

Circuit Split Deepens Over Scope Of FAA Pre-Hearing Subpoena Authority

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FAA Pre-Hearing Subpoena Authority***

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[Editor's Note: Louis J. Aurichio is a partner at Butler Rubin Saltarelli & Boyd, in Chicago, Illinois, where he concentrates his practice on arbitration and litigation of reinsurance disputes. Mr. Aurichio would like to acknowledge the assistance of his colleague, Kristen Brown, an associate in the firm's Reinsurance practice group, for her research and editing. Copyright 2004 by the author. Replies are welcome.]

Participants in reinsurance arbitrations are often faced with circumstances in which information relevant to contested issues in the arbitration is in the possession of companies or individuals who are not a party to the arbitration. The question that arises is whether the Federal Arbitration Act ("FAA") authorizes arbitrators to issue subpoenas to non-parties for pre-hearing discovery. The short but unsatisfying answer to this question is that it depends on which federal court you ask. The Eighth Circuit held in 2000 that the FAA empowers arbitration panels to subpoena documents from non-parties for discovery purposes before the arbitration hearing. A year earlier, the Fourth Circuit reached a different conclusion, finding that the FAA does not authorize arbitrators to subpoena non-parties for pre-hearing discovery of any kind absent a showing of "special need or hardship." In the only other U.S. Court of Appeals decision squarely on point, the Third Circuit recently concluded that the FAA does not empower arbitrators to compel a non-party to produce documents pursuant to a pre-hearing subpoena when the production is not contemporaneous with a physical appearance before the panel. The court noted, however, that arbitrators have the power, in advance of the ultimate hearing, to require a non-party witness to appear with subpoenaed records before a single arbitrator, who can then adjourn the proceedings.

These three U.S. Court of Appeals decisions, and the rationale employed by the Eighth, Fourth and Third Circuits in reaching their varying conclusions, are discussed below. While this article is not intended as a survey of all decisions on point in other jurisdictions, a few additional cases are noted to provide a flavor for the results and analytical approach of other courts that have addressed the scope of arbitrators' authority under the FAA to obtain pre-hearing discovery from non-parties.

The Eighth Circuit: In Re Security Life Ins. Co. Of America

In *In re Security Life Ins. Co. of America*, a Minnesota insurance company, Security Life ("Security"), entered into a reinsurance treaty with a group of reinsurers, among them Transamerica. Under the treaty, which was managed by Duncanson & Holt ("D&H"), the reinsurers agreed to assume liability for Security's bad faith or negligent handling of claims provided Security counseled with and obtained the concurrence of D&H concerning actions giving rise to extracontractual liabilities. The reinsurers refused to pay a loss ceded to the treaty because, according to D&H and the reinsurers, Security failed to honor the "counsel and concur" provision in the treaty. *In re Security Life Ins. Co. of America*, 228 F.3d 865, 867 (8th Cir. 2000).

Security demanded arbitration against D&H, but did not designate Transamerica or any of the other reinsurers as parties to the arbitration. *Id.* at 868. At Security's request, however, the arbitration panel issued a subpoena to Transamerica at its Los Angeles offices requiring the production of documents and the testimony of a Transamerica employee. (There is no indication in the *Security Life* court's opinion that the document production or deposition was to occur in connection with a physical appearance before the Panel). Transamerica refused to comply, contending that it was not a party to the arbitration and that the arbitration panel therefore had no authority under the FAA to issue the subpoena. Upon Security's petition to compel Transamerica's compliance, the district court directed Security's counsel to issue a subpoena to Transamerica (pursuant to F.R.C.P. 45(a)(3)(B)) on behalf of the district court in which the deposition or production was compelled by the subpoena. Transamerica appealed. *Id.* at 868-69.

Finding that Transamerica's challenge to the district court's order compelling attendance of its employee at a pre-hearing deposition was mooted, the Eighth Circuit's decision deals exclusively with that portion of the subpoena requiring the production of documents.¹ Like all courts that have grappled with the scope of arbitrators' pre-hearing subpoena authority under the FAA, the *Security Life* court's analysis centers on the following language in § 7 of the Act, which grants arbitrators authority to:

summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material evidence in the case.

The court stated that the efficient resolution of disputes through arbitration is furthered by permitting a party to review relevant documentary evidence before the arbitration hearing. Having established efficient dispute resolution as its guiding principle, the court held that "implicit in an arbitration panel's power to subpoena relevant documents for production at hearing is the power to order the production of documents for review by a party prior to the hearing." The court found that "the panel's exercise of this implicit power was proper" regardless of whether Transamerica was found to be a party to the arbitration — a disputed issue on appeal. *Id.* at 870-71.²

The Fourth Circuit: Comsat Corp. v. National Science Foundation

In contrast to the Eighth Circuit, the Fourth Circuit found no "implicit power" in the FAA pursuant to which an arbitrator can subpoena a non-party for purposes of pre-hearing discovery. In *Comsat Corp. v. National Science Foundation*, 190 F.3d 269, 271-72 (4th Cir. 1999), an arbitrator issued subpoenas demanding that the National Science Foundation ("NSF"), which was not a party to the arbitration agreement, produce documents and employee testimony regarding a contract dispute between Comsat Corporation and an NSF awardee. The subpoenas were issued returnable to Comsat's counsel. The NSF refused to comply, the district court granted a petition to compel NSF's compliance, and NSF appealed. *Id.* at 273-74.

Focusing on precisely the same provision in § 7 as did the *Security Life* court, the *Comsat* court stated that "[n]owhere does the FAA grant an arbitrator the authority" to order non-parties to appear at depositions or to produce documents to arbitrating parties during pre-hearing discovery. Adhering to the express language of the FAA, the court observed:

[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them;" that is, to compel testimony by non-parties at the arbitration hearing.

Id. at 275.

The *Comsat* court stated that the “rationale for constraining an arbitrator’s subpoena power is clear.” Parties to arbitration agreements agree to relinquish certain procedural rights afforded in the litigation context “in return for a more efficient and cost-effective resolution of their disputes.” A defining feature of arbitration and a predicate to its efficient operation is “a limited discovery process.” Accordingly, the court reasoned, disputants who have elected to arbitrate should not expect to obtain full-blown discovery from each other “or from third parties.” *Id.* at 276.

The court’s analysis did not end there, however; the court carved out an exception to its holding. Specifically, the court noted that a party might, “under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship.” The court did not attempt to define “special need,” except to say that a party must, at a minimum, demonstrate that “the information it seeks is otherwise unavailable.” *Id.*

The Third Circuit: Hay Group, Inc. v. E.B.S. Acquisition Corp.

A recent decision by the Third Circuit lays out an interpretation of § 7 that, intentionally or not, charts a course somewhere between the holdings in *Security Life* and *Comsat*. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, the Third Circuit rejected the *Security Life* court’s “power-by-implication” analysis, finding no basis in the language of § 7 for implying the power to require non-parties to produce documents when the production is not connected to a physical appearance before the panel. 360 F.3d 404, 408-09 (3d Cir. 2004). The court also rejected *Comsat*’s “special need” exception, finding no textual basis in § 7 for permitting an arbitration panel, even under unusual circumstances, to require a non-party to produce documents in advance of the ultimate arbitration hearing unassociated with an actual appearance before an arbitrator. *Id.* at 409-10. But the *Hay Group* court stated that § 7 conferred upon arbitrators the authority to convene, before the hearing on the merits, for purposes of having the subpoenaed non-party appear and the requested documents turned over. *Id.* at 410-11.

Hay Group involved a dispute between a management consulting firm, Hay Group, Inc. (“Hay”) and its former employee (Hoffrichter) who left Hay to join PriceWaterhouseCoopers in 1999. In 2002, PriceWaterhouseCoopers sold to E.B.S. the division employing Hoffrichter. Hay commenced arbitration against Hoffrichter, alleging that he breached a non-solicitation clause in a separation agreement between Hay and Hoffrichter; that agreement provided that any dispute arising under it be resolved by arbitration. *Id.* at 405-06.

During discovery in the arbitration, Hay served subpoenas for documents on E.B.S. at its Pittsburgh office and on PriceWaterhouseCoopers at its Philadelphia office. It appears from the *Hay Group* court’s opinion that the subpoenaed records were to be produced in Pennsylvania; it is clear that the subpoenas called for production prior to the arbitration hearing. PriceWaterhouseCoopers and E.B.S. raised their objections to the subpoenas with the arbitration panel to no avail. When PriceWaterhouseCoopers and E.B.S. still refused to comply, Hay petitioned the U.S. District Court for the Eastern District of Pennsylvania to enforce the subpoenas. The district court granted Hay’s petition, accepting the Eighth Circuit’s view that the FAA authorizes arbitration panels to issue subpoenas to non-parties for pre-hearing document discovery. PriceWaterhouseCoopers and E.B.S. appealed. *Id.*

The Third Circuit began its analysis by noting that an arbitrator’s authority over parties that are not contractually bound by the arbitration agreement derives solely from the FAA. Construing § 7, the court stated:

[t]he power to require a non-party “to bring” items “with him” clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier.

The court thus held that § 7 restricts an arbitrator's subpoena authority to situations where "the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." *Id.* at 407.

The *Hay Group* court acknowledged that its holding had an "ambiguous efficiency effect" on the arbitration process. *Id.* at 411. At one point in its opinion, the court observed that "a reasonable argument can be made" that its literal reading of § 7 furthers arbitration's goal of resolving disputes in a timely and cost-efficient manner. A physical appearance requirement "may . . . discourage the issuance of large-scale subpoenas upon non-parties" because the proponent of the discovery will be forced to decide "whether the documents are important enough to justify the time, money, and effort [it] will be required to expend if an actual appearance before an arbitrator is needed." *Id.* at 409. At another point, the court tacitly acknowledged that a physical appearance requirement may increase the time and expense of arbitration when it stated that, in the case before it, "convening and adjourning an arbitration panel will hardly prove an insurmountable obstacle . . ." *Id.* at 411.

This somewhat defensive discussion of the practical effect of its holding ends with the court's observation that, whatever the effect, "efficiency considerations clearly cannot override the terms of Section 7." *Id.* Accordingly, the court concluded that if Hay wanted access to the requested documents for purposes of pre-hearing discovery, "the panel must subpoena PriceWaterhouseCoopers and E.B.S. to appear before it and bring the documents with them." *Id.*

A concurring opinion lends some clarity to the *Hay Group* court's ruling. In more direct terms than the majority opinion, the concurring judge noted that the court's opinion does not leave arbitrators powerless to require the production of documents by non-parties before the ultimate hearing on the merits. "Under section 7 . . . arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings."

Like the statement in the majority opinion about the "ambiguous efficiency effect" of the court's ruling, the concurring judge's comments reveal a certain lack of assurance about the practical effect of the ruling on the arbitration process. The concurring judge notes that, as a practical matter, the inconvenience of making a personal appearance may well prompt a non-party witness to "deliver the documents and waive presence." The judge also observes that the inconvenience of the physical appearance requirement for arbitrators may curb unnecessary discovery by "induc[ing] the arbitrators and parties to weigh whether advance production is really needed." *Id.* at 413-14. These two observations are somewhat difficult to reconcile, for if the inconvenience of making a personal appearance prompts non-parties to deliver requested documents and waive presence, the physical appearance requirement may do little to curb the incidence of broad discovery requests on non-parties.³

Other Federal Court Decisions

No other U.S. Court of Appeals has decided whether the FAA grants arbitrators the authority to provide pre-hearing discovery. But the Sixth Circuit's opinion in *AFTRA v. WJRK-TV*, 164 F.3d 1004 (6th Cir. 1999), which was issued before the decisions in *Security Life*, *Comsat*, and *Hay Group*, offers some insight into how that court might rule if faced with the question. In *AFTRA*, an arbitrator conducting an arbitration under a collective bargaining agreement issued a subpoena directing a non-party to produce documents at the offices of the plaintiff's counsel a week before the hearing. *Id.* at 1006. The Sixth Circuit was asked to decide whether § 301 of the Labor Management Relations Act ("LMRA") authorized the labor arbitrator to subpoena the requested records. *Id.* at 1008-09.

To answer this question, the Sixth Circuit looked for guidance in the FAA's provisions and in court decisions concerning a district court's power to enforce subpoenas under the FAA. Drawing support from the language of § 7 of the FAA, the court concluded that, just as an arbitrator's

subpoena power under the FAA extends to non-parties, a labor arbitrator should also have the power pursuant to § 301 of the LMRA to subpoena non-parties. Additionally, the court held that under § 301, an arbitrator has the power to issue a subpoena compelling a non-party "to produce records he deems material to the case either *before* or at an arbitration hearing." *Id.* at 1009 (emphasis supplied).

In support of its holding, the AFTRA court cited two district court cases for the proposition that, under the FAA, an arbitrator's authority to compel non-parties to produce documents "implicitly include[s] the authority to compel the production of documents for inspection by a party prior to the hearing." *Id.* The district court cases cited by the AFTRA court are *Meadows Indemnity Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994) and *Stanton v. Paine Webber*, 685 F. Supp. 1241 (S.D. Fla. 1988). The subpoenas at issue in *Meadows* and *Stanton* called for the production of documents (but not testimony) in advance of the arbitration hearing. *Meadows*, 157 F.R.D. at 44; *Stanton*, 685 F. Supp. at 1242. Both *Meadows* and *Stanton* involved the production of records by non-parties unrelated to a physical appearance before an arbitration panel. *Meadows*, 157 F.R.D. at 44 (subpoena called for production of documents at non-parties' Tennessee office or at another location as agreed by parties); *Stanton*, 685 F. Supp. at 1242 (the subpoenas in dispute "require pre-hearing production of documents to the defendants"). Not surprisingly, the Eighth Circuit, in *Security Life*, cited approvingly to *Meadows* while the Fourth Circuit, in *Hay Group*, explicitly rejected its "power-by-implication" analysis.

Meadows and *Stanton* also figure largely in the decision by the United States District Court for the Southern District of New York in *In re Arbitration Between Douglas Brazell v. American Color Graphics, Inc.* There, the underlying arbitration between American Color Graphics ("ACG") and its former employee, Brazell, included a counterclaim in which ACG alleged that Brazell violated the noncompete provisions of his employment agreement. In connection with its counterclaim, ACG requested and obtained a subpoena issued by the presiding arbitrator, which required the production of documents by LTC, a competitor of ACG that was not a party to the arbitration. The subpoena demanded the non-party, LTC, to produce certain documents in advance of the hearing and unconnected to any physical appearance before the arbitrator. LTC refused to comply and ACG sought an order compelling production of the requested documents. *Brazell*, 2000 WL 364997, at *1, (S.D.N.Y. April 7, 2000).

In concluding that case law "support[s] the arbitrator's authority to provide for pre-hearing production of documents from third parties," the court drew heavily on the holdings and rationale of *Stanton* and *Meadows*. *Brazell*, 2000 WL 364997, at *2-3. The court, invoking its authority under § 7 of the FAA, ordered non-party LTC to produce the requested documents promptly for inspection "at a time and location agreed upon by the parties. . . ." *Id.* at *3.

The court in *Brazell* took pains to distinguish its ruling from *Integrity Ins. Co. v. American Centennial Ins. Co.* — an earlier Southern District of New York decision in which the court held that § 7 of the FAA does not empower arbitrators to compel attendance of a non-party at a pre-hearing deposition. As noted by the *Brazell* court, the judge in *Integrity* distinguished *Stanton* and *Meadows* on the ground that those cases dealt with pre-hearing production of documents, while the petition to quash the subpoenas in *Integrity* focused solely on pre-hearing depositions. *Id.* (citing *Integrity*, 885 F. Supp. 69, 72-73 (S.D.N.Y. 1995)). In explaining the significance of this distinction, the court in *Integrity* found that pre-hearing depositions were more burdensome for non-parties than pre-hearing production of documents:

Documents are only produced once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice — once for deposition and again at the hearing.

Integrity, 885 F. Supp. at 73. In two fairly recent decisions concerning the scope of subpoena power under § 7, district courts sitting in Louisiana and Minnesota have followed the *Integrity* court's rationale to compel non-parties' compliance with arbitration panels' document subpoenas, but not that portion of the subpoenas purporting to require pre-hearing depositions of non-party witnesses. In the matter of *Meridian Bulk Carriers, Ltd.*, 2003 WL 23181011, at *1-2 (E.D. La. July 17, 2003);⁴ *Schlumbergersema, Inc. v. XCEL Energy, Inc.*, 2004 WL 67647, at *2 (D. Minn. Jan. 9, 2004).

Before concluding, it is worth noting that, in the vast majority of reported decisions, courts agree that it is not the role of the district court in which the petition to compel is filed to make an independent assessment of the materiality of the information sought by the disputed subpoena. Citing arbitrators' greater familiarity with the details of the underlying disputes, courts typically decline to second-guess arbitrators' judgment about the relevance of subpoenaed information.⁵ Of course, to the extent *Comsat's* "special need" exception is followed, the courts' current hands-off approach may change, since the relevance of the particular information sought would undoubtedly be an integral component of any attempt to demonstrate a "special need" for information in the possession or control of a non-party.

Conclusion

To date, the federal appellate courts appear reluctant to rule out categorically the power of arbitrators under the FAA to compel pre-hearing discovery from non-parties. *Security Life* expressly allows arbitrators to subpoena documents from non-parties for discovery purposes before the arbitration hearing. *Comsat* establishes a general rule against pre-hearing deposition or document discovery from non-parties, but still permits such discovery upon a showing of "special need or hardship." And *Hay Group* allows pre-hearing document discovery from non-parties, but only when arbitrators are prepared to convene a pre-hearing proceeding requiring a physical appearance before the panel by the non-party and the proponent of the discovery. Undoubtedly, the case law addressing this question will continue to evolve as the courts strive to strike a balance between the goal of efficient dispute resolution through arbitration and the time and expense attendant to non-party discovery.

ENDNOTES

1. During the pendency of Transamerica's Eighth Circuit appeal, Security obtained a subpoena from the district court in California, which was served on Transamerica in Los Angeles. When Transamerica failed to appear, the California district court granted Security's motion for a contempt order. Transamerica subsequently complied with the subpoena by producing a deponent and documents, but appealed to the Ninth Circuit. The Eighth Circuit held that Transamerica's compliance mooted Transamerica's appeal relating to the subpoenaed deposition but not that portion of the appeal regarding the subpoenaed records. According to the court, Transamerica had a sufficient interest in maintaining the secrecy of the documents such that the appeal might "lead to meaningful relief in the form of the return of those documents." *Id.* at 869-70 and fn.2.
2. The Eighth Circuit also rejected Transamerica's argument that an arbitration panel's authority to subpoena documents is limited by F.R.C.P. 45(b)(2)'s territorial limit. The court concluded that there is no territorial limit on a panel's authority to order the production of documents because, unlike a subpoena for testimony of a witness, "the burden of producing documents need not increase appreciably with an increase in the distance those documents must travel." The court did not rule on what it viewed as the "thorny question" whether Rule 45(b)(2)'s territorial limits present "a serious problem in the enforcement of witness subpoenas under the FAA." *Id.* at 871-72.

3. The Third Circuit also addressed PriceWaterhouseCoopers' argument that, under F.R.C.P. 45(a)(2), the subpoenas were improper because they sought the production of documents that were located beyond the territorial jurisdiction of the district court. Rule 45(b)(2) states that a subpoena calling only for "production or inspection" of documents "shall issue from the court for the district in which the production or inspection is to be made." The court held that, because "production" refers to the delivery of documents, not their retrieval, "the district in which the production . . . is to be made" is not the district in which the documents are stored, but the district in which the subpoenaed party is required to turn them over. *Id.* at 412-13. As the documents at issue were to be produced in Pennsylvania, the Court rejected PriceWaterhouseCoopers' argument.
4. In its discussion of the scope of arbitrators' authority under § 7, the court in *Meridian Bulk Carriers* cites to *Nat'l Broadcasting Company v. Bear Stearns and Co., Inc.*, 165 F.3d 184 (2d Cir. 1999) as an example of a court that has held that an "arbitration panel does not have the power to engage in discovery as to non-parties to the arbitration." *Meridian Bulk Carriers*, 2003 WL 23181011, at 1. This statement is not an accurate characterization of the Second Circuit's opinion in *Nat'l Broadcasting Company*. There, the question presented was whether a commercial arbitration conducted in Mexico under the auspices of the International Chamber of Commerce, a private organization headquartered in France, is a "proceeding in a foreign or international tribunal" as those words are used in 28 U.S.C. § 1782. *Nat'l Broadcasting Company*, 165 F.3d at 185. The Second Circuit did not decide the scope of arbitrators' subpoena authority over non-parties for pre-hearing discovery under § 7 of the FAA. Rather, in the course of its opinion, the Second Circuit noted — but did not rule on — what it characterized as "open questions . . . as to whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties." *Id.* at 187-88.
5. See, e.g., *Security Life*, 228 F.3d at 871 (concluding that the determination as to the relevancy of the subpoenaed records to the underlying dispute should be made by the arbitrator not the court); *AFTRA*, 164 F.3d at 1010 (same); *Schlumbergersema*, 2004 WL 67647, at *3 (same); *Brazell*, 2000 WL 364997, at *3 (same); *Meadows*, 157 F.R.D. at 44 (same). ■