

Henry Schein Inc. v. Archer & White Sales Inc. | CPR's Video Conference Interview of Rick Faulkner and Phil Loree Jr. about Schein's Second Trip to the the Nation's Highest Court



On May 20, 2020, the International Institute of Conflict Protection and Resolution (CPR) interviewed our good friend and fellow arbitration attorney Richard D. Faulkner and Loree & Loree partner Philip J. Loree Jr. about a two-part article we wrote about the Schein case for the May 2020 and June 2020 issues of Alternatives to the High Cost of Litigation, CPR's international ADR newsletter published by **John Wiley & Sons, Inc.** To watch and listen to the video-conference interview, [CLICK HERE](#)].

The article and the interview concern whether the United States Supreme Court should grant certiorari to determine whether an arbitration agreement that requires arbitration in accordance with arbitration provider rules clearly and unmistakably evidences an agreement to arbitrate arbitrability issues if those provider rules contain a provision that purports to require parties to arbitrate arbitrability.

This issue has arisen out of the Fifth Circuit's decision on remand 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 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, asking 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's blog, CPR Speaks, 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 that the Court grants the Petition, asks the Court also 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 will be published in the June 2020 issue.

As the title suggests, the focus of the article is on whether the U.S. Supreme Court should, if it grants the Petition, 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.

Our good friend Russ Bleemer, Editor of Alternatives, conducted the [video conference interview](#) and did a great job editing the article. As Russ states in the video, persons who would like to review copies of the article can request them 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.

Contacting the Author

If you have any questions about this article, arbitration, arbitration-law, arbitration-related litigation, then please contact Phil Loree Jr., at (516) 941-6094 or at PJL1@LoreeLawFirm.com.

Philip J. Loree Jr. is a partner and founding member of Loree & Loree. He has 30 years of experience handling matters arising under the Federal Arbitration Act and in representing a wide variety of clients in arbitration, litigation, and arbitration-related litigation.

Loree & Loree represents private and government-owned-or-controlled business organizations, and persons acting in their individual or representative capacities, and often serves as co-counsel, local counsel or legal adviser to other domestic, and international, law

firms requiring assistance or support.

Loree & Loree was recently selected by **Expertise.com** out of a group of 1,763 persons or firms reviewed as one of Expertise.com's top 18 ?Arbitrators & Mediators? in New York City for 2019, and now for 2020. (See **here** and **here**.)

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