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Agreement to Arbitrate Arbitrability Cannot Be Overridden by Courts

by Deborah A. Reperowitz

In the case of *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[1] (see https://www.supremecourt.gov/opinions/18pdf/17-1272_7l48.pdf) the United States Supreme Court held that the Federal Arbitration Act (FAA) does not permit a "wholly groundless" exception. Therefore, even in instances where it appears that a party's claim of arbitrability is wholly groundless, the court may not override the parties' contract if it provides for the determination of arbitrability to be made by an arbitrator. Prior to the *Henry Schein* case, regardless of whether a contract delegated threshold issues such as arbitrability to an arbitrator, certain U.S. Circuit Courts nonetheless decided arbitrability issues if "the argument for arbitration is wholly groundless," reasoning that the wholly groundless exception allowed courts to block frivolous attempts to transfer disputes from the court system to arbitration.

The *Henry Schein* case involved claims under federal and state antitrust law and demands for money damages and injunctive relief. The contract between the parties provides in relevant part

> 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…), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.[2]

Plaintiff filed a motion to compel arbitration of the question of arbitrability, reasoning that the parties' contract delegated the threshold or "gateway" arbitrability question to an arbitrator. The defendant countered that plaintiff's request for arbitration was wholly groundless because plaintiff sought injunctive relief, which was excluded from the issues the parties agreed to arbitrate. The District Court denied plaintiff's motion to compel arbitration and the Fifth Circuit affirmed. Because there was a split among the circuits as to the existence of the wholly groundless exception to arbitrability, the issue was certified to the Supreme Court for determination.

The Supreme Court reversed the Fifth Circuit, determining that the wholly groundless exception is inconsistent with the FAA and precedents previously established by the Supreme Court. In so doing, the Court rejected each of the following arguments raised by the defendant. First, pointing to certain provisions of the FAA, the defendant argued that a court, not an arbitrator, must always decide issues of arbitrability. Second, pointing to a provision of the FAA that provides for judicial back-end review of an arbitrator's decision if the arbitrator exceeded his or her authority, the defendant argued that the court should be able to decide that a particular issue is not arbitrable at the front end. Third, the defendant argued that as a practical and policy matter it would be a waste of time and money to send the arbitrability issue to an arbitrator if the request for arbitration is wholly groundless. Fourth, the defendant argued the wholly groundless exception is necessary to deter frivolous motions to compel arbitration.

In rejecting these arguments, Justice Kavanaugh, writing for the Court, stated, "This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence."[3] The Court further expressly noted that the FAA "contains no 'wholly groundless' exception, and we may not engraft our own onto the statutory text."[4]

The Supreme Court unequivocally established that arbitrability of a particular dispute is determined by the parties' contract, which must be enforced according to its terms. The Court, however, did not determine whether the *Henry Schein* agreement actually delegated the arbitrability question to an arbitrator. Accordingly, the matter was remanded to the Fifth Circuit to make such determination, which likely will depend on whether the parties' agreement delegates the arbitrability issue to arbitration "by 'clear and unmistakable' evidence."

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[1] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).
[2] *Henry Schein*, at 528 (emphasis added).
[3] *Henry Schein*, at 530.
[4] *Henry Schein*, at 530.

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