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In This Issue

Michael J. Faley is an associate at the law firm of Crisham & Kubes, Ltd. and former law clerk to Justice John J. Bowman of the Illinois Appellate Court. In this month's article, Mr. Faley discusses the shortcoming of third-party discovery under the Federal Arbitration Act.

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Third-Party Discovery - A Downside of the Federal Arbitration Act

By Michael J. Faley, Esq.¹

Parties turn to arbitration for a quicker and more cost-effective means of dispute resolution. Indeed, the arbitration process offers many advantages over the formality, protraction, and vexation often created by litigating in court. However, as many experienced attorneys can attest to, not every case is a perfect fit for arbitration. For all of its advantages, arbitration also has its shortcomings. In particular, third-party discovery sometimes becomes problematic.

Third parties often resist an arbitrator's subpoena for discovery of documents or for a deposition because they question the arbitrator's power to compel their compliance. Frequently, the third parties' recalcitrance is supported by a large body of case law that precludes prehearing discovery under the Federal Arbitration Act (FAA).

The FAA governs arbitration involving interstate transactions.² Section 7 of the FAA permits the parties to obtain discovery from third parties.³ It provides that an arbitrator "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 evidenced in the case."⁴

A split in authority has developed regarding whether the parties to the arbitration can compel a third party to comply with an arbitrator's subpoena for prehearing discovery of documents or a prehearing deposition. Courts find that Section 7 is problematic because it does not expressly empower an arbitrator to order

