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Perjury in Arbitration

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1. Overview of Perjury

In judicial proceedings, false testimony by a witness long has been criminally punishable as perjury when the false testimony is deliberate and relates to a material matter. While similar standards have been applied to the question of perjury in arbitration, the determination that perjury has occurred, and its consequences, differ in the arbitration setting. This article discusses the legal bases for a finding of perjury in arbitration, before analyzing the circumstances in which alleged false testimony may support vacatur of an arbitration award.

1.1 Definition of Perjury

Under the Federal Criminal Code perjury is defined as a "witness testifying under oath or affirmation . . . [giving] false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."[2] This definition has gained general acceptance, and remained unchanged for over a century.[3] States typically have adopted the federal definition.[4]

The concept of a "false statement" is not limited to affirmative misrepresentations, but includes omissions of fact made with intent to deceive or conceal.[5] Thus, for example, a witness's failure to mention an important meeting when directly asked to identify all such meetings may constitute a predicate for perjury.

Even if testimony is knowingly false, it does not constitute perjury unless it is material. "Immaterial testimonial inconsistencies by themselves do not constitute perjury."[6] "The test of materiality is whether the false testimony was capable of influencing the fact finder in deciding the issues before it."[7] The testimony need not directly concern a dispositive issue, and even a false denial of gambling activity by a prosecution witness in a bribery case has been deemed material, since a truthful answer in such a case "could have tended to undermine the credibility" of this prosecution witness.[8]

1.2 Evidentiary Standard of Review

A determination of perjury requires clear and convincing evidence.[9] This is a higher standard than a preponderance, though not as rigorous as the "reasonable doubt" standard. "Easy cases, in which the evidence of perjury is weighty and indisputable, may require less in the way of factual findings, whereas close cases may require more."[10] For example, when the defendant's account of events differed only slightly from that of the arresting officer, the defendant was entitled to "the benefit of the doubt," and perjury could not be found.[11]

2. Perjury in Arbitration as a Ground for Vacating an Award

On its face, the Federal Criminal Code definition of perjury is not limited to testimony in judicial proceedings. Courts interpreting this code in the arbitration context have found that knowing, material, false testimony constitutes perjury so long as the testimony is given under oath.[12]

2.1 Perjury as "Fraud" for Purposes of Vacatur Under the Federal Arbitration Act

Under the Federal Arbitration Act, one ground for vacating an arbitration award is fraud that materially taints the award.[13]

Several federal circuit courts have addressed the circumstances under which perjured testimony in an arbitration proceeding rises to the

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level of fraud within the meaning of the Federal Arbitration Act. The Third, Sixth, Ninth, and Eleventh Circuits have recognized that obtaining an arbitration award by perjured testimony may constitute fraud.[14] The Second Circuit has indicated, without deciding, that perjury at an arbitration hearing can be considered fraud within the meaning of the Federal Arbitration Act.[15]

Vacatur of arbitration decisions is rare, but several decisions have vacated or modified arbitration awards based on perjurious testimony.[16] In a prominent case, the Eleventh Circuit Court of Appeals modified an arbitration award on the basis of false testimony constituting perjury.[17] In *Bonar v. Dean Witter Reynolds*, the Eleventh Circuit amended an arbitration award to vacate the punitive damages award because the alleged breach of fiduciary duty was substantially proved through testimony by an expert who had egregiously falsified his credentials.[18] The court remanded the punitive damages award for a new hearing. Notably, the court ordered that the hearing occur before a different panel of arbitrators.[19]

In reviewing arbitration awards to determine if vacatur for fraud-based on perjury or otherwise, is appropriate, courts have relied on a three-pronged test. The perjured testimony must:

(1) not have been discoverable upon the exercise of due diligence prior to the arbitration;

(2) be materially related to an issue in the arbitration; and

(3) be established by clear and convincing evidence.[20]

If any one element is missing, then vacatur will not be ordered. The "due diligence" and "materiality" prongs of this test are discussed in parts 2.3 and 2.4 of this article.

2.2 State Statutes and Cases

Some states have statutes recognizing fraud as a ground for vacating an arbitration award, including Illinois, Washington State, New Jersey, New York, and Pennsylvania.[21] The Supreme Court of California has stated that an arbitration award cannot be reviewed on the basis of the merits of the controversy, the validity of the arbitrator's reasoning, the sufficiency of the evidence, or an error of fact or law.[22] However, like other states, the California Code of Civil Procedure provides courts with the power to vacate an arbitration award if, among other things, "[t]he award was procured by corruption, fraud or other undue means."[23] A number of states have taken an approach similar to the Federal Arbitration Act and federal court interpretations and have recognized perjury in arbitration as a type of fraud that may result in setting aside or modifying an award.

An older New York Court of Appeals case, *Jacobowitz v. Metselaar*, soundly rejected the proposition that perjury can support vacatur,[24] though the decision rarely has been cited. More recently, a Washington state court interpreted its state statute to include perjury materially related to an issue of consequence in an arbitration as constituting fraud and requiring vacatur if there is substantial prejudice.[25] A Florida statute states that fraud is a ground for vacating an arbitration award, and case law interpreting the statute has recognized perjury as a type of fraud.[26] In addition, a New Mexico court determined that "[p]erjury and concealment of material evidence are justifications for setting aside an arbitration award based on fraud, undue means, and corruption."[27] Likewise, a Texas court found that an expert who testified in an arbitration and lied about his credentials gave rise to fraud in arbitration.[28] Finally, state courts in Utah and Wisconsin have held that fraud includes perjury.[29]

A California court of appeal decision, *Pour Le Bebe, Inc. v. Guess? Inc.*, discussed the definition of fraud at length in dictum and distinguished fraudulent conduct which triggers setting aside a judgment from conduct supporting vacatur of an arbitration award.[30] The court stated that fraudulent conduct that will result in vacating an arbitration award is not subject to the distinction between intrinsic or extrinsic fraud used in the context of a courtroom judgment "[b]ecause parties to an arbitration are not afforded the full panoply of procedural rights available to civil litigations . . . [so] courts generally take a more lenient approach when examining intrinsic fraud [such as perjury] in the context of a motion to vacate an arbitration award."[31] The court therefore concluded that the federal three-pronged test – requiring (1) clear and convincing evidence of false testimony (2) on a material point (3) that could not have been discovered during the arbitration by due diligence – should be utilized to determine if the perjured testimony rises to the level of fraud resulting in vacating an award.[32]

2.3 The Materiality Requirement

To support vacatur of an arbitration award, it has been held, the alleged fraud must be material to the outcome of the arbitration, rather than merely to resolution of an ancillary issue.[33] Applying this standard, the Seventh Circuit Court of Appeals declined to vacate an award because (i) the arbitration award did not include any reasoning regarding the evidence and factors that were determinative, and (ii) the award referred to claims that could have been upheld independently from the alleged fraudulently concealed evidence. Accordingly, "it was impossible to know whether the single issue Petitioners contested here was material to the outcome of the entire arbitration ..."[34]

In an unpublished decision, the party petitioning to vacate an arbitration award under California state law procedures contended that perjury occurred when the prevailing party offered into evidence at the hearing an altered version of a crucial email exchange.[35] The original (printed) version of the email had contained a preceding email and a dealer listing which, Petitioner contended, cast the version submitted at the hearing in a light contrary to its altered appearance. The Petitioner contended it had been unable to discover the alteration because she was given the exhibit "buried under 41 other exhibits" only a

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First, parties should of course take every precaution to prevent perjury from tainting an arbitration. A party that realizes its own witness has committed perjury, but conceals it, may not only run afoul of ethical constraints, but also may create the predicate for vacatur if its opponent could not have detected the perjury.

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week before the hearing.[36]

The court concluded that the failure to produce the entire email exchange was not perjury, "which is defined as a willfully false statement under oath, of a material fact." Nor did the circumstances otherwise constitute fraud, given that the altered email did refer to the earlier email and to the dealer listing. Furthermore, the arbitrator found multiple grounds on which to rule against the Petitioner, and thus it was "apparent the arbitrator would not have ruled any differently if the complete email exchange had been submitted at the arbitration hearing."[37]

2.4 The Due Diligence Requirement

Fraud, for purposes of vacatur under Section 10(a)(1) of the FAA, "must prevent the panel from considering a significant issue to which it does not otherwise enjoy access."[38] In order to protect the finality of arbitration awards, courts will not vacate an award because of fraud unless the fraud was not "discoverable upon the exercise of due diligence prior to the arbitration."[39]

Where the evidence relied on for vacatur not only was discoverable prior to arbitration, but was actually presented to the panel, a court likely will presume the panel had the opportunity to consider, and either reject or disregard, the possibility that perjury was committed.[40] As Judge Augustus N. Hand, of the Second Circuit Court of Appeals observed: "[I]f perjury is 'fraud' within the meaning of the statute, then, since it necessarily raises issues of credibility which have already been before the arbitrators once, the party relying on it must first show that he could not have discovered [the perjury] during the arbitration, else he should have invoked it as a defense at that time."[41]

As another court stated:

> If the perjury of defendant's witnesses was as patent as is now claimed, it should have been made apparent to the arbitrator in the proceedings before him. In effect, what plaintiffs are now asking me to do is to substitute my judgment for the arbitrator's as to the credibility of witnesses who appeared before him, and beyond that, to conclude not only that the testimony of defendant's witnesses should not have been accepted as true and accurate, but that it was deliberately false.[42]

In a recent case, the losing party in a securities arbitration sought to vacate the decision on the basis of an audit document discovered after the arbitration that referred to significant errors relating to the securities at issue, and further indicated the errors had been "covered up" by the prevailing party.[43] However, the court determined this document could have been discovered prior to the award through the exercise of due diligence. It had been in the possession of the petitioners' investment advisor, to whom petitioners had failed to issue a subpoena. One who fails to subpoena a witness who is suspected of possessing material information during arbitration "cannot claim that evidence found from that witness is new after the arbitration award issues," according to this court.[44]

In another case, an Oklahoma federal court concluded that perjury could have been raised in the arbitration, even though the petitioner had been denied the right to take the witness's deposition. The court concluded that the alleged perjury could have been adduced during the arbitration hearing, when the witness gave inconsistent testimony. The court held, in language that may be broader than the prevailing rule: "If there was an opportunity to cross-examine a witness, as there was here, then a party may not try to vacate an award for false testimony.[45]

3. Conclusion

Several practical observations should be noted in light of the general recognition that (1) testimony under oath in arbitrations may constitute perjury, and (2) perjury in arbitration may be grounds for vacatur of an arbitration award.

First, parties should of course take every precaution to prevent perjury from tainting an arbitration. A party that realizes its own witness has committed perjury, but conceals it, may not only run afoul of ethical constraints, but also may create the predicate for vacatur if its opponent could not have detected the perjury.

Second, a party that suspects impeaching evidence may be in the possession of a third party, but fails to pursue issuance of a subpoena, may forfeit a ground for vacatur. At least two courts have held that the "due diligence" required to obtain vacatur on the basis of perjury cannot be satisfied where the perjury was demonstrated on the basis of on evidence held by a third party to whom the Petitioner had failed to issue a subpoena during the arbitration proceedings.

Third, when issuing reasoned awards, arbitrators should exercise particular care in identifying the evidence relied upon and the issues deemed material. A court considering a vacatur motion may presume that certain testimony was relied on, unless the reasoned award clearly provides otherwise. Similarly, a court considering a motion to vacate may assume that perjury related to a material issue, requiring vacatur, unless the award either (i) identifies that issue as immaterial, or (ii) states alternative grounds for the award.

Fourth parties may, of course, agree to require issuance of a reasoned award that identifies the facts relied upon by the Panel. Reinsurance arbitration panels in the United Kingdom customarily undertake this as part of providing written opinions in arbitrations involving disputed issues of fact.▼

2 *United States v. Dunnigan*, 507 U.S. 87, 94 (U.S. 1993) (summarizing the elements of 18 U.S.C. § 1621).

3 *Id*; see also *United States v. Smull*, 236 U.S. 405, 408 (1915).

4 *Dunnigan*, 507 U.S. at 94; *See e.g.* 18 Pa. Cons. Stat. § 4902 (defining perjury as when one makes "a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.").

5 *U.S. v. Ellis*, 50 F.3d 41 (7th Cir. 1995).

6 *U.S. v. Libby*, 495 F.Supp.2d 49 (D.D.C. 2007).

7 *U.S. v Fayer*, 573 F.2d 741, 745 (2d Cir. 1978).

8 *U.S. v. Guariglia*, 962 F.2d 160, 164 (2d cir. 1992).

9 *United States v. Montague*, 40 F.3d 1251, 1256 (D.C. Cir. 1994).

10 Id.

11 Id.

12 *See e.g. Karppinen v. Karl Kiefter Machine Co.*, 187 F.2d 32, 34 (2d Cir. 1950); see also, Newark Stereotypers' U. No. 18 v. *Newark Morning Ledger Co*. 397 F.2d 594, 598 (3d Cir. 1968); *Dogherra v. Safeway Stores*, 679 F.2d 1293, 1297 (9th Cir. 1982).

13 9 U.S.C. § 10(a)(1) (2009).

14 See *Newark Stereotypers' U. No. 18 v. Newark Morning Ledger Co*. 397 F.2d 594, 598 (3d Cir. 1968) (assuming "that the obtaining of an award by perjured testimony would constitute fraud"); *Int'l Brotherhood of Teamsters, Local 519 v. United Parcel Serv. Inc.*, 335 F.3d 497, 503 (6th Cir. 2003); *Dogherra v. Safeway Stores,* 679 F.2d 1293, 1297 (9th Cir. 1982); ` 835 F.2d 1378 (11th Cir. 1988).

15 *Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 34-35 (2d Cir. 1951); *Bridgeport Rolling Miller Co. v. Brown*, 314 F.2d 885 (2d Cir. 1963); *see also A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd*, 1989 WL 115941 (S.D. N.Y. 1989) ("It is now apparently settled that obtaining an award through perjured testimony constitutes 'fraud' within the meaning of § 10(a)).

16 *Bonar*, 835 F.2d at 1383 n.7 (expert witness testified to credentials that were false); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982) (witness admitted his statement to union investigators was a lie); *Int'l Brotherhood of Teamsters, Local 519 v. United Parcel Serv. Inc*, 335 F.3d 497, 503 (6th Cir. 2003) (key witness recanted his testimony to the arbitrator that a fellow employee had assaulted him).

17 *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988).

18 *Id*. at 1384 (11th Cir. 1988).

19 *Id*. at 1388.

20 *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986).

21 710 ILCS 5/12; McKinney's CPLR § 7511; RCW 7.04.160; N.J.S.A. 2A:23B-23; 42 Pa.C.S.A. § 7341

22 *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 11 (Cal. 1992).

23 Ca.C.C.P. § 1286.2(a).

24 197 N.E.2d at 170 (N.Y. 1935) ("If perjury were accepted as a ground for relief, litigation might be endless the same issues would have to be tried repeatedly.").

25 *Seattle Packaging Corp. v. Barnard*, 972 P.2d 577, 579 (Wash.App. Div. 1,1999)

26 F.S.A. § 682.13(1)(a); *Davenport v. Dimitrijevic*, 857 So.2d 957 (Fla. Ct. App 2003).

27 *Medina v. Found. Reserve Ins. Co., Inc.*, 940 P.2d 1175, 1179 (N.M.,1997).

28 *Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, (Tex.App. 2008).

29 *Fleming v. Simper*, 158 P.3d 1110, 1112 (Utah App.,2007); *Steichen v. Hensler*, 701 N.W.2d 1, 6 (Wis. Ct. App. 2005).

30 *Pour Le Bebe, Inc. v. Guess? Inc.,* 5 Cal.Rptr.3d 442,458 (Cal. Ct. App. 2003).

31 *Id.* Perjury is "intrinsic" to the judicial proceeding. Fraud in the inducement, by contrast, is referred to as "extrinsic" fraud.

32 *Id.* at 459.

33 *Envtl. Barrier Co., LLC v. Slurry Sys.*, 540 F.3d 598, 608 (7th Cir. 2008)

34 *Id.*

35 *Ray v. Cingular Wireless, LLC,* 2007 WL 4100136, *8-*9 (Cal.Ct. App. 2007).

36 *Id*. at *8.

37 *Id*. at *9.

38 *Plank v. Vision Limited Partnership*, 2003 WL 76864, *2 (N.D. Ill. 2003)

39 *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982).

40 *See id*.

41 *Karpinnen v. Karl Keifer Machine Co.*, 187 F.2d 32, 35 (2d Cir. 1951).

42 *Halcoussis Shipping*, 1989 WL 115941, *4 (S.D.N.Y. 1989).

43 *Gimbel v. UBS Financial Services, Inc.*, 2009 WL 1904554 (N.D. Ill. 2009).

44 Id. at *9 (quoting *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986).

45 *Valentino v. Smith*, 1992 WL 427881, *8 (W.D. Okl. 1992) (citing O.R. *Securities, Inc. v. Progessional Planning Associates, Inc.*, 857 F.2d 742, 749 (11th Cir. 1988)).