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# Legal loopholes: Navigating third-party subpoena restrictions in arbitration pretrial discovery

By Tricia Bigelow

When litigants prepare their cases, they invest considerable effort from the outset, gathering critical evidence in support of their positions. They need to know the good, the bad and the ugly so that they can get their facts straight and prepare their arguments for trial. Litigants expect the trial judge to facilitate these efforts by issuing subpoenas and ordering depositions of anyone who can provide information relevant to any claim or defense.

But when an arbitrator decides the case, different discovery rules apply. Although there is a federal circuit split, the Ninth Circuit and a California Court of Appeal have held that the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA) bar arbitrators from issuing prehearing third-party subpoenas.

Under CAA, prehearing third-party discovery is not allowed unless the arbitration agreement expressly allows it — by specifically referencing Code of Civil Procedure (CCP) section 1283.05 — or the claim involves wrongful death or personal injury.

These limitations can effectively blindside parties to a lawsuit, sidetracking or completely derailing their cases. Critical information in a third party's hand — evidence that can prove or disprove a case — may be out of reach until it is too late. By the time this evidence comes to light, claims have already been asserted and arguments made.

However, with proper planning, this does not have to be the case. Thoughtfully drafted arbitration agreements can allow full and fair pretrial discovery in arbitration.

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**Barriers imposed by the FAA and the CAA**

The FAA addresses the role of arbitrators in discovery as follows: "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 evidence in the case." (9 U.S.C. § 7 (section 7).)

The Ninth Circuit in *CVS Health Corp v. Vividus, LLC* (9th Cir. 2017) 878 F.3d 703, 705 (CVS Health) read this language to mean an arbitrator has no authority to order nonparties to produce documents as part of prehearing discovery. Section 7 gives arbitrators two powers — they may compel the attendance of a person to attend before them as a witness, and they may compel that person to bring with him or them relevant documents. Thus, *CVS Health* concluded, arbitrators have no power to order third-parties to produce documents prior to the arbitration hearing. (*Id.* at p. 708.)

*CVS Health* informed the California Court of Appeal decision in *Aixtron Inc. v. Vecco Instruments, Inc.* (2020) 52 Cal.App.5th 360) (*Aixtron*), a case in which a party to an arbitration proceeding sought prehearing discovery from a nonparty. The parties stipulated to use JAMS Employment Rules, which allowed the arbitrator to "'issue subpoenas for the attendance of witnesses or the production of documents either before or at the hearing.'" (*Aixtron*, at p. 373, fn. 2.) The arbitrator ruled he had the authority under the JAMS rules to issue the prehearing subpoena, and a trial court that was asked to review that ruling allowed the subpoena to issue. The *Aixtron* appellate court reversed, finding there was no right to prehearing discovery under the FAA or the CAA. (*Aixtron, supra*, 52 Cal. App.5th at p. 394.)

The court noted the split of authority in the federal courts of appeals regarding the scope of an arbitrator's subpoena power under section 7 of the FAA, referencing cases out of the Sixth and Eighth Circuits as examples of the holding that "'implicit' in the arbitrator's power under the FAA 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.'" (*Aixtron, supra,* 52 Cal.App.5th at p. 394, citing *In re Security Life Ins. Co. of America* (8th Cir. 2000) 228 F.3d 865, 870-871 and *American Fed'n of Tel. & Radio Artists v. WJBK-TV* (6th Cir. 1999) 164 F.3d 1004, 1009.)

The court rejected this position, however, and adopted the holding of *CVS Health*. (*Aixtron, supra,* 52 Cal. App.5th at p. 395.) The court agreed it was reasonable for the FAA "'to restrict third-party discovery to the disclosures that can be made at a hearing; third parties 'did not agree to [the arbitrator's] jurisdiction' and this limit on document

discovery tends to greatly lessen the production burden'" on nonparties. (*Aixtron*, at pp. 395–396, quoting *CVS Health*, supra, 878 F.3d at p. 708.)

The *Aixtron* court also found that the legislative history of the CAA and case law supported imposing similar limitations on prehearing discovery under CCP section 1282.6. (*Aixtron, supra*, 52 Cal. App.5th at p. 402.) It rejected the notion that arbitrators had broad powers to issue subpoenas in arbitration for purposes of discovery, noting the right to discovery in arbitration under the CAA was "limited" and "highly restricted." (*Ibid.*) Ultimately, the *Aixtron* court concluded that, regardless of whether the agreement was governed by the FAA or the CAA, and because the arbitration agreement before it did not incorporate CCP section 1283.05 or involve personal injury (exceptions discussed below), the arbitrator had no authority to issue the prehearing discovery subpoena to the nonparty. (*Aixtron*, at p. 395.)

*Aixtron* also foreclosed the possibility of relying on the JAMS rules for issuing the subpoenas. (*Aixtron, supra,* 52 Cal.App.5th at pp. 402-405.) The then-current JAMS Rule 21 allowed "subpoenas for the attendance of witnesses or the production of documents either prior to or at a [h]earing . . . in accordance with applicable law." (*Aixtron*, at pp. 404.) Because nonparty discovery subpoenas were not permitted by the FAA or the CAA, and the specific exceptions did not apply, the subpoena was not authorized by law as required by JAMS Rule 21. (*Ibid.*)

Perhaps even more significantly, the *Aixtron* court noted that only the parties to an arbitration had agreed to be bound by the JAMS rules. The court stated, "[T]he arbitration and the application of JAMS rules obtain their legal force based on party consent as reflected in the terms of the arbitration agreement or statutes that authorize limited discovery in arbitration." Because the nonparty did not consent to be bound by the JAMS rules, the arbitration agreement did not authorize discovery from the nonparty. (*Aixtron* at p. 404.)

In conclusion, the *Aixtron* court held the arbitrator's prehearing discovery subpoena for the nonparty's business records and computers was not authorized under the FAA, the CAA, or the JAMS rules. (*Aixtron* at p. 404.) And there is no workaround: A bifurcated prehearing with the arbitrator and the third party for the purpose of satisfying the "hearing" requirement of CCP section 1282.6 has been found unavailing. (*McConnel v. Advantest America* (2023) 92 Cal.App.5th 596, 612-613.)

**Overcoming the CAA barriers**

Notably, the *Aixtron* court observed that parties could avail themselves of the benefits of prehearing third-party subpoenas if they included CCP section 1283.05 in their arbitration agreements. (*Aixtron, supra*, 52 Cal.App.5th at p. 879; see also *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83, 105.) That section defines the scope of third-party discovery available under the CAA, and it allows parties to take depositions and obtain discovery on the subject matter of the arbitration, invoking the same rights as if it were a case pending before a court. Indeed, many arbitrators allow parties to stipulate to including CCP section 1283.05 in the agreement even after receiving a case for arbitration.

Further, CCP section 1283.05 has also been held to apply to claims involving personal injury or wrongful death. Under CCP section 1283.1, subdivision (a), "All of the provisions of Section 1283.05 shall be conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another."

In *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* ((2008) 44 Cal.4th 528, 535), the plaintiff brought a personal injury action based on medical care and treatment he received. After the case was compelled to arbitration, the plaintiff requested production of documents from a nonparty, who claimed the documents were privileged. (*Id.* at p. 532.) The California Supreme Court upheld the Court of Appeal's decision that an arbitrator has statutory authority to enforce discovery subpoenas against a nonparty in personal injury cases under CCP section 1283.05. (*Ibid.*)

Given that more generous discovery provisions apply to personal injury claims, it is important to remember which claims may qualify as personal injury for purposes of CCP section 1283.1. For example, in *Bihun v. AT & T Information Systems, Inc.* ((1993) 13 Cal.App.4th 976), the court found a sexual harassment claim under the Fair Housing and Employment Act was properly characterized as a personal injury. Similarly, in *O'Hara v. Storer Communications, Inc.* ((1991) 231 Cal.App.3d 1101), the court held that a defamation action was a claim for personal injury.

**Overcoming the FAA Barriers**

Perhaps the best way around the FAA ban is to draft an arbitration agreement that is generally governed by the FAA but includes an explicit exception that applies the laws of a different jurisdiction, such as California, for prehearing third-party discovery (and that references CCP section 1283.05 or the law of another jurisdiction that is similarly permissible).

Even post-*Aixtron*, an arbitrator might allow the parties to stipulate or amend an agreement to stipulate that the FAA does not apply to discovery. If all else fails, the parties can also try to resolve the discovery dispute with the third party.

**Conclusion**

Pretrial discovery is critical, whether a case ends up in court or before an arbitrator. Litigants should therefore take every opportunity to obtain and evaluate evidence in advance of a proceeding. If they want full and timely pretrial access to all valuable information for every type of claim, parties must carefully draft their arbitration agreements or work with counsel and their arbitrator to ensure they have access to the discovery they deserve.

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