Wholly groundless

A look at the United States Supreme Court's decision on arbitration agreements and saving the right to a jury trial when faced with a motion to compel

By RYAN J. KRUPP

"I Agree to the Terms and Conditions." It seems like a harmless checkbox, a necessary item in completing your purchase for a product or service, but did you know that you may have entered into a binding contract which strips away your 7th amendment jury trial rights and may force you into arbitration in another state?

Arbitration agreements are contracts and are being enforced around the nation with the trend in higher courts to hold the agreements as binding and interpret them based on the terms of the contract. Large companies are therefore able to force weaker parties into arbitration, even when the "agreeing" party didn't know that arbitration was even a possibility.

Particularly in situations where someone purchases a service or product which would subject them to another state's jurisdiction (e.g. a person in Illinois purchases a night's stay at a hotel in Missouri) an arbitration agreement could severely hurt the value of a plaintiff's claim by forcing arbitration in a different state according to the terms of the arbitration agreement, which the person probably didn't even think about when they purchased the service and hit "I agree."

In Justice Brett Kavanaugh's first opinion with the United States Supreme Court, the Court unanimously decided on several issues further bolstering the validity of arbitration agreements. How does this decision interact with other relevant law and how can Missouri plaintiff lawyers attack and defeat these arbitration agreements, thus, preserving their clients' 7th Amendment right to a jury trial?

United States Supreme Court Decision in *Henry Schein v. Archer and White Sales, Inc*:

In Justice Kavanaugh's first opinion as a Supreme Court Justice, the Court was called upon to decide whether courts could decide arbitrability where the parties to the contract delegated an arbitrator to decide matters of arbitrability.[1]

The facts of the case revolve around a distributor, seller and servicer for multiple dental equipment manufacturers who brought an antitrust suit against its competitors, alleging violations of the Sherman Act and the Texas Free Enterprise and Antitrust Act.[2]

In a unanimous decision, the court held that arbitrators would determine matters of arbitrability where the parties to the contract agree that an arbitrator rather than a court will resolve the disputes arising out of the contract. The court also held that a "wholly groundless" exception was not consistent with the Federal Arbitration Act.[3]

The court's holding was based upon principles of contract law from existing United States Supreme Court precedent in cases such as *Rent-A-Center, West, Inc. v. Jackson* which holds that parties to a contract may agree to have "gateway" questions of arbitrability decided by an arbitrator in addition to the merits of the dispute.[4] The court also cites precedent: "when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless."[5]

The decision has clear implications as to whether arbitrators or the court make initial decisions on arbitrability but raises a question as to how courts especially in Missouri will treat the "wholly groundless" portion of the Court's decision or whether it will have any impact at all.

How the decision may affect your case:

The Federal Arbitration Act (FAA), 9 U.S.C. S 1 et eq. (2006), governs the applicability and enforceability of arbitration agreements in all contracts involving interstate commerce.[6]

In considering a motion to compel arbitration Missouri courts must consider three factors: (1) whether a valid arbitration agreement exists; (2) whether the dispute is within the scope of the agreement; and (3) whether applicable contract principles subject the agreement to revocation. [7] The Court's decision in *Henry Schein* doesn't touch the question of whether a valid arbitration agreement exists, or whether the dispute is within the scope of the agreement. Therefore, it should be noted that the decision most directly affects whether the contract principals are subject to revocation.

An arbitrator deciding arbitrability of a claim is not a new concept and is already Missouri law. Thus, the Supreme Court's decision has not changed much in that regard, other than solidifying what was already in place.[8] The "wholly groundless" exception, however, is somewhat if not entirely foreign to Missouri courts.

Prior to the decision in *Henry Schein*, in some jurisdictions the judge was given authority to decide whether a respondent's motion to compel arbitration was frivolous, or in other words, "wholly groundless." In those cases,

where the district court in determining whether it was "satisfied" of the arbitrability of an issue found that the assertion of arbitrability was not "wholly groundless," then it should stay the trial of the action until a ruling was made by an arbitrator on its arbitrability. However, if the district court found that the that the motion to compel arbitration was "wholly groundless," the court, rather than an arbitrator could conclude that it is not "satisfied" under FAA, and therefore deny the moving party's request for a stay.[9]

While the *Henry Schein* decision may fortify defense motions to compel based on the terms of the contract, if you were planning on attacking the arbitrator's ability to arbitrate or an exception to the validity of the contract similar to the "wholly groundless" exception, you may have been fighting a losing battle to begin with. Consider attacking arbitration agreements at their heart: formation.

Defeating Arbitration Agreements in Missouri

We have had success in Missouri cases against out-of-state online marketing companies by fighting the arbitration agreement based on the first factor - its validity. In determining whether an arbitration agreement is valid they are tested through a lens of ordinary state contract law principles.[10] The elements dictating the validity of the agreement are identical to Missouri law on basic contract formation principles: offer, acceptance, bargained for consideration. [11]

Thus, it logically follows that the strongest point of attack is the contract itself. Please consider two plans of attack based on the validity of the contract: the "illusory agreement" argument which is based on bargained-for consideration and "unconscionability," which is a defense to contract based on unfairness. Both methods of attacking the arbitration agreement are most strongly centered around the unfairness in bargaining power between a plaintiff and the company or organization which drafts a complicated legal document that the plaintiff must agree to without understanding the implications of her actions before making a purchase.

Illusory Agreement

Attacking the arbitration agreement at its formation is probably the best place to start. The bargained-for consideration aspect of its formation may be particularly vulnerable. Why? Believe it or not, most likely because it's too strong. Perhaps better said, one side's bargaining power is too strong (especially in the case of the large company against a solitary plaintiff).

Bilateral contracts are supported by consideration and enforceable only when each party promises to undertake some legal duty or liability.[12] If the promises are illusory, however, they will not be enforced for lack of bargained-

for consideration.[13] An illusory promise is one where a party retains the absolute and unilateral right to amend the agreement and avoid its obligations.[14] In *Baker v. Bristol Care, Inc. 450 S.W.3d 770 (2014)* the Missouri Supreme Court deemed an arbitration agreement illusory and unenforceable where in the agreement the defendant maintained a unilateral right to, **"amend modify or revoke [the] agreement within thirty (30) days' prior written notice to the employee."** The Court held that the quoted language gave the defendant unilateral authority to change the agreement retroactively, thus, making it illusory and not supported by consideration.

We've had similar success arguing a lack of bargaining power in the agreement using *Baker v. Bristol* as the primary ammunition and have recently defeated an arbitration agreement between an online marketing company in another state and a plaintiff who purchased services in Missouri through the company and unknowingly agreed to forced arbitration by clicking a checkbox that stated, "I agree to the Terms and Conditions."

The success of the argument was based on the disparity of bargaining power where we were dealing with what is considered a "click-wrap agreement," which may be interpreted as a contract of adhesion. A contract of adhesion, as opposed to a negotiated contract, is created by the party with greater bargaining power and offered on a take it or leave it basis. The provision of the contract that rendered it illusory stated, **"[Company] reserves the right at all times to discontinue or modify any of our terms of use and/or our Privacy Policy as we deem necessary or desirable."** The provision rendered the agreement illusory because it gave the company the unilateral right to amend the agreement and avoid its obligations, which was to say that the company had not undertaken a legal detriment and there was no bargained for consideration, just as in *Baker v. Bristol*.

Unconscionability

Today's marketplace is rapidly evolving to online forums as brick and mortar businesses fall by the wayside. In its place, unfettered access to the purchase of goods and

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services from the comfort of your own couch. Along with this luxury comes "click-wrap agreements" which you may have used or seen in the form of "I agree to the Terms and conditions," or something similar. This is where you'll most likely find arbitration agreements in your contract. These click-wrap agreements also may make themselves vulnerable to the contract defense of unconscionability because of the disparity in bargaining power and the unfairness of its terms.

Unconscionability, as opposed to the "illusory agreement" argument is a contract defense and should be used as a second line of defense as arguing it may presuppose that the arbitration agreement is otherwise valid (i.e. even if there were a valid offer, acceptance and consideration the arbitration agreement is unconscionable). Missouri courts may invalidate an otherwise valid arbitration agreement if an applicable contract defense such as fraud, duress or unconscionability applies.[15]

Unconscionability means "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it."[16] Unconscionability has two aspects: procedural unconscionability and substantive unconscionability and both must be present to invalidate the agreement.[17]

Like the "illusory agreement" argument, procedural unconscionability is based on a disparity in bargaining power and focuses on things like high pressure sales tactics, difficult to read fine print, or misrepresentation in the contract formation process.[18]

Substantive unconscionability concerns itself with the actual terms of the contract and examines the relative fairness of the obligations assumed, meaning an undue harshness in the contract terms.[19] An unconscionable contract or even a single unconscionable clause in a contract will not be enforced.[20]

Opinion:

"I agree to the Terms and Conditions" buttons are becoming more common with the increase in online purchases and interstate commerce. With that comes more arbitration agreements, meaning more battles to preserve a plaintiff's 7th Amendment right to a jury trial. The decision in *Henry Schein* addresses one aspect of arbitration agreements which have already been held as the law in Missouri; namely, arbitrators, rather than a court may determine matters of arbitrability.

The holding as it relates to arbitrators deciding arbitrability altogether could affect how you defeat the arbitration agreement. The holding means that arguing the terms regarding the arbitrator's ability to determine arbitrability will not be persuasive in attempting to show unfair bargaining power for the "illusory agreement" argument or the procedural portion of unconscionability. It also means that the terms of the contract will unlikely be deemed too unfair to satisfy the substantive portion of unconscionability.

The "wholly groundless" exception hasn't been an apparent staple in Missouri litigation, so the Court's decision to not apply the exception to the FAA doesn't seem to be too harsh of a detriment to plaintiff's rights. Nevertheless, it shows a trend to favor arbitrators over courts and shows that the Court will strike down exceptions not written into the Act.

Still, the "illusory agreement" argument and unconscionability are being argued successfully in Missouri higher court decisions as well as in lower courts.[21] The "illusory agreement" argument expounded in *Baker v. Bristol* is a good line of attack of the agreement because it cuts straight to the heart of the agreement rather than looking for a contract defense such as fraud, duress or unconscionability. Unfair bargaining power is almost inherent in these arbitration agreements, especially in the case of the single plaintiff against a large company who checks a box on a take-it-or-leave-it basis. Look for terms in the agreement which give the defendant the unilateral right to modify the agreement. It could save your jury trial and win your case.

Endnotes

[1] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 U.S. 524 (2019).
[2] *Id.*
[3] *Id.*
[4] *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 177, L.Ed.2d 403 at 68-69.
[5] *See, AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-650, 106 S.Ct. 1415, 89 L.Ed.2d 648.
[6] *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426 (Mo. Supp. 2015).
[7] *Sharp v. Kansas City Power & Light Co.*, 457 S.W.3d 823, 826 (Mo. App. W.D. 2015)
[8] *See, NutraPet Systems, LLC v. Proviera Biotech, LLC*, 542 S.W.3d 410 (Mo. Ct.App. W.D. (2017).
[9] *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 n.5 (Fed.Cir.2006) (applying 9th Circuit law). (overruled by Schein).
[10] *Eaton*, 461 S.W.3d at 432
[11] *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 775 (2014).
[12] *Sumners v. Serv. Vending Co.*, Inc., 102 S.W.3d 37, 41 (Mo.App. 2003)
[13] *Id.*
[14] *Baker*, 450 S.W.3d at 776.
[15] *Eaton*, 461 S.W.3d at 432.
[16] *State of Missouri, Dept. Soc. Servs., Div. of Aging v. Brookside Nursing Ctr.*, Inc., 50 S.W.3d 273, 277 (Mo. banc 2001) (quoting Restatement (Second) of Contracts § 153 (1981))
[17] *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo.Supp. 2006).
[18] *Id.*
[19] *Id.*
[20] *Whitney v. Alltel Communications, Inc.*, 173 S.W. 300, 310 (Mo.Ct.App. W.D. 2005).
[21] *See e.g. Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426 (Mo. Banc 2015); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. banc 2014); *Wilder v. John Youngblood Motors, Inc.*, 534 S.W.3d 902 (Mo.App. S.D. 2017); *Caldwell v. UniFirst Corporation*, 2018 WL 4568885 (Mo.App. E.D. 2018)(Cause Ordered Transferred to Mo.S.Ct. January 29, 2019);