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U.S. Supreme Court

- **"WHOLLY GROUNDLESS" EXCEPTION INCONSISTENT WITH FAA TEXT AND WITH PRECEDENT**

  Schein, Inc. v. Archer and White Sales, Inc.
  2019 WL 122164
  Supreme Court of the United States
  January 8, 2019

  Archer and White (Archer) contracted with Pelton and Crane (Pelton) to distribute dental equipment. The parties' contract provided that "(a)ny 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 AAA Rules. When Archer sued Pelton's successor-in-interest and Henry Schein, Inc. (Schein), alleging violations of federal and state antitrust law and seeking monetary damages and injunctive relief, Schein moved for arbitration. Archer asserted that the dispute was not arbitrable because it sought injunctive relief, raising the question: who would decide arbitrability? Under AAA rules, arbitrators have the power to resolve arbitrability questions. Archer asserted that the motion was wholly groundless and the court should resolve the question of arbitrability. The court ruled that Schein's argument for arbitration was wholly groundless and denied the motion to compel. The United States Court of Appeals for the Fifth Circuit affirmed and certiorari was granted.

  The Supreme Court of the United States vacated and remanded. Under the FAA, arbitration is a matter of contract and courts must enforce arbitration agreements according to their terms. Parties may agree to have an arbitrator decide gateway issues of arbitrability, such as whether an agreement covers a particular controversy. Even where parties do so, however, some Courts of Appeals have carved out an exception for the court to decide arbitrability if the argument for arbitration is wholly groundless. The Supreme Court found the "wholly groundless" exception to be inconsistent with the text of the FAA and with Court precedent. When the arbitrability question is delegated to an arbitrator, a court has no power to decide the issue, even if it thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless. Just as a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous," (*AT&T Technologies* (475

US 643)), a court may not decide an arbitrability question that parties have delegated to an arbitrator. The Court expressed no view about whether the contract at issue delegated the arbitrability question to an arbitrator and remanded to the Court of Appeals to address the issue.

Federal Circuit Courts

- **ARBITRATOR BLURRED LINES BETWEEN ARBITRABILITY AND MERITS**

  Local Joint Executive Board of Las Vegas v. Mirage Casino-Hotel
  911 F.3f 588
  United States Court of Appeals, Ninth Circuit
  December 13, 2018

  Culinary Union sued Mirage, alleging that it violated the Collective Bargaining Agreement (CBA) by failing to pay food and beverage employees for accrued vacation time after the closing of a club operated by Mirage subcontractor, BB King. The grievance was arbitrated pursuant to Article 21 of the CBA, Grievance and Arbitration. The parties agreed to submit briefs on the issues of timeliness and arbitrability, raised by Mirage at the arbitration, with the Union's attorney requesting the arbitrator to "issue an expedited order on the timeliness-arbitrability issue. If you rule that it is arbitrable, then the parties will submit a brief on the merits…" The arbitrator issued a decision and award, characterized as resolving two procedural issues: the grievance was timely filed, Mirage was not the "'guarantor for payment of wages or benefits of [BB King's employees]," and the dispute over vacation pay was not arbitrable.. The Union's petition to vacate the award was denied and the court confirmed the award. The Union appealed.

  The United States Court of Appeals for the Ninth Circuit reversed and remanded. The arbitrator "decided an arbitrability question that he was not empowered to adjudicate on the mistaken belief that it was procedural, and based his conclusion of non-arbitrability on an analysis anchored entirely in his view of the merits." Whether a CBA creates a duty for parties to arbitrate a particular grievance is a question for judicial determination unless the parties "'clearly and unmistakably'" provide otherwise. Questions of procedural arbitrability, such as timeliness, are for the arbitrator. In this case, the arbitrator conflated the issues of arbitrability and merits, deciding that Mirage was not obliged to pay BB King's employees for vacation and benefits, without first considering his authority to so decide. As a result, Union employees were denied a chance to present their merit arguments to the arbitrator. The arbitrator's award "carves out of the parties' agreement a wide swath of presumptively arbitrable grievances…without any textual basis in the CBA or rational basis in the law."

- **ARBITRATOR IGNORED CBA TERMS**

  Southwest Airlines v. Local 555, Transport Workers Union of America AFL-CIO
  2019 WL 139247
  United States Court of Appeals, Fifth Circuit
  January 9, 2019

  Southwest and Local 555's new collective bargaining agreement (CBA) stated that it would be effective upon ratification and required that grievances be filed within 10 working days of notice of a management decision. 10 days after the CBA was signed but more than 10 days after it was ratified, Local 555 filed a grievance against Southwest for using non-union vendors to clean aircraft. Southwest challenged the timeliness of the grievance; however, the arbitrator ruled that it was timely because it was filed 10 working days after the CBA was signed. Southwest filed a dispute under the Railway Labor Act (RLA), seeking judicial review of the award and arguing that the arbitrator exceeded his jurisdiction by ignoring the CBA's terms. The court declined to vacate the ruling and Southwest appealed.

  The United States Court of Appeals for the Fifth Circuit reversed and remanded. This was an example of an arbitrator going too far. Judicial review of arbitration decisions arising from the terms of a CBA is narrowly limited, flowing from the RLA's preference for the "settlement of disputes in accordance with contractually agreed-upon arbitration procedures." Southwest

asserted that the award exceeded the scope of the arbitrator's jurisdiction under the CBA. This award fell within this narrow exception, conflicting with the plain language of the CBA and amounting to "the arbitrator's own brand of industrial justice." The interpretation that the grievance was timely ignored the period of the CBA, clearly noted on the title page, the language that the CBA would be in effect from ratification, and other references to ratification related to bonuses and parties' conduct. The arbitrator attributed significance to the CBA Execution Page; however, execution was not mentioned in any of the CBA terms. By relying on this, the arbitrator ignored the express terms of the CBA.

- **FRCP 6(a) GOVERNS CALCULATION OF THREE MONTH TIME PERIOD TO VACATE AWARD**

  Stevens v. Jiffy Lube
  2018 WL 6802644
  United States Court of Appeals, Ninth Circuit
  December 27, 2018

  Jiffy Lube franchisees Randy and Elissa Stevens sued franchisor Jiffy Lube after Jiffy Lube terminated their franchise agreement. The case proceeded to arbitration, per the binding arbitration provision in the franchise agreement. The arbitrator ruled in favor of Jiffy Lube and the Stevenses moved for relief from the judgment or, in the alternative, to alter or amend the judgment. The motion was denied and the Stevenses appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. The notice of appeal was timely. The Stevenses had 30 days to file an appeal – they filed 29 days after the entry of the order disposing of their post-judgment motion. The petition to vacate the arbitral award was untimely. The FAA requires notice to be "served upon the adverse party or his attorney within three months after the award is filed or delivered." The question was whether the Federal Rule of Civil Procedure (FRCP) (6(a)) or the FAA governed how to calculate the three-month deadline. The Court found that 6(a) controlled. The FRCP applies to FAA proceedings unless the FAA provides other procedures. Though the FAA grants petitioners three months to petition for vacatur, it does not provide procedures for calculating the three months. The FRCP does, outlining a three-step process for calculating the time period. Under the three-step process, the Stevenses petition to vacate was untimely.

- **ARBITRABILITY OF CLAIMS OF NON-PARTY TO AGREEMENT TO BE DECIDED BY COURT**

  Wakaya Perfection, LLC et al., v. Youngevity International, Inc., et al.
  910 F.3d 1118
  United States Court of Appeals, Tenth Circuit
  December 11, 2018

- Wakaya and its principals sued Youngevity in Utah state court, alleging claims of breach of contract and tortious behavior. Youngevity sued Wakaya in California federal district court and removed the Utah case to federal court, resulting in concurrent federal cases. The cases shared some claims and issues, including a disagreement over whether Wakaya could bring its claims in court rather than in arbitration. The California litigation progressed and the federal district court in Utah ordered dismissal, holding that "the court should abstain from exercising jurisdiction under the *Colorado River* test and an arbitrator would need to decide the arbitrability of Wakaya's claims." Wakaya appealed.
  The United States Court of Appeals for the Tenth Circuit reversed and remanded. The Court focused on two issues: whether the federal district court should have abstained from exercising jurisdiction under Colorado River and whether an arbitrator would decide the arbitrability of Wakaya's claims. The Court found the *Colorado River* test inapplicable. The Court also found that the court should have decided the arbitrability of Wakaya's claims. Though Wakaya was not a party to the arbitration agreements, the lower court found that Wakaya's claims were "likely arbitrable" because they were intertwined with claims asserted by some of the parties to the arbitration agreements. But the court declined to decide whether Wakaya was subject to the agreements, leaving this question to the arbitrator. The Supreme Court has held that unless parties clearly and unmistakably provide otherwise, the question of whether parties agreed to

arbitrate is to be decided by the court, not the arbitrator. Because Wakaya did not sign the arbitration agreement, the arbitrability of Wakaya's claims are to be decided by a court.

- **NO REASONABLE NOTICE OF ARBITRATION PROVISION**

  Starke v. Squaretrade
  2019 WL 149628
  United States Court of Appeals, Second Circuit
  January 10, 2019

  Squaretrade sells protection plans to cover defects and damage on a variety of consumer products. Starke purchased a protection plan – on Amazon – for a CD player he purchased through Staples. The Post-Sale Terms and Conditions (T&C), emailed by Squaretrade after Starke's purchase, included an arbitration provision. When the CD player malfunctioned, Starke made a claim for coverage under the Protection Plan. Squaretrade denied the claim, notifying Starke that because he purchased the CD player through Staples rather than Amazon, it was not covered and the Protection Plan would be canceled. Starke filed a putative class action again Squaretrade, alleging fraudulent and deceptive practices in the selling and marketing of protection plans. Squaretrade moved to stay the action and compel Starke to arbitrate his claims individually, citing the arbitration clause and class action waiver contained in the Post-Sale T&C. The court denied the motion. Squaretrade appealed.

  The United States Court of Appeals, Second Circuit affirmed. Despite a strong federal policy favoring arbitration, courts must still decide whether parties to a contract have agreed to arbitrate disputes. With web-based contracts, the design and content of the interface are important in determining if the contract terms were presented to the offeree in a way that would put the offeree on notice of such terms. Starke did not have reasonable notice of the arbitration provision in the Post-Sale T&C. Squaretrade did not direct Starke's attention to the T&C hyperlink that contained the Post-Sale T&C, providing no language that stood out to do so. The email, cluttered with diverse text, did not signal to Starke that he should click on the link or advise him that he would be deemed to agree to contract terms by doing so. The T&C were also spatially and temporally decoupled from the transaction. Starke had no way to review the T&C until after his purchase, when he received the T&C by email. Though Starke had a duty to read contract terms, cases applying this principle require that the offeree be put on notice of the existence of additional contract terms before it can be said that he assented to them. Starke was not. Squaretrade's argument that Starke was on notice of the terms because he had previously purchased Squaretrade Protection Plans was unconvincing. Squaretrade never gave Starke clear and convincing notice that the transaction would subject him to binding arbitration.

California

- **DISPUTE OUTSIDE SCOPE OF ARBITRATION AGREEMENT**

  Howard v. Goldbloom
  2018 WL 6715755
  Court of Appeal, First District, Division 4, California
  December 21, 2018

  Goldbloom recruited Howard to join Kaggle as an investor and employee. Howard was issued nearly half of the Kaggle common stock. When the company faltered, the board terminated Howard's employment. When Kaggle's financial troubles worsened, Goldbloom and board members (defendants) increased the issued stock, thus diluting the value of existing stock, without compensating minority stakeholders. Defendants used the shares to pay off venture capitalists and compensate themselves before selling to Google. Howard sued defendants, alleging abuse of corporate power and breach of fiduciary duty through dilution of interest in stock. Defendants moved to compel arbitration pursuant to four separate agreements between Howard and Kaggle. The motion was denied and defendants appealed.

  The Court of Appeal, First District, Division 4, California affirmed. No dispute may be ordered to

arbitration unless it is within the scope of the arbitration agreement. Howard's dispute did not fall within the scope of his arbitration agreements with Kaggle. His employment agreement, including an arbitration provision, was no longer operable, superseded by his Separation Agreement with the company. The arbitration provision in the Separation Agreement was narrow, requiring arbitration only of disputes "arising out of the terms of this agreement, their interpretation, and any of the matters herein," up until the date of the agreement. The arbitration provision in Howard's stock repurchase agreement applied to any and all claims "arising out of or relating to the Agreement" and "arising out of, relating to, or resulting from employment with the company." Howard's claims did not have their roots in the relationship between the parties that was created by this contract. His claims were instead rooted in his rights as a company shareholder. Defendants' argument that Howard received most of his stock because of his employment with and separation from the company was not applicable. They owed a fiduciary duty whether Howard obtained stocks through employment or in a different manner. The broad arbitration agreement in Howard's at-will employment with Kaggle was similarly inapplicable. The dispute was based on obligations owed by defendants to minority stakeholders, which were independent of Howard's employment relationship and not subject to arbitration even under a broad understanding of the arbitration clause in the at-will employment contract.

- **ARBITRATOR'S MISSTEPS DO NOT REQUIRE VACATUR OF AWARD**

  Cox v. Bonni
  2018 WL 6598930
  Court of Appeal, Second District, Division 1, California
  December 17, 2018

  Lisa Cox sued Dr. Aram Bonni for medical malpractice. Bonni's motion to compel arbitration pursuant to two physician-patient arbitration agreements was granted and parties proceeded to arbitration. The panel consisted of party arbitrators and a neutral arbitrator from Judicate West. Three months after a change in defense counsel, the neutral arbitrator disclosed to the parties his work with defense counsel. Before and after the arbitration hearing, the neutral arbitrator had ex parte communications with defense counsel: one to discuss availability and one to discuss whether defense would seek costs. The neutral arbitrator did not disclose the ex parte communications, sharing the information only upon request by plaintiff's counsel. The arbitration panel found in favor of Bonni and Cox moved to vacate on the basis of the neutral arbitrator's conduct. The court vacated the award, finding the disclosure about previous work with defense counsel untimely and ex parte communications not properly disclosed. Bonni moved for reconsideration. The neutral arbitrator appeared at the hearing, arguing that his ex parte communications disclosures were proper and that Cox never sought to disqualify him after learning of his work with defense counsel. The court entered judgment in favor of Bonni and Cox appealed.

  The Court of Appeal, Second District, Division 1, California affirmed. Cox contended that Bonni waived his right to arbitrate by "engaging in litigation conduct inconsistent with an intent to arbitrate." Without the requisite showing of prejudice, Bonni's action did not give rise to waiver. Cox asserted that the language in the arbitration agreements did not comply with the Code of Civil Procedure §1295 and that she did not understand the arbitration agreements. The Court found the evidence sufficient that the patient agreement satisfied §1295 and that Cox read and understood the agreements. The neutral arbitrator's disclosure of his work with defense counsel was untimely, but Cox forfeited her challenge by not objecting until after the award was issued. The ex parte communications, both on administrative matters that may be discussed by an arbitrator "with a party in the absence of other parties" (Ethics Standard 14(b), should have been disclosed. Still, Cox did not claim that she suffered any prejudice from the arbitrator's ex parte communication on costs. Cox forfeited her challenge to the ex parte communication about availability by waiting to object until after the award – though she learned of the communication a week before the arbitration. As for the arbitrator's appearance at the hearing, the record demonstrated that he did more than testify to address the charge of partiality - he propounded legal arguments as if he were "an advocate for the defendant.". This was improper, but the error was harmless. The court's order confirming the award was substantively correct. Though Cox was deprived the opportunity to challenge the neutral arbitrator's arguments, she had the opportunity on appeal and was not persuasive.

New York

- **ARBITRATOR EXCEEDED POWERS**

  Banegas v. GEICO
  2018 WL 6626841
  Supreme Court, Appellate Division, Second Department, New York
  December 19, 2018

  Banegas was a passenger in a car owned by Pedro Guerrero and driven by Kenia Arias. The car was struck by an unidentified vehicle that fled the scene. Banegas demanded arbitration of his uninsured motorist claim. GEICO did not move to stay arbitration. The arbitrator continued the hearing to allow GEICO to call Guerrero and Arias as witnesses. Arias testified that Banegas was not a passenger in the car at the time of the accident. Based on the testimony, the arbitrator denied the uninsured motorist claim. Banegas appealed.

  The Supreme Court, Appellate Division, Second Department, New York reversed and remitted. With a hit and run cause of action, there must be physical contact by a hit and run vehicle to a "qualified person." The determination of whether Banegas was a qualified person pursuant to the policy was a condition precedent to arbitration and, therefore, a basis for an application to stay the arbitration - to be determined by the courts. GEICO did not move to stay the arbitration, waiving the ability to litigate this issue and, effectively, conceding that Banegas was a covered person under the policy. By deciding this issue, the arbitrator "created an artificial distinction between a contractual coverage issue and a liability issue and clearly exceeded his powers."

Texas

- **EXCLUSIVE JURISDICTION DOES NOT INTERFERE WITH PARTIES' FREEDOM TO CONTRACT TO ARBITRATE**

  RSL Funding v. Newsome
  2018 WL 6711316
  Supreme Court of Texas
  December 21, 2018

  Newsome transferred structured settlement payments to RSL Funding for a lump sum of $53,000. The Structured Settlement Protection Act required court approval to validate the transfer. Here, the court issued two orders, one that approved the transfer and included a handwritten note providing for a penalty if RSL did not pay within 10 days and a nunc pro tunc order that removed the handwritten 10-day condition. When RSL did not pay, Newsome petitioned for a bill of review, asserting that the nunc pro tunc was void and that the transfer order should be enforced. In the alternative, Newsome moved for summary judgment, asserting that the original order should be vacated because RSL did not comply. RSL moved to compel arbitration, pursuant to a mandatory arbitration clause in his contract with Newsome that delegated to the arbitrator questions of arbitrability. The court granted summary judgment and denied the motion to compel arbitration. RSL appealed. The court of appeals affirmed and RSL petitioned for review of the order denying arbitration.

  The Supreme Court of Texas reversed and remanded. The arbitrator, not the court, was required to decide the arbitrability of the dispute, even though the legislature assigned approval of structured settlement transfers to the courts under the Structured Settlement Protection Act. Newsome asserted that the matter should not proceed to arbitration due to the unique circumstances – a bill of review attacking approving court orders under the Structured Settlement Protection Act. This reflected a misunderstanding of the statute and of arbitration. The FAA preempts any state law that would interfere with the parties' freedom to contract to arbitrate their disputes. Parties may contract to arbitrate issues even when the law vests some related exclusive power in a court. Newsome also asserted that no enforceable arbitration agreement

existed because the entire transfer agreement never came into existence. This contract defense, attacking the contract as a whole, must be decided by the arbitrator. Newsome failed to present any theory, analysis, or authority that put the validity of the original approved order and contract formation in issue. RSL's argument that the court of appeals decision was an adoption of the wholly groundless exception and should be rejected was not properly before the Court.

- **CLAIMS WITHIN SCOPE OF ARBITRATION AGREEMENT**

  Longoria v. CKR Property Management, LLC
  2018 WL 6722340
  Court of Appeals of Texas, Houston (14th Dist.)
  December 21, 2018

  Longoria signed an arbitration agreement before beginning employment with CKR Property Management (CKR). The agreement provided that the parties would arbitrate "any claim or dispute between them or against the other…whether related to the employment relationship or otherwise…'" Longoria resigned from CKR after a year. Ten months later, she was rehired. Longoria did not sign a separate arbitration agreement before beginning her second period of employment. CKR fired Longoria six months later and sued her for violating a non-compete contract. Longoria's motion to compel arbitration was denied and Longoria appealed.

  The Court of Appeals of Texas, Houston (14th Dist.) reversed and remanded. Longoria and CKR had a valid and enforceable arbitration agreement. CKR did not dispute this – it argued that the claims were not covered by the agreement. TX and federal law recognize a strong presumption in favor of arbitration, with courts resolving doubts regarding scope in favor of arbitration. The arbitration agreement between Longoria and CKR, encompassing all disputes between them and containing no temporal or subject matter limitations, was reasonably susceptible to an interpretation that would encompass the dispute at issue. Longoria did not expressly or impliedly waive her right to arbitration. Nothing in her brief indicated her wish to resolve the matter in a judicial forum. She filed her motion to compel before the trial court entered a docket control order and before the parties took depositions and exchanged anything other than written discovery requests. She did not substantially invoke the judicial process.

Florida

- **CLAIMS WITH SIGNFICANT RELATIONSHIP TO CONTRACT ARE ARBITRABLE**

  Vanacore Construction v. Osborn, et al.
  2018 WL 6579205
  District Court of Appeal, Florida, Fifth District
  December 14, 2018

  Homeowners Osborn, Royals, and Winnek (Homeowners) sued builder Vanacore Construction for negligence and violations of the Florida Building Code and the Florida Deceptive and Unfair Trade Practices Act, due to alleged water intrusion in their homes and other construction defects. The contracts between the homeowners and builders provided for binding arbitration "before a general builder" or the opportunity for the builder to buy-back the property from homeowners in lieu of arbitration. Builder moved to compel arbitration and the court denied the motion, finding no valid arbitration agreement and no arbitrable issues. Builder's motion to sever the buy-back provision and for reconsideration was denied. Builder appealed.

  The District Court of Appeal of Florida, Fifth District reversed and remanded with instruction. The arbitration clause at issue was broad. With broad provisions, courts will compel arbitration when the party's claims have a significant relationship to the contract. All of the allegations contained in the complaint had a significant relationship to the subject of the contract: the construction of the Homeowners' homes. The buy-back provision in the arbitration clause, which limited damages the Builder would pay if it purchased the property, was severable. It did not go to the essence of

the arbitration agreement or the construction contracts. If removed, a valid arbitration agreement would remain.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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