

***PUGH’S LAWN AND LANDSCAPE COMPANY, INC. v.***  
***JAYCON DEVELOPMENT CORPORATION: THE***  
**TENNESSEE COURT OF APPEALS LIMITS JUDICIAL**  
**REVIEW OF ARBITRATION AWARDS**

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INTRODUCTION

In its April 2009 opinion in *Pugh’s Lawn Landscape Company, Inc. v. Jaycon Development Corporation*,<sup>1</sup> the Tennessee Court of Appeals announced its judgment that Tennessee’s arbitration statutes do not permit parties to modify by agreement the scope of judicial review of an arbitral award. The *Pugh’s Lawn* decision answered a state law question left unanswered by the United States Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,<sup>2</sup> a 2009 case in which the Court held that the Federal Arbitration Act (“FAA”)<sup>3</sup> did not permit parties contractually to expand the grounds for vacating or modifying an arbitral award.<sup>4</sup> While the ruling in *Hall Street* contemplated the possibility that expanded judicial review might be permissible under state statutory or common law,<sup>5</sup> the Tennessee Court of Appeals’ decision in *Pugh’s Lawn* has, for now, settled this state statutory issue in Tennessee.<sup>6</sup>

JUDICIAL REVIEW OF ARBITRAL AWARDS

The precise contours of judicial review of arbitral awards have divided courts and confounded contract drafters. Section 9 of the FAA states that courts “must” confirm an award made pursuant to an arbitration “unless” it is “vacated, modified,

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<sup>1</sup> *Pugh’s Lawn Landscape Co. v. Jaycon Dev. Corp.*, No. W2008-01366-COA-R3-CV, 2009 WL 1099270 (Tenn. Ct. App. Apr. 23, 2009).

<sup>2</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008). Pinpoint citations to this case herein shall refer to the S. Ct. publication of the case, as the U.S. volume is not yet available.

<sup>3</sup> 9 U.S.C. §§ 1-14 (2009).

<sup>4</sup> *Hall St.*, 128 S. Ct. at 1403.

<sup>5</sup> *Id.* at 1406.

<sup>6</sup> *Pugh’s Lawn*, 2009 WL 1099270, at \*6.

or corrected as prescribed in sections 10 and 11” of the FAA.<sup>7</sup> Section 10 sets forth four grounds for vacating an arbitral award, including circumstances:

where the award was procured by corruption, fraud, or undue means;  
... where there was evident partiality or corruption in the arbitrators  
...; ... where the arbitrators were guilty of misconduct ... or of any  
other misbehavior by which the rights of any party have been  
prejudiced; or ... where the arbitrators exceeded [or imperfectly  
executed] their powers.<sup>8</sup>

Grounds for modifying or correcting an award appear in section 11 of the FAA and include “an evident material miscalculation of figures or an evident material mistake,” an award by arbitrators upon a matter not submitted to them, and an imperfection in matter of form not affecting the merits of the controversy.<sup>9</sup> To supplement these very limited statutory grounds for vacating an award, parties seeking to arbitrate under the auspices of the FAA<sup>10</sup> frequently contracted for heightened judicial scrutiny of awards under a broader set of circumstances, including review for legal error or evidentiary failures.<sup>11</sup> With provisions such as these, parties sought to minimize one of the most risky aspects of arbitration, the limited ability to appeal an unfavorable and/or irrational award.<sup>12</sup>

This practice, however, was not without controversy, and the United States Circuit Courts of Appeals were split as to whether such provisions were enforceable pursuant to the FAA.<sup>13</sup> Prior to the Supreme Court’s decision in *Hall Street*, the

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<sup>7</sup> 9 U.S.C. § 9 (2009).

<sup>8</sup> *Id.* at § 10(a)(1).

<sup>9</sup> *Id.* at § 11.

<sup>10</sup> The United States Supreme Court has declared that the FAA’s substantive provisions apply in both federal and state fora with regard to the determination of the enforceability of an agreement to arbitrate. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). However, the Supreme Court also has made it clear that the federal policy is not to occupy the entire field of arbitration, but rather is to ensure enforceability according to the terms of private agreements to arbitrate. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”). Parties therefore must carefully weigh the choice-of-law provisions when drafting arbitration agreements.

<sup>11</sup> See, e.g., Stanley A. Leasure, *Arbitration After Hall Street v. Mattel: What Happens Next?*, 31 U. ARK. LITTLE ROCK L. REV. 273 (2009).

<sup>12</sup> ADR Brief, *The Calm and the Storm: Arbitration Experts Speak Out on Hall Street Associates*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG. 104 (May 2008).

<sup>13</sup> Whitney R. Duesman, *Hall Street Associates, L.L.C. v. Mattel, Inc.: How the Supreme Court Balanced Arbitral Efficiency and Parties’ Intent*, 83 TUL. L. REV. 1497, 1500 (2009).

Ninth and Tenth Circuits limited judicial review of arbitral awards to the FAA's enumerated grounds,<sup>14</sup> while the First, Third, Fourth, Fifth, and Sixth Circuits held that parties could, consistent with the FAA, contractually specify the scope of judicial review of an award in an arbitration.<sup>15</sup>

The Supreme Court firmly resolved this split in *Hall Street*, holding that sections "10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification" of arbitration awards.<sup>16</sup> In so concluding, the Court considered and rejected two arguments that would have led to the contrary result: the first a common law argument based upon the "manifest disregard [of the law]" language in *Wilko v. Swan*,<sup>17</sup> and the second an argument based upon the national policy embodied in the FAA of promoting the enforcement of arbitration agreements.<sup>18</sup>

The Court was not persuaded by these arguments, focusing instead upon the language and construction of the FAA to conclude:

On application for an order confirming the arbitration award, the

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<sup>14</sup> See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001); *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991). In dicta, the Seventh and Eighth Circuits also expressed reservations about contractual provisions purporting to expand the bases for judicial review of arbitral awards. See *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998); *Chi. Typographical Union*, 935 F.2d at 1504-05.

<sup>15</sup> See *P.R. Tel. Co. v. United States Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at \*6 (4th Cir. Aug. 11, 1997) (unpublished decision); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995).

<sup>16</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008). *Hall Street* concerned a domestic arbitral award subject to the FAA. *Id.* The implications of the decision for international arbitral awards subject to the New York Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, codified at 9 U.S.C. § 201, and the Panama Convention, the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448, O.A.S.T.S. No. 42, codified at 9 U.S.C. § 302, are unclear.

<sup>17</sup> *Wilko v. Swan*, 346 U.S. 427, 436 (1953). For a detailed analysis of the Court's discussion of the "manifest disregard of the law" basis for vacatur and its validity post-*Hall Street*, see Robert Ellis, *Imperfect Minimalism: Unanswered Questions in Hall Street Associates L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), 32 HARV. J.L. & PUB. POL'Y 1187 (2009); Thomas N. Pieper, "Manifest Disregard of the Law" After *Hall Street* – From One Circuit Split to the Next, 22 INT'L L. PRACTICUM 47 (2009).

<sup>18</sup> *Hall St.*, 128 S. Ct. at 1403-04. The Court instead emphasized a second, somewhat philosophically conflicting, foundational policy underpinning the FAA, that of finality and efficiency. *Id.* at 1405-06.

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.<sup>19</sup>

The Court’s holding on the exclusivity of the grounds set forth in the FAA, however, did not exclude a “more searching review based on authority outside the [FAA] statute.”<sup>20</sup> Emphasizing that its decision spoke only to the FAA, the Court suggested that “judicial review of different scope is arguable” under state statutory or common law or as an exercise of a United States District Court’s case management authority under Federal Rule of Civil Procedure 16.<sup>21</sup> The Court provided little guidance on these alternatives,<sup>22</sup> leaving to other courts a number of questions for further consideration, one of which was at issue in the *Pugh’s Lawn* case before the

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<sup>19</sup> *Id.* at 1405. Justice Stevens, writing for himself and Justice Kennedy, dissented, as did Justice Breyer, writing alone. *Id.* at 1408-10. A thorough analysis of the *Hall Street* opinion is beyond the scope of this short comment. However, should readers seek such analysis, the case, hailed as a “landmark,” see Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1105 (2009), has generated a prolific volume of commentary and speculation from academics and practitioners alike, including, *inter alia*, Duesman, *supra* note 13; Ellis, *supra* note 17; Leasure, *supra* note 11; Pieper, *supra* note 17; Reuben, *infra* note 19; Stuart M. Widman & Donald Lee Rome, *Judicial Remands of Challenged Awards: Legal and Procedural Issues After Hall Street*, 63 DISP. RESOL. J. 50 (2009).

<sup>20</sup> *Hall St.*, 128 S. Ct. at 1406-07.

<sup>21</sup> *Id.* At the conclusion of a bench trial before the United States District Court for the District of Oregon in *Hall Street*, the parties attempted unsuccessfully to mediate an indemnification claim and proposed to submit the issue to arbitration. *Id.* at 1400. The District Court agreed, and the parties drafted an arbitration agreement which provided, in part, that:

[t]he United States District Court . . . 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.

*Id.* at 1400-01. The District Court adopted this agreement as an order. *Id.* at 1400. According to the Supreme Court, it was this circumstance that implicated the trial court’s authority to manage cases under Rule 16 of the Federal Rules of Civil Procedure. *Id.* at 1407-08. Because the parties had not briefed or addressed 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.*,” the Court left them open to be pursued on remand. *Id.* at 1407-08.

<sup>22</sup> *Id.* at 1407. For an in-depth discussion of these alternatives, see Reuben, *supra* note 19.

Tennessee Court of Appeals.

### THE *PUGH'S LAWN* DECISION

In *Pugh's Lawn*, the Tennessee Court of Appeals addressed the unresolved state statutory question raised in *Hall Street*.<sup>23</sup> Interestingly, the parties in *Pugh's Lawn* did not raise the issue; the Court itself did.<sup>24</sup> In the case, Pugh's Lawn Landscape Company, Inc. filed a breach of contract action against Jaycon Development Corporation, to which Jaycon responded and counterclaimed, also for breach of contract.<sup>25</sup> The parties' original contract specified the application of Tennessee law, but it did not require that disputes be submitted to arbitration.<sup>26</sup>

After limited discovery, however, the parties did agree to arbitrate the matter.<sup>27</sup> The trial court's Order of Reference to Arbitration and Reservation of Appellate Rights set forth the terms of the arbitration, one of which stated that:

[t]he parties agree that a) any and all findings, rulings or judgments issued by the arbitrator shall be appealable, using the same standards of review, as if the finding, ruling or judgment in question was issued by [the Circuit Court]; b) that the agreement that the arbitrator's ruling is appealable was material consideration for the agreement of each party to submit this matter to arbitration; c) each party agrees that if this matter is appealed, neither party will raise an issue on appeal that the arbitrator's ruling is not appealable, that an 'arbitrary and capricious' standard of review is applicable due to the appeal arising out of an arbitration, or any other issues relating to the fact that the findings of facts and conclusions of law were reached by an arbitrator, as opposed to a Judge of Circuit Court.<sup>28</sup>

The trial court's order was entered by consent of the parties, and the parties proceeded to arbitration.<sup>29</sup>

After the hearing, the arbitrator issued a written decision that awarded to

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<sup>23</sup> *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, No. W2008-01366-COA-R3-CV, 2009 WL 1099270, at \*3 (Tenn. Ct. App. Apr. 23, 2009).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Jaycon the sum of \$51,082.20, plus reasonable attorney fees, the costs of the arbitration, and court costs.<sup>30</sup> Jaycon then filed a motion asking the trial court to affirm the arbitrator's award.<sup>31</sup> Pugh's Lawn did not file a response to this motion, nor did it file a motion asking the trial court to vacate or modify the arbitrator's award.<sup>32</sup> The trial court then issued an order confirming the arbitrator's award and entering a judgment in favor of Jaycon.<sup>33</sup>

An appeal to the Tennessee Court of Appeals followed, in which Pugh's Lawn asked the Court to review the arbitrator's initial decision rather than the trial court's final order.<sup>34</sup> At no time during the initial appellate process did either party raise the unresolved jurisdictional issue from *Hall Street*.<sup>35</sup> At oral argument, the Court itself "questioned whether the parties could modify the judicial standard of review of an arbitrator's decision."<sup>36</sup>

In its April 2009 opinion, the Court answered this question in the negative, holding "that the arbitration agreement between [the parties] improperly expanded the scope of judicial review."<sup>37</sup> It began by noting that parties in Tennessee have several alternative dispute resolution processes from which to choose, including negotiation, mediation, non-binding arbitration, and arbitration.<sup>38</sup>

Rejecting the apparently *post hoc* argument made by *Pugh's Lawn* that the parties had not agreed to *binding* arbitration, the Court examined the question of which statute, the FAA or the Tennessee statute,<sup>39</sup> governed the particular arbitration.<sup>40</sup> Because both parties were Tennessee corporations, because the initial contract between the parties required any disputes to be heard by Tennessee courts

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<sup>30</sup> *Id.* at \*2. The arbitrator set the amount of Jaycon's attorney fees and the costs of the arbitration in a second decision. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *Id.* at \*3.

<sup>37</sup> *Id.* at \*6.

<sup>38</sup> *Id.* at \*3 (citing Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) from ADR Services*, 26 U. MEM. L. REV. 975, 975 (1996)); *see also* TENN. SUP. CT. R. 31.

<sup>39</sup> TENN. CODE ANN. §§ 29-5-301 to -320 (2009).

<sup>40</sup> *Pugh's Lawn*, 2009 WL 1099270, at \*3.

under Tennessee law, and because the original dispute involved matters occurring solely in Tennessee, the Court concluded that the Tennessee statute, a version of the Uniform Arbitration Act ("UAA"), applied.<sup>41</sup>

Section 313(a) of the Tennessee statute<sup>42</sup> addresses vacatur in language very similar to that of the FAA, providing that a trial court "shall" vacate an arbitrator's award under the following circumstances:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 29-5-306, as to prejudice substantially the rights of a party; or
- (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 29-5-303 and the party did not participate in the arbitration hearing without raising the objection.<sup>43</sup>

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<sup>41</sup> *Id.* The Uniform Arbitration Act ("UAA") was promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). According to the NCCUSL, a "primary purpose of the 1955 Act was to insure the enforceability of agreements to arbitrate in the face of often times hostile state law." UNIF. ARBITRATION ACT Prefatory Note (2000), 7 U.L.A. 2 (2009).

<sup>42</sup> TENN. CODE ANN. § 29-5-313(a) (2009).

<sup>43</sup> *Id.* at (1)-(5). The fifth ground is an addition to those provided for in the FAA. The Revised UAA, adopted by the NCCUSL in 2000, adds a sixth ground for vacatur:

- (a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
  - (1) the award was procured by corruption, fraud, or other undue means;
  - (2) there was:
    - (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
    - (B) corruption by an arbitrator; or
    - (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
  - (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice

Modifications and correction of awards are addressed in the Tennessee statute's section 314(a)(1)-(3),<sup>44</sup> and, if an application for review is denied under either section, the trial court must confirm the award.<sup>45</sup>

Having reached this conclusion regarding the applicable law, the Court tackled the primary issue: whether the parties could agree to modify the statutory standards by which courts review arbitration awards.<sup>46</sup> The issue, the Court opined, implicated two competing values underlying the arbitration policy embedded in the FAA and the UAA, the model for the relevant Tennessee statute.<sup>47</sup> The first principle, contractual autonomy,<sup>48</sup> operates to ensure that agreements to arbitrate are enforced according to their terms.<sup>49</sup> In cases such as these, where parties contract to

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substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

UNIF. ARBITRATION ACT (2000) § 23, 7 U.L.A. 77-78 (2009). Other states have established different standards in their statutes, at least one of which explicitly authorizes expanded judicial review. *See, e.g.*, N.J. STAT. ANN. § 2A:23B-4(c) (2009) (Parties may “expand[ ] the scope of judicial review of an award by expressly providing for such expansion.”).

<sup>44</sup> TENN. CODE ANN. § 29-5-314(a)(1)-(3) (2009). The statute provides:

Upon application . . . the [trial] court shall modify or correct the [arbitrator's] award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

*Id.*

<sup>45</sup> TENN. CODE ANN. § 29-5-313(d), -314(b) (2009).

<sup>46</sup> *Pugh's Lawn*, 2009 WL 1099270, at \*4.

<sup>47</sup> *Id.*

<sup>48</sup> Reuben, *supra* note 19, at 1130-33.

<sup>49</sup> *See Volt Info. Sci. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (explaining that the federal policy is to ensure the enforceability, according to their terms, of “private agreements to arbitrate”).



expand the statutory grounds for judicial review, this first value comes into direct conflict with the second principle, that of process finality and efficiency.<sup>50</sup>

In order to determine how the Tennessee statute resolved this philosophical tension, the Court sought guidance from other courts, turning first to the United States Supreme Court's conclusion in *Hall Street* that the FAA "substantiated a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."<sup>51</sup> It next examined the split among the various state courts<sup>52</sup> that had addressed the issue post-*Hall Street* in the context of their versions of the UAA.<sup>53</sup> The Court concluded that, because Tennessee authority appeared to favor the finality of arbitration,<sup>54</sup> "Tennessee court[s] may vacate or modify an arbitration award only under the grounds provided in [the statute]."<sup>55</sup>

#### PROSPECTS FOR ARBITRAL REVIEW POST-*HALL STREET* AND *PUGH'S LAWN*

The *Hall Street* and *Pugh's Lawn* decisions are significant ones for consumers of

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<sup>50</sup> See *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008) (noting that the FAA substantiates a "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway").

<sup>51</sup> *Pugh's Lawn*, 2009 WL 1099270, at \*5 (quoting *Hall Street*, 128 S. Ct. at 1405).

<sup>52</sup> Compare *John T. Jones Constr. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003) and *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995), with *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008).

<sup>53</sup> *Pugh's Lawn*, 2009 WL 1099270, at \*5. The *Pugh's Lawn* court noted that "[u]nder Tenn. Code Ann. § 29-5-320, [it was] required to construe the arbitration statutes so as to conform with the laws of the other states which have adopted the UAA." *Id.* at n.1 (citing *Buraczynski v. Eyring*, 919 S.W.2d 314, 318 (Tenn. 1996); *T.R. Mills Contractors, Inc. v. WHR Enters., LLC*, 93 S.W.3d 861, 868-69 (Tenn. Ct. App. 2002)).

<sup>54</sup> *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445, 452 (Tenn. 1996). In *Arnold*, the Tennessee Supreme Court opined that:

[t]he reason for attaching such a high degree of conclusiveness to an award made by arbitrators is that the parties have, themselves, by agreement, substituted a tribunal of their own choosing for the one provided and established by law, to the end that they may avoid the expense usually incurred by litigation and bring the cause to a speedy and final determination. To permit a dissatisfied party to set aside the arbitration award and to invoke the Court's judgment upon the merits of the cause would render arbitration merely a step in the settlement of the dispute, instead of its final determination.

*Id.* at 452.

<sup>55</sup> *Pugh's Lawn*, 2009 WL 1099270, at \*6.

arbitration. There have been dire predictions that parties now will eschew arbitration as a means of dispute resolution absent the availability of expanded judicial review.<sup>56</sup> However, while some may explore other options, the benefits of the arbitral process likely will still be attractive to the vast majority, and neither *Hall Street* nor *Pugh's Lawn* has limited too completely parties' contractual autonomy regarding process design.

What, then, does remain for parties seeking to retain the ability to have an arbitral award reviewed? Recall that the *Hall Street* court expressly stated that its holding did not preclude parties from seeking a "more searching review based on authority outside the" FAA.<sup>57</sup> Further, while the court in *Pugh's Lawn* did not address this directly, the holding in that decision very narrowly focused on the vacatur standards in Tennessee's arbitration statute, leaving open the possibility that authority for post-award review exists beyond that statute's provisions.<sup>58</sup>

The Supreme Court itself suggested several such possibilities in *Hall Street*.<sup>59</sup> The circumstances of that case prompted the Court to question whether expanded review might be possible pursuant to a court's inherent authority to manage its cases under the relevant rules of civil procedure or pursuant to statutes that authorize courts to refer matters to arbitration, such as the Alternative Dispute Resolution Act of 1998.<sup>60</sup>

Of course, a court's case management authority has limited application and offers no authority in the context of pre-dispute arbitral agreements. For parties bound by pre-dispute arbitral provisions specifying broadened judicial review, *Hall Street* also posited that state statutory law may offer authority for enforcement.<sup>61</sup> All states have arbitration statutes, but only one of which, the New Jersey statute,<sup>62</sup>

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<sup>56</sup> See *Hall Street*, 128 S. Ct. at 1406 ("Hall Street and its *amici* say parties will flee from arbitration if expanded review is not open to them."). See also Leasure, *supra* note 11, at 306-307.

<sup>57</sup> *Hall St.*, 128 S. Ct. at 1406.

<sup>58</sup> *Pugh's Lawn*, 2009 WL 1099270, at \*6.

<sup>59</sup> *Hall St.*, 128 S. Ct. at 1407.

<sup>60</sup> *Id.* ("The parties' supplemental arguments . . . implicate issues of . . . the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 *et seq.* . . ."). In both *Hall Street* and *Pugh's Lawn*, the parties entered into arbitration agreements during the course of litigation, and the agreements were approved and entered as court orders. *Hall Street*, 128 S. Ct. at 1400; *Pugh's Lawn*, 2009 WL 1099270, at \*1.

<sup>61</sup> *Hall St.*, 128 S. Ct. at 1406 ("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 . . ."). The question of FAA preemption in this context is beyond the scope of this essay. See, e.g., Reuben, *supra* note 19, at 1156; see also Ellis, *supra* note 17, at 1194-95.

<sup>62</sup> N.J. STAT. ANN. § 2A:23B-4(c) (2009) (Parties may "expand[ ] the scope of judicial review of an

explicitly authorizes expanded judicial review of arbitral awards. Like Tennessee, most states have enacted a version of the UAA,<sup>63</sup> which is silent on the issue. At least 13 states have adopted the Revised UAA.<sup>64</sup> When revising the UAA in 2000, the drafters debated, but ultimately did not include, a provision that would permit parties to contract for judicial review of errors of facts or law in the arbitrator's award.<sup>65</sup>

Post-*Hall Street*, state courts are being asked to determine whether these state arbitration laws provide authority for parties seeking to contract for broadened review in court. As we have seen, the Tennessee Court of Appeals in *Pugh's Lawn* responded in the negative,<sup>66</sup> as have courts in several other states.<sup>67</sup> One court in California, on the other hand, has held that a contract providing for expanded judicial review is enforceable under California's arbitration statute.<sup>68</sup>

In addition to state arbitration statutes, the *Hall Street* court opined that state

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award by expressly providing for such expansion.”).

<sup>63</sup> Twenty-eight states and the District of Columbia have adopted the UAA, or some version thereof, including Tennessee. See Stanley A. Leasure & Kent P. Ragan, *Arbitration of Medical Malpractice Claims: Patient's Dilemma and Doctor's Delight?*, 28 MISS. C. L. REV. 51, 56 n.28 (2008-09) “The following states have adopted the Uniform Arbitration Act of 1956: Alaska, Arizona, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wyoming.” *Id.* (citing UNIF. ARBITRATION ACT (1956) Table of Jurisdictions Wherein Act Has Been Adopted, 7 U.L.A. 99 (2009)).

<sup>64</sup> Thirteen states have passed the RUAA: Alaska, Colorado, the District of Columbia, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington. See Uniform Law Comm'rs, Uniform Arbitration Act (2000), available at [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-aa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp).

<sup>65</sup> Francis J. Pavetti, Chair, RUAA Drafting Committee, *Policy Statement*, Revised Uniform Arbitration Act (May 15, 2000).

<sup>66</sup> *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, No. W2008-01366-COA-R3-CV, 2009 WL 1099270, at \*6 (Tenn. Ct. App. Apr. 23, 2009).

<sup>67</sup> See *supra* note 52; see also *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (the statutory grounds are the exclusive avenues for a court to vacate or modify an arbitrator's award); *John T. Jones Const. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003) (“[A] court may vacate or modify an award only if one of the grounds set forth in [the statute] is present.”); *Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795, 799 (Tex. Ct. App. 2008) (“[P]arties seeking judicial review of an arbitration award covered under the [Texas arbitration statute] cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute.”).

<sup>68</sup> *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008) (express arbitral agreements incorporating traditional judicial review are enforceable under the state arbitration statute).

common law may offer yet another route into court for parties seeking review of arbitration awards.<sup>69</sup> Parties potentially could contractually provide that enforcement of arbitral awards would be based upon principles of state contract law. Courts seem willing to undertake such reviews, so long as the specified standards of review are not unusual. One court noted that “just as the parties to any contract are limited in the constraints they may place on judicial review, an arbitration agreement providing that a ‘judge would review the award by flipping a coin or studying the entrails of a dead fowl’ would be unenforceable.”<sup>70</sup>

The opinion in *Hall Street* called into question the availability of one widely-accepted option for parties seeking expanded judicial review pre-*Hall Street*: the judicially-created “manifest disregard of the law” basis for vacatur.<sup>71</sup> Courts created this standard as an additional non-statutory ground to allow judges to vacate arbitral awards when arbitrators were conscious of, yet “disregarded,” the controlling law.<sup>72</sup> While the Court in *Hall Street* did not explicitly disclaim it as a ground for vacatur, it cast doubt upon this interpretation by conjecturing that manifest disregard may not be an independent ground for review.<sup>73</sup> Rather, it may simply be one way of referring to the FAA’s section 10 vacatur grounds generally or to section 10(a)(3)’s “guilty of misconduct” or section 10(a)(4)’s “exceeded their powers” standards specifically.<sup>74</sup> Courts are undecided whether “manifest disregard” survived *Hall Street* as a non-statutory ground or merely as “judicial gloss”<sup>75</sup> on section 10’s grounds.<sup>76</sup>

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<sup>69</sup> *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008).

<sup>70</sup> *Cable Connection, Inc.*, 190 P.3d at 605 (quoting *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *overruled by* *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003)).

<sup>71</sup> See Jill I. Gross, *Hall Street Blues: The Uncertain Future of Manifest Disregard*, 37 SECS. REG. L.J. 232 (2009); Pieper, *supra* note 17, at 47; see also Hiro Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009), <http://yalelawjournal.org/2009/09/29/aragaki.html>. At least one state has legislatively incorporated the “manifest disregard” standard into its arbitration statute. See GA. CODE ANN. § 9-9-13(b)(5) (2009). State courts have split on its viability as a judicially created basis for vacatur. Compare *Weiner v. Jones*, 610 S.E. 2d 850 (S.C. Ct. App. 2005) (adopting the manifest disregard standard) with *Moore v. Omnicare, Inc.*, 118 P.3d 141 (Idaho 2005) (refusing to adopt the standard).

<sup>72</sup> See Pieper, *supra* note 17, at 47.

<sup>73</sup> *Hall St.*, 128 S. Ct. at 1403.

<sup>74</sup> *Id.*

<sup>75</sup> *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

<sup>76</sup> See Pieper, *supra* note 17, at 48-49. Compare *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277 (9th Cir. 2009) (manifest disregard is still viable after *Hall Street*) with *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008) (manifest disregard standard did not

The *Hall Street* Court's focus on section 10(a)(4)'s "exceeded their powers" language has inspired parties to contractually restrict arbitrators from committing errors of law or fact.<sup>77</sup> Should an arbitrator fail to adhere to this contractual restriction, courts may find this to be a valid ground for vacatur under section 10(a)(4) or its state law equivalent.<sup>78</sup>

While neither *Hall Street* nor *Pugh's Lawn* discussed or speculated upon them, courts have referred to other non-statutory grounds for expanded judicial review.<sup>79</sup> Commentators have suggested that several of these grounds, that an arbitral award is "arbitrary and capricious"<sup>80</sup> or "completely irrational,"<sup>81</sup> are no longer viable.<sup>82</sup>

The "public policy" exception, on the other hand, may still have life after *Hall Street* and its state progeny. Courts historically have been willing to consider vacatur of arbitral awards on public policy grounds.<sup>83</sup> The Supreme Court has referred to this public policy standard of review as a "specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy."<sup>84</sup> The standard is a very strict one as an award will only be vacated on public policy grounds when enforcement of the award violates or

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survive *Hall Street*).

<sup>77</sup> See *Hall St.*, 128 S. Ct. at 1403-04.

<sup>78</sup> At least one court has so held. See *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d at 589 (this holding is based upon an analysis of California's arbitration statute). See also Ellis, *supra* note 17, at 1195. One scholar has discussed *Hall Street*'s impact on so-called "restricted submissions." Reuben, *supra* note 19, at 1150-51. Professor Reuben defines these submissions as those "which compel the arbitrator to apply the law" and in which "the arbitrator may make an initial decision on the law, but the parties reserve for the court the power to make a final decision, thus allowing for judicial review for questions of law." *Id.* The Professor opines that *Hall Street* invalidates such submissions in public courts, but that their review may still be possible by private arbitrators. *Id.*

<sup>79</sup> See, e.g., Reuben, *supra* note 19, at 1113.

<sup>80</sup> *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005) ("[T]he Eleventh Circuit Court of Appeals has recognized three non-statutory bases for vacatur of an arbitration award. The award may be vacated (1) if it is arbitrary and capricious, (2) if its enforcement is contrary to public policy, or (3) if it evinces a manifest disregard of the law.").

<sup>81</sup> *Comedy Club, Inc. v. Improv West Assocs.*, 514 F.3d 833, 846 (9th Cir. 2007) ("Review of an arbitration award is 'both limited and highly deferential' and the arbitration award 'may be vacated only if it is completely irrational [or] constitutes manifest disregard of the law.'" (citations omitted)).

<sup>82</sup> See, e.g., Reuben, *supra* note 19, at 1141; Leasure, *supra* note 11, at 308-09.

<sup>83</sup> See, e.g., *United Paperworkers Int'l v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

<sup>84</sup> *Id.*

directly conflicts with an explicit, well-defined, and dominant public policy.<sup>85</sup> Some have speculated that the *Hall Street* Court's insistence on the exclusivity of the FAA grounds for vacatur may preclude application of the public policy doctrine.<sup>86</sup> However, others believe that it will have little or no effect on the doctrine's availability for a number of reasons,<sup>87</sup> some pragmatic and some based upon legal analysis. From a legal perspective, the public policy exception is a broad legal concept that is applicable to, and has been enforced by, the courts in the context of all types of contracts, not merely arbitral awards.<sup>88</sup> Further, practically speaking, it is unlikely that the judiciary will use its authority to enforce awards that violate widely-held public policies, risking its credibility and diminishing its public capital.<sup>89</sup> Accordingly, this extra-statutory ground may still be extant post-*Hall Street*.

Outside of the courtroom setting, parties have other options for seeking review of arbitral awards. One or more layers of arbitral review may be built into parties' contractually-agreed arbitration process, including review by another arbitrator or panel of appellate arbitrators. Several of the major institutional providers of arbitration offer appellate services and have created draft clauses and procedures, and the rules of most would appear to accommodate appeals, even those without specific appellate rules.<sup>90</sup>

Finally, should parties prefer to forgo arbitration altogether to eliminate the risk that they will be unable to secure meaningful review of an irrational award, there are many other dispute resolution processes from which to choose, including negotiation, conciliation, mediation, non-binding arbitration, neutral evaluation, summary jury trial, mini-trial, private judging, and hybrid or self-designed processes

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<sup>85</sup> See *id.* at 43. This necessarily is an oversimplification of the application of the public policy doctrine by the courts. For a thorough review of the three different forms of the public policy exception – illegality, award, and pure policy – in the context of judicial review of arbitral awards, see Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 615-16 (2009).

<sup>86</sup> See, e.g., Marcantel, *supra* note 85, at 623-25.

<sup>87</sup> See, e.g., Reuben, *supra* note 19, at 1141-43.

<sup>88</sup> See *id.*

<sup>89</sup> Cf. Marcantel, *supra* note 85, at 623-25.

<sup>90</sup> See, e.g., CPR Int'l Institute for Conflict Prevention & Resolution: Arbitration Appeal Procedure, available at <http://www.cpradr.org> (search "Arbitration Appeal"; then follow link); JAMS Optional Arbitration Appeal Procedure, available at <http://www.jamsadr.com/rules-optional-appeal-procedure/> (last visited Oct. 29, 2009). The American Arbitration Association and the National Arbitration Forum have not established specific rules or procedures for appeals, but appeals appear possible within their systems. For a short article on this topic, see Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60 DISP. RESOL. J. 10 (Oct. 2005).

limited only by the parties' imaginations.<sup>91</sup> Courts often sponsor alternative dispute resolution programs for litigants, and federal and many state statutes or court rules authorize courts to mandate participation in these programs.<sup>92</sup> Indeed, the court in *Pugh's Lawn* took note of just some of the options available to parties in Tennessee.<sup>93</sup>

### CONCLUSION

Resolving an unsettled state law issue in the Supreme Court's *Hall Street* decision, the Tennessee Court of Appeals made it clear in *Pugh's Lawn* that Tennessee courts may vacate or modify arbitral awards only under the grounds provided in Tennessee's arbitration statute.<sup>94</sup> While some have opined that *Hall Street* and state law cases like *Pugh's Lawn* may be the harbingers of arbitral doom, there likely still will be those who prefer the relative speed, flexibility, and confidentiality that the process offers.

Accordingly, parties already embroiled in litigation may still seek to refer discrete issues to arbitration, yet also to preserve the ability to seek judicial review of the arbitral result. *Hall Street* and *Pugh's Lawn* appear to contemplate this scenario.<sup>95</sup> Consumers of arbitration endeavoring to contract for expanded judicial or other review of arbitration awards in a pre-dispute context must carefully consider where to seat the arbitration and must explicitly opt out of the FAA or of the law of a state such as Tennessee where courts have confined judicial review to statutory grounds. The contract must make it absolutely clear that the arbitration shall be conducted pursuant to the applicable state law.

This exercise in forum shopping<sup>96</sup> carries some risk as not all state courts have weighed in on the issue. However, there are states such as California, through

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<sup>91</sup> A lengthy description of each of these processes is beyond the scope of this short article. For a more detailed overview of these processes, see Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Case and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006).

<sup>92</sup> See Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-58 (2009); see also TENN. SUP. CT. R. 31.

<sup>93</sup> *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, No. W2008-01366-COA-R3-CV, 2009 WL 1099270, at \*3 (Tenn. Ct. App. Apr. 23, 2009) ("In Tennessee, parties have several options for alternative dispute resolution: negotiation, mediation, non-binding arbitration, or arbitration.").

<sup>94</sup> *Id.*, at \*6 (TENN. CODE ANN. § 29-5-313 and -314).

<sup>95</sup> See *supra* note 61 and accompanying text.

<sup>96</sup> Consideration of the implications of *Hall Street* in international judicial fora exceeds the scope of this article, but even more uncertainty is likely in that context as foreign law and the judges applying it may adopt more or less expansive views of judicial review of arbitral awards.

case law,<sup>97</sup> or New Jersey, by statute,<sup>98</sup> that permit parties to contract for expanded judicial review. Indeed, more legislatures may feel compelled to respond to *Hall Street* and state cases like *Pugh's Lawn* by amending the relevant arbitration statutes to clarify any ambiguity regarding the grounds for judicial review of arbitral awards or explicitly to expand these grounds to include contractually broadened review.<sup>99</sup>

Parties too risk averse to choose or to rely upon an unfamiliar state and its laws or to hazard that a state's court may interpret its laws unfavorably to limit vacatur may prefer to contract for an arbitral appeal or to decline arbitration altogether to pursue alternative dispute resolution processes. Fortunately, Tennessee offers a plethora of dispute resolution options and a "friendly" environment for parties seeking such alternatives.

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<sup>97</sup> See *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008) (holding that express arbitral agreements incorporating traditional judicial review are enforceable under the state arbitration statute).

<sup>98</sup> See N.J. STAT. ANN. § 2A:23B-4(c) (2009).

<sup>99</sup> Whether state law amendments to this effect may be preempted by the FAA is beyond the scope of this essay. See, e.g., Reuben, *supra* note 19, at 1156; Ellis, *supra* note 17, at 1194.