



The Elusiveness of the Doctrine of Manifest Disregard under the Federal Arbitration Act and the New Jersey Arbitration Act

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It is well settled that federal and state laws promote arbitration and there is a strong presumption in favor of enforcing arbitration awards.¹ The Federal Arbitration Act (FAA)² was first enacted over 90 years ago, in 1925, and has long been recognized as reflecting “a liberal policy favoring arbitration.”³ In line with the preference for arbitration, and to confirm arbitration awards, the FAA specifies only four grounds on which *vacatur* of an arbitration award is permitted upon the application of a party:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁴

While New Jersey has had laws regarding arbitration for decades, the Revised Uniform Arbitration Act (NJAA), which is patterned after the FAA, currently governs the practices, procedures and principles of arbitration in New Jersey.⁵ The NJAA has six (as opposed to four) grounds for *vacatur*; but, similar to its federal counterpart, the grounds are extremely limited and are based primarily on the misconduct of the arbitrator:

- (1) the award was procured by corruption, fraud, or other undue means;
- (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
- (4) an arbitrator exceeded the arbitrator's powers;
- (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
- (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.⁶

Because arbitrators are granted extremely broad powers under both the

FAA and NJAA,⁷ and are not bound by legal precedent or the rules of evidence⁸ (unless the parties agree that the arbitrators are to be bound by them), the scope of review of an arbitration award is very narrow.⁹ An arbitrator's award will not be vacated as a result of the arbitrator's legal error.¹⁰ But what happens when an arbitrator manifestly disregards the law in connection with rendering an award, since neither the language of the FAA nor of the NJAA address the issue?

What is Manifest Disregard?

The United States Supreme Court held, in *Wilko v. Swan*, 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."¹¹ This language resulted in what has now become known as the doctrine of manifest disregard, and a number of federal circuits have found that an arbitrator's manifest disregard of the law is an additional ground for *vacatur*, on top of those listed in Section 10 of the FAA.¹²

For manifest disregard, the decision of the arbitrator/arbitrators "must fly in the face of clearly established legal precedent,"¹³ such as where an arbitrator "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."¹⁴ Put another way, "'manifest disregard' is a judicially-created doctrine by which '[a federal] district court may...vacate an arbitrator's decision [that] evidences a manifest disregard for the law rather than an erroneous interpretation of the law.'"¹⁵ Disregard of the evidence, and mistakes of fact or law, are not encompassed within the doctrine of manifest disregard of the law, and "are not grounds for *vacatur* in their own rights."¹⁶

A party seeking to vacate an arbitration award based on the arbitrators' manifest disregard of the law carries a heavy burden, since the party must prove "that

the arbitrators were fully aware of the existence of a clearly defined governing legal principle, but refused to apply it, in effect, ignoring it."¹⁷

Because of the similarities between the FAA and NJAA, many New Jersey state courts applying the NJAA cite favorably to cases interpreting the FAA and appear to have adopted a similar definition of the doctrine of manifest disregard, but its application in New Jersey is questionable.¹⁸

The Current State of Manifest Disregard under the FAA

In 2008, the United States Supreme Court decided *Hall Street Associates, LLC v. Mattel, Inc.*,¹⁹ which called into question the validity of the doctrine of manifest disregard. The Court did not outwardly reject the doctrine, but rather held that Section 10 of the FAA provides the "exclusive" grounds for vacating an arbitration award.²⁰ The Court dissected the wording in *Wilko v. Swan*,²¹ and held that "there is the vagueness of *Wilko's* phrasing" and the phrase "manifest disregard" perhaps "merely referred to the §10 grounds collectively, rather than adding to them."²² Subsequently, when the Supreme Court was presented with the chance to clarify the validity or invalidity of the doctrine, it declined to "decide whether 'manifest disregard' survives...*Hall Street*...as an independent ground for review or as a judicial gloss on the enumerated ground for *vacatur* set forth at 9 U.S.C. § 10."²³

As a result of the U.S. Supreme Court's unclear rulings, some of the federal circuits have continued to vacate arbitration awards based on an arbitrator's "manifest disregard of the law,"²⁴ and yet other circuits have explicitly held that manifest disregard is no longer an independent ground for setting aside an arbitrator's award.²⁵ Other circuits, including the Third, have not yet answered the question, and a determination regarding whether the doctrine

will be recognized as a standalone basis for *vacatur* remains unknown.²⁶ As one District of New Jersey court said: “Rather than viewing [manifest disregard] as an extra-statutory vehicle for *vacatur*, this Court—in the absence of a Third Circuit directive otherwise—will continue to apply the manifest disregard standard as a means to enforce § 10, consistent with *Hall Street*.”²⁷

Manifest Disregard under the NJAA

Under New Jersey law, arbitration awards are generally presumed valid.²⁸ It is well settled that “there is a strong preference for judicial confirmation of arbitration awards.”²⁹ New Jersey had recognized a standard that permitted judicial intervention when an arbitrator’s decision of law was “clearly mistaken” and “appear[ed] on the face of the award.”³⁰ This judicially created standard was rejected two years later, in *Tretina Printing, Inc. v. Fitzpatrick & Associates*.³¹ In *Tretina*, the New Jersey Supreme Court imposed a strict standard of review of arbitration awards, noting that the NJAA “narrowly defines the circumstances under which a court may” vacate an award.³²

In *Tretina*, the New Jersey Supreme Court also declared that, “in rare circumstances a court may vacate an arbitration award for public-policy reasons.”³³ Despite the New Jersey Supreme Court’s restrictive holding in *Tretina*, state courts have continued to apply the doctrine of manifest disregard, but have done so in conjunction with the public policy exception. The Court noted that this “heightened judicial scrutiny” is limited to circumstances where the court is acting in its role as *parens patriae*, such as in the case of an arbitration award affecting child support,³⁴ or “because public policy demands that a public-sector arbitrator, who must consider the effect of a decision on the public interest and welfare, issue a decision in accordance with the law.”³⁵ By way of

further example, an arbitrator’s award has been vacated as being in manifest disregard of the law and public policy when the award contradicted state law on the licensing requirement of health-care providers by finding in favor of an unlicensed medical practitioner who had been warned by the Department of Health that he could not operate until a license was issued.³⁶

Although numerous parties have sought to vacate an arbitration award based on the doctrine of manifest disregard, most New Jersey state courts have refused to find that the arbitrator’s rulings rise to the level required for manifest disregard, even if it is viable,³⁷ or have failed to make a declaration one way or another regarding the viability of the doctrine as a stand-alone basis for *vacatur*.³⁸

The Future of Manifest Disregard

Whether the Third Circuit will declare manifest disregard to be a valid basis for *vacatur* under the FAA remains to be seen. On the one hand, because the Supreme Court has not definitively rejected manifest disregard as a valid basis for *vacatur*, when the Third Circuit is directly faced with the issue it may determine that the doctrine is viable in order to promote justice and encourage arbitrators to apply precedential law. On the other hand, because of the strong presumption in favor of arbitration and finality of arbitration awards, the Third Circuit may instead decline to expand the grounds for vacating an arbitration award, and hold that manifest disregard is not a valid basis for *vacatur*.

In New Jersey, the *Tretina* decision continues to be the judicial pronouncement on the restrictive grounds for *vacatur*, but the door remains open regarding manifest disregard, since its application could avoid “sham” rulings.³⁹ Many courts continue to reference manifest disregard without declaring whether the doctrine may be

applied in isolation or only in combination with a public policy situation. Unlike the FAA, the NJAA includes the broad category of “an arbitrator exceed[ing] the arbitrator’s powers” as a valid basis for *vacatur*, which a court could find to encompass manifest disregard when faced with the question. Only time will tell. ☺

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ENDNOTES

1. *Atalese v. U.S. Legal Servs. Group, L.P.*, 219 N.J. 430, 440 (2014) (“The Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, and the nearly identical New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration.”)
2. 9 U.S.C. 1, *et seq.*
3. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (noting that Supreme Court case law has “repeatedly described the [FAA] as embodying a national policy favoring arbitration.”) (internal citations omitted).
4. 9 U.S.C. 10.
5. N.J.S.A. 2A:23B-1 *et seq.* The NJAA was adopted on June 23, 2003, with an effective date of Jan. 1, 2003. The NJAA superseded a prior version of the act, N.J.S.A. 2A:24-1 *et seq.*, and is very comprehensive, addressing, among other things, the validity and effect of

- arbitration provisions in written agreements (Sections 4 and 6); the manner and method by which judicial relief may be obtained by a particular litigant (Section 5); and the nature and type of judicial relief that may be sought by a party, both prior to, and at the conclusion of, the arbitration process (Sections 7, 8, 23 and 28). See Paul A. Rowe and Andrea J. Sullivan, *New Jersey Business Litigation*, §18-1, 18-3 at 575-86, 579-80 (2016 ed.).
6. N.J.S.A. 2A:23B-23.
 7. N.J.S.A. 2A:23B-15.
 8. *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 211 n. 9 (3d Cir. 2010) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)).
 9. *Newark Morning Ledger Co., v. Newark Typographical Union*, 797 F.2d 162, 165 (3d Cir. 1986) (holding that because of the strong presumption in favor of arbitration under the FAA, a court's review is exceedingly narrow and a district court should vacate arbitration awards "only in the rarest case[s]."); *Fawzy v. Fawzy*, 199 N.J. 456, 470 (2009) ("the scope of review of an arbitration award is narrow" under the NJAA).
 10. *Whitehead v. Pullman Group, LLC*, 811 F.3d 116, 121 (3d Cir. 2016).
 11. *Wilko v. Swan*, 346 U.S. 427, 436 (1953).
 12. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).
 13. *Whitehead, supra*, 811 F.3d at 121 (3d Cir. 2016) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995)).
 14. *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986)).
 15. *Goldman v. Citigroup Global Mkts., Inc.*, 834 F.3d 242, 255 (3d Cir. 2016) (quoting *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003)).
 16. *Popkave v. John Hancock Distribs. LLC*, 768 F. Supp. 2d 785, 795 n.3 (E.D. Pa. 2011).
 17. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003).
 18. See, e.g., *Associated Humane Soc'ys, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2014 N.J. Super. Unpub. LEXIS 2583, *11 (App. Div. Oct. 29, 2014).
 19. *Hall Street Assocs., L.L.C., supra*, 552 U.S. 576.
 20. *Id.* at 586.
 21. *Wilko, supra*, 346 U.S. 427.
 22. *Hall Street Assocs., supra*, 552 U.S. at 585-86.
 23. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n. 3 (2010).
 24. See *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009) (manifest disregard of the law "remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act"); *UBS Fin. Servs. v. Padussis*, 127 F. Supp. 3d 483 (D. Md. 2015) (reiterating that the Fourth Circuit recognizes manifest disregard of the law as a common law ground for vacating an arbitration award).
 25. See *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1026 (7th Cir. 2013) ("manifest disregard of the law is not a ground on which a court may reject an arbitrator's award unless it orders parties to do something that they could not otherwise do legally") (internal quotations and citation omitted); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) (manifest disregard of the law is no longer an "independent, nonstatutory ground" for vacating an arbitration award).
 26. See *Goldman, supra*, 834 F.3d at 256, n. 13 (noting the circuit split with regard to manifest disregard, as well as the Third Circuit's indecision, and declining to address whether manifest disregard has any continuing validity based on the conclusion that the plaintiff's claim did not raise a substantial question of federal law); *Whitehead, supra*, 811 F.3d at 120-21 (stating that the Third Circuit "has not yet weighed-in" on whether "manifest disregard of the law" survived *Hall Street*); *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F. 3d 19, 22 (1st Cir. 2010) (noting that the First Circuit has addressed the viability of manifest disregard *in dicta* and declining to "determine[] whether our manifest disregard case law can be reconciled with *Hall Street*.").
 27. *Vitarroz Corp. v. G. Willi Food Int'l Ltd.*, 637 F. Supp. 2d 238, 245 (D.N.J. 2009).
 28. *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 187 (1981).
 29. *Linden Bd. of Educ. v. Linden Educ. Ass'n*, 202 N.J. 268, 276 (2010) (citation and internal quotation marks omitted); see also *Martindale v. Sandvik, Inc.*, 173 N.J. 76 (2002).
 30. *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 494 (1992).
 31. *Tretina Printing, Inc. v. Fitzpatrick & Assocs.*, 135 N.J. 349 (1994).
 32. *Id.* at 355.
 33. *Id.* at 364.
 34. *Id.* (citing *Faherty v. Faherty*, 97 N.J. 99, 111 (1984)).
 35. *Id.* (citing *Kearny PBA Local #21 v. Town of Kearny*, 81 N.J. 208, 217(1979)).
 36. *Liberty Mutual Ins. Co. v. Open MRI of Morris & Essex, L.P.*, 356 N.J. Super. 567, 585 (Law Div. 2002).
 37. *Associated Humane Soc'ys, Inc., supra*, 2014 N.J. Super. Unpub. LEXIS 2583, *11 ("even if [manifest disregard] remains viable post-*Tretina*, vacating an arbitration award under that standard is warranted only if a reviewing court determines both that the arbitrators knew the correct law, and also engaged in a conscious decision to ignore it") (citing *Liberty Mutual Ins. Co., supra*, 356 N.J. Super. at 582-85).
 38. See, e.g., *Liberty Mutual Ins. Co., supra*, 356 N.J. Super. at 583-84 (noting that "no New Jersey court has discussed the effect of an arbitrator's manifest disregard of the law," looking to United States Supreme Court and federal circuit and district courts for guidance and ultimately finding the doctrine applicable in conjunction with the public policy exception).
 39. The Law Division noted in its conclusion in *Liberty Mutual Ins. Co.*, that if it had not vacated the award that was in manifest disregard of the law and in violation of public policy, the arbitration process would be rendered a "sham." 356 N.J. Super. at 585.