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SUPREME COURT FINDS CIRCUIT SPLIT "WHOLLY GROUNDLESS"

In Justice Kavanaugh's first written opinion since he joined the Supreme Court, he addressed one of the most common disputes associated with arbitration agreements: who decides what issues should be arbitrated? In *Henry Schein, et al. v Archer & White and Sales, Inc.*,[1] the Supreme Court held that it is the arbitrator, not the court, who must make that decision.

Arbitration agreements outline specific claims between the parties that must be heard by an arbitrator. These agreements are dropped into contracts and typically require parties to agree to the rules of a particular arbitration association, such as the American Arbitration Association. Often, to avoid some of the procedural restraints associated with arbitration, parties have argued that certain claims do not apply and should be presented to a court rather than the agreed upon arbitrator. Even though association rules regularly provide that arbitrators have the power to resolve these "arbitrability" questions, some federal courts have determined the issue themselves.

The Fourth, Fifth and Sixth Circuits have regularly determined arbitrability when a party argues that the applicability of a specific arbitration agreement to a particular dispute is "wholly groundless." The Tenth and Eleventh Circuits, on the other hand, have ruled that the determination should be made by the arbitrator if so designated by the contract or referenced arbitration association rules. The Supreme Court resolved the Circuit Court split in favor of the Tenth and Eleventh Circuits, holding that a contract's language alone should determine if a court, or an arbitrator, can make the determination of an agreement's applicability to certain claims.

In its decision, the Court dispelled the defendants' first two arguments in favor of judicial determination. First, the Court disagreed with the defendants' argument that the Federal Arbitration Act ("FAA") requires courts always make the determination. The Court held that the FAA may allow judicial determination, but "if a valid agreement exists, and if the agreement delegates the arbitrability issues to an arbitrator, a court may not decide the arbitrability issue."[2] Second, the Court disagreed with the argument that if a court may provide judicial review of arbitrability, it should provide the initial determination. Like the Court's previous decision regarding frivolous merits arguments[3] — if the matter has been delegated to the arbitrator, that is where it belongs.

The Court concluded its decision by disagreeing with the defendants' arguments that judicial determination of arbitrability would save time and money for parties and that it would deter frivolous motions to compel arbitration. The Court refused to read these types of policy exceptions into the statutory text of the FAA.

PRACTICAL TAKEAWAY

Arbitration agreements are an effective way to dictate the procedure and rules that will apply to potential issues in an agreement. The Supreme Court added weight to that notion by finding that a well-written contract can also prevent courts from even determining which claims can successfully be heard by an arbitrator. Health care systems and providers should ensure any agreement with an arbitration agreement includes, either specifically or by reference, the authority to determine arbitrability.

If you have any questions or would like more information on this topic, please contact:

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[1] No. 17-1272, 2019 WL 122164 (U.S. Jan. 8, 2019)

[2] Id. at *4.

[3] *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986).