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GROUNDED! SUPREME COURT REJECTS LOWER COURTS' ABILITY TO AXE ARBITRATION AGREEMENTS

Insights
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In a unanimous opinion issued today, the United States Supreme Court continued its expansive reading of the Federal Arbitration Act and arbitration provisions, rebuffing an effort by some to erect an additional hurdle that would interfere with an employers' ability to enforce arbitration agreements (*Henry Schein Inc. v. Archer and White Sales Inc.*). By rejecting the "wholly groundless" exception that courts had used to "spot-check" whether a claim of arbitrability was plausible before compelling arbitration, all lower federal courts must now compel arbitration in all cases where the parties have agreed to delegate the issue of "who decides what is arbitrable" to an arbitrator.

The Court's decision—the first authored by Justice Brett Kavanaugh—extinguishes a conflict among various circuit courts of appeal and provides uniform guidance to employers who use arbitration agreements throughout the country. Employers should familiarize themselves with the ruling in order to ensure that their dispute resolution plans are fully compliant and in line with today's decision.

LEGAL LANDSCAPE: SPOT-CHECKING THE AGREEMENT

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? In most circumstances, this gateway issue is for a court to decide. However, parties may also agree that an arbitrator will decide whether the dispute is arbitrable.

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In those instances, the Supreme Court had previously held in 2010 that "an agreement to arbitrate a gateway issue is simply an additional, antecedent agreement . . . and the Federal Arbitration Act (FAA) operates on this additional arbitration agreement just as it does on any other" (*Rent-A-Center, West, Inc. v. Jackson*). In plain English: the federal policy in favor of enforcing arbitration agreements applies with full-force to the parties' delegation of arbitrability to an arbitrator.

Nevertheless, some federal courts of appeals developed a workaround where they would "spot-check" the parties' claims and the arbitration agreement to ensure that the claim of arbitrability was not "wholly groundless." If there were plausible arguments in favor of arbitration, the inquiry ended and the court compelled arbitration.

If, however, a party's claim was wholly groundless—such that it was clear that the arbitration agreement did not apply to the legal claims at issue—the court could deny the request to compel arbitration, and ignore the parties' agreement to delegate the arbitrability issue to an arbitrator. This escape valve was designed to avoid the inefficiencies of compelling arbitration of an issue that was clearly not arbitrable.

HOW DID WE GET HERE?

Henry Schein, Inc. manufactures and distributes dental equipment throughout the United States. In 2012, Archer and White Sales sued Henry Schein based on alleged violations of antitrust law. Archer and White sought monetary damages and injunctive relief. As part of the parties' business dealings, Archer and White had executed an arbitration agreement that stated "any dispute arising under or related to this Agreement (except for actions seeking injunctive relief) . . . shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." The rules of the American Arbitration Association require disputes about "who decides if a claim is arbitrable" to be decided by an arbitrator.

Henry Schein moved to compel arbitration. Archer and White opposed the motion on the grounds that, because their lawsuit included a claim for injunctive relief, it was not covered by the arbitration agreement and therefore should not be referred to an arbitrator. Henry Schein countered by

arguing that even if the claim was excluded by the injunctive relief carve-out, the parties had agreed that arbitrability questions were to be delegated to an arbitrator. The lower court ultimately agreed with Archer and White and refused to compel arbitration because such a claim was "wholly groundless" due to the carve-out for claims involving injunctive relief.

The 5th Circuit Court of Appeals agreed, as it had previously endorsed the "wholly groundless" exception. As the court noted, "we see no plausible argument that the arbitration clause applies to an 'action seeking injunctive relief.'" Instead, Henry Schein's argument to have the arbitrator decide that issue was "wholly groundless" and the court refused to grant its motion to compel.

SCOTUS HAS THE FINAL SAY

In keeping with its recent interest in defining the contours of the FAA, the Court accepted the case to clear up the conflict among the circuit courts. A unanimous Court reiterated that it meant what it said in the *Rent-A-Center* case and that the parties are certainly free to delegate issues of arbitrability to an arbitrator: "The FAA does not contain a 'wholly groundless' exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President." The Court went further and confirmed it saw no reason to "engraft our own exceptions onto the statutory text."

According to today's decision, once a court determines that such a delegation has been made, it should compel arbitration—as nothing in the FAA empowers a court to make a determination as to the merits of the arbitrability dispute. Even the "spot-check" provided by the "wholly groundless" exception runs counter to unambiguous Supreme Court precedent that lower courts may not "delve into the merits of a dispute." To hold otherwise, the Court said, would diminish the fact that "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."

WHAT EMPLOYERS NEED TO KNOW

All in all, the Supreme Court's ruling involves a technical issue concerning who decides the arbitrability of certain disputes. Where the parties elect to delegate the arbitrability

issue to an arbitrator, the courts must respect that decision —even where it is clear on the face of the lawsuit that such claims are not arbitrable. This, the Court held, "is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless."

There's a double dose of good news for employers in today's *Henry Schein* ruling. First off, the decision clears up conflicting case law in the various circuits, and employers now know there is a uniform interpretation as to the enforceability of parties' delegations of arbitrability to an arbitrator. Second, the decision sweeps aside a possible hurdle that might have otherwise existed in trying to enforce an arbitration agreement with your employees.

You may want to review and revise your arbitration agreements to include clear and unmistakable language delegating any dispute about the arbitrability of a given issue to an arbitrator. Doing so now will ensure that you can guarantee that the issue is heard before an arbitrator, and not a court.

The Supreme Court's ruling in this case is in line with a number of arbitration related cases decided over the past two decades in favor of a broad and expansive reading of the Federal Arbitration Act. 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.

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