

## FEDERAL ARBITRATION ACT PREEMPTS TRIAL RULE 28(E)

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Can a party arbitrating an action pursuant to the Federal Arbitration Act ("FAA") use Trial Rule 28(E) to subpoena an Indiana resident? On January 12, 2001, the Indiana Court of Appeals said, "No," in *In re the Subpoena Issued to Beck's Superior Hybrids, Inc.*, Case No. 29A05-1008-MI-48.

In 2002, Monsanto entered into a contract with DuPont and, pursuant to that contract, any disputes between the parties were to be resolved by arbitration in New York City. In May 2009, Monsanto demanded arbitration and the arbitration panel issued a subpoena *duces tecum* to Beck's, ordering Beck's to appear at a preliminary hearing, in Indiana, before one of the panel members and to produce business records relating to Monsanto's arbitration claim. Beck's refused to comply with the subpoena, arguing that the FAA required Monsanto to seek enforcement of its nonparty subpoena in "the United States district court for the district" in which the arbitration panel was sitting, the Southern District of New York. Monsanto then filed a petition to assist in the Hamilton Superior Court, pursuant to Indiana Trial Rule 28(E), to compel Beck's to comply with the subpoena. The trial court agreed with Monsanto and ordered Beck's to comply with the arbitration panel's subpoena.

On appeal, the Court held that Section 7 of the FAA is unambiguous: to enforce an arbitration panel's subpoena against a nonparty, the party seeking enforcement must file its petition "in the United States district court for the district" where the arbitration panel, or a majority of its members, is sitting. Although an arbitration panel has relatively broad power to issue a subpoena, "the authority of an arbitration panel to issue a nonparty subpoena is not equivalent to the authority to enforce that subpoena." Because Section 7 is clear, "the attempt to use an Indiana trial rule when a federal forum is unavailable frustrates Congress' intent to limit these petitions to the federal courts."

In sum, Monsanto's use of Trial Rule 28(E) conflicts with Section 7's purposes and objectives. The plain language of Section 7 establishes a specific procedure for the enforcement of an arbitration panel's subpoena to a nonparty: the party seeking compliance must "petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting," and that court then "may compel the attendance of such person or persons before said arbitrator or arbitrators." The text of the law is the beginning and the end of our analysis.

While that language may in some cases, such as this one, create a "gap in enforceability," federal case law persuasively demonstrates that such "gaps" were an intentional policy choice by Congress. Monsanto may not use an Indiana trial rule to circumvent the jurisdictional and territorial limitations intended by Congress. Accordingly, the trial rule must yield to the federal statute.

In this decision, the Court stuck strictly to the language of the statute and resisted Monsanto's many and varied attempts to avoid this strict statutory construction. The Court's statement in the above-quoted section that the statute is the beginning and end of the analysis will surely be attractive to those attempting to construe statutes strictly.

### Lessons:

1. A party arbitrating a dispute under the Federal Arbitration Act may only have a subpoena issued from the district in which the arbitration is taking place.
2. A party arbitrating a dispute under the Federal Arbitration Act may not use Trial Rule 28(E) to enforce a subpoena.