DAVID A. WEINTRAUB
P.A.

7471 West Oakland Park Boulevard
Suite 110
Ft. Lauderdale, Florida 33319

www.stockbrokerlitigation.com

Admitted to Practice in:
Florida
Nebraska
New York

Telephone: (954) 746.8180
Facsimile: (954) 746.7820
Toll Free: (800) 718.1422

Securities Law Update – April 2008

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vescobar@stockbrokerlitigation.com

When Do Statutes of Limitation Apply In Arbitration?

My October 2007 article in The Florida Bar Journal of this same title can be found on the Florida Bar's website. In a follow-up to one of the principal cases discussed, the court in Berkley v. Merrill Lynch, 2008 U.S. Dist. LEXIS 27107 (S.D. Ohio 2008) declined to vacate an arbitration award in which arbitrators refused to follow existing case law holding that statutes of limitation do not apply in Ohio arbitrations. The Court held that the arbitrators did not manifestly disregard the law, as existing precedent did not represent either "controlling law" or a "clearly defined legal principle." This holding will serve to buttress the argument that arbitrators would not be erring by applying statutes of limitation that may otherwise be limited in application to court actions.

Woe is Bear Stearns!

The New York Court of Appeals held on March 13, 2008 that Bear Stearns's insurance carrier was not required to reimburse Bear Stearns for certain settlements for which coverage may otherwise have existed. Pursuant to Bear Stearns's insurance policy, it was required to obtain its carrier's authorization for any settlement in excess of $5 million. The Court stated, "[a]s a sophisticated business entity, Bear Stearns expressly agreed that the insurers would "not be liable" for any settlement in excess of $ 5 million entered into without their consent. Aware of this contingency in the policies, Bear Stearns nevertheless elected to finalize all outstanding settlement issues and executed a consent agreement before informing its carriers of the terms of the settlement. Bear Stearns therefore may not recover the settlement proceeds from the insurers." When it rains, it pours!

New U.S. Supreme Court Arbitration Decision

In Hall Street Associates v. Mattel, the Supreme Court held that judicial review pursuant to the Federal Arbitration Act is limited to those grounds identified in sections 9 – 11 of the Act. The parties were not free to contractually agree to different standards of judicial review, provided that the review purported to be pursuant to the Act. The Court left open the possibility that the parties could agree to different standards outside the parameters of the Federal Arbitration Act.

The Arbitrary Nature of Arbitration

The inability to predict the outcome of any given arbitration is no doubt a product of the arbitral review process, as evidenced by a February 7, 2008 N.Y. Supreme Court decision, "[a]n arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement" (*Matter of Silverman [Benmor Coats*], 61 NY2d 299, 308, 461 N.E.2d 1261, 473 N.Y.S.2d 774 [1984]). The award in this case, which was less than the amount sought by petitioner, is not irrational."

Terry Berkley, et al., Plaintiffs v. Merrill Lynch, et al., Defendants.

Case No. 1:06cv606

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

2008 U.S. Dist. LEXIS 27107

March 19, 2008, Filed

JUDGES: Michael R. Barrett, Judge. Magistrate Judge Timothy Hogan.

OPINION BY: Michael R. Barrett

OPINION

ORDER

This matter is before the Court pursuant to Plaintiffs' motion to vacate three NASD Arbitration Panel Final Decisions (Doc. 1). Each Defendant responded (Doc. 15 and 16). Plaintiffs filed a joint reply brief (Doc. 17). This matter is now ripe for review. Having considered the evidence before this Court, for the reasons set forth below, the Motion to Vacate is DENIED.

I. Background Facts

Plaintiffs, Terry Berkley, Allyson Berkley (collectively "Berkleys"), the 1992 Samuel Harris Family Trust, the Charlotte Harris Trust (collectively "Harris Trusts") and the Harris Berkley Sirking & Kruger PS Trust ("HBSK Trust"), request that this Court vacate three National Association of Securities Dealers (NASD) arbitration panel final decisions in NASD case numbers 05-04195 (Harris Trusts matter), 05-04196 (Berkleys matter), 05-04250 (HBSK Trust matter) and issue an order requiring a complete rehearing.

Each Plaintiff was introduced to Marc N. Jaffe in either 1999 or 2000 and then invested various amounts of money with Mr. Jaffe while he was employed at Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and then when he was with Morgan Stanley Dean Witter ("Morgan Stanley"). The Harris Trusts initially transferred approximately Two Million Five Hundred Thousand Dollars to Marc Jaffe and Defendants. The investment objective of each Trust was conservative growth. Thereafter, the accounts were over-concentrated in unsuitable, speculative and highly volatile securities by Jaffe and Defendants. The Harris Trusts allege that as a result of Jaffe and Defendants' decisions the account values sustained losses of One Million Four Hundred Sixty-Four Thousand Three Hundred Dollars.

The Berkleys also maintained accounts with Jaffe and Defendants and assert the same claims. The Berkleys transferred Seven Hundred Eighty-Nine Thousand Three Hundred Thirty-Two Dollars to Jaffe and Defendants. These accounts sustained losses of Two Hundred Ninety-Six Thousand Thirty-Seven Dollars.

The HBSK Trust is a profit sharing plan for a professional dental group. The HBSK Trust initially transferred approximately Three Million Dollars to Jaffe and Defendants. The

HBSK Trust makes the same allegations as the other Plaintiffs. This account suffered losses of Two Million Four Hundred Eighty-Six Thousand Six Hundred Thirteen Dollars.

Unbeknownst to Plaintiffs, Mr. Jaffe began to accumulate an extensive disciplinary history in 2001. According to his CRD report, customers had filed at least 24 complaints against Jaffe, including alleging unsuitable investments, excessive trading, churning, negligence, negligent supervision on the part of his employing brokerage firms, breach of fiduciary duty, and violations of various state securities laws. Apparently, Jaffe used a "one size fits all" approach to investing by purchasing large amounts of volatile technology, internet, and other speculative stocks. Jaffe left Merrill Lynch and moved to Morgan Stanley in March of 2001. Plaintiffs were not aware of these allegations against Jaffe and continued their business with him at Morgan Stanley.

In August of 2005, the Plaintiffs filed the three arbitration actions against Merrill Lynch and Morgan Stanley for the inappropriate conduct and activities of Jaffe and the Defendants. Each claim sought the following relief: recommending and implementing unsuitable investments, recommending and implementing unsuitable trading activities, churning, negligence, misrepresentations and omissions of material information, violations of the NASD conduct rules, violations of NYSE rules, breach of contract, breach of fiduciary duty/constructive fraud, respondeat superior, negligent supervision, common law fraud and misrepresentation, and Violations of the Indiana Securities Act. [1] The arbitration panels were selected by the parties and the panels in the Berkleys matter and the Harris Trusts matter were identical. The HBSK Trust panel was comprised of two different arbitrations, however, it was chaired by C. William Swinford, Jr., who also chaired the other panels.

1 Mr. Jaffe was an Indiana broker.

Each Defendant filed a motion to dismiss in each arbitration matter. After the motions to dismiss were fully briefed, a telephonic hearing was conducted with counsel for the parties and the arbitration panel in the Berkleys matter and the Harris Trusts matter on May 23, 2006. On June 16, 2006 the panel issued a decision in each case dismissing the claim with prejudice. A telephonic hearing was conducted with counsel for the parties and the arbitration panel in the HBSK Trust matter on June 9, 2006. Also, on June 16, 2006 that panel issued a decision dismissing the claims against Merrill Lynch with prejudice but overruling Morgan Stanley's motion to dismiss. Thus, HBSK Trust's claim against Morgan Stanley was the only claim to survive. No reasoning was set forth in any of the decisions.

II. Arguments

First, Plaintiffs argue that the arbitrator panels ("arbitrators" or "panels") demonstrated a manifest disregard of the law by failing to follow Ohio legal precedent. In particular, the arbitrators completely disregarded *NCR Corp. v. CBS Liquor Control,* 874 F. Supp. 168 (S.D. Ohio 1993), aff'd on other grounds sub nom. *NCR Corp. v. SAC-CO, Inc.,* 43 F.3d 1076 (6th Cir. 1995), which held statutes of limitations in Ohio inapplicable to arbitrations. Furthermore, Plaintiffs argue that the arbitrators also completely disregarded the Indiana Securities Act which provides a three year statute of limitations that begins to accrue upon actual knowledge of a violation of the act. Next, Plaintiffs argue that the panels engaged in misconduct when they denied Plaintiffs a hearing. Plaintiffs, therefore, did not have an opportunity to put forth evidence as to the merits of their claims or even to the factors relevant to statutes of limitations, such as evidence needed to determine when those statutes accrued, tolled or lapsed. Plaintiffs then

argue that the arbitrators exceeded their powers and imperfectly executed their powers by not holding a hearing and by dismissing Plaintiffs' claims with prejudice where the NASD Code of Arbitration Procedure Rule 10305 only allows for dismissal without prejudice. Finally, Plaintiffs argue that the arbitration panels' decisions were ambiguous, inconsistent and arbitrary on their face as the claims against Morgan Stanley in the HBSK Trust matter survived and the exact claims in the Berkleys matter and the Harris Trusts matter were dismissed with prejudice.

Defendants counter that the statute of limitations is applicable and that the Plaintiffs' claims are time barred as the losses suffered were obvious and Plaintiffs received account statements showing the activity in their accounts and the performance of such accounts. Defendants further counter that the panels did not exceed their powers as NASD Rule 10214 specifically provides that, "[t]he arbitrator(s) shall be empowered to award any relief that would be available in court under the law." Thus, dismissal with prejudice was an acceptable result. Additionally, Defendants argue that the panels did not exceed their powers as the NASD Rules do not require an "in person" hearing and allow for a pre-hearing conference to address "any other matters that will expedite the arbitration proceedings." NASD Rule 10321. Defendants also argue that the panels did not engage in misconduct as a hearing was held and Plaintiffs were not cut off from presenting any arguments or evidence to the panel. Finally, Defendants argue that the decisions were not ambiguous, inconsistent or arbitrary as it is clear that the decisions were based upon statute of limitations grounds. Morgan Stanley also notes that although the claims' of the HBSK Trust against it survived, this could have been the result of a the panels interpreting the facts differently. Morgan Stanley also points out that no award has been entered by the arbitrators against Morgan Stanley in the HBSK Trust matter, thus, making any determination by this Court premature.

III. Jurisdiction

This Court has diversity jurisdiction pursuant to 28 U.S.C. ß1332. Plaintiffs are citizens of Ohio while Defendants are both incorporated in the State of Delaware and maintain their principle place of business in the State of New York. The amount in controversy exceeds $ 75,000.

IV. Standard of Review

The relevant sections of the Federal Arbitration Act allow federal courts to vacate an arbitration award "where the arbitrators were guilty of misconduct in refusing to ... hear evidence pertinent and material to the controversy... or 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." 9 U.S.C. ß10(a)(3) and (4). However, this review is extraordinarily limited. *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.,* 894 F.2d 862, 866 (6th Cir. 1990). "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Warren v. Tacher,* 114 F. Supp. 2d 600, 602 (D. Ky. 2000) *quoting United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987).

In addition, the Sixth Circuit has held that a federal court may also vacate an arbitration award when the arbitrators act in manifest disregard of the law meaning "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Jacada v. International Marketing Strategies,* 401 F.3d 701, 712 (6th Cir. 2005). This is a very narrow standard, "one of the narrowest

standards of judicial review in all of American Jurisprudence." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005). A mere error in interpretation or application of the law will not suffice. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). "Rather, the decision must fly in the face of clearly established legal precedent." *Id.*

The *Jaros* Court then further explained the standard. "Where, as here, the arbitrators decline to explain their resolution of certain questions of law, a party seeking to have the award set aside faces a tremendous obstacle. If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside." *Id. citing Storer Broadcasting Co. v. American Fed'n of Television and Radio Artists*, 600 F.2d 45 (6th Cir. 1979).

The relevant section of the Arbitrators' decision, dated June 16, 2006, is as follows: "The panel, having heard arguments of counsel, having reviewed the entire record herein, and being otherwise sufficiently advised, hereby ORDERS and ADJUDGES that the Motions of the Respondents, Merrill Lynch and Morgan Stanley, to dismiss Claimant's Statement of Claim with prejudice are SUSTAINED." See Berkley Ex. 9 [2]

> 2 The decision as to the Harris Family Trust is not in the Exhibit Book; however, the award is identical to that in the Berkley Exhibit Book. Additionally, the decision in the HBSK Trust states, "The panel, having heard arguments of counsel, having reviewed the entire record herein, and being otherwise sufficiently advised, hereby ORDERS and ADJUDGES that the Motion of the Respondent, Merrill Lynch to dismiss Claimant's Statement of Claim with prejudice are SUSTAINED and the Motion of the Respondent, Morgan Stanley, to dismiss the Claimants' statement of claim with prejudice is hereby OVERRULED." See HBSK Trust Ex. 9.

V. Analysis

A. Manifest Disregard of the Law

Plaintiffs argue that the arbitrators demonstrated a manifest disregard of the law by failing to follow Ohio legal precedent. In particular, Plaintiffs argue that the arbitrators completely disregarded *NCR Corp. v. CBS Liquor Control*, 874 F. Supp. 168 (S.D. Ohio 1993), aff'd on other grounds sub nom. *NCR Corp. v. SAC-CO, Inc.*, 43 F.3d 1076 (6th Cir. 1995), which held statutes of limitations inapplicable to arbitrations. Plaintiffs also argue that the arbitrators completely disregarded the Indiana Securities Act which provides a three year statute of limitations that begins to accrue upon actual knowledge of a violation of the act.

As stated above, the Sixth Circuit has held that a federal court may vacate an arbitration award when the arbitrators act in manifest disregard of the law meaning "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Jacada v. International Marketing Strategies*, 401 F.3d 701, 712 (6th Cir. 2005). The problem facing the Plaintiffs is that *NCR Corp. v. CBS Liquor Control*, 874 F. Supp. 168 (S.D. Ohio 1993) is not a clearly defined legal principle. *NCR Corp.* has not been treated as controlling law by any other Court. In addition, *Jaros, supra* and *First Family Financial Services Inc. v. Mollett*, 2006 U.S. Dist. LEXIS 25561 (E.D.K.Y.) have indicated that a statute of limitations, albeit it a federal one, would be applicable in an arbitration proceeding.

Furthermore, the applicable NASD Rule 10304 states that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy... This Rule shall not extend applicable statutes of limitations."

Although it is clear from the record before this Court that no witness testimony was heard, Counsel for Plaintiffs did argue that the statute of limitations, even if applicable, was tolled. As best stated by Judge Bunning, "The arbitrator was presented with conflicting theories on the statute of limitations, not a clearly defined legal principle that he ignored." *First Family Financial Services Inc. v. Mollett*, 2006 U.S. Dist. LEXIS 25561, *23. Thus, based upon the narrow standard of review, this Court is unable to find a manifest disregard of the law.

As to the Indiana Securities Act's three year statute of limitations that begins to accrue after Plaintiffs' have actual knowledge of the existence of a violation, it is plausible that the panels considered the arguments of counsel and the statements of the claims to come to a determination that Plaintiffs' had actual knowledge more than three years prior to the filing of the arbitration claim. The facts show that each Plaintiffs knew their accounts were losing money in 2001 when their accounts were transferred to Morgan Stanley. Plaintiffs argue that this does not mean that the Plaintiffs knew that Jaffe and the Defendants were being negligent at that time, only that the market was not performing favorably. Although, the Court finds this argument to be a plausible one, it is not a manifest disregard of the law for the panels to find otherwise.

Additionally, it is plausible for the panels to find that the common law claims alleged are also time barred as it has been held that such claims fall within the time limitations set forth in the Ohio Securities Act, O.R.C. ß1707.43. See *Ware v. Kowars,* 200 Ohio App. LEXIS 199, p12 (Ohio Ct. App. Jan. 25, 2001); *Wuliger v. Owings*, 365 F. Supp.2d 838, 851-852 (N.D. Ohio 2005).

B. Misconduct

Plaintiffs contend that the panels engaged in misconduct when by denying Plaintiffs a hearing, arguing that they did not have an opportunity to put forth evidence as to the merits of their claims or even to the factors relevant to statutes of limitations, such as evidence needed to determine when those statutes accrued, tolled or lapsed. However, the Plaintiffs do admit that oral arguments were heard via a telephonic hearing. There is no indication in the record that Plaintiffs were not permitted to submit affidavits in support of their memorandum in opposition to the motions to dismiss. Since the panels did not issue a detailed opinion, there is no evidence that the panels did not treat the facts, as set forth in the statements of claims or as argued by counsel, as true for purposes of ruling on the motions to dismiss.

C. Exceeded Powers and Imperfectly Executed Powers

Plaintiffs then argue that the arbitrators exceeded their powers and imperfectly executed their powers by not holding a hearing and by dismissing Plaintiffs' claims with prejudice where the NASD Code of Arbitration Procedure Rule 10305 only allows for dismissal without prejudice. For the same reasons set forth above, the Court does not find that the panels exceeded their powers or imperfectly executed their powers by failing to hold a hearing. Additionally, the Court finds that the telephonic hearing was, in fact, held. *See Warren v. Tacher,* 114 F. Supp. 2d 600, 602-603 (D. Ky. 2000)(Petitioners had a hearing as they were given adequate opportunity to respond to Bear Stearns motion to dismiss and they did so. They were also represented by counsel at oral arguments.)

Although NASD Rule 10305 does permit dismissal without prejudice, Rule 10214 says that panels "shall be empowered to award any relief that would be available in court under the law. Plaintiffs, citing *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Association,* 59 Ohio St. 3d 177 (1991), argue that the panels imposed an additional term not expressly provided for by the rules. However, it is clear that a pre-hearing motion to dismiss may be granted. *See Warren v. Tacher,* 114 F. Supp. 2d 600, 602 (D. Ky. 2000). "Courts have recognized the authority of NASD arbitrators to decide pre-hearing dismissals for failure to state a claim under the NASD Code." *Warren v. Tacher,* 114 F. Supp. 2d 600, 602 (D. Ky. 2000) *citing Prudential Securities, Inc. v. Dalton,* 929 F. Supp. 1411, 1417 (N.D.Okla. 1996); *Max Marx Color & Chemical Co. Employees' Profit Sharing Plan v. Barnes,* 37 F. Supp. 2d 248 (S.D.N.Y. 1999). Furthermore, such dismissals may be with prejudice so long as it does not deny a party fundamental fairness. *Reinglass v. Morgan Stanley Dean Witter,* 2006 Ohio 1542, P17 (Ohio Ct. App. 2006) *citing Sheldon v. Vermonty,* 269 F.3d 1202, 1206 (10th Cir. 2001); *Warren v. Tacher* (W.D. KY 2000), 114 F.Supp.2d 600, 602-603. Because Plaintiffs responded to the motions to dismiss and participated in oral arguments at the telephonic hearing, this Court can not find that Plaintiffs were denied fundamental fairness. *See Sheldon,* 269 F.3d at 1206.

D. Ambiguous, Inconsistent and Arbitrary

Finally, Plaintiffs argue that the arbitration panels' decisions were ambiguous, inconsistent and arbitrary on their face as the claims against Morgan Stanley in the HBSK Trust matter survived and the exact claims in the Berkleys matter and the Harris Trusts matter were dismissed with prejudice. First, as to Merrill Lynch, the three panels were clear and consistent in their decisions, thus the Court can not find a reason to vacate the award. And, although, the panel in the HBSK Trust matter did not grant Morgan Stanley's motion to dismiss, it, too, can not be found to be ambiguous, inconsistent and arbitrary. Although this Court does question why the claims against Morgan Stanley were allowed to survive in the HBSK Trust matter and not in the other matters, "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Warren v. Tacher,* 114 F. Supp. 2d 600, 602 (D. Ky. 2000) *quoting United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987). Furthermore, since the matter is still pending in arbitration against Morgan Stanley it is not appropriate for the Court to rule on the interlocutory decision at this time.

VI. Conclusion

Plaintiffs' motion to vacate the three NASD Arbitration Panel Final Decisions is hereby DENIED. The Clerk of Court is directed to terminate this matter from the docket of this Court.

IT SO ORDERED.

/s/ Michael R. Barrett

Michael R. Barrett, Judge

United States District Court

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Vigilant Insurance Company, et al., Appellants, v The Bear Stearns Companies, Inc., Respondent.

No. 25

COURT OF APPEALS OF NEW YORK

2008 NY Slip Op 2080; 10 N.Y.3d 170; 2008 N.Y. LEXIS 542

March 13, 2008, Decided

PRIOR HISTORY: Vigilant Ins. Co. v. Bear Stearns Cos., Inc., 34 A.D.3d 300, 824 N.Y.S.2d 91, 2006 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't, 2006)

DISPOSITION: Order reversed, with costs, plaintiffs' motion for summary judgment granted, judgment granted declaring in accordance with the opinion herein and certified question answered in the negative.

CORE TERMS: insurer, settlement, investment banking, disgorgement, summary judgment, breached, investor, regulator, coverage, policy provision, final judgment, issues of fact, obligating, settling, insured, triable, settle, agreed to pay, settlement-in-principle, insurance contracts, settlement agreement, citation omitted, ill-gotten, consented, executing, modified, insurance policy, excess policies, financial services, financial institutions

COUNSEL: Joseph G. Finnerty III, for appellants.

John H. Gross, for respondent.

JUDGES: Opinion by Judge Graffeo. Judges Ciparick, Read, Smith, Pigott and Jones concur. Chief Judge Kaye took no part.

OPINION BY: Graffeo

OPINION

GRAFFEO, J.:

In this insurance dispute, we conclude that the insured breached a policy provision obligating it to obtain the consent of its liability carriers before settling claims in excess of $ 5 million. We therefore reverse the order of the Appellate Division denying the insurers' motion for summary judgment.

Defendant Bear Stearns Companies, Inc., a financial services firm, was issued a primary professional liability insurance policy by plaintiff Vigilant Insurance Company that provided coverage for losses resulting from claims made against the insured for its wrongful acts. The Vigilant policy afforded $ 10 million in coverage after Bear Stearns exhausted its $ 10 million self-insured retention. Plaintiffs Federal Insurance Company and Gulf Insurance Company further provided Bear Stearns an additional $ 40 million in coverage under follow-form excess liability policies.[1] Pursuant to the terms of these insurance contracts, Bear Stearns agreed not to settle any claim in excess of $ 5 million without first obtaining the consent of its insurers. In addition, the policies excluded coverage for claims arising from investment banking work undertaken by Bear Stearns.

1 The Travelers Indemnity Company is the successor-in-interest by merger to Gulf Insurance Company. Bear Stearns was also covered by additional excess policies not relevant to this appeal.

In early 2002, the U.S. Securities and Exchange Commission (SEC), National Association of Securities Dealers (NASD) and New York Stock Exchange (NYSE), along with state Attorneys General, initiated a joint investigation into the practices of research analysts working at financial services firms and the potential conflicts that could arise from the relationship between research functions and investment banking objectives. The investigation focused on allegations that research analysts employed at ten major financial institutions, including Bear Stearns, were improperly influenced by investment banking concerns. Toward the end of 2002, the regulators met separately with each of the investigated firms to discuss a global settlement.

On December 20, 2002, Bear Stearns signed a settlement-in-principle document, acknowledging that each regulator would commence an action or administrative proceeding against it and that Bear Stearns would subsequently "consent to the action and the relief sought without admitting or denying the allegations." Bear Stearns further agreed to pay $ 50 million in retrospective relief, plus $ 25 million to fund independent research and $ 5 million for investor education. The document indicated that the terms of the settlement were subject to approval by the SEC and other regulators. Also taking place on December 20, 2002, the regulators issued a press release announcing they had achieved an industry-wide settlement with the 10 financial institutions that would result in payments of more than $ 1.4 billion in penalties, restitution and education funds.

A few months later, Bear Stearns executed a consent agreement in which it acceded to the entry of a final judgment in the SEC's federal lawsuit against Bear Stearns in the United States District Court for the Southern District of New York. Under the terms of the "Consent of Defendant Bear, Stearns & Co. Inc.," dated April 21, 2003, Bear Stearns consented to be permanently enjoined from violating a number of NASD and NYSE rules and agreed to pay a total amount of $ 80 million allocated as follows: $ 25 million as a penalty, $ 25 million in disgorgement, $ 25 million for independent research and $ 5 million for investor education. Of the $ 50 million in retrospective relief, $ 25 million was designated to resolve the SEC action and related proceedings instituted by the NASD and NYSE, while the remaining $ 25 million covered the settlement of proceedings with various state regulators. Bear Stearns explicitly agreed not to seek insurance coverage for the $ 25 million penalty. The agreement also allowed the SEC to present a final judgment to the federal court "for signature and entry without further notice" to Bear Stearns.

Three days after executing the settlement agreement, Bear Stearns sent letters to its insurers requesting their consent to the settlement. The insurers disclaimed coverage and commenced this declaratory judgment action seeking a declaration that the $ 45 million sought by Bear Stearns (after depletion of the $ 10 million self-insured retention) was not covered by the policies.

In October 2003 the federal district court found the Bear Stearns settlement to be "fair, adequate, and in the public interest," and entered a final judgment ordering Bear Stearns to pay the agreed-upon sum of $ 80 million. Shortly thereafter, the insurers moved for summary judgment in this declaratory judgment action. In support of their motion, the insurers argued that they were not liable for all or part of the $ 45 million sought by Bear Stearns for four reasons. First, they asserted that Bear Stearns could not recover any of the settlement because it had breached the policy provision obligating it to obtain the insurers' consent before settling the case. Second, they claimed that the investment banking exclusion precluded recovery of the settlement proceeds. Third, the insurers contended that the $ 25 million disgorgement payment was uncollectible either as a matter of public policy or under contract interpretive principles. Finally, they posited that neither the $ 25 million payment for independent research nor the $ 5 million payment for investor education was covered because those liabilities were not "losses" within the meaning of the policies.

Supreme Court found that triable issues of fact existed as to whether Bear Stearns breached the policy clause prohibiting it from settling without the insurers' consent and whether the investment banking exclusion applied. Siding with the insurers on the disgorgement issue, the court held that the $ 25 million disgorgement payment did not constitute damages under the terms of the policies and that Bear Stearns was not entitled to look behind the settlement to ascertain whether the entire $ 25 million truly represented ill-gotten gains. The court also rejected the insurers' position that the $ 25 million payment for independent research and $ 5 million payment for investor education were not losses under the policies. Bear Stearns and the insurers appealed.

The Appellate Division modified, by granting Bear Stearns summary judgment on the investment banking exclusion and independent research/investor education issues and denying the insurers summary judgment on the disgorgement issue, and otherwise affirmed. The court concurred with Supreme Court in finding an issue of fact as to whether Bear Stearns breached the provision obligating it to obtain the consent of the insurers, but determined that the investment banking exclusion was not applicable. Despite the agreement by Bear Stearns to pay $ 25 million as disgorgement, the court found "an issue of fact as to whether the portion of the settlement attributed to disgorgement actually represented ill-gotten gains or improperly acquired funds" (34 AD3d 300, 302, 824 N.Y.S.2d 91 [2006]). Finally, the court rejected the insurers' contention that the combined $ 30 million payment for independent research and investor education were not covered losses.

The Appellate Division granted the insurers leave to appeal and certified the following question to this Court: "Was the order of the Supreme Court, as modified by this Court, properly made?" We conclude that it was not.

The insurers raise a number of objections to the Appellate Division order, but we find it necessary to address only one of them. The insurers contend that the Bear Stearns settlement is not recoverable because Bear Stearns breached the policy provision obligating it to obtain their consent prior to settling the regulator lawsuits. Specifically, the insurers claim that Bear Stearns resolved and finalized the settlement of the case when it executed the settlement-in-principle in December 2002 or, at the latest, when it signed the consent agreement in April 2003 without advising the

insurers. Bear Stearns counters that the courts below properly found a triable issue of fact as to whether its execution of these two documents constituted a breach of the policy provision.

The primary insurance policy, whose terms and conditions are incorporated into the follow-form excess policies, provides in relevant part:

"The Insured agrees not to settle any Claim, incur any Defense Costs or otherwise assume any contractual obligation or admit any liability with respect to any Claim in excess of a settlement authority threshold of $ 5,000,000 without the Insurer's consent, which shall not be unreasonably withheld . . . The insurer shall not be liable for any settlement, Defense Costs, assumed obligation or admission to which it has not consented." As with the construction of contracts generally, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267, 878 N.E.2d 1019, 848 N.Y.S.2d 603 [2007] [citation omitted]).

We conclude that Bear Stearns breached this provision when it executed the April 2003 consent agreement before notifying the insurers or obtaining their approval. As contemplated by the earlier settlement-in-principle, Bear Stearns signed the April 2003 agreement acquiescing to the relief sought in the SEC federal action. Under this agreement, Bear Stearns agreed to pay $ 80 million, covering four payment categories, in order to resolve the various federal and state regulatory actions and proceedings pending against it. Bear Stearns further accepted injunctive relief that prevented it from violating certain NASD and NYSE rules. And it acknowledged that the SEC could present a final judgment to the federal court for signature and entry without further notice. In short, Bear Stearns did everything within its ability to settle the matter and no further action was required on its part.

We are unpersuaded by the contention that a triable issue of fact exists because the federal court did not approve the settlement until it entered a final judgment in October 2003. [HN1]Parties are free to enter into a valid settlement agreement that is made subject to court approval. Notably absent from the agreement, however, was any provision similarly subjecting it to the insurers' approval. Having signed the consent agreement, Bear Stearns was not free to walk away from it before entry of a final judgment (*see TLC Beatrice Intl. Holdings, Inc. v Cigna Ins. Co.*, 2000 WL 282967, *7, 2000 U.S. Dist LEXIS 2917, *20-21 [SD NY 2000] ["Although the Court, whose approval was sought by the parties, could accept or reject the Settlement, subject to that approval the parties themselves were bound by the Settlement's terms" (citation omitted)], *affd in unpublished op sub nom. Lewis v Cigna Ins. Co.*, 234 F3d 1262 [2d Cir 2000]). In executing the April 2003 agreement, Bear Stearns settled a claim within the meaning of the insurance policy provision.

As a sophisticated business entity, Bear Stearns expressly agreed that the insurers would "not be liable" for any settlement in excess of $ 5 million entered into without their consent. Aware of this contingency in the policies, Bear Stearns nevertheless elected to finalize all outstanding settlement issues and executed a consent agreement before informing its carriers of the terms of the settlement. Bear Stearns therefore may not recover the settlement proceeds from the insurers.

Accordingly, the order of the Appellate Division should be reversed, with costs, plaintiffs' motion for summary judgment granted, judgment granted declaring in accordance with this opinion and the certified question answered in the negative.

* * * *

Order reversed, with costs, plaintiffs' motion for summary judgment granted, judgment granted declaring in accordance with the opinion herein and certified question answered in the negative. Opinion by Judge Graffeo. Judges Ciparick, Read, Smith, Pigott and Jones concur. Chief Judge Kaye took no part.

Decided March 13, 2008

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HALL STREET ASSOCIATES, L.L.C., PETITIONER v. MATTEL, INC.

No. 06-989

SUPREME COURT OF THE UNITED STATES

2008 U.S. LEXIS 2911

November 7, 2007, Argued
March 25, 2008, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Hall St. Assocs., L.L.C. v. Mattel, Inc., 196 Fed. Appx. 476, 2006 U.S. App. LEXIS 19527 (9th Cir. Or., 2006)

DISPOSITION: 196 Fed. Appx. 476, vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner landlord sued defendant tenant, alleging, inter alia, that the tenant had to indemnify the landlord for the costs of cleaning up a pollutant. The parties submitted to arbitration the indemnification issue. Certiorari to the United States Court of Appeals for the Ninth Circuit was granted to resolve a split in the circuits as to whether the grounds for vacatur and modification provided by 9 U.S.C.S. §§ 10 and 11 were exclusive.

OVERVIEW: The issue was whether statutory grounds for prompt vacatur and modification could be supplemented by contract. Case law rejected the landlord's argument that general review was allowed for an arbitrator's legal errors. While the Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 et seq., allowed parties to tailor many features of arbitration by contract, the Act's textual features did not provide for enforcing a contract to expand judicial review following the arbitration. Under the ejusdem generis rule, 9 U.S.C.S. § 9, which had no textual hook for expanding judicial review, did not authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. Rather, 9 U.S.C.S. §§ 10 and 11 provided exclusive regimes for the review provided by the FAA. Although the lower court properly held that the FAA confined its expedited judicial review to the grounds listed in 9 U.S.C.S. §§ 10 and 11, a remand was appropriate to consider further argument as to whether the arbitration agreement should have been treated as an exercise of the district court's authority to manage its cases under Fed. R. Civ. P. 16.

OUTCOME: Although the lower court properly concluded that the FAA confined its expedited judicial review to the grounds listed in the FAA, the judgment was vacated and the case was remanded for further proceedings. 6 majority; 2 dissents.

CORE TERMS: arbitration, arbitrator's, judicial review, arbitration agreement,

arbitration awards, vacatur, modification, vacated, legal error, vacate, expedited, lease, correcting, vacating, confirm, evident, corrected, modifying, modified, modify, agreement to arbitrate, enforcing, manifest, judicial enforcement, environmental, confirmation, enforceable', prescribed, favoring, Federal Arbitration Act FAA

LexisNexis(R) Headnotes

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN1]The Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., provides for expedited judicial review to confirm, vacate, or modify arbitration awards. 9 U.S.C.S. §§ 9-11.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > Coverage & Exceptions
[HN2]As for jurisdiction over controversies touching arbitration, the Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., does nothing, being something of an anomaly in the field of federal-court jurisdiction in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis. But in cases falling within a court's jurisdiction, the Act makes contracts to arbitrate valid, irrevocable, and enforceable, so long as their subject involves commerce. 9 U.S.C.S. § 2. And this is so whether an agreement has a broad reach or goes just to one dispute, and whether enforcement be sought in state court or federal.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN3]The Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. 9 U.S.C.S. §§ 9-11. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. 9 U.S.C.S. § 6. Under the terms of 9 U.S.C.S. § 9, a court must confirm an arbitration award unless it is vacated, modified, or corrected as prescribed in 9 U.S.C.S. §§ 10 and 11. 9 U.S.C.S. § 10 lists grounds for vacating an award, while 9 U.S.C.S. § 11 names those for modifying or correcting one.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN4]See 9 U.S.C.S. § 10(a).

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN5]See 9 U.S.C.S. § 11.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN6]9 U.S.C.S. §§ 10 and 11 respectively provide the exclusive grounds under the Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., for expedited vacatur and modification.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN7]The text compels a reading of the 9 U.S.C.S. §§ 10 and 11 categories as exclusive.

Governments > Legislation > Interpretation
[HN8]Under the ejusdem generis rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN9]On application for an order confirming an arbitration award, a court must grant the order unless the award is vacated, modified, or corrected as prescribed in 9 U.S.C.S. §§ 10 and 11. 9 U.S.C.S. § 9. There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the prescribed exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN10]Instead of fighting the text, it makes more sense to see 9 U.S.C.S. §§ 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-bore 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.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > Federal Arbitration Act > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN11]In holding that 9 U.S.C.S. §§ 10 and 11 provide exclusive regimes for the review provided by the Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 et seq., the U.S. Supreme 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 common law, for example, where judicial review of different scope is arguable.

SYLLABUS

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 9-11, provides expedited judicial review to confirm, vacate, or modify arbitration awards. Under § 9, a court "must" confirm an award "unless" it is vacated, modified, or corrected "as prescribed" in §§ 10 and 11. Section 10 lists grounds for vacating an award, including where the award was procured by "corruption," "fraud," or "undue means," and where the arbitrators were "guilty of misconduct," or "exceeded their powers." Under § 11, the grounds for modifying or correcting an award include "evident material miscalculation," "evident material mistake," and "imperfect[ions] in [a] matter of form not affecting the merits."

After a bench trial sustained respondent tenant's (Mattel) right to terminate its lease with petitioner landlord (Hall Street), the parties proposed to arbitrate Hall Street's claim for indemnification of the costs of cleaning up the lease site. The District Court approved, and entered as an order, the parties' arbitration agreement, which, *inter alia,* required the court to vacate, modify, or correct any award if the arbitrator's conclusions of law were erroneous. The arbitrator decided for Mattel, but the District Court vacated the award for legal error, expressly invoking the agreement's legal-error review standard and citing the Ninth Circuit's *LaPine* decision for the proposition that the FAA allows parties to draft a contract dictating an alternative review standard. On remand, the arbitrator ruled for Hall Street, and the District Court largely upheld the award, again applying the parties' stipulated review standard. The Ninth Circuit reversed, holding the case controlled by its *Kyocera* decision, which had overruled *LaPine* on the ground that arbitration-agreement terms fixing the mode of judicial review are unenforceable, given the exclusive grounds for vacatur and modification provided by FAA §§ 10 and 11.

Held:

1. The FAA's grounds for prompt vacatur and modification of awards are exclusive for parties seeking expedited review under the FAA. The Court rejects Hall Street's two arguments to the contrary. First, Hall Street submits that expandable judicial review has been accepted as the law since *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168. Although a *Wilko* statement--"the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation," *id.,* at 436-437, 74 S. Ct. 182, 98 L. Ed. 168 (emphasis added)--arguably favors Hall Street's position, arguable is as far as it goes. Quite apart from the leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the *Wilko* statement expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Moreover, *Wilko*'s phrasing is too vague to support Hall Street's interpretation, since "manifest disregard" can be read as merely referring to the § 10 grounds collectively, rather than adding to them, see, *e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656, 105 S. Ct. 3346, 87 L. Ed. 2d 444, or as shorthand for the § 10 subsections authorizing vacatur when arbitrators were "guilty of misconduct" or "exceeded their powers." Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is motivated by a congressional desire to enforce such agreements. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220, 105 S. Ct. 1238, 84 L. Ed. 2d 158. This argument comes up short because, although there may be a general policy favoring arbitration, the FAA has textual features at odds with enforcing a contract to expand judicial review once the arbitration is over. Even assuming §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand their uniformly narrow stated grounds to the point of legal review generally. But § 9 makes evident that expanding § 10's and § 11's detailed categories at all would rub too much against the grain: § 9 carries no hint of flexibility in unequivocally telling courts that they "must" confirm an arbitral award, "unless" it is vacated or modified "as prescribed" by §§ 10 and 11. Instead of fighting the text, it makes more sense to see §§ 9-11 as the substance of a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. *Dean Witter, supra,* at 217, 219, distinguished. Pp. 7-12.

2. In holding the § 10 and § 11 grounds exclusive with regard to enforcement under the

FAA's expedited judicial review mechanisms, this Court decides nothing about other possible avenues for judicial enforcement of awards. Accordingly, this case must be remanded for consideration of independent issues. Because the arbitration agreement was entered into during litigation, was submitted to the District Court as a request to deviate from the standard sequence of litigation procedure, and was adopted by the court as an order, there is some question whether it should be treated as an exercise of the District Court's authority to manage its cases under Federal Rule of Civil Procedure 16. This Court ordered supplemental briefing on the issue, but the parties' supplemental arguments implicate issues that have not been considered previously in this litigation and could not be well addressed for the first time here. Thus, the Court expresses no opinion on these matters beyond leaving them open for Hall Street to press on remand. Pp. 13-15.

196 Fed. Appx. 476, vacated and remanded.

JUDGES: SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, GINSBURG, and ALITO, JJ., joined, and in which SCALIA, J., joined as to all but footnote 7. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined. BREYER, J., filed a dissenting opinion.

OPINION BY: SOUTER

OPINION

JUSTICE SOUTER delivered the opinion of the Court. *

> * JUSTICE SCALIA joins all but footnote 7 of this opinion.

[HN1]The Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.*, provides for expedited judicial review to confirm, vacate, or modify arbitration awards. §§ 9-11 (2000 ed. and Supp. V). The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.

I

This case began as a lease dispute between landlord, petitioner Hall Street Associates, L. L. C., and tenant, respondent Mattel, Inc. The property was used for many years as a manufacturing site, and the leases provided that the tenant would indemnify the landlord for any costs resulting from the failure of the tenant or its predecessor lessees to follow environmental laws while using the premises. App. 88-89.

Tests of the property's well water in 1998 showed high levels of trichloroethylene (TCE), the apparent residue of manufacturing discharges by Mattel's predecessors between 1951 and 1980. After the Oregon Department of Environmental Quality (DEQ) discovered even more pollutants, Mattel stopped drawing from the well and, along with one of its predecessors, signed a consent order with the DEQ providing for cleanup of the site.

After Mattel gave notice of intent to terminate the lease in 2001, Hall Street filed this suit, contesting Mattel's right to vacate on the date it gave, and claiming that the lease obliged Mattel to indemnify Hall Street for costs of cleaning up the TCE, among other things. Following a bench trial before the United States District Court for the District of Oregon, Mattel won on the termination issue, and after an unsuccessful try at mediating the indemnification claim, the parties proposed to submit to arbitration. The District Court was amenable, and the parties drew up an arbitration agreement, which the court approved and entered as an order. One paragraph of the agreement provided 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." App. to Pet. for Cert. 16a.

Arbitration took place, and the arbitrator decided for Mattel. In particular, he held that no indemnification was due, because the lease obligation to follow all applicable federal, state, and local environmental laws did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act (Oregon Act); that Act the arbitrator characterized as dealing with human health as distinct from environmental contamination.

Hall Street then filed a District Court Motion for Order Vacating, Modifying And/Or Correcting the arbitration decision, App. 4, on the ground that failing to treat the Oregon Act as an applicable environmental law under the terms of the lease was legal error. The District Court agreed, vacated the award, and remanded for further consideration by the arbitrator. The court expressly invoked the standard of review chosen by the parties in the arbitration agreement, which included review for legal error, and cited *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (CA9 1997), for the proposition that the FAA leaves the parties "free . . . to draft a contract that sets rules for arbitration and dictates an alternative standard of review." App. to Pet. for Cert. 46a.

On remand, the arbitrator followed the District Court's ruling that the Oregon Act was an applicable environmental law and amended the decision to favor Hall Street. This time, each party sought modification, and again the District Court applied the parties' stipulated standard of review for legal error, correcting the arbitrator's calculation of interest but otherwise upholding the award. Each party then appealed to the Court of Appeals for the Ninth Circuit, where Mattel switched horses and contended that the Ninth Circuit's recent en banc action overruling *LaPine* in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (2003), left the arbitration agreement's provision for judicial review of legal error unenforceable. Hall Street countered that *Kyocera* (the later one) was distinguishable, and that the agreement's judicial review provision was not severable from the submission to arbitration.

The Ninth Circuit reversed in favor of Mattel in holding that, "[u]nder *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review are unenforceable and severable." 113 Fed. Appx. 272, 272-273 (2004). The Circuit instructed the District Court on remand to

> "return to the application to confirm the original arbitration award (not the subsequent award revised after reversal), and . . . confirm that award, unless . . . the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." *Id.*, at 273.

After the District Court again held for Hall Street and the Ninth Circuit again reversed, [1] we granted certiorari to decide whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive. 550 U.S. , 127 S. Ct. 2875, 167 L. Ed. 2d 1151 (2007). We agree with the Ninth Circuit that they are, but vacate and remand for consideration of independent issues.

1 On remand, the District Court vacated the arbitration award, because it supposedly rested on an implausible interpretation of the lease and thus exceeded the arbitrator's powers, in violation of 9 U.S.C. § 10. Mattel appealed, and the Ninth Circuit reversed, holding that implausibility is not a valid ground for vacating or correcting an award under § 10 or § 11. 196 Fed. Appx. 476, 477-478 (2006).

II

Congress enacted the FAA to replace judicial indisposition to arbitration with a "national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). [HN2]As for jurisdiction over controversies touching arbitration, the Act does nothing, being "something of an anomaly in the field of federal-court jurisdiction" in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n. 32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); see, *e.g.*, 9 U.S.C. § 4 (providing for action by a federal district court "which, save for such [arbitration] agreement, would have jurisdiction under title 28"). [2] But in cases falling within a court's jurisdiction, the Act makes contracts to arbitrate "valid, irrevocable, and enforceable," so long as their subject involves "commerce." § 2. And this is so whether an agreement has a broad reach or goes just to one dispute, and whether enforcement be sought in state court or federal. See *ibid.; Southland Corp. v. Keating*, 465 U.S. 1, 15-16, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

2 Because the FAA is not jurisdictional, there is no merit in the argument that enforcing the arbitration agreement's judicial review provision would create federal jurisdiction by private contract. The issue is entirely about the scope of judicial review permissible under the FAA.

[HN3]The Act also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. §§ 9-11. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. [3] § 6. Under the terms of § 9, a court "must" confirm an arbitration award "unless" it is vacated, modified, or corrected "as prescribed" in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one. [4]

3 Unlike JUSTICE STEVENS, see *post*, at 2 (dissenting opinion), we understand this expedited review to be what each of the parties understood it was seeking from time to time; neither party's pleadings were amended to raise an independent state-law contract claim or defense specific to the arbitration agreement.

4 Title 9 U.S.C. § 10(a) (2000 ed., Supp. V) provides:

[HN4]"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

"(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."

Title 9 U.S.C. § 11 (2000 ed.) provides:

[HN5]"In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

"(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.

"The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement. [5] As mentioned already, when this litigation started, the Ninth Circuit was on the threshold side of the split, see *LaPine*, 130 F.3d at 889, from which it later departed en banc in favor of the exclusivity view, see *Kyocera,* 341 F.3d at 1000, which it followed in this case, see 113 Fed. Appx., at 273. We now hold that [HN6]§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification.

5 The Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (CA9 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (CA10 2001). The First, Third, Fifth, and Sixth Circuits, meanwhile, have held that parties may so contract. See *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (CA1 2005); *Jacada (Europe), Ltd. v. International Marketing Strategies, Inc.*, 401 F.3d 701, 710 (CA6 2005); *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 288 (CA3 2001); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997 (CA5 1995). The Fourth Circuit has taken the latter side of the split in an unpublished opinion, see *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (1997), while the Eighth Circuit has expressed agreement with the former side in dicta, see *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-998 (1998).

III

Hall Street makes two main efforts to show that the grounds set out for vacating or modifying an award are not exclusive, taking the position, first, that expandable judicial review authority has been accepted as the law since *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953). This, however, was

not what *Wilko* decided, which was that § 14 of the Securities Act of 1933 voided any agreement to arbitrate claims of violations of that Act, see *id.*, at 437-438, 74 S. Ct. 182, 98 L. Ed. 168 , a holding since overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Although it is true that the Court's discussion includes some language arguably favoring Hall Street's position, arguable is as far as it goes.

The *Wilko* Court was explaining that arbitration would undercut the Securities Act's buyer protections when it remarked (citing FAA § 10) that "[p]ower to vacate an [arbitration] award is limited," 346 U.S., at 436, 74 S. Ct. 182, 98 L. Ed. 168 , and went on to say that "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation," *id.*, at 436-437, 74 S. Ct. 182, 98 L. Ed. 168 . Hall Street reads this statement as recognizing "manifest disregard of the law" as a further ground for vacatur on top of those listed in § 10, and some Circuits have read it the same way. See, *e.g., McCarthy v. Citigroup Global Markets, Inc.*, 463 F.3d 87, 91 (CA1 2006); *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (CA2 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-396 (CA5 2003); *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1017 (CA11 1998). Hall Street sees this supposed addition to § 10 as the camel's nose: if judges can add grounds to vacate (or modify), so can contracting parties.

But this is too much for *Wilko* to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. See, *e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (STEVENS, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207"); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 431 (CA2 1974). Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." See, *e.g., Kyocera, supra*, at 997. We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

Second, Hall Street says that the agreement to review for legal error ought to prevail simply because arbitration is a creature of contract, and the FAA is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 220, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). But, again, we think the argument comes up short. Hall Street is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

To that particular question we think the answer is yes, that [HN7]the text compels a reading of the §§ 10 and 11 categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] . . . powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted;" the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, the old rule of *ejusdem generis* has an implicit lesson to teach here. [HN8]Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and a mistake of law are not cut from the same cloth.

That aside, expanding the detailed categories would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility. [HN9]On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else. [6]

6 Hall Street claims that § 9 supports its position, because it allows a court to confirm an award only "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." Hall Street argues that this language "expresses Congress's intent that a court must enforce the agreement of the parties as to whether, and under what circumstances, a judgment shall be entered." Reply Brief for Petitioner 5; see also Brief for Petitioner 22-24. It is a peculiar argument, converting agreement as a necessary condition for judicial enforcement into a sufficient condition for a court to bar enforcement. And the text is otherwise problematical for Hall Street: § 9 says that if the parties have agreed to judicial enforcement, the court "must grant" confirmation unless grounds for vacatur or modification exist under § 10 or § 11. The sentence nowhere predicates the court's judicial action on the parties' having agreed to specific standards; if anything, it suggests that, so long as the parties contemplated judicial enforcement, the court must undertake such enforcement under the statutory criteria. In any case, the arbitration agreement here did not specifically predicate entry of judgment on adherence to its judicial-review standard. See App. to Pet. for Cert. 15a. To the extent Hall Street argues otherwise, it contests not the meaning of the FAA but the Ninth Circuit's severability analysis, upon which it did not seek certiorari.

In fact, anyone who thinks Congress might have understood § 9 as a default provision should turn back to § 5 for an example of what

Congress thought a default provision would look like:

> "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator . . . ."

"[I]f no method be provided" is a far cry from "must grant . . . unless" in § 9.

[HN10]Instead of fighting the text, it makes more sense to see the three provisions, §§ 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-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," *Kyocera*, 341 F.3d at 998; cf. *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 184 (CA7 1985), and bring arbitration theory to grief in post-arbitration process.

Nor is *Dean Witter*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158, to the contrary, as Hall Street claims it to be. *Dean Witter* held that state-law claims subject to an agreement to arbitrate could not be remitted to a district court considering a related, nonarbitrable federal claim; the state-law claims were to go to arbitration immediately. *Id.*, at 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158. Despite the opinion's language "reject[ing] the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims," *id.*, at 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158, the holding mandated immediate enforcement of an arbitration agreement; the Court was merely trying to explain that the inefficiency and difficulty of conducting simultaneous arbitration and federal-court litigation was not a good enough reason to defer the arbitration, see *id.*, at 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158.

When all these arguments based on prior legal authority are done with, Hall Street and Mattel remain at odds over what happens next. Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them. See, *e.g.*, Brief for Petitioner 39; Brief for New England Legal Foundation et al. as *Amici Curiae* 15. One of Mattel's *amici* foresees flight from the courts if it is. See Brief for U.S. Council for Int'l Business as *Amicus Curiae* 29-30. We do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds. [7]

> 7 The history of the FAA is consistent with our conclusion. The text of the FAA was based upon that of New York's arbitration statute. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) ("The bill . . . follows the lines of the New York arbitration law enacted in 1920 . . . "). The New York Arbitration Law incorporated pre-existing provisions of the New York Code of Civil Procedure. See 1920 N. Y. Laws p. 806. Section 2373 of the code said that, upon application by a party for a confirmation order, "the court must grant such an order, unless the award is vacated, modified, or corrected, as prescribed by the next two sections." 2 N. Y. Ann. Code Civ. Proc. (Stover 6th ed. 1902) (hereinafter Stover). The subsequent

sections gave grounds for vacatur and modification or correction virtually identical to the 9 U.S.C. §§ 10 and 11 grounds. See 2 Stover §§ 2374, 2375.

In a brief submitted to the House and Senate Subcommittees of the Committees on the Judiciary, Julius Henry Cohen, one of the primary drafters of both the 1920 New York Act and the proposed FAA, said, "The grounds for vacating, modifying, or correcting an award are limited. If the award [meets a condition of § 10], then and then only the award may be vacated. . . . If there was [an error under § 11], then and then only it may be modified or corrected . . . ." Arbitration of Interstate Commercial Disputes, Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H. R. 646, 68th Cong., 1st Sess., 34 (1924). The House Report similarly recognized that an "award may . . . be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form." H. R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924).

In a contemporaneous campaign for the promulgation of a uniform state arbitration law, Cohen contrasted the New York Act with the Illinois Arbitration and Awards Act of 1917, which required an arbitrator, at the request of either party, to submit any question of law arising during arbitration to judicial determination. See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 97-98 (1924); 1917 Ill. Laws p. 203.

IV

[HN11]In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do 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 common law, for example, where judicial review of different scope is arguable. 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. There was never any question about meeting the FAA § 2 requirement that the leases from which the dispute arose be contracts "involving commerce." 9 U.S.C. § 2; see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (§ 2 "exercise[s] Congress' commerce power to the full"). Nor is there any doubt now that the parties at least had the FAA in mind at the outset; the arbitration agreement even incorporates FAA § 7, empowering arbitrators to compel attendance of witnesses. App. to Pet. for Cert. 13a.

While it is true that the agreement does not expressly invoke FAA § 9, § 10, or § 11, and none of the various motions to vacate or modify the award expressly said that the parties were relying on the FAA, the District Court apparently thought it was applying the FAA when it alluded to the Act in quoting *LaPine*, 130 F.3d at 889, for the then-unexceptional proposition that "'[f]ederal courts can expand their review of an arbitration award beyond the FAA's grounds, when . . . the parties have so agreed.'" App. to Pet. for Cert. 46a. And the Ninth Circuit, for its part, seemed to take it as a given that the District Court's direct and prompt

examination of the award depended on the FAA; it found the expanded-review provision unenforceable under *Kyocera* and remanded for confirmation of the original award "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11." 113 Fed. Appx., at 273. In the petition for certiorari and the principal briefing before us, the parties acted on the same premise. See, *e.g.*, Pet. for Cert. 27 ("This Court should accept review to resolve this important issue of statutory construction under the FAA"); Brief for Petitioner 16 ("Because arbitration provisions providing for judicial review of arbitration awards for legal error are consistent with the goals and policies of the FAA and employ a standard of review which district courts regularly apply in a variety of contexts, those provisions are entitled to enforcement under the FAA").

One unusual feature, however, prompted some of us to question whether the case should be approached another way. The arbitration agreement was entered into in the course of district-court litigation, was submitted to the District Court as a request to deviate from the standard sequence of trial procedure, and was adopted by the District Court as an order. See App. 46-47; App. to Pet. for Cert. 4a-8a. Hence a question raised by this Court at oral argument: should the agreement be treated as an exercise of the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16? See, *e.g.*, Tr. of Oral Arg. 11-12. Supplemental briefing at the Court's behest joined issue on the question, and it appears that Hall Street suggested something along these lines in the Court of Appeals, which did not address the suggestion.

We are, however, in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA. The parties' supplemental arguments on the subject in this Court implicate issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 *et seq*., none of which has been considered previously in this litigation, or could be well addressed for the first time here. We express no opinion on these matters beyond leaving them open for Hall Street to press on remand. If the Court of Appeals finds they are open, the court may consider whether the District Court's authority to manage litigation independently warranted that court's order on the mode of resolving the indemnification issues remaining in this case.

* * *

Although we agree with the Ninth Circuit that the FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11, we vacate the judgment and remand the case for proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: STEVENS; BREYER

DISSENT

JUSTICE STEVENS, with whom JUSTICE KENNEDY joins, dissenting.

May parties to an ongoing lawsuit agree to submit their dispute to arbitration subject to the caveat that the trial judge should refuse to enforce an award that rests on an erroneous conclusion of law? Prior to Congress' enactment of the Federal Arbitration Act (FAA or Act) in 1925, the answer to that question would surely have been "Yes." [1] Today, however, the Court holds that the FAA does not merely authorize the vacation or enforcement of awards on specified grounds, but also forbids enforcement of perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court. Because this

result conflicts with the primary purpose of the FAA and ignores the historical context in which the Act was passed, I respectfully dissent.

1 See *Kleine v. Catara*, 14 F. Cas. 732, 735, F. Cas. No. 7869 (C. C.D. Mass. 1814) ("If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please") (Story, J.).

Prior to the passage of the FAA, American courts were generally hostile to arbitration. They refused, with rare exceptions, to order specific enforcement of executory agreements to arbitrate. [2] Section 2 of the FAA responded to this hostility by making written arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. § 2. This section, which is the centerpiece of the FAA, reflects Congress' main goal in passing the legislation: "to abrogate the general common-law rule against specific enforcement of arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 18, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (STEVENS, J., concurring in part and dissenting in part), and to "ensur[e] that private arbitration agreements are enforced according to their terms," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). Given this settled understanding of the core purpose of the FAA, the interests favoring enforceability of parties' arbitration agreements are stronger today than before the FAA was enacted. As such, there is more--and certainly not less--reason to give effect to parties' fairly negotiated decisions to provide for judicial review of arbitration awards for errors of law.

2 See *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120-122, 44 S. Ct. 274, 68 L. Ed. 582 (1924); *The Atlanten*, 252 U.S. 313, 315-316, 40 S. Ct. 332, 64 L. Ed. 586 (1920). Although agreements to arbitrate were not specifically enforceable, courts did award nominal damages for the breach of such contracts.

Petitioner filed this rather complex action in an Oregon state court. Based on the diverse citizenship of the parties, respondent removed the case to federal court. More than three years later, and after some issues had been resolved, the parties sought and obtained the District Court's approval of their agreement to arbitrate the remaining issues subject to *de novo* judicial review. They neither requested, nor suggested that the FAA authorized, any "expedited" disposition of their case. Because the arbitrator made a rather glaring error of law, the judge refused to affirm his award until after that error was corrected. The Ninth Circuit reversed.

This Court now agrees with the Ninth Circuit's (most recent) interpretation of the FAA as setting forth the exclusive grounds for modification or vacation of an arbitration award under the statute. As I read the Court's opinion, it identifies two possible reasons for reaching this result: (1) a supposed *quid pro quo* bargain between Congress and litigants that conditions expedited federal enforcement of arbitration awards on acceptance of a statutory limit on the scope of judicial review of such awards; and (2) an assumption that Congress intended to include the words "and no other" in the grounds specified in §§ 10 and 11 for the vacatur and modification of awards. Neither reason is persuasive.

While § 9 of the FAA imposes a 1-year limit on the time in which any party to an arbitration may apply for confirmation of an award, the statute does not require that the application be given expedited treatment. Of course, the premise of the entire statute is an assumption that the arbitration process may be more expeditious and less costly than ordinary litigation, but that is a reason for interpreting the statute liberally to favor the parties' use of arbitration. An unnecessary refusal to enforce a

perfectly reasonable category of arbitration agreements defeats the primary purpose of the statute.

That purpose also provides a sufficient response to the Court's reliance on statutory text. It is true that a wooden application of "the old rule of *ejusdem generis*," *ante*, at 9, might support an inference that the categories listed in §§ 10 and 11 are exclusive, but the literal text does not compel that reading--a reading that is flatly inconsistent with the overriding interest in effectuating the clearly expressed intent of the contracting parties. A listing of grounds that must always be available to contracting parties simply does not speak to the question whether they may agree to additional grounds for judicial review.

Moreover, in light of the historical context and the broader purpose of the FAA, §§ 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' "valid, irrevocable and enforceable" agreements to arbitrate their disputes subject to judicial review for errors of law. [3] § 2.

> 3 In the years before the passage of the FAA, arbitration awards were subject to thorough and broad judicial review. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270-271 (1926); Cullinan, Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements, 51 Vand. L. Rev. 395, 409 (1998). In §§ 10 and 11 of the FAA, Congress significantly limited the grounds for judicial vacatur or modification of such awards in order to protect arbitration awards from hostile and meddlesome courts.

Even if I thought the narrow issue presented in this case were as debatable as the conflict among the courts of appeals suggests, I would rely on a presumption of overriding importance to resolve the debate and rule in favor of petitioner's position that the FAA permits the statutory grounds for vacatur and modification of an award to be supplemented by contract. A decision "*not to regulate*" the terms of an agreement that does not even arguably offend any public policy whatsoever, "is adequately justified by a presumption in favor of freedom." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 320, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993) (STEVENS, J., concurring in judgment).

Accordingly, while I agree that the judgment of the Court of Appeals must be set aside, and that there may be additional avenues available for judicial enforcement of parties' fairly negotiated review provisions, see, *ante*, at 13-15, I respectfully dissent from the Court's interpretation of the FAA, and would direct the Court of Appeals to affirm the judgment of the District Court enforcing the arbitrator's final award.

JUSTICE BREYER, dissenting.

The question presented in this case is whether "the Federal Arbitration Act . . . *precludes* a federal court from enforcing" an arbitration agreement that gives the court the power to set aside an arbitration award that embodies an arbitrator's mistake about the law. Pet. for Cert. i. Like the majority and JUSTICE STEVENS, and primarily for the reasons they set forth, I believe that the Act does not *preclude* enforcement of such an agreement. See *ante*, at 13 (opinion of the Court) (The Act "is not the only way into court for parties wanting review of arbitration awards"); *ante*, at 3-4 (STEVENS, J., dissenting) (The Act is a "shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law").

At the same time, I see no need to send the case back for further judicial decisionmaking.

The agreement here was entered into with the consent of the parties and the approval of the District Court. Aside from the Federal Arbitration Act itself, 9 U.S.C. § 1 *et seq.*, respondent below pointed to no statute, rule, or other relevant public policy that the agreement might violate. The Court has now rejected its argument that the agreement violates the Act, and I would simply remand the case with instructions that the Court of Appeals affirm the District Court's judgment enforcing the arbitrator's final award.

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Paul Fitzgerald, Petitioner-Respondent, v Fahnestock & Co., Inc., et al., Respondents-Appellants.

2723, 2723A, 112515/06

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2008 NY Slip Op 1068; 48 A.D.3d 246; 850 N.Y.S.2d 452; 2008 N.Y. App. Div. LEXIS 1010

February 7, 2008, Decided
February 7, 2008, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

CORE TERMS: arbitrator, settlement agreement, arbitration, arbitration award, standard of review, employment agreement, equitable, unanimously

LexisNexis(R) Headnotes

Civil Procedure > Settlements > Releases From Liability > Interpretation of Releases
Contracts Law > Types of Contracts > Releases
[HN1]A release may not be read to cover matters which the parties did not desire or intend to dispose of.

Civil Procedure > Alternative Dispute Resolution > Arbitrations > General Overview
Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN2]Assessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court. An arbitrator may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement.

COUNSEL: Winget, Spadafora & Schwartzberg, LLP, New York (Michael Schwartzberg of counsel), for appellants.

Lax & Neville, LLP, New York (Barry R. Lax of counsel), for respondent.

JUDGES: Andrias, J.P., Nardelli, Williams, McGuire, Acosta, JJ.

OPINION

Judgment, Supreme Court, New York County (Carol Edmead, J.), entered February 14, 2007, awarding petitioner the principal sum of $ 436,000, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about December 12, 2006, which confirmed the arbitration award, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Respondents argue on appeal that the Federal Arbitration Act (9 USC ß 1 *et seq.*) (FAA) governs the arbitration of this dispute, including review of the arbitration award. While petitioner now takes the position that the standard of review is governed by CPLR article 75, he conceded below that since the dispute concerned employment in the securities industry, the standard of review set forth in the FAA is applicable (*see e.g. Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 85 NY2d 173, 180, 647 N.E.2d 1298, 623 N.Y.S.2d 790 [1995]).

Although the FAA applies, the arbitrators did not manifestly disregard the law (*see Wien & Malkin LLP v Helmsley-Spear, Inc.,* 6 NY3d 471, 480, 846 N.E.2d 1201, 813 N.Y.S.2d 691 [2006]). Contrary to respondents' claim, the settlement agreement and release between petitioner and Fahnestock, which contained a recital of petitioner's action against Fahnestock and their desire to settle the action, but no reference to petitioner's employment or his employment agreement, is not necessarily a general release (*see Morales v Solomon Mgt. Co.,* 38 AD3d 381, 382, 832 N.Y.S.2d 195 [2007]).

Moreover, [HN1]"a release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Cahill v Regan,* 5 NY2d 292, 299, 157 N.E.2d 505, 184 N.Y.S.2d 348 [1959]). The arbitrators may have credited petitioner's testimony that he intended the settlement agreement and release to cover only two specific matters rather than the contrary testimony of respondents' witnesses.

Even if the settlement agreement and release were a general release, it would not bar petitioner's equitable claims, which accrued after the date of the release. Since petitioner's statement of claim included causes of action for quantum meruit and unjust enrichment, and since petitioner's closing statement sought equitable relief, the arbitrators could have made their award based on equity instead of the employment agreement (*see Duferco Intl. Steel Trading v T. Klaveness Shipping A/S,* 333 F3d 383, 390 [2d Cir 2003]).

We are not persuaded by respondents' argument that the amount of the award has no support in the record. [HN2]"[A]ssessment of the evidence presented at an arbitration proceeding is the arbitrator's function rather than that of the court" (*Matter of Peckerman v D & D Assocs.,* 165 AD2d 289, 296, 567 N.Y.S.2d 416 [1991]). An arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement" (*Matter of Silverman [Benmor Coats*], 61 NY2d 299, 308, 461 N.E.2d 1261, 473 N.Y.S.2d 774 [1984]). The award in this case, which was less than the

amount sought by petitioner, is not irrational (*see J.J.K. Constr., Inc. v Rosenberg*, 141 AD2d 507, 508, 529 N.Y.S.2d 339 [1988]).

We have considered respondents' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 7, 2008

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