Justice Breyer issued a plurality opinion in Green Tree, however, questions may arise on appeal whether the district court properly relied on Green Tree.[50]

In response, proponents of the district court's opinion in Dorinco will likely cite to at least three post-Green Tree decisions of the U.S. Courts of Appeals.

First, in Employers Insurance Company of Wausau v. Century Indemnity Company,[51] the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's order directing the parties to appear before a consolidated arbitration panel, to which the parties could address the consolidation issue. In affirming the district court's order, the Seventh Circuit concluded that the U.S. Supreme Court's opinion in Howsam v. Dean Whitter Reynolds, Inc.[52] provided grounds independent of Green Tree to support the district court's determination.[53]

In Howsam, which involved a question of whether an arbitrator or a court should apply a NASD time-limit rule for submitting controversies to arbitration, the U.S. Supreme Court held that "*procedural questions* which grow out of the dispute and bear on its final disposition [such as the time limit rule] are presumptively *not* for the judge, but for an arbitrator, to decide."[54] Applying Howsam, the Seventh Circuit concluded that the issue of consolidation fell within the bailiwick of "procedural issues" presumptively reserved for the arbitrators to decide.[55]

Similarly, in Certain Underwriters at Lloyd's, London v. Westchester Fire Insurance Company,[56] the U.S. Court of Appeals for the Third Circuit affirmed a district court's order directing the parties to proceed to consolidated arbitration panels before which the reinsurers could raise the consolidation question. Like the Seventh Circuit, the Third Circuit characterized the consolidation issue as a "procedural one" which the parties should resolve in arbitration.[57] Going one step further than the Seventh Circuit, the Third Circuit also concluded that Justice Stevens' concurring opinion in Green Tree provided a "common denominator" in support of the judgment in the Green Tree decision, namely, that Howsam "arguably" compels the conclusion that "the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than [by] the court."[58]

Lastly, in Certain Underwriters at Lloyd's London v. Cravens Dargan & Company,[59] the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's order requiring the reinsurer-appellants to appoint a single arbitrator and to present their "multiple arbitrations theory" to the single panel. In a brief opinion, the Ninth Circuit concluded that the district court's determination was "consistent with Howsam's instruction that courts should decide gateway issues, but leave procedural issues to the arbitrator."[60]

C. Preserving The Consolidation Issue For The Arbitrators

Perhaps the most contentious issue of the district court's determination in Dorinco involved its decision to refer the consolidation question to the two consolidated panels sought by Dorinco, rather than to the eight separate panels sought by the reinsurers. Both the reinsurers and Dorinco advanced significant arguments on the matter.

In seeking eight separate panels, the reinsurers contended that the U.S. Court of Appeals for the Sixth Circuit — the immediate appellate authority for Michigan federal district courts — had previously resolved the issue in American Centennial Insurance Company v. National Casualty Company.[61] In American Centennial, the Sixth Circuit held that a "district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is *silent* regarding consolidation."[62] The appellate court thus affirmed the district court's order denying the petitioner's motion to compel respondents to "proceed with a single consolidated arbitration."[63]

In reply to the reinsurers' contentions, Dorinco argued that Green Tree "represent[ed] a change in the law since American Centennial was decided."[64] Under Green Tree, Dorinco argued, the court must "leave questions of ambiguous or silent contractual provisions to the arbitrator to resolve."[65]

In an effort to further support its position, Dorinco relied upon the U.S. District Court for the District of New Jersey's opinion in Markel International Insur-

ance Company v. Westchester Fire Insurance Company,[66] where the court concluded that "*principles of efficiency* strongly favor a single arbitration panel's determination of whether consolidation is appropriate," for "[r]equiring multiple panels . . . would likely result in strategic behavior that would only serve to frustrate a resolution of the parties' dispute."[67]

Weighing these competing arguments by the reinsurers and Dorinco, the district court ultimately decided that the two consolidated panels sought by Dorinco should decide the question of arbitration structure, but for reasons not entirely consistent with the above arguments advocated by Dorinco.

Indeed, as an initial matter, the district court concluded that, on the facts before it, the court could read Green Tree consistent with American Centennial for the proposition that arbitrators, and not the courts, should resolve questions as to the structure of arbitration.[68] The more narrow question, as the district court framed the issue, was how to "assure that arbitrators do resolve the question" of arbitration structure.[69]

Addressing the Markel decision, the district court also noted its reservations in making "principles of efficiency" the controlling grounds for its determination.[70] As the court explained, the problem with entertaining consideration of "principles of efficiency" is that it involves the court, and not the arbitrators, in the interpretation of the arbitration provision, which arguably might have principles of efficiency written into the provision.[71] Green Tree, the court noted, sought to remove the courts from involvement with those issues.[72]

Rather than interpreting the arbitration provision, the district court viewed its mandate as one of "preserving the arbitrators' ability to actually decide the question" of arbitration structure.[73] In this instance, the court found that directing the parties to arbitrate the question of consolidation before separate panels might impede the arbitrators' ability to actually decide the question, for if "any one panel decides that separate panels are warranted, a consolidated panel is necessarily precluded."[74]

Thus, the district court concluded that ordering the parties to "submit the question of the structure of the arbitration to the [consolidated] arbitration panels demanded by Dorinco advance[d] the principle emphasized by Green Tree that it is arbitrators that should determine the structure of the parties' arbitration clause absent clear guidance in the parties' contract."[75]

VI. Conclusion

The district court's opinion in Dorinco sets forth an analytical framework for addressing consolidation issues that arise in connection with demands for multi-party and/or multi-contract arbitrations. The court structured this framework around the guiding principle that arbitrators, and not the courts, should decide questions of arbitration structure where the arbitration provision does not unambiguously express the parties' intent as to the form of the arbitration.

Applying this principle, and finding that the arbitration provision at issue did not unambiguously reflect the parties' intent as to the form of the arbitration, the court concluded that directing the parties to submit the consolidation issue to two consolidated panels requested by Dorinco rather than to eight separate panels sought by the reinsurers best preserved the arbitrators' ability to actually decide whether consolidated arbitrations should proceed.

Endnotes

1. In a Stipulated Order dated March 25, 2008, the district court stayed the court's prior order requiring reinsurers to collectively appoint a single arbitrator to each of the two demanded panels pending a ruling by the U.S. Court of Appeals for the Sixth Circuit on certain reinsurers' motion for a stay pending appeal. Stipulated Order Amending February 22, 2008 Order To Extend Date For Appointment Of Arbitrator, Dorinco Reins. Co. v. ACE Am. Ins. Co., et al., No. 07-12622 (E.D. Mich. Mar. 25, 2008) (Ludington, J.).

2. Dorinco Reins. Co. v. ACE Am. Ins. Co., et al., No. 07-12622, 2008 U.S. Dist. LEXIS 4593, **2-3, 10-11 (E.D. Mich. Jan. 23, 2008).

3. Id.

4. Id. at *11.

5. Id.

6. Id. at **2-3.

7. Id. at *7.

8. Id. at **7-8.

9. Id.

10. Id. at **8-10.

11. Id. One reinsurer — XL Insurance (Bermuda) Ltd. ("XL Insurance") — deleted the arbitration provision contained in the "General Conditions" agreement, and substituted a separate arbitration clause requiring a London-based three-member panel to decide disputes applying New York law. See Dorinco's Petition To Enforce Arbitration Agreement Through Appointment Of An Arbitrator Or Compelled Arbitration Of The Question Of Consolidation ("Dorinco Petition"), Dorinco Reins. Co. v. ACE Am. Ins. Co., et al., No. 07-12622, ¶ 34 (E.D. Mich. filed June 20, 2007). Dorinco, consequently, did not include XL Insurance in its consolidated arbitration demands or name XL Insurance as a respondent in Dorinco's petition to compel arbitration. See id. at p. 1 and Exhs. R & S.

12. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at **8-9. The individual slip agreements executed by five of the sixteen reinsurers incorporated the same arbitration provision. Id. at *10.

13. Id. at **2-3, 11; see also Dorinco Petition, supra, at p. 1 and Exhs. R & S.

14. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at *11.

15. Id.

16. Id.

17. Id. at **11-12.

18. See Dorinco Petition, supra, at pp. 1-2.

19. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at *12.

20. Id. at **3-4, 11-12, 19.

21. Id. at *26.

22. Id. at *12; see also Affidavit of Gregory E. Smith, Dorinco Reins. Co. v. ACE Am. Ins. Co., et al., No. 07-12622, ¶¶ 10, 35 (E.D. Mich. filed July 26, 2007).

23. Id.

24. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at **4, 12-13.

25. Id. at *4.

26. Id. at *7.

27. Id. at *12.

28. Id. at **12-13.

29. Id.

30. Id.

31. The district court did not rule upon the merits of Allianz's motion to dismiss, as counsel to Dorinco and Allianz apparently advised the court that the motion may be premature. See id. at **31-32.

32. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

33. Among other reasons for this conclusion, the court found that the arbitration agreement's use of the term "Reinsurer(s)" in the plural reasonably supported two different interpretations: on the one hand, it demonstrated the parties' intent to bind all reinsurers to a single arbitration panel as all reinsurers named in the arbitration demands executed certificates or slip agreements subject to an identical arbitration provision; on the other hand, the use of the term "Reinsurer(s)" equally supported an interpretation that the arbitration provision only bound those signatories to each individual certificate. See Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at **19-23.

34. Id.

35. Id. at **29-31.

36. Id. at **23-26.

37. 9 U.S.C. § 4 (emphasis added); see also id. § 206 ("A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement . . . .").

38. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at *15 (emphasis added).

39. Volt Info. Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468 (1989).

40. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at *15 (citing Volt Info. Sciences, supra, 489 U.S. at 478).

41. Id. at **15, 18-19, 23.

42. Id. at **18-23.

43. Id. at *23.

44. Green Tree, supra, 539 U.S. at 453.

45. Id. at 452-53 (emphasis in original) (internal citations omitted).

46. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at **18-19.

47. Id. at **18-23.

48. Id. at **25-26.

49. Id.

50. As further discussed below, see infra n.58 and accompanying text, in Green Tree, Justice Stevens authored a short concurrence, providing the fifth vote for the plurality's judgment. See Green Tree, supra, 539 U.S. at 454-55 (Stevens, J., concurring in judgment and dissenting in part). As to the precedential effect of a plurality opinion, the U.S. Supreme Court has stated, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977).

51. Employers Ins. Co. of Wausau v. Century Indem. Co., 443 F.3d 573 (7th Cir. 2006).

52. Howsam v. Dean Whitter Reynolds, Inc., 537 U.S. 79 (2002).

53. Employers Ins. Co. of Wausau, supra, 443 F.3d at 581.

54. Howsam, supra, 537 U.S. at 84-85 (emphasis added) (internal citations omitted).

55. Employers Ins. Co. of Wausau, supra, 443 F.3d at 581.

56. Certain Underwriters at Lloyd's, London v. Westchester Fire Ins. Co., 489 F.3d 580 (3d Cir. 2007).

57. Id. at 590.

58. Id. at 586 n.2 (citing Green Tree, supra, 539 U.S. at 455); see also Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. Of Texas, Inc., 343 F.3d 355, 358-59 (5th Cir. 2003) ("Justice Stevens did express his agreement, however, with the principle laid down by the plurality that arbitrators should be the first ones to interpret the parties' agreement. As a result, the plurality's governing rationale in conjunction with Justice Stevens's support of that rationale substantially guides our consideration of this dispute."). But cf. Certain Underwriters at Lloyd's, supra, 489 F.3d at 581 (concluding that because it was only "likely" "that Justice Stevens agreed with the plurality that an arbitrator should be the first to interpret the agreements," the identification of "a controlling rationale" in Green Tree would be too presumptuous).

59. Certain Underwriters at Lloyd's London v. Cravens Dargan & Co., Nos. 05-56154, 05-56269, 2006 U.S. App. LEXIS 20853 (9th Cir. 2006).

60. Id. at **5-6. Proponents of the district court's order in Dorinco will also likely point to the U.S. Court

of Appeals for the First Circuit's decision in Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, 321 F.3d 251, 254-55 (1st Cir. 2003), where the First Circuit relied upon Howsam, supra, to conclude that the arbitrator, and not the court, should decide if arbitrations can be consolidated.

61. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at **26-27 (citing Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107 (6th Cir. 1991)).

62. Am. Centennial Ins. Co., supra, 951 F.2d at 108 (emphasis added).

63. Id. at 107-08.

64. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at *27.

65. Id. at *28.

66. Markel Int'l Ins. Co. v. Westchester Fire Ins. Co., 442 F. Supp.2d 200 (D.N.J. 2006).

67. Id. at 204 (emphasis added).

68. Dorinco Reins. Co., supra, 2008 U.S. Dist. LEXIS 4593, at **27-28.

69. Id. at *28.

70. Id. at **29-30.

71. Id.

72. Id. at *30.

73. Id. at **30-31.

74. Id.

75. Id. at *31. ■

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