

# What's Left of "Manifest Disregard of the Law" as a Basis for Vacatur of Arbitration Awards after *Hall Street*?

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Binding arbitration remains an oft-chosen dispute resolution mechanism for cedents and reinsurers, making the permissible scope of judicial review of arbitral awards a subject of interest to the industry. There is broad agreement among the federal courts that judicial review of arbitration awards is limited and the grounds for vacatur of awards narrow. The precise contours of the bases for vacatur under the Federal Arbitration Act ("FAA"), however, continue to be a subject of disagreement in the federal courts.

Last year, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), the United States Supreme Court resolved a circuit split over whether parties, who are free to contract for arbitration as a method of dispute resolution, are also free to contract for greater judicial review of arbitral awards than expressly provided by the FAA. In *Hall Street*, the Supreme Court addressed the enforceability of so-called "expanded review" clauses, holding that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification of arbitration awards.<sup>1</sup>

Long before *Hall Street*, however, the federal courts recognized a basis for vacatur of arbitration awards that is not expressly enumerated in the FAA, namely, "manifest disregard of the law." Indeed, the Court in *Hall Street* acknowledged that some Courts of Appeals had treated "manifest disregard of the law" as a further ground for vacatur in addition to those listed in § 10. *Hall Street* makes clear that §10 provides the exclusive grounds for vacatur under the FAA. But the Supreme Court's comments about the

"manifest disregard" standard have engendered a further split of authority over whether "manifest disregard" remains a valid basis for vacatur after *Hall Street*.

This article discusses the origin of the "manifest disregard" standard, federal jurisprudence defining and applying the standard in adjudicating motions to vacate under the FAA, and the federal courts' differing conclusions about whether "manifest disregard of the law" survives as a ground for vacatur after *Hall Street*.

## I. The "Manifest Disregard of The Law" Standard of Review

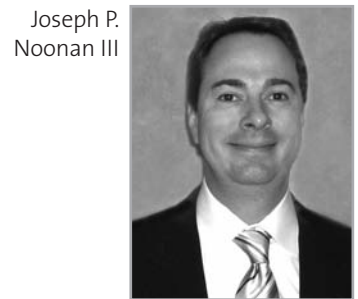
The FAA supplies mechanisms for enforcing arbitration awards: a judicial decree confirming the award, an order vacating it, or an order modifying or correcting it. Under § 9, a court "must grant" an order confirming the arbitration award "unless the award is vacated, modified, or corrected as prescribed in §§ 10 and 11 of this title." 9 U.S.C. § 9. Section 10 lists grounds for vacating an award, while § 11 lists those for modifying or correcting one. Among the § 10 grounds for vacatur are that arbitrators were "guilty of misconduct" or "exceeded their powers." 9 U.S.C. §§ 10(a)(3) & 10(a)(4). The grounds specified in §§ 10 and 11 do not expressly include "manifest disregard of the law" as a basis for vacating, modifying or correcting an award. Nonetheless, for many years, the federal courts have reviewed arbitral awards using what has come to be termed the "manifest disregard of the law" standard.

The manifest disregard standard finds its origins in *dictum* from the Supreme Court's decision in *Wilko v. Swan*. There, the Supreme Court stated that "the interpretations of the law by the arbitrators in contrast to manifest

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However, the Seventh Circuit parts company with the other Circuits in taking an even more narrow view of what constitutes manifest disregard. In the Seventh Circuit, “manifest disregard of the law” is confined to cases where arbitrators “direct parties to violate the law.” This “standard is so high that it ‘provides an almost nonexistent standard of review.’”

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disregard are not subject, in the federal courts, to judicial review for error in interpretation.”<sup>2</sup> From this statement the federal Courts of Appeals concluded that an arbitral award may be vacated if manifest disregard of the law is plainly evident from the arbitration record.<sup>3</sup>

After *Wilko* and before *Hall*, most federal appellate courts ultimately came to recognize an arbitrator’s manifest disregard of the law as a valid extrastatutory basis for vacatur of an arbitral award.<sup>4</sup> While the articulated standards for manifest disregard of the law are not perfectly aligned, federal courts applying the doctrine — in both the pre-*Hall* and post-*Hall* contexts — are generally in accord in their analytical approach with respect to certain fundamental elements of the manifest disregard standard. It is widely agreed that federal courts’ review of an arbitrator’s decision is extremely narrow and highly deferential.<sup>5</sup> Indeed, it has been described as “one of the narrowest standards of judicial review in all of American jurisprudence.”<sup>6</sup> In this light, manifest disregard of the law has been interpreted “to mean more than error or misunderstanding with respect to the law.”<sup>7</sup> Generally, the party seeking vacatur bears the burden of proving that the arbitrator(s) were aware that a clearly defined legal principle governed but refused to apply it or simply ignored it.<sup>8</sup>

However, the Seventh Circuit parts company with the other Circuits in taking an even more narrow view of what constitutes manifest disregard. In the Seventh Circuit, “manifest disregard of the law” is confined to cases where arbitrators “direct parties to violate the law.”<sup>9</sup> This “standard is so high that it ‘provides an almost nonexistent standard of review.’”<sup>10</sup>

As in most circuits, the law in the Second Circuit, a hub of reinsurance-related litigation, is that a federal court cannot vacate an arbitration award simply because it determines that the arbitration panel made the wrong call on the law. On the contrary, the Second Circuit concluded before *Hall Street*, and confirmed after it, that “the award should be enforced, despite a court’s disagreement with [the panel] on the merits, if there is a *barely colorable justification* for

the outcome reached.” The Second Circuit has also stated, however, that proof that the arbitrator refused to apply or ignored governing law is not confined to the unusual case in which the arbitrator explicitly rejects controlling precedent.

If the arbitrator’s decision ‘strains credulity’ or ‘does not rise to the standard of barely colorable,’ a court may conclude that the arbitrator ‘willfully flouted the governing law by refusing to apply it.’<sup>11</sup>

In the Southern District of New York, this standard is equally applied to the non-reasoned awards that are common in reinsurance arbitrations.<sup>12</sup> “Where arbitrators have failed to document the reasoning behind their decision — a perfectly acceptable practice in arbitration — courts must consider the facts and the law to determine whether the allegedly disregarded law was clearly applicable and ignored.”<sup>13</sup>

In *Hall Street*, the Supreme Court rejected the argument that *Wilko* recognized manifest disregard of the law as a further statutory ground for vacatur on top of those listed in § 10 of the FAA. Relying on both the text and the legislative history, the Court in *Hall Street* concluded (and reiterated several times in its opinion) that §§ 10 and 11 provide the “exclusive grounds” for review under the FAA.<sup>14</sup> But the Court did not decide whether the manifest disregard standard that arose from *Wilko* has any place in the analytical lexicon of courts reviewing arbitration awards. Referring to its use of the phrase “manifest disregard” in *Wilko*, the Court 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. Or, as some courts have thought, ‘manifest disregard’ may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when arbitrators were ‘guilty of misconduct’ or ‘exceeded their powers.’<sup>15</sup>

These comments in *Hall Street* have engendered a debate over the continued validity of the manifest disregard standard as a basis for seeking vacatur under the FAA.

## II. The Split in the Circuit Courts

### A. Circuits Holding *Hall Street* Abrogates “Manifest Disregard of the Law” as a Basis For Vacatur of Arbitration Awards Under the FAA

The first federal appellate court to address the continued validity of the manifest disregard standard after *Hall Street* was the First Circuit in *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120 (1st Cir. 2008). In that case, an arbitrator granted summary judgment against a UPS employee and in favor of UPS in a dispute submitted to arbitration pursuant to a collective bargaining agreement. The UPS employee challenged the arbitrator’s decision in a state court action, which was removed to federal district court on the basis of jurisdiction granted by the Labor Management Relations Act. Finding that the arbitrator had not acted in manifest disregard of the law, the First Circuit affirmed the district court’s enforcement of the award and declined to reach the question whether *Hall Street* precludes a manifest disregard inquiry in a non-FAA setting. In its opinion, however, the court described *Hall Street* as holding “that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA].” *Id.* at 122-124 fn.3.

The Fifth Circuit, in *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009), squarely considered whether manifest disregard of the law survives as a ground for vacatur in light of *Hall Street*. There, the plaintiff sought vacatur of an award, citing § 10 of the FAA. The district court granted the motion to vacate, holding that the award was made in manifest disregard of the law. Upon review, the Fifth Circuit held that in light of *Hall Street* “manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.” *Citigroup*, 562 F.3d at 355-58.

The Fifth Circuit interpreted *Hall Street* as rejecting the notion that *Wilko*

created an independent, non-statutory ground for vacatur. *Id.* at 353.

In 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, non-statutory 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.*

*Id.* at 358 (emphasis supplied). The court concluded its opinion by observing that, “from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10.” *Id.*

### B. Circuit Tentatively Holding That “Manifest Disregard of the Law” Survives *Hall Street* as a Ground for Vacatur Independent of Those Specified in FAA

After reviewing the grounds for vacatur enumerated in § 10, the Sixth Circuit, in *Coffee Beanery, Ltd. v. WW, L.L.C.*, stated that its “ability to vacate an arbitration award is almost exclusively limited to these grounds, although it may also vacate an award found to be in manifest disregard of the law.” 300 Fed.Appx. 415, 418 (6th Cir. 2008) (emphasis supplied). The *Coffee Beanery* court interpreted *Hall Street* narrowly, noting that while the Supreme Court “significantly reduced” the federal court’s ability to vacate awards for reasons other than those specified in Section 10, “it did not foreclose federal court’s review for an arbitrator’s manifest disregard of the law.” *Coffee Beanery*, 300 Fed.Appx. at 418. The court read *Hall Street* as narrowly limited to its holding prohibiting “private parties” from supplementing by contract the FAA’s statutory grounds for vacatur. But, with respect to the “judicially-invoked” ground for an arbitrator’s manifest disregard of the law, the court thought that *Hall Street*’s discussion of *Wilko* demonstrated a “hesitation to reject the ‘manifest disregard’ doctrine in all

circumstances . . .” *Id.* at 418-19. With this analysis as backdrop, and after noting the wide acceptance of the manifest disregard standard in other circuits, the court said that it would continue to employ the standard as a basis for vacatur of arbitral awards. *Id.*

In a subsequent decision, however, the Sixth Circuit noted that while it had previously suggested that manifest disregard of the law is a “judicially created supplement” to the FAA’s express grounds for vacatur, “*Hall Street*’s reference to the ‘exclusive’ statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory.” *Grain v. Trinity Health, Mercy Health Services Inc.*, 551 F.3d 374, 380 (6th Cir. 2008).<sup>16</sup>

### C. Circuits Holding That the “Manifest Disregard” Standard Survives as a Judicial Gloss on the Grounds for Vacatur Specified in § 10(a)(4)

The Second Circuit, in *Stolt-Nielsen SA v. Animalfeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008), addressed the effect of *Hall Street* on the manifest disregard doctrine. The court acknowledged that *Hall Street*’s holding — that the FAA set forth the “exclusive” grounds for vacating an arbitral award — is “undeniably inconsistent” with its own dictum treating the manifest disregard standard as a ground for vacatur entirely separate from those listed in the FAA.

But the *Hall Street* Court also speculated that ‘the term manifest disregard . . . merely referred to the § 10 grounds collectively, rather than adding to them’ – or as ‘shorthand for § 10(a)(3) or § 10(a)(4).’ It did not, we think, abrogate the ‘manifest disregard’ doctrine altogether.

*Id.* at 93-95.

After reviewing the relevant post-*Hall Street* case law, the Second Circuit

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agreed with those courts which concluded that manifest disregard is a “judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA,” and thus remains a valid ground for vacatur. *Id.* at 94. Having reached this conclusion, the court stated that, even after *Hall Street*, it still had the responsibility to vacate arbitral awards in the “rare instances” in which the arbitrator knew of the legal principle that controlled the outcome of the disputed issue but nonetheless refused to apply it. In those instances, the arbitrators have failed to interpret the contract at all, which is tantamount to arbitrators having “thereby ‘exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.’” *Id.* at 95 (citing FAA § 10(a)(4)).

Similarly, the Ninth Circuit has held that *Hall Street* did not undermine manifest disregard of the law as a statutory ground for vacatur. In *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1289-90 (9th Cir. 2009), the court noted that it had previously treated the manifest disregard standard as shorthand for those subsections of the FAA authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.” The court stated that, because the Supreme Court did not reach the question whether the manifest disregard doctrine fits within §§ 10 or 11 of the FAA, instead listing several possible readings of the doctrine, it was bound by prior Ninth Circuit precedent. Thus, the Ninth Circuit concluded that “after *Hall Street Associates*, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4).” *Id.*

Finally, the Tenth Circuit has questioned, without deciding, whether the manifest disregard standard remains a valid basis for vacatur after *Hall Street*. See *Hicks v. Cadle Company*, 2009 U.S. App. WL 4547803, \*\*8-9 (10th Cir. Dec. 7, 2009).

### III. Development Of “Manifest Disregard” Jurisprudence in District Courts in Remaining Circuits

Among the district courts where there has been no definitive ruling by the relevant court of appeals, there is no consensus with respect to the post-*Hall Street* viability of the “manifest disregard of the law” doctrine under the FAA. However, some trends appear to be emerging within a few circuits. District courts within the Eighth and Eleventh Circuits appear to be trending toward the view that manifest disregard is no longer viable at all. District courts within the Third and Seventh Circuits generally appear to hold the view that manifest disregard remains viable as a shorthand for statutory grounds for vacatur.<sup>17</sup> District courts in the remaining circuits have recognized the circuit split but either have not decided the issue or have not arrived at general agreement within the circuit.

#### A. Circuits Trending Toward View That *Hall Street* Abrogates “Manifest Disregard of the Law” as a Basis for Vacatur

In the Eighth Circuit, there are two cases in which a district court decided the issue. In both instances, the court held, in light of *Hall Street*, that manifest disregard is no longer a viable ground for vacatur of an arbitration award under the FAA. In *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008), the U.S. District Court for the District of Minnesota held that courts can no longer vacate an arbitration award on judicially-created grounds such as manifest disregard of the law. The court recognized that *Hall Street* concerned contractual expansion of judicial review rather than judicial expansion, but reasoned that “[i]t would be somewhat inconsistent to say that the parties cannot contractually alter the FAA’s exclusive grounds for vacating or modifying an arbitration award, but then allow the courts to alter the exclusive grounds by creating extra-statutory bases for vacating or

modifying an award.” *Id.* Accordingly, the court held that it did not need to address the argument that the arbitrator’s decision was in manifest disregard of the law since that is not one of the grounds for vacatur within the FAA. *Id.*

In *Medicine Shoppe International, Inc. v. Simmonds*, No. 4:08CV90 FRB, 2009 WL 367703, \*3 (E.D. Mo. 2009), the U.S. District Court for the Eastern District of Missouri held that “manifest disregard of the law” is not a valid basis for vacatur of an arbitration award under the FAA. The court interpreted the Supreme Court’s decision in *Hall Street* as providing that manifest disregard “is not a prescribed basis upon which an arbitrator’s award may be vacated or modified under §§ 10 or 11,” and therefore a reviewing court is not permitted to engage in a review of an arbitral award for manifest disregard of the law. *Id.*

In the Eleventh Circuit there are two cases concerning the survival of non-statutory grounds for vacatur after *Hall Street*, but only one that directly involves manifest disregard. Both cases hold that non-statutory bases for vacatur are unavailable after *Hall Street* and one explicitly includes manifest disregard among the defunct non-statutory bases. In *Carey Rodriguez Greenberg & Paul, LLP v. Arminak*, 583 F. Supp. 2d 1288, 1290 (S.D. Fla. 2008), the U.S. District Court for the Southern District of Florida held that § 10 of the FAA provides the exclusive grounds for vacating an award pursuant to the FAA. The party arguing in favor of vacatur in that case asserted that the arbitral award violated public policy as the basis for vacatur. *Id.* The court held that, in light of *Hall Street*, it could not consider any non-statutory grounds for vacatur and violations of public policy are not among the exclusive statutory grounds provided in the FAA. *Id.* at 1290-91.

In *Waddell v. Holiday Isle, LLC*, No. 09-0040-WS-M, 2009 WL 2413668, \*5 (S.D. Ala. Aug. 4, 2009), the U.S. District Court for the Southern District of Alabama held that manifest disregard of the law is not viable after *Hall Street*. The Court

held that manifest disregard of the law does not fall within § 10 of the FAA, and therefore it is an additional, non-statutory ground for vacatur. *Id.* Because the Supreme Court made clear that §§ 10 and 11 of the FAA provide the exclusive grounds for vacatur and modification, the court, citing the Fifth Circuit's decision in *Citigroup*, held that manifest disregard can no longer be relied upon as a ground for vacatur under the FAA. *Id.*

### B. Circuits Trending Toward View That “Manifest Disregard” Survives as a Judicial Gloss on § 10 of the FAA

In the Third Circuit, there are three district court cases that reach the issue and hold that manifest disregard is shorthand for the FAA's § 10 grounds for vacatur, so the courts continue to perform the analysis. There are others that recognize the circuit split and decline to reach the issue.<sup>18</sup> But there is also one case in the Third Circuit that stated in *dictum* that the Supreme Court, in *Hall Street*, “reject[ed] the widely held judicial view that another ground was implicit in the FAA, namely, where the arbitration award was made in ‘manifest disregard of the law.’” *Martik Bros., Inc. v. Kiebler Slippery Rock, LLC*, No. 08cv1756, 2009 WL 1065893, \*2 n.2 (W.D. Penn. April 20, 2009).

The first of the three cases holding that manifest disregard survives as a judicial gloss on § 10 grounds is *Vitarroz Corp. v. G. WilliFood Int'l Ltd.*, 637 F. Supp. 2d 238 (D.N.J. 2009). In *Vitarroz*, the U.S. District Court for the District of New Jersey held that manifest disregard was not abrogated by *Hall Street* but will continue to be applied as shorthand for §§ 10(a)(3) or 10(a)(4) of the FAA. *Vitarroz*, 637 F. Supp. at 245. The court makes clear that manifest disregard cannot continue as an additional non-statutory basis for vacatur. *Id.* The court held, however, that “in the absence of a Third Circuit directive otherwise,” it will continue to apply manifest disregard as a means to enforce § 10 of the FAA. *Id.*

In *Silicon Power Corp. v. General Elec. Zenith Controls, Inc.*, No. 08-4331, 2009 WL 3127759, \*11 (E.D. Penn. Sept. 29, 2009), the U.S. District Court for the Eastern District of Pennsylvania held that “[t]he ‘manifest disregard of the law’ doctrine is not an independent, non-statutory ground for

vacatur, but is shorthand for the grounds provided for vacatur provided by § 10(a).” As such, the court held, manifest disregard continues to be viable after *Hall Street* as shorthand for the statutory grounds provided by the FAA. *Id.*

In *Ario v. Cologne Reinsurance (Barbados), Ltd.*, No. 1:CV-98-0678, 2009 WL 3818626, \*5 (M.D. Penn. Nov. 13, 2009), the U.S. District Court for the Middle District of Pennsylvania held that it agreed with the Second Circuit's analysis in *Stolt-Nielsen* that manifest disregard is a judicial gloss on the specific grounds for vacatur enumerated in § 10 of the FAA and hence may continue to be applied in light of *Hall Street*. The court reasoned that “a claim that arbitrators acted in manifest disregard of the law is just another way of saying that the arbitrators ‘exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.’” *Id.*

In the Seventh Circuit, the jurisprudence of the manifest disregard doctrine appears to have been unaffected by *Hall Street*. Even before the Supreme Court decided *Hall Street*, the Seventh Circuit rejected the view of manifest disregard as a non-statutory ground for vacatur but viewed it instead as a narrow doctrine that fits entirely within the first clause of § 10(a)(4), which provides for vacatur “where the arbitrators exceeded their powers.” *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 268 (7th Cir. 2006). But it must be recalled that, in the Seventh Circuit, “manifest disregard of the law” is confined to cases where arbitrators “direct parties to violate the law.” *Id.* at 269. The district courts in the Seventh Circuit that have reached the issue after *Hall Street* have concluded that the Seventh Circuit's version of manifest disregard survives *Hall Street* because, following *Wise*, it is shorthand for arbitrators exceeding their powers and so fits entirely within § 10(a)(4) of the FAA. *Joseph Stevens & Co., Inc. v. Cikaneck*, No. 08 C 706, 2008 WL 2705445, \*4 (N.D. Ill. July 9, 2008); *Raymond Prof'l*, 397 B.R. at 430-31; *Doerflein v. Pruco Securities, LLC*, No. 1:07-cv-0738-DFH-JMS, 2009 WL 232134, \*2 (S.D. Ind. Jan. 30, 2009); *Williams v. RI/WFI Acquisition Corp.*, No. 06 C 2103, 2009 WL 383420, \*2 (N.D. Ill. Feb. 11, 2009).

The court recognized that *Hall Street* concerned contractual expansion of judicial review rather than judicial expansion, but reasoned that “[i]t would be somewhat inconsistent to say that the parties cannot contractually alter the FAA's exclusive grounds for vacating or modifying an arbitration award, but then allow the courts to alter the exclusive grounds by creating extra-statutory bases for vacating or modifying an award.”

In several circuits, the case law has not yet developed to a point where any trend can be discerned with respect to how they will treat the doctrine of manifest disregard in light of the post-*Hall Street* circuit split. Still, a few courts provide some guidance as to how they may view the issue.

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### C. Circuits In Which No Discernible Trend Has Yet Appeared

In several circuits, the case law has not yet developed to a point where any trend can be discerned with respect to how they will treat the doctrine of manifest disregard in light of the post-*Hall Street* circuit split. Still, a few courts provide some guidance as to how they may view the issue.

In the Fourth Circuit, there are two cases that discuss but decline to reach the issue. In both cases, while the court states that it is declining to decide whether manifest disregard remains a viable ground for vacatur, the court continues to entertain the argument and concludes that the petitioner failed to meet its burden of proof. In *Regnery Publ'g, Inc. v. Minitex*, 601 F. Supp. 2d 192, 195 (D.D.C. 2009), the U.S. District Court for the District of Columbia notes that some courts have held that manifest disregard is no longer viable after *Hall Street*. While declining to decide whether manifest disregard is still a viable ground for vacatur, the court conducted a manifest disregard inquiry and concluded that the allegations of the party petitioning for vacatur did not rise to the level of a manifest disregard for the law. *Id.* In *MCI Constructors, Inc. v. Hazen and Sawyer, PC.*, No. 1:99CV2,1:02CV396, 2009 WL 632930, \*5 n.8 (M.D.N.C. April 28, 2009), the U.S. District Court for the Middle District of North Carolina observed in a footnote that “[t]he *Hall Street* Court did not . . . determine whether common law grounds for vacatur, including ‘manifest disregard’ and ‘essence of the agreement,’ are permissible bases for vacatur independent of, or as a shorthand for, the grounds for vacating awards that are specified in the FAA.” Nonetheless, the court went on, “assuming, without deciding, that [it] could vacate or remand the [arbitration award] for ‘failing to draw its essence’ from the Agreement,” and found that the petitioner failed to carry its burden of proof. *Id.*

In the Tenth Circuit, apart from the previously discussed *Hicks* case in which the Tenth Circuit Court discussed but did not opine on the circuit split, there are three district court cases that also discuss without deciding the issue. In *DMA Int'l, Inc. v. Qwest Communications Int'l*, No. 08-CV-00358-

WDM-BNB, 2008 WL 4216261, \*4 (D. Colo. September 12, 2008), *aff'd* 585 F.3d 1341 (10th Cir. 2009), the U.S. District Court for the District of Colorado observed that *Hall Street* only addressed private expansion by contract (as opposed to judicial expansion) of the FAA's grounds for vacatur. Opining that it remains an open question whether *Hall Street* eliminates judicially created grounds for vacatur, the court observed that it “need not decide the difficult issue” because the party petitioning for vacatur failed to meet the standards of the judicially-created grounds of manifest disregard of the law and violation of public policy. *Id.* On appeal, the Tenth Circuit also declined to address the “interesting issue” of “[w]hether manifest disregard for the law remains a valid ground for vacatur” because it was “not central to the resolution of [the] case.” *DMA Int'l, Inc. v. Qwest Communications Int'l, Inc.*, 585 F.3d 1341, 1344 n.2 (10th Cir. 2009).

In a pair of cases in the U.S. District Court for the District of Utah, the court appears to have suggested differing conclusions. In *Abbott v. Mulligan*, No. 2:06-CV-593, 2009 WL 2497386, \*4 (D. Utah Aug. 13, 2009), the court held that neither private parties nor the judiciary can expand the grounds for vacatur beyond those provided in § 10 of the FAA. The court held, however, that the manifest disregard doctrine can be read within the bounds of §10. It proceeded to do just that by interpreting the petitioner's claim for vacatur based on manifest disregard of the law as shorthand for having argued that the arbitration panel violated § 10 of the FAA, so it continued to analyze the case under the manifest disregard standard. *Id.* In *Marketstar Corp. v. Prosper Bus. Dev. Corp.*, No. 2:07-CV-00132-DB, 2009 WL 2929390, \*7 n.2 (D. Utah Sept. 8, 2009), by contrast, the court called into question the continued viability of manifest disregard as a ground for vacatur under any conceptual framework. In addressing the post-*Hall Street* circuit split, the court cited the Fifth Circuit's opinion in *Citigroup* calling into question “the utility of retaining the manifest disregard standard as ‘shorthand’ in light of the difficulty district courts have in deciphering the meaning of that phrase.” *Id.* Quoting a 1961 opinion of the Ninth Circuit, the court indicated that it shares that court's reservations:

The statutory language provided by the FAA itself provides better

guidance than the judiciary's oft-repeated, after-applied gloss. . . . The grounds for vacatur should be moored to these words, and not to the lackluster gloss of the manifest disregard standard.

*Id.* Despite its express doubts about the continuing viability of the manifest disregard doctrine, the court wrote that it need not “enter [the] thicket” of this question because the petitioner had not presented sufficient facts to demonstrate that the arbitrator manifestly disregarded the law. *Id.* at \*7.

## IV. Conclusion

While the Supreme Court's decision in *Hall Street* significantly curtailed the recognition of the already-narrow doctrine of “manifest disregard of the law” as a ground for vacating an arbitration award under the FAA, the doctrine is not yet dead in several circuits. Though the doctrine has either been eliminated or called into serious doubt in the First, Fifth, Eighth, and Eleventh Circuits by virtue of *Hall Street*, the doctrine remains viable in at least the Second, Third, Seventh (in its unique form), and Ninth Circuits — with the Fourth, Sixth, and Tenth Circuits on the fence. The Supreme Court may have an opportunity to further clarify whether manifest disregard has any place in FAA jurisprudence when it decides the appeal of the Second Circuit's decision in *Stolt-Nielsen*. Until such time as the Supreme Court does settle the question, it will be important for counsel concerned with the viability of the doctrine to continue to monitor the developing landscape in the federal courts. ▼

- 1 For a discussion of the impact of *Hall Street* on the debate over the enforceability of expanded review clauses, see Laura Accurso & Rachel W. Petty, *How Final Are Arbitration Awards?: The Enforceability of Expanded Review Clauses*, *ARIAS•U.S. Quarterly*, Vol. 15, No. 2 (2008).
- 2 *Wilko v. Swan*, 346 U.S. 427, 437 (1953), overruled on other grounds, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).
- 3 See, e.g., *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003); *Black Box Corp. v. Markham*, 127 Fed. App'x 22, 25 (3d Cir. 2005); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995); *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150 (10th Cir. 2007); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1459 & n.5 (11th Cir. 1997).
- 4 *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349, 353-54 n.3 (5th Cir. 2009) (collecting citations); see also, *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 419

- (6th Cir. 2008) (same). *But see Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 268 (7th Cir. 2006) (holding that manifest disregard doctrine fits entirely within first clause of § 10(a)(4) of FAA, which provides for vacatur where the arbitrators exceeded their powers).
- 5 See, e.g., *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 123 (1st Cir. 2008) (citing pre-*Hall* precedent); *Stolt-Nielsen SA, Animalfeeds Int'l Corp.*, 548 F.3d 85, 91 (2d Cir. 2008) (same); *Coffee Beanery, Ltd.*, 400 Fed. Appx. at 418 (same); *Hicks v. Cadle Company*, Nos. 08-1306, 08-1307, 08-1429, 08-1435, 2009 U.S. App. WL 4547803 at \*7 (10th Cir. Dec. 7, 2009) (same); *Black Box Corp. v. Markham*, 127 Fed. App'x 22, 25 (3d Cir. 2005).
- 6 *Coffee Beanery*, 400 Fed. Appx. at 418; accord *Ramos-Santiago*, 524 F.3d at 123.
- 7 *Stolt-Nielsen*, 548 F.3d at 92 (citing pre-*Hall* authority); accord *DMA Int'l, Inc. v. Qwest Communications Int'l, Inc.*, 585 F.3d 1341, 1344-45 (10th Cir. 2009) (same); *Ramos-Santiago*, 524 F.3d at 124 (same); *Coffee Beanery*, 400 Fed. Appx. at 418 (same).
- 8 *Duferco Int'l Steel Trading*, 333 F.3d at 389; *Saipem America v. Wellington Underwriting Agencies*, 335 Fed. Appx. 377, 380 n.3 (5th Cir. 2009); *Coffee Beanery*, 400 Fed. Appx. at 418.; *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *DMA Int'l*, 585 F.3d at 1345.
- 9 *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 269 (7th Cir. 2006).
- 10 *Raymond Prof'l Group, Inc. v. William A. Pope Co.*, 397 B.R. 414, 428 (N.D. Ill. 2008).
- 11 *Stolt-Nielsen*, 548 F.3d at 92-93 (quoting pre-*Hall* Second Circuit precedent) (emphasis in original).
- 12 For a discussion of the effect that honorable engagement clauses have on manifest disregard scrutiny, see Natasha C. Lisman, *Honoring the Honorable Engagement Clause in Judicial Review of Arbitral Awards: Should The Honorable Engagement Clause Preclude Any Scrutiny for Manifest Disregard of the Law?*, *ARIAS•U.S. Quarterly*, Vol. 14, No. 3, pp. 11-16 (2007).
- 13 *Global Reinsurance Corp. of Am. v. Argonaut Ins. Co.*, 634 F. Supp. 2d 342, 349 (S.D.N.Y. 2009).
- 14 *Hall Street*, 128 S. Ct. at 1400, 1401, 1403-04, and 1406.
- 15 *Id.* at 1404 (internal citations omitted).
- 16 See also *Augusta Capital, LLC v. Reich & Binstock, LLP*, No. 3:09-CV-0103, 2009 WL 2065555, \*4 n.4 (M.D. Tenn. July 10, 2009) (citing *Coffee Beanery* and *Grain* for proposition that whether manifest disregard survives *Hall Street* in Sixth Circuit is an open question).
- 17 It should be remembered, however, that the Seventh Circuit, as discussed above, takes an extraordinarily narrow view of the doctrine that is unlike the narrow view of other circuits.
- 18 See, e.g., *Franko v. Ameriprise Financial Svcs., Inc.*, No. 09-09, 2009 WL 1636054, \*4 (E.D. Pa. June 11, 2009); *Fruehauf Trailer Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 414 B.R. 36, 40-42 (D. Del. 2009).

Though the doctrine has either been eliminated or called into serious doubt in the First, Fifth, Eighth, and Eleventh Circuits by virtue of *Hall Street*, the doctrine remains viable in at least the Second, Third, Seventh (in its unique form), and Ninth Circuits — with the Fourth, Sixth, and Tenth Circuits on the fence.