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Kaepernick Case Raises Arbitrator Subpoena Power Questions

Sports Law360 | June 20, 2018

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It has been widely reported that lawyers representing Colin Kaepernick in collective bargaining arbitration proceedings with the NFL are considering asking the arbitrator to issue a subpoena to compel President Trump to appear for deposition. Aside from obvious issues as to whether a sitting president can be subpoenaed to sit for deposition, the case also presents interesting issues about the power of an arbitrator to compel testimony of a non-party under the Federal Arbitration Act (FAA), and the territorial limitations on that power as prescribed by Fed.R.Civ.P. 45.

Arbitrator's Power to Subpoena a Non-Party for Deposition

An arbitrator's power to compel non-parties to produce documents or testify is derived from Section 7 of the FAA, which grants arbitrators the authority 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."[1] Section 7 also provides that the "summons shall issue in the name of the arbitrators…shall be signed by the arbitrators…." and shall be enforced by "petition to the United States district court for the district in which such arbitrators, or a majority of them, are sitting…."

Notably, Section 7 does not expressly provide that arbitrators may compel pre-hearing discovery or deposition testimony from a non-party. Although there is a lack of consensus among the federal circuit courts as to whether an arbitrator has the authority to compel pre-hearing discovery from a non-party, there appears to be an "emerging rule" that "the arbitrator's subpoena authority under [Section 7] does not include the authority to subpoena non-parties or third parties for prehearing discovery [including depositions and document production] even if a special need or hardship is shown."[2] The Second, Third and Ninth Circuits follow this approach without exception.[3] The Fourth Circuit suggested a limited exception noting that "a party might, under unusual circumstances petition the district court to compel pre-arbitration discovery [from a non-party] upon a showing of special need."[4]

On the other hand, the Eighth Circuit has reached the opposite conclusion, holding "implicit in an arbitration panel's power to subpoena relevant documents for production at the arbitration hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[5] But, this holding is limited to pre-hearing document productions and does not encompass subpoenas for non-party depositions. Indeed, district courts in the Eighth Circuit have distinguished between pre-hearing document production and depositions, enforcing arbitral subpoenas for the former but not the latter, and observing that producing documents "is less onerous and imposes a lesser burden than does a witness deposition."[6]

In addition to the federal court decisions, there is one recent New York state trial court case worth noting. [7] Recognizing the lack of "unanimity" among the federal courts or a decision on point from the New York Court of Appeals, the court in *Matter of Roche Molecular Sys. Inc.,* declined to follow the Second Circuit's decision in *Life Receivables Trust, supra,* and instead relied on

*Imclone Systems, Inc. v. Waksal.**[8]*** In *Imclone*, a New York appellate court interpreted the FAA to give arbitrators the authority to issue non-party deposition subpoenas, where the "information sought would plainly be unavailable from other sources" and was focused on a "crucial" issue in the case.[9] Following *Imclone*, the *Roche Molecular* court also enforced an arbitration panel's subpoena directing the deposition of a non-party witness where the testimony sought was not available from another source and was "sufficiently focused on the topics at issue in the arbitration."[10]

Although no federal circuit court has enforced an arbitral subpoena commanding a non-party's deposition, courts have recognized that Section 7 of the FAA does not prevent arbitrators from holding preliminary hearings, in advance of a final hearing on the merits, to hear testimony from non-parties.[11] "[T]he language of Section 7 is broad, limited only by the requirement that the witness be summoned to appear 'before [the arbitrators] or any of them' and that any evidence requested be material to the case."[12] In *Stolt-Nielsen*, the petitioner first sought to enforce subpoenas for the depositions of non-parties, and the district court refused. Therefore, the petitioner went back to the panel seeking the issuance of subpoenas for testimony at a preliminary hearing. These subpoenas directed the non-parties to "appear and testify in an arbitration proceeding."[13] The district court enforced the subpoenas, finding the dispositive difference was that the instant subpoenas "call[ed] for the non-parties to appear before the arbitrators themselves."[14] The non-parties appealed. Both the district court and Second Circuit denied the motions for stay pending appeal. Therefore, the arbitrators and the parties convened the preliminary hearing and heard the non-parties' testimony prior to the Second Circuit ruling on the appeal. Agreeing with the district court, the Second Circuit rejected the non-parties' argument that the subpoenas "were thinly disguised attempts to obtain pre-hearing discovery,"[15] and set forth

several factors that distinguished the preliminary hearing from a deposition (*i.e.* the preliminary hearing was before the arbitrators, the arbitrators ruled on evidentiary issues such as admissibility and privilege during the hearing, and the testimony became a part of the arbitration record used by the arbitrators in their final determination of the dispute).[16]

Although it does not appear that Mr. Kaepernick can compel the deposition of a non-party under the FAA, following the guidelines set forth in *Stolt-Nielsen*, it is possible to call a non-party to appear for a preliminary hearing. However, the preliminary proceeding must resemble an evidentiary hearing rather than a deposition. The most important factor is the presence of the arbitrator. Although arbitrators and courts should take steps to minimize the burden on non-party witnesses, there is no blanket prohibition against re-calling a non-party witness at a later hearing.[17]

Territorial Limitations of Rule 45

Section 7 mandates that subpoenas issued by an arbitrator must be served “in the same manner as subpoenas to appear and testify before the court.”[18] Fed.R.Civ.P. 45 applies to subpoenas and provides that a subpoena summoning a person to attend a hearing or trial must be issued "from the court where the action is pending."[19] Rule 45(c)(1)(A) and (B) contain territorial restrictions which limit a district court’s power to compel a non-party’s appearance to attend a hearing taking place within the state where the non-party resides, is employed or regularly transacts business, or is within 100 miles of where the non-party resides, is employed or regularly transacts business.

At least one court concluded that the territorial limitations of the Rule 45(c)(1) apply to an arbitrator’s subpoena commanding documents and testimony.[20] Additionally, where there is no independent basis for personal jurisdiction over a non-party who is outside the court’s normal geographic jurisdiction, courts have

refused to enforce a subpoena commanding appearance by phone or video.[21] In other words, a party cannot circumvent the territorial limitations of Rule 45 by requesting video testimony.

If Mr. Kaepernick seeks to compel a non-party to appear at a hearing or produce documents, he will have to consider these territorial limitations. To avoid these issues, one alternative is to convince the arbitrator to convene a preliminary hearing in a location within the non-party's territorial limitations. This alternative was recognized by the court in *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co. (In re Arbitration).* Although the *Legion* court refused to enforce the subpoena because of territorial limitations, it suggested that if the testimony and the documents "sought by the subpoena are of sufficient importance, and if all else fails, attendance could presumably be compelled at an arbitration hearing [where the non-party is located]." [22] This alternative is by no means guaranteed as it requires the arbitrator's, and possibly adverse parties', agreement.

Conclusion

Obtaining prehearing discovery from non-parties in an arbitration can often be difficult, but there are workarounds to consider. Under Section 7 of the FAA, federal courts have generally concluded that an arbitrator is not authorized to subpoena the deposition of a non-party. However, an arbitrator still has broad powers under Section 7 to convene multiple hearings to accommodate non-party testimony even in advance of a final hearing on the merits. Moreover, an arbitrator arguably has the power to move the situs of the hearing to circumvent the territorial limitations of Rule 45.

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[1] 9 USC § 7.

[2] *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008) quoting H. Oehmke, 3 Commercial Arbitration § 91:5 (2008) (noting this emerging rule was triggered by *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004)).

[3] *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008) (*adopting Hay Grp*.); *CVS Health Corp. v. Vividus*, LLC, 878 F.3d 703, 706 (9th Cir. 2017) (an arbitrator has "no freestanding power to order third parties… other than in the context of a hearing.").

[4] *Comsat Corp. v National Sci. Found*., 190 F3d 269, 275-276 (4th Cir 1999) (did not define "special need," but stated the party moving to compel must at least show that "the information it seeks is otherwise unavailable").

[5] *See In re Security Life Ins. Co.*, 228 F.3d at 870-71 (8th Cir. 2000); *see also Am. Fed'n of Tel. & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) (looking to the FAA for guidance in a labor employment case and following decisions from district courts finding that Section 7 implicitly allows pre-hearing document discovery from third parties).

[6] *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. 02-4304 (PAM/JSM), 2004 U.S. Dist. LEXIS 389, at *7 (D. Minn. Jan. 9, 2004) (enforcing the subpoena for pre-hearing production of

document and refusing to enforce the subpoena for a pre-hearing deposition of a non-party witness).

[7] *Matter of Roche Molecular Sys. Inc. (Gutry)*, 2018 N.Y. Misc. LEXIS 1455 (N.Y. Sup. Ct. April 24, 2018).

[8] *Id.* relying on *Imclone Systems, Inc. v. Waksal*, 22 AD3d 387 (N.Y. App. Div., 1st Dept 2005).

[9] *Imclone Systems, Inc.,* 22 AD3d. at 388.

[10] *Matter of Roche Molecular Sys. Inc. (Gutry)*, 2018 N.Y. Misc. LEXIS 1455, at *14-15.

[11] *Stolt-Nielsen Transp. Grp., Inc. v. Celanese AG*, 430 F.3d 567, 578 (2d Cir. 2005); *All. Healthcare Servs. v. Argonaut Private Equity*, LLC, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011) (“permitting an arbitrator to hold a preliminary hearing that is not a hearing on the merits ‘does not transform [the preliminary hearing] into a [prohibited] discovery device.’”).

[12] *Stolt-Nielsen Transp. Grp., Inc.*, 430 F.3d at 578-79.

[13] *Id.* at 570.

[14] *Id.* at 571.

[15] *Id.* at 571.

[16] *Id.* at 578.

[17] *Id*. at 580.

[18] 9 USC § 7.

[19] Fed.R.Civ.P. 45(a)(2) (2013).

[20] *See, e.g., Lin v. Horan Capital Mgmt.*, LLC, 2014 U.S. Dist. LEXIS 114631, at *3-4 (S.D.N.Y. Aug. 13, 2014).

[21] *Id. citing Roundtree v. Chase Bank USA, N.A.*, 2014 U.S. Dist. LEXIS 76255, at *5 (W.D.Wash. June 3, 2014).

[22] *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co. (In re Arbitration)*, MISC. NO. 01-162, 2001 U.S. Dist. LEXIS 15911, at *5 (E.D. Pa. Sep. 5, 2001).