

## Dental Co. Wins Arbitration Row After Loss At Supreme Court

By Jimmy Hoover

*Law360 (August 15, 2019, 5:33 PM EDT)* -- After a setback at the U.S. Supreme Court, dental equipment distributor Archer and White Sales Inc. has won a Fifth Circuit ruling blocking arbitration of its multimillion-dollar antitrust suit against a competitor.

The Fifth Circuit said Wednesday that it was not clear that Archer and competing distributor Henry Schein Inc. had agreed to let an arbitrator decide a gateway question of arbitrability of their contract dispute. The appeals court, therefore, resolved the arbitrability question on its own in Archer's favor, finding that the dispute falls outside the scope of the arbitration agreement, keeping Archer's lawsuit in federal court.

"Tasked with interpreting the arbitration clause anew, we conclude that the parties have not clearly and unmistakably delegated the question of arbitrability to an arbitrator," the Fifth Circuit said.

Wednesday's ruling by the three-judge-panel was Archer's second victory at the Fifth Circuit in its case against Henry Schein, which it has accused of conspiring to limit its sales territories under distribution agreements. When the district court refused to compel arbitration at Henry Schein's request, the company appealed.

But the Fifth Circuit affirmed the decision in late 2018. It said that Henry Schein's request for arbitration was "wholly groundless" because the dispute clearly falls outside the scope of the agreement. The provision included a carveout in the agreement precluding arbitration of disputes seeking injunctive relief, which Archer has sought in its lawsuit.

However, the Supreme Court vacated the ruling in January. In a unanimous opinion written by Justice Brett Kavanaugh, the high court said the Federal Arbitration Act contained no such "wholly groundless" exception to arbitrability.

Still, the Supreme Court did not express an opinion on whether the contract at issue had in fact delegated the arbitrability question to an arbitrator, though it invited the circuit court to address the issue.

On remand, the Fifth Circuit has answered that it did not. The arbitration provision incorporated the rules of the American Arbitration Association, which delegate questions of arbitrability to the arbitrator. But the Fifth Circuit said that the provision incorporates the rules "for all disputes except those under the carveout," referring to the contract's exclusion of disputes seeking injunctive relief.

“Given that carveout, we cannot say that the Dealer Agreement evinces a “clear and unmistakable” intent to delegate arbitrability,” the Fifth Circuit said.

"My client has been waiting for years to have his day in court," said Archer's lawyer, Lewis T. LeClair of McKool Smith PC. "We are grateful to the Fifth Circuit for finally putting to rest the defective arbitration demand that has been held both wholly groundless and lacking the necessary delegation to the arbitrator. We have now been all the way to the United States Supreme Court and back down. We look forward to trial in the Eastern District of Texas."

U.S. Circuit Judges Patrick Higginbotham, James E. Graves and Stephen A. Higginson sat on the panel.

Counsel for Henry Schein could not be reached for comment Thursday.

Archer & White Sales Inc. is represented by Lewis T. LeClair of McKool Smith PC.

Henry Schein Inc. is represented by Christopher E. Ondeck and Stephen R. Chuk of Proskauer Rose LLP and Paul F. Schuster and Cynthia K. Timms of Locke Lord LLP.

The case is Archer and White Sales, Inc. v. Henry Schein, Incorporated, et al., case number 16-41674, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Caroline Simson. Editing by Peter Rozovsky.

*Update: This story has been updated with comments from Archer's attorney.*