BURR FORMAN LLP

Eleventh Circuit's Reading of FAA Bars Pre-Hearing Discovery

Articles / Publications
10.03.2019

If an arbitration is governed solely by the FAA, an arbitrator may not require non-parties to take part in any pre-hearing discovery outside the presence of the arbitrator. In the recent Eleventh Circuit Court of Appeals decision *Managed Care Advisory Group, LLC v. Cigna Healthcare, Inc.,* -- F.3d --, 2019 WL 4464301 (11th Cir. 2019), the Court considered summonses directed to non-parties to appear by video and to produce documents. The subpoenaed parties objected to summonses and took the position that they would not comply absent being ordered to do so. After an order from the United States District Court for the Southern District of Florida compelled the subpoenaed parties to comply with the summonses, the matter was appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit, relying on the plain-meaning of § 7 of the FAA, held that the District Court had abused its discretion in enforcing the arbitral summons because the District Court lacked the power to order witnesses to appear at a video conference and lacked the power to order witnesses to provide pre-hearing discovery. Section 7 of the FAA allows an arbitrator 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 as evidence in the case." But it does not permit the arbitrator to order a non-party to participate in a video conference or to participate in pre-hearing discovery.

RELATED PROFESSIONALS

Victor L. Hayslip

Emily Schreiber Pendley

Eleventh Circuit's Reading of FAA Bars Pre-Hearing Discovery

Through this opinion, the Eleventh Circuit joins the Second, Third, Fourth, and Ninth Circuits, which have held that § 7 does not provide for pre-hearing discovery. *See e.g. Life Receivables Tr. V. Syndicate 102 at Lloyds of London*, 549 F.3d 210, 216 (2d Cir. 2008); Hay Grp., Inc. v. E.B.S. Acquisitions Corp., 360 F.3d 404, 407 (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269,275-76 (4th Cir. 1999) (providing an exception to the pre-hearing discovery bar for "unusual circumstances); CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017). The Eighth Circuit remains an outlier. While recognizing that § 7 does not "explicitly" authorize pre-hearing discovery, the Eighth Circuit has held pre-hearing to be an implicit arbitral power. See *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000).

The practical effect of the Court's decision is this: if a non-party receives an arbitral summons for pre-hearing discovery, the arbitral summons is probably not enforceable. An arbitrator, however, may require non-parties to attend an arbitration in person and to produce documents at the hearing.

Download PDF