

PUBLICATION

A Win for Employers: Justice Kavanaugh and Supreme Court Issue Pro-Arbitration Opinion

Authors: Zachary B. Busey

January 24, 2019

In his first opinion since being confirmed to the Supreme Court, Justice Kavanaugh was joined by his fellow justices in unanimously deciding that delegation clauses in arbitration agreements must be enforced. Delegation clauses provide an option for keeping the entirety of a workplace dispute in arbitration, and this case is a win for employers.

Over the last decade, the Supreme Court has taken a keen interest in arbitration agreements. In its last term, it affirmed the use of class waivers in arbitration agreements and specifically affirmed the availability of one-on-one arbitration between employers and their employees. So far, in this term, the Supreme Court has decided one of the three arbitration cases before it. That case, *Henry Schein Inc. v. Archer and White Sales Inc.*, questioned the scope and enforceability of "delegation clauses" in arbitration agreements. Delegation clauses determine which disputes should be heard by a court and which should be heard by an arbitrator.

Say, for example, the parties dispute whether they have an *enforceable* arbitration agreement, or whether their agreement allows for class arbitration. A delegation clause states whether these disputes are decided by a court (before arbitration) or by an arbitrator (as part of arbitration). In *Henry Schein*, the arbitration agreement stated, essentially, that all disputes between the parties should be decided by an arbitrator. Now, the parties are locked in an antitrust dispute. One side argues that their dispute is not covered by the arbitration agreement, and, therefore, it can be heard by a court. The other side argues that the dispute is covered by the agreement and, therefore, must be heard by an arbitrator, not a court.

The specific question before the Supreme Court was who – a court or an arbitrator – decides the parties' "coverage" dispute. In other words, does a court decide which disputes are covered by the arbitration agreement, or does the arbitrator decide which disputes are covered by the arbitration agreement? To date, the Supreme Court has been largely willing to enforce arbitration agreements according to their terms. It continued this approach in *Henry Schein*. "[A]rbitration is a matter of contract," that opinion explained, "and courts must enforce arbitration contracts according to their terms." The Supreme Court went on to explain that when an arbitration agreement (i.e., "an arbitration contract") delegates questions or issues to an arbitrator, "a court may not override the contract." Courts must enforce delegation clauses and arbitration agreements as they are written.

For employers, delegation clauses provide an option for keeping the entirety of a workplace dispute in arbitration. Accordingly, employers must draft their workplace arbitration agreements with care and, like most workplace policies, with precision. For additional information regarding this case or the benefits of workplace arbitration agreements in general, please contact the author, [Zachary B. Busey](#), or any member of Baker Donelson's [Labor & Employment Group](#).