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IN WORDS OF THE PANDEMIC, ARBITRATION JURISPRUDENCE NEEDS A VENTILATOR

By Bartholomew L. McLeay[1]

INTRODUCTION

The COVID-19 pandemic and arbitration share a few chronic symptoms. There are conflicting opinions about the standards for governing rulemaking, a debate on whether state policy or federal authority should control, and questions about the jurisdiction and neutrality of decisionmakers responsible for providing solutions. For those seeking review of an arbitration award today, like the current health environment, the situation is disconcerting. No herd immunity or PPE exists to protect challengers against the legal contagion spreading through the arbitration review process.

The United States has become "arbitration nation."[2] Some arbitrations have become so complex and litigation-like that they amount to commercial litigation masquerading as arbitration. Late Justice Antonin Scalia observed those arbitrations are not envisioned by the Federal Arbitration Act ("FAA")[3] and may not be required under state law.[4] The United States Supreme Court needs to flatten the curve and create a new normal by removing the pariah treatment associated with those who challenge arbitration awards. It should act with Operation Warp Speed.

Lower courts have tried to distill a few homemade elixirs,[5] but major infirmities in arbitration jurisprudence remain for which only the United States Supreme Court can provide the cure, and some ailments show signs of need for critical care.

There are sharply conflicting standards of review for determining "evident partiality" of an arbitrator under the FAA.[6] There also is a recognized split in the lower courts over whether a challenging party must have knowledge of the specific underlying conflict of an arbitrator

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[2] Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC, 913 F.3d 1162, 1169 (9th Cir. 2019).

[3] 9 U.S.C. §§ 1-16.

[4] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344, 351 (2011) (Scalia, J., dissenting) ("[T]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures . . . Parties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or . . . process rivaling that in litigation. . . . But . . . [that] is not arbitration as envisioned by the FAA . . . [and] may not be required by state law").

[5] *See, e.g.*, Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Fund, 748 F.2d 79, 83–84 (2d Cir. 1984) ("Against this murky backdrop of Supreme Court precedent, we examine prior decisions in this circuit… In attempting to delineate standards of impartiality on a relatively clean slate, we are struck by the competing interests inherent in the use of arbitration"); Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9th Cir. 1994) ("[T]he majority [in *Commonwealth Coatings*] did not articulate a succinct standard [but] '[r]easonable impression of partiality,' . . . is the best expression of the *Commonwealth Coatings* court's holding").

[6] 9 U.S.C.§ 10(a)(2) ("court … may make an order vacating the award … where there was evident partiality … in the arbitrators"); UBS Fin. Servs. v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico, 997 F.3d 15, 19 (1st Cir. 2021) (citing authority "describing the circuit split in the wake of" Commonwealth Coatings Corp. v. Cont'l. Cas. Co., 393 U.S. 145(1968)).

before it is found to have waived the conflict.[7] There is further an entrenched divide in the lower courts regarding whether an arbitration award may be vacated under the FAA if it is found to have been made in "manifest disregard of the law"[8] or, separately, in violation of a dominant state public policy.[9] There is still further a widespread discord in the lower courts concerning an important jurisdictional issue: whether an *interim* arbitration award is subject to immediate court review.[10]

The potential for misdiagnosis in the lower courts on the wrong side of these court splits, especially as it relates to arbitrator neutrality, presents a worrisome prognosis not only for arbitration, but for the judiciary as well.[11] This is not a hallucinatory reaction. Arbitration nation continues to grow and is rapidly moving toward becoming the only civil justice system the public truly knows.[12] As the public discovers that arbitrators can with impunity make awards implicating their own interests, or manifestly disregard the law or ignore dominant public policies of the forum that judges cannot, the threat of a systemic loss of confidence in the justice system could become a reality. At the very far extreme, the Supreme Court's intervention is needed to avoid a future where people conclude the best medicine for legal ills may be found by administering doses of street justice they can prescribe for themselves.

This article first concludes the reasonable impression of bias standard based on the majority opinion in *Commonwealth Coatings Corp. v. Cont. Cas. Co.*[13] for determining "evident partiality" should be reaffirmed by the Supreme Court. As discussed herein, this standard should be strictly applied particularly when an arbitrator fails to disclose a personal ownership or financial interest related to the arbitration.

Second, this article concludes waiver of "evident partiality" should not be found in a case where an arbitrator has a personal ownership or financial interest in the arbitration unless the challenging party has actual knowledge of the specific conflict and the arbitrator has complied with any applicable law requiring written consent from the parties.

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[7] *See, e.g.*, Shaffer v. Priority One Bank, No. 3:15-CV-304-HTW-LGI, 2021 WL 2386824, at *10 (S.D. Miss. June 10, 2021) ("Federal Circuits are split as to whether a complaining party must have had actual knowledge of the underlying conflict before waiving its right to assert the conflict").

[8] Luciano v. Tchrs. Ins. & Annuity Ass'n of Am., No. 15-6726, 2021 WL 1663712, at *2, n.2 (D.N.J. Apr. 28, 2021) ("Since [Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)], a circuit split has emerged regarding the manifest disregard of the law doctrine . . . .") (citations omitted).

[9] Caputo v. Wells Fargo Advisors, LLC, 2020 WL 2786934, at *3 (D.N.J. May 29, 2020) ("[T]he Circuit Courts of Appeals have . . . disagreed on whether the public policy exception continues to serve as cognizable means for challenging an arbitration award").

[10] La. Health Serv. Indem. Co. v. DVA Renal Healthcare, Inc., 422 F. App'x 313, 314, n.1 (5th Cir. 2011) (referring to a "partial final" award, stating "[w]e note that a circuit split exists as to whether federal courts may hear an interlocutory appeal from an arbitral tribunal").

[11] Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984) ("[T]he statutory scheme we examine today implicates the process of the federal courts in the enforcement of 'private' remedies. Were we to lend our imprimatur to an award grounded in fraud or bias, the sense of fairness that society rightfully demands of its judiciary would be sadly diminished").

[12] *See* Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1137 (9th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 1100 (2020) (noting in a case with "two sophisticated companies, the proliferation of arbitration clauses in everyday life—including in employment-related disputes, consumer transactions, housing issues, and beyond[.]").

[13] Commonwealth Coatings Corp. v. Cont'l. Cas. Co., 393 U.S. 145, 150 (1968) ("[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias[.]").

Third, this article concludes a court should be authorized in rare and exceptional circumstances to vacate at least that part of an arbitration award governed by the FAA made in clear "manifest disregard of the law" or in violation of an explicit, well-defined and dominant public policy.

Fourth, this article recognizes any attempt by parties to definitively decide by agreement when a court has appellate jurisdiction to consider an interim or non-final award is a legal nullity. But there is wooziness in the lower courts in applying this basic principle to arbitration awards. The Supreme Court should treat this jurisdictional disorder, and place it in permanent remission, by promulgating a simple rule discussed herein.

Finally, this article discusses at length a recent Nebraska Supreme Court decision, *Seldin v. Estate of Silverman*,[14] in which each of the arbitration "variants" discussed above[15] are helpfully quarantined in a single opinion. *Seldin* is an excellent case for autopsy because it reveals the difficulty and confusion for litigants and courts alike in tracking and monitoring the viral transmission of numerous conflicts in arbitration jurisprudence. *Seldin* also demonstrates the harsh sequalae imposed on arbitration challengers forced to shoulder the impact of incompatible arbitration rules while patiently awaiting the Supreme Court's development of an arbitral vaccine in an appropriate case. Until remedied, a contract party's decision to pursue arbitration will remain a risky Queen's Gambit.[16]

Evident Partiality Is Shown by Arbitrator's Personal Ownership or Financial Interest

A. Any Interest "Influencing the Conduct" of Adjudicator

In the majority opinion in *Commonwealth Coatings*, the Supreme Court found lower courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well the facts and are not subject to appellate review."[17]

Commonwealth Coatings involved a subcontractor who brought an action against sureties under a prime contractor bond to recover money allegedly due for a painting job.[18] The contract required the parties to submit the dispute to arbitration. The arbitration panel consisted of three arbitrators, one selected by each party, and the third jointly selected. The third arbitrator

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[14] *See generally* Seldin v. Est. of Silverman, 305 Neb. 185, 939 N.W.2d 768 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021). There were multiple related parties and law firms involved in this action. This author appeared on behalf of Scott A. Seldin (defined herein as "Scott") in his individual capacity and limited to post-arbitration proceedings only.

[15] There is yet another issue subject to circuit split, also identified in *Seldin*, whether a court can modify an award based on review of the arbitration record as a whole or, instead, whether its review is limited to errors found on the face of the award. *Id.*, 305 Neb. at 215, 939 N.W.2d at 792. *See also* John B. Rich, J., *Arbitrator's Error and the "Face of the Award" Rule*, 24 J. CONS. & COMMC'N. L. 49 (2021) (noting "widening [of] the split in the circuits").

[16] Queen's Gambit is a popular opening chess move that sacrifices a pawn to gain a better control of the center of the board. *The Queen's Gambit*, SIMPLIFY CHESS, https://simplifychess.com/queens-gambit (last visited Aug. 22, 2021). *The Queen's Gambit* was the most watched scripted series on Netflix during the COVID-19 pandemic. Todd Spangler, *'The Queen's Gambit' Scores as Netflix Most-Watched Scripted Limited Series to Date*, VARIETY (Nov. 23, 2020), https://variety.com/2020/digital/news/queens-gambit-netflix-viewing-record-1234838090.

[17] *Commonwealth Coatings*, 393 U.S. at 149.

[18] *Id.* at 146.

had a substantial business relationship with the prime contractor, including "rendering of services on the very projects involved in this lawsuit."[19] Those facts were not disclosed by the third arbitrator and were unknown to the subcontractor until after the award.[20]

Justice Black led a six-Justice majority in *Commonwealth Coatings* that interpreted the phrase "evident partiality" to impose a "simple requirement" that "arbitrators disclose to the parties any dealings that might create an impression of possible bias."[21] This standard aligned with public expectations for judges because it "rest[s] on the premise that *any tribunal* permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."[22]

Justice White, joined by Justice Marshall, wrote a concurrence stating he was "glad to join" Justice Black's majority opinion.[23] Despite clear language in the majority opinion equating the neutrality of arbitrators to judges and adoption of an "impression of bias" standard, Justice White commented he did not read it to "decide" that "arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges."[24] Although Justice White also found "evident partiality" did not mean actual bias, he did not articulate a standard different than "reasonable impression of partiality" to be applied under the FAA.[25]

The interplay between *Commonwealth Coatings*' majority opinion and Justice White's concurring opinion has led to a longstanding, "intractable judicial division"[26] and half-century split in the courts over the proper standard of review for "evident partiality" of an arbitrator, with courts on one side of the divide applying a "reasonable impression of bias"

[19] *Id*.

[20] *Id*.

[21] *Id.* at 148–49.

[22] *Commonwealth Coatings*, 393 U.S. at 150 (emphasis added); s*ee also id.* at 148.

[23] *Id.* at 150 (White, J., concurring).

[24] *Id.*

[25] None of the Justices in *Commonwealth Coatings* found the arbitrator guilty of actual bias. Justice Black found "[P]etitioner does not charge . . . the . . . arbitrator was actually guilty of . . . bias in deciding this case" and "we have no reason . . . to suspect him of any improper motives." *Id.* at 147. Justice White, concurring, did not add anything on this point. *Id.* at 150. "The Court sets aside the arbitration award despite . . . no claim . . . of actual partiality, unfairness, bias, or fraud." *Id.* at 152. (Fortas, J., dissenting).

[26] Edward C. Dawson, *Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges*, 63 AM. U. L. REV. 307, 324 (2013).

standard[27] and the courts on the other side of the split applying what is referred to here as the "have to conclude" standard.[28] They are demonstrably different.[29]

In support of the majority opinion, Justice Black cited *Tumey v. State of Ohio*,[30] in which the Supreme Court reversed the conviction of a defendant because the ruling judge's compensation included court fees and costs derived from convicted defendants.[31] *Tumey* explained, applying constitutional standards: "[n]o matter what the evidence was against him, he had the right to have an impartial judge."[32] *Tumey* further intimated "[e]very procedure"[33] in a legal proceeding may be evaluated when it comes to the neutrality of an adjudicator.[34]

In other settings, the Supreme Court has explained any "interest" potentially "influencing the conduct" of an adjudicator is disqualifying even under heightened constitutional standards.[35] Notably, there is no requirement, even under a constitutional challenge, to demonstrate an adjudicator is "in fact . . . influenced," only to show "whether sitting on the case . . . 'would offer a possible temptation to the average . . . judge to . . . lead

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[27] Four courts—the Ninth and Eleventh Circuits, as well as the highest courts of Alabama and Texas—have employed standards in conformity with Justice Black's majority opinion. These courts have held evident partiality is found when an arbitrator fails to disclose a fact or circumstance that gives rise to a "reasonable impression of partiality" or "reasonable impression of bias." *See, e.g.*, Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9th Cir. 1994); Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1339 (11th Cir. 2002); *see also* Mun. Workers Comp. Fund, Inc. v. Morgan Keegan & Co., Inc., 190 So. 3d 895, 915–16 (Ala. 2015); Burlington N. R.R. Co. v. TUCO Inc., 960 S.W.2d 629, 636 (Tex. 1997); Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 525, 527 (Tex. 2014).

[28] Six federal courts of appeals, and the Nebraska Supreme Court, have rejected the *Commonwealth Coatings* majority's analysis and instead applied a heightened standard, which purportedly is derived from Justice White's concurrence that requires a party seeking vacatur of an award to show "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984); *see also* UBS Fin. Servs. v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico, 997 F.3d 15, 19 (1st Cir. 2021); Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 253 (3d Cir. 2013); ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999), *cert. denied*, 528 U.S. 877 (1999); Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 645 (6th Cir. 2005); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983); Seldin v. Est. of Silverman, 305 Neb. 185, 204 n.30, 939 N.W.2d 768, 785 (2020), *cert. denied*, 141 S.Ct. 2622, 209 L. Ed. 2d 751 (2021).

[29] The "reasonable impression of partiality" standard "is much broader" than the "have to conclude" standard because "circumstances can convey an *impression* of partiality without necessarily dictating a *conclusion* of partiality." *Burlington N. R.R. Co.*, 960 S.W.2d at 633–34; *see also Morelite Constr. Corp*, 748 F.2d at 83–84 ("[W]e read Section 10(b) as requiring a showing of something more than the mere 'appearance of bias' to vacate an arbitration award"). In practice, the "have to conclude" standard appears to effectively demand a showing of *actual* bias, although Justice White did not purport to go that far. *See* Commonwealth Coatings Corp. v. Cont'l. Cas. Co., 393 U.S. 145, 151 (1968) (White, J., concurring).

[30] Tumey v. State of Ohio, 273 U.S. 510, 535 (1927).

[31] *See id.* at 535.

[32] *Id.*

[33] *Id.* at 532 ("Every procedure which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law").

[34] Justice White likewise stated the Justices could not "overlook" unacceptable conduct because "that would be an abdication" of responsibility, adding the "arbitration process functions best when an amicable and trusting atmosphere is preserved." *Commonwealth Coatings*, 393 U.S. at 150-51.

[35] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986); *see Commonwealth Coatings*, 393 U.S. at 150.

him not to hold the balance nice, clear and true.'"[36] The failure of an adjudicator to adequately disclose the intensity of his or her reaction to a personal dilemma related to a case under review[37] also is disqualifying.[38]

B. Arbitrator's Ongoing Obligation to Make Disclosures

Arbitrators are required to "take steps to ensure that the parties are not misled into believing that no nontrivial conflict exists."[39] An arbitrator has "an ongoing obligation" to make disclosures even during arbitration and, once an arbitrator is aware "a nontrivial conflict of interest might exist," the "calculus change[s]," especially if the arbitrator has "assured the parties that he intended" to have further contact if such an event occurred.[40] If an arbitrator delays disclosure to the point that, given the amount already invested in the proceeding, it is not practical for a party to object, a court may decide the late disclosure was insufficient and justifies vacation of the award.[41] The failure to disclose alone can establish "evident partiality."[42]

When an arbitrator has a "personal stake" on an arbitral issue in an ongoing arbitration, the arbitrator is prohibited from making a ruling on the issue and the challenging

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[36] Caperton v. AT Massey Coal Co., 556 U.S. 868, 878, 879 (2009) (noting "more general concept of interests that tempt adjudicators to disregard neutrality[.]").

[37] United States v. Kelly, 888 F.2d 732, 747 (11th Cir. 1989) (finding disqualification where "the judge did not reveal . . . [timely] the intensity of his personal reaction to the dilemma[.]").

[38] 28 U.S.C. § 455(b); Parker v. Connors Steel Co., 855 F.2d 1510, 1527 n.18 (11th Cir. 1988) ("Grounds for disqualification under § 455(b) cannot be waived by the parties. *See* 28 U.S.C. § 455(e)"). The Supreme Court has strictly applied this federal law to "require[] disqualification . . . regardless of whether or not the interest actually creates an appearance of impropriety"); *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859, n.8 (1988) (applying 28 U.S.C. § 455(b)(4) and (d)(4)).

[39] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 138 (2d Cir. 2007).

[40] *Id.* at 138–39.

[41] Univ. Commons-Urbana, Ltd. v. Universal Constructors, Inc., 304 F.3d 1331, 1336, 1344 (11th Cir. 2002) ("An arbitrator must disclose a potential conflict as soon as it becomes apparent; otherwise, delay and concealment would be encouraged. . . . [If an arbitrator] delayed . . . disclosure . . . to the point that, given the amount . . . invested in the proceeding, . . . [it was] not . . . practical . . . to object . . ., then the court may well decide [the] disclosure was insufficient to avoid vacatur") (citations omitted).

[42] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) ("A reasonable person would have to conclude that an arbitrator who failed to disclose under [required] circumstances was partial to one side"); *see also* Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 525, 527 (Tex. 2014) "[T]he standard for evident partiality in *Commonwealth Coatings* . . . requires vacating an award if an arbitrator fails to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality" and "evident partiality is established from the nondisclosure itself").

party is not required to establish the arbitrator showed any actual or apparent bias.[43] When a "personal stake" is involved, the risk of unfairness is so inconsistent with basic principles of justice that the arbitration award should be automatically vacated.[44]

The Supreme Court has made this point in other contexts. For example, in *NLRB v. Amax Coal Co*., the Court found a fiduciary with conflicting interests cannot serve two "masters equally well" or rationalize a difference in loyalty owed to both.[45]

C. Federalism and Role of State Law in Disqualification of Neutral

The Supreme Court has observed disqualification of an adjudicator[46] is often based on failing to meet statutory requirements rather than constitutional violations.[47] It further has noted, as a general rule, any person acting in a quasi-judicial capacity must be disqualified from overseeing a tribunal if he or she has an interest in the controversy to be decided.[48] It still further has found a non-judge acting under statutory authority to adjudicate a dispute must affirmatively demonstrate an "appearance of justice."[49] Finally, it has explained in another

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[43] Pitta v. Hotel Ass'n of N.Y.C., Inc., 806 F.2d 419, 420 (2d Cir. 1986), demonstrates a "rarely litigated" circumstance of evident partiality. In *Pitta*, plaintiff and defendant disputed whether an assigned arbitrator could be dismissed by one of the parties acting alone and further whether the arbitrator could rule on the dismissal provisions under the agreement. *Id.* at 421. On appeal from a district court ruling against defendant, the Second Circuit found the issue was arbitral, but that "evident partiality" prevented the arbitrator from deciding the issue because he had a "personal stake" in the matter. *Id*. at 423–24. The Second Circuit found:

> In assessing "evident partiality," we need not inquire into whether . . . [the arbitrator] showed actual rather than merely apparent bias. The relationship between a party and the arbitrator may, in some circumstances, create a risk of unfairness so inconsistent with basic principles of justice that the arbitration award must be automatically vacated.

Id. at 423–24.

[44] *Id*.

[45] NLRB v. Amax Coal Co., 453 U.S. 322, 329–30 (1981) (quoting Woods v. City Nat'l Bank & Trust Co. of Chi.. 312 U.S. 262, 269 (1941) ("A fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one'")); *see also* Varity Corp. v. Howe, 516 U.S. 489, 526 n.6 (1996) (Thomas, J., dissenting).

[46] Several states impose judicial ethical rules on arbitrators by statute. *See, e.g.*, NEB. REV. STAT. § 25-2604.01 (1997) (arbitrators are subject to disqualification on same grounds as judges); *accord* CAL. CIV. PROC. CODE § 1281.9(a) (West 1994) (requiring arbitrators to "disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt" as to their impartiality, including "[t]he existence of any ground specified in . . . [California law] for disqualification of a judge"); *see also* MONT. CODE ANN. §§ 27-5-116(3)-(4) (2009) (disclosure to the extent of "any ground . . . for disqualification of a judge").

[47] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820–21 (1986) ("The more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice"). In contrast to disqualification under federal or state statutes, the Supreme Court has determined there is a higher *constitutional* standard, stating it "decline[s] to read *Tumey*, 273 U.S. 510, 522 (1927) as constitutionalizing any rule that a decision rendered by a judge with 'the slightest pecuniary interest' constitutes a *violation of the Due Process Clause*." *Aetna Life Ins. Co.*, 475 U.S. at 825 n.3 (emphasis added).

[48] "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 617 (1993) (quoting *Tumey*, 273 U.S. at 522).

[49] *Tumey*, 273 U.S. at 522; *see also Concrete Pipe*, 508 U.S. at 618 (quoting *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 243 (1980)) ("'[J]ustice,' indeed, 'must satisfy the appearance of justice' . . . This, too, is no less true where a private party is given statutory authority to adjudicate a dispute . . . .").

context there are "fundamental arbitration questions" in which "consent" must be explicit and may not be inferred by the parties.[50]

FAA procedural rules do not govern review of an arbitration award in state court.[51] Indeed, the FAA specifically refers to review only by a "United States court."[52] In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[53] the Supreme Court explained requests to vacate or modify an award under "§§ 10 and 11 . . . do not . . . exclude more searching review based on authority outside the [FAA] statute as well," adding the FAA is "not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law."[54] State supreme courts have adopted this view.[55] The FAA and state law arbitration rules both have been found to apply in a state court action.[56]

While recognizing that policies applicable in the context of judicial recusal may be different than those applicable to arbitrator disclosure,[57] courts have rejected the contention that a written disclosure requirement under a state statute relating to arbitrators "violates the purpose of the FAA by allowing a party to seize upon a technicality" to vacate an arbitration award.[58] State courts also have expressly held that state statutory judicial ethical standards apply to arbitrators.[59]

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[50] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (noting "refusal to infer consent when it comes to . . . fundamental arbitration questions").

[51] *See, e.g.*, Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 597 (Cal. 2008) (quoting Cronus Invs., Inc. v. Concierge Servs., 107 P.3d 217, 226 (Cal. 2005) ("'[T]he United States Supreme Court does not read the FAA's procedural provisions to apply to state court proceedings'"); *see also* Kindred Nursing Ctrs., Ltd. v. Clark, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting) (FAA "does not apply to proceedings in state courts").

[52] 9 U.S.C. § 10.

[53] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

[54] *Id.* at 590.

[55] *Cable Connection*, 190 P.3d 586 at 597, 599 ("'[T]he United States Supreme Court['s] . . . interpretation of sections 10 and 11 of the FAA does not preclude other grounds for review") (quoting *Cronus Invs.*, 107 P.3d 217 at 226); Finn v. Ballentine Partners, LLC, 143 A.3d 859, 871-72 (N.H. 2016) ("*Hall Street* was a question of statutory interpretation, not preemption. . . . It considered only federal law as it applied to a federal court").

[56] Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97 n.64, 98 (Tex. 2011) ("The TAA and the FAA may *both* be applicable to an agreement, absent the parties' choice . . . For the FAA to preempt . . ., state law must refuse to enforce an arbitration agreement that the FAA would enforce . . . .") (emphasis added) (citations omitted); *see also* Masseau v. Luck, 252 A.3d 788, 801, 803-04 (Vt. 2021) (Reiber, C.J., concurring) ("FAA was enacted as a procedural statute . . . [and] contains no express pre-emptive provision . . . The result [here] is inconsistent with principles of federalism . . . ."). Parties may affirmatively agree the FAA applies in a state proceeding. *See* Wyatt v. Own a Car of Fresno, No. F075692, 2019 WL 698017, at *1 (Cal. Ct. App. Feb. 20, 2019).

[57] *See, e.g.*, Haworth v. Super. Ct., 235 P.3d 152, 163, 166 (Cal. 2010) ("[T]he standard for disclosure by a neutral arbitrator . . . is the same as the standard for disqualification of a judge . . . . Clearly, [however,] some of the policies applicable in the context of judicial recusal may differ from those applicable to arbitrator disclosure").

[58] *See, e.g.*, Ovitz v. Schulman, 133 Cal. App. 4th 830, 853, 35 Cal. Rptr. 3d 117, 127, 134 (Cal. Ct. App. 2005) (rejecting argument that written disclosure of arbitrator required by state law "violates the purpose of the FAA because it 'undermines the entire arbitration process, allowing a party to seize upon a technicality to vacate an arbitration award'").

[59] *See, e.g.*, *Haworth*, 235 P.3d at 163 ("[T]he standard for disclosure by a neutral arbitrator . . . is the same as the standard for disqualification of a judge"); State v. Pattno, 254 Neb. 733, 739, 579 N.W.2d 503, 507 (1998) (noting "judges and arbitrators . . . [are] subject to the same ethical standards"); *cf.* Meso Scale Diagnostics, LLC. v. Roche Diagnostics GmbH, 247 A.3d 229, 243, 243 n.60 (Del. 2021) (noting "rules of judicial ethics" apply to "other types of adjudicators").

In Words of the Pandemic, Arbitration Jurisprudence Needs a Ventilator

Written Waiver Should Be Strictly Required for Arbitrator Personal Ownership Interest

A. Ownership Is Crucial Fact

The Supreme Court in *Commonwealth Coatings* noted the arbitrator's relationship with a party included "the very projects involved in this lawsuit," which the arbitrator had not "revealed" until after the award was made.[60] *Commonwealth Coatings* found "highly significant" an arbitration rule that requires a "writing" from both parties to "waive" circumstances likely to create a presumption of bias or that might disqualify the arbitrator.[61]

The decision by the United States Court of Appeals for the Ninth Circuit in *Monster Energy Co. v. City Beverages*[62] highlights the significant differences between the standards for "evident partiality" in lower courts and waiver of any objection to same.[63] In *Monster Energy*, two "sophisticated companies," a supplier and a distributor of beverage products, arbitrated a dispute before a JAMS arbitrator who fully disclosed to all parties he had "an economic interest in the overall financial success of JAMS" and further informed the distributor that JAMS previously had "participated in" a dispute resolution proceeding with the supplier.[64]

Neither party objected to the arbitrator's disclosures. After an award was made in favor of the supplier, the distributor obtained additional information about the arbitrator and sought to vacate the award for "evident partiality" under the FAA.[65] The distributor explained it learned only after the final award that the arbitrator had a *personal* "ownership" interest in JAMS beyond his economic interest in an official capacity as a JAMS arbitrator.[66]

The district court rejected the distributor's challenge, finding, among other things, the distributor had "waived its evident partiality claim because . . . the [a]rbitrator disclosed his economic interest."[67] On appeal, the Ninth Circuit reversed and vacated the award, finding the arbitrator's statement concerning his "economic interest in the overall financial success of JAMS" was insufficient to reveal "his ownership interest" *individually* in JAMS.[68] Applying the reasonable impression of bias standard of review, the Ninth Circuit found the arbitrator's "partial disclosure" did not constitute waiver as "constructive knowledge"[69] because the

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[60] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 146 (1968).

[61] *Id.* at 146.

[62] Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130 (9th Cir. 2019), *cert. denied,* 141 S.Ct 164 (2020).

[63] Heather Cameron, *Blind Justice and Just Arbitrators: Understanding the Federal Arbitration Act's Evident Partiality Standard*, 89 FORDHAM L. REV. 2233, 2243-44 (2021) (noting "[a] [b]lack and [w]hite [c]ircuit [s]plit[] . . . has developed over how to interpret *Commonwealth Coatings* . . . [and] *Monster Energy*" and also "highlight[ing] the significant differences between the standards").

[64] *Monster Energy*, 940 F.3d at 1132–33, 1137.

[65] *Id.* at 1133, 1137.

[66] *Id.* at 1136.

[67] *Id.* at 1134.

[68] *Id.* at 1133-37.

[69] *Monster Energy*, 940 F.3d at 1134 (citing Fidelity Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004) (holding "waiver doctrine applies where a party to an arbitration has constructive knowledge of a potential conflict but fails to timely object"); *see also* Goldman, Sachs & Co. v. Athena Venture Partners, L.P., 803 F.3d 144, 148 (3d Cir. 2015) (quoting *Constructive Knowledge*, BLACK'S LAW DICTIONARY (8th ed. 2004) ("Constructive knowledge is defined as the '[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person'")).

arbitrator's individual "ownership interest" in JAMS was "[t]he crucial fact," and it was not known until after the final award.[70]

B. Undisclosed Personal "Connection" to Party Is Disqualifying

In *Shaffer v. PriorityOne Bank*,[71] a bankruptcy trustee for husband-wife debtors and a state bank arbitrated disputes relating to eighteen loans. Following the bankruptcy, the bank foreclosed on the property and the trustee filed an action, later stayed for arbitration, seeking to recover "surplus" allegedly held by the bank beyond its collateral, and for wrongful foreclosure. The arbitrator entered an award in favor of the bankruptcy trustee of $2,711,813.33.[72]

Before the arbitration, the arbitrator represented in a notice of appointment that he did not have "any connections, direct or indirect, with any of the case participants," but later stated he had forgotten, and thus omitted, he had previously provided a third-party guaranty for a commercial property developer on an unrelated loan.[73] That loan was refinanced with another financial institution when it "became due" before the arbitration award was entered and it was paid by the developer without any known involvement of the arbitrator.[74] After the arbitration, the bank moved to vacate the award on the ground the arbitrator "failed to make complete disclosures." During post-arbitration proceedings, the arbitrator testified he "never had the first thought that [he] had any relationship with" the bank and that "he would have disclosed the guaranty '[h]ad it come to [his] mind that th[e] guaranty was out there.'"[75] The arbitrator emphatically "testified that his financial relationship with the Bank 'would have [had] no impact on [his] neutrality, independence, or impartiality.'"[76]

Applying the "reasonable impression of bias" standard,[77] the district court in *Shaffer* found the bank "me[t] its burden of showing 'evident partiality'" of the arbitrator based on his "connection" with the bank.[78] But the district court refused to vacate the award because it found the bankruptcy trustee had shown the bank had at least "constructive knowledge" the arbitrator

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[70] *Monster Energy*, 940 F.3d at 1135. A similar result also was reached in Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 527 (Tex. 2014) (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968)) (noting arbitrator's ownership interest alone may create an appearance of partiality since it is contrary to the Supreme Court's "directive to be 'scrupulous to safeguard the impartiality of arbitrators' in a process not subject to appellate review").

[71] Shaffer v. PriorityOne Bank, No. 3:15-CV-304-HTW-LGI, 2021 WL 2386824, at *1 (S.D. Miss. June 10, 2021), *appeal docketed*, No. 21-60802 (5th Cir. Oct. 18, 2021).

[72] *Id.* at *1, *5.

[73] *Id.* at *4, *9.

[74] *Id.* at *9.

[75] *Id.* at *5, *9. Prior to selection, the arbitrator completed a disclosure form stating he did not have "any professional or social relationship with any parties" or "connections, direct or indirect, with any of the case participants . . . ." *Id*. at *4.

[76] *Id*. at *9.

[77] *Shaffer*, 2021 WL 2386824 at *9. *Shaffer* stated:

> The Fifth Circuit has set out the test for "evident partiality" in the non-disclosure case of *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007 (en banc)). In *Positive Software*, the Court held that an arbitrator's non-disclosure must involve a "reasonable impression of bias" stemming from "a significant compromising connection to the parties" in order to warrant vacatur of an arbitration award under § 10(a)(2).

Id. at *9.

[78] *Id.*

was a guarantor on a loan at the bank through review of its own records, which was "sufficient to waive" the bank's claim of "evident partiality" under case authority relied upon by the district court.[79]

Shaffer recognized there is a split in the lower courts on the standard of review to be applied to waive an "evident partiality" objection.[80] *Shaffer* noted, for example, the Sixth Circuit has found waiver justified only if the challenging party knew of the precise facts suggesting bias during the arbitration proceedings.[81] *Shaffer* contrasted that standard with a rule it first attributed to the Eighth Circuit, and described by later courts,[82] as the "constructive-knowledge" standard.[83] Under the latter standard, a waiver is found when a party does "'not have full knowledge of all the relationships to which they now object, [but] they did have concerns about [the arbitrator's] impartiality and yet chose to have her [or him] remain on the panel rather than spend time and money investigating further until losing the arbitration.'"[84]

The Ninth Circuit's decision in *Monster Energy* applied the "constructive knowledge standard" for waiver[85] differently than *Shaffer*.[86] *Monster Energy* rejected the argument in its case that the distributor waived objection to evident partiality by the arbitrator's disclosure of his "economic interest" in his official capacity as a JAMS arbitrator, finding it was only akin to a "partial disclosure" that failed to include the "crucial fact" of the arbitrator's *personal*

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[79] *Id.* at *8, *12 (citing Light-Age, Inc. v. Ashcroft-Smith, 922 F.3d 320, 322-23 (5th Cir. 2019)).

[80] *Shaffer*, 2021 WL 2386824 at *10 ("Federal Circuits are split as to whether a complaining party must have had actual knowledge of the underlying conflict before waiving its right to assert the conflict").

[81] *Id.* (citing Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1359 (6th Cir. 1989) "(applying waiver only 'if all the facts now argued as to the alleged bias were known . . . at the time the arbitrator heard [the]grievances.') (internal citations omitted))"; *see also* Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir. 1982) ("To hold, in the circumstances of this case, that the [challenging parties] waived their right to contest the alleged impartiality of the neutral arbitrator because the[y] . . . did not discover evidence of partiality prior to arbitration would put a premium on concealment. Waiver applies only where a party has acted with full knowledge of the facts"); Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1334 (11th Cir. 2002) (same); Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 528 (Tex. 2014) ("Tenaska did not waive its evident partiality challenge by proceeding to arbitration based upon information it was unaware of at that time").

[82] *See, e.g.*, Goldman, Sachs & Co. v. Athena Venture Partners, L.P., 803 F.3d 144, 148 (3d Cir. 2015); *Light-Age Inc.*, 922 F.3d at 322-23 (5th Cir. 2019).

[83] *Shaffer*, 2021 WL 2386824 at *11 (citing Kiernan v. Piper Jaffray Cos., Inc., 137 F.3d 588, 593 (8th Cir. 1998)).

[84] *Id.*

[85] Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1134–35 (9th Cir. 2019) ("[W]e joined several of our sister circuits that utilize a constructive knowledge standard when considering whether a party has waived an evident partiality claim . . . . The Arbitrator undoubtedly knew of his ownership interest in JAMS prior to arbitration yet failed to disclose it. To find waiver in this circumstance would 'put a premium on concealment' in a context where the Supreme Court has long required 'full disclosure' (quoting *Tenaska Energy* and *Levine*). Thus, we hold that Olympic Eagle did not have constructive notice of the Arbitrator's potential non-neutrality, and therefore did not waive its evident partiality claim").

[86] "*Monster Energy*, 940 F.3d at 1134; *see also* Fidelity Federal Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004) ("where a party to an arbitration has constructive knowledge of a potential conflict but fails to timely object"); Goldman, Sachs & Co. v. Athena Venture Partners, L.P., 803 F.3d 144, 148 (3d Cir. 2015) (quoting BLACK'S LAW DICTIONARY 888 (8th ed. 2004) ("Constructive knowledge is defined as the '[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person'").

"ownership interest."[87] The district court in *Shaffer* did not mention that *Commonwealth Coatings* had found "highly significant" an arbitration rule that requires a "writing" from both parties to "waive" circumstances likely to create a presumption of bias or that might disqualify the arbitrator.[88] *Shaffer* also did not discuss *Monster Energy* or its precise application of the "constructive knowledge" standard, nor that the Ninth Circuit did not give any weight to the fact that the arbitrator's ownership information had been available to both parties.[89]

Manifest Disregard of the Law

In *Wilko* v. *Swan*,[90] the Supreme Court, in a case involving the Securities Act of 1933,[91] made a passing comment regarding Section 10 of the FAA, observing that "interpretations of the law by the arbitrators in contrast to *manifest disregard*" are not subject to "judicial review for error in interpretation."[92] More than a half century later, the Court in *Hall Street*[93] stated that parties to an arbitration agreement should not "leap" to the conclusion they can make a "private expansion by contract" based on *Wilko.*[94] *Hall Street* explained that petitioner's request in its case was "too much for *Wilko* to bear," stating: "[petitioner] sees this supposed addition to §10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties."[95]

Since *Hall Street*, a steep chasm has formed in manifest-disregard-of-the-law doctrine, with multiple courts on one side of the split finding it continues to exist as a "judicial gloss" under § 10(a)(4) of the FAA, and a few courts concluding it did not survive *Hall Street*

[87] *Monster Energy*, 940 F.3d at 1135. A similar result also was reached in Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 527 (Tex. 2014) (noting arbitrator's ownership interest alone may create an appearance of partiality since it is contrary to the Supreme Court's "directive to be 'scrupulous to safeguard the impartiality of arbitrators' in a process not subject to appellate review") (quoting *Commonwealth Coatings*, 393 U.S. at 149); see also The Jacobs Co., Inc. v. Innovative Ins. Solutions, LLC, No. 173, September Term, 2021 (Md. Ct. Spec. App. Oct. 21, 2021) (rejecting claim of "waiver" of "evident partiality" under state law based on "financial" relationship, among other things, despite argument that a simple "website" review would have revealed the arbitrator's relationship).

[88] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

[89] *Monster Energy*, 940 F.3d at 1134-35; *see also* Petition for a Writ of Certiorari at 35, Monster Energy v. City Beverages LLC, 207 L. Ed. 2d 1100 (June 29, 2020) (No. 19-1333), 2020 WL 2949949, at *35 (noting "the fact that JAMS is owned by some of its neutrals" is publicly available information).

[90] Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

[91] Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. §§ 77 (1933).

[92] *Wilko*, 346 U.S. at 436-37, *supra* note 90, *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[93] Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

[94] *Id.* (rejecting a "supposed judicial expansion" of the FAA by virtue of court "interpretation").

[95] *Id. at* 585.

because the doctrine is not explicitly enumerated in the FAA.[96] A few years after *Hall Street*, the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*. made clear it had not decided, and it remains an open question, whether a court may vacate an arbitration award based on manifest disregard of the law by an arbitrator.[97]

Factors used to apply the manifest disregard of the law standard also are not uniform. In *Stolt-Nielsen*, the Supreme Court accepted, for discussion purposes, a standard used by the Second Circuit, which requires a showing an arbitrator "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it."[98] Other circuits have similar rules, but they also have notable differences.[99] Under any application, however, the party seeking to vacate the award on the basis of a manifest disregard of the law bears a "heavy burden."[100]

Public Policy Exception to Vacating Award Under FAA

There is a recognized split in the lower courts[101] whether an arbitration award may be challenged on public policy grounds following the Supreme Court's decision in *Hall Street*,

[96] Luciano v. Tchrs. Ins. & Annuity Ass'n of Am. - Coll. Ret. Equities Fund, No. CV156726MASDEA, 2021 WL 1663712, at *2 (D.N.J. Apr. 28, 2021) ("Since [*Hall Street*], a circuit split has emerged regarding the manifest disregard of the law doctrine, with the 'Second, Fourth, and Ninth Circuits hav[ing] found that it continues to exist as a 'judicial gloss' under § 10(a)(4),' while the 'Fifth, Eighth, and Eleventh Circuits have concluded that . . . [it] no longer survives because it is not enumerated in the FAA'") (citations omitted); *compare* Warren v. Geller, 386 F. Supp. 3d 744, 757 (E.D. La. 2019) ("Following *Stolt-Nielsen*, a Circuit split has developed. The Second, Fourth, Sixth, and Ninth Circuits have recognized 'manifest disregard of law' as a basis for vacatur. Whereas the Seventh and Eleventh Circuits have concluded that 'manifest disregard of law' is no longer a legitimate basis for vacatur").

[97] Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in [*Hall Street*]").

[98] *Id.* at 691-92.

[99] Interactive Brokers LLC v. Saroop, 969 F.3d 438, 442–43 (4th Cir. 2020) ("'A court may vacate an arbitration award under the manifest disregard standard only when a plaintiff has shown that: (1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused to apply that legal principle'") (citations omitted); *compare* Ebbe v. Concorde Inv. Servs., LLC, 953 F.3d 172, 176 (1st Cir. 2020) ("The manifest disregard standard allows courts to reject an award that 'is (1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact'") (citations omitted); Whitehead v. Pullman Grp., LLC, 811 F.3d 116, 121 (3d Cir. 2016) (noting movant must show "the arbitrator's decision . . . 'fl[ies] in the face of clearly established legal precedent,' such as where an arbitrator 'appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it'").

[100] *Saroop*, 969 F.3d at 443 ("The party seeking to vacate an arbitration award bears a 'heavy burden'") (citation omitted).

[101] *See* Caputo v. Wells Fargo Advisors, LLC, No. 19-17204, 2020 WL 2786934, at *3 (D.N.J. May 29, 2020).

with an identified majority of courts finding it remains a valid ground for challenge,[102] while a minority of courts hold the opposite view.[103]

A court's refusal to enforce an arbitrator's award because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law.[104] If a contract as interpreted by an arbitrator violates public policy, the Supreme Court has found a court is obliged to refrain from enforcing it.[105] The Court has explained, however, any such public policy must be "explicit," "well defined," and "dominant," and must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[106] This rule of law has not been yet been fully settled by the Supreme Court in the context of the FAA,[107] but multiple lower courts have applied the rule to cases governed by the FAA.[108]

In *Hall Street*, the Court considered "whether statutory grounds for prompt vacatur and modification [of an arbitration award] may be supplemented by contract" negotiated by the parties.[109] As noted, it did not decide whether the FAA permits *courts* to apply judicially created, common-law bases for vacatur or modification, such as violation of public policy. At minimum, there does not appear to be any indication that when Congress enacted the FAA it intended to displace the common-law rule that had long recognized a public policy exception

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[102] The Second, Fourth, Seventh and Ninth Circuits as well as the Alaska Supreme Court have all continued to apply the public-policy exception in post-*Hall Street* decisions governed by the FAA. *See* Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, 734 F.3d 708, 716-17 & n.8 (7th Cir. 2013); Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 451-42 (2d Cir. 2011); Matthews v. Nat'l Football League Mgmt. Council, 688 F.3d 1107, 1111-12 (9th Cir. 2012); DeMartini v. Johns, 693 F. App'x 534, 537 (9th Cir. 2017); Wells Fargo Advisers, LLC v. Watts, 540 F. App'x 229, 231 (4th Cir. 2013); Dunham v. Lithia Motors Support Servs., Inc., No. S-15068, 2014 WL 1421780, at *6 (Alaska Apr. 9, 2014).

[103] The Eleventh Circuit and the highest courts of Alabama, Florida and Nebraska have held *Hall Street* forecloses a public-policy challenge finding "the judicially-created grounds for vacatur . . . are no longer valid." Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1314, 1323-24 (11th Cir. 2010); *see also* Cavalier Mfg., Inc. v. Gant, 143 So. 3d 762, 768-69 & n.5 (Ala. 2013); Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc., 154 So. 3d 1115, 1128, 1132 (Fla. 2014); Seldin v. Est. of Silverman, 305 Neb. 185, 207, 939 N.W.2d 768, 787 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[104] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987).

[105] W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983).

[106] Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 63 (2000).

[107] In a concurring opinion in *Misco*, 484 U.S. at 46, Justice Blackmun averred that "issues" relating to whether "a court's authority to set aside an arbitration award on public policy grounds differs . . . outside the collective-bargaining context . . . are left for another day." In *Hall Street*, Justice Breyer in dissent hinted an award offending public policy in an FAA case may be treated differently than when no such circumstance exists. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 595 (2008) ("I would . . . rule in favor of petitioner's position . . . . A decision . . . that does not even arguably offend any public policy whatsoever 'is adequately justified by a presumption in favor of freedom'").

[108] Since *Hall Street*, several federal courts have applied or recognized the public policy exception outside the labor context in cases governed by the FAA. *See* Immersion Corp. v. Sony Comp. Ent. Am. LLC, 188 F. Supp. 3d 960, 968 (N.D. Cal. 2016) ("Although the public policy defense to enforcement developed primarily in the context of labor dispute arbitrations, it has been applied to FAA review of arbitration awards"); *see also* Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, 734 F.3d 708, 716-17 n.8 (7th Cir. 2013) (citing Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc., 660 F.3d 281 (7th Cir. 2011) (FAA case holding public-policy exception "survives *Hall Street*").

[109] *Hall Street*, 552 U.S. at 578.

to enforcement of an arbitration award.[110] Since the parties themselves cannot agree to violate the law, the arbitrator arguably exceeds his or her powers when the award compels a violation of public policy.[111]

There also are federalism considerations with a public policy exception to enforcement of an arbitration award in state court. Under Supreme Court precedent, there is an assumption that historic police powers of the states are not superseded by federal law and that courts should be "absolutely certain" Congress intended to displace state authority, for example, regarding disqualification of a state adjudicator before reaching such a conclusion.[112]

Interim Award Applications Seeking Court Review

A. General Authority on Non-Final Awards

A party seeking to vacate an arbitration award under the FAA must serve notice of a motion within three months after the award is delivered, and a party seeking to confirm an award must do so within one year.[113] The time requirements are jurisdictional, meaning a party's right to vacate an award, for example, is barred if not timely filed.[114]

The FAA expressly authorizes an appeal from orders denying or confirming "partial awards."[115] Justice Ginsburg, joined by two other Justices, observed the Supreme Court has not given "definitive guidance," and "lower court opinions are . . . divided," on when an interim award or partial award is deemed final and must be appealed to be timely.[116] The law is uniform, however, literally everywhere, that parties cannot themselves decide by agreement or stipulation when a court has jurisdiction to hear an appeal or any other case.[117]

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[110] United States v. Tex., 507 U.S. 529, 534 (1993); *cf.* Wachovia Sec., LLC v. Brand, 671 F.3d 472, 483 (4th Cir. 2012) (noting "manifest disregard" of law as a "judicial gloss" on 9 U.S.C. § 10(a)(4)).

[111] *See, e.g.*, Brown v. TGS Mgmt. Co., 271 Cal. Rptr. 3d 303, 312-13 (Cal. Ct. App. 2020) (reversing confirmation of an award that violated public policy under the California Arbitration Act).

[112] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

[113] 9 U.S.C. § 12 ("within three months"); 9 U.S.C. § 9 ("within one year").

[114] *See, e.g.*, Seldin v. Est. of Silverman, 305 Neb. 185, 198, 939 N.W.2d 768, 782 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[115] "An appeal may be taken from . . . an order . . . confirming or denying confirmation of [a] . . . partial award." 9 U.S.C. § 16(a)(1)(D). Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010) (rejecting the contention "the question presented" by a partial award was "not ripe"); *see also* Bull HN Info. Sys., Inc. v. Hutson, 229 F. 3d 321, 328 (1st Cir. 2000) ("The . . . Phase 1 Award could be characterized as a partial order . . . . The statute expressly provides an appeal . . . from orders denying or confirming partial awards").

[116] *Stolt-Nielsen S.A.,* 559 U.S. at 670 (Ginsberg, J., dissenting).

[117] "Parties may not consent to jurisdiction . . . no matter how that consent is phrased." *In re* Am. Ready Mix., Inc., 14 F.3d 1497, 1502 (10th Cir. 1994). "[E]ven a joint stipulation cannot cure a jurisdictional defect." Sentry Select Ins. Co. v. Royal Ins. Co. of Am., 481 F.3d 1208, 1217 (9th Cir. 2007); DeLima v. Tsevi, 301 Neb. 933, 945–946, 921 N.W.2d 89, 98 (2018).

An arbitrator's determination whether an interim award is final is only a "factor" to be considered by a court.[118] The argument that a court cannot rule on an interim award where the "arbitrator characterized it as tentative and subject to revision" has been rejected.[119] Courts have found multiple interim awards to be "final orders" even when they do not dispose of all claims submitted in the arbitration.[120] The question of timeliness is particularly vexing when an arbitration extends over many months or even years,[121] which adds the risk that the arbitrator may become unavailable due to death or other reasons before entering a final award.[122]

Several federal courts of appeals, and individual federal judges, have recognized or demonstrated the peril to a party who fails to timely challenge, or seek to confirm, an interim award in light of jurisdictional time requirements under the FAA.[123] For example, in the Eighth Circuit, despite an arbitrator announcing he had "explicitly retained jurisdiction" after issuing an interim award, two federal judges found a party's failure to challenge an interim award resulted in the claim becoming time-barred since the party "could have" filed a motion to vacate the interim award "within 90 days" after its issuance.[124]

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[118] Local 36 Sheet Metal Workers Int'l Ass'n, AFL-CIO v. Pevely Sheet Metal Co., 951 F.2d 947, 949 (8th Cir. 1992); *see also* Crawford Grp., Inc. v. Holekamp, No. 406-CV-1274 CAS, 2007 WL 844819, at *4-5 (E.D. Mo. Mar. 19, 2007) ("Most . . . circuits have held that an interim award which finally disposes of an independent claim is subject to judicial review . . . The Court rejects defendant's argument that the interim award should not be treated as final . . . ."); Publicis Commc'n. v. True N. Commc'ns, Inc., 206 F.3d 725, 728, 730-31 (7th Cir. 2000) ("The content of a decision—not its nomenclature—determines finality . . . [T]he arbitration tribunal's [interim] decision—as to this chunk of the case—was final").

[119] Johnson v. Dentsply Sirona Inc., No. 16-cv-0520-CVE-PJC, 2017 WL 4295420, at *4 (N.D. Okla. Sept. 27, 2017); *see also* Vital Pharms. v. PepsiCo, Civil Action No. 20-CIV-62415-RAR, 2020 WL 7625226, at *4 (S.D. Fla. Dec. 21, 2020) (citing *Johnson*).

[120] Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986) (affirming district court's confirmation of "eight orders" and rejecting argument the interim orders should "be regarded as non-final and non-confirmable," ruling instead they are "all . . . final orders . . . and therefore may be confirmed although [they do] not dispose of all the claims that were submitted to arbitration").

[121] Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231, 236 (1st Cir. 2001) ("Another important consideration is the risk that . . . we may create situations at the arbitration level in which the losing side may forfeit an appeal (e.g., as to liability) by waiting until all arbitration proceedings are complete"); First State Ins. Co. v. Nationwide Mut. Ins. Co., No. 13-cv-11322-IT, 2014 WL 5342609, at *4 (D. Mass 2014) (citing *Hart* stating, "[t]hat exact concern is illustrated here, where First State filed its petition to confirm the award one hundred days after the February award issued and has argued that Nationwide has forfeited any motion to vacate by not objecting to the award within ninety days").

[122] Trade & Transp., Inc. v. Nat. Petrol. Charterers, Inc., 931 F.2d 191, 194, 195 (2d Cir. 1991) ("[The] partial final award . . . could not be disturbed" where it was "rendered before [the arbitrator's] death[.]"); *see also* Zelasko v. Zelasko, No. 342854, 2019 WL 2478015, at *1–2, 4, 6 (Mich. Ct. App. June 13, 2019), *appeal denied*, 944 N.W.2d 684 (Mich. 2020) (upholding, after arbitrator had passed away, "seven interim awards" which the arbitrator "indicated that he intended that the final arbitration award would incorporate" under Michigan law, identical to the FAA).

[123] *See Hart Surgical, Inc.*, 244 F.3d at 235 ("Since a party has one year . . . under the FAA, 9 U.S.C. § 9, a contrary decision would have barred [appellant] from confirming the partial award . . . What runs through . . . decisions is a tension between . . . the parties' intent to divide an arbitration into distinct phases, and making sure that a losing party does not thereby forfeit an appeal . . . ."); *see also* Kerr-McGee Ref. Corp. v. M/T Triumph, 924 F.2d 467, 471 (2d Cir. 1991) (noting it "need not resolve" the issue of "whether the one-year limitation should apply to a party seeking confirmation of an award that does not end the arbitration[.]").

[124] Int'l Union v. Trane USA, Inc., 970 F.3d 956, 960 (8th Cir. 2020) (Kobes, J., dissenting); *see also* Schatt v. Aventura Limousine & Transp. Serv., Inc., 603 Fed. Appx. 881, 885–86, 883 (11th Cir. 2015) (reversing district court's order finding interim awards to be "sufficiently 'final' for review" even though the arbitrator had indicated the interim award would be viable "until such time as a final Award" was entered).

Citing *Stolt-Neilsen*, one federal court found that a party's failure to seek judicial review of an interim award in an "ongoing arbitration" within the three-month limitations period rendered its later challenge time-barred because the party "had the opportunity to timely preserve its argument" by filing an objection in court to the interim award.[125] A federal district court echoed the view of the Fifth Circuit that "the *Stolt-Nielsen* exception may apply, but [the United States Supreme Court] did not provide the courts with any direction about when or how."[126] This uncertainty has given rise to a recognized circuit split whether a court has jurisdiction to confirm a partial award.[127]

Seldin v. Estate of Silverman—An Arbitration Case Under the Microscope

A. Background Facts

In *Seldin v. Estate of Silverman*,[128] Scott A. Seldin ("Scott") and his now late father, Millard R. Seldin ("Millard"), and their related entities, worked together in commercial real estate and other business ventures and were known as "Arizona Seldins." They became embroiled late in Millard's life in a complex business dispute subject to arbitration with Millard's now deceased brother and brother-in-law and their related entities, which were known as "Omaha Seldins."[129] The parties entered into a separation agreement that included many litigation-type rules, including a "claims bar date" to prohibit late claims, required use of the

[125] La. Health Serv. Indem. Co. v. Gambro A B, 756 F. Supp. 2d 760, 766 (W.D. La. 2010) ("Gambro had the opportunity to timely preserve its argument . . . [on] the [interim] Award by filing its objection within the limitation period under Section 12, just as the petitioner in *Stolt-Neilsen* . . . Because Gambro chose not to file such an objection, the Court is powerless to hear it now"); *see also* Nu-Best Franchising, Inc. v. Motion Dynamics, Inc., No. 805CV507T27TGW, 2006 WL 1428319 (M.D. Fla. May 17, 2006) (finding motion to vacate filed more than three months after an interim award was untimely since the interim award resolved the claims in the arbitration and reserved jurisdiction only for limited relief of attorney fees and costs).

[126] Mitchell v. Franchise Servs. of N. Am., Inc., No. 3:18-CV-723-HTW-LRA, 2019 WL 6135058, *7 (S.D. Miss. Nov. 19, 2019) ("This court is persuaded . . . [by] authority that allows this court to confirm a partial arbitrator's award").

[127] La. Health Serv. Indem. Co. v. DVA Renal Healthcare, Inc., 422 F. App'x 313, 314 n.1 (5th Cir. 2011) ("split exists . . . whether federal courts may hear an interlocutory appeal from an arbitral tribunal").

[128] *Seldin*, 305 Neb. 185, 939 N.W.2d 768 (2020), *cert. denied.* 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[129] *Seldin*, 305 Neb. at 189–90. Millard built a large and thriving commercial real estate business, initially from his hometown in Omaha, Nebraska, and later with Scott, from Phoenix, Arizona, and he invited his brother, Ted, and brother-in-law, Stan, to join him in the business from Omaha. *Id.*

Federal Rules of Civil Procedure during the arbitration, and a requirement for a "reasoned award"[130] for "any decision."[131]

The separation agreement is governed by Nebraska law and the arbitration was to take place in Omaha, Nebraska, subject also to rules of the "Commercial Division" of the American Bar Association ("AAA rules").[132] Nebraska law is favorable for arbitration. The Nebraska Supreme Court long ago gave an "instruction" that arbitrators are subject to the "same" ethical standards as judges.[133] A Nebraska statute provides a judge, and thus an arbitrator, is automatically disqualified if he or she acquires a personal interest in a case without obtaining express, written consent from the parties and making the writing part of the record in the proceeding.[134] The Nebraska Supreme Court also has recognized as longstanding public policy that an identifiable double recovery or windfall violates the Nebraska Constitution and will not be upheld.[135]

Omaha Seldins' operative pleading was a 172-paragraph demand for arbitration with 32 separate counts for relief, and Arizona Seldins, including Scott,[136] responded with a

[130] "Where parties to an arbitration have agreed and directed the arbitrator to issue a reasoned award, the arbitrator is obligated to conform to the parties' directive and issue a reasoned award." Vold v. Broin & Assocs., Inc., 2005 S.D. 80, ¶ 18, 699 N.W.2d 482, 488; Stage Stores, Inc. v. Gunnerson, 477 S.W.3d 848, 860, 864 (Tex. App. 2015) (reversing confirmation of arbitration award for arbitrator's failure to issue a "reasoned award" on key defense). *See also* Steven Hooten & Richard Bales, *"Reasoned" Arbitration Awards*, 12 ARB. L. REV. 81, 94–95 (2020) ("[A] reasoned award should address all issues and arguments that were heard during an arbitration hearing and affect the outcome, and that particular attention should be given to the rejected arguments of the losing party").

[131] The separation agreement required the arbitrator to make specific written findings of fact and law in "any decision" rendered, but the parties agreed to revise the requirement to a "reasoned award." *Seldin*, 305 Neb. at 211; *see also Seldin*, Bill of Exceptions ("BOE"), notice filed April 29, 2019 (Image 000076683NSC) (references to exhibits in the Bill of Exceptions are hereinafter designated as "Ex."), Ex. 1-A § 9.14.1; *see also* Ex. 1-D at 9 ¶ C (CMO No. 1).

[132] *Seldin*, 305 Neb. at 190, 939 N.W.2d at 776–77.

[133] Nebraska judicial "ethical standards" apply to an arbitrator's neutrality and any failure by the arbitrator to disclose a conflict of interest. *See* State v. Pattno, 254 Neb. 733, 739, 579 N.W.2d 503, 507 (1998).

[134] NEB. REV. STAT. § 24-739(1)(a) (1879) (noting adjudicator "shall be disqualified from acting . . ., except by mutual consent of the parties, which mutual consent is in writing and made part of the record . . . [i]n any case in which . . . he or she is . . . interested").

[135] *See, e.g.*, Abel v. Conover, 170 Neb. 926, 931, 104 N.W.2d 684, 689 (1960) ("[D]amages which double or treble the actual compensatory damages established, are in contravention . . . of the Nebraska Constitution").

[136] Scott is included in the definition of "Arizona Seldins" in the separation agreement and in this article. Ex. 1-A, *supra* note 131, at 1. Since Scott had separate claims, he also is sometimes identified individually. Scott's briefs in the Nebraska Supreme Court are publicly accessible (https://www.nebraska.gov/courts/sccales/index.cgi) and include a Brief and Cross-Appeal dated August 16, 2019 (Image ID N19229A0JNSC) ("Scott CA Brief"); Motion for Rehearing and Brief dated March 16, 2020 (Image ID N20076C6ANSC, Image ID N20091CCKNSC) ("Scott RH Brief"); and Appellee Scott A Seldin's Response to Omaha Seldins' Motion for Attorney Fees dated March 29, 2020 (Image ID N20090CBNNSC) ("Scott AF Brief"). Other briefs cited here include Appellants' Opening Brief dated July 22, 2019 (Image ID N192039PTNSC) ("AS Brief"); Arizona Seldins' Response to the Omaha Seldins' Motion for Attorney Fees dated March 29, 2020 (Image ID N20090CBONSC) ("Arizona Seldins' AF Brief"); Brief and Cross-Appeal of Omaha Seldins' Appellees dated September 16, 2019 (Image ID N19260AC3NSC) ("OS Brief"); Brief in Support of Omaha Seldins' Motion for Attorney Fees dated (N20077C6FNSC) ("Omaha Seldins' AF Brief").

340-paragraph counterclaim with 30 affirmative defenses.[137] In the end, the arbitration took place over years, with 53 days of hearings, 58 fact and expert witnesses, and 1,985 exhibits.[138]

During the arbitration, but long after the claims bar date had expired,[139] the arbitrator allowed what became the largest claim in the arbitration known as "Sky Financial."[140] Under one theory of the new Sky Financial claim, Omaha Seldins stated Millard engaged in a "rare misstep"[141] in technically committing a securities violation, which resulted in joint and several liability of the other Arizona Seldins, initially including Scott.[142] But even Omaha Seldins eventually recognized it was impossible for Scott to have committed "any" form of securities violations and, as a result, the parties entered a new "mutual agreement" during the arbitration, contemporaneously approved by the arbitrator, exonerating Scott from "any" securities violation.[143]

After reaching the agreement with Scott, Omaha Seldins proceeded in the arbitration to seek rescission for Millard's claimed securities violation relating to Sky Financial, arguing they were entitled to be returned to their status quo as though they were never owners of Sky Financial.[144] At the same time, Omaha Seldins also added a separate theory for *damages* related to Sky Financial, alleging they suffered lost "corporate opportunities" as Sky Financial owners as a result of Millard's actions.[145]

At a hearing held approximately seven months before the final award, and without prior notice, Omaha Seldins presented legal assignments to the "arbitrator" that would "irrevocably" transfer their Sky Financial ownership interests to the arbitrator in his *official* role "as arbitrator."[146] Omaha Seldins stated they sought to take this action to satisfy a "tender" requirement (return of the securities) prescribed by applicable law when rescission is sought.[147] The arbitrator initially questioned this proffer,[148] but ultimately confirmed to Arizona Seldins his belief he was authorized to accept it in his formal role "as arbitrator," stating, in that capacity, he had "jurisdiction" and would treat the matter as an official "act of interpleading"

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[137] Ex. 10-07; Ex. 2-F.

[138] *Seldin*, 305 Neb. at 191, 939 N.W.2d at 778-79.

[139] Scott CA Brief, *supra* note 136, at 9.

[140] *Seldin*, 305 Neb. at 191-92, 939 N.W. 2d at 778 ("Sky Financial Securities, LLC . . . is an Arizona limited liability company, created as part of a plan to acquire and operate a chain of pizza restaurants in numerous states").

[141] Scott CA Brief, *supra* note 136, at 10.

[142] *Id*. at 22.

[143] *Id*. at 11.

[144] *Seldin*, 305 Neb. at 192, 939 N.W.2d at 778 (noting the arbitrator awarded $3,135,681 "in recessionary [sic] damages for the securities violation claims").

[145] *Id.* (noting "the arbitrator awarded the Omaha Seldins $1,962,528 in damages for their lost corporate opportunities claims" in addition to the rescission theory).

[146] *Seldin*, 305 Neb. at 201, 939 N.W.2d at 784. Under Arizona law, purchasers of securities may obtain rescission to recover consideration paid for securities, but must "tender" the securities to obtain such relief. A.R.S. § 44-2001(A).

[147] *Id.*

[148] *Id.* ("ARBITRATOR: why would the assignment come to me?").

Sky Financial to the arbitration tribunal.[149] Because the proposed action did not involve compromising the arbitrator with *personal* ownership, and further because an interpleader[150] to the arbitration tribunal would ensure there should never be a double recovery awarded against them, Arizona Seldins agreed[151] to this narrow, unusual request.[152]

Unfortunately for Scott and Arizona Seldins, the final award brought surprise.[153] The arbitrator revealed for the first time in the final award he privately determined during the arbitration that he had acquired Sky Financial *in his personal capacity* and further found it to be important to "individually" "disclaim[]" and "release" all such personal interests in Sky Financial in the final award.[154]

The arbitrator awarded financial *damages* to Omaha Seldins in the final award on the basis of their ownership in Sky Financial.[155] At the same time, the arbitrator also added millions of dollars to Omaha Seldins' recovery by granting their request for *rescission* relating to Sky Financial as though they had never been owners.[156] These rulings also appeared antithetical to a formula[157] in the final award designed to avoid a double recovery.[158]

In addition to awarding damages and rescission, the arbitrator announced in the final award he was transferring "back" to Omaha Seldins the Sky Financial interests he had privately

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[149] *Id*. ("ARBITRATOR: Well, the only way I know how to deal with this right now is to consider this an act of interpleading these interests to me. I'm not an officer of the court, but I do have jurisdiction over the matter, so for the time being, at least, I'll accept them"). A few weeks later the arbitrator entered an interim award, which was later incorporated into the final award, showing his earlier acceptance of a formal tender of Sky Financial in his official capacity as arbitrator was not temporary and had become final. Ex. 1 at 341; Ex. 10 at 71-72 ("Certain membership interests in Sky Financial were formally tendered to the arbitrator at the . . . hearing"). *See also* Scott CA Brief, *supra* note 136, at 8.

[150] Under Nebraska law, a party invoking an interpleader "must not have nor claim any interest" in the subject property. Strasser v. Com. Nat'l Bank, 157 Neb. 570, 573, 60 N.W.2d 672, 674 (1953) ("It is the essence of an interpleader . . . that the party invoking the remedy . . ., assert[] no interest in himself"). Other jurisdictions apply the same rule. Pac. Loan Mgmt. Corp. v. Super. Ct., 196 Cal. App. 3d 1485, 1489, 242 Cal. Rptr. 547 (Cal. Ct. App. 1987).

[151] E1, 452-72:15-17, I. Arizona Seldins preserved an objection "for the record," stating they were not "going to commit" to "how" language in the written assignments, for example, the specific "relief . . . to be awarded," would be "recognized" by the arbitrator. Seldin Supplemental Transcript dated April 2, 2019 in Case No. A19-310 (Image ID A00102653NSC) ("*Seldin* ST") at 12, 128; E53-A at 7.

[152] *Seldin*, 305 Neb. at 202, 939 N.W.2d at 784. The arbitrator also represented he would seek "guidance" from the parties on how to "deal" with the interpleader "at the point in time where an award is entered." Scott CA Brief, *supra* note 136, at 25.

[153] Ex. 1-QQ at 462-63 (final award).

[154] AS Brief, *supra* note 136, at 13 (quoting final award: "The Arbitrator, individually and d/b/a . . . a Colorado corporation, disclaims and releases any and all right, title and interest in any and all membership interests that were or could have been the subject of the Original Assignments. And to the extent deemed necessary, the Arbitrator hereby re-assigns any and all such interests back to the assignors [i.e. two Omaha Seldins entities]." *See also* Scott CA Brief, *supra* note 136, at 28.

[155] Omaha Seldins asserted in support of their lost corporate opportunity claim that their ownership of Sky Financial made the "great deal possible" because their "assets" were used "to obtain the opportunity" to earn significant "distributions and fees." Scott CA Brief, *supra* note 136, at 15.

[156] *Seldin*, 305 Neb. At 192, 939 N.W.2d at 778; Scott CA Brief, *supra* note 136, at 15.

[157] Scott CA Brief, *supra* note 136, at 12–13, 15.

[158] The formula on the face of the final award provides any recovery for Sky Financial securities violations is to be reduced by "income received . . . from ownership of the securities." *Id.* at 12 (quoting final award). The final award specifies both the precise amount of damages for securities violations ($3,185,681) as well as the precise "income . . . from ownership" ($1,962,528) to facilitate a mathematical reduction dictated by the formula. *Id.*

determined he acquired "individually," arguably creating a *triple* recovery[159] to Omaha Seldins.[160] Despite the new mutual agreement with Scott, which had superseded[161] an earlier general oral agreement,[162] the final award also found Scott jointly and severally liable for securities violations related to Sky Financial.[163] The triple recovery[164] and inconsistent action toward Scott were later shown when Omaha Seldins brought new Sky Financial claims against Arizona Seldins, including Scott, in an Arizona court where Omaha Seldins claimed to be owners of Sky Financial again, despite their earlier irrevocable transfer by written assignments.[165]

The arbitrator did not disclose to Arizona Seldins before the final award that he had determined the transfer of Sky Financial involved him *individually* acquiring personal ownership interests in Sky Financial.[166] The arbitrator also did not obtain written consent from the parties, or make such a writing part of the arbitration record, as mandated by Nebraska law,[167] in order for the arbitrator to avoid becoming immediately disqualified.[168] The arbitrator entered a final net award[169] for Omaha Seldins in the amount of $2,997,031, plus interest.[170]

The final award incorporated twelve interim awards, each of which states it is "law of the case," but also includes a statement that "[t]he parties understand" the interim award "is not a final appealable arbitration award."[171] Prior to the final award, and primarily due to

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[159] *Id.* at 15, 25.

[160] *Id.* at 14; AS Brief, *supra* note 136, at 13 (quoting final award).

[161] Hagerbaumer v. Hagerbaumer Bros., Inc., 208 Neb. 613, 617, 305 N.W.2d 4, 7 (1981) ("A contract complete in itself will be conclusively presumed to supersede and discharge another . . . concerning the same subject matter, where . . . the later . . . [is] inconsistent . . . .") (citations omitted).

[162] Scott CA Brief, *supra* note 136, at 22; Scott RH Brief, *supra* note 136, at 6.

[163] Seldin v. Est. of Silverman, 305 Neb. 185, 215, 939 N.W.2d 768, 791 (2020), *cert. denied.* 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[164] When the Sky Financial assignments were first presented in the arbitration, Omaha Seldins were asked questions addressed to whether the transfer of Sky Financial as part of an interpleader could result in Sky Financial ever coming back to them to which Omaha Seldins responded in the arbitrator's presence: "It's an unconditional and irrevocable assignment. That's what it says." Scott CA Brief, *supra* note 136, at 14. Omaha Seldins later declared in the Arizona court after the final award that they were again owners of Sky Financial and entitled to relief, stating: "The Omaha Seldins hold equity ownership interests in debtor Sky Financial Investments, LLC." *Id.* at 15–16 (quoting record).

[165] A triple recovery in this context can be explained by analogy. Assume a purchaser bought a home under contract at fair market value for $250,000 and, after discovering a faulty foundation, paid $50,000 for it to be fixed, and then filed suit against the seller. At minimum, the purchaser could choose to return to the status quo by moving out of the house and seek rescission of the purchase price of $250,000. Or the purchaser could affirm the contract, continue to reside in the house as owner and recover out-of-pocket costs of $50,000. A purchaser would receive a windfall, however, if the purchaser was allowed to recover $250,000 in relief for rescission and $50,000 in damages *and* also allowed to continue living in the house.

[166] Ex. 1-QQ, *supra* note 131, at 462–63 (final award).

[167] NEB. REV. STAT. § 27-739 (Reissue 2016); State v. Pattno, 254 Neb. 739, 579 N.W.2d 507 (1998).

[168] State v. Vidales, 6 Neb. Ct. App. 163, 176, 571 N.W.2d 117, 124 (1997) (vacating prior order as "void and of no effect" even though it was entered before the judge had any personal knowledge of his disqualifying interest).

[169] Ex. 1-QQ, *supra* note 131, at 462–63 (final award).

[170] Seldin v. Est. of Silverman, 305 Neb. 185, 192, 208, 939 N.W.2d 768, 788(2020), *cert. denied* 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[171] *Seldin*, 305 Neb. At 192, 212, 939 N.W.2d at 778, 790.

differences related to Sky Financial,[172] Scott[173] decided to act cautiously by filing interim award applications in five specific instances.[174]

Citing case authority,[175] Scott explained he filed the interim award applications only in an "abundance of caution" and in a manner to avoid the parties or the district court from having to take piecemeal action until the final award in the arbitration was entered.[176] The parties soon thereafter stipulated to a stay, and the district court approved the stipulation, fully eliminating, as represented, the need for any action by the parties or the district court before the final award.[177]

B. Seldin Court Review

After the final award was entered, Arizona Seldins filed an application to modify or vacate the final award in the district court, while Omaha Seldins filed a motion to confirm the final award.[178] Despite the great length and extent of the commercial litigation-styled arbitration, Arizona Seldins and Scott,[179] according to the district court, identified only *five* issues under the FAA to be heard and all of them were based on a single subject, Sky Financial.[180] The district court conducted an initial hearing for a few hours and received briefs on post-arbitration motions and later asked the parties to appear for a second hearing.[181]

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[172] As of the time Sky Financial was under review in the arbitration, Scott and Arizona Seldins had prevailed under the law-of-case interim awards on a net basis in the amount of $2,101,178. Scott CA Brief, *supra* note 136, at 8–9.

[173] Scott retained appellate counsel during the arbitration in part because it became clear he had separate issues relating to Sky Financial and he also sought to preserve his position in regard to a few interim awards. *See id.* at 2. The FAA affords relief to "any" person, such as Scott individually, seeking to challenge an award. 9 U.S.C. § 10(a)(3); *see also* Scott CA Brief, *supra* note 136, at 25.

[174] *Seldin*, 305 Neb. At 212, 939 N.W.2d at 790; *see also* Scott CA Brief, *supra* note 136, at 16. Scott's request further was not inconsistent with the separation agreement, which allowed him to request "equitable procedures in a court to obtain interim relief . . . to preserve the status quo . . . pending resolution by" the arbitrator and to enforce "any" award. Ex. 1-A, *supra* note 131, at § 9.14.3.

[175] *Seldin*, 305 Neb. At 212, 939 N.W.2d at 790. *See, e.g.*, Seldin 2nd Supplemental Transcript in Case No. A-19-310 dated May 21, 2019 (Image ID A00105706NSC) ("*Seldin* 2d ST") at 106 n.2 (citing *In re: Chevron U.S.A., Inc.*, 419 S.W.3d 329 (Tex. App. 2010) ("*Chevron*").

[176] *Seldin*, 305 Neb. At 212, 939 N.W.2d at 790. For example, Scott included in the caption of the first interim award application, "REQUEST STAY OF ACTION," in all capitalized and bold letters, and explained in the body of the application that piecemeal action was not sought and would not be necessary. *See, e.g.*, *Seldin* 2d ST, *supra* note 175, at 1 (emphasis omitted).

[177] *See Seldin* 2d ST, *supra* note 175, at 56.

[178] *Seldin* ST, *supra* note 151, at 1-9.

[179] *Seldin* ST, *supra* note 151, at 119-20 ((1) arbitrator ownership – misbehavior; (2) claim bar date – no reasoned award; (3) legal fees and expenses not allowed; (4) materially miscalculated prejudgment interest; and (5) material mistake resulting in Scott's joint and several liability for Sky Financial). Arizona Seldins also asked the district court to consider that the arbitrator's award of a double recovery violated public policy, but it was not addressed. *Id*. at 143.

[180] *Id.*

[181] At the end of the initial hearing, the district court stated the parties had done an "excellent job" in providing "very helpful" assistance in light of the complexity of the case and noted it may seek "additional argument" in a second hearing, which later occurred. AS Brief, *supra* note 136, at 35-36. *Seldin* ST, *supra* note 151, at 115.

The district court entered an order finding the issues "did not involve resolution of complicated factual disputes,"[182] overruled Arizona Seldins' objections, confirmed the final award[183] and awarded attorney fees in favor of Omaha Seldins as a sanction.[184] On appeal, the Nebraska Supreme Court affirmed the district court's judgment, modifying it to include additional attorney fees[185] and a further award of sanctions.[186]

C. Unique Legal Issues in Seldin

1. Claims Bar Date

The district court rejected Arizona Seldins' objection[187] to an order of the arbitrator allowing the largest claim in the arbitration, Sky Financial, to be late added long past the claims bar date deadline.[188] The district court acknowledged the arbitrator failed to even consider the "concept" of a procedure ("relation back") required to be used, but it claimed Arizona Seldins had "mischaracterize[d]" its significance.[189] The district court did not discuss that the arbitrator had entered specific orders[190] during the arbitration observing that the relation back method was

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[182] *Seldin* ST, *supra* note 151, at 62.

[183] Seldin v. Est. of Silverman, 305 Neb. 185, 192, 195, 939 N.W.2d 768, 780 (2020), *cert. denied* 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021); *see also Seldin* ST, *supra* note 151, at 139–40.

[184] *Seldin*, 305 Neb. At 217, 939 N.W.2d at 793 (awarding $131,184.45).

[185] *Id.*, 305 Neb. at 212, 219, 939 N.W.2d at 790, 795 ("[W]e . . . affirm the district court's award of sanctions . . . and order the fee judgment in favor of the Omaha Seldins be increased to $342,860.95").

[186] *See Neb. App. Cts. Case Search*, NEB. JUD. BRANCH, https://www.nebraska.gov/justice (last accessed December 19, 2021) (adding $50,000.00 in docket order dated August 26, 2020).

[187] Garlock v. 3DS Props., L.L.C., 303 Neb. 521, 534, 930 N.W.2d 503, 513 (Neb. 2019) (preserving "judicial challenge to arbitrability").

[188] *Seldin* ST, *supra* note 151, at 133-34. The district court first suggested Arizona Seldins "waived" their objection to the arbitrator's failure to provide a "reasoned award," but its "waiver" analysis is not in accord with other parts of its opinion in which it found claims are not ripe until the final award. *Compare Seldin* ST at 68 (finding Scott's objections were not ripe until the final award based on "explicit agreement" of the parties and arbitrator consent) with *Seldin* ST at 11 (suggesting waiver of objection even though a reasoned award is not due until the final award based on the same explicit agreement). There also is substantial authority an arbitrator cannot rule on an objection by a party after the final award. Ex. 60-B at 2 n.3 (discussing "functus officio").

[189] *Seldin* ST, *supra* note 151, at 133-34. The district court did not discuss a leading case on relation-back doctrine presented by Arizona Seldins, which demonstrates why a reasoned award was required in this circumstance. Ex 53-A at 20-22 (citing Glover v. F.D.I.C., 698 F.3d 139 (3d Cir. 2012) (discussing relation back under Fed. R. Civ. P. 15).

[190] *See* Ex. 53-A at 5 (Scott's trial court brief dated August 11, 2017) (arbitrator declaring as "law of the case" the requirement that, after the claims bar date, any proposed new claim "will be barred . . . subject, however, to the parties' right, . . . to amend and/or supplement their Ancillary Claims . . . and relate them back in accordance with Rule 15, F.R.C.P."); Ex. 4-J at 399-400. *See also* Scott CA Brief, *supra* note 136, at 33 (quoting arbitrator's order that any amended claim is "*required* to follow the procedure" of "relat[ion] . . . back in accordance with Rule 15, F.R.C.P").

mandatory.[191] On appeal, the Nebraska Supreme Court did not address case authority demonstrating an arbitrator must comply with any agreed upon "method,"[192] or specifically consider the prejudice involved to Arizona Seldins by the arbitrator's action, but ruled instead the arbitrator was merely interpreting the separation agreement. [193]

2. Joint and Several Liability

The district court rejected[194] as "misleading" [195] the argument[196] that the arbitrator made a material mistake[197] in finding Scott jointly and severally liable for securities violations[198] because the district court found such liability is "firmly rooted in the terms of the Separation Agreement."[199] But joint and several liability is not included in the separation agreement for any claim.[200] An arbitrator also is not automatically entitled to deference for his or her interpretation of an oral agreement merely because it concerns a subject related to the

[191] The district court also appeared to rely on the arbitrator's speculation of what he "heard" about a Rule 26 report submitted to the former arbitrator. *See Seldin* ST, *supra* note 151, at 132; *see also* OS Brief, *supra* note 136, at 13, 58. The arbitrator did not prepare a reasoned award—even though he was adding the biggest claim awarded in the arbitration after the claims bar date—showing he conducted any relation back analysis on any Rule 26 report he "heard" about. *Id.*; Ex. 2-H at 210; *see also* Ex. 53-A, *supra* note 190, at 11 (Scott's trial court brief dated August 11, 2017) (quoting Stage Stores, Inc. v. Gunnerson, 477 S.W.2d 848, 860, 864 (Tex. Ct. App. 2015) (vacating award for failure to issue a "reasoned award" on key defense).

[192] *See Seldin*, 305 Neb. at 217, 939 N.W.2d at 793 (citing Scott CA Brief, *supra* note 136, at 33, but not discussing Crawford Grp., Inc. v. Holekamp, 543 F.3d 971, 976 (8th Cir. 2008)); *see also* Scott AF Brief, *supra* note 136 (noting "arbitrator was 'obliged' under the 'AAA Code' to 'comply' with 'the relation-back procedure[]' in a reasoned award"). *See also* Vold v. Broin & Assoc., Inc., 2005 S.D. 80, ¶ 18, 699 N.W.2d 482, 487-88 ("Where parties to an arbitration have agreed and directed the arbitrator to issue a reasoned award, the arbitrator is obligated to conform to the parties' directive and issue a reasoned award").

[193] Allowing the Sky Financial claim to be made after the claims bar date significantly impacted Scott in relation to an earlier oral agreement on joint and several liability. Scott RH Brief, *supra* note 136, at 5-6; Scott CA Brief, *supra* note 136, at 19.

[194] Ex. 53-A, *supra* note 190, at 9-10; *Seldin* ST, *supra* note 151, at 139. *Seldin*, 305 Neb. At 215, 939 N.W.2d at 791.

[195] *Seldin* ST, *supra* note 151, at 138.

[196] Scott showed the new "mutual agreement" between the parties incorporated into the final award, and approved by the arbitrator, fully exonerated Scott from "any" form of liability, including joint and several liability, for securities violations related to Sky Financial. *See* Scott CA Brief, *supra* note 136, at 10-11, 16-18 (citing the record and discussing arguments made to the district court).

[197] 9 U.S.C. §11(a) authorizes a court to correct an arbitration award on this ground.

[198] Scott CA Brief, *supra* note 136, at 10-11, 13 and 18.

[199] *Seldin* ST, *supra* note 151, at 138.

[200] *See generally* Ex. 1-A, *supra* note 131. The district court cited passing comments made by, or in the presence of, the arbitrator regarding expected enforcement of the final award from a "collection" standpoint, but enforcement is not discussed in the separation agreement or AAA rules and is not a matter over which the arbitrator has any power. *Seldin* ST, *supra* note 151, at 139; *see generally* Pac. Reinsurance Mgmt Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991 ("Arbitrators have no power to enforce their decisions").

arbitration.[201] On appeal, the Nebraska Supreme Court essentially found the same[202] and chose not to address[203] caselaw and other arguments[204] bearing upon joint and several liability.[205]

D. Issues in Seldin in Conflict in Courts

On specific issues for which there is widespread conflict in state and federal courts, the district court and Nebraska Supreme Court analyses and rulings in *Seldin* were as follows:

Arbitrator Ownership. The district court recognized arbitrator ownership as a "major focus" of Arizona Seldins, but reframed[206] the argument as invoking "evident partiality,"

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[201] An arbitrator is not automatically entitled to deference by a court in regard to his or her interpretation of a "modification" to the operative arbitration agreement. *See, e.g.*, Scott AF Brief, *supra* note 136, at 6 (quoting Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. V. TRW Auto. U.S. LLC, 766 F. App'x 186, 188 (6th Cir. 2019) ("TRW challenged an aspect of the remedy awarded by the arbitrator that provided relief on the basis of an implicit agreement beyond the scope of the [operative] agreement and its arbitration clause. Notwithstanding the extraordinary deference accorded to arbitral decisions, it was error for the district court to enforce that aspect of the arbitral award in this case")); *see also* Anheuser-Busch, Inc. v. Int'l Bhd. Of Teamsters Local No. 744, 280 F.3d 1138 (7th Cir. 2002) ("We have pointed out that an arbitrator cannot shield himself from judicial correction by merely '*making noises of contract interpretation*'") (citation omitted; emphasis in original).

[202] Seldin v. Est. of Silverman, 305 Neb. 185, 215–16, 939 N.W.2d 768, 791–92 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021). Like the district court, the Nebraska Supreme Court also mistakenly stated joint and several liability was found in the "terms of the separation agreement." *Id.* at 792; *see generally* Ex. 1-A, *supra* note 131.

[203] The Nebraska Supreme Court chose not to address Scott's contention that the term "Respondents" in the net award rendered the final award unenforceable due to ambiguity. *Seldin*, 305 Neb. at 185-221, 939 N.W.2d at 768-95; *see* Scott CA Brief, *supra* note 136, at 21-22; Scott RH Brief, *supra* note 136, at 3-5. But the court itself must independently "determine whether the arbitration award is ambiguous." *Id.* (quoting Brown v. Witco Corp., 340 F.3d 209, 220 n.12 (5th Cir. 2003). *Compare* Defterios v. Dallas Bayou Bend, Ltd., 350 S.W.3d 659, 674 (Tex. Ct App. 2011) ("We . . . reform the judgment by deleting all references to a joint and several recovery").

[204] Scott acknowledged, absent a double recovery, he could be jointly and severally liable for damages on the *non-securities* claim ($1,962,528). Ex. 53-A, *supra* note 190, at 9-10; Scott CA Brief, *supra* note 136, at 11, 13; Scott RH Brief, *supra* note 136, at 5-6. But Scott explained he should not be jointly and severally liable for the securities violations ($3,185,681) after the parties agreed, and the arbitrator approved during the arbitration, a new, superseding agreement. *Id.* The district court had suggested Scott was liable for securities violations *because* he was jointly and severally liable for lost "corporate opportunities," but it did not explain how one could *cause* the other. *Id.*; *see also Seldin* ST, *supra* note 151, at 139.

[205] The Nebraska Supreme Court did not address "indistinguishable" legal authority existing at the time of the district court decision in support of vacating statutory legal expenses awarded as damages. Ex. 60-A at 3; Ex. 60-B at 1-2 (citing *Sabre GLBL, Inc. v. Shan*, No. 15-cv-8900, 2018 WL 1905802 (D.N.J. Apr. 23, 2018), *rev'd*, 779 F. App'x 843 (3d Cir. 2019). *See also* Arizona Seldins' AF Brief, *supra* note 136, at 4-5. The Nebraska Supreme Court raised AAA rules as relevant, but did not discuss that the separation agreement includes an "[u]nless . . . inconsistent" clause, which other courts have indicated subordinates AAA rules to conflicting contract provisions. *Compare* Brady v. Williams Capital Grp., L.P., 878 N.Y.S.2d 693, 695, 698 (N.Y. App. Div. 2009), *aff'd as modified*, 14 N.Y.3d 459, 928 N.E.2d 383 (N.Y. 2010) (observing "arbitration agreement" with "except as provided" provision takes "precedence over the AAA rules"); Beacon Towers Condo Trust v. Alex, 473 Mass. 472, 476-77, 42 N.E.3d 1144, 1148 (2016) (incorporation of AAA rules themselves are "not a sufficient contractual basis for an award of fees").

[206] Arizona Seldins led with the argument that arbitrator ownership in this context constituted "misbehavior" under 9 U.S.C. § 10(a)(3). *Seldin*, 305 Neb. At 210, 939 N.W.2d at 789; *see also Seldin* ST, *supra* note 151, at 6, 119.

declared *Commonwealth Coatings* to be "inapposite" and chose not to discuss Arizona Seldins' contention the issue should be resolved by a Nebraska statute, Neb. Rev. Stat. § 24-739(1)(a).[207]

On appeal, the Nebraska Supreme Court did consider Neb. Rev. Stat. § 24-739(1)(a) and reaffirmed its prior "instruction" of Nebraska law that arbitrators are subject to the "same" ethical rules as judges.[208] But, like the district court, the Nebraska Supreme Court refashioned Arizona Seldins' argument to be primarily based on "evident partiality" and found the Nebraska statute to be inapplicable.[209] The Nebraska Supreme Court found "judicial ethics" are not to be applied to arbitrators under the FAA based on its precedent, which adopted Justice White's *concurring* opinion in *Commonwealth Coatings*.[210] The Nebraska Supreme Court did not discuss the conflicting decision in *Monster Energy*[211] raised by Scott[212] or acknowledge the substantial split in the lower courts, or that the binding majority opinion in *Commonwealth Coatings* approved use of a "canon of judicial ethics" for determining "evident partiality" under the FAA.[213] The Nebraska Supreme Court referred to AAA rules,[214] but it did not apply

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[207] The district court remarked the arbitrator's personal ownership of Sky Financial was "unusual" and not "the best solution," but it did not address the question under NEB. REV. STAT. § 24-739(1)(a), even though the issue was raised in oral argument and in written submissions. *Seldin* ST, *supra* note 151, at 128, 130, 117-140; BOE, *supra* note 131, at 140:7-141:3; 149:24-150:8; Ex. 53-F at 1-3. *See also* Scott AF Brief, *supra* note 136, at 3 (noting "the district court declined to address the question" raised by Neb. Rev. Stat. § 24-739(1)(a)).

[208] *Seldin*, 305 Neb. At 204 n.30, 939 N.W.2d at 785 (quoting Dowd v. First Omaha Secs. Corp., 242 Neb. 347, 495 N.W.2d 36, 42 (1993) (adopting "have to conclude" standard in Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Fund, 748 F.2d 79, 83-84 (2d Cir. 1984) and referring to majority opinion in *Commonwealth Coatings* as "plurality opinion"); *but see* Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) ("*Commonwealth Coatings* is not a plurality opinion . . . .").

[209] *Seldin*, 305 Neb. At 203–04, 939 N.W.2d at 785. The Nebraska Supreme Court did not suggest the arbitrator complied with NEB. REV. STAT. § 24-739(1)(a), or reject Arizona Seldins' contention that application of the statute requires disqualification of the arbitrator. *Seldin*, 305 Neb. At 203–04, 939 N.W.2d at 785. *Seldin* ST, *supra* note 151, at 13; BOE, *supra* note 131, at 140:7-141:3; 149:24-150:8; *Seldin* ST, *supra* note 151, at 117-40; Ex. 53-F, *supra* note 131, at 1-3.

[210] *Seldin*, 305 Neb. at 204, 939 N.W.2d at 785 (quoting *Dowd*, 242 Neb. at 347, 495 N.W.2d at 43 (adopting "have to conclude" standard in Morelite Constr. Corp., 748 F.2d at 83-84 (based on Justice White's concurring opinion in *Commonwealth Coatings*).

[211] *Compare Seldin*, 305 Neb. at 204, 939 N.W.2d at 785 (applying "have to conclude" standard), *with* Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1135, 1138 (9th Cir. 2019), *cert denied*, 207 L. Ed. 2d 1100 (2020) (applying "reasonable impression of bias" standard); *see also* Burlington N. R.R. Co. v. TUCO Inc., 960 S.W.2d 629, 633-34 (Tex. 1997) (noting "reasonable impression of partiality" standard "is much broader than the "have to conclude" standard).

[212] *Monster Energy* was announced after briefing deadlines had passed, but Scott raised it during oral argument and in post-argument briefing. *See* Supreme Court Oral Argument Archive, NEB. JUD. BRANCH, https://supremecourt.nebraska.gov/courts/supreme-court/oral-argument-archive (last accessed December 19, 2021); *see also* Scott AF Brief, *supra* note 131, at 4; *see also id.* at 10 (noting "split concerning the interpretation of 'evident partiality'" under *Commonwealth Coatings*).

[213] *Seldin*, 305 Neb. at 203–04, 939 N.W.2d at 785.

[214] *Seldin*, 305 Neb. At 204, 939 N.W.2d at 785. The Nebraska Supreme Court correctly noted AAA rules authorize an arbitrator to enter "interim measures" for "protection . . . of property," but it did not discuss that AAA ethical rules are controlled by "applicable law" and that AAA rules do not "take the place of or supersede such laws." Ex. 11 at 2 (AAA Code of Ethics for Arbitrators in Commercial Disputes). *See* Scott CA Brief at 8; Scott AF Brief, *supra* note 136, at 3.

Nebraska "applicable law" as directed by those rules[215] or credit Arizona Seldins with making a reasonable argument, even though decisional law on the other side of the court split would have changed the result.[216]

Waiver. The district court found Arizona Seldins "waived" any objection to the arbitrator's *personal* ownership of Sky Financial *because* of their response to the arbitrator's representation that he would conduct a legal "interpleader" in the arbitration tribunal in his *official capacity* "as arbitrator."[217] On appeal, the Nebraska Supreme Court found the same,[218] adding that the record refutes the claim that the interpleader "was not disclosed or explained."[219] The Nebraska Supreme Court did not discuss that the *agreed* interpleader, which was to be completed by the arbitrator acting in his official capacity, never took place and was cancelled, *sub silentio*, after the arbitrator privately determined he had accepted title to Sky Financial in his *personal* capacity.[220] The Nebraska Supreme Court's opinion shows it has adopted a "constructive knowledge" standard for determining waiver of "evident partiality," even though, like the Eighth Circuit, it did not expressly identify the standard by name.[221] The Nebraska Supreme Court also did not mention the court split on the issue[222] or different application of the constructive knowledge standard when personal ownership is found to be the "crucial fact" as the *Monster Energy* decision[223] raised by Scott shows.[224]

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[215] Nebraska law supplies the default "procedural" rules for arbitrations taking place "in Nebraska." Cullinane v. Beverly Enters.-Neb., Inc., 300 Neb. 210, 226, 912 N.W.2d 774, 790-91 (2018) ("Arbitration in Nebraska is governed by the UAA . . ., but if arbitration arises from . . . interstate commerce, it is governed by the FAA . . . However, the U.S. Supreme Court has never held . . . a procedural section, applies to state courts").

[216] *See infra* pp. 31-32.

[217] *Seldin* ST, *supra* note 151, at 128.

[218] *Seldin*, 305 Neb. At 204, 939 N.W.2d at 785.

[219] *Id.* The Nebraska Supreme Court found Arizona Seldins' consent contemplated the Sky Financial "asset" would be delivered to the "appropriate party," but the assignments expressly state they were "irrevocably and unconditionally" transferred by Omaha Seldins as an "act of interpleading" and not to be returned. *Seldin*, 305 Neb. at 192, 201–02, 939 N.W.2d at 778, 784. *See* Scott CA Brief, *supra* 136, at 13-14. If the "interpleader" was meant to be something other than the well-known procedure under Nebraska law, such meaning was not disclosed or explained. *See id.* at 24. Arizona Seldins argued they should not be found to have consented to what amounts to secret rules of interpleader in this scenario. *Id.*

[220] The Nebraska Supreme Court's analysis on this point should be reconsidered. By analogy, it would be like a doctor scheduling a much needed operation for a patient in 30 days, only to abruptly cancel the surgery on the scheduled date because the doctor privately determined he or she is not licensed to perform the operation, and then delivering a disclaimer stating he or she never was. The *patient's consent* is not the relevant issue of concern. Arizona Seldins' *consent* to the arbitrator performing a formal interpleader in his official capacity likewise was not the relevant issue identified by Arizona Seldins in *Seldin*.

[221] *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1998); *see* Shaffer v. PriorityOne Bank, No. 3:15-CV-304-HTW-LGI, 2021 WL 2386824, at *11 (S.D. Miss. June 10, 2021) (citing *Kiernan*, 137 F.3d at 493).

[222] *Shaffer*, 2021 WL 2386824 at *10 ("Federal Circuits are split . . . .").

[223] Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1135 (9th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 1100 (2020).

[224] *Monster Energy* was announced after briefing deadlines had passed, but Scott raised *Monster Energy* during oral argument and post-argument briefing. *See* Supreme Court Oral Argument Archive, NEB. JUD. BRANCH, https://supremecourt.nebraska.gov/courts/supreme-court/oral-argument-archive (last accessed December 19, 2021); *see also* Scott AF Brief, *supra* note 131, at 4; *see also id.* at 10 (noting "split concerning the interpretation of 'evident partiality'" under *Commonwealth Coatings*).

Public Policy. The district court claimed Arizona Seldins[225] had failed to argue that double recovery in the final award had violated Nebraska "public policy,"[226] but it was mistaken in this view since Arizona Seldins had expressly argued in the district court that the arbitrator "violated Nebraska public policy and entered [an] award that was a windfall . . . and should be vacated."[227] On appeal, the Nebraska Supreme Court combined two separate strains of FAA decisional law in analyzing the question of whether a public policy exception exists under the FAA and did not mention there are conflicts in the lower courts on both grounds.[228] Specifically, the Nebraska Supreme Court quoted an Eighth Circuit case,[229] which cited the Supreme Court decision in *Hall Street*,[230] to conclude that "manifest disregard of the law" is no longer viable after *Hall Stree*t and that, as a result, an exception based on public policy recognized by some courts also must suffer the same fate.[231]

The Nebraska Supreme Court did not discuss[232] that lower courts are divided on the continuing vitality of "manifest disregard of the law."[233] Nor did it discuss that the Supreme Court, even before the cited Eighth Circuit case, had decided "manifest disregard of the law"

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[225] *See* Seldin 2nd Supplemental Transcript in Case No. A-19-311 dated April 2, 2019 (Image ID A00102651NSC) ("Seldin 19-311 2d ST") at 64. Scott and other Arizona Seldins filed a joint application to modify or vacate the final award, reserving "all the arguments" made by the other. BOE, *supra* note 131, at 8:18-22, 76:19-77:1, 107:1-2; *Seldin* ST, *supra* note 151, at T1-8.

[226] *Seldin* ST, *supra* note 151, at 143; Seldin 19-311 2d ST, *supra* note 225, at 1.

[227] BOE, *supra* note 131, at 110:7-10; Ex. 1, *supra* note 131, at 423–25, 429-30; Ex. 2, *supra* note 131, at 303; Ex. 50, *supra* note 131, at 14-24; BOE, *supra* note 131, at 65:10-66:25. Significantly, the district court recognized double recovery is a proper ground to challenge an arbitration award (citing Priority One Servs., Inc. v. W&T Travel Servs., LLC, 825 F. Supp. 2d 43 (D.D.C. 2011)); *see also* AS Brief, *supra* note 136, at 21, 34–35 (citing Transcript in Case No. A-19-310 dated April 2, 2019 (Image ID A00102628NSC) ("Seldin T") at 138).

[228] Seldin v. Est. of Silverman, 305 Neb. 185, 207, 939 N.W.2d 768, 787 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021). Since *Seldin*, the Nebraska Supreme Court has acknowledged the split in authority on this issue. City of Omaha v. Pro. Firefighters Ass'n, 309 Neb. 918, 938–39, 963 N.W.2d 1 (2021) (noting "[w]hether arbitration awards governed by the FAA can be vacated on the grounds that the arbitrator manifestly disregarded the law is a question on which courts have diverged" and, citing *Seldin*, explained it "recently sided with" those courts that find "an arbitration award may not be vacated on the grounds that the arbitrator manifestly disregarded the law").

[229] *Seldin*, 305 Neb. at 202, 939 N.W.2d at 784 n.25 (citing Medicine Shoppe Int'l. v. Turner Invs., 614 F.3d 485 (8th Cir. 2010)). *Seldin* did not discuss a later Eighth Circuit case, Air Line Pilots Ass'n Int'l, v. Trans States Airlines, 638 F.3d 572, 579 (8th Cir. 2011) (citing Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 749–50 (8th Cir. 1986), which noted "manifest disregard of the law and public policy [are] distinct exceptions[.]").

[230] *Medicine Shoppe Int'l.*, 614 F.3d at 488 (citing Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 582 (2008)).

[231] *Seldin*, 305 Neb. at 207, 939 N.W.2d at 787. *Seldin* cites the Supreme Court decision in E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57(2000), for an unrelated point and apparently did not review subsequent caselaw history that connects that decision to FAA case authorities finding the public-policy exception "survives *Hall Street*." *See* Titan Tire Corp. of Freeport, Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, 734 F.3d at 716-17 & n.8 (citing Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc., 660 F.3d 281 (7th Cir. 2011) (FAA case)). On the other hand, the Nebraska Supreme Court in *Pro. Firefighters Ass'n* correctly recognized the "narrow" exception on public policy allowed by *E. Associated Coal Corp.* and, citing *Seldin*, intimated that *Seldin* also did not join courts finding a public policy exception after *Hall Street*. *Pro. Firefighters Ass'n*, 309 Neb. at 942.

[232] *Seldin*, 305 Neb. at 205–207, 939 N.W.2d at 785-87.

[233] Luciano v. Tchrs. Ins. and Annuity Assoc. of Am., No. 15-6726, 2021 WL 1663712, *2 n.2 (D.N.J. Apr. 28, 2021) ("Since [*Hall Street*], a circuit split has emerged regarding the manifest disregard of the law doctrine . . . .") (citations omitted).

under the FAA *remained* an open question after *Hall Street*.[234] The Nebraska Supreme Court also did not comment on the separate, but equally clear, court split on the issue of whether a public policy exception survived *Hall Street*,[235] and thus did not recognize its decision may represent a minority view.[236] Arizona Seldins' argument on the public policy exception[237] was among those cited in support of awarding further attorney fees as a sanction.[238]

Interim Award Applications. The district court ruled interim award applications filed in the district court did not have a "legal basis"[239] because a precise case sought by the district court had not been cited[240] and further because the applications allegedly ran counter to a "chief concern" of the parties to avoid piecemeal actions in the district court.[241] But the district court did not mention that the requested case was provided[242] or discuss highly relevant views of several United States Supreme Court Justices in *Stolt-Nielsen*,[243] or note that an immediate stay

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[234] Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in [*Hall Street*]").

[235] Caputo v. Wells Fargo Advisors, LLC, No. 19-17204, 2020 WL 2786934, at *3 (D.N.J. May 29, 2020) ("[T]he Circuit Courts of Appeals have . . . disagreed on whether the public policy exception continues to serve as cognizable means for challenging an arbitration award").

[236] *See supra* notes 102–103; *see also Seldin*, 305 Neb. at 205-207, 939 N.W.2d at 785-87.

[237] Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 248 n.5 (5th Cir. 1993) ("[C]ourts are the ultimate arbiters of public policy, not arbitrators").

[238] *Seldin*, 305 Neb. at 209–213, 939 N.W.2d at 788–90. *See* Omaha Seldins' AF Brief, *supra* note 136, at 8 ("The Arizona Seldins' refusal to apply this Court's precedents in good faith also extends to their argument that 'public policy' was an available ground for vacatur under the FAA"); *see also* AS Brief, *supra* note 136, at 35; *see also* https://www.nebraska.gov/courts/sccales/index.cgi (disposition dated August 26, 2020, awarding additional attorney fees sustained in the total sum of $50,000).

[239] *See, e.g.*, *Seldin* 2d ST, *supra* note 175, at 1–2, 26–27; Ex. 60-A, *supra* note 131, at 13 (citing In re Chevron U.S.A., Inc., 419 S.W.3d 329 (Tex. App. 2010) as on "one side of disparate authority").

[240] The district court sought a very specific case in which an award "both the parties and the Arbitrator intended to be non-final was treated as a final, appealable arbitration award." *Seldin* 19-311 2d ST, *supra* note 225, at 68. But an incomplete response would not be determinative of attorney fees. *See* City of Omaha v. Pro. Firefighters Ass'n, 309 Neb. 918, 948 (2021) (noting "arguments that the arbitration award should have been vacated lacked merit" does not mean a position is "so lacking in merit to be deemed frivolous"); First Nat'l. Bank of Omaha v. Acceptance Ins. Cos., Inc., 12 Neb. App. 353, 377, 675 N.W.2d 689, 707 (2004) ("[I]t is rare that litigated issues without merit are also frivolous").

[241] Seldin T, *supra* note 227, at 1; Seldin 19-311 2d ST, *supra* note 225, at 31.

[242] Ex. 60-C, *supra* note 131, at 1 (citing Am. Intl. Specialty Lines Ins. Co. v. Allied Cap. Corp., 167 A.D. 3d 142, 86 N.Y.S. 3d 472 (N.Y. App. Div. 2018) (finding it had jurisdiction to rule on a partial award *even though* the arbitrators found: (1) the parties *did not agree* to an immediate appeal of the partial award as would occur in a bifurcated proceeding; and (2) the arbitrators intended the partial award to be non-final). Like Dorothy in *Wizard of Oz*, the triumph in meeting the district court's challenge by delivering what appeared to be the requested case did not result in a granted request. Paul Rudoff, *The Wizard of Oz Movie Script*, THE WIZARD OF OZ -- MOVIE SCRIPT, http://www.wendyswizardofoz.com/printablescript.htm (last visited August 22, 2021) ("Bring me her broomstick, and I'll grant your requests").

[243] Ex. 60-B, *supra* note 131, at 2 (quoting Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. 662, 691–92 (2010) (Ginsburg, J., dissenting, joined by Stevens & Breyer, JJ.) (noting the Supreme Court needs to provide more "definitive guidance" on when a partial award is considered final for jurisdictional purposes because "lower court opinions are . . . divided"). *See also* Ex. 60-A, *supra* note 131, at 13 (citing Schatt v. Aventura Limousine & Transp. Serv., Inc., 603 F. App'x 881, 886 (11th Cir. 2015) (noting "[i]t falls to [the court] to determine if [an] Interim Award was a 'final' arbitration award under the meaning of the FAA").

order *was* in fact entered completely averting any piecemeal action by the parties or the district court.[244]

On appeal, the Nebraska Supreme Court upheld the district court's ruling on the interim award applications,[245] but it did not fully evaluate caselaw advanced by Scott (*Chevron*)[246] or, similar to the district court, discuss the important observations of three Supreme Court Justices on this subject (*Stolt-Nielsen*).[247] It also sought to distinguish other authority cited by Scott (*Allied Capital*) on a ground not squarely at issue in the proceeding.[248] The Nebraska Supreme Court further did not comment, when conducting its own jurisdictional review,[249] that an agreement by the parties purporting to declare when a court has jurisdiction to hear a case is a legal nullity.[250] And similarly, for jurisdiction purposes, it did not address that a legal decision found by a Nebraska tribunal to be law-of-the-case is co-extensive with a final order, which presumptively triggers the time clock for appeal under Nebraska law.[251]

Attorney Fees. The district court did not credit Arizona Seldins with making reasonable arguments, despite the existence of conflicting decisions in lower courts on several

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[244] *Seldin* 2d ST, *supra* note 175, at 65-67, 76.

[245] Seldin v. Est. of Silverman, 305 Neb. 185, 213, 939 N.W.2d 768, 790 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[246] *Id.*, 305 Neb. at 212–213, 939 N.W.2d at 790 (citing In re Chevron U.S.A., Inc., 419 S.W.3d 329 (Tex. App. 2010)). The district court found *Chevron* "lacked evidence" that the parties or arbitrators "agreed or intended" interim awards to be "nonfinal and non-appealable." *Id.*, 305 Neb. at 212–213, 939 N.W.2d at 790. However, the parties in *Chevron* had an express agreement that only a *single* award would be entered. *See* Scott CA Brief, *supra* note 136, at 34. Despite that agreement for a single award, the arbitrator entered eight interim awards and *Chevron* found two of them to be barred under the FAA because they were not timely appealed. *See* Scott CA Brief, *supra* note 136, at 34.

[247] Scott's CA Brief, *supra* note 136, at 34

[248] The Nebraska Supreme Court found *Allied Capital* to be "clearly distinguishable" because it determined the parties there agreed and "requested . . . a final determination on one of the issues" to be made in a partial decision. *Seldin*, 305 Neb. at 213, 939 N.W.2d at 790. That reading of the factual record, however, was not accepted by the New York Court of Appeals shortly after *Seldin* was decided: "[T]he record is devoid of any evidence that the parties . . . mutually agreed to . . . a partial decision." American Int'l. Specialty Lines Ins. Co. v. Allied Capital Corp., 35 N.Y.3d 64, 67, 149 N.E.3d 33, 125 N.Y.S.3d 340 (N.Y. 2020). Moreover, the central point of *Allied Capital* is the finding that a court has unrestricted power to completely ignore an arbitrator's statement about whether an award is non-final: "[T]his court is not bound by the [arbitrators'] statements . . . that the [partial final award] was not final." *Allied Capital*, 167 A.D.3d at 148, 86 N.Y.S.3d at 4. That determination was not disturbed by the New York Court of Appeals on further appeal after *Seldin*. *Allied Capital*, 167 A.D.3d at 148, 86 N.Y.S.3d at 4.

[249] *Seldin*, 305 Neb. at 198, 939 N.W.2d at 782 (noting "it is the power and duty of an appellate court to determine whether it has jurisdiction" independent of any argument presented or omitted by the parties); *see also* Karo v. Nau Country Ins. Co., 297 Neb. 798, 820, 901 N.W.2d 689, 704 (2017) ("3-month notice requirement . . . is jurisdictional . . . under the FAA to vacate the arbitration award . . . .").

[250] DeLima v. Tsevi, 301 Neb. 933, 945–46, 921 N.W.2d 89, 98 (2018) ("[P]arties cannot confer subject matter jurisdiction upon judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of parties").

[251] Jill B. v. State, 297 Neb. 57, 64, 899 N.W.2d 241, 248 (2017) ("[T]he law-of-the-case doctrine requires a final order").

issues in the litigation.[252] It also did not find merit in a few unique legal challenges made by Arizona Seldins, including their objection to the arbitrator's award of one million dollars in legal expenses prohibited by the separation agreement[253] or their request to correct a mistaken award of hundreds of thousands of dollars in prejudgment interest, which the arbitrator did not explain in a reasoned award required by agreement of the parties.[254]

The Nebraska Supreme Court upheld the district court's award of post-arbitration attorney fees as sanctions and increased the amount of fees in the district court to reflect the total sought.[255] The Nebraska Supreme Court, again, did not discuss *Monster Energy* in which the Ninth Circuit, among other things, reversed and vacated an award of post-arbitration attorney fees when addressing similar arguments.[256] Even though, according to the district

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[252] The district court awarded sanctions based in part on a claimed absence of legal support for "evident partiality," but did not discuss the question in context of the significant court split on the applicable standard of review. *Seldin* 2d ST, *supra* note 175, at 62; *Seldin* 19-311 2d ST, *supra* note 225, at 64 (finding Arizona Seldins allegation the arbitrator "engaged in misconduct by accepting a 'tender' of the Sky Financial Securities as a form of interpleader . . . was meritless and frivolous").

[253] The district court found Arizona Seldins "should not have raised" an argument in response to the arbitrator awarding more than one million dollars in attorney fees as statutory damages, even though the separation agreement expressly states: "each Party shall bear its own . . . legal fees and expenses." *Seldin* ST, *supra* note 151, at 121; *Seldin*, 305 Neb. at 192, 208, 939 N.W.2d at 788. Arizona Seldins presented "indistinguishable" legal authority showing a veteran federal judge, using identical reasoning, vacated an award of attorney fees as damages under a state "statute" because, like *Seldin*, the arbitration agreement provided the parties were to "bear their own attorneys' fees." Ex. 60-A, *supra* note 131, at 3; Ex. 60-B, *supra* note 131, at 1–2 (citing Sabre GLBL, Inc. v. Shan, No. 15-CV-8900, 2018 WL 1905802, at *5 (D.N.J. Apr. 23, 2018), *aff'd in part, rev'd in part and remanded sub nom.* Sabre GLBL, Inc v. Shan, 779 F. App'x 843 (3d Cir. 2019) (holding "[b]y including this provision, the parties restricted the arbitrator's authority to award attorney fees . . . regardless of whether the fees are awarded pursuant to an out-of-state tort statute"). The district court in *Seldin* suggested "important" language was "omitted" from Arizona Seldins' argument related to *Sabre GLBL*, but the claimed omission had no relevance to the common issue of the two cases. *Seldin* 19-311 2d ST, *supra* note 225, at 59–60. Neither Arizona Seldins nor the district court in *Sabre GLBL* prevailed on this point, but there is no indication the Third Circuit found the ruling of the federal judge to be frivolous. *See generally Sabre GLBL, Inc.*, 779 Fed. App'x 843. Indeed, the federal judge in *Sabre GLBL* was not alone in his view. Moore v. Omnicare, Inc., 118 P.3d 141, 149-50, 141 Idaho 809, 817–18 (2005) ("[A] general entitlement to an award of attorney's fees under [state statute] will not override a valid agreement . . . In this case the parties contracted for a zero dollar amount . . . of attorney's fees") (citation omitted).

[254] Arizona Seldins argued the arbitrator made a material miscalculation of prejudgment interest under Arizona law. *Seldin* ST, *supra* note 151, at 120. The applicable statute, ARIZ. REV. STAT. ANN. § 44-1201, has two adjacent provisions, but only one could possibly apply as Arizona Seldins explained: "[The arbitrator's act of selecting an interest rate from a book or code does not involve an arbitrator's evaluation of witnesses or discretionary review of substantive evidence [but] . . . merely involves locating a posted rate in a statute." Ex. 53-A, *supra* note 131, at 25–26 (citing Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles, Inc., 235 Ariz. 141, 143, 329 P.3d 1043 (2014)). The district court acknowledged a similar mistake in reviewing two adjacent statutes in this action. *Seldin* 19-311 2d ST, *supra* note 225, at 61 ("In the Order, the Court stated that attorney fees were awarded pursuant to NEB. REV. STAT. § 25-834 . . . . However, . . . it is patently obvious that the Court intended . . . NEB. REV. STAT. § 25-824"). Beyond these closely relatable circumstances, there is case authority showing a court may make a correction under 9 U.S.C. § 11(a), even when an arbitrator has "denied" a request to do so. *See* Turquoise Props. Gulf, Inc. v. Overmyer, 81 So. 3d 1250, 1253-57 (Ala. 2011) (cited in Scott AF Brief, *supra* note 136, at 6).

[255] Seldin v. Est. of Silverman, 305 Neb. 185, 212, 939 N.W.2d 768, 709 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021); *see also* https://www.nebraska.gov/courts/sccales/index.cgi, dated August 26, 2020 (additional attorney fees sustained in the total sum of $50,000).

[256] Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1133, 1139 (9th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 1100 (2020).

court, Arizona Seldins presented argument over a period of a few hours on five issues, all of which were based on the FAA, and related to one subject, Sky Financial, the Nebraska Supreme Court agreed with the district court that the post-arbitration proceedings had turned "into a re-litigation of the Arbitration itself," which had taken place over nearly two months.[257]

E. Seldin Analysis

1. Evident Partiality: Arbitrator's Disclosure Would Have Obviated Problem

Arizona Seldins were entitled to receive the benefit of their bargain in selecting Nebraska law[258] to govern the separation agreement for the arbitration in Nebraska,[259] including the wisdom of Nebraska law that judges and arbitrators are held to the same ethical standards if they have an interest in a case.[260] The Nebraska Supreme Court in *Seldin* "rejected a 'judicial ethics'" standard when analyzing "evident partiality" under the FAA based on a precedent undergirded by the concurring, not majority, opinion in *Commonwealth Coatings*.[261] The Nebraska Supreme Court in *Seldin* found such authority blocked and foreclosed application of Neb. Rev. Stat. § 24-739(1)(a), a statute that requires written consent of waiver and the writing to be made part of the proceeding, because it found a judicial ethics rule does not apply to cases under the FAA.[262]

Under the majority opinion in *Commonwealth Coatings*, however, the Nebraska Supreme Court was not prohibited from using the Nebraska statute because it embodied judicial ethics; indeed, the opposite is true. *Commonwealth Coatings* expressly embraced a "canon of judicial ethics" in the majority opinion, finding it is an appropriate basis for evaluating evident partiality of an arbitrator.[263]

Under principles of federalism recognized in *Hall Street*, the Nebraska Supreme Court's prior "instruction" that judges and arbitrators are subject to the "same" ethical standards meant Neb. Rev. Stat. § 24-739(1)(a) was applicable to the Nebraska arbitration in *Seldin*,

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[257] *Seldin*, 305 Neb. at 95, 212, 939 N.W.2d at 780, 790.

[258] Under Nebraska law, an "arbitration proceeding" is considered "similar to a judicial or quasi-judicial proceeding." Kloch v. Ratcliffe, 221 Neb. 241, 245, 375 N.W.2d 916, 919 (1985).

[259] Scott CA Brief, *supra* note 136, at 20, 31; Scott AF Brief, *supra* note 136, at 3.

[260] *Seldin*, 305 Neb. at 203–04 n.29, 939 N.W.2d at 785 (citing AS Brief, *supra* note 136, at 24, quoting Barnett v. City of Scottsbluff, 268 Neb. 555, 684 N.W.2d 553 (2004)). *See* State v. Pattno, 254 Neb. 733, 739, 579 N.W.2d 503, 507 (1998) ("We noted that judges and arbitrators were both subject to the same ethical standards and proceeded to address whether an arbitrator's failure to disclose a possible conflict of interest proved bias or prejudice against one party").

[261] *Seldin*, 305 Neb. at 204 n.30, 939 N.W.2d at 785 (quoting Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 495 N.W.2d 36, 42 (1993) (adopting "have to conclude" standard in Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83–84 (2d Cir. 1984), which based its decision on the concurring opinion of Justice White in *Commonwealth Coatings* and referred to the majority opinion in *Commonwealth Coatings* as a "plurality opinion"); *but see* Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) ("*Commonwealth Coatings* is not a plurality opinion . . ."). *See* Scott AF Brief, *supra* note 136, at 10.

[262] *Seldin*, 305 Neb. at 204 n.30, 939 N.W.2d at 785 (quoting *Dowd*, 242 Neb. at 204 n.30, 495 N.W.2d at 42).

[263] Commonwealth Coatings Corp. v. Cont'l. Cas. Co., 393 U.S. 145, 150–51 (1968) (citing with approval "canon of judicial ethics [because it] rest[s] on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias").

resulting in the arbitrator becoming "disqualified."[264] A finding of arbitrator disqualification based on a Nebraska state law canon of "judicial ethics" is authorized by *Commonwealth Coatings* and would thus support a conclusion of "evident partiality" by the arbitrator at least relating to Sky Financial.

The Nebraska law requirement that "consent" be secured from "the parties" shows that Neb. Rev. Stat. § 24-739(1)(a) is made to protect clients, not their lawyers. By effectively mandating the writing be marked as an exhibit in the arbitration proceeding ("consent . . . in writing . . . made part of the record"), the procedure promotes transparency, ensures honesty and enhances efficiency. As designed by the Nebraska Legislature, there will not be any question in a post-arbitration appeal about waiver if the mandatory procedure in Neb. Rev. Stat. § 24-739(1)(a) is explicitly followed.[265] Nebraska courts have enforced this law.[266]

Strict adherence to Nebraska law by the arbitrator in *Seldin* would have avoided any controversy. If the arbitrator had sought "guidance" from the parties[267] after privately determining he had "individually" acquired interests in Sky Financial that he needed to release and disclaim,[268] Arizona Seldins, at minimum, could have insisted the arbitrator order the interpleader to be pursued and conducted in the district court as permitted by the separation agreement.[269] If so, there would not have been any ownership conflict because a district court judge in an interpleader action only takes *control*, not title, of any property deposited into the court registry and makes a "distribution" of same. A district court judge would not consider interpleaded property to be "*individually*" owned by him or her, or deem it to be a *personal*

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[264] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008).

[265] Cisneros v. Graham, 294 Neb. 83, 101, 881 N.W.2d 878, 890 (2016) ("If a statute requires written authority for a particular transaction, oral ratification will not validate" it) (citation omitted).

[266] When a judge has a disqualifying interest in a case by virtue of participation that theoretically could favor or aid one of the parties and there has not been a "waiver of such disqualification 'as required by statute,'" the judge is automatically disqualified and every prior ruling made by the judge, even those made before his or her interest arose, is "void." Harrington v. Hayes Cnty., 81 Neb. 231, 235, 115 N.W.773, 774 (1908); State v. Vidales, 6 Neb. Ct. App. 163, 175–76, 571 N.W.2d 117, 125 (1997) (vacating as "void and of no effect" and not a "mere formality" a judge's order entered *even before* he discovered his wife, a deputy county attorney, had filed pleadings in the case); *cf.* Farm Bureau Ins. Co. of Neb. v. Wozny, 206 Neb. 639, 644, 294 N.W.2d 363, 366 (1980) (finding judge did not have an actual interest in a "case" due to an insurance policy obtained from the insurer before events involved and unrelated to the case where "neither party objected" after full disclosure of the judge's precise interest had been explained).

[267] The arbitrator stated he would seek "guidance" from the parties before entering the final award, but he did not raise the issue of his *personal* ownership in Sky Financial before the final award or discuss having the parties pursue the interpleader in the district court. Scott CA Brief, *supra* note 136, at 25.

[268] Omaha Seldins did not dispute, in response to Scott's arguments, the arbitrator had been impacted by a "belief and concern about his personal ownership in Sky Financial," had a growing "undisclosed discomfort with Sky Financial ownership" and was "uneasy" after accepting Sky Financial ownership, all of which resulted in the arbitrator taking the "additional and extraordinary step of including a personal legal conveyance in the body of the Final Award." *Id.* at 14, 27–28; OS Brief, *supra* note 136, at 1–75.

[269] The separation agreement provides in pertinent part:

"The obligation to submit a dispute to . . . the [arbitrator] . . . shall not be binding . . . with respect to . . . equitable procedures in a court . . . to obtain interim relief . . . to preserve the status quo . . . pending resolution by the [arbitrator] of the actual dispute . . . Venue . . .will be in the District Court of Douglas County, Nebraska."
Ex. 5-E, *supra* note 131, at § 9.14.3(a).

asset that would require the judge to formally disclaim and release his or her personal interest in the property.[270]

The interpleader in *Seldin* involved an *irrevocable* transfer of Sky Financial by Omaha Seldins, which meant it would never be returned to them and thus ensure Arizona Seldins would not be subject to risk of double or triple recovery.[271] The prejudice to Arizona Seldins in the arbitration relating to Sky Financial was material from a financial standpoint since they went from dollars-ahead winners to seven-figure losers in the arbitration.[272] That result would have been different if the Nebraska "judicial ethics" statute authorized by the majority opinion in *Commonwealth Coatings* for evaluating "evident partiality" had been accepted and applied.

Arizona Seldins raised *Monster Energy* to the Nebraska Supreme Court because it is factually similar and legally indistinguishable from *Seldin*.[273] The arbitrator in *Monster Energy* openly disclosed to participants his "interest" in the arbitration based on his *official* capacity as arbitrator overseeing the arbitration, but he withheld disclosure of his knowledge of his *personal* "ownership" in the arbitration service involved and that fact was not discovered until after the final award.[274]

The factual circumstances in *Seldin* are closely analogous. The arbitrator in *Seldin* openly disclosed to Arizona Seldins his "interest" in Sky Financial in his official capacity "as arbitrator," but he withheld disclosure of his knowledge of his *personal* "ownership" in Sky Financial and that fact was not discovered until the final award.[275] Like the arbitrator in *Monster Energy*, the arbitrator's action in *Seldin* at best constituted an insufficient "partial disclosure."[276] The arbitrator's description of his "jurisdiction" as a role akin to an "officer of the court" in *Seldin* also is substantively the same as the arbitrator in *Monster Energy* who "likened his interest" to "'each JAMS neutral.'" *Id*.[277]

The critical legal lesson gained from *Monster Energy* and *Seldin* also is the same. In both cases, the arbitrator's personal ownership interest was the "crucial fact" and, in both instances, disclosure of that fact was not made by the arbitrator and remained unknown until after the final award.[278] The cases reached polar opposite results only because the standards of

[270] *See, e.g.*, Ehlers v. Perry, 242 Neb. 208, 494 N.W.2d 325 (1993) (noting interpleader action was filed "to determine distribution" of fund paid into court, not a conveyance of individual ownership of an asset to the judge).

[271] In Nebraska, a party interpleading property represents it has "no interest" in the subject-matter. Strasser v. Com. Nat'l Bank, 157 Neb. 570, 573, 60 N.W.2d 672, 674 (1953) ("It is the essence of an interpleader . . . that the party invoking the remedy shall be entirely indifferent . . ., asserting no interest in himself in the subject matter of the dispute"). Ex. 1, *supra* note 131, at 13, 48–50; Ex. 11, *supra* note 131, at 2.

[272] Ex. 1, *supra* note 131, at 342, 463–66, 470; Ex. 1, *supra* note 131, at 466–67 (noting award in Arizona Seldins' favor of $2,101,178); Seldin v. Est. of Silverman, 305 Neb. 185, 192, 939 N.W.2d 768, 778 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021) (noting "$1,962,528 in damages [awarded to Omaha Seldins] for their lost corporate opportunities claims[.]").

[273] *Seldin*, 305 Neb. at 204, 939 N.W.2d at 785 ("have to conclude") and Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1133, 1138 (9th Cir. 2019), *cert. denied*, 207 L. Ed. 2d 1100 (2020) ("reasonable impression of bias").

[274] *Monster Energy*, 940 F.3d at 1133–37.

[275] Ex. 1, *supra* note 131, at 462–63.

[276] *Monster Energy*, 940 F.3d at 1134.

[277] *Id*.; *Seldin*, 305 Neb. at 202, 939 N.W.2d at 784.

[278] *Monster Energy*, 940 F.3d at 1135.

review used by the two courts are manifestly different and outcome determinative.[279] Unfortunately, the Supreme Court was unable[280] to accept review in either case.[281]

Between *Monster Energy* and *Seldin*, the Ninth Circuit's rule of "reasonable impression of bias" closely tracks *Commonwealth Coatings*,[282] while the opposing "have to conclude" rule adopted in *Seldin* and by other courts on its side of the split is not found anywhere in *Commonwealth Coatings*, not even in Justice White's concurrence.[283]

At bottom, as it applies to "evident partiality" in *Seldin*, there is a difference between a judge or arbitrator during a formal hearing announcing he or she has "jurisdiction" in an official capacity to perform a legal procedure ("act of interpleading") related to a statutory defense ("tender"), while acting in a role as or similar to an "officer of the court," and, on the other hand, a circumstance, as in *Seldin*, where an arbitrator or judge privately determines he or she "individually" acquired *personal* ownership of the property in dispute during the proceeding and indicates a *need* to formally disclaim and release such interest in the final award or judgment to avoid the consequences of personal ownership.[284]

2. Waiver: Constructive Knowledge is Insufficient Regarding Personal Ownership

In *Seldin*, the specific challenged action—the arbitrator's acceptance of Sky Financial ownership in his *personal* capacity—was not disclosed or explained to Arizona Seldins before the final award.[285] Moreover, if the arbitrator intended the term "interpleader" to have a different meaning[286] than how it is used under governing Nebraska law, such an interpretation

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[279] A Ninth Circuit panel has reaffirmed *Monster Energy*. *See* EHM Prods., Inc. v. Starline Tours of Hollywood, Inc., 1 F. 4th 1164 (9th Cir. 2021) ("*Monster Energy* only requires disclosure when an arbitrator holds an ownership interest in JAMS *and* JAMS engages in nontrivial business dealings with a party to the arbitration").

[280] *Seldin* appeared to generate significant interest. SCOTUSblog identified *Seldin* as one of five cases out of 230 worth "watching." *See Seldin v. Est. of Silverman*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/seldin-v-estate-of-silverman/ (last accessed December 20, 2021). *See also* Sarah Biser, *U.S. Supreme Court Declines To Review Whether The Federal Arbitration Act Forecloses Public-Policy Challenges To Arbitration Award*, JD SUPRA (June 17, 2021), https://www.jdsupra.com/legalnews/u-s-supreme-court-declines-to-review-4498197/ (discussing *Seldin*).

[281] *Monster Energy*, 940 F.3d at 1135–36; *Seldin v. Est. of Silverman*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021). The Supreme Court should consider resolving the standard of review for evident partiality in a case similar to *Monster Energy* or *Seldin* in which the "[c]rucial fact" to be decided is narrow and based on personal ownership or a direct financial interest of the arbitrator. *Monster Energy*, 940 F.3d at 1135. In that way, the Supreme Court will be able to resolve the longstanding conflict as to the proper standard of review for evident partiality in a clean case, unobstructed by the messiness involved when trying to unravel knotty facts, or in dissecting nuanced professional relationships between parties, their counsel and arbitrators, as is often required in typical arbitration nondisclosure cases.

[282] *Commonwealth Coatings*, 393 U.S. at 149 ("any dealings that might create impression of possible bias").

[283] *Id*. at 152 (White J., concurring) (stating only that "more than trivial business with a party . . . must be disclosed").

[284] Ex. 5, *supra* note 131, at 5-7; Ex. 10, *supra* note 131, at 70-71; Ex. 1-QQ, *supra* note 131, at 462–63, 483.

[285] Scott CA Brief, *supra* note 136, at 31 ("The Arbitrator did not consider the transfer of Sky Financial to be an act of interpleading, but instead found it to be a conveyance of property to him personally and a transaction that he felt compelled to disavow and unwind in the Final Award after seven months of ownership").

[286] Lewis Carroll's *Through the Looking Glass* makes the same point. Humpty Dumpty stated: "'When I use a word,' . . . 'it means just what I choose it to mean — neither more nor less.'" Alice mused, "The question is whether you can make words mean so many different things," to which Humpty Dumpty said: "The question is, which is to be master — that's all." LEWIS CAROL, THROUGH THE LOOKING GLASS 99 (1917).

also was not disclosed or explained by the arbitrator and the unfamiliar procedure, as Arizona Seldins explained, amounted to a "secret" interpleader[287] to which Arizona Seldins should not reasonably have been found to have consented."[288]

Respectfully, once the faux interpleader in *Seldin* is removed from the analysis, the only waiver issue for the Nebraska Supreme Court to address is whether the arbitrator strictly complied with the "writing" and "record" requirements of Neb. Rev. Stat. § 24-739(1)(a),[289] which the record shows were not met.[290] Because Omaha Seldins had represented to the arbitrator the ownership transfer of Sky Financial was made "irrevocably" and "unconditionally,"[291] they could not, as the party invoking the interpleader, later reacquire or assert any interest in Sky Financial, but the record shows they did.[292]

Waiver should not be found without specific knowledge of the precise conflict, at least when it comes to "evident partiality" based on personal ownership or financial interest of the arbitrator. In *Commonwealth Coatings*, the Supreme Court, while ordering the arbitration award to be set aside,[293] found "no reason" to suspect "any improper motives" of the arbitrator,[294] even though it found the arbitrator had a relationship with "the very projects involved in th[e] lawsuit."[295] *Commonwealth Coatings* indicated good faith of the arbitrator is not enough, however, explaining that courts "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges."[296] The Supreme Court also specifically found "highly significant" an arbitration rule that requires a "writing" from both parties before either could be found to "waive" a circumstance that creates a presumption of bias or "might" disqualify the arbitrator.[297]

The Ninth Circuit's decision in *Monster Energy* reflects a similar view of waiver. The arbitrator identified in *Monster Energy* is described as a distinguished retired state court judge[298] who may "not have subjectively believe[d] there was any reason his owner status

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[287] Scott CA Brief, *supra* note 136, at 24.

[288] The Nebraska Supreme Court found Arizona Seldins' consent contemplated the Sky Financial "asset" would be delivered to the "appropriate party," but the written assignments provide Omaha Seldins had "irrevocably and unconditionally" transferred Sky Financial and that it would never be returned to them. Ex. 5, *supra* note 131, at 5–7; Ex. 10, *supra* note 131, at 70–72; Seldin v. Est. of Silverman, 305 Neb. 185, 192, 201–02, 939 N.W.2d 768, 778, 784 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[289] Ex. 1-A, *supra* note 131, at § 9.10. (noting that "Scott signed and consented to" certain "irrevocable assignments").

[290] *Seldin*, 305 Neb. at 203-204, 939 N.W.2d at 785.

[291] Ex. 10, *supra* note 131, at 72.

[292] Ex. 1, *supra* note 131, at 463; Ex. 7, *supra* note 131, at 172; Ex. 51, *supra* note 131, at 9; Strasser v. Com. Nat'l Bank, 60 N.W.2d 672, 673–74 (1953) ("It is the essence of an interpleader under section 25–325, R.R.S.1943, as it was under the common-law bill of interpleader, that the party invoking the remedy shall be entirely indifferent to the conflicting claims, asserting no interest in himself in the subject matter of the dispute").

[293] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968).

[294] *Id*.

[295] *Id.* at 146.

[296] *Id*. at 149.

[297] *Id.*

[298] *Hon. John W. Kennedy, Jr. (Ret.)*, JAMS, https://www.jamsadr.com/kennedy/ (last accessed December 20, 2021).

would in any way bias him in favor of either party."[299] A similar conclusion could be made regarding the arbitrator in *Seldin*,[300] but the result in *Monster Energy* also should be the same.[301] As previously noted, without any advance notice, and much to the surprise of Arizona Seldins, the arbitrator privately determined during the arbitration before the final award that he needed to include a release and disclaimer in the final award[302] based on his personal ownership of Sky Financial.[303] The arbitrator's *personal* ownership of Sky Financial was not a fact known to Arizona Seldins before the final award and should not constitute "constructive waiver" of "evident partiality" in the absence of showing strict compliance with statutory requirements for waiver.[304]

3. Public Policy and Manifest Disregard of the Law: Proper Narrow Exceptions

Public policy and manifest disregard of the law should be allowed in limited circumstances as narrow and exceptional grounds for a court to vacate an arbitration award. Adherence to principles of federalism and the general dictates of *Hall Street* strongly support this conclusion. There is no evidence or justified concern that acceptance of these two thin reeds for judicial consideration will cause arbitration review to swell into giant tree trunks obstructing the path to a quick and efficient resolution of disputes. In jurisdictions that recognize these grounds to vacate awards, challenges are rarely successful.[305] The onerous standards that a party must meet, coupled with the healthy skepticism of judges, will ensure these exceptions remain infrequent. But their mere existence, regardless of the likelihood of success, is meaningful to abate an otherwise troubling perception of arbitration as an illegitimate dispute resolution method.

The Nebraska Supreme Court's decision in *State v. Henderson*,[306] provides a good illustration of the public policy exception. In *Henderson*, the Nebraska Supreme Court refused to confirm an award reinstating a known member of the Ku Klux Klan to his position as a police

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[299] Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1132 (9th Cir. 2019) (Hon. John W. Kennedy, Jr.); *see also* Heather Cameron, *supra* note 63, at 2261 ("Judge Kennedy likely did not disclose his ownership interest because he did not subjectively believe there was any reason his owner status would in any way bias him in favor of either party").

[300] Seldin v. Est. of Silverman, 305 Neb. 185, 204, 939 N.W.2d 768, 785 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021). ("No evidence that the arbitrator engaged in . . . partiality").

[301] *Monster Energy*, 940 F.3d at 1133–37.

[302] Ex. 1-QQ, *supra* note 131, at 462–63 (final award).

[303] The arbitrator did not explain in the final award the basis on which he decided, or precisely when he determined, he had acquired a personal ownership interest in Sky Financial. The arbitrator may have privately concluded, without disclosure to Arizona Seldins, that neither an arbitrator nor the parties could create or recognize a non-statutory interpleader that allows an arbitrator to officially own property. *Compare* Marsch v. Williams, 23 Cal. App. 4th 238, 248, 28 Cal. Rptr. 2d 402 (1994) ("In sum, the precedents we have examined strongly suggest we are not at liberty to create or recognize a nonstatutory receiver, even where the parties have agreed to the appointment of one"), *with* AAA rules, Ex. 11., *supra* note 131 ("Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office").

[304] *Seldin*, 305 Neb. at 203-204, 939 N.W.2d at 785.

[305] Jones v. Michaels Stores, Inc., 991 F.3d 614, 615 (5th Cir. 2021) ("For a time, we did recognize manifest disregard as its own basis for setting aside an arbitration award, though that standard was 'difficult to satisfy'") (quoting Citigroup Global Mkts., Inc., v. Bacon, 562 F.3d 349, 354 (5th Cir. 2009)).

[306] State v. Henderson, 277 Neb. 204, 762 N.W.2d 1, 3 (2009).

officer.[307] The award was governed by the Nebraska Uniform Arbitration Act[308] ("NUAA"), which, like the FAA, does not explicitly provide for vacatur on public-policy grounds; the Nebraska Supreme Court nonetheless applied the common-law exception based on the federal *W.R. Grace* trio of cases.[309] Since *Seldin* was decided, the Nebraska Supreme Court has provided additional clarity to demonstrate how exceedingly narrow the public policy exception to enforcement of an arbitration award under the NUAA must be before it is found to apply.[310]

The question in *Seldin* was whether the arbitrator's award of a double/triple recovery could be vacated on the ground it violated an explicit, well-defined and dominant state public policy based on the Nebraska Constitution.[311] Despite its state constitutional implications, the Nebraska Supreme Court in *Seldin*, interpreting *Hall Street*, felt compelled to answer the question in the negative and, indeed, added that language in *Henderson* should not in the future be construed as authorizing Nebraska courts to vacate awards on public policy grounds governed by the FAA.[312]

The Nebraska Supreme Court should not be placed in this position. It is unreasonable for a Nebraska court to be forced to accept an arbitration award identical to *Henderson* merely because the contract invokes interstate commerce and is subject to the FAA. Beyond the harmful incursion on federalism, Congress did not suggest in enacting the FAA it intended to withdraw the traditional jurisdiction of state courts to remedy violations of state law in interstate contracts.[313]

A clear ruling from the United States Supreme Court recognizing a narrow public policy exception under the FAA would have led to a different outcome in *Seldin*. At minimum, such a rule would have allowed the Nebraska Supreme Court to determine whether the arbitration award in *Seldin* violated public policy in awarding a double or triple recovery—which appeared to be the case[314]—under the Nebraska Constitution.[315]

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[307] *Id.* at 8–9, 17–18.

[308] NEB. REV. STAT. § 25-2601

[309] W.R. Grace & Co. v. Loc. Union of United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983); *see also* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 42 (1987); *see also* E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000).

[310] City of Omaha v. Pro. Firefighters Ass'n, 309 Neb. 918, 948, 963 N.W.2d 1, 22 (2021). In light of *Henderson*, and because its case is governed by the NUAA, the Nebraska Supreme Court in *Professional Firefighters* likely did not find it necessary to definitively address the split in authority on whether public policy may be used as a basis for vacating an arbitration award under the FAA. *See, e.g.*, Caputo v. Wells Fargo Advisors, LLC, No. 19-17204, 2020 WL 2786934, at *3 (Dist. Ct. N.J. May 29, 2020).

[311] Seldin v. Est. of Silverman, 305 Neb. 185, 207, 939 N.W.2d 768, 787 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[312] *Id.*

[313] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 222 (1947).

[314] Arizona Seldins also argued the court may modify an award for "double recovery" under 9 U.S.C. § 11(a), which also includes an underlying issue subject to a circuit split. *See* AS Brief, *supra* note 136, at 21; *see also* John B. Rich, *Arbitrator's Error and the "Face of the Award" Rule*, 24 J. CONSUMER & COMMC'N L. 49, 49 (2020) (noting "widening [of] the split in the circuits").

[315] Abel v. Conover, 170 Neb. 926, 931, 104 N.W.2d 684, 689–90 (1960) ("[D]amages which double or treble the actual compensatory damages established[,] are in contravention . . . of the Nebraska Constitution").

4. Interim Award Appeals Should Require a "Final Award" Designation

a. Law-of-the-Case Awards are Presumptively Final

The law-of-the-case doctrine under Nebraska law is coterminous with a "final order."[316] The Nebraska Supreme Court has long recognized that a failure to timely file an application to vacate an arbitration award within the three-month period of an arbitration award renders it time-barred.[317] Indeed, the Nebraska Supreme Court has ruled an attorney's "failure to challenge an arbitration award within the required time frame," when joined with a personal conflict issue, was a proper ground for the court to issue a "public reprimand" against the attorney for professional misconduct.[318]

b. Interim Award Applications in Seldin

The Nebraska Supreme Court in *Seldin* found, due to the number of claims, each "involving several independent causes of action" and affirmative defenses, the arbitrator proposed, and the parties agreed, the arbitrator would "bifurcate" each claim to "address liability and damage claims in separate hearings" as necessary.[319]

During the latter part of the arbitration proceedings, Scott[320] filed a few interim award applications in the district court only in an "abundance of caution" and in a manner to avoid the parties or the district court from having to take any action until the final award was entered.[321] For example, Scott included in the caption of the first interim award application, "**REQUEST STAY OF ACTION**," in all capitalized and bold letters in an effort to clearly make this point.[322] The parties soon thereafter stipulated to a stay, and the district court approved the stipulation, completely eliminating any need for action by the parties or district court until after the final award.

In a closely analogous circumstance, the Fifth Circuit, following an arbitration decision, found nothing frivolous about a party filing an appeal *"in an abundance of caution"* even though the appealing party "acknowledged that [it] might not be the right time" and, after review, the court *"*readily conclude[d]" the appeal was "premature.*"*[323]

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[316] Jill B. v. State, 297 Neb. 57, 899 N.W.2d 241, 248 (2017) ("[T]he law-of-the-case doctrine requires a final order").

[317] Karo v. Nau Country Ins. Co., 297 Neb. 798, 901 N.W.2d 689, 704 (2017) ("3-month notice . . . is jurisdictional . . . .").

[318] State *ex rel.* Couns. for Discipline of Neb. Sup. Ct. v. Palagi, 308 Neb. 253, 953 N.W.2d 253, 254–56 (2021) ("The formal charges generally allege violations stemming from the respondent's failure to challenge an arbitration award within the required timeframe . . . The respondent also had a personal conflict of interest . . . The respondent is publicly reprimanded").

[319] Seldin v. Est. of Silverman, 305 Neb. 185, 191, 939 N.W.2d 768, 777 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021).

[320] Scott retained appellate counsel during the arbitration in part because it became clear he had separate issues relating to Sky Financial. BOE, *supra* note 131, at 202:20–25; Ex. 2, *supra* note 131, at 228; Ex. 1, *supra* note 131, at 342, 463–66.

[321] *Seldin*, 305 Neb. at 212, 939 N.W.2d at 790.

[322] *Seldin* 2d ST, *supra* note 175, at 65–67, 76; Ex. 53-G, *supra* note 131, at 2.

[323] Banca Pueyo SA v. Lone Star Fund IX (US), L.P., 978 F.3d 968, 974 (5th Cir. 2020).

In evaluating the whether it was reasonable to file interim award applications, the Nebraska Supreme Court in *Seldin* did not mention that the FAA specifically authorizes an appeal of a "partial award" or acknowledge the view that "lower court opinions are . . . divided" on when a partial award is final for jurisdictional purposes.[324] The Nebraska Supreme Court also did not address, when conducting its independent review of jurisdiction, authority that holds an agreement to establish a court's jurisdiction is a legal nullity, or discuss that a mounting number of judges have found a failure to appeal an interim award results in a claim becoming time-barred.[325]

The rule of finality of interim arbitration awards discussed in *Seldin* should be reassessed. If the parties and the arbitrator are authorized to decide—over a court—whether a ruling is "final-appealable," they could theoretically "agree" that a given award is not "final appealable" until 100 days after it is formally issued by the arbitrator. In the event the losing party would seek to challenge the award after 95 days, contrary to the 100-day agreement, that party would suffer adverse action based on *Seldin*, yet the court also would be required to dismiss the post-arbitration appeal under the FAA because it is more than three months after the award.[326]

CONCLUSION

Arbitration offers positive benefits to society and the judiciary. It can serve as a much-needed ventilator delivering oxygen to federal and state court systems gasping for air due to overcrowded dockets or in anticipation of expected case spiking. But the cure is worse than the disease if the general public loses confidence in the arbitration vaccine and decides at the far extreme that self-administered relief in the streets provides better access to justice.

This contention is not an excess of advocacy. If arbitration becomes, as it is quickly becoming, the dominant civil justice system the general public truly knows, and that system allows its "judges," namely arbitrators, to acquire personal ownership interests in the arbitration without strict compliance with governing state statutes, or arbitrators are allowed to render double or triple recovery awards in violation of explicit state public policies in ways that judges cannot, arbitration will eventually be relegated to be the equivalent of a kangaroo court.

The Supreme Court also should announce a clear rule on when an arbitration award is final. This is a jurisdictional issue, after all, and it is hornbook law that parties cannot agree to a court's jurisdiction no matter how emphatically they assert their claimed right. Arbitration appeals should not be guided by gotcha treatments only Dr. Frankenstein would prescribe. The general public, and the attorneys who serve it, should not be forced to guess the jurisprudential time of demise of a client's right to appeal of an arbitration award. The rule should be simple:

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[324] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 691 (2010) (Ginsberg, J., dissenting). The Nebraska Supreme Court also did not discuss that filing interim award applications guards against a party losing his or her statutory right to challenge an arbitral decision in the event the arbitrator became unavailable. *See* Scott CA Brief, *supra* note 136, at 16; Scott RH Brief, *supra* note 136, at 11-12; *see also* note 121, *supra.*

[325] *See supra* notes 30–31, 241–45. The Nebraska Supreme Court's attempt to distinguish decisional law presented by Scott, including In re Chevron U.S.A., Inc., 419 S.W.3d 329 (Tex. App. 2010) and Am. Int'l. Specialty Lines Ins. Co. v. Allied Cap. Corp., 35 N.Y.3d 64,, 149 N.E.3d 33, 125 N.Y.S.3d 340 (N.Y. 2020), already has been addressed herein.

[326] Karo v. Nau Country Ins. Co., 297 Neb. 798, 805, 901 N.W.2d 689, 704 (2017) ("3-month notice . . . is jurisdictional . . . .").

when an arbitrator includes the capitalized term "Final Award" in the caption of a ruling, the award is considered final and capable of review by a court. Otherwise, it is not final and cannot be reviewed. An announced rule of this nature by the Supreme Court would have entirely avoided any concern or perceived need to file any interim award application in *Seldin*.

Seldin represents a complex commercial litigation case posing as an arbitration. By virtue of the length, scope and court rules applied in the underlying arbitral proceeding,[327] the arbitration review in *Seldin* could not reasonably have been expected to be speedy or efficient.[328] The parties themselves bargained for complex rules and the arbitration hearing took months, resulting in an arbitration proceeding the late Justice Scalia observed was not envisioned by the FAA, or even enforceable under state law.[329]

Relief from true arbitration ills cannot be illusory. Congress granted statutory rights under the FAA to parties in arbitration for a reason. Courts are required to enforce those rights with equal vigor to their effort to find a basis to confirm an arbitration award. The FAA is not a statutory placebo and should not be a poison pill.

Arbitration awards are not self-executing. Courts will be involved in addressing an arbitration award regardless of whether a challenge is made. There is no reason a clearly unmeritorious request to vacate an arbitration award cannot be disposed of in a single sentence without more in all but the most egregious circumstances.[330] While awarding attorney fees against abusive litigants in post-arbitration proceedings may be perceived as providing tough and needed medicine for those engaging in misconduct, the chilling effect created in others who decide not to pursue a warranted challenge because of the threat of sanctions is worse.[331]

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[327] Thomas J. Stipanowich, *Arbitration: The New Litigation*, 1 ILL. L. REV. 1, 12 (2010) ("[I]t is not unusual for legal advocates to agree to trial-like procedures for discovery, even to the extent of employing standard civil procedural rules").

[328] Seldin v. Est. of Silverman, 305 Neb. 185, 212, 939 N.W.2d 768, 790 (2020), *cert. denied*, 141 S. Ct. 2622, 209 L. Ed. 2d 751 (2021)

[329] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

[330] An order in the trial court could be entered along the following lines: "This matter is before the court on applicant's motion to vacate an arbitration award and, after giving consideration to the motion, the court finds the arguments presented by petitioner to be frivolous under the applicable standard of review and the motion is thus denied." On appeal, the courts could follow the example of the Fourth Circuit in Acceleration Acad., LLC v. Charleston Acceleration Acad., Inc., No. 20-1621, 2021 WL 2182983, at *1 (4th Cir. May 28, 2021) (unpublished summary opinion perfunctorily rejecting challenges two weeks after the submission date).

[331] Courts "are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators." Matteson v. Ryder Sys. Inc., 99 F.3d 108, 113 (3d Cir. 1996); State v. Henderson, 277 Neb. 240, 265, 762 N.W.2d 1, 18 (2009) ("[A]lthough arbitration decisions are given great deference, they are not sacrosanct"); *see also* Westfield Ins. Co. v. Sheehan Constr. Co., 564 F.3d 817, 820 (7th Cir. 2009) (applying Indiana law) ("How can [a party] exhibit 'bad faith' by taking a position that . . . is endorsed by a district judge?").

A fear of judicial retribution by those contemplating post-arbitration relief[332] can impact the important role of the judiciary. It can result, for example, in courts losing visibility and vital knowledge of activities taking place behind closed doors in private tribunals in *their* jurisdiction.[333] If the arbitration review process is not resuscitated by the Supreme Court, this could mean hospice care for the justice system in the long run, well after the COVID pandemic finally subsides.

An arbitrator should know any improper conduct will always be subject to a close review by the judiciary. As one court bluntly noted, an arbitrator is "subject to some judicial oversight" and does not "sit as King."[334] This is presumably true even if the arbitrator is the *Tiger King*.[335]

[332] An Eleventh Circuit panel decision in B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 913-14 (11th Cir. 2006), *abrogated on other grounds by* Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313, 1321 (11th Cir. 2010), is often cited to repeat the panel's view of becoming "exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards." *Id.* at 914. *Hercules Steel* arguably has led to unintended consequences. In Hill v. CAG2 of Tuscaloosa, LLC, No. 7:19-CV-02044-LSC, 2020 WL 3207615, at *4 (N.D. Ala. June 15, 2020), a district court, obliged to follow *Hercules Steel*, ordered sanctions against a party in part for arguing "manifest disregard of the law" after *Hall Street*, even though the Supreme Court had expressly stated such a challenge remains an open question. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. at 672 n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in [*Hall Street*]").

[333] *See generally* Nebraska Judicial Branch, Supreme Court Oral Argument Archive, *available at* https://supremecourt.nebraska.gov/courts/supreme-court/oral-argument-archive.

[334] State Sys. Of Higher Ed. v. State College, 743 A.2d 405, 411, 560 Pa. 135, 145 (Pa. 1999) ("Yet, the Court also recognized that the arbitrator's actions are subject to some judicial oversight. An arbitrator does not sit as King").

[335] Christopher Palmeri & Lucas Shaw, *Netflix's Quirky 'Tiger King' Becomes Breakout Pandemic Hit*, BLOOMBERG (April 8, 2020, 11:16 AM) https://www.bloomberg.com/news/articles/2020-04-08/netflix-s-quirky-tiger-king-becomes-breakout-pandemic-hit ("'Tiger King,' the Netflix Inc. documentary about a big-cat trainer who goes by the name of Joe Exotic, has become the runaway hit of the global pandemic").