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Maya Rashid
Penn State Law, mnr5214@psu.edu

UNCOMPELLED: CIRCUITS SPLIT OVER THE PRE-HEARING DISCOVERY POWERS OF ARBITRATORS

By
Maya Rashid*

I. INTRODUCTION

Subpoenas are an integral tool for obtaining information in both criminal and civil proceedings.[1] Despite their usefulness, parties cannot utilize subpoenas in all dispute resolution forums.[2] The circuit courts are split regarding whether an arbitrator has the power under Section 7 of the Federal Arbitration Act (hereinafter "Section 7") to issue subpoenas on third parties.[3] The majority of circuits believe that Section 7 only permits arbitrators to compel a third party to appear at an arbitral hearing and produce documents at that hearing.[4] The Eighth Circuit continues to be the only circuit that interprets Section 7 to permit arbitrators to compel documents from third parties outside of an arbitration hearing.[5] The Fourth Circuit finds itself somewhere in the middle and permits arbitrators to exercise subpoena powers over a third party when "special need or hardship" is shown by the requesting party.[6] The Sixth Circuit's position on the issue has fluctuated over time

* Maya Rashid is the Articles Editor of Arbitration Law Review and a 2024 Juris Doctor Candidate at Penn State Law.

1. *See generally* Will Kenton, *What Is a Subpoena? How It Works, How They're Used, and Types*, INVESTOPEDIA (Aug. 26, 2021), https://www.investopedia.com/terms/s/subpoena.asp (defining subpoena as "a formal written order that requires a person to appear before a court, or other legal proceedings (such as a Congressional hearing), and testify, or produce documentation.").

2. *See Subpoenas in Arbitration: Not as Easy as One Would Think*, COLE, SCOTT, AND KISSANE (July 14, 2014), https://csklegal.com/publication/subpoenas-in-arbitration-not-as-easy-as-one-would-think/ (explaining that "[d]iscovery in arbitration is typically limited in comparison to litigation in either the State or Federal court systems.").

3. *See* Imre Stephen Szalai, *Exploring the Federal Arbitration Act through the Lens of History Symposium*, 2016 J. DISP. RESOL. 115, 128 (2016) (providing a brief history of the circuit split over Section 7 of the FAA).

4. *See id.; see generally* Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008); Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004); CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017); Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145 (11th Cir. 2019).

5. *See* Sec. Life Ins. Co. of Am. v. Duncanson & Holt, 228 F.3d 865 (8th Cir. 2000) (for the purposes of this article, a "hearing" refers to the time when the parties present their case and have it adjudicated).

6. COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999) (finding a special need exception because "the much-lauded efficiency of arbitration will be degraded if the parties are unable to review and digest relevant evidence prior to the arbitration hearing.").

without landing definitively on either side of the split.[7] Unless the Eighth Circuit's position gains more traction with other circuits, the U.S. Supreme Court is unlikely to grant certiorari to resolve the circuit split.

This article argues that the Eighth Circuit's interpretation of Section 7 is flawed because the language of Section 7 unambiguously provides arbitrators with limited discovery powers. First, the article provides background information on the Federal Arbitration Act and the language of Section 7. Second, the article explains the tools of statutory interpretation that courts employ when evaluating claims that rely on specific statutory language. Third, the article outlines the reasoning and conclusions of the circuits that took a stance on the issue. Fourth, the article discusses how the Supreme Court might rule if it heard the issue. Fifth, the article argues that the Eighth Circuit's interpretation of Section 7 is inconsistent with the plain language meaning of the Federal Arbitration Act and current arbitration doctrine demands limited discovery. Finally, the article concludes that if subpoena powers under Section 7 are to be broadened, it must be through an act of Congress, and not through the judiciary.

II. BACKGROUND

A. Section 7 of the Federal Arbitration Act

The Federal Arbitration Act (hereinafter "FAA"), originally known as the U.S. Arbitration Act, is an essential guide to understanding arbitration, its procedures, and the power of arbitrators and arbitral tribunals in the United States.[8] Section 7 of the FAA outlines the scope of an arbitrator's evidence-gathering powers.[9] Section 7 provides:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may 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

7. *See generally* Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Commc'ns of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999) (holding that "a labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he deems material to the case either before or at an arbitration hearing"); Westlake Vinyls, Inc. v. Resolute Mgmt., No. 3:18-MC-00013-CHB-LLK, 2018 U.S. Dist. LEXIS 220517, at *1, *7 (W.D. Ky. Aug. 20, 2018) (denying that the Sixth Circuit has definitively weighed in on the issue in American Federation); Symetra Life Ins. Co. v. Admin. Sys. Rsch. Corp., No. 21-2742, 2022 U.S. App. LEXIS 30996, at *1, *15-16 (6th Cir. Nov. 7, 2022) (declining to "address whether pre-hearing discovery is otherwise permitted under the statute.").

8. *See* THOMAS E. CARBONNEAU & HENRY ALLEN BLAIR, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE, 95-96 (8th ed. 2019); *see generally* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 404 (1998) (explaining that the FAA was enacted to end the long-running judicial hostility towards arbitration in the United States); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (explaining how Section 2 of the FAA created a federal policy that favors arbitration agreements).

9. *See id.*

> evidence in the case . . . Said summons . . . shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.[10]

The uncertainty surrounding the powers granted by Section 7 has led to inconsistent court decisions.[11] Numerous circuits and district courts disagree over whether an arbitrator may compel a third party to produce documents outside the context of an arbitration hearing.[12]

B. Statutory Interpretation Tools

Courts often face the task of interpreting ambiguous statutory language.[13] To discern the proper interpretation of a statute, judges employ numerous methods of statutory construction.[14] Most judges start with the "language and structure" of the statute.[15] When interpreting statutory language, courts aim to read the language as a "harmonious whole."[16] This often requires considering the broader purpose and language of the statute.[17] If the statutory language is ambiguous, courts may look at the legislative history and the purpose of the statute.[18]

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10. 9 U.S.C.S. § 7.

11. *See* CARBONNEAU & BLAIR, *supra* note 8, at 134; *Compare* Sec. Life Ins. Co. of Am. v. Duncanson & Holt, 228 F.3d 865 (8th Cir. 2000) (finding that Section 7 implicitly grants arbitrators pre-hearing discovery powers), *with* Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145 (11th Cir. 2019) (agreeing with the Second, Third, Fourth, and Ninth Circuits that Section 7 prohibits pre-hearing discovery from non-parties).

12. *See id.*

13. *See* LARRY M. EIG, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 1-3 (2014).

14. *See id*. (explaining that there "is no unified, systematic approach for unlocking meaning in all cases.").

15. *Id.*

16. *Id*.

17. *See id.*

18. *See* Katharine Clark and Matthew Connolly, *A Guide To Reading, Interpreting And Applying Statutes*, THE WRITING CENTER AT GULC 1, 9 (2006), https://www.law.georgetown.edu/wp-

Courts also use linguistic canons of construction, which look at how words are customarily used, and ordinary grammar, to support their conclusions.[19] There are many canons of statutory constructions, but their use, and level of persuasion, are left to the judge's discretion.[20] Most of the circuits have used one or more of these tools of statutory interpretation to aid in their analyses of an arbitrator's subpoena power under Section 7.[21] The Eighth Circuit, however, does not reference any of these tools to support its conclusion that Section 7 grants arbitrators the implicit right to subpoena third parties outside of an arbitration hearing.[22]

III. THE CIRCUIT SPLIT

A. The Minority View: Arbitrators have the power to compel the production of documents from third parties outside of an arbitration hearing.

The Fourth Circuit in *COMSAT Corporation v. National Science Foundation* was the first circuit to take a stance on the issue in 1999.[23] In *COMSAT*, Associated Universities, Inc. (hereinafter "AUI") and COMSAT Corporation, pursuant to an arbitration agreement in their contract to build a radio telescope, submitted their dispute over liability for cost overruns to arbitration.[24] Prior to their agreement, AUI entered into a cooperative

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content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf (explaining that "[t]hese tools fall into the following four categories: (A) the text of the statute; (B) legal interpretations of the statute; (C) the context and structure of the statute; and (D) the purpose of the statute"); *see also Interpreting the Language of an Ambiguous Statute*, MEUSER, YACKLEY & ROWLAND (Feb. 19, 2015), https://meuserlaw.com/interpreting-the-language-of-an-ambiguous-statute/ ("'A statute is only ambiguous when it is subject to more than one reasonable interpretation' . . . [o]nce a court decides that the language of the statute is subject to more than one meaning, and is thus ambiguous, it must determine which reasonable interpretation the legislature intended.").

19. *See* Eig, *supra* note 13, at 5-6, 14-19 (explaining popular canons, such as the fixed-meaning canon that looks to the meaning of the word at the time Congress enacted the statute); *see also* Clark and Connolly, *supra* note 18, at 7 (explaining the presumption of consistent use canon, which provides that a "word or phrase is presumed to bear the same meaning throughout a text.").

20. *See* Eig, *supra* note 13, at 1; *see generally* Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, SCHOLARLY WORKS 113 - 162 (1999) (explaining various other canons of construction).

21. *See* Danielle C. Beasley, *Recurring Concerns in Arbitration Proceedings: Examining the Contours of Arbitral Subpoenas Issued to Nonparty Witnesses*, 87 U. DET. MERCY L. REV. 315, 329 (2010).

22. *See Sec. Life Ins. Co. of Am.*, 228 F.3d at 870-71.

23. COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999).

24. *Id*. at 272.

agreement with National Science Foundation (hereinafter "NSF") wherein AUI agreed to oversee the National Radio Astronomy Observatory.[25]

Furthermore, the arbitrator issued a subpoena to the NSF requiring the agency to produce documents related to the telescope, but NSF refused to comply.[26] The arbitrator subsequently issued another subpoena requiring the agency "to appear and to produce all documents relate[d] to the . . . telescope project."[27] Again, the NSF refused to comply with the subpoenas.[28] The district court held that the NSF "had violated its own . . . [housekeeping] regulations and thereby waived any right to object [to the subpoenas] or to seek a protective order."[29] The appellate court began by clarifying that the FAA grants an arbitration panel the limited subpoena power "to compel non-parties to appear 'before them.'"[30] An arbitrator, however, is generally not permitted to subpoena third parties to provide documents before an arbitration hearing.[31] Contrary to its view on subpoena powers, the court, in dicta, "contemplated that a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship."[32]

Aside from the Fourth Circuit's undefined exception, the Eighth Circuit is the only proponent of the minority view.[33] The court's opinion in *Security Life Insurance Company*

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25. *COMSAT Corp*., 190 F.3d at 271-72 (The agreement "imposed no obligation upon NSF or the government to fund AUI operations beyond the upper limits of the award, which was provisional and subject to congressional appropriations. NSF retained the right to terminate the agreement due to a lack of available funds or for other reasons").

26. *Id.* at 272-73 (COMSAT had already sought substantially the same documents through a Freedom of Information Act request).

27. *Id*. at 272 (the arbitrator also issued two other subpoenas which "ordered NSF employees Robert Dickman, a liaison to AUI for the telescope program, and Hugh Van Horn, Dickman's supervisor and a former member of the AUI board of trustees, to appear and produce all documents in their possession related to the telescope project.").

28. *Id*. at 274.

29. *Id*. at 273-74 (Under NSF's regulations, "if a response to a demand is required before the General Counsel has made the determination [whether to respond] . . . the General Counsel shall provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.").

30. *COMSAT Corp*., 190 F.3d at 275.

31. *Id.* at 275-76 (the court also noted that "[t]he enforcement provision [of the FAA] does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration tribunal.").

32. *Id*. at 276 (The court declined to define "special need.").

33. *See* Sec. Life Ins. Co. of Am. v. Duncanson & Holt, 228 F.3d 865 (8th Cir. 2000); *see also COMSAT Corp.*, 190 F.3d at 276 (to meet the special need exception, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.").

of America v. Duncanson & Holt is highly controversial and contested by the majority of the other circuit courts.[34] In *Security Life*, Security Life Insurance Company of America (hereinafter "Security") entered into a reinsurance contract with Transamerica Occidental Life Insurance Company (hereinafter "Transamerica"), which contained an arbitration clause.[35] Duncanson & Holt, Inc., as manager of the contract, submitted its claim that Security failed to honor a part of the contract to arbitration.[36] The arbitration panel issued a subpoena on Transamerica to produce documents.[37] Because Transamerica was not a party to the arbitration, it refused to comply with the subpoena.[38] The appellate court held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[39] The court noted, however, that the efficiency of arbitration entails a limited discovery process.[40] Additionally, the court explained that Transamerica was not brought into the matter arbitrarily but was "a party to the contract that is the root of the dispute and is therefore integrally related to the underlying arbitration."[41]

34. *See* Szalai, *supra* note 3, at 14.

35. *See Sec. Life Ins. Co. of Am.*, 228 F.3d at 867-68 ("If any dispute shall arise between [Security] and [the reinsurers] with reference to the interpretation of this Contract or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Contract, such dispute, upon written request of either party, shall be submitted to three arbitrators . . . ."); *see generally* Caroline Banton, *Reinsurance Definition, Types, and How It Works*, INVESTOPEDIA (Apr. 3, 2022), https://www.investopedia.com/terms/r/reinsurance.asp (explaining that reinsurance "is insurance for insurance companies. It's a way of transferring some of the financial risk that insurance companies assume . . . to another company.").

36. *Id*. at 867-68 ("Transamerica took the position that it was not a party to the arbitration, insisting that the . . . dispute was not arbitrable, and that in any event it was entitled to arbitrate the dispute in a separate proceeding against it alone.").

37. *Id*.

38. *Id*. at 868-69 ("The magistrate therefore directed Security's attorney to issue a subpoena to Transamerica. Transamerica appealed to the district court, which found the magistrate's order neither clearly erroneous nor contrary to law.").

39. *Sec. Life Ins. Co. of Am*., 228 F.3d at 870-71.

40. *Id*. at 870.

41. *Id*. at 871 (The court seemingly claimed that Transamerica's status as a third-party to the arbitration would not change its conclusion. Specifically, the court noted that "the panel's exercise of this implicit power was proper whether or not Transamerica is ultimately determined to be a party to the arbitration.").

B. The Majority View: Arbitrators do not have the power to compel the production of documents from third parties outside of an arbitration hearing.

The Third Circuit in *Hay Group, Inc. v. E.B.S. Acquisition Corporation* was the first circuit to challenge the Eighth Circuit's holding in *Security Life* that arbitrators may compel third parties to produce documents outside of an arbitration hearing.[42] In *Hay Group,* David Hoffrichter left his employment at Hay Group, Inc., to join PriceWaterhouseCoopers, L.L.P. (hereinafter "PWC"), which was later sold to E.B.S. Acquisition Corp (hereinafter "EBS").[43] Hay Group alleged that Hoffrichter violated a non-solicitation clause in their separation agreement, and pursuant to an arbitration provision in the same agreement, commenced an arbitration proceeding against him.[44] Hay Group then served subpoenas for documents on EBS and PWC, both of whom were third parties to the arbitration.[45] EBS and PWC refused to comply arguing that the arbitration panel did not have the authority to issue subpoenas on third parties for the production of pre-hearing documents.[46] Turning first to the FAA for guidance, the court's inquiry focused on Section 7, as the court found that the language of the section unambiguously addressed the issue.[47] The court reasoned that Congress's choice to use the words "to bring" and "with him" in Section 7 of the FAA clearly indicated that an arbitrator has the power to compel documents only when the "non-party accompanies the items to the arbitration proceeding."[48]

Four years after the decision in *Hay Group,* the Second Circuit adopted the view of the Third Circuit in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*.[49] In *Life Receivables*, Peachtree Life Settlements (hereinafter "Peachtree"), on behalf of Life Receivables Trust (hereinafter the "Trust"), obtained an insurance policy from Syndicate 102 at Lloyd's of London (hereinafter "Syndicate"), which contained an arbitration provision.[50] Afterward, the Trust commenced an arbitration proceeding against Syndicate

42. *See* Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004).

43. *Id*. at 405.

44. *Id.*

45. *See id.* at 405.

46. *Id.* at 405-06 (The arbitration panel and District Court for the Eastern District of Pennsylvania disagreed with EBS and PWC, and enforced the subpoenas).

47. *See Hay Grp*., 360 F.3d at 406-07.

48. *Id*. at 407 (The court also found support for its interpretation "by the interpretation of similar language in a previous version of Federal Rule of Civil Procedure 45.").

49. *See* Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008).

50. *Id*. at 212 ("Peachtree buys some life insurance policies for its own account, and others for the accounts of related entities.").

in response to its denial of Peachtree's request for payment under the policy.[51] After several failed attempts to obtain documents from the Trust, the arbitration panel issued a subpoena on Peachtree to produce the requested documents.[52] Peachtree challenged the authority of the panel to issue the subpoena.[53] The court, adopting the Third Circuit's reasoning in *Hay Group*, found Section 7's language to be "straightforward and unambiguous," and must be enforced "'according to its terms.'"[54]

In 2017, the Ninth Circuit joined the debate in *CVS Health Corp. v. Vividus*.[55] In *CVS Health*, Vividus, LLC and other parties (collectively, "HMC") filed suit against Express Scripts, Inc. and CVS Health Corporation (hereinafter "CVS") for antitrust violations.[56] HMC's claims against CVS, not Express Scripts, were submitted to arbitration in Arizona.[57] The arbitrators issued a subpoena on Express Scripts to produce certain documents, but Express Scripts did not respond to the subpoena.[58] HMC sought relief from the district court, but the court refused to enforce the subpoena.[59] The appellate court held that Section 7 conferred two powers to arbitrators.[60] First, the power to compel individuals to appear before them as witnesses.[61] Second, the power to compel those individuals to bring specific documents with them to the hearing.[62] The plain language of the statute, the court said, must be enforced according to its terms, and its terms did not grant arbitrators broad subpoena powers.[63] As an end note, the court explained that because an arbitrator's

51. *See Life Receivables Tr*., 549 F.3d at 213.

52. *See id.* at 213-14.

53. *Id*. at 213-14.

54. *Id*. at 216; *Hay Grp*., 360 F.3d at 406-07.

55. *See* CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017).

56. *Id*. at 705.

57. *CVS Health Corp*., 878 F.3d at 705 (The claims against Express Scripts were transferred to the United States District Court for the Eastern District of Missouri).

58. *Id*. (The documents requested had previously been produced in the Missouri litigation).

59. *Id*.

60. *Id*. at 706.

61. *Id*.

62. *CVS Health Corp*., 878 F.3d at 706.

63. *See id*. ("A plain reading of the text of section 7 reveals that an arbitrator's power to compel the production of documents is limited to production at an arbitration hearing. The phrase 'bring with them,' referring to documents or other information, is used in conjunction with language granting an arbitrator the power to

Section 7 powers only extend "to documentary evidence 'which may be deemed material as evidence in the case,'" it establishes that an "arbitrator is not necessarily vested with the full range of discovery powers that courts possess."[64]

The Eleventh Circuit in *Managed Care Advisory Group., LLC v. CIGNA Healthcare, Inc.* was the last court to embrace the majority's stance.[65] In *Managed Care*, CIGNA Healthcare, Inc. and Managed Care Advisory Group "entered into an arbitration agreement" to resolve a dispute over settlement funds from prior litigation.[66] The arbitrator subpoenaed the "settlement claims administrator and independent review entities," who were not parties to the arbitration agreement, to produce certain documents.[67] The parties refused to comply with the subpoenas.[68] The appellate court found Section 7's language to be unambiguous.[69] Like the many circuits before it, the court determined that Section 7 permits an arbitrator to subpoena a third party to testify before it and bring documents with them to the hearing.[70] However, the court stated that the FAA's silence on whether an arbitrator can subpoena documents from a third party without a hearing meant that the FAA implicitly withheld the power.[71] The court went on to explain that their interpretation was in line with the FAA's plain language, and would not lead to an "absurd result."[72] In what appears to be a nod at the Eighth Circuit's arbitral efficiency argument, the court explained that there was a need to reduce the ease with which parties could obtain information prior

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'summon . . . any person to attend before them.' Under this framework, any document productions ordered against third parties can happen only 'before' the arbitrator.").

64. *CVS Health Corp*., 878 F.3d at 708.

65. *See* Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145 (11th Cir. 2019).

66. *Id*. at 1150.

67. *Id*. at 1150-51 (note that the court refers to the arbitrator's "summonses," but for consistency, this article will refer to them as subpoenas).

68. *Id.* at 1152 ("The district court affirmed the magistrate judge's order granting [Managed Care Advisory Group's] motion to enforce the arbitral summonses").

69. *Id*. at 1156-57 (("'[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others . . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. [W]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'") (citation omitted)).

70. *See Managed Care Advisory Grp., LLC*, 939 F.3d at 1159-60 (The court notes that "[n]on-parties to an arbitration agreement have not subjected themselves to the authority of an arbitrator and, therefore, have not limited their rights beyond the FAA.").

71. *Id*. at 1160-61 (Interestingly, another issue the court had with the subpoenas was that the third parties would attend the hearing via video conference. The court held that section 7 only allows an arbitrator to subpoena a third party to physically attend a hearing before the arbitrator and to bring documents to that hearing).

72. *Id*. at 1161.

to the hearing.[73] Specifically, the court stated that its interpretation "is beneficial because it will impose some inconvenience on the arbitrator that will induce the arbitrator to weigh whether the production of the documents is necessary."[74] Finally, the court explained that the words in the statute "should be interpreted as taking their ordinary meaning at the time Congress enacted the statute."[75]

C. A Conflicted Sixth Circuit

At first glance, it appears that the Sixth Circuit has weighed in on the split, but a recent decision reveals that the circuit may be undecided.[76] In *American Federation of TV and Radio Artists v. WJBK-TV,* the Sixth Circuit addressed the issue in the context of labor arbitration.[77] Because the U.S. Supreme Court "expressly recognized that federal courts may look to the FAA for guidance in labor arbitration cases," the court looked to Section 7 to find its answer. The court explained that Section 7 "implicitly include[s] the authority to compel the production of documents for inspection by a party prior to the hearing."[78] Following their interpretation of Section 7, the court held that Section 301 of the Labor Management Relations Act granted a labor arbitrator the authority to subpoena documents from third parties before or during an arbitration hearing.[79]

However, in *Westlake Vinyls, Inc. v. Resolute Management*, a district court noted that the Sixth Circuit had not joined either side of the circuit split.[80] In *Westlake*, the court stated that "Section 7 appears to authorize only subpoenas commanding attendance at a live arbitration hearing, for document production to the arbitrators or witness testimony

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73. *See Managed Care Advisory Grp., LLC*, 939 F.3d at 1161.

74. *Id.* (internal citation omitted).

75. *Id*. at 1160 ("Looking to dictionaries from the time of Section 7's enactment makes clear that a court order compelling the 'attendance' of a witness 'before' the arbitrator meant compelling the witness to be in the physical presence of the arbitrator.").

76. *See Am. Fed'n of Television & Radio Artists, AFL-CIO*, 164 F.3d at 1009.

77. *See id.* at 1008.

78. *Id*. at 1009; *see also* Meadows Indem. Co. v. Nutmeg Ins. Co., 157 F.R.D. 42, 45 (M.D. Tenn. 1994) ("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing").

79. *Am. Fed'n of Television & Radio Artists, AFL-CIO*, 164 F.3d at 1009 ("Just as the subpoena power of an arbitrator under the FAA extends to non-parties, a labor arbitrator conducting an arbitration under a collective bargaining agreement should also have the power to subpoena third parties").

80. *See* Westlake Vinyls, Inc. v. Resolute Mgmt., No. 3:18-MC-00013-CHB-LLK, 2018 U.S. Dist. LEXIS 220517, at *7 (W.D. Ky. Aug. 20, 2018) ("This report respectfully disagrees with Petitioner's and Alliance's interpretation of American Federation and concludes that the Sixth Circuit has not definitely weighed in on the circuit split.").

before the arbitrators."[81] The court went on to claim that *American Federation* was specific to labor arbitration, and it was unclear if the Sixth Circuit would expand its holding to non-labor cases.[82] Recently, the court was presented with another opportunity to clarify its position but instead declined to address the issue.[83] In *Symetra Life Insurance Company v. Administration Systems Research Corporation*, the court disposed of the case by finding that the subpoena at issue was clearly within the scope of the FAA and "decline[d] to address whether pre-hearing discovery is otherwise permitted under the statute."[84]

IV. ANALYSIS

A. A Supreme Court Review of Section 7 Would Likely Favor the Majority View

If the Supreme Court were to review Section 7 to determine an arbitrator's pre-discovery subpoena power, it would begin its analysis with the language of Section 7 like the numerous circuits that addressed the language of Section 7. One canon of construction provides that courts should "give effect, if possible, to every clause and word of a statute."[85] The pertinent language for a court to interpret is: an arbitrator "may summon in writing any person to attend before them . . . and . . . to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[86] The language that proves to be the most troubling is "before them" being connected to "bring with" by the word "and."[87] Giving effect to every word in Section 7, but mostly the conjunction of these two phrases shows an intent to grant arbitrators subpoena powers only under specified circumstances, namely, to compel an individual to attend a hearing before an arbitrator and to bring documents with them to that hearing.[88] Specifically, the intentional use of "to bring

81. *Westlake Vinyls, Inc*., 2018 U.S. Dist. LEXIS 220517, at *7-8 (The subpoena at issue was a request for documents from a non-party to be given to a party in the case).

82. *Id.* at *9.

83. *See* Symetra Life Ins. Co. v. Admin. Sys. Rsch. Corp., No. 21-2742, 2022 U.S. App. LEXIS 30996, at *15-16 (6th Cir. Nov. 7, 2022) ("Under a straightforward reading of the statute's text, the subpoena was a proper exercise of the panel's section 7 powers.").

84. *Id.*

85. Eig, *supra* note 13, at 15.

86. 9 U.S.C.S. § 7.

87. *See Hay Grp*., 360 F.3d at 407.

88. *See* Beasley, *supra* note 21, at 322-23 (The courts "have accurately read Section 7's arbitral subpoena power to require that nonparties appear in person before an arbitral panel and produce documents at that time. However, these courts have failed to acknowledge that Section 7 of the FAA does not distinguish between

with" places a limitation on the circumstances in which an arbitrator is permitted to compel documents from third parties.[89]

A flaw with the Eighth Circuit's reasoning is that its conclusion is not based on the text of Section 7. The court acknowledged that the language of Section 7 does not "explicitly" provide the power it ultimately finds.[90] The "implicit" power the court seeks to establish was not granted by the language of the FAA, but by the court's own beliefs of what would further the FAA's goal of efficiency.[91] Alternatively, the Supreme Court in *Dean Witter Reynolds v. Byrd* held that the FAA's primary goal was to enforce privately made agreements, not to "encourage[] . . . efficient and speedy dispute resolution."[92] Following the holding in *Byrd*, it is clear that the Eighth Circuit improperly focused on the efficiency of arbitration over the main goal of arbitration, enforcing the agreements private parties enter into.[93] Although interpreting Section 7 to limit the powers arbitrators have to subpoena third parties may not promote efficiency, courts should not override clear statutory language just because its interpretation would make the arbitration process quicker.

The position of the majority of the circuits is reinforced by the background of Section 7.[94] Those who advocate for a broad grant of powers under Section 7 commonly reference the Federal Rules of Civil Procedure (hereinafter "FRCP") for support.[95] Pre-trial discovery was not common at the time of the FAA's enactment and the FRCP did not exist yet.[96] Additionally, the FRCP did not initially permit an expansive discovery

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appearing 'before them' at the final hearing on the merits or at a hearing held especially for document-production purposes").

89. *See Hay Grp.*, 360 F.3d at 407.

90. Sec. Life Ins. Co. of Am., 228 F.3d at 870 (stating that the FAA does not "explicitly authorize the arbitration panel to require the production of documents for inspection by a party.").

91. *See id.*

92. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (The Supreme Court explained that "realiz[ing] the intent of the drafters" did not require promoting expediency over the primary goal of the FAA).

93. *See id.*

94. *See generally Hay Grp.*, 360 F.3d at 405-06.

95. *See generally* Tamar Meshel, *Closing the Enforcement Gap: Third-Party Discovery Under the FAA and the Federal Rules of Civil Procedure*, 70 U. KAN. L. REV. 1, 8 (2021).

96. *See id.* at 8-9; *see also* Szalai, *supra* note 3, at 128 ("When one examines this circuit split in the context of the FAA's history, one can better understand this discovery issue. The FAA was enacted before modern, broad discovery existed. At the time of the FAA's enactment, the federal court system did not have procedures for broad, pre-trial discovery such as those that exist today.").

process.[97] However, the FRCP was amended and now permits a broad discovery process to "obtain all evidence relevant to a claim or defense."[98] In an article written by Professor Tamar Meshel, she points to the inconsistency between the amended FRCP and FAA that creates an "enforcement gap" that must be reconciled by adopting the Eighth or Fourth Circuit's interpretation of Section 7.[99] This argument fails when considering that Congress amended the FRCP in 1991 to permit more discovery, but Congress did not similarly amend the FAA.[100] If Congress intended to grant arbitrators broader subpoena powers, it would have amended the FAA to reflect that purpose.[101] Because Congress only amended the FRCP, but left the FAA intact, it can be argued that Congress did not intend to broaden the subpoena powers of arbitrators. If the Supreme Court was to override the clear intent of Congress regarding the scope of Section 7, it would create a separation of powers issue.[102]

B. Policy Arguments for Broader Discovery Powers Do Not Save the Eighth Circuit's Interpretation

There are many reasons why a party might want to broaden discovery in their arbitration proceeding.[103] First, each party likely wants access to all the necessary information to build their case.[104] With more information at their disposal, the arbitrator or the arbitral panel can better understand the entire context before making a decision.[105]

97. *See* Meshel, *supra* note 95, at 9-10.

98. *Id.* at 10; *see generally* FED. R. CIV. P. 45(c) ("For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition . . . For Other Discovery. A subpoena may command: (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and (B) inspection of premises at the premises to be inspected.").

99. *See* Meshel, *supra* note 95, at 8 (arguing that "the minority view allowing arbitrators to subpoena pre-hearing third-party evidence under § 7 of the FAA, at least in some circumstances.").

100. *See generally Hay Grp.*, 360 F.3d at 409.

101. *See Managed Care Advisory Grp., LLC*, 939 F.3d at 1160.

102. *See generally* Robert Longley, *Separation of Powers: A System of Checks and Balances*, THOUGHTCO. (May 16, 2022), https://www.thoughtco.com/separation-of-powers-3322394.

103. *See* Gilda R. Turitz, *Managing Discovery in Arbitration*, 18 WOMAN ADVOCATE COMMITTEE 17 (2013).

104. *See generally Why It's Important To Get Limited Discovery Right In Finra Arbitrations*, EPPERSON & GREENIDGE LLP, https://www.finraarbitrationattorney.com/why-important-get-limited-discovery-right-finra-arbitrations/.

105. *See id.*

Additionally, matters submitted to arbitration increasingly have become more complex.[106] Permitting arbitrators to compel more documents and testimony from third parties better prepares the arbitrator when it comes time to address these complex issues.[107] This was a point made by the fourth circuit when it created its substantial need exception.[108] The fear is that the efficiency of arbitration would be lost in cases where an arbitrator who is faced with a complex issue does not have extensive discovery powers.[109] Allowing more discovery would also lead to more effective hearings and promote fairness.[110]

Although there are many benefits of broad discovery in arbitration, the Eighth Circuit's reasoning falls short. Those who choose arbitration do so because they do not want the hassle and expense of litigation.[111] One of the main appeals of arbitration is that there is a limited discovery process.[112] Neither the FAA nor caselaw grants parties to an arbitration a right to broad discovery.[113] For example, in *Gilmer v. Interstate/Johnson Lane Corporation*, the Supreme Court explained that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"[114] Pre-trial discovery is far more expansive than discovery in arbitration, and there are more costs and delays associated with it.[115] A broad pre-hearing discovery would likely have the same additional costs and time delays as pre-trial discovery.[116] Additionally, arbitration is commonly associated with being less hostile and more of a collaborative process to resolve disputes.[117] Permitting more documents and

106. *See Pre-Hearing Discovery in Arbitration: Is It Illusory?*, FINDLAW (Apr. 27, 2016), https://corporate.findlaw.com/litigation-disputes/pre-hearing-discovery-in-arbitration-is-it-illusory.html.

107. *See generally id*.

108. *See COMSAT Corp*., 190 F.3d at 276.

109. *See id*.

110. *See* Meshel, *supra* note 95, at 6.

111. *See 8 Advantages of Arbitration: Why Arbitration Is Superior to Litigation*, ARBITRATIONAGREEMENT, https://arbitrationagreements.org/advantages-of-arbitration/.

112. *See generally id*.

113. *See* Turitz, *supra* note 103, at 17.

114. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

115. *See* Turitz, *supra* note 103, at 17-18.

116. *See* Odjfell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) ("Arbitration, which began as a quick and cheap alternative to litigation, is increasingly becoming slower and more expensive than the system it was designed to displace, and permitting pre-hearing discovery of non-parties would only make it more so.").

117. *See 8 Advantages of Arbitration*, *supra* note 111.

parties to be drawn into a dispute could have an adverse effect and cause more conflict between the parties. Thus, an expansive discovery process goes against the general conception and appeal of arbitration.

V. CONCLUSION

A subpoena is a powerful information collection tool in both litigation and arbitration. A subpoena's usefulness, however, does not justify guaranteeing its use in all arbitral contexts. The FAA was intended to promote the enforceability of arbitration clauses and outline the procedures of an arbitral hearing.[118] Disputes over the powers granted by Section 7 of the FAA led the Eighth Circuit astray. The majority of circuits have correctly held that the plain language of Section 7 does not permit an arbitrator to compel documents from third parties outside the context of an arbitration hearing.[119] The Supreme Court would likely agree with the interpretation adopted by the majority of circuit courts. The language and context of Section 7 as well as the goal and purpose of arbitration better align with a narrow discovery process. Despite the reasonable policy arguments for a broad discovery process in arbitration, they do not overcome the clear statutory language. Any expansion of the powers granted by Section 7 must be done outside of courts, by Congress itself.

118. *See generally Dean Witter Reynolds Inc.*, 470 U.S. at 221 (discussing the goals of the FAA).

119. *See generally Life Receivables Tr.*, 549 F.3d at 213; *Hay Gr.*, 360 F.3d at 407; *CVS Health Corp.*, 878 F.3d at 706; *Managed Care Advisory Grp., LLC*, 939 F.3d at 1160-61.