Arbitrator Partiality: Disclosure Obligations and Timeliness of Objections

By Amy D. Sells, Tiffany & Bosco, P.A.

In its recent opinion, *Fisher* v. USAA Casualty Insurance Company, 1 CA-CV 17-0589, ___ P.3d ___, 2018 WL 3804114, at *1 (App. Aug. 7, 2018), the Arizona Court of Appeals examined arbitrator partiality under Arizona's Revised Uniform Arbitration Act, A.R.S. § 12-3001 et seq., including:

- What constitutes a "substantial relationship" with a party, triggering an arbitrator's duty to disclose the relationship?

- What constitutes a "timely objection" to the appointment or continued service of an arbitrator based on impartiality of the arbitrator?

In this case, the Fishers submitted an underinsured motorist claim with their insurer, USAA. Pursuant to the underinsured motorist policy, the claim was submitted for arbitration before a single arbitrator. One day prior to the arbitration hearing, the Fishers' counsel advised them that the arbitrator often served as an arbitrator for Jones Skelton & Hochuli ("JSH," the law firm representing USAA), and that this business relationship could compromise the arbitrator's neutrality. The Fishers proceeded with the arbitration, failing to raise the issue of partiality until after the arbitration award was entered. The Fishers unsuccessfully moved the superior court to vacate the arbitration award on grounds of impartiality under A.R.S. § 12-3012.

Under A.R.S. § 12-3012(E), an arbitrator does not have a duty disclose the number of times she has served as an arbitrator in other matters for the parties' counsel.

On appeal, the Fishers argued that they were entitled to a presumption of partiality under A.R.S. § 12-3012(E) because the arbitrator did not disclose an existing relationship with USAA's counsel. Subsection E provides that an arbitrator is "presumed to act with evident partiality" if the arbitrator does not disclose a "known, existing and *substantial* relationship with a party." A.R.S. § 12-3012(E) (emphasis added.) The Court held that that the number of times that a person has served as an arbitrator for a particular law firm does not alone establish a "substantial relationship" that would require disclosure under A.R.S. § 12-3012(E).

Parties who know or have reason to know of possible partiality must raise an objection with the arbitrator during the course of the arbitration proceeding, or the objection is waived.

Pivotal to the Fishers' loss was the fact that they had notice of the alleged relationship between the arbitrator and USAA's counsel before the arbitration hearing, but they did not challenge the arbitrator's impartiality until after he handed down an unfavorable award. The Fishers attempted to argue that the arbitrator's failure to disclose his relationship with JSH deprived the Fishers of the knowledge they needed to object to his impartiality. The Court rejected this argument, adopting the Ninth Circuit's broad approach, finding waiver where a party has at least "*constructive* knowledge of a *potential* conflict" but fails to timely object. Citing *Fidelity Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) (emphasis added).

Takeaways from *Fisher*: The low threshold for a finding of waiver may result in an uptick in objections based on arbitrator bias. However, such objections must be well-founded to survive. The sheer number of times that an arbitrator has been hired by a particular law firm to serve as an arbitrator does not, without more, give rise to an arbitrator's duty to disclose the relationship.