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WAIVER OF BIAS COMPLAINTS IN ARBITRATION

The Dallas Court of Appeals, in a case decided August 20, 2012, held that a litigant in arbitration who had information relevant to its post arbitration claim of "evident bias" **waives** that argument by failing to object to bias during the arbitration process. *Ponderosa Pine Energy, LLC v. Tenaska Energy, Inc.*, No. 05-10-00516-CV, 2012 Tex. App. LEXIS 6915 (Tex. App. Dallas Aug. 20, 2012, nph). The Fifth Circuit reached a similar conclusion a week earlier in *Dealer Computer Servs. v. Michael Motor Co*., No. 11-20053, 2012 U.S. App. LEXIS 17162 (5th Cir. Tex. Aug. 14, 2012) (unpublished).

Post-arbitration claims of "evident bias" have been increasingly popular tools used by unsuccessful litigants in arbitration to escape the results of that process. These Courts, applying the Federal Arbitration Act, have re-affirmed that, because arbitration is founded upon a voluntary agreement and is intended to expedite the resolution of the dispute, at minimal cost to the litigants, the Court's review is necessarily limited. For this reason, where the complaining party should have known of a relationship, or could have learned of the relationship, between the Arbitrator and the opponent, the complaint about that relationship is *waived* if not made during the arbitration process itself, prior to the final award.

FACTS OF THE CASES

In *Dealer Computer Servs*. the parties had an agreement whereby Dealer Computer Services would service Michael Motors' computer under a "no-charge replacement" program pursuant to the contract. The contract contained an arbitration clause, requiring the parties to resolve disputes in accordance with the commercial rules of the American Arbitration Association. Dealer Computer Services later announced to its customers that it would require them to upgrade to a new server, due to software changes, to continue service. Michael Motors objected to this and demanded arbitration, claiming that Dealer Computer Services was obligated to replace the system.

This arbitration was before a three-member panel, each litigant choosing an arbitrator, the two chosen picking a third. In the initial disclosure for Dealer Computer Services' arbitrator, communicated to both parties via e-mail, she indicated that she had served on a panel of arbitrators in a prior case for Dealer Computer Services, but apparently did not disclose that the former arbitration involved similar issues and the same expert. The AAA disclosure form did not overtly call for this information. But Michael Motors complained that she had an ethical duty under the AAA rules to disclose it and argued that it only learned the details of the prior arbitration after losing its case. The Fifth Circuit disagreed and ruled that Michael Motors had enough information to raise whatever challenge it wanted before the arbitration.

In *Ponderosa Pine Energy*, the case again concerned a panel of arbitrators. Tenaska Energy's appointed arbitrator had a tenuous business relationship with the firm representing it. The case arose out of the sale of a power plant to Ponderosa Pine Energy by Tenaska Energy. The purchase agreement contained an arbitration clause. The parties disputed whether Tenaska Energy had to indemnify Ponderosa Pine Energy. The trial court vacated the award for Tenaska Energy on the ground that partiality of an arbitrator was shown. After initial disclosure by the Arbitrator, Ponderosa Pine Energy sought additional disclosure because it revealed some contacts with the law firm involved, but not with the party itself. In response the arbitrator answered that he had nothing further to disclose.

The arbitrator did have a relationship with a legal service business that was seeking to do business with Tenaska Energy's lawyers. The arbitrator facilitated meetings between that business and the lawyer. Ponderosa Pine Energy ultimately complained that these were inadequately disclosed. The Court of Appeals disagreed and reversed the trial court's vacatur of the arbitration award, holding that the complaint was *waived*.

THE COURTS' DECISIONS

Both Courts concluded that the complaints were waived. *Dealer Computer Services* held that the disclosures, though vague, were sufficient to put Michael Motors on notice of a potential conflict and pointed out that "arbitrating parties have a reasonable duty to investigate information of potential partiality." *Dealer Computer Servs.* at LEXIS *11 n.4 (citation omitted).

The Fifth Circuit concluded that sufficient disclosures were made to provide Michael Motors with notice of the potential bias about which it later complained and that it should have raised its objection prior to receiving an adverse result. Because it did not, its objections were *waived*. *Id*. at *12.

In *Ponderosa Pine Energy*, the Court explained that a prospective arbitrator exhibits "evident partiality" if he does not disclose facts that might, to an objective observer, create a reasonable impression of the arbitrator's partiality. *Ponderosa Pine Energy*, 2012 Tex. App. LEXIS 6915 at *30, citing *Burlington N. R.R. v. TUCO, Inc*., 960 S.W.2d 629, 636 (Tex. 1997).

But "[a] party that learns of a basis for objecting to an arbitrator must promptly object in the arbitration proceeding to avoid waiving the complaint." *Ponderosa Pine Energy* at *33, citations omitted. Furthermore, a "party intentionally and knowingly relinquishes its right to complain of an arbitrator's partiality if the arbitrator divulges information 'sufficient to place [the party] on notice of the facts giving rise to what [it] now contend[s] is a reasonable possibility of partiality.'" *Id*. at *34, citations omitted.

In *Ponderosa Pine Energy* the arbitrator had disclosed information about his prior arbitrations with the firm involved, but did not specifically identify the persons involved. Moreover the Arbitrator disclosed that he had been involved with connecting the law firm to the services company, though he did not disclose details about his relationship with it.

The Court concluded that this was more than enough to allow Ponderosa Pine Energy to inquire further to learn the details it later acquired. Though the information that Ponderosa Pine Energy had from initial disclosures was incomplete, that "information failed to even pique appellees' curiosity at the time the information was disclosed. After the award, however, [the Arbitrator's] relationship gained significance that triggered an investigation and ultimately became the basis for an evident partiality challenge." Id. at 43.

The complaint was simply waived.

WHAT DOES THIS MEAN?

The lesson that parties and lawyers ought to take away is that Courts, both federal and state, do not look kindly upon attempts to vacate an arbitration award based on claimed bias of the arbitrator – especially if that alleged bias is based on facts disclosed, or even suggested by disclosures, prior to the final award.

Arbitration is a voluntary process and parties to it have an obligation to verify that it is conducted according to their agreements. Failure to do so results in waiver of the complaint.

Parties will need to be vigilant in investigating the arbitrator prior to arbitration. Generally, it'll be too late to do it afterwards.








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