19-2240

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

KETLER BOSSE,

Plaintiff–Appellee,

—v.—

NEW YORK LIFE INSURANCE COMPANY; NEW YORK LIFE INSURANCE ANDANNUITY CORP.; NEW YORK LIFE INSURANCE COMPANY OF ARIZONA,

Defendants–Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
NO. 1:19-CV-016 (HON. STEVEN J. MCAULIFFE)

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLEE

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3) Does the parties' dispute about the scope of their agreement to arbitrate claims between them - as opposed to the parties' dispute about the scope of their agreement to arbitrate questions of arbitrability - constitute "a controversy thereafter arising out of such contract or transaction" for the purposes of Section 2 of the FAA?

4) When an agreement explicitly states that the issue of arbitrability is delegated to the arbitrator, does the arbitrator or a court decide if the FAA's "aris[e] out of" requirement is met? Why?

5) How, if at all, does the fact that the provision in the parties' contract delegating questions of arbitrability to the arbitrator applies to "dispute[s] as to whether such Claim" is arbitrable affect the resolution of these questions, given the provision in the contract that requires an arbitrator to adjudicate the parties' "Claim[s]"?

6) What effect, if any, should the United States Supreme Court's decision to grant certiorari in *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), cert. granted, ___ U.S.L.W. ___ (U.S. June 15, 2020) (No. 19-963), have on the First Circuit's resolution of this case?

ARGUMENT

I. What condition, if any, does the "arising out of such contract or transaction" language in the Federal Arbitration Act ("FAA") place on enforcement of arbitration provisions under the FAA, where, under the FAA, "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable," 9 U.S.C. § 2 (emphasis added), and where, based on that provision, the District Court concluded that "the Federal Arbitration Act itself requires that an arbitration clause have some relationship to, some connection with, the agreement or contract" containing the arbitration clause "as a condition of federal enforcement." *Bosse v. N.Y. Life Ins. Co.*, No. 19-CV-016-SM, 2019 WL 5967204, at *5 (D.N.H. Nov. 13, 2019).

The language "arising out of such contract or transaction" conditions the enforcement of an arbitration clause in a contract on there being – as the District Court concluded – "some connection with, the agreement or contract." (ADD. at 14.). The District Court described the above language as a ***limit*** on the enforcement of an arbitration clause: the "FAA explicitly limits itself to agreements 'to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof.'" *Id.* (quoting *Wexler v. AT&T Corp.*, 211 F. Supp. 3d 500, 503 (E.D.N.Y. 2016)).

The District Court analogized *Wexler* to this case: AT&T moved to compel arbitration based on a similar broad arbitration provision in a service agreement, despite the expiration of the service agreement, and the fact the arbitration provision survived that expiration. (ADD. at 13.). The District Court, quoting

Wexler, explained "a reasonable person would be expressing, at most, an intent to agree to arbitrate disputes connected in some way to the service agreement." *Id.* (quoting *Wexler*, 211 F. Supp. 3d at 504-05).

This Court has expressed the same condition in a different way: "A party who attempts to compel arbitration must show . . . that ***the claim asserted comes within the clause's scope***." *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003) (emphasis added). This condition is important because "'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* at 142-43 (quoting *AT&T Techs., Inc. v. Commcn's Workers of Am.*, 475 U.S. 643 (1986)).

The application of this condition in situations like this case limits the enforcement of arbitration clauses to those disputes that – as in *Wexler* – "are connected in some way to" the agreement and, for example, excludes unrelated disputes that arose years after the agreement. (ADD. at 13.).

For instance, in *Wexler*, the plaintiff's claims were "not so connected" to the service agreement, and the district court did not enforce the arbitration clause. 211 F. Supp. 3d at 504-05. In his Brief, Mr. Bossé relied on two other cases, *Bogen Communications, Inc. v. Tri-Signal Integration, Inc.*, 227 F. App'x 159, 161 (3d Cir. 2007), and *Vantage Tech. v. College Entrance Examination Bd.*, 591 F. Supp. 2d 768 (E.D. Pa. 2008), that reached similar conclusions. In *Bogen*, the Third

Circuit found that a dispute that occurred ***after*** the expiration of the parties' agreement was not subject to an arbitration clause contained in that agreement, because the lawsuit did not arise under the original contract, and the companies continued to do business together ***but on different terms***. In *Vantage Tech.*, the district court denied a motion to compel arbitration of a contract dispute because it arose after the expiration of the parties' written contract containing an arbitration clause and before the commencement of their subsequent written contract that did not include an arbitration provision. *Id.* at 770-72.

Thus, the language "arising out of such contract or transaction" conditions the enforcement of an arbitration clause the existence of some connection with the underlying agreement or contract.

II. On the facts of this case, if such a limit is imposed, is that limit applicable here?

If the limit above is imposed (it should be), it certainly applies here. Like the cases above, Mr. Bossé's claims were not connected to the arbitration agreement in the Partner's Employment Agreement he signed in in March 2004: his claims concern facts and events that occurred ***over 12 years after*** that Agreement was terminated in 2005, and under two other contracts (the Agent's Contract and District Agent Agreement) that did not contain an arbitration clause. *See* Brief for Plaintiff-Appellee at 12-22. (Indeed, when New York Life terminated Mr. Bossé, it provided him with a letter that purported to terminate him

under the 30-day at-will provision in the ***Agent's Contract***, not the Employment Agreement. (JA at 029.)). Mr. Bossé's claims, therefore, are not covered by the arbitration clause in the Employment Agreement, and the arbitration clause cannot be enforced. *See* Brief for Plaintiff-Appellee at 12-22.

III. Does the parties' dispute about the scope of their agreement to arbitrate claims between them - as opposed to the parties' dispute about the scope of their agreement to arbitrate questions of arbitrability - constitute "a controversy thereafter arising out of such contract or transaction" for the purposes of Section 2 of the FAA?

The answer is no. The United States Supreme Court has held that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. To satisfy itself that such agreement exists, ***the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce***. ***Where there is no provision validly committing them to an arbitrator, these issues typically concern the scope of the arbitration clause and its enforceability***. *Granite Rock Co. v. Int. Brotherhood Teamsters*, 561 U.S. 287, 297 (2010). "[A]rbitration is strictly a matter of consent—and thus . . . ***courts must typically decide any questions concerning the formation or scope of an arbitration agreement*** before ordering parties to comply with it." *Id.* at 299 n.6.

In addition to the Court's holding in *Granite Rock*, the arbitration agreement here leaves no doubt that the parties' dispute about its scope does not constitute "a

controversy thereafter arising out of such contract or transaction" for the purposes of Section 2 of the FAA: the arbitration agreement does not expressly include disputes about its scope (as opposed to the arbitrability issue) among the "dispute[s], claim[s] or controvers[ies]" that must be referred to arbitration. (JA at 74-75.).

IV. When an agreement explicitly states that the issue of arbitrability is delegated to the arbitrator, does the arbitrator or a court decide if the FAA's "aris[e] out of" requirement is met? Why?

A court must decide if the FAA's "aris[e] out of" requirement is met because it remains an issue of contract formation. Much of the confusion over this question appears to stem from New York Life's overwhelming on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). In that case, the Supreme Court ***did not decide whether the contract delegated the arbitrability question to an arbitrator***. 139 S. Ct. at 531 ("We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator.") The Court held only that, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract," and rejected the notion that a court may decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." *Id*. As will be demonstrated below, other authorities support the District Court's Order.

A challenge to a delegation provision requires a court to answer two questions: "(1) was there a valid agreement; and (2) was there clear and mistakable evidence that the parties agreed to delegate questions of arbitrability to the arbitrator?" Brief of Appellants at 13. No one disputes there is a valid agreement to arbitrate ***in general***. But it does not cover ***this dispute***: There is no "clear and unmistakable evidence" there was an agreement to arbitrate ***the dispute in this case***.

The question of who decides the arbitrability issue depends on whether the arbitration agreement covers the underlying dispute. This question was answered in a single line in the District Court's opinion: "There is not an enforceable agreement to arbitrate ***the claims brought in this case***." (ADD. at 8.) (emphasis added) This conclusion ***also*** applies to the arbitrability question: In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court held: "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, ***so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter***." *Id.* at 943 (internal citations omitted) "If . . . the parties did *not* agree to submit the arbitrability question itself to arbitration, ***then the court should decide that question just as it would decide any other question that the parties did not submit***

to arbitration, namely, independently." *Id.* (internal citation omitted) (emphasis added)

The Court explained further: "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* Because the issue is a matter of contract, '[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944. The only "qualification" the Court added to this analysis was that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

Henry Schein acknowledged "[t]his Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." 139 S. Ct. at 530 (quoting *First Options*, 514 U.S. at 944).

In the First Circuit, the "clear and unmistakable evidence" standard is a "high one." *Shank/Balfour Beatty v. IBEW Local 99*, 497 F.3d 83, 89-90 (1st Cir. 2007) (quoting *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005)). This Circuit has held that "[a] dispute over whether an arbitration

provision applies to a particular controversy raises an issue of substantive arbitrability that is ***presumptively for the courts, not the arbitrator, to decide***." *Shank/Balfour Beatty v. IBEW Local 99*, 497 F.3d 83, 89 (1st Cir. 2007) (emphasis added); *see also NASDAQ OMX Group, Inc. v. UBS Securities, LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014) ("The law generally treats arbitrability as an issue for judicial determination 'unless the parties clearly and unmistakably provide otherwise.'") (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). New York Life's own case law supports this point: "[W]hether the court or the arbitrator decides arbitrability is '"an issue for judicial determination unless the parties *clearly and unmistakably provide otherwise.*"' *Oracle Am., Inc. v. Myriad Group AG*, 724 F.3d 1069, 1072 (9th Cir. 2013) (cited in Brief of Appellants at 21). "[T]he federal policy in favor of arbitration does not extend to deciding questions of arbitrability." *Oracle Am.*, 724 F.3d at 1072.

The District Court's decision in this case is consistent with several prior cases, including the Fifth Circuit's decision in *Henry Schein* on remand after the Supreme Court's January 2019 decision, *First Options*, *Turi v. Main St. Adoption Servs. LLP*, 633 F.3d 496 (6th Cir. 2011), and *NASDAQ OMX Group, Inc. v. UBS Securities, LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014).

In *First Options*, the Court held an arbitration clause in a workout agreement between a firm (First Options) that cleared stock trades on the Philadelphia Stock

Exchange and several investors (the Kaplans) did not apply to the arbitrability of a dispute between the parties arising from that agreement. 514 U.S. at 944-46. It concluded the agreement did not show the parties delegated that issue to an arbitrator. *Id.* at 946.

In *Turi*, the Sixth Circuit held an arbitration clause was so narrow that questions of arbitrability did not need to be decided by the arbitrator. 633 F.3d at 511. The clause covered claims regarding fees in excess of $5,000. *Id.* at 506. The plaintiffs asserted claims, however, outside that delineation: claims for fraud, conspiracy, misrepresentation, intentional and negligent infliction of emotional distress, and RICO violations. *Id.* at 500. The Sixth Circuit held the delegation of the arbitrability issue "applies only to claims that are at least *arguably* covered by the agreement." *Id.* at 511.

In *Henry Schein*, on remand in August 2019, the Fifth Circuit held the parties did ***not*** clearly delegate arbitrability. *See Henry Schein, Inc. v. Archer & White Sales*, 935 F.3d 274, 278-82 (5th Cir. Aug. 14, 2019). There was a valid arbitration clause in a dealer agreement that referred any dispute arising out of the agreement to arbitration, except for several types of claims, including actions seeking injunctive relief. *Id*. The defendant argued the clause's general incorporation of the AAA rules functioned as a delegation of the arbitrability issue to an arbitrator. *Id*. The Fifth Circuit held that, because some of the plaintiff's

claims sought injunctive relief, they fell within the carve-out provision in the arbitration clause and could not be arbitrated. *Id*. Thus, the Court held, because the arbitration clause delegated arbitrability for all disputes except those under the carve-out, it could not conclude the agreement showed a "clear and unmistakable" intent to delegate arbitrability. *Id.*

Finally, in *NASDAQ*, the Second Circuit held a similar arbitration clause that incorporated the AAA rules did not clearly and unmistakably delegate arbitrability because the clause contained a carve-out that arguably covered the underlying dispute. 770 F.3d at 1031-32. Thus, the Court held the arbitrability question was for the Court to decide. *See id.*

Thus, a court must decide if the FAA's "aris[e] out of" requirement is met because there must be an enforceable agreement to arbitrate the claims brought in the case.

V. How, if at all, does the fact that the provision in the parties' contract delegating questions of arbitrability to the arbitrator applies to "dispute[s] as to whether such Claim" is arbitrable affect the resolution of these questions, given the provision in the contract that requires an arbitrator to adjudicate the parties' "Claim[s]"?

The principles above in response to the fourth question posed by this Court demonstrate that there is no "clear and unmistakable evidence" of an agreement to arbitrate ***this dispute***.

The Employment Agreement states it "shall be governed by and interpreted in accordance with the laws of the State of New York." (JA at 76.) Under New York law, "'[t]he court must ascertain the intent of the parties from the plain meaning of the language employed,' and a 'contract should be construed so as to give full meaning and effect to all its provisions.'" *Painewebber, Inc. v. Elahi*, 87 F.3d 589, 600 (1st Cir. 1996) (quoting *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (N.Y. Add. Div. 1990)). "A contract term is ambiguous if it is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business.'" *Painewebber*, 87 F.3d at 600 (quoting *Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir. 1987)).

Here, the Employment Agreement does not demonstrate "clear and unmistakable evidence" that Mr. Bossé and New York Life intended that the issue of whether the arbitration clause applies to this dispute is an arbitrability issue that must be decided in arbitration. The arbitration clause states, "The ***Partner*** [Mr. Bossé] and New York Life agree that ***any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) in violation of a statute (hereinafter "the Claim"), as well as any dispute as to whether such Claim is arbitrable***, shall be resolved by an arbitration proceeding." (JA at 74) (emphases added). Mr. Bossé was an ***employee*** under this Agreement, and his relationship with New York Life at that time was an ***employment*** relationship: he had a far more limited set of duties and obligations than he had under the Agent's Contract or District Agent Agreement, and he earned a salary and had no right to the extensive commission structure provided by the latter two agreements. Thus, reading the Employment Agreement as a whole, a "dispute, claim, or controversy" between Mr. Bossé and New York Life would have necessarily been limited to employment-related claims arising from his work during the brief period of time when the Employment Agreement was in force, such as a traditional employment discrimination claim (which is expressly included in the arbitration clause) or a breach of the non-compete provision in the Employment Agreement. *See id.* They

would not have included claims or disputes arising out of the resumption of Mr. Bossé's relationship with New York Life as a soliciting agent and his relationship with New York Life as a District Agent. These latter relationships yield a separate set of duties and obligations and different array of disputes, claims, or controversies, such as the many claims Mr. Bossé asserted in the Complaint. Thus, while there may be "clear and unmistakable evidence" that the parties intended that the issue of whether the arbitration clause applies to disputes arising out of Mr. Bossé's prior employment relationship with New York Life is an arbitrability issue for an arbitrator, there is no such evidence that the issue of whether the clause applies to disputes arising out of Mr. Bossé's subsequent independent contractor relationship with New York Life is also an arbitrability issue for an arbitrator. Thus, *the District Court* must decide whether the arbitration clause applies to this dispute. As demonstrated above, the clause does not apply.

VI. What effect, if any, should the United States Supreme Court's decision to grant certiorari in *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), cert. granted, ___ U.S.L.W. ___ (U.S. June 15, 2020) (No. 19-963), have on the First Circuit's resolution of this case?

The United States Supreme Court's decision to grant certiorari in *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), should have no effect on this Court's resolution of this case. The Petitioner's principal argument in its Petition for a Writ of Certiorari in *Henry Schein* was that there is a

"conflict" among the federal and state appellate courts on the issue of whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator. The Petitioner alleged two federal courts of appeals and two state courts had addressed this question. Two of those cases – *NASDAQ* above and *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006) – held the court, and not the arbitrator, must resolve the arbitrability dispute under the agreements at issue in those cases. The other two cases – *Oracle* above and *Ally Align Health, Inc. v. Signature Advantage, LLC*, 574 S.W.3d 753 (Ky. 2019) – held the arbitrator, not the court, must resolve the arbitrability dispute under the agreements at issue in those cases.

There is no conflict, however, between these cases. These courts agreed on the same principle of law articulated above (there must be a clear and unmistakable delegation of the arbitrability issue to an arbitrator) and reached different results merely because they construed different contractual language. Like the decisions in *NASDAQ* and *James & Jackson*, the Employment Agreement does not demonstrate "clear and unmistakable evidence" that Mr. Bossé and New York Life intended that the issue of whether the arbitration clause applies to this dispute is an arbitrability issue that must be decided in arbitration.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Order denying New York Life's Motion to Compel Arbitration.

Respectfully submitted,

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By His Attorneys,

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Dated: July 10, 2020

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CERTIFICATE OF COMPLIANCE

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Dated: July 10, 2020

/s/Robert M. Fojo
Robert M. Fojo, Esq.

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Dated: July 10, 2020

/s/Robert M. Fojo
Robert M. Fojo, Esq.