

Ronald Mann: Opinion analysis: Kavanaugh's first opinion rejects vague exception limiting enforcement of arbitration agreements

The justices' first opinion day of 2019 brought the first opinion from Justice Brett Kavanaugh, writing for a unanimous court in *Henry Schein Inc. v. Archer & White Sales Inc.* The case is the most recent in a decade-long string of opinions under the Federal Arbitration Act, in which the Supreme Court consistently has reversed lower-court decisions refusing to enforce arbitration agreements. Many of those cases have been decided by narrow 5-4 majorities, which has raised the possibility that the replacement of Justice Anthony Kennedy by Kavanaugh might lead to some softening of the court's position in those cases. As it turns out, *Henry Schein* will shed no light on that broader question, because even the justices more skeptical about arbitration saw no merit in the arguments against arbitration here.

The topic in this case is the arbitrability of "gateway" questions: not the underlying dispute (was the employee properly fired; did the seller breach a contract), but the question whether that underlying dispute is arbitrable. At bottom, the question is whether a court or an arbitrator decides whether an arbitration agreement governs a particular dispute. The Supreme Court repeatedly has held that the Federal Arbitration Act allows the parties to a contract to decide whether an arbitration agreement will extend to those gateway questions, explaining that courts must compel arbitration of the gateway questions whenever the agreement includes "clear and unmistakable evidence" that the parties delegated the decision of those questions to the arbitrator.

Several lower courts, though, have adopted an exception to that rule, reasoning that it would be a waste of time to send a case to an arbitrator if the claim of arbitrability is "wholly groundless." In this case, for example, the contract called for arbitration of any "dispute arising under or related to" the contract "except for actions seeking injunctive relief." Because the complaint sought injunctive relief in addition to damages, the courts below reasoned that the defendant's request for arbitration was wholly groundless and thus they refused to compel arbitration.

None of the justices could accept that treatment. As you would expect for a first opinion, Kavanaugh's opinion was succinct and methodical. He started from the Supreme Court's repeated decisions holding that the "agreement to arbitrate a gateway issue is simply an additional ... agreement the party seeking arbitration asks the federal court to enforce, and the [Federal Arbitration Act] operates on this additional arbitration agreement just as it does on any other." He then pointed out the court's frequent rejection of the idea that a court should use a claim of frivolity as a basis for rejecting enforcement of an arbitration agreement, quoting earlier decisions explaining that courts have "no business weighing the merits of the grievance," because the

“agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.”

Echoing the discussion at oral argument (summarized [here](#)), Kavanaugh scoffed at the notion that an exception vitiating “wholly groundless” requests for arbitration “would save time and money systemically.” Among other things, he suggested, such an “exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.” Perhaps it did not escape the notice of the justices that the litigation over arbitrability in this case has consumed seven years: Arbitration might have been a waste of time, but would it have wasted seven years? As suggested above, I don’t think this opinion tells us much about whether the post-Kennedy Supreme Court will soften its support for arbitration. As the argument made clear, none of the justices saw any merit in a process calling for collateral litigation over the gateway question of arbitrability. We will have to wait for decisions in the term’s other arbitration cases (*Lamps Plus v. Varela* and *New Prime Inc v. Oliveira*) to know more about the broader question.

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