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NOTE

LETTING THE FOX GUARD THE HENHOUSE: WHY THE FIFTH CIRCUIT’S RULING IN POSITIVE SOFTWARE SOLUTIONS SACRIFICES PROCEDURAL FAIRNESS FOR SPEED AND CONVENIENCE

Linden Fry+

The appeal of resolving disagreements through arbitration is an age-old concept with roots that can be traced from the Greek myth “The Judgment of Paris.”

Arbitration is a concept so intuitive that children on a playground, without knowledge of Greek mythology, use it every day as a quick and easy method to resolve disputes. The children with a dispute agree to bring their dispute to another neutral child. This resolves the issue without black eyes, torn shirts, or a trip to the principal’s office, and the parties go their ways with a resolution.

Unfortunately, playground arbitration, like the arbitration in “The Judgment of Paris” and most other forms of arbitration, is susceptible to a fatal flaw:

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2. See generally EDMONSON, supra note 1, § 2:1, at 2-1 (noting that “[t]he concept of arbitration is not novel”; it is a method long used to resolve disputes that is more efficient and constructive than traditional adversarial approaches).

3. Arbitration, both in the schoolyard and in business, has three essential attributes. First, the decision to arbitrate is consensual, with all parties agreeing to it. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 1 (1994). Second, “nongovernmental decision-makers” resolve the dispute. Id. Finally, absent flaws in the process, it produces a “definitive and binding award” that is capable of being enforced by a court. Id.
what happens when the neutral arbitrator selected is not really neutral? To this day, the issue as to when courts should vacate arbitration because of the appearance of bias on the part of the arbitrator remains nested at the forefront of arbitration. As evidence of this, the United States Court of Appeals for the Fifth Circuit, sitting en banc, in Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software II), reversed a panel decision and concluded that an arbitrator's undisclosed connection to one of the parties did not constitute grounds for vacation of the arbitrator's decision under the Federal Arbitration Act. In the short time since Positive Software II was decided, several lower federal courts have relied on the opinion in deciding cases requiring the interpretation of "evident partiality."

However, the Fifth Circuit's ruling in Positive Software II does little to clarify the confusion over how the "evident partiality" standard should be interpreted and applied by federal courts when considering whether to vacate an arbitration decision. More importantly, the decision misinterprets Supreme Court precedent on the issue and sets an unduly high standard for determining when arbitration awards should be overturned because of an arbitrator's failure to disclose possible sources of bias. As a result, parties selecting arbitrators will be stripped of the mechanism for obtaining meaningful appellate review of arbitration awards in circumstances of alleged arbitrator "evident partiality."

Federal courts need to ensure that the process of federally endorsed arbitration is free from bias, corruption, and the appearance of impropriety.

4. For example, the story of "The Judgment of Paris" resulted in the Trojan War. The Judgment of Paris, supra note 1. Unfortunately, while Paris was making his decision, Aphrodite offered him the love of the world's most beautiful woman. Id. When Paris then rendered his judgment in favor of Aphrodite, he was granted the love of Helen, the most beautiful woman in the world. Id. The problem was, Helen was already married—to a powerful Trojan man. Id.

5. See Halliburton Energy Servs., Inc. v. NL Indus., 553 F. Supp. 2d 733, 785–88 (S.D. Tex. 2008) (addressing the allegation that an arbitrator failed to disclose that he had served as counsel against one of the parties in a previous litigation); Amicorp Inc. v. Gene. Steel Domestic Sales, LLC, Civil No. 07-cv-01105-LTB-BNB, 2007 WL 2890089, at *3 (D. Colo. Sept. 27, 2007) (debating the appropriate legal standard when a party challenges an arbitration award because of bias or the appearance of bias); Toroyan v. Barrett, 495 F. Supp. 2d 346, 351–52 (S.D.N.Y. 2007) (discussing when a relationship between an arbitrator and a party reaches a level where an arbitration award should be overturned because it creates an impression of possible bias).


8. See infra Part I.B. for a discussion of Supreme Court precedent on partiality in arbitration.

9. See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 109 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) ("Arbitral integrity and fairmindedness are critical to the working of the process and to parties' perceptions of arbitration."); see also Edward Brunet, The Core Values of Arbitration Law, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3, 15 (2006) ("[I]mpartial arbitrators are essential to
Without this guarantee, meeting the other goals of the arbitration process, namely efficiency, cost effectiveness, and finality, become irrelevant.\(^\text{10}\) To accomplish this task, Congress passed the Federal Arbitration Act of 1925 (FAA), which empowered courts to vacate otherwise binding arbitration awards when the arbitrator was corrupt or showed “evident partiality.”\(^\text{11}\) The passage of this Act marked the beginning of a “national policy favoring arbitration.”\(^\text{12}\) Willingness by federal courts to interpret and properly apply this power is essential to the continued impartiality and success of the arbitration process.\(^\text{13}\)

Many commentators and jurists consider the FAA to be one of the first modern arbitration statutes because it provides for a judicial role that permanently validates arbitration agreements and creates very limited grounds the integrity of the arbitration process . . . . [A]rbitration . . . has a foundational need for an impartial decision maker.”).

10. See Brunet, supra note 9 (noting that while it is essential to have arbitrators who are experts in the field, having experts cannot be a substitute for having neutral and impartial arbitrators).


13. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). In enacting the statute, “Congress overruled [many] years of judicial hostility toward arbitration.” Elizabeth A. Murphy, Note, Standards of Arbitrator Impartiality: How Impartial Must They Be?, 1996 J. DISP. RESOL. 463, 466. Congressman Mills described the law as providing “that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract.” 65 CONG. REC. 11,080 (1924) (statement of Cong. Mills). Over time, state law has also begun formally to recognize and regulate arbitration as well. See Murphy, supra, at 467. Since 1955, when the Uniform Arbitration Act was created, it has been adopted by thirty-four states and the District of Columbia, and fourteen states have enacted substantially similar provisions. Id. Therefore, in most federal and state courts today, “agreements to arbitrate . . . are valid, irrevocable, and enforceable.” Id.

In the words of Congressman Graham, the FAA was designed to give arbitral parties the ability to bring arbitration decisions “before the court in order to give enforcement to that which they have already agreed to.” 65 CONG. REC. 1,931 (1924) (statement of Cong. Graham). Before the law’s enactment in 1925, courts were distrustful of arbitration awards and would routinely intervene and overturn an arbitrator’s decision. See THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 77 (2d ed. 2007). This approach by the courts hindered the effectiveness of arbitration as an alternative to judicial resolution of disputes. Id. “Congress decided to set a policy in this field and promulgated the United States Arbitration Act, 9 U.S.C. §§ 1–14, in 1925, to delineate the thorny relationship between the role of private arbitration and the federal courts.” Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software I), 436 F.3d 495, 499 (5th Cir. 2006), rev’d en banc, Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software II), 476 F.3d 278 (5th Cir. 2007) (en banc).
for vacating arbitration awards. Generally, the FAA authorizes courts to refuse enforcement of arbitration awards because of certain procedural flaws, creating a strong presumption that once an arbitration award is rendered, it is legally enforceable.

In Part I, this Note will discuss § 10 of the FAA, specifically focusing on its standards for determining when federal courts will vacate arbitration awards. Part I will then focus on the Supreme Court's interpretation of the FAA's "evident partiality" language in Commonwealth Coatings and examine how lower courts have construed the decision. Part II of this Note will review the recent decision in Positive Software II. Finally, Part III will analyze Positive Software II and conclude with a discussion of why the decision runs counter to the FAA, the Supreme Court's interpretation of "evident partiality," and the best interests of the arbitral system.

I. EVIDENT PARTIALITY

Any discussion of "evident partiality" should begin with an analysis of the FAA, the statute that created the phrase. At its root, the Fifth Circuit's en banc decision in Positive Software II is the most recent significant attempt by a circuit court to decide what standard should be used to determine when an arbitrator's decision will be overturned because of "evident partiality." Thus, to trace the real meaning of the term, this Note will begin with the term's genesis, the FAA.

A. The Official Beginning: The FAA

The FAA established a governmental policy favoring arbitration. Arbitration is a favored means of dispute resolution because it is a quick, efficient, expertly reasoned conflict resolution process that generally is free

14. CARBONNEAU, supra note 13, at 78 (noting that the statute also gives the arbitration process "the systemic autonomy it needs to function effectively as a remedial process"); see also IAN R. MACNEIL, AMERICAN ARBITRATION LAW 15 (1992) ("The key characteristic distinguishing nonmodern from modern [arbitration statutes] is that the latter make simple executory agreements to arbitrate disputes . . . [which are] irrevocable and fully enforceable and the former do not.").

15. CARBONNEAU, supra note 13, at 124 ("The basis for denying legal effect to an [arbitral] award is quite limited. In the main, only significant procedural deficiencies in the arbitral process can thwart the enforcement of an award.").

16. Id. at 124-25 ("The limited number of grounds [for vacatur] and their restrictive scope reflect the FAA's liberal disposition toward arbitration . . . . A nearly irrebuttable presumption exists in the federal case law that arbitral awards, once rendered, are legally enforceable.").

17. See Positive Software II, 476 F.3d at 282-83 (surveying decisions from numerous circuits across the country).

18. Southland Corp., 465 U.S. at 10 ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration . . . .").
from judicial interference. For these reasons, the FAA provides little solace to those wishing to modify or overturn an arbitration award. Even those parties who are permitted to seek vacatur of their awards are prohibited from rearguing their claims. Parties are thus restricted to arguing that the procedure, rather than the ultimate decision, was flawed.

The FAA does not directly govern an arbitrator’s conduct. However, in order to keep the arbitration process free from partiality or corruption, the drafters of the FAA added subsection 2 to § 10(a). It provides that the losing party may protest an arbitration award “[w]here there was evident partiality or corruption in the arbitrators, or either of them.”

19. See EDMONSON, supra note 1, § 1:5, at 1-13 (“[M]any [disputes] can be resolved, to the advantage of everyone, quickly and in a less costly fashion, by resorting to arbitration rather than by using the traditional adversarial method of dispute resolution.”); see also Brunet, supra note 9, at 3 (determining that arbitration rests on the “firm bedrock of . . . efficiency, . . . party autonomy, privatization, arbitrator expertise, neutrality, and finality”).

20. See Fine v. Bear, Stearns & Co., 765 F. Supp. 824, 827 (S.D.N.Y. 1991) (noting that the courts’ “power to vacate an arbitration award must be extremely limited because an overly expansive judicial review of arbitration awards would undermine the litigation efficiencies which arbitration seeks to achieve”); see, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 643 (6th Cir. 2005) (“The Federal Arbitration Act (‘FAA’) expresses a presumption that arbitration awards will be confirmed.”); see also Nat’l Bulk Carriers, Inc. v. Princess Mgmt. Co., 597 F.2d 819, 825 (2d Cir. 1979) (“Arbitration cannot achieve the savings in time and money for which it is justly renowned if it becomes merely the first step in lengthy litigation.”).

21. Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 100 (7th Cir. 1996) (noting a previous holding “that parties are not entitled to reargue their claims in a proceeding to vacate an arbitral award ... litigation like this defeats the goal of arbitration to provide a quick and cheap decision” (citing Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994))).

22. See id. The standard of review given to the courts is “one of the narrowest standards of judicial review in all of American jurisprudence.” Lattimer-Stevens Co. v. United Steelworkers, 913 F.2d 1166, 1169 (6th Cir. 1990). The “narrow” review available to the courts is enumerated in § 10 and § 11 of the FAA. 9 U.S.C. §§ 10–11 (2000). Section 11 allows a judge only to “modify and correct” an award. Id. § 11.

23. See Lee Korland, Comment, What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act, 53 CASE W. RES. L. REV. 815, 821 (2003) (“Any requirement that an arbitrator disclose potentially disqualifying conflicts of interest or conduct an investigation to uncover such conflicts stems from case law and suggested guidelines by organizations within the field of arbitration.”).

24. See generally CARBONNEAU, supra note 13, at 124–27 (noting that the purpose of FAA subsection 10(a)(2) is to give courts limited supervisory authority).

25. 9 U.S.C. § 10(a)(2). Section 10(a) also allows vacatur for the following other reasons:

1. Where the award was procured by corruption, fraud, or undue means.

2. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

3. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
Because of the importance in keeping the arbitration process free from fraud or corruption, and the limited ability of losing parties to challenge arbitration awards on other grounds, many courts have carefully reviewed the "evident partiality" language of § 10(a)(2). The interpretation of "evident partiality" in § 10(a)(2) has a significant effect on the ability of parties to challenge an arbitration; if interpreted to require only the appearance of bias, § 10(a)(2) becomes the only way to have an arbitration award vacated without a showing of actual, prejudicial wrongdoing on the part of the arbitrator.

Proving actual misconduct or bias on the part of an arbitrator can be a difficult proposition because the arbitration process tends to be private in nature and often is not well documented. The product of arbitration under the FAA is not usually a "discursive opinion"; rather, it is typically "a one-page award that merely denotes the final result of a dispute without explanation." Without a detailed record of the proceedings or the rationale behind an arbitrator's decision, proving wrongful acts by the arbitrator can be nearly impossible.

B. The Supreme Court's Only Bite at the Apple: Commonwealth Coatings Corp. v. Continental Casualty Co.

In Commonwealth Coatings Corp. v. Continental Casualty Co., the Supreme Court interpreted the term "evident partiality" and ruled that, absent any sign of actual bias or corruption on the part of the arbitrator, an arbitrator's undisclosed financial relationship with an attorney for one of the parties provided a basis to vacate the arbitrator's decision. In ruling on the matter, the Court rendered its only interpretation of § 10(a)(2) of the FAA.

Id. § 10(a)(1), (3), (4).

26. See, e.g., Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278, 280-83 (5th Cir. 2007) (en banc) (discussing how the court should interpret the "evident partiality" standard of 9 U.S.C. § 10(a)(2) and citing how many other courts have addressed the same problem).

27. See infra notes 39-43 and accompanying text.

28. See Brunet, supra note 9, at 9 ("Typically, arbitration in the United States ends silently with a cryptic written award that does not contain a discursive opinion."); see also Consol. Coal Co. v. Local 1643, United Mine Workers, 48 F.3d 125, 129 (4th Cir. 1995) (proving actual bias in an arbitration decision is an almost insurmountable task).

29. See Brunet, supra note 9, at 9.

30. See id. (stating that the "secrecy" of the process is desired by many who use it).


32. See Cont'l Ins. Co. v. Williams, No. 84-2646-CIV, 1986 WL 20915, at *4 (S.D. Fla. Sept. 17, 1986) (noting that "the unquestioned starting point" when addressing "evident partiality" is Commonwealth Coatings); see also Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995) (finding that the "leading case on evident partiality is Commonwealth Coatings"). Foreshadowing that holding, Justice Black stated that the question to be resolved was "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through federal arbitration." Commonwealth Coatings, 393 U.S. at 145.
The case arose after a disputed arbitration between the parties. After a panel of three arbitrators rendered its decision, the neutral arbitrator, who also worked as an engineering consultant, was found to have conducted business with one of the parties "from time to time at irregular intervals." The Court noted that, although the total business transacted between the arbitrator and the party equaled approximately $12,000, the relationship "was in a sense sporadic," occurred over the course of a few years, and "there had been no dealings between [the arbitrator and the party] for about a year immediately preceding the arbitration."

Even taking into account the somewhat "sporadic" nature of the relationship between the party and the arbitrator, six Justices concluded that the arbitrator's failure to disclose the relationship before the commencement of the arbitration constituted "evident partiality," and vacated the decision. The majority holding was reached by combining two opinions: Justice Black's opinion and Justice White's concurrence.

1. Justice Black's Opinion

Justice Black reasoned that under the circumstances, where there was no allegation of actual fraud or bias, but merely a periodic relationship between one of the parties and the arbitrator, vacatur was still appropriate. According to Justice Black, Congress intended the "evident partiality" clause of § 10(a)(2) to ensure a fair and impartial arbitral process. Thus, the undisclosed

33. Commonwealth Coatings, 393 U.S. at 146. Before the disagreement, both parties had contracted to settle all disputes through binding arbitration when they signed a painting contract. Id. After the parties encountered a dispute over monies due, they entered into arbitration, as dictated by the contract. Id. Under the terms of the arbitral contract, the "petitioner appointed one arbitrator, the [respondent] appointed a second, and these two [arbitrators] together selected the third arbitrator." Id. The third arbitrator was a "supposedly neutral" party. Id.

34. Id.

35. Id.

36. See generally id. at 145. Justice Black stated that the question to be resolved was "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through federal arbitration." Id.


Because this combination of votes resulted in a debate on whether the Commonwealth Coatings decision was a majority or a plurality opinion, this Note will refer to the opinions as "Justice Black's opinion" and "Justice White's concurrence" or "Justice White's opinion."

38. Commonwealth Coatings, 393 U.S. at 147-48 (stating that the "undisclosed business relationship" at issue was a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in [the] case").

39. Id. at 147 (concluding that "Congress [intended] to provide not merely for any arbitration but for an impartial one").
relationship fell below the ethical standards Congress intended when it enacted the FAA.  

The Court reached this conclusion by reasoning that Congress expects arbitrators to perform their functions with "strict morality and fairness." Justice Black reasoned that Congress intended the duty of an arbitrator to be similar, though not identical, to that of a judge or a jury. An arbitrator's failure to disclose "financial relations" that previously existed between the arbitrator and one of the parties violated this "strict morality and fairness" standard, regardless of whether the arbitrator's decision was demonstrated to be actually biased.

The opinion suggested that the standard for arbitrators should be higher than that for judges or jurors because there are fewer oversight mechanisms in place for arbitrators than for judges. Justice Black reasoned that judges maintain proper decorum partly because of the possibility of an appeal and the potential for reversal of their decisions, whereas arbitrators do not have to be concerned with similar oversight. Because the threat of appeal and reversal as an impetus to prevent judicial bias is not present in arbitral decisions, Justice

40. See id. at 147–48. Justice Black's opinion makes a clear distinction between actual evidence of an arbitrator's bias or fraud and the appearance of an arbitrator's bias or fraud. Id. Justice Black concluded that actual bias should not be a prerequisite to finding that an arbitrator violated Congress's intended guidelines. Id.

41. Id. at 148.

42. Id. Justice Black's opinion relied on the standards set forth in *Tumey v. Ohio*, which analyzed the circumstances in which a judgment should be overturned due to an undisclosed financial connection of a judge to a case. Id. (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). The Court in *Tumey* found that it "deprives a defendant... of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The *Tumey* Court held that "it is very clear [in English common law] that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." Id. at 524. Justice Black's opinion in *Commonwealth Coatings* added that although the undisclosed possible bias may be slight, the size of the connection is irrelevant to the question of "evident partiality." *Commonwealth Coatings*, 393 U.S. at 148. As Justice Black's opinion states: "[s]ince in the case of courts[,] [impartiality] is a constitutional principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality.'" Id.


44. Id. at 149.

45. Id. (stating that the courts should "be even more scrupulous to safeguard the impartiality of arbitrators than judges"). This heightened standard should apply because "the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." Id.; see also Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 425–26 (1995) (postulating that because of the constant threat of reversal by a higher court "judges are less likely to follow their predilections or to exercise favoritism").
Black concluded that higher standards of conduct be enforced directly on arbitrators.  

Justice Black’s opinion in *Commonwealth Coatings* adopted a simple rule: “dealings that might create an impression of possible bias” on the part of an arbitrator, regardless of actual bias in the decision, is enough to allow for vacatur of an arbitral award. As a result, arbitrators will be held to similar standards as those applied to Article III judges. This standard, as laid out by Justice Black, is commonly referred to as the “appearance of bias standard.”

2. Justice White’s Concurrence: “Glad to Join My Brother Black”

Proper analysis of *Commonwealth Coatings* is difficult because lower courts disagree on exactly what treatment to give Justice Black’s opinion. Because two of the six Justices who comprised the majority only concurred with Justice Black, many courts have interpreted *Commonwealth Coatings* as generating no majority decision; rather, they assert that it is a plurality decision. As a

46. *Commonwealth Coatings*, 393 U.S. at 149. Justice Black’s opinion also considered the Rules of Ethics of the American Arbitration Association (AAA), which governs disclosure of possible bias by one of its sanctioned arbitrators. *Id.* (citing § 18 of the Rules of the American Arbitration Association). One canon of the AAA code, which is similar to that of the bias rules in the 33d Canon of Judicial Ethics, requests that arbitrators “disclose any circumstances likely to create a presumption of bias.” *Id.* at 149–50. Justice Black combined the arbitration rule with Congress’s requirement that the proceedings be free from “evident partiality,” to conclude that arbitrators have a duty to disclose all sources that “might create an impression of possible bias.” *Id.*

47. *Id.* at 150 (stating that “[t]his rule of arbitration and this canon of judicial ethics rest 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”).

48. See *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (“Justice Black imported this rigorous [appearance of bias] standard from those safeguarding the impartiality of Article III judges.”). Justice Black “[could not] believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.” *Commonwealth Coatings*, 393 U.S. at 150.

49. See *Amicorp Inc. v. Gen. Steel Domestic Sales, LLC*, Civil No. 07-cv-01105-LTB-BNB, 2007 WL 2890089, at *3 (D. Colo., Sept. 27, 2007) (“The standard articulated in Justice Black’s opinion is often referred to as the ‘appearance of bias standard . . . .’”); see also *Tamari v. Bache Halsey Stuart Inc.*, 619 F.2d 1196, 1198 (7th Cir. 1980) (“*Commonwealth Coatings* held that § 10(b) implicitly allowed the setting aside of arbitration awards . . . even if actual bias or corruption is not found . . .”).

50. See *Positive Software Solutions Inc. v. New Century Mortgage Corp.* (*Positive Software II*), 476 F.3d 278, 281 (5th Cir. 2007) (en banc) (noting that courts and scholars have found that the rule of law stemming from *Commonwealth Coatings* is “not pellucid”); see also *Amicorp Inc.*, 2007 WL 2890089, at *3 (pointing out that “circuits differ on their interpretation of the [Commonwealth Coatings] holding”).

51. *Commonwealth Coatings*, 393 U.S. at 150 (beginning Justice White’s concurrence, which was joined by Justice Marshall).

52. *Positive Software II*, 476 F.3d at 281. A plurality decision can be defined as one where “the opinion announced [by the Court] has not been acceptable to a majority of the justices sitting
result, many courts have declined to follow Justice Black’s opinion by distinguishing it on the grounds that it does not speak for the majority of the Court; instead, they follow Justice White’s concurrence. However, these courts minimize the significance of the first sentence in Justice White’s concurrence, where he stated that he was “glad to join [his] Brother Black’s opinion.”

In his concurrence, Justice White argued that conduct by arbitrators should not be held to the same standard that is applied to Article III judges. This is because arbitrators, unlike judges, often are members of the same business community as the parties to the arbitration. The concurring opinion states that there is “no reason automatically to disqualify the best informed and most capable potential arbitrators” as a result of their activities and relationships in the industry.

Under the statute governing the recusal of Article III judges, a judge must recuse him or herself in “any proceeding in which his impartiality might reasonably be questioned.” Thus, if an Article III judge rather than an arbitrator was slated to hear the initial dispute in Commonwealth Coatings, the judge would have been forced to withdraw because of his past financial relationship with one of the parties. Moreover, the parties would have been

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55. Commonwealth Coatings, 393 U.S. at 150 (White, J., concurring).
56. Id.
57. Id. Among other comments, Justice White clearly stated that he did not believe arbitrators should be held to the same “standards of judicial decorum [as] Article III judges, or indeed of any judges.” Id. He did, however, specifically note:

This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both the parties are informed of the relationship in advance . . . .

59. See 28 U.S.C. § 455(b) (requiring a judge to “disqualify himself [if]: . . . [h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding”).
unable to waive the judge’s possible conflict irrespective of whether they were put on proper notice of the past financial relationship.  

Justice White advocates that arbitrators should be treated differently than judges and not be “automatically disqualified by a business relationship” with one or more of the parties to the litigation. In his view, “if both parties are informed of the relationship in advance,” and still consent to the arbitrator, they should be allowed to continue. In this way, the parties are not foreclosed from having the highest quality arbitrators hear their disputes.

The remainder of Justice White’s concurring opinion appears to completely support Justice Black’s opinion. Specifically, Justice White agreed with Justice Black in overturning the decision of the arbitrator, even though there was no finding or indication of impartiality or bias. Oddly, however, the concurring opinion only provided a standard for overturning arbitration decisions involving actual bias. It concluded with the mandate that “where the arbitrator has a substantial interest in a firm . . . that fact must be disclosed.” Thus, with respect to whether arbitrators should be held to the same standard as federal judges, Justice White did not adopt the same standard proposed by Justice Black. However, a clear majority of the Court agreed that arbitrators must “disclose any circumstances likely to create a presumption of bias.”

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60. See 28 U.S.C. § 455(e).
61. Commonwealth Coatings, 393 U.S. at 150 (White, J., concurring).
62. Id.
63. See id.
64. Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) (finding that Justice White’s concurrence was not intended to differ from Justice Black’s opinion, but merely to add “additional remarks”). Justice White went on to discuss the importance of arbitrators disclosing possible conflicts, specifically stating that it is far more beneficial to state possible relationships at the beginning of arbitration proceedings and leave it to the parties to choose whether to accept or protest the arbitrator before a decision has been issued, rather than challenge possible bias after a decision has been issued. Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring). He suggested that disclosure beforehand would minimize challenges based on an arbitrator’s possibly conflicting relations. Id. (“It is far better for a relationship to be disclosed at the outset . . . than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it . . . ”).
65. Commonwealth Coatings, 393 U.S. at 151–52. Justice White inserted a footnote specifically acknowledging that the lower court found the arbitrator’s action to be “entirely fair and impartial.” Id. at 151 n.*.
66. Amicorp Inc. v. Gen. Steel Domestic Sales, LLC, Civil No. 07-cv-01105-LTB-BNB, 2007 WL 2890089, at *3 (D. Colo. Sept. 27, 2007) (“The standard articulated in Justice Black’s opinion is often referred to as the broader ‘appearance of bias standard,’ and the stricter or narrower standard in Justice White’s concurrence is referred to as the ‘actual bias standard.’
68. See supra note 66.
69. Commonwealth Coatings, 393 U.S. at 149 (plurality opinion).
C. As Simple as Black Versus White? Life After Commonwealth Coatings

The Supreme Court has never clarified its decision in Commonwealth Coatings; however, many lower federal courts have tried. Unfortunately, these attempts have failed to provide clarity on whether Justice Black’s opinion should be given majority status. Specifically, it is unclear how much “actual bias,” as opposed to “the appearance of bias,” will be required before a court will conclude that an arbitration award should be vacated.

1. The White Team: Using Marks v. United States to Reject Justice Black’s “Appearance of Bias” Language

The majority of circuits have chosen to ignore the “appearance of bias” standard set forth in Justice Black’s opinion. These courts have stated that the vacatur of an arbitrator’s decision under FAA § 10(b) is only appropriate when there is proof of “actual bias” on the part of the arbitrator, because Justice Black’s opinion should be read as dicta and the weight of the Court’s opinion should be given to Justice White’s concurrence.

The courts’ decisions to give legal authority to Justice White’s concurrence rather than Justice Black’s opinion can be explained by the “Marks rule.”

Marks v. United States holds that when the Court delivers a plurality opinion,

70. See generally Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software II), 476 F.3d 278, 282 (5th Cir. 2007) (en banc) (reviewing the lower courts that have rendered their own interpretation of Commonwealth Coatings).
71. Id. at 282-83.
72. See Amicorp Inc. v. Gen. Steel Domestic Sales, LLC, Civil No. 07-cv-01105-LTB-BNB, 2007 WL 2890089, at *3 (D. Colo. Sept. 27, 2007) (describing that “[b]ecause the ruling was a ‘plurality-plus’ decision, the circuits differ on their interpretation of the holding”); see also Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983) (stating that lower courts are provided “little guidance because of the inability of a majority of Justices [in Commonwealth Coatings] to agree on anything but the result”).
73. See Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 644-45 (6th Cir. 2005) (rejecting the “appearance of bias” standard espoused in Justice Black’s opinion in Commonwealth Coatings and noting that “a majority of the Court did not endorse the ‘appearance of bias’ standard set forth in the plurality opinion”); ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 499 (4th Cir. 1999) (noting that “mere nondisclosure does not in itself justify vacatur”); Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83-84 (2d Cir. 1984) (reading “Section 10[b] [of the FAA] as requiring a showing of something more than the mere ‘appearance of bias’ to vacate an arbitration award”); Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1147 (10th Cir. 1982) (“[T]he court must be satisfied that a plaintiff’s case is not subsumed within the merits of another case and that it is only evidence of a bias on the part of the arbitrator that justifies the denial of summary confirmation of an arbitration award.”).
74. See, e.g., ANR Coal Co., 173 F.3d at 499-500 (stating that a plaintiff must establish that the arbitrator was impartial and that a failure to disclose is insufficient for vacatur).
75. See, e.g., Toroyan v. Barrett, 495 F. Supp. 2d 346, 351 n.4 (S.D.N.Y. 2007) (noting that the “Second Circuit has consistently treated Justice Black’s opinion . . . in Commonwealth Coatings as dicta and rejected the appearance of bias standard”).
76. See Mark Alan Thurman, Note, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 DUKE L.J. 419, 420-21 (1992) (discussing the origins of the Marks rule).
the opinion given precedential weight should be the one that expresses the narrowest grounds on which a majority can be reached.\textsuperscript{77}

The Court in \textit{Marks} recognized, in a case that found a Massachusetts obscenity law to be unconstitutional, that three opinions constituting the majority of the Court were irreconcilable.\textsuperscript{78} Because of a lack of a clear majority regarding the constitutional standard that controlled, the Court followed the decision based on the "narrowest grounds," that of those supporting a three-part test.\textsuperscript{79}

The United States Court of Appeals for the Sixth Circuit's ruling in \textit{Nationwide Mutual Insurance Co. v. Home Insurance Co.}, is an example of a lower court interpreting \textit{Commonwealth Coatings} as a plurality opinion and applying the \textit{Marks} rule to give weight to Justice White's opinion.\textsuperscript{80} In

\textsuperscript{77} Marks v. United States, 430 U.S. 188, 193 (1977) (noting that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))); see also Gregg v. Georgia, 428 U.S. 153, 169 (1976) (stating that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds").

\textsuperscript{78} Marks, 430 U.S. at 193–94.

\textsuperscript{79} Id. at 193.

\textsuperscript{80} See \textit{generally} \textit{Nationwide Mut. Ins. Co. v. Home Ins. Co.}, 429 F.3d 640, 644 n.5 (6th Cir. 2005) (explaining that the concurrence by Justice White should be viewed as a narrower holding than Justice Black’s opinion). For another case similarly decided see \textit{Ormsbee Development Co. v. Grace}, 668 F.2d 1140, 1147 (10th Cir. 1982). There, a lessee (Grace) appealed the decision from the United States District Court for the District of New Mexico, which had confirmed an arbitration decision in favor of the lessor (Santa Fe). \textit{Id.} at 1142. The lease the parties entered into contained an arbitration clause covering disagreements over whether the lease terms had been breached, allowing the lease to be forfeited. \textit{Id.} at 1142–43. The lease terms stated the following:

\textit{Lessee shall not subject Lessor or the leased premises to any liability or lien for or on account of any work done . . . upon said premises, and if by reason of the failure of Lessee to pay bills or expenses incurred by Lessee, any lien or liens shall be filed against the leased premises . . . . Lessor may also at its election declare a forfeiture of this Lease and Agreement.}

\textit{Id.} at 1142–43.
Nationwide, the court interpreted Justice White’s remarks, which disagreed with the idea that arbitrators should be held to the same standards as Article III judges, as removing his endorsement of Justice Black’s “appearance of bias” standard. The court then used this apparent discrepancy between Justice Black and Justice White’s language to characterize the appearance of bias discussion in Justice Black’s opinion merely as dicta. In so doing, the court implicitly applied the Marks rule, determining that Justice White’s opinion was more narrowly crafted and thus controlled. The Nationwide court went on to hold that because the Supreme Court majority has not adopted an “appearance of bias” standard, to vacate an award for “evident partiality,” the “alleged partiality must be direct, definite, and capable of demonstration,” and that the party alleging the partiality bears the burden of establishing facts indicative of partiality.

Courts that support the “actual bias” standard do so by noting that arbitrators, unlike judges, are often active members of the community in which they arbitrate. Elaborating on Justice White’s point that arbitrators are “men of affairs, not apart from but of the marketplace,” the lower courts have

Arbitration commenced, each party selected an arbitrator, and the American Association of Arbitrators selected the third “neutral” arbitrator. Id. at 1144. The arbitrators ruled, in a two-to-one decision that the actions of Grace terminated the lease, per the lease agreement. Id.

Santa Fe moved to confirm the award and Grace moved to vacate the decision on the grounds that the “neutral” arbitrator had demonstrated evident partiality in violation of 10 U.S.C. § 10(b) by failing to disclose a prior relationship between the arbitrator and the law firm representing Santa Fe; specifically, Grace alleged that the arbitrator actively represented a company involved in a partnership between two other companies, one of which is represented by Santa Fe’s law firm. Id. There were other connections between the arbitrator and Santa Fe’s law firm, but those had been disclosed in a resume the arbitrator provided to the parties before commencing the arbitration. Id.

After considering the facts, the United States Court of Appeals for the Tenth Circuit held that while “a]rbitrators are, of course, obligated to disclose possible bias . . . only clear evidence of impropriety . . . justifies the denial of summary confirmation of an arbitration award.” Id. at 1147. The court relied on Justice White’s opinion and the background rule that arbitration awards should be final and confirmed absent “exceptional circumstances.” Id. at 1146-47 (citing Fizer v. Safeway Stores, Inc., 586 F.2d 182 (10th Cir. 1978)). The court went so far as to say that “evidence of bias or interest of an arbitrator must be direct, definite, and capable of demonstration.” Id. at 1147. It concluded by finding that because no direct financial involvement between the neutral arbitrator and either of the parties did not exist, the appellant “fail[ed] to establish exceptional circumstances” necessary to vacate the ruling. Id. at 1151-52.

82. Id.
83. Id. at 645 (accepting that Justice Black’s “appearance of bias standard espoused in the plurality opinion in Commonwealth Coatings” was merely dicta).
84. Id. at 645 (quoting Consolidation Coal Co. v. Local 1643, United Mine Workers, 48 F.3d 125, 129 (4th Cir.1995)).
85. See, e.g., Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83–84 (2d Cir. 1984) (noting that the use of arbitrators is often preferable because of their expertise in the community).
found that applying an “appearance of bias” standard would severely decrease, if not totally hinder, qualified arbitrators from arbitrating.  

2. The Black Team: Courts Supporting the “Appearance of Bias” Standard

Other courts read Commonwealth Coatings as support for the proposition that proof of “actual bias” is not required to vacate an arbitration decision under 9 U.S.C. § 10. Schmitz v. Zilveti is the most prominent and well cited of these cases. There, the United States Court of Appeals for the Ninth Circuit concluded that courts that interpret Commonwealth Coatings as requiring “actual bias” have misinterpreted the case. According to the Ninth Circuit, because Justice White “said he joined in the ‘majority opinion’ but wrote to make ‘additional remarks,’” Justice Black’s opinion in

87. See, e.g., Nationwide Mut. Ins. Co., 429 F.3d at 647 (“[T]o disqualify any arbitrator who had professional dealings with one of the parties (to say nothing of a social acquaintanceship) would make it impossible, in some circumstances, to find a qualified arbitrator at all.” (alteration in original) (quoting Morelite Constr. Co., 748 F.2d at 83)).

88. See, e.g., Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994) (“Consistent with Commonwealth Coatings, courts examining nondisclosure cases have not required proof of actual bias in showing ‘evident partiality.’”). The court in Sanko S.S. Co. v. Cook Indus. specifically explained that:

Although not endorsing the view that arbitrators should be held to as high standards as judges and therefore be required to disqualify themselves in all instances in which a judge would have been required to do so, Mr. Justice White did endorse the Court’s position that extensive disclosure must be made by each arbitrator prior to the arbitration.

495 F.2d 1260, 1263 (2d Cir. 1973).

In Schmitz, the parties brought their dispute before National Association of Securities Dealers (NASD) arbitrators, as dictated by their contract. Schmitz, 20 F.3d at 1044. NASD requires arbitrators “to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination.” Id. (quoting NATIONAL ASSOCIATION OF SECURITIES DEALERS CODE OF ARBITRATION PROCEDURE § 23(a) (1990) [hereinafter NASD CODE]). NASD required this disclosure of any “financial, business, professional, family, or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias.” Id. (quoting NASD CODE § 23(a)(2)).

All three arbitrators selected to hear the case “completed a disclosure form” listing all matters they believed had to be disclosed. Id. After an award had been rendered, the losing party learned that one of the arbitrators’ law firms had represented the parent company of the victorious party in nineteen cases over thirty-five years. Id. The arbitrator at issue had run a conflicts check on the parties to the arbitration, but not on their parent companies, even though he was aware of the parent companies. Id.

The Ninth Circuit determined that the arbitrator had a duty under the NASD Code to disclose the prior relationship with the victorious party and that the failure to inform the other party constituted “evident partiality.” Id. at 1049. As a result, the arbitration decision was vacated under FAA § 10(a)(2). Id. at 1049–50.

89. Cf. Positive Software Solutions, Inc., v. New Century Mortgage Corp. (Positive Software 1), 436 F.3d 495, 501 (5th Cir. 2006) (stating that Schmitz is cited for the proposition “that the ‘best expression’ of the Supreme Court’s holding is that evident partiality exists when ‘undisclosed facts show a reasonable impression of partiality’”).

90. Schmitz, 20 F.3d at 1045.
*Commonwealth Coatings* is a majority opinion. Therefore, the argument is that courts are not required to give weight to Justice White's additional remarks in his concurring opinion.91

However, the Ninth Circuit went on to state that the same conclusion can be reached even while accounting for Justice White's concurrence.92 The court reasoned that even though Justice White specifically rejected the notion that arbitrators should be held to the same standards of conduct applicable to Article III judges, he never "expressly reject[ed] the 'appearance of bias language'" in Justice Black's opinion.93 In contrast to the strict requirement that Article III judges recuse themselves when there is an appearance of bias, arbitrators are required merely to disclose possible conflicts, not recuse themselves from the proceedings.94 In *Schmitz*, the Ninth Circuit noted that the conflict between the approach taken by Justice White and Justice Black "dissipates when one recalls that the context in which arbitrators and judges operate and the functions they perform differ."95

In reaching its conclusion, the *Schmitz* court relied heavily on the United States Court of Appeals for the Second Circuit's decision in *Sanko S.S. Co. v. Cook Industries*.96 In *Sanko*, the court concluded that Justice White's concurring opinion in *Commonwealth Coatings* "did endorse [Justice Black's] position that extensive disclosure must be made by each arbitrator prior to the arbitration."97 The Second Circuit remanded the case to determine whether the arbitrator failed to disclose *any* connections with a party, and, if so, whether

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91. *Id.* (quotating *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring)).
92. *Id.* at 1045–46.
93. *Id.* at 1046 (stating that the court did "not rest [its] decision on any conflict Justice White's concurrence may have with the *Commonwealth Coatings* majority opinion").
94. *Id.* (The court specifically stated that "[t]hough the concurrence may show an apparent contradiction, the conflict dissipates when one recalls that the context in which arbitrators and judges operate and the functions they perform differ. Expert arbitrators will nearly always, of necessity, have numerous contacts within their field of expertise.").
95. *Id.* at 1046–47 ("[T]he actual standard for arbitrators does differ from that for judges, even though the language used to describe both standards may be similar."); see also 9 U.S.C. § 10(a)(2) (2000) (providing no grounds for vacatur based on an arbitrator's failure to disclose). Furthermore, the court noted the analytical difference between cases alleging actual bias on the part of the arbitrator and those that alleged the reasonable impression of bias. *Schmitz*, 20 F.3d at 1047.
96. *Schmitz*, 20 F.3d at 1046 (emphasizing that "[e]xpert arbitrators will nearly always . . . have numerous contacts within their field of expertise").
97. See *id.* (citing Sanko S.S. Co. v. Cook Indus., 495 F.2d 1260 (2d Cir. 1973)). In *Sanko*, the court ruled that a ship owner was entitled to an evidentiary hearing to determine if an arbitration award in favor of the charter of his ship should be vacated due to the arbitrator's failure to disclose business connections with the charter's lawyer. *Sanko*, 495 F.2d at 1261.
98. *Sanko*, 495 F.2d at 1263. The court went on to differentiate the case from *Cook Industries v. C. Itoh & Co.*, 449 F.2d 106 (2d Cir. 1971), because in *Cook*, the party alleging undisclosed connections on the part of the arbitrator should have known of the connections before arbitration because of the limited people involved in the local industry. *Id.* at 1264–65.
those connections were substantial enough to "have raised doubts concerning [the arbitrator's] impartiality and should have been revealed." 99

Schmitz also cited Tamari v. Bache Halsey Stuart Inc., which distinguished cases that concerned an arbitrator with significant connections to one of the parties from cases that involved relatively insubstantial connections. 100 The court first scrutinized the facts of the case looking for any "evident partiality," which it defined as a relationship "that might reasonably give rise to an appearance of partiality." 101 Finding none, the court examined the record to uncover any evidence of actual bias by the arbitrator, which it said "must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative." 102

The United States Court of Appeals for the Eleventh Circuit has also interpreted Commonwealth Coatings to mean that an arbitration award can be vacated where a neutral arbitrator has failed to disclose facts creating the appearance of bias, even in the absence of an arbitrator's actual conflict of interest. 103 The court reached this decision by analyzing, in addition to the FAA, the Florida Arbitration Code, which has a similar rule allowing vacatur of an arbitration decision because of "evident partiality." 104

99. Id. at 1263, 1264 n.3.
100. Tamari v. Bache Halsey Stuart Inc., 619 F.2d 1196, 1199-1200 (7th Cir. 1980) (stating that a highly speculative allegation of bias was insufficient for either actual bias or the appearance of bias). The court first dismissed the plaintiff's possible bias claim by noting that Commonwealth Coatings does not dictate a contrary result because that case dealt with "the failure to disclose relationships that might reasonably give rise to an appearance of partiality," whereas the present case involved no significant relationship and disclosure by the arbitrator. Id. at 1199-1200. The court stated that the bias standard, not the "evident partiality" standard, is that of an "'interest or bias of an arbitrator [which is] direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.'" Id. at 1200 (quoting U.S. Wrestling Fed'n v. Wrestling Div. of the AAU, Inc., 605 F.2d 313, 318 (7th Cir. 1979)).

101. Id. at 1200-02.

102. Id. at 1200 (quoting U.S. Wrestling Fed'n, 605 F.2d at 318) (concluding that the "possibility of bias was highly speculative" because the arbitrator has disclosed the conflict and removed himself from the proceedings as soon as the conflict arose).

103. Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1339 (11th Cir. 2002) (stating that "evident partiality" can exist when the arbitrator is aware of conflicts and fails to disclose them); see also Woods v. Saturn Distribution Corp., 78 F.3d 424, 427 (9th Cir. 1996) ("Whether the arbitrator's decision itself is faulty is not necessarily relevant.").

104. FLA. STAT. ANN. § 682.13(1)(b) (West 2003) (mandating that "[u]pon application of a party, the court shall vacate an award when: . . . [t]here was evident partiality by an arbitrator appointed as neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party").
II. POSITIVE SOFTWARE SOLUTIONS

Positive Software Solutions v. New Century Mortgage (Positive Software II) represents the Fifth Circuit's most recent attempt to interpret and apply the Supreme Court's Commonwealth Coatings rule.\(^{105}\)

A. The Basics

The case arose out of a dispute between two companies, Positive Software Solutions, Inc. and New Century Mortgage Corporation, both of which are involved in the mortgage industry.\(^{106}\) As agreed to in their contract, the parties submitted their dispute to the American Arbitration Association (AAA).\(^{107}\)

They then participated in a seven-day arbitration hearing before the

\(^{105}\) Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software II), 476 F.3d 278, 280-81 (5th Cir. 2007) (en banc) (reviewing the plaintiff’s allegations that vacatur should be granted due to the fact that "there was evident partiality" in the arbitrator) (quoting 9 U.S.C. § 10(a)(2)(2000)).

\(^{106}\) Positive Software Solutions v. New Century Mortgage Corp. (Positive Software I), 436 F.3d 495, 496 (5th Cir. 2006), rev’d en banc, Positive Software II, 476 F.3d 278. New Century sells mortgages while Positive Software "develops, markets, and manufactures computer-software products for the mortgage industry." \textit{Id.}

Positive Software developed a new database software program and licensed it to New Century "pursuant to a Software Subscription Agreement." \textit{Id.} During the course of business between the two companies, a dispute arose regarding whether New Century's use of the software was within the scope of the licensing agreement. \textit{Id.} Positive Software alleged that New Century was copying the software and incorporating it into its own programs in violation of the licensing agreement. \textit{Id.}

Positive Software sued on claims of "copyright infringement, theft of trade secrets, [and] breach of contract." \textit{Id.} In April 2003, the district court granted Positive Software a preliminary injunction to prevent New Century from continuing to use the software, but ordered arbitration to resolve the dispute in accordance with the terms of the licensing agreement. \textit{Positive Software II, 476 F.3d at 279.}

\(^{107}\) Positive Software I, 436 F.3d at 496. The parties then "jointly selected" the arbitrator from a list provided by the AAA. \textit{Id.} at 497. The AAA provided the parties with a list of arbitrators, along with their \textit{curricula vitae}, and asked them to rank the arbitrators in order of preference. Peter J. Shurn received the highest combined ranking and was selected by the parties to arbitrate the case. \textit{Id.}

The AAA informed Shum of his selection, gave Shurn a list of the parties, the firms representing the parties, and their specific counsel, and reminded Shurn to disclose any connections he had to the parties. \textit{Id.} The reminder specifically stated that Shurn had an "obligation to disclose any circumstances likely to affect impartiality or create an appearance of partiality." \textit{Id.}

The court also found of note that the same reminder appeared at the bottom of two additional letters sent to Shum regarding the case prior to arbitration. \textit{Id.} Furthermore, Shurn signed a standard AAA "Notice of Appointment" form, asking him to disclose any "past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional, social, or any other kind." \textit{Id.} The letter also specifically asked Shurn if he had "any professional or social relationship with counsel for any party in [the] proceeding or with the firms for which they work[.]

\textit{Id.} He indicated that he did not. \textit{Id.}
arbitrator. Shortly thereafter, the arbitrator issued a written ruling in favor of New Century on all counts. After the decision, Positive Software discovered that the arbitrator and his former law firm had represented the same party as New Century's counsel in prior litigation. Consequently, Positive Software filed a motion to vacate the award.

In September of 2004, the district court granted the motion to vacate because the previously undisclosed relationship between the arbitrator and New Century created "an appearance of partiality." The case was then appealed to the Fifth Circuit Court of Appeals.

\[ B. \text{ Three to Zero for Black: Positive Software I} \]

A three-judge panel of the appellate court analyzed the opinions of Commonwealth Coatings along with many of the cases interpreting and applying its holding. The Fifth Circuit affirmed the district court's decision, finding that the arbitrator's "past professional relationship with [opposing counsel] might have conveyed an impression of possible partiality to a

\[ 108. \text{ Id. at 497.} \]

\[ 109. \text{ Id. The arbitrator gave no award to Positive Software, but awarded New Century $11,500 on its counterclaim and $1.5 million in fees associated with the litigation and arbitration. Positive Software II, 476 F.3d at 280.} \]

\[ 110. \text{ Positive Software II, 476 F.3d at 280. Shurn had previously worked for Arnold, White, & Durkee. Id. While there, he, along with many others, represented Intel Corporation in a patent litigation issue. Id. Also representing Intel in the same action was Susman Godfrey, L.L.P., New Century's counsel of record. Id. In addition, "[o]ne of Susman Godfrey's attorneys in the New Century arbitration, Ophelia Camina, had [also] been involved in the Intel litigation." Id. The court went on to note that "[a]lthough their names appeared together on pleadings, Shurn and Camina never attended or participated in any meetings, telephone calls, hearings, depositions, or trials together." Id.} \]

\[ 111. \text{ Id.} \]

\[ 112. \text{ Id. (reciting how the district court found "that Shurn failed to disclose 'a significant prior relationship with New Century's counsel'"). The Fifth Circuit explained the district court's holding and rationale:} \]

\[ \text{[A]ny reasonable lawyer selecting a sole arbitrator for arbitration would have wanted to know that the arbitrator chosen had a prior association with opposing counsel, given the contentious nature of the dispute between the parties and the duration and importance of the prior litigation with which both arbitrator and opposing counsel were associated. Therefore, Shurn's failure to disclose his prior relationship with opposing counsel created a reasonable impression of possible partiality that warranted vacating the award. The district court also held that Positive Software did not learn of Shurn's prior professional relationship until after the arbitration and, therefore, did not waive its objection to the nondisclosure. Positive Software I, 436 F.3d at 498 (footnotes omitted).} \]

\[ 113. \text{ Positive Software I, 436 F.3d at 496. The case was heard by an appellate panel consisting of Judges Reavley, Garza, and Benavides; Judge Reavley issued the unanimous opinion of the court. Id.} \]

\[ 114. \text{ Id. at 499–502.} \]
reasonable person."\textsuperscript{115} Although New Century argued that a finding of evident impartiality in this case would make it more difficult to find arbitrators, the court disagreed, explaining that arbitrators with past relations to the parties are not automatically disqualified; rather, they must disclose the connections to all parties involved, who may then decide to waive the connection.\textsuperscript{116}

Similar to Commonwealth Coatings, the court in Positive Software I noted that it did not find any bias or corruption on the part of the arbitrator, merely a failure to disclose as required by both the AAA rules governing the proceeding and 9 U.S.C. § 10(a)(2).\textsuperscript{117} The court reasoned that "such relationships must be disclosed to the parties if the integrity and effectiveness of the arbitration process is to be preserved."\textsuperscript{118} Furthermore, the court held that Positive Software did not waive the nondisclosure issue at any time because Positive Software had no actual knowledge of the relationship between the arbitrator and New Century.\textsuperscript{119}

\textbf{C. Eleven to Five for White: Positive Software II}

Following the panel decision in Positive Software I, New Century sought and obtained an en banc review by the Fifth Circuit.\textsuperscript{120} Sixteen Fifth Circuit judges heard the case, and eleven joined an opinion, written by Chief Judge Jones, reversing the previous decision and refusing to vacate the arbitration decision because the undisclosed relationship was not "a significant compromising relationship."\textsuperscript{121} The majority opinion began by noting that Webster's Dictionary defines "[p]artiality" as "bias," and "evident" as "clear to the vision or understanding."\textsuperscript{122} The opinion noted that the previous panel decision in Positive Software I ignored the straightforward language that seemed to indicate that arbitral awards should be upheld "unless bias was clearly evident."\textsuperscript{123} The court also acknowledged that the Supreme Court has

\begin{itemize}
  \item \textsuperscript{115} \textit{Id.} at 504. ("It is not hard to think that Positive Software might not want to employ [the arbitrator's] services in an arbitration hearing with New Century once it discovered [the arbitrator's] prior relationship with the law firm and counsel representing New Century. On the other hand, Positive Software might decide that Shum's qualifications as an arbitrator outweigh whatever concerns it might have. The point is simply that the information should have been disclosed to Positive Software so that it could make that decision. The integrity of the arbitral process demands no less.").
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.} at 503–04.
  \item \textsuperscript{118} \textit{Id.} at 504.
  \item \textsuperscript{119} \textit{Id.} at 505.
  \item \textsuperscript{120} Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software II), 476 F.3d 278, 280 (5th Cir. 2007) (en banc).
  \item \textsuperscript{121} \textit{Id.} at 279, 286.
  \item \textsuperscript{122} \textit{Id.} at 281 (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 430 (1985)).
  \item \textsuperscript{123} \textit{Id.}
\end{itemize}
already attempted to lend its own interpretation to the phrase "evident partiality," and that this interpretation was controlling.\textsuperscript{124} The court then addressed the recurring issue of just what is the controlling holding of *Commonwealth Coatings.*\textsuperscript{125} The court noted that while Justice Black and Justice White agreed that the arbitrator in that case demonstrated evident partiality, the two Justices did not agree on a standard to be used in making such a determination.\textsuperscript{126} As a result, the court determined that Justice White's "joinder" of Justice Black's opinion is "magnanimous but significantly qualified."\textsuperscript{127} Therefore, the court concluded that Justice White's concurring opinion rendered Justice Black's opinion a plurality opinion and because Justice White's opinion was narrower in scope, it should be given precedential weight.\textsuperscript{128} The court in *Positive Software II* emphasized that "evident partiality" cannot be based on an arbitrator's undisclosed "trivial or insubstantial prior relationship" with one of the parties.\textsuperscript{129} The court concluded that the "reasonable impression of bias" standard [should be] interpreted practically \textit{rather than with utmost rigor.}\textsuperscript{130} The court applied its interpretation of "evident partiality" to the facts of the case and found that the connection between the arbitrator and New Century's counsel was trivial and did not require vacatur.\textsuperscript{131}

\begin{enumerate}
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id. at 281–83.
\item \textsuperscript{126} Id. at 282 (stating that Justice Black "use[d] an egregious set of facts as the vehicle to require broad disclosure of 'any . . . possible bias,'" whereas Justice White hew[ed] "closely to the facts" to find evident partiality, stating that evident partiality requires more than just an undisclosed "trivial business" connection between the parties).
\item \textsuperscript{127} Id. The court found that allowing vacatur based on "mere appearance of bias" would not just hold arbitrators to the standards of Article III judges (a view explicitly rejected by Justice White in *Commonwealth Coatings*), but would also actually hold arbitrators to an even higher standard than that to which Article III judges are held. Id. at 285. The court noted that if a relationship similar to the one at issue *Positive Software I* existed between a judge and a lawyer, disclosure or recusal would not even be suggested. Id.
\item The court based its logic on *Chitimacha Tribe v. Harry L. Laws Co.*, where the Fifth Circuit stated that the fact that a judge once represented one of the defendants in the case did not require his disqualification under 28 U.S.C. § 455 because in that specific circumstance, no one could reasonably question his impartiality. 690 F.2d 1157, 1166 (5th Cir. 1982). The court found the connection between judge and party to be "too remote and too innocuous to warrant disqualification." Id. As referenced in *Chitimacha*, 28 U.S.C. § 455(a) clearly states that any "judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a) (2000).
\item \textsuperscript{128} *Positive Software II*, 476 F.3d at 282 (finding that because Justice White's opinion was "based on a narrower ground . . . it becomes the Court's effective ratio decidendi").
\item \textsuperscript{129} Id. at 283.
\item \textsuperscript{130} Id. (emphasis added).
\item \textsuperscript{131} Id. at 284–85 ("No case we have discovered in research or briefs has come close to vacating an arbitration award for nondisclosure of such a slender connection between the arbitrator and a party's counsel."). The court believed that the facts of *Positive Software II*
The court supported its decision by showing that allowing vacatur would damage three of the main goals of arbitration, namely that arbitration decisions be timely, have finality, and be decided by experts in the industry. Specifically, the court found that allowing vacatur in these instances would lead to a rise in litigation, thereby destroying the speed and finality of arbitrations. Additionally, a holding for Positive Software would deprive the arbitration process of its best arbitrators because those with the most expertise and specialized knowledge generally have numerous contacts in the field, thus creating contacts with many parties likely to seek arbitration.

D. They Got It Wrong: The Dissent in Positive Software II

The dissent in Positive Software II disagreed with both the result reached by the majority and its understanding of "evident partiality" as the Supreme Court interpreted the term in Commonwealth Coatings. Writing for the dissent, Judge Reavley first provided his interpretation of the Commonwealth Coatings decision to demonstrate how the majority departed from the Supreme Court's reasoning. He asserted that the majority, like many previous courts giving controlling weight to Justice White's concurrence, failed to explain how Justice Black and Justice White's opinions are "irreconcilable." As a result, the dissent viewed Justice Black's opinion as a majority opinion, rather than a plurality, and therefore concluded that it should be given the force of legal precedent.
Judge Reavley acknowledged the majority's concern over protecting the finality of arbitral awards, but determined that this concern "does not justify evading the law of the Supreme Court by misstating it or by avoiding it by bleaching the evidence of possible partiality."\textsuperscript{139} Furthermore, the dissent argued that arbitrator partiality should not be sacrificed in order to minimize litigation expenses and ensure finality of arbitral awards.\textsuperscript{140} In the dissent's view, the Court's decision in \textit{Commonwealth Coatings} stressed protecting the integrity of the arbitral process by ensuring the impartiality of arbitrators.\textsuperscript{141} As Judge Reavley stated, "it is the protection and reassurance of the party that matters most," thus elevating impartiality over finality.\textsuperscript{142}

Judge Wiener joined Judge Reavley's dissent, but wrote a separate opinion stressing the key differences between selection of an arbitrator as opposed to an Article III judge, and urging that this difference should affect the interpretation of \textit{Commonwealth Coatings}.\textsuperscript{143} He noted that a judge is assigned by the court, whereas an arbitrator is chosen directly by the parties or their representatives; therefore, the disclosure of possible sources of bias on the part of the arbitrator is far more significant than any possible bias of a judge.\textsuperscript{144}

Accordingly, Judge Wiener concluded that Justice White's remarks regarding the different standards applicable to arbitrators and Article III judges had nothing to do with "the immutable prerequisite that, before the parties sign off on a candidate for arbitrator, they must have received from him an unexpurgated disclosure of absolutely every past or present relationship with the parties and their lawyers."\textsuperscript{145} In fact, according to Judge Wiener, \textit{Commonwealth Coatings} did not decide or even reach the question of whether

\textsuperscript{139} Id.
\textsuperscript{140} Id. Judge Reavley favored a standard that requires the disclosure of an arbitrator's possible connections or bias because he felt that proving actual bias was difficult or impossible to do. \textit{Id.} In his concurrence with the dissent, Judge Wiener further articulated this point by stating:

The informalities attendant on proceedings in arbitration come at the cost of the protections automatically afforded to parties in court, which reside in such venerable institutions as the rules of evidence and civil procedure. Likewise sacrificed at the altar of quick and economical finality is virtually the entire system of appellate review, as largely embodied for the federal courts in rules of appellate procedure and the constantly growing body of trial, appellate, and Supreme Court precedent interpreting and applying such rules. By dispensing with such basic standards of review as clearly erroneous, de novo, and abuse of discretion, there remain to parties in arbitration only the narrowest of appellate recourse.

\textit{Id.} at 292–93 (Wiener, J., concurring with dissent).

\textsuperscript{141} Id. at 287 (Reavley, J., dissenting) (finding that the six justices in \textit{Commonwealth Coatings} agreed that impartiality and fairness of the arbitrator was paramount).

\textsuperscript{142} Id. at 288.

\textsuperscript{143} Id. at 291 (Wiener, J., concurring with dissent).

\textsuperscript{144} Id. at 291–92 ("These general and particular differences underscore why such full and fair disclosure by a potential arbitrator of every conceivable relationship with a party or counsel, however slight, is a prerequisite." (emphasis added)).

\textsuperscript{145} Id. at 291.
"arbitrators are to be held to the standards of judicial decorum of Article III judges." 146 Rather, the proper emphasis should be on whether the arbitrator made sufficient disclosures.147 For this very reason, arbitrators are not "automatically disqualified by a business relationship" with the parties before them. If the relationship is properly disclosed, Judge Wiener interpreted Justice White's concurrence as clearly standing for the proposition that arbitrators have an absolute duty to disclose all past relationships.149

III. THE ERRONEOUS RULING BY THE FIFTH CIRCUIT IN POSITIVE SOFTWARE II

A. An Opportunity Missed

When the Fifth Circuit accepted the panel decision in Positive Software I for en banc review, it had an opportunity to clarify how courts should interpret the "evident partiality" standard provided by FAA § 10(a)(2).150 However, instead of adopting a workable rule of law that could be applied with reasonable predictability, the court offered only the vague guidance that "Justice White's opinion [should be read] holistically."151

On its surface, the opinion appears to have avoided deciding which Commonwealth Coatings opinion should be given precedential weight.152 The court adopts a hybrid of the two judicial camps, those allowing vacatur for the appearance of bias and those requiring actual bias.153 A close reading, however, uncovers a decision that deploys the Marks rule to give precedential

146. Id. (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968) (White, J., concurring)).
147. Id.
148. Id. (quoting Commonwealth Coatings, 393 U.S. at 150 (White, J., concurring)).
149. Id. at 291–92 (positing that "Justice White meant much more, at least regarding the absolute nature of the duty of a potential arbitrator to disclose every relationship large and small. This is because he and the other justices who joined the Black opinion knew full well who it is that has the sole authority and duty to determine whether a candidate for the post of arbitrator should be accepted or rejected: the parties and they alone").
150. See id. at 280–81 (contemplating the meaning of "evidence partiality"). The court recognized that although an interpretation of Commonwealth Coatings is critical to defining the term, that there is much disagreement among courts regarding the holding of the case. Id. at 281–83.
151. Id. at 283.
152. See id. at 281–82. While the majority cites to numerous decisions asserting that Justice White's opinion in Commonwealth Coatings is controlling, Chief Judge Jones concluded that a failure to disclose may justify a finding of "evident partiality," but that a finding of actual bias is not required to justify vacatur based on evident partiality. See id. at 282–83. However, this point is added with a caveat that "the better interpretation of Commonwealth Coatings is that which reads Justice White's opinion holistically." Id. at 283.
153. See id. at 282 (advancing a hybrid of the two Commonwealth Coatings opinions by allowing arbitration decisions to be overturned due to the "reasonable impression of bias" standard, while still finding that Justice White's opinion should be followed).
authority to Justice White's opinion.\(^{154}\) In attempting to articulate a rule of law based on Justice White's concurrence, the Fifth Circuit set a more demanding standard for "evident partiality,"\(^{155}\) while acknowledging that Justice White was not purporting to advocate for a rule that restricted the "actual bias" standard.\(^{156}\)

**B. Justice Black Authored a Majority Decision**

Chief Judge Jones, who authored the en banc majority opinion in *Positive Software II,* was correct in finding that Justice White’s concurrence in *Commonwealth Coatings* does not, as found by many of the circuits, endorse an "actual bias" standard.\(^{157}\) In *Commonwealth Coatings,* there was no allegation of actual bias on the part of the arbitrator.\(^{158}\) In order for Justice White to have agreed with Justice Black on the appropriate disposition of the case, he must have agreed that the standard for vacatur is less strict than the "actual bias" requirement. Otherwise, he would not have been able to join the majority.\(^{159}\)

However, Chief Judge Jones was incorrect in applying the *Marks* rule to *Commonwealth Coatings* and in concluding that Justice White’s opinion should be the controlling opinion. Just as the Fifth Circuit began its interpretation of "evident partiality" by analyzing the plain language of the statute, any analysis of Justice White's intent should begin with the plain language in his concurring opinion.\(^{160}\) Justice White himself said "I am glad to

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154. *See id.* at 282. The majority in *Positive Software II* followed Justice White’s concurrence. *Id.* at 282–83. To do this, the court had to apply the *Marks* rule after finding that the rationales behind Justice Black and Justice White’s opinions were different. *See supra* notes 76–79 and accompanying text.

155. *See Positive Software II,* 476 F.3d at 283 (stating, based on Justice White’s opinion, that “[t]he resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties”).

156. *See id.* at 282 (“Justice White . . . supports an ample but not unrealistic disclosure, and he supports a cautious approach to vacatur for nondisclosure.”).

157. *Compare id.* at 283 (noting that Justice White’s position on “actual bias” was in fact, “a reasonable impression of bias” standard, interpreted "practically"), *with Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993) (citing Justice White’s concurrence in *Commonwealth Coatings* for the proposition that “a mere appearance of bias is insufficient to demonstrate evident partiality,” thus seemingly asserting that Justice White endorsed the actual bias standard).

158. *See Commonwealth Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 147 (1968) (stating that the Court had “no reason, apart from the undisclosed business relationship, to suspect [the arbitrator of having] any improper motives”).*

159. *See Lucent Techs. Inc. v. Tatung Co., 379 F.3d 24, 28 (2d Cir. 2004) (implying that because of the importance of disclosure, Justice White also believed that “actual bias” was not necessary to vacate an arbitration decision for “evident partiality”).*

160. *See Positive Software II,* 476 F.3d at 281 (reading literally Justice White’s statement about his desire to join Justice Black’s opinion).
join my Brother Black's opinion.161 "Glad" is defined as "pleased," and "join" is defined as "to come into the company of." 162 Therefore, "glad to join," on its face, appears to be Justice White's indication that he was pleased to come into the company of Justice Black's opinion.

Even if one disregards Justice White's initial language, it is still incorrect to classify Commonwealth Coatings as a plurality and apply the Marks rule to give precedential weight to Justice White's opinion. In Marks, the Court illustrated the difference between a plurality decision and a concurrence to a majority decision to set the rule for how lower courts should interpret plurality decisions.163 The Marks Court explained that in a prior case, Memoirs v. Massachusetts, the three different opinions constituting a plurality agreed upon the result, but differed greatly as to the standard that should be used to define obscene material.164 To devise a rationale from the three opinions, the Court looked to the narrowest common rationale.165 In other words, the Court implied that the Marks rule should only be invoked when the plurality opinions cannot all agree on a rationale.166

Contrary to the Justices in Marks, Justices Black and White agree on the rationale of the decision: that arbitrators must disclose possible sources of bias to the parties involved in the arbitration before its commencement.167 Furthermore, Justice White does not take issue with Justice Black's broad characterization that § 10 shows the "desire of Congress to provide not merely for any arbitration but for an impartial one." 168

While Justice White's remarks that arbitrators are not to be held to the same standards as Article III judges may be read as a divergence from Justice Black's opinion,169 Justice White's opinion should be read in full to clearly

161. Commonwealth Coatings, 393 U.S. at 150 (White, J., concurring).
164. See Marks discussion supra notes 76-84 and accompanying text.
165. See Marks, 430 U.S. at 193.
166. See id.
167. See Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968) (calling for broad disclosure "of any dealings that might create an impression of possible bias"); id. at 152 (White, J., concurring) (emphasizing that arbitrators should "err on the side of disclosure").
168. Id. at 147 (plurality opinion).
169. See Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 644 n.5 (6th Cir. 2005) (noting that Justice White "concurred in the result, but declined to hold that arbitrators are to be held to the standards of judicial decorum of Article III judges"); ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 498 (4th Cir. 1999) ("Justice White explained that subjecting arbitrators to extremely rigorous disclosure obligations would diminish one of the key benefits of arbitration: an arbitrator's familiarity with the parties' business."); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993) (stating that Justice White found arbitrators to be "men of affairs" and thus it would be paradoxical to hold them to the same standards as detached Article III judges); Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82-83 (2d Cir. 1984) (indicating that Justice Black's opinion is dicta, and reiterating
understand the significance of these remarks. Justice White explained later in his concurrence that the reason he wants to be clear that arbitrators should be held to different standards than judges is so that their previous connections with the community do not automatically preclude them from taking part in the proceedings. \(^\text{170}\) If the arbitrator discloses the relationship beforehand, he should not be excluded.\(^\text{171}\) This statement does not alter Justice Black’s holding that the “arbitration process [has the] simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.”\(^\text{172}\)

The concurrence concluded that the “law requires the disclosure” so that parties to arbitration can be the “architects of their own arbitration process,” and freely accept or reject the arbitrator based upon their own knowledge of “ethical standards and reputations within their business.”\(^\text{173}\) Therefore, Justice Black and Justice White do not disagree on the rationale underlying the decisions in *Commonwealth Coatings*, rather, both Justices believe that unlike judges, arbitrators are allowed to have connections to the parties over which they preside as long as they disclose these relationships.\(^\text{174}\)

the statement of Justice White, that arbitrators cannot be held to the same standard as judges because they are more connected to the community they are adjudicating over); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir. 1983) (stating that Justice White’s opinion controls and did not believe that arbitrators should be held to the same standards as Article III judges).

\(^\text{170}\). See discussion supra Part I.B.2. Justice White explained that unlike Article III judges, arbitrators are not to be excluded from an arbitration proceeding because they have had a previous relationship with one of the parties, as a federal judge would be. *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring).

\(^\text{171}\). See *Commonwealth Coatings*, 393 U.S. at 150 (stating that a difference between arbitrators and judges is that “arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance”).

\(^\text{172}\). *Id.* at 149 (plurality opinion). Furthermore, Justice White goes as far as to say that an arbitrator will not be “automatically disqualified” for having a previous relationship with one of the parties when “[both parties] are unaware of the facts [and] the relationship is trivial.” *Id.* at 150 (White, J., concurring).

\(^\text{173}\). *Id.* at 151.

\(^\text{174}\). See Planned Parenthood of Southeastern Penn. v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), *aff’d in part and rev’d in part*, 505 U.S. 833 (1992) (“Marks stands for . . . [the] proposition [that] the controlling opinion in a splintered decision is that of the Justice or Justices who concur on the ‘narrowest grounds’”). The Third Circuit specifically stated that when a Justice “concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree that standard is the law of the land.” *Id.* at 693.

Judge Wiener perhaps puts this best by stating that “Justice White meant much more [than what courts credit him for] at least regarding the absolute nature of the duty of a potential arbitrator to disclose every relationship large and small.” Positive Software Solutions, Inc. v. New Century Mortgage Corp. (*Positive Software II*), 476 F.3d 278, 291 (5th Cir. 2007) (en banc) (Wiener, J., concurring with dissent). Judge Wiener further proved this point by illustrating additional differences between judges and arbitrators:
Thus, the Fifth Circuit’s conclusion that “[t]he draconian remedy of vacatur is only warranted upon nondisclosure that involves a significant compromising relationship” is completely at odds with the rationale supporting the opinions of both Justice Black and Justice White. The Fifth Circuit reached this decision by incorrectly giving excessive weight to Justice White’s concurrence and ignoring the ratio decidendi of the Court as expressed by Justice Black. Instead, the “reasonable impression of bias” standard requires arbitrators to disclose any relationship that would raise concerns about a possible bias.

C. The Facts Demonstrate that the Arbitrator’s Decision Should Have Been Vacated

Just as the panel of the Fifth Circuit Court of Appeals initially found in Positive Software I, applying the correct “evident partiality” standard as interpreted by Commonwealth Coatings requires vacatur of the arbitrator’s decision. The arbitrator and the co-lead counsel for New Century had both previously represented the same client at the same time in the same matter.

A less frequently encountered and less frequently discussed distinction and its tradeoffs is the one implicated here: the vital difference between the method by which a federal judge is selected to hear a case in litigation vis-à-vis the method by which arbitrators are selected—a distinction hinted at by Justice White but frequently overlooked or misinterpreted. All know that trial judges in the federal system are nominated and confirmed only after a rigorous testing of their capabilities, experience, and integrity. By contrast, arbitrators are quickly selected by the parties alone, who frequently have unequal knowledge of or familiarity with the full history of potential arbitrators. Federal trial judges are full-time dispute resolvers; the experience of arbitrators falls all along the experience spectrum, from those who might serve but once or twice in a lifetime to those who conduct arbitration with increasing regularity. The trial judge who is to hear a case is almost never “selected” by or agreed on by the parties; rather, such judge is “selected” or designated by objectively random or blind assignment through long established court procedures (except in the rare case of a party’s successful forum shopping in a single-judge district, or consenting to try a case to a known magistrate judge). In stark contrast, it is the parties to arbitration themselves who have sole responsibility for the selection of their arbitrator or arbitrators.

Id. at 292.

175. Positive Software II, 476 F.3d at 286 (majority opinion).

176. Id. at 288 (Reavley, J., dissenting) (stating that “the majority opinion . . . [does] not explain how Justice Black’s majority opinion is irreconcilable with Justice White’s concurrence”).

177. See id. at 282 (majority opinion) (stressing that Justice White’s opinion should control because it was based on “narrower grounds”). In his dissent, however, Judge Reavley noted that “Justice White did not articulate an alternative rationale . . . [He] merely stated what the Court did not hold, which is not inconsistent with the majority opinion.” Id. at 288 (Reavley, J., dissenting).

178. See supra notes 174–75 and accompanying text.

179. Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software I), 436 F.3d 495, 497–98 (5th Cir. 2006), rev’d en banc, Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software II), 476 F.3d 278 (5th Cir. 2007) (en banc).
While it is unclear how much actual contact the two had, the district court found physical evidence that they, along with many others, were counsel of record together.¹⁸⁰

This relationship demonstrates “evident partiality” because the relationship is not trivial, as “it might have conveyed an impression of possible partiality to a reasonable person.”¹⁸¹ When both parties assumed the representation of the former client, they obligated themselves to zealously work for that client.¹⁸² This obligation went far beyond the typical business relationships that Commonwealth Coatings addressed and found to raise “evident partiality” concerns.¹⁸³ Commenting on the seriousness of this obligation, Judge Wiener stated that “[n]o relationship with a party or a lawyer is too minimal to warrant its disclosure.”¹⁸⁴ Furthermore, because of their legal professional responsibility obligations, both the arbitrator and counsel for New Century were permanently linked to their former client, and thus permanently linked to one another.¹⁸⁵

The district court, which gathered the facts, was so convinced that “the record had already established a failure to disclose,” that it refused to let Positive Software conduct any additional discovery relating to the possible relationship between the arbitrator and New Century.¹⁸⁶ Deference should be given to a district court’s findings of fact unless they are shown to be clearly erroneous.¹⁸⁷ Given the record established in the district court, the Fifth Circuit should have vacated the arbitrator’s decision under FAA § 10 because his failure to disclose a prior relationship with counsel for New Century constituted “evident partiality.”¹⁸⁸

¹⁸⁰.  Id.
¹⁸¹.  Id. at 504.
¹⁸².  See generally MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2008) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).
¹⁸⁵.  See generally MODEL RULES OF PROF’L CONDUCT R. 1.9(A) (2008) (stating that once a lawyer has represented a client in a matter, they cannot “represent another person in the same or a substantially related matter” without the original client’s consent, regardless of how long ago the lawyer represented the original client).
¹⁸⁶.  Positive Software II, 476 F.3d at 290 (Reavley, J., dissenting).
¹⁸⁸.  See Commonwealth Coatings, 393 U.S. at 147 (“Section 10 does authorize vacation of an award . . . ‘[w]here there was evident partiality . . . in the arbitrators.’”).
D. The Rationale in Positive Software is Contrary To Congressional Intent and is Unwarranted for Public Policy Reasons

Many of the courts that have endeavored to reduce the impact of the "impression of possible bias" language from the Commonwealth Coatings decision, including the en banc court in Positive Software II, have done so out of fear that a robust application of an appearance of possible bias standard would undermine the important values of the arbitral system. On one level these courts are correct—imposing a higher standard of disclosure on arbitrators and putting a mechanism in place to enforce those standards may, at least initially, create more litigation challenging arbitral awards. When arbitral decisions become subject to judicial challenge, they lose efficiency and finality, two of the overarching goals of the arbitration system.

Even so, sacrificing some degree of finality and efficiency permits full implementation of procedural fairness rules. The Supreme Court said that in creating the FAA, Congress showed a desire to create a fair and impartial arbitration system. Ensuring fairness and impartiality are core values in any arbitration system. Thus, Congress added § 10 of the FAA, which has been interpreted to require arbitrators to disclose all previous relationships that give the "impression of possible bias." Ultimately, some sacrifice of efficiency and finality must be tolerated in order to promote the level of procedural fairness called for in § 10.

Additionally, some courts, fearing that the "appearance of bias" standard would result in disqualification of the most experienced arbitrators, have incorrectly chosen the "actual bias" standard. However, as Justice Black and Justice White make clear, forcing arbitrators to disclose possible sources of bias does not remove those arbitrators from the available pool; it merely

189. See Positive Software II, 476 F.3d at 285.
190. See, e.g., New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1111 (9th Cir. 2007) (noting that "the public interest in efficient and final arbitration" need not be sacrificed in order to achieve meaningful disclosure, but also recognizing that these interests may conflict at times).
191. See Brunet, supra note 9, at 23–24 (discussing that the notion of finality in arbitration is often tempered by the realities of judicial review).
192. See New Regency Prods., 501 F.3d at 1111 (concluding that a rule encouraging disclosure is consistent with the interests of efficiency and finality).
193. See Commonwealth Coatings, 393 U.S. at 147.
194. See supra note 9 and accompanying text.
195. See Commonwealth Coatings, 393 U.S. at 147, 149.
196. See New Regency Prods., 501 F.3d at 1111 (noting that efficiency and finality are important goals of the arbitration system, and "a rule encouraging 'arbitrators to err on the side of disclosure' is consistent with that interest" (quoting Commonwealth Coatings, 393 U.S. at 152) (alteration in original)).
197. See, e.g., Positive Software Solutions, Inc. v. New Century Mortgage Corp. (Positive Software II), 476 F.3d 278, 285 (5th Cir. 2007) (en banc) (noting that the appearance of bias standard would make it too easy for a losing party to challenge an arbitration).
forces them to disclose their history and allows the parties to choose for themselves.\footnote{198}

IV. CONCLUSION

The Supreme Court has interpreted the "evident partiality" language of the FAA to require the vacation of arbitral decisions when there is a reasonable "impression of possible bias" on the part of the arbitrator.\footnote{199} This reasonable "impression of possible bias" can stem from an arbitrator’s failure to disclose any relationship that may indicate bias.\footnote{200} Given that legal standard, the court in \textit{Positive Software II} incorrectly overturned the vacatur of an arbitral award where the arbitrator and counsel for one of the parties had previously worked on the same case. Holding in this manner will damage the credibility of arbitral decisions and may eventually deter people from participating in arbitration rather than encourage them toward it.

\footnote{198. See supra notes 150–53 and accompanying text. This again demonstrates how arbitrators are held to a different standard than judges.}
\footnote{199. See \textit{Commonwealth Coatings}, 393 U.S. at 148–49.}
\footnote{200. See \textit{id.} at 147–49.}