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Compelling Circumstances: The Need to Clarify the Availability of Arbitral Subpoenas

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In recent years, arbitration clauses—particularly in employment and consumer contracts—have been a frequent topic before the U.S. Supreme Court. Throughout this period, the Court has consistently upheld the enforceability of arbitration clauses against a variety of challenges. The resulting decisions have often been controversial, with dissenters and critics citing employees' and consumers' lack of bargaining power, the prohibitive cost of individual claims, and a perceived pro-business bias among arbitrators.

Of course, arbitration isn't unique to consumers and employment contracts. Parties often include arbitration provisions in their contracts, believing that arbitration will be a more efficient way to resolve disputes. Whatever one may think about the merits of the Supreme Court's decisions, or the wisdom of arbitration generally, a growing number of litigants of all types and sizes must submit their disputes to arbitration.

As the frequency of arbitration increases, an issue percolating through the federal courts could dramatically limit a litigant's ability to obtain discovery from third parties. The issue is currently the subject of a circuit split and, absent congressional action, could be the next arbitration-related question before the Supreme Court.

The issue concerns the use of subpoenas to obtain discovery prior to a final evidentiary hearing. Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, generally permits arbitrators to compel third parties to produce documents or testimony. It states in relevant part:

> The arbitrators . . . may summon in writing any person to attend . . . 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 as evidence in the case. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, . . . the United States district court for the district in which such arbitrators . . . are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt . . . .

While it is undisputed that Section 7 permits arbitral subpoenas, there is a circuit split on when and where compliance with a subpoena must occur. The debate stems from the phrase "attend before them . . . as a witness." Section 7 empowers arbitrators to compel attendance at an arbitration hearing. But does Section 7 also permit an arbitrator to require a third party to produce documents or appear at a deposition *before* the hearing?

The answer to that question depends on the location of the arbitrators and subpoenaed party. In Minnesota, the answer is generally "yes," provided the target is within Minnesota or 100 miles of the planned hearing location. The Eighth Circuit has held that Section 7 permits arbitrators to issue pre-hearing subpoenas, and the U.S. District Court for the District of Minnesota has enforced pre-hearing discovery subpoenas. The Sixth Circuit likewise permits discovery subpoenas. These courts reason that the power to compel production prior to a hearing is "implicit" in Section 7.

But the Second, Third, and, most recently, Ninth Circuits have taken the opposite position, holding that Section 7 prohibits pre-hearing subpoenas. At a minimum, arbitrators sitting in those circuits must conduct a special session prior to the final evidentiary hearing for the express purpose of summoning documents or testimony. Other circuits have yet to address the matter.

To further complicate matters, there may be geographic limitations to arbitrators' subpoena authority. In general, a federal court's authority to enforce an arbitration subpoena is coextensive with its authority to enforce its own subpoenas. In the past, that meant subpoenas—whether issued in discovery or for attendance at a hearing—were effective only against persons located within the same judicial district or 100 miles of the hearing location. But Rule 45 was amended in 2013 to include a new subdivision, Rule 45(f). Under that subdivision, a federal district court can, in certain circumstances, require a party outside the traditional geographic limits to comply with a subpoena. It is unclear how, if at all, Rule 45(f) affects an arbitrator's subpoena authority.

These conflicting decisions and open questions can lead to confusion among arbitrators and arbitration litigants. More important, the restrictions can place limits on a litigant's access to discovery that would not exist were the dispute heard in a federal or state court. Given the increased use and importance of arbitration, the frequency with which companies include arbitration provisions in non-negotiable contracts, and the need to understand the consequences of including an arbitration provision in a contract, it is time that Congress or Supreme Court clarify the timing and geographic limitations of arbitral subpoenas.

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