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“PREPARE FOR TROUBLE, AND MAKE IT DOUBLE”¹: THE FOURTH CIRCUIT CONTINUES
DOWNWARD ITERATION OF DUPLICITOUS TEST FOR MANIFEST DISREGARD

By
Garrett Lent*

I. INTRODUCTION

In *Wachovia Securities v. Brand*, the Fourth Circuit held that arbitrators do not act in manifest disregard of the law by failing to adhere to state procedural laws where state substantive laws govern the underlying dispute.² The Fourth Circuit reasoned that the national policy favoring arbitration, at least in part, favors the expedited nature of arbitration proceedings. Accordingly, where an arbitration agreement mandates that state substantive law governs the underlying dispute, the arbitrator may elect not to adhere to the law’s procedural provisions, unless ignoring those provisions unduly prejudices the parties. In drawing its conclusion, the Fourth Circuit assessed manifest disregard of the law as a grounds for vacating arbitral awards, concluding that the legitimacy of the doctrine remained unclear in United States arbitration law. While immaterial to the disposition of the case, the Fourth Circuit’s indecision provided ambiguous guidance to the lower courts, which must continue to grapple with inconsistent precedent when determining whether and how to apply the manifest disregard doctrine. The resulting intra-jurisdictional variability frustrates the Supreme Court’s efforts to federalize U.S. arbitration law.

II. BACKGROUND

On October 1, 2007, Wachovia Securities merged with A.G. Edwards.³ Frank Brand, Stephen Jones, Marvin Slaughter and George Stukesall (collectively, the “Former Employees”), employees of the A.G. Edwards branch in Florence, South Carolina at the time of the merger, became employed by Wachovia Securities before being terminated on June 26, 2008.⁴ Thereafter, the Former Employees began working at a competing brokerage firm in Florence.⁵

¹ *Pokemon: Pokemon Emergency!* (4Kids Entertainment September 9, 1998) (quoting the introductory chant of Team Rocket members Jesse and James).

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² *Wachovia Sec., L.L.C. v. Brand*, 671 F.3d 472 (4th Cir. 2012).

³ *See Wachovia Sec., L.L.C. v. Brand*, Civ.A. No. 4:08-CV-02349-TLW, 2010 U.S. Dist. LEXIS 88505, at *3 (D. S.C. Aug. 26, 2010) (providing a more detailed background of the facts underlying the appeal).

⁴ *Id.*

⁵ *See Wachovia*, 671 F.3d at 475.

On June 27, 2008, Wachovia initiated arbitration against the Former Employees by filing a Statement of Claim with the Financial Industry Regulatory Agency (“FINRA”).⁶ Wachovia alleged that the Former Employees misappropriated proprietary information, and conspired to use that information to open a competing firm in Florence. Moreover, Wachovia alleged that the Former Employees were soliciting Wachovia clients and personnel to develop the new firm. In arbitration, Wachovia sought the following: (1) a permanent injunction prohibiting the Former Employees’ solicitation of Wachovia’s clients and personnel, (2) the return of proprietary information the Former Employees allegedly misappropriated before leaving the Wachovia office; and (3) costs and attorneys’ fees pertaining to the arbitration proceeding.⁷

On November 26, 2008, the Former Employees filed their arbitration brief.⁸ The Former Employees asserted that Wachovia initiated a meritless claim and planned on using the arbitration as an attempt to “punish, intimidate and deter” other employees who were considering leaving Wachovia following the merger with A.G. Edwards.⁹ The Former Employees requested an award of attorneys’ fees and costs for defending against the arbitration.¹⁰ The Former Employees also argued that Wachovia’s claims were frivolous.¹¹ Further, the Former Employees brought counterclaims for unjust enrichment and conversion, as well as violations of the South Carolina Wage Payment Law.¹²

On October 22, 2009, the Arbitration Panel requested accountings or proposals be submitted by the parties on the issue of attorneys’ fees and costs for the November 23 and 24, 2009 hearings.¹³ Wachovia requested the parties brief the Panel on legal authorities that addressed the issues of fees and costs.¹⁴ The Panel granted the request and directed the parties to submit briefs by November 23, 2009.¹⁵ At the November 23 hearing, the

⁶ Wachovia, 2010 U.S. Dist. LEXIS 88505, at *7. That same day, Wachovia filed suit in the United States District Court for the District of South Carolina at Florence, seeking preliminary injunctions against the former Employees. *See* Wachovia, 671 F.3d at 475 n.3. Specifically, Wachovia sought judgments: (1) mandating that the Former Employees return proprietary information they allegedly misappropriated upon departure; and (2) preventing the Former Employees from soliciting remaining Wachovia personnel with job offers at the competing firm. The District Court granted the first preliminary injunction, but denied the latter. *See id.*

⁷ Wachovia, 2010 U.S. Dist. LEXIS 88505, at *7-8.

⁸ *Id.* at *9.

⁹ *Id.*

¹⁰ *Id.* at *9-10.

¹¹ *Id.* at *10.

¹² Wachovia, 2010 U.S. Dist. LEXIS 88505, at *9.

¹³ *Id.*

¹⁴ *Id.* at *10.

¹⁵ Wachovia, 2010 U.S. Dist. LEXIS 88505, at *10.

Wachovia attorney stated Wachovia was unprepared to turn in the requested information that day.¹⁶ The Panel advised the attorney that November 23 was the deadline, but allowed both parties to submit their briefs the following day.¹⁷

The following day, November 24, 2009, both parties submitted the requested information.¹⁸ The Former Employees argued they were entitled to an award for attorneys' fees and costs under four authorities.¹⁹ In its brief, Wachovia submitted that neither party was entitled to recover attorneys' fees under a South Carolina law that precludes the award of attorneys' fees, unless previously prescribed by statute or contract.²⁰ Further, Wachovia argued that no statute or contract provisions was in place that would allow such a recovery.²¹

Near the end of the November 24, 2009 hearing, the Panel asked Wachovia's attorney if "he felt he had been given a fair opportunity to present his case in its entirety."²² The attorney for Wachovia responded in the affirmative, except that he did not believe he was able to adequately make his case on the matter of attorneys' fees.²³ The Panel stated it might need clarification from the parties on the issue of attorneys' fees, and ultimately asked the parties to submit fees and expenses incurred in November to the Panel.²⁴

The Panel issued an arbitration award denying all of Wachovia's claims on December 18, 2009.²⁵ The Panel also awarded the Former Employees compensation for their Wage Act claims in the amount of \$15,080.67, and awarded the Former Employees

¹⁶ *Id.*

¹⁷ *Id.* at *10-11.

¹⁸ *Id.*

¹⁹ *See id.* at *11. Former Employees argued that they were entitled to an award of attorneys' fees and costs under: 1) the South Carolina Uniform Trade Secrets Act, 2) the South Carolina Frivolous Civil Proceedings Sanctions Act, 3) the South Carolina Wage Payment Act for their counterclaim, and 4) the Panel's power under FINRA Code of Arbitration Procedure Rule 13212(a).

²⁰ *See* Wachovia, 2010 U.S. Dist. LEXIS 88505, at *11. (Wachovia arguing, "South Carolina follows the 'American Rule,' whereby litigants are responsible for their own attorneys' fees, unless there exists a contract or applicable statute that specifically provides for an award of attorneys' fees").

²¹ *Id.*

²² *Id.* at *12.

²³ *Id.*

²⁴ *Id.* at *12.

²⁵ *See* Wachovia, 2010 U.S. Dist. LEXIS 88505, at *13-14 (confirming the award, denying all claims against the defendants, and awarding defendants money damages for their counterclaims).

\$1,111,553.85 for attorneys' fees under the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA").²⁶

Wachovia moved to vacate the award in the United States District Court for South Carolina at Florence, arguing that the award was unenforceable under §§ 10(a)(3) and (4) of the Federal Arbitration Act ("FAA").²⁷ In support of its § 10(a)(3) argument, Wachovia claimed that the Panel engaged in misconduct by denying Wachovia the opportunity to sufficiently articulate its arguments on the matter of attorneys' fees.²⁸ In support of its § 10(a)(4) argument, Wachovia claimed that the Panel exceeded its authority and manifestly disregarded the law by relying on the FCPSA.²⁹ Moreover, Wachovia argued the FCPSA is applicable only in judicial adjudications, and not in arbitration proceedings.³⁰ The District Court denied Wachovia's arguments, and confirmed the award.³¹ Wachovia appealed.

III. COURT'S ANALYSIS

The Fourth Circuit began its analysis by reiterating the "severely circumscribed" standard of de novo review under which it would evaluate the District Court's decision to confirm the award.³² Such limited review, the Fourth Circuit explained, is demanded by the FAA and the broad federal policy favoring arbitration.³³ After explaining the standard of review, the Fourth Circuit considered whether an arbitrator must implement the state's procedural law where the arbitrator implemented the state's substantive law.

²⁶ See Wachovia, 2010 U.S. Dist. LEXIS 88505, at *13-14.

²⁷ See Wachovia, 671 F.3d at 477.

²⁸ *Id.*

²⁹ See *id.* According to Wachovia, disputing parties that face FCPSA sanctions are entitled to a thirty-day notice that FCPSA sanctions are being considered, and a separate hearing on the matter prior to imposing FCPSA sanctions. Wachovia argued that it never received notice that of the sanctions, and that it did not receive an opportunity to be heard on the legitimacy of its claims.

³⁰ See *id.* Wachovia maintained that, even absent the Panel's procedural errors in imposing FCPSA sanctions, the FCPSA only authorizes "courts" to award sanctions for frivolous civil proceedings post-"verdict."

³¹ Wachovia, 672 F.3d at 477-78.

³² See *id.* at 478.

³³ See *id.*

A. The Arbitrator is Not Required to Apply the Procedural Provisions of State Law When He Applies the Substantive Provisions

The Fourth Circuit rejected Wachovia's argument that an arbitrator is required to also apply a state's procedural law when the arbitrator has adopted state's substantive law in issuing an arbitral award.³⁴ The Court first noted that the parties did not provide evidence of an agreement to import the procedural rules of South Carolina state law.³⁵ The Fourth Circuit also noted that the Supreme Court has stated "informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."³⁶ Therefore, the Panel was not required to follow the FCPSA's procedural rules (i.e. the thirty-day notice requirement and separate hearing requirement for frivolous claims sanctions under the FCPSA), even though Wachovia attempted to import them after formation of the contract.³⁷

Additionally, the Fourth Circuit explained that arbitrators have broad discretion in establishing arbitration procedures.³⁸ In *Marrowbone*, the Fourth Circuit held "an arbitrator's procedural ruling may not be overturned unless it was in bad faith or so gross as to amount to affirmative misconduct."³⁹ The Fourth Circuit determined this ruling was closely aligned with the plain language of FAA § 10(a)(3).⁴⁰ Wachovia did not allege the arbitrator engaged in intentional misconduct by not importing the procedural provisions of the FCPSA.⁴¹ Thus, the Fourth Circuit rejected Wachovia's argument.⁴²

³⁴ See Wachovia, 671 F.3d at 478-79. Wachovia argued that the arbitrator violated 9 U.S.C. §10(a)(3) and engaged in misconduct.

³⁵ *Id.* at 479.

³⁶ See *id.* See also *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1749 (2011) (emphasizing the expeditious nature of arbitration's informal proceedings as being an integral benefit in the decision to adjudicate claims through that method).

³⁷ See Wachovia, 671 F.3d at 479 (noting that nothing prevents parties from adopting state law procedures in the formation of the arbitration clause or at any other time prior to the issue of an arbitration award). See also *Int'l United Mine Workers v. Marrowbone*, 232 F.3d 383, 389 (4th Cir. 2000) (holding "an arbitrator typically contains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present").

³⁸ See Wachovia, 671 F.3d at 479; *Marrowbone*, 232 F.3d at 389.

³⁹ *Marrowbone*, 232 F.3d at 390.

⁴⁰ See Wachovia, 671 F.3d at 479 (4th Cir. 2012) (quoting 9 U.S.C. § 10(a)(3) which authorizes vacatur "where the arbitrators were guilty of misconduct in refusing to postpone the hearing...or in refusing to hear evidence...; or of any other misbehavior by which the rights of any party have been prejudiced").

⁴¹ *Id.*

⁴² *Id.*

Lastly, the Fourth Circuit found that the arbitrator did not deprive Wachovia of a fundamentally fair proceeding by refusing to hear testimony or evidence on the issue of attorneys' fees and costs.⁴³ The Fourth Circuit noted that Wachovia, not the arbitrator, was at fault.⁴⁴ The Fourth Circuit explained that it would not overturn an arbitral award under FAA § 10(a)(3) where one party failed to follow the applicable procedures put in place by an arbitrator.⁴⁵ The Fourth Circuit further explained that Wachovia, by turning in its briefs on the issue on the final day of arbitration, left no time for the issue to be debated.⁴⁶ The court summarized:

After Wachovia complained that it had not received a fair hearing on the issue of fees, the arbitrators asked Wachovia if it wanted to submit additional briefs. Wachovia turned down this opportunity. Even if Wachovia is correct in its contention that the FCPSA requires a hearing in the context of arbitration, it could have used the additional briefing to explain why a hearing was necessary.⁴⁷

B. The Arbitrator Did Not Demonstrate Manifest Disregard of the Law by Applying the Substantive Provisions of a State Law with an Alternative Procedure

The Fourth Circuit lastly addressed Wachovia's argument that the District Court erred in finding the arbitrator did not manifestly disregard the law.⁴⁸ The Fourth Circuit laid the foundation for its analysis of manifest disregard of the law by explaining both the Circuit's application of the doctrine prior to the ruling in *Hall Street Associates*, and the status of the doctrine after *Stolt-Nielsen*.⁴⁹

Prior to *Hall Street Associates*, in *Long John Silver's*, the Fourth Circuit held that manifest disregard was a limited two-part test independent of the FAA.⁵⁰ In *Long John Silver's* the Fourth Circuit stated when the applicable legal principle is clearly defined and not subject to reasonable debate, and the arbitrator refused to heed that legal

⁴³ Wachovia, 671 F.3d at 480.

⁴⁴ *Id.*

⁴⁵ *See supra* notes 15-16 and accompanying text.

⁴⁶ Wachovia, 671 F.3d at 480.

⁴⁷ *See id.* (holding that a party cannot allege misconduct on behalf of an arbitrator when a refusal to hear testimony or take additional briefing is the result of a party's failure to meet the procedural deadlines it consented to abide by).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Long John Silver's v. Cole*, 814 F.3d 345, 349-50 (4th Cir. 2006).

principle, the arbitrator has demonstrated a manifest disregard of the law.⁵¹ However, the Supreme Court in *Hall Street Associates* held that FAA §§ 10 and 11 provided the exclusive grounds for vacatur.⁵² Subsequently, in *Stolt-Nielsen*, the Supreme Court held that it need not decide whether manifest disregard survived its decision in *Hall Street Associates* as an independent grounds for vacatur or as a judicial gloss of § 10 of the FAA, and ultimately vacated the arbitration award at issue.⁵³

Here, the Fourth Circuit interpreted *Stolt-Nielsen* to mean that manifest disregard continues to exist *either* as a judicial gloss of the FAA’s authorized grounds *or* as an independent ground for vacatur.⁵⁴ Therefore, the Fourth Circuit did not foreclose *Long John Silver’s* independent test as a ground for vacatur.⁵⁵ Ultimately, the Fourth Circuit held that although manifest disregard exists as either an independent ground for vacatur or as a judicial gloss of FAA § 10, it need not decide which interpretation controls because under either the Panel was not required to import the procedural provisions of the FCPSA.⁵⁶ Therefore, the Fourth Circuit affirmed the decision of the United States District Court for the District of South Carolina.⁵⁷

IV. SIGNIFICANCE

The threshold rulings in *Wachovia* demonstrate consistency in the Fourth Circuit’s constrained review of arbitral awards,⁵⁸ and also demonstrate the favorable

⁵¹ Long John Silver’s, 814 F.3d at 349-50.

⁵² See *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008) (holding §§ 10 and 11 provide the exclusive regimes of review). Commentators have suggested that the holding in *Hall Street* eliminated the common law grounds for manifest disregard, leaving only a “judicial gloss” of the FAA, but also noted “mystifying dicta” that calls this proposition into question. See Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*. 14 CARDOZO J. CONFLICT. RES. 593 (2013).

⁵³ See *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1768 n.3 (2010) (“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 9 U.S.C. § 10.... Assuming, arguendo, that such a standard applies, we find it satisfied for the reasons that follow.”).

⁵⁴ See *Wachovia*, 671 F.3d at 482-83 (discussing the Supreme Court’s approach as tracking the majority of circuit court approaches to manifest disregard prior to *Hall Street*). The Fourth Circuit interpreted the language in *Stolt-Nielsen* to allow for manifest disregard to be reviewed as either a judicial gloss of the FAA or independent grounds for judicial review because the Court assumed the applicability of a two part test posed by *AnimalFeeds*.

⁵⁵ See *id.* at 483 (“we decline to adopt the position of the Fifth and Eleventh Circuits that manifest disregard no longer exists”).

⁵⁶ *Id.*

⁵⁷ *Id.* at 483.

⁵⁸ See *id.* at 478.

treatment courts grant arbitration's informal procedures.⁵⁹ However, the enumeration of an "either or" approach, to what test determines whether an arbitrator acted in manifest disregard of the law, should give practitioners in the Fourth Circuit pause.

Wachovia demonstrates the downward iteration of uncertainty regarding the application of manifest disregard that began after *Hall Street Associates*,⁶⁰ and was again highlighted by *Stolt-Nielsen*.⁶¹ The court in *Stolt-Nielsen* correctly reiterated the high bar for vacatur that manifest disregard establishes, but did not decide whether it was an independent test or a judicial gloss of FAA §§ 10(a)(3) or (4).⁶² Ultimately, the correct decision by the Supreme Court to vacate the award left unclear whether manifest disregard of the law was a judicial gloss of the FAA or an independent common law test.⁶³

Practitioners in other circuits can at least take solace in the idea that their circuit has taken a definitive stance on which test for manifest disregard is to be applied.⁶⁴ In the Fourth Circuit, however, practitioners have no such assurance.⁶⁵ Instead, they are left with a duplicitous test founded upon principles in a controversial, if not troublesome, Supreme Court opinion.

⁵⁹ See *Wachovia*, 671 F.3d at 479.

⁶⁰ See *supra* note 52.

⁶¹ See *supra* note 53 and accompanying text. The Fourth Circuit in *Wachovia* adopted the Supreme Court's reasoning from *Stolt-Nielsen*, and assumed manifest disregard either existed as an independent test or a judicial gloss of the FAA grounds for vacatur.

⁶² See *supra* note 53.

⁶³ Manifest disregard was further discussed by the Supreme Court in *Sutter*, where the Court found that an arbitrator simply construing a contract cannot be acting in manifest disregard of the law because misinterpreting a contract does is not a departure from the delegated task of interpretation. See generally *Oxford Health Plans, L.L.C. v. Sutter*, 133 S.Ct. 2064 (2013) (holding an arbitrator misinterpreting a contract does not constitute manifest disregard). However, the Supreme Court in *Sutter* did not revisit the tests for manifest disregard.

⁶⁴ For court decisions finding that manifest disregard is a separate non-statutory ground for vacatur did not survive the *Hall Street*, see *S. Comm'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1358 (11th Cir. 2013) (holding judicially created bases for vacatur "are no longer valid"); *Bain v. Bank*, No. 13-30120, 2013 WL 4647317 (5th Cir. Aug. 30, 2013) (holding "to the extent Whitney asserts the arbitral award evinced a 'manifest disregard for the law,' this independent, nonstatutory ground cannot be the basis for vacatur or modification in this circuit."). Additionally, for court decisions finding manifest disregard continues to exist as a judicial gloss of the FAA, see *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1115 (9th Cir. 2012) (manifest disregard is the "shorthand for a statutory ground under [the Federal Arbitration Act (FAA)]...which states that the court may vacate where the arbitrators exceeded their powers."); *Giller v. Oracle USA, Inc.*, 512 Fed. App'x 71, 72 (2d Cir. Feb. 22, 2013) ("[w]e continue to recognize 'manifest disregard of the law' as a valid ground for vacatur as a 'judicial gloss' on the grounds specified by Section 10 of the FAA."); *Comedy Club, Inc. v. Improv. West Assoc.*, 553 F.3d 1277, 1289-90 (9th Cir. 2009) (holding that manifest disregard of the law is a valid ground for vacatur because it is a part of § 10(a)(4)).

⁶⁵ See *infra* note 78 and accompanying text.

In *Wachovia*, the Fourth Circuit opted to use the same analysis as the Supreme Court in *Stolt-Nielsen* and leave open the question of whether manifest disregard exists as an independent ground for vacatur or as a judicial gloss of the FAA.⁶⁶ Practitioners and scholars should note that the courts below the Fourth Circuit have recently litigated which test for manifest disregard should be applied, and the results are inconsistent.⁶⁷ By not providing guidance to the district courts regarding what test to apply to discern if an arbitrator manifestly disregarded the law, the Fourth Circuit has potentially created an intra-circuit regime that inconsistently reviews and enforces arbitration awards.⁶⁸ Now, rather than focusing on a consistent application of a solitary stringent intra-circuit standard, practitioners must juggle duplicitous tests between the district courts.

It is, however, important to note that the decision in *Wachovia* did not lower the high hurdle a party must meet during the review of an arbitral award.⁶⁹ The Fourth Circuit has made it clear that its courts will not overturn an arbitral award because the arbitrator did its job poorly or did not adjudicate reasonably.⁷⁰ Instead the Fourth Circuit will only vacate an award where the arbitrator failed to do its job.⁷¹ Further, the Fourth Circuit did not hold that either the separate and independent or judicial gloss test for manifest disregard of the law was less stringent than the other. Rather, the Court enunciated two high bars for a party seeking vacatur to meet, even though enunciating one would have sufficed.

V. CRITIQUE

The Fourth Circuit's analysis of the threshold issues in *Wachovia* is grounded in a consistent application of the federal policy favoring arbitration,⁷² but the lack of guidance from the Fourth Circuit in what test for manifest disregard district courts are to apply is problematic for uniformity in the review of arbitral awards.⁷³

⁶⁶ See *supra* note 57 and accompanying text.

⁶⁷ See *infra* text accompanying note 79.

⁶⁸ See *infra* notes 80-85 and accompanying text.

⁶⁹ See *Wachovia*, 671 F.3d 478 n.5.

⁷⁰ See *id.* at 480. Here, the arbitrator did nothing remotely wrong. Foremost, he was not required to import the procedural protections of the FCPSA, so long as he applied its substance. Further, any lack of fairness in the proceedings was constructed by *Wachovia's* lack of diligence in meeting deadlines it asked for and agreed to in the arbitration proceedings.

⁷¹ See *supra* note 37 and accompanying text.

⁷² See *supra* note 33 and accompanying text.

⁷³ For a discussion of the problematic lack of uniformity among the federal circuits regarding that status of manifest disregard after *Hall Street Associates* and *Stolt-Nielsen*, see Anthony Rallo, *The Veil of Acquiescence: Between the Lines of an Intuitive Appellate Decision the 9th Circuit Subtly Marginalizes*

Mere availability of manifest disregard as a grounds for vacatur already represents a point of disdain for arbitration under United States arbitration laws for both foreign and domestic entities.⁷⁴ The Fourth Circuit's decision in *Wachovia* further frustrates the matter by reiterating the Supreme Court's analysis of manifest disregard in *Stolt-Nielsen*. Variability in the test for manifest disregard applied in the various Fourth Circuit district courts, who determine whether an arbitrator manifestly disregarded the law, further emphasizes the source of the aforementioned disdain.

Under Fourth Circuit precedent, the independent test for manifest disregard of the law enunciated in *Long John Silver's* states that the arbitrator acts in manifest disregard of the law where the arbitrator's conduct is contrary to clearly established legal principles.⁷⁵ In contrast, the judicial gloss test treats manifest disregard of the law as either misconduct or acts in excess of authority by the arbitrator.⁷⁶ While comparable in their deferential application, the tests are substantively different. Allowing the tests to co-exist is duplicitous, and fails to minimize variability in the review of arbitration awards.

Where other circuits have at least handled the confusion that resulted from *Stolt-Nielsen* by clearly deciding that manifest disregard is no longer an independent ground for vacatur or that it is simply a judicial gloss of the FAA,⁷⁷ the Fourth Circuit in *Wachovia* provided its district courts with no guidance as to the ground's fate.⁷⁸ Rather than preventing intra-circuit confusion and establishing a clear status for manifest disregard in *Wachovia*, the Fourth Circuit allowed the matter to be further obfuscated in the resultant case law. Left without guidance, variability among the district courts resulted. Within the past two years, the common law test for manifest disregard, the treatment of manifest disregard as a judicial gloss of the FAA, and the application of *Wachovia's* "either or" analysis have all occurred in the Fourth Circuit.⁷⁹

FAA Limitations on Judicial Review, 24 AM. REV. INT'L ARB. 683, 690 n.75 (forthcoming Spring 2014) (on file with author).

⁷⁴ See generally Lawrence W. Newman & David Zaslowsky, 'Manifest Disregard' and International Arbitration Awards, N.Y. L.J., January 24, 2013.

⁷⁵ See *Long John Silver's*, 814 F.3d at 349-50.

⁷⁶ See *Matthews*, 688 F.3d at 1115; *Giller*, 512 Fed. App'x at 72.

⁷⁷ See *supra* note 60 and accompanying text.

⁷⁸ As such, the Fourth Circuit is now internally split in how to determine manifest disregard of the law. See *Wells Fargo Advisors, L.L.C. v. Watts*, 858 F.Supp.2d 591, 597 (W.D.N.C. 2012) [hereinafter *Wells Fargo I*] (discussing and applying both a statutory grounds for vacatur and federal common law grounds for vacatur in manifest disregard); see also *Choice Hotels Int'l v. Cherokee Hospitality*, Civ.A. No. DKC 11-2095, 2012 WL 5995583, at *3 (D. Md. Nov. 29, 2012) (utilizing the judicial gloss of the FAA test of manifest disregard); see also *Cherry Road Investors 2, L.L.C. v. TIC Props., L.L.C.*, Civ.A. No. 6:12-3076-TMC, 2013 WL 3208460, at *2 (D.S.C. June 24, 2013) (citing the independent 2 part test used in *Long John Silver's v. Cole*, 814 F.3d 345, 349-50 (4th Cir. 2006)). Both the independent common law and judicial gloss categorizations establish high bars for vacatur that protect the enforcement of arbitral awards. However, by allowing the tests to coexist, the Fourth Circuit provides multiple methods to challenge an arbitral award where a single method could suffice.

⁷⁹ See *supra* note 78.

After the decision in *Wachovia*, the United States District Court for the District of Maryland in *Choice Hotels* elected to analyze manifest disregard as a judicial gloss of FAA § 10.⁸⁰ Conversely, the United States District Court for the District Court of South Carolina in *Cherry Road Investors 2* applied the independent test for manifest disregard propagated by the Fourth Circuit in *Long John Silver's*.⁸¹

Further, in *Wells Fargo Advisors*, the United States District Court for the Western District of North Carolina applied both the judicial gloss standard and the independent test for manifest disregard.⁸² However, the court in *Wells Fargo I* noted a lack of clarity regarding the common law standard of manifest disregard.⁸³ On recent appeal, in *Wells Fargo II*, the Fourth Circuit upheld its approach in *Wachovia* and affirmed the district court's holding that the arbitrator did not act in manifest disregard of the law under either the judicial gloss or separate independent test approach.⁸⁴ The decision in *Wells Fargo II* demonstrates the Fourth Circuit's reluctance to clear the air surrounding manifest disregard. Rather than clarify *Wachovia*, or enunciate a clear ground for manifest disregard, the Fourth Circuit adhered to its duplicitous precedent, seemingly punting the issue for resolution by the Supreme Court.

The aforementioned cases demonstrate the problems likely to arise from the Fourth Circuit's lack of clarity in *Wachovia*. The Supreme Court created problems for uniformity in the application of manifest disregard in *Stolt-Nielsen*,⁸⁵ and the Fourth Circuit allowed the inconsistency to trickle down to its district courts. Until the Supreme Court clearly determines the fate of manifest disregard, circuits that take a hardline stance when determining the test can at least remain internally consistent. The Fourth Circuit does not even earn this consolation prize by adopting the Supreme Court's "either or" approach in *Wachovia*, but rather adds an internally fractured case law to the existing manifest disregard circuit split.⁸⁶

⁸⁰ See *Choice Hotels*, 2012 WL 5995583, at *3 (holding the arbitrator did not demonstrate manifest disregard of the law).

⁸¹ See *Cherry Road Investors 2*, 2013 WL 3208460, at *2 (holding the arbitrator did not demonstrate manifest disregard of the law).

⁸² See *Wells Fargo Advisors*, 858 F.Supp.2d at 597. The court in *Wells Fargo I*, ultimately found that the arbitrator did not demonstrate manifest disregard of the law. See *id.* at 600.

⁸³ See *id.* at 597 n.3.

⁸⁴ See *Wells Fargo Advisors, L.L.C. v. Watters*, 540 Fed. App'x 229, 231 (4th Cir. 2013) [hereinafter *Wells Fargo II*] (citing *Wachovia*, 671 F.3d at 483). The language from *Wachovia* cited by the Fourth Circuit in *Wells Fargo II* focuses on the proposition that manifest disregard exists as either an independent grounds for review or as a judicial gloss of the enumerated grounds for vacatur in the FAA.

⁸⁵ See *supra* note 73.

⁸⁶ For discussion of the circuit split over the application of manifest disregard, see *supra* note 64. For discussion of the varying district court applications of manifest disregard in the Fourth Circuit post-*Wachovia*, see *supra* notes 80-84 and accompanying text.

It is worth noting, however, the Fourth Circuit's decision does not diminish the high bar for the vacatur of an arbitration award established by manifest disregard after *Wachovia*.⁸⁷ Instead, there are multiple bars a party could choose to approach and no direction for which it should try to clear. The Fourth Circuit may have failed to limit the number of manifest disregard tests, but the "either or" analysis still provides limited review of arbitration awards.

Now, until either the Fourth Circuit reevaluates the stance it took in *Wachovia*, or the Supreme Court clarifies *Stolt-Nielsen*'s treatment of manifest disregard, the iteration of uncertainty will continue to loom over this ground for reviewing an arbitral award. This uncertainty is not, and cannot, be favorable for arbitration.

VI. CONCLUSION

The contradictory judgment in *Wachovia* demonstrates the favorable treatment arbitration is given in the Fourth Circuit,⁸⁸ while granting that favorable treatment under a duplicitous test that frustrates uniformity in the enforcement of arbitration awards.⁸⁹ While the court in *Wachovia* approached reviewing the confirmation of an award with proper deference, it enunciated two tests for district courts to determine whether an arbitrator acted in manifest disregard of the law. The resultant case law on manifest disregard illustrates variability in litigation surrounding arbitration award enforcement that the Fourth Circuit refuses to correct.

⁸⁷ None of the resultant case law in the Fourth Circuit has resulted in an arbitration award being vacated, *see supra* notes 80-83, and note 85. The various tests for manifest disregard remain narrowly applied.

⁸⁸ *See supra* notes 32 and 33.

⁸⁹ *See supra* notes 80-84.