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# HOMECOURT ADVANTAGE: PITFALLS, CHALLENGES AND OPPORTUNITIES REGARDING NONPARTY WITNESS SUBPOENA MOTION PRACTICE IN FEDERAL DISTRICT AND BANKRUPTCY COURT

May 3, 2017

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Practitioners Beware: When a client located in the state in which you practice law is served with a subpoena from a federal court located in another state, **only** the relevant federal court in your state (whether district or bankruptcy court) can adjudicate a motion to quash or otherwise modify the subpoena. A recent decision from a Colorado bankruptcy court, In re SBN Fog Cap II, LLC, 562 B.R. 771 (Bankr. D. Colo. 2016), explains that under Rule 45 of the Federal Rules of Civil Procedure, the "issuing court" is the court where the litigation is pending, but only the court in the "place of compliance" (i.e., the court in the state where the client-witness is located) has the authority to adjudicate a motion to quash or otherwise modify the subpoena. For example, if a district court in Georgia issues a subpoena for a non-party witness located in Miami, only the U.S. District Court the Southern District of Florida (located in Miami) can entertain a challenge by the non-party witness to the subpoena. In this example, a good argument can be made based upon SBN Fog Cap that if counsel for the non-party witness in Miami seeks to challenge the subpoena in the "issuing court" in Georgia, that court lacks the authority to adjudicate the motion, and the non-party witness must refile the motion in the U.S. District Court the Southern District of Florida (located in Miami). This outcome was not the case under the prior version of Rule 45 (modified effective December 1, 2013) which, unlike the current version of the Rule, did not clarify the roles of the "issuing court" and the "compliance court" as explained by Judge McNamara in SBN Fog Cap. Under the old version of the Rule, new miscellaneous matters had to be opened in the jurisdiction where the respondent to the subpoena resided (i.e., the location of the non-party witness) so that the federal court there could issue the subpoena. But that is no longer necessary, as the court where the action is pending can under Rule 45 issue a subpoena to a non-party located in another state, but efforts to challenge that subpoena can only be brought in the court whose jurisdiction covers the non-party witness. The SBN Fog Cap opinion is short, but well worth a read to avoid expending significant time and money and being told to go back home by the court which issued the subpoena—that is, the "issuing court."

For more information about this topic, please contact the authors, Paul Avron and Ilyse Homer, on the firm's Business Reorganization Team.

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