

Supreme Court and Appellate Alert

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Arbitration Agreements Can Control Who Decides Arbitrability: Arbitrator or Court

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Key Points

- The Supreme Court held that, under the Federal Arbitration Act (FAA), courts must enforce arbitration contracts according to their terms, including provisions authorizing arbitrators to decide “gateway” questions of arbitrability.
- The Court also held that there is no exception to this rule when a party contends that an arbitration demand is wholly groundless.

Background

Archer & White Sales, Inc., a dental equipment distributor, sued competitor Henry Schein, Inc., alleging violations of the Sherman Antitrust Act and various parallel state laws, and seeking monetary damages and injunctive relief.

Schein moved to compel arbitration. Archer opposed on the grounds that the arbitration agreement exempted actions seeking injunctive relief. Schein responded that the “main thrust” of the litigation was for monetary damages, so the matter was subject to arbitration.

The 5th Circuit’s Opinion

The question raised is one of “arbitrability”—Is the dispute subject to arbitration or not? The 5th Circuit applies a two-part test. The first step is to determine whether the parties had a clear and unmistakable agreement to arbitrate the claims at issue. If they did, then the motion to compel arbitration is granted in “almost all cases.” However, the second step is to determine whether the argument that the claim is arbitrable is “wholly groundless.” If it is, then the court should decide the question of arbitrability.

The Fifth Circuit found that the argument that the claim at issue was within the scope of the arbitration agreement was “wholly groundless,” so the court should decide arbitrability.

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The U.S. Supreme Court’s Opinion

In a unanimous opinion written by Justice Kavanaugh (his first written opinion on the Court), the Supreme Court reversed. The Court reasoned, “We must interpret the [FAA] as written, and the [FAA] in turn requires that we interpret the contract as written. When the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract.”

Archer made several arguments in favor of having courts deciding arbitrability—the Court rejected all of them:

First, Archer argued that courts should always decide “threshold” questions of arbitrability (never arbitrators). The Court found that that argument had already been rejected in *Rent-A-Center, West, Inc. v. Jackson*¹ and *First Options of Chicago, Inc. v. Kaplan*.²

Second, Archer argued that §10 of the FAA—which provides for judicial review of an arbitrator’s decision if an arbitrator has “exceeded” his or her “powers”—supports the conclusion that the court should also be able to say that the underlying issue is not arbitrable at the outset. The Court found that this interpretation was inconsistent with the way Congress wrote the FAA and declined to “rewrite” it.

Third, Archer argued that it would be wasteful to send “wholly groundless” arbitration demands to arbitrators. However, the Court recognized that the FAA itself does not have a “wholly groundless” exception and declined to “engraft its own exceptions onto the statutory text.”

Finally, Archer argued that this exception is necessary to deter “wholly groundless” motions to compel arbitration. The Court rejected this policy argument, finding that it overstates the problem because arbitrators are capable of efficiently disposing of frivolous cases and deterring frivolous motions, including imposing fee-shifting and cost-shifting sanctions.

The Court remanded for determination of whether the contract, in fact, delegated issues of arbitrability to an arbitrator.

Conclusion

The lesson of *Schein* is that the terms of arbitration agreements matter. You must make it clear whether you want an arbitrator or court to decide an issue, including whether a dispute is arbitrable.

¹ 561 U.S. 63, 67-70 (2010) (Arbitration is a matter of contract, and courts must enforce arbitration contracts as written.).

² 514 U.S. 938, 943-44 (1995) (Parties may agree to have an arbitrator decide not only the merits of a particular dispute, but also “gateway” questions of “arbitrability,” such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy).