# Who decides if my claim is arbitrable? The Bullet Point: Volume 3, Issue 2

The Bullet Point: An Ohio Commercial Law Bulletin

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation.

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## The Gateway Question of Arbitrability

Henry Schein, Inc. v. Archer & White Sales, Inc., Slip Op. No. 17-1272 (Jan. 8, 2019.)

In this appeal, the United States Supreme Court decided unanimously that the gateway question of whether a claim is arbitrable is not always for a court to decide. Rather, the question of arbitrability must be submitted to an arbitrator to decide when called for in the arbitration agreement. This is the case even if the claim for arbitration is considered "wholly groundless" by the court.

***The Bullet Point:*** The Court's Henry Schein opinion follows Supreme Court precedent favoring arbitration. As the Court noted, under the Federal Arbitration Act (FAA), arbitration is a matter of contract and courts must enforce arbitration agreements according to the FAA's terms. As such, parties may agree to have an arbitrator decide not only the merits of a dispute but also the "gateway" question of arbitrability. In those instances, a court cannot override the parties' intention in the contract and decide whether a dispute is arbitrable in the first place. This is the case even if the court determines that the request for arbitration is "wholly groundless." Courts have utilized the "wholly groundless" exception to arbitration to "block frivolous attempts to transfer disputes from the court system to arbitration." However, as the Court noted, no such exception exists under the Federal Arbitration Act and courts are not permitted to re-write the statute to include such an exception to arbitration.

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## Ohio's Deceptive Trade Practices Act

*Wooster Floral & Gifts, LLC v. Green Thumb Floral & Garden Center, Inc.*, 9th Dist. Wayne No. 17AP0026, 2019-Ohio-63.

This appeal involved two competing floral shops and a dispute over the domain name woosterfloral(dot)com. The owner of the plaintiff shop used to own the domain name. However, she sold the assets to an associate and, at the time of the sale, she no longer owned the domain name because she had let the registration lapse. Instead, the owner of the defendant floral shop owned the domain name at the time of sale. She used the domain name to direct customers to her floral shop's own website. Eventually, the new owner of the plaintiff shop sued the defendant arguing, among other things, that the defendant's actions violated Ohio's Deceptive Trade Practices Act (DTPA). Eventually the matter proceeded to a bench trial and the trial court found in favor of the defendant. Plaintiff appealed.

On appeal the Ninth Appellate District affirmed, finding that the defendant's advertising actions did not create a likelihood of confusion or misunderstanding as to the source of goods or services, as required to constitute a violation of the DTPA.

***The Bullet Point:*** A violation of the DTPA can occur when advertising "[c]auses likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services[.]" To determine whether such confusion or misunderstanding exists, courts consider whether a customer who purchased the good or service is likely to be confused about or misunderstand the source of the goods or services. This could include, like in this case, an actual review of the website at issue.

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## Stay of Proceedings Pending Arbitration

*Fayette Drywall, Inc. v. Oettinger*, 2d Dist. Montgomery No. 28059, 2019-Ohio-48.

This was an appeal of the trial court's decision to deny a motion to compel arbitration and stay proceedings filed by a defendant, Restaurant Specialties, Inc. (RSI). RSI was the general contractor on a restaurant. The plaintiff was a sub-contractor on the project. After the project was completed, the plaintiff filed suit alleging claims for breach of contract and unjust enrichment among other things, claiming that it had not been paid in full for its labor or materials provided. One of the defendants, Flapjack Holding Company, LLC (Flapjack), the owner of the restaurant, filed a cross-claim against RSI who, in turn, also filed a cross-claim against it. Flapjack and RSI had a written contract that contained an arbitration clause. RSI sought to formally compel arbitration and moved to stay the proceedings pending arbitration. Plaintiff opposed, and the trial court overruled the request to stay the case pending arbitration.

On appeal, the Second Appellate District reversed the trial court's decision, finding that once the court found that there was an agreement to arbitrate, it had no discretion to deny a motion to stay the proceedings pending arbitration.

***The Bullet Point:*** R.C. 2711.02(B) provides, in relevant part: "If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement… ." Thus, to be entitled to a stay pending arbitration a party must establish: (1) that it is a party to a contract in writing, (2) the contract contains an arbitration provision, (3) the issue in the case is arbitrable, and (4) the applicant is "not in default in proceeding with the arbitration." The statute does not provide any discretion to the trial court to deny such a request when the requisite showing has been made by the party seeking to compel arbitration.

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