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# Limitations on Arbitral Power to Issue Discovery Subpoenas to Non-Parties Under the FAA

**Robert S. Amador**, Amador Law Corporation

Every health care lawyer and professional knows that mandatory binding arbitration is ubiquitous in health care and that arbitration awards are routinely enforced in federal and state courts. Arbitrations are generally faster and less expensive than litigation in court and usually result in more moderate damage awards. Many practitioners specifically reference the Federal Arbitration Act (FAA) in their contractual arbitration clauses because it contains a strong presumption in favor of enforcing arbitral awards and sets forth the broad reach of federal jurisdiction and preemption.[1]

Discovery in arbitration where the FAA[2] applies, however, could actually be problematic. Lurking within the FAA is a potential limitation absent in court litigation and in most state arbitration statutes. Namely, a majority of federal courts *will not enforce an arbitrator's discovery subpoena to non-parties* under the FAA, even if the rules of the operative arbitration organization give the arbitrator the power to do so, and even if the arbitration agreement provides for broad discovery. Depending on the case and the federal circuit, that limitation could drastically affect the outcome of the arbitration. This

issue applies only to pre-hearing or "discovery" subpoenas, not to subpoenas issued to attend and produce for the arbitration trial. Most federal courts will enforce a subpoena issued by an arbitrator to appear and produce documents *at the arbitration hearing*.[3]

## Split of Circuit Authority

Section 7 of the FAA authorizes arbitrators to subpoena non-parties to *appear* before them to produce documents and evidence. The Second, Third, Ninth, and Eleventh Circuits have interpreted this language to restrict the arbitrator's power to hearings in the *physical presence of the arbitrator* at the evidentiary hearing.[4] The Fourth Circuit has held that an arbitrator can subpoena a non-party for prehearing discovery only "under unusual circumstances" upon a showing of special need or hardship.[5] The rationale for the majority rule is that non-parties have not consented to the arbitrator's authority and have not voluntarily given up the full judicial review of arbitrator's discovery orders to which they are otherwise entitled, and allowing prehearing discovery could result in the parties engaging in fishing expeditions that undermine the advantages of shorter and cheaper arbitrations.[6]

The minority rule from the Sixth and Eighth Circuits is that "implicit" in the arbitrator's power under the FAA to subpoena relevant documents for production at the hearing is the power to order production for review by a party prior to the hearing, but these decisions are much less recent than the majority rule cases.[7]

## Implications for Health Care Cases

There are many examples of potential health care cases that could be impeded by the lack of court enforcement of discovery subpoenas issued by arbitrators against non-parties, including tortious interference with contractual relations (competitor solicits a group of physicians and induces them to breach their existing service contract); breach of confidentiality (an employee physician or other health care professional subject to an employment agreement breaches the confidentiality provisions and provides confidential information, such as productivity, membership, and compensation information, to the new employer medical group or business); breach of covenant of good faith and fair dealing (insurer colludes with third-party administrator against contracted provider to limit payment for services rendered by the provider); antitrust[8]; and multi-district litigation settlements.[9] In all these cases the claimant will want to subpoena the third party for documents and depositions in advance of the arbitration hearing, including business records, deposition of third-party key employees, and possibly a forensic examination of the third party's computers. The respondent and third party will object and will move for a protective order and to quash the subpoenas, and the claimant will move to compel. Ultimately, the courts will be asked to enforce the subpoenas. If the case is in the Second, Third, Fourth, Ninth, and Eleventh Circuits it is highly likely the subpoena *will not be enforced* because the courts lack the power to do so under the FAA. In the other Circuits the result is uncertain, but if they follow the majority rule, the subpoena also will not be enforced in those jurisdictions.

## Practice tips

1. Think twice before incorporating the FAA into an arbitration clause if the applicable state arbitration law is sufficient. If the arbitration clause does not state the FAA applies, then the party seeking to invoke the FAA to limit non-party discovery must prove it applies by virtue of an impact on interstate commerce.
2. Specify full discovery rights in the arbitration clause, including the arbitrator's powers to issue subpoenas, which will at a minimum be binding on the parties and help in responding to a party's objections to the non-party discovery subpoenas.
3. Schedule an early "discovery hearing" with the arbitrator involving third parties to test the issue and to see if the courts will deem that hearing sufficient under Section 7 of the FAA if the subpoenas are challenged.
4. Plan the arbitration hearing to allow sufficient time to issue and test the viability of subpoenas to non-parties to bring documents and testify at the evidentiary hearing, as these will likely be enforced. Even though you may be receiving the documents for the first time and may not have had the benefit of pre-hearing discovery, the documents and witnesses could still prove helpful at the hearing and could apply settlement pressure. Courts enforcing subpoenas against non-parties may compel attendance of witnesses even outside of the jurisdiction where the arbitrator sits under Fed. R. Civ. P. 45.
5. If the non-party documents and witnesses are essential and the non-party will not cooperate, consider suing the non-party in court. The non-party may then agree to cooperate in the arbitration and/or the necessary documents and witnesses may be obtained through discovery in the litigation for use collaterally in the arbitration.

## About the Author

**Robert S. Amador, Esq.** is an experienced health care arbitrator and mediator on the AHLA panel of neutrals available nationally.

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[1] *See, e.g., CHG Hosp. Hous. LLC v. Blue Cross Blue Shield*, No. H-20-0718 (S.D. Tex. Aug. 20, 2020) (enforcing arbitration clause in unpaid claims case over objections that FAA impairs state insurance law); *Kaki v. Tenet Healthcare Corp.,* No. 20-10004 (E.D. Mich., Feb. 1, 2021) (enforcing arbitration clause under FAA in whistleblower retaliation case).

[2] 9 U.S.C. § 1 et seq.

[3] *See Washington Nat'l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126 (2d Cir. 2020) (affirming district court's order enforcing subpoenas against non-party witnesses over

objections that court lacked subject matter jurisdiction and holding that arbitrators had power to rule on the motion to quash). The Second Circuit affirmed diversity jurisdiction based not on the diversity of the parties, but on the citizenship of the non-party witness served with the subpoena. It also found that that the $75,000 amount in controversy requirement was satisfied based on the amount of the demand even though the subpoenaed documents pertained to "only a small fraction" of the award sought. *Id.* at 134-35.

[4] *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004); *CVS Health Corp. v. Vividus LLC*, 878 F.3d 703, 704-705 (9th Cir. 2017); and *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019).

[5] *COMSAT Corp. v. National Science Found.*,190 F.3d 269, 275-276 (4th Cir. 1999).

[6] A California court recently held in a 50-page decision on an issue of first impression that an arbitrator's power to issue discovery subpoenas to non-parties is not allowed even under the California Arbitration Act where the parties did not provide for full discovery rights in their arbitration agreement. *Aixtron, Inc. v. Veeco Instruments, Inc.,* 2020 WWL 4013981 (Cal. Ct. App. July 16, 2020).

[7] *See In re Security Life Ins. Co. of Am.*, 228 F.3d 865, 870-871 (8th Cir. 2000); *American Fed'n of Tel. & Radio Artists v. WJBK-TV,* 164 F.3d 1004,1009 (6th Cir. 1999).

[8] *CVS Health Corp.*, 878 F.3d 703.

[9] *Managed Care Advisory Grp.,* 939 F.3d 1145.