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Appellate Lawyer of the Week: Dallas Lawyer Convinces 5th Circuit to Vacate Arbitration Order

The attorney managed to pull it off when the court decided to allow his client to pursue a multi-million-dollar price-fixing case before a federal jury in Texas.

BY JOHN COUNCIL

Lew LeClair had a nearly impossible mission at the **U.S. Court of Appeals for the Fifth Circuit**: convince the appellate court to agree to vacate a motion to compel arbitration, a move the court is historically loath to do. He also had less than two months to do it.

Yet LeClair managed to pull it off when the court **decided** to allow his client to purse a multimillion-dollar price-fixing case against one of the nation's largest dental equipment distributors before a federal jury in the Eastern District of Texas.

"It's funny, I actually like those situations," said LeClair, a principal in Dallas' **McKool Smith**. "I was happy with that. I liked studying the issue and being fresh about it."

The reason LeClair was comfortable taking on a new case with a looming oral argument date in New Orleans is because his firm emphasizes appeals, and prepares its lawyers through mock trials.

"At McKool, where I've been for [20] years, that's our real signature, how to approach appeals and make sure you know any question the court will ask and which way to go with each answer," LeClair said. "And it worked. I was able to go in whatever direction the panel wanted to go."

LeClair's client, Archer and White Sales Inc., which sells and distributes dental supply equipment, sued Henry Schein Inc. and the Danaher Corp., the nation's largest dental equipment distributor, for antitrust violations. They sought tens of millions in damages as well as injunctive relief.

Lewis LeClair

The defendants later moved to compel arbitration pursuant to a clause in the contract with Archer and White. The agreement stated any dispute

between would be handled in arbitration "except for actions seeking injunctive relief and disputes related to trademarks, trade secrets or other intellectual property."

A U.S. magistrate judge granted the motion to compel arbitration, holding that the gateway question of the arbitrability of the claims belonged to the arbitrator. But the district court later vacated the magistrate's order and held the district court could decide the question of arbitrability because the plain language of the arbitration clause expressly excluded suits that involved injunctive relief.

The defendants appealed the decision to the Fifth Circuit. A key question the appeals court had to answer was whether the defendant's motion to compel arbitration was "wholly groundless" under Fifth Circuit precedent and should not be sent to an arbitration.

The defendants argued their motion was not wholly groundless and if a district court were allowed to decide whether the case should be sent to arbitration, it would effectively obviate the entire purpose of delegating the gateway question to the arbitrator in the first place.

But LeClair argued the plain language of the arbitration clause makes it clear the parties did not agree to arbitrate actions that involve a request for injunctive relief and any argument to the contrary is groundless.

In its Dec. 21 decision in *Archer and White v. Danaher*, the Fifth Circuit agreed with LeClair's argument.

"The arbitration clause creates a carve-out for 'actions seeking only injunctive relief.' It does not limit the exclusion to 'actions seeking only injunctive relief' nor 'actions for injunction in aid of an arbitrator's award,'" wrote Senior Judge Patrick Higginbotham.

"Because we find that defendants' arguments for arbitrability are wholly groundless, we affirm the district court's holding that the claims are not arbitrable," Higginbotham concluded.

Jonathan Pitt, a partner in Washington, D.C.'s Williams & Connolly who represents Schein and Danaher, did not return a call for comment.

LeClair said the toughest part of the case was convincing the Fifth Circuit that the motion to compel arbitration was groundless.

"More and more, the question of whether a case is arbitrable are questions to be decided by the arbitrator and do not go before the court," LeClair said. "And man is it difficult to defeat arbitration. But this one was unique because there was a clause that allowed us not to fall under arbitration."