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Do Judicially Created Grounds for Vacating Arbitral Awards Still Exist? Why Manifest Disregard of the Law and Public Policy Exceptions Should be Considered under Vacatur

Visiting Nurse Association of Florida, Inc. v. Jupiter Medical Center, Inc., 145 So. 3d 1115 (Fla. 2014).

ASHLEY K. SUNDQUIST*

I. INTRODUCTION

When parties enter into an agreement with an arbitration provision, an arbitrator will typically have the final say in the dispute. Successful challenges to arbitral awards in court are rare, although there are several exceptions. The grounds for vacating an arbitral award under the Federal Arbitration Act (FAA) are set forth in 9 U.S.C. § 10.¹ Courts have created additional grounds for vacatur, including where awards manifestly disregard the law and when awards violate public policy.² However, the United States Supreme Court in *Hall Street* created a divide among the circuits as to whether judicially created grounds for vacatur are still permissible.³

The Court's strong language in *Hall Street* indicated the Court's intent for the FAA to provide the exclusive grounds for vacating an arbitral award. Therefore, once the Court addresses the circuit split, it will likely hold that judicially created grounds are not an acceptable form of vacatur. However, doing so would cause individuals injustice, in particular where awards manifestly disregard the law and go against public policy. This Note argues that if the Court abolishes judicially created grounds, it should reinterpret the FAA to include manifest disregard of the law and violations to public policy under the exceeded powers exception of the statute.

This Note begins in Part II by discussing the facts and holding of *Visiting Nurse Association of Florida, Inc. v. Jupiter Medical Center, Inc.*⁴ In Part III, this Note sets forth the legal background of vacatur and some of the most recent cases

*B.B.A., University of Wisconsin 2009, J.D./MBA, University of Missouri 2016. I would like to thank the editorial staff of the *Journal of Dispute Resolution* for the time spent helping edit this Note. I would also like to thank my husband and my parents who have edited numerous papers and who have helped me to become a much better writer.

1. 9 U.S.C. § 10 (2012).

2. See *infra* Part II.

3. See *Visiting Nurse Ass'n of Fla. v. Jupiter Medical Ctr., Inc.*, 145 So. 3d 1115, 1130 (Fla. 2014). 1130 ("The Supreme Court's decision in *Hall Street* . . . has led to a federal circuit court split regarding whether *Hall Street* prohibits all extra-statutory grounds for vacating an award, including judicially created grounds.").

4. *Visiting Nurse Ass'n*, 145 So. 3d at 1119.

on this issue. Part IV discusses the legal reasoning behind the Florida Supreme Court decision in *Visiting Nurse Association* and Part V argues that the Supreme Court should permit vacatur when an arbitrator manifestly disregards the law and when the award goes against public policy.

II. FACTS AND HOLDING

In February 2005, Visiting Nurse Association (VNA) and Jupiter Medical Center (JMC) entered into an agreement for VNA to purchase JMC's hospital-based home health care agency for \$639,000.⁵ Additionally, VNA and JMC filed a separate "office lease" agreement in which VNA agreed to occupy 5,000 square feet of office space in the hospital for \$375,000 in exchange for JMC's Home Health Agencies (HHA) referrals.⁶ Under the agreement, JMC would recommend VNA's HHA for patients who expressed no preference for another HHA.⁷ VNA believed it could generate \$1.5 million in revenue per year based on the 45 to 50 Medicare referrals JMC would provide each month.⁸

In November 2006, VNA suspected that JMC was rotating its HHA referrals to ensure equal distribution of HHAs and thereby reducing the number of patients being referred to VNA in violation of the agreement.⁹ In September 2007, JMC notified VNA that due to a shortage of office space, VNA could not continue to use the office space in the hospital and terminated the lease agreement.¹⁰

On November 1, 2007, VNA initiated arbitration proceedings against JMC for breach of contract.¹¹ VNA alleged that JMC breached the contract by implementing a rotating HHA referral system and by terminating VNA's lease agreement.¹² An arbitration panel delivered an interim award for VNA, issuing damages of \$1,251,213 and interest of \$900,000 due to VNA's loss of referrals.¹³ Additionally, the panel awarded \$352,267 to VNA for attorney's fees and other fees.¹⁴

JMC filed a motion for reconsideration with the panel after the interim award was pronounced arguing that panel's interpretation of the agreement violated multiple state and federal healthcare laws and regulations and therefore should not have been enforced.¹⁵ Specifically, JMC argued that the contract, which allowed

5. *Id.*

6. *Id.*

7. *Id.* The discharge procedures indicated that any patient requiring home health services post discharge would receive a discharge plan list of HHAs, which was provided by JMC. The list was updated annually and informed the patient of his or her right to freely choose the home health agency of their choice. The last provision stated, "If, after following the foregoing procedures, the patient expresses no preference, [JMC] will inform the patient of its relationship with the VNA. The purpose of establishing a working relationship with the VNA is to facilitate the smooth transfer of patients into post-hospital care and thereby reduce the average length of stay for hospitalization." *Id.*

8. *Id.*

9. *Id.*

10. *Visiting Nurse Ass'n*, 154 So. 3d at 119.

11. *Id.*

12. *Id.*

13. *Id.* at 1120-21.

14. *Id.* at 1121. The fees included \$214,047.50 in attorney's fees, \$16,550 in administrative filing fees and expenses, and \$71,780.07 in arbitrators' fees and expenses. Additionally, JMC was required to reimburse VNA \$49,890.05 for fees and expenses previously incurred by VNA. *Id.*

15. *Id.* Some of the laws JMC alleged the agreement violated were Florida's Anti-Kickback Statutes, FLA. STAT. §§ 465.054, 395.0185 (2009), the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7(b)(b) (2012), Medicare Hospital Condition of participation; Discharge planning, 42 C.F.R. § 482.43

the parties to influence future patient referrals, was in violation of multiple federal and state kickback laws and therefore should not be enforced.¹⁶ The panel denied the motion to reopen the award decision because the panel stated they had considered the violations during deliberations.¹⁷

With no other recourse available, JMC filed a motion to vacate the arbitration award in the Fifteenth Judicial Circuit Court in Palm Beach County, Florida, arguing that the award should be vacated because the panel impermissibly construed the contract.¹⁸ The state circuit court dismissed the motion to vacate and granted VNA's motion to enforce the award.¹⁹ On appeal, the Florida District Court of Appeals, Fourth District, held that although the illegality of a contract is not a basis to vacate an arbitral award, the trial court must consider such illegality in determining whether to enforce the award.²⁰ The Fourth District ultimately reversed and remanded the case to the trial court to determine the legality of the contract.²¹

Upon the Fourth Circuit's ruling, VNA filed a petition to the Florida Supreme Court, arguing that the Fourth Circuit's ruling directly conflicted with the holding in *Commercial Interiors Corporation of Boca Raton v. Pinkerton & Laws, Inc.*,²² which held that a trial court's disagreement with an arbitrator's application of the law is not a sufficient basis to vacate an arbitral award.²³ VNA claimed that the only grounds on which a court can vacate an arbitration award are set forth in Florida Statute 682.13, which does not include illegality of a contract.²⁴ JMC argued that the illegality of a contract is a judicially created ground not recognized in the statute, and thus, the arbitration panel exceeded its powers by not considering the legality of the contract.²⁵

The Florida Supreme Court held that the referral of Medicare patients was a transaction that involved interstate commerce and was therefore subject to the FAA.²⁶ Under the FAA, a court cannot review an arbitrator's determination of the legality of a contract.²⁷ Therefore, the court held that the arbitration panel did not exceed its powers by construing the contract to be a lawful agreement.²⁸ Additionally, the court held that considering the issue under the Florida Arbitration Code would render the same result.²⁹

(2012), Florida's Patient Brokering Act, FLA. STAT. § 817.505 (2009), and the Federal Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a (2012). *Id.*

16. *Visiting Nurse Ass'n*, 154 So. 3d at 1122.

17. *Id.*

18. *Id.*

19. *Id.* "The circuit court dismissed the motion to vacate and granted the motion to enforce the award without little explanation or analysis." *Id.* at 1122-23.

20. *Id.* at 1119.

21. *Id.*

22. *Commercial Interiors Corp. of Boca Raton v. Pinkerton & Laws, Inc.*, 19 So. 3d 1062, 1064 (Fla. Dist. Ct. App. 2009).

23. *Visiting Nurse Ass'n*, 154 So. 3d at 1123.

24. *Id.* at 1124.

25. *Id.*

26. *Id.* at 1124-25.

27. *Id.* at 1132.

28. *Id.* at 1133.

29. *Visiting Nurse Ass'n*, 154 So. 3d at 1136-38.

III. LEGAL BACKGROUND

Congress passed the FAA³⁰ in 1925, allowing the resolution of disputes by arbitration to be enforceable and irrevocable.³¹ The United States Supreme Court has continually affirmed that national policy favors arbitration.³²

A. Vacating an Arbitral Agreement

This national policy is demonstrated further in the FAA's limitation on courts to vacate arbitral awards.³³ A party who has agreed to arbitrate has relinquished his or her right to judicial review, and a court will set an arbitral decision aside only in very unusual circumstances.³⁴ The FAA sets forth the limited grounds for vacatur, which include corruption, fraud or undue means; arbitrator misconduct; or arbitrators who "exceeded their powers."³⁵

I. Judicially Created Grounds for Vacatur

Since the adoption of the FAA, lower federal and state courts have recognized additional grounds for vacating arbitral awards.³⁶ Although these exceptions are judicially recognized, successful challenges on these grounds are rare.³⁷ Parties who challenge an arbitral award have a heavy burden since parties often agree to arbitration in order to reduce costs, to increase efficiency, and to enhance control over who settles the dispute by choosing the arbitrator.³⁸ Allowing parties to vacate arbitral awards would result in arbitration beginning, rather than ending, party disputes.³⁹

30. 9 U.S.C. §§ 1-307 (2012).

31. 9 U.S.C. § 2 (2012). The statute states as follows: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

32. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (Congress enacted the FAA to replace judicial indisposition to arbitration with a "national policy favoring arbitration and plac[ing] arbitration agreements on equal footing with all other contracts."); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (stating "Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring it and placing arbitration agreements on equal footing with all other contracts") (citations omitted); see also *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . .").

33. *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 478 (4th Cir. 2012) ("[W]e begin by noting that the FAA limits courts' ability to vacate arbitral awards as part of its comprehensive scheme to replace judicial hostility to arbitration with a national policy favoring it.") (citing *Hall St. Assocs.*, 552 U.S. at 581).

34. *First Options of Chi. v. Kaplan*, 514 U.S. 938, 942 (1995).

35. 9 U.S.C. § 10 (2012).

36. Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1110 (2009).

37. *Id.* at 1116.

38. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008), *rev'd*, 559 U.S. 662 (2010) (stating that parties choose arbitration to "enhance efficiency, to reduce costs, or to maintain control over who would settle their disputes . . .").

39. *Id.*

Manifest disregard of the law has been one of the most common grounds for arbitral vacatur outside of the FAA statute.⁴⁰ The United States Supreme Court dicta in *Wilko v. Swan*⁴¹ indicated that, although mistaken interpretations of the law are not a justifiable reason for vacatur, manifest disregard for the law may be permitted.⁴²

In *Montes v. Shearson Lehman Brothers, Inc.*,⁴³ the Eleventh Circuit defined manifest disregard of the law and distinguished it from erroneous interpretation.⁴⁴ An arbitration panel that incorrectly applies the law has “simply made a legal mistake.”⁴⁵ However, under manifest disregard of the law, the arbitration panel must recognize the law and expressly disregard it.⁴⁶ The other federal circuits have defined manifest disregard of the law similarly.⁴⁷ By 1999, all federal circuits had adopted the manifest disregard standard as a means of vacating an arbitral award.⁴⁸

Arguing that an arbitral award goes against public policy is an even more challenging argument on which to prevail.⁴⁹ For an award to go against public policy, the public policy needs to be explicit and well defined in laws and legal precedents,⁵⁰ and the arbitral award must directly violate that policy.⁵¹ In *State University of New York v. Young*,⁵² the New York Supreme Court vacated an arbitral award because it went against public policy.⁵³ In that case, University Hospital employee David Young was fired for using the same syringe to draw blood from different patients.⁵⁴ Young took the case to arbitration, and the arbitrator instead imposed a two-month suspension without pay.⁵⁵ The hospital appealed, and the court held that the lesser-imposed penalty violated the State’s strong public policy of providing high-quality, safe hospital services, and the court affirmed the lower court’s vacatur.⁵⁶

The United States Supreme Court has alluded to a public policy exception when the policy is well defined and can be determined “by reference to the laws

40. See Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 143 (2011).

41. *Wilko v. Swan*, 346 U.S. 427, 436 (1953) *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 479-86 (1989) (holding that predispute agreement to arbitrate claims was enforceable).

42. *Id.* “[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.” *Id.* at 436-37.

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

44. *Id.* at 1461.

45. *Id.*

46. *Id.*

47. LeRoy, *supra* note 40, at 158-69.

48. *Id.* at 158.

49. See *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int’l Ass’n of Machinists & Aerospace Workers*, 886 F.2d 1200, 1210 (9th Cir. 1989); *MasTec N. Am., Inc. v. MSE Power Sys., Inc.*, 581 F. Supp. 2d 321, 329 (N.D.N.Y. 2008); *Saint Mary Home, Inc. v. Serv. Employees Int’l Union*, Dist. 116 F.3d 41, 45 (2d Cir. 1997).

50. *Stead Motors of Walnut Creek*, 886 F.2d at 1210.

51. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993) *abrogated by* *Frazier v. Citifinancial Corp.*, 604 F.3d 1313, 1322 n. 7 (11th Cir. 2010) (holding that there were no statutory grounds for vacating the arbitral award after *Hall Street*).

52. *State Univ. of N.Y. v. Young*, 170 A.D.2d 510 (1991).

53. *Id.* at 511-12.

54. *Id.* at 511.

55. *Id.*

56. *Id.* at 510-12.

and legal precedents and not from general considerations of supposed public interests.⁵⁷ In *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*,⁵⁸ an employee was discharged for violating a rule against having drugs on plant premises.⁵⁹ The case went to arbitration under the arbitration agreement, and the arbitrator ordered the company to reinstate the employee with back pay and full seniority.⁶⁰ The company sought to vacate the award in district court, arguing that the award was contrary to public policy because it reduced safety by permitting employees under the influence of drugs to operate dangerous machinery.⁶¹ The Fifth Circuit affirmed the district court's decision to vacate, and the Supreme Court reversed the decision on the basis that neither court demonstrated that the employee was actually under the influence of drugs when he was found.⁶² Although the Court reversed the decision, it stated that a question of whether a contract violates public policy is left to the courts.⁶³

Additional judicially created grounds for vacating an arbitral award, although seldom used, include vacating when the award is arbitrary and capricious⁶⁴ or when the award is found to be irrational.⁶⁵ Courts have held that an award is arbitrary and capricious when an arbitrator's decision is not clearly based on the facts of the case.⁶⁶ An award is considered to be irrational when there is no support in the record to justify it.⁶⁷ However, courts have typically interpreted irrationality to fall under the "exceeded their powers" exception of the FAA statute.⁶⁸

Although courts have created extra-statutory grounds for vacatur, the FAA does not indicate whether those grounds are permissible. The United States Supreme Court provided some guidance on this issue in *Hall Street Associates, L.L.C. v. Mattel, Inc.*⁶⁹ In that case, Mattel and Hall Street entered into a lease agreement where Mattel would indemnify Hall Street for any costs Mattel incurred for failure to comply with environmental laws.⁷⁰ A dispute arose when the property's water well was found to have high levels of pollutants and Mattel did not indemnify Hall Street according to the agreement.⁷¹ The parties agreed to arbitrate the issue pursuant to an arbitration agreement.⁷² The agreement also

57. *United Paperworkers Int'l Union, v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

58. *Id.*

59. *Id.* at 33.

60. *Id.* at 32-34.

61. *Id.* at 34-35.

62. *Id.* at 29, 45.

63. *United Paperworkers*, 484 U.S. at 43.

64. Reuben, *supra* note 36, at 1114-15; Jack Jarrett, *What's in A Name? Why Judicially Named Grounds for Vacating Arbitral Awards Should Remain Available in Light of Hall Street*, 20 GEO. MASON L. REV. 909, 915 (2013).

65. *Drummond Coal Co. v. United Mine Workers of Am.*, 748 F.2d 1495, 1497 (11th Cir. 1984).

66. *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992) (holding that the arbitral award was arbitrary and capricious because awarding damages was a reasonable interpretation of the statute and was required by law); *Bhd. of R.R. Trainmen v. Cent. of Ga. Ry. Co.*, 415 F.2d 403, 412 (5th Cir. 1969).

67. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 295-96 (3d Cir. 2010).

68. *See id.* ("The irrationality standard comes from the fourth ground 'exceeded their powers' provision . . ."); *see also Yonir Technologies, Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 210 (S.D.N.Y. 2002).

69. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

70. *Id.* at 579.

71. *Id.*

72. *Id.*

contained language that permitted the court to review the arbitrator's award for legal error where "(i) the arbitrator's finding of facts [were] not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law [were] erroneous."⁷³ The arbitrator decided for Mattel, and after multiple appeals and remands, the case made its way to the United States Supreme Court on the issue of whether statutory grounds for vacatur of an arbitral award could be supplemented by contract.⁷⁴

The Court held that the statutory language of the FAA constituted the exclusive grounds for vacatur and modification of an arbitration award and that a contract could not give the courts authority to review.⁷⁵ However, the Court did not address whether the statute could be supplemented through judicially created grounds, which has led to a federal circuit court split as well as differences among top state courts on the issue.⁷⁶

In *Citigroup Global Markets Inc. v. Bacon*,⁷⁷ the Fifth Circuit analyzed the holding in *Hall Street* and concluded that the Supreme Court intended that Sections 10 and 11 of the FAA provide the exclusive grounds for vacatur.⁷⁸ The Seventh, Eighth, and Eleventh Circuits have followed the holding in *Citigroup* in concluding that the Supreme Court was clear in its intention to have the statute set forth the only grounds for vacatur.⁷⁹ Additionally, the First Circuit stated in a footnote that *Hall Street* abolished manifest disregard as a way of vacating an arbitral award.⁸⁰

On the other side of the split, courts interpret *Hall Street* narrowly to apply only to contractual expansions, and therefore, judicially created grounds such as manifest disregard of the law are permissible as grounds for vacatur.⁸¹ In *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, the Second Circuit began its analysis by concluding that the holding in *Hall Street* permitted the use of manifest disregard of the law as a reason for vacating an arbitral award based on the dicta from *Wilko*.⁸² The Supreme Court heard the appeal, and in a footnote, the Court stated it would not address whether manifest disregard of the law was abolished in *Hall Street* as a judicially created ground for vacatur.⁸³

Because the Supreme Court refused to rule on the availability of judicially created grounds for vacatur, the Second Circuit continues to permit parties to

73. *Id.*

74. *Id.* at 578-582.

75. *Hall Street*, 552 U.S. at 578.

76. See Michael S. Oberman, 'The Other Shoe': Are Agreements Narrowing Judicial Review Enforceable?, 31 ALTS. TO HIGH COST LITIG. 71 (2013) ("After *Hall Street*, the highest courts of California, Alabama and Texas held that their state laws permit expanded review and are not preempted by the FAA. In contrast, the Maine, Georgia and Tennessee top courts held that their state statutes do not permit expanded review.")

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

78. *Id.* at 353.

79. See *Affymax, Inc. v. Ortho-McNiel-Janssen Parhm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (holding that manifest disregard of the law is not a ground for vacating an arbitral award); *Medicine Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding that the Court would not review the merit's of arbitrator's conclusions if the grounds were not enumerated in the FAA); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) (holding that judicially created grounds for vacatur are no longer viable after *Hall Street*).

80. *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 (1st Cir. 2008).

81. *Citigroup Global Markets*, 562 F.3d at 355-56.

82. *Stolt-Nielsen S.A. v. AnimalsFeeds Int'l. Corp.*, 548 F.3d 85, 95 (2nd Cir. 2008).

83. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 677 n.3 (2010).

claim manifest disregard as a means of vacating arbitral awards.⁸⁴ The Sixth and Ninth Circuits have followed the Second Circuit in holding that manifest disregard of the law is a permissible grounds for vacating an arbitral award.⁸⁵

2. *Vacatur under the Federal Arbitration Act*

The most popular and most successful ground for vacatur under the FAA statute is enumerated at § 10(a)(4), which provides that a party may seek to set aside an arbitral award due to the arbitrator exceeding his or her power.⁸⁶ However, in a study conducted in 2008, parties that argued for vacatur under this exception prevailed in only 6.3 percent of cases.⁸⁷ Parties have been most successful in establishing that the arbitrator exceeded his or her powers in three types of cases: first, where the award granted relief to a non-signatory to the arbitration agreement;⁸⁸ second, where the award was impermissibly vague,⁸⁹ and third, where the award involved a blatant disregard of the contract.⁹⁰

To blatantly disregard the contract, the arbitrator must do more than commit serious error, and thus, a party seeking to reverse an award under this section has a heavy burden.⁹¹ To grant vacatur under § 10(a)(4), a court must find that an arbitrator acted outside the scope of his or her contractual duties.⁹² Courts will look to see whether the arbitrator's interpretation of the contract was probable based on the facts of the case and whether the arbitrator acted within his or her scope of authority.⁹³ In *Oxford Health Plans LLC v. Sutter*,⁹⁴ the Supreme Court deter-

84. See *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339-40 (2d Cir. 2010) (“[W]e concluded that manifest disregard ‘remains a valid ground for vacating arbitral awards.’”) (quoting *Stolt-Nielsen*, 548 F.3d at 94).

85. See *Stolt-Nielsen*, 548 F.3d at 85; *Comedy Club, Inc. v. Improv W. Assoc.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (“We have already determined that manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA”); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. App'x. 415, 418 (6th Cir. 2008) (stating that the Court could vacate an arbitral award if the Court finds the arbitrator to be in manifest disregard of the law).

86. Lawrence R. Mills & Thomas J. Brewer, “*Exceeded Powers*”: *Exploring Recent Trends in Cases Challenging Tribunal Authority*, 31 ALTS. TO HIGH COST LITIG. 113 (2013).

87. Thomas J. Brewer, Lawrence R. Mills, *When Arbitrators “Exceed Their Powers” A New Study of Vacated Arbitration Awards*, 64 DISP. RESOL. J. 46, 48 (Feb.-April 2009).

88. See *Lumber Liquidators, Inc. v. Sullivan*, No. CIV.A. 10-11890-NMG, 2011 WL 5884252, at *3 (D. Mass. Aug. 10, 2011) (“the arbitrator exceeded her powers because an arbitration award cannot bind a nonparty”); *Brown v. Styles*, No. M2010-02403-COA-R3-CV, 2011 WL 3655158, at *6 n.10 (Tenn. Ct. App. Aug. 18, 2011) (holding that the agreement at issue did not include a party who agreed to arbitrate, therefore the arbitrator exceeded their powers).

89. See *Asia Pac. Hotel Guam, Inc. v. Dongbu Ins. Co.*, 2011 Guam 18, 8 (Guam Oct. 24, 2011) (vacating an award because the agreement had left open whether the work had been substantially completed and whether reasonable documentation had been done).

90. See *Sonic Auto., Inc. v. Price*, No. 3:10-CV-382, 2011 WL 3564884, *15-16 (W.D.N.C. Aug. 12, 2011) (holding that an arbitrator exceeded his powers by ignoring the plain language of the contract straying from the application of the contract).

91. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010); See Lawrence R. Mills & Thomas J. Brewer, “*Exceeded Powers*”: *Exploring Recent Trends in Cases Challenging Tribunal Authority*, 31 ALTS. TO HIGH COST LITIG. 113, 125 (2013).

92. *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 643 (9th Cir. 2010).

93. See *id.* (finding that courts “need only to determine whether the arbitrators’ interpretation was plausible.”) (quoting *Emp’rs Ins. of Wausau v. Nat’l Union Fire Ins. Co. of Pittsburg*, 933 F.2d 1481, 1486 (9th Cir.) (citations omitted); *Cent. W. Virginia Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267, 276 (4th Cir. 2011) (“[W]e nevertheless have an obligation to ensure that the arbitrator’s decision

mined that since the arbitrator reviewed the contract twice and both times he found that the contract permitted class proceedings, the arbitrator did not exceed his powers in finding that the contract provided for class arbitration.⁹⁵

B. Contract Validity

To avoid arguing vacatur under the FAA statute, parties may argue that the contract itself is not valid. The Supreme Court has categorized challenges to contract disputes involving an arbitration clause into two different categories.⁹⁶ The first type of claim challenges the validity of the arbitration agreement or provision itself.⁹⁷ The second category is when a party challenges the validity of the contract as a whole.⁹⁸

Under the first type of claim, the Supreme Court has established that a court can hear a dispute regarding a contract with an arbitration provision when there is an issue as to whether the parties agreed to submit a dispute to arbitration.⁹⁹ Additionally, if the issue concerns contract formation, parties will not be forced to submit that claim to arbitration and will be permitted to submit the issue directly to the courts.¹⁰⁰

However, courts will likely be restricted from hearing claims as to overall contract validity, leaving arbitration as the only means of challenging the validity of the contract as a whole.¹⁰¹ Claims that the contract violates state law or was fraudulently induced will likely fall under challenges to the contract as a whole and will therefore be barred from the jurisdiction of the courts.¹⁰² In *Buckeye Check Cashing v. Cardegna*,¹⁰³ the Supreme Court considered whether a court or an arbitrator should decide if a contract with an arbitration provision is void for illegality.¹⁰⁴ Cardegna argued that the overall agreement violated state consumer protection laws, and thus, the award under the contract should be vacated.¹⁰⁵ The Court held that challenges to the validity of a contract as a whole must be decided

was ‘rationally inferable from the contract.’”) (quoting *Qorvis Commc’ns, LLC v. Wilson* 549 F.3d 303, 312 (4th Cir. 2008)).

94. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2065 (2013).

95. *Id.* But see *Muskegon Cent. Dispatch 911 v. Tiburon Inc.*, 462 Fed. Appx. 517 (6th Cir. 2012) (holding that the arbitrator exceeded powers by failing to review the underlying contract).

96. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006).

97. See e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 4-5 (1984).

98. *Buckeye Check Cashing*, 546 U.S. at 444.

99. See *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (“It is well settled in both commercial and labor cases that whether parties have agreed to submit a particular dispute to arbitration’ is typically ‘an issue for judicial determination.’”).

100. See *AT&T Tech., Inc. v. Commc’n Workers of Am.*, 475 U.S. 643, 648-49 (1986).

101. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that courts are not permitted to hear challenges to the contract as a whole).

102. See *Preston v. Ferrer*, 552 U.S. 346 (2008) (holding that “the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.”); *Prima Paint*, 388 U.S. at 406 (1967) (holding that a claim of fraud in inducement of entire contract is for arbitrators or any claim arising out of the agreement).

103. *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006).

104. *Id.* at 440.

105. *Id.* at 443.

by an arbitrator when the contract contains an arbitration provision.¹⁰⁶ Therefore, only issues as to whether the parties agreed to arbitrate, and not contract validity, will be heard by the courts.

C. FAA vs. FAC

Similar to the FAA, Florida enacted the Florida Arbitration Code (FAC) in 1957.¹⁰⁷ In Florida, the FAC supplements the FAA and when a contract concerns interstate commerce, then the FAA supersedes the FAC where the two conflict.¹⁰⁸ After the enactment of the FAC, Florida courts were permitted to review arbitral awards for unreasonable departures from the law.¹⁰⁹

However, in 1967, the Florida legislature amended the FAC to include section 682.13, creating grounds for vacating an arbitral award similar to the grounds for vacatur under the FAA.¹¹⁰ Like the FAA, the FAC allows for vacatur of an arbitral award when there is corruption, fraud, or partiality by the arbitrator, or where an arbitrator exceeds his or her authority.¹¹¹ Since this amendment, Florida courts have held that the statute sets forth the exclusive grounds for vacating an arbitral award and have not allowed vacatur for judicially created grounds.¹¹²

IV. INSTANT DECISION

The Florida Supreme Court in *Vising Nurse Association* began its discussion by determining whether the FAA applied in addition to the FAC.¹¹³ Since the referral of Medicare patients was part of the transaction between the parties, the transaction involved interstate commerce, and therefore, the FAA applied in this case.¹¹⁴ The court noted that the FAA and FAC are not in conflict with each other, and thus, the court also applied the FAC to the facts.¹¹⁵

106. *Id.* at 449. The Supreme Court relied on the holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* which stated that contracts as a whole cannot be heard by a court. *Prima Paint*, 388 U.S. at 403-04 (1967).

107. Act Effective Oct. 1, 1957, ch. 57-402, § 24, 1957 Fla. Laws 928, 936 (codified at FLA. STAT. § 57.11 (1957)).

108. *O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006) (holding that when there is no interstate commerce the parties follow the FAC and not the FAA).

109. *See Nat'l Airlines, Inc. v. Metcalf*, 114 So. 2d 229, 232 (Fla. Dist. Ct. App. 1959) (“[T]he agreement to arbitrate these disputes and be bound by the award does not preclude a review of procedural due process and jurisdictional limitations.”).

110. *Compare* FLA. STAT. § 682.13 (2014), *with* 9 U.S.C. § 10 (2012).

111. FLA. STAT. § 682.13 (“the award was procured by corruption, fraud, or other undue means; (b) [t]here was: 1. Evident partiality by an arbitrator...[c]orruption by an arbitrator; or 3. Misconduct... (d) [a]n arbitrator exceeded the arbitrator’s powers; (e) [t]here was no agreement to arbitrate... (f) [t]he arbitration was conducted without proper notice of the initiation of an arbitration....”).

112. *See Cassara v. Wofford*, 55 So. 2d 102, 105 (Fla. 1951) (“Thus, the award of arbitrators in statutory arbitration proceedings cannot be set aside for mere errors of judgment . . . [and] if the award is within the scope of the submission, and the arbitrators are not guilty of the acts of misconduct set forth in the statute, the award operates as a final and conclusive judgment”); *see also Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327 (Fla. 1989) (holding that the only grounds for vacating an arbitral award are set forth in § 682.13).

113. *Visiting Nurse Ass’n of Florida, Inc. v. Jupiter Med. Ctr.*, 154 So. 3d 111, 1124 (2014).

114. *Id.* at 1124-25 (listing numerous state and federal cases which all held that the FAA applied when Medicare was apart of the disputed transaction).

115. *Id.* at 1125.

The court then determined whether a trial court could consider the claim that a contract containing an arbitration provision is void for illegality.¹¹⁶ JMC argued that the court could choose not to enforce an arbitration panel's interpretation of a contract in three situations: (1) if the contract was illegal; (2) if the arbitrators exceeded their powers; or (3) if the contract violated public policy.¹¹⁷

Relying on *Buckeye*, the court determined that trial courts cannot review arbitral awards for illegality since legality concerns the contract as a whole.¹¹⁸ The court then determined whether the court could review the award under the public policy exception.¹¹⁹ The court reviewed the holding in *Hall Street Associates L.L.C. v. Mattel, Inc.*,¹²⁰ in which the United States Supreme Court held that the grounds for vacatur and modification provided in the FAA are exclusive and cannot be supplemented by an agreement.¹²¹ The various interpretations of *Hall Street* created a circuit split in the federal courts on the validity of judicially created grounds for vacatur.¹²² The Florida Supreme Court favored the view held by the Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals, and held that statutory grounds for vacating an award cannot be supplemented judicially or contractually.¹²³

Next, the court considered whether the arbitration panel exceeded its power.¹²⁴ The court relied on the United States Supreme Court holdings in *Oxford Health Plans L.L.C. v. Sutter*¹²⁵ and *Stolt-Nielsen SA v. AnimalFeeds International Corp.*,¹²⁶ in which the Court discussed that a party seeking to set aside an arbitral award bears a very heavy burden under the FAA.¹²⁷ In *Oxford Health Plans*, the Court held that the arbitrator did not exceed his powers, because the arbitrator acted within the scope of the contract by reviewing the parties' agreement twice and concluding that the agreement allowed a class-action proceeding.¹²⁸ However, in *Stolt-Nielsen*, the Court held that the arbitrator exceeded his powers in ordering a party to submit to class arbitration when the parties stipulated that they never reached an agreement on class arbitration.¹²⁹

Here, JMC argued that the arbitrators exceeded their powers because the agreement stated that it must be consistent with state and federal health care laws.¹³⁰ The court held that the arbitration panel's interpretation of the contract was not grounds for review under the FAA and that the arbitration panel did not exceed its powers under 9 U.S.C. § 10(a)(4).¹³¹

116. *Id.* at 1125-26.

117. *Id.* at 1128. JMC cited numerous U.S. Supreme Court cases which all held that a court would refuse to enforce an arbitrator's award if the contract goes against public policy. *Id.*

118. *Id.* at 1126.

119. *Visiting Nurse Ass'n*, 154 So. 3d at 1128.

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

121. *Visiting Nurse Ass'n*, 154 So. 3d at 1130 (Fla. 2014).

122. *Id.* at 1130.

123. *Id.* at 1132.

124. *Id.*

125. *Oxford Health Plans L.L.C. v. Sutter*, 133 S.Ct. 2061 (2013).

126. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 671 (2012).

127. *Visiting Nurse Ass'n*, 154 So. 3d at 1132.

128. *Id.* at 1133.

129. *Id.*

130. *Id.*

131. *Id.*

Finally, the Florida Supreme Court considered whether trial courts could entertain claims that a contract with an arbitration provision was void for illegality and whether the arbitration panel exceeded its authority under the FAC.¹³² The court cited its holding in *Schnurmacher Holding Inc. v. Noriga*,¹³³ and concluded that a court could vacate an award only for reasons set forth in the Florida statute and that judicially created grounds for vacatur, such as a public policy exception, are not permissible.¹³⁴ Additionally, the Florida Supreme Court wrote that *Schnurmacher's* definition of “exceeded their powers” meant that an arbitrator must go beyond his or her authority granted by the parties or must decide a question not related to the resolution of the issue submitted.¹³⁵ In this case, the parties authorized the panel to resolve any dispute or claim arising out of the agreement.¹³⁶ Therefore, the court held that the panel did what the parties had requested and did not exceed its powers.¹³⁷

V. COMMENT

Since the enactment of the FAA, there has been a strong federal presumption in favor of arbitration.¹³⁸ Very few arbitral awards are reversed.¹³⁹ Therefore, it is likely that when the Supreme Court takes up the circuit split, it will likely hold that judicially created grounds for vacating arbitral awards are not permissible. However, refusal to permit vacatur on grounds of manifest disregard of the law and public policy would have negative consequences and should therefore be categorized under the exceeded powers exception in the statute.

The Court's failure to clearly address whether judicially created grounds for vacatur are permissible has led to a split among the federal circuits as well as the state courts.¹⁴⁰ In *Hall Street*, the Supreme Court sought to address a circuit split over whether the statutory grounds for vacatur were exclusive or could be supplemented by agreement.¹⁴¹ The Court's use of the strong language “exclusive grounds” throughout the opinion led the Fifth, Seventh, Eighth, and Eleventh Circuits to conclude that the Court intended the statutory language of the FAA to provide the only grounds for vacatur and thereby made judicially created grounds impermissible.¹⁴² Due to the federal policy favoring arbitration and the Court's strong language in *Hall Street*, it is likely that when the Court addresses the circir-

132. *Id.* at 1124, 1132, 1136.

133. *Schnurmacher Holding Inc. v. Noriga*, 542 So. 2d 1327 (1989).

134. *Visiting Nurse Ass'n*, 154 So. 3d at 1135-36.

135. *Id.* at 1136.

136. *Id.* at 1137.

137. *Id.* at 1137-38.

138. *See Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 478 (4th Cir. 2012).

139. *Reuben*, *supra* note 36, at 1116.

140. *See Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 353 (5th Cir. 2009) (holding that manifest disregard of the law does not constitute a grounds for vacating an arbitral award); *see also Affymax, Inc. v. Ortho-McNiel-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (considering manifest disregard of the law as a valid grounds for vacatur); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (stating it will only vacate on grounds enumerated in the FAA); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323 (11th Cir. 2010) (holding that judicially created grounds for vacatur were abolished in *Hall Street*).

141. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

142. *Citigroup Glob. Mkts*, 562 F.3d at 353; *see Affymax*, 660 F.3d at 284; *Med. Shoppe*, 614 F.3d at 489; *Frazier*, 604 F.3d at 1324.

cuit split, it will hold that judicially created grounds are not permissible for vacating arbitral awards.

However, the Court should permit manifest disregard and public policy exceptions under the FAA. The Supreme Court indicated its willingness to accept the manifest disregard exception in dicta of *Wilko*.¹⁴³ Nevertheless, the Court's intention was unclear, and the circuit courts have had a difficult time discerning whether the exception exists. The Supreme Court had the opportunity to address whether *Wilko* created manifest disregard of the law as a permissible means of vacatur in *Hall Street*. However, the Court instead stated, "[M]aybe 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."¹⁴⁴ The Court was given a second opportunity to address whether manifest disregard was an acceptable ground for vacatur in *Stolt-Nielsen* and yet again the Court stated it would not address the issue.¹⁴⁵

The Eleventh Circuit has defined manifest disregard of the law as recognizing the law but disregarding it.¹⁴⁶ Other circuit courts have defined manifest disregard of the law similarly.¹⁴⁷ In *Stolt-Nielsen*, the Supreme Court held that because the arbitration panel did not follow either the FAA or New York law to make its decision, it had exceeded its powers.¹⁴⁸ The two definitions are similar enough that allowing manifest disregard of the law to fall under the exceeded powers exception to the FAA would not overstep the Court's interpretation and therefore should remain viable as a means of vacatur.

If, however, the Court does not allow manifest disregard as a grounds for vacatur, it will give arbitrators too much control over cases and leave the parties without any judicial review. Checks and balances must be in place to prevent the violation of individuals' rights. Additionally, many statutes are enacted to protect and ensure safe business practices. For example, anti-kickback statutes prevent physicians and medical organizations from engaging in corrupt practices that could be dangerous to patients.¹⁴⁹ Manifest disregard of the law as a ground for vacatur allows a party to seek justice when the arbitrators have clearly disregarded applicable laws. Additionally, it could prevent parties from seeking biased arbitrators they know will enforce illegal contracts.

Forbidding courts to use vacatur in the interest of public policy would be another mistake as it could cause safety issues and give arbitrators legislative authority. Public policy is characterized as a principle that prevents injury to the public and is considered synonymous to "the public good."¹⁵⁰ The Supreme Court has recognized that courts have the ability to refuse to enforce a contract that violates

143. See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 479-86 (1989) (holding that predispute agreement to arbitrate claims was enforceable).

144. *Hall St.*, 552 U.S. at 585.

145. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010).

146. *Montes v. Shearson Lehman Bros. Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997).

147. *LeRoy*, *supra* note 40, at 168.

148. *Stolt-Nielsen S.A.*, 559 U.S. at 676-77.

149. See Pub. L. No. 92-603, 86 Stat. 1329 (codified as amended at 42 U.S.C. § 1320(a)-27(b) (2012)); *see also* 73 Fed. Reg. 56841 (Sept. 30, 2008) (discussing the compliance program which increases resident and patient safety).

150. Erich Vieth & James P. Lemonds, *Whence Public Policy?*, 52 J. Mo. B. 239 (1996).

public policy.¹⁵¹ However, the Court has not clearly addressed whether arbitrators are the only individuals capable of hearing arguments that contracts containing arbitration provisions are void for public policy.

Allowing arbitrators to enforce agreements that clearly violate public policy could have serious safety ramifications. For example, if the New York Supreme Court had not granted vacatur in *State University of New York*, a precedent would have been set that arbitrators could impose more lenient punishment for individuals who have clearly violated public policy and who have put patients' safety at risk.¹⁵² Additionally, in *United Paperworkers*, had the employee been found on the premises under the influence of drugs and operating dangerous equipment, he could have caused harm to himself and other workers.¹⁵³

Permitting arbitrators to uphold arbitral awards that violate public policy would also give arbitrators legislative policy power when they are meant to serve a judicial role. Legislatures often create statutes designed to protect the public. Courts then have the authority to decide whether those statutes are being followed. Similar to judges, arbitrators are given a judicial role in reviewing the applicability of those same public policy statutes. However, arbitration proceedings are considered private.¹⁵⁴ Therefore, arbitrators do not have to answer to the public for the decisions that they make; nor are they held to the same standards as the judiciary. Although arbitral awards that violate public policy may be vacated under the FAA, without judicial review of public policy violations, arbitrators are able to interpret statutes with little chance of a court reviewing their interpretation.

IV. CONCLUSION

The Supreme Court's holding in *Hall Street* created a divide in the circuits as to whether judicially created grounds for vacatur such as manifest disregard of the law and violations to public policy are permissible.¹⁵⁵ Based on the strong language the Supreme Court used in *Hall Street*, and on the strong federal presumption in favor of arbitration, the Court will likely hold judicially created grounds for vacatur are impermissible.

However, removing manifest disregard of the law and public policy exceptions from judicial review could grant arbitrators too much power in deciding whether to follow the law and whether to uphold public policy violations. Therefore, the United States Supreme Court should interpret the FAA to permit manifest disregard of the law and violations of public policy as grounds for vacatur.

151. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of a general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.")

152. *See State Univ. of N.Y. v. Young*, 170 A.D.2d 510, 511-12 (1991).

153. *See United Paperworkers*, 484 U.S. at 42.

154. Bert K. Robinson, *Arbitration: The Quest for Confidentiality*, 58 LA. B.J. 180, 181 (2010).

155. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1400-02 (2008).