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THE ROLE OF ARBITRABILITY IN DISCIPLINARY DECISIONS IN PROFESSIONAL SPORTS

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I. INTRODUCTION

Power. Ultimately, arbitrability is about power. If a claim is arbitrable, then the arbitrator has the power to hear and resolve the dispute rather than the courts. In professional sports, arbitrability may even provide an arbitrator with the power to trump decisions rendered by league commissioners. Such was the case with the decision by a Grievance Arbitrator to reduce a penalty issued by National Basketball Association (NBA) Commissioner David Stern against Indiana Pacer Jermaine O'Neal.[1] The original penalty was a twenty-five game suspension for striking a fan that the arbitrator reduced to fifteen games.[2] Stern and the NBA challenged the arbitrability of the suspensions in federal court, and that case will serve as the backdrop for this article.

The suspension issued by Stern stemmed from a fight that broke out with less than 45.9 seconds left in a nationally televised game between the Indiana Pacers and the Detroit Pistons on November 19, 2004.[3] It was then that Pacer forward Ron Artest committed a flagrant foul against Ben Wallace of the Pistons, setting off a series of events that would ultimately lead to Artest charging into the stands and attacking a fan.[4] A melee ensued that pitted several Pacer players against Pistons and Piston fans. During the fight, Pacer

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1. *See* Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528, 2005 WL 22869 (S.D.N.Y Jan. 3, 2005).

2. *Id.* at *3.

3. *Id.* at *1.

4. *Id.*

forward O'Neal confronted and struck a spectator on the playing floor.[5] Television cameras captured the entire incident. The fight would go down as one of the darkest moments in the history of the NBA.

Wasting no time, Stern sanctioned participating players just two days after the fight.[6] The punishments were some of the most severe in the history of the NBA. In total, nine different players were suspended from playing in an aggregate of 140 games.[7] Pacers Ron Artest, Stephen Jackson, and Jermaine O'Neal received the most severe punishments. Artest was suspended for the remainder of the season while Jackson and O'Neal received thirty and twenty-five game suspensions respectively.[8]

The National Basketball Players Association (NBPA) appealed the suspensions to the Grievance Arbitrator pursuant to Article XXXI of the Collective Bargaining Agreement (CBA), claiming that the suspensions were "inconsistent with the terms of the CBA and applicable law, and without just cause."[9] The NBA countered by arguing that any appeal from disciplinary rulings is solely within the Commissioner's purview.[10]

"On December 3, 2004, the Grievance Arbitrator issued an initial decision that he 'had jurisdiction to determine the arbitrability of [the] grievance'" and urged the NBA to attend a hearing scheduled for December 9, 2004.[11] The hearing was conducted and the Grievance Arbitrator upheld all the suspensions except O'Neal's, whose suspension was reduced by ten games for lack of cause.[12]

The NBA filed for a declaratory judgment from the Circuit Court for the Southern District of New York, asking the court to declare that the Arbitrator had no jurisdiction to hear the dispute.[13] The NBPA answered by asking the court to confirm the Arbitrator's award.[14] The court agreed with the NBPA and the Grievance Arbitrator in finding that the suspension was an arbitrable dispute and denied the NBA's motion to vacate while confirming the

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5. *Id.*

6. *Id.*

7. *Suspensions Without Pay, Won't be Staggered*, ESPN.COM, Nov. 21, 2004, http://sports.espn.go.com/nba/news/story?id=1928540.

8. *Id.*

9. *Nat'l Basketball Ass'n*, 2005 WL 22869, at *1.

10. *Id.* at *2.

11. *Id.* at *3.

12. *Id.* at *4.

13. *Id.* at *1.

14. *Id.*

Arbitration Award that reduced O'Neal's suspension.[15]

The question of how the court determined that the matter was arbitrable will be the focus of this article. In answering this question, this article will analyze *First Options of Chicago, Inc. v. Kaplan*,[16] *Howsam v. Dean Witter Reynolds, Inc.*,[17] and *Green Tree Financial Corp. v. Bazzle*,[18] the three most recent and significant decisions on arbitrability from the United States Supreme Court. Through these cases the Court provides a roadmap for resolving arbitrability issues. Thus, it is important to analyze these cases and determine how closely the district court followed the Supreme Court's roadmap in its holding that the suspension of NBA players by the Commissioner is an arbitrable issue.

II. *FIRST OPTIONS OF CHICAGO, INC. V. KAPLAN*

Perhaps the most critical issue in an arbitrability dispute involves the question of "who decides arbitrability." The Federal Arbitration Act (FAA), passed by Congress in 1925, provides a general answer to this question with its rule that courts are to decide arbitrability.[19] There are, however, exceptions to this general rule. One such exception lies in the fact that the FAA's rules are default rules, meaning that the parties are free to deviate from these rules through express contractual agreement.[20] The U.S. Supreme Court explained this concept in *First Options,* when it stated, "the question 'who has the primary power to decide arbitrability' turns on what the parties agreed about [the] matter. Did the parties agree to submit the arbitrability question itself to arbitration?"[21]

The Court in *First Options* also provided guidance for determining whether the parties actually agreed to submit the issue of arbitrability to arbitration.[22] Thus, further discussion of this case is warranted. The lawsuit in *First Options* arose out of a dispute for a debt allegedly owed as a result of the 1987 stock market crash.[23] Manual and Carol Kaplan were owners of a business, MK Investments, Inc. (MKI), through which Manual Kaplan worked

15. *Id.* at *10.
16. 514 U.S. 938 (1995).
17. 537 U.S. 79 (2002).
18. 539 U.S. 444 (2003).
19. Federal Arbitration Act, 9 U.S.C. §§ 3, 4 (2000).
20. *First Options,* 514 U.S. at 943.
21. *Id.*
22. *Id.*
23. *Id.* at 940.

as a stock trader.[24] First Options acted as a "clearing firm" that handled MKI's trades on the floor at the Philadelphia Stock Exchange.[25] When the stock market crashed in October of 1987, MKI left a deficit of $2.1 million in First Options' account.[26]

The parties attempted to resolve the matter through a "work-out" agreement; however, First Options ultimately submitted the dispute to arbitration pursuant to a broad arbitration agreement contained in one of the four documents that embodied said work-out agreement.[27] MKI agreed to arbitration, but the Kaplans did not.[28] An arbitration panel found in favor of First Options and awarded damages in its favor in excess of $6 million.[29] The Kaplans filed a petition to vacate the award in federal court under section 10 of the FAA, but the district court rejected the Kaplan's claim and confirmed First Options' award.[30] On appeal, the Third Circuit agreed with the Kaplans that their dispute was not arbitrable and reversed the district court's ruling as to the Kaplans.[31] The United States Supreme Court granted certiorari to answer the question of who had the power to decide whether the dispute was arbitrable.[32]

Justice Breyer, writing on behalf of the unanimous Court, stated that "the answer to the 'who' question . . . was fairly simple."[33] The Court only needed to look to the parties' agreement and determine how they agreed to resolve the question.[34] Thus, the answer to the "who" question by the Court would turn on whether the broad arbitration clause found in the work-out agreement provided an express agreement to arbitrate arbitrability.[35]

In making this determination, the Court recognized that it should "apply ordinary state-law principles that govern the formation of contracts."[36] The relevant state law in this case required "the court to see whether the parties

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24. *Id.*

25. *Id.*

26. *Id.*; Richard C. Reuben, First Options, *Consent to Arbitration and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 855 (2003).

27. *First Options*, 514 U.S. at 941.

28. *Id.*

29. *Id.*, Reuben, *supra* note 26, at 856.

30. *First Options*, 514 U.S. at 941.

31. *Id.*

32. *Id.*

33. *Id.* at 943.

34. *Id.*

35. *Id.*

36. *Id.* at 944.

objectively revealed intent to submit the question" of arbitrability to arbitration.[37] However, the Court also recognized that it had added an important qualification for determining when courts should decide whether the parties agreed to arbitrate arbitrability: "[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."[38] Thus, courts should decide arbitrability when the parties are silent or the agreement is ambiguous on the subject.[39] This ruling did not create any new rule of law, but its application reverses an existing presumption of arbitrability for "who decides arbitrability" disputes.[40]

In this regard, the Court recognized that it was distinguishing the "who decides arbitrability" decision from questions concerning the scope of a valid arbitration agreement.[41] As this article will discuss further in Section II, there is a presumption of arbitrability for questions concerning the scope of a valid arbitration agreement.[42] The Court justified the difference in treatment for the two questions on the fact that for scope of arbitration questions, the parties have at least agreed to arbitrate some issues.[43] Thus, the law may be more permissive towards allowing arbitration.[44] Conversely, the Court found that questions of "who decides arbitrability" are arcane.[45] Therefore, the Court stated that the law must be less permissive for these questions because a party should only have to arbitrate those issues that it has specifically agreed to arbitrate.[46] Accordingly, the Court understood why courts may hesitate to interpret silence or ambiguity for "who decides arbitrability" questions in favor of arbitrability because this might force unwilling parties to arbitrate matters that they reasonably thought a judge would decide.[47] Requiring clear and unmistakable evidence that parties want to submit arbitrability disputes to arbitration also adheres to the FAA's default rule that courts should decide arbitrability.[48]

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37. *Id.*

38. *Id.* (citing AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)).

39. *Id.*

40. Reuben, *supra* note 26, at 857.

41. *First Options*, 514 U.S. at 944.

42. *Id.* at 945. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

43. *First Options,* 514 U.S. at 945.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

Applying this requirement to the facts, the Court found that First Options could not show that the Kaplans clearly agreed to arbitrate arbitrability.[49] First Options relied on the Kaplans' filing a written memorandum objecting to the arbitrator's jurisdiction as proof that the Kaplans were willing to arbitrate that issue.[50] The Court dismissed this claim because the Kaplans were forcefully objecting to the arbitrator's deciding their dispute.[51] Further, Third Circuit law suggested that parties might be free to argue arbitrability before an arbitrator without giving up their right to judicial review.[52] Second, First Options tried to persuade the court with arguments based on efficiency and FAA policy.[53] Specifically, First Options argued that permitting the parties to argue arbitrability to an arbitrator without being bound would cause "waste in the resolution of disputes" and that the FAA, therefore, required a presumption that the Kaplans be bound by the arbitrator's decision.[54] The Court dismissed these arguments as inconclusive and legally erroneous.[55]

The Court could not find a strong arbitration-related policy favoring First Options within the FAA.[56] In fact, such a finding would run counter to the FAA's default rule that the courts are to decide arbitrability absent an express agreement to the contrary. Also, the Court found that there is no inconclusive proof that allowing arbitrators to rule on arbitrability would slow down the dispute resolution process.[57] Even if such allowance did result in a quicker resolution, the Court stated that the basic objective in this area is not to resolve disputes in the quickest manner possible regardless of the parties' wishes.[58] Accordingly, the Court upheld the Third Circuit's decision to reverse the arbitrable award against the Kaplans because the parties did not clearly agree to arbitrate arbitrability.[59]

Through its decision in *First Options*, the Court has moved toward an expectation model based on actual consent. Specifically, the Court appears to be focusing on what the parties expected through requiring evidence that the parties actually consented to arbitrate arbitrability. The concept of requiring

49. *Id.* at 946.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 947.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 949.

actual consent is supported by a line of cases beginning with *United Steelworkers of America v. Warrior & Gulf Navigation Co.*[60] where the Court upheld an arbitration clause in a collective bargaining agreement.[61] The Court found that arbitration is a creature of contract and parties cannot be forced to arbitrate those disputes that they have not agreed to arbitrate.[62] *Warrior & Gulf Navigation Co.* is actually one of three cases involving the United Steelworks of America, and the Court upheld arbitration agreements in the collective bargaining process in each decision.[63] This trilogy of cases is often cited for the creation of a presumption of arbitrability for enforcing arbitration agreements found in collective bargaining agreements.[64] Although *Warrior & Gulf Navigation Co.* set the rule that parties must agree to arbitrate arbitrability, the Court expanded this rule with its decision in *AT&T Technologies, Inc. v. Communications Workers of America*[65] by holding that the question of whether the parties agreed to arbitrate is undeniably a question for judicial determination unless the parties clearly and unmistakably provide otherwise.[66]

Thus, *First Options* both affirms and extends the "clear and unmistakable" requirement for agreements to arbitrate arbitrability.[67] It affirms the requirement in the collective bargaining context and it extends it to private contractual contexts.[68] However, at least two circuits have declined to extend *First Options* to the collective bargaining context.[69] These circuits recognize the "clear and unmistakable" requirement but are more willing to find such an agreement in a collective bargaining contract because, "unlike parties in the commercial arbitration context, parties entering into a collective bargaining agreement know they are granting the arbitrator tremendous power to define and 'fill in the gaps' of their agreement."[70] Thus, some courts will find "clear and unmistakable" evidence that the parties wish to arbitrate arbitrability in broad and sweeping arbitration clauses, if the clauses are found in a collective

60. 363 U.S. 574 (1960).

61. *Id.* at 585.

62. *Id.* at 584.

63. *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

64. Reuben, *supra* note 26, at 861.

65. 475 U.S. 643 (1986).

66. *Id.* at 649.

67. Reuben, *supra* note 26, at 861.

68. *Id.*

69. *See, e.g.,* United Bhd. of Carpenters v. Desert Palace, Inc., 94 F.3d 1308, 1311 (9th Cir. 1996); Abram Landau Real Estate v. Benova, 123 F.3d 69, 70 (2d Cir. 1997).

70. *United Bhd.*, 94 F.3d at 1311.

bargaining agreement.[71] Additionally, a number of courts have found "clear and unmistakable" evidence in arbitration agreements that incorporate or adopt by reference the rules of arbitration associations that include provisions stating that the arbitrator shall have the power to rule on his or her own jurisdiction.[72]

III. *HOWSAM V. DEAN WITTER REYNOLDS, INC.*

In 2002, the Court built upon its holding in *First Options* by providing further clarification as to who should decide arbitrability with its decision in *Howsam v. Dean Witter Reynolds, Inc.*[73] The controversy in *Howsam* arose out of investment advice that Dean Witter Reynolds, Inc. (Dean Witter) provided Karen Howsam sometime between 1986 and 1994.[74] Howsam alleged that Dean Witter misrepresented the "virtues of the partnership" in a submission for arbitration before the National Association of Securities Dealers (NASD).[75] This submission was pursuant to a broad arbitration clause found within the Client Service Agreement between Howsam and Dean Witter.[76] The Client Service Agreement also provided that Howsam could select the arbitration forum.[77] Accordingly, Howsam selected the NASD.[78]

Unfortunately for Howsam, the NASD had an arbitration rule that prohibited arbitration for any claim "where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute."[79] Dean Witter filed a lawsuit in federal district court asking the court to declare that the "dispute was 'ineligible for arbitration' because it was more than six years old."[80] Dean Witter also wanted the court to issue an injunction prohibiting Howsam

71. *Id. But see* Roubik v. Merrill, Lynch Pierce, Fenner & Smith, Inc. 692 N.E.2d 1167, 1173 (Ill. 1998) (holding that a broad arbitration clause was silent on the issue of who should decide arbitrability); Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 780-81 (10th Cir. 1998) (holding that broad arbitration clauses lack the specific authorization for arbitrating arbitrability).

72. Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753, 754 (2004). *See, e.g.*, Johnson v. Polaris Sales, Inc, 257 F. Supp. 2d 300, 308-09 (D.Me. 2003); Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 203 F.R.D. 677, 684 (S.D. Fla. 2001); Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1084-85 (Ariz. Ct. App. 2003).

73. 537 U.S. 79 (2002); Reuben, *supra* note 26, at 862.

74. *Howsam*, 537 U.S. at 81.

75. *Id.*

76. *Id.*

77. *Id.* at 82.

78. *Id.*

79. *Id.* at 81 (quoting NAT'L ASS'N OF SEC. DEALERS, NASD CODE OF ARBITRATION PROCEDURE § 10304 (1984)).

80. *Id.* at 82.

from seeking further arbitration.[81] The district court dismissed Dean Witter's claim on the basis that the NASD arbitrator, rather than the court, should interpret and apply NASD rules.[82] On appeal, the Tenth Circuit reversed the district court's decision on the grounds that the application of the NASD rule presented a question of the underlying disputes arbitrability.[83] In its decision, the Tenth Circuit relied heavily on the presumption affirmed in *First Options* that a court, not an arbitrator, will ordinarily decide an arbitrability question.[84] The United States Supreme Court granted certiorari because the federal circuits were split as to whether a court or an arbitrator should interpret and apply the NASD rule.[85]

In particular, the circuits were split into two camps. One division was of the belief that the six-year rule was analogous to a statute of limitations, thus a procedural matter that should be left to the arbitrator.[86] The second grouping of circuits believed that the rule was a substantive jurisdictional requirement that needed judicial resolution.[87] This division provides a perfect example of how courts use the doctrines of procedural and substantive arbitrability to resolve the "who decides arbitrability" question.

Substantive arbitrability involves the substantive merits of whether the parties actually agreed to arbitrate the dispute. Thus, substantive arbitrability involves jurisdictional questions that must be answered by courts because courts, and not arbitrators, must decide whether matters are arbitrable.[88] However, not every gateway question involves the substantive merits of the dispute.[89]

In fact, some gateway questions are more procedural in nature.[90] These questions involve conditions that must be satisfied before there is a duty to arbitrate.[91] Such conditions precedent might include issues involving notice, waiver, and estoppel.[92] The doctrine of procedural arbitrability dictates that the arbitrator instead of the court must answer questions over mere procedural

81. *Id.*
82. *Id.*
83. Howsam v. Dean Witter Reynolds, Inc., 261 F.3d 956, 970 (10th Cir. 2001).
84. *Id.* at 968-69.
85. *Howsam*, 537 U.S. at 83.
86. Reuben, *supra* note 26, at 863.
87. *Id.*
88. 9 U.S.C. §§ 3, 4.
89. *Howsam*, 537 U.S. at 83.
90. *Id.*
91. Reuben, *supra* note 26, at 836.
92. *Id.*

matters.[93] This rule serves to reduce the possibility of delay and the costs associated with such delay that results when courts, rather than arbitrators, have to answer technical questions.[94]

Unfortunately, little consistency could be found in the case law that relied on the doctrines of substantive and procedural arbitrability in resolving the "who decides arbitrability" question.[95] Using these doctrines, different courts could reach different opinions as to whether arbitrability disputes were substantive or procedural. In fact, the split in the circuits over the time limit requirement raised in *Howsam* provided a demonstration of the inconsistency resulting from application of the doctrines.[96] Additionally, there was even some debate as to the continued existence of the doctrine of procedural arbitrability in light of the Court's refashioned method for answering the "who decides arbitrability" question in *First Options*.[97] The Court settled that debate with its decision in *Howsam*.

In *Howsam*, the Court recognized that, "'procedural questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide."[98] However, the Court stated that these gateway procedural disputes are not "questions of arbitrability."[99] Accordingly, "the strong pro-court presumption as to the parties' likely intent does not apply" to these disputes.[100] The Court held that the NASD time limit rule fell within the class of procedural questions that should be resolved by the arbitrator.[101]

Dean Witter argued that even without the pro-court presumption, the contract calls for judicial determination because it incorporated the NASD's time limit rule that used the word "eligible."[102] In Dean Witter's opinion, the word "eligible" indicated the parties' intent for the time limit rule to be answered by a court before arbitration.[103] The Court disagreed with Dean Witter's interpretation of the contract.[104] In fact, the Court found that parties

93. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557-59 (1964).

94. *Id.* at 558.

95. Reuben, *supra* note 26, at 836.

96. *Id.*

97. *Id.* at 862.

98. *Howsam*, 537 U.S. at 84 (quoting *John Wiley & Sons*, 376 U.S. at 557) (emphasis in original).

99. *Id.* at 85.

100. *Id.* at 86.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

to an arbitration agreement would likely expect "a forum-based decisionmaker to decide forum-specific procedural gateway matters."[105] Further, the Court found that the weight placed by Dean Witter on the word "eligible" was counterbalanced by the other NASD rules incorporated into the contract providing that "'arbitrators shall be empowered to interpret and determine the applicability [of the NASD Code.]'"[106]

The Court also recognized that NASD arbitrators are comparatively more knowledgeable in the procedures applicable to the arbitration process and are more expert in understanding NASD's arbitration rules.[107] Thus, the Court found that, in the absence of any statement to the contrary, it is more reasonable to infer that the parties expected the arbitrator to resolve these technical issues.[108] Additionally, the Court recognized that a law that assumes "an expectation that aligns (1) the decision maker with (2) comparative expertise will better help secure a fair and expeditious resolution of the underlying controversy."[109] Consequently, the Court in *Howsam* believed that it had reached a decision that reflected the expectation of the parties, thus continuing its movement toward an expectation model for resolving arbitrability disputes.

IV. *GREEN TREE FINANCIAL CORP. V. BAZZLE*

In *Howsam*, the Court distinguished gateway procedural questions from gateway arbitrability questions.[110] In doing so, the Court held that the "strong pro-court presumption as to the *parties'* likely intent" was not applicable to gateway procedural issues.[111] Instead, the Court aligned gateway procedural questions with questions as to the scope of a valid arbitration agreement.[112] For these questions, there is a presumption for arbitrability.[113] This rule holds true whether the issue involves construction of contract language or allegations of a defense to arbitrability.[114] However, the presumption is a default rule and is thus subject to modification by agreement between the

105. *Id.*

106. *Id.* (quoting NAT'L ASS'N OF SEC. DEALERS, NASD CODE OF ARBITRATION PROCEDURE § 10304 (1984)).

107. *Id.* at 85.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 84.

113. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

114. *Id.*

parties.[115]

In 2003, the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*[116] used the pro-arbitration presumption to find that arbitrators, and not the court, should decide whether class action arbitration is allowed under arbitration association rules.[117] The ruling in *Green Tree Financial Corp.* may not be as significant as the guidance provided by the Court as to how it applies the presumption of arbitrability to the scope of arbitration issues and how it distinguishes the scope of arbitration issues from gateway arbitrability issues.

The conflict in *Green Tree Financial Corp.* involved a contract between a commercial lender and its customers that contained a broad arbitration clause that called for arbitration of all contract-related disputes.[118] *Green Tree Financial Corp.* actually consisted of two different cases that were brought against Green Tree Financial Corporation (Green Tree), each based on the same contract.[119] Further, both cases alleged that Green Tree was not compliant with South Carolina banking laws.[120]

Green Tree won motions to compel arbitration in each case.[121] However, Green Tree's victories proved hollow because both sets of plaintiffs were granted class action certification[122] and both arbitration proceedings resulted in awards for the plaintiffs.[123] In fact, the same arbitrator heard both cases and awarded the first class, represented by Lynn and Burt Bazzle, $10,935,000 in damages, and awarded the second class, represented by Daniel Lackey and George and Florine Buggs, $9,200,000 in damages.[124] Green Tree appealed both decisions in South Carolina state court on the grounds that class action arbitration was legally impermissible.[125]

Ultimately, the cases reached the South Carolina Supreme Court where the two proceedings were consolidated and their awards were affirmed.[126] In affirming the arbitration awards, the court held that even though the contracts did not speak to the validity of class action arbitration, such proceedings were

115. *John Wiley & Sons, Inc.*, 376 U.S. at 558.

116. 539 U.S. 444 (2003).

117. *Id.* at 454.

118. *Id.* at 447.

119. *Id.* at 448.

120. *Id.*

121. *Id.* at 449.

122. The first class was certified by the district court while an arbitrator certified the second class. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 450.

consistent with South Carolina law.[127] The United States Supreme Court granted certiorari to decide whether the South Carolina Supreme Court's ruling was consistent with the FAA.[128]

The author of the Court's decisions in *First Options* and *Howsam*, Justice Breyer, delivered the opinion in *Green Tree Financial Corp.*, further distinguishing himself as the Court's leading authority on arbitration. Unlike the other two cases, *Green Tree Financial Corp.* was not a unanimous decision. Justices Scalia, Souter and Ginsberg joined Justice Breyer in the opinion,[129] but Justices Rehnquist, O'Connor, Kennedy and Thomas dissented.[130] Justice Stevens dissented in part but concurred in the judgment to give it controlling authority as a plurality decision.[131]

A. The Plurality's Decision

In the plurality opinion, Justice Breyer treated the case as one of contract interpretation.[132] Thus, its resolution hinged on whether the scope of the arbitration agreement covered class arbitration.[133] The Court looked to the agreement and found that the parties agreed to arbitrate "[*a*]*ll* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract."[134] While these broad terms did not literally answer the question as to whether class arbitration was allowed, the Court did find that the "sweeping" language provided evidence that the parties intended for an arbitrator to decide the issue and not the courts.[135]

Although, even if the broad language of the arbitration agreement left room for doubt, the Court found that such doubt had to be resolved through application of the presumption of arbitrability.[136] After all, the presumption applies whenever a dispute concerns the scope of a valid arbitration agreement. [137] Accordingly, the pro-arbitration presumption applied in *Green Tree Financial Corp.* because the Court found that the dispute tested the scope of a valid arbitration agreement, particularly, whether the agreement allowed

127. *Id.*
128. *Id.*
129. *Id.* at 447.
130. *Id.* at 455, 460
131. *Id.* at 454.
132. *Id.* at 451.
133. *Id.*
134. *Id.* (emphasis in original).
135. *Id.* at 453.
136. *Id.* at 452.
137. *Id.* at 452 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 626).

for class arbitration.[138]

The Court could have easily ended its discussion on the applicability of the pro-arbitration presumption once it determined that the dispute was one of contract interpretation. Instead, the Court went much further in its application of the presumption of arbitrability by recognizing only two exceptions to its application.[139] According to the Court, these exceptions are based on the assumption that parties intend for particular matters to be resolved by courts and not arbitrators.[140] The two exceptions recognized by the Court arise when the courts must answer the gateway questions of (1) whether the parties have a valid arbitration agreement, and (2) whether the arbitration agreement applies to the controversy.[141]

For these "limited" circumstances, a pro-court presumption applies "in the absence of 'clea[r] and unmistakabl[e]' evidence to the contrary."[142] If the controversy does not concern one of these two questions, then the presumption of arbitrability controls.[143] Thus, by limiting the application of the pro-court presumption to only two gateway questions of arbitrability, the Court greatly extended the presumption of arbitrability's coverage.[144]

Applying this approach to the facts in *Green Tree Financial Corp.*, the Court concluded that the question of whether class arbitration could take place involved "neither the validity of the arbitration clause nor its applicability to the underlying dispute . . . ."[145] Therefore, the question did not fall within the limited set of circumstances included in the exception to the presumption of arbitration.[146] Consequently, the Court held that an arbitrator should resolve the dispute based on both the presumption of arbitration and the broad arbitration clause that evidenced the parties' intent for an arbitrator to resolve the question.[147] Based on this determination, the plurality vacated the decision of the South Carolina Supreme Court and remanded the case to arbitration.[148]

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138. *Id.*
139. *Id.* at 452.
140. *Id.*
141. *Id.*
142. *Id.* (citing AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 454.
148. *Id.*

B. Justice Stevens's Concurrence in Part and Dissent in Part

Justice Stevens concurred with the majority's opinion on the validity of class arbitration, but he dissented on how the Court reached that decision.[149] In his concurring opinion, Justice Stevens emphasized that the parties agreed that South Carolina law governed their arbitration agreement.[150] He then recognized that South Carolina law permitted class arbitration as long as the procedure was not prohibited by the applicable arbitration agreement.[151] Further, FAA did not preclude class arbitration.[152] Thus, Justice Stevens agreed that class arbitration should be allowed, but took issue with the fact that the courts were resolving this dispute rather than the arbitrator.[153] However, because he agreed with the ultimate decision, he would not prevent that decision from having the force of law merely because he believed that the wrong decision maker made it.[154]

C. The Rehnquist Dissent

Chief Justice Rehnquist penned the first dissent and was joined by Justices O'Connor and Kennedy.[155] These three were of the opinion that the question as to whether class action arbitration should be allowed was one for the courts to decide.[156] Further, they believed that the wording of the arbitration agreement at issue in *Green Tree Financial Corp.* prohibited class arbitration.[157]

In the dissent, the Chief Justice did acknowledge that the court must pay considerable deference to decisions rendered by arbitrators.[158] But he also recognized that the deference owed is limited to only those matters that the parties agreed to arbitrate.[159] In deciding that the validity of class arbitration was not a matter that the parties agreed to arbitrate, Chief Justice Rehnquist aligned the facts in *Green Tree Financial Corp.* with those found in *First*

149. *Id.* at 455.
150. *Id.* at 454.
151. *Id.*
152. *Id.* at 454-55.
153. *Id.* at 455.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 456 (citing Major League Baseball Players Ass'n. v. Garvey, 532 U.S. 504 (2001)).
159. *Id.* (quoting *First Options*, 514 U.S. at 945).

Options rather than those found in *Howsam*.[160]

Particularly, the Chief Justice believed that *First Options* controlled the case rather than *Howsam* because the validity of class arbitration is more akin to the issue of what shall be arbitrated than it is those procedural questions that *Howsam* says should be resolved by the arbitrator.[161] The Chief Justice found that the procedural matters left for arbitration in *Howsam* involved prerequisites to arbitration like waiver, delay, or other similar defenses to arbitration.[162] Chief Justice Rehnquist believed that the allowance or probation of class arbitration did not fall within one of the aforementioned gateway prerequisites to arbitration; instead, the question was fundamental to the agreement.[163]

Central to this finding was the fact that class arbitration involves one arbitrator for all claims included in the class.[164] However, the Chief Justice interpreted the arbitration agreement at issue to provide Green Tree with the contractual right to select an arbitrator for each dispute.[165] The basis for this interpretation was the fact that the arbitration agreement used singular nouns. Specifically, the contract called for the selection of an arbitrator "by us," meaning Green Tree, with the consent of "you," meaning the plaintiff, for disputes resulting from "this" contract.[166] The Chief Justice stated that the use of these singular nouns, "make quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer."[167]

Thus, Chief Justice Rehnquist found that arbitrating the claims as a class with only one arbitrator would result in Green Tree Financial being stripped of its contractual right to select an arbitrator for the remaining 3734 disputes.[168] The right to choose an arbitrator, in the Chief Justice's opinion, was just as fundamental to the agreement as the question of what matters are to be submitted to arbitration.[169] Accordingly, the Chief Justice reasoned that the parties must have intended for the court, instead of the arbitrator, to determine

160. *Id.* at 457.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 459.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 456.

whether class arbitration was allowed.[170] Interpreting the issue any other way, in the Chief Justice's judgment, could result in unwilling parties arbitrating matters that they never agreed to arbitrate.[171]

D. Justice Thomas's Dissent

Justice Thomas dissented based on his belief that the FAA does not apply to state court proceedings.[172] Therefore, the FAA could not provide grounds for pre-empting the South Carolina Supreme Court's interpretation of a private arbitration agreement.[173]

E. Reconciling Green Tree Financial Corp.: Comparing the Plurality and the Rehnquist Dissent

At first blush, it may seem alarming that the same Court that unanimously decided *First Options* and *Howsam* could be so divided in *Green Tree Financial Corp.*, especially considering that in *Green Tree Financial Corp.* both the plurality and the Rehnquist dissent used the same case law, *First Options* and *Howsam*, in reaching different conclusions. So exactly why was the Court so divided? Ultimately, contract interpretation and characterization are what separated the plurality from the Rehnquist dissenters in *Green Tree Financial Corp.*

The plurality interpreted the broad arbitration clause to include all issues related to the loan, including whether disputes relating to the loan can be handled through class arbitration.[174] Thus, to the plurality, the case fell more in line with the Court's decision in *Howsam* because the legitimacy of class arbitration was a procedural issue rather than a gateway arbitrability issue.[175] After all, the parties were not disputing the validity of the arbitration clause or whether the arbitration clause covered the underlying loan dispute. Instead, to the plurality, the only question really at issue was whether the parties could procedurally arbitrate as a class.[176]

The Chief Justice, however, was not willing to characterize the dispute as a matter related to the loan and was unwilling to interpret the contract to require arbitration. To Chief Justice Rehnquist, it was not accurate to

170. *Id.*

171. *Id.* (quoting *First Options*, 514 U.S. at 945).

172. *Id.* at 460.

173. *Id.*

174. *Id.* at 451.

175. *Id.* at 453.

176. *Id.* at 452

characterize the question as one dealing with the appropriateness of class arbitration for the underlying loan dispute.[177] Rather, to the Chief Justice, the question hinged on the appropriateness of arbitration for a class action dispute.[178] Therefore, the issue involved a gateway arbitrability question, thus making it more akin to the question presented in *First Options*.[179]

Further, the Chief Justice was unwilling to interpret the broad arbitration clause to cover the question of whether class arbitration was permissible.[180] Conversely, he interpreted the singular tense used in the broad arbitration clause to suggest that the parties did not agree to arbitrate the dispute.[181] In effect, Chief Justice Rehnquist's dissent could be read to conclude that a broadly phrased arbitration clause is not enough to satisfy the "clear and unmistakable" evidence standard needed to overcome the pro-court presumption applicable to gateway arbitrability disputes.[182]

A close look at the plurality and the Rehnquist dissent reveals that these divided factions did not disagree on the applicable law. Instead, the two sides were split on how the law should be applied to the dispute at issue, the validity of class arbitration. Based on this split, the implications of *Green Tree Financial Corp.* remain unclear. It is possible that the case represents a division amongst the Justices as to how the Court should distinguish gateway procedural disputes from gateway arbitrable disputes. However, it is also possible that the Court may only be divided on the specific issue of whether class action arbitration should be permitted. Needless to say, it will be interesting to see where the Court goes from here. However, even though the decision in *Green Tree Financial Corp.* was not unanimous, thanks to Justice Stevens's concurrence, the case is controlling on all lower courts. Further, the Court in *Green Tree Financial Corp.* did reinforce and clarify the process outlined in *First Options* and *Howsam* for resolving arbitrability disputes. Thus, these cases do provide assistance to courts for the resolution of arbitrability questions.

V. THE ARBITRABILITY ROADMAP ESTABLISHED BY *FIRST OPTIONS*, *HOWSAM* AND *GREEN TREE FINANCIAL CORP.*

Through its decisions in *First Options*, *Howsam*, and *Green Tree*

177. *Id.* at 457.

178. *Id. See also* Kristen M. Blankley, *Arbitrability After Green Tree v. Bazzle: Is There Anything Left For The Courts*, 65 OHIO ST. L.J. 697, 704-05 (2004).

179. *Green Tree Fin. Corp.*, 539 U.S. at 457.

180. *Id.* at 458-59.

181. *Id.* at 459.

182. Berger, *supra* note 72, at 799.

Financial Corp., the Supreme Court sought to provide guidance for lower courts and to get the circuit courts on the same page in terms of how they resolve arbitrability disputes. Again, the first two cases, *First Options* and *Howsam*, were unanimously decided and strongly demonstrated the Court's intent to move toward a method for deciding arbitrability based on the parties' expectations, as evidenced through actual consent. Then came the plurality decision in *Green Tree Financial Corp.* The plurality in *Green Tree Financial Corp.* did continue to emphasize the role of party expectation by recognizing that parties expect certain matters to be heard by judges while expecting that arbitrators would hear other matters.[183] However, it could be argued that the Court in *Green Tree Financial Corp.* de-emphasized the role of actual consent in determining party expectation by drastically expanding what parties "expect" to be heard by arbitrators.

With that said, the decisions in *First Options*, *Howsam*, and *Green Tree Financial Corp.* can be read to form a roadmap for courts to follow when confronted with questions as to whether a judge or arbitrator should resolve a dispute. The first step in the roadmap requires the court to determine whether the parties have expressly answered the question through their arbitration agreement. Based on the decision in *Green Tree Financial Corp.*, if the agreement is silent as to who should decide the particular problem at issue but the parties use a broad arbitration agreement, then it is likely that they have agreed that an arbitrator will answer the relevant question.[184]

The next step in the roadmap requires the court to decide which of two presumptions is applicable. The first presumption is the presumption in favor of arbitration, and it applies to all questions concerning the scope of a valid arbitration agreement.[185] Additionally, the presumption of arbitration also applies to gateway procedural issues that "grow out of the dispute and bear on its final disposition."[186] Gateway procedural questions involve prerequisites, or conditions precedent, to arbitration like notice, waiver, and estoppel.[187] If the controversy turns on the resolution of one of these issues, then the presumption of arbitrability also applies.[188]

The application of the presumption of arbitrability to procedural matters is based on the expectation of the parties.[189] This expectation is gleaned from

183. *Green Tree Fin. Corp.*, 539 U.S. at 452.

184. *Id.* at 453.

185. *Id.* at 452.

186. *John Wiley & Sons, Inc.*, 376 U.S. at 557.

187. *Howsam*, 537 U.S. at 85.

188. *Id.*

189. *Id.*

the existence of the valid arbitration agreement. The valid arbitration agreement evidences the parties' intent to arbitrate their underlying disputes; thus, they probably also expect an arbitrator, rather than a court, to resolve mere procedural gateway questions.[190]

However, there are limited circumstances in which the parties expect courts, rather than arbitrators, to resolve their gateway disputes, even if they consented to a broad arbitration agreement.[191] This expectation gives rise to the pro-court presumption. Based on the plurality's decision in *Green Tree Financial Corp.*, the court must determine if one of two gateway arbitrability questions exists before this presumption is triggered.[192]

The first of the two gateway arbitrability questions concerns the existence of a valid arbitration agreement.[193] The second gateway arbitrability question asks whether the arbitration agreement applies to a certain controversy.[194] If the dispute involves one of these two questions, then the pro-court presumption applies in the absence of clear and unmistakable evidence to the contrary.[195] Courts should hesitate to interpret silence or ambiguity in answering these two questions because such interpretation could result in unwilling parties arbitrating matters that they never agreed to arbitrate.[196]

VI. *NATIONAL BASKETBALL ASS'N V. NATIONAL BASKETBALL PLAYERS ASS'N*

This section of the article will examine the District Court for the Southern District of New York's decision in *National Basketball Ass'n v. National Basketball Players Ass'n*, which was the case that upheld the arbitrator's reduction of Indiana Pacer Jermaine O'Neal's suspension. In doing so, close attention will be paid to the district court's analysis to determine if it followed the roadmap outlined by the Supreme Court in *First Options*, *Howsam*, and *Green Tree Financial Corp.* for resolving arbitrability disputes.

The issue before the court was "whether the Grievance Arbitrator had jurisdiction or authority to review an appeal of the suspensions imposed . . . by the NBA Commissioner."[197] The court began its analysis by satisfying the first step of the roadmap. Specifically, the court first looked to the arbitration

190. *Id.*
191. *Green Tree Fin. Corp.*, 539 U.S. at 452.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *First Options*, 514 U.S. at 949.
197. *Nat'l Basketball Ass'n*, 2005 WL 22869, at *4.

clause contained in the Collective Bargaining Agreement (CBA) between the NBA and the NBPA to see if the parties contractually answered the "who decides arbitrability" question.[198]

The NBA argued that the CBA contained both a broadly worded arbitration clause that committed all disputes to arbitration and a conflicting specific clause that assigned certain matters to the commissioner.[199] Thus, the NBA believed that these conflicting clauses created ambiguity as to whether the parties agreed to arbitrate the issue of player suspensions.[200] The court, however, did not agree with the NBA's interpretation of the CBA.[201] Not only did the court fail to find any ambiguity in the contract but instead the court borrowed language from *First Options* by finding "clear and unmistakable" evidence that the parties agreed to arbitrate the issue.[202]

The court found this "clear and unmistakable" evidence in Section 1(b) of Article XXXI of the CBA, which provides that "[t]he Grievance Arbitrator shall also have jurisdiction over disputes involving player discipline to the extent set forth in Section 8 below . . . ."[203] "Section 8 . . . outlines the special procedure[s] for appeals to the Commissioner . . . [for] player discipline [for actions occurring] 'on the playing court.'"[204] Additionally, the court looked to Section 5(b), which provides

> the Grievance Arbitrator [with the] jurisdiction and authority . . . to [1] interpret, apply, or determine compliance with the provisions [of the CBA]; [2] interpret, apply or determine compliance with the provisions of Player Contracts; [3] determine the validity of Player Contracts pursuant to Section 1 of . . . Article [XXXI.][205]

Further, Section 35(h) of the NBA Constitution, which is incorporated into the Uniform Player Contract,

> provides that [e]xcept for a penalty imposed under Paragraph (g) of this Article 35 [relating to players gambling on the outcome of any game], . . . [a]ny such challenge by a player [to the decisions and acts of the Commissioner pursuant to Article 35] shall be resolved by the Grievance Arbitrator in accordance with the grievance and arbitration

198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at *5.

procedures of the collective bargaining agreement.[206]

Thus, the court found that the CBA and the NBA Constitution both contained proof that the parties agreed to arbitrate disciplinary decisions rendered by the Commissioner.[207] Therefore, the Grievance Arbitrator had the authority to answer the "who decides arbitrability" question by determining his own jurisdiction.[208]

The court could have ended its discussion with the finding that the CBA and the NBA Constitution both called for the arbitrator to decide the issue.[209] Instead, the court went on to address the NBA's second argument that the court should resolve the dispute because it involves a matter of substantive arbitrability.[210] By analyzing this argument, the court effectively satisfied the second step of the roadmap, deciding which presumption applies.[211] However, in conducting this second inquiry, the court did not use the exact language utilized in *First Options*, *Howsam*, and *Green Tree Financial Corp.* The court did not look at the facts to determine whether they involved gateway arbitrability questions or gateway procedural questions.[212] Rather, the court analyzed the facts under the traditional concepts of substantive and procedural arbitrability.[213]

The NBA argued that the issue before the court involved a substantive arbitrability question;[214] specifically, whether appeals of disciplinary decisions rendered and imposed by the Comissioner for conduct "on the playing court" are arbitrable.[215] Thus, if the NBA's contentions were correct, the pro-court presumption would apply in the absence of clear and unmistakable evidence that the parties agreed to arbitrate substantive arbitrability questions.[216] The NBA, however, provided clear and unmistakable evidence that the parties did not agree to arbitrate substantive issues.[217] This evidence came in the form of Section 5(b) of Article XXXI of the CBA, which expressly states that the Grievance Arbitrator does not have the authority to resolve questions of

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at *6-7.
214. *Id.* at *5.
215. *Id.* at *7.
216. *Id.*
217. *Id.* at *5.

substantive arbitrability.[218]

Before addressing the NBA's arguments, the court first directed its attention to the grievance and arbitration procedures that were agreed upon by the parties and outlined in the NBA Constitution and the CBA.[219] Section 35(h) of the NBA Constitution discusses "misconduct" and states the general rule that challenges by players for decisions given by the Commissioner "shall be resolved by the Grievance Arbitrator in accordance with the grievance and arbitration procedures of the [CBA]."[220] Turning next to the CBA, the court found that Article XXXI of the CBA sets forth the general procedure players must follow when challenging disciplinary decisions by the Commissioner.[221]

However, the court recognized that Section 8 of Article XXXI contains two exceptions to the general rule established by Section 35(h) of the NBA Constitution.[222] Section 8, titled "Special Procedure with Respect to Player Discipline," outlines the procedures for both the rendering and appealing of disciplinary decisions based on conduct that (a) occurs "on the playing court," or (b) is harmful to the "preservation of the integrity of, or the maintenance of public confidence in, the game of basketball."[223] Section 8 provides the Commissioner with the power to discipline players for offenses that fall into one of these two categories.[224] Section 8 also gives the Commissioner the exclusive authority to hear appeals from such disciplinary decisions.[225] Accordingly, if the dispute involves an appeal of a disciplinary decision based on a Section 8 offense, it is not arbitrable.[226]

After reviewing the NBA's grievance procedures, the court was ready to address the NBA's arguments that the arbitrability dispute was substantive because it concerned the question of who has the authority to review disciplinary decisions imposed for "on the court" offenses.[227] First, the court agreed with the NBA that if the issue involved substantive arbitrability, then the court should decide the issue.[228] The court also agreed with the NBA's contention that appeals from disciplinary decisions by the Commissioner for

218. *Id.*
219. *Id.* at *4-5.
220. *Id.* at *5.
221. *Id.*
222. *Id.* at *5-6.
223. *Id.* at *6.
224. *Id.*
225. *Id.*
226. *Id.* at *6.
227. *Id.* at *5.
228. *Id.*

"on the court" activity are not arbitrable.[229] However, the court refused to accept the NBA's characterization of the issue at bar.[230]

Instead, the court found that the real issue concerned the process through which an appeal must be sought; therefore, the case involved a question of procedural arbitrability.[231] To the court, the issue was not a substantive "who decides arbitrability" question, like what was presented in *First Options*, but rather a question concerning a prerequisite to arbitration, like the issue addressed in *Howsam*. The prerequisite to arbitration that needed resolution concerned the applicable procedure for appealing the Commissioner's decision.[232] The court recognized that "[d]isputes . . . [that] bring into question the procedures to be followed by parties when instituting grievances, are best left to the arbitrator" to decide.[233] Further, the court quoted the Supreme Court's finding in *Warrior & Gulf Navigation Co.* that "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[234]

Finally, the court directed its attention to the NBA's challenge that the Grievance Arbitrator did not have arbitrable jurisdiction over the claim because it involved an appeal from discipline imposed for an "on the court" offense.[235] The NBA argued that "'misconduct at or during a game' constitutes 'conduct on the playing court' which is appealable solely to the Commissioner" and not subject to arbitration.[236] Conversely, the NBPA argued that "conduct on the playing court" only applies to conduct that "occurs as part of the playing of a game (such as flagrant fouls and fights between players [or] confronting referees. . .)."[237] However, both parties were in agreement "that 'conduct on the playing court' [was] not limited [to] . . . the physical dimensions of the basketball court or the time limitations of a professional game."[238] In support of their respective views, both sides asked the court to review three things (a) the CBA, (b) Player Conduct Memos sent

229. *Id.* at *7.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* (citing *Warrior & Gulf Navigation Co.*, 363 U.S. at 581-82).
235. *Id.* at *7.
236. *Id.*
237. *Id.*
238. *Id.*

to players, and (c) the NBA's history of past grievances.[239] The parties hoped that these materials would help guide the court in its interpretation of "conduct on the playing court."[240]

A. The CBA

"The NBA argued that Article 35(d) provided support for [its contention that] 'conduct on the playing court' is synonymous with any conduct at or during an exhibition, regular season or playoff game."[241] The court, however, was not persuaded. In fact, the court found that the NBA's position was "inconsistent with the clear language of the NBA Constitution."[242] The NBA was correct in that Article 35(d) of the NBA Constitution does allow for the suspension of any player by the Commissioner for conduct "at or during an Exhibition, Regular Season, or Playoff game," where the conduct by the player is "prejudicial to or against the best interests of the [NBA] or the game of basketball."[243] But the court found that Article 35(d) is qualified by Article 35(h), which states that the Grievance Arbitrator shall resolve any challenges and acts of the Commissioner except for acts of wagering on games.[244]

Additionally, the court was unwilling to accept the NBA's broad interpretation of Article 35(d) because, in the court's opinion, to do so would expand the Commissioner's power to the point where players would be unable to appeal any discipline imposed by the Commissioner to the Grievance Arbitrator.[245] The court stated that if the parties wanted to give the Commissioner that much authority, then they would have used the same explicit language in both Articles 35(d) and Section 8.[246] Specifically, "[t]he fact that Article 35(d) gives the Commissioner power [over] conduct 'at or during' any game, while Section 8 limits his appe[llate] authority to 'conduct on the playing court' [provided the court with the] indication that the parties did not intend for these [two] sections to be synonymous. . . ."[247] Further, the court recognized that the parties made reference to "on the court" and "off the court" conduct in several different sections of the CBA, the Uniform Player

239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at *8.
247. *Id.*

Contract, and the NBA Constitution.[248] Thus, the parties had clearly differentiated conduct "on the court" and conduct "off the court." Therefore, the court found that "conduct on the playing court" is not synonymous with conduct "at or during" any game.[249]

B. Player Conduct Memos

"Every year since 1997, the NBA [has sent] each player [an] annual Player Conduct Memo [that details] what the [NBA] considers regulated on the court and off the court conduct."[250] Based on the October 18, 2004 Memo, regulated on the court conduct includes (a) throwing a connecting or non-connecting punch during a game, (b) other comparable methods for striking another player, (c) leaving the bench in connection with an altercation during a game, (d) leaving the bench in street clothes during a game, (e) committing a flagrant foul,[251] and (f) improper conduct toward officials.[252]

The Memo contained additional rules relating to on the court conduct concerning fan and player interaction.[253] These rules require that (a) "players remain seated on the bench while the ball is in play," (b) "players conduct themselves in an appropriate manner while sitting on the bench," (c) players "refrain from unnecessarily blocking spectators' views," (d) players should not stimulate or encourage crowd disorder, (e) "players refrain from profane or objectionable language that may be heard by spectators or picked up by radio and/or television microphones," and (f) players "refrain from making lewd and objectionable gestures."[254] The Memo's section of "on the court" regulated conduct concludes by requiring that players leave the court immediately after games and go to their dressing rooms.[255] Further, this last section provides that if a player is ejected from a game, then that player must immediately go to

248. *Id.*

249. *Id.* at *9.

250. *Id.*

251. The rules on flagrant fouls describe a Flagrant "1" as "unnecessary contact committed by a player against an opponent" and a Flagrant "2" as "unnecessary and excessive contact committed by a player against an opponent." *Id.*

252. *Nat'l Basketball Ass'n*, 2005 WL 22869, at *9. The NBA provided examples of improper conduct towards officials in its 2004 Player Conduct Memo. Such conduct included, but was not limited to, physical conduct with an official (including using profanity), overt actions indicating resentment to a foul call, harassing an official before, during, or after a game, entering the official's dressing room at any time, or public criticism of an official. *Id.*

253. *Id.* at *10.

254. *Id.*

255. *Id.* at *10.

the dressing room and remain there until the game is completed.[256]

The Memo also has a section that regulates violent conduct off of the court.[257] This section provides that "[a]ny player who commits an act of violent misconduct against other team employees or a member of the public will be subject to discipline, including fines, suspensions, or termination of employment."[258] Thus, based on these two sections, the court concluded that the Memos supported the NBPA's position that by striking a fan, O'Neal's conduct was regulated by the section concerning off the court conduct.[259]

In fact, the court found that "striking a fan has never been characterized as conduct on the playing court."[260] This finding made sense to the court because striking a fan has no place in the play of the game.[261] The court contrasted this act with violence that takes place on the court.[262] Violence on the court, while prohibited, is expected and anticipated to occasionally occur.[263] Conversely, the court found that violence committed against spectators is "considered something different and much more serious."[264]

To the court, the "dispute [was] not about the Commissioner's authority to take strong and decisive action to discipline players who strike fans."[265] The court stated that this authority was "unquestionable."[266] However, the dispute did concern the appropriate measure for appealing the Commissioner's decision.[267] On this issue, the court found that the NBA's own Player Conduct Memo supports its decision that O'Neal's actions were not subject to Section 8's exception for conduct "on the playing court."[268]

C. Past Grievances

The last basis for the NBA's contention that O'Neal's conduct should be considered to have occurred "on the playing court" was based on the league's

256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*

history of past grievances.[269] In making this argument, the NBA provided a list of sanctions that it imposed against players for various offenses.[270] All of these rulings were rendered by the Commissioner and were not subjected to Grievance Arbitration.[271] However, not one of the provided offenses involved a situation where a player struck a spectator.[272] In fact, the court found that all of the offenses listed by the NBA were clearly covered by the regulations for conduct occurring on the court.[273] Accordingly, the court was not persuaded by the NBA's final argument.[274]

Based on all of its findings, the court ultimately concluded that the Grievance Arbitrator was well within his authority to review his own jurisdiction and resolve the question of arbitrability.[275] The court did note that its holding did not touch the "merits of the Grievance Arbitrator's reduction of O'Neal's suspension from [twenty-five] to [fifteen games.]" Instead, the court limited its opinion to the arbitrability of the dispute.[276]

VII. ADDITIONAL CASES

The O'Neal suspension reduction is not the first instance where an arbitrator has modified or overturned a NBA Commissioner's disciplinary decision. Perhaps no other case best exemplifies the power arbitrators have over the disciplinary decisions rendered by the NBA Commissioner than the arbitrable award in the Latrell Sprewell case.[277] In 1997, Sprewell attacked his former coach, P.J. Carlesimo.[278] Sprewell attacked Carlesimo after being kicked out of practice by the coach.[279] The attack consisted of Sprewell wrapping his hands around Carlesimo's neck for almost ten seconds while stating, "I will kill you."[280] Sprewell then left the court only to reenter and accost the coach again, this time throwing at least one punch that grazed

269. *Id.*

270. *Id.* at *11.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *In re* Nat'l Basketball Players Ass'n on behalf of Player Latrell Sprewell and Warriors Basketball Club and Nat'l Basketball Ass'n, 591 PLI/Pat (Pub. L. Inst.) 469 (2000) (Feerick, Arb.) [hereinafter *Warriors Basketball Club*].

278. *Id.* at 546.

279. *Id.*

280. *Id.*

Carlesimo's right check.[281] As a result of this altercation, Sprewell was suspended from NBA play by NBA Commissioner David Stern for one year.[282] Stern believed the suspension was necessary to preserve the integrity of the game and justified the severity of the sanction by stating that failure to impose such a penalty "would denigrate" the public's confidence in the game.[283] Sprewell's team, the Golden State Warriors, issued its own penalty by terminating Sprewell's contract[284] based on provisions in the Uniform Player Contract[285] and Sprewell's violation of the Warriors' Team Rules.[286]

Sprewell and the NBPA appealed the suspension to a Grievance Arbitrator.[287] After a nine-day hearing, the Grievance Arbitrator issued a ruling that criticized Sprewell's actions but found that the Commissioner's discipline was not fundamentally fair.[288] Therefore, the Grievance Arbitrator reduced Sprewell's suspension by limiting it to the 1997-98 season.[289] Thus, what was once a full year ban that would have carried over into the following season was shrunk to approximately a seven-month ban consisting of sixty-eight games.[290]

The Grievance Arbitrator believed that "justice and fairness" called for a ruling that would allow Sprewell to put the "tragic event behind him."[291] Ironically, before issuing this ruling, the Grievance Arbitrator stated that "it would be wrong for [him] to substitute [his] judgment for [the Commissioner's] in terms of discipline."[292] However, that is exactly what the Grievance Arbitrator did.

The Grievance Arbitrator also reinstated Sprewell's contract with the Warriors based on a finding that the termination lacked cause.[293] Chief to the Grievance Arbitrator's decision was the finding that "[t]here has never been a

281. *Id.* at 548-49.

282. *Id.* at 555.

283. *Id.* at 540.

284. *Id.* at 553.

285. Paragraph 16 of the Uniform Player Contract states that a team may terminate a player's contract if the player fails, refuses, or neglects to conform his personal conduct to standards of good citizenship, good moral character and good sportsmanship. *Id.* at 478-79.

286. Warrior Team Rules contained a provision on player violence that warns of "immediate and appropriate action" against any player who engages in violent conduct. *Id.* at 479-80.

287. *Id.* at 473.

288. *Id.* at 473, 475.

289. *Id.* at 475.

290. *Id.*

291. *Id.* at 573.

292. *Id.* at 571.

293. *Id.* at 576.

case of contract termination in the history of the NBA for . . . physical assault."[294] Based on the Grievance Arbitrator's ruling, that fact continues to hold true today.

However, the NBA Commissioner is not the only professional sports commissioner in the United States to have a disciplinary decision overruled by an arbitrator. On August 10, 2005, Major League Baseball (MLB) Commissioner Bud Selig's suspension of Texas Ranger pitcher Kenny Rogers was reduced from twenty to thirteen games.[295] Selig suspended Rogers for accosting two cameramen before a game in Texas on June 29, 2005.[296] During the confrontation, Rogers shoved both cameramen, sending one to the hospital.[297]

The arbitrator who heard the case upheld the Commissioner's imposition of a $50,000 fine, but reduced the suspension on the basis that it "went too far."[298] Selig commented on the reduction in a released statement by saying that "[i]t sends the wrong message to every one of our constituents: the fans, the media, and our players."[299] Selig also stated that "[t]here is a standard of behavior . . . expected of our players, which was breached in this case. The arbitrator's decision diminishes that standard . . . ."[300]

VIII. WHAT CAN BE DONE?

So what can the NBA and MLB Commissioners do to uphold standards for their leagues by preventing their decisions from being overturned or modified by arbitrators? Well, instead of vesting their respective Players Unions with the option of arbitrating disciplinary decisions, they could have followed the NFL's lead by expressly giving the commissioner sole authority to impose penalties and hear appeals.[301] Thus, the NFL's Commissioner has the power to sanction players without the fear of having a Grievance Arbitrator reduce the sanction based on "fairness", or because it "went too

294. *Id.* at 570.

295. Kelsie Smith, *Arbitrator Ends The Suspension of Rogers*, BOSTON GLOBE, Aug. 10, 2005, at C5.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *See* THE NFL MGMT. COUNCIL & THE NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT art. XI (1998), http://www.nflpa.org/media/printerfriendly.asp?subpage=CBA+Complete#intro.

far."[302] By keeping the punitive process in-house, the NFL does not have to worry about outsiders diminishing the standards of its game.

Unfortunately for the NBA and MLB, the odds are not too good in terms of putting the arbitration genie back into the bottle. It is doubtful that the Players Unions for these two leagues would be willing to give up arbitrable review without a significant fight. After all, both unions view their commissioners as extensions of management, and why should not they? For both leagues, the commissioner represents management in the collective bargaining process.[303] Thus, based on this apparent conflict of interest, it is reasonable for the NBA and MLB Players Unions to question whether their commissioners will be unbiased in ruling on disciplinary matters.

Unlike his counterparts in the NBA and MLB, the NFL Commissioner does not represent management in labor negations.[304] Instead, the NFL has a National Football League Management Council that acts as the exclusive bargaining representative for its member clubs.[305] Thus, there is no prima facie conflict of interest. Accordingly, it is more understandable why the National Football League Players Association (NFLPA) would be willing to allow the NFL Commissioner to retain complete power over disciplinary decisions.

On July 22, 2005, the fourth major professional sport league in the United States, the National Hockey League (NHL), announced the ratification of a CBA.[306] The completion of the CBA was cause for celebration for both NHL management and the National Hockey League Players Association (NHLPA) because it ended a lockout that canceled the entire 2004-5 season.[307] A close look at the new CBA reveals that the NHL Commissioner, Gary Bettman, has exclusive power to issue fines up to $1,000 and suspend players for any offensive conduct that occurs "on the ice."[308] Initially, it appears that the NHL Commissioner has a significant amount of disciplinary authority. However, the "on the ice" qualification might be analogous to the "on the playing court" qualification in Section 8 of the NBA's CBA. It remains to be seen just how analogous the two clauses are. Although, it seems possible that

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302. Smith, *supra* note 295.

303. Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority In Professional Sports*, 67 FORDHAM L. REV. 1645, 1711 (1999).

304. *Id.* at 1711.

305. *Id.*

306. *Board of Governors Ratifies Collective Bargaining Agreement*, NHL.COM, July 22, 2005, http://www.nhl.com/nhlhq/cba/cba_ratified072205.html.

307. *See id.*

308. NAT'L HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT art. 18 (1997), http://www.nhlpa.com/CBA/PDF/CBA-1997.pdf.

an arbitrator could apply the requirement the same way the Grievance Arbitrator did in the case concerning O'Neal's suspension.

Thus, the question remains open as to how the NBA, MLB, and perhaps even the NHL, can keep disciplinary matters out of arbitration. Based on the aforementioned cases, there appears to be a willingness on the part of arbitrators to rule in favor of arbitrability. Critics of the system might argue that the basis for this willingness may lie in the fact that arbitrators are not paid unless the case is actually arbitrated.

If the leagues are concerned about having an arbitrator determine his or her own jurisdiction, then they may want to change the arbitration agreements found in their respective CBAs to call for judicial determination for both substantive and procedural gateway questions. Remember, the presumptions provided by *First Options*, *Howsam*, and *Green Tree Financial Corp.* are default rules and as such can be modified by express agreement of the parties. Further, the first step of the Supreme Court's arbitrability roadmap calls courts to determine if the parties have expressly answered the "who decides arbitrability" question. Thus, if the court determines that the parties have called for judicial determination of all arbitrability questions, then it will hear the case and resolve the dispute.

Although, absent such express agreement, courts have favored a finding of arbitrability when the arbitration clause at issue is contained in a CBA.[309] Additionally, the district court's opinion in *National Basketball Ass'n* serves as an example of at least one court's willingness to rule in favor of arbitrability for matters involving disciplinary decisions rendered by commissioners of professional sport leagues. That case, however, is only a district court decision and as such is not controlling authority in any jurisdiction.

Accordingly, it will be interesting to see how appellate courts and courts of last resort decide similar cases in the future, especially in light of the Supreme Court's decisions in *First Options*, *Howsam*, and *Green Tree Financial Corp.*. Until then, *National Basketball Ass'n* serves as guidance as to how courts may resolve said cases. While the district court in *National Basketball Ass'n* did not use the exact language utilized by the Supreme Court in *First Options*, *Howsam*, and *Green Tree Financial Corp.*, the court effectively followed the Supreme Court's roadmap for resolving arbitrable disputes. Therefore, it is possible that other courts may also find in favor of arbitrability in similar cases.

309. Reuben, *supra* note 26, at 861.

IX. CONCLUSION

Odds are that *National Basketball Ass'n* will not be the last case to decide whether a disciplinary decision rendered by a parallel sports league is arbitrable. After all, such disputes involve power struggles between commissioners, Players Unions, and arbitrators. Commissioners do not want to yield their power to discipline players and uphold expected standards of behavior for their respective leagues. Yet, the Players Unions do not want to give up their rights under their CBA and their individual performance contracts. Finally, arbitrators do not appear to be willing to give up the power given to them by the arbitration agreement in the CBA. Thus, it all comes down to power. Ultimately, that is what arbitrability is about.