The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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THIRD CIRCUIT DEFINES "EVIDENT PARTIALITY"
Freeman v. Pittsburgh Glass Works, LLC
2013 WL 811884 (Third Circuit)
(March 6, 2013)

The Federal Arbitration Act ("FAA") allows courts to vacate an arbitration award "where there was **evident partiality** or corruption in the arbitrators, or either of them."[2] Some courts, including Texas courts, have interpreted "evident partiality" in arbitrator non-disclosure cases to occur "if [the arbitrator] does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality."[3] This standard has been further explained by the Texas Supreme Court to mean that "evident partiality" is "established from the *nondisclosure itself*, regardless of whether the nondisclosed information necessarily establishes partiality or bias."[4] This view (known as the "appearance [of bias] standard") is founded on the plurality opinion of Justice Black in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 3 01 (1968).[5] The broad scope and subjectivity of this disclosure standard creates an almost impossible disclosure burden for the arbitrator and admittedly has nothing to do with whether or not the arbitrator in question was **actually biased** in any given case.

But very recently, the Third Circuit was asked to examine a federal district court's decision to deny a losing arbitration party's motion to vacate based on "evident partiality."[6] The sole neutral arbitrator, a former trial court judge and unsuccessful candidate for the Pennsylvania Supreme Court, was accused by the losing arbitration party of not disclosing at the time of her appointment that (1) a minority owner of the winning party had previously contributed to the arbitrator's unsuccessful campaign for the Pennsylvania Supreme Court and (2) she had co-

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] 9 U.S.C. §10(a)(2)(emphasis added).

[3] *Burlington N.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 636 (Tex. 1997).

[4] Ibid.

[5] Urging "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149 (plurality).

[6] 9 U.S.C. §10(a)(2).

taught a law school seminar on labor law with a senior employment lawyer in the same minority owner's company.

On appeal the Third Circuit indicated that "the first order of business is to define 'evident partiality'." The losing arbitration party argued that these two words established the same standard as the "disqualification standard for federal judges" - the "appearance of bias" standard.[7] The winning arbitration party argued for a less restrictive standard for "evident partiality."

After recognizing the need for a definition of "evident partiality," the court jumped immediately into a discussion of Justice Black's "plurality opinion" in *Commonwealth Coatings* contrasted with Justice White's concurring opinion.[8] Justice White's "much narrower rule" stated that "arbitrators must tell the parties about any 'substantial interest [they have] in a firm' that does business with one of the parties."[9] The Third Circuit then concluded that Justice White's concurrence is the "narrowest grounds for judgment [in *Commonwealth Coatings*], which means that it is the holding of the [U.S. Supreme] Court."[10] As a result of this interpretation of *Commonwealth Coatings*, the court ultimately states its evident partiality standard as follows: "An arbitrator is evidently partial **only if** a reasonable person would have to conclude that she was partial to one side. The conclusion of bias must be ineluctable,[11] the favorable treatment unilateral."[12]

The Third Circuit reminded the parties that it had stated in footnote 30 of its decision in *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1523 (3d Cir.1994) this same "evident partiality" standard but never before "in a precedential opinion."[13] "Evident partiality," the court explained in *Kaplan*, "is strong language and requires proof of circumstances powerfully suggestive of bias."[14] The Third Circuit's footnote 30 in *Kaplan* also states:

> "In order to show 'evident partiality,' 'the challenging party must show '*a reasonable person would have to conclude that the arbitrator was partial*' to the other party to the arbitration.' [omitting *Apperson* citation].[15] 'Evident partiality' is **strong language** and requires proof of circumstances 'powerfully suggestive of bias'."[16]

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[7] 28 U.S.C. §455(a); see *Liteky v. U.S.*, 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (Interpreting §455(a) to say that "...what matters is not the reality of bias or prejudice but its **appearance**.") (Emphasis Added.).

[8] 2013 WL 811884, *7—8.

[9] 2013 WL 811884, *8.

[10] 2013 WL 811884, *8, citing *Positive Software Solutions v. New Century Mortg. Corp.* 476 F.3d 278, 280-285 (5th Cir.2007)(en banc).

[11] An adjective from a compound Latin word "[not] to struggle clear of"; "not to be avoided, changed, or resisted"; with a synonymous cross-reference to "INEVITABLE." *Merriam-Webster's Collegiate Dictionary*, 11th Ed., page 638.

[12] 2013 WL 811884, *9, *citing Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998) ("The alleged partiality must be direct, definite, and capable of demonstration.") (emphasis added).

[13] *Id.* ("To show evident partiality the challenging party must show a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration.").

[14] *Id.*

[15] *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 533 (1990).

[16] *Kaplan*, 19 F.3d at 1523fn30, *citing Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 529, 78 L.Ed.2d 711 (1983), *mandate modified*, 728 F.2d 943 (7th Cir.1984) (emphasis added).

Only at this point does the Third Circuit return to a discussion of its definition of "evident partiality" and observes that its standard "requires a stronger showing – namely, partiality that is evident – than does the appearance standard ...."[17] "Evident," to the Third Circuit, "requires more than a vague appearance of bias."[18] In contrast to the judicial bias standard,[19] the FAA "evident partiality" standard requires that "the arbitrator's bias must be sufficiently obvious that a reasonable person would easily recognize it."[20] The *Kaplan* standard applies to both "so-called actual-bias cases (where the relevant facts were known and objected to beforehand)" as well as to "nondisclosure cases (where the relevant facts were not disclosed)" because the FAA "does not distinguish between actual-bias and nondisclosure cases – instead, it condemns 'evident partiality' in all cases."[21]

The following federal circuits have adopted "evident partiality" standards that appear to be approximately similar, if not identical, to the Third Circuit's *Kaplan* standard: First, Second, Fourth, Fifth,[22] Sixth, and Seventh.[23] Although the Texas General Arbitration Act uses the identical phrase "evident partiality,"[24] the Texas Supreme Court still applies the "appearance" standard, although Justices Enoch, Spector, and Abbott dissented from the seminal Texas case on "evident partiality" in favor of the *Kaplan* standard.[25]

OBSERVATIONS

1. Arbitrators should not read *Freeman* to allow any less strenuous efforts to disclose "any interest or relationship likely to affect impartiality or which might create an appearance of partiality."[26]

2. Arbitrators should continue to evaluate what interests and relationships to disclose based on appearances in the eyes of the parties rather than the eyes of the potential arbitrator.

3. The "appearance of bias" standard is highly subjective by definition as indicated by operative words in the standard of "might," "impression," and "possible."

4. The "appearance of bias" standard also ignores the "evident" in "evident partiality."

5. "Evident partiality" should require "ineluctable" bias that treats one arbitration party more favorably than the other arbitration parties with this "unilateral" bias demonstrated to be "direct" and "definite."[27]

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[17] 2013 WL 811884, *9.
[18] *Id.*
[19] 28 U.S.C. §455(a).
[20] *Id.*
[21] 2013 WL 811884, *10.
[22] *See Positive Software Solutions v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (5th Cir.2007)(en banc).
[23] 2013 WL 811884, *8; *TUCO*, 960 S.W.2d at 633-34.
[24] Tex. Civ. Prac. & Rem. Code §171.088(a)(2)(A).
[25] "I would hold that under this test, a neutral arbitrator need not disclose a circumstance that arises after the proceedings begin unless a reasonable person could believe the circumstance creates actual bias on the part of the arbitrator." *Burlington N.R. Co. v. TUCO, Inc.*, 960 S.W.2d 629, 640 (Tex.1997).
[26] Canon II, *The Code of Ethics for Arbitrators in Commercial Disputes* (March 1, 2004).

6. Texas courts should adopt the *Freeman* evident partiality standard so that losing arbitration parties are not encouraged to neglect their duty to investigate a potential arbitrator's interests and relationships related to a pending arbitration.

7. Texas courts should also adopt an express duty to investigate all potential arbitrator's interests and relationships.

[27] 2013 WL 811884, 9.