



IN GOD WE TRUST

Judicial Review of Arbitration Awards in the Alabama Courts

By William H. Hardie, Jr.

Introduction

On June 20, 2008, the Supreme Court of Alabama in *Horton Homes, Inc. v. Shaner*, ___ So.2d ___, 2008 WL 2469364 (Ala. June 20, 2008), adopted an entirely new set of procedures for the review of an arbitration award in state court. This opinion will have significant impact on the review of arbitration awards in state court in Alabama.

In addition, on March 25, 2008, the Supreme Court of the United States issued an opinion in which it held that the grounds listed in §§ 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11, for vacating or modifying an arbitration award are the exclusive grounds available when the review is sought under the “streamlined treatment” provided in the Act. *Hall Street Associates, LLC v. Mattel, Inc.*, ___ U.S. ___, ___ 128 S. Ct. 1396, 1401-1402 (2008). This opinion will have significant impact on the substantive grounds for future review of arbitration awards in Alabama.

The Court’s opinion in *Hall Street* raised serious questions concerning the continued viability of extra-statutory grounds for vacating an arbitration award in state court. See William H. Hardie, *Arbitration: Post-Award Procedures*, 60 Ala. Law. 314, 322-23 (1999) (discussing extra-statutory grounds created by the courts). The most prominent of these grounds is “manifest disregard of the law” which owes its origins to *dicta* in *Wilko v. Swann*, 346 U.S. 427, 436 (1953), and that ground for vacatur under the FAA was specifically rejected by the following language in the *Hall Street* opinion:

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. . . . 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.” . . . We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, . . . and now that its meaning is implicated, we see no reason to accord it the significance that *Hall Street* urges.

Hall Street Associates, LLC v. Mattel, Inc., ___ U.S. at ___ 128 S. Ct. at 1404.

The *Hall Street* opinion was clearly limited to the procedures available under the FAA, and its rejection of extra-statutory grounds would apparently not apply to proceedings in state courts. Indeed, the Court was at pains to emphasize the continued viability of procedures other than the FAA:

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.

Id. at ___, 128 S. Ct. at 1406.

Nevertheless, the Supreme Court of Alabama in *Hereford v. D.R. Horton, Inc.*, 2008 WL 4097594 (Ala. September 5, 2008), followed the lead of the United States Supreme Court on this issue and abandoned “manifest disregard of the law” as an extra-statutory ground for review of an arbitrator’s award:

Earlier this year, the Supreme Court of the United States, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, *supra*, rejected the conclusion that it had adopted manifest disregard of the law as an additional, nonstatutory ground for relief from an arbitrator’s decision. . . . Under the Supreme Court’s decision in *Hall Street Associates*, therefore, manifest disregard of the law is no longer a proper basis under the Federal Arbitration Act for vacating, modifying, or correcting an arbitrator’s award. In light of the fact that the Federal Arbitration Act is federal law, and in light of the Supremacy Clause of the Constitution of the United States, Art. VI, we hereby overrule our earlier statement in *Birmingham News* that manifest disregard of the law is a ground for vacating, modifying, or correcting an arbitrator’s award under the Federal Arbitration Act, and we also overrule any such language in our other cases construing federal arbitration law.

Id. at 4-5.

Federal Arbitration Act

The Supreme Court of the United States has recognized a state court's concurrent jurisdiction under the FAA. *Moses H. Cohen Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 (1983) ("the federal courts' jurisdiction to enforce the [Federal] Arbitration Act is concurrent with that of the state courts"). The general principle is that state courts have jurisdiction over cases arising under federal law absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state court adjudication. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-478 (1981); see also *Tafflin v. Levitt*, 493 U.S. 455, 458-460 (1990); *Howlett v. Rose*, 496 U.S. 356, 367 (1990). Therefore, in addition to its role requiring enforcement of arbitration agreements, the FAA may have a role as a source of procedure in state court.

Federal courts hold that the petition to enforce or vacate under the FAA may be filed not only in the district in which the award was made, but also in any suitable district under general venue provisions. See *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 195 (2000). It remains an open question whether an action in state court invoking the FAA could rely on the FAA's permissive venue. In *MBNA America Bank, N.A. v. Bodalía*, 949 So.2d 935, 939 n.6 (Ala. Civ. App. 2006) and *Dunigan v. Sports Champions, Inc.*, 824 So.2d 720, 721 (Ala. 2001), the courts held that the restrictive rules of venue were jurisdictional, but the opinions were careful to point out that the FAA had not been invoked by the parties.

The pleading filed in federal court under § 8 of the FAA to confirm an award is a petition to confirm the award, not a complaint. *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). Section 12 of the FAA provides that judicial review of an arbitration award is invoked in the trial court by "Notice of a motion to vacate, modify, or correct an award . . .". The Supreme Court of the United States has not ruled definitively whether the procedural provisions of the FAA must be applied when the FAA is invoked in a state court. See *Government of the Virgin Islands v. United Industrial Workers*, 169 F.3d 172, 175 (3d Cir. 1999). The court has said, however, that the FAA is not intended to occupy the entire field of arbitration. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989), and the Court in *Hall Street* observed similarly that the FAA is not the "only way into court for the parties wanting review of arbitration awards . . .". *Hall Street Associates, LLC v. Mattel, Inc.*, ___ U.S. at ___ 128 S. Ct. at 1406.

The Supreme Court of Alabama has not considered whether review of an arbitrator's award could be commenced in state court solely by motion to vacate in reliance on the FAA procedures.

Section 9 of the FAA provides that the summary confirmation procedure is available for only one year after the award. A conflict exists among the federal circuits whether this is mandatory or permissive. Compare *Photopaint Technologies, LLC v. Smartlens Corp.*, 335 F.3d 152 (2d Cir. 2003), with *Val-U Construction Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581 (8th Cir. 1988); see *General Electric Co. v. Anson Stamping Co.*, 426 F. Supp. 2d 579, 583 (W.D. Ky 2006) (discussing the permissive-mandatory issue at length).

Section 12 of the FAA provides three months for serving notice of a petition to vacate, modify or correct an award in federal court. There are no Alabama cases discussing whether the

more generous FAA time limitations would apply to proceedings brought in state court under the FAA.

The decision in *Hall Street* compels the conclusion that, at least in federal court, a motion to vacate or modify under the FAA may rely only on the grounds enumerated in the Act. Those grounds are:

Section 10(a)(1): Where the award was procured by corruption, fraud or undue means

"Corruption" is not defined in either the state or federal acts. The dictionary defines corruption as "impairment of integrity, virtue, or moral principle." *Webster's Ninth New Collegiate Dictionary* 294 (1987). This evidently refers to corruption by a party, witness or other person as well as the arbitrator. Certainly, it would include bribery or other improper conduct intended to influence the arbitrator, but it also might include bribery of witnesses or other parties.

"Fraud" is a common concept in the law. It seems clear that in order to justify vacating an award because of fraud, the parties seeking vacation must show that the fraud was materially related to the arbitration. In *Pruett v. Williams*, 623 So. 2d 1115, 1116 (Ala. 1993), the court rejected the unsuccessful party's claim that the arbitrator had committed fraud in his award by misrepresenting his expertise in the area of construction law. In Alabama, perjury, that is, false testimony during the course of a trial, is not usually a fraud on the court sufficient to support an action to set aside a judgment. See *Hall v. Hall*, 587 So. 2d 1198, 1200-1201 (Ala. 1991) (quoting *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1552 (11th Cir. 1985)). Therefore, mere perjury, alone, is probably not a sufficient "fraud" on which to base a motion to vacate an arbitration award. On the other hand, if the successful party encouraged false testimony, then it might qualify.

The Court of Appeals for the First Circuit has defined "undue means":

The phrase "undue means" in the statute follows the terms "corruption" and "fraud." It is a familiar principle of statutory construction that a word should be known by the company it keeps. . . . The best reading of the term "undue means" under the maxim *noscitur a sociis* is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either. See *PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 991 (8th Cir.1999) ("The term 'undue means' must be read in conjunction with the words 'fraud' and 'corruption' that precede it in the statute."); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C.Cir.1995) ("undue means" refers to conduct "equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator").

National Cas. Co. v. First State Ins. Group, 430 F.3d 492, 499 (1st Cir. 2005); see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F. Supp. 2d 1337, 1344 (M.D. Fla. 1998), *aff'd*, 214 F.3d 1354 (11th Cir. 2000) (conspiring to secure the unavailability of witnesses, suborning perjury, redacting documents by falsely asserting privilege and procedural maneuvers designed to inhibit the presentation of the adverse party's case were claimed as "undue means").

According to the prevailing formulation in federal court for vacatur under § 10(a)(1):

Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud. Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration. It is not necessary to establish that the result of the arbitration would have been different if the fraud had not occurred.

Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306-307 (5th Cir. 2004) (citing *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir.1988)).

Section 10(a)(2): Where there was evident partiality or corruption in the arbitrators, or either of them

This ground refers to the arbitrator's "bias," and it appears in both the federal and Alabama statutory law. Unfortunately, neither act defines the meaning of "evident partiality," and the courts have had some difficulties with it. Justice Black's plurality opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968), suggested that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." Thus, he concluded, arbitrators must avoid even the "appearance of bias." *Id.* at 150. This was not a majority opinion, and the concurring opinions make it clear that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are aware of the facts that the relationship is trivial." *Id.* (White, J., concurring). Most courts are reluctant to impose Justice Black's burden on arbitrators.

After reviewing numerous federal cases on the issue, the Supreme Court of Alabama adopted the following definition of "evident partiality":

We conclude that the weight of authority developed after *Commonwealth Coatings* requires a review of the offered evidence pursuant to the "reasonable impression of partiality" standard, using the criteria developed in the federal cases reviewed above. The appropriate approach for the trial court to take in assessing Waverlee's allegations that Walker was biased or partial in his arbitration of the underlying dispute is to consider whether Waverlee makes a showing through admissible evidence that the court finds to be credible, that gives rise to an impression of bias that is direct, definite, and capable of demonstration, as distinct from a "mere appearance" of bias that is remote, uncertain, and speculative.

Waverlee Homes, Inc. v. McMichael, 855 So.2d 493, 508 (Ala. 2003). In *Waverlee Homes* the appellate court found that the arbitrator's failure to disclose his relationship with counsel for the claimant was a sufficient basis on which the trial court should have ordered an evidentiary hearing into the claim of bias.

Partiality falls into one of two categories: either the arbitrator failed to disclose relevant facts or the arbitrator displayed actual bias at the arbitration proceeding. The standard used to evaluate a claim of evident partiality varies depending on whether the party argues nondisclosure or actual bias. *See Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.* 455 F. Supp.2d 545, 549 (N.D. Tex. 2006).

One of the most controversial recent opinions concerning bias was the vacatur entered by the district court in the course of the proceedings in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007), *cert. denied*, 127 S. Ct. 2943, ___ U.S. ___ (2007). On rehearing *en banc*, the Fifth Circuit reversed the order of vacatur and held that vacatur on an "evident partiality" theory was not warranted by an arbitrator's failure to disclose that he and the attorney for one of the parties had been two of the 34 attorneys that previously represented the same client in unrelated litigation that had concluded seven years earlier. *Id.* at 284. The court stated:

As we have concluded, the better interpretation of *Commonwealth Coatings* is that which reads Justice White's opinion holistically. The resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The "reasonable impression of bias" standard is thus interpreted practically rather than with utmost rigor.

Id. at 283.

Section 10(a)(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

Section 10(a)(3) does not mean that any refusal to postpone or refusal to hear evidence constitutes misconduct. *See National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 497 (1st Cir. 2005); *El Dorado School Dist. No. 15 v. Continental Cas. Co.*, 247 F.3d 843, 847-848 (8th Cir. 2001). Instead, such refusals are grounds for vacatur only if they deprive a party of a fair hearing. *See Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992); *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399-400 (5th Cir. 2006); *El Dorado School Dist. No. 15 v. Continental Cas. Co.*, 247 F.3d 843, 847-848 (8th Cir. 2001).

In reviewing an arbitrator's refusal to delay a hearing, a court will not vacate the award if there was any reasonable basis for declining to postpone the hearing. *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1016 (11th Cir.1998), *cert. denied*, 525 U.S. 1068 (1999).

A refusal to hear evidence will not justify a vacatur unless the party offering the evidence was deprived of a fair hearing. *National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 497 (1st Cir. 2005). The arbitrator's failure to enforce a motion to compel production of documents does not constitute a refusal to hear evidence if the arbitrator uses the party's refusal to produce

documents as the basis for negative inference. *See National Cas. Co. v. First State Ins. Group*, 430 F.3d 492, 497 (1st Cir. 2005).

The “refusing to hear evidence” ground in § 10(a)(3) does not mean that an arbitrator is prevented from entering the equivalent of a “summary judgment” if the applicable arbitration rules allow such a procedure, but in the absence of such rules, the arbitrator must hold a full evidentiary hearing. *See Sherrock Broth., Inc. v. DaimlerChrysler Motors Co. LLC*, 465 F. Supp.2d 384, 393 (M.D. Pa. 2006). In *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001), the court held that § 10(a)(3) did not prevent the arbitrator from granting a motion to dismiss “facially deficient claims with prejudice” given the broad authority of the NASD rules. *Id.* at 1206. Presumably this reasoning would apply to any arbitration rules that grant broad authority to the arbitrators over the relief available.

Prejudicial misbehavior is also difficult to define. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F. Supp. 2d 1337, 1343 (M.D. Fla. 1998), *aff’d*, 214 F.3d 1354 (11th Cir. 2000), the court found no prejudice in the alleged misbehavior of the arbitrator in striking comments from the record and failing to obtain copies of the exhibits. In *Arbitration Between Trans Chemical Ltd. and China National Machinery Import and Export Corp.*, 978 F. Supp. 266, 306 (S.D. Tex. 1997), the court rejected the contention that an “irrational scheduling order” constituted misbehavior. In *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 730-731 (N.D. Tex. 1997), the court failed to find “misbehavior” in the arbitrator’s refusal to return exhibits produced during the hearings and in the arbitrator’s review of documents without giving an opportunity to the other party to review the documents.

In *Circle Industries USA, Inc. v. Parke Construction Group, Inc.*, 183 F.3d 105, 109 (2d Cir.), *cert. denied*, 528 U.S. 1062 (1999), the court observed that an arbitrator’s violation of AAA rules could require vacatur, citing prejudicial misbehavior under 9 U.S.C. § 10(a)(3) as the basis. However, the court refused to vacate for the arbitrator’s handling of exhibits in violation of AAA rules because there was no prejudice.

These cases confirm that “misbehavior” is an attractive category to challenge any questionable conduct by an arbitrator, but the cases also confirm that such a challenge is rarely successful in the absence of compelling evidence.

Section 10(a)(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

In *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1381 (Ala. 1992), the court concluded that the award was indefinite, uncertain and imperfect because it did not finally dispose of all issues, and the circuit court should have set aside the award. Similarly, in *Wright v. Land Developers Construction Co.*, 554 So. 2d 1000, 1002 (Ala. 1989), the court observed that the award must be a final determination of the matters submitted or “there is no award.” In that case the arbitrators had issued an award clearly labeled as an interim award, so it was not improper for the arbitrators to issue a second, final award.

In resolving questions concerning the authority of an arbitrator, courts construe the agreement and resolve all doubts in favor of the arbitrators who have a great deal of flexibility in fashioning

remedies. Thus, there is a heavy burden on those who claim that the arbitrators have exceeded their authority. *See H. L. Fuller Construction Co. v. Industrial Development Board*, 590 So. 2d 218, 223 (Ala. 1991). In *H.L. Fuller Construction* the appellant contended that the arbitrators had exceeded their powers because they had ruled inconsistently in favor of the petitioner on its claims and in favor of the third-party defendant on its defenses. The Supreme Court of Alabama concluded that it could not say that the arbitrators had exceeded their powers. The court declined to analyze the issues in the arbitration and observed that under the rules of the American Arbitration Association the arbitrator was empowered to grant any remedy or relief that is “just, equitable, and within the terms of the agreement of the parties.” *Id.* at 223. Similarly, in *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1381 (Ala. 1992), the unsuccessful party argued that the arbitrator had exceeded his authority by failing to award interest. The agreement out of which the arbitration arose expressly provided that interest should accrue on the escrow payments in contention. Therefore, the court concluded, the arbitrator had exceeded his authority under the agreement. *Id.*

A delay in making the award may fall within § 10(a)(4). If the arbitration agreement requires the arbitrators to make their award within a specific time, then most courts agree that the arbitrators’ failure to do so will render the award null and void when it is rendered late. *See* Annotation, *Construction and Effect of Contractual or Statutory Provision Fixing Time within Which Arbitration Award Must Be Made*, 56 A.L.R. 3d 815 (1974). However, more modern cases seem reluctant to employ this rule. *See King v. Stevenson*, 445 F.2d 565, 569-70 (7th Cir.1971); *Green v. Ameritech Corp.*, 12 F. Supp.2d 662 (E.D. Mich. 1998) (refusing to apply the rule because the movant failed to show that it had been prejudiced by the delay), *rev’d on other grounds*, 200 F.3d 967 (6th Cir. 2000). In *Tomczak v. Erie Insurance Exchange*, 268 F. Supp. 185 (W.D. Pa. 1965), the court declined to enforce a 30-day requirement incorporated by reference from the rules of the administering tribunal.

The arbitrator’s authority may be at issue if the arbitrator is not chosen in accordance with the agreement of the parties. Several courts, relying on § 5 of the FAA, have determined that arbitration awards made by arbitrators not appointed under the method provided in the parties’ contract must be vacated, but parties must insist upon the enforcement of their contractual rights before the arbitrators as they do in court or they will be waived. *See Brook v. Peak International, Ltd.*, 294 F.3d 668, 672-674 (5th Cir. 2002).

Alabama Arbitration Act

The Alabama Arbitration Act (“AAA”), *Ala Code* § 6-6-1 *et seq.*, contains its own venue provisions. Section 6-6-12 provides that a proceeding to enforce an award under the AAA must be filed in the court in which the action is pending or, if no action is pending, in the circuit court of the county in which the award is made. Similarly, § 6-6-15 provides that the notice of appeal to the appropriate appellate court must be filed in the circuit court where the action is pending or, if no action is pending, then in the circuit court of the county where the award is made. The opinions in *Dunigan v. Sports Champions, Inc.*, 824 So.2d 720 (Ala. 2001), and *MBNA America Bank, N.A. v. Bodalía*, 949 So. 2d 935, 940 (Ala. Civ. App. 2006), hold that the “venue” provisions of § 6-6-12 and § 6-6-15

are jurisdictional and if no action is pending, then the action must be filed only in the county where the award was “made.”

The AAA and the Alabama cases are vague on the meaning of “made” in this context. It might reasonably be inferred that the award is made where the hearing is held, but the issue is more complex if the award is issued without a participatory hearing, as permitted by some arbitration administrators. The courts have ruled that an award “issued in Florida” was not made in Baldwin County, *MBNA America Bank, N.A. v. Bodalía*, 949 So.2d 935, 940 (Ala. Civ. App. 2006), and that an award by a Canadian arbitrator based on a proceeding in Canada was “made” in Canada, *Dunigan v. Sports Champions, Inc.*, 824 So.2d 720 (Ala. 2001). In *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 196 (2000), without analyzing the issue, the court equated the location of the hearing with the district in which the award was made.

Consequently, there is room for further explanation of this jurisdictional issue under the AAA by the courts of Alabama.

Section 6-6-12 of the AAA contains what the Court of Civil Appeals of Alabama calls a “summary enforcement mechanism” for arbitration awards. See *MBNA America Bank, N.A. v. Bodalía*, 949 So.2d 935, 939 (Ala. Civ. App. 2006). If the award is not performed within ten days after notice, the successful party may file the award and it will have the force and effect of a judgment without further action by the court. Apparently no case has questioned the significance of the ten-day wait prescribed in § 6-6-12, but the opinion in *McKee v. Hendrix*, 816 So.2d 30, 32 (Ala. Civ. App. 2001), noted without comment that the motion to confirm had been filed before the expiration of the ten days.

The AAA does not provide for a specific period of limitations on commencing an action to enforce an arbitration award, so Alabama’s six-year limitations period for contracts is probably applicable. See § 6-2-34 *Ala. Code*. No court has held that the one year limit of the FAA applies in state courts, but it might apply if the FAA were invoked.

Section § 6-6-15 of the AAA provides a ten-day period for filing the notice of appeal to the appropriate appellate court, but in *Horton Homes, Inc. v. Shaner*, ___ So.2d ___, 2008 WL 2469364 (Ala. June 20, 2008), where the parties invoked both § 6-6-15 of the *Alabama Code* and Rule 4, *Ala. R. App. Proc.*, the court explicitly held that Rule 4 operates to expand the statutory time period for taking an appeal from ten days to 42 days after receipt of notice of the award.

Other states disagree whether the FAA period of limitations is substantive and applicable to state proceedings or procedural and not applicable. See, e.g., *Joseph v. Advest, Inc.* 906 A.2d 1205, 1210 (Pa. Super. 2006) (holding that the state procedural limits for challenging arbitration awards is not preempted by FAA); *Eurocapital Group, Ltd. v. Goldman Sachs & Co.*, 17 S.W.3d 426, 431 (Tex. App. 2000) (holding that the FAA statute of limitation is considered substantive).

Section 6-6-15 of the AAA provides that an appeal from an arbitrator’s award is effected by filing a notice of appeal to the appropriate appellate court in circuit court within ten days after

receipt of notice of the award. Unless the circuit court sets the award aside within ten days, the award becomes a judgment and the appeal is perfected. This procedure was followed in *Birmingham News Co. v. Horn*, 901 So.2d 27, 44 (Ala. 2004), where the circuit court took no action during the ten-day period following the original filing.

The AAA is silent as to the procedures in the circuit court during the ten-day interval between the original filing and the automatic finalization of the judgment. In an effort to resolve some of the confusion created by the lack of specifics in § 6-6-15, the Supreme Court of Alabama in *Horton Homes, Inc. v. Shaner*, ___ So.2d ___, 2008 WL 2469364 (Ala. June 20, 2008), overruled its prior observations about the procedure in circuit court and established that a motion to vacate the award is a precondition to an appeal:

...a proceeding to enforce an award under the AAA must be filed in the court in which the action is pending or, if no action is pending, in the circuit court of the county in which the award is made.

The judgment entered by the circuit clerk on the arbitrator’s award pursuant to § 6-6-15 is a *conditional* one; it does not become a final appealable judgment until the circuit court has had an opportunity to consider a motion to vacate filed by a party seeking review of the arbitration award. A party seeking review of an arbitration award is *required* to file a motion to vacate during this period—while the judgment entered by the circuit clerk remains conditional—in order to preserve its ability to later prosecute that appeal to an appellate court once the judgment becomes final. This is so not only

because § 6-6-15 contemplates a party’s first seeking relief from an award in the circuit court, but also because “[a]ny grounds not argued to the trial court, but urged for the first time on appeal, cannot be considered.” *Lloyd Noland Hosp. v. Durham*, 906 So.2d 157, 165 (Ala. 2005).

Horton Homes, Inc. v. Shaner, 2008 WL 2469364, at *5.

The court also modified the ten-day period for acting on a motion to vacate by borrowing from Rule 59 of the *Alabama Rules of Civil Procedure*:

Section 6-6-15 provides that the judgment entered by the circuit clerk is to remain conditional for only ten days, after which it “shall become final” unless it has been, during that ten-day period, set aside by the circuit court. However, this short time span—ten days—is impractical in application and not consistent with the *Alabama Rules of Civil Procedure* that govern postjudgment motions. It is unreasonable to expect a party to file a motion to vacate, the opposing party to respond, and the circuit court to then thoughtfully consider their arguments all within a ten-day period. Accordingly, we modify that timeline established in § 6-6-15 as follows to make it consistent with the *Alabama Rules of Civil Procedure* and to allow for a more meaningful review by the trial court.

Rule 59(e), *Ala. R. Civ. P.*, provides that a party has 30 days after the entry of judgment to file a motion to alter, amend, or vacate that judgment. Accordingly, borrowing from the

spirit of Rule 59(e),^{FN3} we hold that a party desiring judicial review of an arbitration award pursuant to § 6-6-15 must file in the appropriate circuit court a motion to alter, amend, vacate, or set aside the award within 30 days of filing the notice of appeal of the arbitration award and the clerk's entry of the conditional judgment based thereon. If that motion is timely filed, the circuit court shall then have 90 days, unless that time is extended by the consent of all the parties, to dispose of the motion. See Ala. R. Civ. P. 59.1 ("A failure by the trial court to dispose of any pending post-judgment motion within [90 days], or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period.").

Horton Homes, Inc. v. Shaner, 2008 WL 2469364 at *5.

Based on the opinion in *Horton Homes, Inc. v. Shaner*, the procedure for appealing from an arbitrator's award under the AAA are now as follows:

1. Within 42 days of receipt of the award, the dissatisfied party must file an appeal to the appropriate appellate court with the clerk of the circuit court in which the action was pending or, if no action was pending, with the clerk of the circuit court in the county where the award was made. The filing must include the award.
2. The clerk must then enter the award as a judgment conditional on the action of the circuit court on the dissatisfied party's motion to vacate.
3. Within 30 days of filing the notice of appeal, the dissatisfied party must file a motion pursuant to Rule 59(e) of the Alabama Rules of Civil Procedure to vacate the award.
4. The circuit court then has 90 days from the date of filing of the Rule 59 motion to rule on the motion, unless extended by agreement of the parties.
5. If no action is taken by the court within 90 days, or if the motion to vacate is denied, then the dissatisfied party's appeal will proceed on the basis of the original notice of appeal.
6. If the circuit court grants the motion to vacate, then the party whose award has been vacated has 42 days from the order in which to file a notice of appeal.

The court in *Horton Homes, Inc. v. Shaner*, did not undertake any revision of the timing for an action to enforce an arbitration award. Specifically, it did not comment on the possibility that in response to a petition for entry of a judgment on an award, the dissatisfied party might file a Rule 59 motion after the expiration of 45 days. In an analogous situation under the FAA, federal courts have held that the unsuccessful party's failure to move to vacate the award within the three months federal limit precludes him or her from later seeking that relief when a motion is made to confirm the award within one year but after the expiration of three months. See, e.g., *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 853-854 (11th Cir. 1989), cert. denied, 490 U.S. 1107 (1989); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). Presumably the Alabama courts will follow this rule.

Grounds for Appeal in the Alabama Courts

In *Birmingham News Co. v. Horn*, 901 So.2d 27, 46-47 (Ala. 2004), the court held that the grounds for appeal enumerated in

§ 10(a)(1) through § 10(a)(4) of the FAA must be applied in Alabama courts to an appeal from an arbitration arising out of a transaction involving interstate commerce. The court also acknowledged that all of the grounds contained in the AAA were replicated in the FAA. *Birmingham News Co. v. Horn*, 901 So.2d 27, 47 (Ala. 2004).

The Arbitrator Acted in Manifest Disregard of the Law

In *Birmingham News* the court held that the award should also be vacated when the arbitrator acted in "manifest disregard" of the law. . . .

Birmingham News Co. v. Horn, 901 So.2d 27, 50 (Ala. 2004); see *Jenks v. Harris*, ___ So.2d ___, ___, 2008 WL 683633, *6 (Ala. March 14, 2008).

"Manifest disregard of the law" is a ground that permits review of the merits of an award, but in *Hereford v. D.R. Horton, Inc.*, 2008 WL 4097594 (Ala. September 5, 2008), the court followed the lead of the United States Supreme Court on this issue in *Hall Street Associates, LLC v. Mattel, Inc.*, ___ U.S. ___, ___ 128 S. Ct. 1396, 1401-1402 (2008), and abandoned "manifest disregard of the law" as an extra-statutory ground for review of an arbitrator's award in a case "governed by the Federal Arbitration Act." *Hereford v. D.R. Horton, Inc.*, supra, at *3. The court in *Hereford v. D.R. Horton, Inc.* found the case was "governed" by the FAA because the contract said it was and because the defendant "invoked" the FAA in its motion to compel arbitration.

In any event, the Alabama court's position that the only grounds for review are those contained in the FAA is not supported by the U.S. Supreme Court's opinion in *Hall Street*. In *Hall Street* the Supreme Court of the United States observed that judicial review of a "different scope" than the FAA "is arguable" when resort is had to state statute or common law. *Hall Street Associates, LLC v. Mattel, Inc.*, ___ U.S. ___, ___ 128 S. Ct. 1396, 1406 (2008). Therefore the *Hall Street* opinion did not actually compel Alabama courts to abandon "manifest disregard" as a ground for vacatur.

The court in *Birmingham News* expressly rejected a number of other grounds for examining the merits of an award, including the ground that the award was "arbitrary and capricious." 901 So.2d at 52-53. "Arbitrary and capricious" has been used as a basis for reviewing an arbitrator's findings of fact. See, e.g., *Southwestern Bell Telephone, L.P. v. Missouri Public Service Com'n*, 461 F. Supp.2d 1055, 1084 (E.D. Mo. 2006). By rejecting it as a ground for vacatur, the Alabama court implied that there is no review of the evidentiary basis for an arbitrator's award. Indeed, the court observed: "Some courts have concluded that an arbitrator's findings of fact are virtually unassailable." *Birmingham News Co. v. Horn*, 901 So.2d 27, 59 (Ala. 2004). However, the court did not adopt that view. Instead it found no need to "evaluate the evidence" because that issue was not before it as "a legitimate component of a legally cognizable ground of arbitral review." *Ibid.* The court left open just which "ground of arbitral review" would authorize it to evaluate the evidence unless evidentiary insufficiency could "constitute a manifest disregard of the law". *Id.* at 61.

Public Policy

Another ground for vacatur recognized by many courts is that the award violated fundamental public policy. See *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1993); *Hackett v.*

Milbank, Tweed Hadley & McCoy, 86 N.Y.2d 146, 630 N.Y.S.2d 274, 654 N.E.2d 95 (1995). The court in *Birmingham News* did not consider this ground, and the court has not had occasion to consider public policy as a ground for vacating an arbitration award.

Public policy may be created by the courts as well as the legislature:

The public policy of the state is found in its Constitution and statutes, and, when they are silent, in its judicial decisions and the constant practice of its public officials.

City of Tuscaloosa v. Hanly, 150 So. 499, 500 (Ala. 1933) (quoting *City of Marengo v. Rowland*, 105 N. E. 285, 286 (Ill. 1914)). See also *Kerlin v. Ramage*, 76 So. 360, 361 (Ala. 1917); *Sears Termite & Pest Control, Inc. v. Robinson*, 883 So.2d 153, 157 (Ala. 2003); *Foremost Ins. Co. v. Parham*, 693 So.2d 409, 421 (Ala. 1997); *Southside Baptist Church v. Drennen*, 362 So.2d 854, 857 (Ala. 1978).

If it is presented with the issue, the Alabama courts could adopt violation of public policy as a separate ground for vacatur under Alabama procedures.

Common Law

Regardless of statutory authority, the common law provides for the enforcement of arbitration awards. See *Restatement (Second) of Contracts* § 345(f) (1981). The common law has been adopted in Alabama by statute. See Ala. Code § 1-3-1. Moreover, § 6-6-16 states that the AAA is not the exclusive means for conducting arbitration.

The circuit courts of Alabama are courts of general jurisdiction. See Ala. Const. 1901, Art. VI, § 142(b). Therefore, they have jurisdiction of any action available at common law to enforce or to vacate an arbitration award. In any action in state court based on the common law, the standard rules for venue will apply. See e.g., §§ 6-3-2, 6-3-7 Ala. Code.

The procedure at common law for enforcing an arbitration award would be the same as the procedure for enforcing a foreign judgment. That is, a complaint would be filed reciting the existence of the contract compelling arbitration and reciting the results of the arbitration. The defendant would be served with a summons and complaint and would have 30 days to answer in accordance with existing procedure. See *Restatement (Second) of Contracts* § 345(f) (1981), comment e. A successful claimant might prefer the common law procedure over the AAA summary procedure if the common law procedure would permit enforcement in the county where the defendant is subject to personal jurisdiction rather than some remote venue where the award was made.

Many state courts have recognized a common law right to vacate or set aside an arbitrator's award. See, e.g., *Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GmbH*, 765 A.2d 1226, 1232 n.8 (R.I. 2001); *Werline v. East Texas Salt Water Disposal Co., Inc.*, 209 S.W.3d 888, 897-898 (Tex. App. 2006). However, as the Restatement has observed, common law procedures for vacating an arbitration award have largely been swallowed by statutory schemes such as the FAA and the Uniform Arbitration Act. See *Restatement (Second) of Contracts* § 345(f) (1981), comment e.

Under Alabama's interpretation of the common law there was no appeal at law from an arbitration award in the absence of statutory authority, but, according to *Moss v. Upchurch*, 278 Ala.

615, 619-620, 179 So.2d 741, 745 (1965), extra-statutory attacks on an award can be made in equity for fraud, partiality, corruption, want of requisite notice, and the like, and the award may also be assailed by a motion on the same grounds as a motion to set aside and vacate judgment or to quash execution.

Post-judgment procedure, and not the restrictive time frame of the AAA, was followed in *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493 (Ala. 2003). The claimant filed the arbitration award in circuit court, and the circuit court entered judgment. *Waverlee Homes* did not file a notice of appeal but filed a motion pursuant to Rule 59(e), Ala. R. Civ. P., to vacate the judgment based on the arbitrator's "partiality, bias, and corruption" within the 30 days required by that rule. *Id.* at 495. The circuit court never ruled on the motion to vacate, and it was deemed denied by operation of law pursuant to Rule 59.1 Ala. R. Civ. P. The appeal was filed within 42 days of the denial of the motion, and the court accepted the appeal. The *Waverlee Homes* opinion presages the court's recognition of the *Horton Homes, Inc. v. Shaner* procedures for review of an award, but it is not so certain that this procedure could be followed to review the award on its merits as opposed to the grounds set out in *Moss v. Upchurch*.

In *Raburn v. Bailes*, 565 So.2d 122, 123 (Ala. 1990), the unsuccessful party filed a complaint against the arbitrator and the other parties alleging that the arbitration had been conducted "negligently, wantonly and fraudulently" and that the arbitration award was therefore due to be set aside. The appellate court affirmed the trial court's dismissal of the complaint because it did not allege specific acts of "fraud, corruption, collusion, partiality, and the like." *Id.* at 125 (citing *McCullough v. Alabama By-Products Corp.*, 343 So.2d 508, 510 (Ala.1977)). No reference was made to any need for compliance with the AAA.

In *MBNA America Bank, N.A. v. Bodalía* 949 So.2d 935, 939 (Ala. Civ. App. 2006), the court observed that a Rule 60(b) motion to vacate a judgment is not a substitute for an appeal on the merits under the AAA. Other courts have also held that a post-judgment motion is not appropriate to review an arbitrator's award on the merits. See, e.g., *ML Park Place Corp. v. Hedreen*, 862 P.2d 602 (Wash. App. 1993) (Rule 60(b) cannot be used as an alternative route to attack an arbitration award outside of the statutory limitations period); *Sportsman's Quikstop I, Ltd. v. Didonato*, 32 P.3d 633, 635 (Colo. App. 2001).

Record on Appeal

As with any procedure for review, the reviewing court will need a record. Section 6-6-15 of the AAA requires that the appealing party file "a copy of the award, signed by the arbitrators or a majority of them, [together] with the file of papers or with the submission, as the case may be." Presumably the "papers" must include all the exhibits and a transcript of testimony if one was made. This was apparently done in *Birmingham News Co. v. Horn*, 901 So.2d 27, 31 (Ala. 2004), as the court recites the number of witnesses and exhibits. If the court is asked to review the arbitrator's actions during the hearing, then a transcript is necessary. See *McKee v. Hendrix*, 816 So.2d 30, 36 (Ala. Civ. App. 2001).

On the other hand, an issue of arbitrator bias may be decided without a transcript if a sufficient record is made of the bias in post-award proceedings. See *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493, 501 (Ala. 2003). The need for a

record to be developed after completion of the arbitration was at the heart of the decision in *Waverlee Homes*. The supreme court explained that the material filed with the motion to vacate the judgment compelled the trial court to hold a hearing on the issues of bias presented by the motion.

Section 13 of the FAA provides detailed instructions for the creation of a record on a motion to confirm or modify an award, but the FAA is not specific about the material to be filed in support of a motion to vacate an award.

Some of the grounds for reviewing an award invite a direct inquiry to the arbitrator, but there is a well-established rule that arbitrators may not be deposed. *See Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 66 (2d Cir. 2003) (“Permitting depositions of arbitrators regarding their mental processes would make arbitration only the starting point in the dispute resolution process and deprive arbitration awards of the last word on their authors’ intentions.”); *Rubens v. Mason*, 387 F.3d 183, 191 (2d Cir. 2004); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002). There is an exception that an arbitrator may be deposed regarding claims of bias or prejudice where clear evidence of impropriety has been presented. *See Uhl v. Komatsu Forklift Co., Ltd.*, 466 F. Supp.2d 899, 910 (E.D. Mich. 2006); *Garzella v. Borough of Dunmore*, 237 F.R.D. 371, 372 (M.D. Pa. 2006); *Driskell v. Empire Fire & Marine Insurance Co.*, 547 S.E.2d 360, 388 (Ga. App. 2001).

Remedy on Appeal

An appellate court has very limited powers to modify an award it deems erroneous. Section 6-6-14 of the AAA provides that an award made in compliance with the code is “final” if the award “determines the matter or controversy submitted . . .”. Section 11 of the FAA permits a court to modify or correct an award only where there was evidence of miscalculation, where the arbitrators issued an award upon a matter not submitted to them, or where the award is imperfect in matter of form not affecting the merits.

When an arbitrator’s award is vacated, the remedy under the FAA is to remand for further arbitration rather than reverse and render a judgment. In this context, the Supreme Court of the United States has stated, “Even when the arbitrator’s award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings.” *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 511 (2001).

Without discussing its authority to do so, the court in *Birmingham News Co. v. Horn*, 901 So.2d 27, 69 (Ala. 2004), recalculated the amount of the compensatory and punitive damages after concluding that the arbitrators had manifestly disregarded the law in awarding the damages. There was no discussion of the possibility of remanding the case to the original or a new set of arbitrators.

In *Massey Brothers Chevrolet-Olds-Geo, Inc. v. W.E. & Davis Construction Co.*, 786 So. 2d 1093, 1096 (Ala. 2000), the Supreme Court of Alabama held that the circuit court “had no authority” to grant the defendant an extension of time to comply with the award.

It seems clear that any remand must be made to a new set of arbitrators. In *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1464 (11th Cir. 1997), the appellate court reversed the district court’s confirmation of the arbitration award and remanded the case to the district court with instructions to refer the matter to

a new arbitration panel. Section 10(a)(5) of the FAA does say that where an award is vacated, the court may direct a rehearing by the original arbitrators only when the time for making the award has not expired. This would seem to preclude remand to the original arbitrators in most cases. For example, Rule 43 of the American Arbitration Association Commercial Arbitration Rules requires the arbitrator to issue the award within 30 days of closing the hearings. It would be very unusual for a court to enter an order of vacatur within this period.

Remand to the original arbitrators is precluded because the original arbitrator loses jurisdiction under the doctrine of *functus officio* which refers to the termination of an arbitrator’s authority once the award has been made. Subject to exceptions, the doctrine bars an arbitrator from revisiting an award, either at the request of a party or upon remand after vacation of an award. *See Edmundson v. Wilson*, 108 Ala. 118, 19 So. 367, 369 (Ala. 1896); *Wright v. Land Developers Construction Co.*, 554 So. 2d 1000, 1002 (Ala. 1989). Nevertheless, contrary to this rule, district courts have remanded cases to the original arbitrator with directions to enter awards in accordance with the court’s instruction. *See, e.g., Wonderland Greyhound Park v. Autotote Systems, Inc.*, 274 F.3d 34, 35 (1st Cir. 2001).

Many courts have recognized the power to remand to the arbitrator for clarification of an award, notwithstanding the doctrine of *functus officio* and the lack of such authority in the FAA. In *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000), the court discussed some of the exceptions to *functus officio* under general law and remanded the case to the original arbitrator because the parties merely sought an explanation of the award as required by the contract. In *Lanier v. Old Republic Insurance Co.*, 936 F. Supp. 839, 848 (M.D. Ala. 1996), Judge Myron Thompson concluded that neither the FAA nor the Alabama Arbitration Act would prevent the court from remanding a case to an arbitrator for clarification.

Conclusion

As the court observed in the *Birmingham News* opinion, the AAA reflects a different era in arbitration. *Birmingham News Co. v. Horn*, 901 So.2d 27, 46 (Ala. 2004). Indeed, the court writes rather wistfully that Alabama is the only state not to adopt the Uniform Arbitration Act, or something substantially similar to it. *Ibid.* The court has also acknowledged that the procedure for review is “far from clear”. *Jenks v. Harris*, ___ So.2d ___, ___, 2008 WL 683633 *3 (Ala. March 14, 2008) (disclosing that the court has asked its standing committees on procedure to draft appropriate rules under § 6-6-15). Nevertheless, in the cases discussed above, the courts have mapped out a fairly clear path for reviewing an arbitrator’s award. Some questions remain open, but they are not serious impediments to an effective resort to the courts. ▲▼▲

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