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### Summary of Sylver v. Regents Bank, N.A., 129 Nev. Adv. Op. 30

Kelli Michelle DeVaney  
*Nevada Law Journal*

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*Sylver v. Regents Bank, N.A.*, 129 Nev. Adv. Op. 30 (May 2, 2013)<sup>1</sup>

**CIVIL PROCEDURE – CHALLENGE TO ARBITRATION AWARD**

**Summary**

Consolidated appeals from a district court order confirming an arbitration award and an amended judgment and order of sale, in which the Court considered two issues: (1) whether an arbitration awards was obtained through undue means and (2) whether the arbitrator’s refusal to void a loan in the underlying dispute constituted a manifest disregard for the law.

**Disposition/Outcome**

To vacate an arbitration award on a theory of “undue means,” the challenging party must prove by clear and convincing evidence that the award was procured through intentionally misleading conduct.

**Facts/Procedural History**

In 2008, Regents Bank, N.A. (Respondent) issued two loans to Marshall Sylver (Appellant). The majority of the transactions took place in California, where Respondent is situated. Appellant did not repay either loan. Respondent filed a complaint in district court for breach of contract and judicial foreclosure. The district court stayed the proceedings and compelled arbitration as provided in the loan documents.

James Hibert (Hibert), Appellant’s point of contact with Respondent, was designated by both parties to testify at the arbitration hearing. Prior to arbitration, Respondent informed Appellant and the arbitrator that Hibert was unwilling to appear in Las Vegas to testify. Respondent took Hibert’s deposition, and Appellant cross-examined Hibert for two hours at the deposition. On the second day of arbitration, Appellant testified that Hibert had informed him that he had never been asked to testify in Las Vegas but was willing to do so. However, Appellant did not ask for a continuance, and the arbitrator ultimately ruled in Respondent’s favor.

Respondent filed a motion to confirm the arbitration award with the district court. Prior to the hearing on Respondent’s motion, Appellant filed a declaration by Hibert (contrary to Hibert’s deposition testimony) which supported allegations that Respondent had made false representations and failed to help secure long-term financing, despite Appellant’s diligence throughout the process. Appellant also opposed Respondent’s motion, arguing that Respondent employed undue means in procuring the award by misrepresenting that Hibert was unavailable, and that the arbitrator had manifestly disregarded the law in refusing to void one of the loans.

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<sup>1</sup> By Kelli Michelle DeVaney

The district court confirmed the arbitration award and later entered an amended judgment and order of sale. Appellant appealed.

## **Discussion**

Appellant revived the contentions he made before the district court on appeal. Justice Parraguire wrote the opinion for the three-justice panel. NRS 38.241 allows a court to vacate an arbitration award procured by fraud, corruption, or undue means. A court may also vacate an arbitration award where the arbitrator “manifestly disregarded the law.”<sup>2</sup>

### The arbitration award was not procured by undue means.

The Court had never defined “undue means” under NRS 38.241, and reviewed the definitions adopted by several states and federal circuit courts. The Court determined that “undue means” describes “underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either.”<sup>3</sup> To prove that an award was procured by undue means, the party challenging the award “must show that the fraud or corruption was (1) not discoverable upon the exercise of due diligence, prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence.”<sup>4</sup> There must be a causal connection between the undue means and resulting arbitration award.<sup>5</sup>

Appellant argued that the arbitration award was obtained by undue means as a result of Respondent’s misrepresentation regarding Hibert’s availability to testify. However, applying the definition of “undue means” to the circumstances, the Court concluded Appellant had not satisfied his burden for vacating the arbitration award because (1) Respondent’s conduct did not rise to the level of intentional bad faith behavior equivalent in gravity to corruption or fraud; (2) Hibert’s availability to testify was discoverable through due diligence, and after discovering Hibert was available to testify, Appellant did not request a continuance; and (3) Appellant did not show any causal connection between the arbitration award and alleged misconduct.

### The arbitrator’s refusal to void the loan was not a manifest disregard of the law.

Appellant asserted the arbitrator manifestly disregarded the law by enforcing the loan despite Respondent’s violation of NRS 645E.910, which requires a national bank to seek a certificate of exemption before engaging in mortgage banking activity in Nevada. The Court noted that judicial inquiry under the manifest-disregard-of-the-law standard is extremely limited, and that the issue in such cases is not whether the arbitrator correctly interpreted the law, but

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<sup>2</sup> Clark Cnty. Educ. Ass’n v. Clark Cnty. Sch. Dist., 122 Nev. 337, 341, 131 P.3d 5, 8 (2006).

<sup>3</sup> National Cas. Co. v. First State Ins. Group, 430 F.3d 492, 499 (1st Cir. 2005).

<sup>4</sup> MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 858 (4th Cir. 2010).

<sup>5</sup> *Id.*

whether the arbitrator knew the law and recognized that the law required a particular result, but simply disregarded the law.<sup>6</sup>

Because Respondent is a national bank, the arbitrator determined that Respondent had violated NRS 645E.910 by recording a deed of trust in Nevada without a certificate of exemption. However, as no civil remedy existed at the time for the violation, the arbitrator concluded that the unintentional violation had no materiality to the issues of the action. Appellant argued that even where there was no civil remedy, Nevada courts had long refused to enforce contracts that are illegal or contravene public policy. However, the Court had never addressed whether failure to comply with a licensing requirement necessarily rendered a contract unenforceable and refused to do so in this case, because the operative standard of review did not entail plenary judicial review.<sup>7</sup>

The Court determined that the only issue before it was whether the arbitrator manifestly disregarded existing Nevada law. A contract is unenforceable on public policy grounds where the policy against enforcement of the contract clearly outweighs the interest in enforcement.<sup>8</sup> This balancing test involves consideration of the seriousness of any misconduct involved and the extent to which it was deliberate, and the directness of the connection between the misconduct and the contract.<sup>9</sup>

The Court noted that the purpose of NRS 645E.910 is to prevent predatory lending by out-of-state mortgage bankers and brokers. In this case, Appellant solicited Respondent's business and freely entered into the loan, and Respondent did not engage in any other mortgage banking activity in Nevada. Additionally, the arbitrator found that Respondent's violation was unintentional, and Appellant did not assert that Respondent's failure to obtain a license or exemption to record the deed of trust was related to Appellant's failure to repay the loan. Therefore, the Court concluded that the public policy of the licensing requirement did not clearly outweigh the interest in enforcing the loan.

Accordingly, the Court determined Appellant did not meet his burden in establishing that the arbitrator, "knowing the law and recognizing that the law required a particular result, simply disregarded the law."<sup>10</sup>

## **Conclusion**

The Court affirmed the district court order confirming arbitration award and judgment thereon, as Appellant did not satisfy his burden in showing by clear and convincing evidence that

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<sup>6</sup> *Clark Cnty Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8.

<sup>7</sup> *Graber v. Comstock Bank*, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995).

<sup>8</sup> *Picardi v. Eighth Judicial Dist. Court*, 127 Nev. \_\_\_, \_\_\_, 251 P.3d 723, 727 (2011).

<sup>9</sup> Restatement (Second) of Contracts § 178(3)(c)-(d) (1981).

<sup>10</sup> *Clark Cnty. Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8.

Respondent secured the award through intentionally misleading conduct and there was no manifest disregard of the law.