

## **Too Many Motions for Vacatur of Commercial Arbitration Awards? The Eleventh Circuit Sanctions Unwary Litigants**

*B.L. Harbert International, LLC v. Hercules Steel Company*<sup>1</sup>

### I. INTRODUCTION

In *B.L. Harbert Int'l. v. Hercules Steel Co.*, the Eleventh Circuit Court of Appeals seemed angered by what they deemed to be another frivolous appeal of a commercial arbitration award. Upon this provocation, the court warned litigants that future baseless appeals would be met with sanctions.<sup>2</sup> By making sanctions a real threat, the court has attempted to promote some goals of arbitration, including finality, but any benefits derived may be offset by the increased confusion the holding has created. Further, the court's mandate represents a divergence from Eleventh Circuit precedent, as past decisions indicated a willingness to hear new arguments and new theories. The court's holding will not cap the number of claims for vacatur as litigants with legitimate claims will merely modify their arguments to accommodate the new standard.

### II. FACTS & HOLDING

B.L. Harbert International, LLC (Harbert), is an Alabama-based corporation involved in financing construction projects.<sup>3</sup> On August 25, 2000, the Army Corps of Engineers awarded Harbert a contract to construct an office complex at Fort Bragg, North Carolina.<sup>4</sup> Thereafter, on September 21, 2000, Harbert granted Hercules Steel Company (Hercules) a fabrication and erection subcontract worth \$1,197,000.<sup>5</sup> The subcontract specified that all disputes would be submitted to binding arbitration under the Construction Industry Arbitration Rules.<sup>6</sup> A separate

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1. 441 F.3d 905 (11th Cir. 2006).

2. *Id.* at 913-14.

3. *Id.* at 907.

4. *Id.*

5. *Id.*

6. *Id.* The subcontract stipulated that the arbitration would be "under the auspices of the American Arbitration Association." *Id.*

Agreement to Arbitrate stipulated that the Federal Arbitration Act<sup>7</sup> (FAA) would control the arbitration proceedings.<sup>8</sup>

The subcontract stipulated that Hercules should proceed according to a schedule prepared by Harbert.<sup>9</sup> The contract further provided that Harbert would prepare a progress schedule for each subcontractor that could be amended “from time to time with the Subcontractor’s input.”<sup>10</sup> Failure to complete any assigned projects within the project schedule’s timelines would result in liability for damages.<sup>11</sup> The subcontract did not define the terms “progress schedule” or “project schedule,” and noted no tangible distinction between the two.<sup>12</sup> Harbert created two schedules, referred to as the 2000 and 3000 schedules.<sup>13</sup> The initial dispute arose over confusion as to which schedule was binding.<sup>14</sup>

The completion dates for the 2000 schedule were earlier than those of the 3000 schedule.<sup>15</sup> The 2000 schedule stipulated a start date of March 5, 2001, and a completion date of June 6, 2001.<sup>16</sup> Hercules began work in April of 2001, and completed their projects in January of 2002.<sup>17</sup> This completion date was late for the 2000 schedule, but within the deadlines stipulated by the 3000 schedule.<sup>18</sup> According to Harbert, Hercules’ work was untimely, so Harbert stopped making payments under the subcontract.<sup>19</sup> Consequently, Hercules filed a demand for arbitration seeking the balance due on the subcontract, interest, other damages, and attorney’s

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7. 9 U.S.C. § 1 (2000).

8. *Harbert*, 441 F.3d at 907.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 908.

18. *Id.*

19. *Id.*

fees.<sup>20</sup> Harbert counterclaimed for acceleration costs, back charges, delay damages, interest, and attorney's fees.<sup>21</sup>

In arbitration, Hercules argued that only the 3000 schedule was applicable to their subcontract.<sup>22</sup> Hercules contended that the subcontract language was ambiguous as it referred to both a "progress schedule" and a "project schedule," but failed to define either term.<sup>23</sup> According to Harbert, however, the 2000 schedule applied to all of its subcontractors, and consequently, Hercules was bound by the 2000 deadlines.<sup>24</sup> On September 8, 2004, the arbitrator awarded Hercules the balance and interest on the subcontract, and denied all other claims and counterclaims.<sup>25</sup> After realizing that the award was nearly \$100,000 less than the amount the parties had originally agreed to, Hercules submitted a request for clarification from the arbitrator.<sup>26</sup> Harbert also moved for clarification and modification of the award on other grounds, noting that the arbitrator did not adequately explain why the specific claims were granted or denied.<sup>27</sup> On October 18, 2004, the arbitrator modified the original award, granting Hercules the additional \$100,000 requested, and explained that Harbert had no claims based upon untimely progress because Hercules was bound only by the more generous 3000 schedules.<sup>28</sup>

On November 18, 2004, Harbert filed a motion in the United States District Court for the Northern District of Alabama.<sup>29</sup> Harbert asked the court to dismiss the arbitration award on a

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The balance and interest totaled \$369,775. *Id.* The parties chose the Honorable Frank H. McFadden as arbitrator. Judge McFadden served as a justice for the United States District Court for the Northern District of Alabama. He also served as general counsel for an Alabama construction company after his time spent on the district court. *Id.* at 908 n.1.

26. *Id.* at 908. "Hercules believed that the arbitrator had made a scrivener's or mathematical error." *Id.*

27. *Id.* at 908-09. Harbert asked for clarification of six issues including: "What was the schedule to which Hercules was bound under its subcontract with Harbert?" *Id.* at 909.

28. *Id.* A decision document corrected the scrivener's error, changing the award from \$369,775 to \$469,775. *Id.*

29. *Id.*

theory of manifest disregard of the law.<sup>30</sup> Hercules countered with a motion seeking confirmation of the award under the provisions of the FAA.<sup>31</sup> On February 7, 2005, the district court entered an order denying Harbert's motion and granting Hercules' motion to confirm.<sup>32</sup> The court assumed the arbitrator's findings, concluding that Hercules was bound by the 3000 schedule, not the 2000 schedule, and that Hercules' conduct did not breach the terms of the subcontract.<sup>33</sup> Harbert then filed a notice of appeal and a motion for a stay of judgment pending the appeal.<sup>34</sup>

On February 28, 2006, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court.<sup>35</sup> The court held that the arbitrator had not acted in manifest disregard of the law,<sup>36</sup> that frivolous appeals in response to arbitration losses undermined the goals of the FAA, and, in the future, similar appeals would be met with sanctions.<sup>37</sup>

### III. LEGAL BACKGROUND

#### A. *The FAA & Vacatur of Commercial Arbitration Awards*

The Federal Arbitration Act provides a framework for commercial arbitration at the federal level. The FAA attempts to promote the presumed goals of arbitration, including: speed, low-costs, party autonomy, privatization, arbitrator expertise, neutrality, finality, and fair hearings.<sup>38</sup> In order to promote these goals and bolster the pro-arbitration policy of the FAA, judicial review of arbitration awards is limited.<sup>39</sup> The FAA attempts to give the contracting parties what they

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 914.

36. *Id.* at 913. The court stated "[t]here is, in short, no evidence that that arbitrator manifestly disregarded the law." *Id.*

37. *Id.* at 913-14.

38. EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3 (2006).

39. *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993).

bargained for in the arbitration agreement.<sup>40</sup> In essence, the contracting parties have traded some degree of certainness that the correct outcome has been reached for the low costs, speed, finality, and other benefits of arbitration.<sup>41</sup> The degree of arbitral finality, particularly, distinguishes commercial arbitration from litigation.<sup>42</sup>

Although finality of arbitration awards is of the utmost importance to promoting the policies behind arbitration, the FAA provides a limited number of grounds for reviewing arbitration awards.<sup>43</sup> These statutory grounds for vacatur are: (1) where the award was produced by corruption, fraud, or undue means; (2) where there was evident partiality 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; (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.<sup>44</sup> These grounds reflect congressional intent to protect parties from rulings that may be unfair, that result in the arbitrator ruling on matter that the parties had not contracted to arbitrate, or that fail to produce definitive conclusions on the issues before the arbitrator.<sup>45</sup>

In addition to the FAA's statutory grounds for vacating arbitration awards, federal courts have recognized several nonstatutory grounds for vacatur of arbitration awards: manifest disregard of the law by the arbitrator; an award that conflicts with well-established public policy; completely irrational or arbitrary and capricious awards; and an award failing to draw its essence

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40. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 740-43 (1996) [hereinafter Hayford, *Law in Disarray*].

41. *Id.*

42. Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 354 (1995) [hereinafter Hayford, *Evolution*].

43. 9 U.S.C. § 10(a) (2000).

44. *Id.*

45. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 450 (1998) [hereinafter Hayford, *Paradigm*].

from the parties' contract.<sup>46</sup> The federal circuits do not uniformly recognize non-statutory grounds for vacatur.<sup>47</sup> Further, the circuits are not in consensus regarding proper application of non-statutory grounds.<sup>48</sup> The federal circuits do generally treat motions for vacatur similarly, as cases in which arbitration awards are overturned are rare in every circuit.<sup>49</sup> Regardless of any jurisdictional differences, "it remains a fundamental principle of arbitration law that an award will not be vacated merely because the arbitrator made a mistake of fact or law."<sup>50</sup> Thus, it remains difficult for appellants to achieve judicial vacatur of arbitration awards.

### *B. Governing Law of the Eleventh Circuit*

In addition to the four statutory grounds, the Eleventh Circuit has recognized three non-statutory grounds for vacatur of commercial arbitration awards.<sup>51</sup> In the Eleventh Circuit, arbitration awards have been vacated for being arbitrary and capricious,<sup>52</sup> for enforcement of the award being contrary to public policy,<sup>53</sup> and where the arbitrator acted in manifest disregard of the law.<sup>54</sup>

In *Ainsworth v. Skurnick*,<sup>55</sup> the Eleventh Circuit outlined its arbitrary and capricious standard for vacatur of commercial arbitration awards.<sup>56</sup> There, the federal district court instructed the arbitration panel that damages must be awarded in accordance with binding Florida law.<sup>57</sup> Nevertheless, the arbitrators decided not to award damages.<sup>58</sup> The court of appeals noted that

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46. See Hayford, *Law in Disarray*, *supra* note 40, at 764.

47. Compare *Hoffman v. Cargill Inc.*, 236 F.3d 458, 462 (8th Cir. 2001) (stating that manifest disregard of the law occurs only where the arbitrators identify the applicable law and then deliberately choose to ignore it) and *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997) ("To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.") with *Butler Mfr. Co. v. United Steelworkers of Am.*, 336 F.3d 629, 636 (7th Cir. 2003) (stating that manifest disregard of the law is only applicable "where the arbitrator's award actually orders the parties to violate the law"). See also Hayford, *Law in Disarray*, *supra* note 40, at 763-75.

48. *Id.* at 800.

49. See Hayford, *Paradigm*, *supra* note 45, at 500.

50. See Hayford, *Evolution*, *supra* note 42, at 354.

51. William H. Hardie, *Arbitration: Post-Award Procedures*, 60 ALA. LAW. 314, 323 (1999).

52. *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992).

53. *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665, 671 (11th Cir. 1988).

54. *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461-62 (11th Cir. 1997).

55. *Ainsworth*, 960 F.2d 939.

56. *Id.* at 941 (citing *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1413 (11th Cir.1990)).

57. *Ainsworth*, 960 F.2d at 941.

58. *Id.*

“an award is arbitrary and capricious only if a ground for the arbitrator’s decision cannot be inferred from the facts of the case,” and thus held that since the arbitration panel knew that the law required damages, their refusal to grant damages was clearly arbitrary.<sup>59</sup> The court found that the panel knew the law, and provided no reasonable basis for deciding to ignore it. The court stated: “In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis.”<sup>60</sup>

The Eleventh Circuit will also vacate an arbitration award that is found to be contrary to public policy.<sup>61</sup> In *Brown v. Rauscher*,<sup>62</sup> the Eleventh Circuit stated that the public policy grounds for vacatur are implicated when enforcement of an arbitration award compels one party to act in violation of public policy.<sup>63</sup> The court held that the award did not violate public policy as neither party was required to act in a way conflicting with any public policy.<sup>64</sup> The appellants’ arguments, the court noted, were merely stating that the arbitration panel misinterpreted the law, which is not enough to overturn an arbitration award on any grounds.<sup>65</sup>

Most recently, the Eleventh Circuit has recognized manifest disregard of the law as a separate doctrine for vacatur of commercial arbitration awards.<sup>66</sup> According to the court of appeals, this ground requires clear evidence that the arbitrator recognized the rule of the law and deliberately ignored it.<sup>67</sup> In *Montes v. Shearson Lehman Brothers, Inc.*,<sup>68</sup> the prevailing party at the arbitration proceeding contended that the arbitrator could ignore the law if doing so would

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59. *Id.*

60. *Id.*

61. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (citing *Delta Air Lines, Inc. v. Airline Pilots Ass’n*, 861 F.2d 665, 671 (11th Cir.1988); *U.S. Postal Serv. v. Nat’l Ass’n of Letter Carriers*, 847 F.2d 775, 777 (11th Cir.1988)).

62. *Brown*, 994 F.2d 775.

63. *Id.* at 782.

64. *Id.*

65. *Id.*

66. *See Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461-62 (11th Cir. 1997).

67. *Id.* at 1461.

68. *Montes*, 128 F.3d 1456.

provide a fair result.<sup>69</sup> The arbitrator accepted the prevailing party's invitation to disregard the law, and based its ruling on suspect reasoning.<sup>70</sup> The Eleventh Circuit Court of Appeals vacated the award because of four relevant facts:

The facts are that: 1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; 2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel's award; 3) neither in the award itself nor anywhere else in the record is there any indication that the panel disapproved or rejected the suggestion that it rule contrary to law; and 4) the evidence is at best marginal.<sup>71</sup>

*Montes* remains the only case in which the facts were found sufficient to satisfy the strict requirements of vacatur on grounds of an arbitrator's manifest disregard of the law.<sup>72</sup>

Although the claims are rarely successful, the Eleventh Circuit appears willing to hear vacatur arguments on many grounds. Eleventh Circuit rulings suggest that just because the circuit has not adopted a particular theory does not mean they are unwilling to do so.<sup>73</sup> For instance, the Eleventh Circuit has taken non-statutory theories from labor arbitration cases and applied them to the commercial arbitration context.<sup>74</sup> The Eleventh Circuit has also been willing to adopt non-statutory theories from other circuits.<sup>75</sup>

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69. *Id.* at 1459.

70. *Id.* at 1461.

71. *Id.* at 1464 (Carnes, J., concurring).

72. *Rueter v. Merrill Lynch, Pierce, Fenner & Smith*, 440 F. Supp. 2d 1256, 1262 (D. Ala. 2006).

73. *See Montes*, 128 F.3d at 1460-62 (noting the other circuits that have adopted the manifest disregard standard, and then proceeding to do the same).

74. *See Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993) (adopting the public policy standard from a series of labor arbitration cases).

75. *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002) (citing *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461-62 (11th Cir. 1997)).

In addition to a willingness to hear arguments based on new or never-before successful theories, Eleventh Circuit rulings on non-statutory grounds are consistently fact-specific. The analysis of successful claims frequently focuses on facts rather than a series of standardized tests.<sup>76</sup> Consequently, it would appear that the Eleventh Circuit has created a situation in which a lack of supporting precedent should not preclude a non-statutory claim, particularly if the theory has not been tried before the court and seems to be a fresh and valid argument.

### *C. Sanctions & Commercial Arbitration Awards*

Sanctions have played an increasingly more prevalent role in federal litigation since Rule 11 of the Federal Rules of Civil Procedure (FRCP) was amended in 1983.<sup>77</sup> Prior to the amendment, sanctions were levied in federal court only if it was found that counsel had engaged in subjective bad faith.<sup>78</sup> The 1983 amendment eliminated the subjective inquiry, providing that the imposition of sanctions should be based on an objective reasonableness test.<sup>79</sup> This change significantly expanded the scope of sanctions at the federal level.<sup>80</sup>

Expansion of Rule 11 has increased the prevalence with which federal courts impose sanctions, and has also created legal complications.<sup>81</sup> The federal circuits have unevenly applied Rule 11, and consequently the standards used for imposing sanctions vary by circuit.<sup>82</sup> Adding to the confusion, the federal courts have various means outside of Rule 11 with which to levy sanctions.<sup>83</sup> For instance, courts may utilize 28 U.S.C. § 1927 to sanction unreasonable or vexatious litigation.<sup>84</sup> Courts may also utilize their inherent power to sanction litigants for a

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76. *Montes*, 128 F.3d at 1464 (Carnes, J., concurring).

77. *See generally* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 1-4 (1994).

78. *Id.* at 4-5.

79. *Id.*

80. *Id.* at 1; *see also* GEORGINE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES, & PREVENTIVE MEASURES 2-5 (2003).

81. *Id.*

82. *See generally* MELISSA L. NELKEN, SANCTIONS: RULE 11 AND OTHER POWERS (1992) (includes circuit by circuit survey of Rule 11 usage).

83. *See id.* at 4-5.

84. *Id.*

multitude of reasons.<sup>85</sup> Like sanctions imposed under Rule 11, other rules, statutes, and powers have standards and levels of usage that vary by circuit.<sup>86</sup>

As in non-arbitration contexts, federal courts differ substantially in imposing sanctions on baseless appeals of commercial arbitration awards. Some federal circuits have rarely addressed the issue of sanctions, while other circuits have used sanctions or the threat of sanctions as an attempt to protect policies behind arbitration.<sup>87</sup> Those federal courts that do address sanctions for frivolously attacking arbitration awards differ as to which rules and which standards will be applied.<sup>88</sup> Circuit courts have invoked FRCP 11, §1927, and their inherent authority to sanction motions for vacatur of commercial arbitration awards.<sup>89</sup> Some circuits, if choosing to use Rule 11 (or another common device) to impose sanctions, will use a standard identical to that applied in other contexts.<sup>90</sup> In other circuits, a court may use a Rule 11 standard intertwined with a standard particular to the commercial arbitration context.<sup>91</sup> Still other courts will forego applying Rule 11, and will assess sanctions based on a standard unique to the context of vacatur of commercial arbitration awards.<sup>92</sup> Regardless of how a circuit has chosen to impose sanctions in the past, sanctions for litigants seeking vacatur will often turn on fact-based judgments and the

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85. *Id.* at 5 (noting that inherent authority has been invoked as a basis for sanctions in most circuits).

86. *Id.* at 4-5.

87. *See, e.g.*, *El Banco De Seguros Del Estado v. Emplrs Ins. of Wausau*, 2002 U.S. Dist. LEXIS 27130, \*13 (D. Wis. 2002) (“Courts take a dim view of frivolous lawsuits; they take a particularly dim view of frivolous efforts to delay compliance with an arbitration award.”); *Cowle v. PaineWebber, Inc.*, 1999 U.S. Dist LEXIS 4702, \*16 (D.N.Y. 1999) (declining to impose sanctions, but stating that the nature of arbitration should preclude the federal courts from serving “as a vehicle to allow the loser to delay paying those sums that the arbitrators determine to be owed.”); *Flexible Mfg. Sys PTY v. Super Prods. Corp.*, 86 F.3d 96, 101 (7th Cir. 1996) (citing *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1203 (“The promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation in the district court followed by groundless appeal to this court; we have said repeatedly that we would punish such tactics and we mean it.”)); *Evangeline Tel. Co. v. AT&T Commc’n of the S. Cent. States*, 916 F. Supp. 598, 600 (D. La. 1995) (declining to impose sanctions, but noting that revisiting the arbitrator’s decision absent specific allegations of fact would “subvert the arbitration process”).

88. *Signer v. Refco Secs., LLC*, 2006 U.S. Dist. LEXIS 62717, \*6 (D. Colo. 2006) (§ 1927: court invokes statute to sanction party seeking vacatur as attorneys acted “unreasonably and vexatiously in pursuing litigation”); *Rueter v. Merrill Lynch, Pierce, Fenner & Smith*, 440 F. Supp. 2d 1256, 1265-66 (D. Ala. 2006) (Rule 11: the court notes that different sanctions options are available, but choosing to use Rule 11); *United Computer Sys. v. AT&T Corp.*, 107 Fed. Appx. 818, 821 (9th Cir. 2004) (Inherent Power: court invokes inherent power to sanction party seeking vacatur because moving party “abuse[d] the judicial process”).

89. *See Corporate Printing Co. v. New York Typographical Union No. 6*, 886 F. Supp. 340, 343 (D.N.Y. 1995); *see also Cook Chocolate Co., Div. of World’s Finest Chocolate, Inc. v. Salomon, Inc.*, 748 F. Supp. 122, 130 (D.N.Y. 1990). In addition, Rule 38 of the Federal Rules of Appellate Procedure has been invoked to sanction frivolous appeals seeking to overturn arbitral awards at the appellate level. *Flexible Mfg.*, 86 F.3d 96, at 101.

90. *Spector v. Torenberg*, 852 F. Supp. 201, 211 (D.N.Y. 1994); *Jardine Matheson & Co. v. Saita Shipping, Ltd.*, 712 F. Supp. 423, 428-29 (D.N.Y. 1989).

91. *Rueter*, 440 F. Supp. 2d at 1266-67 (the court notes that motion for sanctions will be analyzed in light of *Harbert* and applicable Rule 11 law).

92. *United Computer*, 107 Fed. Appx. at 821 (sanctions based on inherent power due to abuse of the judicial process).

court's predisposition toward sanctions.<sup>93</sup> Generally, if a federal circuit chooses to impose sanctions at all, it will only do so in exceptional circumstances.<sup>94</sup>

The Eleventh Circuit appears willing to impose sanctions in a greater number of situations than its sister circuits.<sup>95</sup> In *Harbert*, the Eleventh Circuit has made an attempt to articulate a stricter standard for sanctions for baseless appeals of commercial arbitration awards.<sup>96</sup>

#### IV. THE INSTANT DECISION

In *B.L. Harbert International, LLC v. Hercules Steel Company*,<sup>97</sup> the Eleventh Circuit Court of Appeals first asked whether the arbitrator had acted in manifest disregard of the law.<sup>98</sup> The court began its inquiry by reviewing policy considerations behind the FAA.<sup>99</sup> The court concluded that these policies could only be furthered by ensuring that arbitration remains an alternative to litigation, rather than a preliminary stopping point before protracted appellate review in the courts.<sup>100</sup>

In light of this policy consideration, the court addressed Harbert's claim of manifest disregard of the law.<sup>101</sup> The court noted that manifest disregard is one of three non-statutory grounds for vacating arbitration awards recognized by the Eleventh Circuit.<sup>102</sup> The court recognized that manifest disregard has been an acceptable basis for challenging arbitration

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93. See *Evangeline Tel. Co. v. AT&T Comm'n of the S. Cent States*, 916 F. Supp. 598, 599-600 (D. La. 1995) (the court notes that revisiting the arbitrator's decision would subvert the arbitration process, but uses its discretion in deciding not to impose sanctions); see also *Rueter*, 440 F. Supp. 2d at 1265 (the court notes that sanctions are particularly relevant in light of the *Harbert* decision); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1464 (11th Cir. 1997) (Carnes, J., concurring) (noting specific factual circumstances giving rising to a successful claim of manifest disregard of the law).

94. See [First Options of Chicago, Inc. v. Kaplan](#), 514 U.S. 938, 942 (1995) (vacatur should only be available in "very unusual circumstances," manifest disregard being one such circumstance).

95. *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006).

96. *Id.*

97. 441 F.3d 905 (11th Cir. 2006).

98. *Id.* at 906.

99. *Id.* "The Federal Arbitration Act liberally endorses and encourages arbitration as an alternative to litigation." *Id.* "The reasons for this strong pro-arbitration policy are 'to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.'" *Id.* (quoting *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005)).

100. *Id.*

101. *Id.* at 909.

102. *Id.* at 910.

awards since the court ruled in *Montes*.<sup>103</sup> The court stated that, while a valid theory, manifest disregard will only be applicable in exceptional circumstances.<sup>104</sup> The court reviewed the *Montes* case and concluded that the circumstances in which a manifest disregard theory will prevail are extremely rare.<sup>105</sup> The court further stated that in every case other than *Montes* in which an arbitration loser brought a manifest disregard claim the court has upheld the arbitration award.<sup>106</sup>

The court then evaluated the substance of Harbert's arguments.<sup>107</sup> The court concluded that Harbert's argument that the arbitration award clearly contradicted the terms of the contract was simply another way of arguing clear error on the part of the arbitrator.<sup>108</sup> However, the court clarified that the arbitration loser must establish more than clear error; the losing party must show that the arbitrator recognized a valid rule of law and chose to ignore it.<sup>109</sup> The court stated that Harbert argued a two-part contrary position.<sup>110</sup>

First, the court noted that Harbert argues that the contract is part of the law that the arbitrator must apply, and thus any misapplication of the contract is a misapplication of the law.<sup>111</sup> The court concluded that this argument fails from the start because a mere error of law is not enough to overturn an arbitration award.<sup>112</sup> The second part of Harbert's argument is based on dicta from the court's holding in *Univ. Commons-Urbana, Ltd. v. Universal Constructors, Inc.*<sup>113</sup> The *Univ. Commons* court stated that, "theoretically, we suppose, the arbitrators' approach to the award of damages could be in disregard of the law altogether, if it differed from the provisions of

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103. *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997).

104. *Harbert*, 441 F.3d at 910.

105. *Id.* at 911.

106. *Id.*; *see, e.g.*, *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320 (11th Cir. 2005); *Univ. Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 441 F.3d 1320 (11th Cir. 2002); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000).

107. *Harbert*, 441 F.3d at 911-13.

108. *Id.* at 911-12.

109. *Id.* at 912.

110. *Id.* at 913.

111. *Id.*

112. *Id.*

113. *Id.*

the contract.”<sup>114</sup> The instant court concluded that this “speculative dicta” is not a rule of law, and is contrary to settled Eleventh Circuit precedent.<sup>115</sup>

The court continued its analysis by applying the facts at hand to those found relevant for a successful manifest disregard claim in the *Montes* case.<sup>116</sup> In the instant case, the court explained that there is no factual support that the arbitrator decided the case based on anything other than his best judgment as to how to apply the law to the facts.<sup>117</sup> Further, the court pointed out that there is no proof that Hercules persuaded the arbitrator to ignore the relevant law.<sup>118</sup> The court concluded by stating that there is no evidence that the arbitrator manifestly disregarded the law.<sup>119</sup>

After making its legal conclusions, the court continued to state that Harbert deprived Hercules and the courts of the benefits of arbitration.<sup>120</sup> According to the court, baseless appeals, like the one made by Harbert in the instant case, subvert the goals of arbitration.<sup>121</sup> The court then warned future parties seeking vacatur that the Eleventh Circuit will be willing to consider sanctions in appropriate cases where a party is making claims with no real legal basis.<sup>122</sup>

The court considered imposing sanctions in the instant case, but decided not to do so for three reasons.<sup>123</sup> First, the court stated that the argument regarding the *Univ. Commons* dicta provided some merit to the motion, albeit questionable.<sup>124</sup> Second, Hercules did not move for sanctions, and according to the court this fact should be considered when deciding whether to

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* “The facts of this case do not come within shouting distance of the *Montes* exception.” *Id.* at 911.

120. *Id.* at 913-14.

121. *Id.*

122. *Id.*

123. *Id.* at 914.

124. *Id.*

impose sanctions.<sup>125</sup> Third, Harbert did not have the benefit of the warning that the court's opinion provides.<sup>126</sup> The court concluded by stating that, while Harbert did not have the benefit of notice, future litigants who pursue similar vacatur motions will, and they will be sanctioned accordingly.<sup>127</sup>

## V. COMMENT

### A. District Courts Respond to Harbert

District courts within the Eleventh Circuit have quickly responded to *Harbert's* warning. Since *Harbert* was decided, district courts in the Eleventh Circuit have issued sanctions on two occasions.<sup>128</sup> On July 18, 2006, *Rueter v. Merrill Lynch, Pierce, Fenner & Smith*<sup>129</sup> was decided in United States District Court for the Northern District of Alabama, Southern Division.<sup>130</sup> Rueter (the plaintiff) advanced multiple theories in an attempt to vacate an unfavorable arbitration award.<sup>131</sup> The Court found that none of these theories stood up to the various Eleventh Circuit standards for vacatur of commercial arbitration awards.<sup>132</sup> The court also addressed Merrill Lynch's motion for Rule 11 sanctions.<sup>133</sup> The court found that Merrill Lynch's motion did not meet the procedural requirements for Rule 11 sanctions, but ruled that, pursuant to *Harbert*, a court can impose sanctions *sua sponte*.<sup>134</sup> The court noted that the *Harbert* opinion did not address which particular standard, statute, or rule courts should use to impose sanctions, but the court decided to proceed with a Rule 11 analysis as there is well-

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125. *Id.* The court noted that a sanctions motion by Hercules was not necessary as the court may raise the sanctions issue *sua sponte*. *Id.*

126. *Id.*

127. *Id.*

128. *See* SII Invs., Inc. v. Jenks, 2006 U.S. Dist. LEXIS 51753 (D. Fla. 2006); *Rueter v. Merrill Lynch, Pierce, Fenner & Smith*, 440 F. Supp. 2d 1256 (D. Ala. 2006).

129. 440 F. Supp. 2d 1256 (D. Ala. 2006).

130. *Id.*

131. *Id.* at 1259.

132. *Id.* at 1262-66.

133. *Id.* at 1265.

134. *Id.* at 1266. The court noted that Merrill Lynch's answer stated that they would be seeking sanctions. *Id.* According to the court the answer was enough to put Rueter on notice, but notice would not be required under *Harbert*. *Id.*

established law for imposing sanctions for frivolous claims under Rule 11.<sup>135</sup> The court held that in light of *Harbert* and the applicable Rule 11 law, sanctions should be imposed because Rueter’s legal theory had no reasonable chance of success, and could not be advanced as a reasonable argument to change existing law.<sup>136</sup> The court awarded costs and reasonable attorney’s fees.<sup>137</sup>

Thereafter, on July 27, 2006, the United States District Court for the Middle District of Florida, Tampa Division, decided *SII Invs., Inc. v. Jenks*.<sup>138</sup> SII claimed manifest disregard of the law by the arbitrator—a claim that, according to the court, amounted to a claim of clear error.<sup>139</sup> The court found that the arbitrators had ample evidence from which they could make their decision, and noted that, regardless of their findings, clear error does not amount to manifest disregard.<sup>140</sup> Further, the court noted that like the findings in *Harbert*, the manifest disregard claim did not come close to matching the factual scenario present in *Montes*.<sup>141</sup> Accordingly, the court addressed sanctions under Rule 11.<sup>142</sup> According to the court, *Harbert* “not only warns potential litigants, it directs the district courts to forcefully implement the goals of the FAA by making parties understand they should adhere to the exacting standards for judicial review or face consequences.”<sup>143</sup> The court found that SII’s arguments were “perverse” and nearly identical to those condemned in *Harbert*, and thus awarded Jenks reasonable attorney’s fees.<sup>144</sup>

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135. *Id.* at 1265-66.

136. *Id.* at 1267.

137. *Id.*

138. 2006 U.S. Dist. LEXIS 51753 (D. Fla. 2006).

139. *Id.* at \*16.

140. *Id.*

141. *Id.* at \*11-12.

142. *Id.* at \*13-19.

143. *Id.* at \*18.

144. *Id.* at \*16-20. The court noted that SII had an opportunity to avoid sanctions through Rule 11’s safe-harbor provision, but instead adopted a “never-say-die” attitude that *Harbert* specifically condemned. *Id.* at \*14 (citing *B.L. Harbert Int’l v. Hercules Steel Co.*, 441 F.3d 905, 913 (11th Cir. 2006)).

In light of these two holdings, it is clear that district courts are taking *Harbert's* announcement seriously. Attorneys must be wary of making legal arguments that do not stand up to the Eleventh Circuit's standards for non-statutory claims. Moving to vacate on a manifest disregard theory is unwise, unless the factual circumstances come exceedingly close to matching the "rare" circumstances present in the *Montes* case.

### *B. Harbert's Mandate Is Not Warranted*

The *Harbert* holding has clear practical implications, but the court's stern warning and exasperation are not warranted in light of the Eleventh Circuit's past treatment of motions for vacatur.<sup>145</sup> The Eleventh Circuit has traditionally been flexible in its approach to appeals of commercial arbitration awards. They have been willing to hear arguments advocating adoption of additional non-statutory grounds for vacatur from other circuits, and from labor arbitration.<sup>146</sup> However, this flexible approach to new arguments does not coincide with *Harbert*, and the conflicting signals sent by the Eleventh Circuit prove troublesome.

Particularly concerning, in light of the Eleventh Circuit's past willingness to adopt precedent from other circuits, is a recent opinion from the Fourth Circuit that is at odds with *Harbert*. In *Patten v. Signator Ins. Agency, Inc.*,<sup>147</sup> an employee sought to vacate a labor arbitration award in favor of his former employer.<sup>148</sup> The court stated that the arbitrator had read into the contract a limitations clause where none existed.<sup>149</sup> The court found that two agreements between the parties were relevant, but a later agreement, the "management agreement," containing no limitations clause, superseded the earlier "mutual agreement."<sup>150</sup> The court held that the

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145. *Harbert*, 441 F.3d at 914 ("[T]his Court is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards.").

146. See *supra* notes 73-75 and accompanying text.

147. 441 F.3d 230 (4th Cir. 2006).

148. *Id.*

149. *Id.* at 235.

150. *Id.*

arbitrator, by reading terms into the parties' second arbitration agreement, had acted in manifest disregard of the law, and failed to draw the essence of the agreement.<sup>151</sup>

In reaching its holding, the *Patten* court inferred that the arbitrator had ignored the contract language, revising the agreement based on his "personal notions of right and wrong."<sup>152</sup> Although the court made this inference, there was no substantial evidence of intent to ignore the law, as there was in *Montes*.<sup>153</sup> The possibility that a court could make such an inference regarding the arbitrator's intent would have added substantial weight to the plaintiff's arguments in *Harbert*.

Given the Eleventh Circuit's willingness to adopt non-statutory standards from other circuits, it is certainly possible that they may choose to adopt a stance similar to the Fourth Circuit's. The Eleventh Circuit could do so by amending its manifest disregard standard, or adopting the failure to draw the essence standard. If such a standard was in place, it would not have been fair to sanction the plaintiff on *Harbert*'s facts, as the vacatur claim would have had a colorable justification. The *Harbert* court did not foreclose the possibility that new standards could be adopted, as the court did not proscribe arguments advocating new theories. The *Harbert* court did state that they wanted to deter claims with "no sound basis in the law applicable to arbitration awards," but if anything is clear about the law of arbitration awards in the Eleventh Circuit, it is that the law is constantly subject to change.<sup>154</sup>

### C. *Harbert's Impact on Commercial Arbitration*

Years will pass before *Harbert's* effects on commercial arbitration as a whole will be fully realized. While *Harbert's* threat of sanctions suggests that the number of motions for vacatur will decline, this will not necessarily result. The number of appeals seeking vacatur of

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151. *Id.*

152. *Id.* at 236.

153. *Id.* at 237 (Luttig, J., dissenting).

154. *B.L. Harbert Int'l v. Hercules Steel Co.*, 441 F.3d 905, 914 (11th Cir. 2006).

commercial arbitration awards has never been exceedingly high, and the number of successful claims has been particularly low.<sup>155</sup> Together, these notions suggest, not that appeals will increase or decrease, but that attorneys, wishing to remain zealous advocates, will attempt to find new ways to persuade courts if they believe a case's specific factual scenario warrants vacatur. In other words, the limited number of parties believing they can make a successful claim will not change, but the ways in which they argue their claims will. The court may be seeking to address this kind of creativity by shutting the door on all claimants. Although the court does not make it clear, the holding in *Harbert* may signal change from a policy of willingness to hear new arguments on new theories, to an unfavorable view of vacatur motions generally. The *Harbert* court may be saying that they have heard enough, and the holding may be an attempt to reign in all motions for vacatur. If this is true, the *Harbert* court would be making a substantial step in moving vacatur law back to where it was before the adoption of non-statutory theories.

In the short term, certainly, the number of frivolous appeals like those found in *Harbert* or *SII* will decline, particularly appeals based on theories of manifest disregard. Further, litigants in the Eleventh Circuit are on notice that sanctions are a serious possibility. This notice will promote the goals of arbitration most commonly addressed by the Eleventh Circuit: speed, low costs, and relieving congestion in the courts.<sup>156</sup> *Harbert* should also have the immediate effect of promoting other benefits of arbitration, particularly finality and autonomy, both very important in the commercial context. Parties that contract for arbitration agreements do not wish to have their names and reputations dragged through the courts by appellants that have adopted "never-say-die" attitudes, and this sort of attitude has become exceedingly dangerous post-*Harbert*.

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155. See Hayford, *Paradigm*, *supra* note 45, at 452.

156. See *Harbert*, 441 F.3d 905 at 906 (citing *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) (The pro-arbitration policy exists "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.")).

What immediate benefits *Harbert* will have for the underlying policies of arbitration may be offset by the confusion and complexities that the holding may create. Confusion may arise because *Harbert* creates the possibility of a new body of substantive law. The Eleventh Circuit, post-*Harbert*, will have bodies of law regarding statutory, and non-statutory claims for vacatur, a body of law addressing the proper analysis for sanctions under various rules, statutes, and judicial authority, and now, a body of law pertaining to the standards for sanctioning motions for vacatur of commercial arbitration awards. Each of these bodies of law leaves room for the zealous advocate to find grey areas in which to advance claims, whether genuine or otherwise. Such complexity lends itself to the creation of colorable arguments that address new ambiguities, and leaves claimants with new questions regarding which arguments may be sanctioned. If the Eleventh Circuit and other federal courts truly wish to support the policies behind the FAA and of arbitration generally, they should first obtain a degree of uniformity or consensus before they add more mass to the post-award mire.

## VI. CONCLUSION

In the instant case, the Eleventh Circuit Court of Appeals made it clear that they are upset with what they consider a high number of frivolous appeals of commercial arbitration awards. The court's anger, though, does not seem valid in light of the Eleventh Circuit's past-treatment of vacatur. The *Harbert* holding should cause litigants to give pause before advancing suspect claims, but parties with legitimate claims are left with greater confusion as to which arguments are permissible and which will warrant sanctions. District courts within the Eleventh Circuit are following *Harbert*'s mandate, but it remains to be seen whether the holding will have any lasting benefits for arbitration.

