SCOTUS Punts Question Of Who Decides Arbitrability, Leaving 5th Circuit Decision To Stand

Insights
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The U.S. Supreme Court just refused to address the question of whether a carve-out in an arbitration agreement exempting certain claims from arbitration also exempts those claims from the agreement's delegation of arbitrability to an arbitrator, dismissing a case it had originally agreed to rule upon. In the January 25 one-sentence order in *Henry Schein Inc. v. Archer and White Sales Inc.*, the Court dismissed the case as improvidently granted, declining to substantively opine on the matter and letting the 5th Circuit Court of Appeals holding stand. The upshot for employers? For now, employers may look to the 5th Circuit's decision for guidance on their ability to craft the scope of arbitration agreements in view of the presumption for arbitrability. Employers in the 5th Circuit (Texas, Louisiana, and Mississippi) should familiarize themselves with the ruling in order to ensure that the organization's arbitration agreements reflect the employer's choice of "who decides" whether a case is arbitrable.

Legal Landscape: What Is Arbitrability?

Most people are aware that parties to an agreement can agree to privately arbitrate a dispute. But what happens when there is a question about whether the dispute itself is subject to the arbitration agreement?

The first step in answering questions of arbitrability is to consult the contract. Does the contract state who gets to decide questions of arbitrability? If the parties' contract is silent on the issue, arbitrability is decided by the court. However, when the parties explicitly agree in their contract to delegate questions of arbitrability to an arbitrator, then such decisions are to be made by the arbitrator, not the court.

Prior to 2019, some federal courts created an exception to this rule, allowing the court to decide questions of arbitrability even when the parties had agreed to delegate such questions to an arbitrator. Under this exception, the court would "spot check" the contract to see if the claim was obviously excluded from arbitration under the agreement, making the claim of arbitrability "wholly groundless." If the court found there were no plausible grounds for arbitrability, then the request to arbitrate would be denied, largely based on the premise that compelling arbitration of a claim that was plainly inarbitrable — just for an arbitrator to make that very decision — made no sense. If the court found that there were plausible arguments in favor of arbitration, then the court would compel arbitration.

arbitration.

The Supreme Court Rejects The "Wholly Groundless" Exception

In January 2019, the Supreme Court rejected the validity of the "wholly groundless" exception in its first look at *Henry Schein, Inc. v. Archer and White Sales, Inc.*, a case involving who decides whether Archer's claim for injunctive relief is arbitrable: the court or an arbitrator. The agreement in question undeniably excludes "actions seeking injunctive relief" from the scope of the arbitration provision — but the agreement separately incorporates the American Arbitration Association's rules, which designate the question of "who decides if a claim is arbitrable" to an arbitrator.

When sued by Archer, Schein moved to compel arbitration. Archer opposed the motion on the grounds that, because its lawsuit included a claim for injunctive relief, it was not covered by the arbitration agreement and therefore should not be referred to an arbitrator. Schein countered by arguing that even if the claim were excluded by the injunctive relief carve-out, the parties had agreed that arbitrability questions were to be delegated to an arbitrator. The trial court, and subsequently the 5th Circuit Court of Appeals, ultimately agreed with Archer and refused to compel arbitration because such a claim was "wholly groundless" due to the carve-out for claims involving injunctive relief. On appeal, the Supreme Court reversed, eliminating the "wholly groundless" exception and remanding the case back to the 5th Circuit to decide whether there had been a clear delegation of arbitrability.

The Supreme Court's Remand: Was Arbitrability Delegated To An Arbitrator?

On remand, the 5th Circuit considered whether the delegation clause demonstrated a "clear and unmistakable" intent to have the arbitrator decide whether a given claim must be arbitrated. The 5th Circuit again refused to compel arbitration, reasoning that, "the most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules. The plain language incorporates the AAA rules – and therefore delegates arbitrability – for all disputes *except* those under the carve-out." Thus, lacking a clear intent to delegate arbitrability, the 5th Circuit determined that the authority to decide arbitrability of the excepted claim was not delegated to an arbitrator.

SCOTUS Was To Have The Final Say – But Punted

Schein once again appealed the 5th Circuit's decision to the Supreme Court, arguing that because there was a general delegation clause in the AAA rules, an arbitrator should decide all questions of arbitrability, regardless of whether certain claims were outside the scope of the arbitration agreement. After SCOTUS initially accepted certiorari, it appeared that employers throughout the country would gain clarity on the limits on their ability to contract whether specific claims were subject to delegations of decisions of arbitrability.

However, SCOTUS's decision this week leaves that question to the lower courts, with the 5th Circuit's holding now standing as persuasive precedent that courts will not compel arbitration when parties' contracts exclude certain claims from delegations of arbitrability.

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What Employers Need To Know

What does it mean for employers? Especially if you have operations in Texas, Louisiana, and Mississippi, you may want to review and revise your arbitration agreements with your employment counsel to include clear and unmistakable language delegating any dispute about the arbitrability of a given issue to an arbitrator. If there are any claims you do not want subject to arbitration, you should include such carve-outs in your arbitration agreement. Updating your arbitration agreements now will ensure that you can guarantee your desired claims are heard in your preferred venue, whether with an arbitrator or court.

You should continue to review Fisher Phillips legal alerts for further updates regarding this issue, as various state law initiatives are bubbling up across the country seeking to counter the ever-growing reach of arbitration agreements. You can subscribe to our legal alerts here, and you can always reach out to your Fisher Phillips attorney for questions.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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