ORAL ARGUMENTS - 9/4/96
95-1317
BURLINGTON NORTHERN RAILROAD V. TUCO, INC.

HATCHELL: In this arbitration case, the court is presented with its first opportunity to define the concept of evident partiality, which is one of what has been described in our case is extraordinarily narrow grounds for setting aside an arbitration award.

GONZALEZ: Wouldn't it be better if we made that determination after a full trial on the merits? We would have a better record to make that decision.

HATCHELL: Because of the nature of arbitration awards in the sense that they are intended by the parties to be final and binding without the necessity of appeals or further litigation, it is our contention and some of the cases have so said, that they lend themselves to summary disposition. And I think that should be the norm. I would concede to your honor that there may indeed be some limited cases in which the factual circumstances surrounding the facts which raise evident partiality might lend themselves to a trial. As for example where there is a dispute as to what was revealed or not revealed in nondisclosure case. Our position is however that these challenges are best disposed of in a summary fashion. And that is supported by the authorities we've decided.

GONZALEZ: Under this record as a matter of law?

HATCHELL: Yes, depending on the adoption of the test, and the test is highly determinatively of the outcome. Our position is if you adopt the test that we advocate it is determined as a matter of law. Our position also is, however, if you adopt the reasonable appearance of a bias test that is advocated by our opponents, the case will have to be tried because of blooming fact issues which I will be more than happy to talk about.

ABBOTT: One argument that was set forth by the other side is that if we adopt your argument as opposed to theirs, it really will increase litigation as opposed to the position set forth by them, which should decrease the amount of post-arbitration litigation?

HATCHELL: I don't follow the argument. It seems to me that it is just exactly the opposite. If the standard is so low, that the mere subjective appearance of bias or partiality tested by the judicial canons is the test, and indeed that the party arbitrators can as has happened in this case attempt to create the appearance of partiality during the arbitral process itself, the field of play then becomes so wide open and so suspect to anything that can create a reasonable appearance, that litigation is almost inevitable. The test that we propose raises that standard what we think is a commercially acceptable standard and a standard that would be anticipated by parties who voluntarily contract to go into arbitration with the understanding

that that will be the end of the process.

ABBOTT: What about the jest of what their argument truly is, and that is 1) if we don't have a very strict standard to be followed, then we are going to have more people contesting whether or not there was partiality, whereas under the standard that they are offering it will force the arbitrators to engage in much greater disclosure thereby reducing the possibility of having the case challenged post-arbitration?

HATCHELL: I don't agree with that assessment. The question in this case is not the extent of disclosure, which is required. The ethical standards for disclosure are distinct from the statutory standard of evident partiality. What they would like to do in this case is to collapse the standard for evident partiality into a disclosure standard. And when they do that by making that collapse they spread out and exacerbate the number of fact situations that could fall or meet the standard of evident partiality so that vastly more trials are...

BAKER: What about the fact that our statute focuses on evident partiality on the neutral as opposed to what the federal act does? Doesn't that indicate the legislature is looking at some heightened standard for that particular one of the three?

HATCHELL: No, I think what that is doing it is recognizing that there is a problem in the federal act. Because I think as one of the cases said, "It's a very strange forum when you view a judicial tribunal as having two people paid by the other side sitting next to you and attempting to influence your decision." The federal act speaks of evident partiality as regard all of the arbitrators. And what I think has happened is that the Texas legislature has recognized that's a very unrealistic standard to put on a non neutral arbitrator. You can almost never have an arbitration with hardy arbitrators where the party arbitrator is not indeed openly biased and openly prejudiced. So I think the legislature's intent was almost exactly the opposite of what your honor might suggest.

OWEN: You said a moment ago that the other sides test that they were simply trying to collapse the test into one of disclosure. But even under the case that you rely on for the stricter test doesn't that case talk about disclosure as well?

HATCHELL: Absolutely. And we do not take the position that arbitrators should not when asked make full disclosure. This case however was not tried either under the American Arbitration rules or under the Canons for Arbitration. It was tried under a private arbitration in which there were two questions asked to the arbitrators. So what has happened now in a nondisclosure case based on facts which occurred during the arbitration, the question does not become whether or not there was disclosure, but whether or not the facts which were not disclosed give rise to evident partiality. And this is where the fundamental difference between the parties is because they take the position that the nondisclosure itself is the evident partiality and all that need not be disclosed is a fact which gives the reasonable appearance of biased or partiality which is almost always going to inhere in a commercial arbitration.

The cases which we believe are best reason's say, that the nondisclosure may well be an ethical violation, but it does not have the force of law, nor is it the evident partiality. The nondisclosure merely subjects the arbitration award to review for evident partiality under the appropriate standard.

CORNYN: In order to accept your argument, wouldn't we have to conclude that arbitrators are unlike judges in virtually every respect?

HATCHELL: I believe that you do have to indulge them.

CORNYN: Because if this were a judge, there would be no argument would there?

HATCHELL: I think you're probably correct under the Canons of Judicial Conduct. Let me give you the most eloquent response I can from one of the cases. "The professional competence of the arbitrator is attractive to the businessman because a commercial dispute arises out of an environment that usually possesses its own folk reys(?) more reys(?) and technology. There is a trade off between impartiality and expertise. The expert adjudicator is more likely than a judge or juror not only to be precommitted to a particular substantive position, but to know or have heard of the parties or their key people." And I think this is the policy question that is put to the court and that is whether we are going to give efficacy to arbitration to accomplish its goals in this balanced and trade off that is talked about in this quotation, which is from the Merritt insurance case.

PHILLIPS: Recognizing that, that you do want people with experience in the real world, doesn't that make disclosure all the more important?

HATCHELL: It does indeed make disclosure important. But again, the issue is when nondisclosure occurs, does that rise to the level of evident partiality? Our opponents collapse that to say, "nondisclosure is evident partiality." The better reason cases say that nondisclosure is a reason to examine the award for evident partiality and what you examine is the substantive nature of the facts which were not disclosed. And if I could say that when you do that, I think the court will find the most helpful guidance in two cases which are companion cases. One called Consolidation Coal and the other called Hobet Mining. The Hobet Mining case really in my judgment is the best reasoned case in the whole field. And it composes a 4-part test when there is nondisclosure of a relationship or other facts which say that you look at the relationship to determine whether or not it gave the arbitrator a personal or pecuniary interest in the outcome of the arbitration; 2) how direct was the relationship between the arbitrator and the favored party? 3) the connection of the relationship to the arbitration; 4) the proximity in time of the relationship to the arbitration. I find those to be extremely useful to...

ABBOTT: Under that test, what about the example which I think was posed by the opposing side, and that is, that you have an African/American involved in the arbitration process, and the arbitrator unbeknownst to the African/American was a former member of the KKK, or may be a current member

of the KKK who may have some true partiality. But under your test simply because the arbitrator was a member of the KKK one of the participants in the arbitration was, an African/American would not be grounds for being able to challenge the arbitration?

HATCHELL: Oh, no, not at all. First of all, our case deals...this controversy originated with a charge by the party arbitrator, that the neutral arbitrator Beall had a "business interest." The test we proposed relates to business interest. The type of animus that your honor talks about is dealt with under other portions of 171.014, which contains a laundry list of reasons for setting aside an arbitration, and that laundry list would include: fraud; corruption; undue means; misbehavior; and wilful misconduct. And I would postulate that the type of personal animus and prejudice that you're talking about comes more clearly under that rhetoric than it does under evident partiality. Partiality to me is different from bias. Partiality is an inclination to rule for a party one way or the other. Bias is an outright prejudice against that party which impels me to rule against it.

ABBOTT: Wouldn't you agree that the standard posited by the other side comes more close to the ethical standards required of arbitrators?

HATCHELL: That's very difficult for me to answer because I don't see that they propose a test. And I have to go back again and say that the fundamental difference between us is a very subtle one because they say that it's the nondisclosure which is evident partiality. We say as we believe the cases have said is that it's the substance of what is not disclosed that is important. The ethical standards for arbitration do not have according to the cases the force of law. If they are violated so the cases say, that is a technical violation, but it only gets you to the point of reviewing the arbitration award for the substance of what was not disclosed. And I think Mr. Justice Cornyn was exactly correct in Anglin v. Tipps when he identified the three grounds for arbitration: efficiency; cost; and expertise. And I think based on the remarks that I have given this morning, I think you see how collapsing the standard to the standard for judges based simply upon the appearances rather than an examination of the substance of what was not disclosed largely eliminates most law firm arbitrators and most arbitrators who are genuinely immersed in the business. And the second thing that it does...

BAKER: How does that occur merely because they are lawyers and know people in the field or what?

HATCHELL: Yes. Let's assume in today's society where we have 2 Washington law firms who also have Houston offices you have a neutral in a Washington law firm and party arbitrator in a Washington law firm, and it just so happens let's just say for example to bring up the judicial code, that a lawyer in the party arbitrator's firm in Houston recommends or gives an oath of good character for a lawyer in the Houston office of the party. That's a violation of the judicial canon because you are testifying as to the character. Are we going to go that far _____? The problem is Judge Baker, that you pluck the arbitrators out of the commercial context. You don't require them as judges to give up all of their _____. You

indeed expect that they will continue in the normal course of business and there is a normal course of business exception in many of the cases. But that is the reason I think that the citizen arbitrator has to be freed from the most rigorous application of the standards of judges, or you're going to eliminate the vast majority of people you want to be arbitrators.

ABBOTT: Is it your position that regardless of whether or not partiality is shown that actual bias is required to overturn the arbitration?

HATCHELL: It is not our position. The actual bias cases are different.

* * * * * * * * * *

RESPONDENT

HUNT: What this case is really about is whether Texas should tolerate a neutral arbitrator's undisclosed acceptance of benefits that create an appearance of partiality. The answer should be, no. When a party surrenders procedural and appellate safeguards for the expediency of arbitration, then the arbitration process must be of unquestioned integrity, or else all parties will bypass arbitration and end up at the courthouse. Preserving the integrity of the process must be the basis for any test for evident partiality.

This leads to responding to the carrier's argument and to presenting Tuco's first point of error. The presence of evident partiality is a statutory ground requiring vacation of the arbitration award and requiring that the parties be ordered to rearbitrate.

The presence of the evident partiality is shown by the chronology of critical events in this case. One of the critical events occurred on Jan. 22, 1992, when the arbitrators began to receive the written evidence from Tuco and the carriers. That's when the decisional process began. Then at the end of Feb. or early March, George Beall the so-called neutral arbitrator received the referral of the Mullins case, a high profile federal case. And then he did that only three weeks before the panel was to assemble and hear the cross examination of those witnesses who had given written testimony.

ABBOTT: Was there any evidence that Mr. Coal knew anything about the law firm referring the work to Mr. Beall before the referral took place?

HUNT: The record doesn't reflect that. The record does reflect that Mr. Wright, the referring partner, called this a referral. It does reflect that Beall viewed it as a referral from _____ _____. That of course is the key here, because that referral took place at a point in time when the arbitrators were about ready to hear the oral evidence; a point in time where George Beall explained that he hadn't read a single piece of written evidence in the case, yet he indicated privately to the other arbitrators that he had made up his mind on the first two issues.

ABBOTT: Was there any evidence indicating that the referring person at that law firm that referred the work to Beall knew that Beall was involved in an arbitration with Mr. Cole?

HUNT: No, the record doesn't reflect that nor need it should, because Beall knew. Beall was the one that understood that he was receiving a referral and he was receiving a referral not just from anyone. It's important to get the framework of how this arbitration was working.

HECHT: What difference would it make to your argument if the referral had been to Beall's partner?

HUNT: It might not make any difference if Beall didn't know. But the referral was to Beall, and Beall knew.

HECHT: So if it had been to someone else in the firm, and Beall knew about it, then your argument would be the same?

HUNT: Yes. Here is the problem. George Beall is in the middle. He is the neutral arbitrator. Now on this side speaking in one ear is Emirid Cole.

ENOCH: Do you agree with Mr. Hardy's comment that because of the business that picked him as the arbitrator he is an advocate for their position in the arbitration? Do you agree with that, that the arbitrator is an advocate?

HUNT: Yes. That's undisputed.

ENOCH: Well maybe factually undisputed. I don't know about legally what the position is. Is it critical to your argument that this court hold that the sharing of business among arbitrators is evidence of interest common between an arbitrator and a party?

HUNT: Yes.

ENOCH: If the court doesn't conclude that the sharing of business among arbitrators is the same thing as an interest or an appearance of an interest with a party, do you lose?

HUNT: Yes. But let's frame this in the proper context of what was really happening. Beall was in the middle, party arbitrators on each side, party arbitrators there representing who? A party in the arbitration. Emeird Cole, the venerable _____, a member of that law firm was representing the carriers. Venerable _____ was the law firm that referred this high profile federal case to Beall. Beall received it as a referral. He felt an expression only a short time after the referral took place, after he had begun to work on it, after he had appeared in court, he was then called upon to make these decisions in this

arbitration. And on April 22, 1992, at the conclusion of the arbitration process is where Hardy overheard Beall expressing appreciation to Emrid Cole for the matter you folks were kind enough to send over.

PHILLIPS: When did the arbitrators render their judgment?

HUNT: April 22, is when they concluded the arguments. May 12 is the decision.

PHILLIPS: And when is the first time you protested the information you found out on April 22?

HUNT: Tuco didn't find out the information on April 22. Hardy found it out on April 22. But Tuco didn't find it out until later. And as shown on the last entry on the chronology of critical events, Tuco didn't find out the details until discovery in this lawsuit. Beall refused to reveal them. Beall sent a letter and asked to identify what he was talking about, and he wouldn't tell.

CORNYN: If the referral had been, and I wasn't clear about your response earlier, if the referral had been to a partner of the neutral and the neutral was not aware of the referral, but nevertheless financially benefitted from the generation of fees as a partner in the law firm, would that be evidence of evident partiality?

HUNT: It could be.

CORNYN: But not necessarily?

HUNT: Not necessarily, and that's the problem here. What this court must do, is adopt a test that permits the courts to do what Justice White counseled in the Commonwealth Coating case. And in that case, the court adopted what the CA did here, and that's the test that Tuco asked this court to adopt. Where there is a failure to disclose a matter that's not trivial that reasonably creates the appearance of bias, evident partiality is present.

HECHT: Is this a question of law?

HUNT: Yes.

HECHT: So you agree with petitioner?

HUNT: Yes. And this court's assessment in Anglin.

BAKER: But do you agree with their argument that what you're saying adds the word "appearance" to a clear statute? How do you answer that under statutory construction?

HUNT: Evident means clear. We will accept that.

BAKER: You use the word "appearance?"

HUNT: Yes.

BAKER: Isn't that the rule that the CA enunciated?

HUNT: Yes.

BAKER: An appearance of evident partiality?

HUNT: Yes, it is the appearance of impartiality.

BAKER: Their argument is there ain't no word like that in the statute?

HUNT: Evident means clear. You look at the evidence and this evidence is clear that there was partiality. A reasonable person looking at this evidence subjectively, and we don't propose a subjective test no matter what the carrier suggests, we want an objective test, and when an ordinary prudent person looks at this evidence one is forced to conclude that this is something that should have been disclosed. And if it had of been disclosed it could have altered the outcome of the process.

HECHT: Do you agree that the test should be less than the test for partiality as to judges?

HUNT: It may be the same in some cases. It may be more. It may be less. We're not trying to compare this to the judicial canons.

CORNYN: The test may differ depending on the circumstances?

HUNT: No. The application may differ depending on the facts.

CORNYN: The question was though, is the test the same or different from what you would apply or what is applied to judges under the code of judicial conduct?

HUNT: The test should be no lower than that.

CORNYN: Should be at least as high?

HUNT: At least as high. And the reason why, and in direct rebuttal of what the carriers argue, comes straight from Justice White's opinion. Now there is conflict in the briefs over whether Justice Black

wrote the majority opinion, or whether Justice White did or not. But a 6-member majority of that court wrote the test, and that test has to do with an arbitrator must disclose any dealings that create the impression of bias. And that's where that language comes from.

ABBOTT: Wasn't the US SC applying a test to a different act than what we are applying in this case?

HUNT: They were not applying it to the Texas General Arbitration Act, that's correct.

ABBOTT: And isn't the wording of the Texas Arbitration Act slightly different than the act that they were applying?

HUNT: Yes, but it makes no difference. It's words without a real difference. Because the distinction really is this use of the neutral arbitrator, Justice Baker, which makes the difference. If you have a particular set up, whether it's three neutral arbitrators, it applies to all three. The fact that the word "neutral arbitrator" is in the Texas statute makes no difference in the proper construction of it. It may make a difference in its application where you have party arbitrators who are actually biased. That's their job. They are there to represent the party in the arbitration proceeding.

But the thing that I want to get to is what Justice White said in the concurrence, and why this is so critical to the test you adopt. Now Justice White joined in the four members and there was 6-member majority of the court. Now he joined the opinion of his brother Black he said, but then he went on to add some additional remarks. And what he said in the last sentence is critical: "If arbitrators err on the side of disclosure as they should, it will not be difficult for the courts to identify those undisclosed relationships which are too insubstantial to warrant vacating." So he counsels as does this test from the SC, from the CA, and ____ by Tuco error on the side of disclosure. Why? Well Justice White told us just a little before. And this has to do with the nature of arbitration, and the court's role in judging the impartiality of those who sit as arbitrators. Listen to these words: "The judiciary should minimize its role in arbitration as Judge of the arbiter's impartiality that role is best consigned to the parties who are the architects of their own arbitration process." What he was recognizing is that the parties are best when you are dealing with men of business. They are in the best position to choose the most impartial. Why? Because they err on the side of disclosure. And if they err on the side of disclosure, then they won't have the kind of problem that's present in this case.

ABBOTT: But let's apply your test to the hypothetical that Justice Hecht offered with a slight twist, and that is, let's assume that during the course of the arbitration the referral had been to a partner at Mr. Beall's firm, and Mr. Beall didn't have any idea about it. In fact never knew until months after the arbitration had been finalized. But through your death discovery you found out about that. And so you decided you would go to court and challenge it because of the appearance of impropriety, even though Beall didn't actually know about it. Would that not cause problems with the finalization of the arbitration?

HUNT: No, it wouldn't because you are really dealing with whether it's trivial or not trivial. When you define trivial in such a way so that it has no impact on the arbitration, then you avoid that problem. But here we don't have any difficulty with whether this was trivial or not.

BAKER: Isn't the question really to disclosure, which is what your present argument is, and how can somebody disclose something or be required to disclose something if they have no knowledge of it?

HUNT: That's correct.

BAKER: So under your positive standard no evident partiality?

HUNT: It may not meet the test of whether it's trivial or non trivial. It may end up being nontrivial because it had no impact on the arbitrator.

ABBOTT: But under your test what's going to happen is exactly what we are trying to avoid. And that is to have post-arbitration litigation. Once anybody can find any possibility of appearance under your test, then we are going to have post-arbitration challenges, which will impede the finalization of arbitration.

HUNT: It's not any possibility of an appearance. What it is it's taking an ordinary prudent person standard. Looking at this from the standpoint, of whom these rules are designed to protect: designed to protect the parties to the arbitration process, disclose in advance, let the parties fashion their own arbitration, be the architects of their own arbitration process, and when there is adequate disclosure, then most of the question of actual bias will pass out of the case. When there is adequate disclosure, then these parties will have the opportunity to be the architect of their own situation, and can avoid those people, those men of business, who might have a bias. But it is a matter of an objective standard, ordinary prudent person test looking at the facts to determine if this should have been disclosed. And if it should have been disclosed, then the test of evident partiality has been met.

ABBOTT: And is it your position that if evident partiality exists, then bias need not be shown, that the award should be overturned nevertheless?

HUNT: That's correct. Because the two can exist either together or independently. Now the fact that there is a charge of actual bias here doesn't mean the court can't reverse on evident partiality. As was indicated in Commonwealth there was no charge of actual bias there, and yet, that case was reversed because of the failure to disclose a dealing, a direct dealing. And that's all we say here, that where there is a failure to disclose a matter that's not trivial, it reasonably creates the appearance of partiality, that that should be enough. Because if it's not enough, then the parties really aren't the architects of their own process. They are left to these post hoc determination after the arbitration process is over, then that's when you get into the real fight at the courthouse. Error on the side of disclosure; adopt a rule that has a pain in it to the arbitrators who fail to disclose, and that pain must be vacation. Otherwise, there's no deterrence,

there's no reason why an arbitrator would want to disclose.

For example, consider this situation: If this court upholds this arbitration what will be the scenario when a client walks into a lawyer's office in Texas and the client says: "I'm thinking about signing a contract with an arbitration clause in it. What are my rights?" And the attorney will explain the rights of the parties, and how arbitration works. Then the attorney would be forced to say: "Oh, by the way if there is a partner of the counsel on the other side refers a case to the neutral arbitrator we are never going to find out about that, because the SC says you don't need to. What that will insure if you uphold this arbitration is that in Texas in almost every arbitration there will not be just one referral, but there will be two referrals. Each side will be referring. And that's why the question really is whether Texas should tolerate this neutral arbitrator's undisclosed acceptance of a benefit.

BAKER: In this case it's a procedural situation because it's summary judgment. The CA basically held they solved that question that neither side proved there was or was not evident partiality under this record going back for factual determination of either one or both of the standards that you suggest we adopt. Your position is we ought to hold as a matter of law that there was evident partiality?

HUNT: Correct.

BAKER: Their position is no, it wasn't, therefore we never reached the other issues of the award itself. So you're asking the court really to hold as a matter of law that it set the standard and says that this meets it or doesn't meet it and find in your favor?

HUNT: That's correct. Set the standard and then...

BAKER: But only on the evident partiality issue because the CA didn't reach the award part?

HUNT: That's correct.

BAKER: What's your viewpoint on that issue?

HUNT: On our point of error as petitioners, that the court should set aside the award because the arbitrators exceeded their authority?

BAKER: Yes.

HUNT: Briefly stated, that's a second bases on which this court may set aside the arbitration award. Section 12 of the arbitration agreement says that arbitration will apply only to specific language within specific sections.

BAKER: But you preserved that error in the CA?

HUNT: Yes we did.

BAKER: And here to?

HUNT: There was an express point of error in the motion for rehearing asserting that.

* * * * * * * * * *

REBUTTAL

SPECTOR: Is counsel correct that when asked about the referral, the neutral arbitrator refused to disclose it?

HATCHELL: As a matter of fact your honor, he disclosed the referral during the course of the deliberations to the party arbitrator for Tuco. I think they are overstating the case. What he did not disclose and claimed an attorney/client privilege was the financial aspects. But he did not ever refuse to disclose and the _____ partners also had their depositions taken and readily disclosed .

PHILLIPS: You're not making any objection that opposing side to failed to timely preserve any objection to Mr. Beall's participation are you? I don't see that in your briefs.

HATCHELL: Yes, in a sense. And again it all goes back to the test that you adopt. And I suppose that leads me perhaps to also make the point in response to your question as to why the judgment can never be rendered in Tuco's favor if you adopt Tuco's test. Because the record does show although it is disputed that Mr. Beall did in fact reveal prior to his selection as an arbitrator that he had an ongoing relationship in the ordinary course of dealing with the _____ Baker firm. And that is a fact issue in itself.

BAKER: But isn't it correct that the record show that everybody knew that and at least to that extent...

HATCHELL: No, they specifically denied that they knew that and denied that he said that. What they did know is that he also had cases in which he was aligned against _____ Baker..

BAKER: So that they never knew that he had an ongoing positive relationship with _____?

HATCHELL: That's what they claimed. I would take the position that this court should adopt what's known as the ordinary course of affairs rule in some of the cases that simply exempts ordinary course of referrals which we all engage in. And by the way this was not a referral and I can explain that factually. But I want to get back to the Chief Justice's question because if indeed Mr. Beall did reveal an ongoing day-to-day ordinary course of business relationship before his selection is arbitrary, then it seems to me either there has been full disclosure in the wavier of any complaint about this referral.

PHILLIPS: Is that a factual disputed question?

HATCHELL: Yes, it is indeed a factually disputed question.

PHILLIPS: So the previous understanding that perhaps both of you said that a rendition on _____ is wrong. We may need a trial on the merits according to your...

HATCHELL: If you adopt their test. And the other aspect of it is the CA's test also says in addition to the fact that you don't have to reveal remote relationships you also do not have to...or it is not evident partiality if whatever the subject matter that creates the reasonable appearance did not affect the arbitrator. And Mr. Beall testified in deposition in this case that this referral was just considered to be trivial by him of no moment to the arbitration. So that's another fact issue that would have to be tried assuming you adopt Tuco's test, which I hope you don't do. Because if you do, you depart from the statute.

CORNYN: Mr. Hunt says that if we agree with you, then we will set off a bidding war for the hearts and minds of neutral arbitrators between the parties to the arbitration. What's your response to that?

HATCHELL: My response to that your honor if that is true, if you get into a bidding war you are talking about a process that is either induced by fraud, corruption, intentional misbehavior, or deliberate misconduct, which are other grounds setting aside an arbitration.

OWEN: What if only one side makes a referral is that fraud? Or if both sides make a referral of this type what elevates that to fraud when this single referral isn't fraud?

HATCHELL: I'm not saying that it does. I need to finish the answer. If the referral is made to curry favor with the arbitrator, and it is received as such, then you have fraud, corruption, deliberate misconduct. If the referral is made to curry favor, but it is not understood as such, then you're right back where we are today having to examine the substance of the relationship to determine whether it rises to the level of evident partiality.

CORNYN: The juries are going to make this decision?

HATCHELL: I don't think so.

CORNYN: You said there is a fact question here?

HATCHELL: In the instances where it is disputed as to what was not disclosed, or what was disclosed would there be such a situation. Otherwise I think that it is almost invariably a law question. I can't necessarily preclude every conceivable fact issue because remember again that the CA has thrown in a factor which looks at the effect upon the arbitrator in actual fact. And that brings me back to the

concluding remark is, their test departs from the statute. The statute is concerned with was there evident partiality? Was there evident partiality, not the appearance of it? Appearances can be deceiving. And that is out distinction.