

2006

Courts Have the Final Say: Does the Doctrine of Manifest Disregard Promote Lawful Arbitral Awards or Disguise Unlawful Judicial Review

Lindsay Biesterfeld

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Lindsay Biesterfeld, *Courts Have the Final Say: Does the Doctrine of Manifest Disregard Promote Lawful Arbitral Awards or Disguise Unlawful Judicial Review*, 2006 J. Disp. Resol. (2006)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2006/iss2/12>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Courts Have the Final Say: Does the Doctrine of “Manifest Disregard” Promote Lawful Arbitral Awards or Disguise Unlawful Judicial Review?

*Sawtelle v. Waddell & Reed, Inc.*¹

I. INTRODUCTION

In exchange for a speedy, economical dispute resolution process, parties that submit to binding arbitration assume the risk that an arbitrator might misapply the law.² United States Supreme Court precedent and federal law favor agreements to arbitrate by limiting judicial review of arbitral awards and requiring courts to “rigorously enforce arbitration agreements.”³ These judicial constraints support the arbitral goals of efficiency and finality by reducing the risk that arbitral awards will be vacated on appeal. To balance the risk that arbitrators may abuse this standard of review, courts have supplemented restricted judicial review with a doctrine that allows an arbitral award to be vacated in circumstances where the arbitrator manifestly disregarded the law.⁴ *Sawtelle v. Waddell & Reed*⁵ reaches the outer limits of this doctrine by demonstrating how the courts can use the doctrine to engage in a heightened form of judicial review of arbitral awards.

II. FACTS AND HOLDING

Waddell & Reed, Inc. (Waddell & Reed), a Kansas-based securities broker-dealer and member of the National Association of Securities Dealers, Inc. (NASD),⁶ employed Stephen Sawtelle (Sawtelle) as its Connecticut representative for seventeen years.⁷ Even though Sawtelle had approximately 2,800 customers and received the “number one broker of 1996” award, Waddell & Reed fired Sawtelle on February 10, 1997.⁸

Sawtelle and Waddell & Reed disputed the reason for the termination. Sawtelle alleged that he was terminated in retaliation for testifying before the Securi-

1. 21 A.D.3d 820 (N.Y. App. Div. 2005).

2. Noah Rubins, “*Manifest Disregard of the Law*” and *Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT’L ARB. 363, 367 (2001).

3. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

4. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986).

5. 21 A.D. 820 (N.Y. App. Div. 2005).

6. *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 104 (N.Y. App. Div. 2003).

7. *Id.*

8. *Id.* The trial court found that “until his termination, Sawtelle had been one of Waddell’s most successful salesmen, with approximately 2,800 customers, none of whom had ever made a complaint against him. In fact, as late as February 3, 1997, Sawtelle had received accolades from Waddell for his work and status as the ‘number one broker’ in 1996.” *Id.*

ties and Exchange Commission (SEC) against another Waddell & Reed broker.⁹ Waddell & Reed claimed Sawtelle was fired due to concern about Sawtelle's own "improper practices."¹⁰ However, on a form that Waddell & Reed prepared for the NASD, the U-5 Uniform Notice of Termination form, Waddell & Reed cited "personality differences" as the reason for Sawtelle's termination.¹¹ Other portions of the form referenced customer complaints and suggested that Sawtelle was under investigation for fraud.¹² Specifically, Waddell & Reed answered in the affirmative two questions on the NASD U-5 Uniform Notice of Termination form asking whether Sawtelle was under internal and external investigation for investment related business.¹³

On February 11, 1997, one day after Sawtelle's termination, Sawtelle began working for a Waddell & Reed competitor, Hackett Associates (Hackett).¹⁴ In response, Waddell & Reed wrote letters to Sawtelle's customers, warning them that there could be financial repercussions if they moved their accounts to a new firm.¹⁵ Waddell & Reed then obscured customers' attempts to communicate with Sawtelle by misdirecting Sawtelle's mail and telephone calls.¹⁶ Waddell & Reed also encouraged customers to complain about Sawtelle and suggested to customers that Sawtelle had engaged in criminal behavior.¹⁷ Waddell & Reed's efforts to retain Sawtelle's customer base largely failed, however, as the vast majority of the customers followed Sawtelle to Hackett.¹⁸

In July 1997, Sawtelle filed a claim with the NASD against Waddell and certain officers and representatives alleging tortious interference with business expectancy and a violation of the Connecticut Unfair Trade Practices Act (CUTPA).¹⁹ After holding over fifty days of hearings spanning two and a half

9. *Id.* at 104. Sawtelle testified before the SEC about David Stevenson. Stevenson was a Waddell & Reed broker until 1996, when he was fired. Stevenson was later convicted of embezzling millions of dollars from his clients. *Id.*

10. *Id.* at 105. In the subsequent arbitration, Waddell & Reed alleged that Sawtelle "was terminated because of suspicions about his [Sawtelle's] own improper practices." *Id.*

11. *Id.* The NASD requires its members to complete this form whenever an employee leaves the company, listing, among other things, the reason for the employee's discontinuance of employment. *Id.*

12. *Id.*

13. *Id.* at 106. On the U-5 Uniform Notice of Termination form prepared by Waddell & Reed for the NASD, Waddell & Reed responded yes to the question whether Sawtelle was under investigation by a government body or self regulatory organization. *Id.* Waddell also stated that Sawtelle was "under internal review for fraud or wrongful taking of property, or for violating investment-related statutes, regulations or industry standards of conduct." *Id.*

14. *Id.*

15. *Id.* The letters "explained the potential tax liabilities and other fees if the customers transferred their investments." *Id.* Similar language was not included in letters sent to customers of a Waddell broker who was convicted of embezzling funds. *Id.* The trial court found that the letters "could be construed as threatening." *Id.* at 105.

16. *Id.* "Waddell also rerouted mail from Sawtelle's North Haven, Connecticut office to Waddell's Hamden, Connecticut office, and transferred Sawtelle's phone calls to Waddell's office." *Id.*

17. *Id.* There is some evidence that Waddell "solicited complaints against him by offering customers improper incentives, such as a waiver of transfer fees." *Id.* at 106. Although Waddell wrote letters to his customers the day after he was terminated, Sawtelle did not mail letters to his own customers until February 26th, 1997. *Id.* When customers called in response to Waddell's letters, Waddell representatives untruthfully told the customers that they did not know where Sawtelle was, "suggesting, on several occasions, that Sawtelle might have engaged in criminal conduct." *Id.*

18. *Id.* at 105.

19. *Id.* at 106.

years, a three member arbitration panel found against Waddell & Reed, and awarded Sawtelle \$1,827,499 in compensatory damages and \$747,000 in attorneys' fees.²⁰ The arbitration panel also held Waddell & Reed and its president jointly and severally liable under CUTPA for punitive damages in the sum of \$25 million for "their reprehensible conduct in orchestrating a campaign of deception."²¹

Following the arbitral award, Sawtelle petitioned the New York State Supreme Court of New York County to confirm the arbitration panel's award.²² Waddell and its fellow defendants cross-petitioned to vacate or modify the award, claiming that the punitive damages award was irrational and in manifest disregard of the law, and that the compensatory damages erroneously included Sawtelle's attorneys' fees because the fees were separately awarded.²³ The New York Supreme Court agreed with Waddell & Reed that the panel had awarded the attorneys' fees twice, and accordingly modified the compensatory damage award to \$1,080,499.²⁴ As for the punitive damages, the trial court rejected Waddell & Reed's argument that the large award violated the standard set forth by the Supreme Court in *BMW of North America, Inc. v. Gore*, by reasoning that *Gore* dealt with due process concerns not applicable to arbitration.²⁵ After acknowledging the limited role of judicial review of arbitral awards, the court affirmed the \$25 million award, finding that the punitive damage award was not made irrationally or in manifest disregard of the law.²⁶

Waddell & Reed appealed the award of punitive damages and Sawtelle appealed the reduction of compensatory damages to the New York Supreme Court, Appellate Division.²⁷ The court affirmed the trial court's modification of the compensatory damages award, but vacated the punitive damages award.²⁸ The

20. *Id.* at 106-07. In 1999, Waddell responded to Sawtelle's claim by filing a claim against Sawtelle's new employer, Hackett. *Id.* at 107. The three member arbitration panel consolidated the two proceedings and dismissed the claims against Hackett on September 11, 2000. *Id.*

21. *Id.* In awarding the punitive damages, the arbitration panel found that the campaign of deception "included giving the impression that Sawtelle had mishandled his clients' investments, was untrustworthy, was not authorized to do business and, in some way, had been involved in the embezzlement of clients' funds." *Id.* The panel further ordered the expungement of certain entries on the U-5 form. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* The trial court found that Sawtelle asked the arbitrators to award the amount of income he would have received from Waddell in 1997 if he had not been fired because Sawtelle introduced evidence showing that in 1997 he would have received an annualized commission income of \$766,861, an investment bonus of \$263,648, and an additional \$300,000 in "trails." *Id.* at 116. While Sawtelle conceded that Waddell had paid him \$250,000 prior to his termination, the net total of the amounts, after subtracting the 250,000 credit, is \$1,080,499. *Id.* The court recognized that the compensatory damage award was \$1,827,499, approximately \$747,000 more than Sawtelle had asked for, which was also the amount of Sawtelle's attorneys fees. *Id.* The trial court concluded that because the panel had separately awarded Sawtelle \$747,000 in attorneys fees, the compensatory damages award must have erroneously included a double award of attorneys fees. *Id.* The court accordingly reduced the compensatory damages award to \$1,080,499. *Id.* at 115-16.

25. *Id.* at 107 (citing *BMW of North America, Inc. v. Gore*, 517 US 559 (1996)).

26. *Sawtelle*, 304 A.D.2d at 103, 107. The New York State Supreme Court held that the award was not "otherwise illegal or irrational as grossly excessive since CUTPA, which authorizes an award of punitive damages, does not by its terms, place limits on such an award." *Id.*

27. *Id.* at 104.

28. *Id.* at 117-18.

appellate court reasoned that the *Gore* standards did govern judicial review of arbitral awards, and that the punitive damages award was excessive under *Gore* and also made in ‘manifest disregard’ of the law, remanding for further consideration.²⁹

Upon remand, the original three-member arbitration panel held a one day hearing and issued a second award.³⁰ The panel did not modify the amount of the punitive damage award, but changed only the description of Waddell & Reed’s conduct in its findings from a “campaign of deception” to a “horrible campaign of deception, defamation and persecution.”³¹

Sawtelle again petitioned the New York State Supreme Court in the county of New York to confirm the punitive damages award and Waddell & Reed moved to vacate.³² This time, the trial court applied the *Gore* standards as mandated by the Appellate division, found the punitive damages award excessive under such standards, and vacated the award and remanded to a new arbitration panel.³³ Sawtelle responded to the vacatur by motioning the trial court to modify its order vacating and remanding to a new panel and to instead issue a conditional remittitur.³⁴ The trial court recognized several reasons why Sawtelle’s request for a conditional remittitur was reasonable: first, the several appeals and expensive legal fees had already costs the parties much time and money; second, there was no guarantee that the new arbitration panel’s award would be confirmed by the instant court or that the appeals would end; and finally, the new arbitration panel was “likely to be as expensive and time consuming as the first.”³⁵ However, the court was bound by the FAA and thus without the authority to issue a conditional remitter.³⁶ Therefore, the trial court denied this motion.³⁷

To avoid arbitrating in front of a new and unpredictable panel, Sawtelle appealed both decisions.³⁸ The New York Supreme Court, Appellate Division, affirmed both of the trial court’s orders, denying the conditional remitter and granting the motion to vacate and remand.³⁹ The appellate court agreed that the issue should be remanded to a new arbitrational panel, holding that when a court vacates an arbitral award on the ground that it is in manifest disregard of the law, and where the original arbitrators issue an identical award on remand, the court

29. *Id.* at 109-15.

30. *Sawtelle v. Waddell & Reed, Inc.*, 789 N.Y.S.2d 857, 858 (N.Y. Sup. Ct. 2004).

31. *Sawtelle v. Waddell & Reed, Inc.*, 21 A.D.3d 820, 821 (N.Y. App. Div. 2005).

32. *Sawtelle*, 789 N.Y.S.2d at 858.

33. *Id.* at 858. The trial court stated, “the panel acted illegally, arbitrarily and beyond the scope of its authority when it awarded punitive damages so disproportionate to the compensatory damages awarded. All too aware that the same arbitration panel might not be expected to impartially apply the Appellate Division’s mandate and the *Gore* standard, this Court remanded with a direction that a different panel hear the new (i.e., third) arbitration.” *Id.* at 859.

34. *Id.* at 858. Instead of remanding the issue to a new arbitration panel, Sawtelle asked the court for an order that would remand the matter only if the parties could not stipulate to an amount to be awarded. *Id.*

35. *Id.* at 859. The trial court stated: “The history of this arbitration undermines the very purpose of arbitration: to provide a manner of dispute resolution more swift and economical than litigation in court. Petitioner’s suggestion seems to make sense.” *Id.*

36. *Id.* at 860.

37. *Id.*

38. *Sawtelle v. Waddell & Reed, Inc.*, 21 A.D.3d 820, 820-22 (N.Y. App. Div. 2005).

39. *Id.* at 821-22.

should vacate the award and remand to a new arbitration panel to prevent the original arbitrators from defying the court ruling.⁴⁰

III. LEGAL BACKGROUND

A. Governing Law

Even though the instant dispute occurred in New York state court, it was decided under federal law because the Federal Arbitration Act (FAA) governs the arbitration of employment disputes in the securities industry.⁴¹ The substance and procedure of the FAA apply in both state and federal courts.⁴² State courts must apply the FAA consistently with the United States Supreme Court's interpretation of the federal law.⁴³ When a state court confronts an issue regarding the FAA that has not been addressed by the Supreme Court, unanimous lower federal courts decisions are binding on the state court.⁴⁴ When lower federal courts have divided on the FAA issue, the decisions of the federal circuit in which the state court sits are persuasive authority.⁴⁵

The FAA, enacted in 1925, established a "liberal federal policy favoring arbitration agreements."⁴⁶ As part of this policy, the FAA limits judicial review of arbitration awards in order to preserve the goals of arbitration: speed, economy, and finality.⁴⁷ Theoretically, courts have justified the limited judicial review of arbitral awards by inferring from the decision to arbitrate a belief, on behalf of the parties, that the speed and economy of arbitration outweighs the risk that an arbitrator will misapply the law.⁴⁸

Under the FAA, a reviewing court may vacate an award where: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partial-

40. *Id.* at 821.

41. *Matter of Salvano v. Merrill Lynch, Pier, Fenner & Smith*, 85 N.Y.2d 173, 180 (N.Y. 1995). "[T]he provisions of the FAA are controlling even though the dispute itself may arise under State law (see *supra*, *Southland Corp. v. Keating*). Thus, regardless of what our own State's policies or case law might dictate in other circumstances, we are bound by the policies embodied in the Federal statute and the accompanying case law, and our prior state law holdings remain independently operative only to the extent that they have not been preempted by federal law and policy." *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 630-31 (N.Y. 1993). The FAA was also controlling in the instant dispute because the parties were from different states, thus implicating interstate commerce and the FAA. Federal Arbitration Act, 9 U.S.C. § 1 (2000).

42. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). "In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S., at 1, 25, n. 32, we reaffirmed our view that the Arbitration Act 'creates a body of federal substantive law' and expressly stated what was implicit in *Prima Paint, i. e.*, the substantive law the Act created was applicable in state and federal courts." *Id.* "[W]e cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction." *Id.* at 15.

43. *Id.*

44. *Fletcher*, 81 N.Y.2d at 631-32. "We are bound to follow both the holding and the rationale of the Nation's highest Court on this and other questions of Federal law when, as here, there is no ambiguity in the Court's position." *Id.*

45. See *Flanagan v. Prudential-Bache Sec., Inc.*, 67 N.Y.2d 500, 505-06 (N.Y. 1986).

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

47. Norman S. Posner, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 503 (1998).

48. Rubins, *supra* note 2, at 367.

ity or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their powers.⁴⁹ In addition to these four statutory grounds, each federal circuit has recognized a judicially created, non-statutory ground for vacating arbitration awards,⁵⁰ and manifest disregard of the law is the most common non-statutory ground for vacatur.⁵¹

B. Manifest Disregard of the Law

The doctrine of manifest disregard stems from Justice Reed's statement in a 1953 Supreme Court case, *Wilko v. Swan*, that "the 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."⁵² Although the Supreme Court overruled *Wilko* in 1989,⁵³ Justice Reed's manifest disregard statement has survived.⁵⁴ In 1995, the Supreme Court cited to Justice Reed's manifest disregard statement with approval, acknowledging that arbitral awards made in manifest disregard of the law may be vacated.⁵⁵

Although the Supreme Court and each federal circuit recognize the doctrine of manifest disregard, the precise definition of the doctrine of manifest disregard varies slightly by the circuit.⁵⁶ The prevailing definition, used by at least ten of

49. 9 U.S.C. § 10(a) (2006).

50. Rubins, *supra* note 2, at 369.

51. Posner, *supra* note 47, at 512-23.

Although the courts usually articulate the non-statutory ground as "manifest disregard of the law," some courts have applied other labels to it, either in combination with or as a substitute for the manifest disregard standard. Thus, courts have held that an arbitration award may be vacated if it violates public policy, is completely irrational, is arbitrary and capricious, is fundamentally unfair, is an abuse of discretion, or does not 'draw its essence' from the agreement to arbitrate.

Id.

52. *Wilko v. Swan*, 346 U.S. 427, 436-37 (U.S. 1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

53. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

54. See First Options v. Kaplan, 514 U.S. 938, 942 (1995); Posner, *supra* note 47, at 505-06.

55. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997). "The Supreme Court has also indicated that arbitration awards can be vacated if they are in 'manifest disregard of the law.'" *Id.* First Options v. Kaplan, 514 U.S. 938, 942 (1995). "The court will set that [arbitral] decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko*, 346 U.S. at 436-37 (parties bound by arbitrator's decision not in "manifest disregard" of the law).

56. First Circuit:

The test for a challenge to an arbitration award for manifest disregard of the law is set out in *Advest, Inc. v. McCarthy*: a successful challenge . . . depends upon the challenger's ability to show that the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."

Prudential-Bache Secs. v. Tanner, 72 F.3d 234, 238 (1st Cir. 1995) (citing *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9). Third Circuit: In order to vacate under doctrine of manifest disregard "there must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of an award." *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995). Fourth Circuit: "Appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149-50 (4th Cir. 1994). Fifth Circuit: "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no

the twelve circuits, requires the court to find both that (1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was “well-defined, explicit and clearly applicable to the case.”⁵⁷

The Second Circuit has adopted this definition for the doctrine of manifest disregard.⁵⁸ Second Circuit case law explains that this standard requires the arbitrator’s mistake to be so obvious that the average arbitrator would “readily and instantly” recognize the mistake.⁵⁹ Even if the mistake is blatantly apparent, the court cannot vacate the arbitral award under the manifest disregard standard if the arbitrator offers “even a barely colorable justification for the outcome reached.”⁶⁰ Further, the court must find subjective knowledge of the well-defined law on behalf of the arbitrators before vacatur under manifest disregard is appropriate.⁶¹

While the precise definition of manifest disregard differs by circuit, the federal courts are unanimous in strictly limiting the doctrine.⁶² If the doctrine were not so curtailed, it would threaten the very premise of arbitration—finality—by increasing the risk that parties losing in arbitration would successfully seek vacatur under manifest disregard grounds.⁶³ The circuits have thus limited the doctrine

attention to it.” *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 395 (5th Cir. 2003) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986)). Sixth Circuit: “An arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.” *Merrill Lynch, Pierce, Fenner & Smith v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). Seventh Circuit:

In any event, to vacate an arbitration award for manifest disregard of the law, there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did.

Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992) (citing Second Circuit case law, *Venice v. Holt Industries, Inc.*, 515 F. Supp. 1302 (D.N.Y. 1981)). Eighth Circuit:

Manifest disregard of the law exists when the arbitrator commits an error that was “obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.” Moreover, the term “disregard” implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986)). Ninth Circuit: Although an arbitration award may be vacated for “manifest disregard of the law,” the record must clearly demonstrate that the arbitrator “recognized the applicable law and then ignored it.” *ABC Int’l Traders, Inc. v. Fun 4 All Corp.*, 79 Fed. Appx. 346, 348 (9th Cir. 2003). Tenth Circuit: “A finding of manifest disregard means the record will show the arbitrators knew the law and explicitly disregarded it.” *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001). Eleventh Circuit: “Arbitration awards may be vacated if they are in ‘manifest disregard of the law.’” *Musnick v. King Motor Co.*, 325 F.3d 1255, 1261 (11th Cir. 2003). DC Circuit: “The ‘manifest disregard of law’ standard must be defined in light of the bases underlying the Court’s decisions in Gilmer-type cases.” *Cole v. Burns Int’l Sec. Servs.*, 323 U.S. App. D.C. 133 (D.C. Cir. 1997).

57. Rubins, *supra* note 2, at 369. See *supra*, note 56, circuits 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

58. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986).

59. *Id.* at 933.

60. *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, A.G. 579 F.2d 691, 704 (2d Cir. 1978).

61. *Bobker*, 808 F.2d at 933.

62. Posner, *supra* note 47, at 503.

63. *United Steelworkers of America v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). “The Supreme Court has explained that heightened judicial review by a court of the merits would make meaningless the provisions that the arbitrator’s decision is final, for in reality it would almost never be

in order to comply with the liberal federal policy favoring arbitration, and to preserve the efficient nature of arbitration.⁶⁴

C. Punitive Damages

Federal appellate courts can overturn a trial court's punitive damage award on the ground of excessiveness. When courts award punitive damages, the amount of the award cannot be so unexpected or irrationally high that it violates the offending party's constitutional right to due process.⁶⁵ In *BMW of North America, Inc. v. Gore*,⁶⁶ the United States Supreme Court explained that a punitive damages award, grossly excessive in relation to the State's legitimate interests in punishment and deterrence, enters "the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."⁶⁷ The proper inquiry for determining excessiveness, according to *Gore*, is whether the punitive damages have a rational relationship to the actual and potential harm caused by the defendant's conduct.⁶⁸ The Court emphasized that the question of unconstitutionally excessive punitive awards can not be determined by reference to a set ratio between actual and punitive damages or a "simple mathematical formula."⁶⁹ Rather, *Gore* requires courts to analyze the question of unconstitutional excessiveness in light of three relevant factors: (1) "the degree of reprehensibility of the defendant's conduct;"⁷⁰ (2) how the punitive damages compare to "actual harm inflicted on the plaintiff;"⁷¹ and (3) how the punitive damages compare to "civil or criminal penalties that could be imposed for comparable misconduct."⁷² Almost every federal circuit has not only applied the *Gore* factors, but also cited the Supreme Court's rejection of a "simple mathematical formula" with approval.⁷³

final." *Id.*; Hans Smit, *Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Department*, 15 AM. REV. INT'L ARB. 111, 121 (2004).

64. *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 395 (5th Cir. 2003) (citing *Merrill Lynch, Piere, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986). "A less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties." *Id.*

65. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.*

66. 517 U.S. 559 (1996).

67. *Id.* at 568.

68. *Id.* at 581.

69. *Id.* at 582.

70. *Id.* at 575.

71. *Id.* at 580.

72. *Id.* at 583.

73. The first circuit has noted "that the Supreme Court has 'dismissed any simple, mathematical formula in favor of general inquiry into reasonableness.'" *Davis v. Rennie*, 264 F.3d 86, 117 (1st Cir. 2001) (quoting *Romano v. U-Haul Int'l*, 223 F.3d 655, 673 (1st Cir. 2000)). Third: The constitutionally acceptable range is not reducible to a 'simple mathematical formula,' . . . Rather, the ratio of punitive damages to the harm caused by the defendant is a tool to ensure that the two bear a reasonable relationship to each other. *Gore*, 517 U.S. at 580; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). Fourth: "Indeed, the Supreme Court clarifies in *BMW* that it has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. . ." *Jordan v. Shaw Indus.*, 1997 U.S. App. LEXIS 33589 (4th Cir. 1997) (quoting *Gore*, 517 U.S. at 582). Fifth: "'The principle that

Even if the constitutionality of the punitive damage award is not questioned, it can be overturned as excessive. The non-constitutional standard for excessiveness in most circuits, including the Second Circuit, is whether the award is “so high as to shock the judicial conscience and constitute a denial of justice.”⁷⁴ De-

exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree.” *Gore*, 517 U.S. at 580 (citations omitted). But, the Court has ‘consistently rejected the notion that the constitutional line is marked by a simple mathematical formula’. *Id.* at 582. ‘We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.’ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991).” *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 597 (5th Cir. 1998). The Sixth Circuit has recognized that the Court “declined again to impose a bright-line ratio which a punitive damages award cannot exceed,” *Clark v. Chrysler Corp.*, 436 F.3d 594, 606 (6th Cir. 2006) (quoting *Campbell*, 538 U.S. at 425). Courts in the Seventh circuit have quoted the *Gore* language with approval: “We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.” *Alexander v. City of Milwaukee*, 2006 U.S. Dist. LEXIS 7454 (D. Wis. 2006). Eighth: “As the Supreme Court noted in *Gore*, there is no ‘simple mathematical formula’ that marks the constitutional line.” *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (citing *Gore*, 517 U.S. at 582). Ninth: the Court “rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award,” *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 954 (9th Cir. 2005) (quoting *Gore*, 517 U.S. at 582). Tenth: “Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.” *Progressive Motors v. Frazier*, 220 B.R. 476, 479 (D. Utah 1998). Eleventh: “The Supreme Court has not delineated ‘a simple mathematical formula, even one that compares actual and potential damages to the punitive award.’” *U.S. EEOC v. W&O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000) (quoting *Gore*, 517 U.S. at 582).

74. *Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996) (quoting *Hughes v. Patrolmen's Benevolent Ass'n of New York, Inc.*, 850 F.2d 876, 883 (2d Cir. 1998)). First Circuit: “We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to ‘shock the judicial conscience.’” *Nydam v. Lennerton*, 948 F.2d 808, 811 (1st Cir. 1991) (quoting *Caldarera v. E. Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983)). Third Circuit: “We may disturb the district court's determination with respect to a remittitur only for abuse of discretion, and reverse and grant a new trial ‘only if the verdict is ‘so grossly excessive as to shock the judicial conscience.’” *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 771 (3d Cir. 1987) (quoting *Edynak v. Atl. Shipping, Inc.* 562 F.2d 215, 225-226 (3rd Cir. 1977). Fourth Circuit: “Our review of the punitive damage awards here is limited to whether ‘the verdict is so grossly excessive so as to shock the judicial conscience.’” *Thorne v. Wise*, 1995 U.S. App. LEXIS 2844 (4th Cir. 1995) (quoting *Gumbs*, 823 F.2d at 771). Fifth Circuit: “Unless an award is so ‘inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.’” *Taylor v. Green*, 868 F.2d 162, 164 (5th Cir. 1989) (quoting *Garrick v. City & County of Denver*, 652 F.2d 969, 972 (10th Cir. 1981). Sixth Circuit: “the standard is ‘[w]hether the award is so high as to shock the judicial conscience and constitute a denial of justice.’” *Mitchell v. Associated Bldg. Contractors, Inc.*, 884 F.2d 1392 (6th Cir. 1989) (quoting *Rodgers v. Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102, 1109 (6th Cir. 1984). Eighth Circuit: “[W]e review the size of the compensatory award ‘with a keen sense of respect for the latitude given to juries,’ and will order remittitur only if the verdict is so grossly excessive as to shock the conscience.” *Rowe v. Hussman Corp.*, 381 F.3d 775, 783 (8th Cir. 2004) (quoting *Kucia v. Se. Ark. Cmty. Action Corp.*, 284 F.3d 944, 947 (8th Cir. 2002). Tenth Circuit: “This court has said many times that absent an award so excessive or inadequate as to shock the judicial conscience and raise an irresistible inference that passion, prejudice or another improper cause invaded the trial, the jury's determination of the amount of damages is inviolate.” *Lane v. Gorman*, 347 F.2d 332, 335 (10th Cir. 1965). Eleventh Circuit: Unless an award is so inadequate “as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of fact is considered inviolate.” *Murphy v. Flagler Beach*, 846 F.2d 1306, 1310 (11th Cir. 1988) (quoting *Garrick v. City & County of Denver*, 652 F.2d 969, 972 (10th Cir. 1981).

spite the due process focus of *Gore*, courts in the Second Circuit have used the three *Gore* factors to guide this non-constitutional inquiry.⁷⁵

Although *Gore* dealt with constitutional limits on punitive damage awards, the federal courts agree that constitutional due process protections do not extend to private arbitration.⁷⁶ The federal courts have recognized that the state action required to trigger due process protection is absent in judicial confirmation of punitive damage awards.⁷⁷

Although arbitration does not implicate the due process concerns at issue in *Gore*, courts in the Second Circuit have used the *Gore* factors to review arbitral punitive damages award.⁷⁸ In *Sanders v. Gardner*, the United States District Court for the Eastern District of New York analyzed an arbitral punitive damage award of \$10,000,000.⁷⁹ In applying the three *Gore* factors, the court focused on the legitimate state interest in punishing and deterring federal security regulation violations and the Supreme Court's rejection of a categorical approach to the actual/punitive damages ratio.⁸⁰ Since the court found that the offending party had acted with "greed, avarice, and fraud," the court used the *Gore* factors to uphold a punitive damage award that was fifty times as large as the compensatory damages.⁸¹

Similarly, in *Acciardo v. Millennium Securities Corporation*,⁸² the United States District Court for the Southern District of New York decided whether an arbitral punitive damages award was excessive by applying the *Gore* factors. The court, like the *Sanders* court, highlighted the Supreme Court's refusal to draw a "mathematical bright line" for acceptable and non-acceptable actual/punitive damage ratios.⁸³ The court then held that since the arbitration panel had made a specific finding of malice, it was within the arbitrator's authority to issue a punitive damage award that was twenty times the amount of actual damages.⁸⁴

75. *Lee*, 101 F.3d at 809.

76. Second Circuit: *Sanders v. Gardner*, 7 F. Supp. 2d 151, 174 (E.D.N.Y., 1998). Seventh Circuit: "Private arbitration, however, really is private; and since constitutional rights are in general rights against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term "due process of law" cannot give rise to a constitutional complaint." *Elmore v. Chi. & Ill. Midland R.R. Co.*, 782 F.2d 94, 96 (7th Cir. 1986). Eighth Circuit: "In the arbitration setting we have almost none of the protections that fundamental fairness and due process require for the imposition of this form of punishment." *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 802-03 (8th Cir. 2004) (en banc). Ninth Circuit: "This court recently held that 'neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action.'" *VisionQuest Nat'l v. Marimed Found.*, 1998 U.S. App. LEXIS 15340 (9th Cir. 1998) (citing *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998)). Eleventh Circuit: "We agree with the numerous courts that have held that the state action element of a due process claim is absent in private arbitration cases." *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir 1995).

77. See Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 263 nn. 201, 207-08 (2006).

78. *Sanders*, 7 F. Supp. 2d at 177-78; *Acciardo v. Millenium Secs. Corp.*, 83 F. Supp. 2d 413, 422 (S.D.N.Y. 2000).

79. *Sanders*, 7 F. Supp. 2d at 156-57.

80. *Id.* at 176-77.

81. *Id.* at 177-79.

82. 83 F. Supp. 2d at 422.

83. *Id.*

84. *Id.*

IV. INSTANT DECISION

In *Sawtelle v. Waddell & Reed*,⁸⁵ the Appellate Division of the New York Supreme Court revisited a dispute over an arbitral award of punitive damages.⁸⁶ The court's opinion began by noting that although the instant court had vacated the punitive damage award on a prior appeal, the arbitration panel had awarded Sawtelle the same amount of punitive damages on remand.⁸⁷ The court identified only one difference between the two awards: the description of Waddell & Reed's conduct changed from a "campaign of deception" to a "horrible campaign of deception, defamation and persecution."⁸⁸ The court reasoned that this change did not provide adequate justification for the panel's decision to award \$25 million in punitive damages.⁸⁹ Although the court noted that arbitrators are not required to explain their initial awards on remand, the court clarified that, in the instant case, neither the presence nor the absence of such an explanation could have eliminated the possibility of modification or vacatur on appeal.⁹⁰

The court explained that it previously vacated the initial punitive damages award of \$25 million because the arbitrators had manifestly disregarded the law by awarding punitive damages that were grossly disproportionate to the actual harm Sawtelle suffered.⁹¹ It follows, the court reasoned, that when an arbitral award is vacated on manifest disregard grounds, arbitrators cannot simply ignore the court's holding on remand and reissue the same award.⁹² After discussing the limited amount of actual harm to Sawtelle by pointing out that he did not lose many clients or income, the court declared that when punitive damages are twenty-three times actual damages, the punitive award necessarily conflicts with established law and is per se arbitrary.⁹³

As for Sawtelle's motion for an order remitting the matter to a new panel unless the parties stipulated to the amount to be awarded, the court agreed with the trial court that a reviewing court would impermissibly exceed their limited role if it issued such an order.⁹⁴ After explaining that reviewing courts can only confirm, modify, or vacate arbitral awards, the court affirmed the trial court's order denying the conditional remitter, vacating the second award of punitive damages, and remanding to a new arbitration panel.⁹⁵

85. 21 A.D.3d 820 (N.Y. App. Div. 2005).

86. *Id.* at 820.

87. *Id.* at 821.

88. *Id.*

89. *Id.* "The addition of four words by way of explanation amounts to no more than cosmetic, pretextual gloss." *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 821-22.

95. *Id.* at 820. The court rejected Sawtelle's argument that the remand to a new panel would unnecessarily increase the length of the proceedings because the new arbitration panel could review the same submissions considered by the initial panel. *Id.* at 821-22.

V. COMMENT

In *Sawtelle v. Waddell & Reed*, the New York Supreme Court Appellate Division expanded the doctrine of manifest disregard by holding that an arbitral award of punitive damages can be vacated under the manifest disregard doctrine when the amount of punitive damages is grossly disproportionate to actual harm.⁹⁶ This decision was governed by the FAA, and so the court interpreted and applied a federal law that is substantively and procedurally applicable in both state and federal courts.⁹⁷ The instant court's decision relied on precedent set forth by the United States Supreme Court and the circuit in which it sits—the Second Circuit.⁹⁸

While the doctrine of manifest disregard is a well-established ground for vacatur under federal law, the courts have limited its impact by construing this doctrine of judicial review narrowly.⁹⁹ If the doctrine were construed broadly to expand judicial review of arbitral awards, the increased risk of lengthy and expensive appeals of arbitral awards would threaten the arbitral goals of efficiency and finality. Recognizing these concerns, and in light of the strong federal policy in favor of arbitration, courts have restricted the doctrine of manifest disregard through difficult burdens of proof.¹⁰⁰ The *Sawtelle* court cited to Second Circuit case law to support its use of the manifest disregard doctrine in its application of federal law.¹⁰¹ This standard, which is the most common formulation of manifest disregard, strictly limits vacatur under the manifest disregard grounds to arbitral awards clearly governed by a well-established legal principle.¹⁰² Therefore, by holding that certain punitive awards can be vacated on manifest disregard

96. *Id.* at 821.

97. *See supra* notes 41-42.

98. The Supreme Court's interpretation of the FAA is binding on the state court, and although Second Circuit authority is only binding on the state court's application of federal law when the Supreme Court has not addressed the issue and all the federal circuits are in agreement, the state court is located within the geographical borders of the Second Circuit and so it is not surprising that the state court would rely more heavily on Second Circuit case law than other circuits. *See supra* notes 42-46.

99. Posner, *supra* note 47, at 504.

100. *See supra* note 56. For example, the Second Circuit will only vacate awards under the manifest disregard standard that lack "even a barely colorable justification." *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, A.G. 579 F.2d 691, 704 (2d Cir. 1978).

101. *Sawtelle*, 21 A.D.3d at 821. Immediately after stating that the basis for vacatur was the manifest disregard ground, the instant court cited to the 1998 Second Circuit case, *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998). This case repeats the above quoted standard for vacating an arbitral award made in manifest disregard of the law:

[t]he reach of the doctrine [manifest disregard of the law] is "severely limited." Indeed, we have cautioned that manifest disregard "clearly means more than error or misunderstanding with respect to the law." We have further noted that to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

Halligan, 148 F.3d 197, 202 (quoting *Government of India v. Cargill, Inc.*, 867 F.2d 130, 133 (2d Cir. 1989); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997)). Because the federal circuits are unanimous in strictly limiting this doctrine, the state court is bound by these limitations. *See also supra* notes 44, 62.

102. *Id.* *See also supra* note 57.

grounds, the *Sawtelle* court implied that the law governing excessive damages was “well defined, explicit, and clearly applicable.”¹⁰³

The *Sawtelle* court identified two types of arbitral punitive awards that could be vacated under the doctrine of manifest disregard.¹⁰⁴ First, an arbitral award of punitive damages can be vacated on manifest disregard grounds when the punitive damages are “grossly disproportionate to the actual harm sustained by petitioner.”¹⁰⁵ Second, the court stated a twenty-three to one ratio between punitive and actual damages “can only be construed as arbitrary.”¹⁰⁶ If the twenty-three to one ratio between punitive and actual damages is necessarily arbitrary, the award must lack the “barely colorable justification” required to survive vacatur under the manifest disregard doctrine.¹⁰⁷ In order for the court to have held that these types of punitive awards are appropriate grounds for manifest disregard, the court’s logic must have been to find that *both* the law against punitive arbitral awards that are grossly disproportionate to the actual harm sustained, *and* the legal principle barring punitive awards that are twenty-three times actual damages, are “well defined, explicit, and clearly applicable.”¹⁰⁸

Although the standard used mandates a finding of clearly established, applicable law to support the court’s holding, no clear cut formula for determining when punitive awards are impermissibly excessive exists.¹⁰⁹ The United States Supreme Court has “consistently rejected the notion” that “a simple mathematical formula, even one that compares actual and potential damages to the punitive award,” can determine when a punitive award is impermissibly excessive.¹¹⁰ While the *Gore* court noted that a ratio between punitive and actual damages of 500 to 1 would “surely ‘raise a suspicious judicial eyebrow,’” the Supreme Court refused to adopt a bright line rule that even a 500 to 1 ratio would automatically make the award excessive.¹¹¹ Almost federal circuit, including the Second Circuit, has explicitly cited the Supreme Court’s rejection of a “simple mathematical formula” for determining excessiveness of punitive awards.¹¹² Accordingly, the Second Circuit “refused” to rely exclusively on the ratio between punitive and actual damages to determine whether a punitive award was excessive.¹¹³ Even New York state law is in accord: the New York state courts have held that “there is no rigid formula by which the amount of punitive damages are fixed.”¹¹⁴ New York state courts also agree that while the ratio between punitive and actual damages should be reasonable, the question of excessiveness cannot be decided by a simple mathematical limit on the ratio.¹¹⁵

103. *Sawtelle*, 21 A.D.3d 820 at 821.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Sanders v. Gardener*, 7 F.Supp.2d 151, 159 (E.D.N.Y. 1998).

108. *Id.* at 158. See also *supra* note 104.

109. *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996).

110. *Id.* at 582.

111. *Id.* at 583 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993)).

112. *Supra* note 73; *Disorbo v. Hoy*, 343 F.3d 172, 187 (2d Cir. 2003).

113. *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996).

114. *I.H.P. Corp. v. 210 Cent. Park S. Corp.*, 16 A.D.2d 461, 467 (N.Y. App. Div. 1962); *Deborah S. v. Diorio*, 153 Misc. 2d 708, 711 (N.Y. civ. ct. 1992).

115. *Rupert v. Sellers*, 48 A.D.2d 265, 269 (N.Y. App. Div.1975).

While the courts have uniformly declined to adopt a bright line approach to determine the reasonableness of punitive awards, the United States Supreme Court has identified three factors that should be examined when deciding if a punitive damages award is excessive.¹¹⁶ Some courts have held that *Gore* does not apply to a court's review of arbitral awards because *Gore* dealt with a claim that the punitive damages award was so excessive that it violated the defendant's due process rights, and it is well-settled that judicial review of arbitral awards does not involve the requisite state action to trigger due process protections.¹¹⁷ However, several courts in the Second Circuit have used the *Gore* factors to examine whether an arbitral award is excessive, even when the constitutionality of the award is not challenged.¹¹⁸ While courts in the Second Circuit have used the *Gore* factors to examine arbitral punitive awards, the *Gore* factors have been used to confirm, never vacate, the arbitral award.¹¹⁹ Moreover, such courts have used the *Gore* factors to confirm arbitral punitive damages awards that are twenty and fifty times actual damages.¹²⁰

Despite the uniform rejection of a bright line approach, the *Sawtelle* court declared that when an arbitration panel awards punitive damages twenty-three times the amount of actual damages, that panel has acted in manifest disregard of the law.¹²¹ The court states that such an award "can only be construed as arbitrary" even though the United States Supreme Court, the Second Circuit Court of Appeals, and New York state courts have consistently rejected the idea that the ratio between punitive and actual damages are per se determinative of when a punitive damages award is excessive.¹²² The *Sawtelle* court also states that a punitive damages award twenty-three times greater than actual damages is "irreconcilable with prevailing authority" even though Second Circuit courts have confirmed arbitral punitive awards that are twenty and fifty times actual damages.¹²³ Finally, while binding federal case law recognizes three factors as relevant to the inquiry of excessive punitive awards, *Sawtelle* ignores the factor that the Supreme Court has emphasized as most important: the reprehensibility of the defendant's conduct.¹²⁴ Rather, the court identifies one of the three relevant factors—the relationship between punitive damages and the amount of actual harm inflicted on the plaintiff—as independently sufficient to vacate an arbitral punitive damages award as excessive under the manifest disregard doctrine.¹²⁵

The instant decision presents a radical departure from the previously undisputed treatment of the bright line approach to punitive awards. The fact that the

116. *Gore*, 517 U.S. at 574-75. The three factors are: (1) degree of reprehensibility of defendant's conduct; (2) ratio of punitive damages to actual or potential harm suffered by the plaintiff; and (3) civil or criminal penalties that the state could impose for comparable misconduct. *Id.*

117. *Sawtelle v. Waddell & Reed, Inc.* 789 N.Y.S.2d 857, 859 (N.Y. App. Div. 2003). "This court held *Gore* inapplicable to private arbitrations because the Due Process Clause of the 14th Amendment is not applicable absent state action." *Id.* See *supra* notes 76-77.

118. *Sanders v. Gardner*, 7 F. Supp. 2d 151, 177-79 (E.D.N.Y. 1998); *Acciaro v. Millenium Secs. Corp.*, 83 F. Supp. 2d 413, 422 (S.D.N.Y. 2000).

119. *Sanders*, 7 F. Supp. 2d at 177-79; *Acciaro*, 83 F. Supp. 2d at 422.

120. *Id.*

121. *Sawtelle v. Waddell & Reed, Inc.*, 21 A.D.3d 820, 821 (N.Y. App. Div. 2005).

122. *Supra* notes 11-15.

123. *Sanders*, 7 F. Supp. 2d at 177-79; *Acciaro*, 83 F. Supp. 2d at 422.

124. See *Sawtelle* 21 A.D.3d at 821.

125. *Id.*

bright line rule was used to justify vacatur under the manifest disregard doctrine is significant because the underlying premise of the doctrine is that the scope of review is considerably narrower than the scope of review that an appellate court applies to the judgment of a trial court.¹²⁶ If the *Sawtelle* court found a twenty-three to one ratio excessive under a limited form of judicial review, and judicial review of trial court awards is more rigorous than judicial review of arbitral awards, then courts would have even greater authority to reverse a trial court's punitive award if it exceeded the twenty-three to one ratio.¹²⁷

The instant case illustrates why the doctrine of manifest disregard is limited to issues governed by clearly defined legal principles. When a court vacates an award under the manifest disregard doctrine and remands it to arbitrators, there is a risk that the court will not confirm the new arbitral award, and will force the parties to arbitrate for a third time with the possibility of further appeals. The doctrine of manifest disregard addresses and attempts to limit this problem by allowing awards to be vacated on such grounds only when the governing law is clear and well-defined. When the governing legal principle is well-settled, there is less room for the arbitrators and the courts to disagree on its application and thus the appropriate result.

In the instant case, for example, the definition of excessive punitive awards was not well-settled prior to the instant decision. The only clearly defined law at the time of remand was the Supreme Court's holding that three factors should guide the inquiry, with special emphasis on one factor—the reprehensibility of the defendant's conduct—as the most important of the three.¹²⁸ As such, an argument could be made that punitive damages were awarded in conformity with the law on remand. The panel's single change on remand in the description of the defendant's conduct—a “campaign of deception” to a “horrible campaign of deception, defamation, and persecution”¹²⁹—addressed “the reprehensibility of the defendant's conduct.”¹³⁰ The argument follows that instead of “obdurately issu[ing] an identical determination,” as the court claimed,¹³¹ the panel appears to have changed the description of Waddell & Reed's conduct to reflect their appreciation of the legal significance of this factor. In order to accept the instant court's holding as logically sound, however, this interpretation must fail to provide “an even barely colorable justification.”¹³²

Ironically, the instant dispute would likely have been resolved quicker and less expensively through litigation.¹³³ As noted by the New York State Supreme

126. See Posner, *supra* note 47, at 503.

127. In order for arbitration to maintain its goals of speed and economy, arbitral awards must be final. Judicial review of arbitral awards is strictly limited to minimize the risk that arbitral awards will be vacated and thus preserve the element of finality attributed to arbitral awards. See *supra* notes 62-64. It necessarily follows that a court's ordinary judicial review, of trial court awards, is not so strictly limited.

128. *BMW of North America, Inc. v. Gore*, 517 US 559, 575 (1996).

129. *Sawtelle*, 21 A.D.3d 820, 821.

130. *Gore*, 517 U.S. at 575.

131. *Sawtelle*, 21 A.D.3d 820, 821.

132. *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, A.G. 579 F.2d 691, 704 (2d Cir. 1978).

133. *Sawtelle v. Waddell & Reed, Inc.* 789 N.Y.S.2d 857, 859 (N.Y. Sup. Ct. 2004). The Trial Court stated: “The history of this arbitration undermines the very purpose of arbitration: to provide a manner of dispute resolution more swift and economical than litigation in court.” *Id.*

Court, the courts would have been able to issue a conditional remittitur¹³⁴ if a trial court, rather than an arbitration panel, had awarded the punitive damages.¹³⁵ Had the court issued conditional remittitur, the parties could have avoided going to arbitration again by stipulating to the amount of punitive damages to be awarded.¹³⁶ However, judicial review of arbitral awards is strictly limited to prevent courts from issuing orders, like a conditional remittitur, that would “fundamentally affect the merits.”¹³⁷ Such limitations were implemented to foster the speed and finality of arbitral awards, but here, the limitations prevented the courts from issuing an order—conditional remittitur—that could have reduced the delay and expense of the instant dispute.¹³⁸

VI. CONCLUSION

In the instant case, the court inappropriately used the doctrine of manifest disregard. The law governing when punitive damages awards are excessive is not settled. Although the doctrine of manifest disregard allows remand only in circumstances of well-settled law, the court used this doctrine to overturn the arbitrator’s award as excessive. This case illustrates why limitations of judicial review of arbitral award should remain limited. Although the parties contractually assumed the risk of misapplied law in exchange for economy and finality by agreeing to arbitrate, the parties did not receive the benefit of their bargain.¹³⁹ Instead of receiving a speedy alternative to litigation, the parties’ agreement to arbitrate resulted in a dispute between arbitrators and judges over a legal principle, spanning over eight years, five appeals, and two remands to arbitration panels.¹⁴⁰

LINDSAY BIESTERFELD

134. Conditional Remittitur is “the process by which a court requires either that the case be retried, or that the damages awarded by the jury be reduced.” BLACK’S LAW DICTIONARY 1321 (8th ed. 2004); the Supreme Court explains conditional remittitur as:

When an excessive verdict is given, it is usual for the judge to suggest to counsel to agree on a sum, to prevent the necessity of a new trial. In the absence of agreement the Court has no power to reduce the damages to a reasonable sum instead of ordering a new trial.

Dimick v. Schiedt, 293 U.S. 474, 480 (U.S. 1935).

135. *Sawtelle*, 789 N.Y.S.2d at 859.

Petitioner’s suggestion seems to make sense. If New York law now permits a court to vacate an arbitration award of punitive damages solely on the ground of excessiveness, because it is disproportionate under Gore, then a court should be able to modify that award in the same way that the court would modify a legally excessive jury verdict.

Id.

136. *Sawtelle*, 21 A.D. 3d at 821.

137. *Id.* at 822.

138. The trial court explained, following remand, that:

Petitioner’s suggestion seems to make sense. If New York law now permits a court to vacate an arbitration award of punitive damages solely on the ground of excessiveness, because it is disproportionate under Gore, then a court should be able to modify that award in the same way that the court would modify a legally excessive jury verdict.

Sawtelle, 789 N.Y.S.2d at 859. However, “A court’s power to modify an award issued in an arbitration conducted pursuant to the FAA is governed, and strictly limited by, [the FAA.]” *Id.* at 860.

139. See Rubins, *supra* note 2 at 367.

140. The trial court stated, in the opinion directly preceding the instant decision, “The history of this arbitration undermines the very purpose of arbitration: to provide a manner of dispute resolution more swift and economical than litigation in court.” *Sawtelle*, 789 N.Y.S.2d at 859.