News & Developments

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District Court's Mid-Arbitration Intervention Clear Error

In the middle of an ongoing arbitration, a federal district court took the extraordinary step of disqualifying the parties' arbitrator. *In re Sussex*, 781 F.3d 1065 (9th Cir. 2015), the Ninth Circuit Court of Appeals issued a writ of mandamus vacating the trial court's order. In doing so, the court distanced itself from its ruling in *Aerojet-General Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973), which observed that judicial intervention in ongoing arbitrations may occur in "extreme cases."

In *Sussex*, the American Arbitration Association (AAA) appointed Brendan Hare, an attorney, to arbitrate disputes that condominium purchasers had brought against a developer. 781 F.3d at 1069. At about the time the third of the three related disputes was consolidated before Hare (about one year after Hare's appointment), he started a litigation-finance business—a business that fronts litigation costs for a stake in the outcome. In promoting his new venture, Hare stated that he invests in "high-value, high-probability legal claims and litigations." After beginning his business, Hare completed a new disclosure form for the AAA, but never disclosed the new venture's existence.

The defendant asked the AAA to disqualify Hare, arguing that Hare had an incentive to issue a "high-value" award to the plaintiffs to promote his business—a business that had nothing but a website. While the AAA considered whether to disqualify Hare (which it ultimately refused to do), the defendant filed motions to disqualify Hare in state and federal courts. After some litigation in the state court, the parties agreed to use a different arbitrator in one case. But, relying on the Ninth Circuit's *Aerojet* decision, the federal district court granted the motion to disqualify Hare from the other two proceedings.

In *Aerojet*, the Ninth Circuit found that interim judicial review "should be indulged, if at all, only in the most extreme cases." *Aerojet,* 478 F. 2d at 251. The district court determined that*Sussex* was an "extreme case" because: (a) The defendant would likely prevail on a motion to vacate the arbitration award due to Hare's evident partiality; and (b) disqualifying the arbitrator immediately would avoid repeating the arbitration in the future. *In re Sussex,* 781 at 1070. The Ninth Circuit disagreed and issued a writ of mandamus directing the district court to vacate its order.

Unlike the majority of *other* circuits, which prohibit judicial intervention during an arbitration, the Ninth Circuit's *Aerojet* decision leaves open the possibility of intervention in "extreme cases." However, neither the *Aerojet* court, nor any other panel of the Ninth Circuit has ever found an "extreme case" existed. And *Sussex* would not be the first.

In deciding whether to issue a writ of mandamus, the appellate court focused on one factor—whether the trial court committed clear error in finding Hare partial. Cases finding evident partiality of an arbitrator have involved "direct financial connections between a party and an arbitrator or . . . a concrete possibility of such connections." Conversely, evident partiality does not exist where undisclosed facts relate to attenuated or insubstantial connections between a party and an arbitrator. Here, the Ninth Circuit found Hare's potential ability to profit from a large award to the plaintiffs was, at best, attenuated or insubstantial.

Moreover, even if Hare's undisclosed business created a reasonable impression of partiality, the appellate court rejected the district court's finding that avoiding delays and expenses from a second arbitration warranted Hare's disqualification. The Ninth Circuit reiterated its view that "mere cost and delay" is inadequate to warrant interim collateral review.

Although the Ninth Circuit did not reverse *Aerojet's* "extreme case" exception to judicial intervention in an arbitration, this exception's viability now is in serious doubt.

The defendant filed a petition for a writ of certiorari before the U.S. Supreme Court, which is scheduled for conference on September 28, 2015.

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