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Wachovia Securities, LLC V. Brand (2012): The Fourth Circuit's Dubious Position in the Ongoing Federal Circuit Split in the Application of "Manifest Disregard Of The Law" as a Basis For Vacatur of Arbitration Awards Following the U.S. Supreme Court's *Hall Street* Decision (2008)

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**WACHOVIA SECURITIES, LLC V. BRAND (2012): THE
FOURTH CIRCUIT’S DUBIOUS POSITION IN THE
ONGOING FEDERAL CIRCUIT SPLIT IN THE APPLICATION
OF “MANIFEST DISREGARD OF THE LAW” AS A BASIS FOR
VACATUR OF ARBITRATION AWARDS FOLLOWING THE
U.S. SUPREME COURT’S HALL STREET DECISION (2008)**

JONAS CULLEMARK*

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I. INTRODUCTION

On February 16, 2012, the Fourth Circuit of the United States Court of Appeals, in its *Wachovia Securities, LLC v. Brand*¹ opinion, weighed in on a highly debated topic in arbitration in the United States, namely that of “manifest disregard of the law.” Since the United States Supreme Court’s *Hall Street*² decision in 2008, the circuit courts have been split as to whether the common-law doctrine of manifest disregard of the law is still a valid ground for vacating arbitration awards in cases under the United States Arbitration Act, more commonly known as the Federal Arbitration Act (“FAA”).³ Even though manifest disregard is not among the enumerated grounds for vacatur under the FAA,⁴ and the Supreme Court in *Hall Street* held that “the statutory grounds [of vacatur in the FAA] are exclusive,”⁵ the circuit courts have varying interpretations. The U.S. circuit courts have split into three camps over the meaning of the word “exclusive” in *Hall Street*.⁶ The first camp reasons that manifest disregard is no longer a valid ground for vacatur because the FAA’s

¹ *Wachovia Secs., L.L.C. v. Brand*, 671 F.3d 472 (4th Cir. 2012).

² *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

³ Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2012).

⁴ These are: “(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” *Id.* § 10(a)(1)-(4).

⁵ *Hall St.*, 552 U.S. at 578.

⁶ *Wachovia*, 671 F.3d at 481 n.7.

grounds are exclusive.⁷ The second camp's narrow reading of Hall Street results in the survival of manifest disregard as a separate ground for vacatur.⁸ The third camp holds that manifest disregard applies unchanged post-*Hall Street* but follows a different reasoning than the second camp.⁹

The third camp holds that manifest disregard continues to exist as a shorthand or a judicial gloss on the enumerated grounds for vacatur in the FAA, more specifically the FAA § 10(a)(4).¹⁰ By using this sweeping language, these courts justify an unchanged application of manifest disregard post-*Hall Street*.¹¹ This inclusion of the manifest disregard doctrine in the FAA § 10(a)(4) is confusing because the concepts are distinguishable. The manifest disregard doctrine challenges the arbitrator's application of the law to the dispute at hand, while a challenge of the arbitrator's power under the FAA § 10(a)(4) queries whether the arbitrator's contractual authority extended to resolving the dispute at hand.

In Wachovia, the Fourth Circuit held that it does not belong to the first camp but did not find it necessary to decide whether it belonged to the second or the third camp because the result would be the same in both these camps.¹² This is not surprising because the courts belonging to the third camp have not articulated any difference between manifest disregard as an independent ground for vacatur as compared to a shorthand or a judicial gloss on the enumerated grounds in the FAA.

This article critiques the Fourth Circuit's reasoning in Wachovia. The Fourth Circuit should have acknowledged that its own line of cases was inconsistent with *Hall Street*; therefore, they should have been overruled. Instead, the Fourth Circuit upheld its own line of cases by holding that "manifest disregard continues to exist either as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set

⁷ *Id.*

⁸ *Id.*

⁹ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp. (Stolt-Nielsen I)*, 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp. (Stolt-Nielsen II)*, 130 S. Ct. 1758 (2010) (if an "arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it" the Second Circuit will vacate the arbitration award); see also *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("We have stated that for an arbitrator's award to be in manifest disregard of the law, '[i]t must be clear from the record that the arbitrator [] recognized the applicable law and then ignored it.'").

¹⁰ See *Stolt-Nielsen I*, 548 F.3d at 93-94; see also *Comedy Club*, 553 F.3d at 1290.

¹¹ See *Stolt-Nielsen I*, 548 F.3d at 95; see also *Comedy Club*, 553 F.3d at 1290.

¹² *Wachovia*, 671 F.3d at 483.

forth at [the FAA] § 10.”¹³ This cannot be so. The first proposition is explicitly rejected by the Supreme Court in *Hall Street*. The second proposition fails because manifest disregard cannot be a gloss on excess of power because the concepts are distinguishable. In addition, the Fourth Circuit found dubious support for its holding in the U.S. Supreme Court’s *Stolt-Nielsen*¹⁴ opinion. This is surprising because the Supreme Court explicitly stated in *Stolt-Nielsen* that it “[did] not decide whether ‘manifest disregard’ survives [its] decision in [*Hall Street*].”¹⁵

This article proceeds as follows. Part II introduces arbitration under the FAA as well as some fundamental concepts in arbitration that are essential in order to follow the critique presented against the Fourth Circuit’s opinion in *Wachovia*. Part III explains the reasoning behind the doctrine of manifest disregard of the law. Part IV summarizes three essential U.S. Supreme Court decisions discussed by the Fourth Circuit in its *Wachovia* opinion: *Wilko*, *Hall Street* and *Stolt-Nielsen*. Part V describes the U.S. Circuit Courts’ split regarding manifest disregard following the ruling in *Hall Street*. Part VI reviews the Fourth Circuit’s *Wachovia* case, followed in Part VII by a critique of the same.

II. AN INTRODUCTION TO ARBITRATION UNDER THE FEDERAL ARBITRATION ACT

A. Arbitration under the Federal Arbitration Act

In 1925, Congress enacted the FAA with the purpose of trying to reverse the longstanding judicial hostility towards arbitration agreements that the American courts had adopted from the English common law.¹⁶ Based on Congress’ authority under the Commerce Clause, the FAA is a body of federal substantive law to be applied by both state and federal courts.¹⁷ The FAA provides for arbitration in maritime transactions and contracts for transactions involving interstate or foreign commerce.¹⁸

B. The Contractual Character of Arbitration

A party cannot be required to submit a dispute to arbitration unless it

¹³ *Id.* at 483 n.7.

¹⁴ *Stolt-Nielsen II*, 130 S. Ct. at 1758.

¹⁵ *Id.* at 1768 n.3.

¹⁶ 1 MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 7-4 (3d ed. 2012).

¹⁷ *Id.* § 7-6.

¹⁸ *Id.* § 7-4.

has agreed to do so.¹⁹ State law generally governs the interpretation of an arbitration agreement, but the FAA imposes certain fundamental rules, including the need for consent, as opposed to coercion.²⁰ Arbitration agreements must be interpreted under the accepted rules of contract law.²¹ When enforcing an arbitration agreement or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties, “the parties’ intentions control” the interpretation.²²

C. Vacating an Arbitral Award when an Arbitrator Exceeds His or Her Power

The scope of the arbitrator’s power is of interest from the point of view of judicial review. If an arbitrator “exceeded [his or her powers,] or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made,” then the arbitration award may be vacated under the FAA § 10(a)(4).²³ The parameters of an arbitrator’s powers are defined by the issues submitted to the arbitrator and by the arbitrator’s authority as set forth in the arbitration agreement.²⁴ The arbitrator is empowered to decide all issues of fact and law, unless he or she is contractually restricted from doing so in some specific way by the language of the arbitration clause.²⁵ Arbitration agreements typically prohibit an arbitrator from expanding, narrowing or deviating from the terms of the agreement in connection with which the dispute has arisen.²⁶ Arbitrators exceed their powers if they decide issues not presented to them, or when they grant relief not authorized in the arbitration agreement.²⁷

¹⁹ *Id.* § 1-2; an exception to that rule, however, is that a nonparty may force arbitration if the relevant state contract law allows the nonparty to enforce the agreement to arbitrate. *Id.* § 7-4.

²⁰ *Stolt-Nielsen II*, 130 S. Ct. at 1773.

²¹ 1 DOMKE, *supra* note 16, § 1-2.

²² *Stolt-Nielsen II*, 130 S. Ct. at 1773-74.

²³ 9 U.S.C. § 10(a)(4) (2012).

²⁴ 2 DOMKE, *supra* note 16, § 39-6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (“An arbitrator also exceeds his or her authority when he or she: (1) not only settles the dispute between the primary parties, but also determines the secondary liability of the losing party’s successor corporation; (2) wrongly awards relief to non-grievance employees; (3) awards an unrequested item of damages substantially larger than any item claimed in the submission; (4) determines questions of law when the agreement limits determinations to questions of fact; (5) relies on the definition of a term which conflicted with a term defined in the agreement; (6) awards a remedy not contemplated by the arbitration agreement; (7) fashions a

D. The FAA's Procedural Grounds for Vacatur and Modifications of Arbitral Awards

The FAA provides for the challenge of arbitration awards on matters of procedural fairness.²⁸ The grounds for vacatur under the FAA § 10(a)(1)-(4) are:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.²⁹

An award may also be modified or corrected, but not vacated, under the FAA § 11:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.³⁰

remedy not contained in a collective bargaining agreement by adding to, amending and/or departing from the terms of the agreement; (8) hears an untimely grievance; or (9) awards punitive damages to investors under one state law where the customer agreement clearly established another state law as the governing law.”).

²⁸ Cf. W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 503 (3d ed. 2000) (“In the United States, [prior to *Hall Street*], some but not all federal courts . . . permitted the parties by contract to expand the scope of judicial review of awards beyond the *procedural fairness grounds* provided by the [FAA]”) (italics added).

²⁹ 9 U.S.C. § 10(a)(1)-(4) (2012).

³⁰ *Id.* § 11.

III. MANIFEST DISREGARD OF THE LAW: A COMMON LAW GROUND FOR VACATUR OF ARBITRATION AWARDS

A. Background and Definition

The origins of modern manifest disregard as an independent common-law basis for reviewing American arbitration decisions likely lie in *dicta* from the Supreme Court's 1953 decision in *Wilko*, discussed below.³¹ The federal courts base their definitions of manifest disregard on these *dicta*.³² Manifest disregard is where an arbitrator knew of a relevant legal principle, understood that this principle controlled the outcome of the disputed issue, but nonetheless willfully ignored the governing law by refusing to apply it.³³ Unlike any of the enumerated procedural grounds for vacatur in the FAA, the common law manifest disregard doctrine allows a court to scrutinize how the arbitrator judged the legal merits of the dispute.³⁴

Manifest disregard of the law is, however, more than legal error or misunderstanding; that is, a court would not set aside an arbitral award because it rejected an arbitrator's conclusion as to the meaning or applicability of laws.³⁵ Manifest disregard is where an arbitrator recognizes binding appellate case law, then proceeds to deliberately disregard it.³⁶ The proof of this requires some showing in the record, other than the result obtained, that the arbitrator knew the law applied, yet expressly disregarded it.³⁷ An arbitrator's awareness of the law is imputed only if the governing law has been identified by the parties to the arbitration; otherwise, knowledge and intent are inferred only if the error is so obvious that it would instantly be perceived as such by the average person

³¹ *Wachovia*, 671 F.3d at 480 (discussing *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds* by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989)).

³² Ann C. Gronlund, Note, *The Future of Manifest Disregard As a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court's Ruling in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 96 IOWA L. REV. 1351, 1359 (2011).

³³ 4 THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION § 149-2 (3rd ed. 2010).

³⁴ Compare international arbitration, where "[t]hree statutory models have emerged for review of international arbitral awards at the seat of arbitration. The first provides for appeal on the legal merits of the dispute, coupled with a right to challenge awards for procedural defects in the arbitration such as arbitrator bias, excess of authority or denial of due process. Under the second paradigm, the loser has a right to challenge an award only for procedural defects, not error of law. A third model foresees no judicial review at all." CRAIG, *supra* note 28, at 502-03.

³⁵ 4 OEHMKE, *supra* note 33, § 149-2.

³⁶ *Id.* (citation omitted).

³⁷ *Id.*

qualified to serve as an arbitrator.³⁸ As a defense, the manifest disregard challenge can be overcome by substantial evidence in the record supporting the award's conclusion.³⁹

B. Arguments for Manifest Disregard

The justification behind manifest disregard is that a party should not have to live with an egregious result on the merits in an arbitration that is a consequence from the deliberate failure to apply the law.⁴⁰ Under this theory, the doctrine is important because it serves as a protection against manifest wrongs by arbitrators. The need for protection is particularly evident in adhesion contracts, which translate into uneven playing fields that may be corrected by judicial review.⁴¹ Moreover, mandatory arbitration clauses are becoming an increasingly important part of commercial contracts in a variety of industries, such as securities, employment, health care, and insurance.⁴² In this context, arbitration is not the result of a negotiated contract and can instead pose as a disadvantage to a less sophisticated party.⁴³ Parties forced into arbitration lose their right to a trial, a negative impact that would be exacerbated by a further limitation on judicial review.⁴⁴ The manifest disregard doctrine protects individuals in mandatory arbitration from what could possibly be an unfair forum unconcerned with legal principles.⁴⁵

C. Arguments against Manifest Disregard

Manifest disregard conflicts with the essence of arbitration. Arbitration is not meant to be litigation, and when parties agree to arbitrate, they inevitably gain the benefits of arbitration but also sacrifice some of the features of litigation, including a full appellate process.⁴⁶ The arbitrator's award is meant to be final, thereby increasing the speed and efficiency of the procedure. The manifest disregard doctrine erodes two of the defining

³⁸ *Id.*

³⁹ *Id.* § 149-9.

⁴⁰ Annie Chen, Note, *The Doctrine of Manifest Disregard of the Law After Hall Street: Implication for Judicial Review of International Arbitrations in U.S. Courts*, 32 *FORDHAM INT'L. L.J.* 1872, 1884 (2009).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1884-85.

⁴⁴ *Id.* at 1885.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1886.

features of arbitration as compared to litigation: finality and efficiency.⁴⁷ A potential problem caused by the existence of this doctrine is the “poor loser syndrome,” parties dissatisfied with arbitration may appeal weak or even meritless claims on the assumption that they have nothing to lose.⁴⁸ As a consequence, manifest disregard also weakens the cost-effectiveness that is meant to be an advantage of arbitration.⁴⁹ In addition, manifest disregard may indirectly discourage arbitrators from issuing reasoned awards and instead encourage arbitral decision making with less transparency.⁵⁰ This happens because, in the absence of reasoned awards that reveal how the arbitrator reached her decision, courts are unable to evaluate whether the arbitrator has manifestly disregarded the law.⁵¹

IV. THE SUPREME COURT’S *WILKO*, *HALL STREET* AND *STOLT-NIELSEN* DECISIONS

A. *Wilko*: *Dicta Indicating Vacatur of Arbitration Awards for Manifest Disregard*

The federal courts base their definitions of manifest disregard on dicta in the Supreme Court’s 1953 decision in *Wilko*.⁵² In *Wilko*, a customer brought suit under the Securities Act of 1933 for alleged misrepresentation by partners in a securities brokerage firm.⁵³ Although the question presented to the Supreme Court on certiorari was whether the dispute should be referred to arbitration, the Supreme Court, in dicta, considered whether “a failure of the arbitrators to decide in accordance with the provisions of the Securities Act” might be subject to judicial review.⁵⁴ The conclusion reached was that an arbitrator’s decision would have to be in “manifest disregard” of the law to be vacated.⁵⁵ The Supreme Court specified that “a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would constitute grounds for vacating the award pursuant to [the FAA § 10],” but “that

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1887.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *United States v. Doe*, 968 F.2d 86, 88 (D.C. 1992) (outlining the importance of the *Ward* test).

⁵³ *Wilko*, 346 U.S. at 428–29, *overruled on other grounds* by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

⁵⁴ See *Wilko*, 346 U.S. at 436.

⁵⁵ See *id.* at 436–37.

failure would need to be made clearly.”⁵⁶

B. Hall Street: The Statutory Grounds of Vacatur in the FAA are Exclusive

In Hall Street, the question before the Supreme Court of the United States was whether the statutory grounds in the FAA §§ 9–11 for prompt vacatur and modification may be supplemented by contract.⁵⁷ The Supreme Court held that the statutory grounds could not be supplemented by contract because “the statutory grounds are exclusive.”⁵⁸ The dispute in this case was between a commercial landlord and a tenant about the tenant’s alleged failure to comply with applicable environmental law.⁵⁹ The parties submitted the dispute to arbitration, and included in the arbitration agreement that

[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.⁶⁰

The arbitrator decided for the tenant.⁶¹ Subsequently, the landlord filed a motion with the United States District Court for the District of Oregon asking the court to vacate, modify, and/or correct the arbitrator’s award on the ground that the arbitrator had committed a legal error.⁶² The district court agreed, vacated the award, and remanded the case for further consideration by the arbitrator.⁶³ The district court expressly applied the standard of review chosen by the parties in the arbitration agreement, which included review for legal error.⁶⁴ On remand, the arbitrator amended the award to favor the landlord.⁶⁵ This time, both parties sought modification, and again the district court applied the

⁵⁶ *Id.* at 436.

⁵⁷ Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008).

⁵⁸ *Id.*

⁵⁹ *Id.* at 579.

⁶⁰ *Id.*

⁶¹ *Id.* at 580.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

parties' stipulated standard of review for legal error, correcting the arbitrator's calculation of interest but otherwise upholding the award in favor of the landlord.⁶⁶ Both parties then appealed to the Court of Appeals for the Ninth Circuit.⁶⁷ The Ninth Circuit reversed in favor of the tenant and instructed the district court on remand to confirm the original arbitration award, unless the award should be vacated on any of the grounds allowed under the FAA § 10, or modified or corrected under any of the grounds allowed under the FAA § 11.⁶⁸ After the district court again held for the landlord – this time on the ground that the arbitrator exceeded his powers – and the Ninth Circuit once more reversed, the Supreme Court granted certiorari.⁶⁹

Although the Supreme Court agreed with the Ninth Circuit that the grounds for vacatur and modification provided by the FAA §§ 10 and 11 were exclusive, the Court vacated the award and remanded the case for consideration of independent issues.⁷⁰ The Court held that

[i]nstead of fighting the text, it makes more sense to see the three provisions, [the FAA] §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-borne legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process.⁷¹

Nonetheless, the Court did not rule out that additional grounds for vacatur may exist.

In holding that [the FAA] §§ 10 and 11 provide exclusive regimes for the review provided by the statute, [the Court does] not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or

⁶⁶ *Id.*

⁶⁷ *Hall St.*, 552 U.S. at 580 (2008).

⁶⁸ *Id.* at 581.

⁶⁹ *Id.* at 581 n.1.

⁷⁰ *Id.* at 581.

⁷¹ *Id.* at 588 (citation omitted).

common law, for example, where judicial review of different scope is arguable.⁷²

Thus, if the FAA applies to a case, the U.S. Supreme Court discredits manifest disregard of the law as an independent basis for vacatur outside the grounds provided in the FAA § 10.⁷³ On the other hand, if the arbitration is governed by state statutory or common law, those rules may permit judicial review of a different and more extensive scope as compared to the FAA.⁷⁴ In other words, the FAA's statutory grounds for vacatur are not exclusive when a court interprets the provisions of a state's arbitration code or common law.⁷⁵

Domke on Commercial Arbitration discusses a case from the Texas Supreme Court to illustrate such possible alternative laws.⁷⁶ In *Nafta Traders, Inc. v. Quinn*, the Texas Supreme Court was faced with the following questions in an employment case alleging sex discrimination: (1) whether or not the Texas General Arbitration Act ("TAA"), like the FAA, precludes agreement for judicial review of an arbitration award for reversible error; and, if not, (2) whether the FAA preempts enforcement of such agreement.⁷⁷ The Texas Supreme Court held that the TAA did not preclude the parties from agreeing to expand the scope of judicial review.⁷⁸ It ruled further that the FAA did not preempt enforcement of an arbitration agreement that expanded judicial review.⁷⁹

⁷² *Hall St.*, 552 U.S. at 581 (2008) (citation omitted).

⁷³ See 4 ОЕИМКЕ, *supra* note 33, § 149-2.

⁷⁴ Cf. *Hall St.*, 552 U.S. at 590 ("But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards. Although one such avenue is now claimed to be revealed in the procedural history of this case, no claim to it was presented when the case arrived on our doorstep, and no reason then appeared to us for treating this as anything but an FAA case.") (italics added).

⁷⁵ See 4 ОЕИМКЕ, *supra* note 33, § 149-2 ("While the U.S. Supreme Court seemed to discredit manifest disregard. . . outside the grounds provided in FAA § 10, it is still helpful to understand the doctrine. . . as there still may be applications for review under a specific state law, where an arbitral award is reviewed under the terms of a judicial order referring a matter in litigation to arbitration, or with common law review.").

⁷⁶ 2 ДОМКЕ, *supra* note 16, § 38-3 (discussing *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011), *cert. denied*, 132 S. Ct. 455 (U.S. 2011)).

⁷⁷ *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 87 (Tex. 2011), *cert. denied*, 132 S. Ct. 455 (U.S. 2011).

⁷⁸ *Id.* at 96.

⁷⁹ *Id.* at 101; The Texas Supreme Court held that it "must, of course, follow *Hall Street* in applying the FAA, but in construing the TAA, [it is] obliged to examine *Hall Street's* reasoning and reach [its] own judgment." *Id.* at 91-92.

C. Stolt-Nielsen: *Where an Arbitration Clause Is Silent on the Issue, It Does Not Include Class Action Arbitration*

Arbitration is a matter of contract and the FAA's strong pro-arbitration policy only applies to disputes which the parties have agreed to arbitrate.⁸⁰ Arbitration agreements are only unenforceable under the FAA if the agreement would be revocable under state contract law.⁸¹ In *Stolt-Nielsen*, the question before the Supreme Court was whether the arbitrators exceeded their powers when they construed the bilateral arbitration clause at issue to include class-action arbitration.⁸² The arbitration agreement was silent regarding class-action arbitration, and the parties concurred that they had reached "no agreement" on that issue.⁸³ The Supreme Court held that it was "clear from [its] precedents and the contractual nature of arbitration that parties may specify with whom they choose to arbitrate their disputes."⁸⁴ In *Stolt-Nielsen*, the arbitrators incorrectly interpreted the parties' silence on the issue of class-action arbitration as consent.⁸⁵ This interpretation was prohibited because "the differences between bilateral and class-action arbitration are too great."⁸⁶ Consequently, the Court held that the arbitrators exceeded their powers, and vacated the arbitral award pursuant to the FAA § 10(a)(4).⁸⁷

V. THE U.S. CIRCUIT COURTS' SPLIT REGARDING MANIFEST DISREGARD

A. *The Three Camps*

The U.S. circuit courts have split into three camps about the meaning of the word "exclusive" in *Hall Street*.⁸⁸ The first camp (the First (dicta), Fifth, Seventh,⁸⁹ Eighth, and Eleventh Circuits) has read *Hall Street* as

⁸⁰ 1 DOMKE, *supra* note 16, § 7-4.

⁸¹ 1 *Id.* § 7-4.

⁸² *Stolt-Nielsen II*, 130 S. Ct. 1758 (2010).

⁸³ *Id.* at 1775.

⁸⁴ *Id.* at 1774.

⁸⁵ *Id.* at 1775.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1770.

⁸⁸ *Wachovia*, 671 F.3d at 481 n.7.

⁸⁹ Although the Seventh Circuit asserts that manifest disregard "is not a ground on which a court may reject an arbitrator's award under the [FAA]," it still struggles to completely let go of the term. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281, 285 (7th Cir. 2011). The Seventh Circuit has recognized that manifest disregard applies when an award "directs the parties to violate the legal rights of third

holding that the common law standards are no longer valid grounds for vacatur because the FAA's grounds are exclusive.⁹⁰ The second camp, which consists only of the Sixth Circuit, holds that manifest disregard survives as an independent ground for vacatur.⁹¹ The Sixth Circuit read Hall Street narrowly and found that it only prohibited private parties from contracting for greater judicial review.⁹² This suggests that the Sixth Circuit read any further implications of Hall Street merely as *dicta*. The third camp (the Second and Ninth Circuits) has held that since Hall Street, manifest disregard exists as a shorthand or a judicial gloss for the FAA § 10(a)(4).⁹³ By using this sweeping language, these two courts justify an unchanged application of manifest disregard post-*Hall Street*.⁹⁴ The Third, and Tenth Circuits have not yet decided whether manifest disregard survived Hall Street.⁹⁵ In its Wachovia opinion, the Fourth Circuit held that it does not belong to the first camp. However, the Fourth Circuit did not find it necessary to decide whether it belonged to the second or the third camp because the result would be the same.⁹⁶

B. The Circuit Courts' Reasoning behind Abandonment, Survival, or Shorthand and Judicial Gloss of Manifest Disregard

1. Abandonment

The Fifth Circuit's reasoning in rejecting manifest disregard as an independent, non-statutory ground for setting aside an arbitration award,

persons who did not consent to the arbitration." *Id.* at 284. In the situation described, the arbitrator exceeds his or her power regarding a non-consenting party. The FAA's enumerated grounds for vacatur already covers the situation where an arbitrator exceeds his or her power. Therefore, the Seventh Circuit's reasoning is superfluous.

⁹⁰ Ramos-Santiago v. UPS, 524 F.3d 120, 124 n.3 (1st Cir. 2008); Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009); Med. Shoppe Int'l, Inc. v. Turner Investments, Inc., 614 F.3d 485, 489 (8th Cir. 2010); Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1323-24 (11th Cir. 2010).

⁹¹ Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415, 419 (6th Cir. 2008).

⁹² *Id.* at 418-19.

⁹³ *Stolt-Nielsen I*, 548 F.3d at 93-94, *rev'd on other grounds, Stolt-Nielsen II*, 130 S. Ct. 1758 (2010); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

⁹⁴ See *Stolt-Nielsen I*, 548 F.3d at 95; see *Comedy Club*, 553 F.3d at 1290.

⁹⁵ *Rite Aid N.J., Inc. v. United Food Commercial Workers Union, Local 1360*, 449 F. App'x 126, 129 n.3 (3d Cir. 2011) (the Third Circuit has not yet "addressed the question of whether manifest disregard of the law remains a valid ground for vacating an arbitration award under the FAA, in light of [Hall Street]."); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 619-20 (10th Cir. 2011) (the Tenth Circuit has declined to decide whether the manifest disregard standard should be entirely abandoned "in the absence of firm guidance from the Supreme Court.").

⁹⁶ *Wachovia*, 671 F.3d at 483.

is that it found the Supreme Court's language "clear":⁹⁷ under the FAA, the statutory provisions are the exclusive grounds for vacatur.⁹⁸ Further, the court held that "the term itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards."⁹⁹ Hall Street made it plain that the statutory language means what it says:¹⁰⁰ "courts must [confirm the award] unless the award is vacated, modified, or corrected as prescribed in [the FAA],"¹⁰¹ and there is nothing malleable about "must."¹⁰² In the same way, the Eleventh Circuit agrees with the Fifth Circuit that the categorical language of Hall Street compels the rejection of manifest disregard.¹⁰³ The Eighth Circuit has held that manifest disregard is no longer viable, and "that an arbitral award may be vacated only for the reasons enumerated in the FAA."¹⁰⁴ Likewise, the First Circuit, in dicta, "acknowledge[d] the Supreme Court's recent holding in [Hall Street], that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]."¹⁰⁵ Nonetheless, because the case decided by the First Circuit was not an FAA case, the question whether Hall Street precluded manifest disregard was not decided.¹⁰⁶ Although the Seventh Circuit agrees that manifest disregard "is not a ground on which a court may reject an arbitrator's award under the [FAA],"¹⁰⁷ it still struggles to completely let go of the term.¹⁰⁸

⁹⁷ Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 9 U.S.C. § 9 (2006) (emphasis added)

¹⁰² *Citigroup*, 562 F.3d at 358 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008)).

¹⁰³ *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010).

¹⁰⁴ *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010).

¹⁰⁵ *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008); see also *Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 187 (1st Cir. 2012) ("[*Hall Street*] has caused a circuit split, with this court saying (albeit in dicta) that 'manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]'").

¹⁰⁶ *Ramos-Santiago*, 524 F.3d at 124 n.3.

¹⁰⁷ *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011).

¹⁰⁸ The Seventh Circuit recognizes an exception, that manifest disregard applies when an award directs the parties to violate the legal rights of third persons who did not consent to the arbitration. *Id.* at 284 ("[D]espite the limited scope of § 10(a), a court may set aside an award that directs the parties to violate the legal rights of third persons who did not consent to the arbitration. Thus an award directing the parties to form a cartel, and fix prices or output, could be vacated as a violation of the Sherman Antitrust Act, even though the [FAA] does not authorize the award's vacatur. Arbitration implements contracts, and what the parties cannot do through an express contract they cannot do through an arbitrator."). The Seventh Circuit's exception is where the arbitrator acts in excess of his or her power regarding a non-consenting party. An arbitrator acting beyond his or

2. *Survival*

In the unpublished *Coffee Beanery* opinion, the Sixth Circuit held that manifest disregard survives as an independent ground for vacatur.¹⁰⁹ The court reasoned that the Supreme Court's language in *Hall Street* was not strong enough to overrule the Sixth Circuit's precedent: "[i]n light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle."¹¹⁰ Even though the court recognized that *Hall Street* significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in the FAA § 10, it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law.¹¹¹ The Sixth Circuit read the decision narrowly, and concluded that the Supreme Court held that the FAA does not allow *private parties* to supplement by contract the FAA's statutory grounds for vacatur of an arbitration award.¹¹² In other words, manifest disregard still exists as an independent ground for vacatur to be applied by the federal courts. This suggests that the Sixth Circuit read any further implications of *Hall Street* merely as *dicta*.

3. *Shorthand and Judicial Gloss*

The Second Circuit has held that *Hall Street* "is undeniably inconsistent with . . . treating the 'manifest disregard' standard as a ground for vacatur entirely separate from those enumerated in the FAA."¹¹³ Nonetheless, the Second Circuit will continue to apply manifest disregard in the exact same manner as it did prior to *Hall Street*.¹¹⁴ The Second Circuit reconciles this apparent contradiction by holding that manifest disregard exists as a shorthand or a judicial gloss where the arbitrators exceeded their authority under the FAA § 10(a)(4).¹¹⁵ According to the Second Circuit, where the arbitrator manifestly disregards the law, he or

her scope of power falls under the FAA's enumerated grounds of vacatur. Hence, the Seventh Circuit's argument is superfluous.

¹⁰⁹ *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 418.

¹¹² *Id.* at 418-19.

¹¹³ *Stolt-Nielsen I*, 548 F.3d at 94, *rev'd on other grounds, Stolt-Nielsen II*, 130 S. Ct. 1758 (2010).

¹¹⁴ If an "arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it" the Second Circuit will vacate the arbitration award. *Id.* at 95.

¹¹⁵ *Id.* at 94.

she exceeds his or her authority because the arbitrator failed to interpret the contract at all, because parties do not agree in advance to submit to an arbitration that is carried out in manifest disregard of the law.¹¹⁶

The Ninth Circuit's reasons that manifest disregard exists as a shorthand where the arbitrators exceeded their authority under the FAA § 10(a)(4) mirrors the Second Circuit.¹¹⁷ The Ninth Circuit found itself bound by the "shorthand theory" in its pre-Hall Street precedent *Kyocera* because its holding was not "clearly irreconcilable" with Hall Street.¹¹⁸ As a result, the Ninth Circuit will continue to apply manifest disregard in the exact same manner as it did prior to *Hall Street*.¹¹⁹ In *Wachovia*, the Fourth Circuit held that it did not find it necessary to decide whether it belonged to the second or the third camp, only that it did not belong to the first camp.¹²⁰ This is not surprising because the courts belonging to the third camp have not articulated any difference between manifest disregard as an independent ground for vacatur as compared to a shorthand or a judicial gloss on the enumerated grounds in the FAA.¹²¹

VI. WACHOVIA SECURITIES, LLC v. BRAND

On February 16, 2012, the Fourth Circuit in *Wachovia* upheld the district court's refusal to vacate an arbitration award entered against *Wachovia*, after *Wachovia* had brought several former employees to arbitration on what the arbitrators determined were frivolous claims.¹²² *Wachovia's* challenge of the arbitration award on appeal rested on the arguments of misconduct by the arbitrators in violation of the FAA § 10(a)(3)¹²³ and that the award "manifestly disregarded" the law.¹²⁴ Although the Fourth Circuit denied the challenge of the award, it also held that "manifest disregard continues to exist either as an independent ground for review or as a judicial gloss on the enumerated grounds for

¹¹⁶ *Id.* at 95.

¹¹⁷ *Comedy Club, Inc. v. Improv W. Associates*, 553 F.3d 1277, 1290 (9th Cir. 2009).

¹¹⁸ *Id.* (citing *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc)).

¹¹⁹ *Id.* ("We have stated that for an arbitrator's award to be in manifest disregard of the law, '[i]t must be clear from the record that the arbitrator [] recognized the applicable law and then ignored it.'").

¹²⁰ *Wachovia*, 671 F.3d at 483.

¹²¹ *See Stolt-Nielsen I*, 548 F.3d at 95; *see Comedy Club*, 553 F.3d at 1290.

¹²² *Wachovia*, 671 F.3d at 474.

¹²³ *See* U.S.C. § 10 (3) (2006) ("where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced").

¹²⁴ *Wachovia*, 671 F.3d at 474.

vacatur set forth at the FAA § 10.”¹²⁵

In this case, Wachovia had terminated four employees, whereupon the former employees all went to work for a competing brokerage firm.¹²⁶ In the arbitration proceeding, Wachovia alleged that their former employees violated their contractual and common law obligations when they joined the competitor, for example, by soliciting current Wachovia clients.¹²⁷ The former employees requested that the arbitrators award them attorneys’ fees and costs incurred in defending themselves “from Wachovia’s baseless and unwarranted claims.”¹²⁸ They also asserted counterclaims under the South Carolina Wage Payment Act (“SCWPA”), and the common law doctrines of unjust enrichment and conversion.¹²⁹ The former employees did not assert any claims under the South Carolina Frivolous Civil Proceedings Act (“FCPA”).¹³⁰

The arbitrators denied all of Wachovia’s claims, and awarded the former employees damages under the SCWPA, as well as attorneys’ fees under the FCPA.¹³¹ Wachovia argued for vacatur on two grounds in the district court.¹³² First, it contended that the arbitration panel exceeded its authority and manifestly disregarded the law under the FAA § 10(a)(4) by failing to follow the procedural requirements under the FCPA.¹³³ Second, it argued that the arbitrators deprived Wachovia of a fundamentally fair hearing under the FAA § 10(a)(3).¹³⁴

The district court began by rejecting Wachovia’s argument that the arbitrators exceeded their authority under the FAA § 10(a)(4), because the arbitrators had decided an issue properly before them, the question of fees.¹³⁵ The district court further rejected Wachovia’s claim that the arbitrators manifestly disregarded the law, because Wachovia failed to show that the arbitrators understood the law as having a meaning which they chose to ignore.¹³⁶ Finally, the district court denied Wachovia’s claim that it had been deprived of a fundamentally fair hearing under the FAA

¹²⁵ *Id.* at 483.

¹²⁶ *Id.* at 475.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 477.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

§ 10(a)(3), because any deficiencies in the hearing were of Wachovia's own creation.¹³⁷

On appeal, Wachovia once again argued that the arbitrators had violated the FAA § 10(a)(3) and that they had manifestly disregarded the law.¹³⁸ However, this time Wachovia did not make any claims directly under the FAA § 10(a)(4), but instead argued that manifest disregard is a “judicial gloss” on the FAA § 10(a)(3) and (4).¹³⁹ The Fourth Circuit affirmed the decision of the district court.¹⁴⁰ It agreed with the district court that “Wachovia [was] the architect of its own misfortune” regarding the alleged deprivation of a fundamentally fair hearing.¹⁴¹ In addition, the Fourth Circuit found that although manifest disregard survived Hall Street, Wachovia had not demonstrated that the arbitrators manifestly disregarded the law.¹⁴²

The Fourth Circuit began its analysis with a brief history of the manifest disregard doctrine as well as its own manifest disregard standard prior to Hall Street, which was “that for a court to vacate an award under the manifest disregard theory, the arbitration record must show that (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle.”¹⁴³ The Fourth Circuit recognized the Supreme Court's holding in Hall Street, that the FAA prohibited parties from contractually expanding judicial review based on the theory that the grounds for vacatur in the FAA are “exclusive.”¹⁴⁴

Without any further analysis of Hall Street or its implications, the Fourth Circuit turned its attention to “the Supreme Court's more recent decision in Stolt–Nielsen[, which] sheds further light on the operation of ‘manifest disregard’ post–Hall Street.”¹⁴⁵ The question in Stolt–Nielsen was whether class action arbitration was permitted where the arbitration clause was silent on that point.¹⁴⁶ Based on the following footnote in Stolt–Nielsen, the Fourth Circuit held that manifest disregard continues to exist either “as an independent ground for review or as a judicial gloss on

¹³⁷ *Id.* at 477–78.

¹³⁸ *Id.* at 478.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 483.

¹⁴¹ *Id.* at 480.

¹⁴² *Id.*

¹⁴³ *Id.* at 481 (quotation marks omitted).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 482.

¹⁴⁶ *Id.*

the enumerated grounds for vacatur set forth at [the FAA] § 10”:¹⁴⁷

We do not decide whether “manifest disregard” survives our decision in *Hall Street Associates*, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at [the FAA] § 10. *AnimalFeeds* characterizes that standard as requiring a showing that the arbitrators knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it. Assuming, arguendo, that such a standard applies, we find it satisfied.¹⁴⁸

The Fourth Circuit held that the Supreme Court’s reasoning in *Stolt–Nielsen* closely tracked the majority of circuits’ approach to manifest disregard before *Hall Street*: the Supreme Court noted that there was clearly apposite law, that the panel did not apply the applicable law, and that it acknowledged that it was departing from the applicable law.¹⁴⁹ Because the Fourth Circuit found that *Wachovia’s* claim failed under both the survival and the judicial gloss theory, it did not have to decide which of the two.¹⁵⁰ In fact, under either theory, the Fourth Circuit’s manifest disregard standard is unchanged after *Hall Street*.¹⁵¹

VII. ANALYSIS OF *WACHOVIA SECURITIES, LLC v. BRAND*

A. Introduction

Black’s Law Dictionary defines ‘horizontal stare decisis’ as “[t]he doctrine that a court, [especially] an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself.”¹⁵² Apart from stating the fact that *Hall Street* injected uncertainty

¹⁴⁷ *Id.* at 483.

¹⁴⁸ *Id.* (citing *Stolt–Nielsen II*, S. Ct. at 1768 n.3).

¹⁴⁹ *Id.* at 482–83.

¹⁵⁰ *Id.* at 483.

¹⁵¹ *Id.* (“We do not read *Hall Street* or *Stolt–Nielsen* as loosening the carefully circumscribed standard that we had previously articulated for manifest disregard. Whether manifest disregard is a “judicial gloss” or an independent ground for vacatur, it is not an invitation to review the merits of the underlying arbitration. Therefore, we see no reason to depart from our two-part test which has for decades guaranteed that review for manifest disregard not grow into the kind of probing merits review that would undermine the efficiency of arbitration.”) (citation omitted).

¹⁵² BLACK’S LAW DICTIONARY 1537 (9th ed. 2009).

and a circuit split exists, no reasons for overruling its precedent were discussed in the Fourth Circuit's *Wachovia* opinion.¹⁵³ Despite the fact that "a court must strictly follow the decisions handed down by [a] higher [court],"¹⁵⁴ the Fourth Circuit neither made an effort to put the Supreme Court's holding in *Hall Street* in a wider context nor to analyze that holding's consequences. It may be inferred that the Fourth Circuit found itself in a position where it could choose to which of the three camps, previously discussed, it should belong, without further in-depth analysis. Moreover, the Fourth Circuit's application of *Stolt-Nielsen* suggests that it failed to maintain separate the concepts of arbitration in its analysis. The *Wachovia* opinion suggests that, unless the Supreme Court expressly states, "as a consequence of *Hall Street*, it follows that manifest disregard is not applicable under the FAA," the Fourth Circuit will interpret the Supreme Court's language in superficial ways in order to continue its own line of cases.

This article argues that the Fourth Circuit should have acknowledged that its own line of cases were inconsistent with *Hall Street*; therefore, they should have been overruled. The Fourth Circuit in its *Wachovia* opinion held that "manifest disregard continues to exist either as an independent ground for review or as a judicial gloss"¹⁵⁵ on excess of power. This cannot be so. The first proposition is explicitly rejected by the Supreme Court in *Hall Street*. The second proposition fails because manifest disregard cannot be a gloss on excess of power because the concepts are distinguishable. In addition, the Fourth Circuit should have given no weight to *Stolt-Nielsen* because, in that ruling, the Supreme Court explicitly stated that it "[did] not decide whether 'manifest disregard' survives [its] decision in *Hall Street*."¹⁵⁶

B. The Supreme Court Explicitly Rejected Manifest Disregard as an Independent Ground for Review

The Supreme Court's statement in *Hall Street*, that the grounds for vacatur in the FAA are "exclusive,"¹⁵⁷ does not leave room for interpretation. In order to reach the opposite conclusion, two presumptions would have to be made: that Congress implicitly intended

¹⁵³ See *Wachovia*, 671 F.3d at 481.

¹⁵⁴ BLACK'S LAW DICTIONARY 1537 (9th ed. 2009) (defining 'vertical stare decisis').

¹⁵⁵ *Wachovia*, 671 F.3d at 483.

¹⁵⁶ *Stolt-Nielsen II*, 130 S. Ct. at 1768 n.3.

¹⁵⁷ *Hall St.*, 552 U.S. at 578.

for grounds for vacatur in addition to those enumerated in the FAA; and that the Supreme Court's statement in *Hall Street*, that the grounds for vacatur in the FAA are "exclusive,"¹⁵⁸ does not preclude manifest disregard as a proper basis for vacating an arbitration award under the FAA. It is true that the Supreme Court in *Hall Street* held that the parties may not, by contract, expand the basis for vacatur beyond those provided in the FAA.¹⁵⁹ But since arbitration is based on the parties' agreement,¹⁶⁰ and Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring it,¹⁶¹ the most rational conclusion is that the judiciary should not be given more control over the process than the parties. Consequently, if the parties are not allowed to contract for additional grounds for vacatur, the judiciary should not be allowed to apply non-statutory grounds for vacatur. The Supreme Court recognized that its decision did not "exclude more searching review based on authority outside the statute as well,"¹⁶² when a court "contemplate[s] enforcement under state statutory or common law."¹⁶³ The *Wachovia* opinion presumed that the FAA applied; there was no discussion that it did not apply and that state statutory or common law was the applicable law instead.¹⁶⁴ Therefore, the FAA's exclusive grounds for vacatur were the only ones available to the Fourth Circuit in this case.

C. Manifest Disregard Cannot Be a Shorthand or a Judicial Gloss on the FAA § 10(a)(4)

It may be inferred that the Fourth Circuit interpreted its sister circuits' split as an open door to join whichever of the three camps it found most fit. But the Fourth Circuit should have carried out a more thorough independent analysis. The Fourth Circuit did not discuss the reasoning behind its sister circuits' differing conclusions, it merely noted the conclusions they had reached. As the circuit split shows, "several circuits have stepped out of line"¹⁶⁵ in their application of *Hall Street*. Thomas H. Oehmke asserts that "[t]his is not necessarily judicial arrogance."¹⁶⁶ He

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Stolt-Nielsen II*, 130 S. Ct. at 1774.

¹⁶¹ *Hall St.*, 552 U.S. at 581.

¹⁶² *Id.* at 590.

¹⁶³ *Id.*

¹⁶⁴ See *Wachovia*, 671 F.3d 472 (4th Cir. 2012).

¹⁶⁵ 4 OEHMKE, *supra* note 33, § 149-3.

¹⁶⁶ *Id.*

reasons that “many courts feel bound by their own precedent unless and until its rationale is overruled, implicitly or expressly, by the U.S. Supreme Court or the circuit court sitting en banc.”¹⁶⁷ Therefore, some circuit courts will “adher[e] to circuit precedent despite a ruling by the U.S. Supreme Court having cryptically cast doubt on prior holdings.”¹⁶⁸

Nonetheless, the third camp seems to dilute and blur concepts in arbitration in order to keep manifest disregard alive. The third camp holds that manifest disregard continues to exist as a shorthand or a judicial gloss on the enumerated grounds in the FAA, and applies manifest disregard unchanged post-*Hall Street*.¹⁶⁹ It is telling, but not surprising, that the Fourth Circuit did not find it necessary to decide whether it belonged to the second or the third camp because the courts belonging to the third camp have not articulated any difference between manifest disregard as an independent ground for vacatur as compared to a shorthand or a gloss on the enumerated grounds in the FAA.¹⁷⁰ This alone is suspicious and indicates that the courts in the third camp use sweeping language to follow their own line of cases.

The third camp’s inclusion of the manifest disregard doctrine in the FAA § 10(a)(4) fails because the concepts are distinguishable. The manifest disregard doctrine challenges the arbitrator’s application of the law to the dispute at hand, while a challenge of the arbitrator’s power queries whether the arbitrator’s contractual authority extended to resolving the dispute at hand. The latter examines the arbitrator’s interpretation of the arbitration agreement to determine his or her power to adjudicate the dispute.

D. The Fourth Circuit’s Interpretation of Stolt-Nielsen is Flawed

The Fourth Circuit incorrectly found that “the Supreme Court’s more recent decision in *Stolt–Nielsen* sheds further light on the operation of ‘manifest disregard’ post-*Hall Street*,”¹⁷¹ even though the Supreme Court explicitly stated that it did “not decide whether ‘manifest disregard’ survives [its] decision in *Hall Street*, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at [the FAA] § 10.”¹⁷² The Fourth Circuit read this “to mean that manifest

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Wachovia*, 671 F.3d at 481–82 n.7.

¹⁷⁰ *Id.* at 483.

¹⁷¹ *Id.* at 482.

¹⁷² *Stolt–Nielsen II*, 130 S. Ct. at 1768 n.3.

disregard continues to exist either ‘as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at [the FAA] § 10.’”¹⁷³

By finding support for its conclusion in the Stolt–Nielsen opinion, the Fourth Circuit demonstrates that it failed to separate different aspects of arbitration. The Stolt–Nielsen opinion decided whether a party might be referred, under the FAA, to class arbitration, when the arbitration clause is silent on the question.¹⁷⁴ This question relates to the arbitration clause and the arbitrators’ authority to decide the dispute. Whether an arbitrator is authorized to decide a dispute is a completely different question from how an arbitrator decided a dispute that he was authorized to decide. The Supreme Court in Stolt–Nielsen described arbitration as “simply a matter of contract *between the parties*; it is a way to resolve those disputes—but only those disputes—that the *parties* have agreed to submit to arbitration.”¹⁷⁵ The Court held that “it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”¹⁷⁶

To follow the Supreme Court’s reasoning, which concluded that the arbitrators went beyond their powers as given to them by the parties’ arbitration clause, there is no reason to do anything else than what the Supreme Court did, which was to apply contract law. State law generally governs the interpretation of an arbitration agreement, but the FAA imposes certain fundamental rules, including the need for consent, as opposed to coercion.¹⁷⁷ The parties’ “intentions control” the interpretation, and the courts must give effect to the contractual rights and expectations of the parties.¹⁷⁸ The Supreme Court’s contract interpretation in Stolt–Nielsen is analogous to its statutory interpretation in *Hall Street*. In Stolt–Nielsen, the Supreme Court concluded that the parties’ arbitration clause did not expressly include class action arbitration; therefore, an interpretation including class action arbitration was prohibited. Likewise, in *Hall Street*, the Supreme Court held that the FAA’s enumerated grounds for vacatur were exclusive; therefore,

¹⁷³ *Wachovia*, 671 F.3d at 483.

¹⁷⁴ *See Stolt–Nielsen II*, 130 S. Ct. at 1775. *See also* Gronlund, *supra* note 32, at 1353–54 (“The only instance in which the Court granted certiorari for a case involving manifest disregard [after *Hall Street*] was [*Stolt–Nielsen*]. However, the Court decided the case on different grounds and did not address the current controversy regarding the validity of manifest disregard as a ground for vacatur.”).

¹⁷⁵ *Stolt–Nielsen II*, 130 S. Ct. at 1774.

¹⁷⁶ *Id.* at 1775.

¹⁷⁷ *Id.* at 1773.

¹⁷⁸ *Id.* at 1773–74.

contracting for more extensive review was prohibited. In these two cases, the arbitration clause and the FAA were both interpreted according to their plain language, a “four corners” of the contract/statute interpretation.

Although the Supreme Court in its Stolt-Nielsen decision expressly said that its opinion did not touch on the continued validity of the grounds of “manifest disregard,”¹⁷⁹ the Fourth Circuit held that the Supreme Court’s reasoning in Stolt–Nielsen closely tracked the majority of circuits’ approach to manifest disregard before Hall Street: the Supreme Court noted that there was clearly apposite law, that the panel did not apply the applicable law, and that the panel acknowledged that it was departing from the applicable law.¹⁸⁰ The Fourth Circuit seems to be operating under the misconception that the Supreme Court discussed the arbitrator’s application of the law to the dispute at hand. However, the Supreme Court only discussed whether the arbitrator’s contractual authority extended to class action arbitration. In other words, the Supreme Court only reviewed the arbitrator’s interpretation of the arbitration agreement to determine his or her power to adjudicate the dispute.

VIII. CONCLUSION

The Fourth Circuit in its Wachovia opinion held that “manifest disregard continues to exist either as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at [the FAA] § 10.”¹⁸¹ This cannot be so. The first proposition is explicitly rejected by the Supreme Court in *Hall Street*. The second proposition fails because manifest disregard cannot be a gloss on excess of power because the concepts are distinguishable. The manifest disregard doctrine challenges the arbitrator’s application of the law to the dispute at hand, while a challenge of the arbitrator’s power queries whether the arbitrator’s contractual authority extended to resolving the dispute at hand.

One can speculate whether the thin reasoning of the Fourth Circuit demonstrates judicial arrogance, hostility towards arbitration, or excessive respect for its own stare decisis. Nonetheless, it certainly shows that the Supreme Court must spell out that manifest disregard of the law is not a ground for vacating an arbitration award under the FAA in order for the

¹⁷⁹ *Id.* at 1768 n.3.

¹⁸⁰ *Wachovia*, 671 F.3d at 482-83.

¹⁸¹ *Id.* at 483.

circuit courts to finally disregard it. Until then, it seems as if some circuit courts will not give more weight to the Supreme Court's Hall Street opinion than to their own precedents in this matter.