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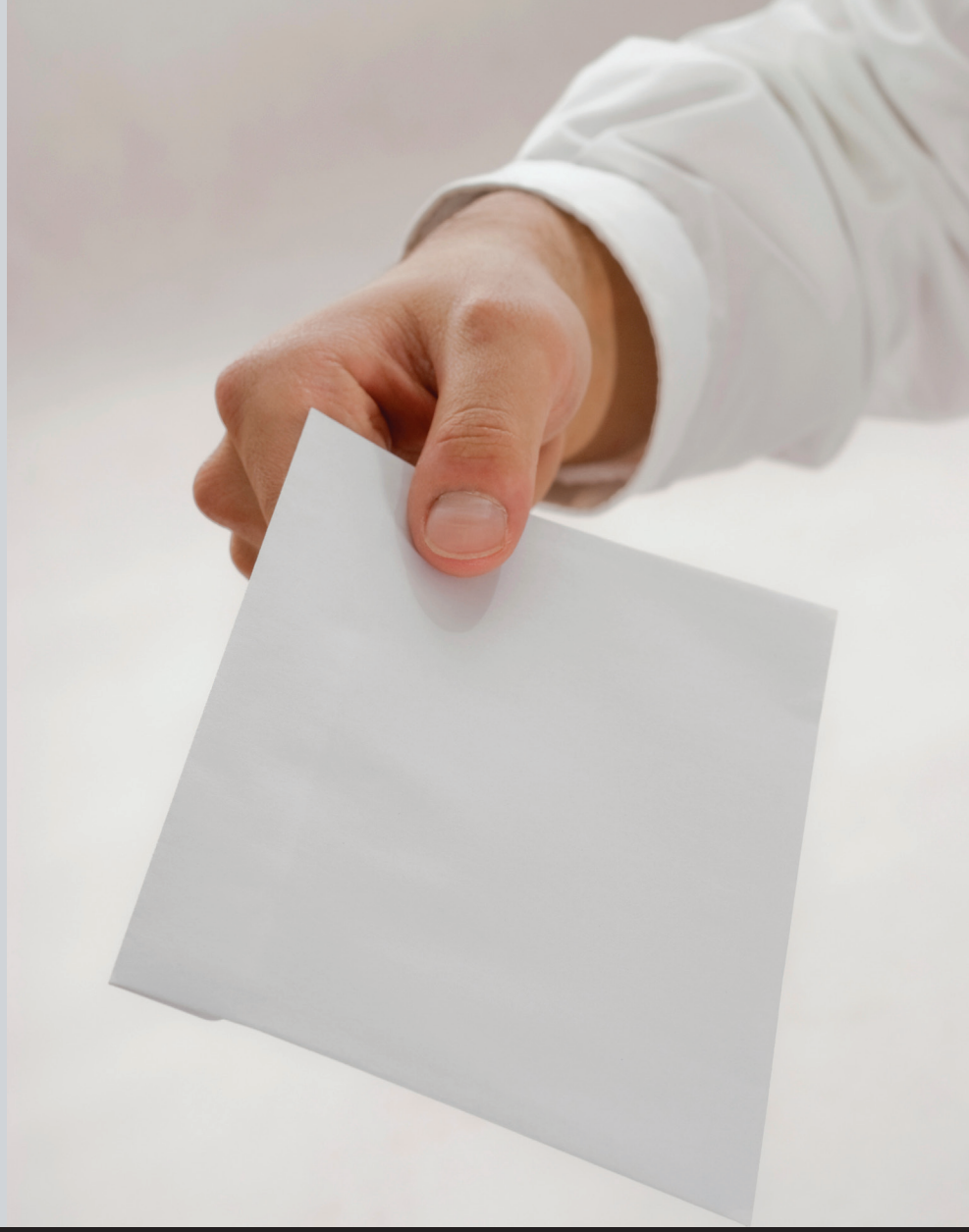

Unlike the Federal Rules of Civil Procedure, the Federal Arbitration Act places sharp limits on a party's ability to obtain information from a nonparty. Nonetheless, documents and testimony can be obtained from nonparties under the FAA. Here's a guide to successful nonparty discovery.

Nonparty Discovery Under the Federal Arbitration Act

Parties in a dispute often need information from nonparty witnesses to properly prepare and present their case. Recognizing this, the Federal Rules of Civil Procedure enable a litigant in federal court to issue subpoenas seeking documents or deposition testimony from witnesses located anywhere in the country.[1]

In contrast, parties to an arbitration proceeding under the Federal Arbitration Act (the "FAA") do not have this ability.[2] Indeed, courts universally recognize that the FAA places significant limits on a party's ability to obtain information from a nonparty.

This article examines those limits and suggests how documents and testimony can be obtained from nonparties in an arbitration governed by the FAA.

Section 7 of the FAA

In arbitration, as in litigation, subpoenas are used to obtain information from otherwise unwilling nonparties. Section 7 of the FAA governs

1. See FRCP 45.
2. See 9 USC § 1, et seq.

the issuance of subpoenas.[3] To modern ears, section 7 is a bit awkward, but it can be simplified by breaking it into the following three parts:

First,

> [t]he arbitrators...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 evidence in the case.

Second,

> [the] summons shall issue in the name of the [] arbitrators...shall be signed by the arbitrators...and shall be served in the same manner as subpoenas to appear and testify before the court.

Third,

> if any person [] so summoned to testify shall refuse or neglect to obey said summons, [then] 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 [the arbitrators] or punish said person or persons for contempt.[4]

Section 7 does not permit the deposition of nonparties

Courts analyzing section 7 uniformly have held that it does not authorize the deposition of a nonparty.[5] No reported decision takes a contrary view.

The basis for this ruling is found in the first sentence of the section, which states that arbitrators may summon "any person to attend before them...as a witness." Federal courts have interpreted this language literally, holding that it authorizes arbitrators to require a nonparty witness to appear and testify at a hearing in front of them but does not authorize arbitrators (or parties) to require a witness to testify at a deposition session in front of the parties alone.

This interpretation of section 7's language also is supported by history. The FAA was passed in 1925, long before modern Rule 45 became law and long before litigants were permitted to take free-ranging discovery. The original version of Rule 45, which itself did not become law until 1937, permitted federal courts to require nonparty witnesses to produce documents or testify only at a hearing held before the court.[6]

In other words, unlike the current iteration of Rule 45, no discovery depositions or document discovery from nonparties was permissible. Inasmuch as section 7 preceded Rule 45 and has never been substantively amended, courts have interpreted it to require the same sort of procedure: testimony from nonparties can be required, if at all, only at a hearing at which at least one of the arbitrators presides.[7]

No uniform rule on the production of documents – early district court decisions

No uniform rule governs whether section 7 permits parties in arbitration to subpoena documents from a nonparty witness. Indeed, the federal courts disagree widely.

Until recently there were no reported decisions dealing with subpoenas issued under section 7. The first reported decision, issued in 1988, held that section 7 permits document discovery from nonparties.

In *Stanton v Paine Webber Jackson & Curtis, Inc*, the plaintiffs brought various Commodities Exchange Act and other claims in federal court.[8] The defendants successfully compelled arbitration and, through the arbitrators, issued several subpoenas duces tecum requiring witnesses to produce documents during the arbitral discovery period. The plaintiffs sought an order enjoining the defendants from serving the subpoenas, arguing that section 7 "only permits arbitrators to compel witnesses at the hearing" and prohibited efforts to obtain documents from nonparties before that time.[9]

The court disagreed, holding that the FAA did not give the court authority to "interfere with the procedures of the arbitration panel," instead authorizing arbitrators to "conduct such discovery as they find necessary."[10] *Stanton* gave section 7 an expansive reading and seemed to allow arbitrators broad discretion to decide what discovery from nonparties was appropriate.

Six years later, in *Meadows Indemnity Co v Nutmeg Ins Co*,[11] another district court cited *Stanton* with approval, holding that nonparties could be compelled to produce documents prior to the final arbitration hearing. The court reasoned that "[t]he 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."[12] The court further justified its decision by referring to the "sheer number of documents" that needed to be produced in that case, noting that the nonparties were "intricately related to the parties involved in the arbitration" and eventually would have to produce the documents in related litigation anyway.[13]

The Federal Arbitration Act appears to permit a non-party witness' testimony to be taken at an arbitral hearing even if it is not the final hearing on the merits.

In 1995, the next district court to consider the issue also followed *Stanton*. In *Integrity Ins Co v American Centennial Ins Co*, subpoenas were issued to nonparty witnesses for both documents and deposition testimony.[14] The witnesses moved to quash the subpoenas.

3. 9 USC § 7.
4. Id.
5. For example, *Ware v CD Peacock, Inc*, 2010 WL 1856021 *3 (ND Ill); and *Integrity Ins Co v American Centennial Ins Co*, 885 F Supp 69, 73 (SDNY 1995).
6. For example, *Hay Group v EBS Acquisition Corp*, 360 F3d 404, 408 (3d Cir 2004).
7. For example, *Atmel Corp v LM Ericsson Telefon, AB*, 371 F Supp 2d 402, 403 (SDNY 2005).
8. *Stanton*, 685 F Supp 1241, 1242 (SD Fla 1988).
9. Id at 1243.
10. Id at 1242-43.
11. *Meadows*, 157 FRD 42, 45 (MD Tenn 1994).
12. Id.
13. Id at 44, 45.
14. *Integrity*, 885 F Supp at 70.

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The court held that the nonparties could not be compelled to appear for depositions but left standing their obligation to produce documents. Citing the *Meadows* decision, the court reasoned that "[c]ommon sense encourages the production of documents prior to the [final arbitration] hearing so that the parties can familiarize themselves with the content of the documents."[15]

The split among the circuit courts

Against this backdrop, the federal circuit courts began to consider whether and to what extent section 7 authorized document discovery from nonparties. Despite the liberal interpretation of section 7 by the district courts in *Stanton*, *Meadows*, and *Integrity Insurance*, the federal circuit courts have taken a much more restrictive view of arbitral discovery from nonparties.

The fourth circuit allows document discovery under special circumstances. In *COMSAT Corp v National Science Foundation*,[16] the fourth circuit held that the FAA did not grant arbitrators the power to order pre-hearing document discovery or depositions from nonparties. Instead, the court held that "[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."[17]

Despite this seemingly strict decision, however, the fourth circuit held that there is an exception to this rule when a party demonstrates a "special need or hardship."[18] Since *COMSAT* was decided, the only district court in the fourth circuit to consider section 7 found that the "special need or hardship" standard was not met,[19] noting that special need or hardship requires more than a "general desire to conduct discovery."[20]

The eighth circuit allows document discovery from nonparties. The eighth circuit held that document discovery from nonparties was permissible under section 7 in *In re Security Life Ins Co of America*,[21] reasoning that arbitral efficiency is furthered when the parties can review and digest documentary evidence before the arbitration hearing.[22]

The third circuit does not allow any document discovery from nonparties. In 2004, the third circuit disagreed with the eighth circuit's position and held that document discovery was not available under section 7. In *Hay Group Inc v EBS Acquisition Corp*, the court held that "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the nonparty has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."[23]

The second circuit also does not allow document discovery from nonparties. In a 2008 decision, the second circuit agreed with the third circuit that document discovery from nonparties is not permissible under section 7. In *Life Receivables Trust v Syndicate 102 at Lloyd's of London*, the court found the language of section 7 to be "straightforward and unambiguous," and held that it did not authorize arbitrators to issue pre-hearing subpoenas for documents to nonparties.[24]

Several district courts disagree about nonparty document discovery. Several district courts have weighed in on this dispute. The Eastern District of Louisiana and Northern District of Georgia have joined the *Meadows* court in the Middle District of Tennessee in holding that section 7 allows document discovery from nonparties.[25]

Taking the contrary view, the Northern District of Texas and the Northern District of Illinois have held that nonparties cannot be required to produce documents except at an arbitration hearing.[26] Interestingly, a more recent decision held that pre-hearing document discovery is not permissible under section 7 and created a split with *Stanton* in the Southern District of Florida.[27]

Thus, in arbitrations governed by the FAA, the split among the courts may be summarized as follows:

- A party may obtain document discovery from nonparties in the eighth circuit, and there is district court authority for such discovery in the Eastern District of Louisiana, the Northern District of Georgia and the Middle District of Tennessee.
- A party may obtain document discovery from a nonparty in the fourth circuit but only if the party demonstrates a special need or hardship.
- A party may not obtain document discovery in the second or third circuits and faces opposition to such discovery from at least one district court in the Northern District of Texas and the Northern District of Illinois.
- A party faces two conflicting decisions in the Southern District of Florida – one allowing and one *not* allowing document discovery from nonparties.

Some jurisdictions enforce a subpoena for documents. Others do not unless the subpoena directs the witness to bring the documents to a hearing before the arbitrators.

The more recent decision does *not* allow such discovery.

Circumventing the limits on arbitral discovery

In spite of their conclusion that document discovery may not be obtained from nonparties in FAA-governed arbitrations, the second and third circuits have suggested a way to accomplish that very thing. Citing a concurring opinion in *Hay Group*, the second circuit in *Life Receivables* commented that, under section 7, the arbitrators have the power to (1) issue a subpoena to a nonparty; (2) convene a hearing to require that nonparty produce its documents to the arbitrators; and (3) adjourn the hearing, with or without testimony from the wit-

15. Id at 73.
16. *COMSAT*, 190 F3d 269 (4th Cir 1999).
17. Id at 275.
18. Id at 276.
19. See *Gresham v Norris*, 304 F Supp 2d 795, 797 (ED Va 2004).
20. Id.
21. Id, FN1, citing *Security*, 228 F3d 865, 870-71 (8th Cir 2000).
22. *Security*, 228 F3d at 870.
23. *Hay Group*, 360 F3d at 407.
24. *Life Receivables*, 549 F3d 210, 216 (2d Cir 2008).
25. *Festus & Helen Stacy Foundation, Inc v Merrill Lynch, Pierce Fenner & Smith Inc*, 432 F Supp 2d 1375, 1378 (ND Ga 2006); *In re Meridian Bulk Carriers, Ltd*, 2003 WL 23181011 *1-2 (ED La) (also holding that depositions of non-parties were not permitted).
26. *Empire Financial Group v Penson Financial Servs, Inc*, 2010 WL 742579 *3 (ND Tex 2010); *Matria Healthcare, LLC v Duthie*, 584 F Supp 2d 1078, 1083 (ND Ill 2008).
27. *Kennedy v American Express Travel Related Servs Co, Inc*, 646 F Supp 2d 1342, 1344 (SD Fla) (disagreeing with *Stanton*).

ness, after the documents have been tendered.[28]

Under this procedure, the party seeking discovery must convince the arbitrators that the documents justify a hearing. As the second circuit has noted, however, the non-party witness may voluntarily produce its documents before the hearing to avoid the inconvenience of having to appear.[29] Thus, parties to an FAA-governed arbitration may be able to obtain documents from non-parties without difficulty.

The second circuit's suggestion may be applied to testimony as well. On its face, section 7 permits arbitrators to subpoena a nonparty witness to appear before them and to testify. Nothing in section 7 requires that such testimony must be given at the final evidentiary hearing at which the arbitration is decided.

This opens the possibility that, in a proper case, the parties could convince the arbitrator to hold a hearing solely to take testimony from a nonparty witness. Doing so might be justified if the witness had important information that a party needed to prepare its case or was not likely to attend the final arbitration hearing. By agreement or at the direction of the arbitrator, such testimony could become part of the evidentiary record or be available for either party to cite.

The geographic limits on arbitral subpoenas

Arbitral subpoenas are limited in their geographic reach. Section 7 provides the governing principles:

> [The] summons shall issue in the name of the arbitrator[s]...and shall be signed by the arbitrators...and shall be served in the same manner as subpoenas to appear and testify before the court.
>
> [Further,] if any person or persons so summoned to testify shall refuse or neglect to obey said summons [then] 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 [the] arbitrators, or punish said person or persons for contempt.[30]

Stated simply, subpoenas issued by an arbitrator can be enforced by the court in the federal district where the arbitrator sits.

Early interpretation of the subpoena enforcement provisions. The first reported decision to consider the enforcement language in section 7 was *Amgen Inc v Kidney Center of Delaware County, Ltd.*[31] There, Amgen was a party to an arbitration being held in Chicago, and it filed a motion to compel compliance with a subpoena issued to a nonparty witness located in the Eastern District of Pennsylvania.[32] The Pennsylvania district court held that Amgen had filed its motion in the wrong district: "Since the arbitrator in the underlying arbitration is sitting in Chicago, it was incumbent upon Amgen, pursuant to the plain language of Section 7 of the Federal Arbitration Act, to bring its petition to compel compliance in the United States District Court for the Northern District of Illinois."[33]

When Amgen presented its motion to the district court in Chicago, it faced a different problem. The court held that, under section 7, an arbitrator sitting in Chicago had no more power to issue and enforce a subpoena issued to a person located in the Eastern District of Pennsylvania than did a district court in the Northern District of Illinois.[34]

A district court in the Northern District of Illinois could issue and enforce a subpoena to a person within (a) the Northern District; (b) 100 miles of the Northern District; or (c) any place in Illinois where Illinois law permits service of subpoenas.[35] Neither the Northern District of Illinois nor the arbitrator, however, could issue or enforce a subpoena directed to a witness located in Pennsylvania.[36]

The *Amgen* ruling is not surprising, but it reveals a severe limitation on arbitral subpoenas built into section 7. Under Rule 45, a party who has filed suit in the Northern District of Illinois can serve a subpoena on a witness located in some other judicial district or state, so long as the subpoena issues from the district court in which that witness is located and any enforcement proceedings are brought in the district where the witness is located. Under section 7, however, arbitrators can issue subpoenas only from the federal district in which they are sitting, and they must bring any action to enforce their subpoena in that district.

Thus, if the witness is located in a judicial district or state other than the one where the arbitrators sit, they have no power to issue or enforce a subpoena served on that witness.

The circuit split concerning geographic limits. Since *Amgen*, two circuit courts have considered the geographic limits on subpoenas and reached different conclusions. In *Security Life*, the eighth circuit held that the territorial limitation in Rule 45 does not apply to subpoenas for documents issued by arbitrators.[37]

Since that time, one district court in the eighth circuit and one court outside it have applied the holding of *Security Life* and enforced a subpoena for documents outside the territorial limitations of Rule 45.[38]

In *Dynegy Midstream Services, LP v Trammochem*, the second circuit faced the same question and disagreed with the eighth circuit's decision.[39] It reasoned that section 7 specifically states that arbitrator's subpoenas are to be "served in the same manner as subpoenas to appear and testify before the court." Inasmuch as a district court in the Southern District of New York could not issue a subpoena to a witness in Houston, an arbitrator sitting in the Southern District of New York could not do so either.[40]

The second circuit also noted that only the federal court in the district where the arbitrators are sitting may *enforce* subpoenas issued by the arbitrators. Because production of the documents was to take place in Houston, a district court in New York could not entertain enforcement proceedings.[41] In short, the second circuit agreed with *Amgen*, holding that an arbitrator's

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28. *Life Receivables*, 549 F3d at 218; see also *Hay Group*, 360 F3d at 413 (Chertoff concurring); *Guyden v Aetna Inc*, 2006 WL 2772695 *7 (D Conn) (citing *Hay Group*).
29. *Life Receivables*, 549 F3d at 218; *Hay Group*, 360 F3d at 413.
30. 9 USC § 7.
31. 1994 WL 594372 *1 (ED Pa).
32. Id.
33. Id.
34. *Amgen Inc v Kidney Center of Delaware County, Ltd*, 879 F Supp 878, 883 (ND Ill 1995).
35. See FRCP 45.
36. In *Amgen*, the arbitration agreement provided for the arbitration to be held pursuant to the Federal Rules of Civil Procedure. In a decision that has been questioned, the Illinois district court held that this provision permitted the issuance and enforcement of a subpoena nationwide. 879 F Supp at 883. Accordingly, after ruling that section 7 did not authorize the court to enforce the subpoena, the court held that the parties' arbitration agreement, coupled with the Federal Rules of Civil Procedure, did permit enforcement.
37. *Security Life*, 228 F3d at 868.
38. *Festus*, 432 F Supp 2d at 1378; *SchlumbergerSema, Inc v Xcel Energy, Inc*, 2004 WL 67647 *2 (D Minn) (enforcing a subpoena for documents issued by arbitrators in Minnesota to a witness located in New York).
39. *Dynegy*, 451 F3d 89, 94 (2d Cir 2006).
40. Id at 96; see also FRCP 45(b)(2).
41. *Dynegy*, 451 F3d at 95.

power to issue and enforce a subpoena is geographically limited.[42]

Circumventing the geographic limits on arbitral subpoenas

In litigation, an attorney for a party seeking discovery from a witness in Houston would issue a subpoena from the Southern District of Texas. The district court in the Southern District of Texas would then have the power to enforce that subpoena without regard to where the underlying litigation was pending.

In arbitrations governed by the FAA, the situation is different. Except for document-only subpoenas in the eighth circuit, (a) arbitrators sitting in a given judicial district may not have the power to issue a subpoena to someone outside the territorial limits set forth in Rule 45, and (b) the only federal court that can enforce an arbitral subpoena may be the court in the district in which the arbitrators are sitting.

In jurisdictions where they apply, these geographic limits on arbitral subpoenas can be overcome by following the same procedure outlined earlier. The party seeking documents or testimony from a nonparty witness must convince the arbitrators to convene a hearing where the witness is located and to issue a subpoena to the witness from that location.

Furthermore, the subpoena must require the witness to appear and to bring its documents to a hearing before the arbitrators held in the witness' locale. In this way, the arbitrators will be *sitting* in the district from which the subpoena was issued and where compliance will be made.

Pursuant to the plain language of section 7, as interpreted by both the second and third circuits, the local district court should have authority to enforce the subpoena if the nonparty chooses not to comply. In addition, in situations where only documents are sought, the witness may voluntarily produce its documents to avoid the inconvenience of having to appear before the arbitrators.

Conclusion

A party's ability to obtain documents and/or testimony from nonparty witnesses is restricted under the Federal Arbitration Act, but it is still significant. It also varies considerably.

Some jurisdictions enforce a subpoena for documents. Others do not unless the subpoena directs the witness to bring the documents to a hearing before the arbitrators.

No court has held that the FAA authorizes the deposition of a nonparty witness, but the statute appears to permit a non-party witness' testimony to be taken at an arbitral hearing even if it is not the final hearing on the merits. Subpoenas served on non-party witnesses may be subject to territorial limitations, but even then a party might be able to obtain documents and/or testimony from a remote witness if it can persuade the arbitrators to convene a hearing where the witness is located and to receive documents and/or testimony there.

The judicial disagreements about section 7 of the Federal Arbitration Act are usually couched in terms of statutory interpretation, but they also may involve basic policy judgments about the role of arbitration. Arbitration is supposed to be faster and less expensive than traditional litigation, and permitting liberal discovery is generally inconsistent with those goals.

At the same time, arbitration should work in complex cases as well as simple ones. That requires that parties to arbitration have a reasonable opportunity to develop their case and that arbitrators be reasonably well informed when they rule. That means documents and testimony from nonparty witnesses must be available when they are truly needed.

At bottom, the different judicial interpretations of section 7 may be predictable byproducts of courts' effort to reconcile arbitration's goals of being speedy, efficient, and fair. ■

42. Id at 94-95; see also *Legion Ins Co v John Hancock Mut Life Ins Co*, 2001 WL 1159852 *1 (ED Pa) (Pennsylvania court did not have personal jurisdiction over witness refusing to produce documents in Florida pursuant to subpoena issued by Pennsylvania arbitrator), affd 33 Fed Appx 26 (3d Cir 2002).

A Pro-Arbitration Ruling from the High Court: *Rent-A-Center, West, Inc v Jackson*

In *Rent-A-Center, West, Inc v Jackson* (No 09-497), 130 St Ct 2772 (2010), the United States Supreme Court made it harder under the Federal Arbitration Act for employees to avoid arbitration, assuming they've signed an arbitration agreement with a valid delegation provision.

In *Rent-A-Center*, Antonio Jackson filed an employment-discrimination suit against Rent-A-Center in a Nevada Federal District Court. Rent-A-Center filed a motion under the Federal Arbitration Act to force Jackson into arbitration instead, based on the arbitration agreement he signed as a condition of his employment. Jackson argued that the agreement was unconscionable under Nevada law and thus unenforceable. The district court ruled for Rent-A-Center, but the ninth circuit reversed and said that Jackson's case could proceed in district court.

In an opinion by Justice Scalia, the Supreme Court ruled that if a party specifically challenges the validity of an agreement to delegate a decision to an arbitrator under the FAA, the district court would have to hear the challenge. But when, as here, a party challenges the enforceability of the agreement as a whole, the arbitrator hears the challenge, not the court.