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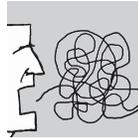
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Who Is the Gatekeeper to Arbitration?

The U.S. Supreme Court Confirms that the Arbitrator May Decide Threshold Questions Depending on the Terms of the Contract

Marie Trimble Holvick and Sara A. Moore
Gordon Rees Scully Mansukhani, LLP

In deciding whether to compel arbitration, the court is charged with two “gateway” issues: (1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute. However, there is an exception to this general rule when “the parties clearly and unmistakably provide otherwise.” In such cases, the court examines the underlying contract to determine whether the parties have agreed to commit the question of arbitrability to the arbitrator.

Although there is a long history of precedent on this issue of delegation, the U.S. Supreme Court recently weighed in as to whether the court or arbitrator may decide this threshold question of arbitrability. On January 4, 2019, Justice Brett Kavanaugh wrote his first opinion for a unanimous court in *Henry Schein, Inc. v. Archer & White Sales Inc.* The high court held that if a contract calls for arbitrability to be decided by the arbitrator, a court cannot make that decision.

In *Schein*, the arbitration agreement at issue contained a specific carve-out for actions seeking injunctive relief. Schein sought to compel the lawsuit to arbitration. Archer & White objected, asserting that because its complaint sought injunctive relief, at least in part, it was exempt from the agreement to arbitrate. The agreement also incorporated the American Arbitration Association Rules (AAA) rules by reference, which explicitly state that the arbitrator has the power to resolve arbitrability questions. However, Archer & White sought an “end-around” to this commitment to delegate this decision to the arbitrator by relying on the “wholly groundless” exception. The “wholly

groundless” exception contends that in cases in which the defendant’s argument for arbitration is “wholly groundless,” because the arbitration agreement does not govern the dispute, then the court may resolve the threshold question of arbitration. In other words, Archer & White claimed that Schein’s argument to try to compel arbitration was “wholly groundless” as the arbitration agreement at issue did not govern a dispute over injunctive relief, and thus, the court could rule on arbitrability. The district court agreed, and the Fifth Circuit affirmed.

The U.S. Supreme Court, however, reversed. The Court rejected a “wholly groundless” exception, and determined courts cannot “short-circuit the process and decide the arbitrability question themselves” even if whether the arbitration agreement applies to a particular dispute is “wholly groundless.” In doing so, the Court confirmed that courts must compel arbitration of gateway arbitrability questions whenever the arbitration agreement includes “clear and unmistakable evidence” that the parties delegated the determination of those questions to the arbitrator. However, the focus of this case was the “wholly groundless exception,” and the opinion did not discuss the “clear and unmistakable” standard in further detail. Indeed, the Court stated: “We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to the arbitrator.”

This case is one of many in recent years in which the court upheld the enforceability of arbitration agreements generally. One of the most critical decisions in the past year regarding arbitration agreements

was *Epic Systems Corporation v. Lewis*, 131 S. Ct. 1612 (2018). In May of 2018, the U.S. Supreme Court ruled – in a close 5-4 split – that employers are not violating the National Labor Relations Act (NLRA) by including class action waiver provisions in arbitration agreements. This decision gave a “stamp of approval” to allow companies to use class action waivers as a tool to limit potential exposure on future class claims alleged by employees.

As the new year begins, employers should carefully review their arbitration agreements to ensure compliance with state and federal rules. This review should include a careful look at the delegation rules as to who decides the threshold question of arbitrability and any provision regarding class action waivers. 



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