



ALTERNATIVE DISPUTE RESOLUTION UPDATE

by Susan Nassar

Manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.

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

In the wake of the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, ___ U.S. ___, 128 S.Ct. 1396, 1402 (2008), the Fifth Circuit issued this opinion, holding that "to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA." The Court noted that the parties in *Hall Street* agreed contractually to give the district court authority to vacate or modify an arbitration award on grounds not included in Sections 10 and 11 of the FAA. The Supreme Court, however, concluded that the statutory grounds in Sections 10 and 11 were the exclusive grounds for review under the FAA. Based on this, the Fifth Circuit determined that because manifest disregard of the law was not one of the statutory grounds set forth in Sections 10 and 11, it was no longer a valid basis for vacating arbitration awards under the FAA.

The Fifth Circuit noted that the petitioner in *Hall Street* had argued based on an earlier Supreme Court decision, *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), that "the widespread judicial recognition of manifest disregard of the law as a nonstatutory ground for vacatur suggests that §§ 10 and 11 are not exclusive." The Fifth Circuit observed, however, that *Hall Street* questioned whether *Wilko* should be read as creating an independent ground for vacatur since that issue was not before the *Wilko* Court and the language in *Wilko* was vague. Thus, although it and many courts had come to recognize manifest disregard of the law as a nonstatutory basis for vacatur over the years, the Fifth Circuit reasoned that this ground for vacatur was no longer valid after *Hall Street*.

In a display of resolve, the Fifth Circuit subsequently issued a one page *per curiam* opinion, *National Resort Management Corp. v. Cortez*, No. 08-10805, 2009 WL 890622 (5th Cir. Mar. 31, 2009), affirming an arbitration award and noting that "[t]he number of grounds for challenging an arbitration award has been substantially reduced in light of *Hall Street* ... and *Citigroup Global Mkts.*..." Similarly, in *Nicholas v. KBR Inc.*, ___ F.3d ___, 2009 WL 998974 (5th Cir. Apr. 15, 2009), the court cited its opinion in *Citigroup Global Markets*. Although this case involved a motion to compel arbitration, the Court noted in passing that "appellate review of an arbitrator's award is severely circumscribed.... manifest disregard of the law is no longer an independent

ground for vacating an arbitration award under the Federal Arbitration Act.").

Citigroup Global Markets was also recently cited by the Second Circuit in *Global Reinsurance Corp. v. Argonaut Insurance Co.*, No. 07 CIV. 7514, 2009 WL 928014 (S.D.N.Y. Mar. 23, 2009). According to that opinion, varying court interpretations of *Hall Street* have resulted in a split among the Circuits. While the Fifth and First Circuits have abandoned the manifest disregard standard, the Second and Seventh Circuits continue to recognize it as a valid, albeit "very narrow," ground for vacating an arbitration award. *Id.* ("*Hall Street* concluded that Sections 10 and 11 are the exclusive grounds for review under the Federal Arbitration Act, and suggested that 'manifest disregard' may have been 'short hand for § 10(a)(3) or § 10(a)(4).'").

Wrongful-death beneficiaries of an employee must arbitrate their claims against the employer even if they did not sign the arbitration agreement.

In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Feb. 13, Tex. 2009) and *In re Jindal Saw Ltd.*, No. 08-0805, 2009 WL 490082, (Tex. Feb. 27, 2009) (per curiam) (not released for publication).

The issue in both of these cases was whether an arbitration agreement governed by the Federal Arbitration Act ("FAA") binds the nonsignatory wrongful-death beneficiaries of a party to the agreement. *In re Labatt Food Service, L.P.* involved wrongful-death claims brought against Labatt Food Service, L.P. ("Labatt") by the family of Labatt employee Carlos Dancy, Jr. ("Dancy"). In lieu of workers' compensation insurance for on-the-job injuries, Labatt offered its employees the option to participate in an "occupational injury plan."

To participate in the plan, employees were required to sign an "Election of Comprehensive Benefits, Indemnity, and Arbitration Agreement." Among other things, the agreement provided that the employee: (1) elected to be covered under the plan "individually and on behalf of heirs and beneficiaries," and (2) will indemnify Labatt from claims and suits based on injury to or death of the employee from occupational causes, except for claims filed pursuant to the plan. The agreement also required that disputes related to the agreement, the plan, and an employee's occupational injury or death be submitted to binding arbitration pursuant to the FAA. Dancy elected to participate in the plan and signed an agreement. He subsequently died from an asthma attack while working, and his parents and children filed a wrongful-death action against Labatt.