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# HOW NICE TO SEE YOU AGAIN: THE REPETITIVE USE OF ARBITRATORS AND THE RISK OF EVIDENT PARTIALITY

Drew J. Hushka\*

## I. INTRODUCTION

The Federal Arbitration Act<sup>1</sup> (“FAA”) permits federal courts to vacate arbitral awards “where there was evident partiality or corruption in the arbitrators, or either of them.”<sup>2</sup> Interpreting this provision, courts have reached varied conclusions as to what biases, relationships, and misconducts constitute “evident partiality.”<sup>3</sup> A prior business relationship between a neutral arbitrator and the victorious party,<sup>4</sup> an ongoing legal dispute between the arbitrator and a party,<sup>5</sup> a father-son relationship between an arbitrator and an officer of a labor union that was party to the arbitration,<sup>6</sup> representation by the arbitrator’s law firm to a party in an unrelated matter,<sup>7</sup> when the arbitrator is an officer at a company that conducts business dealings with a party that the arbitrator was not involved with,<sup>8</sup> and when counsel to a party to the arbitration also represents the arbitrator in an unrelated matter<sup>9</sup> have all been held to create evident partiality. Even after a court determines whether the particular facts create evident partiality, courts still apply varying standards on the disclosure requirements of the evident partiality.<sup>10</sup>

Regardless of the exact applicable standard, actual bias may create evident partiality. With increases in the rates of arbitration today, there is increased concern about potential biases and partiality. The use of a particular arbitrator for repeated employment is such an example of such potential bias that may raise to “evident partiality.” Parties, when choosing arbitrators, logically have an incentive to choose an arbitrator sympathetic to their position, thereby increasing the probability of a decision in

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<sup>1</sup> The United States Arbitration Act, 43 Stat. 883, codified at 9 U.S.C. §§ 1-16 (2012) [hereinafter the “Federal Arbitration Act” or the “FAA”].

<sup>2</sup> 9 U.S.C. § 10(a)(2) (2012).

<sup>3</sup> See generally Lee Korland, *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 (2003) (outlining past decisions finding evident partiality and proposing that arbitrators should be required to conduct “a reasonable investigation” to disclose any potential conflicts of interest); Jennifer C. Bailey, *The Search to Clarify an Elusive Standard: What Relationships Between Arbitrator and Party Demonstrate Evident Partiality*, 2000 J. DISP. RESOL. 153 (2000) (discussing past evident partiality decisions and proposing a “reasonable person” standard in determining evident partiality).

<sup>4</sup> See *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968).

<sup>5</sup> See *Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982).

<sup>6</sup> See *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2d Cir. 1984).

<sup>7</sup> See *Close v. Motorists Mut. Ins. Co.*, 486 N.E.2d 1275 (Ohio Ct. App. 1985).

<sup>8</sup> See *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995).

<sup>9</sup> See *Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 751 A.2d 426 (Del. Ch. 1999).

<sup>10</sup> See Kathryn A. Windsor, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 SETON HALL CIR. REV. 191 (2009) (exploring the split approach to determining evident partiality stemming from the Supreme Court decision in *Commonwealth Coatings* between the Second Circuit and the Ninth Circuit).

their favor. It follows then that a party should be more likely to employ a particular arbitrator if that arbitrator has previously decided in favor of the party, theoretically making a repeated outcome more likely. Therefore, this cycle may give arbitrators an incentive to favor a particular party if the arbitrator desires additional employment opportunities from that party in the future.<sup>11</sup>

This incentive may be particularly strong in today's consumer arbitrations. Consumer arbitration is a widespread means of efficiently determining consumer disputes,<sup>12</sup> although it is difficult to determine exactly how widespread.<sup>13</sup> Because certain parties, such as business conglomerates, that utilize consumer arbitration are likely to be involved in multiple arbitrations, arbitrators employed in consumer arbitration may be particularly susceptible to potential bias created by desire in future employment.

Consumer arbitration typically involves a repeat seller and a consumer. The seller, selling the product or service to multiple persons, may become involved in disputes over each sale.<sup>14</sup> Because of this potential for multiple disputes, decisions favoring the seller could greatly increase the chance of future employment in similar proceedings for the arbitrator. This incentive, potentially unknown to the consumer, could create an evident partiality requiring disclosure.<sup>15</sup>

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<sup>11</sup> See generally Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2356-57 (2012) (discussing how "selection bias" of the stronger party in a mandatory arbitration setting may prejudice the weaker party by selecting favorable arbitrators or arbitration groups); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650 (2005) (explaining that arbitration companies compete against each other for large arbitration contracts, potentially favoring the company in arbitral decisions to keep the contract); Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitral Awards*, 8 NEV. L.J. 214, 217 (2007) ("An institutional party, who chooses arbitration to resolve all disputes, may have an advantage over the party who may utilize the arbitral process only once, and only because his contract with the institutional party requires him to do so. In this situation, the party may develop informal relationships with the arbitrator, creating an incentive for the arbitrator to find in its favor." (footnote omitted)).

<sup>12</sup> See Sternlight, *supra* note 11, at 1639 ("One recent study of the 'average Joe' in Los Angeles showed that approximately one-third of the consumer transactions in his life were covered by arbitration clauses" (footnote omitted)).

<sup>13</sup> See Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 235 (2008) (explaining that there is no reliable data measurement for the extent of arbitration).

<sup>14</sup> Greater familiarity with arbitration of one party compared to the opposing party is known as the "repeat-player" problem. See Sternlight, *supra* note 11, at 1650-51 (outlining that companies in arbitration have greater exposure to arbitration than the average consumer, and that there is some limited empirical evidence that the repeat player performs better than the non-repeat player); see also Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 232 (2004) ("Repeat players operate within a legal framework that affords opportunities to structure relationships and to set limits on liability . . . The resulting structure may affect the scope of their risk from a particular kind of claim or dispute." (footnotes omitted)); Sarah Rudolph Cole, *Incentives and Arbitration, The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452-53 (1996) (outlining that a party that routinely engages in alternative dispute resolution may be at a strategic advantage because of greater familiarity with the process and being in a better position to draft the agreement, and therefore "garner the lion's share of the potential benefits for himself." (footnote omitted)).

<sup>15</sup> See, e.g., American Arbitration Association Commercial Arbitration Rule 16(a), available at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased) ("Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any

This article will first examine the foundation, rise, and implications of the use of mandatory consumer arbitration. Next, it will examine the foundation and current state of arbitrational vacatur for evident partiality. Third, it will examine how repeat arbitration may be treated by current evident partiality standards. Finally, this article will examine how application of evident partiality standards can improve mandatory consumer arbitration by offering a proposal for how repeat arbitration can be treated.

## II. THE RISE AND GROWING USE OF MANDATORY CONSUMER ARBITRATION

### A. Historical Roots

Voluntary arbitration has long existed in the United States, dating back to the early Colonial period.<sup>16</sup> Traditionally, arbitration was used as a voluntary method of solving business disputes between two business associates with greater expertise, speed, efficiency, and privacy than could be achieved through traditional legal proceedings.<sup>17</sup> Until recently, the use of arbitration was limited to business-to-business disputes, management/union disputes, or other disputes involving parties of similar sophistications.<sup>18</sup> These voluntary agreements were generally supported by the courts,<sup>19</sup> and eventually codified with the enactment of the Federal Arbitration Act (“the FAA”)<sup>20</sup> in 1925, requiring all courts to compel arbitration pursuant to such voluntary agreements.<sup>21</sup> It was not until much more recently that businesses began using arbitration agreements to require consumers, employees, franchises, and other parties to submit disputes to arbitration, rather than pursuing recourse through the traditional court system.<sup>22</sup> In fact, this sort of compulsory arbitration seems contrary to the original intent of the FAA. While deliberating the passage of the FAA, one senator voiced concerns over arbitration contracts being used “on a take-it-or-leave-it basis to captivate customers or employees”; however, the senator was assured by FAA supporters that the bill was not intended to cover such situations.<sup>23</sup> Nevertheless, over the last several decades, a series of Supreme Court decisions have allowed businesses to do just that,<sup>24</sup> and ever since, businesses have been able to mandate arbitration on both consumers and employees.<sup>25</sup>

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financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.”).

<sup>16</sup> See Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 144-45 (2002) (explaining that arbitration began in the United States during the colonial period in order to avoid expensive court proceedings).

<sup>17</sup> Sternlight, *supra* note 11, at 1635.

<sup>18</sup> *Id.* at 1636.

<sup>19</sup> *Id.*

<sup>20</sup> 9 U.S.C. §§ 1-16 (2012).

<sup>21</sup> Sternlight, *supra* note 11, at 1636.

<sup>22</sup> *Id.*

<sup>23</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (citing Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 9-11 (1923)).

<sup>24</sup> Sternlight, *supra* note 11, at 1636; see also Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 771 (2001) (citing the Supreme Court’s

Mandatory arbitration, arguably beyond the original intent of the FAA, first began in the securities industry.<sup>26</sup> Since then, it has expanded into nearly every facet of business, eventually expanding to the financial industry,<sup>27</sup> service providers,<sup>28</sup> sales,<sup>29</sup> health care,<sup>30</sup> and education providers.<sup>31</sup> One court has even gone so far as to declare that “[t]he reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic.”<sup>32</sup>

The rise of consumer arbitration beyond the securities arena presents new and unique issues.<sup>33</sup> First, unlike securities arbitration clauses, which are typically signed as

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decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), as allowing the use of arbitration to expand in an employment setting from less than four percent of business surveyed in 1991, to more than 10 percent in 1995).

<sup>25</sup> Sternlight, *supra* note 11, at 1636

<sup>26</sup> See generally Sternlight, *supra* note 11, at 1636-38 (detailing the rise in enforcement of securities arbitration from the Supreme Court’s initial refusal to uphold investor arbitration agreements in *Wilko v. Swan*, 346 U.S. 427 (1953), to the expanded use of accepted arbitration agreements in *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

<sup>27</sup> See, e.g., *Wash. Mut. Fin. Group v. Bailey*, 364 F.3d 260 (5th Cir. 2004) (holding that the borrowers’ alleged inability to read and understand the arbitration agreement did not render it unconscionable or unenforceable, and that the lender’s failure to specifically inform the borrowers that they were signing the arbitration agreement after they learned of their inability to read was not unconscionable); *McKenzie Check Advance of Miss. v. Hardy*, 866 So. 2d 446 (Miss. 2004) (upholding the use of an arbitration clause imposed on payday-loan borrowers even though there was not mutuality of obligation).

<sup>28</sup> See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (upholding the use of an arbitration clause in consumers purchase of termite extermination services as being within the understanding of Congress’ commerce clause powers); *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903 (7th Cir. 2004) (upholding the use of an arbitration clause as part of the consumer contract for the purchase of tax preparation services).

<sup>29</sup> See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (upholding the use of an arbitration clause contained in the warranty brochure within the box on purchasers of personal computers that was binding unless the computer was returned within 30 days from delivery); *Cavalier Mfg., Inc. v. Clarke*, 862 So. 2d 634 (Ala. 2003) (upholding the use of an arbitration clause in the “Acknowledgement and Agreement” section in the purchase agreement of a mobile home).

<sup>30</sup> See, e.g., *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996) (upholding the use of an arbitration clause imposed on a patient in the operating room); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004) (upholding the use of an arbitration clause on nursing home resident); *Hogan v. Country Villa Health Servs.*, 55 Cal. Rptr. 3d 450 (Cal. Ct. App. 2010) (upholding the use of an arbitration agreement signed by the daughter of a nursing home patient who had been given durable power of attorney for health care decisions); see also Reed R. Bates & Stephen W. Still, *Arbitration in Nursing Home Cases: Trends Issues, and a Glance into the Future*, 76 DEF. COUNS. J. 282 (2009) (exploring state trends in the treatment of arbitration cases related to nursing homes).

<sup>31</sup> See, e.g., *Bercovitch v. Baldwin Sch., Inc.* 133 F.3d 141 (1st Cir. 1998) (upholding the arbitration clause used by school in relation to claims under the ADA and Rehabilitation Act); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009) (upholding the use of an arbitration clause used by a vocational school as neither procedurally unconscionable nor coercive); see also Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 539 (2012) (alleging that for-profit colleges are more commonly using arbitration agreements contained in enrollment agreements to protect against litigation).

<sup>32</sup> *Knepp v. Credit Acceptance Corp.*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).

<sup>33</sup> Sternlight, *supra* note 11, at 1640.

part of the document package required to hire the brokerage firm, many consumer arbitration “agreements” are formed without any formal signature.<sup>34</sup> Second, securities arbitration clauses that are typically imposed at the outset of the business-to-customer relationship, while new consumer arbitration agreements are frequently imposed after the relationship has already begun.<sup>35</sup> Third, the increased use of arbitration in non-securities transactions has exposed less-educated and knowledgeable persons to arbitration.<sup>36</sup> Finally, companies imposing arbitration on their consumers are increasingly using the arbitration as a means of limiting the abilities of the consumer to seek complete redress.<sup>37</sup>

These new problems created by the expansion of mandatory arbitration into consumer settings has received mixed reviews from practitioners. Critics of imposed mandatory consumer arbitration generally cite consumer welfare as the primary reason to be cautious of expansion,<sup>38</sup> and decry that many arbitration agreements attempt to slant the arbitral proceedings in favor of the imposing party.<sup>39</sup> Additionally, they argue that the unfairness of the arbitration agreements’ express terms is not the only problem, because empirical research has shown that arbitration agreements are rarely read by consumers.<sup>40</sup> Furthermore, they contend that even when the agreements are read, they are often not fully understood.<sup>41</sup> Some companies even go as far as to deliberately design the arbitration agreement to minimize the likelihood that the consumer will actually

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<sup>34</sup> See *id.* (explaining that while the FAA requires arbitration agreements to be written, the agreements do not need to be signed; companies have imposed arbitration by including the “agreement” in documents that are rarely read by the consumers, including: “small print notices, envelope stuffers, . . . warranties contained in boxes or sent to consumers in the mail” on websites, and delivered via email).

<sup>35</sup> See *id.* at 1641 (outlining that credit card companies frequently send their customers small print notices constituting an arbitration agreement only after the customers have already obtained and used the credit card.).

<sup>36</sup> See *id.* (outlining that, although not all securities investors are well educated, it is reasonable to assume at, on average, they are better educated than members of the general public; therefore, consumers presented with arbitration agreements in phone contracts, credit card contracts, and other common transactions may not have previously seen, been aware of, or understood what the arbitration clauses actually compel).

<sup>37</sup> See *id.* at 1641-42 (contending that companies are increasingly using mandatory arbitration clauses to “shorten statutes of limitations, limit or eliminate discovery, require a claimant to file in a distant forum, prevent consumers from joining together in a class action, or bar consumers from recovering particular forms of relief (injunctive relief, compensatory damages, punitive damages, or attorney fees).”).

<sup>38</sup> See generally Sternlight, *supra* note 11, at 1648-53.

<sup>39</sup> See *id.* at 1649-51 (explaining that consumer and employment arbitration agreements can deter the imposed party from seeking recourse through the arbitrator selection, imposition of high costs, and limitations on the remedies afforded if vindicated); see also David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in the Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 110 (arguing that submission to arbitration is actually a prospective waiver of a substantive right); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 675 (1996) (arguing that the imposition of binding mandatory arbitration is contrary to public policy).

<sup>40</sup> See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1179 (1983) (noting that empirical studies have shown that adhesive contracts are unlikely to be read by the consumer).

<sup>41</sup> See *id.* (noting that even if consumers have read adhesive contracts, they are even less likely to actually understand what they have read); see generally Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233 (2002) (analyzing research showing that literate adults are rarely able to discern pertinent information from contracts).

notice the clause.<sup>42</sup> “In short, under most reasonable definitions mandatory arbitration is nonconsensual, given that consumers and employees don’t typically read or understand the clauses.”<sup>43</sup>

Proponents of the expansion of consumer arbitration, however, advance that these concerns are often overstated.<sup>44</sup> First, proponents argue that adhesion is not unique to arbitration agreements, but is also commonly found in contract formation outside arbitration agreements.<sup>45</sup> Second, proponents argue that consumers and employees have greater access to justice through the use of arbitration than they would have through traditional legal systems.<sup>46</sup> Third, proponents argue that there is no danger in imposed mandatory arbitration agreements because courts strike down the few mandatory arbitration clauses that do overreach.<sup>47</sup> Finally, proponents argue that imposing mandatory arbitration is necessary, because without such imposition, consumers and employees would never agree to arbitrate disputes postdispute.<sup>48</sup>

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<sup>42</sup> See, e.g., *Ting v. AT&T*, 182 F. Supp. 2d 902, 911-13 (N.D. Cal. 2002) (showing that AT&T spent substantial resources developing how best to implement their arbitration provision to minimize resistance by consumers).

<sup>43</sup> Sternlight, *supra* note 11, at 1649.

<sup>44</sup> See generally *id.* at 1653-58.

<sup>45</sup> See *id.* at 1653; see also Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 200 (1998) (noting that adhesive contracts are a typical form of contract formation, and that arbitration clauses are also typical because it is just another aspect of the contract that the party is not fully informed of or aware, like most “boilerplate” language of the contract). *But see* Sternlight, *supra* note 11, at 1653-54 (arguing that while adhesion is used in banking, insurance, and other areas, the substantive content of those agreements is also regulated by federal and/or state law).

<sup>46</sup> See Sternlight, *supra* note 11, at 1654; see also Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001) (using the metaphor that it is better for every employee to be given a new Saturn vehicle than a few select employees be given new Cadillacs in arguing for mandatory employee arbitration; “[a] properly designed arbitration system . . . can do a better job of delivering accessible justice for average claimants than a litigation-based approach”). *But see* Sternlight, *supra* note 11, at 1654-55 (arguing that arbitration does not guarantee better access to justice compared to legal settings because consumers and employees in arbitration are not guaranteed counsel, it may be harder to obtain counsel, there is no indication that there have actually been more claims in arbitration than there were in traditional legal processes, and it is improper to take away rights to the court systems and jury trials).

<sup>47</sup> See Sternlight, *supra* note 11, at 1655; see also Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 119 (1999) (“Courts will only enforce arbitration policies that provide a fair process for the adjudication of employees’ statutory rights”). *But see* Sternlight, *supra* note 11, at 1655-56 (arguing that the Supreme Court has frequently limited the ability to apply state common law on unconscionability or fraud in voiding arbitration agreements, and that consumers and employees must overcome a higher burden of proof, that has been placed on the consumers of employees).

<sup>48</sup> See Sternlight, *supra* note 11, at 1656; see also Estreicher, *supra* note 46, at 567 (arguing that either plaintiff or defendant in a given dispute would favor litigation over arbitration because of their perceived position of strength). *But see* Sternlight, *supra* note 11, at 1656-57 (arguing that voluntary postdispute arbitration is not impossible and often achieved in Great Britain).

## B. Current Trends and Implications

Regardless of the arguments for or against its use, the use of mandatory consumer arbitration is growing, albeit at an undetermined rate.<sup>49</sup> Although the exact rate in the increase of the use of arbitration is uncertain, it is all but certain that the use of arbitration is now thoroughly pervasive throughout society.<sup>50</sup> Indeed, “[i]t is not a hyperbole to state that civil justice or adjudication in the United States . . . is achieved primarily through arbitration.”<sup>51</sup>

Despite the widespread use of arbitration in business-to-consumer transactions, there have been recent indications that the practice is not as common in business-to-business transactions. A recent Rand Institute study showed that more than 75 percent of consumer contracts contained an arbitration clause, while only 6 percent of their non-consumer, non-employment contracts contained an arbitration clause.<sup>52</sup> In the same study, companies typically voiced concerns over predictability in using arbitration in business-to-business transactions.<sup>53</sup> Specifically, companies had concerns over increased trends toward the inclusion of litigation tactics in arbitration, making the process potentially more costly than regular litigation.<sup>54</sup> These concerns may indicate that companies are more likely to receive a desirable outcome when using arbitration in a business-to-consumer transaction than in a business-to-business transaction.

Whatever the reason for the increase in consumer arbitration, it is unlikely to slow barring a change in Supreme Court jurisprudence or congressional authority.<sup>55</sup> It logically follows that as use of arbitration increases, concerns over selection bias likewise increase.<sup>56</sup> More specifically, arbitration service providers such as the American Arbitration Association and the National Arbitration Forum compete against each other

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<sup>49</sup> See Carbonneau, *supra* note 13, at 235 (explaining that there is no reliable data measurement for the extent of arbitration); see also Sternlight, *supra* note 11, at 1658 (finding that “researchers have found it very difficult to evaluate mandatory arbitration, for a number of reasons.”).

<sup>50</sup> See Carbonneau, *supra* note 13, at 235-36 (explaining that the American Arbitration Association alone conducts over 100,000 cases annually, JAMS has an annual revenue of hundreds of millions of dollars annually, and the use of international commercial arbitration departments by law firms); see also Linda J. Demaine & Deborah R. Hensler, “Volunteering” To Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004) (finding at least one-in-three of sampled business include a form of mandatory arbitration in their consumer contracts).

<sup>51</sup> Carbonneau, *supra* note 13, at 236.

<sup>52</sup> Douglas Shontz, Fred Kipperman & Vanessa Soma, *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*, Rand Institute for Civil Justice, 2 (2011), available at [http://www.rand.org/pubs/technical\\_reports/TR781.html](http://www.rand.org/pubs/technical_reports/TR781.html) (last visited April 3, 2013).

<sup>53</sup> *Id.* at 25.

<sup>54</sup> *Id.*

<sup>55</sup> See Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 52 (1999) (“If courts are unwilling to examine the reality of contract formation [in a consumer-commercial dispute setting], then the FAA may itself need to be amended to protect important rights of the one-shot consumer who cannot effectively bargain with a repeat play contractor.” (footnotes omitted)).

<sup>56</sup> See generally Marc Galanter, *Why the “Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (discussing the advantages “repeat players” obtain over “one shooters” in the legal systems); Menkel-Meadow, *supra* note 55, at 34 (explaining how the one-shot player in alternative dispute regimes will be at a distinct disadvantage compared to the repeat-player who “controls virtually all aspects of the disputing process.”).

to provide arbitration services to companies for future consumer disputes.<sup>57</sup> These companies are paid for providing such services,<sup>58</sup> and are more likely to receive repeat business if their client companies are satisfied with the prior services. Similarly, the companies are more likely to receive repeat business if their clients are satisfied with their prior service. Therefore, arbitral tribunals have a natural incentive to provide companies with “satisfactory” proceedings, because companies displeased with the results of a particular arbitration provider may change providers to receive more favorable results.<sup>59</sup>

Not everyone agrees with these charges of potential bias. “[P]roviders and arbitrators vehemently deny the charge that they are biased. . . . Yet, critics maintain that, consciously or unconsciously, arbitrators may slant the result in companies’ favor.”<sup>60</sup> Despite denials by service providers, there is some statistical support to the charge that repeat-players are favored by the neutral arbitrator.<sup>61</sup> Statistical analysis shows that companies who arbitrate a higher number of cases get consistently better results from the very same arbitrators.<sup>62</sup> Additionally, individual arbitrators who rule in favor of firms over consumers tend to receive a greater numbers of cases from those firm in the future.<sup>63</sup>

Beyond merely providing more favorable results, some institutions have gone further, promising to be more friendly to businesses and removing individual arbitrators who rule against companies in subsequent cases.<sup>64</sup> “What is clear is that, because the decision to choose a biased arbitrator often holds few consequences and affords a company the opportunity to save costs on unfavorable judgments, the existing incentive

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<sup>57</sup> Sternlight, *supra* note 11, at 1650.

<sup>58</sup> *See id.*; *see also* Cole, *supra* note 24, at 772 (“The arbitrator is likely to feel pressure to find in favor of the permanent party, the employer, in most cases because industry members will more frequently appear before the arbitrator. In addition, in many employment arbitrators, the employer pays the arbitrator’s entire fee. The sense that the employer ‘owns’ the process as a result may influence the arbitrator’s ultimate resolution of the case. An arbitrator who regularly finds in favor of complaining employees may be certain that the employer will be reluctant to rehire her in the future.” (citation omitted)).

<sup>59</sup> Sternlight, *supra* note 11, at 1650; *see also* Cole, *supra* note 11, at 217 (“An institutional party, who chooses arbitration to resolve all disputes, may have an advantage over the party who may utilize the arbitral process only once, and only because his contract with the institutional party requires him to do so. In this situation, the institutional party may develop informal relationships with the arbitrator, creating an incentive for the arbitrator to find in its favor.” (citation omitted)); Cole, *supra* note 24, at 771 (“An employer using arbitration to resolve disputes has the incentive to compile information about potential arbitrators and their past decisions and develop a relationship with those arbitrators. The former will allow better predictability of arbitral outcomes. The latter will potentially allow the employer to influence the outcome of the arbitration.” (citation omitted)).

<sup>60</sup> Sternlight, *supra* note 11, at 1650; *see also* Menkel-Meadow, *supra* note 55, at 53 (“[W]e do not actually know much about whether one-shot consumers do worse in merchant operated arbitration or privatized dispute resolution systems than they do in court or in other for a (or if they do nothing at all). We assume they do fare worse because we assume that dispute resolution systems chosen and maintained by one of the disputants therefore must benefit that disputant. Why else would all these institutional disputants be defending their arbitration systems so vigorously against consumer legal attacks? It is clear that such institutional disputants believe that they do better, and that such systems are cheaper and better for them than other forms of disputing, but we do not really know.”).

<sup>61</sup> *See* Farmer, *supra* note 11, at 2357 (citation omitted).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* at 2357-58

scheme for arbitrator choice is unacceptable.”<sup>65</sup> If this growing bias problem is believed to be truly unacceptable, one method to address the matter would be to implement a more stringent standard of review for evident partiality.

### III. EVIDENT PARTIALITY

#### A. *Commonwealth Coatings Corp. v. Continental Casualty Co.*

The basis for current standards on evident partiality stems from the Supreme Court’s 1968 opinion of *Commonwealth Coatings Corp. v. Continental Casualty Co.*<sup>66</sup> In *Commonwealth Coatings*, the Supreme Court addressed the question of what level of impartiality is required in arbitration disputes.<sup>67</sup> The Court held that arbitrational decisions required impartiality, but left open the question of what standard applies in determining whether evident partiality exists.

*Commonwealth Coatings* involved a dispute between a contractor and a subcontractor regarding a painting job.<sup>68</sup> The contract between the parties contained an arbitration clause,<sup>69</sup> which provided that, in the event of a dispute, each party would select an arbitrator, and the two party-appointed arbitrators would select the third arbitrator.<sup>70</sup> The facts of the case reveal that the third “neutral” arbitrator had previously engaged in consultations for individuals involved in business construction projects.<sup>71</sup> The prime-contractor was one of the individuals, and regularly hired the arbitrator to conduct consulting work.<sup>72</sup> Although the arbitrator had not been employed by the prime-contractor for more than year prior to the arbitration at issue, the parties had previously been involved for four or five years prior.<sup>73</sup> Additionally, the arbitrator had been engaged in business dealings involving other aspects of the construction project that was subject to the dispute.<sup>74</sup> None of these prior business dealings were disclosed by the arbitrator or opposing party prior to the conclusion of the arbitration.<sup>75</sup> Upon learning of the prior dealings, the subcontractor challenged the arbitral award.<sup>76</sup> The District Court refused to vacate the award,<sup>77</sup> and the Court of Appeals affirmed.<sup>78</sup> The Supreme Court granted certiorari,<sup>79</sup> and reversed.<sup>80</sup>

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<sup>65</sup> *Id.* at 2359.

<sup>66</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968).

<sup>67</sup> *Id.* at 145.

<sup>68</sup> *Id.* at 146.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 146 (1968).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 146 (1968).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 390 U.S. 979 (1968).

<sup>80</sup> *Commonwealth Coatings Corp.*, 393 U.S. at 150.

Justice Black, writing for the plurality,<sup>81</sup> adopted the standard that evident partiality exists when there is the “impression of possible bias.”<sup>82</sup> Under this standard, arbitrators must disclose “any dealings that might create the impression of possible bias.”<sup>83</sup> To comply with the standard, arbitrators must disclose any connection, relationship, or dealings with parties that might show even *possible* bias, and thus evident partiality.<sup>84</sup>

Justice White, joined by Justice Marshall, wrote a separate concurring opinion to provide “additional remarks.”<sup>85</sup> Justice White attempted to limit evident partiality to instances where the arbitrator failed to disclose relationships that had a “substantial interest” to the dispute.<sup>86</sup> He opined that arbitrators should not be automatically disqualified due to the failure to disclose a trivial relationship, or because of a prior business relationship that both parties were aware of, but only where the arbitrator had a “substantial interest” in the underlying dispute.<sup>87</sup>

Following *Commonwealth Coatings*, the differing standards of “impression of possible bias” and “substantial interest” created a confusing framework for evident partiality that necessitated a case-by-case approach throughout the circuits.<sup>88</sup>

### B. Reasonable Person Standard

In 1984, the Second Circuit addressed evident partiality post *Commonwealth Coatings* in *Morelite Construction Corp. v. New York District Council Carpenters Benefit Funds*.<sup>89</sup> *Morelite* arose from a dispute over the alleged non-payment of contributions to the Benefit Funds pursuant to a collective bargaining agreement (“CBA”).<sup>90</sup> Pursuant to the CBA, the parties entered into arbitration. The arbitrator’s father was, at the time of the arbitration, the Vice-President of the international union in which New York District Council Carpenters Benefit Funds (“District Council”) was a member.<sup>91</sup> *Morelite* challenged the choice of the arbitrator prior to the proceedings, but

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<sup>81</sup> There is contention as to whether Justice Black’s opinion was a majority or plurality opinion. Compare *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) (opining that “*Commonwealth Coatings* is not a plurality opinion”), with *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2d. Cir. 1984) (explaining that “[f]our justices . . . do not constitute a majority of the Supreme Court).

<sup>82</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 150 (White, J., concurring).

<sup>86</sup> *Id.* at 151.

<sup>87</sup> *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968).

<sup>88</sup> See Ann Ryan Robertson, *International Arbitration in the U.S.: Evident Partiality Based on Nondisclosure: Betwixt and Between*, 45 HOUSTON LAWYER 22, 23 (2007) ([C]onfusion in the *Commonwealth Coatings* opinion gave lower courts little guidance, and most courts struggled with the import of Justice White’s concurrence. . . . There is no consensus among the circuits, but the test that has emerged can best be characterized as a case-by-case objective inquiry into partiality or a reasonable impression of bias standard.” (citation omitted)).

<sup>89</sup> *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2d. Cir. 1984).

<sup>90</sup> *Id.* at 81.

<sup>91</sup> *Id.*

the challenge was denied by the District Court.<sup>92</sup> The issue proceeded to arbitration, and a decision was entered in favor of District Council.<sup>93</sup> After the decision, Morelite challenged the award, arguing that the arbitrator's father's position created evident partiality in the arbitrator.<sup>94</sup> Despite the familial relationship, the award was upheld by the District Court.<sup>95</sup>

The Second Circuit, after reviewing *Commonwealth Coatings*, concluded that “[b]ecause the two opinions are impossible to reconcile . . . we must narrow the holding to that subscribed to by both Justices White and Black.”<sup>96</sup> As such, the Court held that the reasoning of Justice Black's opinion must be treated as mere dicta.<sup>97</sup> The Court then proceeded to examine the different standards offered by *Commonwealth Coatings*.

The Court first considered Justice Black's “appearance of bias” standard, but determined the standard was too low to create evident partiality.<sup>98</sup> Likewise, the Court concluded that a “proof of actual bias” standard was too great, being hard, if not impossible, to practically prove.<sup>99</sup> Instead, the Court adopted a “reasonable person” standard, finding “evident partiality . . . where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”<sup>100</sup> Applying this standard, the Court concluded that there was evident partiality, reasoning that “we are bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers.”<sup>101</sup>

Following the decision in *Morelite*, the Second Circuit again considered the duties of evident partiality in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanaji, A.S.*<sup>102</sup> The Court reiterated the application of the “reasonable person” standard in determining evident partiality, but also created a duty to investigate.<sup>103</sup> The Court held that if an arbitrator believes that a “nontrivial conflict of interest might exist,” the arbitrator must either investigate the potential conflict, or disclose why the arbitrator believes that there may be a conflict.<sup>104</sup> Further, if the arbitrator does not choose to investigate the potential conflict of interest, the arbitrator must disclose to the parties the intent to not investigate the potential conflict of interest.<sup>105</sup>

In addition to the Second Circuit, the First Circuit,<sup>106</sup> Fourth Circuit,<sup>107</sup> and Sixth Circuit<sup>108</sup> all use some form of the reasonable person standard when evaluating evident partiality.

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Morelite Constr. Corp.*, 748 F.2d at 81.

<sup>95</sup> *Id.* at 81-82 (“Judge Cannella, noting that he ‘remain[ed] troubled by the relationship,’ nevertheless denied the motion.” (brackets in original)).

<sup>96</sup> *Id.* at 83 n. 3.

<sup>97</sup> *Id.* at 83.

<sup>98</sup> *Id.*

<sup>99</sup> *Morelite Constr. Corp.*, 748 F.2d at 84.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 492 F.3d 132 (2d Cir. 2007).

<sup>103</sup> *Id.* at 138.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See, e.g., JCI Commc'ns, Inc. v. Int'l Broth. of Elec. Workers, Local 103*, 324 F.3d 42 (1st Cir. 2003) (applying the reasonable person standard in determining whether the arbitrators being business

### C. Reasonable Impression of Partiality Standard

The Ninth Circuit first addressed *Commonwealth Coatings* implications on evident partiality in *Schmitz v. Zilveti*.<sup>109</sup> The case involved a dispute that was submitted to National Association of Securities Dealers (“NASD”) arbitration.<sup>110</sup> Three arbitrators were selected to conduct the arbitration,<sup>111</sup> and one of the arbitrators failed to conduct a conflicts check with the parties.<sup>112</sup> The conflicts check would have revealed that the arbitrator’s firm represented a party company on numerous occasions.<sup>113</sup>

After the arbitration, the party challenged the award on evident partiality grounds.<sup>114</sup> The District Court concluded that an arbitrator need only disclose the facts that they are actually aware of at the time of the arbitration.<sup>115</sup> Because the arbitrator was not actually aware of the conflict at the time of the proceedings, the District Court held that the lack of knowledge protected the arbitrator from showing evident partiality.<sup>116</sup>

The Ninth Circuit overturned the District Court’s decision, holding that “‘evident partiality’ is present when undisclosed facts show ‘a reasonable impression of partiality.’”<sup>117</sup> “Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality.”<sup>118</sup> Additionally, the court held that arbitrators may have an independent duty to investigate conflicts of interest.<sup>119</sup> A violation of this independent duty can create a reasonable impression of impartiality.<sup>120</sup> The Court concluded that the arbitrator did have such a duty to investigate under the NASD Code,<sup>121</sup> but because the arbitrator failed in this duty, the court found that there was a reasonable impression of partiality warranting vacatur.<sup>122</sup>

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competitors to one of the parties to the arbitration created evident partiality, and concluding that the party waived the claim by not raising the issue during the arbitration).

<sup>107</sup> See, e.g., *ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493 (4th Cir. 1999) (applying the reasonable person standard in determining whether the failure to disclose “attenuated connections” between the arbitrator’s law firm and the other party created evident partiality, and concluding that the failure to disclose was not a violation of American Arbitration Association rule or a demonstration of evident partiality).

<sup>108</sup> See e.g., *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621 (6th Cir. 2002) (applying the reasonable person standard in an appeal of an arbitration decision relating to a reinsurance agreement, and concluding that there was no evident partiality in the limited business dealings by the arbitrator with one of the parties to the arbitration).

<sup>109</sup> 20 F.3d 1043 (9th Cir. 1994).

<sup>110</sup> *Id.* at 1044.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1044-45.

<sup>117</sup> *Id.* at 1046 (citing *Middlesex Mut. Ins. Co., v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982)).

<sup>118</sup> *Id.* at 1048.

<sup>119</sup> *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1049 (explaining that “Section 23(a) & (b) of the NASD Code requires arbitrators to ‘make a reasonable effort to inform themselves of any’ ‘existing or past financial, business, [or] professional . . . relationships [that they or their employer, partners, or business associates may have] that are likely to affect impartiality or might reasonably create an appearance of partiality or bias.’” (brackets in original)).

<sup>122</sup> *Id.*

#### IV. REPEAT ARBITRATION UNDER CURRENT EVIDENT PARTIALITY STANDARDS

I believe that repeat player bias, regardless of the motivation, should constitute evident partiality under either the “reasonable person” or “reasonable impression” standard.<sup>123</sup> Under the reasonable person standard, it is not required to show that the arbitrator is actually biased, the standard allows vacatur for evident partiality merely when a reasonable person would conclude that the arbitrator was partial to one party to the proceedings.<sup>124</sup> The foundation to this conclusion does not need to be a provable fact, but can be based on the mere suspicions of a reasonable person.<sup>125</sup>

Under the reasonable person standard, a contingent, future financial relationship between a party and the arbitration provider would seem to allow a reasonable person to conclude that the arbitrator is partial to the business party. The business party will likely be involved in more frequent arbitral proceedings than the one-shot consumer,<sup>126</sup> and the business party will rationally seek arbitration from the same organization if prior results were satisfactory.<sup>127</sup> Thus, it seems entirely reasonable that the arbitrator may be partial to the business party in order to ensure future business, and therefore in violation of the reasonable person standard to evident partiality.

Likewise, repeat-player bias would constitute evident partiality under the reasonable impression of partiality standard. The reasonable impression of partiality standard creates a showing of evident partiality when the disclosed and undisclosed facts about an arbitrator give rise to a “reasonable” impression that the arbitrator may be partial to one of the arbitration parties.<sup>128</sup> This standard, like the reasonable person standard, does not require a showing of actual bias or partiality, but allows for evident partiality when the facts would permit a mere reasonable inference of partiality.<sup>129</sup>

Mandatory consumer arbitration may also fall within this standard. The less sophisticated consumer often does not fully understand the limitations and requirements

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<sup>123</sup> The opinions in this section are entirely the author’s. The author has found no case law dealing with treatment of a repeat player to an arbitration proceeding. As such, all conclusions are speculative.

<sup>124</sup> See Section III(B), *supra*.

<sup>125</sup> See *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d. Cir. 1984) (“[W]e are bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers.”).

<sup>126</sup> See *Cole*, *supra* note 11, at 217 (“An institutional party, who chooses arbitration to resolve all disputes, may have an advantage over the party who may utilize the arbitral process only once, and only because his contract with the institutional party requires him to do so. In this situation, the institutional party may develop informal relationships with the arbitrator, creating an incentive for the arbitrator to find in its favor.” (citation omitted)); see also *Cole*, *supra* note 24, at 771 (“An employer using arbitration to resolve disputes has the incentive to compile information about potential arbitrators and their past decisions and develop a relationship with those arbitrators. The former will allow better predictability of arbitral outcomes. The latter will potentially allow the employer to influence the outcome of the arbitration.” (citation omitted)).

<sup>127</sup> See *Cole*, *supra* note 24, at 772 (“The arbitrator is likely to feel pressure to find in favor of the permanent party, the employer, in most cases because industry members will more frequently appear before the arbitrator. In addition, in many employment arbitrators, the employer pays the arbitrator’s entire fee. The sense that the employer ‘owns’ the process as a result may influence the arbitrator’s ultimate resolution of the case. An arbitrator who regularly finds in favor of complaining employees may be certain that the employer will be reluctant to rehire her in the future.” (citation omitted)).

<sup>128</sup> See Section III(C), *supra*.

<sup>129</sup> *Id.*

imposed by the contract and the arbitration clause.<sup>130</sup> Likewise, it is unlikely that the business party would disclose whether it regularly conducts arbitration proceedings through the selected arbitration organization. Such a failure to disclose would lead to a reasonable impression of partiality due to the inferences that can be drawn by the arbitration provider desiring a continued financial relationship with the business party to the proceedings. Therefore, this impression should also constitute evident partiality under the reasonable impression of partiality standard.

## V. EVIDENT PARTIALITY, REPEAT ARBITRATION, AND THE NEED FOR THE COLLECTION OF RELIABLE COMPARISON DATA

Currently, there are a variety of proposals for how to limit the impact of potential bias in mandatory arbitration.<sup>131</sup> My proposal for how to treat repeat players for evident partiality purposes is to increase the availability of data related to the prevalence and outcomes of repeat arbitration. Increased availability of data would allow for increased statistical analysis of whether use of repeat arbitration is harmful to consumers, or an unnecessary worry.<sup>132</sup>

Using statistics to evaluate arbitration decisions is not novel.<sup>133</sup> Recently, in an effort to collect data on recent arbitration proceedings, California passed a law mandating arbitration providers to publish certain data related to their administrated arbitration proceedings over the previous five years.<sup>134</sup> The law requires that arbitration providers disclose the name or names of the non-consumer parties to the proceedings, the type of dispute involved in the proceedings, who was the prevailing party, whether the non-consumer party had previously been a party to an arbitration proceeding with the current

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<sup>130</sup> See Rakoff, *supra* note 40, at 1179 (noting that empirical studies have shown that adhesive contracts are unlikely to be read by the consumer).

<sup>131</sup> See Cole, *supra* note 24, at 775-82 (proposing reform to imposed arbitration through the “Due Process Protocol,” further revision to the Revised Uniform Arbitration Act, and formal legislation); see also Farmer, *supra* note 11, at 2360-93 (outlining (1) “the elimination of mandatory arbitration entirely in cases with unequal bargaining power,” (2) “expanded judicial review,” (3) “governmental regulation or inclusion of an institutional middleman,” and (4) “disclosure of data regarding arbitration as current proposals to improve mandatory arbitrational proceedings,” and offering a his own proposal to improve mandatory arbitrational proceedings by creating a system that (1) “creates institutional-level enforcement to prevent systematically biased behavior,” (2) “allows governmental prosecution for enforcement,” (3) “holds drafting parties, as well as providers, directly liable for any wrongdoing,” (4) “allows broad remedy,” (5) “is implemented on both a state and federal level,” and (6) “proactively deals with the costs and efficiency aspects for the effective enforcement of such a regime”).

<sup>132</sup> If such data shows a statistically significant difference in award rates between disputes in a mandatory adhesive setting and consumers in a voluntary submission, there would be evidence of not only a perceived arbitrator bias, but of an actual arbitrator bias. Conversely, if the data shows no statistically significant difference of award rates between consumers in a mandatory adhesive setting and consumers in a voluntary submission dispute, there would be little support that of potential bias on behalf of the arbitrators, real or perceived.

<sup>133</sup> See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 253 (1998) (“Statistical analysis may be useful to explore questions of structural bias stemming from the nature of the rules governing the arbitration.”).

<sup>134</sup> See CAL. CIV. PROC. CODE § 1281.96(a) (West 2013).

arbitration provider, and the name and fee of the arbitrator to the proceeding, as well as other related data.<sup>135</sup>

However, California law alone will not be sufficient to truly examine trends in repeat arbitration.<sup>136</sup> For such data collection to be complete and successful, it will have to be collected not just from California, but from every state. Therefore, I propose the implementation of a nation-wide disclosure law, implemented nationally through Congress, and modeled after the California law.<sup>137</sup>

The law would require the same disclosures as the California model, and would entail publication in a similar manner. The data collected could then be analyzed for evidence of statistical bias or partiality in repeat arbitration. Specifically, such data would allow for a comparison between the rates of success of non-consumer parties in mandatory arbitrations, compared to rates of success of non-consumer parties in post-dispute voluntary submissions.

The data would also allow for more analysis as to whether businesses shop for favorable arbitration proceedings, and how often parties change arbitration providers after an unsuccessful arbitration proceeding (as compared to a successful arbitration proceeding). Statistically significant findings here would give support to the notion that businesses do shop for the most beneficial arbitration provider, and that arbitration providers thereby have incentive to find in favor of the business. Together, these and additional studies would examine whether the use of mandatory arbitration is unintentionally biased, actually biased, or whether there is no concern at all to the practice.

In isolation, although a national disclosure law would not independently prevent bias or impartiality, it would create a mechanism through which necessary information about bias or impartiality could be discovered.<sup>138</sup> With discovery of such information, I believe current FAA provisions would be able to successfully protect consumers against potentially biased or partial proceedings regardless of the actual findings.

## VI. CONCLUSION

In sum, it seems clear that, barring a change in philosophy by the Supreme Court, or modifications to the FAA by Congress, mandatory consumer arbitration will continue to grow in the United States.<sup>139</sup> Businesses that choose to impose arbitration will

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<sup>135</sup> *Id.*

<sup>136</sup> See Farmer, *supra* note 11, at 2368 (“[T]he main problem with California’s disclosure laws . . . is that they do not do enough to ensure fairness in arbitration. California’s program is particularly hamstrung by the lack of availability of data from other states, which prevents widespread comparison of arbitration providers and restricts the amount of data available for analysis.”).

<sup>137</sup> *Id.* (“Although commentators have criticized California’s regime for not focusing on certain disclosures deemed critical to evaluating the fairness of dispute resolution proceedings, the program has proven that data disclosure requirements are workable in practice.” (citation omitted)).

<sup>138</sup> “All truths are easy to understand once they are discovered; the point is to discover them.” – Galileo Galilei.

<sup>139</sup> See Sternlight, *supra* note 11, at 1646-47 (“To date, at least, it seems that the mandatory imposition of predispute arbitration on consumers and employees by companies is virtually a uniquely U.S. phenomenon. Indeed, policies issued by the European Union preclude companies from replacing consumers’ litigation option with binding arbitration.” (citation omitted)).

continue to be able to influence the process on a larger basis than their one-shot consumers. Therefore, in order to protect the less sophisticated consumers from potential repeat-player arbitration bias, it is important to facilitate the collection of data that will allow study of whether such implementation is actually harming consumers. Furthermore, if there is evidence of such harm, the information will allow for the practice to be examined and disallowed under FAA Section 10's prohibition of evident partiality.