

## A Non-Party to An Arbitration Can Be Compelled to Give Testimony and Produce Documents

---

July 15, 2020

Can a court compel you to give testimony and produce documents in an arbitration where you are not even a party? In the United States, the answer is yes.

The United States Circuit Court for the Second Circuit recently affirmed that arbitrators have the authority to issue subpoenas to non-parties and that US federal courts have the power to enforce them. See *Washington Nat'l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126 (2d Cir. 2020). Section 7 of the Federal Arbitration Act (FAA) provides: "[A]rbitrators ... may summon in writing any person to attend before 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 as evidence in the case." 9 U.S.C. § 7. In *Washington Nat'l Ins.*, a panel of arbitrators issued subpoenas to non-party witnesses to appear and produce documents at an arbitration hearing. The non-party witnesses declined to appear or produce documents as directed by the subpoenas. The party that asked the arbitrators to issue the subpoenas petitioned a federal district court in New York to enforce the subpoenas. The non-party witnesses moved to dismiss the petition for lack of subject matter jurisdiction, and to quash the subpoenas. The district court denied the motions and ordered the witnesses to appear at the arbitration hearing with their documents.

On appeal, the Second Circuit affirmed the judgment of the district court. In doing so, the court first concluded that the district court properly exercised diversity of citizenship subject matter jurisdiction. Diversity of citizenship subject matter jurisdiction requires that the amount in controversy exceed \$75,000 and that no plaintiff share a state of citizenship with any defendant. The court held that under the FAA, a court does not consider the citizenship of the parties to the arbitration. Instead, it considers the citizenship of the non-party witness served with the subpoenas and the citizenship of the party that asked the arbitrators to issue the subpoenas. Because the claimant sought an arbitration award of \$134 million, the court also held the \$75,000 amount in controversy requirement was satisfied even if the documents pertained to "only a small fraction" of the award sought. *Washington Nat'l Ins.*, 958 F.3d at 134-35. Regarding the motion to quash, the Second Circuit concluded that "the [arbitration] panel is responsible for ... ruling on objections," and that the district court had properly declined to weigh in on them. *Id.* at 139. The court also confirmed the validity of the subpoenas, noting that "Section 7 [of the FAA] requires only that any documents to be produced 'may be deemed material as evidence in the case.'" *Id.* at 136 (quoting 9 U.S.C. § 7).

The Third, Ninth, and Eleventh Circuits have also held that a non-party must appear and produce documents at an arbitration hearing when directed to do so in an arbitrator-issued subpoena. See *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406-07 (3d Cir. 2004); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017); *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019). Applying a more lenient standard, the Sixth and Eighth Circuits have held that Section 7 of the FAA also implicitly authorizes arbitrators to subpoena documents from non-parties even prior to any arbitration hearing. See *Am. Fed. of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Comm. of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999); *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000). The Fourth Circuit enforces pre-hearing discovery subpoenas issued to non-parties when there is a "special need." See *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 271, 275-76 (4th Cir. 1999).

**Continued**

---

As reflected in the Second Circuit's recent ruling in *Washington Nat'l Ins.*, federal courts routinely enforce arbitral subpoenas issued to non-parties. If you have any questions about non-party arbitration subpoenas or the applicability of this e-alert to your business, please contact the authors or your Miller Canfield attorney.