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The Uncertain Status of the Manifest Disregard Standard One Decade After Hall Street

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The Uncertain Status of the Manifest Disregard Standard One Decade After *Hall Street*

Stuart M. Boyarsky*

ABSTRACT

The Federal Arbitration Act (FAA) enables parties to obtain quick and final resolution to disputes without incurring the costs, delays, and occasional publicity of litigation. Indeed, section 10 of the FAA enumerates four specific grounds on which courts may vacate arbitral awards: corruption, fraud, impartiality, and misconduct or incompetence. Yet over the past 60 years, a debate has raged over the existence of an additional ground: the arbitrator's manifest disregard of the law.

The Supreme Court first enounced this standard in dicta in its 1953 decision in *Wilko v. Swan*. Over next four decades, every federal circuit court slowly adopted the standard as binding law. However, in 2008, the Court cast doubt on the standard's universal acceptance when it issued its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* The majority in *Hall Street* questioned whether *Wilko*'s use of the term "manifest disregard" merely referred to the aggregate effect of the enumerated section 10 grounds rather than a new standard of review. The Court's equivocation has inevitably led to a circuit split, with three circuits permitting vacatur based on an arbitrator's manifest disregard of the law, four circuits holding that *Hall Street* invalidated the manifest disregard standard, another circuit holding that the standard both is and is not valid, and four circuits refusing to decide the issue altogether.

This Article examines the evolution of the manifest disregard standard and the ramifications of *Hall Street*, including the current circuit split and the practical effect of the standard's availability on arbitration decisions at both the federal and state levels. The Article asserts that until the Supreme Court addresses the issue, an incentive to shop for a jurisdiction that en-

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terains a manifest disregard challenge will exist, thereby defeating the bedrock principle of the FAA: finality.

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INTRODUCTION

"[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."

—Justice Sandra Day O'Connor,
*Allied-Bruce Terminix Cos. v. Dobson*¹

There are numerous reasons for the spike in arbitration over the past half-century.² Parties view arbitration as a faster and less

1. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

2. See Bradley T. King, Note, "Through Fault of Their Own"—Applying *Bonner Mall's* Extraordinary Circumstances Test to Heightened Standard of Review

expensive alternative to litigation.³ The proceedings are kept strictly confidential, and the awards are given a degree of finality not found in litigation.⁴ Without this finality, arbitration would provide nothing more than a “system of ‘junior varsity trial courts’”⁵ and “be a mere prelude to, and not a substitute for, litigation.”⁶

Despite this finality, the Federal Arbitration Act (FAA)⁷ provides four explicit circumstances in which federal courts may vacate an arbitral award: if a party procured an award by corruption, if evidence of an arbitrator’s partiality exists, if the arbitrator refused to postpone the arbitral hearing despite a request showing good cause or to consider material evidence, or if the arbitrators exceeded their powers.⁸

Yet, in its 1953 decision in *Wilko v. Swan*,⁹ the Supreme Court seemingly expanded those circumstances and set forth what the federal circuit courts would come to view as a new criterion for vacatur: an arbitrator’s manifest disregard of the law.¹⁰ While the Court has refrained from explicitly approving the standard, every federal circuit court slowly adopted it over the four decades that followed *Wilko*.¹¹ But did *Wilko* indeed provide a new extra-statutory ground for overturning an arbitrator’s award, or had the Court merely rephrased one of the FAA’s enumerated bases for vacatur? The uncertainty led Judge Posner to lament:

We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the

Clauses, 45 B.C. L. REV. 943, 944–45 (2004) (discussing reasons for the increasing prevalence of arbitration).

3. See *id.* at 945.

4. See *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344 (10th Cir. 2009) (“Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances.” (quoting *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1146–47 (10th Cir. 1982))).

5. *Williams v. Katten, Muchen & Zavis*, No. 92 C 5654, 1996 WL 717447, at *6 (N.D. Ill. Dec. 9, 1996) (quoting *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994)).

6. King, *supra* note 2, at 945.

7. United States Arbitration Act, 9 U.S.C. §§ 1–16 (2018).

8. See 9 U.S.C. § 10(a).

9. *Wilko v. Swan*, 346 U.S. 427 (1953).

10. See *id.* at 435–38.

11. See *infra* Part I.B.1–3.

arbitrators 'exceeded their powers'—it is superfluous and confusing. There is enough confusion in the law.¹²

Over 50 years had passed before the Court chose to address the issue again. And even then Justice Souter, writing for the majority, appeared to hedge his bets. Writing for a divided Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,¹³ Justice Souter stated, "Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them."¹⁴ Rather than clarifying the uncertainty surrounding *Wilko*, *Hall Street* added to the confusion and eventually generated a fragmented split among the federal circuit courts. The result: three circuits now permit the use of manifest disregard as a viable ground for vacatur, four circuits have held that the manifest disregard standard no longer exists after *Hall Street*, one circuit has held that the standard both does and does not survive *Hall Street*, and four circuits have refused to decide the issue one way or the other.¹⁵ Given that parties generally enter into arbitration agreements to secure a degree of certainty and predictability not found in litigation,¹⁶ this potential lack of finality, which is based solely on the circuit in which the arbitration occurred, is a worrisome development.¹⁷ The Supreme Court's apparent refusal to address adequately the manifest disregard standard's viability is even more perplexing; the Court has since denied three petitions for writ of certiorari on the issue in 2009¹⁸ and another in 2014.¹⁹

This Article examines the evolution of the manifest disregard standard and the ramifications of *Hall Street*, including the current circuit split and the practical effects that the standard has had on arbitration decisions at the federal and state levels. Part I discusses the standard's emergence in *Wilko* as well as the federal circuit

12. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

13. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

14. *Id.* at 585.

15. For a discussion of the circuit split, see *infra* Part II.B.1–4.

16. ZHENG SOPHIA TANG, JURISDICTION AND ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL LAW 1 (2014).

17. See Petition for a Writ of Certiorari at 12, *Walia v. Dewan*, 134 S. Ct. 1788 (2014) (No. 13-722) ("The courts of appeals are divided . . . over whether 'manifest disregard' survived *Hall Street*. This divergence is untenable, as it subjects arbitral awards to different standards of review based entirely on the happenstance of where they are rendered.").

18. See *Coffee Beanery, Ltd. v. WW, LLC*, 558 U.S. 819 (2009); *Grain v. Trinity Health*, 558 U.S. 820 (2009); *Improv W. Assocs. v. Comedy Club, Inc.*, 558 U.S. 824 (2009).

19. See *Walia*, 134 S. Ct. 1788.

courts' slow adoption of that standard over the course of 40 years. Part II examines the Supreme Court's decision in *Hall Street* and the resulting circuit split. Part III focuses on the Court's missed opportunities to settle the circuit split and the standard's impact on a party's ability to overturn an award. This Article concludes by arguing that until the Supreme Court addresses the issue, an incentive to shop for a jurisdiction that entertains the manifest disregard standard will exist and thereby defeat the FAA's bedrock principle of finality.²⁰

I. *WILKO* AND ITS UNIVERSAL APPLICATION

Beginning with the 1925 enactment of the FAA, courts uniformly rejected claims of an arbitrator's disregard of the law as grounds for vacating awards.²¹ This rejection was rooted in the FAA's explicit list of four grounds upon which a court may vacate an arbitral award.²²

In fact, at the time of the decision, many viewed *Wilko* as solely addressing whether parties could compel investors to bring fraud claims under the Securities Act of 1933²³ ("Securities Act") in arbitration rather than in court. The issue of whether an arbitrator's manifest disregard of the law constitutes grounds for vacating an arbitral award was neither raised by the parties nor adopted by the Court. Nevertheless, it was the viability of the manifest disregard standard for which the case soon became known. The unforeseen ramifications of what can be best described as a throw-away line²⁴ continues to cause uncertainty over the scope of review of an arbitrator's decision.

20. As the Second Circuit explained: "[P]arties choose to arbitrate because they want quick and final resolution of their disputes." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 177 (2d Cir. 1984).

21. *See, e.g.*, *James Richardson & Sons, Ltd. v. W. E. Hedger Transp. Corp.*, 98 F.2d 55, 57 (2d Cir. 1938) ("This court is without power to amend or overrule merely because of disagreement with matters of law or facts determined by the arbitrators."); *The Hartbridge*, 62 F.2d 72, 73 (2d Cir. 1932).

22. The first three grounds focus on the fairness and impartiality of the arbitral process. *See* 9 U.S.C. § 10(a)(1)–(3) (2018); *see also* *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968) ("[Section 10(a)(1)–(3)] show[s] a desire of Congress to provide not merely for any arbitration but for an impartial one."). The fourth ground allows for vacatur when the arbitrators have "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

23. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2018).

24. *See Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) ("[T]he 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."); *see also infra* Part I.A.

A. *Wilko v. Swan*

Wilko involved an action brought by an investor claiming that his broker had violated the Securities Act by fraudulently misleading him into buying stock.²⁵ The broker moved to stay the proceedings pursuant to a clause in the customer agreement that mandated the parties to settle all disputes through arbitration.²⁶ The U.S. District Court for the Southern District of New York denied the motion explaining that “the intent of Congress was to require that the provisions of the Securities Act should be strictly complied with” to fully protect purchasers of securities.²⁷ Enforcing the arbitration clause would run contrary to this intent, the court explained, as most purchasers of securities do not read the small-font provisions before signing the agreements and are therefore unaware that they have waived their Securities Act remedies.²⁸

A divided Second Circuit reversed and remanded the case. Writing for the majority, Chief Judge Swan explained that “[t]here is good reason why [an investor] may prefer to seek enforcement of his statutory right to damages through the speedy remedy of arbitration rather than by the long-delayed remedy of trial in the courts.”²⁹ Moreover, Judge Swan explained, “[i]f Congress had intended to forbid arbitration in a suit based on [the Securities Act], we believe it would have expressed such intent.”³⁰

The Supreme Court granted certiorari on the issue of whether an agreement to arbitrate future controversies conflicted with the Securities Act’s provision that allows claimants to bring actions in state or federal court.³¹ The Court explained that the policies behind the FAA and the Securities Act³² were not “easily reconcilable.”³³ While Congress, through the FAA, afforded parties the ability to agree to use mechanisms that provide prompt solutions to

25. See *Wilko v. Swan*, 107 F. Supp. 75, 76 (S.D.N.Y. 1952).

26. *Id.* at 76–77.

27. *Id.* at 77.

28. *Id.*

29. *Wilko v. Swan*, 201 F.2d 439, 444 (2d Cir. 1953).

30. *Id.* at 445.

31. *Wilko v. Swan*, 346 U.S. 427, 430 (1953).

32. Congress passed the Securities Act intending to ensure that buyers of securities would receive accurate and complete information prior to making investments. *Id.* at 430–31. Moreover, the Securities Act created a special right for investors to recover for misrepresentations in both state and federal court. *Id.* at 431. By contrast, Congress created the FAA to codify the desirability of avoiding the delay and expense of litigation. *Id.* at 431–32. Although the FAA is “use[ful] both in controversies based on statutes or on standards otherwise created,” it does not have the same protections as a judicial proceeding. *Id.*

33. *Id.* at 438.

their disputes, Congress also specifically enacted the Securities Act to protect investor rights and forbade the waiver of any such right, including the ability to bring an action in court.³⁴ The Court thus ruled that “the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act.”³⁵ The Court detailed several shortcomings of the arbitration process, such as an arbitrator’s ability to make an arbitral award without explanation and a court’s inability to examine the arbitrator’s understanding of the Securities Act’s statutory requirements—such as “‘burden of proof,’ ‘reasonable care,’ or ‘material fact.’”³⁶ Although the Court seemingly agreed with the Second Circuit’s belief that the arbitrator’s failure to issue a decision in accordance with the Securities Act would warrant vacating the award, the Court explained that such failure would need to be clear, which would be unlikely since arbitrators are not required to issue written explanations for their decisions.³⁷ This reasoning led the Court to issue its puzzling statement: “[T]he 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.”³⁸

But where did this “manifest disregard” standard come from? Section 10 of the FAA enumerates four specific grounds on which courts may vacate arbitral awards: corruption, fraud, impartiality, and misconduct or incompetence.³⁹ For the most part, these grounds involve instances of bias or procedural unfairness. In fact, the only provision that appears to address errors of substantive law deals with arbitrators who exceed their powers,⁴⁰ and that provision “has been narrowly construed to apply only when arbitrators decide issues not presented to them or grant relief not authorized in the

34. *Id.*

35. *Id.* The Supreme Court later limited its holding in *Wilko* by holding claims under the Securities Exchange Act of 1934, which governs the secondary market, arbitrable. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987). The Court overruled *Wilko* altogether in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, ruling that claims under the Securities Act of 1933, which regulates trading in the primary market, must be arbitrated as per the customer agreement. 490 U.S. 477, 480–84 (1989).

36. *Wilko*, 346 U.S. at 436.

37. *Id.*

38. *Id.* at 436–37 (emphasis added). Justice Frankfurter was even more straightforward in his *Wilko* dissent where he stated that “[a]rbitrators may not disregard the law.” *Id.* at 440 (Frankfurter, J., dissenting).

39. 9 U.S.C. § 10(a)(1)–(4) (2018).

40. LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* § 39:2 (3d ed. 2003).

arbitration agreement.”⁴¹ The FAA nowhere mentions an arbitrator’s “manifest disregard” of the law as grounds for vacatur. Thus, with its statement in *Wilko*, the Court appeared to return to a decision it had issued nearly one century prior.

In 1874, the Court stated in *United States v. Farragut*⁴² that courts could set aside arbitral decisions for a number of reasons, including “for manifest mistake of law.”⁴³ But that case was decided at a time when courts commonly refused to find arbitration agreements binding and instead held that either party could revoke a pre-dispute arbitration agreement at any time.⁴⁴ It was not until the FAA’s adoption that Congress placed arbitration agreements on equal footing with other contracts⁴⁵ and thus established a federal policy favoring arbitration.⁴⁶ Moreover, while the Supreme Court in *Farragut* listed a number of reasons for overturning an arbitral award,⁴⁷ Congress codified only two of those reasons in the FAA: exceeding an arbitrator’s powers and fraud.⁴⁸ Congress’s explicit refusal to include manifest mistake of the law in the FAA raises the question of why the Court chose to mention the standard, albeit in dicta, in *Wilko*.

It is therefore understandable that circuit courts were initially confused as to whether manifest disregard of the law indeed represented a new judicially constructed standard by which courts could

41. *Id.*

42. *United States v. Farragut*, 89 U.S. 406, 420 (1874).

43. *Id.* *Farragut* involved a dispute between the United States Treasury Department and Union Admiral David Farragut and others concerning the value of Confederate property that was seized in 1862 during the Battle of New Orleans and considered a lawful prize of war. *Id.* at 408–12.

44. *See Insurance Co. v. Morse*, 87 U.S. 445, 450 (1874) (“There is no sound principle upon which such [arbitration] agreements can be specifically enforced.”); *Mitchell v. Dougherty*, 90 F. 639, 642 (3d Cir. 1898) (stating courts will not enforce contracts that “oust the jurisdiction of the courts, and substitute for them an extra-legal tribunal of their own creation, with power to finally and conclusively decide” a dispute.); *Jones v. Enoree Power Co.*, 75 S.E. 452, 454 (S.C. 1912) (“An agreement to submit to arbitration all questions of law and fact that may arise under a contract is contrary to the public policy and void, as an attempt to oust the courts of their jurisdiction and establish in their place a contract tribunal.”); *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904) (“The mere executory agreement to submit [to arbitration] is generally revocable, otherwise nothing would be easier than for the more astute party to oust the courts of jurisdiction.”).

45. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

46. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

47. These reasons include: “exceeding the power conferred by the submission, [] manifest mistake of law, [] fraud, and [] all other reasons on which awards are set aside in other courts of law or chancery.” *Farragut*, 89 U.S. at 420.

48. Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 149 (2011).

overturn arbitration awards. As the Ninth Circuit lamented in *San Martine Compania de Navigazione S.A. v. Saguenay Terminals Ltd.*:⁴⁹

[T]he Supreme Court's use of the words 'manifest disregard', has caused us trouble here. Conceivably the words may have been used to indicate that whether an award may be set aside for errors of law would be a question of degree. Thus, if the award was based upon a mistaken view of the law, but in their assumption of what the law was, the arbitrators had not gone too far afield, then, the award would stand; but if the error is an egregious one, such as no sensible layman would be guilty of, then the award could be set aside. Such a "degree of error" test would, we think, be most difficult to apply. Results would likely vary from judge to judge. We believe this is not what the court had in mind when it spoke of 'manifest disregard'.⁵⁰

Similarly, the Second Circuit addressed the manifest disregard standard in *Saxis Steamship Co. v. Multifacs International Traders, Inc.*⁵¹ In *Saxis*, the District Court for the Eastern District of New York had affirmed an arbitration award stemming from a maritime dispute between an owner of a ship and the company that chartered it.⁵² The Second Circuit explained that a court could vacate the award only if a party proved that one of the specific section 10 grounds existed.⁵³ Moreover, the court stated, "We have made it quite clear on earlier occasions that it is the function neither of this court nor the district courts to review the record of the arbitration proceedings for errors of law or fact."⁵⁴

It only took one year for the Second Circuit to change its mind.

B. *Manifest Disregard's Slow Adoption*

1. *The 1960s*

Reversing course from its decision in *Saxis*, the Second Circuit in *Trafalgar Shipping Co. v. International Milling Co.*⁵⁵ became the first court to acknowledge the manifest disregard standard as a valid criterion for reviewing arbitral awards. *Trafalgar Shipping in-*

49. *San Martine Compania de Navigazione S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961).

50. *Id.* at 801 n.4.

51. *Saxis Steamship Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 579–81 (2d Cir. 1967).

52. *Id.*

53. *Id.* at 581.

54. *Id.* at 581–82.

55. *Trafalgar Shipping Co. v. Int'l Milling Co.*, 401 F.2d 568 (2d Cir. 1968).

volved a dispute between the owner of a cargo ship and the defendant who, after chartering the vessel, caused it to run aground while entering a Venezuelan harbor.⁵⁶ When settlement negotiations over damages broke down, the plaintiff moved to compel arbitration pursuant to the charter.⁵⁷ The defendant refused, arguing that the doctrine of laches barred the plaintiff's right to arbitrate due to the plaintiff's long delay in asserting its claim.⁵⁸ The district court ruled that whether the defense of laches bars arbitration is an issue for the courts, but the Second Circuit reversed explaining that in issues of admiralty, the severity of a delay to bring a claim would be best determined by an arbitrator, not a judge.⁵⁹ Perhaps in an effort to allay the defendant's concerns, the Second Circuit cited both section 10 of the FAA and *Wilko*, adding that "an arbitration award is subject to review in the courts for misbehavior of the arbitrators, or manifest disregard of the law."⁶⁰

In the years following *Trafalgar*, the Second Circuit continued to acknowledge the manifest disregard standard but each time stopped short of applying the standard to overturn an arbitral award.⁶¹ However, the court proved that its continued references to the standard were not purely academic when it found that an arbitrator manifestly disregarded the law in *Halligan v. Piper Jaffray, Inc.*⁶² In reaching its conclusion, the court explained that "[i]n view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both."⁶³

A year after the Second Circuit first acknowledged the manifest disregard standard in *Trafalgar*, the Third Circuit was presented with a situation in which a district court vacated a labor arbitration award based on its belief that the arbitrator exceeded its authority.⁶⁴ The dispute in *Ludwig Honold Manufacturing Co. v.*

56. *Id.* at 569.

57. *Id.* at 570.

58. *Id.*

59. *Id.* at 572.

60. *Id.* at 572-73 (citations omitted).

61. *See, e.g.,* Drayer v. Krasner, 572 F.2d 348, 352 (2d Cir. 1978) ("[Manifest disregard of the law] requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law."); Sobel v. Hertz Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972) ("[I]f the arbitrators simply ignore the applicable law, the literal application of a 'manifest disregard' standard should presumably compel vacation of the award.").

62. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

63. *Id.* at 198.

64. *See Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969).

*Fletcher*⁶⁵ centered on a newly hired employee's promotion despite a collective bargaining agreement that expressly required the employer to base promotions on seniority.⁶⁶ Notwithstanding that provision, the arbitrator permitted the promotion.⁶⁷ The district court vacated the award, explaining that the award violated the express language of the collective bargaining agreement.⁶⁸ The Third Circuit reversed reasoning that "the interpretation of labor arbitrators must not be disturbed so long as they are not in 'manifest disregard' of the law, and that 'whether the arbitrators misconstrued the contract' does not open the award for judicial review."⁶⁹

Despite the quick succession of the Second and Third Circuits' decisions, *Trafalgar* and *Ludwig Honold* did not appear to be the bellwether of widespread adoption of the new standard, as the vast majority of circuit courts continued to rely solely on the FAA's statutory grounds for overturning arbitral awards. Nevertheless, after a decade of relative judicial uniformity, the 1980s saw four additional circuit courts adopt the manifest disregard standard.

2. The 1980s

The Sixth Circuit was the next circuit court to deem the manifest disregard standard valid in *Anaconda Co. v. District Lodge No. 27 of International Association of Machinists and Aerospace Workers*.⁷⁰ *Anaconda* involved an employer's action to overturn an arbitral award ordering the reinstatement of an employee who had been terminated without union representation during his discharge meeting.⁷¹ The district court refused to vacate the arbitral award, and the employer appealed.⁷² The Sixth Circuit affirmed explaining that the arbitrator's interpretation of federal law did not demonstrate "a 'manifest disregard of the law.'"⁷³

The Eighth Circuit followed suit, recognizing manifest disregard as a legitimate ground for vacating an arbitral award in *Stroh Container Co. v. Delphi Industries, Inc.*⁷⁴ In *Stroh Container*, the defendant, a brewer, sought to overturn an arbitral award that

65. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969).

66. *Id.* at 1129.

67. *Id.*

68. *Id.*

69. *Id.* at 1128 (citations omitted).

70. *Anaconda Co. v. Dist. Lodge No. 27 of Int'l Ass'n of Machinists*, 693 F.2d 35 (6th Cir. 1982).

71. *Id.* at 36.

72. *Id.*

73. *Id.* at 37–38.

74. *Stroh Container Co. v. Delphi Inds., Inc.*, 783 F.2d 743 (8th Cir. 1986).

found the brewer in breach of both a wholesaler franchise agreement and the duty of good faith and fair dealing.⁷⁵ The district court confirmed the award and the brewer appealed.⁷⁶ Addressing the standard of review, the Eighth Circuit explained that “an arbitrator’s conclusions on substantive matters may be vacated only when the award demonstrates a manifest disregard of the law where the arbitrators correctly state the law and then proceed to disregard it.”⁷⁷ Having found no indication that the arbitrators “expressly flouted the law in reaching their decision or otherwise acted irrationally,” the Eighth Circuit affirmed the district court’s order.⁷⁸

A month after *Stroh Container*, the Ninth Circuit applied the manifest disregard standard to reverse a district court’s decision to strike an arbitral award of consequential damages.⁷⁹ The arbitral panel in *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*⁸⁰ found Merrill Lynch liable to James French, a market maker on the options floor of the Pacific Stock Exchange (PSE), for negligent misrepresentation in connection with the sale of option contracts. Merrill Lynch argued that by awarding consequential damages, the arbitration panel exceeded its scope of authority as defined by the parties’ agreement.⁸¹ After finding that the agreement incorporated the PSE Rules, which in turn allowed for the consequential damages award, the court addressed the award itself and found that it “was neither ‘completely irrational’ nor a ‘manifest disregard of the law.’”⁸² The Ninth Circuit therefore reinstated the panel’s consequential damages award.⁸³

The decade closed with the Tenth Circuit addressing the manifest disregard standard in *Jenkins v. Prudential-Bache Securities, Inc.*⁸⁴ *Jenkins* involved a suit brought by two former stock brokers seeking to overturn an arbitration panel’s decision that allowed their former employer to recover funds that had been loaned to the plaintiffs prior to their voluntary termination.⁸⁵ The district court upheld the award and the plaintiffs appealed, arguing that the arbi-

75. *Id.* at 745–46.

76. *Id.* at 747–48.

77. *Id.* at 749.

78. *Id.*

79. *See French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902 (9th Cir. 1986).

80. *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902 (9th Cir. 1986).

81. *Id.* at 908.

82. *Id.* at 909.

83. *Id.*

84. *Jenkins v. Prudential-Bache Secs., Inc.*, 847 F.2d 631 (10th Cir. 1988).

85. *Id.* at 632–33.

tration record contained no evidence that could rationally support the award and that the panel's decision should therefore be overturned under a "fundamental irrationality" standard implied in section 10 of the FAA.⁸⁶ After discussing the FAA's enumerated grounds for vacatur, the Tenth Circuit somewhat shockingly stated:

[F]ederal courts have *never* limited their scope of review to a strict reading of this statute. Viewed either as an inherent appurtenance to the right of judicial review or as a broad interpretation of subsection (d) prohibiting arbitrators from exceeding their powers, the arbitration award has traditionally been subjected to a sort of "abuse of discretion" standard.⁸⁷

The court then discussed the manifest disregard analysis, explaining that while courts have applied the standard to situations of willful inattentiveness to the governing law, "several other terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice."⁸⁸ Applying this standard, the court found that the language in the employment agreement was open to more than just the plaintiffs' interpretation and that the panel did not ignore the plain language of the contract in reaching its decision.⁸⁹

3. *The 1990s*

a. *Pre-First Options*

Perhaps encouraged by Justice Blackmun's dissenting remark that "[j]udicial review is still substantially limited to the four grounds listed in § 10 of the Arbitration Act and to the concept of 'manifest disregard' of the law,"⁹⁰ the remaining circuit courts adopted the manifest disregard standard by the end of the 20th century.

86. *Id.* at 633.

87. *Id.* at 633–34 (emphasis added).

88. *Id.* at 634.

89. *Id.* at 635.

90. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 259 (1987) (Blackmun, J., dissenting in part). In fact, Justice Blackmun's statement was relied on as "Supreme Court authority for the proposition that in federal court an award may be vacated if it is made in manifest disregard of the law." *Countrywide Fin. Corp. v. Bundy*, 187 Cal. App. 4th 234, 250 (Ct. App. 2010) (quoting *Shearson/Am. Express Inc.*, 482 U.S. at 259); see also *Jenkins*, 847 F.2d at 631 (quoting Justice Blackmun's statement in *Shearson/American Express, Inc.* and explaining that the manifest disregard standard remained valid).

The First Circuit embraced the standard in *Advest, Inc. v. McCarthy*.⁹¹ The appellant in *McCarthy*, a brokerage house, filed a motion to vacate an arbitral award that ordered the restoration of shares of an investor's stock that had been wrongfully liquidated.⁹² In affirming the district court's denial of the motion, the First Circuit explained that although the FAA does not permit courts "to roam unbridled in their oversight of arbitral awards," courts still "retain a very limited power to review arbitration awards outside section 10."⁹³ The court then turned to the appellant's argument that the panel incorrectly calculated the measure of damages and explained that "in order to prevail, [the appellant] . . . must prove that the arbitrator's choice of redress was in manifest disregard of the law."⁹⁴ Having found that the "narrowly tailored compensatory remedy was well within the arbitrators' discretion," the court affirmed the district court's denial of the appellant's motion.⁹⁵

Both the Fourth and D.C. Circuits subsequently adopted the manifest disregard standard in cases involving labor arbitral awards. In *Upshur Coals Corp. v. United Mine Workers of America, District 31*,⁹⁶ the Fourth Circuit reviewed a district court's decision to vacate an award requiring the plaintiff, a coal company, to continue providing health benefits to laid-off employees after the expiration of their collective bargaining agreement.⁹⁷ The district court held that the arbitrators exceeded the scope of their authority by issuing an award that contradicted an earlier Fourth Circuit decision.⁹⁸ The Fourth Circuit began by discussing the "special degree of deference" given to an arbitral award, explaining that the "legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law."⁹⁹ Such instances occur, the court explained, when "arbitrators understand and correctly state the law, but proceed to disregard the same."¹⁰⁰ The court then set forth three plausible readings of the collective bargaining agreement under which the arbitrators could have issued their award without

91. *Advest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir. 1990).

92. *Id.* at 7-8.

93. *Id.* at 8.

94. *Id.* at 10.

95. *Id.* at 11.

96. *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225 (4th Cir. 1991).

97. *Id.* at 227.

98. *Id.* at 228-29.

99. *Id.* at 229.

100. *Id.* (quoting *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961)).

running afoul of the court's earlier decision.¹⁰¹ Accordingly, the Fourth Circuit reversed the district court's decision, finding the arbitrators justified in reaching their conclusion.¹⁰²

Soon thereafter, the D.C. Circuit applied the manifest disregard standard in affirming a district court's confirmation of an arbitral award arising from a breach of contract claim.¹⁰³ The plaintiff in *Kanuth v. Prescott, Ball & Turben, Inc.*¹⁰⁴ sold his business to the defendant for a price that would be determined based on the company's earnings over five years.¹⁰⁵ A dispute over the company's profitability soon arose, causing the seller to file an action alleging fraud and breach of the implied covenant of good faith and fair dealing.¹⁰⁶ The purchaser successfully moved to compel arbitration pursuant to their agreement, and a panel of three arbitrators awarded the plaintiff more than \$38 million in damages.¹⁰⁷ The district court denied the defendant's motion to vacate or modify the award, and the defendant appealed arguing, in part, that the panel disregarded the applicable law.¹⁰⁸ In affirming the district court's judgment, the D.C. Circuit explained that the manifest disregard standard "means much more than failure to apply the correct law."¹⁰⁹ The court further stated that the standard "may be found, for example, if the panel understood and correctly stated the law but then proceeded to ignore it."¹¹⁰ Here, the court explained, the panel never mentioned the Ohio law on calculating lost profit projections, "and it certainly did not proceed either explicitly or implicitly to ignore that law."¹¹¹ The court thus found that "the panel did not manifestly disregard the law," and it was therefore unnecessary to disturb the panel's award.¹¹²

The Seventh Circuit applied the manifest disregard standard in *Health Services Management Corp. v. Hughes*,¹¹³ a case concerning a payment dispute for work performed pursuant to an architectural contract. An arbitration panel awarded the architect \$11,427, and

101. *Id.* at 229–30.

102. *Id.* at 230.

103. *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991).

104. *Id.* at 1176–78.

105. *Id.*

106. *Id.* at 1177.

107. *Id.*

108. *Id.* at 1177–78.

109. *Id.* at 1182.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253 (7th Cir. 1992).

the district court confirmed the award.¹¹⁴ On appeal, the property owner argued that the arbitrators had acted in manifest disregard of the law by awarding the architect damages based on *quantum meruit* even though the claim itself arose from a contract dispute.¹¹⁵ The Seventh Circuit explained that in order to vacate an arbitration award for manifest disregard of the law, the arbitrators must have “deliberately disregarded what they knew to be the law in order to reach the result they did.”¹¹⁶ Finding no evidence in the record met this standard, the court affirmed the district court’s confirmation of the award.¹¹⁷

b. *First Options of Chicago, Inc. v. Kaplan*

With 12 circuit courts having adopted the manifest disregard standard, it was only fitting that the Supreme Court soon found itself again addressing this issue in *First Options of Chicago, Inc. v. Kaplan*.¹¹⁸

First Options involved a dispute between First Options of Chicago—a firm that cleared trades on the Philadelphia Stock Exchange—and Manuel Kaplan, his wife, and their wholly owned investment company, MKI, whose trading account First Options cleared.¹¹⁹ After MKI lost over \$1.5 million, First Options took control of the company and demanded that the Kaplans repay any remaining deficiency.¹²⁰ When those demands went unanswered, First Options brought an arbitration action against both MKI and the Kaplans before a panel of the Philadelphia Stock Exchange.¹²¹ The Kaplans argued that arbitration was improper because only MKI and First Options had signed the document containing the arbitration clause; the Kaplans did not.¹²² The arbitrators disagreed, and the district court confirmed the award.¹²³ The Kaplans appealed to the Third Circuit which reversed the confirmation, agreeing with the Kaplans that the matter was not arbitrable.¹²⁴ The Supreme Court subsequently granted certiorari on the issue of

114. *Id.* at 1256.

115. *Id.* at 1257.

116. *Id.* at 1267.

117. *Id.*

118. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

119. *Id.* at 940.

120. *Id.*

121. *Id.*

122. *Id.* at 941.

123. *Id.*

124. *Id.*

“who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate.”¹²⁵

The Court began its short decision by explaining the practical importance of the issue: because judicial review of arbitral awards is so narrow, arbitration decisions would be nearly invulnerable if arbitrators had the ability to determine their own authority.¹²⁶ In support of this reasoning, the Court detailed the limited scope of arbitral review, citing first to the four grounds for vacatur listed in section 10 of the FAA and then to *Wilko*, stating that “parties [are] bound by [an] arbitrator’s decision not in ‘manifest disregard’ of the law.”¹²⁷ In so doing, the Court once again signaled its approval of manifest disregard as an accepted standard for judicial review.

The impact of *First Options* would be felt almost immediately. Having now seen that the reference to manifest disregard in *Wilko* was not mere dicta,¹²⁸ the two remaining hold-outs, the Eleventh and Fifth Circuits, both went on to apply this non-statutory standard to review the propriety of arbitral awards.

c. Post-*First Options*

The Eleventh Circuit adopted the manifest disregard standard when it reversed a district court’s affirmation of an arbitration award in *Montes v. Shearson Lehman Bros., Inc.*¹²⁹ *Montes* involved an arbitration claim brought by an employee seeking overtime pay pursuant to the Fair Labor Standards Act (FLSA)¹³⁰ from her former employer.¹³¹ The employee alleged that the arbitration board, at the urging of the employer, had issued her employer a favorable award in contravention of FLSA.¹³² The Eleventh Circuit began its opinion by explaining that in the past it had “not found it necessary to expressly adopt [the manifest disregard standard], as it was unnecessary for the resolution of the cases in which it was discussed.”¹³³ However, the court explained, the Supreme Court’s ruling in *First Options* made it clear that such a standard did in fact exist and “constitute[d] grounds to vacate an arbitration decision”

125. *Id.* at 942.

126. *Id.*

127. *Id.*

128. See IAN R. MACNEIL ET AL., 4 FEDERAL ARBITRATION LAW § 40.7.1, at 40:43 (Supp. 1999) (“[*First Options* gives] the Supreme Court’s seal of approval to [the] manifest disregard doctrine . . .”).

129. *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997).

130. 29 U.S.C. § 203 (2018).

131. *Montes*, 128 F.3d at 1458.

132. *Id.*

133. *Id.* at 1460.

where the panel “was flagrantly and blatantly urged” to ignore the law.¹³⁴ The court therefore reversed the district court’s decision and remanded the case with instructions to refer the matter to a new arbitration panel.¹³⁵

In issuing its decision, the Eleventh Circuit pointed out that “every other circuit except the Fifth . . . has expressly recognized that ‘manifest disregard of the law’ is an appropriate reason to review and vacate an arbitration panel’s decision.”¹³⁶ This statement remained true for another two years, at which point the Fifth Circuit finally ended its holdout in *Williams v. Cigna Financial Advisors Inc.*¹³⁷

Williams concerned an arbitration award that denied the plaintiff’s age discrimination and retaliation claims against his former employer.¹³⁸ The district court confirmed the award, and the plaintiff appealed claiming the panel acted contrary to the applicable law under the Age Discrimination in Employment Act of 1967.¹³⁹

The Fifth Circuit began its opinion by explaining that it had twice declined to recognize the manifest disregard standard.¹⁴⁰ Moreover, the court acknowledged that it had previously stated in dicta that judicial review of commercial arbitration awards is limited to instances specifically outlined in section 10 of the FAA.¹⁴¹ However, “clear approval of the ‘manifest disregard’ of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court’s statement in *First Options* that ‘parties [are] bound by [an] arbitrator’s decision not in ‘manifest disregard’ of the law.’”¹⁴² Turning to the case before it, the court found that “it is not manifest” from the arbitration’s transcripts “that the arbitrators acted contrary to the applicable law in re-

134. *Id.* at 1460–62. The court explained:

We apply it here because we are able to clearly discern from the record that this is one of those cases where manifest disregard of the law is applicable, as the arbitrators recognized that they were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal. Thus, there is nothing in the record to refute the suggestion that the law was disregarded. Nor does the record clearly support the award.

Id. at 1462.

135. *Id.* at 1464.

136. *Id.* at 1460.

137. *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752 (5th Cir. 1999).

138. *Id.* at 757.

139. *Id.*

140. *Id.* at 758.

141. *Id.*

142. *Id.* at 759 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

jecting [the plaintiff's] claims."¹⁴³ Therefore, the court affirmed the district court's affirmation of the arbitrators' award.¹⁴⁴

II. *HALL STREET* AND THE ENSUING CIRCUIT SPLIT

Although every circuit court had adopted the manifest disregard standard by the end of the 20th century, many commentators still questioned the practicality of this common law method of arbitral review. As one author lamented, "manifest disregard has become a repository for all sorts of outlandish theories of arbitral misconduct, devised with but one aim in mind: the application of standards of appellate review to the arbitration process, and ultimately, to *vacatur* of a particular arbitral award."¹⁴⁵ In fact, as was soon demonstrated by Judge Frank Easterbrook, academics were not alone in these reservations.

A. *Watts: A Forerunner to Circuit Discord*

Only two years after the *Williams* decision cemented consensus on the manifest disregard standard's viability, the Seventh Circuit's decision in *George Watts & Son, Inc. v. Tiffany & Co.*¹⁴⁶ challenged the new-found harmony.

Watts involved a dispute between Tiffany & Co., a luxury jewelry and specialty retailer, and a store that sold its merchandise.¹⁴⁷ Although the parties did not have a pre-dispute arbitration agreement, they nevertheless agreed to have an arbitrator hear the dispute as opposed to litigating the matter.¹⁴⁸ After the hearing, the arbitrator issued an award in favor of the store owner but did not agree that Tiffany & Co. should pay the owner's attorney's fees and costs.¹⁴⁹ Believing that this decision violated Wisconsin law,¹⁵⁰ Watts asked the district court to provide more relief than the arbitrator had awarded.¹⁵¹ After the district court upheld the award, Watts appealed arguing that the arbitrator's decision departed from state law.¹⁵²

143. *Id.* at 762.

144. *Id.* at 765.

145. Marta Varela, *Arbitration and the Doctrine of Manifest Disregard*, 49 DISP. RESOL. J. 64, 65 (1994).

146. *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001).

147. *Id.* at 578.

148. *Id.*

149. *Id.*

150. The Wisconsin Fair Dealership Law awards successful plaintiffs damages and costs of the action, including attorney fees. See WIS. STAT. § 135.06 (2018).

151. *George Watts & Son, Inc.*, 248 F.3d at 578.

152. *Id.*

Interestingly, rather than simply applying the manifest disregard standard to the facts of the case, the Seventh Circuit instead questioned the exact meaning of the standard. As Judge Easterbrook explained:

What could it mean to say that an arbitrator manifestly disregarded the law? That the arbitrator made a legal error? This is Watts' view—that Wisconsin law entitles the prevailing party to attorneys' fees in every case under the [Wisconsin Fair Dealership Law], that it “prevailed” in the arbitration by obtaining an extension of its dealership plus exceptionally favorable terms for the repurchase of inventory, and that the law therefore required the arbitrator to award legal fees too. If “manifest disregard” means only a legal error, however, then arbitration cannot be final. Every arbitration could be followed by a suit, seeking review of legal errors, serving the same function as an appeal within a unitary judicial system. That would prevent the parties from achieving the principal objectives of arbitration: swift, inexpensive, and conclusive resolution of disputes. If “manifest disregard” means not just any legal error but rather a “clear” error (one about which there is, in Watts' language, “no reasonable debate”), again arbitration could not be final, and the post-arbitration litigation would be even more complex than a search for simple error—for how blatant a legal mistake must be to count as “clear” or “manifest” error lacks any straightforward answer.¹⁵³

The court turned its attention to a Supreme Court decision from the previous year in which the Court had explained that “the judiciary may step in when the arbitrator has commanded the parties to violate legal norms.”¹⁵⁴ The Seventh Circuit believed that the Court's guidance helped clarify the standard's application to situations in which an arbitrator issued an order that requires parties to violate the law or does “not adhere to the legal principles specified by contract, and [is] hence unenforceable under § 10(a)(4) [of the FAA].”¹⁵⁵ With this understanding, the court explained that if the parties wanted to prevent the arbitrator from issuing an award that required each party to bear its own legal expenses, they could have set forth that limitation in their arbitration agreement.¹⁵⁶ Had the parties agreed to such a limitation, the arbitrator's decision would have been reviewable under section 10(a)(4) of the FAA.¹⁵⁷

153. *Id.* at 579.

154. *Id.* at 580 (citing *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 63 (2000)).

155. *Id.* at 581.

156. *Id.*

157. *Id.*

But the agreement at issue did not contain such a provision. Thus, the court concluded, “the arbitrator has considerable leeway so long as he respects the limits the parties’ contract and public law place on his discretion.”¹⁵⁸ The Seventh Circuit therefore upheld the district court’s confirmation of the award and simultaneously adopted an extremely narrow interpretation of the manifest disregard standard.¹⁵⁹

Notwithstanding the Seventh Circuit’s narrow view,¹⁶⁰ the remaining circuit courts continued to allow parties to assert claims of manifest disregard of the law,¹⁶¹ thereby generating a near decade of judicial uniformity. Therefore, it came as somewhat of a surprise when the Supreme Court revisited the manifest disregard standard in 2008 in *Hall Street*¹⁶²—a dispute that Justice Stephen Breyer would refer to as the “case of the century.”¹⁶³

B. Hall Street

Hall Street involved a dispute over an indemnification provision in an agreement between a landlord—Hall Street Associates, L.L.C.—and its tenant—Mattel, Inc.¹⁶⁴ Rather than litigating the dispute, the parties drafted a post-dispute arbitration agreement that contained a provision that allowed a district court to vacate the award “(i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of

158. *Id.*

159. *Id.*

160. The Seventh Circuit would later explain that it had “defined ‘manifest disregard of the law’ so narrowly that it fits comfortably under the first clause of the fourth statutory ground.” *Wise v. Wachovia Sec., L.L.C.*, 450 F.3d 265, 268 (7th Cir. 2006).

161. *See, e.g.*, *Three S. Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) (“The permissible common law grounds for vacating such an award include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law.”) (internal citation omitted); *B.L. Harbert Int’l, L.L.C. v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006) (“This Court first adopted manifest disregard for the law as a basis for challenging an arbitration award”); *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (“In addition, we have acknowledged a judicially-created basis for vacating an award when the arbitrators acted in ‘manifest disregard’ of the law.”); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381 (5th Cir. 2004) (“We agree with the district court that manifest disregard is an accepted nonstatutory ground for vacatur and that the arbitrators in this case did not manifestly disregard the law.”).

162. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

163. Transcript of Oral Argument at 12, *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (No. 06-989).

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

law are erroneous.”¹⁶⁵ After the hearing, the arbitrator issued an award in favor of Hall Street and both parties sought modification.¹⁶⁶ The district court applied the standard of review for legal error stipulated in the parties’ arbitration agreement and modified the arbitrator’s calculation of interest.¹⁶⁷ The Ninth Circuit reversed, explaining that because the FAA did not prescribe the standard of review that the district court applied, “the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable.”¹⁶⁸ The Supreme Court was subsequently presented with the question of whether parties to an arbitration agreement may expand the grounds for vacatur and modification beyond those set forth in sections 10 and 11 of the FAA.¹⁶⁹

Hall Street argued that just as the Court in *Wilko* had created an extra-statutory ground for vacatur through the manifest disregard standard, so too should parties be permitted to contractually expand the grounds to vacate or modify an award.¹⁷⁰ The Court, turning to the language of section 9 of the FAA,¹⁷¹ explained that “[t]here is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.”¹⁷² The Court thus rejected Hall Street’s argument, and announced that “the statutory grounds are exclusive.”¹⁷³ As to *Wilko*’s use of the phrase “manifest disregard,” the Court set forth several possible justifications for the standard:

165. *Id.*

166. *Id.* at 580. Although the arbitration was first decided in favor of Mattel, the district court vacated the award after finding that the arbitrator’s failure to treat the Oregon Drinking Water Quality Act as an applicable law under the terms of the lease was “legal error,” a standard of review that the parties had included in the arbitration agreement. *Id.* at 580.

167. *Id.*

168. *Id.* at 581.

169. *Id.* at 578 (“The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract.”).

170. *Id.* at 584–85 (“[I]f judges can add grounds to vacate (or modify), so can contracting parties.”).

171. 9 U.S.C. § 9 determines when an award is subject to judicial confirmation.

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

173. *Id.* at 578. However, in holding that parties may not contractually expand judicial review, the Court allowed the review of an arbitration award under state law alternatives to the FAA, stating, “we do not purport to say that they exclude more searching review based on authority outside the statute as well.” *Id.* at 590. Accordingly, enforcement of arbitration awards may be sought under state statutory or common law. *Id.*

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.” We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.¹⁷⁴

Commentators immediately noted that while *Hall Street* prohibited parties from contracting to expand judicial review,¹⁷⁵ it was unclear whether the Court eliminated review for manifest disregard by holding that the statutory grounds for vacatur were “exclusive.”¹⁷⁶ Not surprisingly, a circuit split has since developed over the issue, with some circuit courts still applying the standard, some holding that the standard is no longer valid, some explicitly refusing to address the issue, and one circuit issuing two contradictory holdings regarding the standard’s viability.

1. *Circuits that Still Apply Manifest Disregard*

Just eight months after the Supreme Court’s ruling in *Hall Street*, the Second Circuit applied the manifest disregard standard in deciding whether a district court correctly vacated an award due to an arbitral panel’s decision to permit class arbitration when the

174. *Id.* at 585.

175. This restriction led one scholar to lament that “one may still be troubled by the rigidity of an arbitration regime that says to sophisticated commercial parties that if they want arbitration they may have it, but only according to one particular formula.” John J. Barceló, *Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective*, in *RESOLVING INTERNATIONAL CONFLICTS* 1, 6 (Peter Hay et al. eds., 2009).

176. See, e.g., *The Viability of Manifest Disregard Challenges After Hall Street*, INT’L DISP. RESOL. (Skadden, Arps, Slate, Meagher & Flom LLP, New York, N.Y.), Oct. 2008, at 1, <http://bit.ly/2pbNf8E> (“Since the U.S. Supreme Court issued its decision in [*Hall Street*] six months ago, the ability of parties to challenge awards governed by the [FAA] on the ground that the arbitrators manifestly disregarded the law has been in question.”); Ileana Blanco & Andrew F. Spalding, “*The Case of the Century*”: U.S. Supreme Court Decides (Almost) the Extent of Judicial Review of Arbitration Awards, MONDAQ (Mar. 27, 2008), <http://bit.ly/2QwnXOR> (“While making clear that judicial review under the FAA was limited under the statute, the Court’s following conclusion indicate that this issue is far from settled”); Sarah Cole, *Hall Street Decision Today: Parties Cannot Expand Judicial Review of Arbitration Awards*, INDISPUTABLY (Mar. 25, 2008), <http://www.indisputably.org/?p=92> (“[T]he Court’s treatment of the manifest disregard standard was unconvincing. . . . What is [its] fate following *Hall Street*?”).

agreement had not explicitly prohibited it.¹⁷⁷ The plaintiff in *Stolt-Nielsen SA v. AnimalFeeds International, Corp.*¹⁷⁸ shipped goods using the defendant's tankers pursuant to a standard form contract that contained a broad arbitration clause.¹⁷⁹ After learning that the Justice Department had alleged that the defendants engaged in illegal price-fixing, the plaintiff sought to bring an action against Stolt-Nielsen on behalf of class customers and competitors.¹⁸⁰ Stolt-Nielsen countered that the arbitration clause's silence on class arbitration required all arbitral disputes to be brought individually.¹⁸¹ The arbitration panel disagreed concluding that the agreement did indeed permit class arbitration.¹⁸² Stolt-Nielsen petitioned the district court to vacate the award and the court acquiesced, holding that the arbitrators acted in manifest disregard of the law by "fail[ing] to make any meaningful choice-of-law analysis" regarding the applicability of federal maritime law.¹⁸³ The plaintiff appealed, presenting the Second Circuit with the question of what effect, if any, *Hall Street* had on "the scope or vitality of the 'manifest disregard' doctrine."¹⁸⁴

The Second Circuit began its opinion by explaining:

In the short time since *Hall Street* was decided, courts have begun to grapple with its implications for the "manifest disregard" doctrine. Some have concluded or suggested that the doctrine simply does not survive. Others think that "manifest disregard," reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards. We agree with those courts that take the latter approach.¹⁸⁵

Having found that the standard survived the *Hall Street* decision, the court turned to whether the arbitrator manifestly disregarded the law by "ignoring" federal maritime law in permitting class arbitration.¹⁸⁶ The court noted that Stolt-Nielsen failed to cite

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

178. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008).

179. *Id.* at 87-89.

180. *Id.* at 87; *see also* Reply Brief for Respondent-Appellant at 1 n.1, *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008) (No. 06-3474-cv).

181. *Stolt-Nielsen*, 548 F.3d at 89.

182. *Id.*

183. *Id.* at 90.

184. *Id.* at 93.

185. *Id.* at 94 (citations omitted).

186. *Id.* at 96.

any decisions holding that a federal maritime rule of construction precluded class arbitration when the arbitration clause was silent on the matter.¹⁸⁷ The court thus concluded that the dispute before it was really one of contract interpretation.¹⁸⁸ The court then noted that it had previously “held that ‘the misapplication . . . of . . . rules of contract interpretation does not rise to the stature of a ‘manifest disregard’ of law.’”¹⁸⁹ Therefore, the arbitration panel’s decision to interpret the contract language as permitting class arbitration was not an error warranting vacatur.¹⁹⁰

The following year, the Ninth Circuit applied the manifest disregard standard when it held that a district court should have vacated an arbitrator’s grant of injunctive relief. *Comedy Club, Inc. v. Improv West Associates*¹⁹¹ involved a trademark license agreement that granted Comedy Club an exclusive license to use Improv West’s trademarks but prohibited Comedy Club from opening any non-Improv clubs during the agreement’s term.¹⁹² Comedy Club soon defaulted on the agreement, and Improv West notified Comedy Club that they would be withdrawing Comedy Club’s license and right to open more Improv clubs.¹⁹³ In response, Comedy Club sought declaratory relief that the clause prohibiting Comedy Club from opening any non-Improv clubs was void under California’s statutory prohibition on noncompetition agreements.¹⁹⁴ The dispute was ordered to arbitration, and the arbitrator found that the restrictive covenant was “a valid and enforceable in-term covenant not to compete” which remained valid through the remaining term of the agreement.¹⁹⁵

The district court affirmed the arbitrator’s decision and Comedy Club appealed to the Ninth Circuit, arguing that the arbitrator’s enforcement of the covenant, despite California’s statutory prohibitions, constituted a “manifest disregard of the law.”¹⁹⁶ In response, Improv West argued that manifest disregard of the law no longer constituted a valid ground for vacatur post-*Hall Street*.¹⁹⁷ The Ninth Circuit, however, explained that it had previously held that

187. *Id.* at 101.

188. *Id.* at 98.

189. *Id.*

190. *Id.* at 101–02.

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

192. *Id.* at 1281.

193. *Id.* at 1282.

194. *Id.*

195. *Id.* at 1282–83.

196. *Id.* at 1283.

197. *Id.* at 1289–90.

“the manifest disregard ground for vacatur is shorthand for a statutory ground under” section 10(a)(4) of the FAA, which allows a court to vacate an award “where the arbitrators exceeded their powers.”¹⁹⁸ The court therefore concluded that “manifest disregard of the law remains a valid ground for vacatur” post-*Hall Street*.¹⁹⁹

After determining that the manifest disregard standard was the correct standard of review, the Ninth Circuit turned to the arbitrator’s ruling.²⁰⁰ The court explained that by holding the clause enforceable, the arbitrator “ignore[d] . . . [California law] and thus [was] in manifest disregard of the law.”²⁰¹ The court therefore ordered the district court to vacate the arbitrator’s injunctive relief as to any county where Comedy Club was not operating an Improv club.²⁰²

The Fourth Circuit was the last circuit to accept the manifest disregard standard when it vacated an arbitral award in *Dewan v. Walia*.²⁰³ The appellant in *Dewan* filed an arbitration demand claiming that the appellee, his former employee, breached the non-compete and non-solicitation provisions in his employment agreement;²⁰⁴ the appellee countered with a number of employment claims of his own.²⁰⁵ The arbitrator issued an award in favor of the appellee despite having found that the parties signed a valid release clause that discharged the appellants from all employment claims.²⁰⁶ The district court confirmed the award, and the employer appealed to the Fourth Circuit arguing that the arbitrator acted in manifest disregard of the law.²⁰⁷

The Fourth Circuit explained that although “[m]erely misinterpreting contract language does not constitute a manifest disregard of the law[,] [a]n arbitrator may not . . . disregard or modify unambiguous contract provisions.”²⁰⁸ The court then turned to the arbitrator’s conclusion that while the release extinguished the appellee’s ability to bring his claims in state or federal court, it did not extinguish his ability to bring such claims in an arbitral forum.²⁰⁹ The court rejected this logic as supported by “neither lin-

198. *Id.* at 1290 (citation omitted).

199. *Id.*

200. *Id.* at 1293.

201. *Comedy Club, Inc.*, 553 F.3d at 1293.

202. *Id.*

203. *Dewan v. Walia*, 544 F. App’x 240 (4th Cir. 2013).

204. *Id.* at 241.

205. *Id.*

206. *Id.* at 242–43.

207. *Id.* at 244–45.

208. *Id.* at 246 (citations omitted).

209. *Id.* at 247.

guistic gymnastics, nor a selective reading of Maryland contract law” and remanded the case with instructions to vacate the award.²¹⁰

Even though these circuits agree that the manifest disregard standard survived *Hall Street*, they disagree as to the current meaning of that standard. Each circuit maintains its own interpretation.

Two circuits view the standard as “judicial gloss” on the grounds for vacatur enumerated in section 10 of the FAA. In *Stolt-Nielsen*, the Second Circuit opined that *Hall Street* stands for the proposition that the FAA sets forth the “exclusive” grounds for vacating an arbitration award.²¹¹ However, the court observed, that proposition did not render the standard invalid. Instead, the Second Circuit found that *Hall Street*’s remark—that “the term ‘manifest disregard’ . . . merely referred to the § 10 grounds collectively, rather than adding to them”²¹²—confirmed that the ruling “did not . . . abrogate the ‘manifest disregard’ doctrine altogether.”²¹³ The Second Circuit therefore deemed the standard “judicial gloss” on the four standards for vacatur enumerated in the FAA. The Ninth Circuit similarly found in *Comedy Club* that the manifest disregard standard serves as judicial “shorthand” for section 10(a)(4) of the FAA.²¹⁴

The Fourth Circuit in *Dewan* took a more expansive approach, finding that the standard “continues to exist as a basis for vacating an arbitration award, either as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in the FAA.”²¹⁵

2. Circuits that Reject Manifest Disregard

While the three circuits mentioned above continue to apply the manifest disregard standard, other appellate courts interpret *Hall Street* differently, holding instead that the standard did not survive the Supreme Court’s ruling. The first of these decisions was *Ci-*

210. *Id.* at 248.

211. *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 93 (2d Cir. 2008) (citation omitted).

212. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008).

213. *Stolt-Nielsen*, 548 F.3d at 94–95 (citation omitted).

214. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *see also id.* at 1281 (“[I]n this circuit, an arbitrator’s manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act.”).

215. *Dewan*, 544 F. App’x at 246 n.5 (quoting *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012)).

tigroup Global Markets, Inc. v. Bacon,²¹⁶ in which a district court vacated an arbitral award on the grounds that the arbitration panel acted in manifest disregard of the law when it failed to apply Texas law.²¹⁷ The Fifth Circuit discussed how it begrudgingly adopted the manifest disregard standard after the Supreme Court's ruling in *First Options*.²¹⁸ However, with the Court's recent ruling in *Hall Street*, the court found that the standard no longer remained viable.²¹⁹ As the court explained:

In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected. Indeed, the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards. *Hall Street* made it plain that the statutory language means what it says: "courts *must* [confirm the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title," and there's nothing malleable about "must." Thus, from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10.²²⁰

Applying this interpretation of *Hall Street*, the Fifth Circuit vacated the district court's decision and remanded the case for further consideration as to whether the grounds asserted for vacating the award might be supported under those enumerated in the FAA.²²¹

In 2010, the Eleventh Circuit became the next circuit court to question the availability of the manifest disregard standard post-*Hall Street* in *Frazier v. CitiFinancial Corp.*²²² *Frazier* involved a loan dispute in which the borrowers filed claims for breach of contract, fraud, and misrepresentation against the assignee, alleging, among other issues, that the bank misrepresented that the loan was unsecured.²²³ The defendant compelled arbitration pursuant to a clause in the loan agreement, and the arbitrator subsequently issued an award in favor of the bank's assignee.²²⁴ The district court confirmed the award, and the borrowers appealed, claiming in part that

216. *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

217. *Id.* at 350.

218. *Id.* at 355.

219. *Id.*

220. *Id.* at 358 (emphasis and brackets in original) (first quoting 9 U.S.C. § 9; and then quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008)).

221. *Id.*

222. *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010).

223. *Id.* at 1314–17.

224. *Id.* at 1318–19.

the arbitrator's decision was contrary to public policy and made in manifest disregard of the law.²²⁵

The Eleventh Circuit began its opinion by explaining that although it recognized the standard in previous decisions, the Supreme Court's ruling in *Hall Street* "casts serious doubt on their legitimacy."²²⁶ After briefly discussing the *Hall Street* holding, the court concluded that sections 10 and 11 of the FAA provide the exclusive grounds for modifying or vacating an arbitral award.²²⁷ Having found the manifest disregard standard no longer valid, the Eleventh Circuit affirmed the district court's confirmation of the award.²²⁸

Just three months after the *Frazier* decision, the Eighth Circuit became the third circuit court to hold that *Hall Street* foreclosed application of the manifest disregard standard to arbitral awards. *Medicine Shoppe International, Inc. v. Turner Investments, Inc.*²²⁹ involved a franchisor's arbitration claim alleging that the franchisee violated the franchise agreement.²³⁰ The arbitration panel entered an award in favor of the franchisor, and the district court confirmed.²³¹ The franchisee appealed arguing that the panel acted in manifest disregard of the law by failing to properly apply Missouri law when it calculated future profits.²³²

Like the Eleventh Circuit in *Frazier*, the Eighth Circuit began its opinion by discussing *Hall Street's* effect on the status of the manifest disregard standard.²³³ Remarkably, the Eighth Circuit ignored the near decade prior to *Hall Street* during which the circuit courts had been in agreement as to the viability of the standard. Instead the court explained: "In 2008 . . . *Hall Street*, resolving a circuit split, held that 'the text [of the FAA] compels a reading of the §§ 10 and 11 categories as exclusive.'"²³⁴ Ironically, the court appeared to identify a circuit split that never existed and uniformity in the midst of disagreement. Turning to the case before it, the court noted that the franchisee had not alleged corruption, fraud, partiality, or abuse of power—the four grounds recognized under

225. *Id.* at 1320–21.

226. *Id.* at 1322.

227. *Id.* at 1324.

228. *Id.*

229. *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485 (8th Cir. 2010).

230. *Id.* at 487.

231. *Id.* at 487–88.

232. *Id.* at 488.

233. *Id.* at 488–89.

234. *Id.* at 489 (emphasis added) (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008)).

the FAA.²³⁵ Given that the franchisee had limited its argument to the arbitrator's alleged manifest disregard of the law, a standard the Eighth Circuit no longer recognized, the court had no option but to affirm the district court's decision.²³⁶

Finally, the Seventh Circuit rejected the manifest disregard standard in *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*,²³⁷ which involved a lawsuit between former members of a joint venture over ownership rights to several peptide compound patents.²³⁸ The parties' agreement, which included an arbitration clause, stated that while the parties would jointly own any invention created through the parties' joint efforts, an invention attributable to a single party would be owned solely by that party.²³⁹ A dispute ultimately arose and the parties sought a declaration from an arbitration panel identifying the owner of certain patents and patent applications.²⁴⁰ The three-member panel issued an award stating that while some of the patents were jointly owned, one family of patents belonged solely to a single member of the joint venture.²⁴¹ The district court confirmed the award in part, but vacated the award concerning the patents that the panel had declared were solely owned, explaining that the panel acted in manifest disregard of the law by issuing the award without providing legal analysis.²⁴²

After discussing the limited grounds for overturning arbitral awards under section 10 of the FAA, the Seventh Circuit's Chief Judge Easterbrook, citing *Hall Street*, explained that "'manifest disregard of the law' is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act."²⁴³ However, Judge Easterbrook noted, the standard may fall under section 10(a)(4) if it is used to overturn an award when the arbitrator disregarded its limited authority under the parties' agreement.²⁴⁴ Applying this understanding of the manifest disregard standard, Judge Easterbrook questioned why the district court believed that the arbitrators' omission constituted a violation of the FAA, especially since "arbitrators are free to act summarily, unless the parties' con-

235. *Id.*

236. *Id.*

237. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharms., Inc.*, 660 F.3d 281 (7th Cir. 2011).

238. *Id.* at 283.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 285.

244. *Id.*

tract requires an opinion.”²⁴⁵ Judge Easterbrook found that the district court’s inference—that the lack of explicit reasoning signaled that there “must have [been] an extra-contractual ground”—was nothing more than “a logical error.”²⁴⁶ Finding the panel properly applied the joint-venture agreement, the Seventh Circuit reversed the district court’s decision and remanded the case with instructions to confirm the award.²⁴⁷

3. *Circuits that Refuse to Address the Status of Manifest Disregard*

The Supreme Court’s decision in *Hall Street* seemed to present the lower courts with two options: interpret the holding to either limit vacatur to the four grounds listed in section 10 of the FAA or leave the manifest disregard standard untouched. Although each of the seven circuit courts discussed above took one of those two paths, a third option soon developed as four circuit courts chose to avoid addressing the issue altogether.²⁴⁸

The Tenth Circuit was presented with the choice of how to interpret *Hall Street* in *DMA International, Inc. v. Qwest Communications International, Inc.*²⁴⁹ *DMA International* involved a payment dispute that centered on the interpretation of an ambiguous fee provision in a service contract.²⁵⁰ The arbitrator deemed the clause unclear and turned to extrinsic evidence to determine the parties’ intent.²⁵¹ Having reviewed the pertinent material, the arbitrator found that no provision in the contract had been breached.²⁵² The

245. *Id.*

246. *Id.* (“Silence is just silence.”).

247. *Affymax, Inc.*, 660 F.3d at 286. As the court explained:

[T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.

Id.

248. The Fourth Circuit had also originally refrained from deciding the effects of *Hall Street*. See *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 193 n.13 (4th Cir. 2010) (finding it “unnecessary to consider the effect of *Hall Street*.”). However, that circuit would later apply the manifest disregard standard in its post-*Hall Street* decision. See *Dewan v. Walia*, 544 F. App’x 240, 246 (2013); see also *supra* Part II.B.1.

249. *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341 (10th Cir. 2009).

250. *Id.* at 1343–44.

251. *Id.* at 1345.

252. *Id.*

district court, applying the highly deferential standard of review for arbitral awards, upheld the award.²⁵³

On appeal, the Tenth Circuit was presented with the issue of whether the arbitrator acted in manifest disregard of the law in issuing its decision.²⁵⁴ Although the court held that the arbitrator correctly stated the Colorado law governing contract interpretation,²⁵⁵ it found it unnecessary to address whether the manifest disregard standard survived *Hall Street*. The court explained:

Qwest contends that this argument is foreclosed by *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008), in which the Supreme Court held that 9 U.S.C. § 10 provides the exclusive grounds for expedited vacatur of an arbitration award. Whether manifest disregard for the law remains a valid ground for vacatur is an interesting issue, but as the district court noted, one not central to the resolution of this case. As described below, the arbitrator did not act with manifest disregard of the law or in any other way that would justify vacatur.²⁵⁶

The Tenth Circuit therefore found it unnecessary to rule on the status of the manifest disregard standard, and it has since continually refrained from doing so.²⁵⁷

The Third Circuit was next to avoid deciding the manifest disregard standard in *Bapu Corp. v. Choice Hotels International, Inc.*²⁵⁸ The plaintiffs in *Bapu Corp.* entered into a franchise agreement with Choice Hotels allowing them to open and operate a hotel under the Quality Inn name.²⁵⁹ The agreement, which included an arbitration clause, required the plaintiffs to renovate the building

253. *Id.*

254. *Id.* at 1344.

255. *Id.* at 1345.

256. *Id.* at 1344 n.2.

257. *See, e.g.*, *Legacy Trading Co. v. Hoffman*, 363 F. App'x 633, 635 n.2 (10th Cir. 2013) ("But we need not decide what, if any, judicially-created grounds for vacatur survive in the wake of [*Hall Street*], because neither Legacy Trading nor Mr. Uselton has established the right to vacatur under any judicially-created exceptions."); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 620 (10th Cir. 2011) ("[I]n the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned."); *Hicks v. Cadle Co.*, 355 F. App'x 186, 197 (10th Cir. 2009) ("We need not decide whether § 10 provides the exclusive grounds for vacating an arbitrator's decision, because defendants demonstrate neither manifest disregard of the law nor violation of public policy."). Moreover, although one Tenth Circuit decision lists manifest disregard as one of several "judicially-created bases for vacating an award," that decision "is not binding precedent." *Merril Lynch, Pierce, Fenner & Smith, Inc. v. Whitney*, 419 F. App'x 826, 828 n.*, 833 (10th Cir. 2011).

258. *Bapu Corp. v. Choice Hotels Int'l, Inc.*, 371 F. App'x 306 (3d Cir. 2010).

259. *Id.* at 307.

by November 20, 2000.²⁶⁰ Not only did the plaintiffs fail to meet that deadline, but they also failed to respond to two separate offers to extend the time frame in which the work had to be completed.²⁶¹ Finally, four years after the original deadline for renovations passed, Choice Hotels terminated the franchise agreement and sought damages through arbitration.²⁶² The plaintiffs objected to the arbitration and declined to participate, arguing the claims were barred by the applicable statute of limitations under both the franchise agreement and Maryland law.²⁶³ The arbitrator subsequently issued an award in favor of Choice Hotels, and the district court confirmed.²⁶⁴

The plaintiffs appealed, arguing in part that the arbitrator acted in manifest disregard of the law when it allowed Choice Hotels to bring its claim six years after the original breach when the claim was barred by the three-year limitations period.²⁶⁵ In response, Choice Hotels argued that an arbitrator's manifest disregard of the law no longer serves as an independent basis for vacating an arbitral award post-*Hall Street*.²⁶⁶ The Third Circuit disagreed, explaining that although the Court in *Hall Street* held that the grounds for vacatur listed in section 10 of the FAA are exclusive, “[i]t did not . . . expressly decide whether the judicially created doctrine allowing vacatur of an arbitration award for manifest disregard of the law by an arbitrator would continue to exist as an independent basis for vacatur.”²⁶⁷

Yet, although a circuit split had developed on the issue, the Third Circuit saw “no need to decide the issue [since] this case does not present one of those ‘exceedingly narrow’ circumstances supporting a vacatur based on manifest disregard of the law.”²⁶⁸ The court explained that the arbitrator made clear to the plaintiffs that they could raise the arbitrability²⁶⁹ issue again once the record was more complete.²⁷⁰ Having failed to do so, the plaintiffs waived

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 307–08.

265. *Id.* at 308–09.

266. *Id.* at 309.

267. *Id.*

268. *Bapu Corp.*, 371 F. App'x at 309.

269. The Supreme Court explained in *AT&T Technologies, Inc. v. Communications Workers of America* that “[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitration is to be decided by the court, not the arbitrator.” 475 U.S. 643, 649 (1986).

270. *Bapu Corp.*, 371 F. App'x at 309.

their ability to raise the issue later.²⁷¹ Moreover, the franchise agreement itself stated that the parties agreed to submit the question of arbitrability to the arbitrator.²⁷² The court thus affirmed the district court's confirmation of the award.²⁷³

The D.C. Circuit soon joined the Third and Tenth Circuits in avoiding the *Hall Street* issue altogether. The case, *Affinity Financial Corp. v. AARP Financial, Inc.*,²⁷⁴ involved a dispute that arose from a contract in which the petitioner agreed to provide financial services to members of the appellee's organization.²⁷⁵ When the arbitral panel unanimously found in favor of the petitioner, the appellee moved to have the award vacated, arguing that the arbitrators acted in manifest disregard of the law.²⁷⁶ Turning to the *Hall Street* decision, the district court explained that although it appeared that the manifest disregard standard had survived *Hall Street*, "the court need not decide once and for all the viability of the . . . standard in order to resolve this case"²⁷⁷ because the petitioner could not point to examples where the arbitrator refused or ignored legal principles.²⁷⁸

Similar to the district court's decision, the D.C. Circuit explained that it was "[a]ssuming without deciding that the 'manifest disregard of the law' standard still exists after" *Hall Street*; however, the petitioner had not demonstrated that the arbitrators were aware of a governing legal principle that they ignored or refused to apply.²⁷⁹ Therefore, the court affirmed the lower court's confirmation of the award.²⁸⁰

271. *Id.*

272. *Id.* at 308.

273. *Id.* at 311.

274. *Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App'x 4 (D.C. Cir. 2012).

275. *Affinity Fin. Corp. v. AARP Fin., Inc.*, 794 F. Supp. 2d 117, 118 (D.D.C. 2011).

276. *Id.* at 118–20.

277. *Id.* at 120 n.1.

278. *Id.* at 121–22. In fact, rather than attempting to overturn the award, the district court believed that

the respondent here is clearly engaged in an attempt to relitigate each and every argument that was rejected by the Panel. By characterizing its every disagreement with the Panel's Award as a 'manifest disregard' of the law, the respondent hopes that this court will grant the respondent a mulligan in the form of *de novo* review. The respondent's arguments run counter to well-established public policy because *de novo* review would undermine the entire concept of arbitration as a private method of resolving grievances.

Id. at 122.

279. *Affinity*, 468 F. App'x at 5.

280. *Id.*

Lastly, the First Circuit acknowledged its avoidance of the standard's viability in *Raymond James Financial Services, Inc. v. Fenyk*.²⁸¹ The plaintiff in *Fenyk* brought a suit against his former company, claiming that he was fired based on his sexual orientation and status as a recovering alcoholic in violation of Vermont employment laws.²⁸² The defendant moved to compel arbitration, and the court granted its motion pursuant to a previously signed agreement.²⁸³ At the hearing, the plaintiff sought to amend his complaint to add a claim under the Americans with Disabilities Act.²⁸⁴ The arbitral panel denied the request to amend but awarded the plaintiff \$600,000 in back pay and \$36,042 in attorney's fees and costs pursuant to the Florida Civil Rights Act.²⁸⁵ The defendant moved to vacate the award, and the district court granted the motion finding that the arbitration panel exceeded its authority by misapplying state law and allowing the plaintiff to present his claims even though the one-year statute of limitations period had elapsed.²⁸⁶

The First Circuit began its opinion acknowledging that a court's evaluation of an arbitral decision is both extraordinarily narrow and deferential.²⁸⁷ The court explained that the FAA "specifies a number of grounds that would support an order vacating an award, including fraud, bias, and prejudicial misbehavior."²⁸⁸ As to the existence of an extra-statutory ground for review, the court explained:

Whether the manifest-disregard doctrine remains good law, however, is uncertain. A circuit split has developed following the Supreme Court's decision in *Hall Street*, which held that § 10 of the FAA provides the exclusive grounds under the statute for vacatur of arbitration awards. Although we concluded, in dicta, that the doctrine is no longer available we have "not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*." We need not resolve the uncertainty over "manifest disregard" here.²⁸⁹

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

282. *Id.* at 61.

283. *Id.*

284. *Id.*

285. *Id.* at 61–63.

286. *Id.* at 63.

287. *Id.*

288. *Id.* at 64.

289. *Id.* at 64–65 (citations omitted) (quoting *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010)).

Having found that the arbitral award “‘draw[s] its essence from the contract’ that underlies the arbitration proceeding,” the court reversed the district court’s decision and remanded the case for entry of an order confirming the arbitration award.²⁹⁰

In refusing to weigh in on the validity of the manifest disregard standard post-*Hall Street*, the First, Third, Tenth, and D.C. Circuits silently await guidance from the Supreme Court. However, as discussed below,²⁹¹ the Court has had several opportunities to resolve this split but has refrained from doing so each time. An unintended consequence of these four circuits’ continued refusal to assess the standard’s viability is the appearance of a calculated, if not cynical, strategy to refrain from deciding the issue based merely on the possibility of being overturned on appeal. Until the matter is resolved, parties may hesitate to participate in arbitration in those circuits given the uncertainty of both the decision’s finality and the availability of non-statutory grounds to challenge awards.

Interestingly, in addition to being in agreement as to refusing to decide whether manifest disregard remains viable post-*Hall Street*, these circuits also agree as to that standard’s actual meaning. The Tenth Circuit in *DMA International* interpreted the standard to mean “‘willful inattentiveness to the governing law.’”²⁹² The court explained that the record must show that the arbitrator “‘knew the law and explicitly disregarded it.’” The Third Circuit in *Bapu Corp.* did not define the standard, but instead quoted one of its pre-*Hall Street* decisions in which the court stated that the standard applies “‘where an arbitration panel manifestly disregards, rather than merely erroneously interprets, the law.’”²⁹³ The D.C. Circuit expounded on this understanding, explaining that in order to establish that an arbitrator acted in manifest disregard of the law, the moving party must show not only that the arbitrator knew of the governing legal principle and refused to apply it or ignored it altogether, but also that the law was “‘well defined, explicit, and clearly applicable to the case.’”²⁹⁴ Finally, the First Circuit described the standard as

290. *Id.* at 68 (quoting *Cytec Corp. v. DEKA Prods. Ltd. P’ship*, 439 F.3d 27, 32 (1st Cir. 2006)).

291. *See infra* Part III.A.

292. *DMA Int’l, Inc. v. Qwest Commc’ns Int’l, Inc.*, 585 F.3d 1341, 1344–45 (10th Cir. 2009) (citations omitted). The court further explained that “‘mere errors in an arbitrator’s factual findings, or in his interpretation and application of the law, do not justify vacatur.’” *Id.*

293. *Bapu Corp. v. Choice Hotels Int’l, Inc.*, 371 F. App’x 306, 309 (3d Cir. 2010) (quoting *Metromedia Energy, Inc. v. Enserch Energy Servs.*, 409 F.3d 574, 578 (3d Cir. 2005)).

294. *Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App’x 4, 5 (D.C. Cir. 2012).

requiring situations where an award contradicted unambiguous contract language or the arbitrator recognized but ignored the applicable law.²⁹⁵

4. *A Split Within the Circuit Split*

While the circuit courts discussed above each fall into one of the three noted categories regarding the validity of the manifest disregard standard, a split within this split also appears to exist. The Sixth Circuit stands alone as the only circuit that has held both that the manifest disregard standard still applies and—in a subsequent decision—that the circuit has yet to reach a final decision on the issue.

The Sixth Circuit addressed the ramifications of *Hall Street* in *Coffee Beanery, Ltd. v. WW, L.L.C.*,²⁹⁶ a case that involved a failed licensing agreement between Coffee Beanery, and two business partners who later assigned their rights and obligations to WW, L.L.C.²⁹⁷ After opening in 2003, WW's cafe began encountering numerous difficulties which ultimately led to an arbitration demand against Coffee Beanery alleging, among other claims, fraud and breach of contract.²⁹⁸ The arbitrator issued an award in favor of Coffee Beanery on all claims, and the district court confirmed.²⁹⁹ WW appealed, arguing that the arbitrator acted in manifest disregard of the law when it refused to apply the Maryland Franchise Act's provision that requires an offering prospectus to identify all officers who have been convicted of a felony—something that Coffee Beanery had failed to do.³⁰⁰

The Sixth Circuit explained that under *Wilko*, a court “may . . . vacate an award found to be in manifest disregard of the law.”³⁰¹ The court found that although *Hall Street* may have “significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10 . . . it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law.”³⁰² The Sixth Circuit understood the *Hall Street* decision to forbid private parties from contractually adding to the FAA's grounds for vacatur but not to prohibit judicially invoked

295. *Raymond*, 780 F.3d at 64.

296. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415 (6th Cir. 2008).

297. *Id.* at 416.

298. *Id.*

299. *Id.* at 417–18.

300. *Id.* at 418.

301. *Id.*

302. *Id.*

application of that standard.³⁰³ Therefore, “[i]n light of the Supreme Court’s hesitation to reject the ‘manifest disregard’ doctrine in all circumstances,” the Sixth Circuit found that “it would be imprudent to cease employing such a universally recognized principle.”³⁰⁴

Turning to the arbitrator’s decision, the Sixth Circuit explained that under the Maryland Franchise Act, an offering prospectus must indicate whether any person identified in the prospectus had been convicted of a felony.³⁰⁵ Because an officer of Coffee Beanery had been previously convicted of grand larceny, the court found that the arbitrator had acted in manifest disregard of the law when it “expressly chose not to follow clearly established law regarding the disclosure of [the officer’s] prior felony.”³⁰⁶ The court therefore reversed the district court’s judgment and vacated the arbitrator’s award.³⁰⁷

The Sixth Circuit continued to apply the manifest disregard standard three times in 2008.³⁰⁸ Nevertheless, behind the scenes the Sixth Circuit wrestled with the propriety of its continued application of the manifest disregard standard post-*Hall Street* as seen in *Ozormoor v. T-Mobile USA, Inc.*,³⁰⁹ when the court expressed “some doubt whether this theory remains a cognizable one after *Hall Street*.”³¹⁰ However, the court continued, “the Supreme Court has not expressly rejected the theory.”³¹¹ And in any event, the

303. *Id.* at 419.

304. *Id.* (“It is worth noting that since *Wilko*, every federal appellate court has allowed for the vacatur of an award based on an arbitrator’s manifest disregard of the law.”).

305. *Id.* at 420.

306. *Coffee Beanery*, 300 F. App’x at 421.

307. *Id.*

308. For example, in *Dealer Computer Services v. Dub Herring Ford*, the court, while addressing whether an arbitral panel had properly interpreted the arbitration clause at issue as prohibiting class arbitration, explained that “[a] court may also vacate an award on non-statutory grounds if the arbitration panel demonstrates a ‘manifest disregard of the law.’” 547 F.3d 558, 561 n.2 (6th Cir. 2008). Later that same year, the Sixth Circuit stated in *Grain v. Trinity Health, Mercy Health Services, Inc.* that although manifest disregard of the law was not a ground for modifying an award under 9 U.S.C. § 11, it remained “a basis for vacating an award.” 551 F.3d 374, 380 (6th Cir. 2008). Finally, in *Martin Marietta Materials, Inc. v. Bank of Oklahoma*, the Sixth Circuit stated that “the ‘manifest disregard’ standard continues to apply to cases under the Federal Arbitration Act” 304 F. App’x 360, 362–63 (6th Cir. 2008).

309. *Ozormoor v. T-Mobile USA, Inc.*, 459 F. App’x 502 (6th Cir. 2012).

310. *Id.* at 505.

311. *Id.*

court found that the appellants failed to establish that the arbitrator had acted in manifest disregard of the law.³¹²

The Sixth Circuit soon reversed course, or at least suggested a detour, in *Schafer v. Multiband Corp.*³¹³ The plaintiffs in *Schafer* brought an action in arbitration for indemnification against their parent company for payments that they made to settle several breach of fiduciary duty claims.³¹⁴ While the arbitrator cited numerous federal cases that held the Employee Retirement Income Security Act of 1974 (ERISA) permitted indemnification agreements,³¹⁵ he nevertheless ruled in favor of the company and declared the agreements invalid.³¹⁶ The appellees moved to have the award vacated, and the district court granted their motion finding that the arbitrator acted in manifest disregard of the law by deciding that ERISA did not allow the indemnification agreements.³¹⁷

The Sixth Circuit began its opinion by acknowledging that the arbitrator's decision did not fall under any of the factors listed in section 10 of the FAA.³¹⁸ Moreover, although the Sixth Circuit had regularly applied the manifest disregard standard prior to this case, the court attempted to limit those decisions, explaining that while the court had "continued to acknowledge 'manifest disregard' as a ground for vacatur," it had done so only in unpublished decisions.³¹⁹ It was therefore the court's belief that "[t]he issue has not been firmly settled" in the Sixth Circuit.³²⁰ However, rather than seizing the opportunity to settle the issue, the court found that it "need not decide whether a manifest disregard of the law legitimately forms a basis for vacatur in the first place" because "[e]ven under the standard, a 'general review for an arbitrator's legal errors' is not permitted."³²¹ Therefore, the court reversed the district court's judgment and remanded the case.³²²

312. *Id.* at 506.

313. *Schafer v. Multiband Corp.*, 551 F. App'x 814 (2014).

314. *Id.* at 815–17.

315. 29 U.S.C. § 1001 (2018). Congress enacted ERISA to establish a comprehensive federal scheme for the protection of pension plan participants and their beneficiaries. *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1148 (9th Cir. 2000).

316. *Schafer*, 551 F. App'x at 817–18.

317. *Id.* at 818.

318. *Id.*

319. *Id.* at 819 n.1.

320. *Id.* at 819.

321. *Id.* at 818–19 (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008)).

322. *Id.* at 820–21.

III. MISSED OPPORTUNITIES TO RESOLVE THE CIRCUIT SPLIT

Legal scholars quickly noted the conflict among the circuits regarding the manifest disregard standard.³²³ Not surprisingly, the circuit courts also soon acknowledged this conflict. In *Stolt-Nielsen*, for instance, the Second Circuit explained that since *Hall Street*, “[s]ome [circuits] have concluded or suggested that the doctrine simply does not survive,” while “[o]thers think that ‘manifest disregard,’ reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards.”³²⁴ Similarly, the Sixth Circuit explained that because of *Hall Street*, “our sister circuits have suggested different answers to the question whether the ‘manifest disregard’ standard retains continuing vitality.”³²⁵ The Fifth Circuit also acknowledged the emerging split in *Citigroup*.³²⁶ This rapidly growing discord led at least one commentator to suggest:

[T]his 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*.³²⁷

Unfortunately, this prediction has not yet come to fruition, and the result has created an uncertainty as to the finality of arbitral awards based solely on which circuit a party finds itself in. This uncertainty has led to more complex and expensive forum-shopping disputes, which already presented problems pre-*Hall Street*³²⁸ and

323. See, e.g., Jill I. Gross, *Hall Street Blues: The Uncertain Future of the Manifest Disregard*, 37 SEC. REG. L.J. 232, 233 (2009) (“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.”); Annie Chen, *The Doctrine of Manifest Disregard of the Law After Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts*, 32 FORDHAM INT’L L.J. 1872, 1875 (2008) (“Since *Hall Street*, U.S. circuit courts have disagreed on the status of manifest disregard, leaving the doctrine highly unsettled.”).

324. *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

325. *Martin Marietta Materials, Inc. v. Bank of Okla.*, 304 F. App’x 360, 362 (6th Cir. 2008).

326. *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 356–57 (5th Cir. 2009).

327. Gross, *supra* note 323, at 239.

328. Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts’ Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 91 (1998) (“Arbitration clauses, which are supposed to do away with litigation, have ironically spawned many complicated and expensive court fights. Some of the most complex cases involve both forum shopping by the parties . . .”).

became more of an issue thereafter.³²⁹ It has likewise created a situation at the state level where California, through case law, and New Jersey, through statute, now explicitly permit parties to contract for expanded judicial review in response to the *Hall Street* decision;³³⁰ other states, such as Tennessee, do not.³³¹

With this continued discord over the availability of the manifest disregard standard, parties desiring greater availability of appellate review must now take pause when considering where to designate the seat of an arbitration. Not only have several federal circuits refrained from addressing the issue, but as one commentator noted, “[t]his exercise in forum shopping . . . carries some risk as not all state courts have weighed in on the issue.”³³² Challenging an award in a court that has not ruled on the issue can be the legal equivalent of a roll of the dice. To avoid this uncertainty, arbitration organizations have created private appellate arbitration panels whose rules allow parties to challenge arbitration awards under what would otherwise constitute an improper expanded review provision.³³³ But rather than alleviating the seemingly endless confusion, this practice essentially thwarts the congressional intent behind the FAA: to provide the judicial system some, albeit limited, ability to review an arbitral award. It is no wonder that soon after the *Hall Street* ruling, the Court found itself again faced with the issue of the manifest disregard standard.

A. *The Four Cert Petitions*

Within a year of its decision in *Hall Street*, the Supreme Court received three petitions for a writ of certiorari concerning the viability of the manifest disregard standard. Those petitions argued that although Congress enacted the FAA to create a national policy favoring arbitration,

[t]he Circuits’ treatment of the doctrine of manifest disregard of the law . . . has been anything but uniform. Since this Court’s decision in *Hall Street*, the Circuits have divided at least three

329. See generally Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010) (discussing how the *Hall Street* decision invites forum shopping for state arbitration statutes where expanded review is allowed).

330. Becky L. Jacobs, *Pugh’s Lawn and Landscape Company, Inc. v. Jaycon Development Corporation: The Tennessee Court of Appeals Limits Judicial Review of Arbitration Awards*, 11 TRANSACTIONS 199, 213–14 (2009).

331. *Id.* at 207.

332. *Id.* at 213.

333. Paul R. Genender & Christopher D. Kratovil, *Recent Developments in the Law of Arbitration*, 30 TEX. BUS. LITIG. J. 5 (2008).

ways over whether manifest disregard of the law . . . remains a valid ground for vacating an arbitrator's award under the FAA.³³⁴

Moreover, the petitioners believed that the issue was ripe for the Court's intervention:

There is no benefit to allowing this issue to percolate further in the lower courts. The circuit split is deep, and it will not resolve without intervention by this Court. The Circuits have considered both this Court's decision and their own precedent, and have concluded that their respective positions are binding in their circuits Until this court intervenes, parties to arbitration agreements will encounter different sets of rules on the federal courts, based solely on where their arbitrations are held.³³⁵

This argument appears to have fallen on deaf ears. On October 5, 2009, the Supreme Court denied all three petitions³³⁶ thereby allowing the split to continue either in hopes that future case law will provide consistency among the circuits or in wait for the hold-outs to address the issue.³³⁷

Predictably, as additional circuits ruled on the issue and the split grew, the Court was once again presented with an opportunity to clarify its holding in *Hall Street*. On December 13, 2013, the defendant in *Dewan*³³⁸ petitioned the Court arguing:

The courts of appeals are divided . . . over whether "manifest disregard" survived *Hall Street*. This divergence is untenable, as it subjects arbitral awards to different standards of review based entirely on the happenstance of where they are rendered. The conflict is also entrenched: the courts of appeals have acknowledged their irreconcilable positions, but each has concluded that it has the best reading of this Court's precedents. Thus, certiorari is the only way to establish uniformity on this critical question of federal law.³³⁹

334. Petition for a Writ of Certiorari at 15, *Coffee Beanery, Ltd. v. WW, L.L.C.*, 558 U.S. 819 (2009) (No. 08-1396).

335. *Id.* at 23–24.

336. See *Coffee Beanery, Ltd. v. WW, L.L.C.*, 558 U.S. 819 (2009); *Comedy Club, Inc. v. Improv W. Assocs.*, 558 U.S. 824 (2009); *Grain v. Trinity Health, Mercy Health Servs.*, 558 U.S. 820 (2009).

337. James E. Berger & Charlene Sun, *Supreme Court Denies Certiorari in Three Cases Concerning Judicial Review of Arbitral Awards*, STAY CURRENT (Paul, Hastings, Janofsky & Walker LLP, L.A., Cal.), Oct. 2009, at 1, <http://bit.ly/2pblkG0>.

338. *Dewan v. Walia*, 134 S. Ct. 1788 (2014); see also *supra* Part II.B.1.

339. Petition for a Writ of Certiorari at 12, *Dewan v. Walia*, 134 S. Ct. 1788 (2014) (No. 13-722).

But alas, apparently unmoved by this argument, the Court declined Walia's petition, thereby allowing the dispute to endure.³⁴⁰

B. Stolt-Nielsen

The Court was presented with perhaps its best opportunity to resolve the schism when it granted certiorari in *Stolt-Nielsen*.³⁴¹ As discussed above,³⁴² the district court in *Stolt-Nielsen* vacated an arbitral award, finding that the arbitrator acted in manifest disregard of the law when it failed to conduct a choice-of-law analysis before concluding that the parties' arbitration agreement permitted class arbitration.³⁴³ The Second Circuit reversed, explaining that while the manifest disregard standard had survived *Hall Street*, the arbitrator had not acted improperly because the petitioners had failed to cite any authority demonstrating that federal maritime rule or custom and usage barred the use of class arbitration.³⁴⁴

The Supreme Court, however, believed that applying the manifest disregard standard, valid or not, was unnecessary to decide the case. Instead, the Court turned its attention to section 10(a)(4) of the FAA, explaining that the arbitration panel exceeded its powers because its "task . . . is to interpret and enforce a contract, not to make public policy."³⁴⁵ In contrast to the Second Circuit's decision, the Supreme Court explained that the arbitration panel failed to identify and apply maritime or New York law, and instead "imposed its own policy choice."³⁴⁶ In fact, in reversing the Second Circuit's decision, Justice Alito's majority opinion chose only to address the manifest disregard standard once in a footnote where he curtly wrote that the Court "do[es] not decide whether 'manifest disregard' survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U. S. C. § 10."³⁴⁷ This statement was surprising, if not disappointing, given that Justice Alito had joined Justice Souter's majority opinion in *Hall Street* and certainly understood the confusion that the opinion had created.³⁴⁸ Similarly, Justice Ginsberg, who was likewise a

340. *See id.*

341. *Stolt-Nielsen SA v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010).

342. *See supra* Part II.B.1.

343. *Stolt-Nielsen*, 559 U.S. at 669.

344. *Id.* at 670.

345. *Id.* at 672.

346. *Id.* at 676–77.

347. *Id.* at 672 n.3.

348. One court went as far as to sarcastically praise the Supreme Court's decision in *Stolt-Nielsen* for "so helpfully stat[ing] . . . '[w]e do not decide whether

member of the *Hall Street* majority, did not mention the manifest disregard standard in her dissent.³⁴⁹

However, Justice Alito's refusal to endorse the manifest disregard standard did not indicate that he believed the standard was invalid, as demonstrated by the footnote's conclusion: "Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow."³⁵⁰ Interestingly, this last statement—that even if the manifest disregard standard remains valid, the Court's decision would not change—captures a position set forth by several scholars discussed below: application of the manifest disregard standard has shown no statistical consequence in a court's ability to overturn an arbitral decision.

C. *The Practical Effects of Manifest Disregard*

In delivering the opinion in *Hall Street*, Justice Souter acknowledged that the Court did not know whether the ruling would encourage or discourage parties from choosing to arbitrate their disputes.³⁵¹ Although it remains unclear whether the Court's decision has had any impact on parties choosing to arbitrate their claims, the preclusion of a party's ability to allege manifest disregard in several circuits has not led to a sudden increase in arbitral awards confirmations. This phenomenon was demonstrated in a 2011 study by Professor Michael H. LeRoy in which LeRoy examined challenges to employment arbitration awards in both federal and state courts from 1975 to 2010.³⁵² The study found that district courts confirmed a similar percentage of arbitration awards both prior to and after *Hall Street*, and that state courts confirmed a slightly higher number of awards after *Hall Street*.³⁵³

'manifest disregard' survives our decision in *Hall Street*.'" Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp., 758 F. Supp. 2d 222, 225 (S.D.N.Y. 2010).

349. *Stolt-Nielsen*, 559 U.S. at 688–99 (Ginsburg, J., dissenting).

350. *Id.* at 672 n.3.

351. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 (2008) ("We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts.").

352. See Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137, 178 (2011).

353. *Id.* The study found that pre-*Hall Street*, 164 out of 175, or 93.7 percent, of arbitration awards were confirmed, whereas post-*Hall Street*, this number declined to 30 out of 33, or 90.9 percent. Surprisingly, state first-level court rulings increased. Pre-*Hall Street* state courts confirmed 96 out of 122, or 78.7 percent, arbitration awards, and after *Hall Street* was decided state courts confirmed 20 out of 24, or 83.3 percent, arbitration awards. *Id.*

Additionally, Professor LeRoy's study found that the rate of confirmations by federal appeals courts stayed about the same after *Hall Street*.³⁵⁴ Moreover, while state appellate courts did see an increase in confirmations post-*Hall Street*, the increase was not statistically significant due to the small sample size of cases used in the study.³⁵⁵

The New York City Bar Association released a study the following year focusing on the effect of the manifest disregard standard's availability on cases within the Second Circuit.³⁵⁶ That study took statistics that the Second Circuit gathered four years prior and extended the data through 2012. The study explained that the Second Circuit had conducted its own statistical analysis of the manifest disregard doctrine in the 2003 case *Duferco International Steel Trading v. T. Klavness Shipping A/S*,³⁵⁷ in which the court found that since adopting the standard in 1960, the Second Circuit vacated only four of the 48 cases in which the standard was applied.³⁵⁸ The Second Circuit updated its statistics in 2008, noting that since its decision in *Duferco*, it heard 18 cases involving manifest disregard challenges but only vacated one and remanded two others for clarification.³⁵⁹ The Bar Association's study, through its own research, explained that the Second Circuit had heard 17 additional manifest disregard cases in the three years since *Stolt-Nielsen* but had not vacated a single award on that basis.³⁶⁰ Likewise, at the federal district court level, the study explained that out of 367 manifest disregard challenges, courts vacated or partially vacated awards in only 17 cases and remanded five others—a mere six percent of all cases.³⁶¹ Moreover, the Second Circuit reversed six of those 22 cases on the ground that the standard for manifest disregard had not been satisfied.³⁶²

354. *Id.* at 179. Specifically, federal appeals courts reviewing arbitration awards confirmed 79 out of 90, or 87.8 percent, of arbitration awards pre-*Hall Street*. After *Hall Street*, federal courts confirmed 6 out of 7, or 85.7 percent, arbitration awards.

355. *Id.* State appeals courts confirmed 73 out of 103, or 70.9 percent, of arbitration awards pre-*Hall Street*, and confirmed 16 out of 18, or 88.9 percent, arbitrations awards post-*Hall Street*.

356. COMM. ON INT'L COMMERCIAL DISPUTES, THE "MANIFEST DISREGARD OF LAW" DOCTRINE AND INTERNATIONAL ARBITRATION IN NEW YORK 6 (2012).

357. *Duferco Int'l Steel Trading v. T. Klavness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003).

358. *Id.* at 389.

359. *Id.* (citing *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008)).

360. *Id.*

361. *Id.*

362. *Id.*

Not surprisingly, while application of the manifest disregard standard may have no significant effect on the confirmation of arbitral awards, it often leads to an increase in the overall cost of arbitration.³⁶³ As Professor LeRoy explained in an earlier study, the manifest disregard standard “wastes more judicial resources in reviewing awards than any other standard.”³⁶⁴ This fact clearly runs counter to one of the central advantages of arbitration—namely, “an efficient and cost-effective alternative to traditional litigation.”³⁶⁵ Therefore, it would seem that despite the arguments in favor of the Supreme Court resolving the circuit split, the availability of the manifest disregard standard not only has little effect on a party’s ability to confirm an arbitral award, but also removes one of the key advantages of arbitration by increasing its cost.

So, what is the lasting effect, if any, of the manifest disregard standard? Parties choose arbitration because it is a cost-efficient means for resolving disputes and a faster alternative to litigation; it also has finality that court decisions lack. The availability of the manifest disregard standard renders arbitration a mere prelude to meaningless litigation,³⁶⁶ destroys efficiency,³⁶⁷ and increases expenses.³⁶⁸ In short, the very advantages that Congress envisioned

363. *See generally* Brief of the International Franchise Ass’n as Amicus Curiae in Support of Petitioners at 10, *Coffee Beanery, Ltd. v. WW, LLC*, 558 U.S. 819 (2009) (No. 08-1396) (“The possibility of vacatur for manifest disregard also threatens arbitration’s essential benefits of speed, cost-effectiveness and efficiency . . .”).

364. Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 189 (2008).

365. Christopher L. Frost, *Welcome to the Jungle: Rethinking the Amount in Controversy in a Petition to Vacate an Arbitration Award Under the Federal Arbitration Act*, 32 PEPP. L. REV. 227, 230 (2005). Indeed, it was this very point that formed the basis for the core argument for ripeness made by the International Franchise Association in its amicus curiae brief in support of the petitioners in the *Coffee Beanery’s* cert petition. *See* Brief of the International Franchise Ass’n as Amicus Curiae in Support of Petitioners, *supra* note 363, at 9 (“This is an important issue because the possibility of manifest disregard review may decrease the efficiency and cost-effectiveness of arbitration as a means for resolving disputes.”).

366. Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 132 (2002) (“[S]ubstantive review of arbitration awards would render arbitration a meaningless precursor to litigation . . .”).

367. Michael P. O’Mullan, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 FORDHAM L. REV. 1121, 1148 (1995) (“The courts’ attempts to articulate a workable standard of judicial review for legal error in arbitration reflect the fundamental conflict between the speed, informality, and economic efficiency of arbitration and the exhaustive legal precision of the litigation process.”).

368. *Id.* at 1135 (noting the use of the manifest disregard standard “result[s] in undue expense and delay in the arbitration process.”).

when it passed the FAA are defeated by the application of this non-statutory standard while the parties to the dispute receive little to no tangible benefits.

CONCLUSION

During oral arguments in *Hall Street*, Justice Breyer explained that he had earlier referred to the dispute as “the case of the century, because it’s going to take a hundred years to finish.”³⁶⁹ While only a decade has passed since the Court’s decision in that case, the Court’s refusal to settle the circuit split has left many scholars resigned to the fact that it may take a century to resolve the debate.³⁷⁰ In the meantime state and federal courts “face[] this question an average of once a week”³⁷¹ with no guidance from the Supreme Court.³⁷² However, rather than asking if the standard has survived the *Hall Street* decision, a better question might be: should it have existed at all?

The manifest disregard standard entered the arbitration lexicon through dicta in *Wilko* in which the Supreme Court distinguished between an arbitrator’s erroneous interpretation of law—which is not subject to judicial review—and an arbitrator’s manifest disregard of the law—which is.³⁷³ While manifest disregard is not found in section 10 of the FAA, every circuit court nevertheless gradually adopted it over the following 40 years.³⁷⁴ However, the Court’s 2008 decision in *Hall Street*, which held that section 10 of the FAA provides the “exclusive” grounds for vacatur, broke that uniformity.³⁷⁵ Following *Hall Street*, a four-way circuit split developed, with some circuit courts permitting the use of manifest disre-

369. Transcript of Oral Argument, *supra* note 163, at 40.

370. See, e.g., Patrick Sweeney, *Exceeding Their Powers: A Critique of Stolt-Nielsen and Manifest Disregard, and a Proposal for Substantive Arbitral Award Review*, 71 WASH. & LEE L. REV. 1571, 1637 (2014) (“Manifest disregard has a turbulent history and is currently in a state of limbo.”); Liz Kramer, *Circuit Split Persists Regarding Whether Arbitrator’s “Manifest Disregard” of Law Can Vacate Arbitration Award*, ARBITRATION NATION (June 25, 2015), <http://bit.ly/2NI9ykh> (“There was a circuit split then, and that circuit split has not gone away . . . [with] no clear majority on whether the basis is valid.”).

371. Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009).

372. See Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, DISP. RESOL. J., NOV. 2006–Jan. 2007, at 16, 21 (“Bereft of Supreme Court guidance, the federal circuit courts have continued to fend for themselves when it comes to challenges to arbitration awards based on manifest disregard of the law.”).

373. See *Wilko v. Swan*, 346 U.S. 427 (1953).

374. See *supra* Part I.B.

375. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

gard, others holding that the standard was no longer available, another circuit holding that the standard both does and does not survive *Hall Street*, and three remaining circuits refusing to decide the issue one way or the other.³⁷⁶ This split, which resulted from the Court's continued equivocation on the standard's viability, has weakened any legitimacy that the standard once enjoyed.³⁷⁷

But does the split matter? When parties seek to vacate arbitral awards, they usually rely on the full array of defenses listed in section 10 of the FAA and only invoke manifest disregard as one of several alternative grounds.³⁷⁸ What's more, a comparison of the confirmation rates of arbitral awards before and after *Hall Street* shows that courts still confirm an exceptionally high percentage of awards.³⁷⁹ Thus, the availability of the manifest disregard standard appears to not have much practical effect in terms of vacating an award but instead causes delay in the award's enforcement while driving up the cost of litigation for the winning party.³⁸⁰ Nevertheless, the debate over whether the standard should stand as a valid ground for arbitral review will likely continue until the Supreme Court addresses the issue. Until then, practitioners will have the ability to forum shop for jurisdictions that apply the standard favorably to preserve the option of invoking the standard to overturn an unfavorable award.³⁸¹

376. See *supra* Part II.B.1–4.

377. Kevin Patrick Murphy, *Alive but Not Well: Manifest Disregard After Hall Street*, 44 GA. L. REV. 285, 303 (2009) (“[W]hile the Supreme Court [in *Hall Street*] certainly weakened the legitimacy of manifest disregard as an independent ground for vacatur, it did not take the opportunity to abrogate it when it easily could have.”).

378. COMM. ON INT’L COMMERCIAL DISPUTES, *supra* note 356, at 7.

379. See *supra* Part III.C.

380. Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 132–33 (1998) (“[Manifest disregard] destabilizes the process of commercial arbitration, increasing costs and time to resolution in many cases by providing disappointed advocates and parties with an illusory promise of securing justice from a court of law when they believe they have been denied it in arbitration.”).

381. Kate Kennedy, *Manifest Disregard in Arbitration Awards: A Manifestation of Appeals Versus a Disregard for Just Resolutions*, 16 J.L. & POL’Y 417, 446 (2008) (“The lack of a uniform application of the manifest disregard standard has created an atmosphere ripe for forum shopping.”).