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Pre-Arbitration Discovery: Turn to State Law Where the Federal Rules are Inadequate

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As discussed in an **earlier post**, obtaining discovery from a non-party to an arbitration often is easier said than done. Depending on the law of the place of arbitration, arbitrators may not be able to compel document production or testimony from a non-party before a hearing on the merits. This can impair a claimant's ability to prove its claims considerably, or in some cases altogether inhibit a potential claimant from learning the facts necessary to identify the correct respondent(s) or to articulate a competent claim. Moreover, while Fed. R. Civ. P. 27 permits pre-action discovery to "perpetuate testimony regarding [a] matter that may be cognizable," many federal courts have interpreted the phrase "perpetuate testimony" to mean that Rule 27 may only be used to "preserve testimony which could otherwise be lost," rather than as a "substitute for discovery." *Ash v. Cort*, 512 F.2d 909, 912 (3d Cir. 1975); *accord Bryant v. Am. Fedn. of Musicians of the United States*, 666 Fed. Appx. 14, 16 (2d Cir. 2016); *In re Allegretti*, 229 F.R.D. 93, 96 (S.D.N.Y. 2005) ("[Rule 27] is not a method of discovery to determine whether a cause of action exists; and, if so, against whom the action should be instituted.")).

However, potential claimants may turn to state law in certain jurisdictions to facilitate much-needed pre-arbitration discovery. Savvy practitioners may also be able to leverage such procedural tools to obtain non-party discovery concerning the merits of their clients' claims.

New York's Civil Practice Law and Rules ("CPLR") § 3102(c) affords one such tool. The statute provides:

> Before an action is commenced, disclosure to aid in bringing an action, to preserve information *or to aid in arbitration*, may be obtained, but only by court order. The court may appoint a referee to take testimony.

CPLR 3102(c) (emphasis added). The Rule envisions commencement of a special proceeding for the purpose of obtaining such an order. *See, e.g.*, *Matter of VTrader Pro LLC*, 24 Misc. 3d 828, 829 (Sup. Ct. N.Y. Co. 2009). And notably, it does not impose any limits on the scope or type of disclosure generally available under New York law. *See Matter of Barillaro v. City of New York*, 53 Misc. 3d 307, 310 (Sup. Ct. Bronx Co. 2016).

Despite its relatively infrequent use for obtaining pre-arbitration discovery, CPLR 3102(c) can be an effective tool to gain information from non-parties and putative parties that are subject to the jurisdiction of New York courts. For example, it is well settled that CPLR 3102(c) can be used to obtain "information as to the identity of potential defendants/respondents against whom an action/arbitration may exist." 24 Misc. 3d at 830 (citing *Matter of Alexander v. Spanierman Gallery, LLC*, 33 A.D.3d 411, (1st Dep't 2006)); *see Stewart v. New York City Transit Auth.*, 112 A.D.2d 939, 940 (2d Dep't 1985); *Urban v. Hooker Chemicals & Plastics Corp.*, 427 N.Y.S.2d 113, 114 (4th Dep't 1980) (affirming order directing that Hooker Chemicals disclose the identities of "all persons and corporations involved with the design, construction, use, maintenance, covering, and closing of the Love Canal dump site and all written records relating to Hooker's disposal of chemical wastes at the Love Canal.").

Although New York courts generally prohibit a potential claimant's use of CPLR 3102(c) to determine *if* it has a cause of action, pre-action disclosure is nonetheless available to help the prospective claimant to "frame his complaint," so long as it can make a *prima facie* showing that it has a right to redress. *Urban v. Hooker Chemicals & Plastics Corp.*, 427 N.Y.S.2d 113, 114 (4th Dep't 1980). *See also Liberty Imports v. Bourget*, 146 A.D.2d 535, 537 (1st Dep't 1989) ("Thus, while a preaction examination may be appropriate to facilitate accurate pleading, it is not permissible as a fishing expedition to ascertain whether a cause of action exists."); *Wein v. Malkin L.L.P. v. Wichman*, 680 N.Y.S2d 250, 250 (1st Dep't 1998). In other words, an applicant can use Rule 3102(c) to "determine the form or forms which the action should take" by discovering information needed to articulate suitable causes of action. *Stewart*, 112 A.D.2d at 940.

For example, in *In re Houlihan-Parnes, Realtors*, the Appellate Division (an intermediate appellate court) affirmed an order directing that Cantor Fitzgerald appear at a deposition to aid a petitioner in determining

whether, in addition to an action for the reasonable value of its services, "it [had] a cause of action for fraud and deceit and for intentional interference with its contractual rights." 58 A.D.2d 629, 630 (2d Dep't 1977). In a similar vein, in *Hughes v. Witco Corporation-Chemprene Division*, the Appellate Division reversed an order that denied a petitioner's request to inspect a piece of machinery that had injured her at her workplace. 175 A.D.2d 486, 487 (3rd Dep't 1991). The court held that such pre-action discovery was necessary to enable the petitioner "to discover the precise facts needed to draft the pleadings," including "how the accident occurred, if that was indeed the machine which caused her injuries, and to ascertain the identity of the manufacturer and designer." *Id.*

Finally, while New York courts have been more reticent about ordering pre-action disclosure in aid of arbitration rather than litigation, there is recent movement away from this practice. *See, e.g.*, *Matter of Cusimano v. Strianese Family Ltd. P'ship*, 2010 N.Y. Misc. LEXIS 4846, at *4-7 (Sup. Ct. Nassau Co., Oct. 5, 2010) (directing deposition pursuant to CPLR 3102(c) in order to preserve testimony). This is particularly noticeable in connection with insurance arbitrations, where courts regularly grant stays of arbitration to permit discovery under Section 3102(c). *See, e.g., Government Empls. Ins. Co. v. Adorno*, 2012 N.Y. Misc. LEXIS 1682 (Sup. Ct. N.Y. Co., Apr. 10, 2012) (staying arbitration so that automobile insurance company could seek medical records and an independent medical exam of the insured could be conducted); *Matter of New York Cent. Mut. Fire Ins. Co. v. Serpico*, 45 A.D.3d 598 (2d Dep't 2007) (reversing order and granting stay of arbitration so that insurance company could conduct pre-arbitration discovery); *Nationwide Affinity Ins. Co. (Lopez)*, 2017 N.Y. Misc. LEXIS 1883 (Sup. Ct. Suffolk Co., Apr. 4, 2017).

Though the application of NY CPLR 3102(c) in connection with anticipated arbitration is limited, parties who need information from individuals and organizations that are amenable to discovery in New York in order to commence an arbitration, and those who have obtained stays of arbitration, should consider using such State law to develop facts and to obtain evidence needed for the initial prosecution or defense of their cases.

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