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Hall Street Blues: The Uncertain Future of Manifest Disregard

*By Jill Gross**

The scope of permissible judicial review of arbitration awards poses the fundamental policy question of whether and to what degree courts should intervene in the finality of the arbitration process to ensure its integrity. Any regulation of arbitration must balance enforcement of the parties' selection of that dispute resolution process with courts' reluctance to stamp their imprimatur on awards resulting from a fundamentally unfair process or reflecting a fundamentally unfair outcome. Thus, the Federal Arbitration Act ("FAA")[1] provides "streamlined"[2] mechanisms to enable arbitration parties to obtain prompt confirmation,[3] vacatur[4] or modification[5] of an arbitration award on specified grounds without the need to file collateral actions that otherwise would be required to enforce an award in court.

Since the enactment of the FAA, some courts have crafted extra-statutory grounds for award enforcement, due to their discomfort with award finality and arbitrators' lack of accountability.[6] For example, courts have vacated "arbitrary and capricious"[7] awards, those rendered in "manifest disregard of the law,"[8] and those that contravened public policy.[9] Some parties to arbitration agreements, perhaps troubled by the unbridled power of arbitrators to bind them to awards that do not necessarily follow the law, manage risk by incorporating expanded grounds for judicial review of the award, particularly for legal error, into their arbitration agreements.[10]

The Supreme Court halted this expansion in *Hall Street Assocs. v. Mattel, Inc.*[11] The Court resolved a widening split in the circuit Courts of Appeal[12] and ruled that the grounds for vacating an arbitration award listed in section 10(a) of the FAA[13] are exclusive. Thus, parties cannot contractually expand the grounds for judicial review of an arbitration award when invoking FAA's vacatur provisions.[14] In balancing the competing policy concerns of arbitration law, the *Hall Street* Court elevated the finality of arbitration over the parties' freedom of contract.

The *Hall Street* decision necessarily impacted subsequent jurisprudence regarding parties' motions to vacate arbitration awards. While

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the opinion clearly and explicitly barred further contractual expansion of grounds for review, it also avoided and thus left unresolved the issue of whether it would endorse or reject the judicially-crafted "manifest disregard of the law" ground for review of an arbitration award.[15] In the short time since *Hall Street*, a new circuit split has emerged on the question of whether manifest disregard of the law survives *Hall Street* as a valid ground to vacate an award under the FAA.[16] This article will explore that question.

I. Background

The FAA, enacted by Congress in 1925, declares "valid, irrevocable, and enforceable" any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, . . . save upon such grounds as exist at law or in equity for the revocation of any contract."[17] The statute reflects a strong federal policy favoring arbitration.[18] The Supreme Court has consistently recognized that Congress promulgated the FAA "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate."[19]

Among other powers, the FAA conveys to federal courts the authority to enforce, modify, confirm or vacate arbitration agreements or awards arising from maritime transactions or transactions involving commerce.[20] Pursuant to section 9 of the FAA, a court "must" confirm an arbitration award "unless" it is vacated, modified, or corrected "as prescribed" in sections 10 and 11.[21]

FAA section 10 establishes the criteria upon which a court may vacate an arbitration award:

(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—

> (1) where the award was produced by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or 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.[22]

Section 11 of the FAA provides additional grounds for modifying or correcting an award.[23]

The Supreme Court often refers to FAA arbitration as "a matter of consent, not coercion," and has declared that "parties are generally free to structure their arbitration agreements as they see fit."[24] Because the FAA does not prevent "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," parties to arbitration agreements can "specify by contract the rules under which that arbitration will be conducted."[25]

Prior to *Hall Street*, federal appellate courts disagreed as to whether section 10 provided the exclusive basis for vacatur relief in cases arising under the FAA.[26] The First,[27] Third,[28] Fourth,[29] Fifth[30] and Sixth Circuits[31] held that parties may contract for expanded judicial review beyond the scope of section 10. These courts premised their respective holdings on the notion that the FAA, first and foremost, is a statute designed to enforce parties' agreements to arbitrate according to their specific terms.[32] If the parties specified in their arbitration agreements additional grounds for review, then the court should apply those grounds.

By contrast, the Seventh,[33] Ninth[34] and Tenth[35] Circuits held that parties may not expand judicial review contractually. These courts reasoned that, while allowing parties to choose by contract the rules and procedures they wanted to govern their *arbitration* process, the Supreme Court has never allowed parties to determine by contract what rules and procedures a *federal court* should follow.[36] These courts rejected the creation of federal powers by contract.[37]

In 2007, *Hall Street* provided the Supreme Court with an opportunity to resolve this circuit split.

II. The *Hall Street* Opinion

Hall Street arose from a landlord-tenant dispute. Mattel rented property from Hall Street Associates to use for manufacturing. A provision in the lease required Mattel to indemnify Hall Street for any costs related to the failure of Mattel (or its predecessor lessees) to comply with environmental laws while using the premises. Groundwater analysis of the leased premises in 1998 revealed the presence of high levels of trichloroethylene ("TCE"),[38] a toxic chemical by-product of various manufacturing processes employed by Mattel and its predecessors between 1951 and 1980.[39]

Subsequent to the TCE discovery, Mattel notified Hall Street of its intent to terminate the lease. Hall Street sued, alleging that Mattel: (i) did not have the right to vacate the premises on the specified date; and (ii) was obligated to indemnify Hall Street for costs connected to the TCE well contamination and its related non-compliance with the

Oregon Drinking Water Quality Act (the "Oregon Act").[40] Following a bench trial, the United States District Court for the District of Oregon ruled that Mattel could terminate the lease lawfully.[41] Thereafter, the parties attempted, unsuccessfully, to mediate a settlement of Mattel's disputed duty to indemnify Hall Street.[42]

The parties then agreed to arbitrate the indemnification issue. In the relevant post-dispute arbitration agreement, the parties provided for judicial review of the award for legal error — a basis not found in FAA section 10.[43] The arbitrator resolved the dispute in favor of Mattel, reasoning that, since the lease required adherence only to "applicable" federal, state and local environmental laws, Mattel did not owe indemnification costs to Hall Street because the Oregon Act applied only to human health, not environmental contamination.[44]

The district court granted Hall Street's motion to vacate the arbitrator's award on the basis that the arbitrator committed legal error in concluding that the Oregon Act did not apply to environmental contamination.[45] Through application of the agreement's provision for expanded judicial review, the district court relied on then-existing Ninth Circuit precedent for the principle that parties to an arbitration agreement could agree to expand the standards of review of an arbitration award contractually.[46]

On remand, the arbitrator held the Oregon Act applied and Mattel moved to vacate the second award. The district court corrected the arbitrator's interest calculation but otherwise confirmed the award.[47] Mattel then appealed to the Court of Appeals for the Ninth Circuit, arguing that the Ninth Circuit's recent *en banc* opinion overturned *LaPine*,[48] therefore invalidating the expanded standard of review set forth in the parties' arbitration agreement. The Ninth Circuit agreed with Mattel and reversed the district court's judgment, and the Supreme Court granted Hall Street's petition for writ of certiorari to resolve the circuit split.[49]

In a majority opinion authored by Justice Souter, the Supreme Court held the FAA's grounds for prompt vacatur and modification of awards are exclusive for parties seeking expedited review pursuant to the statute.[50] Furthermore, the Court held parties cannot expand or modify these grounds by contract.[51] Thus, the *Hall Street* Court enforced the portion of the arbitration agreement vesting jurisdiction with the arbitrators but not the language providing for expanded review.[52] In effect, this decision precludes all parties who seek "expeditious judicial review" pursuant to FAA §§ 9 to 11 from incorporating expanded standards of review into arbitration agreements.[53]

III. Manifest Disregard of the Law

While not part of its primary holding, *Hall Street* dicta casts doubt

directly on the continued vitality of the "manifest disregard of the law" ground for review. The "manifest disregard" standard originated from a statement by the Supreme Court in *Wilko v. Swan*,[54] a 1953 case in which the Court first explored the arbitrability of claims arising under the Securities Act of 1933 ("Securities Act"). The *Wilko* Court justified holding Securities Act claims were not arbitrable by specifically noting aspects of the arbitration process that could diminish the Securities Act's protections, including the fact that "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."[55]

By 2008, every federal circuit had converted *Wilko*'s dicta into a basis to vacate an arbitration award. While the precise test varied from circuit to circuit, most courts agreed that, to persuade a court to vacate an award on manifest disregard grounds, the losing party must show: (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether; and (2) the law that the arbitrators ignored was well defined, explicit, and clearly applicable to the case.[56] However, the Supreme Court had never directly addressed the validity of the "manifest disregard" standard nor was its validity a question presented to the *Hall Street* Court.[57]

Yet, the *Hall Street* Court offered a few comments about "manifest disregard" when rejecting Hall Street's contentions about the significance of language in *Wilko*. Hall Street had argued that if judges can add grounds of review to the FAA, like the *Wilko* Court did, then parties can, too.[58] The Court rejected Hall Street's logic by retorting that *Wilko* did not, in fact, add "manifest disregard" as a ground for review. Instead, in attempting to explain precisely what *Wilko* did mean when it used the phrase "manifest disregard," the Court merely speculated:

> Maybe the term "manifest disregard" [as used in *Wilko v. Swan*, 346 U.S 427 (1953)] was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them . . .. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers."[59]

The Court concluded only that the reference to "manifest disregard" in *Wilko* did not signify, necessarily, that parties may expand grounds to vacate contractually.[60] Thus, while the *Hall Street* Court did not expressly reject "manifest disregard" as a valid ground for review, it did not embrace it either.

IV. *Hall Street* Progeny: Lower Courts

In the decisions rendered immediately following *Hall Street*, lower courts tried to make sense of the Supreme Court's less clear dicta

regarding "manifest disregard," while applying the unambiguous *Hall Street* holding. For example, one district judge reasoned that it would be inconsistent to allow courts to craft from the bench vacatur grounds not enumerated by the FAA, while disallowing parties to expand upon those same grounds contractually.[61] The *Prime Therapeutics* court relied upon the Supreme Court's theory that Congress wrote FAA sections 9 through 11 to foster expedited review of arbitration awards and any expansion or alteration of those provisions would undermine that policy.[62] Other district courts altogether rejected the continued validity of the "manifest disregard" standard of review after *Hall Street*.[63]

By contrast, other lower courts at first concluded that *Hall Street* did "nothing to jettison the manifest disregard standard."[64] These courts seized upon *Hall Street*'s speculation that "manifest disregard" might be judicial interpretation of section 10(a), and thus not extra-statutory.[65] For example, in *Hale*, a credit card account holder brought an arbitration claim against her credit card company, alleging it violated the Truth in Lending Act through its interest rate charges.[66] An arbitrator deemed the customer's claim frivolous and awarded the credit card company $5,600 in attorney's fees. The customer moved to vacate the award, asserting that the arbitrator acted in "manifest disregard" of the law by awarding attorney's fees to her credit card issuer.[67]

The New York trial court applied *Hall Street*, and held the "manifest disregard" standard was another way to interpret the FAA section 10(a)(4) requirement (arbitrators exceeded their powers).[68] However, since *Hall Street* did not define "manifest disregard" under section 10(a)(4), the *Hale* court held arbitrators manifestly disregard the law when the record indicates that they knew and deliberately ignored well-defined, explicit and clearly applicable law that would affect the outcome of the case.[69] *Hale* further held that "manifest disregard" exceeds a merely erroneous application or interpretation of the law.[70] Applying that test, the *Hale* court confirmed the award, holding, *inter alia,* arbitrators possess the authority to fashion appropriate remedies, which necessarily include awards of attorney's fees for claims brought in bad faith.[71]

Likewise, in *Halliburton Energy Svcs., Inc. v. NL Indus.*,[72] involving a $10 million arbitration award stemming from the parties' disputes over environmental remediation costs, a Texas district judge reviewed the award for manifest disregard of the law. The *Halliburton* court reasoned that *Hall Street* did not explicitly determine "whether the 'manifest disregard' standard remains a separate basis for federal court reviews of arbitration decisions in at least some circumstances," and noted that considerable Fifth Circuit precedent allowed the ap-

plication of the "manifest disregard" standard of review.[73] Applying the well-established test, the *Halliburton* court ultimately denied the motion to vacate, determining that the movant "failed to carry its burden to show that the panel's decisions interpreting the contracts in the [c]ontract [p]hase of the arbitration resulted from 'manifest disregard' of [applicable] contract law."[74]

As these cases demonstrate, in the first few months after *Hall Street*, trial courts diverged in their approach to the task of reconciling *Hall Street* with the manifest disregard standard of review.

V. *Hall Street* Appellate Court Progeny

As cases made their way up through the appellate system, a new circuit split emerged, similar to the earlier lower court split. Thus, the Second,[75] Sixth,[76] and Ninth[77] Circuit Courts of Appeals recognized the continued vitality of the manifest disregard ground of vacatur. For example, in *Stolt-Nielsen*, the Second Circuit concluded that *Hall Street* did not abrogate the doctrine, but instead it "declined to resolve that question explicitly."[78] The Second Circuit explained that it "views the 'manifest disregard' doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision. We must therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which 'the arbitrator knew of the relevant [legal] principle, appreciated that the principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.' "[79] Likewise, in *Comedy Club*, the Ninth Circuit reasoned that *Hall Street* was not "clearly irreconcilable" with prior Ninth Circuit precedent that recognized "manifest disregard" as a prong of review under FAA section 10(a)(4).[80]

By contrast, in *Citigroup Global Markets, Inc. v. Bacon*,[81] a district court vacated on manifest disregard grounds a securities arbitration award to an investor who claimed unauthorized withdrawals from her investment account. The Fifth Circuit flatly rejected "manifest disregard" as a valid ground for vacatur, thus overturning *Halliburton*.[82] The *Bacon* court reasoned that *Hall Street* unequivocally held the statutory grounds are the exclusive means for vacatur under the FAA. As a result, because Fifth Circuit case law "defines manifest disregard of the law as a non-statutory ground for vacatur, . . . manifest disregard of the law constitutes a nonstatutory ground for vacatur [and] is no longer a basis for vacating awards under the FAA."[83]

At the time of publication, two other circuits have addressed manifest disregard under *Hall Street*, but in dicta only. The First Circuit declined to consider the issue directly but stated summarily that manifest disregard was no longer a valid ground for review after

Hall Street.[84] The Eighth Circuit cited *Hall Street* as holding "an arbitral award may be vacated only for the reasons enumerated in the FAA."[85]

VI. The Future of Manifest Disregard

It appears that this latest circuit split, developed less than one year after *Hall Street*, is heading to the Supreme Court. The Court will have to decide whether, under the FAA, "manifest disregard" is a statutory ground for review, and thus permissible, or an extra-statutory ground, and thus prohibited under *Hall Street*. Did the *Wilko* Court use the term "manifest disregard" to refer to one or more of the four grounds listed under section 10, or did it unwittingly create fifty-five years of impermissible extra-statutory review by the lower courts?

In my view, *Hall Street* does *not* abrogate the "manifest disregard" standard of award review. Indeed, the Court stated that it has never directly held whether a trial court can review an arbitration award for "manifest disregard."[86] Rather, the strict constructionist majority merely interpreted the FAA to preclude parties seeking vacatur from asserting grounds other than those identified in FAA section 10, and suggested that lower courts could construe the bases provided by section 10 as inclusive of "manifest disregard." *Hall Street* delegated to the lower courts the semantic task of assigning the "manifest disregard" label to one of the four sub-grounds of section 10, as the statute is not incompatible with the label. Thus, parties can continue to challenge arbitration awards on the FAA ground that arbitrators committed misconduct under FAA section 10(a)(3) by manifestly disregarding the law or exceeded the scope of its powers under FAA section 10(a)(4) by manifestly disregarding the law.[87]

Public policy also dictates that courts should preserve this ground for review. First, the federal common law of this country — which pre-dates and survives the enactment of the FAA — imposed a "fundamental fairness" requirement on commercial arbitration.[88] While acknowledging the general principle that courts should intervene only sparely in arbitration matters, courts reasoned that a court asked to set aside an arbitration award is a court sitting in equity, and no court of equity could confirm an award that resulted from a fundamentally unfair process.[89] If parties can show that a panel manifestly disregarded the law, then it can show a fundamentally unfair process. "Manifest disregard" roots out fundamental unfairness.

Second, if an arbitration panel manifestly disregards law arising under a federal statutory cause of action, then disputing parties cannot effectively vindicate their statutory rights. The Supreme Court has frowned upon unfair arbitration processes that do not permit par-

ties to vindicate their statutory rights.[90] Depriving courts of the manifest disregard weapon would frustrate their ability to enforce that principle post-award.

Third, just as pre-*Hall Street* contracting parties insisted on expanded grounds for review in any pre-dispute arbitration clause for risk management purposes, those same parties are far less likely to consent to arbitration if the Court eliminates manifest disregard. If fewer commercial parties consent to arbitration, then the function of arbitration as one means to alleviate the courts' dockets would diminish. Thus, as a practical matter, to preserve the appeal of arbitration, the Court should permit the risk management mechanism of manifest disregard. The national policy favoring arbitration requires that the Court balance finality with judicial intervention enough to ensure a minimal level of arbitrator accountability by retaining the manifest disregard doctrine.

Finally, until *Hall Street*, every federal circuit had recognized "manifest disregard" as a ground for review for many and varied policy reasons. It seems "imprudent" to obliterate a half-century of well-developed and well-reasoned jurisprudence based on semantics and a rigid view of finality at all costs.[91] Simply put, I see the elimination of manifest disregard as a semantic blunder that, in the end, is anti-arbitration.

Conclusion

For more than 55 years, courts have reviewed arbitration awards governed by the FAA for arbitrators' "manifest disregard of the law." That narrow doctrine emerged as one extremely limited — but wise — check on the far-reaching powers of arbitrators to resolve disputes equitably, privately, quickly and at relatively low cost. According to three out of four Courts of Appeals that thus far have squarely considered the question, *Hall Street* did not eliminate that doctrine from FAA jurisprudence. Unclear dicta in *Hall Street* should not collide with strong public policy reasons to allow for a narrow exception, and a statutorily-supported ground to impose accountability on arbitrators.

NOTES:

[1]9 U.S.C.A. §§ 1 et seq.

[2]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008).

[3]*See* 9 U.S.C.A. § 9 (2008) ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order

confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.").

[4]*See* 9 U.S.C.A. § 10 (listing narrow grounds for vacatur of an award based on errors in the arbitration process).

[5]*See* 9 U.S.C.A. § 11 (listing narrow grounds for modifying or correcting an award).

[6]For an extensive listing of federal courts' interpretation on non-statutory grounds, see Stephen L. Hayford, *Law in Disarray: Judicial Standard for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 763–801 (1996).

[7]*See, e.g., Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992) (affirming vacatur of portion of award because it was "arbitrary and capricious").

[8]*See, e.g., Porzig v. Dresdner, Kleinwort, Benson, North America, LLC*, 497 F.3d 133, 139 (2d Cir. 2008) (vacating arbitration award because arbitration panel manifestly disregarded the law). Before *Hall Street*, every circuit had adopted the manifest disregard test, although some circuits interpreted the standard far more strictly than others. *Compare Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 762 (5th Cir. 1999) (permitting vacatur for manifest disregard only for awards that "would result in significant injustice") *and Geo. Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2000) (allowing vacatur for manifest disregard only when an award directs the parties to violate the law) *with Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (defining manifest disregard test to be when the relevant law is clearly defined and not subject to reasonable debate, and the arbitrators consciously chose not to apply it).

[9]*See, e.g., PaineWebber, Inc. v. Agron*, 49 F.3d 347, 350 (8th Cir. 1995) (acknowledging that federal court can vacate an arbitration award rendered contrary to a "well-defined and dominant" public policy).

[10]Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L. J. 214, 215–18 (2007) (reviewing reasons why commercial parties to arbitration clauses might seek to provide for expanded judicial review of awards).

[11]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

[12]*See infra* notes 26–37 and accompanying text.

[13]9 U.S.C.A. § 10(a).

[14]Clauses that are now invalid include those that specify that a court can review an award for "errors of law," or that awards are subject to *de novo* review in court.

[15]*See infra* notes 58–60 and accompanying text.

[16]*See infra* notes 75–85 and accompanying text.

[17]9 U.S.C.A. § 2.

[18]*See, e.g., Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (recognizing a "liberal federal policy favoring arbitration agreements").

[19]*Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985).

[20]*See Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[21]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008).

[22]9 U.S.C.A. § 10.

[23]Section 11. Same; modification or correction; grounds; order.

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.
c. Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. 9 U.S.C.A. § 11.

[24]*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

[25]*Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) at 479.

[26]*See Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 n.5 (2008). For a discussion of the then-evolving circuit split, see generally Cole, *supra* note 10, at 219–22; Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, DISP RESOL. J. 16 (Nov. 2006/Jan. 2007); Lee Goldman, *Contractually Expanded Review of Arbitration Awards,* 8 HARV. NEGOT. L. REV. 171 (2003).

[27]*See Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005).

[28]*See Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3rd Cir. 2001).

[29]*See Syncor Intern. Corp. v. McLeland*, 120 F.3d 262, 1997 WL 452245 (4th Cir. 1997) (unpublished *per curiam* opinion).

[30]*See Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995)

[31]*See Jacada (Europe), Ltd. v. Int'l Mktg. Strategies Inc.*, 401 F.3d 701 (6th Cir. 2005).

[32]*E.g., Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-997 (5th Cir. 1995).

[33]*See Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991).

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

[35]*See Bowen v Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

[36]*See Bowen v Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001).

[37]*E.g., Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

[38]*See* United States Agency for Toxic Substances and Disease Registry, ATSDR — Toxic Substances — Trichloroethylene (TCE), available at: http://www.atsdr.cdc.gov/substances/toxsubstance.asp?toxid=30 (last visited May 23, 2009).

[39]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

[40]*See* Oregon Drinking Water Quality Act of 1981, Oregon Revised Statute (ORS)

448 (Aug. 21, 1981).

[41]*Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 145 F. Supp. 2d 1211 (D. Or. 2001).

[42]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008).

[43]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400–1401 (2008). The provision, in its entirety, stated: "The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence; or (ii) where the arbitrator's conclusions of law are erroneous." *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400–1401 (2008) (citing post-dispute arbitration agreement).

[44]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1401 (2008).

[45]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1401 (2008).

[46]*See LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), *vacated by Kyocera Corp. v. Prudential-Bache Trade Svcs., Inc.*, 341 F.3d 987 (9th Cir. 2003).

[47]*Hall St. Assocs., L.L.C. v. Mattel Inc.*, 2007 WL 656445 (D. Or. Feb. 26, 2007).

[48]*See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 113 Fed. Appx. 272, 272–73 (9th Cir. 2004), citing *Kyocera Corp. v. Prudential-Bache Trade Svcs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (holding the grounds for vacatur under 9 U.S.C.A. § 10 are exclusive and parties cannot contract for alternative standards of review).

[49]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1401 (2008); *see also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 196 Fed. Appx. 476 (9th Cir. 2006); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 550 U.S. 968 (2007) (*cert. granted*).

[50]*Hall Street*, 128 S. Ct. at 1403. Justice Souter was joined by five other Justices; Justice Stevens, joined by Justice Kennedy, and Justice Breyer, both filed dissenting opinions.

[51]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

[52]While the Court agreed with the Ninth Circuit, it vacated the judgment and remanded the case back to the Ninth Circuit for consideration of independent issues. *See Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1408 (2008); *Hall St. Assocs. v. Mattel Inc.*, 531 F.3d 1019 (9th Cir. 2008).

[53]Also left unresolved in *Hall Street* is the question of whether parties can invoke state arbitration law as a separate source of vacatur remedies. The *Hall Street* Court opined that the FAA procedures are only one route a party might invoke for judicial review of arbitration awards: "The FAA is not the only way into court for parties wanting review of arbitration awards; they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008). Thus, the Court left the door open for parties wanting to invoke state arbitration law in state court, even for actions arising out of arbitration agreements "involving commerce." 9 U.S.C. § 2. Since *Hall Street*, several state courts have referred to their home state's arbitration law as a separate avenue for vacatur, but those courts still disagree as to whether their state's arbitration law allows for expanded grounds of review. *Compare Cable Connection, Inc. v. DIRECTV*, 190 P.3d 586 (Cal. 2008) (holding *Hall Street* does not preclude state courts from enforcing agreements to expand the grounds of review of arbitration awards under state law), *with Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795 (Tex. App.-Dallas 2008) (concluding that Texas' arbitration act, like the

FAA, provides for expedited review of arbitration awards only on those grounds specified in the statute; parties cannot expand those grounds by contract). A related issue is whether FAA section 10 preempts state vacatur law in state court. I have previously written that in does not, except in the rare circumstance where state vacatur law permits broad *de novo* review of award. *See* Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. AM. ARB. 1 (2004). Thus, state law might very well provide alternative vacatur procedures.

[54]*Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

[55]*Wilko v. Swan*, 346 U.S. 427, 436-437 (1953). The Court, in turn, cited to an 1874 Supreme Court decision where the Court reviewed an admiralty arbitration award for "manifest mistake of law," which it equated to "misapprehension of the law," or if "arbitrators violated any principle of law." *United States v. Farragut*, 89 U.S. 406, 420–231 (1874).

[56]*See, e.g.*, *GMS Group, LLC v. Benderson*, 326 F.3d 75, 76 (2d Cir. 2003). Most courts and commentators agreed that this standard is very difficult to meet and leaves most disputants with virtually no avenue for appeal if they believe the arbitrators misapplied the law. *See, e.g.*, Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415 (2003); Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123 (2005); Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471 (1998) (arguing that manifest disregard standard is inadequate).

[57]*See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (dictum) (citing *Wilko* as providing one of few "unusual circumstances" under which a court can set aside an arbitration award and describing *Wilko* as stating "parties bound by arbitrator's decision not in 'manifest disregard' of the law") (citing *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953)).

[58]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008).

[59]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

[60]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

[61]*Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp.2d 993, 999 (D. Minn. 2008).

[62]*Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp.2d 993, 999 (D. Minn. 2008).

[63]*See Medicine Shoppe Intern. Inc. v. Simmonds*, 2009 WL 367703, at *3 (E.D. Mo. 2009) (concluding that the *Hall Street* Court "determined that because 'manifest disregard for the law' is not a prescribed basis upon which an arbitrator's award may be vacated or modified under §§ 10 or 11, a reviewing court cannot engage in such a general review of an arbitrator's award to search for any legal error"); *Robert Lewis Rosen Assoc. Ltd. v. Webb*, 566 F. Supp.2d 228, 233 (S.D.N.Y. 2008) (finding manifest disregard of the law standard "no longer good law"), *overruled by Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008); *ALS & Associates, Inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp.2d 180, 185 (D. Mass. June 2, 2008); *Ascension Orthopedics, Inc. v. Curasan, AG*, 2008 WL 2074058, at *1 (S.D. Tex. May 14, 2008); *Hereford v. D.R. Horton, Inc.*, 2009 WL 104666, at *5 (Ala. Jan. 9, 2009).

[64]*Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342 (Sup. Ct. N.Y. Co. 2008); *see also Mastec North America, Inc. v. MSE Power Systems, Inc.*, 581 F. Supp.2d 321 (N.D.N.Y. 2008) (considering a "manifest disregard" challenge to an award but deny-

ing it on the merits).

[65]*See, e.g., Mastec North America*, 581 F. Supp.2d at 325 (citing *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d at 348–49) (electing to view "manifest disregard" of law as judicial interpretation of the Section 10 requirements, rather than as a separate standard of review, and will "resort to existing case law to determine its contours").

[66]*Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342 (Sup. Ct. N.Y. Co. 2008); 15 U.S.C.A. §§ 1601 et seq.

[67]*Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 347-348 (Sup. Ct. N.Y. Co. 2008).

[68]*Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 348-349 (Sup. Ct. N.Y. Co. 2008). The trial court assumed without deciding that FAA section 10 grounds applied in state court, and thus preempted state vacatur law. For a discussion of whether section 10 preempts state vacatur law, see Gross, *supra* note 53.

[69]*Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 348-349 (Sup. Ct. N.Y. Co. 2008).

[70]*Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 348-349 (Sup. Ct. N.Y. Co. 2008).

[71]*Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 348-349 (Sup. Ct. N.Y. Co. 2008).

[72]*Halliburton Energy Svcs., Inc. v. NL Indus.*, 553 F. Supp.2d 733 (S.D. Tex. 2008).

[73]*Halliburton Energy Svcs., Inc. v. NL Indus.*, 553 F. Supp.2d 733, 753 (S.D. Tex. 2008).

[74]*Halliburton Energy Svcs., Inc. v. NL Indus.*, 553 F. Supp.2d 733, 762 (S.D. Tex. 2008).

[75]*Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008) (recognizing post-Hall Street split and stating that "[w]e agree with those courts that take the . . . approach [that manifest disregard remains a valid ground for vacating arbitration awards]"), *cert. granted*, No. 08-1198, 2009 WL 803120 (June 15, 2009).

[76]*Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 419 (6th Cir. 2008) ("In light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle. Accordingly, this Court will follow its well-established precedent here and continue to employ the 'manifest disregard' standard."); *see also Martin Marietta Materials, Inc. v. Bank of Oklahoma*, 304 Fed. Appx. 360, 362 (6th Cir. 2008) (same).

[77]*Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (stating "[w]e cannot say that *Hall Street Associates* is 'clearly irreconcilable' with *Kyocera* and thus we are bound by our prior precedent. Therefore, we conclude that, after *Hall Street Associates*, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4)") (internal citations omitted).

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

[79]*Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008) (citing *Westerbeke*, 304 F.3d at 217). In so holding, the Second Circuit drew from a pre-*Hall Street* decision in which the Seventh Circuit equated the FAA vacatur mechanism as a means for a losing arbitration party to challenge the award on the ground

the arbitrators violated the arbitration agreement, rather than on the ground the arbitrators were mistaken. 548 F.3d at 95 (citing *Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 269 (7th Cir. 2006)).

[80]*Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (citing *Kyocera*, 341 F.3d at 997, and its holding that "arbitrators 'exceed their powers' . . . when the award is 'completely irrational,' or exhibits a 'manifest disregard of law' ") (internal citations omitted).

[81]*Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

[82]*Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

[83]*Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009); *see also Hereford v. Horton*, 2009 WL 104666, at *4–5 (Sup. Ct. Ala. 2009) ("Under the Supreme Court's decision in *Hall Street Associates*, therefore, manifest disregard of the law is no longer an independent and proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator's award."); *Vermont Built, Inc. v. Krolick*, 969 A.2d 80, 85–86 n.2 (Vt. 2008) (stating that *Hall Street* "held that under the Federal Arbitration Act a court has no authority to review for an arbitrator's legal errors" and clarifying that, under Vermont law, "we do not recognize a court's right to review an arbitrator's decision for manifest disregard of the law").

[84]*Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124, n.3 (1st Cir. 2008) (stating in *dicta* that "[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 [FAA]. Because the case at hand is not an FAA case — neither party has invoked the FAA's expedited review provisions, and the original complaint was filed in Puerto Rico state court under a mechanism provided by state law — we decline to reach the question of whether *Hall Street* precludes a manifest disregard inquiry in this setting").

[85]*Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (citing *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008)).

[86]*Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (insisting that "[w]e, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and now that its meaning is implicated, we see no reason to accord it the significance [i.e., that *Wilko* held that "manifest disregard" was a valid ground for review] that Hall Street urges.")

[87]Even the *Bacon* Court acknowledge that it eliminated manifest disregard as a ground for review after *Hall Street* because Fifth Circuit precedent had semantically labeled manifest disregard as extra-statutory. *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

[88]*Burchell v. Marsh*, 58 U.S. 344, 349 (1854) (confirming award in a commercial dispute between a retailer and two wholesalers and stating that "after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or in fact").

[89]*Burchell v. Marsh*, 58 U.S. 344, 349 (1854).

[90]*See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000) (suggesting that excessive or overly burdensome forum fees, if proven, might bar a court from enforcing an arbitration agreement on the grounds that one party cannot vindicate its statutory rights); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (declaring that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute

[providing that cause of action] will continue to serve both its remedial and deterrent function"); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 29–30 (1st Cir. 2006) (refusing to enforce an arbitration agreement without severing the clause that precludes class action arbitration claims on the grounds that it deprives claimants from vindicating their statutory rights). *See generally* Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 510 (2008) (describing "vindicating rights" doctrine); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 269–73 (2006) (describing the "effectively vindicate" doctrine and noting that the "Supreme Court has yet to flesh out the . . . doctrine").

[91]*Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 419 (6th Cir. 2008) (declaring that "we believe it would be imprudent to cease employing such a universally recognized principle").