

## Dental Suppliers Settle Antitrust Dispute Ahead Of Trial

By **Bryan Koenig**

*Law360 (April 26, 2021, 9:11 PM EDT)* -- Archer and White Sales has settled its antitrust suit accusing Henry Schein and other large dental suppliers of threatening manufacturers that do business with low-cost distributors, resolving the case only five weeks out from a long-anticipated trial.

U.S. District Judge Rodney Gilstrap paused all deadlines in the case for 30 days after Archer and White Sales Inc. and Henry Schein Inc., along with fellow defendant Benco Dental Supply Co., said on Friday that they had cut a deal and needed time "to complete and execute final settlement agreements" before they seek the lawsuit's formal dismissal.

The settlement was announced just three months after the U.S. Supreme Court turned away what would have been the dispute's second trip to the high court.

The latest filings offer no insight into settlement terms. Counsel for Archer and White, as well as Benco, declined to comment, saying the settlement terms are confidential, while counsel for Henry Schein did not immediately respond to a request for comment.

The settlement resolves the case first filed in 2012 accusing several large dental suppliers of conspiring to maintain supracompetitive margins by threatening to stop buying from manufacturers that sold to low-margin distributors such as Archer and White. Dental supplies distributor Patterson Cos. Inc. and its parent firm, equipment manufacturer Danaher Corp., settled out of the case early in 2020.

The case's real claim to legal significance is Henry Schein's attempts to force the allegations into arbitration. Twice those efforts went to the Fifth Circuit and on to the Supreme Court on the question of who gets to decide where legal claims will be decided: an arbitrator or a federal judge.

Most recently, in late January, the high court dismissed Henry Schein's petition, which the court initially agreed to hear, as "improvidently granted" and opted not to take a closer look at a Fifth Circuit decision refusing to send the dispute between the two dental equipment distributors to arbitration due to a carveout in the underlying arbitration clause. The rejection left unanswered whether a carveout in an arbitration agreement negates a provision allowing arbitrators to rule on their own jurisdiction.

Having originally accepted certiorari over the petition last June, it appears that in the months since, the justices came to realize they wouldn't be able to resolve that question without answering a logical antecedent question that had been raised in a cross-petition by Archer and White: whether parties that have incorporated certain arbitral rules into their contracts have clearly indicated they want an

arbitrator to determine whether a matter must be arbitrated or litigated.

The problem is, the justices had already denied certiorari on that question — meaning they likely had no choice but to dismiss the petition as "improvidently granted."

The rejection had teed up the case to finally go to trial, with jury selection slated for June 1.

In trying to avoid trial, Henry Schein had asked the justices to conclude that the Fifth Circuit erred in 2019 when it found that the parties hadn't clearly delegated the "who decides" question to an arbitrator due to a carveout in the arbitration agreement for actions seeking injunctive relief. Archer and White's complaint, which seeks tens of millions of dollars in damages over the alleged conspiracy, includes a claim for unspecified injunctive relief.

Henry Schein told the high court in its petition last year that the Fifth Circuit's decision "defies common sense," and that it deepens a divide among the nation's appeals courts on the effect of a carveout exempting certain claims from arbitration when the parties clearly wanted an arbitrator to decide whether the matter belongs in arbitration or litigation.

The first time the case went to the high court, the justices concluded in January 2019 that courts may not override a contract delegating to arbitrators the question of whether a claim must be arbitrated or litigated, even if the arbitration bid was "wholly groundless," unanimously vacating a Fifth Circuit decision.

The decision struck down the "wholly groundless" exception, under which courts were able to decide whether a claim belongs in arbitration, for being inconsistent with the Federal Arbitration Act.

On remand, the Fifth Circuit concluded in its decision that the parties had intended for an arbitrator to decide the venue question for at least some category of cases. But the panel went on to find that the carveout provision negated that "clear and unmistakable" delegation of the arbitrability question to an arbitrator, and that the court therefore had authority to rule on that issue.

The circuit court then denied Henry Schein's arbitration bid, saying the claim belonged in court because Archer and White was seeking injunctive relief, which is included in the carveout.

Archer and White had alleged that Henry Schein had conspired with the other companies to fix prices and to maintain their control over the dental distribution market. The companies effectuated what amounted to an illegal boycott of the lower-priced plaintiff by conspiring with Danaher's subsidiary manufacturers to limit or even eliminate Archer and White's distribution territory, the company alleged.

Henry Schein Inc. is represented by Paul F. Schuster, John P. McDonald, Matthew K. Hansen, Cynthia K. Timms and Lauren M. Fincher of Locke Lord LLP, Harry L. Gillam Jr. of Gillam & Smith LLP, Colin R. Kass and Stephen Chuk of Proskauer Rose LLP and Richard C. Godfrey of Kirkland & Ellis LLP.

Archer and White Sales Inc. is represented by Lewis T. LeClair, Gary Cruciani, Travis DeArman, Patrick Pijls, Samuel F. Baxter and Jennifer L. Truelove of McKool Smith PC.

Benco Dental Supply Co. is represented by Kenneth Racowski and Mark A. Kasten of Buchanan Ingersoll & Rooney PC and T. John Ward and Claire Abernathy Henry of Ward Smith & Hill PLLC.

The case is Archer and White Sales Inc. v. Henry Schein Inc. et al., case number 2:12-cv-00572, in the U.S. District Court for the Eastern District of Texas.

--Additional reporting by Caroline Simson and Diamond Naga Siu. Editing by Nicole Bleier.

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