PRACTICE POINTS

Supreme Court Eliminates "Wholly Groundless" Exception

By John Haarlow, Jr. – June 12, 2019

Courts normally decide threshold arbitrability questions, such as whether a particular dispute is covered by the parties' arbitration agreement. However, the parties can delegate such questions to the arbitrator. Even then, some federal courts have denied motions to compel arbitration when they view the argument that a dispute is covered by an arbitration agreement to be "wholly groundless." In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. __ (2019), the Supreme Court held that the "wholly groundless" exception is not authorized under the Federal Arbitration Act (FAA) and that, when the parties have delegated jurisdictional questions to the arbitrator, the arbitrator must decide whether the dispute is arbitrable.

Archer & White Sales, Inc. (Archer) entered into a contract with Pelton and Crane (Pelton) to distribute Pelton's dental equipment. After the relationship soured, Archer sued Pelton's successor-in-interest and Harry Schein, Inc. (together, Schein) in federal court alleging antitrust violations.

The contract provided that:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)].

Id. at slip op. p. 2.

Schein asked the district court to refer the case to arbitration, but Archer objected, arguing that the dispute was not arbitrable because it sought, in part, injunctive relief. Schein countered that because the arbitration agreement incorporated the AAA rules, which provide that arbitrators decide arbitrability, an arbitrator had to decide that question. Archer replied that Schein's argument in favor of arbitration was wholly groundless, and, therefore, the district court should resolve arbitrability. The district court accepted Schein's position, and the Fifth Circuit affirmed.

The Supreme Court reversed. Citing the FAA and its own precedent, the Court ruled that courts must apply arbitration agreements as written. Thus, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract," even where the court believes the argument in favor of arbitration is wholly groundless. *Id.* at 5.

The Court rejected Archer's arguments in support of the wholly groundless exception. First, Archer argued that Sections 3 and 4 of the FAA require the courts to determine issues of arbitrability, because they say that courts have the power to stay litigation and to compel arbitration. *Id.* at 6. But the Court ruled that interpreting Sections 3 and 4 in that manner would conflate the determination that a valid arbitration agreement exists, which is left to the courts, with the separate question of what disputes the arbitration agreement covers.

Second, Archer argued that Section 10 of the FAA permits courts to review arbitration decisions on the back end to determine whether an arbitrator exceeded his or her powers, so courts should also be able to say at the front end whether a dispute is arbitrable. However, FAA Section 10 provides for review only *after* an award is issued and not for pre-arbitration review. Or, as the Court put it, "Congress designed the [FAA] in a specific way, and it is not our proper role to redesign the statute." *Id.* at 6.

Third, Archer argued that requiring that an arbitrator decide a wholly groundless argument would waste the parties' resources. The Court expressed doubts that this was so; to the contrary, the parties might be engaged in "collateral litigation" over whether the purportedly "unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless." *Id.* at 7.

Fourth, Archer argued that the exception was necessary to deter frivolous motions to compel arbitration. The Court stated that Archer's argument overstated the potential problem. It pointed out that arbitrators can efficiently dispose of frivolous arbitrability disputes by rejecting them, and possibly by awarding fees or costs for presenting them in the first place. Moreover, the Court saw no evidence that frivolous motions to compel arbitrations were common.

Practice Pointer: Parties who receive meritless motions to compel arbitration have to let the arbitrator decide the question if that is what their arbitration agreement provides. The Supreme Court has foreclosed the ability to ask the judge to decide such issues up front.

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