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October 7, 2021

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WLF Urges Ninth Circuit To Give Parties Their Bargained-For Agreement

(Caremark v. Chickasaw Nation)

“The FAA covers all disputes, even those where Congress has given parties the right to sue in federal court.”

—John Masslon, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today filed an *amicus curiae* brief urging the U.S. Court of Appeals for the Ninth Circuit to hold that the parties to a contractual dispute should adhere to their bargained-for agreement. Under that agreement, the parties must litigate the enforceability of their arbitration agreement before an arbitrator, not in federal court.

The appeal arises from a suit against Caremark, a pharmacy-benefits manager. The plaintiffs—a group of pharmacies—allege Caremark failed to properly reimburse them for drugs they distributed. The parties’ contract had an arbitration provision and a delegation clause. That delegation clause provided that any disputes about the scope or enforceability of the arbitration provision must be decided by an arbitrator. The pharmacies, however, disregarded the contract and sued in federal court. Caremark then filed a separate suit seeking to compel arbitration.

As WLF’s brief shows, the Supreme Court has held that a delegation clause is severable from an arbitration provision. A Ninth Circuit decision from last month recognized this fact and held that when a party challenges the entire arbitration provision in a contract with a delegation clause, the arbitrator must decide whether the arbitration provision is valid. A contrary ruling would make delegation clauses virtually unenforceable.

The pharmacies argue that anytime a federal statute gives parties the right to file a federal lawsuit, that statute displaces the FAA. But as WLF’s brief explains, the Supreme Court has rejected that argument many times. Such a rule would essentially be the death knell for the FAA because dozens, if not more, of statutes allow parties to sue in federal court. Normal tools of statutory interpretation also show why such general laws do not displace the FAA. As the parties bargained for an arbitrator to decide the arbitration clause’s validity, the Ninth Circuit should affirm and order the parties to proceed with arbitration.

Celebrating its 44th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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