REVIEW OF ARBITRATION AWARDS AFTER *HALL STREET*

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PUBLICATIONS

Brandy M. Wingate & Tina S. Koch, *Would You Swear to That? Problems With Verifying a Petition for Writ of Mandamus*, The Appellate Advocate, State Bar of Texas Appellate Section Report, Vol. 19 No. 4, p. 26 (Summer 2007)
Brandy M. Wingate & Robert B. Gilbreath, *Review of Arbitration Awards After Hall Street Associates v. Mattel: The Supreme Court Says "No" to Contractual Expansion . . . and to "Manifest Disregard of the Law"?*, The Appellate Advocate, State Bar of Texas Appellate Section Report, Vol. 20 No. 4, p. 277 (Summer 2008)
Brandy M. Wingate & Dan Worthington, *2009 Legislative Preview,* The Appellate Advocate, State Bar of Texas Appellate Section Report, Vol. 21 No. 3, p. 161 (Spring 2009)
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I. Introduction

As more and more disputes are submitted to arbitration instead of the courts, review of arbitration awards has become increasingly important to litigants. And given the limited grounds for review set out in the Federal Arbitration Act ("FAA"), parties have explored the possibility of expanding appellate review within the arbitration contract—with much success early on.[1] Additionally, prior to 2008, litigants successfully encouraged the courts to adopt "manifest disregard of the law" as a ground for reviewing an arbitrator's award, even though this ground is not specifically enumerated in the FAA.[2]

On March 25, 2008, the United States Supreme Court issued its decision in *Hall Street Associates, LLC v. Mattel,* which resolved a circuit split[3] over whether parties could contractually expand the grounds available for vacating an arbitration award.[4] The Court held that parties cannot.[5] The opinion, while closing this issue regarding review of arbitration awards, opened another issue.

The opinion provides fodder for an argument that the judicially created "manifest disregard of the law" standard for vacating arbitration awards should not be recognized,[6] and several courts have accepted this interpretation of the decision. Other courts, however, have held that the *Hall Street* decision did not eliminate review of arbitrators' decisions for "manifest disregard of the law," for various reasons. Thus, while resolving a circuit split over contractual expansion of arbitration review, *Hall Street* raised an issue about the viability of appellate review for arbitrators' manifest disregard of the law.

A few Texas courts have grappled with the meaning of *Hall Street* in light of the Texas Arbitration Act's review provisions. Meanwhile, Congress and the Texas Legislature have begun work to amend the respective arbitration acts to remedy the perceived injustices created by the current state of arbitration law and process.

This paper provides an overview of the *Hall Street* decision and then examines the existing circuit split about whether the "manifest disregard" ground for vacating an arbitration award remains intact after *Hall Street.* It then discusses recent Texas cases applying *Hall Street.* Finally, the paper discusses the state and federal attempts to alter the arbitration landscape to make it less burdensome on litigants, and the response by prominent arbitral forums.

II. Overview of the *Hall Street* Decision

A. The Majority

In *Hall Street v. Mattel,* the parties' arbitration agreement allowed a district court to set aside an arbitrator's award if "(1) the arbitrator's findings of facts are not supported by substantial evidence, or (2) where the arbitrator's conclusions of law are erroneous."[7] After an arbitrator rendered an award in favor of Mattel, Hall Street moved to vacate the award because of an erroneous conclusion of law.[8]

Applying the contractually agreed standard of review, the district court agreed with Hall Street, vacated the award, and remanded the case back to the arbitrator.[9] The district court cited *LaPine Technology Corp. v. Kyocera Corp.*,[10] holding that the FAA allows parties to dictate an alternative standard of review.[11] On remand, the arbitrator amended the award to apply

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[1] Christian A. Garza & Christopher D. Kratovil, *Contracting for Private Appellate Review of Arbitration Awards*, Vol. 19, No. 2, The Appellate Advocate, at 19-20 (Winter 2007).

[2] *See* 9 U.S.C. §§ 10, 11.

[3] *Compare Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005) (allowing contractual expansion of judicial review), *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005) (same), *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 292 (3d Cir. 2001) (same), *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (same), *and Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (same), *with Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 933-37 (10th Cir. 2001) (rejecting contractual expansion), *Kyocera Corp. v. Prudential-Bach Trade Servs.*, 341 F.3d 987, 997-1000 (9th Cir. 2003) (en banc) (same), *and UHC Mgm't Co. v. Computer Scis. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998) (same in dicta).

[4] *See generally Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

[5] *Id.*

[6] *Id.* at 1404.

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

[8] *Id.* at 1401.

[9] *Id.*

[10] 130 F.3d 884, 889 (9th Cir. 1997).

[11] *Hall Street,* 128 S.Ct. at 1401.

the correct legal standard in favor of Hall Street.[12] The parties each sought modification of the second award by the trial court, and after consideration, the trial court affirmed the second award with one slight modification.[13]

On appeal, Mattel pointed out that the Ninth Circuit had recently reversed its position on allowing contractual expansion of arbitration review in *Kyocera Corp. v. Prudential-Bach Trade Servs*.[14] Hall Street attempted to distinguish this latter case, to no avail.[15] The Ninth Circuit Court of Appeals reversed the award in favor of Mattel holding that "the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable."[16] The Ninth Circuit instructed the district court to review the award under the standards set forth in the FAA, which it held were the exclusive grounds for vacating or modifying an award.[17] On remand, the district court again held for Hall Street, and the Ninth Circuit reversed again.[18]

The Supreme Court held that under 9 U.S.C. § 9,[19] a court "'must' confirm an award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§10 and 11."[20] The Court held that the grounds listed in sections 10 and 11 for vacating or modifying an award are *exclusive* and cannot be expanded by the parties' arbitration agreement.[21]

First, Hall Street argued that expanded judicial review had been accepted since the Court's decision in *Wilko v. Swan*,[22] where Hall Street argued the Court recognized the "manifest disregard" ground of review.[23] Hall Street claimed that if the courts can add "manifest disregard" as a ground for vacating an arbitration award, then parties can alter the grounds for review by contract.[24]

The Court noted that in *Wilko* it had considered whether section 14 of the Securities Act of 1933[25] precluded an arbitration agreement.[26] The Court held that Hall Street's interpretation of *Wilko* was "too much for *Wilko* to bear."[27] It noted that while

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[12] *Id.*

[13] *Id.*

[14] 341 F.3d at 997-1000.

[15] *Hall Street*, 128 S.Ct. at 1401.

[16] *Hall Street Assocs., LLC v. Mattel*, *Inc.*, 113 Fed. Appx. 272, 273 (9th Cir. 2004).

[17] *Id.*

[18] *Hall Street Assocs., LLC v. Mattel*, *Inc.*, 196 Fed. Appx. 476, 477-78 (9th Cir. 2006).

[19] That section provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 9.

[20] *Hall Street*, 128 S.Ct. at 1402.

[21] *Id.* at 1403.

[22] 347 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 484 (1989).

[23] Br. for the Petitioner, *Hall Street Assocs. L.L.C. v. Mattel*, *Inc.,* No. 06-989, *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/06-989/06-989.mer.pet.pdf (filed July 27, 2007).

[24] *Id.*

[25] That section provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." *Wilko*, 347 U.S. at 430 n. 6 (quoting 15 U.S.C. § 77n).

[26] *Id.* at 437-38.

[27] *Hall Street*, 128 S.Ct. at 1404.

many Circuits had interpreted *Wilko* as recognizing "manifest disregard of the law" as an additional ground to vacate an arbitration award, *Wilko*'s language actually stated the opposite or was so vague that it cannot be read as affirmatively establishing an independent ground of review:

> The *Wilko* Court was explaining that arbitration would undercut the Securities Act's buyer protections when it remarked (citing FAA § 10) that "[p]ower to vacate an [arbitration] award is limited," and went on to say that "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation." Hall Street reads this statement as recognizing "manifest disregard of the law" as a further ground for vacatur on top of those listed in § 10, and some Circuits have read it the same way. . . .
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> . . . .
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> Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." 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.[28]

Second, the Court rejected Hall Street's argument that because arbitration is a creature of contract, parties ought to be able to expand judicial review of arbitration awards through their contracts.[29] The Court held that the FAA's language, which demonstrated that the grounds for vacating an award were meant to be exclusive, was at odds with that proposition.[30]

The Court reviewed FAA sections 10 and 11. It held that even if sections 10 and 11 could be expanded to a certain extent, it "would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally."[31] Sections 10 and 11 address "egregious departures from the parties' agreed-upon arbitration," such as "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceeded . . . powers," "evident material miscalculation," "evident material mistake," and "award[s] upon a matter not submitted."[32] The Court noted that only one ground lacked such an extreme focus, "imperfect[ions]," but the Court noted that these may only be corrected if they go to "[a] matter of form not affecting the merits."[33]

The Court noted that under the rule of *ejusdem generis*, a general term following specific terms allows expansion only to items similar to the previously listed specific terms.[34] It reasoned that if a statute containing an expansion term had to be so limited, then "surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. 'Fraud' and a mistake of law are not cut from the same cloth."[35]

Additionally, section 9 is written in mandatory terms: the court "must grant" the confirmation order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."[36] The Court held that this provision provided no wiggle room: it "unequivocally tells courts to grant

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[28] *Id.* at 1403-04 (citations omitted).

[29] *Id.* at 1404.

[30] *Id.*.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1404-05.

[36] *Id.* at 1405.

confirmation in all cases, except when one of the 'prescribed' exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else."[37]

Finally, limiting the avenues of review is more consistent with the FAA's purpose:

> Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," and bring arbitration theory to grief in post-arbitration process.[38]

The Court limited its holding to the circumstances of the case. It noted that its holding only applied to enforcement of arbitration awards under the FAA, expressly declining to extend its holding to other enforcement options available under state statutory or common law enforcement mechanisms.[39] Additionally, at oral argument, the parties pointed out that the trial court had adopted the parties' arbitration agreement as an order.[40] Thus, the Court questioned whether the agreement, once restated as an order, should be recognized as the trial court's exercise of its authority to manage its docket under Federal Rule of Civil Procedure 16.[41] Because the lower courts had not considered this possibility, the Court remanded the case to the court of appeals for consideration of the issue.[42]

B. The Dissents

Justices Stevens, Kennedy, and Breyer dissented. Justices Stevens wrote, and Justice Kennedy agreed, that the Court's opinion conflicted with the purpose of the FAA and ignored its historical context.[43] Justice Stevens opined that the purpose of the FAA was to eliminate the previous hostility to arbitration and to make arbitration agreements "valid, irrevocable, and enforceable."[44] Because these were the "core" purposes of the FAA, Justice Stevens reasoned that there was more, not less, reason to enforce a party's agreement to arbitrate than there was before the FAA. "An unnecessary refusal to enforce a perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute."[45] Justice Stevens disagreed with the Court's reference to *ejusdem generis*, stating that "[a] listing of grounds that must always be available to contracting parties simply does not speak to the question whether they may agree to additional grounds for judicial review."[46]

Justice Breyer agreed with Justice Stevens's analysis, but he wrote separately to state his disagreement with the Court's decision to send the case back for further analysis.[47]

III. "Manifest Disregard" Disregarded?

Courts have grappled with the meaning of *Hall Street.* One thing is clear—parties cannot expand judicial review through their contractual provisions. What is not clear, however, is whether the Supreme Court intended to eradicate review for manifest disregard by holding that the statutory grounds for vacatur are "exclusive." As to this question, a circuit split is erupting, with courts adopting one of three interpretations of *Hall Street.* The *Hall Street* case is still percolating through some of the circuits. For example, the Sixth Circuit appears to have a panel split. We have noted the trend in the district courts for the circuits who have not conclusively decided the matter.

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[37] *Id.*

[38] *Id.* (citations omitted).

[39] *Id.* at 1406.

[40] *Id.* at. 1407.

[41] *Id.* at 1407-08.

[42] *Id.*

[43] *Id.* at 1408 (Stevens, J., dissenting).

[44] *Id.*

[45] *Id.* at 1409.

[46] *Id.*

[47] *Id.* (Breyer, J., dissenting).

A. *Hall Street* Did Nothing to Abrogate Manifest Disregard—Possibly the Sixth Circuit

In *Coffee Beanery, Ltd. v. WW, LLC*, an unpublished decision,[48] a panel of the Sixth Circuit held that *Hall Street* did not eliminate manifest disregard as a ground to vacate an arbitration award.[49] In that case, a couple who purchased a franchise from Coffee Beanery brought an arbitration proceeding arising out of their purchase of the franchise.[50] The arbitrator found in Coffee Beanery's favor, and the franchisees moved to vacate the award, asserting that the arbitrator manifestly disregarded the law.[51] The trial court denied the motion to vacate and affirmed the award.[52]

On appeal, the Sixth Circuit cited *Wilko* and held that courts may vacate an award if the arbitrator manifestly disregards the law.[53] The court acknowledged *Hall Street*, but held that while the opinion "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."[54] Rather, the Sixth Circuit limited the *Hall Street* holding to situations where the parties have attempted to supplement the FAA's statutory provisions for vacatur through their arbitration contracts.[55] The court noted 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."[56] It then held that manifest disregard survived *Hall Street* as an independent, judicially created ground to vacate an arbitration award, citing the Supreme Court's "hesitation to reject the 'manifest disregard' doctrine in all circumstances."[57] The Sixth Circuit found that the arbitrator had acted in manifest disregard of the law, reversed, and vacated the arbitration award.[58] Four days after *Coffee Beanery* was decided, a different panel of the Sixth Circuit decided *Dealer Computer Servs., Inc. v. Dub Herring Ford*, noting in a footnote that an arbitration award could be vacated on non-statutory grounds such as manifest disregard of the law, and it cited *Hall Street* using a "*But See*" signal.[59]

Curiously, however, a few weeks after *Coffee Beanery* was decided, yet another panel of the Sixth Circuit decided *Martin Marietta Materials, Inc. v. Bank of Oklahoma*, also an unpublished decision.[60] In *Martin Marietta*, the panel noted that manifest disregard may not be a ground to vacate an arbitration award after *Hall Street*, assumed that it was a valid ground, and purported to leave the question open for future litigants:

> The parties also assume that the "manifest disregard" standard remains a valid ground for vacating an arbitration award under the Federal Arbitration Act after the Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.,* ---U.S. ----, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). That, however, may not be true. . . . For present purposes, we will resolve the dispute as the parties have presented it to us—namely, with the assumptions that the framework of the labor-arbitration cases applies here, that the "manifest disregard" standard continues to apply to cases under the Federal Arbitration Act and that the two standards are roughly the same. We simply acknowledge each assumption in order to allow future panels and litigants to choose for themselves whether to challenge these

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[48] The Sixth Circuit permits citation of unpublished decisions without limitation. *See* 6TH CIR. R. 28(f); *cf.* FED. R. APP. P. 32.1(a).

[49] 300 Fed. Appx. 415, 419 (6th Cir. 2008).

[50] *Id.* at 417.

[51] *Id.*

[52] *Id.* at 418.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 418-19 ("The Court did not come to a conclusion regarding the precise meaning of *Wilko,* holding only that *Wilko* could not be read to allow parties to expand the scope of judicial review by their own agreement.").

[56] *Id*. at 419 (citing cases).

[57] *Id.*

[58] *Id.* at 421.

[59] 547 F.3d 558, 561 n.2 (6th Cir. 2008).

[60] 304 Fed. Appx. 360, 362-63 (6th Cir. 2008) (acknowledging its assumption "that the 'manifest disregard' standard continues to apply to cases under the Federal Arbitration Act"). *Coffee Beanery* was decided on November 14, 2008. *Martin Marietta Materials* was decided on December 17, 2008.

> premises or to continue to walk down the same calf-path as we have. *See* Sam Walter Foss, *The Calf-Path,* in *Whiffs from Wild Meadows* 77, 77-80 (1895).[61]

The panel in *Martin Marietta Materials* did not address or cite *Coffee Beanery* or the footnote in *Dealer Computer Services*.

A week after *Martin Marietta Materials* was decided, yet another panel of the Sixth Circuit acknowledged *Coffee Beanery* and cited it for the proposition that manifest disregard may be a ground to vacate an award, but not to modify an award.[62] In *Grain v. Trinity Health, Mercy Health Services Inc.*, without any discussion of *Coffee Beanery's* holding, it noted in dicta that *Hall Street* casts doubt on the continuing viability of manifest disregard:

> Grain and Barnes principally argue that their award should be doubled, not because it implicates one of the enumerated grounds for modifying an award, but because it turned on a "manifest disregard of the law." This theory, however, appears nowhere in § 11, and the Supreme Court has recently explained that the enumerated grounds in §§ 10 and 11 provide the "exclusive" grounds for obtaining relief from an arbitration decision. *Hall St.,* 128 S.Ct. at 1406. To the extent that "manifest disregard" is "shorthand" for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10, *id.* at 1404, that does Grain and Barnes no good. As we have shown, the enumerated grounds upon which they rely simply do not apply to their merits-based complaints about the award.
>
> It is true that we have said that "manifest disregard of the law" may supply a basis for *vacating* an award, at times suggesting that such review is a "judicially created" supplement to the enumerated forms of FAA relief. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros,* 70 F.3d 418, 421 (6th Cir.1995). *Hall Street*'s reference to the "exclusive" statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory. But, either way, we have used the "manifest disregard" standard only to vacate arbitration awards, not to modify them.[63]

It appears that in the Sixth Circuit, the panels are not in harmony, and this conflict has yet to be addressed by the district courts.[64]

B. Manifest Disregard Survives As Shorthand for 9 U.S.C. Section 10—Second and Ninth Circuits

The Second Circuit analyzed the question in *Stolt-Nielsen SA v. Animalfeeds International Corp*., and concluded that the doctrine clearly must survive.[65] This case presented the question of whether the parties' arbitration agreement, silent on class arbitration, permitted or precluded it in the context of international shipping services. The shippers, Stolt-Nielsen, appealed the panel's decision that the arbitration agreement allowed class claims. The district court concluded the panel manifestly disregarded the law because it failed to recognize that maritime law governed the dispute, which required charter interpretation to be based on custom and usage, and the shipper had established that maritime agreements are never subject to class arbitration. After acknowledging the heavy burden required to prove manifest disregard,[66] the Second Circuit "paused" to consider *Hall Street* and concluded by aligning itself with the Seventh Circuit in reconceptualizing "manifest disregard" as a "judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA [that] remains a valid ground for vacating arbitration

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[61] *Id.*

[62] *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 380 (6th Cir. 2008). *Grain* was decided December 24, 2008.

[63] *Id*. at 379-80.

[64] *See Augusta Capital, LLC v. Reich & Binstock, LLP*, No. 3:09-CV-0103, 2009 WL 2065555, at *4 (M.D. Tenn. 2009) (citing both *Coffee Beanery* and *Grain* but concluding it did not need to decide if manifest disregard survives *Hall Street*).

[65] 548 F.3d 85, 94-95 (2d Cir. 2008), *cert. granted*, 129 S.Ct. 2793 (2009).

[66] "[O]ur review for manifest disregard is 'severely limited,' 'highly deferential,' and confined to "'those exceedingly rare instances' of 'egregious impropriety on the part of the arbitrators.'" *Id.* at 95.

awards." The court, however, reversed the lower court, finding no grounds existed to vacate the panel's decision.

In *Comedy Club, Inc. v. Improv West Associates (Comedy Club II)*, the Ninth Circuit held that manifest disregard survives the *Hall Street* decision because, under the Ninth Circuit's prior case law, manifest disregard was merely "shorthand" for the statutory ground found in 9 U.S.C. section 10(a)(4), providing that a court may vacate where "the arbitrators exceeded their powers."[67] It held that the Supreme Court did not address the issue of whether manifest disregard fits under 9 U.S.C. sections 10 and 11, but instead, the Court in *Hall Street* listed several possible interpretations of the doctrine, including that already adopted by the Ninth Circuit.[68] Because *Hall Street* was not "clearly irreconcilable" with the Ninth Circuit's prior precedent, the Ninth Circuit followed its prior precedent and held that after *Hall Street*, "manifest disregard of the law remains a valid ground for vacatur because it is a part of [section] 10(a)(4)."[69]

C. *Hall Street* Abrogated Manifest Disregard—Fifth Circuit

The Fifth Circuit has held that *Hall Street* eliminated manifest disregard as a separate ground for vacating an arbitration award.[70] In *CitiGroup Global Markets*, an arbitration panel awarded Bacon damages against CitiGroup.[71] CitiGroup successfully moved the district court to vacate the award, arguing that the panel manifestly disregarded the law.[72] The Fifth Circuit was then forced to decide if manifest disregard remained a valid, independent ground to vacate an arbitration award after *Hall Street*.[73] The court reviewed the *Hall Street* opinion, noting that the Supreme Court repeatedly emphasized that the grounds for vacating an award in 9 U.S.C. sections 10 and 11 are exclusive.[74] It then noted that the Fifth Circuit adopted the manifest disregard ground for vacating an award reluctantly,[75] and under Fifth Circuit precedent, manifest disregard was labeled as an independent ground of review—not a "judicial gloss" on 9 U.S.C. section 10.[76]

The Fifth Circuit then reviewed cases from other circuits that had considered the issue.[77] First, it rejected the Sixth Circuit's conclusion in *Coffee Beanery* that *Hall Street* did not eliminate manifest disregard as a ground to vacate an award.[78] The Fifth Circuit argued that *Coffee Beanery* read *Hall Street* too narrowly and ignored the repeated statements by the Supreme Court that the statutory grounds were exclusive. *Id.* Additionally, unlike *Coffee Beanery*, the Fifth Circuit did not find any "hesitation" by the Supreme Court to discount *Wilko*. *Id.*

Next, the Fifth Circuit analyzed the possibility that manifest disregard is merely a "judicial gloss" on the existing statutory grounds, as found by the Second Circuit. *Id.* It noted that the Second Circuit, prior to *Hall Street*, had acknowledged in dicta that manifest disregard was an independent ground to vacate an arbitration award.[79] The Fifth Circuit held that the Second Circuit's "reconceptualization" of manifest disregard as "folded" into section 10(a)(4) was not inconsistent with *Hall Street*, particularly because Second Circuit precedent defined manifest disregard very narrowly:

> We should be careful to observe, however, that this description of manifest disregard is very narrow. Because the arbitrator is fully aware of the controlling principle of law and yet does not apply it, he flouts the law in such a manner as to exceed the powers bestowed upon him. This scenario does not include an erroneous application of that principle.[80]

Finally, the Fifth Circuit analyzed the Ninth Circuit's decision in *Comedy Club II*.[81] It noted that

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[67] *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (citing *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 997 (9th Cir. 2003)).

[68] *Id.* (citing *Hall Street*, 128 S.Ct. at 1404).

[69] *Id.*

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

[71] *Id.* at 350.

[72] *Id.*

[73] *Id.*

[75] *Id.* at 353-55

[76] *Id.* at 355.

[77] *Id.* at 356.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 357.

[81] *Id.*

the Ninth Circuit had no need to reconceptualize manifest disregard because its precedent already held that manifest disregard was a judicial interpretation of 9 U.S.C. section 10.[82]

The Fifth Circuit then made its decision:

> 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," 9 U.S.C. § 9 (emphasis added), and there's nothing malleable about "must," *Hall Street,* 128 S.Ct. at 1405. Thus from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10.
>
> To the extent that our previous precedent holds that nonstatutory grounds may support the vacatur of an arbitration award, it is hereby overruled.[83]

D. Circuits Percolating

Several circuits have yet to decide the issue, and in one circuit, a split has erupted in the districts.

In dicta, the First Circuit appears to have come to the same conclusion as the Fifth Circuit—that manifest disregard is not a valid ground to vacate an arbitration award.[84] However, the issue has not been squarely presented.

The Third and Seventh Circuits have not yet spoken about *Hall Street's* impact on review for manifest disregard. The district courts in those circuits, however, seem to be assuming that the ground survives as a reference to others listed in 9 U.S.C. section 10.[85]

The Fourth Circuit also stood silent about *Hall Street's* impact on manifest disregard even as it analyzed and declined to hold it as a basis to vacate and award.[86] The Middle District of North Carolina noted that *Hall Street* "did not however 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."[87] However, the court determined that it did not need to expressly decide the issue.[88]

The Eighth Circuit has twice cited *Hall Street*, in dicta, for the proposition that the exclusive grounds for vacating or modifying an arbitration award are found in 9 U.S.C. sections 10 and 11, but it has not expressly addressed the question of whether manifest disregard remains a ground to vacate an arbitration

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[82] *Id.*

[83] *Id.* at 358.

[84] *See Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008) ("We acknowledge the Supreme Court's recent holding in *Hall Street* . . . that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act ('FAA') .")

[85] *Vitarooz Corp. v. G Willi Food Int'l, Ltd*., No. 05-5363, 2009 WL 1844293, *5 (D.N.J. June 26, 2009); *Franko v. Ameriprise Fin. Servs., Inc.,* No. 09-09, 2009 WL 1636054 (E.D.Pa. June 11, 2009); *Williams v. RI/WFI Acquisition Corp.*, No. 06 C 2103, 2009 WL 383420, at *2 & n.3 (N.D. Ill. Feb. 11, 2009); *Doerflien v. Pruco Sec., Inc.*, NO. 1:07-CV-0738-DFHJMS, 2009 WL 232134, at *2 (S.D. Ind. Jan. 30, 2009); *In re Raymond Prof'l Group, Inc.*, 397 B.R. 414, 430-31 (Bankr. N.D. Ill. 2008) ("In short, 'manifest disregard' can be shown only if statutory grounds for vacatur under the FAA can be shown."); *Joseph Stevens & Co. v. Cikanek*, No. 08 C 706, 2008 WL 2705445, at *4 (N.D. Ill. July 9, 2008) (citing *Wise v. Wachovia Sec., LLC,* 450 F.3d 265, 268-69 (7th Cir. 2006) ("[W]e have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground—'where the arbitrators exceeded their powers.'")); *see also Jimmy John's Franchise, LLC v. Kelsey*, 549 F. Supp.2d 1034, 1037-39 (C.D. Ill. 2008) (citing *Hall Street* but applying narrow doctrine of manifest disregard without addressing *Hall Street*'s impact).

[86] *Qorvis Commc'ns, LLC v. Wilson,* 549 F.3d 303, 311-312 (4th Cir. 2008).

[87] *MCI Constructors, Inc. v. Hazen & Sawyer, PC*, No. 1:99CV2, 2009 WL 632930, at *5 & n.8 (M.D.N.C. Mar. 9, 2009).

[88] *Id.*

award.[89] The Minnesota District Court and the District Court for the Eastern District of Missouri have held that *Hall Street* precludes review of arbitration awards under judicially-created doctrines such as manifest disregard.[90] The Southern District of Iowa, however, cited *Hall Street* but reviewed an award for manifest disregard without acknowledging that *Hall Street* might foreclose that review.[91] Thus, the Eighth Circuit likely will be required to address the issue very soon.

The Tenth, Eleventh, and District of Columbia Circuits have not addressed *Hall Street.* The District Courts in these circuits have recognized, but skirted, the issue.[92]

V. Contractual Modification of the Texas Act

The Texas Supreme Court recently granted a petition for review that squarely presents the question of whether parties can contractually limit an arbitrator's authority or expand review of arbitration awards under the Texas General Arbitration Act (TAA). In *Quinn v. Nafta Traders, Inc.*, Nafta Traders included the following arbitration provision in its employment handbook:

> The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.[93]

Quinn sued Nafta Traders for violations of the Texas Human Rights Act, and the trial court compelled the parties to arbitration.[94] The arbitrator awarded Quinn damages and attorney's fees, and Quinn moved to confirm the award.[95] Nafta Traders filed a motion to vacate the award, but the trial court granted Quinn's motion to confirm the award.[96]

On appeal, Nafta Traders argued that "the parties' arbitration agreement expands the scope of judicial review authorized under the TAA to include grounds not expressly identified in the statute."[97] Nafta argued that "the arbitrator made several errors of law and those alleged errors are subject to judicial review following the arbitration."[98] Specifically, Nafta argued that "(1) the arbitrator applied the wrong law, (2) there was no or insufficient evidence of sexual discrimination, (3) it was an abuse of discretion to award attorney's fees, (4) the award of special damages was incorrect, and (5) there was no or insufficient evidence of mental anguish."[99]

The Dallas Court of Appeals assumed, without deciding, that the arbitration agreement expanded the scope of judicial review of the arbitration award.[100] The court noted that the Texas Supreme Court has not addressed whether parties can contractually expand the grounds for review under the TAA.[101] The court cited *Hall Street*, and found it persuasive because of the similarities between the TAA and the FAA:

> Like the FAA, the statutory grounds for vacating and modifying an award under the TAA are extremely narrow and there is no language allowing parties to contract for expanded judicial review. . . . These grounds reflect severe departures from an otherwise proper arbitration process and are of a completely different character than ordinary legal error. . . . As the Supreme Court noted in *Hall, "it would stretch basic interpretive principles to expand the [statutory]*

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[89] *See Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008); *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, 531 F.3d 679, 683 (8th Cir. 2008).

[90] *Medicine Shoppe Int'l, Inc. v. Simmonds*, No. 4:08CV90 FRB, 2009 WL 367703, at *3 (E.D. Mo. Feb. 11, 2009); *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp.2d 993, 999 (D. Minn. 2008).

[91] *Volk v. X-Rite, Inc.*, 599 F.Supp.2d 1118, 1123, 1125-32 (S.D. Iowa 2009).

[92] *Regnery Pub., Inc. v. Miniter*, 601 F.Supp.2d 192, 195 (D.D.C. 2009); *Carey Rodriguez Greenburg & Paul, LLP v. Arminak*, 583 F. Supp.2d1288, 1291 (S.D. Fl. 2008); *DMA Int'l, Inc. v. Quest Commc'ns Int'l*, NO. CIVA 08CV00358WDMBNB, 2008 WL 4216261, at *4 (D. Colo. Sept. 12, 2008).

[93] 257 S.W.3d 795, 797 (Tex. App.–Dallas 2008, pet. granted).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 798.

[99] *Id.* at 797-98.

[100] *Id.* at 798 n.1.

[101] *Id.* at 798.

> *grounds to the point of evidentiary and* legal review generally."
>
> A statute with no provision for expansion cannot permit contracting parties to supplement review for specific instances of egregious conduct or clerical error by additionally providing for judicial review for any legal error. Moreover, section 171.087 addressing judicial confirmation is not written as a default provision in the event the parties' contract is silent on this issue. On the contrary, the TAA specifically mandates confirmation in all cases except where statutory grounds are offered for vacation, modification, or correction. We therefore conclude that parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute.[102]

Nafta Traders argued, in the alternative, that the arbitrator exceeded his powers[103] by making the same legal errors previously argued.[104] Nafta Traders' argument again relied on the arbitration provision as its authority.[105] The court of appeals rejected this approach as a misapplication of the statutory provision and an end-run around *Hall Street:*

> An arbitrator's authority is limited to disposition of matters expressly covered by the agreement or implied by necessity. Arbitrators therefore exceed their authority when they decide matters not properly before them. Nafta does not argue that the arbitrator decided a matter not before him. Instead, it contends the arbitrator decided the matters before him incorrectly. Moreover, our adoption of Nafta's argument would allow Nafta to accomplish indirectly what we have already concluded it cannot do directly, that is, contractually expand judicial review of the arbitration decision. Because Nafta has not established that the arbitrator decided a matter not properly before him, we cannot conclude the arbitrator exceeded his powers under section 171.088(a)(3)(A).[106]

Thus, according to the Dallas Court of Appeals, parties cannot contractually expand the TAA's scope of review of arbitration awards, nor can they contractually define the manner in which an arbitrator should apply the law and then challenge the award when the arbitrator fails to comply.[107] The Dallas Court of Appeals did not consider whether common law or public policy grounds to vacate arbitration awards are preempted by the TAA.[108]

Nafta Traders's petition for review raises two issues: (1) whether parties can contractually limit an arbitrator's authority under the TAA, and (2) whether parties can contractually expand the scope of review under the TAA.[109] The Texas Supreme Court granted Nafta Traders's petition, and oral argument is scheduled for October 8, 2009.

VI. Manifest Disregard of the Law in Texas State Courts

The Texas Supreme Court has not yet addressed whether manifest disregard survives *Hall Street* as a ground for review of arbitration awards under the FAA or the TAA. Justice Brister, however, has shed some light on what his opinion will be when the issue comes before the court. In *In re Poly-America*, *LP*, Justice Brister cited *Hall Street* in his dissent, stating that:

> Both federal and state law require courts to enforce an arbitrator's decision, no matter what it is, with very few exceptions. The allowable

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[102] *Id.* at 798-99 (citations omitted).

[103] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(3)(A) (Vernon 2005) (providing that an arbitration award can be vacated if the arbitrator exceeds his powers).

[104] *Quinn*, 257 S.W.3d at 799.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *See* Nafta Traders Petition for Review, No. 08-612, *available at* http://www.supreme.courts.state.tx.us/ebriefs/08/08061301.pdf (last visited July 26, 2009).

> exceptions concern extrinsic or procedural matters like corruption, fraud, or refusing to hear evidence; they do not include (as the Supreme Court just held) disregarding the law, even if a legal error is "manifest."[110]

The Houston First District Court of Appeals and the San Antonio Court of Appeals, applying the FAA, have reached the same conclusion as the Fifth Circuit—that manifest disregard is no longer a valid ground for review of arbitration awards.[111]

The Texarkana court of appeals, however, has questioned the Fifth Circuit's *Citigroup* decision, noting that courts around the country are split on the effect of *Hall Street* and that Texas Courts are not bound to follow Fifth Circuit precedent even on matters of federal law.[112] The Texarkana court was writing on a case transferred from the Dallas Court of Appeals, and declined to guess how the Dallas court would decide the issue, as it was not necessary to the disposition.[113] Subsequently, the Dallas Court of Appeals noted that *Hall Street* cast doubt on the continuing validity of manifest disregard in a case decided under the FAA, but it did not resolve the question.[114] The Fort Worth Court of Appeals likewise noted *Hall Street*, but it has not yet decided the issue.[115]

In *Cameron International Corp. v. Vetco Gray, Inc.*, the Fourteenth Court of Appeals addressed *Hall Street* in the face of a request to adopt a new, common law standard for reviewing arbitration awards under the FAA.[116] The appellant argued that the arbitrator should be treated as a mutually retained expert, and thus, the standards for reliability of expert opinions should apply to arbitration awards.[117] The court rejected this argument, citing *Hall Street*:

> Any attempt to impose an expert-witness reliability standard on an arbitrator would be completely counter to this special status and provides sufficient reason to reject appellant's suggestion outright. However, if additional support is needed to reject the idea of treating an arbitrator like an expert witness, one need only look to the Supreme Court's recent opinion in *Hall St. Assocs., L.L.C. v. Mattel, Inc.* . . . . In *Hall St.,* the Supreme Court held that section 10 of the FAA provides the exclusive means for vacating an arbitrator's award. According to the Supreme Court, "any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'"[118]

VII. Texas Legislation

Last legislative session, Senator West filed Senate Bill 222, which was a comprehensive arbitration bill, and it proposed significant changes to the current enforceability of arbitration contracts, selection of arbitrators, and review of arbitration awards.[119] The introductory portion highlighted problems with the current arbitration process, citing the unfairness to consumers who are forced to arbitrate their claims to their substantial detriment.

Under Senate Bill 222, section 171.001 would be amended to render void and unenforceable certain arbitration agreements, including agreements to arbitrate (1) disputes between employers and

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[110] 262 S.W.3d 337, 362 & n.15 (Tex. 2009) (Brister, J., dissenting) (citing *Hall Street*, 128 S.Ct. at 1404).

[111] *Allstyle Coil Co. v. Carreon*, No. 01-07-00790-CV, 2009 WL 1270411, at *1-3 (Tex. App.–Houston [1st Dist.] May 7, 2009, no pet.); *Chandler v. Ford Motor Credit Co., LLC,* NO. 04-08-00100-CV, 2009 WL 538401, at *3 (Tex. App.–San Antonio Mar. 4, 2009, no pet. h.) (mem. op.) (Rule 53.7(f) motion granted).

[112] *Xtria L.L.C. v. Int'l Ins. Alliance Inc.*, No. 06-08-00073-CV, 2009 WL 1347171, at *5-7 (Tex. App.–Texarkana May 15, 2009, pet. filed).

[113] *Id.*

[114] *Townes Telecomm., Inc. v. Travis, Wolff, & Co., LLP*, No. 05-08-00079-CV, 2009 WL 1844330, at *2 (Tex. App.–Dallas June 29, 2009, no pet. h.).

[115] *Mauldin v. MBNA Am. Bank, N.A.*, No. 2-07-208-CV, 2008 WL 4779614, at *2 & n.4 (Tex. App.–Fort Worth Oct. 30, 2008, no pet.) (mem. op.).

[116] No. 14-07-00656-CV, 2009 WL 838177, at *8 (Tex. App.–Houston [14th Dist.] Mar. 31, 2009, no pet. h.) (mem. op.) (Rule 53.7(f) motion granted).

[117] *Id.*

[118] *Id.*

[119] *See* Tex. S.B. 222, 81st Leg., R.S. (2009), *available at* www.legis.state.tx.us/tlodocs/81R/billtext/pdf/SB00222I.pdf (last visited Feb. 25, 2009) (proposing to amend Texas Civil Practice & Remedies Code Chapter 171).

employees; (2) disputes between consumers and business organizations or entities providing goods, property, services, money, or credit; (3) disputes between franchisors and franchisees; and (4) disputes arising under statutes intended to protect civil rights or to regulate transactions between parties of unequal bargaining power.

Next, the bill attempted to alter the *Prima Paint* rule, which requires an arbitrator to determine the validity of an arbitration agreement when a party opposing arbitration challenges the validity of other provisions in the contract besides the arbitration provision itself.[120] Specifically, the bill stated:

> Except as otherwise provided by this chapter, the validity or enforceability of an arbitration agreement shall be determined by a court, rather than the arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing the agreement.

The bill also provided that: (1) absent knowing waiver, a court order compelling arbitration may not violate constitutionally-protected rights; (2) an arbitrator must satisfy objective qualification standards that consider education, training, and experience; (3) an arbitration hearing may not proceed in the absence of notice or waiver of notice; and (4) a party is entitled to obtain a stenographic recording of an arbitration hearing.

Most significantly, for purposes of this paper, the bill proposed that an arbitration award be vacated if it violates public policy or if the arbitrator manifestly disregards the law, and that a party may appeal a court judgment or decree granting an application to compel arbitration. This bill was referred to the Senate Jurisprudence Committee, and no action was taken on the bill before the end of the session. However, it can be assumed that the issue will be raised again in the next legislative session.

[120] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967); *Forrest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 & n.13 (Tex. 2008) (arguments regarding enforceability of arbitration provision are decided by court, while arguments relating to enforceability of the entire contract go to the arbitrator).

VIII. Federal Legislation, Claims Against and Reactions by National Arbitral Forums

Both the House and Senate are considering various bills to amend the FAA, referred to as the Arbitration Fairness Act. None of them, however, proposes to alter Section 10 or otherwise directly and legislatively overrule *Hall Street*.[121] Instead, the bills propose to limit altogether the scope of the FAA, particularly "forced pre-dispute arbitration" in consumer, employment, nursing home, and franchise contracts.

On July 14, 2009, the Minnesota Attorney General sued the largest arbitral forum that handles consumer credit card collection cases, the National Arbitration Forum (NAF), claiming the NAF conspired with credit card companies to favor them and disfavor consumers in connection with mandatory arbitration. On July 19, 2009, just five days after the suit was filed, the parties entered a consent decree under which the NAF agreed to never again administer consumer debt claims, including disputes involving credit cards, consumer loans, utilities, health care, and consumer leases.[122]

Also on July 19, 2009, the Minnesota Attorney General wrote an open letter to the American Arbitration Association, which claims to be the world's largest dispute resolution service, asking the AAA to voluntarily stop handling consumer debt disputes. In response, on July 23, 2009, the AAA issued a press release stating that it will no longer administer any consumer debt claims until new procedures are in place to insure fairness, and it invited the House Subcommittee on Domestic Policy to spearhead reform in the areas of consumer notification, arbitrator neutrality, pleading and evidentiary standards,

[121] House Bill 1020 and Senate Bill 931 currently are in committee and neither directly addresses Section 10. Rather, they are designed to limit the scope of the FAA and "forced" pre-dispute arbitration clauses in consumer contracts. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009). Senate Bill 2838 and HR 6126 are similar although they would limit mandatory, pre-dispute arbitration clauses in nursing home agreements and also are in committee. Arbitration Fairness Act of 2009, H.R. 6126, 111th Cong. (2009); Arbitration Fairness Act of 2009, S. 6126, 111th Cong. (2009).

[122] *See* Appendix A, *National Arbitration Forum to Cease* Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges, *available at* http://www.adrforum.com/newsroom.aspx?itemID=1528 (last visited July 29, 2009).

respondents' defenses and counterclaims, and arbitrator training and recruitment.[123]

On July 22, 2009, the House Domestic Policy Subcommittee conducted a hearing entitled "'Arbitration' or 'Arbitrary': The Misuse of Mandatory Arbitration to Collect Consumer Debts." Minnesota's Attorney General testified, as well as representatives of the AAA and NAF. So while Congress may not yet be considering amendments to Section 10 of the Act in response to *Hall Street*, arbitration change is in the political wind.

[123] *See* Appendix B, The American Arbitration Association® Calls For Reform of Debt Collection Arbitration Largest Arbitration Services Provider Will Decline to Administer Consumer Debt Arbitrations until Fairness Standards are

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National Arbitration Forum to Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges

MINNEAPOLIS, July 19, 2009

American Consumers to Lose Affordable Access to Justice through Nation's Largest Administrator of Consumer Arbitration Disputes

BusinessWire -- The National Arbitration Forum (FORUM), the largest U.S. administrator of consumer arbitrations, today announced that it will voluntarily cease to administer consumer arbitration disputes as of Friday, July 24, 2009, as part of a settlement agreement with the Minnesota Attorney General.

"The National Arbitration Forum remains committed to consumer arbitration as the best and most affordable option for consumers to resolve disputes quickly and efficiently. However, the FORUM lacks the necessary resources to defend against increasing challenges to arbitration on all fronts, including from state Attorneys General and the class action trial bar," said Forthright CEO Mike Kelly. "Mounting legal costs, a challenging economic climate, and increased legislative uncertainty surrounding the future of arbitration have prompted the FORUM to exit the consumer arbitration arena. At this time, the costs of providing consumer arbitration services far exceed the revenue generated. Until Congress resolves the legal and legislative uncertainty the cost is simply too high for users and providers of consumer arbitration."

Legislative proposals pending in both houses of Congress threaten to eliminate pre-dispute arbitration as an effective means of alternative dispute resolution. The Arbitration Fairness Act of 2009 (S. 931/H.R. 1020) would invalidate every pre-dispute contractual arbitration agreement that is part of a consumer, financial or franchise dispute – in effect, every contract. The Fairness in Nursing Home Arbitration Act (S. 512/H.R. 1237) would eliminate pre-dispute mandatory arbitration in all nursing home contracts. Legislation before the House to create a new Consumer Financial Protection Agency (H.R. 3126) addresses arbitration and would give broad regulatory authority to restrict or eliminate all consumer arbitrations.

"The National Arbitration Forum provides fair and affordable access to justice to American consumers regardless of size of their claims. Without access to arbitration, consumer disputes will now be forced into an overcrowded and underfunded legal system, where many consumers who cannot afford attorneys will have to navigate complex court procedures," continued Kelly. "The consequence to American consumers is that there will be no meaningful alternative to costly and unpredictable litigation."

Notably, nothing in the Minnesota Attorney General's complaint alleges that arbitration proceedings administered by the FORUM are unfair; the fairness of arbitration is ensured by the independence of the neutral arbitrators.

National Arbitration Forum consumer arbitration claims are decided by an independent panel of more than 1,600 highly experienced and impartial legal professionals, including former judges and experienced attorneys. FORUM neutrals are bound to a code of professional ethics, and decide cases outside of any influence from the FORUM or the other parties.

ADR NEWS

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About the National Arbitration Forum (FORUM)

Founded in 1986, the National Arbitration Forum (FORUM) is a world leader in arbitration and mediation services. The FORUM provides accessible civil justice through the recruitment, selection, and management of a highly experienced and distinguished panel of over 1,600 former judges and seasoned lawyers. Now optimized by Forthright, the FORUM is the faster, lower cost, and superior alternative to litigation, that ensures parties receive the same outcomes they would in court.
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American Arbitration Association
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NEWS RELEASE
For Immediate Release

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The American Arbitration Association® Calls For Reform of Debt Collection Arbitration

Largest Arbitration Services Provider Will Decline to Administer Consumer Debt Arbitrations until Fairness Standards are Established

New York, NY– (July 23, 2009) – The American Arbitration Association (AAA), the world's largest conflict management and dispute resolution services organization, today recommended in a House subcommittee hearing that the process surrounding consumer debt collection arbitration needs major reform and recommended a national policy committee to identify and research solutions. AAA said it will not administer any consumer debt collection programs until those solutions are determined.

AAA senior vice president Richard Naimark told the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee that the AAA "has not administered significant numbers of debt collection arbitrations relative to some other organizations," and has not handled any since June after it concluded a single high-volume program. However, he said that AAA had independently reviewed areas of the process and concluded that it had some weaknesses. As a result of that review, it is evident to the AAA that "a series of important fairness and due process concerns must be addressed and resolved before we will proceed with the administration of any consumer debt collection programs." According to Mr. Naimark, areas needing attention from the national policy committee include consumer notification, arbitrator neutrality, pleading and evidentiary standards, respondents' defenses and counterclaims, and arbitrator training and recruitment.

"AAA has been working with the Domestic Policy Subcommittee to review potential improvements in consumer debt collection arbitration procedures for some time. We believe that arbitration can play a major role in consumer debt collection disputes. A national policy committee dedicated to meaningful reform can enhance an array of due process elements so that there is deeper fairness and transparency. Consumers deserve an alternative to litigation, but they also need to be able to trust that option. Our goal will be to achieve that trust," Mr. Naimark said after the hearing.

"We have been studying this issue for some time. We made our decision to impose a moratorium on administering consumer debt arbitration independently and not at the behest of any outside entity as has been claimed. We commend the Domestic Policy Subcommittee for its initiatives to protect consumers in debt collection cases, and we will continue to work with it willingly and enthusiastically," Mr. Naimark said.

About the American Arbitration Association
The global leader in conflict management since 1926, the American Arbitration Association is a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, negotiation, democratic elections and other voluntary procedures. In 2008, 138,447 cases were filed with the Association in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. Through 30 offices in the United States, Ireland, Mexico, and Singapore, the AAA provides a forum for the hearing of disputes, rules and procedures and a roster of impartial experts to resolve cases. Find more information online at www.adr.org.

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