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‘MANIFEST’ DESTINY: THE FATE OF THE ‘MANIFEST DISREGARD OF THE LAW’ DOCTRINE AFTER *HALL STREET V. MATTEL*

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1. INTRODUCTION

The Federal Arbitration Act (hereinafter “FAA” or the “Act”) was enacted in 1925 in reaction to widespread judicial resistance to arbitration.[1] While it is difficult to imagine that the drafters of this legislation could have envisioned how prominent arbitration would become in the United States, it is clear that their intention was to ensure that contracts to arbitrate would be enforced and that the intent of the parties would be maintained.[2]

In the more than eighty years since the passage of the Act, courts have repeatedly been called on to interpret the Act in order to determine its effect on real world situations. Recently, the Supreme Court determined that the grounds for vacatur and modification outlined in sections 10 and 11 of the FAA are exclusive.[3]

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[1] 9 U.S.C. §§ 1-16 (2009); *see* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) (explaining legislative history and reasoning of the FAA); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270-71 (1995), (*citing* Volt Info. Scis., Inc. v. Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (stating that the purpose of the FAA is to “overrule the judiciary’s longstanding refusals to enforce agreements to arbitrate”)). *See also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 211 n.5 (1956) (tracing the origins of judicial resistance to arbitration in the United States to English courts).

[2] *See Volt*, 489 U.S. at 474, (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (explaining that the FAA was intended to “enforce [arbitration] agreements into which parties had entered,” and “place such agreements ‘upon the same footing as other contracts’”)); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (stating that the FAA was “motivated, first and foremost, by a congressional desire to enforce [arbitration] agreements into which parties had entered”).

[3] *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 968 (2008).

However, the Court failed to explain what effect their holding would have on the longstanding doctrine that allows for modification and vacatur of arbitral awards based on a manifest disregard of the law by the arbitrator.[4] Since then, courts have disagreed about how to move forward, producing a split in the circuits that has become ripe for Supreme Court intervention.

II. BACKGROUND

Section 2 of the FAA exemplifies the national policy favoring arbitration when it states that contracts "involving commerce" that include an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[5] The Act specifically includes grounds for vacating an award in section 10, where it states:

> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
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> > **(1)** where the award was procured by corruption, fraud, or undue means;
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> > **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
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> > **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> >
> > **(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.[6]

The Act goes on to explain grounds for modification of an award in section 11, where it states:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> **(a)** Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> **(b)** Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
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> **(c)** Where the award is imperfect in matter of form not affecting the merits of the controversy.

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[4] *Id.*

[5] 9 U.S.C. § 2 (2009); *see Buckeye*, 546 U.S. at 443-44.

[6] 9 U.S.C. § 2 (2009).

> The order may modify and correct the award, so as to effect [sic] the intent thereof and promote justice between the parties.[7]

Since its inception, much of the controversy surrounding the Act, and sections 10 and 11 specifically, has addressed the exclusivity of the grounds provided. Judges and scholars have grappled with whether sections 10 and 11 provide the *only* grounds upon which a federal court may confirm, vacate, or modify an arbitral award, or if they are "mere threshold provisions open to expansion by agreement," allowing for parties to contract to increased judicial oversight in their particular agreement.[8]

Prior to the United States Supreme Court deciding the issue in 2008, the circuits were split on which route to take, with the courts from the Eighth, Ninth, and Tenth Circuits agreeing with the former, while the First, Third, Fourth, Fifth, and Sixth agree with the latter.[9] The Supreme Court put an end to this controversy in *Hall Street Associates v. Mattel, Inc.*, where it unequivocally held that the grounds outlined in sections 10 and 11 of the FAA are exclusive and may not be contractually expanded.[10]

In *Hall Street*, the parties agreed to arbitrate an indemnification dispute following a bench trial that decided another matter at issue.[11] The arbitration agreement provided for judicial review that was beyond the scope provided for in the FAA, specifically that the District Court "shall vacate, modify or correct any award: (1) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."[12] Arbitration of the matter occurred, and a Motion for Order Vacating, Modifying, and/or correcting the arbitration soon followed.[13] The matter bounced around the

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[7] *Id.* § 11.

[8] *See Hall St.*, 552 U.S. at 1403.

[9] *See id.* (deciding the issue and recognizing the circuit split); *see also* P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005) (holding that parties may contract to expanded judicial review); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 288 (3d Cir. 2001) (holding that parties may contract to expanded judicial review); Syncor Int'l Corp. v. McLeland, 120 F.3d 262, 1997 WL 452245 (4th Cir. 1997) (holding that parties may contract to expanded judicial review in an unpublished opinion); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (holding that parties may contract to expanded judicial review); Jacada (Europe), Ltd. v. Int'l Mktg Strategies, Inc., 401 F.3d 701, 710 (6th Cir. 2005) (holding that parties may contract to expanded judicial review); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997-98 (8th Cir. 1998) (opining that parties may not contract for expanded judicial review in dicta); Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (holding that parties may not contract for expanded judicial review); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) (holding that parties may not contract for expanded judicial review).

[10] *Hall St.*, 552 U.S. at 1404 (reasoning that "the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration," and holding that the grounds outlined in sections 10 and 11 of the FAA provide the sole acceptable rationale for judicial review).

[11] *Id.*at 1400 (outlining the trial court proceedings by explaining that Mattel gave notice of intent to terminate its lease with Hall Street Associates, who filed suit to contest Mattel's right to vacate and claiming the lease obligated Mattel to indemnify Hall Street for environmental clean-up costs on the property. The trial court held for Mattel on the termination issue, and after the parties failed to reach an agreement during mediation, the parties agreed to arbitrate the indemnification issue).

[12] *Id.* at 1400-01.

[13] *Id.* at 1401.

federal court system until it was finally granted certiorari in 2007.[14]

The Supreme Court based its holding on a number of principles of statutory interpretation. First, the Court explained that the rule of *ejusdem generis* mandated that sections 10 and 11 of the FAA be interpreted as the exclusive means of judicial review for arbitration awards.[15] Under this constructional canon, when a list of specifics is followed by a general word or phrase, the general word or phrase will be interpreted to include only items of the same type as those listed.[16] The Court reasoned that

> [s]ince a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. 'Fraud' and a mistake of law are not cut from the same cloth.[17]

Next, the Court explained that regardless of the *ejusdem generis* principle, the plain language of section 9 of the FAA does not allow for flexibility for judicial confirmation of arbitral awards.[18] Finally, the Court explained that sections 9 through11 of the FAA are simply validating the long-held national policy in favor of binding arbitration with only limited review by the courts.[19] They reasoned that any other construction of the FAA would open the door to lengthy appeals, which would render arbitration a meaningless precursor to litigation.[20]With the decision regarding whether judicial review can be contractually expanded decided, the related issue of whether manifest disregard of the law has been or should be recognized as a ground for modification and/or vacatur of an arbitration award has been pushed to the forefront of the conversation.[21] This doctrine has been used by many circuits for many years, based initially on the Supreme Court decision in *Wilko v. Swan*, decided in 1953.[22]

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[14] Hall St. Assocs. v. Mattel, Inc., 550 U.S. 968 (2007).

[15] *Hall St.*, 552 U.S. at 1404-05.

[16] BLACK'S LAW DICTIONARY 247 (8th ed. 2004).

[17] *Hall St.*, 552 U.S. at 1404-05.

[18] *Id.* at 1405 ("[E]xpanding the detailed categories would rub too much against the grain of the [section] 9 language, where provision for judicial confirmation carries no hint of flexibility. 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.").

[19] *Id.*

[20] *Id.* (citing Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)).

[21] *See, e.g.*, Anthony M. DiLeo, *The Enforceability of Contractual Agreements to Arbitrate: A Survey of the Last Three Years of Jurisprudence*, 56 LA. B.J. 174 (2008); Justin Kelly, *Confusion about "Manifest Disregard" After* Hall Street v. Mattel, 63 DISP. RESOL. J. 4, (2008); Michael H. LeRoy, *Do Courts Create Moral Hazard?: When Judges Nullify Employer Liability in Arbitrations*, 93 MINN. L. REV. 998 (2009) (explaining that federal courts had provided additional common law means for review of arbitral awards, including manifest disregard of the law, and questioning their validity after *Hall Street*); Christopher Walsh, Stolt-Nielsen's *Comfort for the 'Average Arbitrator': An Analysis of the Post*-Hall Street *'Manifest Disregard' Award Review Standard*, 27 ALTERNATIVES TO HIGH COST LITIG. 19 (2009).

[22] Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (providing the basis for argument that "manifest

The *Hall Street* Court specifically discussed this standard, as the petitioner tried to make the argument that because judges have added manifest disregard as an accepted ground for vacatur, and because manifest disregard is not specifically listed in section 10 or 11 of the FAA, contracting parties should similarly be allowed to expand the scope of judicial review.[23] The Court rejected this notion, stating:

> 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, [petitioner] overlooks the fact that the statement it relies on expressly rejects just what [petitioner] asks for here, general review for an arbitrator's legal errors. 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 [section] 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for [section] 10(a)(3) or [section] 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 [petitioner] urges.[24]

The actual effect of *Hall Street* on the manifest disregard doctrine has yet to be determined. While some contend the Court's language in *Hall Street* clearly states that such grounds are no longer available, others reason that the doctrine maintains vitality, either as an independent ground or within the FAA.

As of this writing, five of the twelve federal circuit courts have discussed the fate of the manifest disregard ground for vacatur after *Hall Street*.[25] The First and Fifth Circuits reasoned that the holding in *Hall Street* precludes any argument that manifest disregard of the law remains an available ground for vacatur or modification of arbitral awards.[26] The Sixth Circuit held the opposite, reasoning that manifest disregard survives as an independent ground for vacatur.[27] The Second and Ninth Circuits held that manifest disregard is still available; however, not as an independent ground but instead simply shorthand for section 10(a)(4) of the FAA.[28] Thus, of the five, two have held that manifest disregard is no longer

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disregard of the law" should be included as grounds for modification and/or vacatur in addition to those listed in sections 10 and 11 of the FAA by stating "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").

[23] *Hall St.*, 128 S. Ct. at 1403 (citing Wilko v. Swan, 346 U.S. 427, 436-47 (1953)).

[24] *Hall St.*, 128 S. Ct. at 1404 (internal citations omitted).

[25] *See* Kelly, *supra* note 21 (explaining circuit split and discussing the future of the manifest disregard standard).

[26] *See* Ramos-Santiago v. UPS, 524 F.3d 120, 125 n.3 (1st Cir. 2008) (dicta) (stating "[w]e acknowledge the Supreme Court's recent holding in [*Hall Street*] that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act") (internal citations omitted); Citigroup Global Mkts. Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) (concluding that *Hall Street* "restricts the grounds for vacatur to those set forth in [section] 10 of the Federal Arbitration Act, and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.") (internal citations omitted).

[27] *See* Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415 (6th Cir. 2008).

[28] *See* Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008) (equating

available as a rationale for vacatur or modification of an arbitral award, while three have held that it has survived.

Perhaps the most important case to be decided thus far is that of *Comedy Club, Inc. v. Improv W. Assocs*. in the Ninth Circuit.[29] *Improv West* arose out of a trademark dispute: Comedy Club had been given the right to use Improv West's trademarks in the United States based upon a guarantee that Comedy Club open four Improv clubs in a year, and an agreement that Comedy Club would not open any other comedy clubs during the term of the trademark agreement.[30] The agreement also contained an arbitration clause.[31] Comedy Club failed to open four clubs within the year allowed, causing Improv to threaten to terminate the trademark agreement.[32] In turn, Comedy Club filed a declaratory judgment suit, seeking a judgment from the federal district court stating that the trademark agreement was still in effect and that the non-compete clause was unenforceable.[33] Before a judicial decision on those matters could be reached, Improv West moved to compel arbitration pursuant to the agreement, which the district court granted.[34]

The arbitrator ruled in favor of Improv, stating that Comedy Club had defaulted on their trademark agreement, and that the covenant not to compete was valid for the entire term of the trademark agreement.[35] As such, the arbitrator enjoined Comedy Club from opening any comedy clubs in the United States for the duration of the trademark agreement.[36] The district court confirmed the partial award.[37]

Comedy Club appealed on several grounds; most pertinent to this discussion was their assertion that the arbitrator's holding that the covenant not to compete was enforceable was in manifest disregard of applicable law.[38] The Ninth Circuit agreed with this argument and held that because the arbitrator was aware of California law, which holds that in-term covenants not to compete are unenforceable, he manifestly disregarded the law by ignoring established doctrine and interpreting it "in a way to render it inapplicable to this case."[39] As such, the Court vacated the partial award stemming from enforcement of the non-compete

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manifest disregard to section10(a)(4) by stating that "the arbitrators have thereby 'exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." (citing 9 U.S.C. § 10(a)(4))); Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (citing Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) (concluding that the manifest disregard ground for vacatur survives the *Hall Street* decision because it is a part of section 10(a)(4)).

[29] *Comedy Club, Inc.*,553 F.3d 1277.

[30] Comedy Club, Inc. v. Improv W. Assocs., 514 F.3d 833, 839-41 (9th Cir. 2007), *vacated*, No. 07-1334, 2008 term; 129 S.Ct.45 (2008), *remanded to* 553 F.3d 1277 (2009); *see* Kelly, *supra* note 21.

[31] *Comedy Club, Inc.*, 514 F.3d at 840.

[32] *Id.* at 839-41; *see also* Kelly, *supra* note 21.

[33] *Comedy Club, Inc*. at 849.

[34] *Id.* at 841.

[35] *Id.* at 840.

[36] *Id.*

[37] *Comedy Club, Inc.*, 514 F.3d at 841.

[38] *Id.* at 847-851; *see* Kelly, *supra* note 21.

[39] *Comedy Club, Inc.*, 514 F.3d at 850; *see* Kelly, *supra* note 21.

clause.[40]

Improv filed a petition for a writ of certiorari with the Supreme Court. While the Court granted the petition, it did not review the case but instead vacated the judgment and remanded the case back to the Ninth Circuit "for further consideration in light of *Hall Street Associates*."[41]

Upon rehearing, the Ninth Circuit came to essentially the same conclusion, although it used a more carefully worded analysis.[42] The Court invoked their precedent from *Kyocera Corp. v. Prudential-Bache T Servs.*, where they held that manifest disregard is a ground for vacatur because is it "shorthand for a statutory ground under the FAA, specifically section 10(a)(4), which states that the court may vacate 'where the arbitrators exceeded their powers.'"[43] The Court further explained the *Kyocera* holding, where they stated, "arbitrators 'exceed their powers'. . . when the award is 'completely irrational,' or exhibits a 'manifest disregard of the law.'"[44] The Court reasoned that the Supreme Court had not reached the question of whether manifest disregard fits into sections 10 or 11, but instead listed several possible rationalizations.[45] Thus, the Court determined that *Kyocera* was not irreconcilable with *Hall Street*, and therefore the Ninth Circuit is bound by its precedent holding that manifest disregard of the law is a valid ground for vacatur because it is part of section 10(a)(4) of the FAA.[46]

The Ninth Circuit is joined in its analysis by the Second Circuit, which held similarly in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, decided in November of 2008.[47] In that case, the Second Circuit acknowledged the *Hall Street* holding and determined that the Supreme Court did not intend to erase the standard from the available rationale for judicial vacatur.[48] It went on to explain that the manifest disregard doctrine is a necessary part of section 10 of the FAA, as "parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law."[49] The court explained that while previous Second Circuit dicta treated manifest disregard as an entirely separate ground for vacatur from those listed in the FAA, this holding instead reconceptualizes the manifest disregard doctrine as a "judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA," specifically citing section 10(a)(4).[50] Still, the court was careful to emphasize that its holding was not far reaching and was not intended to expand the scope of review under the manifest disregard standard, stating that it must be limited to the rare instances of extreme arbitral impropriety.[51]

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[40] *Id.*

[41] Improv W. Assocs. v. Comedy Club, Inc., 129 S.Ct. 45 (2008).

[42] Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277 (9th Cir. 2009).

[43] *Id.* at 1290 (citing *Kyocera*, 341 F.3d at 997).

[44] *Id.*

[45] *Id.* at 1290 (citing *Hall St.*,128 S.Ct. at 1404).

[46] *Id.* at 1290.

[47] Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94 (2d Cir. 2008).

[48] *Id.*

[49] *Id.* at 95.

[50] *Id.* at 94–95.

[51] *Id.* at 95 (quoting Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389

The Sixth Circuit went even further than the Second and the Ninth Circuits, holding that the vacatur based on an arbitrator's 'manifest disregard' of the law survived the *Hall Street* decision as an independent ground for vacatur.[52] The court construed the *Hall Street* decision narrowly, reasoning that it only applies to contractual expansions of judicial review.[53] The court stated that although "the Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in [FAA section] 10, . . . it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law."[54] The court went on to reason that manifest disregard had been a widely accepted ground for vacatur prior to the *Hall Street* holding, and "[i]n light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, . . . it would be imprudent to cease employing such a universally recognized principle."[55] Thus, at least for the time being, manifest disregard remains an independent ground for vacatur in the Sixth Circuit.

Other courts have disagreed with the approaches of the Second, Sixth, and Ninth Circuits. In *Ramos-Santiago v. UPS*, decided in April of 2008, the First Circuit was clear about its understanding of the impact of the *Hall Street* decision, stating in dicta: "[w]e acknowledge the Supreme Court's recent holding in [*Hall Street*] that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act."[56]

The Fifth Circuit agreed with this passing assertion in *Citigroup Global Markets, Inc. v. Bacon*, decided in March of 2009.[57] In that case, Bacon brought an arbitration claim against Citigroup after her husband made unauthorized withdrawals of more than $200,000 from her IRA.[58] The arbitration panel held for Bacon, granting her damages and attorneys' fees covering her losses. Citigroup then brought a vacatur action in district court, arguing that the arbitrators manifestly disregarded applicable Texas law.[59] The district court agreed that the award was in manifest disregard of the law and granted the motion based on its determination that the arbitrators failed to follow Texas statutory requirements.[60] The Fifth Circuit reversed the district court's holding, reasoning that the Supreme Court's decision in *Hall Street* overruled prior Fifth Circuit precedent, which allowed for vacatur based on manifest disregard of the law.[61] The court explained that "*Hall Street* restricts the grounds for vacatur to those set forth in [section] 10 of the Federal Arbitration Act . . . and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the

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(2d Cir. 2003)).

[52] Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415, 418–19 (6th Cir. 2008).

[53] *Id.*

[54] *Id.* at 418.

[55] *Id.* at 419.

[56] Ramos-Santiago v.UPS,524 F.3d 120, 124 n.3 (1st Cir. 2008) (dictum).

[57] 562 F.3d 349 (5th Cir. 2009).

[58] *Id.* at 350.

[59] *Id.*

[60] *Id.*

[61] *Id.*

FAA."[62] The court went on to discuss the other circuits' holdings in regards to manifest disregard as a ground for vacatur and concluded that because the case law in the Fifth Circuit defines it as an independent ground, manifest disregard is no longer available post-*Hall Street*.[63]

III. ANALYSIS

The disagreement among the circuit courts makes it very likely that the Supreme Court will take up the question of the viability of the manifest disregard doctrine soon. In doing so, the Court should follow the reasoning of the Second and Ninth Circuits and determine that manifest disregard is simply shorthand for FAA section 10(a), and thus remains an available ground for vacatur post-*Hall Street*.[64]

A. Possible Effects of the Disappearance of the Manifest Disregard Ground of Vacatur

The importance of the manifest disregard doctrine to parties to arbitration, especially those with lesser bargaining power, cannot be overstated. Although such a measure is only employed in the most extreme circumstances, if it were to disappear completely, there would be virtually no reason for arbitrators to follow the letter of the law.[65] While sections 10 and 11 of the FAA would still allow for limited judicial review, if the Supreme Court were to hold that manifest disregard does not qualify under those sections, then little could be done if an arbitrator openly disregarded the law in lieu of his or her own belief system.[66] Without the promise of judicial oversight, the risk of arbitral disregard for any established legal precedence or statutory requirement would increase dramatically, as there would be no mechanism in place to assure compliance. In fact, there would be no legal requirement with which to comply. Thus, if the Supreme Court were to determine that manifest disregard is no longer a viable ground for vacatur, an arbitrator would not even be breaking the rules if he or she chose to blatantly ignore the law. While arbitral associations (such as the American Arbitration Association and the National Arbitration Forum) would almost certainly maintain strict guidelines for their members, the ramifications to the entire practice could be disastrous, as rogue arbitrators could make decisions with little fear of repercussion.

There are two possible arguments against this "run amok" theory. First, one might argue that the capitalist nature of the arbitration community makes this type of "rogue behavior" unlikely. Namely, because an arbitrator for any given conflict is chosen from a vast pool of possible neutrals, if a person became known for blatantly disregarding the law, he or she would quickly be out of a job in lieu of someone more virtuous. However, this may not be the case in an industry where

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[62] *Id.*

[63] Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009).

[64] *See supra* notes 28–51 and accompanying text.

[65] *See supra* note 51 and accompanying text.

[66] *See supra* note 6 and accompanying text.

the bargaining power of the parties is sometimes widely disparate. For example, if a credit card company knows that a certain arbitrator disregards the law in their favor, but a consumer does not know of a particular arbitrator's decisions or reputation, how would the consumer ever know to strike the arbitrator's name from a list of arbitrators or to choose a different person when the corrupt arbitrator's name was offered? The capitalistic nature of the industry works both ways, and the sealed nature of arbitration proceedings makes it difficult to envision a way for parties to fully understand what they are getting into before being stuck with a decision that falls squarely outside the laws of the jurisdiction in which the hearing is being held. It is true that this type of misconduct may come perilously close to behavior disallowed under section 10(a)(1) or (2), however, much of the behavior may not rise to that level, and proving corruption, fraud, and undue influence is a very difficult task, which puts an enormous burden on the disadvantaged party.[67]

Second, one could argue that the vast majority of arbitrators would not manifestly disregard the law in the first place, thus any concern over a lack of judicial oversight is overblown. Yet, the provisions of sections 10 and 11 of the FAA are intended to deal with the unscrupulous minority. It can be assumed without much difficulty that most arbitrators would not disregard the law even if the Supreme Court determined that there were no repercussions for doing so. However, the concern has never been over the majority of ethical arbitrators, but is instead over the minority of unethical ones who may take that opportunity to determine conflicts based on reasoning that has little, if anything, to do with established legal doctrine.[68]

Perhaps the most frightening aspect of a world in which manifest disregard is no longer a viable ground for vacatur is the realization that even if parties wanted to agree to disallow such behavior, that agreement would not be enforceable.[69] *Hall Street*'s explicit holding was that parties to arbitration cannot contractually expand the grounds for vacatur beyond those included in sections 10 and 11 of the FAA.[70] Thus, if the Supreme Court were to determine that manifest disregard does not fit into these sections, the doctrine would be erased and parties would no longer be able to rely on the idea that their arbitrator must uphold the laws of their jurisdiction.

While the foregoing analysis may seem like a apocalyptic prediction of improbable future events, failure to allow for judicial review based on manifest disregard of the law would truly open the door for such disregard to become commonplace in the arbitration field. The entire practice of arbitration could very well change into something entirely extrajudicial. As the system is now, parties would never enter into arbitration in good faith with the intention to arbitrate outside of legal standards. However, in a new conceptualization of arbitration in which disregarding the law does not violate the FAA, powerful parties could choose arbitrators based on their penchant for big business or slanted verdicts,

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[67] *See supra* note 6 and accompanying text.

[68] *See supra* note 51 and accompanying text.

[69] *See supra* notes 13–20 and accompanying text.

[70] *See supra* notes 13–20 and accompanying text.

while parties less well-versed in the arbitration system will have far less opportunity to ensure that they are getting a fair hearing.

B. Utilizing the FAA to Maintain the Manifest Disregard Doctrine

The First Circuit was erroneous in reasoning that *Hall Street* rendered the manifest disregard ground for vacatur invalid.[71] Similarly, the Sixth Circuit was mistaken in their assertion that manifest disregard remains feasible as an independent ground for vacatur in light of the explicit holding of *Hall Street*.[72] The more sound reasoning, and that which the Circuits and the Supreme Court should follow in future cases, is that of the Second and Ninth Circuits, which held that although *Hall Street* forecloses the use of manifest disregard as an independent ground for vacatur, it can and should be used under section 10(a) of the FAA.[73]

Both the Second and Ninth Circuits relied solely on section 10(a)(4) to determine that a manifest disregard of the law is a viable ground for modification and vacatur under the FAA by fitting it within the standards of "exceeding [one's] powers."[74] While this is strong reasoning that should be utilized by the other Circuits and the Supreme Court in any future decisions on the matter, section 10(a)(3) also provides a strong statutory basis for modification and vacatur.[75] In that section, an award may be vacated "where the arbitrators were guilty of . . . any other misbehavior by which the rights of any party have been prejudiced."[76] As a party prepares for the arbitration, and throughout the process of the hearing, she will assume that the arbitrator is adhering to accepted legal doctrine and will thus tailor her argument based on that assumption. If the law on which that assumption is based is overtly disregarded in lieu of a different set of rules, it is clear that she is prejudiced by the arbitrator's manifest disregard of the laws of the jurisdiction.

Using the same standards for manifest disregard that were in place prior to *Hall Street*, courts can determine that this arbitral misconduct meets the standard for vacatur under both sections 10(a)(3) and 10(a)(4) of the FAA. These two sections allow for a sturdy statutory footing with which the manifest disregard doctrine can develop, and will produce an outcome with the desired balance of allowing modification and vacatur of arbitral awards only in "rare instances of extreme arbitral impropriety," while maintaining high ethical and professional standards with which all arbitrators must comply.

IV. CONCLUSION

Preserving the vitality of the manifest disregard ground for modification and vacatur of arbitration awards is critical to maintaining a system of fair and equitable arbitrations. While the vast majority of arbitrators would never even

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[71] *See supra* note 56 and accompanying text.

[72] *See supra* notes 10, 52-55 and accompanying text.

[73] *See supra* notes 28-51 and accompanying text.

[74] *See supra* notes 28-51 and accompanying text.

[75] *See supra* note 6 and accompanying text.

[76] *See supra* note 6 and accompanying text.

think to overtly disregard the law, sections 10 and 11 of the FAA were designed to ensure that if and when such indiscretions do occur, a mechanism for judicial oversight would be available to remedy the injustice. Without the manifest disregard standard, arbitrators could completely ignore the law, leaving the injured party with no recourse. While the system may not spiral out of control in one moment, the very foundation upon which the arbitration system has been built would lack efficacy and begin to crumble.

The best way to ensure that the manifest disregard rationale continues to survive post-*Hall Street* is for Circuits and the Supreme Court to follow the reasoning of the Second and Ninth Circuits and hold that manifest disregard of the law is not an independent ground for modification or vacatur of arbitral awards, but instead fits within the allowable grounds found in sections 10 and 11 of the FAA. The arbitration system depends on the fairness and finality of its awards, and this rationale is the best possible way to ensure that arbitration will continue to prosper for years to come.