IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

KAREN HOWSAM, ETC., :

Petitioners :

v. : No. 01-800

DEAN WITTER REYNOLDS, INC. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, October 9, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

ALAN C. FRIEDBERG, ESQ., Denver, Colorado; on behalf of the Petitioners.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

KENNETH W. STARR, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 01-800, Karen Howsam v. Dean Witter Reynolds.

Mr. Friedberg.

ORAL ARGUMENT OF ALAN C. FRIEDBERG

ON BEHALF OF THE PETITIONERS

MR. FRIEDBERG: Mr. Chief Justice, and may it please the Court:

There is at least a little irony in the fact that Dean Witter is the litigant here before you, about 27 years past the time when it started with Dean Witter and Byrd the -- the move toward closing the courthouse doors to public investors and forcing them into industry-run arbitration. Dean Witter is now back here attempting to place a hurdle in the way of the public investor who ironically at this point seeks to enforce an arbitration agreement.

The issue today before the Court is the extent to which the industry and Dean Witter may now invoke court involvement to interfere with a customer's claims before arbitration and -- and to decide whether the customer's claims are timely under a section of an arbitration code providing for a time limitation on eligibility. The issue is who decides.

It is clear that -- that over the years a presumption has developed in favor of arbitrability where there is an arbitration clause in a contract. And the cases say that that presumption can only be overcome by clear and convincing evidence that the parties agreed to have a court decide arbitrability issues within a -- within the scope of an arbitration agreement. In this case, there is no such evidence.

The arbitration clause in the 1992 agreement between the parties is as broad a clause as one can imagine. The client agrees that all controversies between her and Dean Witter concerning or arising from any account or any transaction involving Dean Witter and the client, whether or not it occurred in the account, or the construction, performance, or breach of this or any other agreement between us. It's an industry-designed arbitration clause, meant to be as broad as possible. The intent clearly is to move cases against brokers by customers out of the courts and into arbitration.

That -- that 1992 agreement was, of course, followed by a 1997 submission agreement signed by Ms. Howsam which merely states that as an undersigned party, she and her trust submit the present matter in controversy, as set forth in the attached statement of claim, to arbitration in accordance with the Constitution,

by-laws, rules, regulations, and/or code of arbitration procedure of the sponsoring organization. In this case, it's the NASD, but the -- the other self-regulatory organizations and exchanges have similar rules to the 6-year rule.

QUESTION: It seems to me that some of the language in First Options, which the respondent relies on cuts against your case. How -- how do you deal with that?

MR. FRIEDBERG: Well, first of all, First Options is a case in which there was a question about whether an arbitration agreement existed, which is not the case here. And Justice Breyer, writing for the Court, wrote that -- that in that situation, the presumption shifts.

The AT&T case -- clearly the -- when the question is just the scope of an arbitration agreement, but there is no question about the existence of the agreement, there needs to be clear and unmistakable evidence of an intent to have the courts decide rather than the arbitrators decide.

QUESTION: The respondents here, of course, argue that because of the not to be submitted clause, the 6 years, that limits the scope of the -- of the arbitration agreement.

MR. FRIEDBERG: The -- the respondent, of

course, is -- is referring to rule 10304, which says that -- that disputes which arose out of transactions or events more than 6 years prior are not eligible for submission to arbitration.

First of all, that -- that rule is found in a section of the arbitration code. It's not found in the agreement itself. And it's found in a section of the Code of Arbitration Procedure.

QUESTION: Well, so is 10324 which you're relying on. That is, the arbitrator shall be empowered to interrupt and determine the applicability of. I mean, that's --

MR. FRIEDBERG: Exactly, Justice Scalia. And the point I was -- was trying to make is that -- that the code has to be read as -- as one code in that -- in that respect.

The -- it's also, I think, illuminating that the -- the section, the 300 series of the code in which that is found, is -- is not the eligibility section in the sense that the 100 series is. The 300 series is -- is basically a procedural, instructive portion of the code for the arbitrators to apply.

There is some -- we -- we've made the argument and -- and I think it's a valid argument -- that eligible for submission can mean a number of things. And -- and

that it refers, in this case to -- it could refer in this case to when the arbitrators take the case under submission, just as this Court takes the case under submission after the petition, after the briefing, after the arguments are made.

There -- there is, of course, the need to get the case in front of a tribunal in order to -- to decide whether or not the case is timely. So while the rule may prevent the case from going all the way to the end zone, it -- it certainly doesn't prevent the -- the litigant from or the -- the person arbitrating from -- from getting out of the starting gate.

Moreover --

QUESTION: Is -- is that your criterion, that -- that -- the -- on -- on the question of what -- arbitrability turns on the question, do you get in front of the particular person or tribunal at all as opposed to how long do you stay when you get there? In other words, if -- if it's a question of whether you get there at all, it's -- the question is arbitrability and the presumption goes one way. If the question is how long you stay there if you get in front of that person, that's not an arbitrability question and the presumption goes the other way. Is that -- that's your point.

MR. FRIEDBERG: That -- that is one point,

Justice Souter.

The -- the other point that -- that needs to be made is that whether or not this is part of the code, part of an agreement, it falls within the John Wiley and Moses Cone case law as opposed to the First Options holding. And in -- in John Wiley, if the Court will recall, there were prerequisites, timeliness prerequisites, to filing for arbitration, which the Court said, because there was an arbitration agreement and there was no dispute about that, were for the arbitrators to decide.

In Moses H. Cone Hospital, there were -- there were prerequisites of timeliness. The -- as I recall, the arbitration had to be filed within 30 days after an opinion by an architect as to the disputed contracting claims. And so -- and -- and the Court -- the Court clearly said in Moses Cone that the Federal Arbitration Act establishes as a matter of Federal law that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the contract involves construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

QUESTION: -- definition of the domain of arbitrability? You're saying shall be eligible for submission just means that the arbitration forum doesn't

get to the merits if more than 6 years have elapsed. But -- so you say that's not a question of arbitrability but how the arbitrator will proceed.

What is your definition of arbitrability?

MR. FRIEDBERG: Justice Ginsburg, our -- our definition of arbitrability I think has to be broader than that. But there is -- there is the merits arbitrability. There is the --

QUESTION: Well, the question that doesn't go to the arbitrator -- you're saying this one does. It's just he has to take it up first -- or she. But we're dealing with, if it's a question of arbitrability, the courts decide it. If it's not a question of arbitrability, but the -- the range of other questions, then it's for the arbitrator.

So my question is, what -- the domain for the court -- the question is it arbitrable is a question for the court. What is the content of that label, arbitrable?

MR. FRIEDBERG: It's a hard question for me to get my hands around, Justice Ginsburg, but there -- there is no question that in the first instance the court has to decide whether a claim is -- is arbitrable. And -- and if the court finds that -- that there is an arbitration clause that covers the merits of the dispute, then the court should defer to arbitrators on any question

regarding scope.

QUESTION: Well, now --

MR. FRIEDBERG: I don't think --

QUESTION: -- this -- this is a contract matter. Right? I mean, if -- if the parties clearly didn't want the arbitrator to do this and wanted the court to do it, you -- you don't dispute that the court would do it. Right?

MR. FRIEDBERG: Right.

QUESTION: So it's just a question of contract.

Now, you concede the point that arbitrability is for the courts. Right?

MR. FRIEDBERG: Right.

QUESTION: So presumably if 10304 had read no dispute, claim, or controversy shall be arbitrable, okay, under -- under this code where 6 years have elapsed, that would -- would that exclude this from -- from the arbitrator?

MR. FRIEDBERG: I believe not, Justice Scalia.

QUESTION: My goodness, it's using the exact term that you concede sends it over to the -- to the court.

MR. FRIEDBERG: Well --

QUESTION: It -- what do you have to do beyond using the -- the very word that you say bounces it to the

court? They say it. It shall not be arbitrable. And even that will not -- will not get it to the courts. What -- what does one have to do to get it to the courts?

MR. FRIEDBERG: Well --

QUESTION: And my next question is going to be, is there a whole lot of difference between saying it shall not be arbitrable and saying, it shall not be eligible for submission to arbitration?

MR. FRIEDBERG: I'm not --

QUESTION: And I don't think there is.

MR. FRIEDBERG: I don't think there is either, Justice Scalia.

QUESTION: Okay. Which is why you're fighting me so hard on this. Right?

(Laughter.)

MR. FRIEDBERG: Precisely.

I think what we have to do is look to the case law, including the ATT case and -- and its progeny, and First Options says the same thing really, that the court has to decide in the first instance is there an arbitration agreement. Having decided -- and in this case it's undisputed -- that there is an arbitration agreement, then the question is, does it go to the substance of the case or is it a matter of the scope? And the cases say, starting with the Gulf and Warrior --

QUESTION: What happened to the intent of the parties?

MR. FRIEDBERG: That -- that's what --

QUESTION: I mean, you're talking as -- as though this is some law being sent down from on high. I thought we established that step one is what did the parties intend.

MR. FRIEDBERG: Right.

QUESTION: And you say that even if the parties say it's not arbitrable, well, that doesn't matter. We still go through this -- this game that seems to come down from on high.

MR. FRIEDBERG: But the question is who will decide a certain issue of arbitrability, and AT&T and -- and Moses H. Cone and First Options even says that once you find that there's an agreement to arbitrate the substance of the -- the dispute, then the question is did the parties, by unmistakable evidence, agree that the courts, rather than the arbitrators, would decide that scope issue.

QUESTION: So then you're saying arbitrability under our cases is not for the court necessarily.

MR. FRIEDBERG: I'm saying --

QUESTION: I mean, you can't have it both ways.

MR. FRIEDBERG: There -- there's a --

QUESTION: If you say arbitrability is for the courts, then if the -- if the agreement between the parties says this is not arbitrable, that question of -- of whether those facts exist or not ought to be for the courts.

MR. FRIEDBERG: I think that's true for that threshold issue, but if we get to a point where all issues that -- that may preclude ultimately submitting the case to the arbitrators for determination have to be decided by the court, then we're running afoul of John Wiley.

QUESTION: I -- I didn't understand it that way. I thought the question was not what the parties intend. It's how we find out what they intend. And I thought we're trying to decide between a tough burden of proof standard on that that favors courts and where you apply no burden of proof standard or, if anything, favor the arbitration. In both instances, we're trying to find out what the party intended. But we assume that they intended court unless there is clear and convincing evidence they wanted this arbitrable. Am I right?

MR. FRIEDBERG: I think you're wrong, Justice Breyer, although --

QUESTION: Because? Then I may not have stated it correctly.

MR. FRIEDBERG: I think what -- what the --

again, what the initial issue for the Court is, did the parties agree to arbitrate the substance of the dispute.

QUESTION: Yes, of course, and I thought what my opinion said was that when we're trying to decide whether they agreed to arbitrate or not, we apply a fairly tough standard. They have to show rather clearly that they did.

What were the -- what was the word you quoted at the beginning from the opinion? Didn't you quote a phrase that said on that -- in deciding whether an issue is arbitrable, we apply the standard of?

MR. FRIEDBERG: I believe I quoted from the Moses H. Cone --

QUESTION: Yes. I'm sorry. You go ahead.

MR. FRIEDBERG: -- decision which -- which says -- which says that the presumption is in favor of the arbitrator's deciding.

QUESTION: I'll get the phrase and then -- I'm not communicating. I'm sorry.

QUESTION: I -- Justice Ginsburg asked a question that I'm also interested in. Quite apart from the reference of -- in the agreement to the fact that the arbitrator shall decide this, your second argument, on your first argument, what do you want me to say if I write the opinion or another member of the Court writes the

opinion in your favor? If the essence of the dispute involves the particular issue, then that is arbitrable and that's for the arbitrators to decide?

MR. FRIEDBERG: No. I --

QUESTION: I -- I just don't know what you want us to write. It's the same question Justice Ginsburg had.

MR. FRIEDBERG: Justice Kennedy, it's basically what was announced in the AT&T case when it was sent back to the court to decide who decides certain questions. The Court should decide in this case that where there's a valid, written agreement to arbitrate the subject matter or the merits of the dispute, particularly where the arbitration clause encompasses all controversies and the parties have not clearly and unmistakably reserved certain issues of arbitrability for a court decision and -- and I mean, within the scope as opposed to the basic dispute -- the presumption in favor of arbitrability should apply, and issues relating to the scope of the arbitration agreement are for the arbitrators.

And in this case -- AT&T, when the Court sent the case back to the lower court said, these issues are for the arbitrators to decide unless you find unmistakable evidence that the parties agreed -- and this is the intent of the parties -- that the court would decide.

I -- I would like to reserve --

QUESTION: Mr. Friedberg, do you disagree with the Government? The Government did say there are two considerations. The first one you agree with obviously, whether the parties entered into a binding arbitration agreement. And then the Government says there's a second question, that is, whether the subject matter of the dispute falls within the scope of that agreement. Those are the two things. You seem to be saying there's only the one, did they agree to arbitrate.

MR. FRIEDBERG: No. I'm not -- obviously I'm not doing a very good job of expressing our position. Where the subject matter of the dispute, the merits-related issue -- as in First Options, it was the question of whether the Kaplans owed money or not -- is within an arbitration agreement, then any ancillary type dispute as to timeliness should go to the arbitrators to --

QUESTION: What -- what if I have an arbitration agreement that says all -- all disputes arising from an -- an accident on the employer's premises shall be arbitrable, and the issue is whether this accident occurred on the employer's premises or not? One of the parties -- or the -- the employer contends that this injury occurred elsewhere entirely. Who decides whether it occurred on the premises or elsewhere?

MR. FRIEDBERG: I think in the first instance

the court would decide that because the parties did not agree to arbitrate any claims.

QUESTION: Why is that different from here? The parties --

MR. FRIEDBERG: Because --

QUESTION: -- did not agree to arbitrate any claims that -- with -- with regard to an accident that did not occur on different premises, but that incurred -- occurred more than 6 years before.

MR. FRIEDBERG: Because --

QUESTION: They didn't agree to arbitrate it. They said it shall be -- shall not be eligible for submission to arbitration.

MR. FRIEDBERG: Because of the principle, Justice Scalia, set out in the John Wiley case and the Moses H. Cone --

QUESTION: But I don't see how that principle applies -- doesn't apply here, but applies in the other premises situation. I -- I just don't see any distinction between the two.

MR. FRIEDBERG: I -- I think because the Court has previously said that a timeliness issue is -- is a procedural issue. It's intertwined with -- with substantive issues, of course, but --

QUESTION: Well, can't you make it a -- I mean,

it's up to the parties, who are masters of their agreement. If they want to make timeliness part of the condition of the arbitration, surely they can do it, can't they?

MR. FRIEDBERG: They could but they didn't in this case.

QUESTION: What you're saying, I guess, is that if the -- if the allegation of harm falls within the subject of the arbitration clause, everything goes to the arbitrator unless they have unmistakably said that some subsidiary issue does not. Is that --

MR. FRIEDBERG: That -- that is what our position is.

QUESTION: Thank you, Mr. Friedberg.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

For two reasons the question whether petitioners' claims were submitted within the 6-year time limit is for the arbitrators to decide.

First, as this Court held nearly 40 years ago in John Wiley, when the parties have agreed to submit the

subject matter of the underlying dispute to arbitration, the question whether the dispute was presented within a contractual time limit is presumptively for the arbitrators even if the time limit is a prerequisite that conditions the duty to arbitrate.

Second, the time limit in this case is imposed by the NASD Code of Arbitration Procedure, which the parties incorporated into their agreement in full.

QUESTION: What is -- what is the general principle that Justice Ginsburg was asking for that controls your first conclusion?

MR. ROBERTS: Okay. Arbitrability is, as used in the Court's cases, a term of art that includes two questions. One of those questions is whether the parties are bound by a valid arbitration agreement and the other question is whether the subject matter of their underlying dispute is within the scope of that agreement. And by the subject matter of their underlying dispute, what I mean is whether they agreed to arbitrate disputes about the primary conduct that -- that is given rise to the -- to the underlying claim.

And what the Court held in -- in John Wiley is once the parties -- once the court has determined that the parties have agreed to arbitrate disputes arising out of the -- the underlying conduct that's at issue, then

questions about their litigation conduct and how those -- how that dispute was processed after it arose -- those are presumptively for the arbitrators to decide.

QUESTION: What was the text in John Wiley & Sons? What was the language of the agreement? Did it -- did the agreement say that no controversy shall be eligible for submission to arbitration?

MR. ROBERTS: No, Your Honor. The -- the agreement didn't use that -- that language. It said the failure of either party to file a grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance. But the point --

QUESTION: Why? That -- that seems to me -- let me put -- it's the same question. Let me put it to -- to you another way. Is there any difference between your reading of this clause, shall be -- shall not be eligible for submission to arbitration, and the -- the way you would read a clause which said, no dispute, claim, or controversy which -- which occurred 6 years previously shall be --

QUESTION: Arbitrable.

QUESTION: No, not arbitrable -- shall be remediable? No award shall be given for any -- for any occurrence prior to 6 years.

MR. ROBERTS: There -- there may be --

QUESTION: Now, that -- that would be a merits question, and that's what I think was at issue in -- you know, it's a statute of limitations.

MR. ROBERTS: The --

QUESTION: This is not phrased as a statute.

MR. ROBERTS: There may be differences, Your Honor, but -- but the -- the time limit language, the eligible for submission language, what that indicates is that the timely submission of a claim is a prerequisite to arbitration of the merits of the claim. It doesn't say one way or the other who decides whether that prerequisite has been met. It doesn't say that the timeliness question is not arbitrable.

QUESTION: Of course, it says the --

MR. ROBERTS: It says the underlying claim is not arbitrable --

QUESTION: Neither --

MR. ROBERTS: -- if it's not timely.

QUESTION: Neither does a clause which says only -- only events that occurred on the employer's premises are arbitrable. That doesn't say --

MR. ROBERTS: No.

QUESTION: -- who decides that either. But -- but since it is an arbitrability question, you -- you assume the court will decide.

MR. ROBERTS: You presume -- you presume that because if the parties didn't -- didn't contemplate that they would arbitrate about disputes arising from the -- from the underlying conduct, which that goes to, then they presumably didn't think the arbitrators were going to have anything to do with any questions connected with such a dispute. But when they did -- no. Here -- here we know.

QUESTION: They didn't think they were going to arbitrate about any matter that occurred more than 6 years previously.

MR. ROBERTS: When --

QUESTION: And therefore, they didn't think the arbitrator would be the one to decide whether it occurred 6 years previously or not.

MR. ROBERTS: They agreed and there's -- there's no question about it that they agreed that disputes that arose from petitioners' securities accounts would be within the -- would the kind of disputes that they would arbitrate. And so when this claim arose, it was within the scope of -- of the agreement.

And the question here is not whether it's the kind of claim that the parties agreed that they might arbitrate about. It's a question of whether a claim that was arbitrable when it arose has become not subject to arbitration because of the parties' litigating conduct.

And ordinarily people -- people would assume that the -- the forum that they've selected to resolve the underlying dispute is going to resolve ancillary questions about how the dispute has been processed and the litigating --

QUESTION: There are all sorts of characteristics of a claim: where it occurred, when it occurred, the people between whom it occurred, and so forth. You -- you've given us no -- no basis for distinguishing one of those characteristics from another as far as whether the court or -- or the arbitrator decides.

MR. ROBERTS: I --

QUESTION: I suggest that a very clear basis is what the parties themselves have said. When they have referred to a particular characteristic as being non-arbitrable, it means that the question of whether that issue -- whether that -- that fact rendering it non-arbitrable exists is a question for the courts. That -- that would solve a lot of cases. And I don't know how else you -- you -- you distinguish where from when from between which people.

MR. ROBERTS: My -- my distinction is between and it's the distinction the Court drew in the John Wiley case and that the courts of appeals have followed for 40 years except in -- in the limited context of the question

presented here. It's the -- the distinction that's -- that's been embodied in the Uniform Arbitration Act, which is cited on page 14 of the reply brief. It's the distinction between the primary conduct and whether there's a limit on what primary conduct is subject to arbitrability and other questions about -- about litigating conduct.

And the -- the rule that would focus on the language of -- of the parties and parse that language to see whether it's phrased as a limit of arbitrability, to then decide whether the presumption in favor of courts deciding the question of arbitrability imposes an extra layer of complexity that doesn't -- it's not likely to reflect the -- the real intent of the parties.

The -- what we're trying to figure out is not whether the parties thought this was a question of arbitrability, but who they intended to decide the -- who they intended to decide the question. And the -- and when the underlying claim is within the scope of their agreement, it's likely that they intended that ancillary questions would be decided by the party that they committed the underlying dispute to.

But even setting that aside, here we've got 10324.

QUESTION: Here where language is not very

likely to reflect their intent, it's -- their language will --

MR. ROBERTS: Their language reflects their intent --

QUESTION: It's more likely to be reflected by some arbitrary rule that if it relates to place, yes; if it relates to time, no.

MR. ROBERTS: It reflects their intent that -- that timely submission of a claim is a prerequisite to arbitration of the merits of that claim. But it doesn't reflect their intent of who is to decide whether the prerequisite is -- is met. There's -- it doesn't say anything about that.

Rule 10324, which is also a part of the parties' agreement, does say something about that. It says that the arbitrator shall be empowered to interpret and determine the applicability of all code provisions. And the time limit is a code provision. The clear import of that, regardless of the issue that we're discussing, is that the arbitrators are empowered to apply the time limit.

And so, even setting aside the 40 years of law that's settled by John Wiley and the distinction between the subject matter of the underlying dispute and -- and questions that go to the parties' litigating conduct, the

agreement here is clear and that --

QUESTION: Mr. Roberts, are you saying essentially the parties have an agreement to arbitrate, and that looks like very broad, any and all questions, and then there's this code of procedure? So what the NASD code is directed to is how, if the arbitrator has authority, the arbitrator is to proceed. Is that essentially what you're saying?

MR. ROBERTS: Yes. It's -- it's concerned -- the -- the code is concerned with the rules of the arbitrable forum, and it makes sense that the arbitrators are the ones to interpret and apply those rules. And that's confirmed by Rule 10324.

But -- but yes, the -- the question whether a claim is timely submitted goes not to the character of the underlying claim at the time it arose and whether claims of that character are subject to arbitration.

QUESTION: And haven't we got to take that position? Because otherwise we're just going to have litigation chaos?

MR. ROBERTS: Yes. That -- it's going to completely undermine the purpose of arbitration, Your Honor. The reason that people agree to arbitration is because they want cost effective and efficient dispute resolution, and moving all these questions into antecedent

judicial proceedings is going to delay dispute resolution. It's going to impose added costs on the parties, and it's going to undermine the very reason they agreed to arbitrate. And it's -- it's -- that's another reason why it's just not likely that that's what they intended -- intended to happen.

QUESTION: Mr. Roberts, am I right in understanding that this 6-year is a statute of limitations for the arbitration forum?

MR. ROBERTS: Yes.

QUESTION: Because it says nothing about if the case were in court what the limitation would be.

MR. ROBERTS: Yes. It's a forum-specific limit, and that's another reason why it makes sense that the forum that the limit applies to should be the one that -- that applies it. It says that cases won't be eligible for arbitration under this code. It doesn't refer to whether they might be pursued in other -- in other forums or other venues. It reinforces the -- the expectation that the arbitrators would decide it which, in any event, as I said, is -- you know, you can't get any clearer than a rule that says that the arbitrator shall be empowered to interpret and determine the applicability of all code provisions.

Thank you.

QUESTION: Thank you, Mr. Roberts.

Mr. Starr, we'll hear from you.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE RESPONDENT

MR. STARR: Thank you, Mr. Chief Justice, and may it please the Court:

Let me begin with what we believe to be the fundamental point in the case. It has been mentioned in the opening arguments, and that is, this is in fact determined by contract. What did the parties intend?

In response to the specific question posed by Justice Ginsburg, the language of AT&T we think is quite pertinent. It says arbitrability simply means whether the parties' agreement creates a duty for the parties to arbitrate the particular grievance, not whether there's an arbitration clause at that level of generality.

QUESTION: But doesn't a grievance -- I mean, isn't the point of speaking of grievance just what Mr. Roberts said? The grievance has got to refer to the primary conduct causing injury. If it is not limited to that, in the absence of unmistakable language, then we're going to have a trial before every arbitration if there is any procedural or other defense that could be raised.

MR. STARR: We believe, Justice Souter, that the language is in fact clear, of 10304. Let me return to

that.

But let me go to your point with respect to litigation chaos.

QUESTION: Wait. Before you do that, do you disagree with -- what he said the -- I thought that your -- your -- you would accept what he says, but that -- that your point is that the primary conduct causing the injury under this agreement is conduct that occurred within the last 6 years --

MR. STARR: It is --

QUESTION: -- and not conduct that occurred before 6 years.

MR. STARR: It is going to the issue of what did AT&T mean by the specific word grievance. What I believe 10304 is is a clear statement by the parties, leaving the First Options presumption aside, which works for us. If there is any doubt as to who decides, the presumption is the courts decide. But here we know, by virtue of the plain meaning of eligible for submission. When we couple that, since this is an NASD rule -- and what we did not hear from the SEC was what did the NASD intend. What have they said this rule, which has been --

QUESTION: This is your submission argument, your -- your argument based on the -- on the word submission.

MR. STARR: It's eligible --

QUESTION: Okay.

MR. STARR: -- eligible for submission.

QUESTION: But submission -- I just don't see how submission can decide this case because you can say the -- the ultimate issue is submitted when the -- when the whole case goes to the arbitrator, or you can say it is submitted when the arbitrator gets beyond procedural issues and gets down to the issue of the primary conduct that caused the injury.

MR. STARR: Justice Souter --

QUESTION: So I don't see how submission is -- is going to be the -- the deciding factor.

MR. STARR: Justice Souter, we would guide the Court first to the word eligible for submission. Eligible -- and the NASD has described -- and we set this forth at page 25 of the brief -- specifically what it means in this context. But eligible is a very familiar term. It is found in rule 6 of the Court, and what it means is if you're not eligible, you don't get to this podium. You don't go to the forum.

And the parties are -- I think what is essentially dividing the parties here today is that there is some sense that because of John Wiley & Sons, the parties cannot agree to a temporal restriction. That

makes no sense whatever, and indeed it's inconsistent with the Federal Arbitration Act, Congress' policy.

QUESTION: But you can agree to a temporal restriction and still not commit yourself as to who decides whether that restriction is true.

MR. STARR: And that guides us -- you're exactly right, and so you then go to what is that temporal restriction, and let's analyze that temporal restriction. We believe the words --

QUESTION: But if the temporal restriction then were phrased in terms of no relief shall be granted on a claim arising, then it clearly would go to the arbitrator.

MR. STARR: It might very well go to the arbitrator --

QUESTION: But it clearly would, wouldn't it?

MR. STARR: -- under -- under those circumstances. It all depends upon the specific language.

QUESTION: So it depends on the wording of the clause.

MR. STARR: Absolutely. But here, Your Honor -- Justice Stevens, we know -- and I would guide the Court or refer the Court to page 25 where we summarize what the NASD has said this is its rule. The rule is applicable throughout the industry. This is commonplace. This is what the rule means, and it is called a -- a

jurisdictional limitation, a -- a substantive jurisdictional limitation, and it gives the reason.

QUESTION: But how -- how does the party that's dealing with the NASD know that this is -- I mean, why should it be bound by what the NASD has said in other contexts? I mean, it's not a Government organization, is it?

MR. STARR: Well, Mr. Chief Justice, the submission agreement in 1997 -- and this is commonplace. In that submission agreement, the petitioner did, indeed, agree to submit the issue for arbitration to the NASD under the rules.

QUESTION: No, no. To one of three -- I think they agreed to submit to one of -- one of three or four different arbitrators, and they happened to pick this one. And if the other arbitrator had different rules, it would have had a different result.

MR. STARR: But they -- they don't, and that's the assurance I want to give and why it's odd that the SEC has been silent on this. The SEC has had, in terms of what the industry knows -- this is common practice in the industry, this -- this rule, the eligibility rule that you could use at a university, are you eligible for admission to this university? Eligibility means qualified for our justice. Chief -- now Chief Judge Becker described in

PaineWebber v. Hofmann -- we quote that language at page 20. 12 years ago he said, looking at the dictionary, at Webster's, it can only have one reasonable meaning, and that is qualified for it. One doesn't get in the door.

And there needs to be a gatekeeper. And it is, under this Court's presumption -- this Court's law and it's consistent with the Federal Arbitration Act as well -- it makes sense for the courts to be the gatekeeper.

And I want to come, if I may, to Justice Souter's concern about litigation chaos. To the contrary. The rule that is being suggested here ushers in all manner of difficulties and we would describe or refer the Court, in particular -- this is in our brief -- to the Edward Jones v. Sorrells case. The Seventh Circuit had before it the following kind of question. Eligibility claim made. No one went to court, but an eligibility defense offered to the arbitrators. The arbitrators simply noted it.

Some of these arbitrations go on for years. Literally 2 years is not unknown in the industry.

In that particular case, the arbitrators never decided the eligibility issue.

And the NASD has said this -- we refer you to page 7 of our brief, as well as page 25. There was a need for the eligibility rule -- for that rule to be clear and for there to be a gatekeeper.

QUESTION: Well, I thought that -- that what it says, this rule says -- one interpretation of it, plausible interpretation, is arbitrators decide the eligibility question first.

Do you agree, Mr. Starr, that this 6-year rule is a rule for the arbitration forum? That is, suppose this dispute now goes to court and the court says, we think that the 6-year limit has not been met. Then the customer says, fine, court, but under New York law, the limit, if we're in court, is 10 years and I'm well within that. This is a limit, as I understand it, this 6-year limit, is for the arbitration forum only, not for the dispute.

MR. STARR: That is correct. But the issue is who then decides whether this forum -- who is the gatekeeper? That's what's before you.

QUESTION: That's now -- now, that's my puzzle because isn't it odd that a limitation period that applies only in the arbitration forum is then decided by a court where the court would have a different limitation?

MR. STARR: Not -- not at all because if there is a different limitation -- and, indeed, 10304 draws the very distinction between the eligibility requirement to get in the door of arbitration as opposed to a statute of limitation which might vary.

Now, the 6-year limitation -- the eligibility rule -- and we would guide the Court back to the meaning of the word eligible for submission. We think that's clear, but we think it's clear for the reasons Chief Judge Becker said. But we would again refer the Court to what the NASD has said. It is a substantive jurisdictional --

QUESTION: It said more than that. I mean, it said -- you quote it on page 25. It said -- and this -- I wanted to ask you how that got into the Federal Register. It said, the courts determine the scope of the agreement to arbitrate, including whether a matter is eligible for arbitration on subject matter, timeliness, or other grounds. And that's the NASD in the Federal -- what's it doing in the Federal Register?

MR. STARR: Yes. The self-regulatory organization, which is what the NASD and the exchanges are, submit their proposed rules to the SEC which could change this at the stroke of a pen. It has not done so for lo these years while these issues have been languishing in -- in the courts.

QUESTION: I -- I would like to get back to the question --

MR. STARR: Yes.

QUESTION: Well, why is these interpretations that are not part of the agreement that the respondent or

the petitioner here signed -- why are they binding on the petitioner?

MR. STARR: Because she agreed in the submission agreement to be bound by arbitration under the code of procedure. It's an express agreement by her which she signed, which goes back to paragraph 19 --

QUESTION: Well, so we're just talking here, when you say the NASD has said, this is incorporated in the code of procedure which she agreed to be bound by?

MR. STARR: No.

QUESTION: Okay. I thought -- I thought you said something else.

MR. STARR: What I tried to say is that the NASD has described the reasons for the rule to which she agrees.

QUESTION: Well, why should that bind her?

MR. STARR: It binds her only in the sense of it helps the Court understand what the background of the rule is. She is bound the rule. We are now moving to what does the rule mean and what's the purpose of the rule. We think, Mr. Chief --

QUESTION: Well, supposing I enter into a contract with Sears and, say, I'll pay $300 for something, and then Sears has a publication which says, you know, here's the warranty and, okay, you get the warranty. And

then Sears puts out a magazine and says, what we really mean in this warranty is A, B, C. Now, certainly that doesn't affect the terms -- how you interpret the terms of the warranty.

MR. STARR: There may very well be, under those circumstances, an issue of whether there was a contract.

The other side doesn't dispute that there is a contract and that the NASD rule is a part of the contract.

QUESTION: But it's the NASD's interpretation of the rule. I mean, if you have a private entity expressing a view as to what the contract means, I just don't think it binds the other side.

MR. STARR: I'm not suggesting binding authority. I'm suggesting that illumination is provided by the NASD's explanation, which also goes to the purpose. Why is this? Is this simply an arbitrary rule? No. It is a rule that is borne of experience of the entire industry --

QUESTION: But, Dr. Starr, can I ask you a question about the meaning of the rule? It may not really be germane to this ques -- but I've been puzzled. Supposing you had a case in which the conduct occurred 7 years ago and it was fraudulently concealed until 1 year before the arbitration is requested. Would that be arbitrable or not?

MR. STARR: Well, there would be an issue that the Court would then analyze what is the occurrence or event.

QUESTION: Well, I'm talking about the occurrence is 7 years ago.

MR. STARR: And -- and in terms of purchase or sale of security, it might very well that that would not be arbitrable in this industry because of the occurrence or event. There are also, as the Court knows, statutes of repose in the statute of limitation -- in -- in the Federal securities context as well.

But the point is the --

QUESTION: So this is an absolute rule without any tolling provision.

MR. STARR: That's correct. It -- it is a absolute eligibility rule that simply tells the person -- and again, there's no choice here in the sense of if she had gone to the New York Stock Exchange or the American Stock Exchange because the rule is exactly the same.

QUESTION: But I'd -- I'd like you to go back to what I thought was the key question, Justice Ginsburg's initial question. What is this term arbitrability?

That the context -- I've gotten not to an answer, but I've gotten to a beginning with First Options. First Options says that the question of whether you agreed

to arbitration is basically a matter of intent and apply State law. That's the basic rule.

Then there's a subsidiary rule. The subsidiary is, but if what you're interested in is whether the parties agreed to arbitrate the question of arbitrability -- see Justice Ginsburg says what is that -- at subsidiary rule, what you do is assume that silence means no because only if it's clear and unmistakable.

Then First Options goes on to say we'll give you a couple of examples. An example whether or not a particular merits-related dispute is arbitrable because it was within the scope of a valid arbitration agreement, that is not a question of arbitrability. Why not? Because the parties, after all, have a contract for arbitrability. They thought about the question of arbitrability. It won't -- it -- it's all very likely that they wanted this whole thing to be arbitrable. And then they give you an example of where it is, where there is no contract, where there is nothing, where the parties never thought about arbitration, in all likelihood.

Now, with those examples, it seems to me that we're honing in on but we don't have yet an answer to the question Justice Ginsburg asked. Well, if there's a contract and it's a thing they likely thought about and it's sort of a minor subsidiary thing and, after all, it's

something that the arbitrator knows about and courts don't, that would all say it's not about arbitrability in the sense of requiring a special presumption. But if there's nothing at all in writing, if it's something courts know about, there is.

All right. That's where I am. That doesn't help you because I think in this case, yours would fall in the first category. But, nonetheless, I'd appreciate a response because I -- I need my thinking developed on this.

MR. STARR: Justice Breyer, I believe that the question of arbitrability, the duty, and who decides that question is guided by the -- is determined by the intent of the parties.

QUESTION: And we agree with that.

MR. STARR: We now look to the contract. There's some discussion as what does the contract include. The parties have been in agreement that the contract includes the rules, including 10304. That is the most specific and targeted provision, that we then go to that rule, and we say, what is the parties' intent with respect to whether this issue is eligible -- this matter, dispute, claim, or controversy shall be eligible for submission. It does not say specifically the courts are going to decide that. Right? But the First Options presumption,

since the language is not clear that the court shall decide it, is that that is the baseline. That is, in fact, the default position unless, indeed, the parties have clearly and unmistakably provided that that is an issue for the arbitrator.

QUESTION: Which brings you to 10324.

MR. STARR: And 10324 is, in fact, a broadly worded provision that says on its face that the arbitrators are empowered to decide, to interpret, and the like, the provisions of the code.

Several points. The first is this is a very general, as opposed to a quite specific, provision, and when we then analyze it, and we analyze it in the context of the remainder of the code -- and I would guide the Court especially to rule -- or section 10104 that says arbitrators shall be appointed --

QUESTION: Where do we find that in your brief?

MR. STARR: 10104 is at page 35 --

QUESTION: Thank you.

MR. STARR: -- of the brief, Mr. Chief Justice.

And that's 10304. And then at the bottom paragraph, 10104 says that arbitrators shall be appointed by whom? The director of arbitration only for cases that shall be eligible for submission under the code. In other words, when we take the code and we look at various

provisions -- and we refer the Court to our footnote 8 on page 36 of our brief where we identify, Justice Kennedy, a number of provisions of the code that cannot, in reason, be interpreted by the arbitrators. The powers of the director of arbitration, by way of example. We enumerate six examples. I think they're more like 17, but when one goes through the entire Code of Arbitration Procedure, one will see a number of provisions that the arbitrators just will not have occasion --

QUESTION: But are not -- but that those -- those provisions are not ones that the court decides either.

And I'd like you, Mr. Starr, to tell me why I'm wrong, because I take it from your argument you would say I'm wrong, in saying we have an agreement to arbitrate signed by the broker and the customer. That seems to be as broad as you can get. And then we have a code of procedure which says, if you are going to use the NASD auspices, these are the procedural rules, including statute of limitations, which you should decide up front and not after you've decided the merits. Limitations first, then merits. If I think of this as the agreement is the agreement to arbitrate and sets what's arbitrable, then the code of procedure is how you proceed in the arbitration forum.

What is wrong with that division?

MR. STARR: Because it is building in a procedural versus subject matter distinction, a sort of way of looking at the code as opposed to determining -- and you used the term, Justice Ginsburg, statute of limitations. This is not a statute of limitations. We would guide the Court again -- refer the Court to the second sentence of 10304 which draws the distinction -- this also goes back to Justice Kennedy's question -- that with respect to this -- the first sentence tells us, 6 years eligible for submission. It's not eligible for submission --

QUESTION: Mr. Starr, can I interrupt?

MR. STARR: Yes.

QUESTION: Supposing the -- the claimant files a piece of paper saying the events occurred 5 years and 11 months ago, and the -- a company comes in and files a piece of paper and says, no, they occurred 6 years and 1 month ago. It depends on how you interpret it. Who's going to decide which is right?

MR. STARR: That would be a question of -- for the court. It's a question of arbitrability.

QUESTION: So just filing a defensive pleading would oust the arbitrator of jurisdiction --

MR. STARR: Oh.

QUESTION: -- even though the claim itself said it was 5 years.

MR. STARR: No. Under the -- I'm sorry. If you're suggesting that -- and this is the Sorrells example. The -- at -- there, there has been, in effect, an agreement, as it were, to allow the arbitrators to take that first cut which comes back to Justice Kennedy's rule. They can, if the parties agree, make the eligibility determination, but if they make it wrong, that's Sorrells. If -- if the evidence is it's 6 months --

QUESTION: Well, so -- so in my hypothetical --

MR. STARR: Yes.

QUESTION: -- it would be the arbitrator's initial task to resolve the question of fact.

MR. STARR: Only under the circumstances that -- I want to be very clear. The issue of eligibility is, in fact, a question of arbitrability and it's presumptive -- it is for the courts to decide absent clear and convincing evidence.

QUESTION: So then am I correct --

MR. STARR: But --

QUESTION: -- that if the -- if the claimant files a claim saying it happened 5 years ago, and the company files an answer saying, no, it happened 6-and-a-half years ago, they would immediately refer that to the

court?

MR. STARR: Well, you're suggesting a procedural issue, namely, filing an answer which suggests to me that the company has, under those circumstances, agreed for the arbitrators to decide that issue.

QUESTION: Why? Why? The whole reason for filing the answer is to get it out of the arbitration.

MR. STARR: No, I'm sorry.

QUESTION: That's why you file. Go ahead.

MR. STARR: You can, under those circumstances, say the arbitrators -- I will allow the arbitrators to take this initial cut at that.

QUESTION: But you can, but what if you don't say that? What if you say, I am saying it was 6 years and 1 month and for that reason this eligibility question is jurisdictional and it goes to a court?

MR. STARR: Exactly. Exactly. And that's what --

QUESTION: All right, and if that's what they say, then they go to the court.

MR. STARR: That's right.

QUESTION: So all they've got to do is file a paper and we're out of arbitration and into court. And your theory --

MR. STARR: You're -- you're in -- you're in the

court. I was trying to respond to the specific -- specific hypothetical, but the principle is yes, you go to the court. What you would do under those circumstances is not file an answer. You would, in fact, say you go to court and you go to court --

QUESTION: And it's the same thing if -- if you say that the accident occurred somewhere other than in the work place. And it --

MR. STARR: There's -- it's the same principle. You're saying this is an eligible arbitration.

QUESTION: All right. And -- and doesn't that --

MR. STARR: Are you going to stand -- I'm sorry.

QUESTION: No. You go ahead.

MR. STARR: I was just going to say the issue is are you going to stand on your rights under the contract. In your hypothetical, they're filing an answer which is exactly what happened in Sorrells. It goes through arbitration and eventually this is -- I want to provide the Court again with the Sorrells exam --

QUESTION: They make --

MR. STARR: I'm sorry.

QUESTION: They make their submission in a motion to dismiss, not in an answer. They say this is not proper -- suited for arbitration because the time, in

fact, is different.

MR. STARR: You -- the point is you would file that in court.

QUESTION: Can you step back one second -- one second from these details you're in? Because I'm seeing it not as a matter of detail. What we're after is the parties' intent. In most places in the law, the law of arbitration in this area is either neutral or sometimes favorable to arbitration. But there is one exception. The one exception is where the parties may or may not have agreed to arbitrate arbitrability. And there we, interestingly enough, use a presumption that's very hostile to finding the intent to have the arbitrators arbitrate arbitrability.

Now, in terms of the reason for that hostility, how does that apply here? I would think, at first blush, it shouldn't apply at all. Why? Because we're talking about rules of an arbitration forum. And rules of an arbitration forum -- after all, they're more expert in. And moreover, the parties have agreed to go to arbitration in a lot of circumstances anyway, so they at least know something of what they're talking about. Why would we want to apply so hostile an interpret -- hostile a presumption as to what their intent really is in this kind of an area?

MR. STARR: Justice Breyer, we're asking you not to apply a presumption at all. We want you to follow the intent of the parties --

QUESTION: Oh, well, fine. If no exception -- if no -- if -- if that's really what you mean, then you do not mean that there has to be clear and unmistakable evidence. What I mean by my assumption is these words, clear and unmistakable evidence, because once we're out of that box, then I think we're right into what Justice Kennedy said and that's the end of the case. But, I mean, it's only those words, clear and unmistakable, that help you, and that's what I mean by the hostile presumption.

MR. STARR: But again, the presumption and the analysis in First Options goes to where, in fact, the parties have not spoken to this issue. We believe the parties have spoken to the issue through the NASD rules for the reasons that we have stated, and that is, it's not that we're seeking to build in some new presumption. To the contrary, we're suggesting --

QUESTION: No, I know. But would you agree -- you want it clear and unmistakable or not? Is that the standard or not?

MR. STARR: That's the standard with respect to -- the First Options presumption works for us. What we're relying on is the intent of the parties as articulated in

the rules, and again, the NASD has said, here's the reason for the rule.

QUESTION: Can I -- can I ask you about the rules, about 10324 in particular which deals with the interpretation of provisions of code?

MR. STARR: Yes.

QUESTION: I assume your -- the -- the other side says that -- that that provision gives the arbitrator the power to decide whether 6 years have elapsed or not. If it did that, I suppose it would also give the arbitrator the power to decide whether the injury was one that occurred in the work place; that is, whether the subject matter was also --

MR. STARR: The same logic applies.

QUESTION: I don't see how you could limit it to the one and -- and not apply it to the other, could you?

MR. STARR: I don't think that they could.

QUESTION: Shall be empowered to -- so how do you read it? Shall be empowered to interpret and determine the applicability of all provisions. How do you read it? Meaning what? Once he has -- once he has jurisdiction.

MR. STARR: Once the arbitrator has juris --

QUESTION: Within the scope of --

MR. STARR: -- arbitrators have jurisdiction,

they are empowered to interpret the code. But it would be passing strange to suggest that prior to arbitration a number of the provisions of the code precede the appointment of the arbitrators and go to the powers of the director of arbitration. Therefore, it makes no sense to say that the arbitrators can by virtue of the all language, which this Court has said in a variety of contexts, TWA, any number of contexts, to the effect that that breadth, if anything, raises ambiguity.

I just to -- if I may respond, I believe again the First Options presumption is the default presumption. But we would guide the Court and we rest our case on 10304 --

QUESTION: So you don't think you even need it. You don't think you even need the presumption.

MR. STARR: That's correct, because we think the parties' intent is clear and the NASD is clear with respect to why this rule exists. It exists because long, stale claims, as good as the arbitration forum is -- and it's a very fine forum. It's been used in the industry since 1872. But it does not work for long, stale claims. You can't say let's arbitrate a claim from 1929 --

QUESTION: Well, nobody is questioning the 6-year limitation, and the question is who decides it. And I'm still left with the anomaly that a limitation,

applicable only in the arbitration forum, gets decided by a court. It's not a limitation on court action. It's not an all-purpose. It's not saying this -- these parties will arbitrate -- will -- will have this dispute. This dispute will be dead after 6 years. You've conceded that that's not so. The dispute might be alive for 12 years depending on what the State law is.

Isn't it odd that -- to read a contract to say that a rule governing only the arbitration forum and not the court is decided by the court?

MR. STARR: It's not odd in this context where the original agreement -- there was not, Justice Ginsburg, an agreement, in paragraph 19 of the original client access agreement, to arbitrate in some generic, undifferentiated way. It is to arbitrate under the rules of either a self-regulatory organization or an exchange --

QUESTION: But that would --

QUESTION: Mr. Starr, I guess the same anomaly occurs when -- when the dispute goes to whether the primary conduct is covered. Isn't there the same anomaly --

MR. STARR: It's the -- it's --

QUESTION: -- if the court decides it? And if the court decides it, the arbitration can't go forward even though the plaintiff may have a cause of action

before that court --

MR. STARR: It's the --

QUESTION: -- for the conduct that -- that is not arbitrable.

MR. STARR: It is the same principle in terms of to what did the parties agree. And I think Justice Ginsburg is resisting -- I'm inferring -- resisting the idea that something that is in the code could somehow be in the contract. We would respectfully disagree and say that will, indeed, create havoc in the securities --

QUESTION: What I was saying is that there's a difference between a code of procedure that says we agree to arbitrate and then this is the rules governing the arbitration forum when you're in arbitration. The parties have agreed to a code of procedure for arbitration. That's how I'm reading this.

MR. STARR: But, Justice Ginsburg, I would guide you back to 10304 and its language and the term eligible. I think, with all due respect, that that interpretation does grave violence to the term eligible for submission. Eligible cannot mean that you go to the university and then they said, whoops, you're now out. It cannot -- and there needs to be a gatekeeper here --

QUESTION: But it could be if you say that all this is is a code of procedure, like the Federal rules.

MR. STARR: Your Honor --

QUESTION: And if that's what you -- if you say we opt for arbitration and we opt for it to proceed under this set of procedural rules.

MR. STARR: May I briefly respond?

QUESTION: Very briefly.

MR. STARR: Justice Ginsburg, our submission is rigorously enforce the contract. This is part of the contract. That is what Dean Witter v. Byrd says.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Starr.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)