Six Years After Hall Street*: The Continued Viability of Manifest Disregard, Jurisdiction by Jurisdiction*

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I. INTRODUCTION

The Federal Arbitration Act ("FAA") generally requires that state and federal courts enforce or "confirm" arbitration awards. FAA Section 10 sets forth four exceptions to this general rule—four grounds under which courts may "vacate" arbitration awards. In *Hall Street Associates v. Mattel (2008)*, the United States Supreme Court declared that these four grounds for vacatur are exclusive and that parties to an arbitration agreement cannot expand them through contract or otherwise.

Early commentators predicted that *Hall Street* would bar any further use of the manifest disregard doctrine, which allows for vacatur upon a court's finding that an arbitrator disregarded recognized law while rending an award. Indeed, as a ground for vacatur not expressly stated in FAA Section 10, manifest disregard seemed doomed under *Hall Street*'s broad language, especially to the extent the doctrine is understood as independent from rather than implicit within FAA Section 10.

Nevertheless, now six years after *Hall Street*, manifest disregard lives on, albeit in varying degrees of force across the country. In a jurisdiction by jurisdiction analysis, this Article examines the current state of manifest disregard, directing readers to recent decisions in every United States Court of Appeals. This Article further provides a history of American arbitration law as well as an overview of the FAA.

In concluding, this Article recommends that the Supreme Court soon supplement its *Hall Street* decision with a decisive declaration that manifest disregard is no longer viable, at least not when understood as a ground for vacatur independent of FAA Section 10. Out of over 250 cases reviewed in preparation for this Article, only three post-*Hall Street* decisions vacated arbitration awards based on manifest disregard. Thus, while many Courts of Appeals technically recognize manifest disregard post-*Hall Street*, the doctrine is dead in practice, existing at this point almost exclusively as an added cost of litigation and a drain on judicial resources.

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II. BACKGROUND

A. Brief History of American Arbitration Law

Parties have used arbitration as a form of alternative dispute resolution since at least the medieval period.[3] Sources suggest contemporary arbitration traces back to the Ecclesiastical courts of Europe and the laws of Ancient Rome.[4] Notwithstanding this rich history, early American courts exhibited extreme hostility towards arbitration, often eschewing arbitration through any and all means available.[5] In some cases, courts simply refused to compel arbitration despite a valid arbitration agreement, or refused to stay judicial proceedings despite pending arbitrations.[6] In other cases, courts upheld arbitration agreements only insofar as they left liability determinations for the judiciary, restricting arbitrators to the adjudication of particular facts.[7] In still other cases, courts permitted parties to revoke arbitration agreements *during* arbitration proceedings, so long as revocation occurred before the arbitrator rendered a final award.[8]

This early judicial apprehension toward arbitration stemmed from a fear of "ouster," the notion that parties cannot contract away courts of competent jurisdiction.[9] The first ouster doctrine cases involved

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[3] Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).

[4] Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595, 598 (1928).

[5] Hall Street Assoc. v. Mattel, 552 U.S. 576, 593 (2008) ("American courts were generally hostile towards arbitration."); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120–21 (1924) ("The federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to en force executory agreements to arbitrate disputes.").

[6] *See, e.g.*, Tobey v. Cnty. of Bristol, 3 Story 800 (C.C. D. Mass. 1845) (denying a right in equity to specific performance of an arbitration agreement).

[7] *See, e.g.*, Wood v. Humphrey, 114 Mss. 185, 186 (Sup. Jud. Ct. Mass. 1873) ("It has been long settled that agreements to arbitrate which entirely oust the courts of jurisdiction will not be supported either at law or in equity; although it is said that those which do not go to the root of the action, but are only preliminary thereto or in aid thereof—such as respect the mode of settling the amount of damage, or the time of paying it, or the like—will be sustained."); Martinsburg & P. R. Co. v. March, 114 U.S. 549, 550–54 (1885) (analyzing, within the context of a construction contract, an arbitration agreement which provided for one party's railroad engineer to "determine questions relating" to quality of work and compensation earned).

[8] *See* Nicholas R. Weiskopf, *Arbitral Injustice—Rethinking the Manifest Disregard Doctrine for Judicial Review of Awards*, 46 U. LOUISVILLE L. REV. 283, 292–96 (2007) (discussing at length the "revocation doctrine"); *see, e.g.*, U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008 (S.D.N.Y. 1915) (discussing briefly the "doctrine of revocability").

[9] The 68th Congress recognized fear of ouster as the driving force behind judicially created barriers to enforcement of arbitration agreements and awards. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1–2 (1924) (stating that courts typically "refused to enforce

insurance policies that contain terms calling for arbitration in the event of disputed claims.[10] In rejecting the validity of such terms, these early cases proffer a thought-provoking rationale: judicially created law gives power to contracts; the judiciary expresses this power by granting remedies in the event of a breach; arbitration agreements reject the judiciary's ability to grant remedies and thereby reject the very power of contract law, in turn rejecting the only law under which an arbitration agreement might be enforceable.[11]

Whatever the case with its rationale, the ouster doctrine was gradually abandoned during the 1800s as courts diverged from English common law and increasingly accepted arbitration within certain areas,[12] especially mercantile law.[13] The transition proved slow, however, and it was only through legislative action that judicial will was fully overborn, ultimately producing today's widespread acceptance of arbitration.[14] Among the most influential legislative actions was New York's 1920 arbitration statute,[15] which the United States Congress mimicked when drafting the FAA.

B. FAA Overview

First titled the United States Arbitration Act, in 1925 Congress enacted what is now referred to as the Federal Arbitration Act, or FAA.[16] Enacted during a rapidly expanding economy and driven by the desire for efficient dispute resolution, the FAA overrode lingering judicial

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specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction").

[10] *See* Home Ins. of New York v. Morse, 87 U.S. 445, 451–53 (1874) (collecting cases, some dating to the early 1700s); *see also* Vaden v. Discover Bank, 556 U.S. 49, 64 & n.14 (providing a brief history of the "ouster doctrine").

[11] *See Morse*, 87 U.S. at 552–53 (summarizing cases).

[12] Scholars suggest at least two reasons for the initial instances of judicial acceptance: (1) throughout the 1700s, American commerce expanded rapidly, leading to numerous disputes and the need for efficient adjudication; and (2) American common law came to increasingly honor "the intent of the parties," a practice which suggested the appropriateness of arbitration. *See* James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 748 (2009); *see, e.g.*, Hobson v. McArthur, 41 U.S. 182, 192–93 (1842) (enforcing an arbitration award based on the contracting parties' intent).

[13] Indeed, even early English common law distinguished "law merchant" from other areas of jurisprudence. *See* WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 569–70 (1922).

[14] *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860 151 (1977) (describing the initial judicial backlash against statutes furthering arbitration). *But see* Red Cross Line v. Atlantic Fruits Co., 264 U.S. 109, 120–21 (1924), which was decided just one year prior to Congress' enacting the FAA and which generally supported the enforcement of arbitration agreements, suggesting that courts might have developed strong policies favoring arbitration even without legislative action.

[15] Originally enacted as Act of Apr. 19, 1920, ch. 275, 1920 N.Y. LAWS 803.

[16] *See* Berger & Sun, *supra* note 12 at 754.

apprehension[17] and declared a national acceptance of arbitration. "[T]he purpose of the [FAA] was to assure those who desired arbitration . . . that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures."[18]

Having undergone several modifications since 1925, the FAA currently has three chapters. Chapter 1, titled "General Provisions," constitutes the FAA's thrust and is the primary focus of this Article.[19] Chapters 2[20] and 3[21] constitute implementing legislations for two distinct international arbitration conventions, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[22] and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").[23]

Note that the FAA applies in both state and federal court.[24] The FAA, however, is not a jurisdiction creating statute.[25] Thus, to litigate under the FAA in federal court, parties must show either: (i) diversity of citizenship and the requisite jurisdictional amount; or (ii) federal question subject matter.[26]

1. FAA Chapter 1

FAA "Chapter 1" is comprised of FAA Sections 1-16. Section 1 delineates Chapter 1's scope,[27] which the Supreme Court interprets as reaching to the "broadest permissible exercise of Congress' Commerce Clause power."[28] Accordingly, virtually all arbitration agreements fall

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[17] As discussed earlier, judicial distrust began fading in the 1800s; however, even by the mid-1920s, many courts and state legislatures remained hostile towards arbitration. *See* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) ("The problems Congress [sought to correct in enacting the FAA] were therefore twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.").

[18] *See id.* at 13 (internal quotations and marks omitted).

[19] 9 U.S.C. §§ 1–16 (2012).

[20] *Id.* at §§ 201–208.

[21] *Id.* at §§ 301–307.

[22] Commentators refer to the Convention as the New York Convention. For a brief historical survey of the Convention, see Indus. Risk Insurers v. M.A.N. Gutehoffnungshuttle GmbH, 141 F.3d 1434, 1440–41 (11th Cir. 1998).

[23] Commentators refer to the Convention as the Panama Convention. For a brief historical survey of the Convention, see Freaner v. Valle, No. 11CV1819 JLS (MDD), 2013 WL 4763418, at *5–6 (S.D. Cal. Aug. 22, 2013).

[24] *Keating*, 465 U.S. at 10, 16 n.10.

[25] Vaden v. Discover Bank, 554 U.S. 49, 55 (2009).

[26] *See, e.g.*, Peak Med. Okla. No. 5, Inc. v. Collins, 237 F. Supp. 2d 1287, 1289–91 (2002) (rejecting the notion that a federal question can be found merely in the parties' disagreement concerning whether the FAA preempts aspects of the Oklahoma Nursing Home Care Act).

[27] 9 U.S.C. § 1 (2012).

[28] Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 55 (2003).

under Chapter 1's scope, so long as they are contained within contracts that implicate interstate commerce.[29]

Section 2 is Chapter 1's most powerful provision, mandating that courts enforce arbitration agreements in much the same way they would any other contract.[30] Sections 3 through 8 provide various means through which courts may enforce arbitration agreements, including granting stays of litigation,[31] compelling arbitration,[32] appointing arbitrators,[33] enforcing an arbitrator's power to call witnesses,[34] and attaching property.[35]

Section 9 states that courts "must" confirm arbitration awards upon a party's motion "unless" Sections 10 or 11 authorize a court to do otherwise.[36] Section 10(a) then lists four grounds for vacatur, which serve as the only expressly stated grounds for vacatur in all of Chapter 1.[37] It is these four grounds listed below which the Supreme Court analyzed in *Hall Street* and which comprise much of this Articles focus:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
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> (4) 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 11 lists several grounds under which courts may modify arbitration awards, including the court finding an "evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award."[38] Sections 12

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[29] *See, e.g.*, Comanche Indian Tribe of Okla. v. 49, LLC, 391 F.3d 1129, 1132 (10th Cir. 2004) (Native American tribe's contracts with gaming machine lessor sufficiently implicated interstate commerce for arbitration clause to fall under FAA).

[30] 9 U.S.C. § 2 (2012).

[31] *Id.* at § 3.

[32] *Id.* at § 4.

[33] *Id.* at § 5.

[34] *Id.* at § 7.

[35] *Id.* at § 8.

[36] *Id.* at § 9.

[37] *Id.* at § 10.

[38] *Id.* at § 11(a).

through 16 detail various exemptions and procedural rules, none of which apply to our discussion.

2. FAA Chapters 2 and 3

FAA "Chapter 2" is comprised of FAA Sections 201-208, and "Chapter 3" is comprised of FAA Sections 301-307. Chapters 2 and 3 are the implementing legislations for the New York Convention and the Panama Convention, respectively.[39] To be clear, the Conventions themselves are the multinational treaties to which the United States has acceded. Chapters 2 and 3 are merely the vehicles through which American courts enforce those multinational treaties.[40]

Parties are subject to the New York Convention when: "(1) there is an agreement in writing to arbitrate [a] dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen."[41] The Panama Convention has a slightly broader reach, applying "when an arbitration arises from a commercial relationship between citizens of signatory nations."[42]

The two treaties set forth their own schemes for the recognition and enforcement of arbitration agreements and awards, which schemes are technically distinct from each other as well as from the Chapter 1 scheme discussed above. Yet, due to cross incorporation and the use of similar language, much overlap exists between the three schemes. For example, Article V of the New York Convention provides seven grounds under which a court may vacate an arbitration award.[43] The Panama Convention contains the same seven grounds for vacatur,[44] which

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[39] *Id.* at §§ 201–307.

[40] Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F.3d 277, 286 n.7 (3d Cir. 2010).

[41] Lim v. Offshore Specialty Fabrications, Inc., 404 F.3d 898, 903 (5th Cir. 2005). For a list of signatory nations and territories, see New York Convention Countries, NEW YORK ARBITRATION CONVENTION.ORG (last visited Apr. 3, 2014), http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.

[42] Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 257 F. Supp. 2d 681, 684 (S.D.N.Y. 2003). For a list of signatory nations and territories, see *B–35: Inter-American Convention on International Commercial Arbitration*, ORGANIZATION OF AMERICAN STATES, WASHINGTON D.C., DEPARTMENT OF INTERNATIONAL LAW, available at http://www.oas.org/juridico/english/sigs/b-35.html.

[43] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, *adopted* June 10, 1958, 21 U.S.T. 2517. Note that courts regularly find judicial interpretations of the New York Convention to be highly persuasive when analyzing the Panama Convention, and vice versa. *See, e.g.*, RZS Holdings AVV v. PDVSA Petroeos S.A., 598 F. Supp. 2d 762, 770 (E.D. Va. 2009) ("The substance of Articles V(1)(d) of the New York and [Panama] Conventions are sufficiently similar that the Court finds it appropriate for the analysis of a claim under Article V(1)(d) of the New York Convention to be instructive in an analysis under Article V of the [Panama] Convention.").

[44] Organization of American States, Inter–American Convention on International

grounds bear high resemblance to the four grounds listed above in Chapter 1 Section 10(a).

Adding to the overlap between the three schemes, FAA Chapters 2 and 3 both mandate (somewhat confusingly) that all of Chapter 1 apply to arbitration agreements subject to the New York and Panama Conventions, so long as Chapter 1 is not "in conflict" with the applicable Convention.[45] Thus, pursuant to Chapter 2, Chapter 1's language will stand in for the New York Convention's language unless Chapter 1's language directly conflicts with the New York Convention's. The same is true for the Panama Convention pursuant to Chapter 3.

Under this mandate, courts have developed vague guidelines outlining when Chapter 1 is to apply over the language of the Conventions. For example, in the case of arbitration agreements subject to the New York Convention, when hearing a party's motion to vacate an arbitration award, courts generally apply Chapter 1 over the language contained in the New York Convention whenever the disputed arbitration award was rendered within the United States.[46] However, when hearing a

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Commercial Arbitration art. 5, Jan. 30, 1975, 104 Stat. 448. The seven factors are listed here: (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside of suspended by a competent authority of the country in which, or under the law of which, that award was made. (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country. *Id.*

[45] 9 U.S.C. §§ 208, 307 (2012).

[46] *See, e.g.*, Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 19–20 (2d Cir. 1997); *see also* Atlas Chartering Servs., Inc. v. World Trade Grp., Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978) (holding that, because one party's property sat in the United States, aspects of Chapter 1 applied to an arbitration dispute between two foreign parties, despite the contract at hand calling for arbitration in London).

motion to vacate a foreign arbitration award, courts will look at only the New York Convention, to the exclusion of Chapter 1.[47]

For most purposes, because the three schemes share so much in common, the difference between applying the language of Chapter 1 over the language of the New York or Panama Conventions has little meaning.[48] But the distinction can be critical for purposes of our discussion, since many courts have utilized manifest disregard when reviewing under the language of Chapter 1, whereas they have declined to do so when reviewing under the language contained in the New York and Panama Conventions.[49] It seems, therefore, that manifest disregard will be available as a ground for vacatur only in: (i) domestic arbitration disputes directly subject to Chapter 1; and (ii) foreign arbitration disputes subject to the New York or Panama Conventions, but only in those instances where Chapter 1 applies over the language contained in Conventions.

Of course, in a post-*Hall Street* world, manifest disregard will be available only to the extent a jurisdiction continues to recognize the

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[47] Admart AG v. Stephen and Mary Birch Found., Inc., 457 F.3d 302, 308 (3d Cir. 2006) (collecting cases). Note that in the case of arbitration agreements subject to the Panama Convention, courts seem even quicker to apply the language of Chapter 1 and often make no distinction between foreign and domestic arbitrations. *See, e.g.*, Banco de Seguros del Estado v. Mutual Marine Office, Inc., 257 F. Supp. 2d 681, 684 (S.D.N.Y. 2003) (seeming to assume that Chapter 1 and aspects of the Panama Convention are totally interchangeable). As for why courts are quicker to apply Chapter 1 within the Panama Convention context compared to the New York Convention context, the difference might be explained in that arbitration agreements are not subject to the New York Convention when a United States citizen is a party, whereas United States citizens may be parties to agreements subject to the Panama Convention, making the application of United States law more appropriate in the latter context. For examples of United States citizens contracting to arbitrate with foreigners, see Banco de Seguros del Estado v. Mutual Marine Offices, Inc. (Banco I), 230 F. Supp. 2d 362, 364 (Uruguayan reinsurer and American reinsurer formed a contract held subject to the Panama Convention); Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 43 (2d Cir. 1994) (arbitration agreement between Guatemalans and Americans held subject to Panama Convention).

[48] *See, e.g.*, Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro, No. 00 C 6703, 2001 WL 322005, at *3 (N.D. Ill. Apr. 2, 2001) (making no substantive distinction between Chapter 1 language and that of the Conventions).

[49] *See, e.g.*, M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 850–51 (6th Cir. 1996) (stating that manifest disregard will apply to Chapter 1, Section 10 but not to the language contained in the New York Convention); Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 257 F. Supp. 2d 681, 684–85 (S.D.N.Y 2003) (carrying the manifest disregard doctrine along with Chapter 1 when applying Chapter 1 to an arbitration agreement subject to the Panama Convention). Several older cases provide further support for the notion that manifest disregard does not exist in the New York or Panama Conventions. *See, e.g.*, Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 181–82 (S.D.N.Y. 1990) (declining to extend manifest disregard to an arbitration agreement subject to the New York Convention); Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160, 167 (S.D.N.Y. 1987) ("[T]he 'manifest disregard' defense is not available under . . . the [New York] Convention . . . .").

doctrine at all, an issue which is the central feature of this Article and which we discuss in detail below.

C. Early Interpretation of the FAA

Congress' enactment of the FAA in 1925 left numerous unanswered questions for the courts. In fact, early litigants questioned the constitutionality of the Act altogether.[50] Other important questions involved the scope of a court's power under FAA Section 3 to stay pending judicial proceedings in light of ongoing arbitrations.[51] More nuanced questions involved intricacies such as whether a motion to confirm an arbitration award should be treated as a civil cause of action even where the underlying arbitration award related to an admiralty cause of action.[52]

Courts eventually came to wrestle with the question of when vacatur of an arbitration award was appropriate under FAA Section 10(a). While paying lip service to the notion that Section 10(a)'s language forbid vacatur except upon the four limited grounds it outlined,[53] all courts ultimately develop "judicially named" grounds for vacatur.[54] Today, most of the various judicially named grounds—*e.g.*, irrationality,[55] arbitrary and capricious[56]—are generally referred to simply as "manifest disregard."

D. Manifest Disregard and the Pre-*Hall Street* Standards

The phrase manifest disregard comes from dicta in the 1953 case of *Wilko v. Swan*, where the Supreme Court wrote, "[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject . . . to judicial review for error in interpretation."[57] In distinguishing an arbitrator's "interpretation" of the law from its

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[50] *See* Marine Transp. Corp. v. Dreyfus, 284 U.S. 263, 278–79 (1932) (upholding the constitutionality of the FAA in the face of an attack claiming that courts lacked the power to compel specific performance to arbitrate under their admiralty and maritime jurisdiction).

[51] *See* Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 453 (1935) (holding that power to stay judicial proceedings under FAA Section 3 is not conditioned on a court's power to compel arbitration under Section 4).

[52] Cities Serv. Oil Co. v. Am. Mineral Spirits Co., 22 F. Supp. 373, 376 (S.D.N.Y. 1937) (ultimately ignoring the question and confirming the underlying arbitration award).

[53] *See, e.g.*, The Hartbridge, 62 F.2d 72, 73 (2d Cir. 1932) (denying a motion to vacate an arbitration award and providing a narrow reading of Section 10).

[54] *See* Jack Jarrett, Note & Comment, *What's in a Name? Why Judicially Named Grounds for Vacating Arbitral Awards Should Remain Available in Light of Hall Street*, 20 GEO. MASON L. REV. 909, 915–17 (2013).

[55] *See* French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986) ("An arbitrator's decision must be upheld unless it is 'completely irrational.'")

[56] *See* USPS v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 847 F.2d 775, 778 (11th Cir. 1988).

[57] Wilko v. Swan, 346 U.S. 427, 436–37 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 590 U.S. 477, 479–80 (1989).

"manifest disregard" of the law, the Court cited to *The Hartbridge*, which in turn cited to *Wilkins v. Allen*, a pre-FAA New York Court of Appeals case declaring that "a court will not [vacate] an [arbitration] award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established."[58]

By the time of the Supreme Court's 2008 decision in *Hall Street*, parties routinely challenged arbitration awards based on manifest disregard and each federal circuit court had declared its own articulation of the doctrine.[59] Each circuit's articulation generally centered around the sentiment expressed above by the New York Court of Appeals in *Wilkins v. Allen*, although significant variations eventually emerged.

As a foundational requirement, before vacating an award based on manifest disregard, almost all circuits required a showing that an arbitrator deliberately ignored law that was known to him at the time he rendered his decision.[60] On top of this requirement, several circuits required that the ignored law be clearly established or "well defined . . . and clearly applicable to the case."[61] The Fifth Circuit utilized what was arguably the most rigid standard, requiring that an arbitrator's error of law be "obvious" and "instantly perceive[able] by the average person qualified to serve as an arbitrator."[62] The Seventh Circuit standard was probably the most idiosyncratic, requiring that an arbitrator (1) "direct parties to violate the law;" or (2) render an order that does not "adhere to the legal principles specified by the [parties' arbitration agreement]."[63]

Despite the circuits' diverging manifest disregard standards, a consistent theme emerges upon examination of the relevant cases: courts

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[58] *Id.* at 437 n.24; The Hartbridge, 62 F.2d 72, 73 (2d Cir. 1932); Wilkins v. Allen, 169 N.Y. 494, 496 (1902).

[59] McCarthy v. Citigroup Global Mkts., Inc., 463 F.3d 87, 91 (1st Cir. 2006); Hoeft v. MVL Grp., Inc., 343 F.3d 57, 64 (2d Cir. 2003); Dluhos v. Strasberg, 321 F.3d 365, 370 (3d Cir. 2003); Three S Delaware, Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 527 (4th Cir. 2007); Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395–96 (5th Cir. 2003); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 420–21 (6th Cir. 1995); Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008); Manion v. Nagin, 392 F.3d 294, 298 (8th Cir. 2004); Collins v. D.R. Horton, Inc., 505 F.3d 874, 879 (9th Cir. 2007); Dominion Video Satellite, Inc. v. Echostar Satellite LLC, 430 F.3d 1269, 1275 (10th Cir. 2005); Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1017 (11th Cir. 1998); Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 821 (D.C. Cir. 2007).

[60] *See, e.g.*, LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702, 706 (D.C. Cir. 2001) ("[T]he arbitrators [must have known] of a governing legal principle yet refused to apply it or ignored it altogether." (quoting DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997)).

[61] *See, e.g., id.*; Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 136 (6th Cir. 1996) ("An arbitration panel only acts in manifest disregard of the law if the applicable legal principle is clear and well-settled and it refuses to follow that legal principle.").

[62] *Prestige Ford*, 324 F.3d at 259.

[63] *See Halim*, 516 F.3d at 563; Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2006).

rarely and only in the most egregious of circumstances vacated based on manifest disregard. Indeed, various sources suggest that manifest disregard challenges enjoyed pre-*Hall Street* success rates of approximately five percent. The Second Circuit itself noted that between the years 1960 and 2003 it vacated only four arbitrations awards based on manifest disregard.[64] In one study from 2005, manifest disregard emerged as the least effective ground for vacatur, leading to vacatur in only three percent of cases; other vacatur grounds like "arbitrator misbehavior" led to vacatur in approximately fifteen percent of cases.[65]

Nevertheless, manifest disregard enjoyed at least some pre-*Hall Street* success. One pre-*Hall Street* vacatur based on manifest disregard occurred in *Hardy v. Walsh Manning*, a Second Circuit decision from 2003 in which an investor brought several claims in arbitration against the brokerage firm Walsh Manning and two of its employees. The arbitration panel ultimately found one employee and Walsh Manning jointly liable for almost three million dollars in damages "based upon the principles of respondeat superior."[66] In vacating the award and remanding to the arbitration panel for clarification, the Second Circuit noted that all parties to the arbitration agreed that an employee could not be liable under respondeat superior given the facts presented. In fact, the investor had apparently conceded as much to the arbitration panel in briefs.[67] Thus, notwithstanding knowledge of the correct legal principle, the arbitration panel misapplied respondeat superior and in turn held an individual liable for millions of dollars in damages despite "no finding of [personal] wrongdoing."[68]

Another vacatur based on manifest disregard occurred in *Gas Aggregation v. Howard Avista Energy*, an Eight Circuit decision from 2003 in which two wholesale "gas traders" arbitrated disputes arising out of a joint venture.[69] The arbitration panel ultimately awarded one wholesaler attorneys' fees pursuant to the Minnesota Consumer Fraud Act, which provides for attorneys' fees in certain consumer actions. In rendering its award, however, the arbitration panel cited a Minnesota Supreme Court case which declared that attorneys' fees were unavailable in despites like the one at hand, namely because the two litigants to the arbitration proceeding were wholesalers, not consumers. In fact, the arbitration panel had stated, puzzlingly, "[we have been] presented [] with a decision

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[64] Hardy v. Walsh Manning Sec., LLC, 341 F.3d 126, 130 (2d Cir. 2003).

[65] Lawrence R. Milles, et al., *Vacating Arbitration Awards Study Reveals Real-World Odds of Success by Grounds, Subject Matter, and Jurisdiction*, DISPUTE RESOLUTION MAGAZINE (Summer 2005). *But see* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 189 (2008) (finding that manifest disregard succeeded in 7.1% of cases).

[66] *Hardy*, 341 F.3d at 128.

[67] *Id.* at 130.

[68] *Id.*

[69] Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC, 319 F.3d 1060, 1069 (8th Cir. 2003).

of the Minnesota Supreme Court holding that the Consumer Fraud Act does not apply to [the] dispute [at hand]."[70]

Other vacaturs based on manifest disregard present similarly bewildering behavior from arbitrators, and all inevitably involve arbitrators flouting well-settled legal principles readily applicable to the facts at hand.[71]

III. THE *HALL STREET* DECISION

The *Hall Street* case began as a dispute between landlord Hall Street Associates and tenant Mattel, Inc. The dispute involved two issues, whether Mattel could terminate its lease and whether Mattel must indemnify Hall Street for various costs associated with environmental pollution. On the first issue, the United States District Court for the District of Oregon ruled for Mattel after a bench trial. Following the trial, the parties agreed to arbitrate the indemnification issue. The ensuing arbitration agreement called for judicial vacatur or modification of the arbitration award "(i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."[72]

The appointed arbitrator eventually rendered a decision for Mattel, which Hall Street then sought to vacate in the District Court based on the "legal error" standard of review spelled out in the parties' arbitration agreement. Siding with Hall Street, the District Court vacated the arbitration award and remanded to the arbitrator for further proceedings. In doing so, the District Court expressly relied on the "legal error" standard set out in the parties' agreement, despite the standard clearly exceeding the level of review contemplated by the language in FAA Section 10(a). To support its use of the heightened standard, the District Court cited a Ninth Circuit decision which read the FAA as allowing parties to dictate in arbitration agreements judicial standards of review distinct from those listed in FAA Section 10(a).[73]

On remand from the District Court, the arbitrator rendered a new arbitration decision, this time in favor of Hall Street. Both Mattel and Hall Street then sought to modify this second arbitration award in the District Court. After various appeals, the question ultimately litigated before the Supreme Court was whether arbitration agreements subject to

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[70] *Id.* at 1069.

[71] *See, e.g.*, Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 847 (6th Cir. 2003); Coca–Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688, 959 F.2d 1438, 1440–41 (8th Cir.1992).

[72] Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 579–81 (2008).

[73] *Id.*

the FAA may call for judicial review above that which Congress outlined in FAA Section 10(a).[74]

The Court answered in the negative, stating that the grounds for vacatur listed in Section 10(a) are "exclusive" and not amenable to contractual expansion. In reaching this conclusion, the Court rejected two strong arguments from Hall Street.[75]

First, Hall Street argued that because the FAA seeks to further arbitration primarily through honoring the intent behind arbitration agreements, courts should apply whatever standard of review parties happen to agree upon. The Court rejected this, claiming that the FAA's purpose was not merely to honor arbitration agreements, but also to provide great deference towards arbitration through limited judicial review and expedited enforcement of arbitration awards. The Court noted that FAA Section 9 states that courts "must" confirm arbitration awards "unless" Section 10(a)'s vacatur or Section 11's modification standards apply. Thus, the Court concluded, the FAA endorses parties' indentions only to the extent those intentions are consistent with Section 10(a) and 11.[76]

Second, Hall Street argued that its contractually expanded judicial review was enforceable because it called for a standard that was no more expansive than that regularly applied by the courts—manifest disregard. That is, Hall Street argued that its contract merely called for judicial review in accordance with that condoned by the Supreme Court's 1935 language in *Wilko v. Swan*: "[T]he interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject . . . to judicial review for error in interpretation."[77]

The Court rejected this argument on numerous grounds. First, it was not immediately clear that the Hall Street arbitration agreement called merely for a manifest disregard standard, the agreement seeming to go beyond manifest disregard in naming *any* legal error as grounds for vacatur. But more important for our purposes, the Court called into question the very meaning of its earlier *Wilko* language, writing:

> Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." We,

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[74] *Id.*
[75] *Id.* at 586.
[76] *Id.*
[77] *Id.* at 584–85

> when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.[78]

Indeed, before the Court's *Hall Street* decision, although lower courts had all applied a manifest disregard standard, they had done so without express authorization from the Supreme Court. The *Hall Street* decision highlighted this lack of authorization. The decision, moreover, suggests that manifest disregard is improper to the extent it represents a standard of review independent from the four listed vacatur grounds in FAA Section 10(a). On the other hand, the doctrine might remain viable to the extent it represents a standard of review already implicit in Section 10's stated grounds.

IV. POST *HALL STREET* LANDSCAPE

Introduction. Every Court of Appeals has reacted in one way or another to the difficult question that *Hall Street* left open. The Second Circuit's reaction constitutes what has become the most popular: declare that manifest disregard is still viable after *Hall Street*, but not as a ground for vacatur independent of FAA Section 10(a), only as a ground for vacatur implicit within FAA Section 10(a)(4), which allows for vacatur when arbitrators "exceed their authority." Other reactions from the circuits include declaring manifest disregard wholly defunct under *Hall Street*'s reading FAA Section 10(a) as "exclusive." Still other circuits have not directly answered the question of manifest disregard's continued viability, instead assuming *arguendo* that the doctrine survives while continuously rejecting its application to challenged arbitration awards.

Whatever the case with each circuit's individual reaction, it is clear that post-*Hall Street* courts will vacate virtually no arbitration awards based on manifest disregard. No matter how much lip service a circuit pays to the doctrine's survival, review of over 250 cases revealed only three successful manifest disregard challenges.

First Circuit. The First Circuit has waivered in its opinion of whether manifest disregard survived *Hall Street.* On the one hand, the Circuit's 2008 opinion in *Ramos–Santiago v. UPS* stated in dicta, "we acknowledge the Supreme Court's recent holding [in *Hall Street*], that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]."[79] On the other hand, in the more recent case of *Bangor Gas v. H.Q. Energy Services*

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[78] *Id.* at 585 (citations omitted).

[79] Ramos–Santiago v. UPS, Inc., 524 F.3d 120, 124 n.3 (1st Cir. 2008) (upholding under Puerto Rico state arbitration law an arbitrators ruling that a UPS employee had violated a collective bargaining agreement when deliberately failing to deliver packages) (quotations and citations omitted).

(2012), the Circuit refused to address the question of whether manifest disregard remains viable. Instead, the Circuit assumed *arguendo* that the doctrine survives, ultimately concluding that the arbitrator at issue had not committed manifest disregard.[80]

Faced with these two decisions, district courts within the First Circuit have continued applying manifest disregard, arguing that the Circuit has not expressly overruled the doctrine.[81] In applying the doctrine, district courts use the First Circuit's pre-*Hall Street* manifest disregard standard, under which a movant must show that the arbitrator's decision is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."[82]

Review of over twenty relevant cases from within the First Circuit revealed no post-*Hall Street* decision vacating an arbitration award based on manifest disregard.

Second Circuit. The Second Circuit has expressly concluded that manifest disregard survives *Hall Street*, albeit with limited force to be applied only in egregious circumstances. The Circuit reached this conclusion in *Stolt-Nielsen v. AnimalFeeds (2008)*, reasoning that while *Hall Street* bars manifest disregard when understood as a standard of review distinct from FAA Section 10(a), manifest disregard is viable when understood as implicit within Section 10(a).[83] Specifically, Section (10)(a)(4) calls for vacatur when arbitrators "exceeded their powers, or so imperfectly execute[] them that a mutual, final, and definite award upon the subject matter submitted was not made."[84] The Circuit argues that Section 10(a)(4) implicitly encompasses at least a limited manifest disregard doctrine, since arbitrators necessarily "exceed their powers" when they know "of the relevant legal principle, appreciate[] that this principle control[s] the outcome of the disputed issue, and nonetheless willfully flout[] the governing law by refusing to apply it."[85]

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[80] Bangor Gas Co., LLC v. H.Q. Energy Services (U.S.), Inc., 695 F.3d 181, 187 (1st Cir. 2012) (upholding an arbitration decision addressing a dispute arising out of a gas transportation contract).

[81] *See, e.g.*, Union De Tronquistas De Puerto Rico, Local 901 v. UPS, Inc., 960 F. Supp. 2d 354, 358 (D. P.R. 2013); OneBeacon Am. Ins. Co. v. Swiss Reinsurance Am. Corp., No. 09-CV-11495-PBS, 2010 WL 5395069, at *1 (D. Mass. Dec. 23, 2010) (unreported).

[82] *See* Ramos–Santiago, 524 F.3d at 124 (citing McCarthy v. Citigroup Global Mkts. Inc., 463 F.3d 87, 91 (1st Cir.2006); *see, e.g., Union De Tronquistas*, 960 F. Supp. 2d at 358.

[83] Stolt-Nielsen SA v. AnimalFeeds Intern. Corp., 548 F.3d 85, 93–95 (2d Cir. 2008), *rev'd on other grounds* 559 U.S. 662 (2010).

[84] 9 U.S.C. § 10(a)(4) (2012).

[85] *Stolt*-Nielsen, 548 F.3d at 95 (internal marks and citations omitted).

The Circuit has not addressed the scope of manifest disregard since its *Stolt-Nielsen* decision. Instead, in a series of non-binding summary orders, the Circuit has merely echoed the manifest disregard standard it articulated in *Stolt-Nielsen*: "(1) we first consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators, (2) we must then find that the law was in fact improperly applied by the Arbitrator, leading to an erroneous outcome, and finally (3) we determine whether the arbitrator must have known of the applicable law's existence, and its applicability to the problem before him."[86] None of the Second Circuit decisions since *Hall Street* have vacated an arbitration decision based on manifest disregard.

District courts within the Second Circuit seem to apply manifest disregard in accordance with *Stolt-Nielsen* insofar as they recognize manifest disregard but refuse to actually vacate arbitration awards based on the doctrine.[87] In reviewing over thirty cases from the Southern District of New York, we found not one granting a party's motion to vacate based on manifest disregard.[88]

Third Circuit. During the five years after the Supreme Court's decision in *Hall Street*, the Third Circuit did not directly examine the manifest disregard doctrine in any published opinion.[89] In a series of unpublished opinions, however, the Circuit suggested it would follow the Second Circuit's approach—assume the continued viability of manifest disregard but apply it so narrowly as to extinguish any real chance of vacatur.[90] Indeed, review of over fifteen district court cases from the

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[86] *See, e.g.*, Sotheby's Int'l Realty, Inc. v. Relocation Grp., 588 Fed.Appx. 64, 65 (2d Cir. 2015) (summary order); Cardell Fin. Corp. v. Suchodolski Assoc., Inc., 409 Fed.Appx. 458, 459 (2d. Cir. 2011) (summary order).

[87] *See, e.g.*, Holdings, Inc. v. Jiffy Intern. AS, Nos. 13 Civ. 2284(JGK), 13 Civ. 2755(JGK), 2014 WL 1141717, at *19 (S.D.N.Y. Mar. 21, 2014) (upholding arbitration award); Century Indemnity Co. v. AXA Belgium, No. 11 Civ. 7263(JMF), 2012 WL 4354816, at *6 (S.D.N.Y. Sept. 24, 2012) (upholding arbitration award that decided various issues pertaining to a reinsurance dispute); *but see* Sotheby's Int'l Realty, Inc. v. Relocation Grp., LLC, 987 F. Supp. 2d 157, 168 (D. Conn. 2013) (applying manifest disregard to vacate arbitration award), *rev'd by* 588 Fed.Appx. 64, 65 (2d Cir. 2015) (summary order) (finding that district court erred in vacating arbitration award based on manifest disregard).

[88] *See generally* Rai v. Barclays Capital, Inc., 739 F. Supp. 2d 364 (S.D.N.Y. 2010) (upholding arbitration decision despite allegations that arbitrators tampered with evidence and took only five minutes to deliberate, concluding that such allegations "do not support [a] claim[] of partiality, because there is no reason to believe the [the arbitrators' actions] prejudiced the determination of [the] case").

[89] *See* Fluke v. CashCall, Inc., 792 F. Supp. 2d 782, 785–86 (E.D. Pa. 2011) ("[The Third Circuit has] specifically declined to resolve whether manifest disregard of the law remains a valid basis for vacatur after the Supreme Court's *Hall Street* decision.").

[90] *See, e.g.*, Bapu Corp. v. Choice Hotels Intern., Inc., 371 Fed.Appx. 306, 309–10 (3d Cir. 2010) (unpublished) (concluding that arbitrator did not manifestly disregard the law despite litigant's alleging, among other things, arbitrator's conflict of interest); Andorra Services, Inc. v. Venfleet, Ltd., 355 Fed.Appx. 622, 627 (3d Cir. 2009) (unpublished) ("Whether [manifest disregard] continues to exist today as an independent, viable ground

Third Circuit, all decided within the five years proceeding *Hall Street*, revealed not one vacating an arbitrator's award based on manifest disregard. Although none vacated based on manifest disregard, all the district court opinions recognized the doctrine's viability or at least assumed *arguendo* that the doctrine survived *Hall Street*. In recognizing the doctrine's continued viability during this five year period, the district courts articulated the Third Circuit's pre-*Hall Street* manifest disregard standard: (1) the arbitrators deliberately ignored law that was known to them; and (2) there exists no "barely colorable" justification for the arbitrators' decision.[91]

After the five year period discussed above, the terrain changed slightly when the Third Circuit decided *Akers v. United Steel (2013)*, a published opinion reversing a district court decision to vacate an arbitration award.[92] The arbitrator in *Akers* had decided in favor of an employee regarding a collective bargaining agreement. The district court reasoned that the arbitrator's decision did not "draw its essence" from the collective bargaining agreement and was thus open to vacatur. In reversing the district court, the Third Circuit stated that "a reviewing court may disturb an arbitrator's award only where there is manifest disregard of the agreement, totally unsupported by principles of contract construction . . . ."[93]

Since the *Akers* decision, district courts within the Third Circuit have applied the *Akers* articulation of manifest disregard when confronted with arbitrations deciding matters of collective bargaining agreements. Thus, within the collective bargaining agreement context, it seems that Third Circuit courts will now uphold arbitration decisions attacked on grounds of manifest disregard so long as the decision is not "totally unsupported by the principles of contract construction."[94]

Outside the collective bargaining agreement context, *Akers* seems to have played no role, district courts continuing with their pre-*Akers* pattern: when faced with a manifest disregard challenge, pay lip service to the Third Circuit's pre-*Hall Street* standard while actually vacating no

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for vacatur [is] an issue we need not decide, [because] this case does not evidence one of those extremely narrow circumstances supporting an issue to vacate." (internal citations and quotations omitted)).

[91] *See, e.g.*, Popkave v. John Hancook Distribs. LLC, 768 F. Supp. 2d 785, 790–91 (E.D. Pa. 2011).

[92] Akers Nat. Roll Co. v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Industrial and Serv. Workers Int'l Union, 712 F.3d 155, 160, 165 (3d Cir. 2013).

[93] *Id.* at 160.

[94] *See, e.g.*, Phillips 66, Bayway Refinery v. Int'l Brotherhood of Teamsters, Local 877, No. Civ. 2:13-4910 (WJM), 2014 WL 320384 (D. N.J. Jan. 29, 2014) (upholding arbitration decision); Akers Nat. Roll Co. v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Industrial and Serv. Workers Int'l Union v. ALCOA, Inc., No. 2:12cv164, 2013 WL 4735170, at *2–3 (W.D. Pa. Sept. 3, 2013) (same).

arbitration awards.[95]

Other than the district court opinion in *Akers*, review of over fifteen relevant cases from within the Third Circuit revealed no post-*Hall Street* case vacating an arbitration award based on manifest disregard.

Fourth Circuit. Manifest disregard survives in the Fourth Circuit pursuant to *Wachovia Securities v. Brand (2012).* In *Brand*, the Circuit declared that its pre-*Hall Street* standard still controls: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle."[96]

While the *Brand* decision itself ultimately confirmed the arbitration award at issue, research revealed one recent Fourth Circuit opinion vacating an arbitration award based on manifest disregard. Although unpublished, [97] *Dewan v. Walia (2013)* exhibits at least a minimal commitment to vacating those arbitration decisions which are totally divorced from the law.[98]

Dewan involved a release agreement that an employee signed during termination negotiations with his employer. The agreement released the employer from any potential claim brought by the employee and provided for arbitration should a dispute arise. [99] After various conflicts arose, the parties proceeded to arbitration, wherein the arbitrator found for the employee, ruling that although the release agreement barred the employee from bringing claims against the employer in court, the agreement did not bar the employee from bringing claims in arbitration. The Fourth Circuit found this ruling fatally flawed, stating that the arbitrator "rewrote the release," which in reality "impose[d] no qualification whatsoever concerning the forum in which [the employee's] claims could [or could not be] brought."[100]

Dewan aside, courts within the Fourth Circuit have been unwilling to vacate arbitration awards based on manifest disregard—review of over twenty relevant cases revealed not one decision vacating an arbitration award based on manifest disregard.[101]

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[95] *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Milnes, No. 11-260, 2014 WL 1386321 (E.D. Pa. April 8, 2014).

[96] Wachovia Sec., LLC v. Brand, 671 F.3d 472, 484 (4th Cir. 2012).

[97] For a discussion on the precedential value of unpublished opinions within the Fourth Circuit, see Local Rule of the Fourth Circuit, United States Court of Appeals for the Fourth Circuit, (Dec. 1, 2013), *available at* https://www.ca4.uscourts.gov/docs/pdfs/rules.pdf.

[98] Dewan v. Walia, 544 Fed.Appx. 240, 248 (4th Cir. 2013) (unpublished).

[99] *Id.* at 243–44.

[100] *Id.* at 247.

[101] *See, e.g.*, Wells Fargo Advisors, LLC v. Watts, 540 Fed.Appx. 229, 232 (4th Cir. 2013) (enforcing arbitration award); Trademark Remodeling, Inc. v. Rhines, No. PWG-11-1733, 2012 WL 3239916, at *10 (D. Md. Aug. 6, 2012) (same)

Fifth Circuit. The Fifth Circuit has, in essence, followed the Second Circuit's decision in *Stolt-Nielsen*, holding that while the manifest disregard doctrine did not survive *Hall Street* as a ground for vacatur independent of FAA Section 10, it did survive *Hall Street* insofar as an arbitrator will "exceed its power" under FAA Section 10(a)(4) when it "is fully aware of [a] controlling principle of law and yet does not apply it."[102] Despite this limited acceptance of the doctrine, the Fifth Circuit disapproves of litigants using the phrase "manifest disregard,"[103] and some argue that the Fifth Circuit wholly rejects manifest disregard post-*Hall Street.*[104] In short, litigants should refer to only FAA Section 10(a)(4) when arguing on what would otherwise be manifest disregard grounds.[105]

Review of over twenty post-*Hall Street* cases from within the Fifth Circuit revealed no decision vacating an arbitration award based on manifest disregard or an arbitrator otherwise "exceeding its power."[106]

Sixth Circuit. District courts within the Sixth Circuit seem to agree that manifest disregard has survived *Hall Street.*[107] In support of this conclusion, they cite *Coffee Beanery v. WW*, an unpublished opinion from 2008 in which the Sixth Circuit vacated an arbitration award that was predicated on a misapplication of Maryland's Franchise Registration and Disclosure Law.[108] *Coffee Beanery* endorsed a version of the Sixth Circuit's pre-*Hall Street* manifest disregard standard: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."[109] The *Coffee Beanery* decision parts ways with the Second Circuit's *Stolt-Nielsen* decision and recognizes manifest disregard as an independent ground for vacatur, separate and apart from FAA Section 10.[110] In justifying this position, the Circuit argued that the Supreme Court's *Hall Street* decision was equivocal as to the continued viability of manifest disregard; accordingly, *Hall Street*

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[102] Citigroup Global Mrkts., Inc. v. Bacon, 562 F.3d 349, 357–58 (5th Cir. 2009).

[103] *Id.* at 353.

[104] *See, e.g.*, Abbot v. Law Office of Patrick J. Milligan, 440 Fed.Appx. 612, 618 (10th Cir. 2011) (unpublished) (stating that the Fifth Circuit has "left no room for the judicially created doctrine" post-*Hall Street*).

[105] Bain v. Bank, 539 Fed.Appx. 485, 487 (5th Cir. 2013). *But See* Tres Tech Corp. v. Carefusion Corp., No. 3:13-CV-1800-K, 2013 WL 4603329, at *5 (N.D. Tex. Aug 29, 2013) (stating that the Fifth Circuit recognizes "manifest disregard").

[106] *But see* United Steel Workers AFL-CIO v. Murphy Oil USA, Inc., No. 09-7191, 2010 WL 3074322, at *4 (E.D. La. Aug. 3, 2010) (unpublished) (vacating arbitration award based on arbitrator's conflict of interest and ex parte contact).

[107] *See, e.g.*, Questar Capital Corp. v. Gorter, 909 F. Supp. 2d 789, 825 (W.D. Ky. 2012).

[108] Coffee Beanery, Ltd. v. WW, LLC, 300 Fed.Appx. 415, 416, 421 (6th Cir. 2008).

[109] *Id.* at 418–19.

[110] *Id.* at 419.

was insufficient to overrule a doctrine which prior to 2008 was "universally" recognized by the Courts of Appeals.[111]

Aside from *Coffee Beanery*, review of over thirty relevant cases from within the Sixth Circuit revealed no decision vacating an arbitration award based on manifest disregard.[112]

Seventh Circuit. Even before the Supreme Court's *Hall Street* decision, the Seventh Circuit used an extremely narrow manifest disregard standard, which allowed for vacatur only when an arbitrator (1) "direct[ed] parties to violate the law," or (2) rendered an award that did not "adhere to the legal principles specified by the [parties' arbitration agreement]."[113] Courts within the Seventh Circuit still apply this standard today, asserting that it falls squarely within FAA Section 10(a)(4) and thus does not implicate the Supreme Court's language in *Hall Street.*[114] Review of over thirty-five relevant pre and post-*Hall Street* cases from within the Seventh Circuit revealed not one arbitration decision vacated based on manifest disregard.[115]

Eighth Circuit. The Eighth Circuit does not recognize manifest disregard post-*Hall Street.* In *Air Line Pilots v. Trans State (2011)*, the Circuit referred to manifest disregard as a "defunct vacatur standard," reasoning that manifest disregard is a non-statutory ground for vacatur

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[111] *Id.* ("In light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle.").

[112] *See, e.g.*, Lakeshore Eng'g Servs., Inc. v. Target Const., Inc., No. 13-14498, 2014 WL 793653, at *11 (E.D. Mich. Feb. 27, 2014) (confirming arbitration award). *But see* Town & Country Salida, Inc. v. Dealer Computer Servs., Inc., 521 Fed.Appx. 470, 472–73 (6th Cir. 2013) (unpublished). In *Town & Country*, the Sixth Circuit affirmed a district court decision that "partially vacated" an arbitration award based on manifest disregard. In short, the arbitration award was improper because it imposed liability on an entity that was not actually a party to the underlying arbitration agreement. *Id.* However, while the district court based its decision on "manifest disregard," the Sixth Circuit based its affirmance on the arbitrator "exceeding its power" under FAA Section 10(a)(4), expressly declining to analyzes the manifest disregard doctrine. *Id.* at 474. Note that the Sixth Circuit likely should have affirmed using FAA Section 11(a), which allows for modification of an arbitration award in the event of a mistaken description of "any person." *See* 9 U.S.C. § 11(a) (2012). Section 11(a) was more proper because a "partial vacatur" is actually a modification and because the dispute at hand seemed to center around identity. In any event, we mention the case because it is technically an example of the Sixth Circuit upholding a district court's decision to vacate based on manifest disregard.

[113] *See supra* note 63.

[114] *See* Prime United Inc. v. Sears Holdings Mgmt. Corp., No. 12 C 5364, 2013 WL 3754829, at *3 (N.D. Ill. July 16, 2013).

[115] *See, e.g.*, Renard v. Ameriprise Fin. Servs., Inc., No. 13-CV-555-JPS, 2014 WL 896971, at *8 (E.D. Wis. Mar. 6, 2014) (confirming arbitration award); Affymax, Inc. v. Ortho-NcNeil-Janssen Pharmaceuticals, Inc., 660 F.3d 281, 285 (7th Cir. 2011) (reversing district court's partial vacatur based on manifest disregard); Cremin v. Merill Lynch, Pierce, Fenner & Smith, Inc., 434 F. Supp. 2d 554, 567 (N.D. Ill. 2006) (denying motion to vacate arbitration award).

and thus impermissible under *Hall Street*'s pronouncement that FAA Section 10 is to be read exclusively.[116]

The *Air Line Pilots* decision, coupled with a recent *en banc* ruling in *Reyco Granning v. International Brotherhood of Teamsters (2014)* speaks substantially to the Eighth Circuit's unwillingness to question arbitrators. *Reyco Granning* vacated an Eight Circuit panel decision that itself had vacated an arbitration award based on FAA Section 10(a)(4).[117] The panel, over a dissenting judge, argued that the arbitrator to a labor dispute exceeded its power by deciding matters based on the parties' course of prior dealings rather than an applicable written contract.[118] Although the *en banc* decision did not result in a written opinion, it was likely grounded in a sentiment expressed by the dissenting member of the original Eighth Circuit panel—namely, that vacatur based on FAA Section 10(a) is to occur only where the arbitrator is totally wayward in refusing to apply the law, like where he refuses to read a pertinent contract or where he applies a contract not at all relevant to the dispute at hand.[119]

Ninth Circuit. The Ninth Circuit recognizes manifest disregard's continued viability after *Hall Street*, but only as a standard of review implicit within FAA Section 10(a)(4). That is, an arbitrator will "exceed its power" under Section (10)(a)(4) when he manifestly disregards the law, which a litigant may establish only upon a "clear [showing] from the record that the arbitrator[] recognized the applicable law and then ignored it."[120] Like all other federal courts recognizing manifest disregard's continued viability, courts within the Ninth Circuit apply the doctrine narrowly and not merely where an arbitrator "misapplied" or "misunderstood" the law.[121] Review of over twenty relevant post-*Hall Street* decisions from within the Ninth Circuit revealed not one vacating an arbitration award based on manifest disregard.[122]

Tenth Circuit. The Tenth Circuit has left open the question of whether manifest disregard survived *Hall Street* as a ground for vacatur independent of FAA Section 10.[123] In unpublished opinions, however,

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[116] Air Line Pilots Ass'n Int'l, 638 F.3d 572, 578 (8th Cir. 2011).

[117] Reyco Ranning LLC v. Int'l Brotherhood of Teamsters, Local Union 245, 735 F.3d 1018, 1120 (8th Cir. 2013), *Opinion Vacated (Jan 17, 2014).*

[118] *Id.*

[119] *Id.* at 1024 (Smith, J., dissenting).

[120] Biller v. Toyota Motor Corp., 668 F.3d 655, 665 (9th Cir. 2012); *see also* Scripps Health v. Blue Cross and Blue Shield of Kansas, Inc., 577 Fed.Appx. 672, 763 (9th Cir. 2014) (unpublished) (applying *Biller*).

[121] Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 641 (9th Cir. 2010) (confirming arbitration decision despite claims that arbitrator entirely misinterpreted insurance policy provision).

[122] *See, e.g.*, Campbell v. Nevada Property 1 LLC, No. 2:10-CV-02169-APG-PAL, 2013 WL 6118622, at *5 (D. Nev. Nov. 20, 2013).

[123] *See* Bartlett Grain Co., L.P. v. Sunburst Farms P'ship, No. 13-1152-JWL, 2013 WL 3366277, at *3 (D. Kan. July 5, 2013) ("*Like the Tenth Circuit* [], the court here declines to decide whether 'manifest disregard' survives *Hall Street* because even

the Circuit has at least recognized manifest disregard as implied within Section 10(a)(4), declaring that an arbitrator will "exceed his power" when he displays "willful inattentiveness to the governing law."[124]

Review of over twenty relevant cases from within the Tenth Circuit revealed no post-*Hall Street* decision vacating an arbitration decision based on manifest disregard or an arbitrator otherwise exceeding its power.[125]

Eleventh Circuit. In the Eleventh Circuit, "manifest disregard of the law is no longer a valid basis for vacating an arbitration award."[126] The Circuit reasons that manifest disregard is an non-statutory ground for vacatur and that *Hall Street* requires courts to read FAA Section 10 exclusively.[127] Moreover, while the Circuit will vacate an award upon an arbitrator exceeding its power under FAA Section 10(a)(4), it has interpreted that section narrowly as providing no review whatsoever for "underlying legal error."[128] Indeed, courts within the Eleventh Circuit will vacate based on Section 10(a)(4) only when (1) the arbitrator "decided an issue not submitted by the parties," or (2) the arbitrator granted "relief not authorized in the arbitration agreement."[129] For example, in *Antietam Industries v. Morgan Keegan (2013),* a district court vacated an award based on 10(a)(4) where an arbitration panel awarded attorneys' fees despite the pertinent arbitration agreement expressly precluding attorneys' fees.[130]

Aside from *Antietam Industries*, review of over twenty relevant cases from within the Eleventh Circuit revealed not one decision vacating an arbitration award based on Section 10(a)(4).[131]

DC Circuit. Although in one unpublished opinion it assumed *arguendo* that manifest disregard survives, the D.C. Circuit has not directly

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assuming that an arbitrator's 'manifest disregard of the law' may support a decision to vacate an award either as a non-statutory ground for vacatur or as a 'judicial gloss' on the enumerated grounds for vacatur set forth in [FAA] § 10, [the defendant] has not met its burden of showing that vacatur is warranted on that basis." (emphasis added)).

[124] *See, e.g.*, Abbot v. Law Office of Patrick J. Milligan, 440 Fed.Appx. 612, 620 (10th Cir. 2011) (unpublished).

[125] *See, e.g.*, Cessna Aircraft Co. v. Avcorp Indus., Inc., 943 F. Supp. 2d 1191, 1201 (D. Kan. 2013).

[126] Southern Mills, Inc. v. Nunes, No. 13-11921, 2014 WL 1244004, at *2 n.2 (11th Cir. March 27, 2014).

[127] Frazier v. CitiFinancial Corp, LLC, 604 F.3d 1313, 1323–24 (11th Cir. 2010).

[128] White Springs Agriculture Chemicals, Inc. v. Glawson Invs. Corp., 660 F.3d 1277, 1283 (11th Cir. 2011).

[129] *See, e.g.*, Morgan Stanley & Co., LLC v. Core Fund, 884 F. Supp. 2d 1229, 1231 (M.D. Fla. 2012).

[130] Antietam Indus., Inc. v. Morgan Keegan & Co., No. 6:12-CV-1250-Orl-36TBS, 2013 WL 1213059, at *9 (M.D. Florida March 25, 2013).

[131] *See, e.g.*, Spungin v. GenSpring Family Offices, LLC, 883 F. Supp. 2d 1193, 1198 (S.D. Fla. 2012) (confirming arbitration award that dismissed investors' claims against wealth manager).

decided whether the doctrine remains viable after *Hall Street.*[132] Faced with the Circuit's silence, the D.C. District Court has continued applying the Circuit's pre-*Hall Street* manifest disregard standard: "(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it all together and (2) the law that the arbitrator ignored was well defined, explicit, and clearly applicable to the case."[133] Review of over twenty relevant cases from within the D.C. Circuit revealed not one decision vacating an arbitration award based on manifest disregard or an arbitrator otherwise exceeding its power under FAA Section 10(a)(4).[134]

State Arbitration Law. In interpreting state arbitration laws—which all fifty states have enacted—many state courts have developed manifest disregard doctrines to supplement the limited grounds for vacatur provided by their local statutes.[135] The various state court standards that developed pre-*Hall Street* were extremely divergent. Under California arbitration law, for example, it seems that manifest disregard is not recognized whatsoever.[136] Under New York arbitration law, although manifest disregard is not expressly recognized, vacatur based on "irrationality" was.[137] In exploring the post-*Hall Street* landscape here, I do not discuss *Hall Street*'s effect on state doctrine, but readers should be aware that while not binding on state courts' interpretation of state arbitration law, *Hall Street* has influenced state doctrine, at least to a degree. Readers may wish to consult the source we cite below the line regarding the development of manifest disregard under state law.[138]

V. CONCLUSION

Studies suggest that litigants challenging arbitration awards use manifest disregard more than almost any other vacatur ground. Yet manifest disregard challenges remain among the least successful, and they continue decreasing in effectiveness post-*Hall Street.* Indeed, pre-*Hall Street* studies found that manifest disregard was successful in approximately three to seven percent of cases, whereas this Article's research, while not purporting to constitute a proper empirical study, suggests that manifest disregard is successful post-*Hall Street* in around one percent of cases.

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[132] Regnery Publ'g, Inc. v. Miniter, 368 Fed.Appx. 148, 149 (D.C. Cir. 2010) (unpublished).

[133] Hill v. Wackenhut Servs. Int'l, No. 11-2158 (JEB), 2013 WL 5298156, at *8 (D.D.C. Sept. 18, 2013) (quotations omitted); *see also* Priority One Servs., Inc. v. W & T Travel Servs., LLC, 825 F. Supp. 2d 43, 50–51 (D.D.C. 2011).

[134] *See, e.g.*, Int'l Trading and Indus. Inv. Co. v. DynCorp Aerospace Tech., 763 F. Supp. 2d 12, 24–25 (D.D.C. 2011) (confirming arbitration award that was subject to the New York Convention).

[135] *See* Berger & Sun, *supra* note 12, at 767 n.115 (collecting cases).

[136] *See* Siegel v. Prudential Ins. Co. of Am., 67 Cal.App.4th 1270, 1280–81 (Cal. Ct. App. 1988).

[137] *See* Banc of Am. Sec. v. Knight, 781 N.Y.S. 2d 829, 832 (N.Y. Sup. Ct. 2004).

[138] Berger & Sun, *supra* note 12 at 781.

Thorough review of the relevant cases shows that manifest disregard has become a desperate, last-ditch effort to avoid unfavorable arbitration awards. In asserting hopeless manifest disregard challenges, litigants thwart the FAA's goal of expedited arbitration and in turn impose substantial costs on their adversaries and the judiciary.

A declaration from the Supreme Court asserting manifest disregard's end as an independent ground for vacatur will prove helpful in furthering the FAA's goals. Even the Court's ambiguous *Hall Street* decision has helped in narrowing judicial review of arbitration, working to funnel litigants with meritorious claims towards more effective and legitimate grounds for vacatur, such as arbitrator partiality or an arbitrator exceeding its power.

A declaration from the Supreme Court, moreover, will work no real disservice to litigants, since FAA Section 10(a)(4) arguably includes a limited review for those egregious instances of manifest disregard, as many of the circuits analyzed above have concluded. If nothing else, a declaration from the Court will clarify the current state of manifest disregard, providing courts and litigants with consistent terminology and furthering the goal of uniform federal law.