Supreme Court Arbitration Decision:
Henry Schein Inc. v. Archer and White Sales Inc.

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The line between cases subject to arbitration and cases that aren't is sometimes difficult to draw. But even before confronting that issue, it can also be difficult to figure out whose job it is to make that decision. *Henry Schein Inc. v. Archer and White Sales Inc.*, - - - U.S. - - -, 2019 WL 122164 (Jan. 8, 2019), seeks to make that second line a little bit more of a "bright line." Consider this scenario:

> A Title VII retaliation suit is filed seeking damages and an injunction against future retaliation. The employer moves to compel arbitration under an arbitration agreement with the employee that adopts the rules of the American Arbitration Association ("AAA") that contains an exception to arbitration for cases asserting claims for injunctive relief. The employee resists arbitration, contending that since the lawsuit seeks equitable relief, the arbitration agreement simply does not apply. To the contrary, argues the employer. The AAA rules specifically provide that the arbitrator is to decide questions of arbitrability. So, it says, arbitration must be ordered and the arbitrability question left up to the arbitrator to decide.
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> The court, though, decides that arbitration is not proper because the argument that the case is subject to arbitration is "wholly groundless." In such cases, many courts have held, it is unnecessary to go through the process of appointing an arbitrator who would then inevitably have to send the case right back to court. Here, the case plainly sought equitable relief and thus is not subject to arbitration.

These were the facts in *Henry Schein Inc. v. Archer and White Sales Inc.*, except that the dispute arose in the context of an antitrust suit, not a Title VII case. Writing for a unanimous court, Justice Kavanaugh rejected the "wholly groundless" exception, principally because there was nothing in the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA") to support it.

The FAA ordinarily calls for the court to decide whether a given case comes within the scope of an agreement to arbitrate. But where the parties agree that the arbitrator will decide this "gateway" question, this amounts to a mini-arbitration agreement—an agreement, in effect, to arbitrate the arbitrability question. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–944 (1995).

Since the agreement to leave arbitrability decisions to the arbitrator is to be enforced under the FAA, Justice Kavanaugh wrote, "a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that

the argument that the arbitration agreement applies to a particular dispute is wholly groundless." This is consistent with precedent in labor arbitration, said the Court, holding that a court "may not rule on the potential merits of the underlying claim that is assigned by contract to an arbitrator." The opinion reaffirms both the *First Options* holding and the principle that even if they find a claim frivolous, courts must defer to contrary decisions by arbitrators.

The Court also rejected a policy argument that the "wholly groundless" exception avoids inefficiency, pointing first to the lack of a statutory basis for the exception and second to the very real possibility that a judge might think the decision obvious in one direction and the arbitrator see the question differently. Nor was the court persuaded that the exception was needed to prevent frivolous motions to compel arbitration, noting that arbitrators possess the same power a court does to award attorney's fees in such situations.

This issue is one that arises frequently because most arbitration agreements incorporate the rules of the AAA, and those rules delegate arbitrability issues to the arbitrator. See AAA Employment Arbitration Rule 6. Prior to *Henry Schein Inc.*, the Circuits were hopelessly divided on this question, with the Fourth, Fifth, Sixth and Federal Circuits following the exception and the Tenth and Eleventh Circuits rejecting it. But the issue is now settled.

This does not mean that the courts are left with nothing to decide on a motion to compel arbitration. Disputes over mutual assent and consideration are for the court, and likely the same for questions of unconscionability, the validity of state laws that would render the arbitration agreement invalid, and waiver of arbitration.

The line between cases that are subject to arbitration and those that aren't has proven to be a difficult and complicated one to draw in many cases. The Court's decision in *Henry Schein Inc.* at least makes it a bit clearer *who* will make that determination. If there is a valid delegation of arbitrability issues to the arbitrator, then even if it seems a pointless exercise, an arbitrator must be selected and must decide the question.