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**VACATUR OF ARBITRATION AWARDS:  
A REAL-WORLD REVIEW OF THE CASE LAW**

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## **THE PRESENTERS**

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# **VACATUR OF ARBITRATION AWARDS: A REAL-WORLD REVIEW OF THE CASE LAW**

## **Introduction**

Litigators and arbitrators are well aware of the limited statutory grounds on which a court may vacate arbitration awards under the Federal Arbitration Act and companion state laws.<sup>1</sup> Some jurisdictions also permit vacatur if the arbitrator's award exhibits "manifest disregard of the law"<sup>2</sup> or falls into one of several other judicially-created categories ("contrary to public policy," "irrational," "arbitrary and capricious," etc.) recognized in some jurisdictions.

The purpose of this program is to take a snapshot of the real-world application of these familiar standards in a recent sample of the reported case law. We had the gracious assistance of Heller Ehrman White & McAuliffe and, in particular, its Seattle attorney David Spence, to conduct the initial search for and categorization of the cases. We have reviewed every case, state and federal, published and unpublished, reported between January 1, 2004, and October 31, 2004, in which a party sought to vacate an arbitration award on any of these grounds. We found 182 cases. Allowing for the reality that some of the cases involved multiple challenges to an award, we found 277 instances of a party seeking vacatur based on one or another of these grounds.

We wanted to know which of the available grounds for vacatur are invoked most frequently, which most often succeed and fail, whether the facts of the cases could help us read additional content into the relatively general and elastic grounds for vacatur employed by the courts, and whether the cases suggest any useful practice lessons for litigators and arbitrators.

Accordingly, after the cases were located and categorized, we tabulated them to compute the number of cases in which a party sought award vacatur on each of the available grounds, the number of times such challenges succeeded and failed, noted the standards fashioned by the courts to apply the somewhat Delphic grounds for vacatur set out in the statutes and the case law, charted the types of misconduct actually alleged in the cases, and have briefly commented on some of the cases we found particularly noteworthy or interesting. The discussion that follows begins with an overview of our

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<sup>1</sup> Section 10 of the FAA, 9 U.S.C. §10(a), for example, authorizes vacatur where (1) "the award was procured by corruption, fraud or undue means;" (2) where "there was evident partiality or corruption in the arbitrators;" (3) where "the arbitrators were guilty of misconduct," *e.g.*, by refusing to postpone the hearing for good cause shown or by refusing to consider material and pertinent evidence; and (4) where "the arbitrators exceeded their powers, or so imperfectly executed them that a . . . final, and definite award upon the subject matter submitted was not made."

<sup>2</sup> *See, e.g., Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004); *Montes v. Shearson Lehman Bros. Inc.*, 128 F.3d 1456 (11th Cir. 1997); *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995).

findings, and then proceeds to a more detailed discussion of the case law we found applying each of the statutory and other available grounds for vacatur of awards during our snapshot sample period. We conclude by noting some of the interesting procedural issues that arose in a number of these cases.

We should note that three categories of cases were excluded from our research. First, we excluded cases in which an award was vacated because the arbitration clause was held unconscionable or otherwise unenforceable from its inception as a matter of contract law (due to duress, mistake, fraud, failure to reach an agreement, etc.) Rather, we limited our search to cases in which vacatur was sought following a properly convened arbitral proceeding involving an enforceable clause. For those interested in a recent review of the unconscionability cases, see Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185 (Winter 2004). Second, although we included employment termination and discrimination disputes in our sample, we excluded cases addressing awards issued in the labor/collective bargaining context as *sui generis*. Third, we eliminated certain decisions involving statutorily mandated arbitrations in insurance and public contracting disputes where the applicable standard of review was far less deferential, and not representative of outcomes under the FAA or the analogous state statutes.

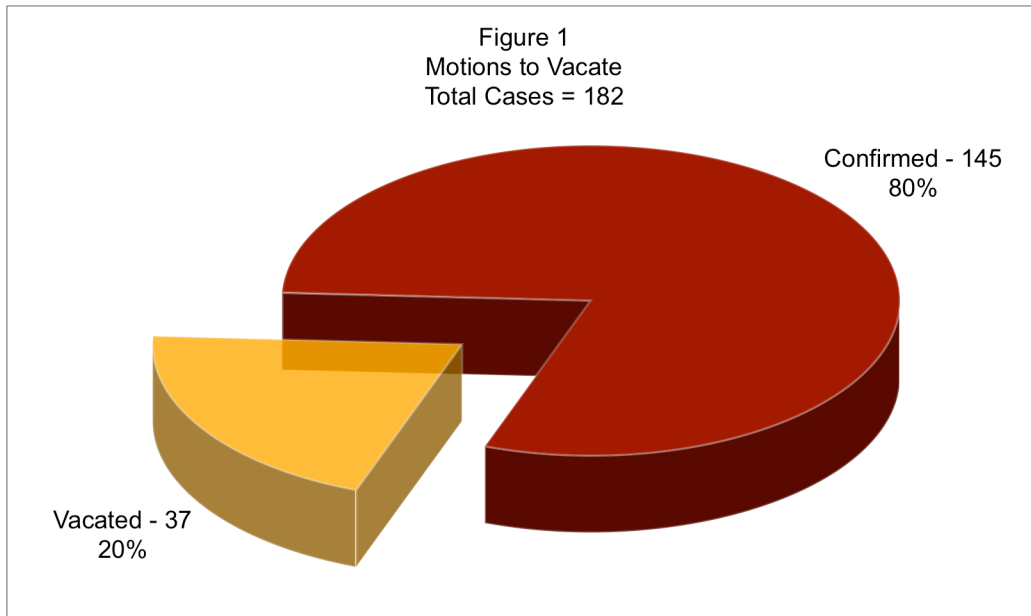
These exclusions left us with a sample of 182 reported cases, state and federal, decided during the first ten months of 2004, involving a wide variety of civil disputes, in which a party sought vacatur of an arbitral award.

The panelists invite audience participation as we discuss and explore these issues.

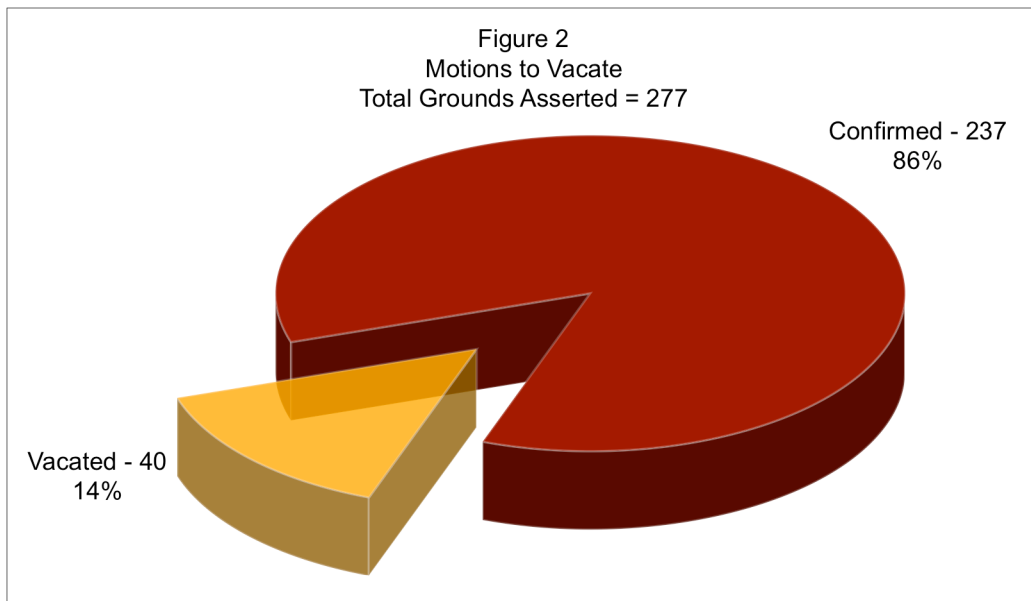
### **Overview of Results**

As discussed above, we found 182 cases in which a party sought to vacate an award during our ten-month snapshot period in 2004. Multiple grounds for vacatur were asserted in many of these cases. In total, we found that the various statutory or other grounds for vacatur were asserted 277 times in these cases.

Overall Success of Vacatur Applications. Of the 182 cases in which vacatur was sought, the motion to vacate succeeded 37 times, or 20%. See Figure 1:



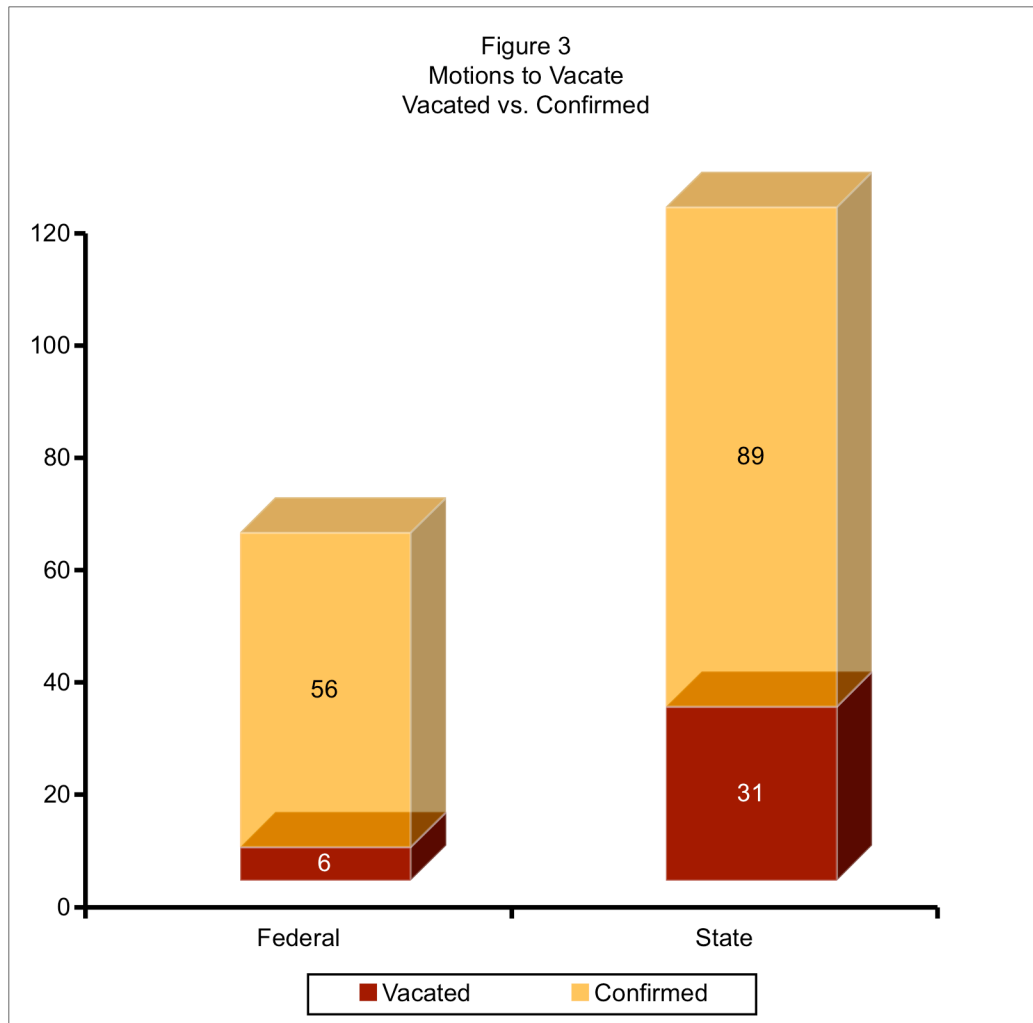
This percentage falls substantially if the comparison is to the total number (277) of statutory or other grounds asserted as a basis for vacatur in these cases. We found that the parties successfully asserted only 40, or about 14%, of the 277 grounds advanced for vacatur. See Figure 2:



Subject-Matter Considerations. We reviewed the 37 cases in which an award was vacated for possible subject-matter patterns in order to assess whether vacatur

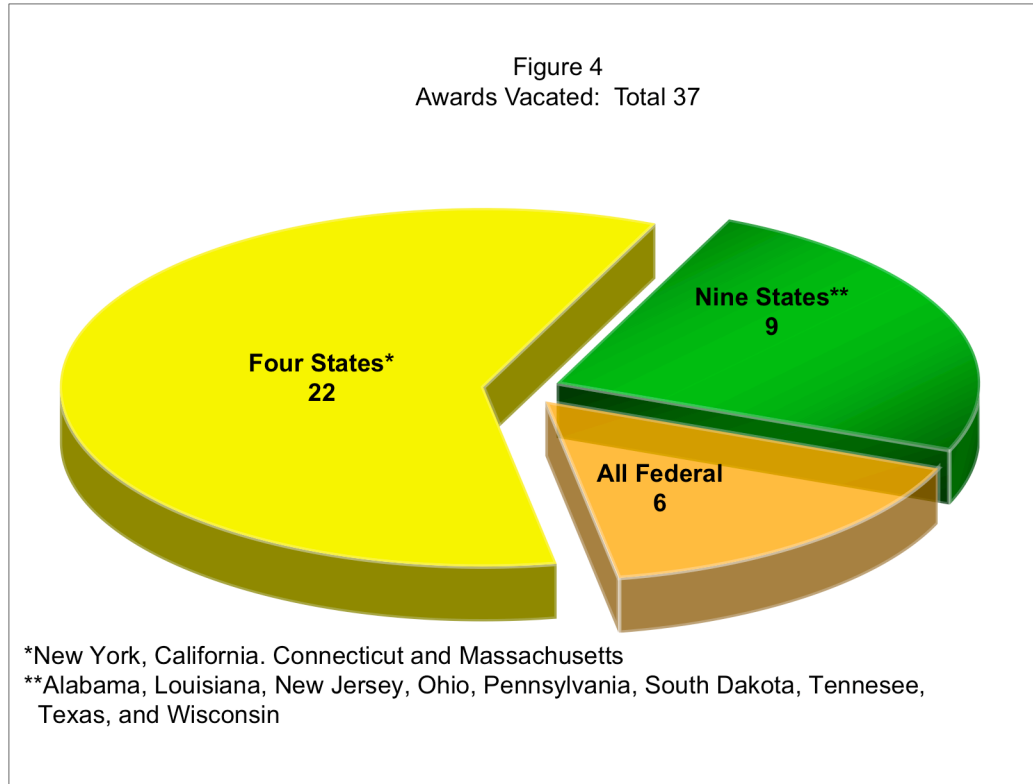
was ordered disproportionately in cases involving employees, consumers, other individual litigants, or in any particular types of cases or industries. We found no such patterns. Rather, the 37 cases in which the award was vacated exhibited a very wide variety of parties and subject matter content. We did not see a statistical "tilt" toward or against vacatur in cases involving individuals as opposed to organizational parties, in any particular type of disputed subject-matter, or in any particular industrial setting.

Forum Considerations. We did find significant differences in the frequency of successful vacatur applications based on the forum where the case was decided. Of the total universe of 182 cases we reviewed, 120 were brought in state courts, with the remainder (62) brought in the federal courts. Of the state court cases, thirty-one, or about 25.8%, resulted in vacatur. By contrast, only six of the federal cases, or about 9.7%, vacated the award. See Figure 3:



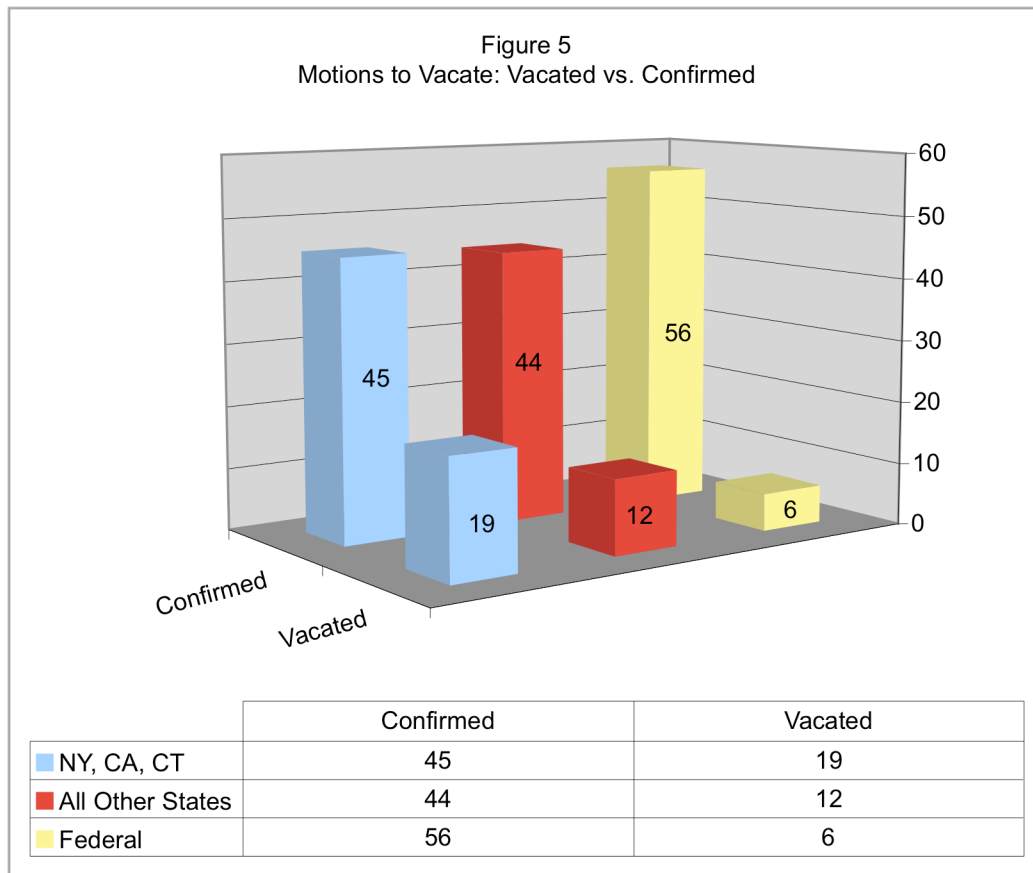
We also saw dramatic differences in the vacatur success rate between the different states. Of all the state court cases vacating an award, twenty-two, or

71%, were decided in only four states - New York (9 cases), California (6), Connecticut (4) and Massachusetts (3). Nine other states (Alabama, Louisiana, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Texas and Wisconsin) each had one case vacating an award. No other state had any. See Figure 4:



The figures also indicated that vacatur was attempted more often, and succeeded more often, both on an absolute and on a percentage basis, in just three states than anywhere else in the nation. Of the 120 cases in which vacatur was sought in a state court, 27 were brought in California, 25 in New York and twelve in Connecticut. The total of 64 cases in which a party sought vacatur in these three states exceeded the total of all such cases brought in all of the other 47 states combined (56), and also exceeded the total number of such cases brought in the entire federal system (62). Moreover, the courts in these 64 cases vacated the award 19 times. A litigant seeking vacatur in these three states thus had a 30% chance of success, as compared to a 21% chance of success in the other 47 states

(12 awards vacated) and only a 9.7% chance in the federal system (six awards vacated). See Figure 5:



Vacatur Success Rates by Statutory or Other Ground. Our review found that the most frequently asserted and most frequently successful of all of the statutory and other grounds advanced by parties seeking vacatur was the allegation that the arbitrators had “exceeded their powers, or so imperfectly executed them that a . . . final and definitive award upon the subject matter submitted was not made.” This ground was asserted 101 times in our cases, and succeeded in 21, or about 20.8%, of them. By comparison, the next most active category – that the arbitrators allegedly “manifestly disregarded the law” – was asserted just 52 times, and succeeded in only two cases, or about 4% of the times it was argued.

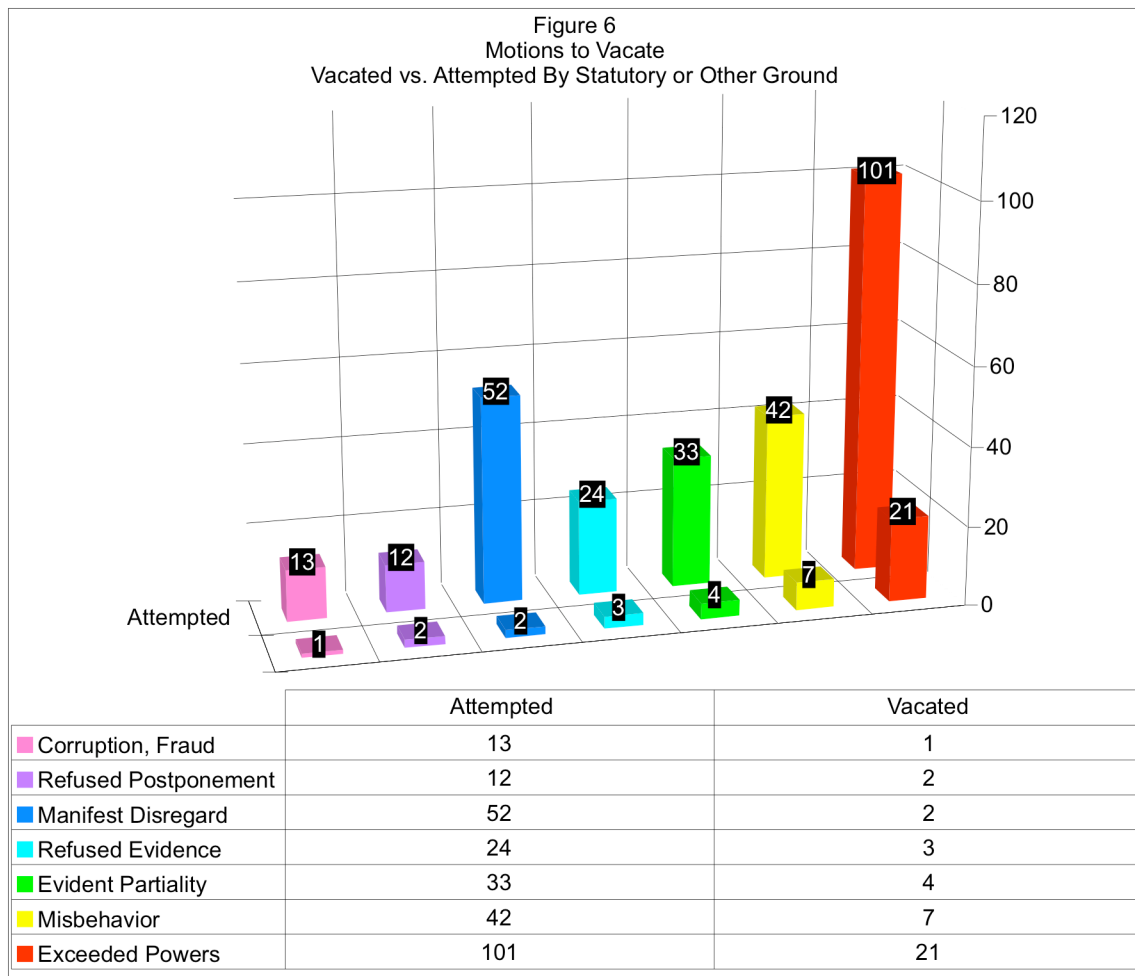
The third most frequently advanced ground, and the second most potent, was the allegation that the arbitrators had committed “misbehavior by which the rights of a party were prejudiced,” a catch-all category encompassing various judge-made grounds for vacatur, other than “manifest disregard,” and includes allegations that the award was “irrational,” “violated public policy” or was “arbitrary and capricious.” This ground was argued in 42 of the cases and succeeded in seven, or about 17%, of them. Almost as successful, but much less frequently argued, was the ground that the arbitrators “refused to postpone the

hearing upon sufficient cause shown.” This ground was argued in only 12 cases, but succeeded twice, or about 16.7% of the time.

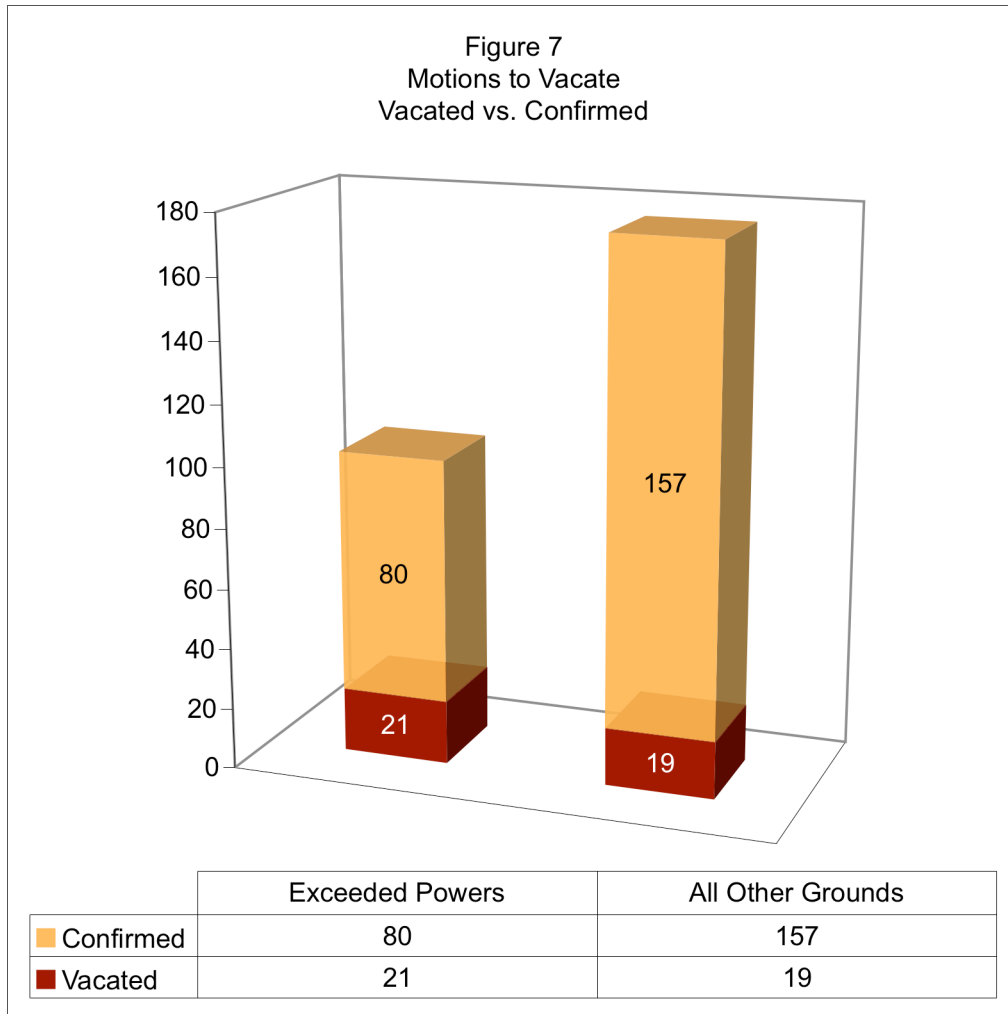
Vacatur was sought only 33 times due to “evident partiality or corruption in the arbitrators,” which surprised us because this is the ground that encompasses the much-discussed topic of arbitrator disclosures, and succeeded in only four, or about 12.1%, of them. Those cases do, however, indicate a major divergence in approach between the courts in California compared to the rest of the nation.

Arbitrators regularly counseled to “let everything in” at arbitrator-training seminars on evidence management may be interested to learn that vacatur was sought in only 24 cases on the ground that the arbitrator allegedly “refused to hear evidence pertinent and material to the controversy,” moreover, that argument succeeded in only three, or about 12.5%, of these cases.

The most anemic of the grounds reviewed in our sample was the allegation that the award “was procured by corruption, fraud or undue means.” This argument was attempted in 13 cases and only succeeded in one, or 7.6% of them See Figure 6:



In general, our sample confirmed once again how very difficult it is in the real world for parties to obtain vacatur of an award. Depending on whether the comparison is to the total cases or to the total grounds asserted, the odds of successfully vacating an award in our sample were either one in five or one in six. In the cases where the arbitrators actually decided the issues submitted to them (*i.e.*, excluding the cases where they exceeded their powers or didn't render a definite award), those odds were one in eight. See Figure 7:



When these figures are combined with the forum-related observations discussed above, the chances of successfully vacating an award in states other than New York, California or Connecticut, or in the federal system, were quite remote in our sample, particularly if the ground relied upon was something other than an argument that the arbitrators exceeded their powers.

Our review also indicated, as discussed more specifically in the sections that follow, that the courts in our sample saw their roles mainly as one of policing the

procedural propriety of the arbitral process rather than correcting the substantive merits of the awards rendered: Did the arbitrators decide the issues entrusted to them? Did the arbitrators engage in prejudicial misconduct that tainted the fairness of the process? Once satisfied that the arbitrators had decided the issues submitted to them by the parties, and that the process employed satisfied some acceptable standard of "due process," the courts in this sample by and large refrained from second-guessing the merits of the decisions reached by the arbitrators.

Pragmatic Observations. Most observers would agree that the goal of an arbitral proceeding should be a just award rendered in a fair, efficient and final proceeding. Vacatur litigation inevitably compromises at least some of these goals, by adding an expensive and potentially protracted judicial "second round" to the process, whether the motion to vacate ultimately succeeds or not. In cases where the award is vacated, the consequences to the parties can be severe, especially in cases where they may be ordered to arbitrate anew and thus will have wasted much or all of the time and expense invested in the vacated arbitral proceedings. Looking at the world of arbitration from this pragmatic perspective, our sample identified certain types of behavior by arbitrators and trial counsel that probably should be given a wide berth, even if such conduct did not always, or even often, result in vacatur. Although not necessarily held to be misconduct in the cases reviewed in our sample, these types of conduct did appear repetitively in our sample as behaviors that gave rise to vacatur litigation.

For arbitrators, the short list of sensitive behavior suggested by our sample of cases includes:

- Exceeding the tribunal's powers by deciding issues not submitted to the arbitrators, awarding relief in favor of or against parties not bound by the arbitration agreement, granting relief outside the claims alleged, or awarding types of relief (punitive damages, consequential damages, interest, or attorneys' fees) that the clause or applicable law may not permit the arbitrator to award;
- Failing to render an award that definitely and finally decides the issues submitted to the arbitrators;
- Making incomplete disclosures during the arbitrator-selection process;
- Engaging in *ex parte* communications with parties or counsel;
- Allowing a party to be unfairly surprised by new claims at or on the eve of the hearing;
- Intemperate denials of motions for a continuance;
- Ill-advised jokes, rudeness or bickering with witnesses, parties or counsel during the hearing;
- Refusals to hear evidence or witnesses, communicated in a manner that suggests bias;
- Conducting default cases in a manner that, with the aid of hindsight, may not seem fair; and

- issuing an award that orders a party to do something illegal (e.g., to pay a brokerage fee to a person not licensed as a broker or to employ unlicensed truck drivers).

For trial counsel who hope to represent the client in an arbitration in a manner that forecloses avoidable risks of becoming embroiled in vacatur litigation later, a comparable list suggested by our sample of cases includes:

- Last-minute amendments of claims or prayers for relief;
- Last-minute production of key evidence or witnesses that should have been disclosed sooner;
- Failure to produce relevant documents;
- Failure to make timely investigation into the arbitrators' disclosures;
- Conducting *ex parte* communications with, and failing to obtain disclosures from, party-appointed arbitrators who later agree to serve as neutrals;
- Offering testimony that is contravened by other testimony by the same witnesses given in other, particularly criminal, proceedings; and, probably most importantly,
- Seeking relief that the arbitrator is not empowered to grant.

We do not suggest that all such conduct will result in vacatur of the award. As discussed above, seeking vacatur successfully is everywhere and on all available grounds an uphill battle. We do suggest that these behaviors seemed to recur in the cases in our sample, and probably led to unfortunate expense and delay consequences for the parties to the arbitral process regardless of whether the motion to vacate was ultimately granted or not.

Interesting Procedural Issues. Although the focus of this project was to review the real-world application of the substantive statutory and non-statutory grounds for vacatur, we did encounter a number of interesting procedural issues in the course of our review of these cases. These are discussed briefly in Part VIII below.

We now turn to a discussion of the cases found in our sample for each of the available grounds for vacatur.

**I. VACATUR SOUGHT BECAUSE: “AWARD PROCURED BY CORRUPTION, FRAUD OR UNDUE MEANS.”**

**NUMBER OF CASES: 13**

**AWARD VACATED IN 1 CASE (7.6%).**

**STANDARDS APPLIED:**

**GENERALLY:** “Judicial review of arbitration awards is ‘very narrowly limited . . . [and] the burden of proving a ground for vacating an award rests on the party who seeks to vacate it.’” *Hakala v. Deutsche Bank AG*, 2004 WL 1057788, \*2 (S.D.N.Y. May 11, 2004), *citing Application of Nat’l Ass’n of Broadcast Employees and Technicians*, 707 F.Supp. 124, 128 (S.D.N.Y. 1988).

**CORRUPTION and FRAUD:**

The party seeking to vacate the award must demonstrate (1) that the opposing party engaged in fraud; (2) that the fraud was material to an issue in dispute during the arbitration; and (3) that he could not have discovered the fraud before or during the arbitration proceeding through the exercise of due diligence. *See Hakala, supra*, at \*3. Numerous courts state that the first of these elements must be proven by “clear and convincing evidence.” *See, e.g., B-Steel of Kansas, Inc. v. Texas Industries, Inc., et al.*, 321 F.Supp.2d 1214, 1222 (D. Kan. 2004).

**UNDUE MEANS:**

The party asserting error has the burden of showing: (1) that the winning party procured the award through bad faith behavior “equivalent in gravity to corruption or fraud”; and (2) a nexus between the bad faith behavior and procurement of the award. Courts have “uniformly construed the term undue means as requiring proof of intentional misconduct.” *Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc.*, 678 N.W.2d 804, 805-06 (S.D. 2004).

**TYPES OF MISCONDUCT ALLEGED:**

**A. Unsuccessfully:**

- Arbitrator allegedly failed to make adequate disclosure of prior dealings with respondent law firm’s malpractice carrier. *Theis Research v. Brown & Bain*, 386 F.3d 1180 (9<sup>th</sup> Cir. 2004).
- Respondent allegedly presented evidence at the arbitration inconsistent with prior judicial admissions; counsel for respondents had appeared in other cases before the arbitrator. *Rath v. Casey*, 309 F.Supp.2d 661 (E.D. Pa. 2004).

- Arbitrator allegedly conducted an improper *ex parte* meeting with a competitor of one of the parties. *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. App. 2004).
- Respondent testified in his own defense on the merits at an NASD arbitration without revealing that he had previously invoked the Fifth Amendment on the same issues in a prior proceeding. *Cooper v. Morgan Keegan & Co.*, 2004 WL 2030305 (6<sup>th</sup> Cir. Sept. 7, 2004).
- Arbitrator allegedly considered claims outside the scope of the original demand and failed to give the losing party adequate prior notice that the tribunal would be entertaining such claims. *Pitt v. Holt Development LLC*, 604 S.E.2d 278 (Ga. App. 2004).
- Winning party allegedly “fraudulently misrepresented the nature of one of its exhibits during the arbitration hearing.” *Hesfibel Fiber Optik v. Four’s Group, Inc.*, 315 F.Supp.2d 1365 (S.D. Fla. 2004).
- Arbitrator allegedly entertained previously undisclosed claims and evidence at the hearing. *Harmer v. Reynaud*, 2004 WL 2223046 (Cal.App. Oct. 5, 2004).

**B. Successfully:**

- *Accessible Development Corp. v. Ocean House Center, Inc.*, 772 N.Y.S.2d 263 (2004) (discussed below).

**NOTEWORTHY CASES:**

***Hakala v. Deutsche Bank AG, et al.*, 2004 WL 1057788, \*2-3 (S.D.N.Y. May 11, 2004)**

**The prevailing party at the arbitration allegedly procured the award by (1) committing willful discovery violations in which they denied the existence of important documents during discovery and then “found them” on the first day of the hearing and (2) suborned perjury. Vacatur was denied because the movant failed to show persuasively that it could not have discovered the alleged fraud before the award was issued. “The purpose of requiring fraud to be ‘newly discovered’ before vacating an arbitration award on that ground is ‘to avoid reexamination by the courts, of credibility matters that either could have been or were in fact called into question during the course of the arbitration proceedings. . . .’ Hakala had the opportunity to present to the arbitrators evidence of this alleged fraudulent behavior of respondents. The arbitrators, as the finders of fact, had the opportunity to assess firsthand the credibility of the allegedly perjured testimony and of respondents’ explanations for their last-minute document production. Accordingly, Hakala may not now seek review of those issues in this court.”**

***Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc.*, 678 N.W.2d 804, 805-06, 809 (S.D. 2004). Respondent allegedly intentionally failed to produce documents inconsistent with key testimony given by respondents’ witnesses at the arbitration. The documents surfaced in other litigation after the award had been issued. The court remanded the case to the trial court to reconsider its earlier decision to deny the motion to vacate: “The trial court should determine in light of the new documents whether Thermo-Shield acted in bad faith in withholding the evidence;**

**and, if so, whether there is a nexus between the bad faith behavior and the procurement of the arbitration award.”**

***Accessible Development Corp. v. Ocean House Center, Inc.*, 772 N.Y.S.2d 263, 264, 4 A.D.3d 217 (2004). Prior to the arbitration, principals of a development company had been indicted for fraud, theft and falsification of business records and the company’s owner had testified to participating in a scheme to divert construction funds. The same persons testified at the arbitration hearing – a dispute over payments due relating to alterations to an adult care facility – as if the events described to the grand jury had never occurred. An award was issued in favor of the development company. The losing party’s motion to vacate the award was granted: “Although discovery of new evidence is generally not a ground for vacating an arbitration award, these circumstances [the omitted information “might have drastically altered the outcome of the arbitration”] warranted a finding that the award herein was procured by corruption and fraud . . . .”**

## II. VACATUR SOUGHT BECAUSE: ARBITRATOR “REFUSED TO POSTPONE THE HEARING UPON SUFFICIENT CAUSE SHOWN”

NUMBER OF CASES: 12

AWARD VACATED IN 2 CASES (16.7%).

### STANDARDS APPLIED:

“When refusal to postpone an arbitration hearing is raised as a ground for vacating an award, the court’s task is to determine whether there was ‘any reasonable basis’ for the refusal. . . . This deferential standard of review is consistent with the broad discretion arbitrators have in conducting hearings and ‘the basic policy behind arbitration, which is to permit parties to resolve their disputes in an expeditious manner without all the formalities and procedures that might attend fullfledged litigation.’” *Moeller v. D.E. Frey & Co.*, 2004 WL 1173397, \*2 (N.D. Fla. May 10, 2004).

“The arbitrator enjoys a measure of discretion in deciding whether to grant a continuance. . . . ‘The references in the statutes to good cause, and to sufficient cause, require valid reasons to be established for an arbitrator, in his discretion, to adjourn or postpone hearings.’” *Canha v. LaRoche*, 2004 WL 136352, \*1 (Mass. App. Jan. 27, 2004).

“Once the parties are in the arena of arbitration, the powers of the arbitrators concerning the issues before them are wide, and the scope of judicial review of arbitration proceedings is narrow. . . . It is important that a Court not make an arbitration proceeding into a hybrid, part judicial and part arbitral.” *Travelers Casualty and Surety Co. of America, Inc. v. Long Bay Management Co.*, 18 Mass.L.Rptr. 284, 2004 WL 2341339, \*4 (Mass. Super. Sept. 7, 2004).

“Section 10(a)(3) [of the FAA] provides for vacatur if ‘the arbitrators were guilty of misconduct in refusing to postpone the hearing. . . .’ The misconduct must amount to a denial of fundamental fairness of the arbitration proceeding in order to warrant vacating the award.” *Congressional Securities, Inc. v. FiServ Correspondent Services, Inc.*, 2004 WL 1367925, \*1 (2d Cir. June 17, 2004).

“We define ‘misconduct’ under [Section 10(a)(3)] as conduct ‘which so affects the rights of a party that it may be said that he was deprived of a fair hearing.’” *Coastal General Construction Services Corp. v. Virgin Islands Housing Authority*, 2004 WL 1096241, \*2 (3d Cir. May 18, 2004).

## **TYPES OF MISCONDUCT ALLEGED:**

### **A. Unsuccessfully:**

- Losing party sought continuance six days before hearing was to begin on ground that it had that day initiated a separate arbitration against an allegedly indispensable third-party and sought time to seek consolidation of the two arbitrations. *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422 (Tex. App. 2004).
- Arbitrator decided, and granted, a motion to dismiss based on statute of limitations grounds prior to completion of allegedly relevant depositions. *Minsk v. Kaiser Foundation Hospitals*, 2004 WL 1663970 (Cal. App. July 27, 2004).
- Arbitrator denied a continuance of the hearing sought in order to allow one party's investigator to be able to appear and testify. *Victoria Ins. Co. v. Utica Mutual Ins. Co.*, 778 N.Y.S.2d 481 (N.Y. App. Div. 2004).
- Arbitrator refused to continue hearing to allow one party to conduct three allegedly essential depositions. *Azarian v. Liberty Investments*, 2004 WL 885753 (Cal. App. 2d Dist. April 14, 2004).
- Claimant was allowed to present a damages expert, and submit his report at the hearing, despite not having previously produced the report. Respondent's motion for a six-week continuance was denied after the panel offered to take several more modest mitigating steps, all of which were rejected by respondent. *Moeller v. D.E. Frey & Co.*, 2004 WL 1173397 (N.D. Fla. May 10, 2004).
- Arbitration panel granted claimants one lengthy continuance, over respondent's objection, but denied claimant's request for a second adjournment shortly before a long-scheduled hearing was to begin. *Congressional Securities, Inc., et al. v. FiServ Correspondent Services, Inc.*, 2004 WL 1367925 (2<sup>nd</sup> Cir. June 17, 2004).

### **B. Successfully:**

- Prevailing party at the arbitration "refused to supply documentation for its original claim [\$1.14 million] and, less than twenty-four hours before the arbitration hearing was set to begin, presented hundreds of pages of documents in support of an amended claim for almost double the amount [\$2.242 million] of the original claim." The arbitrator "committed misconduct by refusing to postpone the . . . arbitration hearing." *Coastal General Construction Services Corp. v. Virgin Islands Housing Authority*, 2004 WL 1096241, \*2 (3d Cir. May 18, 2004).
- City sought continuance of a substantial construction arbitration so that testimony to be given by an official of the claimant contractor in a pending criminal trial could be introduced as part of the City's defense at the arbitration. The arbitrator denied the motion and also later denied a post-hearing motion to add the transcript

of the criminal testimony to the arbitration record. *City of Bridgeport v. The Kasper Group*, 2004 WL 2039692 (Conn. Super. Aug. 17, 2004).

### III. VACATUR SOUGHT BECAUSE OF: “EVIDENT PARTIALITY OR CORRUPTION IN THE ARBITRATORS”

NUMBER OF CASES: 33

AWARD VACATED IN 4 CASES (12.1%).

STANDARDS APPLIED:

#### California:

Section 1281.9 of the California Arbitration Act (Code.Civ.Proc. §1280 *et seq.*), subdivision (a), requires disclosure of “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial,” including specified matters relating to the arbitrator’s present arrangements or past relationships with the parties or their attorneys. Section 1281.9, subdivision (a)(4), specifies that an arbitrator must disclose “the names of the parties to all prior or pending noncollective bargaining cases [within the prior five years] involving any party or lawyer for a party for which the proposed neutral arbitrator served or is serving as a neutral arbitrator.” Section 1281.9, subdivision (a)(2), requires arbitrators to make all disclosures required by the California Ethics Standards. Section 1289.91, subdivision (b)(1), provides that an arbitrator who makes such disclosures “shall be disqualified on the basis of the disclosure statement” if either party serves a notice of disqualification within 15 days.

“This subdivision confers on both parties the unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality. . . . There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner. . . . As long as the objection is based on a required disclosure, a party’s right to remove the proposed neutral by giving timely notice is absolute. . . . [The objecting party has] no independent burden to demonstrate that a reasonable person would doubt [the arbitrator’s] capacity to be impartial. . . . [A demand for disqualification has] the same practical effect as a timely peremptory challenge to a superior court judge under section 170.6 – disqualification is automatic, the disqualified judge loses jurisdiction over the case and any subsequent orders or judgments made by him or her are void.” *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal.App.4<sup>th</sup> 1156, 1163, 1169-70, 18 Cal. Rptr.3d 142 (2004).

#### Elsewhere:

“The United States Arbitration Act authorizes vacatur of an arbitration award ‘where there was evident partiality . . . in the arbitrators.’ 9 U.S.C. §10. Interpreting that provision in favor of full disclosure, the Supreme Court adopted ‘the simple requirement that arbitrators disclose to the parties any dealings that *might* create an impression of *possible* bias.’ *Commonwealth Coatings Corp. v. Continental Cas.*

*Co.*, 393 U.S. 145, 149 (1968) (emphasis added). . . . Other circuits have developed two different standards for evident partiality, one for nondisclosure cases, and one for other claims of actual bias. In nondisclosure cases, courts have adopted a more lenient ‘reasonable impression of partiality’ standard. Cases not involving nondisclosure use a more strict standard for evident partiality . . . where the circumstances [must be] such that a ‘reasonable person would have to conclude that [the] arbitrator was partial to one party to the arbitration. . . .’ [I]n nondisclosure cases, an arbitration award must be vacated where there is a reasonable impression of partiality. One way to assess whether undisclosed facts convey a reasonable impression of partiality is to inquire whether those facts would be material to a lawyer selecting an arbitrator.” *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F.Supp.2d 862, 880-81, 885 (N.D. Tex. 2004) (citations omitted).

“The Ninth Circuit has identified two categories of evident partiality cases: non-disclosure cases and actual bias cases. . . . In a non-disclosure case, ‘[a] reasonable impression of bias sufficiently establishes evident partiality because the integrity of the process by which arbitrators are chosen is at issue. . . . In . . . actual bias cases . . . the [complaining] party must show the arbitrators actually were biased against the complaining party. . . . In which case, evidence giving rise to ‘the appearance of impropriety’ is not sufficient to establish evident partiality. . . . Accordingly, a party seeking to establish evident partiality through a showing of actual bias must set forth ‘specific facts’ indicating improper motives, aside from those facts merely showing a ‘reasonable impression of partiality.’” *Nordahl Dev. Corp., Inc. v. Salomon Smith Barney*, 309 F.Supp.2d 1257, 1266 (D.Or. 2004) (citations omitted).

“To set aside an award, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative. ‘[E]vident partiality will be found where a reasonable person would have to conclude that the arbitrators were partial to one party to the arbitration.’” *B-S Steel of Kansas, Inc. v. Texas Industries, Inc., et al.*, 321 F.Supp.2d 1214, 1222-23 (D.Kan. 2004).

“[W]e have declined to vacate awards because of undisclosed relationships where the complaining party should have known of the relationship, or could have learned of the relationship ‘just as easily before or during the arbitration rather than after it lost its case.’ We have also noted that ‘a principal attraction of arbitration is the expertise of those who decide the controversy,’ that ‘[e]xpertise in an industry is accompanied by exposure . . . to those engaged in it, and that the dividing line between innocuous and suspect relationships is not always easy to draw. . . .’ Furthermore, *Commonwealth Coatings* does not establish a *per se* rule requiring vacatur whenever an undisclosed relationship is discovered. . . . The Court explained that ‘an arbitrator’s business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business

biography.” *Lucent Technologies, Inc. v. Tatung Co.*, 379 F.3d 24, 28, 30-31 (2d Cir. 2004) (citations omitted).

## **TYPES OF MISCONDUCT ALLEGED:**

### **A. Unsuccessfully:**

- Arbitrator in a 2001 arbitration allegedly failed to disclose that he had served as a neutral arbitrator in 14 other cases since 1997 in which a party was represented by one of the lawyers appearing in the arbitration, called the objecting party a “jerk” during the hearing, and stated at the hearing that he had not read some of the materials submitted by the objecting party. *Klungle v. Klungle*, 2004 WL 435385, \*7-8 (Mich.App. March 9, 2004) (“That Quinn had used Kooistra numerous times as an arbitrator simply does not evidence ‘certain and direct’ partiality or bias. It is ‘uncertain or speculative.’ . . . Even assuming that the arbitrator made the disparaging comment at issue, we cannot conclude that it provided sufficient evidence of bias such that the award should have been vacated.”)
- Arbitrator made an ill-advised joke during the hearing (“I’ve got an idea . . . you know, I’m a developer in the area and I’m always looking for unique properties I can develop and make a nice profit on . . . . [W]hy don’t I buy the property from both of you and solve both your problems?”). Losing party objected that the remark showed bias in favor of the prevailing party (a developer) and an untoward interest in the real property at issue in the arbitration. Judgment confirming award affirmed. *Rose v. Maljanian*, 2004 WL 1520731 (Cal. App. 2d Dist. July 8, 2004) (“statements, apparently made in jest, do not demonstrate bias”).
- Arbitrator allegedly had served in many other cases involving respondent’s counsel, including one that was still ongoing and one that had concluded shortly before the present arbitration began. Award confirmed. *Rath v. Casey*, 309 F.Supp.2d 661, 667 (E.D. Pa. 2004) (such grounds “do not in this Court’s opinion rise to the level of misconduct, corruption, fraud, undue means or improper partiality to justify setting aside [the arbitrator’s] decision.”).
- The arbitrators conducted an *ex parte* conversation with respondents’ counsel in order to explain why a scheduled witness could not attend the hearing that day (apparently, due to a then-confidential pending merger) and the chairman allegedly exhibited a “markedly more favorable attitude” towards respondents after the *ex parte* meeting. Motion to vacate denied. *Hakala v. Deutsche Bank AG*, 2004 WL 1057788, \*4 (S.D.N.Y. May 11, 2004) (“Hakala’s claim of partiality must be denied because he failed to establish that the *ex parte* conversation influenced the outcome of the proceeding, deprived him of a fair hearing, or dealt with the merits of the dispute.”).

- Arbitrators allegedly showed partiality to one of the parties by bickering with the complaining party's damages expert and by making "derogatory" and "loaded" remarks during the hearing. Award confirmed. *B-S Steel of Kansas, Inc. v. Texas Industries, Inc., et al.*, 321 F.Supp.2d 1214, 1223 (D. Kan. 2004) ("Essentially B-S Steel claims that the arbitrators were rude, but rudeness is not a basis to vacate an arbitration award. B-S Steel has failed to show that a reasonable person would have to conclude that the arbitrators were partial to Midlothian.").
- Arbitrator failed to disclose that his son was an officer in a trade association that had given an award to one of the parties. Motion to vacate denied. *The Norwood Company v. Bennett Composites, Inc.*, 2004 WL 1895193 (E.D.Pa. Aug. 24, 2004) ("a distant and trivial business relationship . . . that does not raise the appearance of bias").
- Arbitrators made repeated rulings against the objecting party on matters such as venue, a motion to amend the claims, issuance of subpoenas, and attendance at the hearing by witnesses. Motion to vacate denied. *Nordahl Dev. Corp., Inc. v. Salomon Smith Barney*, 309 F.Supp.2d 1257, 1266 (D.Or. 2004)("[e]ven repeated rulings against one party will not establish bias absent some evidence of improper motivation.").
- Arbitrator stated that he did not credit some of a party's evidence. Trial court's denial of motion to vacate affirmed. *Brooks v. Cintas Corp.*, 2004 WL 57704 (5<sup>th</sup> Cir. Jan. 12, 2004).
- Chair allegedly made disparaging comments when a party requested a continuance. *Moeller v. D.E. Frey & Co., Inc.*, 2004 WL 117397, \*5 (N.D.Fla. May 10, 2004) ("The statements made by the chairperson evidence frustration with Cassedy's change of position, but they do not support a 'reasonable impression of partiality.'")
- Arbitrator allegedly showed bias by granting one side's request for a continuance but then later denying other party's request for a postponement. *Canha v. La Roche*, 802 N.E.2d 130, 2004 WL 136352 (Mass.App. Jan. 27, 2004).
- Arbitrator ruled that a non-participating respondent had been duly served in accordance with AAA Rules, and conducted a default hearing; after the hearing but before the award issued, the arbitrator denied a motion by the defaulting party to participate and reopen the hearing. *Choice Hotels Int'l, Inc. v. Patel*, 2004 WL 57658, \*6 (D. Md. Jan. 13, 2004) ("bias is not established merely because an arbitrator ruled against the complaining party").

#### **B. Successfully:**

- *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal.App.4<sup>th</sup> 1156, 18 Cal. Rptr.3d 142 (2004) (discussed below).

- Arbitrator failed to disclose a significant prior co-counsel relationship with one of the counsel appearing in the arbitration. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F.Supp.2d 862, 880, 883, 885 (N.D.Tex. 2004) (“[W]ould a reasonable lawyer in Positive Software’s position have wanted to know about the Arbitrator’s role in the Intel Litigation before selecting an arbitrator. The answer to that question is clearly yes. . . . [A]ny reasonable trial lawyer would want to know of an arbitrator-candidate’s prior association with opposing counsel before choosing him as the sole arbitrator.”)
- California arbitrator failed to disclose prior service as a neutral arbitrator in non-collective bargaining arbitrations in which a present party’s law firm had appeared as counsel. The objecting party’s failure to glean this information from a document marked as an exhibit at the hearing did not waive the objection. Award vacated. *Int’l Alliance of Theatrical Stage Employees etc. v. Laughon*, 118 Cal.App. 4<sup>th</sup> 1380, 14 Cal.Rptr.3d 341 (2004).
- Arbitrators involved themselves in a pre-hearing dispute between the parties over pre-payment of arbitration fees, “a matter in which the arbitrators had a direct financial interest,” in a manner that created “an appearance of impropriety.” *Coty, Inc. v. Anchor Construction, Inc.*, 7 A.D.3d 438, 776 N.Y.S.2d 795 (2004).

#### NOTEWORTHY CASES:

***Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal.App.4<sup>th</sup> 1156, 1163, 1167-69, 18 Cal. Rptr.3d 142 (2004). A California arbitrator in a case proceeding under AAA Construction Rules made disclosures, required by Section 1289.1, that he had served as a neutral arbitrator on other matters in which a party was represented by counsel appearing for a party in the present arbitration, seventeen years earlier had been employed for one year by a company that at that time also had employed the lawyer, and that the law firm where he was “of counsel” listed a party to the arbitration as potentially adverse to one of its clients on an unrelated matter. One party timely demanded disqualification based on the disclosure. The AAA determined that the grounds for the objection were insubstantial and confirmed the appointment. The arbitration proceeded to a conclusion and an award was issued. The trial court denied a motion to vacate, holding that the objecting party had waived its right to do so under the statute by agreeing to arbitrate under AAA Rules (and also stated that were it to consider the AAA’s refusal to disqualify the arbitrator de novo, it also would have concluded that nothing in the disclosure statement required disqualification). The Court of Appeal reversed, with directions to enter a new order vacating the award: “We conclude that [the objecting party] could not, by agreeing to submit to arbitration before the AAA, waive its statutory rights to disqualify an arbitrator under the methods set forth by the Act. In resolving [the] objection to the proposed arbitrator, the AAA was required to follow [the statutes].”**

*Fidelity Federal Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1312-13 (9<sup>th</sup> Cir. 2004). A party-appointed arbitrator had *ex parte* conversations with appointing counsel both before and after the party-appointed arbitrators had agreed to act “as neutrals.” Neither party-appointed arbitrator made any disclosures at the time of appointment or at the time they agreed to act as neutrals. After an award was issued, the losing party requested that the other party’s arbitrator also make a disclosure, which revealed a relationship by marriage (that had ended twenty-five years earlier due to a divorce) with attorneys at the appointing counsel’s law firm, a prior co-counsel relationship with that firm, and some lunches with various lawyers at the firm. The court affirmed the denial of a motion to vacate because the objecting party had waived its right to seek vacatur on that basis. The court held, “The parties selected a process for appointing arbitrators whereby each party selected its own arbitrator and the party-appointed arbitrators selected a third neutral arbitrator. The parties then chose to have the party-appointed arbitrators act neutrally or impartially. That process put Fidelity on notice that Arbitrator Leib, who was initially retained and appointed by Durga Ma as a non-neutral party-appointed arbitrator, was likely to have some personal or professional connection to Durga Ma or its attorneys. . . . We address as a matter of first impression whether a party with constructive knowledge of potential partiality of an arbitrator waives its right to challenge an arbitration award based on evident partiality if it fails to object to the arbitrator’s appointment or his failure to make disclosures until after an award is issued . . . . A rule that places the burden on parties to obtain disclosure statements from arbitrators who were initially party-appointed but later agree to act neutrally is consistent with our policy favoring the finality of arbitration awards.”

*Lucent Technologies Inc. v. Tatung Co.*, 379 F.3d 24, 28-31 (2d Cir. 2004). An arbitrator made an appropriate disclosure that he had previously served as an expert witness for one of the parties, but AAA failed to transmit it to the opposing party. The disclosure failed to include the information that the arbitrator and one of the other arbitrators had jointly owned an airplane from 1974 to 1990. The court affirmed the confirmation of the award, explaining: “This court has . . . ‘viewed the teachings of *Commonwealth Coatings* pragmatically’ . . . . In particular, we have declined to vacate awards because of undisclosed relationships where the complaining party should have known of the relationship, . . . or could have learned of the relationship ‘just as easily before or during the arbitration rather than after it lost its case. . . .’ In this case, it is undisputed that Luening disclosed his work as an expert witness for Lucent to the AAA. If Tatung failed to receive Luening’s disclosure form, the fault lies with the AAA and not with Luening or Lucent. The concern, noted in *Commonwealth Coatings*, that nondisclosure might create an appearance of bias or even be evidence of bias is simply not present in this case. There is no basis to argue that Luening and Lucent intended to hide their relationship from Tatung. . . . Luening and Smith’s co-ownership of an airplane more than a decade ago is simply too insubstantial to require vacatur.”

***Power Services Associates, Inc. v. UNC Metcalf Servicing, Inc.*, 338 F.Supp.2d 1375 (N.D.Ga. 2004). An arbitrator in a 2002 arbitration disclosed his firm’s current and substantial representation of a party’s parent corporation but failed to disclose his firm’s representation of the parent in a 1964 litigation or his own personal participation in that case. The court confirmed the award. “The 1964 case, thirty-nine years removed from the arbitration, does not create an impression, reasonable inference or presumption of bias and it cannot be used as a grounds to vacate the award. . . . It was [the] current and substantial relationship between the arbitrator and GE that was required to be disclosed . . . because it was this relationship that raised an issue of impartiality.” Although this current relationship was fully disclosed, the party now seeking vacatur “failed to inquire into it further. . . .” Rather, that party made a ““calculated decision”” not to inquire into the subject matter of the disclosure or make a timely objection based on it, and thereby waived its right to object later. “[W]e do not want to encourage the losing party to every arbitration to conduct a background investigation of each of the arbitrators in an effort to uncover evidence of a former relationship with the adversary.”**

**IV. VACATUR SOUGHT BECAUSE: THE ARBITRATOR ALLEGEDLY  
“REFUSED TO HEAR EVIDENCE PERTINENT AND MATERIAL TO  
THE CONTROVERSY.”**

**NUMBER OF CASES: 24**

**AWARD VACATED IN 3 CASES (12.5%).**

**SOURCE:**

This statutory ground for vacatur exists in one form or another in every state arbitration law, and in §10 of the FAA. The most common formulation of the standard is that found in the Uniform Arbitration Act (“UAA”):

§12(a). Upon application of a party, the court shall vacate an award where:

\* \* \*

(4) The arbitrators refused to . . . hear evidence material to the controversy . . . as to prejudice substantially the rights of a party.”

Section 12(a)(4) is unchanged in the Revised UAA, except that the arbitrators, under the Revised Act, are now admonished to “*consider*” evidence rather than to “*hear*” evidence.

The FAA standard is slightly different: One must allege that “ the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy.” The statute omits the UAA requirement that the refusal to hear evidence has substantially prejudiced the party seeking vacatur.

**STANDARDS APPLIED:**

The cases appear to pay little attention to the ostensible requirement that a party suffer “prejudice” on account of the refusal of an arbitrator to permit a witness to testify, or to put a document into evidence, or some like matter. Rather, the cases uniformly focus on whether a party had been “*deprived of a fair hearing. . . .* Such misconduct occurs when an arbitration panel fails to employ ‘basic notions of fairness and due process’ and ‘grossly and totally blocks a party’s right to be heard.’” (*Lee v. McDonald Securities, Inc.*, 2004 WL 2535277, \*3 (N.D. Ill. Sept. 27, 2004) (citations omitted). Thus, the inquiry focuses on whether the exclusion of evidence caused hearing to be unfair, as opposed to whether the party was prejudiced by the evidence’s exclusion. In this sense, the case law more closely tracks the standard found in §10 of the FAA: There the standard is not prejudice to the complaining party, but “*misconduct* in refusing to . . . hear evidence pertinent and material to the controversy.” (Emphasis added.)

**TYPES OF MISCONDUCT ALLEGED:**

**A. Unsuccessfully:**

- Arbitrator excluded a document from admission into evidence, where there was an agreement that exhibits were to be exchanged before the hearing and the document in question was not exchanged. Award confirmed. *B-S Steel of Kansas v. Texas Industries*, 321 F.Supp.2d 1214 (D. Kan 2004).
- Arbitrator refused to permit an expert to testify where the proffered expert was not listed on the party's witness list. *Hesfibel Fiber Optik v. Four S Group*, 315 F. Supp.2d 1365 (D. Fla. 2004).
- Arbitrator refused to permit the taking of a deposition (in a matter in which the arbitration clause permitted full-blown discovery) after the discovery cut-off date. Vacatur denied. *Landfill and Ecology v. Browning-Ferris*, 2004 WL 1398342 (Cal. App. 2d Dist. 2004).
- Arbitrator refused to listen to cumulative testimony (not "material"). *Ganguly v. Charles Schwab*, 2004 WL 213016 (S.D.N.Y. 2004).
- Arbitrator refused to permit rebuttal evidence. *Kaminsky v. Segura*, 2004 WL 1945007 (N.Y. Sup. Ct. 2004).
- When the hearing was reopened for the purpose of taking further testimony on the issue of remedy, the arbitrator refused to permit the introduction of evidence in the reopened hearing on the issue of liability. *Roe v. Cargill*, 333 F. Supp. 2d 808, 815 (D. Pa. 2004).

**B. Successfully:**

- The panel refused to permit an expert to testify with respect to the applicable standard of care, proclaiming that they were the experts, and that they were going to "decide what's going to be the appropriate standard to apply and whether the standard has been met in this case." The award was vacated, the court stating that "without [the expert's] testimony, plaintiff was prevented from presenting evidence that was material and pertinent to his case. We conclude that the panel's exclusion of [the expert's] testimony eviscerated plaintiff's case and thus amounts to a gross procedural impropriety." *Bordonaro v. Merrill Lynch, Pierce, Fenner & Smith*, 805 N.E.2d 1138 (Ohio App. 2004).
- In an arbitration involving a construction contract with the City of Bridgeport, the City contended that the respondent had illegally used a special relationship to obtain the contract. To establish that, the city wanted to use the testimony of one Pinto, who was a witness in a parallel criminal

trial involving the City's mayor. Pinto said that if called in the arbitration he would assert the Fifth Amendment; hence the City asked that the arbitration be postponed until Pinto had testified in the criminal trial, at which point it would attempt to use his testimony from that proceeding in the arbitration. The arbitrator refused to grant the continuance, and later also refused to admit a transcript of the testimony into the record. The Court stated that "as a result of his evidentiary rulings, [the Arbitrator] did not have before him all of the evidence necessary to properly decide the case. How he may have ruled after considering that evidence cannot be known. It is conceivable that, having considered the evidence which he excluded, he might have discounted its import or declined to find it credible. However, the court finds that by not allowing it, he deprived the City of a full and fair hearing." *City of Bridgeport v. The Kasper Group*, 2004 WL 2039692, \*4 (Conn. Super. August 17, 2004)

- The panel improperly determined that under the rules of the Massachusetts Fee Arbitration Board the panel could not consider a counterclaim, and hence refused to consider any evidence that related to the subject of the counterclaim. Award vacated. *Hague v. Piva*, 61 Mass.App.Ct. 223 (2004).

**V. VACATUR SOUGHT BECAUSE OF: MISBEHAVIOR BY AN ARBITRATOR BY WHICH THE RIGHTS OF A PARTY ALLEGEDLY WERE PREJUDICED.**

**NUMBER OF CASES: 42**

**AWARD VACATED IN 7 CASES. (17%).**

**SOURCE:**

Lumped together in this category are those miscellaneous non-statutory grounds, other than "manifest disregard," on which lawyers advocate for vacatur of an award. Those grounds include allegations that the award is irrational, violates public policy, or is arbitrary and capricious. There is no source in either the UAA (and individual state variants) or the FAA for any of these grounds; they are purely judge-made. Indeed, the drafters of the Revised UAA debated the issue of whether violation of public policy ought to be made a ground for vacatur, and expressly rejected it. See the Official Comment on Section 23(a)(2), (5), (6), and (c) of the RUAA. Nevertheless, violation of public policy was the most successful asserted ground in this category of cases, accounting for 3, or almost half, of the seven vacated cases.

**CIRCUITS' ACCEPTANCE OF NON-STATUTORY GROUNDS:**

The court in *Brabham v. A.G. Edwards & Sons*, 376 F.3d 377, 382 n.6 (5<sup>th</sup> Cir. 2004), stated that the circuits "are in disarray ..." with respect to nonstatutory grounds for vacatur, and described the situation as follows:

"*Cf. George Watts & Son v. Tiffany & Co.*, 248 F.3d 577, 580 (7<sup>th</sup> Cir.2001) (recounting confusion in the Seventh Circuit and commenting that '[t]he law in other circuits is similarly confused, doubtless because the Supreme Court has been opaque'). The Eleventh Circuit has accepted that an award may be vacated as arbitrary and capricious. *See Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 435 (11<sup>th</sup> Cir.1995). The Eleventh Circuit, however, stands alone. *See* Larry E. Edmondson, 1 *Domke on Commercial Arbitration* § 39:10 (3d ed. 2003) (characterizing the idea that an award may be vacated as arbitrary and capricious as a 'construct of the Eleventh Circuit').

"The Fourth, Seventh, and Tenth Circuits have implicitly rejected the Eleventh Circuit's position by enunciating accepted grounds for vacatur and rejecting all others. *See, e.g., Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10<sup>th</sup> Cir.2001); *IDS Life Ins. Co. v. Royal Alliance Assocs.*, 266 F.3d 645, 650 (7<sup>th</sup> Cir.2001); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4<sup>th</sup> Cir.1998). (However, these three circuits do not agree on what those accepted non-statutory grounds for vacatur are. The Fourth Circuit accepts only manifest disregard. *Apex*, 142 F.3d at 193. The

Seventh Circuit accepts only a limited version of manifest disregard. *See IDS*, 266 F.3d at 650. The Tenth Circuit accepts manifest disregard, violation of public policy, and denial of a fundamentally fair hearing. *See Sheldon*, 269 F.3d at 1206.)

“The First, Second, and D.C. Circuits have neither accepted nor rejected arbitrariness and capriciousness but have emphasized that vacatur is available only in very limited circumstances. *See, e.g., Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000); *Morani v. Landenberger*, 196 F.3d 9, 11 (1st Cir.1999); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682 (D.C.Cir. 1996).

“The Third, Eighth, and Ninth Circuits have recognized that an award may be vacated as completely irrational. *See, e.g., Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003), *cert. denied*, --- U.S. ----, 124 S.Ct. 1414, 158 L.Ed.2d 81 (2004); *G.C. & K.B. Invs. v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003), *cert. dismissed*, --- U.S. ----, 124 S.Ct. 980, 157 L.Ed.2d 810 (2004); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 292 n.2 (3d Cir. 2001). This test is ‘similar in nature in thrust to the ‘arbitrary and capricious’ test of the Eleventh Circuit.’ 1 Domke, *supra*, § 39:11. Some cases from these Circuits, however, suggest that ‘complete irrationality’ is simply a subset of a statutory ground for vacatur. *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 997 (9th Cir. 2003) (*en banc*) (“We have held that arbitrators ‘exceed their powers’ [under section 10(a)(4) of the FAA] not when they merely interpret or apply the governing law incorrectly, but when the award is ‘completely irrational’ or exhibits ‘manifest disregard of law.’”) (internal citations omitted); *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989) (considering in context of challenge under § 10(a)(4) whether award was completely irrational).”

## **STANDARDS APPLIED:**

### **VIOLATION OF PUBLIC POLICY:**

“An arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated fundamental policy. . . . An arbitration award made in direct contravention of constitutional protections, such as wholly disregarding the requirement for perfecting a mechanic’s lien on a homestead, would be of such a magnitude as to violate public policy.” *Action Box Co., Inc. v. Panel Prints, Inc.*, 130 S.W.3d 249, 252 (Tex. App. 2004).

“A court’s refusal to enforce an arbitrator’s interpretation of [agreements] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained

by reference to the laws and legal precedents and not from general considerations of supposed public interests . . . . [T]he party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated.” *Private Healthcare Systems, Inc. v. Torres*, 855 A.2d 987, 990 (Conn. App. 2004)

### **IRRATIONALITY:**

“While the term “irrationality” is oft bandied about in arbitration decisions and finds its way, almost inexorably, as the last of the losing litigator’s long litany of laments in actions to vacate an arbitration award, there is precious little precedent to delineate in this context what ‘irrational’ means. . . . For irrationality to be found, perhaps a Court should know it when it sees it.” *Banc of America Securities v. Knight*, 781 N.Y.S.2d 829, 836-37 (N.Y. Sup. Ct. 2004) (questioning whether irrationality is a ground for vacatur under New York law).

### **TYPES OF MISCONDUCT ALLEGED:**

#### **A. Unsuccessfully:**

- The award was allegedly impermissibly vague because the arbitrator did not make specific findings of fact. Vacatur denied. *Marchelletta v. Seay Construction Services, Inc.*, 593 S.E.2d 64 (Ga. App. 2004).
- Arbitrator reinstated physician who had been convicted of larceny. .” *Private Healthcare Systems, Inc. v. Torres*, 855 A.2d 987, 990 (Conn. App. 2004).

#### **B. Successfully:**

- Award violated public policy where arbitrator awarded a broker’s fee to a broker not licensed in the state where the property sold was located. *Kadlec v. Kadlec*, 679 N.W.2d 914 (Wis. App. 2004).
- Award violated public policy because the award would permit the prevailing party to profit from an historical fraud. *Commercial Union Insurance v. E.W. Lines*, 378 F.3d 204 (2d Cir. 2004).
- Arbitrator’s dismissal, as untimely, of a claim for reimbursement of no-fault payments was arbitrary and capricious where the claimant had submitted evidence documenting the date of the first payment and showing the claim was timely filed. *State Farm Mutual v. Mutual Service Casualty Company*, 2004 WL 2453223 (NY 2004).
- The panel, rather than award a lodestar fee (the submitted matter involved a shareholder’s derivative action) awarded what it considered a “reasonable” fee,

without considering the attorney's time incurred in prosecuting the action. A submission agreement provided that an attorney's fee award could be vacated "upon a determination by the court that the fee award was clearly erroneous either as to entitlement and/or amount." *Stutz v. Shepard*, 2004 WL 503601 (Conn. Super. Feb. 24, 2004).

#### **NOTEWORTHY CASES:**

***Hirsch v. Hirsch*, 4 A.D.3d 451, 774 N.Y.2d 48 (2004). *Hirsch* is a domestic relations case, in which the divorcing husband and wife submitted the questions of support and property distribution to a Bais Din for resolution under Jewish law. The working of the Bais Din is as follows (taken from the web site of Bais Din):**

**When the defendant responds to a summons the administrator of the Vaad will work to set a hearing time and date which is mutually convenient. Typically, a Bais Din session lasts approximately two hours. A complex case may require multiple sessions. Both parties will be asked to sign a binding arbitration agreement (Shtar Berurim). The agreement ensures that the Bais Din decision is upheld by all. A legally binding document, it makes the ruling of the Bais Din enforceable in civil court.**

**In the *Hirsch* case, the award of the Bais Din was vacated on the grounds that it was violative of public policy because the award (1) required the wife to withdraw a criminal complaint she had filed against her husband; (2) purported to dispose of property owned by one not a party to the proceeding; and (3) awarded the wife \$450 per month for four children, which violated New York's Child Support Standards Act. Although not discussed at all, the case at its core raises fascinating issues dealing with the use of arbitration for the purpose of providing an alternative forum to resolve disputes under ecclesiastical or other religious law.**

**VI. VACATUR SOUGHT BECAUSE: ARBITRATORS “EXCEEDED THEIR POWERS, OR SO IMPERFECTLY EXECUTED THEM THAT A MUTUAL, FINAL, AND DEFINITE AWARD UPON THE SUBJECT MATTER SUBMITTED WAS NOT MADE.”**

**NUMBER OF CASES: 101**

**AWARD VACATED IN 21 CASES (20.8%).**

**SOURCE:**

Section 10(a)(4) of the FAA provides that a court may vacate an arbitration award 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.” Section 12(a)(3) of the UAA, as enacted in many states, provides for vacatur where “the arbitrators exceeded their powers.” This provision has been carried forward in Section 20(a)(4) of the RUAA. In California, § 1286.2(a) of the Code of Civil Procedure provides that an award may be vacated if the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision.

**STANDARDS APPLIED:**

In determining whether the arbitrators exceeded their powers, the inquiry “focuses on whether the arbitrators had the power, based on the parties’ submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided the issue.” *Westerbeck Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 220 (2d Cir. 2002). “When determining whether the arbitrator exceeded his powers, the focus is on the issue submitted by the parties. If the award disposes of that issue, correctly or not, the arbitrator will be deemed to have acted within the scope of his authority.” *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003). The California courts follow the same standard: Arbitrators do not exceed their powers “merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators.” *Alexander v. Blue Cross of California*, 88 Cal.App.4<sup>th</sup> 1082, 1089 (2001).

**TYPES OF MISCONDUCT ALLEGED:**

**A. Unsuccessfully:**

- In a securities arbitration, after the claimant rested and the respondent moved to dismiss the proceedings for lack of proof, the arbitrators permitted the claimant to recall one of its witnesses to rebut the respondent’s motion to dismiss. *Ruei-Chan v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2004 WL 2072460 (S.D.N.Y. Sept. 8, 2004).

- Arbitrator awarded punitive damages of 1% of the equity of the respondent company pursuant to an arbitration agreement that waived claims of punitive damages “to the fullest extent permitted by law.” The applicable law (Missouri) did not permit a waiver of punitive damages. *Stark v. Sandberg, Phoenix & Von Gontard*, 381 F.3d 793 (8th Cir. 2004).
- Arbitration panel awarded consequential damages for design defects as part of an award of over \$1,000,000 to a furniture manufacturer arising from a dispute with the designer of a conveyor despite a warranty provision prohibiting the award of consequential damages in connection with the installation, use, or failure of the conveyor. *Action Industries, Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337 (5th Cir. 2004).
- The arbitrators entered an award individually against the general partner of the respondent, who participated in the arbitration as an individual as well as in his representative capacity as managing general partner, was proper. *Far Eastern Group I v. Hix*, 2004 WL 1932162 (Cal. App. 1 Dist. Aug. 31, 2004).
- The arbitrators had authority to construe the ambiguous remedies provision of the parties’ arbitration agreement and award treble damages for unfair and deceptive acts and practices under North Carolina law. *WMS, Inc. v. Weaver*, 602 S.E.2d 706 (N.C. App. 2004).
- In a dispute between insurance companies over a reinsurance contract, the panel did not exceed its powers by deciding whether a reinsurance broker had the authority to bind coverage on behalf of an insurance company and create valid insurance contracts. *Sphere Drake Insurance Limited v. All American Life Ins. Co.*, 2004 WL 442640 (N.D. Ill. Mar. 8, 2004).
- In an arbitration to determine the amount of attorneys’ fees payable to counsel for plaintiffs in litigation against the tobacco industry, the arbitrators did not exceed their powers by awarding attorneys’ fees that considered professional work performed in connection with lawsuits other than the lawsuit in question. *In re Brown & Williamson Tobacco Corp. v. Chesley*, 777 N.Y.S.2d 82 (N.Y. App. Div. 2004).
- Although the claimant advised the arbitrator he was not a proper party and did not appear for a portion of the arbitration hearing, the award holding the claimant was a proper party and was individually liable was upheld. *Rothenberg Sawasy Architects, Inc. v. Sternlicht*, 2004 WL 179495 (Cal. App. 2 Dist. Jan. 30, 2004).
- In a dispute between a county and a city over a contract regarding the cost of future capital improvements, the arbitration panel had authority to allocate to each party a share of the costs of future capital improvements as provided in the submission agreement. *County of Summit v. City of Cuyahoga Falls*, 2004 WL 785468 (Ohio App. Apr. 14, 2004).

- Claimant’s allegation that an award was “shocking” and “totally unsupported” did not provide evidence that the arbitrators exceeded their power. *Shoemaker v. First Level Capital, Inc.*, 2004 WL 2186614 (E.D. La. Sept. 28, 2004).
- An arbitration award denying attorneys’ fees to both parties was upheld in the face of a challenge by the claimant who alleged a right to recover attorneys’ fees under a lien foreclosure statute. *North Central Construction v. Siouxland Energy and Livestock Cooperative*, 2004 WL 2413394 (N.D.Iowa Oct. 26, 2004).
- Lost profits were properly included in an award of \$1,115,440 to a service provider under a software hosting agreement where the arbitrator found that language in the contract prohibiting recovery for lost profits was intended to protect both parties from damage claims from third parties and not to restrict the remedies available under the contract between them. *Corio, Inc. v. Liveperson, Inc.* 2004 WL 2260608 (Cal. App. 1 Dist. Oct. 8, 2004).

**B. Successfully:**

- The arbitrator awarded the claimant its full damages, ignoring the parties’ stipulation that the claimant had already recovered half of its damages from another party. The award was partially vacated and modified to correct the amount. *Williams Holding Company v. Willis*, 2004 WL 1838388 (Tenn. App. Aug. 17, 2004).
- Following a court order compelling arbitration, the arbitrator granted a motion to dismiss the arbitration because the arbitration clause in a healthcare service plan enrollment form was not in the legally prescribed format and did not contain certain required disclosures. The question of arbitrability was held to be for the court and not the arbitrator. *Malek v. Blue Cross of California*, 121 Cal.App.4th, 44, 16 Cal.Rptr.3d 687 (2004).
- Arbitrator exceeded his powers by awarding attorneys’ fees to the prevailing party in a divorce case where the parties’ arbitration agreement did not authorize such an award. *Hirsch v. Hirsch*, 4 A.D.3d 451, 774 N.Y.S.2d 48 (2004).
- Arbitrator violated two of the applicable arbitration rules, as stipulated by the two insurance company parties, by refusing to entertain a request for deferment of the arbitration hearing because of pending court actions and a possible statute of limitations issue. *Utica First Ins. Co. v. Republican Franklin Ins. Co.*, 2004 WL 749701 (N.Y. Dist. Ct. Apr. 2, 2004).
- Where an award stated that “the mathematical calculation of the profits earned will be undertaken by the attorneys” and the attorneys could not agree, the arbitrator failed to determine a question submitted that was necessary to determine the controversy. *Malaklou v. Kashani*, 2004 WL 693109 (Cal.App. Apr. 2, 2004).

- Parties to a law firm break-up agreed to dissolve the law firm and submit issues regarding the dissolution to the arbitrator. The arbitrator exceeded his authority by denying the dissolution and granting other relief. *Robinson v. West*, 2004 WL 178586 (Tex. App. Jan. 30, 2004).
- After a preliminary hearing conference call, an American Arbitration Association arbitrator entered an award deciding the case should not be heard by the AAA. Because no arbitration hearing actually occurred, the award was vacated and the case remanded for arbitration. *Sherer v. Fine Point Inspection, LLC*, 2004 WL 2039430 (Conn. Super. Aug. 10, 2004).
- An award was rendered against two entities affiliated with a party but those entities never agreed to arbitrate and were not bound by the arbitration agreement. *Schaad v. Susquehanna Capital Group*, 2004 WL 1794481 (S.D.N.Y. Aug. 10, 2004).
- In a dispute between a hotel owner and a hotel operator that the court had ordered to arbitration to determine the fair market value of the operator's interests, the arbitrators improperly ordered the hotel owner to pay a specific amount to the hotel operator, when the arbitrators' task instead was only to determine the fair market value of the operator's interests. *LHO New Orleans LM, L.P. v. MHI Leasco New Orleans, Inc.*, 869 So.2d 304 (La.App. Mar. 3, 2004).
- In an arbitration involving sexual harassment allegations by an employee against an employer, the arbitrator improperly apportioned the arbitration costs and fees between the parties where the employer had promised to pay all arbitration costs and fees. *Rivera v. Thomas*, 316 F.Supp.2d 256 (D. Md. 2004).
- An arbitrator exceeded his powers by adding a corporation as a claimant at the end of the arbitration and issuing an award in favor of the corporation and an individual claimant. Applying California law, the court corrected the error by striking the corporation and leaving intact the award against the individual. *Abbruzzese v. Torres-Morfin*, 2004 WL 1168019 (Cal.App. May 26, 2004).
- In an arbitration between former law partners following the withdrawal of certain partners and placement of the former firm in receivership, the arbitrator exceeded his powers in adjudicating claims initiated by one of the remaining partners, over the receiver's objection that the claims could be prosecuted only in the receiver's name, and exceeded his authority by declaring forfeiture of the withdrawing partners' capital accounts, a remedy that was not authorized by the partnership agreement. *O'Flaherty v. Belgum*, 115 Cal.App.4th 1044, 9 Cal.Rptr.3d 286 (2004).

**VII. VACATUR SOUGHT BECAUSE: ARBITRATOR “MANIFESTLY DISREGARDED” THE LAW.**

**NUMBER OF CASES: 52**

**AWARD VACATED IN 2 CASES (4%).**

**SOURCE:**

In addition to the statutory and other grounds discussed above, all federal circuits and many state courts recognize that an arbitral award may be vacated when an arbitrator has exhibited a “manifest disregard” of clearly applicable law. See *Birmingham News Co. v. Horn*, 2004 WL 1293993, \*19-21 (Ala. 2004) (surveying federal and state cases). The manifest disregard rule grew from *dicta* in a Supreme Court decision, *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (“the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation”), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). The Supreme Court has apparently approved the use of this test in review of arbitration awards. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (“parties [are] bound by [an] arbitrator’s decision not in ‘manifest disregard’ of the law”).

Courts uniformly reject an arbitrator’s alleged disregard of the *evidence* as a ground to vacate an award, but a showing that the award is fundamentally inconsistent with established facts may demonstrate an arbitrator’s manifest disregard of the law. An alleged disregard of facts may show manifest disregard of the law “when the facts are ‘legally dispositive’ and ‘so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law.’” *Nordahl Dev. Corp. v. Salomon Smith Barney*, 309 F. Supp.2d 1257, 1263 (D. Ore. 2004), *citing American Postal Workers*, 682 F.2d 1280, 1283 (9th Cir. 1982) (an arbitrator would manifestly disregard the law if he were to find an employee did not strike, a fact conclusively established by the record and dispositive of the legal issue). Thus a federal court may review the evidentiary record of an arbitration proceeding “for the purpose of discerning whether a colorable basis exists for the panel’s award so as to assure that the award cannot be said to be the result of the panel’s manifest disregard of the law.” *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004).

**STANDARDS APPLIED:**

“An arbitral award may be vacated for manifest disregard of the law ‘only if a reviewing court find[s] both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.’” *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004).

“[A] court may infer that the arbitrators manifestly disregarded the law if it finds that the error made by [them] is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator.” *Willemihh Houdstermaatschappij, BV v. Standard Microsystems Corp*, 103 F.3d 9, 13 (2d Cir. 1997)

“Courts can intervene to correct an arbitrator’s decision that manifests a ‘willful inattentiveness to the governing law.’ . . . This Court is not permitted to determine whether the arbitrator applied the law of contracts correctly, but only whether the arbitrator deliberately ignored the relevant law[.]” *Commercial Refrigeration, Inc. v. Layton Construction Co., Inc.*, 319 F. Supp.2d 1267, 1270-71 (D. Utah 2004).

“‘Requiring more than error or misunderstanding of the law, . . . a finding of manifest disregard means the record will show the arbitrators knew the law and explicitly disregarded it.’ . . . Moreover, errors in an arbitrator’s factual findings or in his interpretation of the law do not justify review or reversal of the award.” *Blake v. Transcommunications Inc.*, 2004 WL 955893, \*6 (D. Kan. 2004).

“‘Because ‘arbitrators are not required to elaborate their reasoning supporting an award,’ . . . ‘if they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law.’ . . . ‘In determining an arbitrator’s awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration.’” *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 803 (8th Cir. 2004).

“An arbitration award . . . must ‘fly in the face of established legal precedent’ for us to find manifest disregard of the law. . . . [A] court must find that the relevant law was clearly defined and that the arbitrator consciously chose not to apply that law. . . . [I]f a ‘reviewing court can find any line of argument that is legally plausible and supports the award, then it must be confirmed.’” *Mack v. Strategic Materials, Inc.*, 2004 WL 1987305, \*2 (6th Cir. 2004).

“Where, as here, arbitrators decline to provide a full explanation for their decision, the court, nevertheless, must confirm the award ‘if a ground for the arbitrators’ decision can be inferred from the facts of the case[.] . . . even if the ground for their decision is based on an error of fact or an error of law.’ . . . [The record need only provide] ‘a barely colorable justification for the outcome reached.’ . . . On the other hand, ‘when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account.’” *Prasad v. MML Investors Services, Inc.*, 2004 WL 1151735, \*4 (S.D.N.Y. 2004).

Where there is no written opinion, [the] court must confirm [the] award if it can ‘discern any colorable justification for the arbitrator’s judgment, even if that reasoning would be based on an error of fact or law,’ . . . [but] where [the]

explanation, if given, ‘would have strained credulity,’ lack of [a] written opinion may be considered in finding manifest disregard. . . . Vacating an award for manifest disregard is appropriate only in ‘those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.’ . . . This is not a situation where the Panel’s decision was contradicted by strong and overwhelming evidence or where any explanation, if given, ‘would have strained credulity.’” *Wedbush Morgan Securities, Inc. v. Robert W. Baird & Co.*, 320 F.Supp.2d 123, 127 (S.D.N.Y. 2004).

## **TYPES OF MISCONDUCT ALLEGED:**

### **A. Unsuccessfully:**

- Arbitrator who found mortgage company liable for unfair debt collection practices held the company’s contractual limitation on punitive damages was unenforceable, and awarded \$6 million in punitive damages in addition to actual damages of \$1,000. *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 803 (8th Cir. 2004).
- Arbitrators refused to admit in evidence the legal discussion and conclusions of an SEC investigative report unless the authoring official was available to testify, because the report was made as part of a settlement inadmissible under Fed. R. Evid. 408; and refused to give collateral estoppel effect to arbitration decisions in other cases against the same defendants on similar claims. *Bear Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 318 F. Supp.2d 199 (S.D.N.Y. 2004).
- Arbitrator ordered a managed health care provider to reinstate a surgeon it had terminated from its provider roster after learning that, years earlier, the surgeon had used credit card information from patient files to make telephone calls to adult entertainment venues. The arbitrator concluded that the surgeon’s conduct was caused by a temporary mental illness, that he had been rehabilitated, and that public policy required that the contract permitting termination at will should be limited to terminations for cause. *Private Healthcare Systems, Inc. v. Torres*, 855 A.2d 987 (Conn. App. 2004).
- Arbitrator applied Tennessee’s securities antifraud statute, where arbitration clause specified applicability of Tennessee law, but parties had not raised the securities antifraud statute in their arguments. *Blake v. Transcommunications Inc.*, 2004 WL 955893, \*6 (D. Kan. 2004).
- Where arbitration clause stated Texas law was applicable, arbitrators applied Texas choice of law rules, rather than Texas substantive law, and applied the law of Kansas as the state with the most significant relationship to the contract. *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.*, 321 F.Supp.2d 1214 (D. Kan. 2004).

- Arbitrator awarded prejudgment interest, over defendant's objection that the amount due was not liquidated until the arbitration hearing. *Corio v. LivePerson, Inc.*, 2004 WL 2260608 (Cal. App. 2004).
- Arbitrators refused to clarify their award, as directed by the district court in an order of remand. The district court had stated that clarification was "necessary and appropriate" in order for the district court to exercise its review powers. *Lincoln Nat'l Life Ins. Co. v. Payne*, 374 F.3d 672, 675 (8th Cir. 2004).

#### **B. Successfully:**

- *Birmingham News Co. v. Horn*, 2004 WL 1293993 at \*35-36 (Ala. 2004) (discussed below).
- In a dispute over a series of transactions by companies in which Leona Helmsley had an interest, regarding management of commercial properties, the arbitrators (1) disregarded clear principles of agency law by validating Helmsley's covert assignment of contracts for property management to a newly-formed company; (2) disregarded the existence of valid agreements which had terminated an option, finding instead that the option still existed and was validly exercised; and (3) disregarded the terms of partnership agreements in finding defects in a proxy procedure used, while the agreements did not specify proxy procedures. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 783 N.Y.S.2d 339, 344-45 (N.Y. App. Div. 2004) (applying Federal Arbitration Act).

#### **NOTEWORTHY CASES:**

***Birmingham News Co. v. Horn*, 2004 WL 1293993 (Ala. 2004) – In a dispute between the Birmingham News and its dealers, the Alabama Supreme Court held that because the dispute affected commerce, the FAA applied and preempted state law as to the grounds for vacating arbitration awards. The opinion exhaustively details the origin and development of the "manifest disregard of the law" standard through references in *dicta* in a series of U.S. Supreme Court decisions, and lists cases in each circuit, and many states, adopting manifest disregard as a ground for challenging an award. *Id.* \*19-21. The Court chose, as the most succinct standard, that the movant must show "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Id.* \*23. The Court rejected a series of arguments by the News that the arbitrators had disregarded contractual provisions limiting the plaintiffs' damages, a statute of limitations, and proof requirements for promissory fraud. But the Court held the panel manifestly disregarded the law in granting duplicative forms of recovery for each dealer's loss of his or her franchise: The panel awarded both the market value of the lost franchise *and* the future profits the dealer would have earned from the franchise over a period of 10-20 years, discounted to present value. The panel's decision stated that it had not awarded duplicative damages, thereby acknowledging its**

awareness that to do so would be impermissible, and one arbitrator dissented on the grounds that the awards amounted to a double recovery. *Id.* at \*35. To do the least violence to the substance of the award, the Court allowed the larger recovery for lost profits, and disallowed the smaller amount awarded for lost franchise value. *Id.* at \*36.

## VIII. INTERESTING PROCEDURAL ISSUES.

Although this was not our principal focus, our review of these cases disclosed a number of interesting procedural issues that can arise in the course of vacatur litigation. Very briefly, these were as follows:

1. The amount in controversy requirement for purposes of federal court diversity jurisdiction over a proceeding to vacate an award is measured by the amount at issue in the underlying arbitration, not the amount of the award. *Theis Research, Inc. v. Brown & Bain, et al.*, 386 F.3d 1180, 1183-85 (9<sup>th</sup> Cir. 2004).

2. State statutes often require a motion to vacate an award to be filed sooner than a motion to confirm. Failure to move to vacate within the prescribed time period may bar the losing party from seeking vacation in response to a later-filed motion to confirm. *See, e.g., Abd Allah v. Mourssi*, 680 N.W.2d 569, 572-74 (Minn.App. 2004); *Pitt v. Holt Development, LLC*, 604 S.E.2d 278, 279 (Ga.App. 2004). This can be a trap for the unwary for trial counsel.

3. Can a party seeking vacation on the ground of evident partiality obtain discovery (*e.g.*, to ascertain whether an arbitrator's disclosures were adequate) in the reviewing court to attempt to prove its allegations? Limited discovery into such issues apparently was permitted in *Fidelity Federal Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1310 (9<sup>th</sup> Cir. 2004). The Second Circuit has held that "clear evidence of impropriety" must be presented before post-award discovery into potential arbitrator bias will be permitted. *Lucent Technologies Inc. v. Tatung Co.*, 379 F.3d 24, 31 (2d Cir. 2004), *citing with approval Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 702 (2d Cir. 1978).

4. Should a reviewing court look to state arbitration law or to the FAA, when it applies, to govern the procedural requirements applicable to the arbitration? In *Fidelity Federal Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311-12 (9<sup>th</sup> Cir. 2004), the arbitration clause provided: "Disputes or controversies shall be submitted to and resolved by binding arbitration in accordance with the laws of the State of California and the rules of the American Arbitration Association." The Ninth Circuit interpreted this as an election of "state substantive law but federal procedural law. Rules relating to disclosure by an arbitrator and remedies for arbitrator bias or misconduct relate to the process of the arbitration rather than the substance of the dispute. We look to the FAA and federal law to determine whether Arbitrator Leib was evidently partial, whether vacation of the award was required and whether Fidelity's evident partiality challenge is waived."

5. To what extent does an arbitrator have a duty of reasonable investigation when preparing disclosures? "A full disclosure rule is rendered toothless if the corresponding duty to investigate is not enforced." *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F.Supp.2d 862, 886 (N.D. Tex. 2004), *citing Schmitz v. Zilveti*, 20 F.3d 1043, 1048-49 (9<sup>th</sup> Cir. 1994) ("That the lawyer forgot to run a conflict check or had forgotten that he had previously represented a party is not an excuse. . . . Requiring

arbitrators to make investigations in certain circumstances gives arbitrators an incentive to be forthright”).

6. *Carey v. Ablan*, 271 Wis.2d 820 (2004), adds fuel to the fire of those who advocate against reasoned awards. There Ablan, a party, moved to vacate an arbitration award alleging that the “arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy.” The court declined to do so, stating that it “has no means to review whether this occurred here, because Ablan failed to provide any record of the arbitration proceeding, whether Ablan adequately raised the issue, whether the panel did, in fact, refuse to consider evidence and why it may have done so, and whether the information offered was pertinent and material, cannot be determined. The issue is therefore waived.” *See also Brown v. Premiere Designs*, 266 Ga. App. 432 (2004) (the absence of a record precludes review of the claims of error by the arbitrator). As discussed above in Section VII, however, some other courts have looked askance at bare awards when reviewing for “manifest disregard.”

7. Where a panel bifurcates liability and damages, its issuance of an award announcing liability may be required to be both issued and signed by the panel within 30 days of the completion of the liability phase, even though the proceedings were not “closed” because the damages phase remained for hearing. In *JLM Marketing v. Stolthaven*, 2004 WL 1161851 (N.J. Super A.D. 2004), the court, on a motion to vacate, held that the panel, under the applicable AAA rule, lost jurisdiction on the 31st day, and that the appropriate remedy was to set aside the award determining liability, and to send the matter back to the panel to start over. This must be one of the first cases that deals with the relationship of the 30-day rule of AAA commercial Rule R41 to interim awards, especially in the context of a bifurcated hearing.<sup>3</sup>

8. Arbitrators have broad discretion to determine whether to give preclusive effect to an issue determined in a prior arbitration against the defendant, because arbitrators are not required to provide explanations for their decisions, and because arbitration decisions are subject only to circumscribed and heavily deferential judicial review. A party seeking offensive collateral estoppel based on a prior arbitration decision has the burden of “showing with clarity and certainty what was determined” by the prior judgment. *Bear Stearns & Co., Inc. v. 1109580 Ontario, Inc.*, 318 F. Supp.2d 199 (S.D.N.Y. 2004).

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<sup>3</sup> A more forgiving attitude toward untimeliness of an award was adopted by the court in *Hasbro, Inc. v. Catalyst USA, Inc.*, 367 F.3d 689 (2004). In *Hasbro*, following an AAA arbitration hearing conducted between October 2000 and March 2001, the panel requested additional briefing. When no award had been issued by November 2001, the respondent objected in writing to the untimeliness of the award. The arbitrators declared the hearing closed on December 5, 2001, and issued the award on January 2, 2002. The court upheld the arbitration award, finding that time was not of the essence under the arbitration agreement and noting that the issue of untimely performance by the arbitrators was not formally raised until November 2001.