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## Federal Court Rules Arbitrators Lack Authority Under Federal Arbitration Act to Subpoena Third-Party Deposition Testimony

With the proliferation of arbitrations as a method of resolving commercial disputes, greater numbers of companies are receiving requests for information relating to arbitrations in which they are not involved as parties, including for deposition testimony. On October 6, the United States District Court for the Northern District of Illinois joined an emerging majority of courts holding that arbitrators do not have the authority to require pre-trial discovery from third parties.

The court ruled in *Matria Healthcare, LLC v. Duthie*, 2008 WL 4500173 (October 6, 2008) that § 7 of the Federal Arbitration Act (“FAA”) does not grant an arbitrator the power to compel the attendance of a non-party witness at a deposition.

Section 7 of the FAA provides that arbitrators “may summon . . . 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 . . .” Judge Alito ruled while he was on the Third Circuit that § 7 “unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator . . . the FAA’s subpoena authority is defined as the power to compel . . . testimony by non-parties at the arbitration hearing.” *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3rd Cir. 2004) (in context of request for third-party document production).

*Matria Healthcare* follows *Hay Group* and courts in the Second, Fourth, and Eighth Circuits in strictly construing the language of § 7. The *Matria Healthcare* court held that because the FAA was enacted in 1925, prior to the more liberal Federal Rules of Civil Procedure, “Congress could not have intended . . . to have authorized arbitrators and district courts to require pre-hearing production in arbitrations . . .” 2008 WL 4500173, at \*3.

*Matria Healthcare* distinguished a leading case on the other side, which was decided by the Northern District of Illinois in 1996. In *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878, the Court ruled that “implicit in the power to compel testimony and documents for purposes of a hearing is the lesser power to compel such testimony and documents for purposes prior to the hearing.” *Matria Healthcare* distinguished *Amgen* on the grounds that: 1) the parties there had agreed to arbitrate their dispute pursuant to the Federal Rules of Civil Procedure; 2) the third party had not briefed the arbitrator’s “implicit” power to compel deposition testimony; and 3) the *Amgen* court did not have the benefit of the courts’ decisions in *Hay Group* and in a Fourth Circuit case, *COMSTAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999). 2008 WL 4500173, at \*5.

*Matria Healthcare* further confirms (especially in regards to disputes with a nexus to the Northern District of Illinois) that entities or persons wishing to resist involvement with discovery taking place in an arbitration between two or more other entities or persons are in a strong position to do so.

### ABOUT THE AUTHORS

Nick J. DiGiovanni leads LLB&L’s reinsurance group, which includes more than 45 lawyers nationally. He has more than 20 years of experience concentrating in reinsurance and insurance-related issues.

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