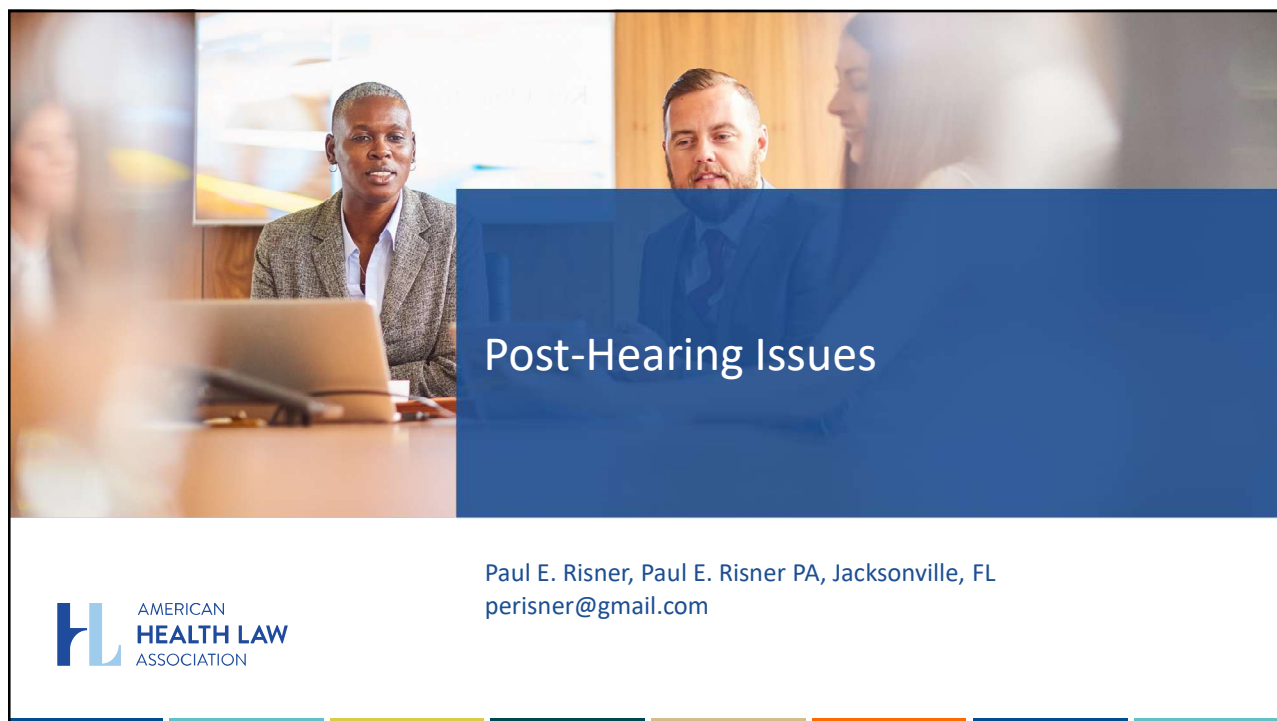




1

Final Awards – Conclusiveness and Effect

- [AHLA Rule 7.10](#)
- As a threshold matter, a Final Award (or a Consent Award under Rule 7.3) “. . . **fully and finally resolves all claims and counterclaims** presented in arbitration.”
- But- - before you get to that point, there are a few matters to consider.

2

AMERICAN HEALTH LAW ASSOCIATION

2

Corrections and Reconsideration

- AHLA Rule 7.9

- While certain “. . . clerical, typographical, or computational errors in the award” may be sought within 15 days after receipt of the award, **the merits may not be reconsidered.**
- This is consistent with the principle of finality and is embodied in the doctrine of *“functus officio.”*
- Essentially, an arbitrator **may not reconsider** the merits of an award after it has been issued.

3

AMERICAN HEALTH LAW ASSOCIATION

3

Doctrine of *Functus Officio*

This applies to Final Awards - - not Interim Awards - - but, some Interim Awards are considered “final” such as where liability or damages have been conclusively determined.

The functus officio doctrine “prevents arbitrators from revisiting a final award after the final award has been issued.” *WMA Sec. Inc. v. Wynn*, 32 F. App'x 726, 729 (6th Cir. 2002).

The policy promoted by functus officio “is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion.” *Green v. Ameritech Corp.*, 200 F.3d 967, 976–77 (6th Cir. 2000) (quoting *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967)).

However, the doctrine has certain exceptions. An arbitrator may revisit an award “to clarify an ambiguous award or ... to address an issue submitted to him but not resolved by the award.” *Indus. Mut. Ass'n Inc. v. Amalgamated Workers, Loc. No. 383*, 725 F.2d 406, 412 n. 3 (6th Cir. 1984) (citations omitted).

4

AMERICAN HEALTH LAW ASSOCIATION

4

Rule 7.9 - Correction of Award

- The right of an arbitrator to correct **clerical, typographical, or computational** errors in the award under the AHLA Rules is consistent with the FAA ([9 U.S. C. A §11](#)).
- Note timing:
 - Must request **within 15 days** after receiving an award
 - Other/Opposing parties have 15 days to respond
 - Arbitrator must respond/rule within 30 days
- The point here is that an Award can be corrected - - but **not if it affects the merits** in any way, because that would be inconsistent with the *Doctrine of Functus Officio*.
- And we see that in the FAA at [9 U.S.C.A. § 11](#)

5

 AMERICAN HEALTH LAW ASSOCIATION

5

9 U.S.C.A. § 11

§ 11. Same; **modification or correction; grounds; order**

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

- (a) Where there was an **evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property** referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter **not affecting the merits of the decision upon the matter submitted**.
- (c) Where **the award is imperfect in matter of form not affecting the merits of the controversy**.

NOTE THIS CATCHALL: The order may modify and correct the award, so as to effect the intent thereof and **promote justice between the parties**.

6

 AMERICAN HEALTH LAW ASSOCIATION

6

Confirmation and Vacatur

These are the opposite sides of the same coin --

Under the FAA, [9 U.S.C.A. §9](#), a District Court **must** confirm a Final Award of the Arbitrator "... **unless** the Award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."

It is not uncommon to see a Petition for Confirmation and a Counter-Petition for Vacatur in the same proceeding. In fact, some courts hold that one or the other is a **compulsory** counterclaim to the first-filed Petition.

- These Petitions may, of course also be filed in state court where there is no basis for federal court jurisdiction (i.e., diversity and/or subject matter jurisdiction).
- A final award must first be confirmed or vacated (in whole or in part) **before** there is an appeal to an intermediate state appellate court or the federal court of appeals.
- This is a **2-step process**. There is no immediate right to an appeal unless or until the Final Award is first confirmed or vacated. And, even where it is vacated, there may be no immediate right to an appeal depending upon, for example, whether more arbitral labor is required.

7

 AMERICAN HEALTH LAW ASSOCIATION

7

Vacatur

- Under the FAA [9 U.S.C.A. §10\(a\)](#) only 4 statutory grounds are specified:
 1. Procured by **corruption**, fraud or undue means;
 2. Evident **partiality or corruption** by arbitrator(s);
 3. Arbitrator(s) engaged in **misbehavior** (i.e., denial of fundamental due process) by, *e.g.*,
 - Refusing to consider material evidence
 - Refusing to postpone a hearing
 - Other acts prejudicing one of the litigants
 4. **Exceeded powers** or imperfectly executed such that a mutual, final and definite award on the subject matter was not made.

8

 AMERICAN HEALTH LAW ASSOCIATION

8

Vacatur

Under very recent FAA decisions, an arbitrator does not exceed his powers by misinterpreting the requirements of a contract. See, e.g., *Gherardi v. Citigroup Global Markets Inc.*, 975 F.3d 1232 (11th Cir. 2020)(reversing vacatur order of an arbitration award in favor of claimant under an employment contract).

In *Gherardi*, the Eleventh Circuit recently held that, *Id.* at 1238: “Our ‘sole question’” under. . . [the FAA], then, is ‘whether the arbitrator (even arguably) interpreted the parties’ contract, not whether she got its meaning right or wrong.’” (internal citations omitted). “Arbitrators do not exceed their powers when they make errors, even ‘a serious error.’” *Id.* at 1237 (internal citation omitted).

9

AMERICAN HEALTH LAW ASSOCIATION

9

9 U.S.C.A. § 10

§ 10. Same; vacation; grounds; rehearing

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

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.* [This is why an immediate appeal may not be ripe]

(c) The United States district court for the district wherein an award was made that was issued pursuant to [section 580 of title 5](#) may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in [section 572 of title 5](#).

10

AMERICAN HEALTH LAW ASSOCIATION

10

Vacatur – Jurisdictional Issues

NOTE: The FAA does not automatically confer jurisdiction in federal court upon parties in any Confirmation / Vacatur proceeding. The parties' arbitration clause may state where an arbitration award is to be confirmed.

Generally, the other traditional tests of federal court jurisdiction must be met.

In *Badgerow v. Walters*, 596 U.S. 1, 142 S.Ct. 1310, 212 L.Ed.2d 355 (2022), the Court held that “Congress has not authorized a federal court to adjudicate a Section 9 or 10 application just because the contractual dispute it presents grew out of arbitrating different claims, turning on different law. . .” Id. at 1318. Further, “[t]he statutory plan ... makes Section 9 and 10 applications conform to the normal—and sensible—judicial division of labor: The applications go to state, rather than federal, courts when they raise claims between non-diverse parties involving state law.” Id. at 1321.

The Supreme Court addressed the jurisdictional differences between 9 U.S.C. § 4, which allows courts to “look through” a petition to compel arbitration to the underlying dispute and base the court's subject matter jurisdiction on the underlying controversy, and sections 9 (confirmation of an arbitration award) and 10 (vacation of an award). Id. at 1314. In holding that the same “look through” jurisdiction does not apply to § 9, the Supreme Court stated that “a court may look only to the application [to affirm an arbitration award] actually submitted to it in assessing its jurisdiction” pursuant to § 9. Id.

11

AMERICAN HEALTH LAW ASSOCIATION

11

9 U.S.C.A. §10(a)(4) - Exceeding Powers

This is a trending common basis for challenges to arbitration awards because the statute uses language which is rather general.

Generally speaking, an Arbitrator's award may not be vacated because there are evident errors of fact, errors of law, misinterpretations of the parties' contract, and difficult to reconcile. None of that constitutes the exceeding of arbitral powers.

Nevertheless, there is a very **narrow standard of review** of award under the FAA - -

- “An arbitrator's result may be **wrong**; it may appear **unsupported**; it may appear **poorly reasoned**; it may appear **foolish**. Yet, it may not be subject to court interference.” *Delta Air Lines v. Air Line Pilots Ass'n, Intern.*, 861 F.2d 665, 670 (11th Cir. 1988)(*internal citation omitted*).
- “We will not vacate an award simply because we might have interpreted the contract differently.” *Kohn law Group, Inc. v. Jacobs*, 825 Fed.Appx. 465 (9th Cir. 2020)(*internal citation omitted*).

12

AMERICAN HEALTH LAW ASSOCIATION

12

More on “Exceeding powers”

- Arbitration agreements are contracts where **the bargain is for the arbitrator’s construction** of the underlying agreements, rather than for any particular outcome.
- Arbitrator does **not** exceed powers by **misinterpreting** the requirements of a contract or when they make **errors**, even serious errors
- **Sole question:** whether the arbitrator (even arguably) interpreted the parties’ contract, not whether the arbitrator got its meaning right or wrong
- Court must **defer to the arbitrator’s interpretation** of the underlying contract no matter how wrong that interpretation is assessed.

Gherardi v. Citigroup Global Markets Inc., 975 F.3d 1232 (11th Cir. 2020)

13

AMERICAN HEALTH LAW ASSOCIATION

13

Exceeding Powers

JPay, Inc. v. Kobel, 2020 WL 5763930 (S.D. Fla. Sept. 28, 2020) provides some exemplars of where it has been found that an arbitrator exceeded powers:

An arbitrator is aid to have exceeded the arbitral powers “. . . when an arbitrator ‘strays from interpretation and application of the agreement and effectively **dispenses his own brand of industrial justice**.’” *Id.* (quoting, *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001)). Some examples of when vacatur is appropriate include: “awarding relief on a statutory claim when the arbitration agreement allows only for arbitration of contractual claims; failing to give preclusive effect to an issue already (and properly) decided by a court; and forcing a party to submit to class arbitration without a contractual basis for concluding that the party agreed to it.” *Id.*

14

AMERICAN HEALTH LAW ASSOCIATION

14

Manifest Disregard of the Law

- A controversial doctrine and not universally applied throughout the federal courts - -
- Not a specifically enumerated basis for vacatur under the FAA
- It is similar - - **but not identical** - - to the statutory basis of vacatur where an arbitrator exceeds arbitral powers.
- Generally, exceeding powers involving a disregard of the powers bestowed under the parties' agreement - - while manifest disregard of the law involves an arbitrators' flagrant disregard of the law.

15

AMERICAN HEALTH LAW ASSOCIATION

15

Manifest Disregard

Available in the Second Circuit

Michael R. Tyskowski, v. International Business Machines Corp., 2023 WL 6394061 (**S.D.N.Y. Sept. 30, 2023**)

- . . . the Second Circuit has long held that “[a]n arbitration award may be vacated if it exhibits ‘a manifest disregard of the law.’ ” *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002)
- First, a court must consider whether the “governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable.” *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986)). Second, a court must look to the knowledge actually possessed by the arbitrator. *Id.* **The arbitrator must “appreciate[] the existence of a clearly governing legal principle but decide[] to ignore or pay no attention to it.”**

16

AMERICAN HEALTH LAW ASSOCIATION

16

Manifest Disregard

Not available in Seventh Circuit

London v. Financial Industry Regulatory Authority, Inc., 2023 WL 6388206 (N.D. Ill. September 29, 2023)

- The Seventh Circuit has held that manifest disregard of the law is not a ground to vacate an award “unless [the arbitrator] orders parties to do something that they could not otherwise do legally (e.g., form a cartel to fix prices).” *Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1026 (7th Cir. 2013); *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268–69 (7th Cir. 2006) (explaining the Seventh Circuit has confined “manifest disregard” to cases where arbitrators “direct the parties to violate the law”).

17

AMERICAN HEALTH LAW ASSOCIATION

17

Manifest Disregard

Not available in the Eleventh Circuit

Spirit of the East, LLC v. Yale Products, Inc., 2023 WL 2890013 (S.D. Fla. June 12, 2023)

- “. . . ‘public policy’ grounds and maintain that the arbitrator’s award exhibits a ‘manifest disregard of [the] law’—fall squarely within the “judicially-created bases for vacatur” that were repudiated in *Frazier [v. CitiFinancial Corp., LLC]*. 604 F.3d [1313 (11th Cir. 2010)] at 1322 n.7, 1324 (rejecting the ‘public policy’ ground and the “manifest disregard of the law” ground as permissible bases for vacatur).”
- “. . . § 10(a)(4)—the statutory basis for vacatur under which the ‘sole question for us’ is “whether the arbitrator (even arguably) interpreted the parties’ contract.” *Sutter*, 569 U.S. at 569. Instead, Spirit’s arguments are aimed at seeking vacatur on grounds that we explicitly rejected in *Frazier*. . . (holding that ‘our judicially-created bases for vacatur are no longer valid in light of Hall Street’).”

18

AMERICAN HEALTH LAW ASSOCIATION

18

Manifest Disregard

Available in Fourth Circuit

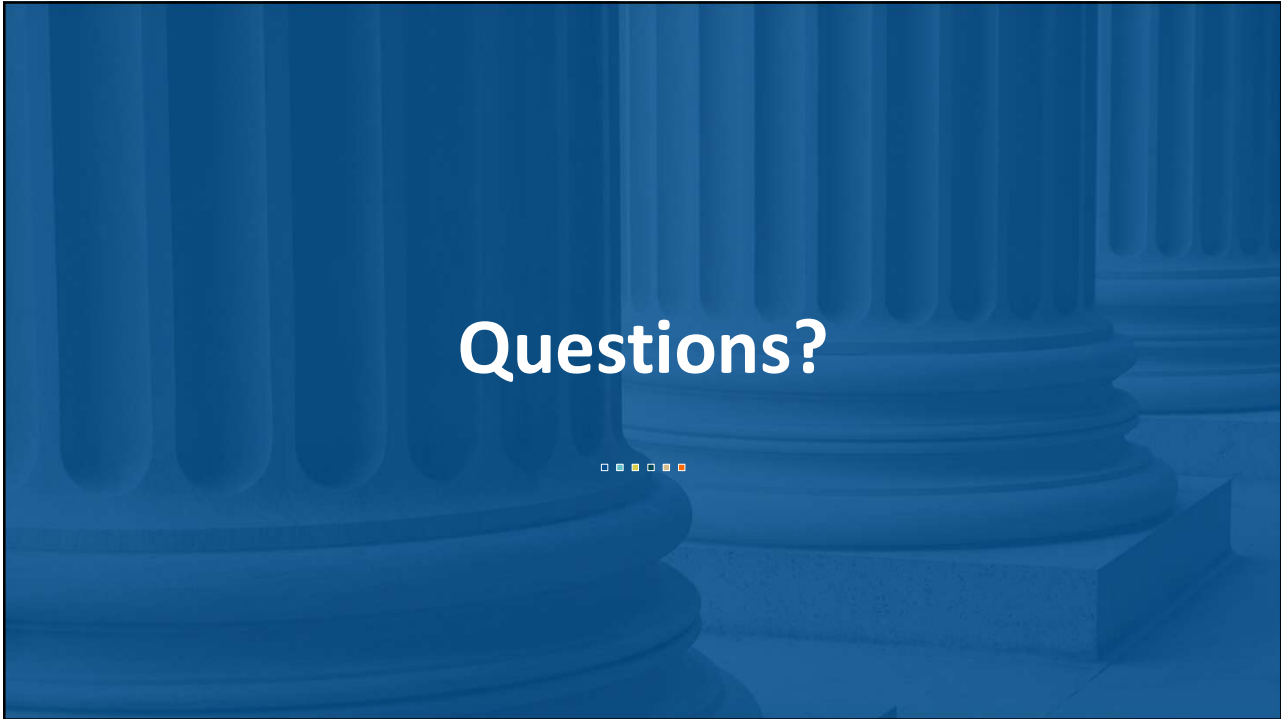
Constellium Rolled Products Ravenswood, LLC v. United Steel, et. al., 2021 WL 5549053 (4th Cir. Nov. 29, 2021)

- Either way, manifest disregard requires that “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle.”
- In other words, manifest disregard requires that the arbitrator was “‘aware of the law, understood it correctly, found it applicable to the case before him, and yet chose to ignore it in propounding his decision.’”
- This Court has also endorsed “manifest disregard of the law” as a ground for vacating an arbitration award. *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006). Although we have questioned that precedent in light of more recent decisions from the Supreme Court, “manifest disregard continues to exist either ‘as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.’”

19

AMERICAN HEALTH LAW ASSOCIATION

19



Questions?

□ □ □ □ □ □ □ □

20

