

## Journal of Law and Policy

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Volume 16

Issue 1

SCIENCE FOR JUDGES IX

Article 12

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2008

# Manifest Disregard in Arbitration Awards: A Manifestation of Appeals Versus a Disregard for Just Resolutions

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### Recommended Citation

Kate Kennedy, *Manifest Disregard in Arbitration Awards: A Manifestation of Appeals Versus a Disregard for Just Resolutions*, 16 J. L. & Pol'y (2007).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol16/iss1/12>

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**MANIFEST DISREGARD IN ARBITRATION  
AWARDS:  
A MANIFESTATION OF APPEALS VERSUS A  
DISREGARD FOR JUST RESOLUTIONS**

*Kate Kennedy\**

INTRODUCTION

Over the years, there has been an increase in judicial review of arbitration awards under the manifest disregard of the law doctrine.<sup>1</sup> This practice has whittled away the finality for which arbitration is known and valued,<sup>2</sup> and diminished its allure as a quick and inexpensive method of dispute resolution.<sup>3</sup> What makes this practice even more detrimental to the future of arbitration is that the standard used to grant judicial review varies tremendously between circuits.<sup>4</sup> This inconsistency was recently exhibited in

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\* Brooklyn Law School Class of 2008; B.A. Carleton College, 2003. The author wishes to thank Victoria Szymczak for introducing her to this topic as well as Susanne Flanders, Nicholas Reiter, and Nicole Roodhuyzen for their encouragement and editing expertise.

<sup>1</sup> The manifest disregard doctrine, arising out of Supreme Court's opinion in *Wilko v. Swann*, 346 U.S. 427, 436 (1953), has now been adopted in some variation in every federal circuit. See *Birmingham News Co. v. Horn*, 901 So. 2d 27, 59-61 (2004) (identifying representative manifest disregard cases from each of the federal circuits).

<sup>2</sup> Ronald J. Hedges, *Arbitration Developments and Trends*, SL081 A.L.I.-A.B.A. 1643, 1649 (2006).

<sup>3</sup> See Lou Whiteman, *Arbitration's Fall from Grace*, LAW.COM, July 13, 2006, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1152695125655>.

<sup>4</sup> Marcus Mungoli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY'S L.J. 1079, 1080 (2000) (citing *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d

decisions of the Courts of Appeals for the Fourth and the Eleventh Circuits wherein it became clear that the variance between the standards used to evaluate manifest disregard claims had reached a critical level: what the Eleventh Circuit sanctions as an unwarranted appeal may be reviewed and overturned on grounds of manifest disregard by the Fourth Circuit.<sup>5</sup>

This discrepancy creates an atmosphere of uncertainty in the law and the field of arbitration. Lawyers and their clients are at a disadvantage when deciding whether to arbitrate because they are unable to predict whether it will serve its purpose or only add to the time and expense of resolving the claim.<sup>6</sup> This situation casts a shadow on the future of arbitration and leaves scholars wondering whether the use of arbitration will “plateau,”<sup>7</sup> whether arbitration will continue to be abused by “poor losers,”<sup>8</sup> or whether a consistent standard of review will be implemented allowing arbitration to become the reliable and predictable method of quick and inexpensive dispute resolution as was originally intended.<sup>9</sup>

This Note will examine two recent decisions by the Fourth Circuit Court of Appeals<sup>10</sup> and the Eleventh Circuit Court of

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752, 761–62 (5th Cir. 1999)).

<sup>5</sup> Compare *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006) (refusing to vacate an arbitration award and threatening sanctions for future appeals that are not based on a record which demonstrates that the arbitrator knew the applicable law and ignored it; the reasonableness of the arbitrator’s analysis in arriving at an award is not considered), with *Patten v. Signator Ins. Agency*, 441 F.3d 230 (4th Cir. 2006) (granting review and vacating an arbitrator’s award because it was an unreasonable act to carry the one-year statute of limitations from the first contract over to the second).

<sup>6</sup> Cf. David Boohaker, *The Addition of the “Manifest Disregard of the Law” Defense to Georgia’s Arbitration Code and Potential Conflicts with Federal Law*, 21 GA. ST. U. L. REV. 501, 522 (2004) (The author’s assertion that the Georgia State Courts’ adoption of the federal two-prong test of manifest disregard will result in arbitration being less outcome determinative because the courts will have to choose factors and tests to evaluate the two prongs can be seen as a reflection of the current state of affairs in the federal circuits).

<sup>7</sup> Whiteman, *supra* note 3.

<sup>8</sup> Hedges, *supra* note 2, at 1648.

<sup>9</sup> Norman S. Poser, *Arbitration: Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 518 (1998).

<sup>10</sup> *Patten*, 441 F.3d 230.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 419

Appeals<sup>11</sup> in which the “courts seem to have gone in opposite directions in applying the [manifest disregard] standard.”<sup>12</sup> However, rather than interpreting these decisions as the emergence of a split amongst circuits, this Note proposes that the apparent conflict is actually the manifestation of inconsistent analyses applied to the same standard. Further, this Note argues that this is the inevitable result of the lack of a coherent model for courts to follow when appealed to on the grounds of manifest disregard, an often-used common law mechanism for appealing arbitration awards.<sup>13</sup>

Part I of this Note will provide an overview of the history of arbitration, the benefits and detriments to using this method of alternative dispute resolution, and the expanding role of arbitration in today’s world. Part II will focus on a common method used to appeal arbitration decisions—that is, arguing that the arbitrator manifestly disregarded the law.<sup>14</sup> It will examine the role that the manifest disregard doctrine plays in arbitration and in elevating arbitration disputes to the courts. Specifically, this Note will look at the manifest disregard doctrine in the context of two recent Fourth and Eleventh Circuit cases that have applied the standard with strikingly different methods. Part III will discuss the policy implications of the inconsistent application of the manifest disregard standard in the context of domestic law. It will also further examine the side effects of this inconsistency, such as an increase in unjustified appeals and forum-shopping. Finally, part IV will conclude that it is time for the Supreme Court to intercede and assert a clear and defined standard for the circuits to use when deciding whether to review an arbitration award on the grounds of manifest disregard.

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<sup>11</sup> B.L. Harbert Int’l, LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

<sup>12</sup> Lawrence W. Newman & David Zaslowsky, ‘*Manifest Disregard*’ in *International Arbitration*, N.Y.L.J., July 31, 2006, at 3.

<sup>13</sup> See James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT’L ARB. 9, 47 (2004).

<sup>14</sup> *Id.*

## I. ARBITRATION'S SCOPE AND ROLE IN ALTERNATIVE DISPUTE RESOLUTION

### A. *Overview of Arbitration as a Method of Alternative Dispute Resolution*

Arbitration fills an important and unique niche in the field of alternative dispute resolution and has been touted as a method through which businesses as well as individuals can resolve disputes cheaply, quickly, and privately.<sup>15</sup> Arbitration allows for the resolution of claims by a mutually agreed upon third party<sup>16</sup> who investigates the claim(s) and makes a determination based on the evidence.<sup>17</sup> This process saves disputants the investments of time and money that are inevitable in traditional judicial proceedings.<sup>18</sup> Further, arbitration often facilitates a more satisfactory resolution because the parties may select an arbitrator who is an expert in the relevant area of law and they have the authority to limit the scope of the arbitrator's review.<sup>19</sup>

### B. *Arbitration: The Pros and The Cons*

Alternative Dispute Resolution includes a variety of conflict resolution methods that can be used as an alternative to traditional judicial proceedings.<sup>20</sup> Private Arbitration is the most popular type

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<sup>15</sup> See William H. Daughtry, Jr. & Donnie L. Kidd, Jr., *Shifting Attorney's Fees in Litigation Attacking Commercial Arbitration Awards: A Disincentive for Meritless Motions for Correction, Modification or Vacatur*, 35 AM. BUS. L.J. 515 (1998).

<sup>16</sup> The "third party" chosen as arbitrator is not required by law to have any specific qualifications such as a law degree or experience as an attorney or judge. It is only when the arbitration agreement or the statute providing for arbitration specifies requirements for an acceptable arbitrator that the arbitrator is required to have these specific qualifications. See 4 AM. JUR. 2D *Alternative Dispute Resolution* § 154 (2006).

<sup>17</sup> See *id.* § 8.

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

<sup>19</sup> *Id.* § 9.

<sup>20</sup> *Id.* § 1.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 421

of alternative dispute resolution because of its unique characteristics.<sup>21</sup> It offers parties the ability to resolve their dispute outside of the public eye, within agreed upon parameters, and often without the need for judicial intervention.<sup>22</sup>

Despite the many benefits of private arbitration, there are also some drawbacks.<sup>23</sup> These drawbacks manifest themselves in the arbitrator's decision making power and the subsequent rights of the parties involved in the arbitration to further adjudicate their claims. While parties can choose an arbitrator who is experienced in the subject matter of the dispute, arbitrators, unlike judges, are not required to have been instructed in the judicial application of the law.<sup>24</sup> Consequently, the arbitrator may misapply the law to the detriment of one or both parties. Further, without a clause in the arbitration agreement specifying otherwise, an arbitrator is not required to document the reasoning behind his decision.<sup>25</sup> An empty record can spell trouble for a dissatisfied party that has to demonstrate on appeal both that the arbitrator misapplied the law to the claim and that the arbitrator intentionally disregarded the law.

*C. Judicial Review of Arbitration Awards Is Limited*

Judicial review of arbitration awards is relatively limited.<sup>26</sup> By agreeing to arbitrate, parties forfeit their right to a jury trial and agree to the stipulations set forth in the Federal Arbitration Act ("the FAA").<sup>27</sup> These stipulations state that an arbitration award

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<sup>21</sup> 4 AM. JUR. 2D *Alternative Dispute Resolution* § 9 (2006).

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

<sup>23</sup> *Id.* § 11.

<sup>24</sup> *Id.* § 11.

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

<sup>26</sup> *Id.*; see also Poser, *supra* note 9, at 503; Christopher R. Drahozal, *Civil Law, Procedure, and Private International Law: New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233 (2006) (quoting Alan Scott Rau & Edward F. Sherman, 30 TEX. INT'L L.J. 89, 90 n.3 (1995) (In fact, the Federal Arbitration Act has been characterized as "barebones" because of the limited occasions in which it allows courts to review and vacate arbitration awards).

<sup>27</sup> 4 AM. JUR. 2D *Alternative Dispute Resolution* § 11 (2006).

can be vacated by courts only in the following limited circumstances: 1) the award was obtained by corruption, fraud, or undue means; 2) there was evidence of partiality or corruption on the part of the arbitrators; 3) the arbitrator is guilty of misconduct or misbehavior that prejudiced the rights of either party; or 4) the arbitrator acted outside the confines of the powers authorized to him or failed to execute his powers such that a resolution was never reached.<sup>28</sup>

In addition to these four circumstances in which a court is authorized to vacate an award, the FAA allows a court to modify an award under the following circumstances: 1) there has been either a material miscalculation of figures or a material mistake in the description of an object referred to in the award; 2) there is evidence showing the arbitrators made an award in connection with a matter that had not been submitted for their review; or 3) an arbitration award is imperfect in the form in which it was made.<sup>29</sup>

While the provisions set out in the FAA protect a majority of the rights of parties who submit to arbitration, there are a number of circumstances affecting these rights that it does not protect against.<sup>30</sup> The most recognized circumstances that lead to judicial review of arbitration awards under the common law rather than the FAA are when an arbitrator 1) manifestly disregards the law he is being asked to apply, 2) fails to draw his or her award from the essence of the contract, 3) creates an award that is “completely irrational,” or 4) where the award is bad public policy.<sup>31</sup> These common law exceptions to the finality of arbitration awards provide leeway to parties that agree to submit to arbitration but want to ensure they obtain a just award in addition to a speedy and economical resolution.

The common law avenues for judicial review are unique in that they illustrate the balance courts are trying to strike between just resolutions and resolutions that are quick and inexpensive. All of the common law rules permitting judicial review recognize the risk

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<sup>28</sup> 9 U.S.C. §§ 10 (a)(1)d–(4) (2007).

<sup>29</sup> 9 U.S.C. §§ 11 (a)–(c) (2007).

<sup>30</sup> Kenneth Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U.L. REV. 255, 305–06 (1998).

<sup>31</sup> *Id.* at 306.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 423

associated with choosing arbitration as a method of dispute resolution. These rules, unlike the FAA rules outlined above, enable parties to accept the inherent risk of arbitration along with the assurance that there is a judicial safety net that will catch them if their award does not conform to legal norms. The manifest disregard doctrine exemplifies this balance. Under the manifest disregard doctrine, parties are able to appeal awards that are contrary to applicable law.<sup>32</sup> This provides protection not afforded in the FAA and ensures that the goal of a just resolution is not overcome by the objectives of increased efficiency and reduced expense.<sup>33</sup>

*D. The Role of Arbitration Today*

Domestic use of arbitration has grown steadily over the past decade.<sup>34</sup> In light of that growth, the lack of judicial oversight regarding the arbitration process, specifically with respect to the structure of the appeal process, has created some concern.<sup>35</sup> While this lack of oversight raises legitimate concern, it is an inherent characteristic of arbitration and it can be assumed that parties accept this when they agree to settle disputes through the arbitration process.<sup>36</sup> The Ninth Circuit Court of Appeals eloquently stated this risk in its decision in *Kyocera Corp v. Prudential-Bache T Servs*:<sup>37</sup>

The risk that arbitrators may construe the governing law imperfectly in the course of delivering a decision that attempts in good faith to interpret the relevant law, or may make errors with respect to the evidence on which they base their rulings, is a risk that every party to arbitration

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<sup>32</sup> See *Wilko v. Swan*, 346 U.S. 427, 436 (1953).

<sup>33</sup> Poser, *supra* note 9, at 503.

<sup>34</sup> Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round III*, 38 TEX. TECH L. REV. 535, 580 (2006).

<sup>35</sup> Caroline E. Mayer, *There's no Way to Arbitrate This Issue; Critics, Firms at Odds on Policy*, WASH. POST, Jul. 14, 2002, at H01.

<sup>36</sup> Hedges, *supra* note 2, at 1647.

<sup>37</sup> 341 F.3d 987 (9th Cir. 2003).



assumes. . . .<sup>38</sup>

In addition to domestic growth, the United States' participation in international arbitration has greatly increased since the early 1990s.<sup>39</sup> In 2002, following a decade in which the American Arbitration Association's participation in international arbitration tripled, the organization declared itself "the largest international commercial arbitral institution in the world."<sup>40</sup>

The United States is involved in international arbitration at a variety of levels. For instance, the United States has agreed to submit to international arbitration for disputes arising out of the North American Free Trade Agreement (NAFTA) and the Central American Free Trade Agreement (CAFTA). Further, Congress has codified the United States' commitment to international arbitration in section 207 of the FAA which includes the New York Convention—an international agreement fostered by the United Nations establishing the recognition and enforcement of foreign arbitration awards.<sup>41</sup> Section 207 of the FAA states that courts under the jurisdiction of the United States will confirm international arbitration awards unless the awards fall into one of the ten categories which create exceptions to this rule.<sup>42</sup>

In addition to its involvement with international arbitration, the United States ("U.S.") takes part in international dispute resolution on a smaller scale through numerous bilateral investment treaties.<sup>43</sup> Indirectly, the U.S. is also increasingly involved in international arbitration as U.S. citizens are being chosen as arbitrators for international disputes, and the United States is frequently chosen as a forum for the arbitration of international disputes.<sup>44</sup>

Finally, although the FAA recognizes the manifest disregard doctrine as a method for challenging an arbitration award, the New York Convention is silent as to how courts in the forum nation

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<sup>38</sup> *Id.* at 1003.

<sup>39</sup> Drahozal, *supra* note 26, at 233.

<sup>40</sup> *Id.* (quoting from [www.adr.org](http://www.adr.org)).

<sup>41</sup> *See id.* at 241.

<sup>42</sup> 9 U.S.C. 207 (2007).

<sup>43</sup> Drahozal, *supra* note 26, at 235.

<sup>44</sup> *Id.* at 244–45.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 425

should review the award.<sup>45</sup> The New York Convention focuses on the enforcement of arbitration awards in nations other than the country where the award was decided, and therefore, does not explicitly recognize the manifest reward doctrine.<sup>46</sup> Consequently U.S. Federal Courts are able to apply the doctrine of manifest disregard to arbitration awards involving international parties despite the fact that the New York Convention does not recognize the standard. It is not a violation of the New York Convention for U.S. Federal Courts to vacate an arbitration award based on the common law of the United States so long as the award was decided in the United States or a U.S. territory.<sup>47</sup> Given this unique application of manifest disregard, it behooves parties to international arbitration agreements to think carefully before choosing the forum for their arbitration proceedings. Specifically, these parties should consider whether they agree with the principle of manifest disregard and whether they want to expose themselves to the possibility of having their arbitration award vacated on this ground.

## II. MANIFEST DISREGARD OF THE LAW

### *A. History of the Manifest Disregard Standard*

Manifest disregard—one of the limited circumstances in which arbitration awards can be reviewed and the most widely used common law method of vacating arbitration awards<sup>48</sup>—was first introduced in dicta within the Supreme Court’s decision in *Wilko v. Swan*.<sup>49</sup> “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.”<sup>50</sup> The Court’s 1953

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<sup>45</sup> *Id.* at 241.

<sup>46</sup> Richard W. Hulbert, *Comment on a Proposed New Statute for International Arbitration*, 13 AM. REV. INT’L ARB. 153, 157 (2002).

<sup>47</sup> *Id.*

<sup>48</sup> See Gaitis, *supra* note 13, at 47.

<sup>49</sup> *Wilko v. Swan*, 346 U.S. 427 (1953).

<sup>50</sup> *Id.* at 436–37.

statement has been accepted by all circuits as providing a non-statutory avenue for judicial review of arbitration awards if the arbitrator manifestly disregarded the relevant law.<sup>51</sup>

When evaluating an appeal based on manifest disregard, the court typically looks for two specific elements of the arbitrator's act: that the arbitrator knew of the relevant legal rule and ignored it, and that the legal rule ignored by the arbitrator was unambiguous in its meaning and applicability to the case.<sup>52</sup> As the two cases that are the focus of this Note will illustrate, the variances in the standards used by courts when evaluating an appeal based on manifest disregard are the result of differences in the ways in which the courts interpret and apply those two elements to the facts of a case.<sup>53</sup> Specifically, the differing outcomes in the two cases considered below are a result of which factor the courts found to be determinative. This Note will focus on manifest disregard because it is the standard that, given the lack of guidance from the Supreme Court and the circuits' various applications of the doctrine, appears to provide the most challenge to courts. Some have gone so far to say that the doctrine of manifest disregard has "taken on a life of its own" as a result of this lack of guidance and uniformity.<sup>54</sup>

### B. *Two Diverging Cases*<sup>55</sup>

It has been suggested that there is the emergence of a split between the Fourth and Eleventh Circuits over the application of

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<sup>51</sup> Newman & Zaslowsky, *supra* note 12.

<sup>52</sup> Newman & Zaslowsky, *supra* note 12.

<sup>53</sup> Compare *Patten v. Signator Ins. Agency*, 441 F.3d 230, 235 (4th Cir. 2006), a contradiction of the plain and unambiguous terms of the contract is not reasonable and is evidence of manifest disregard, with *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 911–12 (11th Cir. 2006), an "argument that the arbitration award clearly contradicts an express term of the contract is simply another way of saying that the arbitrator clearly erred," is insufficient to establish manifest disregard.

<sup>54</sup> William Park et al., *International Commercial Dispute Resolution*, 37 INT'L LAW. 445 n.3 (2003).

<sup>55</sup> Newman & Zaslowsky, *supra* note 12.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 427

the manifest disregard standard.<sup>56</sup> While the courts reached different outcomes in two recent cases, these cases nonetheless illustrate the variance of the manifest disregard standard between jurisdictions. The result of these variations, coupled with the inevitable application of subjective judicial interpretation, has led to the recent inconsistent verdicts.

However, this is not to say that the circuits necessarily reach opposing conclusions when applying the manifest disregard standard. This Note argues that while the Fourth Circuit would have agreed with the Eleventh Circuit's decision in *B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*,<sup>57</sup> the Eleventh Circuit would not have reached the same conclusion as the Fourth Circuit in *Patten v. Signator Insurance Agency, Inc.*<sup>58</sup> This difference can be attributed to the nuances of the two circuits' manifest disregard standards; specifically, which of the two facets of manifest disregard each court gives the most weight to when analyzing an appeal.<sup>59</sup> In *Patten*, the Fourth Circuit focused on whether the legal rule ignored by the arbitrator was unambiguous in its meaning and applicability to the case.<sup>60</sup> In *Harbert*, however, the Eleventh Circuit focused on whether there was evidence that the arbitrator knew of the relevant legal rule and ignored it; the court gave less weight to whether the legal rule was unambiguous in its meaning and applicability.<sup>61</sup>

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<sup>56</sup> Newman & Zaslowsky, *supra* note 12.

<sup>57</sup> 441 F.3d 905 (11th Cir. 2006).

<sup>58</sup> 441 F.3d 230 (4th Cir. 2006).

<sup>59</sup> Compare *Harbert*, 441 F.3d at 910 with *Patten*, 441 F.3d at 235. In *Patten*, the Fourth Circuit looks most closely at whether the legal rule was ambiguous, while in *Harbert* the Eleventh Circuit looks not at whether the legal rule was ambiguous but instead, at whether there is evidence that the arbitrator knew the law and ignored it. If the legal rule is unambiguous and the arbitrator applies a contrary legal rule, the Fourth Circuit will find manifest disregard regardless of whether there is evidence that the arbitrator knew the law and intentionally ignored it, while the Eleventh Circuit will only find manifest disregard if there is evidence the arbitrator knew the law and intentionally disregarded it. *Harbert*, 441 F.3d at 910; *Patten*, 441 F.3d at 235.

<sup>60</sup> 441 F.3d at 235.

<sup>61</sup> 441 F.3d at 910.

## I. Patten v. Signator Insurance Agency

The United States Court of Appeals for the Fourth Circuit recently reviewed an arbitration decision that had been appealed on the grounds of manifest disregard of the law.<sup>62</sup> The case, *Patten v. Signator Insurance Agency*, concerned alleged employment discrimination and was originally brought in the form of arbitration by the employee, Ralph Patten.<sup>63</sup> Patten was dismissed from his position with Signator Insurance Agency (“Signator”) on December 13, 2000, effective January 2, 2001, allegedly for violating company policy by advancing premiums for clients.<sup>64</sup> In August of 2001, eight months after his dismissal, Patten sent a letter to Signator informing the company that he intended to bring a claim based on age discrimination.<sup>65</sup> Settlement negotiations then took place between the two parties; however, these negotiations were unsuccessful, and in March of 2002, fourteen months after his dismissal, Patten sent a formal demand for arbitration.<sup>66</sup> Signator responded with a letter stating that the company would not participate in arbitration because Patten’s claim was time-barred under the parties’ arbitration agreement.<sup>67</sup>

The relevant documents to the arbitration claim are two employment contracts between Patten and Signator.<sup>68</sup> In the first contract, drawn up in 1992 after Patten had been promoted to the position of General Agent for the insurance company, the parties agreed to arbitrate all disputes and to give notice of such arbitration within one year of the incident in question.<sup>69</sup> In 1998, Patten and Signator engaged in a second contract whereby they again agreed to arbitrate all claims; however, this contract included different terms regulating the arbitration process.<sup>70</sup> In contrast to the 1992

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<sup>62</sup> *Patten*, 441 F.3d 230.

<sup>63</sup> *Id.* at 232.

<sup>64</sup> *Id.*

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

<sup>66</sup> *Id.*

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

<sup>68</sup> *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 232 (4th Cir. 2006).

<sup>69</sup> *Id.* at 231.

<sup>70</sup> *Id.* at 231–32.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 429

contract, the 1998 contract was silent as to any date by which arbitration had to be brought.<sup>71</sup> In addition, the second contract appeared to preempt the first contract due to a clause which stated that the 1998 contract “supersedes all previous agreements, oral or written, between the parties hereto regarding the subject matter hereof.”<sup>72</sup>

Following the trial, the court granted summary judgment, mandating Signator to participate in arbitration; the parties finally began arbitrating the wrongful termination, breach of contract, breach of the implied covenant of good faith and fair dealing, and unlawful discrimination claims asserted by Patten.<sup>73</sup> When the arbitrator reviewed these claims brought by Patten, however, he decided that they were time-barred and therefore decided in favor of Signator.<sup>74</sup>

The arbitrator did not decide the case on its merits.<sup>75</sup> Instead, he looked at the dates corresponding to when Patten had been terminated by Signator, January 2, 2001, and when the notice of arbitration had been asserted by Patten, March 4, 2002.<sup>76</sup> The arbitrator noted that Patten gave Signator notice of a demand to arbitrate as a means to resolve his “claims of discrimination, wrongful termination, and breach of contract”<sup>77</sup> over a year after he had been terminated by the insurance company.<sup>78</sup> Patten responded with two arguments to support his claims.<sup>79</sup> First, he provided evidence that his first letter notifying Signator of his claims was sent eight months after his termination, within the one-year time-frame of the first contract, and second, he noted that his subsequent letter to Signator, in which he gave notice of his intent to compel arbitration, was acceptable because there was no time-

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<sup>71</sup> *Id.* at 232.

<sup>72</sup> *Id.* (citing page 12 of the Joint Appendix filed by the parties in the appeal).

<sup>73</sup> *Id.* at 232.

<sup>74</sup> Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 233 (4th Cir. 2006).

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

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 232.

<sup>78</sup> *Id.* at 233.

<sup>79</sup> *Id.*

frame stipulated in the second contract.<sup>80</sup> Despite this argument, the arbitrator found that Patten had not complied with the arbitration agreements.<sup>81</sup> The arbitrator decided that the one-year limit in which to bring a claim stated in the first contract was implicitly carried over to the second contract, and therefore, the notice of intent to compel arbitration was ineffective because it occurred over a year after Patten's termination.<sup>82</sup> The arbitrator granted Signator's motion for summary judgment.<sup>83</sup>

Displeased with this outcome, Patten appealed the arbitrator's decision to the district court on grounds that the arbitrator had manifestly disregarded the law; specifically, that he had failed to draw the award from the contractual agreement between Patten and Signator.<sup>84</sup> Patten asserted that these violations occurred when the arbitrator disregarded the superseding clause of the second agreement and instead carried the one-year time limit stated in the first contract over to the second contract.<sup>85</sup> The district court disagreed with Patten.<sup>86</sup> The court stated that the arbitrator had not ignored applicable laws and that a misinterpretation of the arbitration agreements was insufficient to vacate the arbitration award.<sup>87</sup> Patten appealed to the appellate division.<sup>88</sup>

The issue addressed by the appellate court was whether the arbitrator manifestly disregarded the law as to the time frame within which Patten had to bring his suit.<sup>89</sup> While the district court noted that the arbitrator may have made an error in his interpretation of the contract, it decided that such an error did not constitute manifest disregard and therefore was insufficient to trigger judicial review.<sup>90</sup> In contrast, the appellate court found that

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<sup>80</sup> Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 233 (4th Cir. 2006).

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

<sup>82</sup> *Id.*

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

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

<sup>85</sup> *Id.*

<sup>86</sup> Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 234 (4th Cir. 2006).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 235.

<sup>90</sup> *Id.* at 233.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 431

the arbitrator had “disregarded the plain and unambiguous language of the governing arbitration agreement. . . .” and had “failed to draw his award from the essence of the agreement.”<sup>91</sup> As a result, the appellate court found that the arbitrator’s decision was in manifest disregard of the law.<sup>92</sup>

In arriving at this decision, the Fourth Circuit Court of Appeals applied a standard of manifest disregard whereby a violation occurs when an arbitrator “understands and correctly states the law, but proceeds to disregard the same”<sup>93</sup> or “disregards or modifies unambiguous contract provisions.”<sup>94</sup> The court elaborated on what it would mean to disregard or modify an unambiguous contract provision by stating that a violation of failing to draw an award from the essence of the agreement is established when either the arbitrator makes his decision based upon “personal notions of right and wrong”<sup>95</sup> or the award fails to be “rationally inferable from the contract.”<sup>96</sup> Thus, the Fourth Circuit analyzed whether the legal rule ignored by the arbitrator was unambiguous in its meaning and applicability to the case rather than whether it was clear that the arbitrator knew of the relevant legal rule and ignored it.

In *Patten*, the arbitrator’s application of a one-year limitation was deemed “not reasonable” because it contradicted the clearly stated terms of the 1998 contract which specified that it superseded all previous agreements.<sup>97</sup> The court found that the arbitrator imposed his own opinions as to what the contract should have said rather than applying the terms stated in the contract and consequently, overrode the parties’ specific intent.<sup>98</sup> Applying its standard for manifest disregard, the Fourth Circuit held that

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<sup>91</sup> *Id.* at 235.

<sup>92</sup> *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006).

<sup>93</sup> *Id.* quoting *Upshur Coals Corp. v. United Mine Workers*, Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991)).

<sup>94</sup> *Patten*, 441 F.3d at 235 (citing *Mo. River Servs. v. Omaha Tribe*, 267 F.3d 848, 854 (8th Cir. 2001)).

<sup>95</sup> *Patten*, 441 F.3d at 235 (quoting *Upshur Coals*, 993 F.2d at 229).

<sup>96</sup> *Patten*, 441 F.3d at 235 (citing *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir. 1998)).

<sup>97</sup> 441 F.3d at 236.

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



because the contract was unambiguous, the arbitrator did not merely misapply contract law or err in his interpretation of the contract, but altered the agreement without authority.<sup>99</sup> Consequently, his acts constituted a manifest disregard of the law.<sup>100</sup>

It is interesting to note that in its decision, the appellate court invoked a standard of reasonableness when referring to the arbitrator's actions: "the one-year limitations period imposed by the arbitrator was *not reasonable*, in that it contradicted the plain and unambiguous terms of the Management Agreement."<sup>101</sup> This Note will return to the Fourth Circuit's emphasis on reasonableness when comparing the different standards used by courts.<sup>102</sup> For now, it will suffice to say the Eleventh Circuit has not stated whether it will take into account whether an arbitrator's decision is unreasonable when evaluating an appeal based on the doctrine of manifest disregard of the law,<sup>103</sup> though given the court's decision in *Harbert*, reasonableness does not appear to be a relevant factor in the Eleventh Circuit's analysis.

## 2. B.L. Harbert International, LLC v. Hercules Steel Co.

In *B.L. Harbert International, LLC v. Hercules Steel Co.*, the Eleventh Circuit refused to vacate an arbitration award that had been appealed on the grounds of manifest disregard because there was no evidence in the record that the arbitrator knew the appropriate law and intentionally failed to apply the law.<sup>104</sup> In the eyes of the Eleventh Circuit, the possibility of error on the part of the arbitrator did not give rise to a level of misconduct that would trigger manifest disregard.<sup>105</sup> Rather, to invoke manifest disregard, the court imposed the requirement that the error made by the

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<sup>99</sup> *Id.* at 235.

<sup>100</sup> *Id.* at 236.

<sup>101</sup> *Id.* (emphasis added).

<sup>102</sup> See *supra* text accompanying notes 153–57.

<sup>103</sup> See *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 911–12 (11th Cir. 2006).

<sup>104</sup> *Id.* at 911–13.

<sup>105</sup> *Id.* at 911.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 433

arbitrator must have been deliberate.<sup>106</sup>

*Harbert* is the result of a commercial contract dispute between a construction firm, B.L. Harbert International (“Harbert”), and a steel manufacturer, Hercules Steel Company (“Hercules”).<sup>107</sup> In the subcontract between the two parties, there were two schedules specified: a “progress schedule” and a “product schedule.”<sup>108</sup> The completion dates specified in these schedules differed by more than six months.<sup>109</sup> The conflict between the parties arose when Harbert became displeased with what it considered to be tardiness on the part of Hercules.<sup>110</sup> Harbert reacted to the delay in production by refusing to continue its payments to Hercules and by claiming that it was owed money in excess of the balance due to Hercules on the subcontract.<sup>111</sup> In response, Hercules initiated arbitration proceedings.<sup>112</sup> Hercules’ objective was to receive the balance it was owed and to receive an additional award to recover other expenses related to the disagreement, such as attorney’s fees.<sup>113</sup> Harbert counterclaimed for delay damages and an additional claim to recover for other costs and fees associated with the delay and the arbitration proceedings.<sup>114</sup>

As a result of the arbitration, Hercules was awarded the remainder of the balance on the contract owed by Harbert.<sup>115</sup> However, it appeared to Hercules that the arbitrator had erred in his award because he had awarded Hercules one-hundred thousand dollars less than both parties had agreed was the contract balance.<sup>116</sup> Thus, Hercules requested a clarification on the award.<sup>117</sup>

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<sup>106</sup> *Id.* at 912.

<sup>107</sup> *Id.* at 907.

<sup>108</sup> *Id.*

<sup>109</sup> See *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907–08 (11th Cir. 2006).

<sup>110</sup> *Id.* at 908.

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

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

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

<sup>114</sup> *Id.*

<sup>115</sup> *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 908 (11th Cir. 2006).

<sup>116</sup> *Id.*

Harbert also asked for a clarification of the arbitrator's analysis of the six 'issues for decision'—topics identified by both parties to help explain the basis for the arbitrator's award.<sup>118</sup> In response, the arbitrator increased the award by one-hundred thousand dollars and provided an explanation of his reasoning as to the identified topics.<sup>119</sup> He explained that his award favored Hercules because he had determined that they were bound by the longer project schedule which was used to guide the builders, rather than the product schedule which had been "unilaterally set by Harbert."<sup>120</sup>

Unhappy with the arbitration result, Harbert appealed to the district court citing manifest disregard for the law as the grounds for appeal.<sup>121</sup> Predictably, Hercules responded by asking the district court to confirm the award.<sup>122</sup> The district court examined the briefs the parties had submitted to the arbitrator and found that despite evidence that Hercules had been sent a copy of the shorter schedule before signing the contract, and thus presumably would have been bound to that shorter schedule under fundamental principles on contract law, there was nothing to establish that the arbitrator had manifestly disregarded the law when making his award.<sup>123</sup> Specifically, the court determined that the arbitrator had likely found that Hercules was bound by the contract providing a longer time-table for delivery, and because this was an interpretation of the arbitrator, it was beyond the boundary of judicial review for a manifest disregard claim.<sup>124</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 909.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Harbert had created two schedules governing the time-table of the development project. Hercules work fell within the timetable of one contract but failed to meet the deadlines of the other contract. In explaining his award, the arbitrator stated that rather than being bound by the contract with the shorter time-table "unilaterally set by Harbert," Hercules should be bound by the contract with the more lenient time-table. *Id.*

<sup>121</sup> B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 909 (11th Cir. 2006).

<sup>122</sup> *Id.* at 908.

<sup>123</sup> *Id.* at 909.

<sup>124</sup> *Id.*

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 435

Harbert appealed the court's decision to no avail.<sup>125</sup> Though the evidence indicated that Hercules was aware of the shorter schedule prior to signing the contract, this was not sufficient to satisfy the Eleventh Circuit's standard for reversal based on manifest disregard.<sup>126</sup> The court found that the arbitrator may have erred by not following an express term contained in the contract but not through an intentional disregard of the law.<sup>127</sup> The appellate court characterized the appeal as little more than the griping of a customer "unhappy" with the arbitration process.<sup>128</sup> Quoting the court in *Montes v. Shearson Lehman Bros., Inc.*,<sup>129</sup> the *Harbert* court stated that it needed to see "evidence that the arbitrator was 'conscious of the law and deliberately ignore[d] it.'"<sup>130</sup> To emphasize that mere error in the arbitrator's decision would be insufficient to establish manifest disregard of the law, the court elaborated, "Harbert's argument that the arbitration award clearly contradicts an express term of the contract is simply another way of saying that the arbitrator clearly erred, and even a showing of a clear error on the part of the arbitrator is not enough."<sup>131</sup>

In its decision, the appellate court laid out some important guidelines for invoking manifest disregard claims.<sup>132</sup> As noted above, the court indicated that error is not enough to invoke manifest disregard<sup>133</sup> and "misinterpretation of a contract"<sup>134</sup> is also an insufficient basis for appealing on the grounds of manifest disregard.<sup>135</sup> Additionally, the court found that manifest disregard is only appropriate in cases where there is evidence that the

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<sup>125</sup> *Id.* at 912–13.

<sup>126</sup> *Id.* at 911–12.

<sup>127</sup> *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 911–12 (11th Cir. 2006).

<sup>128</sup> *Id.* at 909.

<sup>129</sup> 128 F.3d 1456 (11th Cir. 1997).

<sup>130</sup> *Harbert*, 441 F.3d at 910 (quoting *Montes*, 128 F.3d at 1461).

<sup>131</sup> *Harbert*, 441 F.3d at 911–12.

<sup>132</sup> *Id.* at 913.

<sup>133</sup> *Id.* at 911.

<sup>134</sup> *Id.* at 913.

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

arbitrator knew the law and intentionally did not apply the law.<sup>136</sup> It is clear that the *Harbert* Court relied heavily upon whether the arbitrator knew of the relevant legal rule and ignored it, and the court paid far less attention to whether the legal rule ignored by the arbitrator was unambiguous in its meaning and applicability to the case. To illustrate the strictness with which judges should apply this standard, the court noted that the Eleventh Circuit has only found one instance of manifest disregard of the law.<sup>137</sup>

In its decision the appellate court explained that policy considerations support the strict criteria for successful manifest disregard claims.<sup>138</sup> The generally acknowledged purpose of arbitration is to resolve disputes as quickly and inexpensively as possible.<sup>139</sup> To ensure that arbitration continues to serve this purpose, there needs to be a method of preventing parties from frivolously dragging cases through the courts because arbitration appeals add cost and delay to the dispute resolution process.<sup>140</sup>

In accordance with this goal of arbitration, the court used its decision to discourage the practice of appealing arbitration awards and to support the utilization of arbitration by parties.<sup>141</sup> Specifically, the court warned *Harbert* and potential litigants that appeals based on the manifest disregard doctrine may result in sanctions if the appellant fails to allege the arbitrator knowingly ignored the applicable law.<sup>142</sup> The court did not apply sanctions to *Harbert* because it felt sanctions would be unjust as *Harbert* was not on notice that his appeal could result in such punishment.<sup>143</sup> However, the court made it clear that sanctions are a real and

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<sup>136</sup> *Id.* at 912–13.

<sup>137</sup> *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 911 (11th Cir. 2006). The only case in which the Eleventh Circuit has found manifest disregard of the law is *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997).

<sup>138</sup> *Harbert*, 441 F.3d at 907.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 913.

<sup>141</sup> *Id.* at 913–14.

<sup>142</sup> *Id.* at 913–14.

<sup>143</sup> *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 914 (11th Cir. 2006).

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 437

present threat to future parties that drag baseless arbitration claims into Eleventh Circuit courts on the grounds of manifest disregard.<sup>144</sup>

*C. Comparing Patten and Harbert with Montes*

In order to conduct a meaningful analysis of the Fourth and Eleventh Circuits' decisions, it is important to identify two differences between the decisions and to eliminate these factors as deciding influences in the courts' rulings. Notably, the Fourth Circuit decision in *Patten* pertained to an employment dispute, and the Eleventh Circuit decision in *Harbert* concerned a contractual dispute. Additionally, the Fourth Circuit's case involved an individual and a large corporation while the Eleventh Circuit's case involved two corporations. To ensure that these cases can be compared against one another, this Note focuses upon an additional Eleventh Circuit case mentioned previously, *Montes v. Shearson Lehman Bros.*,<sup>145</sup> and compares the Eleventh Circuit's decision in *Montes*—an employment dispute between an individual and a corporation—to its decision in *Harbert*. Though *Montes* and *Harbert* produced different judgments, a comparison between the analyses in the two decisions illustrates that the Eleventh Circuit has applied a uniform standard of what is required to establish manifest disregard of the law.

In *Montes*, the Eleventh Circuit used the manifest disregard doctrine to vacate an arbitrator's award in favor of an employee who alleged she was not paid her overtime wages.<sup>146</sup> At arbitration, the employee's attorney instructed the arbitrator as to the applicable law but then asked him not to apply the law.<sup>147</sup> As a result of the evidence that the arbitrator knew of the law but intentionally failed to follow the law,<sup>148</sup> the Eleventh Circuit held

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<sup>144</sup> *Id.*

<sup>145</sup> 128 F.3d 1456 (11th Cir. 1997).

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

<sup>147</sup> *Id.* at 1459.

<sup>148</sup> *Id.* (reporting that the attorney said to the arbitrator: "You have to decide whether you're going to follow the statutes that have been presented to you, or whether you will do or want to do or should do what is right and just

the manifest disregard doctrine was satisfied and found in favor of the employer.<sup>149</sup>

If one looks at the details of *Montes*, it is clear that the subject matter of the dispute in *Harbert* did not impact the standard of manifest disregard applied by the court. It is evident that the less sympathetic subject matter of the dispute in *Harbert* did not sway the court's application of manifest disregard because the Eleventh Circuit found evidence of manifest disregard of the law in an arbitration decision in *Montes*;<sup>150</sup> *Montes*, like *Patten*, was also an employment dispute. The court used the same method of analyzing a manifest disregard claim in *Montes* as it did in *Harbert*; thus, the subject matter of the case can be safely put aside as a non-factor.

To determine whether the status of the parties as individuals or corporations affected the judicial analysis in *Patten* and *Harbert*, it is important to consider whether the Eleventh Circuit would employ such a rigid standard of manifest disregard in a case that involved an individual litigating against a corporation. Returning to *Montes*—the seminal case for manifest disregard in the Eleventh Circuit—one is able to see that the same strict standard applied to the corporation in *Harbert* was also applied to the individual.<sup>151</sup> As described above, the *Montes* court reversed an arbitrator's decision that had been in favor of the individual in an effort to correct the arbitrator's manifest disregard of the law.<sup>152</sup> Following the *Harbert* Court's close adherence to the principles laid out in *Montes*, it can be inferred that the court would not have been affected had one of the parties been an individual asserting a claim against a corporation, as occurred in *Patten*.

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and equitable in this case.”).

<sup>149</sup> *Id.* at 1461–62.

<sup>150</sup> *See Montes*, 128 F.3d at 1463–64.

<sup>151</sup> *Compare id.* at 1461–62, with *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 911 (11th Cir. 2006) (The *Montes* court explicitly based its ruling on the fact that there was evidence that the arbitrator *knew* the applicable law and intentionally disregarded; this is the same standard applied in *Harbert*).

<sup>152</sup> *Montes*, 128 F.3d at 1464.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 439*D. Do These Cases Indicate a Split in the Courts or Merely a Tension?*

The variation between the Fourth and Eleventh Circuits, as illustrated by *Patten* and *Harbert*, can be attributed to the courts' divergent views of which factor in the manifest disregard standard should be emphasized. The Fourth Circuit looked primarily at whether the legal rule ignored by the arbitrator was unambiguous in its meaning and applicability to the case<sup>153</sup> while the Eleventh Circuit looked primarily at whether there was evidence that the arbitrator intentionally disregarded the law.<sup>154</sup> Given the two elements of a manifest disregard claim—that the arbitrator knew of the relevant legal rule and ignored it *and* that the legal rule ignored by the arbitrator was unambiguous in its meaning and applicability to the case—it is evident that the discrepancy between the Fourth and Eleventh Circuits lies in which factor receives the most weight in the courts' analyses. While the outcomes are not entirely in conflict with one another, the two courts' analyses demonstrate a lack of uniformity that has the potential to cause undesirable side-effects.

If the Eleventh Circuit's manifest disregard analysis is applied to the facts of *Patten*, it becomes apparent that the Court would have not found evidence of manifest disregard of the law. *Harbert* demonstrates that judicial review in the Eleventh Circuit requires evidence that the arbitrator knew of the applicable law and intentionally disregarded it.<sup>155</sup> Had *Patten* come before a court in the Eleventh Circuit, it is very likely that the court would not have invoked the doctrine of manifest disregard because the evidence presented in that case failed to establish that the arbitrator intentionally disregarded relevant law.<sup>156</sup>

The Eleventh Circuit would have approached *Patten* from a different angle than that of the Fourth Circuit. The court in *Harbert*

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<sup>153</sup> *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006).

<sup>154</sup> *Harbert*, 441 F.3d at 912.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 912–13.



stated, “[t]he contract is not part of the applicable law, but the agreement of the parties to which the law is applied. In any event, as we have already explained, errors of law are not enough to justify setting aside an arbitration award.”<sup>157</sup> Therefore the issue examined by the court would not have been the content of the two contracts between Ralph Patten and Signator Insurance, but rather, the arbitrator’s application of the law onto those contracts. The Eleventh Circuit would not have looked at whether the arbitrator erred in applying a term from a previous contract to a later contract, as the Fourth Circuit did, but would instead have looked at whether there was evidence that the arbitrator knew the law and intentionally applied the incorrect contract term.

Even if the Eleventh Circuit determined that the arbitrator in *Patten* incorrectly carried over the one-year statute of limitations from the first contract into the second contract, the Court would not have vacated the arbitrator’s award on grounds of manifest disregard of the law. Rather, the Court would have viewed the arbitrator’s error as a misinterpretation of contract terms, or at most, a legal error—something the Eleventh Circuit distinctly identified as insufficient to invoke the doctrine of manifest disregard.<sup>158</sup> There is no indication in the facts of *Patten* to suggest that the arbitrator knew the correct rules of contract law to apply and intentionally failed to apply the relevant law. Consequently, it can be assumed that the Eleventh Circuit would not have found the arbitrator’s award in *Patten* to have been in manifest disregard of the law.<sup>159</sup>

It is less clear how *Harbert* would have come out if it had been heard in the Fourth Circuit. Like *Patten*, *Harbert* involved two different documents that conveyed conflicting information pertaining to the same situation.<sup>160</sup> However, unlike *Patten*, neither

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<sup>157</sup> *Id.* at 913.

<sup>158</sup> *Id.* at 913.

<sup>159</sup> *See id.* at 912–913.

<sup>160</sup> Compare *Patten*, 441 F.3d 235, with *Harbert*, 441 F.3d 905. In *Harbert*, the documents were two conflicting schedules, a product schedule and progress schedule; the dispute between the parties emerged because they could not agree on which schedule was controlling. *Harbert*, 441 F.3d 905. In *Patten*, the dispute arose out of whether the original employment contract was

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 441

document in *Harbert* contained a clause stating that one contract superseded the other. It was this type of clause in *Patten* that made the arbitrator's interpretation conflict with "the plain and unambiguous terms of the Management Agreement."<sup>161</sup> The important facet of *Patten* is that it appears that the Fourth Circuit analyzed the arbitrator's analysis with regard to the ambiguousness of the contract terms rather than the arbitrator's intentional application, or non-application, of law to the contract (as the Eleventh Circuit would have done). It is doubtful that *Harbert* would have met the Fourth Circuit's standard for manifest disregard. Due to the existence of two conflicting schedules, the arbitrator was faced with ambiguity as to how to apply the law. Consequently, regardless of how the arbitrator had interpreted this case, it is unlikely that the Fourth Circuit would have found him to have acted with manifest disregard because his decision would not have been in conflict with unambiguous terms of the contract.

Having analyzed the Fourth and Eleventh Circuits' applications of manifest disregard, *Patten* would not have been found to be an instance of manifest disregard by the Eleventh Circuit, while *Harbert* would have met the same outcome had it been heard in the Fourth Circuit. While these hypothetical outcomes indicate a lack of consensus on which factor is most persuasive in a manifest disregard appeal, they do not provide evidence of a circuit split. Nonetheless, serious consequences to the role of arbitration in dispute resolution will arise if a uniform standard of manifest disregard is not implemented throughout the circuits.

### III. POLICY IMPLICATIONS OF THESE INCONSISTENT STANDARDS

#### *A. Domestic Waves of Confusion*

With the confusion as to how courts apply the manifest disregard standard, and the newly added threat of sanctions for meritless appeals, attorneys are in a precarious position when

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controlling or whether it was superseded by the second employment contract. *Patten*, 441 F.3d 235.

<sup>161</sup> *Patten*, 441 F.3d at 236.

advising their clients whether to pursue judicial review of arbitration awards.<sup>162</sup> Some members of the academic community have suggested that the Eleventh Circuit's decision will give prospective arbitration candidates more confidence in the arbitration system and in arbitration awards.<sup>163</sup> The logic of this argument is that if courts give arbitrators more deference, and therefore more control, arbitrators will feel obligated to demonstrate a greater degree of professionalism and there will be fewer instances of manifest disregard of the law.<sup>164</sup> Also, presumably parties will be able to rely on the finality of arbitration decisions with greater confidence.

However, this analysis, which focused solely on the *Harbert* decision, ignores the inconsistent application of the manifest disregard standard. Consequently, while parties to arbitration in the Eleventh Circuit may have more confidence in the finality of arbitration awards, it does not necessarily follow that all arbitration parties will feel confident because not all courts use sanctions based on the strict standard laid out by the Eleventh Circuit to restrict unwarranted appeals. An arbitrator's unreasonable conclusion constitutes grounds for a successful appeal based on manifest disregard in one circuit and grounds for sanctions if appealed in another circuit.<sup>165</sup> Thus, any potential validity to this hypothesis cannot be radiated throughout the circuits. Unless the parties are certain as to which jurisdiction they will select for arbitration, parties will be unable to predict whether courts will

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<sup>162</sup> See Geri Dreiling, *No Pity for Poor Losers*, A.B.A. J. E-REPORT, March 17, 2006.

<sup>163</sup> See *id.* (arguing that parties will be more confident in arbitration because the courts are putting more pressure on the arbitrators to be "professional and do good work").

<sup>164</sup> See *id.*

<sup>165</sup> Compare *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 236 (4th Cir. 2006) with *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006). The Fourth Circuit found that the arbitrator's interpretation was unreasonable as the legal rule was unambiguous; consequently, the court found that there was evidence of manifest disregard. *Patten*, 441 F.3d at 230. However, the Eleventh Circuit would not find evidence of manifest disregard if the arbitrator made a legal error, much less an unreasonable finding. *Harbert*, 441 F.3d at 905.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 443

accept challenges to arbitration awards.

Rather than feeling more confident about arbitration, parties will feel less confident as a result of the inconsistencies amongst the circuits. First, parties may be unable to predict the standard of manifest disregard that would potentially be applied to their case when entering into an arbitration agreement. Second, parties may not be able to predict whether they will be susceptible to sanctions. Third, because of the lack of guidance with regard to judicial appeals, parties may no longer be persuaded by the allure of a quick and inexpensive method of dispute resolution.

The only way to dispel the confusion plaguing the courts, attorneys and potential parties to arbitration is to have a uniform standard describing exactly what constitutes manifest disregard and what evidence is needed to bring a successful appeal based on manifest disregard of the law. Although sanctions may help promote confidence in the arbitration process after a standard is established, sanctions will only serve to intimidate parties from participating in arbitration if inconsistent standards remain in place. Arbitration will lose its appeal because sanctions will upset the balance between the benefits of a quick and inexpensive method of resolution and the goal of obtaining a just resolution that was formerly achieved through the possibility of judicial appeal.

*B. The Side-Effects*

The lack of a uniform application of the doctrine of manifest disregard within the circuit courts has the potential to lead to a number of undesirable outcomes. First, if the circuits adopt unclear standards without invoking a penalty for meritless claims, the poor loser syndrome<sup>166</sup> may arise. In other words, parties dissatisfied with an arbitration award may appeal weak or even meritless claims on the assumption that they have nothing to lose. Further, these “poor losers” may even win their appeals since it is unclear how the court will evaluate their claim. Second, parties may be fearful of participating in arbitration because they will not feel secure in the judicial safety net supporting this method of dispute

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<sup>166</sup> See Dreiling, *supra* note 162, at 2.

resolution. Parties will be hesitant to participate in arbitration from the outset if they feel constrained in the availability of judicial appeals because of the threat of sanctions. Finally, circuits may develop applications of the doctrine of manifest disregard that do not conform to one another, as we have seen here with the Fourth and Eleventh Circuit. If this trend continues to develop, parties will engage in forum shopping: participating in arbitration agreements only in forums that they view as favorable based on the circuit's application of the manifest disregard doctrine. All of these potential developments will be detrimental to the judicial system and all can be averted if the Supreme Court intervenes and sets forth a clear standard of how courts are to apply the doctrine of manifest disregard.

### 1. "Poor Loser"<sup>167</sup> Syndrome

While the Eleventh Circuit's threat of sanctions may dissuade arbitration because parties have the potential to feel that the balance between a just, inexpensive and swift resolution is skewed, the Fourth Circuit's approach may have the same exact result for the opposite reason. This is because the Fourth Circuit's standard opens the door to the "poor loser" syndrome.<sup>168</sup> Therefore, although *Patten* lowers the probability of an unjust resolution, the decision jeopardizes the opportunity for a speedy and inexpensive resolution.

The threat of "poor loser" appeals is a real concern for some parties considering arbitration. The attorney who represented Hercules Steel in *Harbert* was featured in an ABA synopsis of the "poor loser" syndrome and was quoted as saying, "It seems that more and more over the last several years, 'sore losers' have been running to the courts to try to get arbitration awards vacated . . . it is really a ray of sunshine to see the courts stand up and say arbitration is a good thing."<sup>169</sup> In this respect, manifest disregard has been characterized as a tool with which losers can "disrupt the

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<sup>167</sup> *Harbert*, 441 F.3d at 907.

<sup>168</sup> *See id.* at 907 (asserting that if courts were to not impose sanctions, they would be encouraging poor losers to appeal unfavorable arbitration awards).

<sup>169</sup> Dreiling, *supra* note 162, at 2.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 445

arbitral process.”<sup>170</sup> Individuals with this viewpoint are pleased when courts refrain from analyzing anything except for the “fundamental procedural integrity” of the arbitration process.<sup>171</sup>

## 2. *Discouraging the use of arbitration*

For arbitration to be a successful method of alternative dispute resolution, parties must begin to perceive arbitration awards as a judicially sanctioned resolution. Accordingly, while there are inherent risks in arbitration,<sup>172</sup> parties would recognize that arbitration is founded on legal principals, and violations of these principals will be reviewed by courts. It is important to remember that “arbitrators are not restricted to individuals trained in the law or a particular area of expertise.”<sup>173</sup> This is important to keep in mind because while parties enter into arbitration knowing that they have agreed to have their dispute settled by a third party, they are also entering into arbitration with the knowledge that it is a resolution process sanctioned by courts. If parties become fearful that the judicial appeals process is unavailable because of the threat of sanctions, as from the Eleventh Circuit, these parties may elect not to participate in arbitration; without this safeguard, the risks of arbitration may outweigh its benefits.

One might argue that the Eleventh Circuit left the door open for successful manifest disregard appeals and therefore did not undermine the faith that parties to arbitration place in the legal basis of an arbitrator’s decision. However, one only need look at the intent of the Eleventh Circuit to predict the impact that its decision will likely have. The Eleventh Circuit wanted to restrict appeals of arbitration awards based on manifest disregard.<sup>174</sup> In

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<sup>170</sup> Park, *supra* note 54.

<sup>171</sup> Park, *supra* note 54.

<sup>172</sup> See *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 1003 (9th Cir. 2003).

<sup>173</sup> Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 450–51 (2004).

<sup>174</sup> *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006).

accomplishing this goal and intimidating unwarranted appeals with the threat of sanctions, it is likely that, as a byproduct, the court will also discourage the filing of bona fide appeals. While only the future can tell, it seems to be a natural repercussion that, with sanctions at stake, parties will be hesitant to appeal arbitration awards even if these parties feel their awards were unjust.

Under the Eleventh Circuit test, parties can only appeal in very limited circumstances: they must be able to show that the arbitrator knew the law and intentionally did not apply it.<sup>175</sup> Because there is no requirement that arbitrators document their reasoning,<sup>176</sup> the Eleventh Circuit's standard may be very difficult to meet. Although parties may accept this risk when they agree to arbitrate, it seems to present a conflict: How can courts support an arbitration model which restricts the checks and balances of arbitration to such an extent that an award appearing to have been made in disregard of the law can only be appealed under the threat of sanctions?

### 3. *Forum Shopping*

The lack of a uniform application of the manifest disregard standard has created an atmosphere ripe for forum shopping. Parties will be motivated to search for jurisdictions with, as in the Eleventh Circuit, clear and favorable applications of the manifest disregard doctrine. This invitation to forum shop is problematic because it allows for domestic and international exploitation of inconsistencies in the arbitration process. Indeed, in international arbitration, manifest disregard “gives the United States a competitive disadvantage compared to arbitral venues where judicial intervention is limited to matters related to fundamental procedural integrity.”<sup>177</sup> Given the substantial increase in the United States' participation in international arbitration over the

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<sup>175</sup> *Id.*

<sup>176</sup> Gaitis, *supra* note 13 at 16 (describing differing standards for arbitration proceedings, including the AAA preference for proceedings that do not contain documentation of the reasoning behind the arbitrator's award).

<sup>177</sup> Park, *supra* note 54.

*MANIFEST DISREGARD IN ARBITRATION AWARDS* 447

past decade,<sup>178</sup> the potential for a backlash over courts applying manifest disregard to international awards should be a concern to those who want the United States to continue its prominent role as an the arbitration forum.<sup>179</sup>

## IV. WHERE ARE WE NOW AND WHAT CAN WE EXPECT?

Because of the increased importance of arbitration, it is timely for the court to hear a manifest disregard case and impose a clear standard for what circuits should consider when analyzing such appeals. This will prevent the confusion, poor loser syndrome, and forum shopping that are inherent with the current status of the manifest disregard doctrine. However, it does not appear that the Supreme Court is willing to hear a manifest disregard case at this time.<sup>180</sup> Signator Insurance Agency appealed to the Supreme Court for a writ of certiorari regarding the Fourth Circuit Court of Appeals' application of manifest disregard of the law to overturn the arbitrator's award in the arbitration between Patten and Signator.<sup>181</sup> However, on October 16, 2006, the Supreme Court denied the petition for a writ of certiorari.<sup>182</sup>

The Supreme Court's decision to deny the petition for certiorari requested by Signator Insurance is surprising given the disparity in the application of manifest disregard amongst the circuits, and the evident distinction between the *Patten* Court and the other circuits as indicated by language used in the *Patten* decision. *Patten* is unique in that the Fourth Circuit explicitly stated that it determined the arbitrator's award was in manifest

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<sup>178</sup> Drahozal, *supra* note 26, at 244.

<sup>179</sup> See Newman & Zaslowsky, *supra* note 12. The authors suggest that because courts in the United States use manifest disregard and therefore evaluate arbitration awards on their merits, international parties to arbitration will be hesitant to enter into arbitration that falls under the jurisdiction of the United States. *Id.* It would appear that, from the authors' points of view the *Harbert* court's approach to arbitration awards would be more pleasing to international parties than would the *Patten* court's approach.

<sup>180</sup> *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 434 (2006).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*



disregard because it was “not reasonable”<sup>183</sup> to carry the one year statute of limitations from the first arbitration agreement over to the second arbitration agreement.<sup>184</sup> This statement has been singled out by legal commentators and academics as a distinguishing characteristic that makes the case ripe for certiorari review by the Supreme Court.<sup>185</sup> Perhaps the Court does not find it troubling that the appellate court overturned the arbitrator’s award because the Court did not want *Patten* to be the test case. When weighing the interests of arbitration and justice, the Court may have decided that it is more important to have a result that is just from a legal standpoint than a result that was procured by a quick and inexpensive method of dispute resolution.

Whatever the reason behind the Court’s decision to deny Signator’s petition for a writ of certiorari, one thing is clear: The confusion that currently exists in the circuits as to the correct standard for applying manifest disregard of the law to arbitration awards will not be resolved this year. Consequently, the poor loser syndrome will continue, arbitration participants and their attorneys will be at a disadvantage when weighing their options for appeal, and the threat of the possible exploitation of manifest disregard in the context of forum shopping will continue at both the domestic and international level.

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<sup>183</sup> *Id.* at 236.

<sup>184</sup> *Id.*

<sup>185</sup> See Ross’s Arbitration Blog, [http://www.lawmemo.com/arbitration\\_blog/2006/08/manifest\\_disreg\\_1.html](http://www.lawmemo.com/arbitration_blog/2006/08/manifest_disreg_1.html) (last visited Nov. 8, 2007) (question #2 for the Supreme Court: “Whether (in conflict with the decisions of at least eight other federal courts of appeals) a court may vacate an arbitrator’s award for not ‘drawing its essence from the agreement’ on the ground that the arbitrator construed an ‘unambiguous’ contract in a way that is ‘not reasonable?’”); see also, Workplace Prof Blog, [http://lawprofessors.typepad.com/laborprof\\_blog/2006/08/cert\\_request\\_ch.html](http://lawprofessors.typepad.com/laborprof_blog/2006/08/cert_request_ch.html) (last visited Nov. 8, 2007) (“The petition was spurred by a ruling [by the Fourth Circuit in *Patten v. Signator Ins. Agency et al.*] that endorsed vacating an award where an arbitrator’s decision was ‘not reasonable’ based on the terms of a contract.”).