This Week's Feature

Justice Kavanaugh's Debut Supreme Court Opinion

By Lawrence S. Ebner

Justice Brett Kavanaugh's first Supreme Court opinion is a model of stylistic clarity and judicial restraint. Writing for a unanimous Court, his January 8, 2019, opinion in *Henry Schein, Inc. v. Archer & White Sales, Inc.,* No. 17-1272, holds that where contracting parties have agreed that an arbitrator—rather than a court—should decide whether a dispute is subject to the contract's arbitration provision, there is no exception under the Federal Arbitration Act, even if the argument in favor of arbitration is "wholly groundless."

In just six pages, Justice Kavanaugh explains—in plain English that even non-lawyers can understand—the question presented and conclusion, the factual background, the applicable statutory provision, the pertinent Supreme Court precedents, and the reasons why none of the respondent's arguments in favor of an exception are persuasive. Here are some excerpts that illustrate the point.

Question Presented and Holding:

> Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.' The question presented in this case is whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act. We conclude that it is not… [T]he 'wholly groundless' exception is inconsistent with the text of the Act and with our precedent.

Facts:

> Archer and White's complaint alleged violations of federal and state antitrust law, and sought both money damages and injunctive relief… Schein invoked the Federal Arbitration Act and asked the District Court to refer the parties' antitrust dispute to arbitration… According to Archer and White, the parties' contract barred arbitration of disputes when the plaintiff sought injunctive relief, even if only in part. The question then became: Who decides whether the antitrust dispute is subject to arbitration?

Statute:

> "The [Federal Arbitration] Act provides: 'A written provision in… a contract… to settle by arbitration a controversy thereafter arising out of such contract… shall be valid, irrevocable, and enforceable… 9 U.S.C. § 2.'"

Precedent:

> "[W]e have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. 63, 67 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995)) (internal quotation marks omitted).

Respondent's Arguments:

> In an attempt to overcome the statutory text and this Court's cases, Archer and White… interprets [§§ 3 & 4 of the Federal Arbitration Act] to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed. 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." [(citing *First Options*, 514 U.S. at 944)].... To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. *See* 9 U. S. C. §2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Justice Kavanaugh's opinion not only is crystal clear, but also repeatedly demonstrates adherence to statutory and contractual text, and thus, is an exemplar of judicial restraint. The following are some pithy examples:

- "The Act 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."
- "Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."
- "We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract."

- "Congress designed the Act in a specific way, and it is not our proper role to redesign the statute."
- "[W]e may not rewrite the statute simply to accommodate [a] policy concern."
- "The short answer is that the Act contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text."

If Justice Kavanaugh's first Supreme Court opinion is any indication, he will prove to be a brilliant high court choice for decades to come.

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