

# Case Law and Articles on Arbitrator Disclosure and Arbitrator Bias

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Teresa Snider  
Eric A. Haab

A list of some of the recent cases and some of the leading federal court opinions that illustrate the jurisprudence on the issues of arbitrator disclosure and bias is set forth below. The list and accompanying summaries are not meant to be exhaustive, as a great deal has already been written on this subject. For those interested in additional information, a number of recent articles that provide a more comprehensive discussion of the case law or of particular recent cases are listed following the cases.

## U.S. Supreme Court

*Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337 (1968). The Supreme Court reversed the lower courts' refusal to set aside an arbitration award where the neutral arbitrator, an engineering consultant, failed to disclose that one of the parties to the arbitration was a regular customer of the neutral arbitrator. In the plurality opinion, the Court referred to both the "evident partiality" and "undue means" provisions of Section 10 of the Federal Arbitration Act ("FAA") in setting aside the award without specifying upon which of those provisions it relied in rendering its decision. In his concurring opinion, Justice White noted that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial."

## Second Circuit Cases<sup>2</sup>

*Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007) (affirming district court's decision vacating arbitration award). The Second

Circuit Court of Appeals concluded that "if we are to take seriously Justice White's statement that 'arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial,'... arbitrators must take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists. It therefore follows that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate." *Id.* at 138 (citation and emphasis omitted).

*Morelite Construction Corp. v. New York City District Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (holding that "evident partiality"... will be found where a reasonable person would have to conclude that an arbitrator was partial to one party in the arbitration"). The Court held that, although the party moving to vacate an arbitration award must show more than an appearance of bias, proof of actual bias is not required. *Id.*

*Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 701 (2d Cir. 1978) (explaining that "a principal attraction of arbitration is the expertise of those who decide the controversy. Expertise in an industry is accompanied by exposure, in ways large and small, to those engaged in it").

*Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Insurance Co.*, 732 F. Supp. 2d 293 (S.D.N.Y. Feb. 23, 2010) (holding that failure of party-arbitrator and umpire to disclose that they had served on a panel involving a dispute between one of St. Paul's successors that involved contracts and witnesses that

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Teresa Snider

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Teresa Snider is a partner at Butler Ruben Saltarelli & Boyd LLP. Eric A. Haab is a partner at Foley & Lardner LLP.

CONTINUED ON PAGE 20

The resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The ‘reasonable impression of bias’ standard is thus interpreted practically rather than with utmost rigor.” *Id.* at 283.

CONTINUED FROM PAGE 19

overlapped with the instance dispute merited vacating the award on the basis of evident partiality) (appeal pending).

*Arrowood Indemnity Co. v. Trustmark Insurance Co.*, No. 3:03-CV-1000(PCD) (D. Conn. Feb. 2, 2010) (refusing to stay remand to arbitration panel and rejecting argument that one party’s choice of the umpire as a party-appointed arbitrator in unrelated cases showed bias or evidenced an improper relationship between the party and the umpire in the current proceeding).

### Third Circuit Cases

*Kaplan v. First Options of Chicago*, 19 F.3d 1503, 1523 n.30 (3d Cir. 1994) (holding that evident partiality requires “proof of circumstances ‘powerfully suggestive of bias’”) (citation omitted).

*Ario v. Cologne Reinsurance (Barbados) Ltd.*, Civil No. 1:CV-98-0678, 2009 U.S. Dist. LEXIS 106133 (M.D. Pa. Nov 13, 2009) (granting motion to confirm arbitration award, holding that panel member’s disclosure of appointment in another proceeding is timely if made while proceedings were still pending before the panel, and concluding that “there is no evident partiality from an arbitrator’s accepting a position as an umpire in another, unrelated arbitration while the current arbitration is still ongoing, even if that position was partially obtained by the action of a party-appointed arbitrator, or is a position in an arbitration where one of the parties is an affiliate of a party to the current arbitration”).

### Fifth Circuit Cases

*Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007) (holding arbitrator’s failure to disclose trivial connection to attorney for one of the parties did not justify vacating the award) (en banc). The Fifth Circuit Court of Appeals concluded that “the better interpretation of *Commonwealth Coatings* is that which reads Justice White’s opinion holistically. The resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The ‘reasonable impression of bias’ standard is thus interpreted

practically rather than with utmost rigor.” *Id.* at 283.

*Dealer Computer Services, Inc. v. Michael Motor Co.*, No. H-10-2132, 2010 WL 5464266 (S.D. Tex. December 29, 2010) (granting motion to vacate where party-appointed neutral arbitrator had previously served on an arbitration panel between the plaintiff and another automobile dealership and, although arbitrator disclosed she had served on a three-person panel in the prior arbitration, she failed to disclose that the prior arbitration involved the same issues of contractual interpretation and damages calculation, as well as related witnesses) (appeal pending).

### Sixth Circuit Cases

*Nationwide Mutual Insurance Co. v. Home Insurance Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (affirming confirmation of award, reiterating rejection of appearance of bias standard, and requiring that party alleging partiality “establish specific facts that indicate improper motives on the part of the arbitrator”) (citation omitted).

*Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) (adopting objective test and rejecting appearance of partiality test for evident partiality).

### Seventh Circuit Cases

*Trustmark Insurance Co. v. John Hancock Life Insurance Co. (U.S.A.)*, 631 F.3d 869, 873 (7th Cir. 2011) (overturning district court’s grant of preliminary injunction, ruling that knowledge relevant to the dispute that was acquired as an arbitrator in a prior arbitration, even if subject to confidentiality, is not a disqualifying interest and citing *Sphere Drake Insurance Ltd. v. All American Life Insurance Co.*, 307 F.3d 617, 622 (7th Cir. 2002) for the proposition that “evident partiality’ for arbitrators means acts that simultaneously show support for one side and disregard the rules; party-appointed arbitrators can’t be dismissed on the ground that they are inclined to support the party who named them”).

*Sphere Drake Insurance Ltd. v. All American Life Insurance Co.*, 307 F.3d 617, 621 (7th Cir. 2002) (“[O]nly evident partiality, not appearance or risks, spoils an award.”). The Seventh Circuit Court of Appeals reversed the district court’s

decision granting a motion to vacate an arbitration award, holding that failure of party-appointed arbitrator to make a full disclosure regarding his representation of party's subsidiary in prior unrelated arbitration did not demonstrate "evident partiality" under Section 10(a)(2) of the FAA.

*Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673 (7th Cir. 1983) (reversing district court's decision vacating arbitration award where the neutral arbitrator failed to disclose that he had worked for the president of one of the parties to the arbitration while both were employed at another company).

*Midwest Generation EME, LLC v. Continuum Chemical Corp.*, No. 08 C 7189, 2010 WL 2517047, at \* 5 (N.D. Ill. June 21, 2010) (refusing to permit post-arbitration discovery and explaining that "only nonspeculative, reasonably certain evidence of impropriety will suffice to allow post-arbitration discovery" of arbitrator's alleged bias).

*Trustmark Insurance Co. v. Clarendon National Insurance Co.*, No. 09 C 6169, 2010 WL 431592 (N.D. Ill. Feb. 1, 2010) (refusing to disqualify party-arbitrator because of "fear of a future breach" of the confidentiality agreement from a prior arbitration).

*Employers Insurance Company of Wausau v. Certain Underwriters at Lloyds of London*, No. 09-cv-201-bbc, 2009 WL 3245562, at \*4 (W.D. Wis. Sept. 28, 2009) (refusing to disqualify arbitrator because respondents did not show that arbitrator was "partial" or "non-neutral" on the basis of allegations that arbitrator engaged in ex parte communications with petitioner concerning the merits of the reinsurance dispute and that arbitrator was beholden to petitioner's parent company because arbitrator was certified as an arbitrator by ARIAS and senior counsel for petitioner's parent company was the vice president of ARIAS).

## Ninth Circuit Cases

*New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir.

2007) (affirming district court's decision vacating an arbitration award where the arbitrator failed to investigate or disclose possible conflicts arising from his acceptance of employment with a company in negotiations with one of the parties). In reaching its decision, the Court utilized a "reasonable impression of partiality" standard, explaining that an arbitrator "may have a duty to investigate independent of [his] ... duty to disclose." *Id.* at 1106.

*Schmitz v. Zilveti*, 20 F.3d 1043, 1047 (9th Cir. 1994) (vacating award where arbitrator did not investigate or disclose his law firm's long-time representation of parent company of party, adopting a "reasonable impression of partiality" standard, and suggesting that an arbitrator might have an affirmative duty to investigate).

*Arora v. TD Ameritrade, Inc.*, No. CV 10-01216 CW, 2010 U.S. Dist. LEXIS 84856 (N.D. Cal., July 26, 2010) (holding that allegations of casual small talk between arbitrations and one of the parties during a hearing are not sufficient to establish evident partiality or actual bias).

## Articles<sup>3</sup>

Daniel L. FitzMaurice, *Trustmark v. Hancock: A Significantly Flawed Decision with the Potential to Wreak Havoc for Confidentiality Agreements in Arbitration*, Mealey's Litigation Reports: Reinsurance, Vol. 20, No. 22 (March 19, 2010) (analyzing district court's decision).

Paul Janaskie and Steven McNutt, *When Does an Arbitrator's Failure to Disclose Prior Relationships Constitute "Evident Partiality" Under the Federal Arbitration Act*, Mealey's Litigation Reports, Reinsurance, Vol. 17, No. 8 (August 17, 2006)

Wm. Gerald McElroy, Jr., *Navigating the Ethical Thicket in Reinsurance Arbitrations*, ARIAS•U.S. Quarterly, Vol. 18, No. 1 (First Quarter 2011)

Steven C. Schwartz and David Wax, *Arbitrator Disclosure Requirements and Enforceability of Awards*, *New York Law Journal* (October 22, 2010)

Brian Silbernagel, *Pre-Award Disqualification of Biased Arbitrators Under the FAA*, Mealey's Litigation Reports: Reinsurance, Vol. 21, No. 6 (July 23, 2010)

Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 Seton Hall Cir. Review 191 (Fall 2009)▼

<sup>2</sup> Cases decided by the various federal courts of appeal are listed in reverse chronological order under each heading, followed by district court cases from within that circuit (again, in reverse chronological order).

<sup>3</sup> Articles are listed alphabetically by author's last name

*Employers Insurance Company of Wausau v. Certain Underwriters at Lloyds of London...*(refusing to disqualify arbitrators because respondents did not show that...arbitrator was beholden to petitioner's parent company because arbitrator was certified as an arbitrator by ARIAS and senior counsel for petitioner's parent company was the vice president of ARIAS).