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CLIENT ALERT

Supreme Court Holds that Arbitrator Must Decide Arbitrability if the Contract So Provides

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This morning, the Supreme Court issued another in a long string of decisions underscoring its willingness to honor the choice by contracting parties to agree in advance to arbitrate their disputes. In *Schein v. Archer & White*, No. 17-1272, the Court held unanimously that if a contract reflects the parties' agreement to have the arbitrator decide issues of arbitrability, a court may not override that agreement, even if it believes that the claim of arbitrability is "wholly groundless." The decision—the first authored by Justice Kavanaugh—resolves a split in the circuits as to whether this "wholly groundless" exception is consistent with the Federal Arbitration Act ("FAA"). In rejecting this exception, the decision forecloses the ability of courts to determine threshold questions of arbitrability when a contract unmistakably refers such decisions to the arbitrator.

The case arose when Archer & White, a small dental equipment business, alleged violations of state and federal antitrust law against Henry Schein, Inc., a dental equipment manufacturer with whom Archer & White had entered into a contract. The contract provided that any dispute, except those seeking injunctive relief or those related to Schein's intellectual property, would be resolved by binding arbitration in accordance with the rules of the American Arbitration Association ("AAA"). After Archer & White filed its complaint, Schein moved to compel arbitration. Archer & White argued that the dispute was not subject to arbitration because the complaint sought injunctive relief (at least in part). Although the rules of the AAA provide that arbitrators have the power to decide arbitrability questions, the district court, relying on Fifth Circuit precedent, ruled that Schein's argument for arbitration was "wholly groundless" and denied the motion to compel. The Fifth Circuit affirmed, and the Supreme Court granted certiorari to resolve a circuit split over the "wholly groundless" exception.

The Supreme Court disagreed with the Fifth Circuit, holding that such an exception is contrary to both the text of the FAA and the Court's own precedent. Under the FAA, parties to a contract may agree to have the merits of a particular dispute, as well as threshold questions of arbitrability, decided by an arbitrator. This necessarily means that when a "contract delegates the arbitrability question to an arbitrator, a court may not override the contract" regardless of whether the argument for arbitration is "wholly groundless." The same conclusion follows from the Court's precedent, which holds that a court may not "rule on the potential merits of [an] underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous." The Court concluded that the same is true of questions of arbitrability.

In so holding, the Court rejected Archer & White's various arguments in favor of the "wholly groundless" exception. First, Archer & White contended that the FAA requires a court to compel arbitration only after being satisfied that the issue is "referable to arbitration" under the contract. In response, the Court noted that the FAA clearly allows questions of arbitrability to be delegated to an arbitrator, as described above. Second, Archer & White argued that the FAA provides for back-end judicial review of an arbitrator's decision—including whether the issue itself was arbitratable in the first place. The Court rejected this argument as well, based on precedent holding that courts may not resolve the merits of claims assigned to an arbitrator, even when it believes those claims are frivolous. Finally, Archer & White asserted that referring a wholly groundless question of arbitrability to an arbitrator would be a waste of time and resources and that the exception deterred frivolous motions to compel. These policy arguments, however, did not persuade the Court to "engraft [its] own exceptions onto the statutory text" of the FAA.

The Court ultimately expressed no view as to whether the contract in question did in fact delegate the arbitrability question to an arbitrator, as the Fifth Circuit had not decided the issue. On remand, the courts will need to decide whether the contract provides "unmistakable evidence" of an agreement to grant arbitrators the ability to decide questions of arbitrability. And in the meantime, the Court's decision will reassure contracting parties who prefer arbitration that threshold questions of arbitrability—even those that are wholly groundless—will be decided by an arbitrator and not a court.

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