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Vacating Arbitration Decision Not An Appealing Task

State Supreme Court doctrine holds firm for nearly 20 years

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"Arbitration appeals": the phrase is almost an oxymoron. If you know anything at all about arbitration, you must know that review of an arbitrator's decision is limited. Extremely limited. The "squeezing blood out of a stone" kind of limited. So it happens more often than not that a potential appellant will approach me, hopefully, a losing arbitration decision in one hand and his checkbook in the other, looking for me to intercede on his behalf. And I (with tears in my eyes and a heavy heart) have to tell him to put his checkbook away.

OK, no, seriously, I never do that. First, I tell him: "Arbitration appeals are notoriously difficult because the standard of review of an arbitrator's decision is limited and it is *very* hard to establish reversible error. But if you would like, why don't you explain the issues to me and I will review the materials you've brought and let you know whether I think there is anything worth pursuing." And then I cross my fingers and say a little silent prayer to Reversius (the god of appeals), that there will be an appealable error hiding in there.

And sometimes there is: the arbitrator might have made a tactical error regarding the conduct of the proceedings (for example, preventing the admission of pertinent evidence or exhibiting bias), or perhaps the arbitration agreement is somehow defective (which is the Holy Grail of arbitration appeals).

But, frankly, mostly what I get is: "The arbitrator got it wrong. He didn't understand/apply the statute/credit my defenses/interpret the law/find the issues correctly." And I sigh…because "getting it wrong" is not enough to flip an arbitration decision. Not even getting it flat-out wrong…or terribly, horribly (insert "ly" of your choosing) wrong will wrest vacatur from the court. Not too many other lawyers seem to understand this plain truth, though; or they are loath to accept it.

In 1992's *Garrity v. McCaskey* (in language that today looks suspiciously offhanded), the state Supreme Court stated that an arbitration award that "manifests an egregious or patently irrational application of the law" could be set aside pursuant to §52-418(a)(4). Indeed, the Court opined that "society's confidence in the legitimacy of the arbitration process" would be undermined by judicial approval of arbitration awards that egregiously departed from established law.

To be fair, however, in the same breath the Court warned that this ground for vacating an arbitration award is particularly narrow and should be reserved for "circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles."

What happened after that is this: lawyers zeroed in on *Garrity's* use of the words "misapplication of law" and "set aside," and the courts focused on the words "narrow, "extraordinary," "egregious," and "patently irrational." A canyon formed between the two that still gapes today. Litigants continue to file applications to vacate arbitration awards claiming that the arbitrator committed legal error and the Supreme Court continues to reject them. A Lexis search of "manifest disregard of the law" in the Supreme Court brings up about 20 cases. And not one of them is a reversal of the arbitrator's decision on the ground that he "manifestly disregarded the law."


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That's right ~ you heard me. Not one reversal has the "manifest disregard" doctrine harvested at the Supreme Court since the doctrine's conception almost 20 years ago.

Not only that, but the Court seems somewhat inordinately proud of that fact, remarking just last fall (and not for the first time) that "this court has yet to conclude that an arbitrator manifestly disregarded the law." *AFSCME v. Local 1565*. One does wonder, doesn't one, what is the sense in creating a doctrine that exists to placate society's fear of an event (a patently irrational application of the law) that oddly seems to never occur? At least, not even once every 20 years.

But I digress. The purpose of this article was to serve as an introduction to the futility of attacking an arbitration award on the ground that the arbitrator has "manifestly disregarded the law." So I will offer some unsolicited appellate advice to those of you dealing with applications to vacate arbitration awards.

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Making A Distinction

To those of you who are defending against an application to vacate an arbitration award, you will likely confront the "manifest disregard" doctrine because it is a favorite of the arbitration-frustrated. To you, I offer the following arguments which have served me well in the many cases I have handled where I staved off vacatur.

You must argue pointedly that a "manifest disregard of the law" is not synonymous with "erroneous application of the law." One cannot challenge an arbitrator's decision by claiming merely that the arbitrator did not understand the pertinent law or that he applied the law incorrectly. This is not about a court deciding that the law is other than what the arbitrator believed. There is no second-guessing in arbitration appeals.

To the contrary, in *Saturn Construction v. Premier Roofing*, the state Supreme Court held that a party moving to vacate an arbitration award on the ground of manifest disregard must establish that: (1) the error committed by the arbitrator was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the arbitrator appreciated the existence of a clearly governing legal principle, but decided to ignore it; and (3) the governing law that was ignored is "well defined, explicit, and clearly applicable."

Given these elements, it really is not surprising that no one has been able to convince the Supreme Court that an arbitrator has "egregiously misapplied the law." Considering that the arbitrator not only has to misapply the law, but must misapply a clear and unmistakable law, *and* must also admit to knowingly and intentionally misapplying a clear and unmistakable law, well, I would guess that we are not likely to see that happen even once every 50 years.

And, despite my haranguing, I do not find fault with the Court's "limited" (*i.e.*, non-) application of the manifest disregard doctrine, so much as ponder its necessity in the first instance. Yes, I understand that the Court worried that there might come a day when an arbitrator would render his decision based on the recommendations of a Ouija board; no, I am not making this up, *see Darien Education Assn v. Board of Ed.*

But, to my mind, the larger question that looms is whether parties are able to invest with confidence their energies in pursuing a remedy in arbitration, fully accepting its limitations on appeal and in reliance that such limitations will protect them if they should prevail, by preventing their opponent from upsetting the award in court. So long as the manifest disregard doctrine does not interfere with these expectations, I can accept its existence to ward off the Ouija boarders (I can't promise, but I would bet that an arbitrator's use of a Magic 8 Ball would also be covered by the manifest disregard doctrine).

Oh, and for those who want to seek vacatur of an arbitration award based on the manifest disregard of the law doctrine, my advice is simple: Don't. ■