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ARBITRATION LAW IN TENSION AFTER *HALL STREET*:
ACCURACY OR FINALITY?

*Stanley A. Leasure**

I. INTRODUCTION

The overarching purpose of the Federal Arbitration Act (FAA), enacted in 1925, was to ameliorate the judiciary's long-standing hostility toward arbitration and to inaugurate a federal policy supporting it.¹ Subsequently, one of the most controversial aspects of the FAA is the limited judicial review available to parties seeking to vacate an arbitration award.² The FAA provides four statutory grounds for vacatur involving circumstances in which the arbitrator engaged in misconduct or exceeded her powers, and the courts have created a few others, including one ground particularly pertinent to this discussion: manifest disregard of the law.³

By 2008, the circuits were split on the question of whether parties to arbitration could agree to extend these grounds for vacatur.⁴ It was at that point when the Supreme Court of the United States resolved that circuit split by deciding *Hall Street Associates L.L.C. v. Mattel, Inc.*⁵ The *Hall Street* majority held that parties to arbitration agreements could not, by agreement, expand the grounds for judicial review outside those provided by the FAA.⁶ However, in dictum, the Court called into question the viability of the longstanding common law grounds for vacatur—including manifest

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1. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In *Shearson/American Express Inc. v. McMahon*, the Supreme Court of the United States provided a brief overview of the history of arbitration under the FAA that will be useful in setting the stage for a more careful examination of *Hall Street Associates L.L.C. v. Mattel, Inc.* and its aftermath. See *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987).

2. See *Hall St. Assocs. L.L.C. v. Mattel*, 552 U.S. 576, 578–80 (2008); *Citigroup Glob. Mkt., Inc. v. Bacon*, 562 F.3d 349, 352 (5th Cir. 2009); *Frazier v. CitiFinancial Corp.*, 562 F.3d 1313, 1322 (11th Cir. 2010); *Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App'x 828, 830 (11th Cir. 2014); *A&G Coal Corp. v. Integrity Coal Sales, Inc.*, 565 F. App'x 41, 42 (2d Cir. 2014); *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 566 (7th Cir. 2015); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009).

3. 9 U.S.C. § 10 (2012).

4. See *infra* Part III.B.

5. 550 U.S. 576 (2008).

6. *Id.* at 591–92.

disregard of the law.⁷ Not surprisingly, this led to another significant circuit split by putting into tension the underlying premises on which arbitration law in the United States is based, particularly the accuracy of results (emphasizing greater access to judicial review) juxtaposed against finality and efficiency (both emphasizing more limited access to judicial review).⁸

Part II of this article considers underpinnings of manifest disregard of the law as a ground for vacatur; the jurisprudential foundation of manifest disregard in the pre-*Hall Street* era; and finally, the responses of the circuits to the *Hall Street* dicta. Part III explicates the majority opinion and considers the manner in which the Supreme Court addressed the circuit split. Part IV discusses the potential risks and benefits attendant to the elimination of manifest disregard of the law as a common law ground for vacatur. This Part also argues that denying arbitral parties the right to seek judicial redress even in the face of the arbitrator's manifest disregard of the law will undermine arbitration in the United States.

II. *HALL STREET ASSOCIATES L.L.C. v. MATTEL INC.*

The *Hall Street* litigation arose in connection with a real estate lease in which Hall Street was the lessor and Mattel the lessee.⁹ Under the lease, Mattel was required to indemnify Hall Street from claims resulting from water pollution on the leased premises.¹⁰ The overarching question in the litigation was whether Mattel was obligated to indemnify Hall Street from environmental claims related to the subject property.¹¹ A preliminary and potentially dispositive issue in the litigation was whether Mattel had terminated the lease.¹² If the Court determined that issue in the negative, then two additional issues would need to be resolved. First, whether Mattel failed to comply with the Oregon Drinking Water Quality Act (ODWQA), and second, if it did, whether the ODWQA fell within the definition of "applicable environmental law" contained in the lease thereby activating an obligation to indemnify Hall Street.¹³

The first issue litigated was whether Mattel had terminated the lease.¹⁴ The district court determined that Mattel had not terminated the lease.¹⁵ The

7. See Stanley A. Leasure, *Arbitration After Hall Street v. Mattel: What Happens Next?*, 31 U. ARK. LITTLE ROCK L. REV. 273, 276–83 (2009).

8. See *infra* Part IV.

9. *Hall Street*, 550 U.S. at 579.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 579–80.

14. *Id.* at 579.

15. *Hall St.*, 552 U.S. at 579.

district court also approved an agreement between Hall Street and Mattel to submit the two remaining issues to arbitration.¹⁶ The resulting arbitration agreement contained a provision expanding the availability of judicial review of the arbitrator's decision beyond the grounds outlined in the FAA.¹⁷ Hall Street and Mattel agreed that a reviewing court would have the authority to "vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."¹⁸

The arbitrator determined that the lease term "applicable environmental law" did not encompass the ODWQA.¹⁹ Hall Street requested review of the arbitral award by the district court under the terms of its arbitration agreement with Mattel.²⁰ Rejecting the arbitrator's determination that the ODWQA did not fall within the scope of the lease term "applicable environmental law," the district court remanded the case.²¹ Upon remand, the arbitrator amended his original award to find for Hall Street following the district court's legal conclusion that an "applicable environmental law" encompassed the ODWQA.²²

Mattel appealed, asking the Ninth Circuit to consider whether the grounds for vacatur are subject to expansion by agreement of the parties beyond those provided in 9 U.S.C. §10. The Ninth Circuit answered that question in the negative, vacated the judgment of the district court, and remanded the case to the district court with instructions to confirm the arbitral award unless it determined that the award is subject to vacatur or modification under the FAA.²³ On remand, the district court ruled that the arbitrator exceeded his powers by interpreting the lease in a manner it characterized as "implausible." Another appeal ensued, and the Ninth Circuit reversed; pointing out that "implausibility" is not a ground for vacatur.²⁴ The Supreme Court of the United States granted certiorari to decide whether the bases for vacatur or modification established by the FAA are exclusive.²⁵

The issue in *Hall Street* dealt with the enforceability of agreements providing for judicial review of arbitral decisions on grounds beyond those

16. *Id.*

17. 9 U.S.C. § 10 (2012).

18. *Hall St.*, 552 U.S. at 579.

19. *Id.* at 580.

20. *Id.*

21. *Id.*

22. *Id.* After the entry of the amended award, both parties appealed seeking modification of the award, and, in response, the district court corrected the interest calculation but otherwise upheld the amended award. *Id.*

23. *Hall St. Assocs. L.L.C. v. Mattel, Inc.*, 113 F. App'x. 272, 273 (2004).

24. *Hall St. Assocs. L.L.C. v. Mattel, Inc.*, 196 F. App'x. 476, 477-78 (2006).

25. *Hall St.*, 552 U.S. at 578.

provided by the FAA.²⁶ In a 5-4 decision, the Court declared those contractual provisions unenforceable.²⁷ The majority yielded to what it saw as the textual constraint of the FAA precluding the contractual expansion of the grounds for vacatur.²⁸ The impact of the decision seemed rather straightforward; resolution of a circuit split regarding the efficacy of agreements to expand the grounds for vacatur. However, more fundamentally, the Court laid bare the inherent conflict between two basic tenets of arbitration law: freedom to contract and finality.²⁹

The FAA sets out the parameters for judicial review and vacatur of an arbitral award, and they fall into one of two categories, arbitrator misconduct or arbitrator misuse of powers.³⁰ Federal common law has arisen in the context of vacatur, and those cases are not encouraging to the intrepid litigant seeking to set aside an award. Litigants face a difficult path to vacatur, given the narrow interpretation of the statutory grounds and the deference afforded awards.³¹

Justice Souter wrote for the *Hall Street* majority, Chief Justice Roberts, and Justices Thomas, Ginsburg, Alito, and Scalia joined in the opinion.³² Justice Stevens penned a dissenting opinion in which Justice Kennedy joined.³³ Justice Breyer wrote separately in dissent.³⁴ The issue was whether the bases for vacatur or modification established by the FAA are subject to expansion or modification by agreement of the parties.³⁵

Hall Street first argued that manifest disregard of the law became a creature of the law of vacatur beginning with dictum in the Supreme Court decision in *Wilko v. Swan*.³⁶ The language of *Wilko* establishes the possibility that extra-statutory grounds for vacatur arose from the Court's discussion of the statutory power to vacate an arbitral award under 9 U.S.C. § 10:

26. *Id.* at 580.

27. *Id.* at 579. The agreement for expanded judicial review between Hall Street and Mattel gave a reviewing court the power to vacate, modify, or correct an award if the findings of fact were unsupported by substantial evidence or the conclusions of law were erroneous. *Id.*

28. *Id.* at 586.

29. *See generally Hall St.*, 552 U.S. 576 (2008).

30. 9 U.S.C. § 10(a) (2012).

31. *See O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 746 (11th Cir. 1988).

32. *Hall St.*, 552 U.S. at 577.

33. *Id.* at 593.

34. *Id.* at 596.

35. *Id.* at 578. The burden placed on parties seeking vacatur includes the following: (i) clear and convincing evidence; (ii) direct nexus between defects in the process and the decision; (iii) more than mere factual or legal errors. *See id.* at 579.

36. *Id.* at 584-85 (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953)).

Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would ‘constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,’ that failure would need to be made clearly to appear. In unrestricted submission, such as the present margin agreements envisage, 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.³⁷

With the aforementioned predicate, the following dictum from *Wilko* has been often cited to support the position that the Supreme Court of the United States has recognized manifest disregard of the law as an extra-statutory ground for vacatur: “[P]ower to vacate an [arbitration] award is limited . . . [t]he interpretations of the law by the arbitrators *in contrast to manifest disregard [of the law]* are not subject, in the federal courts, to judicial review for error in interpretation”³⁸

Justice Souter drew a sharp distinction between “judicial expansion by interpretation” and the “private expansion by contract.”³⁹ Furthermore, the language relied upon rejects what Hall Street wanted, a general review for legal errors committed by the arbitrator.⁴⁰ The majority also found the phrasing upon which Hall Street relied as capable of many interpretations.⁴¹

The *Hall Street* Court put forth a second line of attack in support of its position with two discrete parts. First, Hall Street argued that arbitration springs from a contract sanctioned by the FAA, and second, judicial review for legal errors in these contracts is appropriate because the FAA is “motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.”⁴² Justice Souter framed the second issue in the form of a question: “whether the FAA has *textual features* at odds with enforcing a contract to expand judicial review following the arbitration.”⁴³ Justice Souter responded this way:

To that particular question we think the answer is yes, that the text compels a reading of §§ 10 and 11 categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent,

37. *Wilko*, 346 U.S. at 436–37, *overruled on different grounds* by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (citation omitted).

38. *Hall St.*, 552 U.S. at 584 (citing *Wilko*, 346 U.S. at 436) (emphasis added).

39. *Hall St.*, 552 U.S. at 585.

40. *Id.*

41. *See id.*

42. *Id.* at 585–86 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)) (alteration in original).

43. *Hall St.*, 552 U.S. at 586 (emphasis added).

it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally.⁴⁴

In addition to the argument based on the concept of *ejusdem generis*, the Court found the expansion of such detailed categories of circumstances in which judicial review is appropriate “would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility.”⁴⁵ The requirement was that the court “must grant” the order of confirmation “unless the award is vacated, modified, or corrected” under the provisions of sections 10 and 11.⁴⁶ Such mandatory language, without a hint of malleability, requires the court to confirm all arbitral awards unless one of the “prescribed” exceptions is found applicable.⁴⁷

Rather than torture the language of the statute, Justice Souter chose to construe sections 9 through 11 in the policy context of a favoring arbitration with limited review required to maintain its efficient resolution of disputes.⁴⁸ Otherwise, he feared that arbitration would simply be another step in the litigation process—a result to be avoided.⁴⁹

After dispatching with each of Hall Street’s arguments, he concluded with a “prediction” of what happens next:

When all these arguments based on prior legal authority are done with, Hall Street and Mattel remain at odds over that happens next. Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them. One of Mattel’s *amici* foresees flight from the court if it is. We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.⁵⁰

According to the majority in *Wilko*, the Court found that section 14 of the Securities Act of 1933 voided agreements purporting to encompass alleged violations of the Act. The passage on which Hall Street focused was

44. *Id.* at 586. The expansion of those grounds grossly expands the grounds enumerated in the FAA to include general reviews of evidentiary and legal issues would be to place the “egregious” conduct, “corruption,” “fraud,” “evident partiality,” “misconduct,” “misbehavior,” “exceed[ing] . . . powers,” “evident material miscalculation,” “evident material mistake,” “award[s] upon a manner not submitted” to equate those type actions with common ordinary mistakes of law. *Id.*

45. *Id.* at 587.

46. *Id.*

47. *Id.*

48. *Id.* at 588.

49. *Hall St.*, 552 U.S. at 588.

50. *Id.* at 588–89 (citation omitted).

nothing more than an explanation that arbitration would undermine the protection afforded buyers by the Securities Act given the limited vacatur powers available under the FAA and the fact that appellate review of interpretations of the law by arbitrators is not available—as compared to manifest disregard of the law.⁵¹

Justice Souter conceded that Hall Street’s interpretation of this passage as legitimizing manifest disregard of the law as an additional extra-statutory ground for vacatur is in accord with some of the circuits.⁵² Nevertheless, he redirected the examination to the ability of parties to arbitration to contract for expanded judicial review and the question of the availability of “general review for an arbitrator’s legal errors”:

Hall Street sees this supposed addition to § 10 as the camel’s nose: *if judges can add grounds to vacate . . . so can contracting parties.*

. . . .

But this is too much for *Wilko* to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator’s legal errors.⁵³

He then launched into a series of “maybes” about possible meanings of the manifest disregard language in *Wilko*:

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, 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.⁵⁴

Determining the question of whether the parties could contractually expand the grounds for judicial review of arbitral decisions was the thrust of

51. *Id.* at 584.

52. *Id.* at 584–85 (citing *McCarthy v. Citigroup Glob. Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Comput. Servs. Inc.*, 324 F.3d 391, 395–96 (5th Cir. 2003); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998)).

53. *Hall St.*, 552 U.S. at 585.

54. *See id.* at 585 (citations omitted).

the dispute between Hall Street and Mattel and the reason for granting certiorari. It was not whether the jurisprudence leading up to the common law grounds for vacatur are valid and much of the majority opinion is dictum. Among the best examples are the following:

On application for an order confirming the arbitration award, the court “must grant” the order “unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title.” There is nothing malleable about “must grant,” which unequivocally tells courts to grant confirmation in all cases, except when one of the “prescribed” exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.⁵⁵

Adding to the confusion, the majority suggested that:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards.⁵⁶

The status of the common law grounds for vacatur—particularly manifest disregard of the law—was not only left unanswered by *Hall Street*, but also rendered more confused than before. The statutory grounds for vacatur under the FAA have been supplemented by judicially crafted grounds in each of the circuits, including manifest disregard of the law. Because manifest disregard falls outside the FAA’s statutory framework, its continued viability has been called into question by *Hall Street* and the majority conceded that it could not predict the practical effect of this ruling.⁵⁷

III. MANIFEST DISREGARD OF THE LAW AS A GROUND FOR VACATUR

A. Statutory Vacatur Under the FAA

The majority in *Hall Street* placed significant, if not primary, emphasis on the textual language of the confirmation and vacatur provisions of the FAA in reaching its decision.⁵⁸ For purposes of this preliminary discussion, several points are important and will be discussed briefly.

First, the FAA requires judicial confirmation of arbitral awards in certain circumstances.⁵⁹ The FAA provisions for confirmation of arbitral

55. *Id.* at 587.

56. *Id.* at 590.

57. *Id.* at 589.

58. Leasure, *supra* note 7, at 276–83.

59. See 9 U.S.C. § 9 (2012).

awards are found at 9 U.S.C. § 9, and provide that upon the request of a party the district court must confirm the award unless it is vacated, modified, or corrected pursuant to 9 U.S.C. §§ 10 and 11.⁶⁰

The section of the FAA receiving the most scrutiny in the *Hall Street* opinion was, without a doubt, the statutory vacatur provisions found in 9 U.S.C. § 10.⁶¹ It is important to note that in *Hall Street*, as well as its progeny, the pole star of this section is the strict, narrow, and technical manner in which the courts have construed it.⁶² Described generally, the section 10 grounds for vacatur are established upon showing one of the following: the award was procured by corruption, fraud, or undue means; evident partiality or corruption of the arbitrator; and arbitrator misconduct or when the arbitrator exceeded his powers or imperfectly executed them.⁶³

B. The Nature of the Manifest Disregard Circuit Split Before *Hall Street*

The starting point for any discussion of manifest disregard of the law as a common law basis for vacatur begins with dictum from *Wilko*.⁶⁴ It is important to note just how widespread manifest disregard of the law became in the wake of the 1953 *Wilko* decision. Subsequent to *Wilko*, manifest disregard of the law as a ground for vacatur had been adopted in some form or another in all the circuits.⁶⁵ The following dictum in the *Wilko* opinion has served as the source of almost all of the modern case law establishing manifest disregard of the law as a common law basis for vacatur: “In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators *in contrast to manifest disregard*

60. 9 U.S.C. §§ 10, 11 (2012).

61. Under 9 U.S.C. § 10 arbitral awards are subject to vacatur on the following grounds related to the conduct by the arbitrator(s): corruption, fraud, or undue means; partiality or corruption; refusing to postpone, or to hear evidence, or other misbehavior; and exceeded/imperfectly executed powers. *Id.* For a detailed discussion of the statutory underpinnings of *Hall Street v. Mattel* found in sections 9, 10, and 11 of the FAA, see Leasure, *supra* note 7, at 276–83.

62. See *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418 (6th Cir. 2008); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 90–91 (2d Cir. 2008); *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 351–54 (5th Cir. 2009); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 488 (8th Cir. 2010); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1321 (11th Cir. 2010); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 478 (4th Cir. 2012); *Bellantuono v. ICAP USA, LLC*, 557 F. App'x 168, 173 (3d Cir. 2014); *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567 (7th Cir. 2015).

63. 9 U.S.C. § 10 (2012).

64. *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) *overruled on different grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

65. See Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 235 n.11 (2007) (citing *Birmingham News Co. v. Horn*, 901 So.2d 27, 48–49 (2004)).

are not subject, in the federal courts, to judicial review for error in interpretation.⁶⁶

Litigants attempting to bolster the efficacy of the *Wilko* dictum now have a more recent case upon which to rely. In 1995, the Supreme Court decided a case involving an arbitration dispute, *First Options of Chicago v. Kaplan*.⁶⁷ In *Kaplan*, the Supreme Court reaffirmed the viability of the dictum in *Wilko* that since 1953 has been relied upon as the Supreme Court's imprimatur on manifest disregard of the law as a common law ground for vacatur. In addressing the scope of judicial review of an arbitrator's decision, the Supreme Court cited the oft-quoted dictum from *Wilko* recognizing a common law right to judicial review of arbitration decisions in manifest disregard of the law.⁶⁸

C. The Nature of the Manifest Disregard Circuit Split After *Hall Street*

Hall Street v. Mattel came to the Supreme Court of the United States to resolve a deepening circuit split over the question of whether parties to an arbitration agreement could expand, *by agreement*, the grounds for judicial review beyond those in section 10 of the FAA.⁶⁹ The Supreme Court answered that question in the negative, but as a result of the majority's dicta, the Court created another split, that being whether the manifest disregard of the law confusion caused by *Wilko* survived.⁷⁰ Justice Souter's discussion on that particular point appears to have created more questions than it answered.⁷¹ As mentioned above, *Hall Street* resolved one circuit split and, at the same time, created another one with the potential for even more disruption to the law of arbitration than already existed. As discussed below, the Fifth, Eighth, and Eleventh Circuits have held that manifest disregard of the law is not a viable basis for vacatur post-*Hall Street*.⁷² Conversely, the Second, Fourth, Seventh, Ninth, and Tenth Circuits continue to allow submis-

66. *Wilko*, 346 U.S. at 436–37 (emphasis added); *accord* *McCarthy v. Citigroup Glob. Mkts.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Comput. Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003); *Scott v. Prudential Sec., Inc.* 141 F.3d 1007, 1017 (11th Cir. 1998).

67. 514 U.S. 938 (1995).

68. *Id.* at 942. In *Kaplan*, the Supreme Court discussed the limited scope of judicial review of arbitration decisions in some detail: “The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances.” *Id.*

69. *Hall St. Assocs. L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583 n.5 (2008).

70. *Id.* at 584–85 (quoting *Wilko*, 346 U.S. at 436–37).

71. Matthew J. Brown, “*Final*” Awards Reconceptualized: A Proposal to Resolve the *Hall Street Circuit Split*, 13 PEPP. DISP. RESOL. L. J. 325, 340 (2013).

72. See *infra* Part III.C.1.

sion of manifest disregard as a basis for vacatur.⁷³ That leaves the First, Third, and Sixth Circuits as the outliers that have yet to definitively answer the question of whether manifest disregard continues as an extra-statutory ground for vacatur.⁷⁴

I. Circuits Rejecting Manifest Disregard

Citigroup Global Markets, Inc. v. Bacon involved unauthorized withdrawals from Bacon's individual retirement account by Citigroup.⁷⁵ The arbitral panel concluded that Citigroup was required to reimburse Bacon for the unauthorized withdrawals.⁷⁶ The district court vacated the arbitrators' award, and Bacon appealed to the Fifth Circuit.⁷⁷ The Fifth Circuit characterized the issue before it as "whether manifest disregard of the law remains a valid ground for vacatur of an arbitration award in light of the Supreme Court's recent decision in *Hall Street*. . . ."⁷⁸ The court answered that question in the negative, rejecting the notion that the *Wilko v. Swan* dictum gives rise to manifest disregard as an extra-statutory ground for vacatur.⁷⁹

With that as its predicate, the Fifth Circuit presented a detailed history of the law of vacatur from the mid-19th century to the present.⁸⁰ Before the adoption of the United States Arbitration Act in 1925, arbitration decisions were subject to being vacated only in the presence of a few narrow circumstances subject to very limited review.⁸¹ The Fifth Circuit characterized

73. See *infra* Part III.C.2.

74. See *infra* Part III.C.3.

75. 562 F.3d 349, 350 (5th Cir. 2009).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 350, 354–55 ("We conclude that *Hall Street* restricts the grounds for vacatur to those set forth in §10 of the Federal Arbitration Act . . . 9 U.S.C. § 1 *et seq.*, and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA. *Hall Street* effectively overrules our previous authority to the contrary."); see also *McVay v. Halliburton Energy Servs., Inc.*, 608 F. App'x 222, 225 (5th Cir. 2015). In *Bacon*, the Fifth Circuit went on to discuss how the various lower courts that have considered and attempted to apply the concept of manifest disregard as a ground for vacatur, have "grappled with the uncertain implications" of the clause in question in *Wilko*. *Citigroup Glob. Mkts., Inc., v. Bacon*, 562 F.3d at 354 (citing *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 746–47 (11th Cir. 1988)); *Nat'l R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 143 n.9 (7th Cir. 1977) ("We share the reservations recently expressed by the Second Circuit as to whether the *Wilko* dictum was actually intended to add 'manifest disregard' of the law to the statutory grounds for vacating an award in 9 U.S.C. [§]10.").

80. *Bacon*, 562 F.3d at 350–51.

81. *Id.* at 351 (citing *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349–51 (1854)); see also *Karthauss v. Ferrer*, 26 U.S. (1 Pet.) 222, 228 (1828). Deference was due to the arbitral decision. Courts of equity were not to set aside arbitral awards for error as long as: (1) the

these common law vacatur rules as closely akin to the provisions of section 10 of the FAA.⁸² By enacting the FAA, Congress evidenced its concurrence with those common law precedents, and arbitration awards usually survive judicial review under the concepts espoused in the FAA.⁸³ The *Bacon* Court quoted with approval the following from the *Hall Street* opinion:

[P]ermitt[ing] vacatur and modification of arbitration awards on more expansive grounds “opens the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process.”⁸⁴

Accordingly, enactment of the FAA evidenced its concurrence with the state of the common law at that time with the result that, consistent with the previously existing common law, arbitration awards are to be generally upheld under the principles espoused in the FAA.⁸⁵ However, the standard for establishing manifest disregard was stringent, involving more than an error or misunderstanding of the law. It required showing that the error was obvious and capable of being easily identified by the arbitrator and that the arbitrator appreciated the existence of a governing principle but decided to ignore it.⁸⁶ Further, establishing manifest disregard of the law required a showing it resulted in a significant injustice.⁸⁷

In *McVay v. Halliburton Energy Services, Inc.*, the Fifth Circuit was faced with a dispute between an employer and its former employee on the use of intellectual property by the employee after leaving his employment.⁸⁸ Based on an intellectual property agreement between the parties, the arbitrator entered an award enjoining McVay from using Halliburton’s intellectual property and awarding the company money damages, attorney’s fees, and

award was in the arbitral submissions; (2) it contained the honest decision of the arbitrators; and (3) a full and fair hearing was held. *Id.* (citing *Burchell*, 58 U.S. (17 How.) at 349). Vacatur was appropriate only in the face of (1) fraud, corruption, or improper conduct on the part of the arbitrator; (2) failure of the arbitrators to decide all of the issues submitted; (3) circumstances in which the arbitrators exceeded their powers by deciding non-submitted issues; and (4) if the award was not certain, final, and mutual. *Id.* (citing *Burchell*, 58 U.S. (17 How.) at 351; *Carnochan v. Christie*, 24 U.S. (11 Wheat.) 446, 460–67 (1826)).

82. *Bacon*, 562 F.3d at 351.

83. *Id.* at 351–52.

84. *Id.* at 351 (citation omitted).

85. *Id.* at 351–54.

86. *Id.* at 354 (quoting *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (2013) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933–34 (2d Cir. 1986))).

87. *Bacon*, 562 F.3d at 354 (quoting *Kerogosien v. Ocean Energy, Inc.*, 390 F.3d 346, 355 (5th Cir. 2004)).

88. *McVay v. Halliburton Energy Servs., Inc.*, 608 F. App’x 222, 224 (5th Cir. 2015).

costs.⁸⁹ The district court affirmed the award.⁹⁰ McVay appealed, contending that the arbitrator entered an indefinite award and therefore had imperfectly executed her powers.⁹¹ In response to this argument, Halliburton argued that McVay had waived this ground for challenge “by basing it on the repudiated ‘manifest disregard’ standard.”⁹² The Fifth Circuit affirmed the decision of the district court, declaring that the standard of review for arbitral awards is both deferential and narrow, reviewing factual findings for clear error and legal conclusions *de novo*.⁹³

In *Medicine Shoppe, International, Inc. v. Turner Investments, Inc.*, the United States Court of Appeals for the Eighth Circuit confirmed its understanding that *Hall Street*’s practical effect was to establish the grounds specifically enumerated in the FAA as the exclusive grounds for vacatur.⁹⁴ As in most of the post-*Hall Street* cases, the court began by describing the standard of appellate review of arbitral decisions as quite deferential; that being that questions of law are reviewed *de novo*, and findings of fact examined under a clearly erroneous standard.⁹⁵ Finally, the reviewing court’s authority to vacate an arbitration award at all is limited to the circumstances set out in the provisions of 9 U.S.C. §§ 9 through 11.⁹⁶ The Eighth Circuit

89. *Id.*

90. *Id.* at 223–24.

91. *Id.* at 225. Under 9 U.S.C. § 10(a)(4) vacatur is appropriate where the arbitrator “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

92. *McVay*, 608 F. App’x at 225 (citing *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009)). In *Bacon*, the Fifth Circuit said:

The question before us now is whether, under the FAA, manifest disregard of the law remains valid, as an independent ground for vacatur, after *Hall Street*. The answer seems clear. *Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a *nonstatutory* ground for vacatur. Thus, to the extent that manifest disregard of the law constitutes a non-statutory ground for vacatur, it is no longer a basis for vacating awards under the FAA. 562 F.3d at 355 (citation omitted).

93. *McVay*, 608 F. App’x at 224–25, 227.

94. *Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010). This case involved a dispute between parties to a franchise agreement in which the arbitrator entered an award in favor of Medicine Shoppe for lost profits and future license fees, which was confirmed by the district court. *Id.* at 487–88. On appeal, Turner Investments argued that the arbitrator entered the award in manifest disregard of the law. *Id.* at 488.

95. *Id.* at 488 (quoting *McGrann v. First Albany Corp.*, 424 F.3d 743, 748 (8th Cir. 2005)). As the *Medicine Shoppe* court noted, “The bottom line is we will confirm the arbitrator’s award even if we are convinced that the arbitrator committed serious error, so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.” *Id.* (quoting *McGrann*, 424 F.3d at 748).

96. *Med. Shoppe*, 614 F.3d at 488 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008)). The court took care to point out that those four grounds set forth in section 10 of the FAA permit vacatur of an arbitration award only in the presence of:

recognized that, before *Hall Street*, the grounds for vacatur were broader than those set forth in 9 U.S.C. § 10 to include, among others, awards evidencing a manifest disregard for the law. In the view of the Eighth Circuit, these extra-statutory grounds did not survive the Supreme Court's decision in *Hall Street*.⁹⁷

*Frazier v. CitiFinancial Corp.*⁹⁸ was decided by the Eleventh Circuit. The parties submitted a mortgage dispute to arbitration. The arbitrator granted CitiFinancial monetary damages and certain equitable relief. Frazier asked the district court to vacate the award because, *inter alia*, it was in manifest disregard of the law.⁹⁹ This contention required the court to consider whether, after the Supreme Court's decision in *Hall Street*, manifest disregard was still viable.¹⁰⁰ The Eleventh Circuit quickly laid that question to rest:

Having determined that the award was not subject to vacatur and/or modification under sections 10 or 11, we turn to Mrs. Fraser's additional arguments that the award was arbitrary and capricious, in violation of public policy, and made in manifest disregard for the law. Although our prior precedents have recognized these three non-statutory grounds for vacatur, *Hall Street* casts serious doubt on their legitimacy.¹⁰¹

The majority in *Hall Street* found that a reviewing court "must grant" application for an order of confirmation unless it is subject to vacatur, modification, or correction under the provisions of sections 10 and 11.¹⁰²

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (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 any other misbehavior by which the rights of any party have been prejudiced; or (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.

Med. Shoppe, 614 F.3d at 488–89. The court also noted that it had previously recognized the effect of *Hall Street* vis-à-vis manifest disregard of the law leaving only the grounds specified in the FAA. *Id.* at 489 (citing *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008)).

97. *Med. Shoppe*, 614 F.3d at 489.

98. 604 F.3d 1313 (11th Cir. 2010).

99. *Id.* at 1320–22. Frazier also sought (1) vacatur of the award because the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made (9 U.S.C. § 10(a)(4)); and (2) modification or correction of the award because the arbitrator entered it in a matter not submitted to him (9 U.S.C. § 11(b)) and it was imperfect in matter of form not affecting the merits of the controversy (9 U.S.C. § 11(c)); Frazier asked the court to vacate the award on the common law grounds that the award was arbitrary and capricious and in violation of public policy. *Id.*

100. *Id.* at 1314 (citing *Hall St.*, 552 U.S. 576).

101. *Frazier*, 604 F.3d at 1322.

102. *Hall St.*, 552 U.S. at 587.

The Eleventh Circuit found the language “must grant” to be an unequivocal mandate unless one of the statutory exceptions is applicable, “there is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.”¹⁰³ The court then turned to the question of whether one of the statutory bases for vacatur was applicable in this case and concluded that none were, “[w]e think it clear that none of the statutory bases for vacating an arbitrator’s award under the FAA applies in this case.”¹⁰⁴

The court presented an extensive review of the issues touching vacatur in the wake of *Hall Street*, including the standard of review,¹⁰⁵ grounds for vacatur under the FAA,¹⁰⁶ and common law grounds for vacatur of arbitration awards.¹⁰⁷ Recognizing that the Supreme Court did not “explicitly extend its holding in *Hall Street* to judicial expansions of §§ 10 and 11,” the *Frazier* court recited the varying treatment to which these non-statutory grounds for vacatur have received in the circuits.¹⁰⁸ After reviewing this judicial history and considering the manner in which the *Hall Street* majority addressed non-statutory grounds, the court held that the common law grounds for vacatur were precluded by the *Hall Street* decision.¹⁰⁹

In *Campbell’s Foliage, Inc. v. Federal Crop Insurance Corp.*, the Eleventh Circuit confirmed that the only viable grounds for vacatur in that circuit were those enumerated in the FAA.¹¹⁰ The dispute surrounded a denial of coverage under a crop insurance policy issued by the Federal Crop Insurance Corporation to Campbell’s. Subsequently, the arbitrator confirmed the denial of coverage, and Campbell’s sought vacatur of the award

103. *Frazier*, 604 F.3d at 1322.

104. *Id.* at 1321. In addition, the court rejected *Frazier*’s contentions that she was entitled to modification or correction of the arbitral award because it was entered upon a matter not submitted to the arbitrator (9 U.S.C. § 11(b)) and that it was imperfect in matter of form not affecting the merits of the controversy (9 U.S.C. § 11(c)). *Id.* at 1321–22.

105. *Id.*

106. *Id.* at 1322–23.

107. *Id.* at 1322–24. In addition to the aforementioned statutory grounds for vacatur, prior to *Hall Street*, the Eleventh Circuit had upheld vacatur of arbitral awards under circumstances in which the arbitral awards were arbitrary and capricious, in violation of public policy, and made in manifest disregard for the law. *Id.* at 1322.

108. *Frazier*, 604 F.3d at 1323 (citing *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009)); see also *Ramos-Santiago v. UPS*, 524 F.3d 120, 124–25 (1st Cir. 2008); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010); see generally *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277 (9th Cir. 2009).

109. *Frazier*, 604 F.3d at 1324. The Eleventh Circuit minced no words in striking down manifest disregard of the law and its other common law bases for vacatur, “[w]e hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*. In so holding, we agree with the Fifth Circuit that the categorical language of *Hall Street* compels such a conclusion.” *Id.*

110. *Campbell’s Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App’x 828, 831 (11th Cir. 2014).

in the district court.¹¹¹ Campbell's conceded that none of the bases for vacatur set forth in 9 U.S.C. § 10 were present. The district court interpreted the judicial review mentioned in the subject insurance policy as contemplating the limited review provided in section 10 of the FAA.¹¹² On appeal, Campbell's asserted that (1) the district court should have interpreted the policy provision more expansively, and (2) the grounds for vacatur provided in the FAA were not the only available bases for vacatur.¹¹³

The court reiterated its acknowledgment in *Frazier* that the *Hall Street* decision invalidated the "'judicially-created bases for vacatur' we had formerly recognized, such as where an arbitrator behaved in manifest disregard of the law"¹¹⁴ The court also rejected Campbell's argument that the policy's arbitration provisions fell within the *Hall Street* "carve-outs" regarding a "more searching review based on authority outside the statute" and that "[t]he FAA is not the only way into court for parties wanting review of arbitration awards."¹¹⁵

2. *Circuits Affirming Manifest Disregard*

The Second, Fourth, Seventh, Ninth, and Tenth Circuits have continued to allow submission of manifest disregard as a basis for vacatur after *Hall Street*. Representative cases from these circuits are examined in this section.

Soon after the Supreme Court handed down its decision in *Hall Street*, the Second Circuit, in *Stolt-Nielson SA v. AnimalFeeds International Corp.*, considered the continued viability of manifest disregard as a ground for vacatur.¹¹⁶ An arbitral panel had concluded that the arbitration clause in the parties' contract allowed for class arbitration.¹¹⁷ The United States District

111. *Id.* at 829–30. The policy provision relied on by Campbell's provided: "Any decision rendered in arbitration is binding on you and us unless judicial review is sought Notwithstanding any provision in the rules of [the American Arbitration Association], you and we have the right to judicial review of any decision rendered in arbitration." *Id.* at 830.

112. *Id.*

113. *Id.*

114. *Id.* at 831 (citing *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010)).

115. *Campbell's Foliage, Inc.*, 562 F. App'x at 832.

116. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008). In *Stolt-Nielson*, the dispute that led to arbitration consisted of an anti-trust dispute brought by AnimalFeeds against Stolt-Nielson founded on allegations that Stolt-Nielson engaged in price fixing vis-à-vis a class of purchasers of parcel tank or transportation services. *Id.* at 87–88.

117. *Id.* at 89. The basis for the panel's conclusion regarding class arbitration was: (1) the arbitration clause and the parties' contract allowed for class arbitration; and New York law had no prohibition of class arbitration. *Id.* at 89–90.

Court for the Southern District of New York determined that the panel made the award in manifest disregard of the law.¹¹⁸

At the outset, the Second Circuit considered the manifest disregard claim of Stolt-Nielson in light of *Hall Street*.¹¹⁹ Analyzing the process of vacatur as one part of an overall arbitral process, the Second Circuit focused first on the intent of the parties and their agreement to submit their dispute to arbitration as opposed to entering the judicial system, most commonly for reasons of efficiency, reduction in cost, and control over the process.¹²⁰ The court reiterated the elements of manifest disregard in the Second Circuit: presence of a clear law explicitly applicable to the subject of the arbitration, improperly applied and leading to an erroneous outcome, and the arbitrator's knowledge of the existence of the law and its applicability to the subject of the dispute.¹²¹

Next, the court considered the status of manifest disregard in the wake of *Hall Street*. In the wake of *Hall Street*, the Second Circuit sustained its logic with the “judicial gloss” approach to manifest disregard.¹²² The linchpin of the “judicial gloss” construction is that a challenge to an arbitral award is *not* that the arbitrator erred but that the arbitrator violated the arbitration agreement by engaging in one or more of the acts described in section 10 of the FAA and to which the parties did not consent to in the agreement to arbitrate.¹²³ The question is whether the arbitrator exceeded the authority granted in the arbitral agreement.¹²⁴ In attaching itself to this argument, the Seventh Circuit declared the judicial gloss approach to be both consistent with the Supreme Court's ruling in *Hall Street* and its own view of manifest disregard in the pre-*Hall Street* era.¹²⁵

With this as a rubric against which to consider the claim of manifest disregard, the Second Circuit reversed, determining that Stolt-Nielson failed

118. *Id.* at 90. The basis for this conclusion was that the arbitrators should have conducted a choice of law analysis that would have led to the conclusion that federal maritime law requires contracts to be interpreted in light of custom and usage. *Id.* (citing *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 435 F. Supp. 2d 382, 385–86 (S.D.N.Y. 2006)).

119. *Stolt-Nielsen*, 548 F.3d at 93–94 (2d Cir. 2008).

120. *Id.* at 91–92. (citing *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 138–39 (2d Cir. 2007); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997); Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681, 681–82 (1950)).

121. *Stolt-Nielsen*, 548 F.3d at 93.

122. *Id.* at 94.

123. *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006).

124. *Id.*

125. *Stolt-Nielsen*, 548 F.3d at 94. To bolster its pre-*Hall Street* consistency argument, the court noted that it had characterized its manifest disregard review as “‘severely limited,’ ‘highly deferential,’ and confined to ‘those exceedingly rare instances’ of ‘egregious impropriety on the part of the arbitrators.’” *Id.* (citing *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2003)).

to cite legal authority applying custom and usage precluding class arbitration.¹²⁶ Accordingly, the arbitration panel had not manifestly disregarded New York law which had no such established rule against class arbitration.¹²⁷

The Supreme Court granted certiorari to decide whether imposing class arbitration on parties whose contracts fail to address the issue comports with the provisions of the FAA.¹²⁸ In addition to the class arbitration issue, the Court also considered whether manifest disregard survived *Hall Street*.¹²⁹

As described by Justice Alito writing for the majority, the petitioners had the burden to “clear a high hurdle” to sustain their burden to establish grounds for vacatur of the arbitration award.¹³⁰ This burden, according to the majority, can only be satisfied in circumstances where the arbitrator “strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ to the extent that his decision may be unenforceable.”¹³¹ In these circumstances, the statutory basis for such vacatur would be section 10(a)(4) of the FAA under the moniker that the arbitrator had “exceeded his powers.”¹³² Here, the majority concluded that the arbitration panel had exceeded its powers in issuing its award to such an extent that it was tantamount to imposing on the party its “own view of sound policy regarding class arbitration.”¹³³

In *A&G Coal Corporation v. Integrity Coal Sales, Inc.*, the Second Circuit ruled that manifest disregard of the law continues as a viable common law ground for vacatur but, that in this case, it was not established by the proof.¹³⁴ The Second Circuit, relying on its holding in *Schwartz v. Merrill Lynch & Co.*, reiterated: “As ‘judicial gloss’ on these specific grounds

126. *Stolt-Nielsen*, 548 F.3d at 96.

127. *Id.* at 96–97.

128. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 666 (2010).

129. *Id.* at 670. With respect to the manifest disregard issue, the Second Circuit concluded that that common law ground for vacatur did survive *Hall Street* as “judicial gloss” on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10. *Id.* For purposes of this case, the Second Circuit determined that the arbitration panel’s decision was not in manifest disregard of federal maritime law because the petitioners had failed to cite authority applying a maritime rule of custom and usage against class arbitration. *Id.*

130. *Id.* at 671 (citing *E. Assoc. Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

131. *Stolt-Nielsen*, 559 U.S. at 671–72. (citing *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam); (quoting *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))).

132. *Stolt-Nielsen*, 559 U.S. at 672. The Court identified the function of the arbitrator in such circumstances is “to interpret and enforce a contract, not to make public policy.” *Id.*

133. *Id.*

134. *A&G Coal Corp. v. Integrity Coal Sales, Inc.*, 565 F. App’x 41, 42–43 (2d Cir. 2014).

for vacatur, this court has held that an arbitration award may be set aside if it was rendered in ‘manifest disregard of the law.’”¹³⁵

The court found that the party seeking vacatur must establish that: (1) “the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable” and (2) “the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.”¹³⁶ Also, as the court noted, an arbitral award is subject to vacatur if in “manifest disregard of the terms of the parties’ relevant agreement.”¹³⁷ Using these principles, the Second Circuit concluded that the proof in the case was lacking, and the challenge to the award on the basis of manifest disregard must fail.¹³⁸

In *Dewan v. Walia*, the Fourth Circuit held that the arbitral award was subject to vacatur on the grounds of manifest disregard of the law.¹³⁹ The dispute involved an alleged breach of a non-competition provision in an employment contract between Dewan, a CPA firm, and one of its employees, Walia.¹⁴⁰ Upon referral to arbitration, the arbitrator entered a money damages award in Walia’s favor.¹⁴¹ The district court confirmed the award and granted Walia his attorney’s fees and costs.¹⁴² Dewan appealed, contending that the award was the result of the arbitrator’s manifest disregard of the law. The Fourth Circuit agreed and remanded the case to the district court with instructions to vacate the arbitral award.¹⁴³ The Fourth Circuit conducted the review of factual findings for clear error and conclusions of law *de novo*.¹⁴⁴ The controlling law, according to the Fourth Circuit, was not that relied upon by the parties and the court below (the Maryland Uniform Arbitration Act), but rather, the FAA.¹⁴⁵ Dealing with the merits of the case,

135. *Id.* at 42 (citing *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451 (2d Cir. 2011)).

136. *A&G Coal Corp.*, 665 F.3d at 42 (quoting *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n.1 (2d Cir. 2011)).

137. *A&G Coal Corp.*, 665 F.3d at 42 (quoting *Schwartz*, 65 F.3d at 451).

138. *A&G Coal Corp.*, 665 F.3d at 43.

139. 544 F. App’x 240, 245 (4th Cir. 2014).

140. *Id.* at 241.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 244 (quoting *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 190 (4th Cir. 2010)).

145. *Dewan*, 544 F. App’x at 244 (quoting *Preston v. Ferrer*, 552 U.S. 346, 349 (2008)). The basis for this conclusion was the jurisdictional provisions of the FAA: “Under § 2 of the FAA, ‘[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the ramification of any contract.’” *Id.* (citing 9 U.S.C. § 2). Walia is a citizen of Canada and the CPA firm a citizen of the United States which creates, according to the Fourth Cir-

and the question of manifest disregard of the law, the court first reviewed the grounds for vacatur set forth in 9 U.S.C. § 10(a).¹⁴⁶ The court then noted that the permissible common law grounds for vacating such an award “include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law.”¹⁴⁷ In a footnote, the court pointed out that the decision in *Hall Street* has caused the Fourth Circuit to recognize considerable uncertainty as to the validity of extra-statutory grounds for vacatur.

In the wake of the Supreme Court’s decision in *Hall Street Assocs., LLC v. Mattel, Inc.* this court has recognized that considerable uncertainty exists “as to the continuing viability of the extra-statutory grounds for vacating arbitration awards.” Nevertheless, we have recognized that “manifest disregard continues to exist” as a basis for vacating an arbitration award, either as an independent ground for review or as a “judicial gloss” on the enumerated grounds for vacatur set forth in the FAA.¹⁴⁸

In a case before the Seventh Circuit, *Renard v. Ameriprise Financial Services, Inc.*, Renard sought vacatur, contending Ameriprise had fraudulently obtained the arbitral award, and the arbitrators had manifestly disregarded the law.¹⁴⁹ It considered the question of whether manifest disregard survived *Hall Street* as a ground for vacatur of an arbitral award and affirmed the award in its entirety.¹⁵⁰

The court began with a discussion of the limited nature of a review of arbitral awards, “[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.”¹⁵¹ Arbitration awards are subject to vacatur: “[O]nly if one of the criteria specified in 9 U.S.C. § 10 is present—as relevant here, only if ‘the arbitrator deliber-

cuit, a transaction involving foreign commerce, and, therefore, it falls within the jurisdictional provisions of the FAA. *Id.* at 244–45.

146. *Id.* at 245.

147. *Id.* at 245–46 (quoting *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010)).

148. *Dewan*, 544 F. App’x at 240 n.5 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

149. 778 F.3d 563, 566 (7th Cir. 2015).

150. *Id.* at 564–66. In this case, which involved a dispute between a securities brokerage firm and one of its financial advisors, the arbitration panel awarded money damages in favor of the brokerage firm, and the financial advisor sought vacatur of the award, contending, *inter alia*, that the arbitrators acted in manifest disregard of the law. *Id.* The award was confirmed by the district court and an appeal to the Seventh Circuit followed. *Id.*

151. *Id.* at 567 (citing *Nat’l Wrecking Co. v. Local 731, Int’l Bhd. of Teamsters*, 990 F.2d 957, 960 (7th Cir. 1993)). The court also pointed out that under the FAA, even serious error in an arbitral decision does not subject it to vacatur. *Id.* (citing *Stolt-Nielsen S.A. v. Animal-Feeds Int’l Corp.*, 559 U.S. 662, 671(2010)).

ately disregards what he knows to be the law.”¹⁵² The court limited the applicability of manifest disregard of the law to circumstances in which “the arbitrator directs the parties to violate the law.”¹⁵³ Renard averred that the arbitrators had manifestly disregarded the law by misapplying Minnesota and Wisconsin law that the court concluded was far short of the standard for manifest disregard of the law.¹⁵⁴

The Seventh Circuit determined that the applicable law to be applied was the FAA with its tougher standard for manifest disregard of the law.¹⁵⁵ Turning to consideration of the efficacy of manifest disregard of the law as grounds for vacatur the court noted:

An arbitral award cannot be vacated pursuant to the FAA merely because the petitioner “show[s] that the panel committed an error—or even a serious error. It may be set aside only if one of the criteria specified in 9 U.S.C. § 10 is present—as relevant here, only if “the arbitrator deliberately disregards what he knows to be the law.”¹⁵⁶

Under this standard, the Seventh Circuit found that the arbitrators had not reached the benchmark for manifest disregard of the law.¹⁵⁷

*Comedy Club, Inc. v. Improv West Associates*¹⁵⁸ came before the Ninth Circuit by way of a declaratory judgment action with respect to a trademark license agreement by which Improv West granted Comedy Club rights in certain trademarks.¹⁵⁹ Comedy Club appealed to the Ninth Circuit after “a complex procedural history” resulting in an arbitration award and an order by the district court confirming the award.¹⁶⁰ The Ninth Circuit had previously determined that it lacked jurisdiction to review the order compelling arbitration entered by the district court.¹⁶¹

Upon remand, the *Comedy Club* court concluded that *Hall Street* left its previous precedent intact. “[W]e conclude that *Hall Street Associates* did not undermine the manifest disregard of law ground for vacatur, as under-

152. *Renard*, 778 F.3d at 567 (quoting *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1993)).

153. *Renard*, 778 F.3d at 567 (quoting *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 579–81 (7th Cir. 2001)).

154. *Renard*, 778 F.3d at 569.

155. *Id.*

156. *Id.* at 567 (quoting *Stolt-Nielsen*, 559 U.S. at 671).

157. *Renard*, 778 F.3d at 569.

158. 553 F.3d 1277 (9th Cir. 2009).

159. *Id.* at 1280.

160. *Id.* at 1281.

161. *Id.* (citing *Comedy Club, Inc. v. Improv W. Assocs.*, 514 F.3d 833 (9th Cir. 2007)). After the Supreme Court issued the *Hall Street* decision, it vacated the Ninth Circuit’s opinion (*Comedy Club*) and remanded the case to the Ninth Circuit for further consideration in light of *Hall Street*. See *Comedy Club Inc.*, 553 F.3d at 1281.

stood in this circuit to be a violation of § 10(a)(4) of the Federal Arbitration Act, and that the arbitrator manifestly disregarded the law.”¹⁶²

In analyzing the effect of *Hall Street* on the continued viability of manifest disregard, the court began its analysis with an examination of the argument of Improv West that manifest disregard is beyond the scope of the statutory reasons for vacatur and therefore invalid.¹⁶³ The Ninth Circuit rejected this contention based on its holding in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*¹⁶⁴ In *Kyocera*, the Ninth Circuit held that it was within the power of the courts to vacate an arbitration award in circumstances in which the arbitrators exceeded their powers, which it defined to include when the award is completely irrational or exhibiting manifest disregard of the law.¹⁶⁵

The Ninth Circuit concluded that the issue—whether manifest disregard falls within section 10 or 11 of the FAA—is beyond the scope of the decision reached in *Hall Street*.¹⁶⁶ Rather, according to the Ninth Circuit’s reading of *Hall Street*, the Supreme Court simply identified the several possible interpretations of the doctrine including that previously espoused by the Ninth Circuit.¹⁶⁷ The “possible readings of the doctrine” included sections 10(a)(3) or 10(a)(4), those portions of the FAA dealing with vacatur on the grounds of misconduct or exceeding powers.¹⁶⁸ Based on the discussion of the status of manifest disregard in *Hall Street*, the court concluded that *Hall Street* could not be said to be “‘clearly irreconcilable’ with *Kyocera*.”¹⁶⁹ As such, the court considered itself bound by prior Ninth Circuit precedent and, accordingly, held that manifest disregard remains a valid ground for vacatur as a part of section 10(a)(4).¹⁷⁰

Recently, in *Wetzel’s Pretzels, LLC v. Johnson*, the Ninth Circuit again had occasion to consider the status of manifest disregard post-*Hall Street*.¹⁷¹ The Johnsons appealed a district court order denying vacatur of an arbitra-

162. *Comedy Club Inc.*, 553 F.3d at 1283.

163. *Id.* at 1289–90.

164. *Id.* at 1290 (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)).

165. *Kyocera Corp.*, 341 F.3d at 997.

166. *Comedy Club Inc.*, 553 F.3d at 1290.

167. *Id.*

168. *Id.* at 1290.

169. *Id.*

170. *Id.* The Ninth Circuit noted that this conclusion is in accord with the interpretation given to *Hall Street* by the Second Circuit. *Id.* (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010)).

171. *Wetzel’s Pretzels, LLC v. Johnson*, 567 F. App’x 493, 494 (9th Cir. 2014).

tion award in favor of Wetzel because the arbitrator exceeded his powers.¹⁷² Framing the issue as whether the arbitrator exceeded his powers under section 10(a)(4) of the FAA—the court held that the Johnsons had not shown the arbitrator exceeded his powers and denied the request for vacatur.¹⁷³ The standard applied to finding facts sufficient to justify vacatur of the award was the following: “In order for us to vacate the award on the ground that the arbitrator exceeded his powers under § 10(a)(4), the Johnsons would have to show that the award was ‘completely irrational, or exhibit[ed] a manifest disregard of the law,’ but they have made no such showing.”¹⁷⁴ Although the court recognized the viability of manifest disregard of the law, it concluded that the Johnsons failed to establish manifest disregard, defined as a circumstance in which the arbitrator recognized the applicable law and then ignored it.¹⁷⁵

In *Adviser Dealer Services, Inc. v. Icon Advisers, Inc.*, the Tenth Circuit also acknowledged the continued viability of manifest disregard of the law:

A District Court may vacate an arbitration award only “for the reasons enumerated in the Federal Arbitration Act, 9 U.S.C. § 10, or for ‘a handful of judicially creative reasons.’” These judicially creative reasons “include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing.”¹⁷⁶

An arbitral panel constituted under the Financial Industry Regulatory Authority (FINRA) found Adviser Dealer Services and its co-defendants jointly and severally liable to Icon for damages and attorney’s fees under a retirement agreement.¹⁷⁷ The district court vacated the attorney’s fee award. Icon appealed the vacatur of the attorney’s fee award and Adviser Dealer Services cross-appealed the order upholding the damages award to Icon.¹⁷⁸ The Tenth Circuit identified the grounds for vacatur of arbitral awards in the post-*Hall Street* era to include those set forth in the FAA, and “a handful of judicially created reasons” including “manifest disregard of the law.”¹⁷⁹

172. *Id.* at 494. The arbitrator entered an award of enforcing post-termination provisions of a franchise agreement requiring that the Johnsons assign a lease in certain property interests to Wetzel’s Pretzels. *Id.*

173. *Id.*

174. *Id.* (quoting *Billier v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012)).

175. *Wetzel’s Pretzels*, 567 F. App’x at 494 (quoting *Billier*, 668 F.3d at 656).

176. *Adviser Dealer Servs., Inc. v. Icon Advisers, Inc.*, 557 F. App’x 714, 717 (10th Cir. 2014) (citation omitted).

177. *Id.*

178. *Id.* at 718.

179. *Id.* at 717 (quoting *Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.*, 269 F.3d 1202, 1206 (10th Cir. 2001)); (quoting *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001)). See also *Bangor Gas Co. v. H.Q. Energy*

3. *Circuits Undecided on Manifest Disregard*

The First, Third, and Sixth Circuits are outliers that have yet to definitively answer the question of whether manifest disregard continues, after *Hall Street*, as an extra-statutory ground for vacatur. Post-*Hall Street* decisions from these circuits are examined in this section.

In *Raymond James Financial Services, Inc. v. Fenyk*, the First Circuit held that regardless of the legal status of manifest disregard as a basis for vacatur, the facts in the case did not establish manifest disregard of the law.¹⁸⁰ Accordingly, the court found it unnecessary to make a definitive ruling on the status of manifest disregard in the First Circuit: “We need not resolve the uncertainty over ‘manifest disregard’ . . . even assuming the doctrine remains available, it would not invalidate the award in this case.”¹⁸¹ Nevertheless, the court addressed the viability of manifest disregard of the law as a ground for vacatur in some detail, without a conclusion one way or the other:

Whether the manifest-disregard doctrine remains good law, however, is uncertain. A circuit split has developed following the Supreme Court’s decision in *Hall Street Associates, L. L. C. v. Mattel, Inc.*, which held that § 10 of the FAA provides the exclusive grounds under the statute for vacatur of arbitration awards. Although we concluded, in dicta, that the doctrine is no longer available, we have “not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*.”¹⁸²

A Third Circuit case, *Bellantuono v. ICAP USA, LLC*, centered on the breach of an employment contract.¹⁸³ The arbitration panel found for the employer, ICAP.¹⁸⁴ Bellantuono appealed to the district court, unsuccessfully arguing that the panel had manifestly disregarded the law by denying him certain discovery and refusing to issue sanctions as result of untimely production of documents.¹⁸⁵ Bellantuono again appealed, this time to the Third Circuit.¹⁸⁶ That court affirmed the district court’s judgment on the grounds that Bellantuono had “failed to carry his substantial burden of showing a manifest disregard of the law or a failure to consider material evidence in the arbitration panel’s rulings.”¹⁸⁷

Services (U.S.) Inc., 695 F.3d 181, 187 n.3 (2012) (listing cases).

180. *Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 65 (1st Cir. 2015).

181. *Id.*

182. *Id.* at 64–65 (citation omitted).

183. *Bellantuono v. ICAP USA, LLC*, 557 F. App’x 168, 170 (3d Cir. 2014).

184. *Id.* at 172–73.

185. *Id.* at 173.

186. *Id.* at 170.

187. *Id.*

As for the grounds available to support vacatur of an arbitration award in the post-*Hall Street* era, the court held:

The narrow circumstances under which a court may vacate an arbitration award are defined exclusively in Section 10 of the FAA. A court may vacate an arbitration award pursuant to Section 10 where: (1) the award was procured by corruption, fraud, or undue means; (2) the arbitrators demonstrated partiality or corruption; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their powers.¹⁸⁸

The court noted that the legal basis for Bellantuono's vacatur request was a manifest disregard of the law as opposed to any of the section 10 grounds.¹⁸⁹ The factual basis for the claim was that the panel had mishandled certain discovery related issues and in so doing had committed manifest disregard of the law.¹⁹⁰ Even though it is not one of the grounds enumerated in section 10, the Third Circuit was among those recognizing manifest disregard as a basis for vacatur before the *Hall Street* decision.¹⁹¹ However, as the court pointed out, *Hall Street* declared that "the grounds for vacatur . . . provided by § . . . 10 . . . of the FAA are exclusive . . . [s]ince then, our sister Circuit Courts of Appeals are split on the question of whether manifest disregard of the law remains a viable ground for vacating an arbitration award."¹⁹² In a footnote to this passage, the court noted:

The Second, Fourth, and Ninth Circuits have held that manifest disregard of the law survived *Hall Street* because an arbitrator exceeds his powers under 9 U.S.C. § 10(a)(4) by manifestly disregarding the law. Conversely, the Fifth, Eighth, and Eleventh Circuits have held that manifest disregard of the law is no longer a valid ground for vacatur in light of *Hall Street*.¹⁹³

The court identified the question to be answered as whether the arbitral panel in making its discovery rulings or in failing to grant a mistrial refused "to apply a plainly controlling rule of law."¹⁹⁴ The court acknowledged that the Third Circuit had not ruled on the viability of manifest disregard. However, because it agreed with the finding of the district court that the arbitral panel did not act in manifest disregard of the law the continuing

188. *Id.* at 173 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586–87 (2008)).

189. *Bellantuono*, 557 F. App'x at 173.

190. *Id.*

191. *Id.* (citing *Tanoma Min. Co., Inc. v. Local Union No. 1269*, 896 F.2d 745, 749 (3d Cir. 1990)).

192. *Bellantuono*, 557 F. App'x at 173.

193. *Id.* (citations omitted).

194. *Id.* at 174.

validity of manifest disregard of the law is not outcome determinative in the case. Accordingly, it was not necessary for the court to make that determination in this case.¹⁹⁵

The Sixth Circuit addressed the manifest disregard conundrum in two cases, *Coffee Beanery, LTD. v. WW, L.L.C.*,¹⁹⁶ and *Schaefer v. Multiband*.¹⁹⁷ *Coffee Beanery*, arose out of an agreement under which WW obtained a license to operate a cafe from Coffee Beanery.¹⁹⁸ The parties ended up in a dispute over the license agreement of which they submitted to arbitration that resulted in an award in favor of Coffee Beanery on all claims.¹⁹⁹ The district court denied WW's motion to vacate and confirmed the award in its entirety.²⁰⁰ It also held, among other things, that WW did not establish that the arbitrator was guilty of manifest disregard of the law.²⁰¹

The Sixth Circuit acknowledged the following with respect to those statutory grounds: "This Court's ability to vacate an arbitration award is almost exclusively limited to these grounds, *although it may also vacate an award found to be in manifest disregard of the law.*"²⁰² In further reliance on *Wilko* as to what it is that constitutes manifest disregard:

In *Wilko*, the Supreme Court implicitly recognized judicial review based on "manifest disregard" of the law when it stated that "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." To constitute a manifest disregard for the law, "[a] mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent." Thus, an arbitrator acts with manifest disregard if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."²⁰³

The Sixth Circuit conceded that the language in *Hall Street* "reduced the ability of federal courts" to vacate awards for non-statutory reasons, but it yielded not an inch to the argument that it foreclosed review for manifest

195. *Id.*

196. *Coffee Beanery, LTD. v. WW, L.L.C.*, 300 F. App'x 415, 418–19 (6th Cir. 2008).

197. *Schaefer v. Multiband* 551 F. App'x 814, 818–19 (6th Cir. 2014).

198. *Coffee Beanery*, 300 F. App'x at 416.

199. *Id.*

200. *Id.* at 417.

201. *Id.* at 417–18.

202. *Id.* at 418 (emphasis added) (citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953)). The section 10 grounds include: procurement of the award by corruption, fraud or undue means; arbitrator partiality or corruption; arbitrator misconduct; and arbitrator exceeded powers. *Id.*

203. *Coffee Beanery*, 300 F. App'x at 418 (citing *Wilko*, 346 U.S. at 436).

disregard of the law.²⁰⁴ In fact, it bolstered its argument with Justice Souter's dictum in *Hall Street*.²⁰⁵ The Sixth Circuit recognized the decision in *Hall Street* as characterizing that holding as having reduced, but not foreclosing, federal courts' ability to vacate arbitration awards on grounds other than those laid out in 9 U.S.C. § 10.²⁰⁶ However, after considering the issue of whether the arbitrator had manifestly disregarded the law, initiating the arbitral award in the case, the court concluded that WW had failed to establish manifest disregard of the facts or the law on the part of the arbitrator.²⁰⁷

In the other Sixth Circuit case, *Schafer v. Multiband Corp.*, the court again left open the question of whether manifest disregard of the law remains a valid basis for vacatur.²⁰⁸ It concluded that even if manifest disregard is alive and well as a basis for vacatur, under the facts in this case, the arbitrator had committed an error of law, but he had not manifestly disregarded it.²⁰⁹

Even so, the court took the opportunity to discuss *Hall Street* briefly noting that in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, decided two years after *Hall Street*, the Supreme Court left open the door for a later determination of the vitality of manifest disregard.²¹⁰ "We do not decide whether 'manifest disregard' survives our decision in *Hall Street* as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10."²¹¹ The Sixth Circuit asserted that it had "continued to acknowledge 'manifest disregard' as a ground for vacatur—albeit not in a published holding."²¹²

IV. ACCURACY V. FINALITY: WHY NOT BOTH?

The thrust of much of the jurisprudence surrounding arbitration agreements and awards has been to mandate enforcement and suppress judicial review.²¹³ Reducing the "risk" that awards will be vacated on appeal ad-

204. *Coffee Beanery*, 300 F. App'x at 418 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008)).

205. *Coffee Beanery*, 300 F. App'x at 418 (citing *Hall St.*, 552 U.S. at 585).

206. *Coffee Beanery*, 300 F. App'x at 419–20 (citing *Hall St.*, 552 U.S. at 584).

207. *Coffee Beanery*, 300 F. App'x at 419–20.

208. *Schafer v. Multiband Corp.*, 551 F. App'x 814 (6th Cir. 2014).

209. *Id.* at 818–20.

210. *Id.* at 821.

211. *Id.* at 821 n.1 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 543 F.3d 85, 93–95 (2d Cir. 2008), *overruled on other grounds*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)).

212. *Schafer*, 551 F. App'x at 821 n.1.

213. See e.g., *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (opining that "this plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final"); *Dueferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d

vances two of the primary goals of arbitration, efficiency, and finality.²¹⁴ Despite its many perceived advantages, and perhaps because of some of them, including finality and expediency, arbitration now comes with the potential for a significant offsetting risk that the arbitrator grievously fails to apply the law appropriately, with no available remedy. The choice faced by many potential beneficiaries of the arbitral process, including businesses involved in high-stakes disputes, is to forgo arbitration's many advantages rather than accept the risk of harm resulting from a serious misapplication of the law in the face of no possible redress for even the most grievous misapplication of the law.²¹⁵

An article published by the author just after the Supreme Court's decision in *Hall Street* raised the question of how the decision would affect the course of arbitration going forward.²¹⁶ Questions surrounding such issues include the willingness of arbitral parties to exchange "reliable decision making and legal certainty for simplicity, speed, and economy" in the absence of meaningful judicial review.²¹⁷ Another previously raised question was one directly on point here, the secondary effects on the practice of arbitration given the uncertain status of the common law grounds for vacatur including manifest disregard of the law.²¹⁸ Regrettably, that question remains unanswered, seemingly caught in the effects of the serious circuit split that has continued since the *Hall Street* decision was issued in 2008.

As exemplified by the majority opinion in *Hall Street* and the other cases discussed in this article, obtaining judicial review of an arbitration decision can be perceived as an uphill climb without much, if any, certainty.

Cir. 2003) (quoting *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854)) (asserting that to interfere with this process would frustrate the intent of the parties, and to work the usefulness of arbitration, making it the commencement, not the end, of litigation.); see also Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681, 681-82 (1950).

214. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986). "A less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties." *Id.*

215. Lindsay Biesterfeld, *Courts Have the Final Say: Does the Doctrine of "Manifest Disregard" Promote Lawful Arbitral Awards or Disguise Unlawful Judicial Review?* 2006 J. DISP. RESOL. 627 (2006); Weathers P. Bolt, *Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions*, Comment, 63 ALA. L. REV. 161, 162 (citing Wendy L. Rovina, *Is it Time to Revise Your Arbitration Agreements or Rethink Your Alternative Dispute Strategy?* 57 LA. B. J. 168 (2009)); David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency and Arbitration after Hall Street Associates*, 8 FLA. ST. U. BUS. REV. 77, 92 (2009).

216. Leasure, *supra* note 7, at 273.

217. *Id.* at 306-07 (citing Brief for the Petitioner at 38-39, *Hall St.*, 128 S. Ct. 1396 (No. 06-989); Brief for the Petitioner at 40, *Hall St. Assocs. L.L.C. v. Mattel, Inc.* 128 S. Ct. 1396 (2008) (No. 06-989)).

218. Leasure, *supra* note 7, at 308.

A participant in the process could easily come away with the impression that no matter what the arbitrator decides, the chance of any meaningful judicial review to redress a manifest disregard of the law is remote.

Precluding judicial review in all but the most unusual circumstances advances two of the goals of arbitration, efficiency and finality. Despite its many perceived advantages, and perhaps because of some of them, including finality and expediency, arbitration now comes with an offsetting risk; that the arbitrator knowingly fails to apply the law appropriately, and there is no available remedy. As such, the choice faced by many potential beneficiaries of the arbitral process, including businesses involved in high-stakes disputes, is to forgo arbitration's many advantages rather than accept the risk of harm resulting from a serious misapplication of the law without the possibility of redress.²¹⁹ In his brief essay, Timothy M. O'Shea succinctly captures the uncertainty that participants and potential participants in arbitration face regarding the availability of judicial review of arbitral decisions in the wake of *Hall Street*:

What does all this mean for someone considering an arbitration agreement? It means that it may be a good time to reevaluate whether arbitration would be appropriate for disputes that could arise in the future. The fact that there is no viable appeal mechanism at least in some jurisdictions—even if an arbitrator manifestly disregards the applicable law should serve as a strong warning to those who are thinking about adding an arbitration clause to their contracts.

If the potential disputes involve substantial rights or sums of money, then arbitration may not be the best forum to resolve such disputes. Yet, it is also important to recognize that arbitration is not designed to be a perfect dispute resolution forum. Rather, it is designed primarily to avoid the time-consuming and costly alternative of litigation. The Supreme Court made it clear in *Hall Street* that a restrictive standard of review is necessary to preserve these benefits so that arbitration does not become a mere dress rehearsal for litigation. Nevertheless, the developing split of authority among the courts on this issue makes it likely that the Supreme Court will be asked once again to address whether an arbitrator can really disregard the law.²²⁰

Without question, many factors play into the decision to submit a dispute to arbitration. The potential benefits of arbitration are well known. However, to take advantage of these benefits, should the participant be required to forfeit any meaningful judicial review of an arbitral decision re-

219. See generally Biesterfeld, *supra* note 215, at 627; Bolt, *supra* note 215, at 162 (citing Rovina, *supra* note 215, at 168); Kessler, *supra* note 215, at 92.

220. Timothy M. O'Shea, *Arbitration's Appeal: The Grounds Have Narrowed*, 66-JUL BENCH & B. MINN. 31 (2009).

sulting from a knowing misapplication of the law? Particularly in arbitrations with a great deal at issue, parties should not be precluded in that way from taking advantage of the arbitration process in preference to litigation. Some solutions have been suggested, including an amendment to the FAA to permit such limited judicial review.²²¹ But one thing seems certain; there is little expectation that relief will come soon in the form of a resolution by the Supreme Court of the manifest disregard circuit split.

221. See Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L. J. 214 (2008); Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L. J. 234 (2008). See also Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117 (1998).