

Henry Schein Case: CPR Interviews Loree and Faulkner on Supreme Court's Grant of Certiorari



Steps and columns on the portico of the United States Supreme Court in Washington, DC.

On Monday, June 15, 2020 the International Institute of Conflict Protection and Resolution (?CPR?) interviewed our good friend and colleague Richard D. Faulkner and Loree & Loree partner Philip J. Loree Jr. about the U.S. Supreme Court's grant of certiorari in *Henry Schein Inc. v. Archer and White Sales Inc.*, No. 19-963. To watch and listen to the video-conference interview, [CLICK HERE](#)].

The petition for and grant of certiorari arose out of the Fifth Circuit's remand decision from the United States Supreme Court's decision in *Henry Schein Inc. v. Archer & White Sales Inc.*, 139 S. Ct. 524 (2019) (available at <https://bit.ly/2CXAgPw>) (?Schein I?).

If you've been following our posts about the Schein I and the remand decision, *Archer and White Sales Inc. v. Henry Schein Inc.*, 935 F.3d 274 (5th Cir. 2019) (available at <http://bit.ly/2P9FGMU>) (?Schein II?), then you know that the arbitration proponent, Henry Schein, Inc. (?Schein?), petitioned for rehearing en banc of Schein II in fall 2019. (See [here](#), [here](#), [here](#), and [here](#).) In October 2019, while the petition for rehearing en banc was pending, Philip J. Loree Jr. published in *Alternatives* an article entitled *'Back to Scotus's Schein: A Separability Analysis that Resolves the Problem with the Fifth Circuit Remand,'* 37 *Alternatives* 131 (October 2019).

The Fifth Circuit denied the petition for rehearing en banc on December 6, 2019. But Schein, a Melville, N.Y.-based dental equipment distributor, filed on January 30, 2020 a petition for certiorari, which asked the U.S. Supreme Court to review the Fifth Circuit's Schein II ruling.

The Petition asks the U.S. Supreme Court to determine '[w]hether 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.' (Petition at I)

We wrote about the Petition in a post [CPR Speaks](#), CPR's blog, published on February 19, 2020, which was entitled **?'Schein Returns: Scotus's Arbitration Remand Is Now Back at the Court.'** And we also published in the April 2020 issue of [CPR Alternatives](#) an article about the Petition, which was entitled **?'Schein's Remand Decision Goes Back to the Supreme Court. What's Next?'**, 38 Alternatives 54 (April 2020) (the **?'April 2020 Alternatives Article'**).

As noted in the April 2020 Alternatives Article, Schein's filing of the petition for certiorari prompted Archer & White Sales Inc. (?'Respondent?' or **?'Archer & White'**), a Plano, Texas, distributor, seller, and servicer of dental equipment, to file a conditional cross-petition (the **?'Cross Petition'**), which in the event the Court granted the Petition asked the Court to determine **?'[w]hether the parties clearly and unmistakably agreed to arbitrate arbitrability by incorporating the AAA Rules into their contract.'**

The Cross-Petition ultimately prompted Rick Faulkner and Phil Loree Jr. to co-author a two-part article for Alternatives entitled **?'Schein's Remand Decision: Should Scotus Review the Provider Rule Incorporation-by-Reference Issue?'** Part I was published in the May 2020 issue of Alternatives. Part II was published in the June 2020 issue.

The two-part article argued that, if the Court granted the Petition, it should also grant the Cross-Petition, and address the issue whether the parties, by agreeing to arbitrate **?'in accordance with?'** the American Arbitration Association's Commercial Arbitration Rules, clearly and unmistakably agreed to arbitrate arbitrability issues.

But as it turned out, the Court granted the Petition, but denied the Cross-Petition, one of the issues addressed in the [interview](#)].

Our good friend Russ Bleemer, Editor of Alternatives, conducted the [interview](#)], and did a great job editing the articles Rick and I wrote about Schein for Alternatives. He also wrote for the [CPR Speaks Blog](#) an [excellent summary](#)] of where things stand in light of the Court's grant of the Petition. The video of the interview is embedded into that [blog post](#)]. You can request copies of the articles Rick and Phil wrote about Schein by emailing CPR at alternatives@cpradr.org].

We also shout-out CPR's **Tania Zamorsky**, who, among other things, is the blog master of **CPR Speaks**, and who coordinated the effort to share copies of the video on CPR's social media outlets.

Photo Acknowledgment]

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