Kavanaugh's First Supreme Court Opinion Rejects "Wholly Groundless" Exception to Arbitrability

By Robert Tomilson, Scott B. Galla / Jan 10, 2019

On January 8, 2019, a unanimous Supreme Court held that a court may not decide gateway issues of arbitrability where the parties' contract explicitly provides for an arbitrator to decide those issues. In *Henry Schein, Inc. v. Archer & White Sales, Inc.* (No. 17-1272), the court rejected the "wholly groundless" exception that courts in some jurisdictions use to decide arbitrability despite a contract's express delegation of this role to an arbitrator where the argument for arbitration is "wholly groundless." The Court reasoned that the Federal Arbitration Act ("FAA") does not provide for this exception, and remanded the case back to the Fifth Circuit Court of Appeals to determine whether the contract, in fact, delegated arbitrability to an arbitrator.

In the underlying commercial dispute, a dental equipment distributor alleged antitrust claims against other manufacturers and distributors, seeking both injunctive relief and monetary damages. Defendants moved to compel arbitration under a contract clause that did not apply to "actions seeking injunctive relief" and called for governance under the American Arbitration Association ("AAA") rules. The AAA rules, in turn, delegate threshold decisions of arbitrability to an arbitrator rather than a court of law.

A Federal District Court in Texas ruled, and the Fifth Circuit Court of Appeals affirmed, that the district court could determine the threshold issue of arbitrability despite the arbitration clause's purported delegation of this role to an arbitrator because the defendants' argument that the dispute was subject to arbitration was "wholly groundless." Prior to this ruling, Circuit Courts of Appeals were divided on whether this so-called "wholly groundless" exception applied in light of the FAA's mandate to enforce arbitration provisions as written.

Relying on the terms of the FAA and precedent under *Rent-A-Center, West, Inc. v. Jackson*, the *Schein* court held that there is no "wholly groundless" exception, and that an arbitrator enjoys jurisdiction to decide gateway issues of arbitrability when the arbitration clause so delegates that authority. In throwing out the "wholly groundless" exception, the court's ruling also rejected appellee's arguments that (i) a court should always resolve questions of arbitrability (as contradicted by *First Operations of Chicago, Inc. v. Kaplan*); and (ii) the FAA's provision of *post hoc* review of arbitration decisions implies ex ante review of the same (because the FAA, by design, only provides for limited *post hoc* review).

This clearly-written and succinct opinion was the first authored by Justice Brett Kavanaugh since he replaced Retired Justice Anthony Kennedy last October. At only eight pages in length, it met with Supreme Court tradition whereby newly-appointed justices draft opinions involving politically neutral, non-contentious, and narrow issues. This mostly expected ruling provides a narrow win for businesses seeking to avoid the cost and potentially aberrant jury verdicts possible with traditional litigation.

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